



DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

DATE: June 23rd, 2020

TO: Senate President Peter Courtney, Co-Chair
House Speaker Tina Kotek, Co-Chair
Senate Minority Leader Fred Girod, Co-Vice Chair
House Minority Leader Christine Drazan, Co-Vice Chair
Members

FROM: Aaron Knott, Legislative Director

SUBJECT: Testimony re: Policing Bills (LC 49, 78, 79, 80, 81, 83))

This testimony is offered in support of the package of policing bills (LC 49, 78, 79, 80, 81, 83). The Attorney General and Department of Justice broadly agree with the tremendous need for substantive policing reform and applaud the POC Caucus for their work in recommending this package of concepts, which will do much to move toward a more equitable system of policing which works for all Oregonians regardless of race or ethnicity. Thank you for your commitment and hard work in offering these suggestions.

The following observations are submitted with an understanding that the language in these concepts remains fluid and will be refined in the days to come. As such, we do not include a line by line analysis of the proposed LCs at this time but will instead identify broad principles to assist in making this legislation as robust and effective as possible.

LC 79 – DOJ Investigation of Officer Use of Force Resulting in a Death or Physical Injury. Public transparency demands that a law enforcement agency not have the exclusive responsibility of investigating wrongdoing which occurs within their own ranks. The need for avoiding a conflict of interest, especially in something as serious as a fatal use of deadly force by law enforcement, is obvious and compelling. That said, LC 79 requires further refinement. While we understand that this bill is still being negotiated and very much appreciate the continued opportunity to provide feedback, this also limits the ability of the Department to provide a preliminary estimated fiscal or operational impact at this time. A few principles to consider in refining this concept:

- **Investigation and prosecution are separate phases.** Under existing law, the investigation of a crime, including an unlawful use of force by a law enforcement officer, is generally handled by a law enforcement agency – police officer, sheriff deputy or state trooper. The prosecution, which is the legal pursuit of criminal charges, is handled by a District Attorney’s Office. The Department of Justice has seen proposals that would make the Department responsible in varying degrees for one function, the other function, or both functions. Each of these proposals would bring very different operational challenges and staffing needs – the two phases are not fungible.

- **“Physical Injury” requires a great deal more investigative resources to establish than a case resulting in death.** Under Senate Bill 111 (2007), any law enforcement use of force which results in a death requires a special investigative protocol. LC 79, as written, would expand this to cover any law enforcement use of force which causes a “qualifying injury.” Determining whether an injury is severe enough to qualify a use of force for special treatment requires extensive investigation and can be crucially important to any subsequent prosecution. As such, any proposal which incorporates an injury standard will be significantly more complicated to administer than the current rule applying to deaths only. Under no circumstances should the definition of injury be delegated to the agency rulemaking process as is proposed in the introduced version of LC 79. Fundamental jurisdictional questions, especially in the area of criminal law, do not typically lend themselves to rulemaking and are far more appropriate for direct legislative action.
- **The first few hours of an investigation are crucially important.** The opening hours following a criminal act are crucial to the success or failure of any prosecution. Physical evidence must be carefully documented and kept free from interference. Crucial witnesses must be interviewed as quickly as possible. LC 79 contemplates that these first moments should or even must be handled by a law enforcement agency located outside of the county in which the use of force occurs. This legislation needs to account for the fact that marshalling those resources will take time and protocols for managing the case during that intervening period must be fully developed, especially in a state as geographically large as Oregon.
- **A person who is subjected to use of force may also be a criminal defendant.** This means that a person who is potentially a necessary witness to establish that an officer committed an unlawful use of force may themselves simultaneously be the subject of an investigation which largely relies on the same facts, same evidence and same witness testimony. Any proposal which assigns investigative or prosecutorial authority to an out of county entity needs to account for this dynamic and make sure that the two investigations, which may be conducted by two different law enforcement entities, do not interfere with one another.

LC 78 – Disclosure of Law Enforcement Discipline Actions. This proposal seeks to close an important loophole where a member of law enforcement could potentially escape the consequences of their own misconduct by simply leaving their current employer and moving to a different law enforcement agency, either in Oregon or in another state. While we believe that a truly comprehensive remedy to this issue will require federal action, we support Oregon taking this step to manage their own jurisdiction.

Dept. of Justice attorneys flagged one possible consideration relating to the possible inclusion of unsubstantiated complaints. Procedural due process typically requires that a person cannot be deprived of a benefit without notice and an opportunity to be heard. Publishing a complaint which was not found to be substantiated has the potential to hazard a risk that an officer will suffer a deprivation of employment without ever having had the opportunity to challenge the complaint. Indeed, the complaint may not have had any merit at all. We recommend confining any information posted to this database to complaints that have been substantiated by an appropriate process, whether via internal investigation or otherwise.

LC 81 – Limitation on Munitions Used to Control Assemblies. Cities across Oregon have seen the heavy and widespread use of munitions against protestors – both peaceful and otherwise – in the weeks following the death of George Floyd. Tear gas, which is mentioned but not defined by the current draft

language of LC 81, is only one of a number of different types of ordinance which has been deployed against protestors in recent weeks, a list which also includes LRAD “sound cannon” devices, flashbang grenades, rubber bullets and other forms of “less lethal” ordinance. Each of these devices, used in a limited and appropriate way, have a place in a law enforcement toolbox and, when used correctly, may present an alternative to more harmful applications of force. That being recognized, their overdeployment against civilian demonstrations who are often violating no crime more serious than a curfew violation or incidental participation in an “unlawful assembly” is deeply troubling. In lieu of banning individual technologies, each of which could plausibly be replaced with a different but equally coercive approach, we suggest that the legislature instead significantly curtail the application of *any* undifferentiated use of force against a protest or as a form of crowd control.

Because this is a significant shift from the existing language of the legislative concept, we would encourage the immediate convening of an appropriate workgroup to return recommendations with the goal of passing legislation at a future special session in line with these objectives.

LC 49 – Arbitration, LC 80 – Duty to Intervene, LC 83 – Prohibition on Use of Chokeholds. While the Attorney General supports these important proposals and look forward to continuing discussions with stakeholders to refine any remaining points of contention, we offer no additional feedback at this time.

While these proposals are an important step toward a more equitable system of policing, they are not by themselves an adequate answer. The Attorney General requests that the legislature continue this discussion into the future and work with Black, Indigenous and People of Color led organizations to refine the next round of reforms. We pledge to assist in any way we can over the months to come.

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