



COMMONWEALTH OF MASSACHUSETTS
PLYMOUTH DISTRICT

OFFICE OF THE DISTRICT ATTORNEY

MAIN OFFICE:

166 MAIN STREET
BROCKTON, MA 02301
TEL: (508) 584.8120
FAX: (508) 586.3578

TIMOTHY J. CRUZ
DISTRICT ATTORNEY

July 17, 2020

VIA EMAIL

The Honorable Aaron Michlewitz, Chair
House Committee on Ways and Means
24 Beacon Street
State House, Room 243
Boston, MA 02133

The Honorable Claire Cronin, House Chair
Joint Committee on the Judiciary
24 Beacon Street
State House, Room 136
Boston, MA 02133

RE: **Initial Review of Senate's Police Reform Bill**

Dear Chairs Michlewitz and Cronin:

Senate Bill 2820 is an extraordinarily complex and consequential piece of legislation that, as written, will have extensive impact (both intended and unintended) on law enforcement and our criminal justice system. Regrettably, we have only been afforded a few short hours to offer our response to this 89-page document, passed after only 17 hours of debate in the wee hours of the morning under cover of darkness. Due to the scope of the bill and the significant, and perhaps, inadvertent consequences of some of the provisions, I respectfully and strenuously urge the Legislature to schedule a public hearing on this legislation. I am expressing my intention to appear and to testify at such hearing.

This bill will have very severe and likely unintended adverse consequences, including at least; the immunization of police officers from criminal prosecution during investigations by the Standards and Accreditation Committee; imposing massive financial burdens on the Commonwealth's 351 cities and towns; criminalizing or making officers liable for what is today

lawful investigative conduct; and creating both liability and confusion for all state and municipal employees for conduct that may affect the property and other rights of all persons subject to the jurisdiction of the wide variety of municipal and state agencies and actors.

As a result of the time imposed for this response, I have included and expressed concerns regarding only a small range of proposed provisions at this time:

Section 6: Investigations of Misconduct by Commission:

These provisions (sections 222, 224, 225) provide the Committee with the power and authority to immunize police officers – both those being investigated and witnesses called before the Committee – from prosecution for any and all crimes about which the Committee compels statements. Because the Committee has power to adversely affect an officer’s employment status, they have the power to immunize the officers who appear as witnesses, as well as any officer under investigation, from criminal prosecution. Such immunity would be conferred simply by compelling the person to speak to investigators or commission members. To protect against such grants of immunity the power or authority of the Committee should only be activated or invoked when the prosecuting authorities (the District Attorney and Attorney General) have certified that any criminal investigation or prosecution is at an end and that action by the Committee will not interfere with the criminal investigation or prosecution.

Section 10 re civil rights lawsuits and Qualified Immunity:

Currently, Massachusetts General Law Chapter 12, section 11H provides a right of action where any person interferes by threats, intimidation or coercion (or attempts to do so) with the exercise or enjoyment of any constitutional right. As drafted, Section 10 (a) mirrors this language and would authorize a private person who has had their rights interfered with (or attempted interference) by threats, intimidation or coercion to bring a lawsuit for injunctive or other appropriate relief, including compensatory damages, costs and attorney fees. Section 10(b), however, is far broader – it provides that a private person may bring a lawsuit for any interference with the exercise or enjoyment of any rights secured by the Constitution or laws of the Commonwealth. This provision is not limited to threats, intimidation or coercion, and arguably not even limited to unlawful conduct, and is not limited to police officers. So, a zoning board that affects property interests, or a health board that has the authority to regulate local businesses, will be subject to such lawsuits for injunctive relief and damages. Obviously this provision must be amended to protect against such interference with the enforcement of the laws. Also of significant concern is the authorization for a private person to seek an injunction against another person or government agency. While it may be appropriate for the Attorney General to be able to seek injunctions against other government agencies and actors, the threat of a myriad of overbroad and potentially conflicting injunctive orders against such agencies and persons by various courts could wreak havoc on the orderly administration of the laws.

Section (c) addresses and apparently attempts to limit the doctrine of qualified immunity. First and foremost, it would be most sensible, if the statute is going to limit the legal

doctrine of qualified immunity that this law should first explicitly adopt and provide a definition of 'qualified immunity' in clear terms that every police officer and every other government actor can learn and understand. Only after the law creates and defines a clear statement of what 'qualified immunity' is for social workers, DCF workers, court clinicians, public employees of every town and city, and/or any other public employees, as well as police officers, should the statute then attempt to place any limit on that qualified immunity. In other words, by explicitly adopting and defining qualified immunity, it will necessarily be limited to that immunity granted by the Legislature to all the employees of the Commonwealth's 351 cities and towns.

Second, as written, this limit on qualified immunity is phrased with a double negative phrasing that is difficult even for an attorney to grasp. It is unlikely that the vast majority of government employees, all of whom will be affected, will understand the limits of their lawful conduct. This provision seems to say that a person has qualified immunity from being sued and held liable if a reasonable person would have believed the conduct engaged in was lawful, or at least, the conduct would not violate the law. "Law" here probably means 'a clearly defined constitutional or statutory right', but again, without further definition this is not clear.

Third, while this section also contains a reference to Chapter 258 (the Mass. Tort Claims Act) and says this provision does not "affect" Chapter 258, "with respect to indemnification of public employees." If this language is intended to affirmatively provide for indemnification for negligence, it does not clearly do that, as a lawsuit brought under Chapter 12 is not a lawsuit under Chapter 258. Simply put, there is no indemnification provision at all under Chapter 12, and the Legislature would need to explicitly incorporate such a provision.

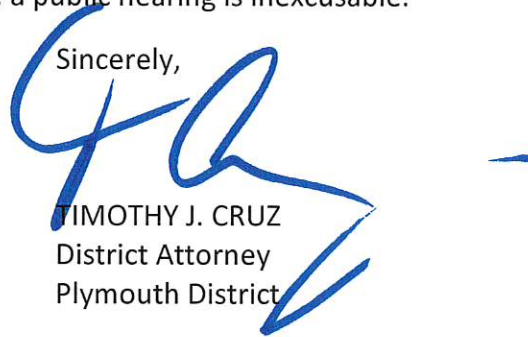
Finally, the potential effects of this statute are very severe, not necessarily for the largest and best-trained departments, such as MSP and MBTA and Boston, Worcester and Springfield, but for the other 350 law enforcement agencies protecting our small towns and cities across the Commonwealth. Each of those municipalities will bear the burden of defending lawsuits, acquiring insurance, and paying claimants as well as indemnifying officers and departments. These additional costs and expenses will mean making hard choices for after school activities, school sports, summer camps, elderly services, and all the other basic functions that our government serves.

Section 49 of Senate Bill 2820 effectively ends and prohibits the communication of information from school department personnel and resource officers, which will frustrate the enforcement of the criminal laws. For instance, if a student in a public school is suspected of murdering another person, the simple question of whether the suspect was away at a sporting event, or was a member of a particular club at school to confirm or dispel an alibi or opportunity to commit the crime, cannot be shared. Yet, under Section 50, that school resource officer is actually a sworn officer of the local police department, who is prohibited from communicating with his/her own department.

Section 58 will substantively change the legal standard (and significantly limit the availability) for authorizing “no knock” warrants, which are needed to guard against the destruction of evidence or escape of suspects, as well as to protect the public and police officers. There has been no showing that the Judges or this Commonwealth are improperly abusing their authority in issuing these warrants, and this new limitation is a solution in search of a problem.

There are many other sections that also deserve comment and further review, however, time is of the essence. In conclusion, assessment and consideration of this far-reaching bill without the opportunity for, and the benefit of, a public hearing is inexcusable.

Sincerely,



TIMOTHY J. CRUZ
District Attorney
Plymouth District

TJC:krs

cc: State Representative Gerard Cassidy
State Representative Josh Cutler
State Representative Angelo D’Emilia
State Representative David DeCoste
State Representative Susan Gifford
State Representative Randy Hunt
State Representative Patrick Kearney
State Representative Kathleen LaNatra
State Representative Joan Meschino
State Representative Mathew Muratore
State Representative Norman Orrall
State Representative William Straus
State Representative Alyson Sullivan
Southeastern Massachusetts Police Chiefs Association
Sheriff Joseph D. McDonald, Jr.