



The Commonwealth of Massachusetts

House of Representatives
24 Beacon Street, Boston, MA 02133

Nika Elugardo

State Representative

15th Suffolk Communities in Mission Hill • Jamaica Plain • Roslindale • Brookline

Legislative Aide

Isabel Torres

isabel.torres@mahouse.gov

State House, Room 448

(T): 617-722-2582

Chairman Michlewitz

Joint Committee on House Ways and Means

Massachusetts State House

24 Beacon St., Room 243

Boston, MA, 02133

Chairwoman Cronin

Joint Committee on Judiciary

Massachusetts State House

24 Beacon St., Room 136

Boston, MA, 02133

Friday, July 17th, 2020

Re: S.2820, *An Act to reform police standards and shift resources to build a more equitable, fair and just commonwealth that values Black lives and communities of color.*

Dear Chair Michlewitz, Chair Cronin, and esteemed members of the Joint Committees on House Ways and Means and Judiciary,

Thank you for hosting the hearing on S2820. While it is no secret that I was deeply disappointed by the approach the Senate took to drafting and releasing their bill, it does, of course, have some important elements I would like to see in our House bill. **I recommend we pass it favorably with redrafted language.** I know you are receiving hundreds of suggestions on exactly what to redraft. For the purposes of this testimony, I will focus on what I perceive to be lower hanging fruit-- those elements of policing and broader reform that pertain directly to the MA Elected of Color Ten Point Plan and other priorities that the Speaker and the Caucus discussed at length.

I am grateful to Chair Cronin for all the time you've given to members of the MBLLC, and to me personally, to develop the following ideas.

- **POST:** This is priority number one for the Caucus. The Senate language improved upon the Governor's bill, for example eliminating bonus payments to officers for training. Amendment 54, however is seriously problematic in my view. Among other things, it raised the evidentiary standard to decertify an officer from "preponderance of the evidence" to "clear and convincing evidence." Even with video evidence, "clear and convincing" is an exceedingly high bar. **I ask that use the governor's "preponderance of the evidence" standard, also found in the original S.2800.**
- **Use of Force: Liz Miranda's bill, HD5128,** is strong and the Senate bill had many elements of it. Additionally I know the Speaker and Chair Cronin were advocating for

duty to intervene, which I strongly agree should remain from S2820. I defer to Chairs Cronin, Naughton and Rep Miranda to determine the course in the House that gets to the best use of force language in the country. The Commonwealth is poised to lead on this and should. Banning tear gas is important and practical, given it isn't used by major departments across the Commonwealth. **I ask that we keep the Senate language here, but will support redrafted language Chairs Cronin or Naughton developed in conjunction with MBLLC members.**

- **Civil Service Review Commission:** Here the Senate bill is silent. I ask that in the House we maintain our Speaker's commitment to address all four MBLLC priorities in our bill in some fashion. I know Rep Holmes has expressed that converting his bill language to a Commission would be a laudable start, and I agree. **I ask that the House redraft of S.2820 include a Civil Service Review Commission** to determine the best course of action to ensure that people of color and veterans have meaningful and demonstrable access to civil service jobs, especially people local to the communities they wish to serve.
- **Commission on Structural Racism:** Chair Cronin worked with me extensively as I developed language to **redraft Rep Holmes original bill H1440**. I also worked with Undersecretary Peck and incarcerated activists. The language we developed was given to the House and Senate at the same time. The Senate adopted this language as Am #16 with some changes. I leave it to the discretion of Chair Cronin as to which language works best. As you know, it is based on work I am already doing with the Undersecretary and we are flexible on the structure as long as it enables us to work closely with incarcerated persons and COs to plan development of a permanent entity to address structural racism at and impacting the DOC, and provided the appointments produce sufficient diversity in experience for working groups to focus on programing, policy, and legislation respectively. **The language I reviewed with Chair Cronin's General Counsel on July 8th does this well, and I ask that it be included in an S.2820 redraft.**

While the above are the priorities of the MBLLC and, therefore, my top priorities, **Caucus members have discussed our individual support for a range of issues. I want to highlight two for which I will be strongly advocating: Student Privacy (see attached red line of Senate language that I am discussing with juvenile justice advocates) and Expungement.** On the latter, **Reps Decker and Khan have already developed strong language in H1386**, and I support its inclusion in the House redraft of S.2820. My career prior to becoming a legislator exposed me to the profound possibilities of transformation for youth engaged in crime and also to the unnecessarily deleterious and far-reaching ripple effects of tracking "problem youth" or "hot spots." Gang databases are one of several examples of well-intended policy that causes more damage than good. The Senate language begins to address that, but I think we can do a better job using some of the language in the attached. I am not sure whether we have the votes in the House for raising the age of juvenile jurisdiction, but I will support that given an opportunity.

The above represent those of my priorities that I believe we have the votes for and could advocate with the Governor to avoid veto (with the possible exception of raising the age). I will make quick mention here of Qualified Immunity. After an extended conversation with Police Association lawyers and a follow up, equally intensive, conversation with Senator Brownsberger, my assessment, for what it's worth, is as follows:

- **Section 10c of S.2820** eliminates the second prong of the QI test, the presence of “clearly established law.” The reasonableness element of the test, the first prong under common law, is tweaked but that tweak will result in little change relative to current law. The new cases allowed to go to trial based on S.2820 language will be largely edge cases with uncommon facts. This is good for the evolution of constitutional law, but will have little impact on communities or police. The types of cases that we in black and brown communities currently find most upsetting are those where brutality was deemed “reasonable” under the law, like in the Ferguson case. **S.2820 is a positive change for jurisprudence, and I support it, but it does not change this fundamental flaw in our system.** Any excessive force not deemed “necessary” (versus not deemed reasonable) should be subject to litigation for the violation of Fourth Amendment rights. This is because “reasonableness” is based on factors including historic expectations of what is normal and even law and policy that are rife with structural racism. **S.2820 will also NOT materially impact the types of cases with “willful and wanton” behavior on the part of officers that involve punitive damages that will NOT be indemnified. Even within the realm of indemnifiable behaviors, the number of additional QI denials as a result of S.2820 likely will be very small.** As it stands only about 3% of cases are currently granted dismissal on the basis of QI. Reducing this number by a fraction will not materially impact municipal budgets. And where it does, there will have been a finding of a civil rights violation (better to pay than to leave members of the community without compensation as happens now). Over many years these new edge cases may more substantially impact liability as they become part of common law. We don’t really know. Even so, this potential added cost to municipalities of indemnifying civil rights violations will be remote, far in the future, and worth it to prevent even a small number of miscarriages of injustice. **In summary, S.2820 Section 10c will be good law and we should include it, but in the near future it will materially impact NEITHER officers, NOR members of the community, NOR, municipal budgets.**
- Section 10c has a lot of issues that are potentially too complex to settle in under a week. I agree with the Police Association concern that it will open the floodgates to state litigation. While this is not inherently problematic, we need more information as to the probable impacts of this and whether those impacts are in the interest of black and brown communities and of Commonwealth communities generally. Furthermore, my constituents working in civil rights law have concerns that the language is ambiguous and rife with unintended negative consequences regarding their payment and other matters. **I recommend we keep Section 10c and study 10b further.**

Thank you for your kind attention to my concerns. For the above reasons I respectfully ask that Bill S.2820 be reported favorably out of Committee with the changes I suggest above.

Sincerely,



Representative Nika Elugardo