Washington Association of
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POLICE CHIEFS

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Tuesday, January 12, 2021

House Public Safety Committee
John L. O'Brien Building
PO Box 40600
Olympia, WA 98504-0600

RE: Supplemental Testimony in Opposition to HB 1054

Chair Goodman, Ranking Member Mosbrucker, and Members of the Public Safety Committee,

Please accept this letter as a supplement to my verbal testimony to the committee this morning.

On behalf of the Washington Association of Sheriffs and Police Chiefs (WASPC), I want to thank Representative Johnson for sharing an early draft of this legislation and taking the time to hear our feedback prior to introducing the bill. He was not obligated to reach out to us, nor was he obligated to hear from us – that he chose to do so is worthy of acknowledgement.

We also want to acknowledge that the topics addressed in HB 1054 are worthy of discussion, consideration, and topics where Washington's law enforcement should strive to continually improve. We want all persons to be able to go home safely at the end of each day. The language contained in HB 1054, however, creates unacceptable consequences and unreasonably places members of the public and law enforcement officer in unnecessary danger. Simply put, HB 1054 removes many opportunities for de-escalation.

It is our desire to work with Representative Johnson and the other members of the Public Safety Committee to address these legitimate issues in a more appropriate and productive manner.

Specific to the language contained in HB 1054, we wanted to call your attention to the following:

**Section 1 (1):** The definition of law enforcement agency fails to include most limited authority Washington law enforcement agencies, including, but not limited to, the Department of Natural Resources, the Department of Social and Health Services, the Gambling Commission, the State Lottery, the State Parks and Recreation Commission, the State Utilities and Transportation Commission, and the Office of the Insurance Commissioner. More than one of these agencies regularly utilizes uniformed law enforcement officers to conduct patrol activities within their jurisdictional boundaries.

**Section 2 (1):** We believe that special attention and consideration should be given to the use of chokeholds and neck restraints. We do not, however, believe that they should be prohibited. Our officers are empowered to use force capable of taking a human life. If a chokehold or neck restraint could be employed to avoid the use of deadly force, the interests of public safety demand that these techniques be available to them. We recommend that the Criminal Justice Training Commission, in consultation with WASPC and others, should utilize credible science to determine the appropriate use of chokeholds and, separately, neck restraints.

**Section 2 (3):** The definitions of chokehold fails to incorporate an intent to restrict a person's airway or blood flow. Instances where an officer needs to pull an aggressor off of another person typically include a leveraging of the neck as a point in the body to effect the 'pull.' Officers don't generally wrap their arms around the chest or stomach of an aggressor to separate them from their victim. In such instances, direct pressure may inadvertently be applied to a person's trachea or windpipe, which would be prohibited under the bill. Inappropriate definitions could result in an officer utilizing a higher level of force than otherwise necessary.

**Section 3:** We agree that the use of a police dog (K9) should be limited to those circumstances where necessary in the interests of public safety; that when a K9 is deployed, it is deployed on the identified public safety threat; that it uses a bite and hold technique; and that it disengages upon the command of its human partner. Certification standards for K9 teams exist in the Criminal Justice Training Commission, and through the Washington State Police Canine Association. WASPC supports partnering with these entities to review and strengthen existing certification standards to accomplish these goals. The language in Section 3 achieves none of these goals – it simply requires a leash. This requirement, if enacted, would create tangible barriers on the use of K9 officers to preserve the sanctity of the life of our human law enforcement officers. Simply put, we deploy a K9 officer in circumstances where a human cannot perform as well (eg - using speed to catch up to a subject fleeing on foot, using their smaller size to access a small space, etc.), and as a substitute to placing a human officer's life in danger (eg – entering a barricaded space, a crawlspace, blind space, etc). The provisions of Section 3 would require our officers to either allow a public safety threat to escape, or to utilize a higher level of force than otherwise necessary.

**Section 4:** The use of chloracetophenone (CN), O-chlorobenzylidene malontrile (CS), oleoresin capsicum (OC), and other similar chemical irritants should be reserved to those circumstances necessary in the interests of public safety. WASPC supports a review and establishment of a model policy/best practices relating to the use of CN/CS. There are two general circumstances where CN and/or CS gas are used: riots/unlawful gatherings, and barricaded subjects. We understand the motivation behind Section 4 is the Seattle Police Department's use of CN/CS during the riots/unlawful gatherings during the summer of 2020. We find it compelling that in the State Supreme Court's December 10, 2020 written ruling in the matter of the recall of Seattle Mayor Jenny Durkan, the Court went to great length to describe the policy and procedures in place for such tactics, and the oversight and control of its use. The primary use of CN/CS is barricaded subjects. Again, the provisions of this section remove tools and techniques used to de-escalate an already dangerous situation and force our officers to insufficiently address a threat to public safety or utilize more force than otherwise necessary. It is also notable that Section 4 appears to allow only one specific chemical to be used – OC. Because this section governs the specific chemicals and ignores how they are deployed, it would prohibit agencies from using another chemical irritant, regardless of whether that irritant were deemed more safe, or effective than OC.

**Section 5:** We agree that certain equipment and weapons are not appropriate for law enforcement use. Firearms and ammunition .50 caliber or greater, armed helicopters, tanks, rockets, rocket launchers, bayonets, grenades, grenade launchers, and missiles are all clearly not appropriate for law enforcement use. To this end, we would suggest adding biological, radiological, and nuclear weapons to the list. Prohibiting the use of armored vehicles, regardless of their form or function, however, is something we will always object to. Such prohibitions create a public policy that allows a law enforcement officer to use a vehicle so long as they are capable of being shot or blown up in it. We find such a policy abhorrent. Other prohibited equipment listed in Section 5 (2) require either further definition or removal. For example, a long range acoustic hailing device (more commonly known as a bullhorn or public address system) is a de-escalation technique used to provide notice to an illegal gathering, to establish communication with a barricaded subject, to warn bystanders of the need to evacuate, among other uses – this should not be prohibited. Directed energy systems and electromagnetic spectrum weapons are two examples of equipment that require further definition – we interpret those to prohibit the use of less-lethal equipment such as a Taser.

**Section 6:** We agree that members of the public should have a reasonable method of identifying an on-duty and uniformed officer. The language in this section, however, fails to appreciate that badge numbers are not universally (or even commonly) used to identify officers in Washington. Additionally, this language fails to acknowledge circumstances where an officer may be equipped with protective equipment such as a riot shield, diving equipment or other circumstances.

**Section 7 (2):** We acknowledge that no-knock warrants present a heightened risk of danger to the public, and to the officers executing them. The practice among Washington's law enforcement agencies over the past 30 years has reflected this acknowledgement. No-knock warrants are a very rare occurrence in this state for exactly this reason. We would support requiring officers seeking no-knock warrants to justify the heightened risk associated with such warrants against the threat to public safety of using a traditional warrant. Prohibiting them in all circumstances, however, creates an unacceptable public safety risk in our opinion. It is easy to question the use of a no-knock warrant in a simple drug possession case. It's not so simple to do so in cases of kidnapping, human trafficking, child sexual exploitation, and other serious criminal acts that our officers fight against.

**Section 8:** It would appear that the language in Section 8 removes the requirement that newly hired law enforcement officers receive training on vehicular pursuits between the effective date of the bill and January 1, 2023. This could result in as many as 1,200 officers who would not be required to receive training on vehicle pursuits.

**Section 9:** We acknowledge that vehicle pursuits can present significant risks to the pursuing officers and to the public, and we should exercise due diligence to ensure that these risks are necessary. Section 9, however, ignores the due diligence exercised by nearly all of Washington's law enforcement agencies and places the public at greater risk by prohibiting vehicle pursuits in all but the rarest of circumstances. Section 9 (2)(a)(i) prohibits, for example, an officer from pursuing a drunk or drugged driver, a domestic violence offender, a person in violation of a domestic violence court order, a car thief in a stolen car, a drug trafficker, a wrong way driver, a reckless driver, a hit and run driver, a person committing a hate crime offense, and a person escaping from a jail or prison, among other examples. Section 9 (2)(a)(ii) fails to allow vehicle pursuits for the purpose of arresting those who break the law. Section 9 (2)(a)(iv) requires an officer to allow a fleeing vehicle

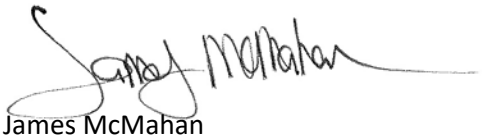
to go unpursued while the requisite factors are considered and approved by a supervisor, therefore increasing the risks associated with a pursuit if/when pursuit is authorized as the officer will need to use speed and risky maneuvers to catch up to the fleeing vehicle. Finally, many Washington law enforcement agencies do not have sufficient staffing to keep a supervisor on duty 24 hours a day.

**Section 9 (2) (b):** We agree that, except in very rare and limited circumstances, officers should be prohibited from firing a weapon at a moving vehicle. The language in Section 9 (2)(b) fails to acknowledge that vehicles are sometimes used as weapons. We do not advocate that our officers choose to stand in front of a vehicle and discharge their weapons when it moves. We also do not advocate to require our officers to surrender themselves to be run over by a vehicle if there are no reasonable means of escape. Whether it be an alley, a parking lot, or other circumstance, our officers should always have the right to defend themselves and should never be required to be run over by a vehicle.

**Section 10:** We see the value in having statewide data related to vehicular pursuits, but we insist that such reporting be fully funded by the state. We would strongly suggest requiring law enforcement agencies to provide the Criminal Justice Training Commission with copies of the incident reports from vehicular pursuits. Such an approach would eliminate nearly all fiscal impacts to the law enforcement agency and enable the Criminal Justice Training Commission to employ uniform and objective standards and criteria for coding and reporting. It is also important to note that the demographic characteristics of the operators and passengers in vehicle pursuits can only be known in those cases where a pursuit is successful in apprehending the operator and/or passenger(s) of the vehicle. It is also important to note that the requirement to collect the national origin of operators and passengers in a vehicle pursuit appears to require Washington's law enforcement officers to violate Washington law (See RCW 10.93.160 (4)(a)).

In summary, we agree that chokeholds, neck restraints, K9 deployments, chemical irritants, military equipment, officer identification, no-knock warrants, and vehicular pursuits are all topics worthy of examination and improvement, and we desire to work with the Legislature to address these important issues. We also believe, however, that these issues are important enough for the Legislature to get them right the first time, and that it is the Legislature's responsibility to ensure that well-intentioned language does not endanger the public or public servants. We look forward to assisting you in that process.

Respectfully submitted,



James McMahan
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Monday, January 18, 2021

Senate Law & Justice Committee
John A. Cherberg Building
PO Box 4066
Olympia, WA 98504-0466

RE: Supplemental Testimony to SB 5051

Chair Pedersen, Ranking Member Padden, and Members of the Law & Justice Committee,

Please accept this letter as a supplement to my verbal testimony to the committee this morning.

On behalf of the Washington Association of Sheriffs and Police Chiefs (WASPC), I want to thank Senator Pedersen for introducing SB 5051. As you know, our association has proposed 13 recommendations to improve the public service of law enforcement in our state includes a recommendation to "Change licensure rules to provide that a law enforcement officer can lose their Peace Officer Certification for excessive use of force, showing a pattern of failing to follow public policy, and other serious breaches of the public's trust."

To this extent, we believe that the Legislature should enact a bill relating to the decertification of peace officers, but we strongly oppose the provisions in SB 5051.

We hope to work with you all to further refine this bill into a proposal that we could support. Given the depth, breadth, and length of the bill draft, this letter will primarily address larger themes and purposes within the draft, and not minor or technical provisions.

We have authored a bill draft consistent with our recommendations on the topic of decertification and encourage the Committee to give this proposal due consideration. That draft is appended to this letter.

**Suspension of Certification**

WASPC strongly opposes the concept of suspension of a peace officer or corrections officer certification. Such a notion essentially creates a second employer for every law enforcement and corrections officer in the state, and creates significant conflict and confusion for both law enforcement and corrections officers and law enforcement and corrections agencies.

We understand that there several examples of professional certification bodies that have authority to suspend a license, such as the Washington State Bar. Most, if not all of these examples, however, have one key distinction: those who hold such licenses commonly work for themselves. As such, there is no supervisory/disciplinary authority other than the state licensing authority.

In law enforcement, however, that is only possible in the case of the elected Sheriff themselves. In every other circumstance, by definition, a law enforcement officer is employed by, and subject to, a supervisory/disciplinary authority.

WASPC takes the same position on language granting authority for the CJTC to reprimand, require retraining, placement on probation, or other supervisory/disciplinary role referenced in the draft. Those are exclusively and properly reserved to the employing agency, not the CJTC.

**Mandatory Decertification**

WASPC opposes new mandatory decertification criteria, except instances where an officer voluntarily surrenders their certification. In all other instances, the CJTC should be empowered to decertify an officer, but not required to.

Mandatory decertification eliminates the ability to consider all of the facts and circumstances of the case, and creates significant challenges when interpreting the subjective nature of interactions with peace officers and corrections officers (many use of force policies include subjective language such as "should" and "when feasible").

For example, one circumstance in which decertification is mandatory is if the applicant has been convicted of a felony and the offense was not disclosed at the time of application for initial certification. Under this language, an individual who was adjudicated of a felony as a juvenile and had their record sealed or received a full and unconditional pardon, and exercised their right pursuant to RCW 13.50.260(6)(a) or (b) and treated the conviction as it "never occurred" and "replied accordingly to any inquiry about the events" would be the subject of mandatory decertification for having performed exactly as the Legislature directed.

**Criteria for Decertification**

Decertification is a very punitive response to officers whose behavior violates core principles and expectations of those to whom we entrust a significant amount of authority. WASPC is convinced that the existing criteria that makes an officer eligible for decertification consideration is much too limited. Eligibility for decertification should be expanded through a very carefully crafted and deliberate process.

**Ensuring the Proper Delivery of Law Enforcement & Corrections Services**

The language redefines the purpose of the CJTC to, among other things "ensure that law enforcement and correctional services are delivered to the people of Washington in a manner that fully complies with the Constitution and laws of this state and United States." This is a significant expansion of the purpose of the CJTC, and is a purpose to which the CJTC could not possibly accomplish. The CJTC does not control or oversee any law enforcement agency. It has no authority regarding how an agency delivers law enforcement or correctional services, nor should it. Those duties are the responsibility of the law enforcement and corrections agencies charged with such tasks, subject to the ways and means of their respective legislative authorities.

**Composition of the Commission**

WASPC opposes the restructuring of the composition of the CJTC Commission as proposed in this language. Under this language, more than half of Commissioners would have no direct knowledge of, or experience in, the professions of law enforcement or corrections, and only 5 of the 17 (29%) would be subject to the decisions of the Commission.

We again look to other professional licensing examples in this state – there are no laypersons in the Washington State Bar. The Washington State Medical Commission is comprised primarily of doctors (15 of the 21 (71%) are doctors or physician's assistants); 14 of the 15 member Washington State Electrical Board must be electricians or otherwise employed in the field; 14 of the 16 members of the Washington Dental Quality Assurance Commission must be employed in the field. The examples are numerous.

We do not maintain, however, that the Criminal Justice Training Commission should be without members of the public. In fact, we have openly advocated for public involvement in, and membership of, the CJTC. WASPC supported HB 2785 – a bill that went into effect less than a year ago to add both a tribal representative and an additional member of the public to the Commission.

**Parallel CJTC Investigations**

WASPC opposes provisions in the bill that require an agency to notify the CJTC prior to the agency's finding of wrongdoing by an officer, and such notification should be limited to findings of wrongdoing that would subject the officer to decertification consideration.

Requiring/allowing the CJTC to conduct parallel investigations prior to the completion of an agency's investigation not only wastes scarce public resources, but also could interfere with the agency's investigation, and, worse yet, could inadvertently immunize the officer from criminal charges.

**Ensure Adherence to Policy and Law**

The language gives broad authority for the CJTC to "provide for the comprehensive and timely investigation of complaints to ensure adherence to policy and law." This responsibility once again lies not in the CJTC, but in the law enforcement agencies that employ law enforcement officers. It would be unrealistic to expect the CJTC to perform such a task – particularly given the decentralized system of government in Washington – and would create false promises to the public that the CJTC could not, and should not, perform.

**Other Tests or Assessments**

This language grants the authority to the CJTC to require "any other test or assessment" to be performed in the pre-employment screening of those who have been offered a conditional offer of employment as a peace officer or corrections officer. This is not an appropriate role of the CJTC, has the potential to create significant unfunded mandates on both state and local governments, and would be an improper delegation of legislative authority.

**Brady Disclosures**

We support ensuring that an agency employing an officer who has previously been employed as a peace officer or corrections officer is aware of information required to be disclosed pursuant to *Brady/Giglio/5$^{th}$ amendment*. We oppose, however, requiring such information to be known or gathered by the potential employer, unless/until the Legislature significantly amends or repeals RCW 10.93.150. Requiring an agency to be in possession of this information prior to a personnel action, and simultaneously prohibiting an agency from making an adverse personnel action based on that information only puts agencies in a lose/lose scenario. Unless/until the Legislature significantly amends or repeals RCW 10.93.150, this information should only be gathered by an employing agency *after* the officer is hired.

**Authorized Complainants**

WASPC has significant concerns with allowing the CJTC to receive complaints from the public, or the CJTC initiating a complaint on its own initiative. Such complaints should always be directed to the appropriate law enforcement agency. The CJTC should only be authorized to receive complaints upon referral from a law enforcement or corrections officer or a law enforcement or corrections agency. This language creates a direct mechanism for individuals to harass and terrorize law enforcement officers with no basis in fact, nor any respect to the rights of law enforcement officers.

Should the Legislature authorize the CJTC to receive and investigate complaints by any person, or upon its own initiative, it should also amend the immunity provisions to exclude those complainants whose complaint is not based in fact, and was not conducted consistent with established rules of procedure and consistent with the rights of the subject of the complaint. Similarly, if the CJTC is granted authority to investigate and de-certify on its own initiative, the CJTC should not be immune from the consequences of having conducted such activities inappropriately.

**Complaints Without Merit**

This language repeals provisions in existing law that requires the CJTC to purge records associated with complaints that it finds are without merit. We find no public benefit achieved by requiring the retention of records that are found to be without merit. We find that such a practice only serves to undermine public trust in law enforcement – a purpose for which this draft directs the CJTC to adopt.

**Publicly Searchable Database**

We find no public benefit achieved through the establishment of the database described in the language. Such a database would serve to only undermine public trust in law enforcement, and facilitate confrontations between law enforcement and members of the public.

**Priority of the CJTC**

WASPC opposes the provision that repeals RCW 43.101.180. That section of law establishes that the first priority of the Criminal Justice Training Commission is the training of criminal justice personnel.

As you are very aware, law enforcement and corrections agencies have struggled for years with the lack of sufficient funding from the Legislature to comply with legislatively mandated training requirements for law enforcement and corrections personnel. Repealing language that clearly establishes training as the priority for the training commission only exacerbates chronic problems that put law enforcement and corrections agencies in a lose/lose scenario.

**Reserve Officers**

The language seems to presume that reserve officers are certified peace officers, which is not correct (at least under current law). Reserve officers, like peace officers, are required to undergo a background investigation, psychological examination, polygraph, etc., but reserve officers are not certified peace officers. While it may be worth discussing whether reserve officers should be certified peace officers, such a policy discussion warrants its own unique discussion in a separate bill.

**Limited Authority Officers**

The language seems to make the same incorrect presumption about limited authority law enforcement officers as it does regarding reserve officers. Additionally, limited authority law enforcement officers are significantly different than reserve officers, and we discourage including the two in the same definition.

**School Security Officers**

The language includes K-12 and higher ed security officers as "reserve officers" and creates a number of challenges, not the least of which is the fact that school security officers are not law enforcement officers. Including non-law enforcement officers into definitions of, and requirements for, law enforcement officers seems to only cause confusion and unintended consequences.

**Applicant**

The language defines "applicant" to refer to those who have already received a conditional offer of employment pending *certification*, apparently creating a conflict with existing provisions that require an applicant who receives a conditional offer of employment be subject to a *background investigation, polygraph, psychological examination, etc*.

**Confidentiality**

WASPC opposes the language changing the confidentiality of records held by the CJTC. Decertification proceedings should consider all facts and circumstances, and that information could very well include items that are not appropriate for public disclosure.

**Background Checks**

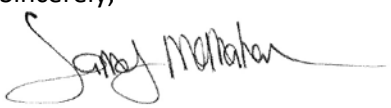
The language incorrectly presumes that the CJTC conducts background checks pursuant to RCW 43.101.095 or 096, and incorrectly presumes that the CJTC possesses such records.

To be clear, there are a number of provisions in this draft that we do support, and that we look forward to working with the Legislature to enact. The focus of this letter is to alert you to areas where we disagree with the language, so we have focused solely on those items here.

Finally, please do not interpret this feedback as the only items that require additional attention, discussion, or revision from our perspective. As you very well know, this language addresses a wide array of issues that have very serious consequences. This letter, while not as brief as we had intended, does not seek to identify all provisions of the language deserving of our feedback. We will soon also provide you with a line-by-line markup of our recommendations on SB 5051.

We anticipate the discussion on decertification to be a comprehensive one that will take place over several weeks, and we look forward to partnering with you and others to improve the public service of law enforcement in our state.

Sincerely,



James McMahan
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Tuesday, January 26, 2021

House Civil Rights & Judiciary Committee
John L. O'Brien Building
PO Box 40600
Olympia, WA 98504-0600

RE: Supplemental Testimony on HB 1202

Chair Hansen, Ranking Member Walsh, and Members of the Civil Rights & Judiciary Committee,

Please accept this letter as a supplement to my verbal testimony to the committee this morning.

On behalf of the Washington Association of Sheriffs and Police Chiefs (WASPC), I respectfully request that you oppose HB 1202.

A legal system that is fair is one that ensures due process of law to its litigants. The law must never favor one party over another, nor should it tip the scales toward liability in any direction. HB 1202 does little to address bad conduct by law enforcement officers yet sets an astonishing precedent of establishing an entire legislative framework that unfairly tilts liability toward law enforcement officers and agencies. This proposal will erode the confidence of the men and women we employ to protect and serve our communities and profoundly diminish trust in the legal system.

It is important to state that nearly all of the 11,000 law enforcement officers in our state perform a very difficult public service exactly the way that we all expect them to, and they deserve credit for countless selfless acts that we rarely hear about. However, so long as we employ humans to perform the functions of a law enforcement officer, we must expect human behavior, including stress, anxiety, exhaustion, abuses of power, poor decision-making, and yes, criminal acts.

We believe that law enforcement officers who violate the law ought to be held accountable. We do not believe, however, that the provisions in HB 1202 accomplish this goal. We believe that HB 1202 creates an inappropriate venue for plaintiff's attorneys to file additional lawsuits that may not have merit, and to further create division between law enforcement and the communities they serve.

**Undermines the public policy of having good policy**
Washington's law enforcement agencies place tremendous importance on crafting and updating their policies and procedures to provide the greatest level of public safety to their communities in a manner that is consistent with the Constitution and laws of the United States and the State of Washington. They do so with the fewest number of

commissioned officers per capita than any other state in the country, without the resources to employ true community policing, and in communities without the capacity to address underlying factors to what often exhibits itself in the form of criminal behavior (mental health, substance use, poverty, family violence, education, counseling, etc.). The punitive nature of HB 1202 will cause rational decision-makers to re-examine policies and procedures currently designed to effect public safety to mitigate the financial impacts of lawsuits against law enforcement officers doing exactly what they are called to do – even if what happened was not wrong. In effect, HB 1202 undermines the public policy of having good policy and substantially motivates agencies to mitigate the risks presented with HB 1202 to preserve their ability to provide any level of public service at all.

**Existing causes of action**

It is important to note that, in our experience, several different judicial remedies already exist to properly address misconduct by a law enforcement officer. Our agencies and officers have been sued in both state and federal court, with both statutory claims and common law claims. These claims have resulted in well-developed jurisprudence that plaintiffs and respondents alike can rely on. The federal courts, in particular, are accustomed to providing rigorous review of existing causes of action. The federal courts are the appropriate venue for these cases.

**Definition of peace officer**

The definition of peace officer, and by extension, the definition of employer in Section 2 (2) fails to include any of Washington's limited authority law enforcement officers or agencies. Ironically, all limited authority Washington law enforcement agencies are state agencies. At least two of those agencies task their officers with regular patrol responsibilities, with general enforcement authority within their respective geographic jurisdictional boundaries.

**Correlation to civil law**

Section 3 (1) (a) establishes liability for law enforcement officers and law enforcement agencies for "conduct that under civil law constitutes an assault, battery, outrage, false imprisonment, false arrest, malicious prosecution, trespass, or conversion." The duty of a law enforcement officer requires them to be placed in situations that would , under civil law, constitute assault, battery, false imprisonment, false arrest, and the like. That is the very nature of why civil societies supporting the rule of law commission law enforcement officers and task them with such significant responsibility. Aside from the seldom-used common law provision of citizen's arrest, if someone who is not a law enforcement officer patted a person down to check for weapons, placed a person into handcuffs, searched their vehicle, or took them to jail without their consent, that person would have committed assault, battery, trespass, false imprisonment, and false arrest. A law enforcement officer in the conduct of their official duties is charged, and in fact, under some circumstances, required by state law, to carry out these duties. Establishing liability for a law enforcement officer and law enforcement agencies by correlating their actions to civil law is inappropriate, in our opinion.

**Negligence**

Section 3 (1)(c) incorporates as a cause of action a bill that has not been enacted relating to a duty of reasonable care. In our experience, a duty of reasonable care is tantamount to a negligence claim. In addition to being contrary to the well-established Public Duty Doctrine, HB 1202 subjects Washington's law enforcement officers and law enforcement agencies to liability for a duty that does not exist, leaving us without the ability to even know what standard of liability is applied to law enforcement officers and law enforcement agencies.

**Vicarious liability for employers**
Section 3 (2) creates vicarious liability for law enforcement employers if the actions of the officer was within the scope of the officer's employment. This provision makes no accommodation as to whether the actions of the officer were in accordance with the law enforcement agency's policies and procedures – it simply makes the employer liable for all decisions and actions of the employee. For example, we have experienced the situation where a law enforcement officer committed a criminal act while on duty. The criminal act, of course, violated the law enforcement agency's policies and procedures, and was in no way approved or condoned by the employing agency. This officer was terminated, charged and convicted for his criminal act, then reinstated to duty by an arbitrator – over the objections of the law enforcement agency. Under the provisions of HB 1202, the law enforcement agency would have been vicariously liable for actions that were a violation of law, policy, and procedure. Creating vicarious liability for law enforcement employers is unfair and inappropriate, in our view.

**Independent liability for employers**
There are two provisions in HB 1202 that create independent liability for law enforcement employers, and we will address them separately:

> **Regulation, custom, usage, practice, procedure or policy**
> Section 3 (3) automatically attaches independent liability for employers if the officer proves that their conduct was approved or condoned by their employer. This automatic attachment of liability appears to be an attempt to escape burden of proof requirements in federal court where the plaintiff must prove such patterns or practices, and unfairly drives additional taxpayer expense. Additionally, it is important to note that a significant amount of policy and training for law enforcement officers is driven by both statutory law and case law, and that a significant portion of training for law enforcement officers is both mandated by the state and provided by the state. Attaching liability for local employers for actions of the state is unfair and inappropriate, in our view.
>
> **Failure to use reasonable care in hiring, training, retaining, supervising, or discipline**
> Section 3 (4) creates additional independent liability for law enforcement employers for failure to use reasonable care in hiring, training, retaining, supervising or disciplining officers. It is important to note that law enforcement agencies are required to abide by specific state laws and rules related to the hiring of law enforcement officers. Additionally, law enforcement agencies are required by the state to adhere to specific training requirements – much of which is provided by the state. Law enforcement agencies are also bound by the state-enacted collective bargaining and arbitration laws, which have resulted in law enforcement officers being terminated from employment by the agency, only to be mandatorily reinstated pursuant to this state created system. In each of these circumstances, law enforcement agencies have little to no discretion, yet Section 3 (4) holds those agencies liable for decisions made and mandated by the state. Creating liability for law enforcement employers as a result of state-mandated actions is unfair and inappropriate, in our view.

**Precluded defenses**
Section 3 (5) precludes law enforcement officers or agencies from asserting a defense under two circumstances:

> **Not clearly established law**
> Section 3 (5)(a) precludes a law enforcement officer and a law enforcement agency from defending themselves in such litigation if the "rights, privileges, or immunities sued upon were not

clearly established at the time of the act, omission, or decision by the peace officer or employer." The fundamental unfairness of this cannot be overstated. Simply put, a law enforcement officer and a law enforcement agency are specifically prohibited from informing the court that the conduct in question was not unlawful at the time. We acknowledge and agree that certain federal courts have applied the doctrine of qualified immunity in inappropriate ways. The proper remedy is to seek federal legislation, not to prohibit a respondent from defending themselves with the simple fact that the conduct alleged was not unlawful at the time. We simply cannot be held liable for something that was not unlawful at the time.

**Could not have reasonably known the act was unlawful**

Section 3 (5) (b) precludes a law enforcement officer and a law enforcement agency from defending themselves in such litigation if "at such time, that the state of the law was such that the peace officer or employer could not reasonably have been expected to know whether such act, omission, or decision was lawful." Again, the fundamental unfairness of this cannot be overstated. For example, if the Legislature decided to expedite the enactment of a bill that made a certain act unlawful with an emergency clause and the Governor signed the bill, and a law enforcement officer committed such act hours later, the officer and their employing law enforcement agency would be held liable pursuant to this provision. All without even a reasonable opportunity to know that such an act had become unlawful. We simply cannot be held liable for something that we cannot reasonably be expected to know.

**Failing to act**

Section 3 (5) contains two references to "omission." The causes of action in Section 3 (1), however, all reference affirmative conduct with terms such as "engaged in" and "executed." These multiple references to "omission" create internal conflict within the bill and could very likely further subject Washington's law enforcement officers and law enforcement agencies to liability that is contrary to the stated purposes in Section 3 (1).

**No contributory fault**

Section 6 (3) exempts contributory fault from these causes of action. In other words, a person whose own actions were 99% attributable to the alleged harm is entitled to 100% of damages under causes of action brought under HB 1202. Take, for example, a scenario where an officer is responding to an emergency with lights and siren, and is otherwise abiding by agency policy and procedure, and their vehicle collides with another vehicle: if the court finds even the smallest notion of fault, such as not 'chirping' the siren a sufficient number of times while the other vehicle unlawfully failed to yield or ran a stop sign, the law enforcement officer and the law enforcement agency would be subject to 100% of the damages. Subjecting Washington's law enforcement officers and law enforcement agencies to unconscionable liability for damages caused by another person should not be the policy of the State of Washington.

We respectfully request, in the strongest of terms, that you not enact HB 1202.

Thank you for considering our feedback. We look forward to partnering with you and others to improve the public service of law enforcement in our state.

Sincerely,

James McMahan
Policy Director

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Tuesday, January 26, 2021

House Public Safety Committee
John L. O'Brien Building
PO Box 40600
Olympia, WA 98504-0600

RE: Supplemental Testimony in Opposition to HB 1203

Chair Goodman, Ranking Member Mosbrucker, and Members of the Public Safety Committee,

Please accept this letter as a supplement to my verbal testimony to the committee this morning.

On behalf of the Washington Association of Sheriffs and Police Chiefs (WASPC), I respectfully request that you oppose HB 1203.

It is important to first recognize that, under current law, every Washington law enforcement agency is already subject to civilian oversight. Every Police Chief is hired, supervised, and can be terminated by a Mayor, City Manager, and/or City Council. Every Sheriff is elected by the voters of their county – there will soon be, of course, one exception to this statement, as the voters of King County recently chose to incorporate the Office of Sheriff into an appointed position under the direction of the elected King County Executive. In all cases, however, law enforcement executives and law enforcement agencies are all overseen by elected officials. Additionally, in all cases, the budgets of every law enforcement agency is determined and overseen by civilian elected officials.

It is also important to note that HB 1203 requires locally elected officials to do what they have chosen to not do. Every city and county can, under current law, choose to establish community oversight boards. In fact, community oversight boards exist in every jurisdiction where the locally elected officials have determined they are in the best interests of their community. HB 1203 removes local control and local decision-making by locally elected officials and removes authority and discretion from locally accountable elected officials.

HB 1203 gives broad authority to a small group of unelected individuals who have no direct duty to their community, and their community has no means to hold them directly accountable for their actions.

**Excludes state law enforcement agencies, universities or special purpose districts** (Section 2 (3))
We find it troubling that Section 2 (3) specifically excludes state law enforcement

agencies. Given the findings in Section 1 of the bill, it seems odd that the state would exempt itself from the provisions of the bill. The state employs more than 2,000 Washington law enforcement officers, most of whom conduct uniform patrols in Washington's communities, and all of whom have at least some authority to enforce the criminal laws of this state.

The definition is Section 2 (3) is also insufficient in that it specifically excludes special purpose district law enforcement agencies, university law enforcement agencies, and tribal law enforcement agencies that have been granted authority to act as general enforcement Washington law enforcement agencies pursuant to RCW 10.92 or have voluntarily requested certification as peace officers pursuant RCW 43.101.157.

**No requirement for factual basis of investigations** (Section 3 (2) (b))

The language in Section 3 (2) (b) makes no provisions requiring that community oversight boards make any determination to the factual basis for any complaint it investigates. This is particularly concerning in light of the specific authority for these boards to investigate incidents on its own initiative. This broad authority amounts to state sanctioned "fishing expeditions."

**Subpoena authority** (Section 3 (2) (e))

The granting of broad and unlimited powers to issue subpoenas to compel documents and testimony authorizes these boards to impede not only on the constitutional rights of private citizens, but also jeopardizes active criminal investigations.

Furthermore, if an oversight board compelled testimony from a law enforcement officer to inquire about alleged or suspected misconduct and such misconduct constituted a criminal act, the 5th Amendment of the U.S. Constitution and the U.S. Supreme Court's rulings in Garrity v. New Jersey and successive case law protect compelled statements from being used against the officer in a criminal proceeding. In other words, this broad power could, in fact, cause a law enforcement officer from being held accountable for criminal acts. This outcome seems contrary to the purpose of the bill.

**Access to crime scenes, evidence, and investigations** (Section 3 (2) (g) & (i))

Requiring access to criminal investigations, access to crime scenes and evidence is entirely inappropriate. Not only does such access jeopardize ongoing criminal investigations, but potentially contaminates crime scenes and associated evidence. Furthermore, any person with access to crime scenes and associated evidence must be carefully tracked for evidentiary and chain-of-custody purposes, and such persons are subject to subpoena and examination in any subsequent criminal trial.

Additionally, given the U.S. Supreme Court's decisions to continually broaden the criteria for potential impeachment disclosures pursuant to Brady v Maryland and subsequent case law, it may be the case that members of such boards become subject to Brady disclosures.

Furthermore, the provision requiring access to evidence and investigations, particularly in light of the requirement in Section 3 (6) to include "justice-involved individuals," could very well require law enforcement agencies to violate federal requirements regarding access to criminal justice information, which could result in the FBI cutting off a law enforcement agency's access to criminal history information from other states and key investigation tools such as fingerprint and DNA databases.

**Select candidates for Chief of Police** (Section 3 (2) (k) and Section 4)

Limiting the potential candidates for Chief of Police to those recommended by oversight boards impedes the inherent authority of local elected officials. Particularly in light of the absence of any knowledge of, or experience in the law enforcement profession, in fact prohibiting a law enforcement officer from being a member of an oversight board, these provisions give sweeping authority for oversight boards to determine the qualifications of candidates to lead professions to which they have little to no experience. Locally elected officials are in the best position to make these determinations, and are accountable to voters.

**Unfunded mandate** (Section 3 (8) & (9))

HB 1203 is an unfunded mandate on local jurisdictions. Washington already has the fewest number of commissioned law enforcement officer per capita than any other state in the nation. In fact, Washington ranks #51 in the country in this measure, according to the Federal Bureau of Investigation's Crime in the United States Report. Washington has maintained this unenviable ranking for ten of the last ten consecutive years. Assuming an average cost of $120,000 per officer per year, it would cost more than $67,000,000 in additional annual investment for Washington to move up to be the second-lowest in the nation in terms of law enforcement staffing.

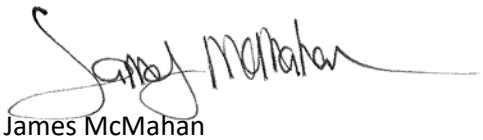
Requiring community oversight boards to be funded with a minimum equivalent of 5% of the law enforcement agency's budget will only worsen the situation our cities and counties, and their respective law enforcement agencies been in for more than a decade. This unfunded mandate will likely result in budget reductions to the law enforcement agency, causing decreased response times to 911 calls, the lack of any response for certain property crimes, and further inhibiting our ability to effectively investigate criminal activity. Perhaps most importantly, these fiscal impacts would leave officers with less access to back-up in violent confrontations, actually increasing the likelihood that an officer use deadly force when back-up could have enabled time, cover and distance to de-escalate the situation.

Furthermore, Section 3 (8) gives unlimited authority for oversight boards to retain legal counsel to represent the board in all matters at the expense of the law enforcement agency. Coupled with the lack of any requirement for a factual basis for investigations, the lack of any material restrictions on the actions of the board, or even a requirement that such boards act in good faith, this provision gives such boards carte blanche authority to waste taxpayer funds on fishing expeditions, and, quite literally, at the expense of public safety in their community.

We respectfully request, in the strongest of terms, that you oppose HB 1203.

We look forward to working with you to improve the public service of law enforcement in our state.

Respectfully submitted,



James McMahan
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Tuesday, February 2, 2021

Senate Law & Justice Committee
John A. Cherberg Building
PO Box 4066
Olympia, WA 98504-0466

RE: Supplemental Testimony to SB 5259 & SB 5261

Chair Pedersen, Ranking Member Padden, and Members of the Law & Justice Committee,

Please accept this letter as a supplement to my verbal testimony to the committee this morning regarding SB 5259 & SB 5261.

On behalf of the Washington Association of Sheriffs and Police Chiefs (WASPC), I want to thank Senator Nobles for introducing SB 5259 and Senator Padden for introducing SB 5261. As you know, our association has advocated for the establishment of a uniform statewide system of data collection on deadly force incidents since 2015. Additionally, our proposed 13 recommendations to improve the public service of law enforcement in our state includes a recommendation to "require all Washington law enforcement agencies to submit data regarding the use of deadly force."

Given the closely linked nature of SB 5259 & SB 5261, and our understanding that SB 5259 will be the vehicle to advance, this letter will discuss the policy of both bills with specific reference to SB 5259.

While we continue to call on the Legislature to enact a uniform, statewide data collection system, we do not support SB 5259 as introduced. We are hopeful, however, that we can work together and find common ground for a proposal that we can all support.

There are a few distinct considerations between SB 5259 and last year's legislation that are worthy of discussion:

1. Should Washington State have a statewide, uniform data collection system?
2. What entity should collect and publish the data?
3. What types of incidents should be reported?
4. What data elements should be collected?
5. Who should bear the financial burden of such a system?
6. What accountability measures should be enacted for failure to report?

**Should Washington have a statewide, uniform data collection system?**
Yes. WASPC has advocated for the creation of such a system since 2015. Uniform data on a statewide basis provides the opportunity to make more informed

policy decisions on these incredibly important issues. It also enables individual law enforcement agencies to conduct an internal evaluation as to how their agency compares to their peers in this state. It could enable Washington to objectively evaluate how we compare to other states.

**What entity should collect and publish the data?**

WASPC is our state's central repository for crime statistics and is the entity that the 2020 legislation proposed to have collect and publish the data – a bill that was supported by WASPC, the Attorney General, and 93 members of the House. WASPC is willing to serve as the central repository for a statewide data collection system, though that does not factor into our support or opposition to legislation. In other words, we don't have a specific interest on what entity collects the data, provided the entity is efficient and effective, and not overly expensive.

We do not object to the establishment of this program at Washington State University, so long as the costs of housing such a program at WSU are not more than twice what it would cost to have WASPC perform the same function.

**What types of incidents should be reported?**

There is a proportional relationship between the types of incidents reported and the value of the data collected. In a pure policy consideration, we would advocate for a great number of incidents and interactions to be reported, as this data provides for the most informed and useful policy decisions and actionable data by individual law enforcement agencies and executives. Our members, however, operate in a much more complex environment, and this question needs to be carefully weighed, and balanced with, the question of who should bear the financial burden of this system.

Washington State has the fewest number of commissioned law enforcement officers per capita in the nation, and 2019 was the 10th consecutive year that we've been 51st in the nation in this measure. A majority of Washington's law enforcement agencies employ 15 or fewer law enforcement officers. Some Washington law enforcement agencies already cannot provide 24-hour service. Some Puget Sound area agencies still do not have a supervisor on duty for overnight shift.

We will have created a disservice to the public by creating a rich data collection system if it means that agencies had to divert an officer from patrol to provide the data. Similarly, if the state covered 100 percent of the costs associated with collecting data on a broad array of incidents, we will serve the public in a responsible manner.

More specifically, SB 5259 would require reporting of some incidents not regularly tracked by most law enforcement agencies. Except in circumstances where a law enforcement agency is negligent in its data collection practices, a statewide data collection system should not require a law enforcement agency to collect new categories of data.

**"Tort Payouts"**

WASPC takes significant issue with the provisions in SB 5259 that would require local government entities to report the amount of "tort payouts" involving an allegation of improper use of force (Section 4).

Not only would this provision require agencies to violate the terms of confidentiality agreements that are common with such "payouts," it incorrectly presumes that a "payout" is equivalent to a wrongful act. Tort claims are often settled for reasons other than guilt. When the cost to the taxpayer of winning a lawsuit is more expensive than settling, public agencies and decision makers sometimes make rational and appropriate decisions to settle. For example, in FY2017, the Attorney General's Office paid a $1,182,996

indemnity claim in the Highway 530 Landslide litigation over allegations of improprieties related to discovery in the case. We do not believe that such a "payout" should be held up as a reflection of the Attorney General's Office, or an indication of wrongdoing by the Attorney General. We ask the same treatment of Washington's law enforcement agencies.

Furthermore, it important that the Legislature understand how common it is for a single claim to be filed alleging a number of harms, and that settlement discussions are often global in nature, without distinguishing what portion of the "payout" is for which portion(s) of the claim.
Finally, the publication of this information – at least at the local level - would perpetuate the false narrative that significant resources exist that could be used for reform but are instead used for such "payouts." Unlike the state, the vast majority of Washington's local governments are not self-insured. They carry liability insurance that works just like vehicle or medical insurance where the insured pays a regular premium and a "payout" is only made upon a covered claim.

While it may be true that the state, a self-insured entity, could assert its sovereign immunity rights to immunize itself from most claims and instead repurpose those funds for other purposes (the Department of Enterprise Service's 2019 analysis shows that the state paid more than $179 million in "indemnity payouts" in FY 2019), local governments do not have such options. Legislation that suggests otherwise would, in our view, be a disservice to those we are sworn to serve and perpetuate a false narrative that only leads to further erosion of public trust in government institutions. We need to focus on solutions that enhance and increase public trust in a comprehensive way.

**What data elements should be collected?**

Similar to the question of what incidents should be reported, the data elements collected are directly proportional to the value of the information. To that end, in a pure policy consideration, we would advocate for a great number of data elements to be reported, as this data provides for the most informed policy decisions and actionable data by individual law enforcement agencies. Our members, however, operate in a much more complex environment, and this question needs to be carefully weighed, and balanced with, the question of who should bear the financial burden of this system.

Again, Washington State has the fewest number of commissioned law enforcement officers per capita in the nation, and 2019 was the 10th consecutive year that we've been 51st in the nation in this measure. A majority of Washington's law enforcement agencies employ 15 or fewer law enforcement officers. Some Washington law enforcement agencies already cannot provide 24-hour service. Some Puget Sound area agencies do not have a supervisor on duty for graveyard shift. We will have created a disservice to the public if Washington created a rich data collection system if it meant that agencies had to pull an officer off of patrol to provide the data. Similarly, if the state covered 100% of the costs associated with collecting a broad array of data elements in these incidents, we will have served the public in a responsible manner.

SB 5259 seeks to collect less information than the HB 2789 from 2020, and we appreciate the spirit in which this change is offered. We find value, however, in data that enables apples-to-apples comparisons among the states – at least as it relates to deadly force incidents. Keeping in mind our position on the financial responsibility, we believe that common ground might easily be found here.

**Who should bear the financial burden of such a system?**

As with the previous two considerations, WASPC's position on this question is conditional. There is a basic level of responsibility that all Washington law enforcement agencies bear to collect and report data related to instances where deadly force is used. All Washington law enforcement agencies should be required to report such instances, even if it means the agency must bear the financial burden of doing so.

Deadly force interactions in Washington State are, thankfully, so rare that the cost of reporting such data in those instances is minor compared to the other responsibilities of an agency. This is reflected in the fiscal note for HB 2789 from 2020 which indicates "no fiscal impact."

SB 5259, however, vastly expands the circumstances where reporting is required, far more often than those contemplated in HB 2789 from 2020 – some of which are not currently regularly tracked by most agencies. This proposal represents a significant financial burden on Washington's law enforcement agencies – a burden that we cannot afford. WASPC will not support SB 5259 unless and until language is included to ensure that the bill creates no fiscal impact to Washington's law enforcement agencies.

Aside from the provisions of RCW 43.135.060, which prohibit unfunded mandates by the Legislature, Washington's law enforcement agencies have borne the burden of the state's abandonment of its financial responsibility in countless ways. Some of the more recent circumstances include, but are not limited to:

- the elimination of the Public Safety Education Account, followed by a 25 percent" local share" of the cost to comply with the requirement to train newly hired law enforcement officers at the state Criminal Justice Training Commission;
- the transfer of more than $30 million from the Criminal Justice Treatment Account over the previous four biennia for other purposes; and
- the failure to re-invest savings realized in community corrections legislation to make "historic investments of more law enforcement on the streets" and "to expand services for inmates re-entering society as well as increase the number of corrections officers."

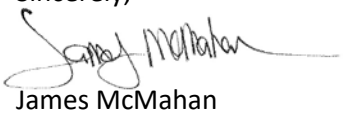
These are a few examples that demonstrate our experience receiving the short end of the stick. We understand that future legislatures cannot be bound just as well as we understand the public safety impacts of unfunded mandates on Washington's law enforcement agencies.

A reporting system that only requires law enforcement agencies to submit incident reports for reportable incidents to WSU would have very minimal impacts on law enforcement agencies. We are aware of at least one data reporting system that uses this approach, enabling a static cadre of trained experts to review the incident reports and use a uniform coding interpretation. This is a promising approach that merits further exploration.

Washington's law enforcement agencies remain committed to our years-long call for the Legislature to create a uniform, statewide deadly force data collection system. We see tangible value to the creation of a system that collects a broad array of useful data from a broad set of incidents. However, we stand firm in our commitment to actively not support any data collection proposal beyond deadly force without our satisfaction that 100 percent of the cost of implementation is borne by the state.

We look forward to working with you to improve the public service of law enforcement in our state.

Sincerely,



James McMahan
Policy Director

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Thursday, January 14, 2021

House Public Safety Committee
John L. O'Brien Building
PO Box 40600
Olympia, WA 98504-0600

RE: Supplemental Testimony to HB 1092

Chair Goodman, Ranking Member Mosbrucker, and Members of the Public Safety Committee,

Please accept this letter as a supplement to my verbal testimony to the committee this afternoon.

On behalf of the Washington Association of Sheriffs and Police Chiefs (WASPC), I want to thank Representative Lovick for introducing HB 1092. As you know, our association has advocated for the establishment of a uniform statewide system of data collection on deadly force incidents since 2015. Additionally, our proposed 13 recommendations to improve the public service of law enforcement in our state includes a recommendation to "require all Washington law enforcement agencies to submit data regarding the use of deadly force."

We appreciated the House's passage of SHB 2789 in the 2020 session, and were disappointed that the Senate did not also pass that bill. We are hopeful that this year will be different.

While we continue to call on the Legislature to enact a uniform, statewide data collection system, we oppose HB 1092 as introduced. We are hopeful, however, that we can work together and find common ground for a proposal that we can all support.

There are a few distinct considerations between HB 1092 and last year's legislation that are worthy of discussion:

1. Should Washington State have a statewide, uniform data collection system?
2. What entity should collect and publish the data?
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HB 1092 seeks to collect less information than the proposal that both of our organizations supported just a few months ago, and we appreciate the spirit in which this change is offered. We find value, however, in data that enables apples-to-apples comparisons among the states – at least as it relates to deadly force incidents. Keeping in mind our position on the financial responsibility, we believe that common ground might easily be found here.

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Washington's law enforcement agencies remain committed to our years-long call for the Legislature to create a uniform, statewide deadly force data collection system. We see tangible value to the creation of a system that collects a broad array of useful data from a broad set of incidents. However, we stand firm in our commitment to actively oppose any data collection proposal beyond deadly force without our satisfaction that 100 percent of the cost of implementation is borne by the state.

We hope that our candid feedback is productive to our ongoing discussions on this important issue, and we remain confident that we can find common ground here.

Sincerely,

James McMahan
Policy Director

Washington Association of
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Tuesday, January 26, 2021

House Public Safety Committee
John L. O'Brien Building
PO Box 40600
Olympia, WA 98504-0600

RE: Supplemental Testimony to HB 1267

Chair Goodman, Ranking Member Mosbrucker, and Members of the Public Safety Committee,

Please accept this letter as a supplement to my verbal testimony to the committee this morning on HB 1267.

On behalf of the Washington Association of Sheriffs and Police Chiefs (WASPC), I want to thank Representative Entenmann for introducing HB 1267. As you know, our association has proposed 13 recommendations to improve the public service of law enforcement in our state includes a recommendation to "explore models for creating a completely independent statewide deadly force investigative team governed by a board that includes community members."

We have a bill draft that creates a completely independent statewide deadly force investigative team governed by a board that includes community members that we do support, and we encourage you to give due consideration to our proposal.

As it stands, WASPC cannot fully support HB 1267, but we acknowledge that HB 1267 takes great steps toward our recommendation. There are a number of key aspects that we would like to work with the Legislature to further perfect the bill so that we can actively support it.

Please note that the following topics are not in order of importance, rather in the order that they first appear in the text of the bill.

**Prioritization of resources**
We note several provisions throughout the bill that infer that the Office of Independent Investigations would have the ability to not conduct investigations of incidents under its jurisdiction. We believe strongly that the Office of Independent Investigations be required to conduct investigations relating to the use of deadly force by a law enforcement officer, and any references that state or imply otherwise be removed from the bill.

**Scope of Authority**
Section 302 (1)(b) authorizes the Office of Independent Investigations to conduct investigations into allegations of sexual assault by a law enforcement officer. Section

306 provides specific authority for the Office of Independent Investigations to have jurisdiction over "any criminal activity related to, or discovered in the course of, the investigation of the case." Section 308 provides specific authorization for the Office of Independent Investigations to have jurisdiction over circumstances beyond those described in RCW 40.114.011. We believe strongly that scope of authority granted to the Office of Independent Investigations be specifically limited to circumstances described in RCW 10.114.011 - to inform a determination of whether the use of deadly force by a law enforcement officer met the good faith standard established in RCW 9A.16.040. Furthermore, we request that language be added to specifically prohibit officers of the Office of Independent Investigations from engaging in any law enforcement activity beyond that specifically enumerated in RCW 10.114.011.

**Governance**

We believe strongly that the Office of Independent Investigations should be as independent and as free from bias and political influence as possible. To that end, we request that the Office of Independent Investigations be governed by a governing board with sole authority to hire, supervise, and terminate the Director of the Office. We do not believe it appropriate that the Director be appointed by the Governor or any other elected official. The Governor should appoint members of the Board, who should be authorized to administer the agency in an informed, objective, transparent, and thorough manner, free of political influence or the perception of political influence. We would also recommend that it be a specific duty of the governing board to adopt a policy to ensure that actions of the board, board members, the Director, and other employees, agents, or representatives of the agency are insulated from bias and political influence. An independent office must balance credibility and trust with the community with the same credibility and trust with the officers under their oversight. This is a challenging balance but it is a critical element to consider.

**Prompt response to scenes**

Section 304 (2) (a) (i) requires the Director to develop a plan to "Allow for prompt response to the incident requiring investigation." We take the position that this language is not sufficient and request that it be a more affirmative statement to reflect the 24/7 nature of law enforcement. "Prompt" is a subjective term that could be interpreted to mean many things. We suggest language that requires an implementation plan to accommodate for an immediate response to such scenes within one hour of being notified, and in no case more than four hours after receiving notification.

**Civilians conducting criminal investigations**

There are several references within the bill to civilian investigators. It is important that, if the state is to undergo the effort and expense of creating a new state agency to conduct these very important investigations, that such investigations are not dismissed. The investigations required by RCW 10.114.011 are criminal investigations. Complex criminal investigations require very specific training, skills, and qualifications by law enforcement officers. Allowing individuals who are not law enforcement officers to conduct criminal investigations jeopardizes not only the investigation itself, but the viability of prosecuting a case where a law enforcement officer is found to have used deadly force in a criminal manner. It would run counter to the very purpose of the Office of Independent Investigations if such investigations precluded the prosecution of a viable case. We do not, however, oppose the involvement of those who are not law enforcement officers. We encourage a balanced approach with language that incorporates non-law enforcement officers into the work of the Office, so long as the criminal investigations are conducted by competent and qualified law enforcement officers.

**Retention of existing independent investigation teams**

HB 1267 contains a definition and at least five specific references to existing independent investigation teams. It is our expectation that the creation of a statewide Office of Independent Investigations that

existing independent investigations teams are no longer necessary. Involved agencies, in cooperation with any agency that provides mutual aid assistance to the scene of an officer-involved use of deadly force, should and will continue to maintain custody of such scenes pursuant to existing rules, though the creation of a statewide Office of Independent Investigations must relieve local jurisdictions of the duty and expense associated with duplicating efforts associated with the retention of existing independent investigation teams. The language contained in HB 1267 should be clarified to reflect this reality.

**For profit criminal investigations**
Section 305 (3) contains a specific authorization for the Office of Independent Investigations to "contract for services to provide additional personnel as needed to conduct criminal investigations of cases." Section 305 (4)(a) and Section 306 (2) also contain references to contracted investigators. Criminal investigations should be performed by commissioned law enforcement officers, not private entities that may be created for profit.

**Priority over scene and evidence**
Section 308 (6) declares that the Office of Independent Investigations will "be the lead investigative body" and "have priority over any other state or local agency investigating the incident or a case that is under the jurisdiction of the office." Similar language appears in other sections of the bill. It is important to keep in mind that most, if not all, instances where an officer uses deadly force will have multiple criminal investigations occurring simultaneously, at the same scene, and with overlapping evidence. For example, if a law enforcement officer uses deadly force to stop a mass shooting, the Office of Independent Investigations, under the bill's language, would have jurisdiction to investigate the actions of the officer's use of deadly force. The "involved agency" will have jurisdiction over the mass shooting. Both criminal investigations will occur simultaneously, at the same scene, with the same witnesses, and with overlapping evidence. Placing a lead status or priority with one agency over another will jeopardize the viability of prosecution in both cases. We recommend that any language establishing a lead agency or giving one agency priority over another be removed and replaced with language that requires the active cooperation of both the Office of Independent Investigations and other agencies conducting criminal investigations to ensure the proper investigation of all matters under their respective jurisdictions.

**Priority Training at the Criminal Justice Training Commission**
Section 309 (2) requires the Criminal Justice Training Commission to give "priority registration" to commission trainings for investigators of the Office of Independent Investigations. Washington's law enforcement agencies have struggled, for more than a decade, to secure timely enrollments for officers to attend mandatory trainings at the Commission. Placing the training needs of the Office of Independent Investigations ahead of the training needs of the other 279 Washington law enforcement agencies is not appropriate. This Office is clearly very important, but so is the public safety of each of our communities.

In summary, we do support the creation of a completely independent statewide deadly force investigative team governed by a board that includes community members, but we cannot support HB 1267 as written. We encourage you to give due consideration of our proposal and we look forward to working with you to improve the public service of law enforcement in our state.

Respectfully submitted,

James McMahan
Policy Director

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Friday, January 29, 2021

House Public Safety Committee
John L. O'Brien Building
PO Box 40600
Olympia, WA 98504-0600

RE: Supplemental Testimony in Opposition to HB 1310

Chair Goodman, Ranking Member Mosbrucker, and Members of the Public Safety Committee,

Please accept this letter as a supplement to my verbal testimony to the committee this morning.

On behalf of the Washington Association of Sheriffs and Police Chiefs (WASPC), I respectfully request that you oppose HB 1310. Washington's Sheriffs and Police Chiefs believe strongly that every person should be able to go home safely at the end of each day. We also believe that help should be provided to those who need help. Those beliefs are not mutually exclusive, and we are concerned that HB 1310, as written, fails to accomplish both of these separate but important goals. In our view, HB 1310 inhibits our ability to help those being victimized, and we are concerned that it will lead to increased harm to victims as a direct result.

As you know, our association has proposed 13 recommendations to improve the public service of law enforcement in our state, including a recommendation to "Standardize the use of force policies and training centered on the cornerstone principle of the sanctity of human life. De-escalation, proportionality, and the use of time, cover and distance will be emphasized, and the required training from I-940 should be accelerated. This required curriculum also includes training on implicit bias and the history of race and law enforcement." The goals and intent of that proposal have some of the same goals addressed in this bill.

We have authored a bill draft that seeks to implement a statewide standard for use of force policies that is centered on the cornerstone principle of the sanctity of human life that we would recommend for your consideration. We believe this proposal appropriately pursues the aforementioned goals in a way that does not characterize them as mutually exclusive.

We offer below some of our thoughts on the major provisions of HB 1310. Please note that the following topics are not in order of importance, rather in the order that they first appear in the text of the bill.

**When physical force is authorized**

Section 3 (1) establishes three circumstances when a law enforcement or corrections officer may use physical force: when necessary to effect an arrest, to prevent an escape as defined in Chapter 9A.76 RCW, or to otherwise protect against an imminent threat of bodily injury. These circumstances fail to acknowledge the duties and expectations of a law enforcement officer.

**Unintended consequence of increased arrests**

Given the (thankfully) rare circumstance where a law enforcement officer is called to prevent an escape from custody of a correctional facility, this list leaves two circumstances where physical force may be used: to effect an arrest or protect against imminent threat of bodily injury. Take, for example, a circumstance where a person seeks to gain access to an unauthorized area like the chamber of the State House of Representatives. In addition to House security, the House chamber is protected by Washington State Patrol Troopers. Under the provisions of HB 1310, a Trooper confronting a person seeking to access the House chamber could only use physical force to prevent such access if the Trooper had first placed the person under arrest or if the person posed an imminent threat of bodily injury. The State Patrol generally seeks to avoid placing persons under arrest in such circumstances unless otherwise unavoidable. Pursuant to Section 3 (1), a Trooper who uses any physical force to safeguard the House chamber must then arrest the individual for such force to be lawful. This dynamic would be true in countless other circumstances. As written, Section 3 (1) would effectively require law enforcement officers to arrest any person where any level of physical force is used – most of which do not result in arrests today.

**Correctional Settings**

Section 3 (1) is equally inappropriate in correctional settings. Keep in mind that a person in a correctional facility is already in custody, leaving a correctional officer the authority to use physical force to prevent an escape and to prevent against an imminent threat of bodily injury. This prohibition will enable significant disruption of our correctional facilities by prohibiting a correctional officer from using physical force when an incarcerated individual is present in a restricted area, or is suspected of possessing a prohibited item.

**Deadly force as last resort**

Section 3 (1) and Section 6 prohibit the use of deadly force except as a "last resort." We agree that the sanctity of human life should be the cornerstone principle of all use of force policies, but a last resort standard unnecessarily places the lives of our officers, and the lives of victims, in jeopardy. By its very nature, and pursuant to Section 3 (2) (b), a last resort standard would require an officer to exhaust alternative tactics prior to using deadly force. Simply put, a law enforcement officer is charged with placing themselves in dangerous circumstances and must be given appropriate authority to respond to a deadly threat with deadly force. Requiring officers to first use a taser in a gunfight is not in the interests of public safety.

**Duty of reasonable care**

Section 3 (2) creates a duty of reasonable care that directly contradicts the long established public duty doctrine. Additionally, this new duty fundamentally alters the ability of law enforcement officers to help those who have been victimized.

**Reasonably avoid situations requiring physical force**

Law enforcement is charged with advancing toward danger. Section 3 (2) (a) fundamentally inhibits a law enforcement officer's ability to effect public safety by requiring officers to avoid

the very circumstances most appropriate for a law enforcement officer's intervention. Take, for example, a domestic violence assault call (which our agencies have seen a marked increase in since COVID hit). Domestic violence situations are notoriously dangerous for both the victim and responding officers, and it is not uncommon for our officers to use physical force to separate the parties and prevent further injury to the victim – in other words, these are circumstances that an officer's conduct (arriving on scene and intervening to stop the harm) is both reasonable and foreseeable. Section 3 (2) (a) creates a mandatory duty for the officer to avoid engaging in such conduct. This is not the public's expectation of law enforcement. Requiring law enforcement officers to 'stage' near the scene until the violence has ended is not good public policy and will result in additional physical harm to victims of crime.

**Exhaust de-escalation tactics**

Washington's law enforcement officers are trained to utilize de-escalation techniques where appropriate. Such techniques include many items listed in Section 3 (2) (b). The challenge, however, is that Section 3 (2) (b) incorrectly presumes that the actions of the officer are the sole factor in de-escalation, and fails to recognize the conduct of the individual at hand. At times, officers are reading the body language of a person and will determine to initiate an arrest before the person can further escalate. To the untrained, it may appear premature. To the seasoned officer, they may have taken this individual into custody before he could escalate (e.g., assault the officers, wait for friends or family to arrive, flee into a back room to grab a weapon, etc.). Furthermore, the specific inclusion of a requirement that an officer "leave the area if there is no threat of imminent harm or no crime is being committed" exacerbates the challenge created in Section 3 (2) (a), and directs law enforcement officers to abandon their sworn duty to enforce the law when a crime *has been* committed. We feel this is extremely damaging to public trust.

Encouraging de-escalation and avoiding unnecessary confrontations is a worthy goal and should be a focus of training, policy, and in recognition of the complexity of situations, and is difficult to properly address in statute. Our work on I-940 and the Criminal Justice Training Commission's work with de-escalation training, which is still being implemented, are consistent with this direction.

**Minimal degree of force necessary**

We agree with this provision in principle, though the language in Section 3 (2) (c) fails to clarify that such minimal degree of force necessary under the circumstances should be as deemed by the officer.

**Terminating use of force**

We agree that the use of physical force should be terminated as soon as the necessity of such force ends, as deemed by the officer.

**Less lethal alternatives**

Section 3 (2) (e) fails to recognize the fact that less lethal alternatives are not generally an appropriate response to a deadly threat. Less lethal alternatives are appropriate to, among other things, prevent the opportunity for a deadly threat to materialize, and there may be exceptions, but this is a complex area of training and sweeping statutory requirements do not account for these factors.

**Reporting to the Attorney General**
Washington's Sheriffs and Police Chiefs object to the Attorney General's development of law enforcement use of force policies or tactics, and further object to being required to report their own policies to the Attorney General. Washington's Office of the Attorney General has no oversight role over Washington's law enforcement agencies, nor should it. This not a role that Washington's Constitution places with the Office of the Attorney General. The Attorney General's Office has neither the experience nor the expertise to perform such functions.

Furthermore, the enactment of Chapter 238, Laws of 2018 granted limited law enforcement authority to the Office of Attorney General. As such, the Attorney General's Office has an unavoidable conflict of interest in carrying out the duties as described in Section 4.

**Undermining the work of I-940 & HB 1064 (2019)**
Section 6 undermines the work of law enforcement and community stakeholders during the I-940/HB 3003/HB 1064 process of 2019. These laws have been in effect for less than twenty four months, and necessary rules became effective just one year ago. Furthermore, the Criminal Justice Training Commission has not yet completed the training required pursuant to this process. To undermine that work and again re-write the law in such an important matter causes unnecessary confusion and complexity among our agencies and officers, and disregards the good faith process that law enforcement, the community, and the Legislature engaged in during that time.

**Present ability, opportunity and intent**
Section 6 (2) (a) defines an imminent threat as "based on the totality of the circumstances, it is objectively reasonable to believe that a person has the present ability, opportunity, and intent to immediately cause death or serious bodily injury." This definition, while well meaning, fails to acknowledge the realities of the dangers our officers encounter as part of their job. It is not reasonable to expect an officer to make an objective determination as to the ability, opportunity, and intent of a person posing a deadly threat to the officer or another person. A seemingly calm situation can escalate to a deadly one in a mere instant, with little to no time for an officer to make such a determination.

An officer must be authorized to act to defend themselves against any circumstance where a reasonable officer would, under the totality of the circumstances known to that officer at the time, deem appropriate. For example, when a law enforcement officer encounters a person who refuses to remove their hand from a concealed location (a bag, a pocket, behind their back, etc), and that person without warning quickly removes their hand and points an object at the officer, the officer must be empowered to act in defense of themselves or others. Subjecting an officer to criminal liability for not taking the time to make an objectively reasonable assessment of a three pronged analysis is simply not reasonable. Officers should be expected to act in good faith in all circumstances, use force according to a policy that is based on the cornerstone principle of the sanctity of human life, and be limited to using deadly force in circumstances where a similarly situated reasonable officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual.

**No reasonable officer standard**
It is notable that HB 1310 lacks any provision whatsoever for a reasonable officer standard. HB 1310 repeatedly uses subjective terms such as "available and appropriate," "reasonably," and "objectively reasonable." The bill does not, however, address the more pressing question with such terms: to whom? The standard should not be what the officer(s) "should have" done, or "could have" done, but was it reasonable for an officer in that scenario with the specific facts confronting him or her (often

compressed in time, with limited information, and concerns for safety all interacting at the same time). Without clarifying that subjective terms such as "reasonable" are as perceived by the officer in such circumstances, HB 1310 subjects Washington's law enforcement officers to liability in their career, their assets, and in their freedom.

**Credible facts**

Section 6 (2) (c) defines 'totality of the circumstances' to mean "all *credible* facts known to the peace officer…" The qualification of facts known to the officer with the term "credible" creates an implication that certain facts known to an officer may be disregarded in determining whether the officer's use of deadly force was lawful. An officer either knows or does not know something. The inclusion of the word "credible" in such definition allows an unfair and inaccurate reconstruction of the circumstances.

**Reluctance to engage in proactive policing**

Perhaps the most troubling impact of HB 1310 is its potential impact of causing a reluctance to engage in proactive policing. Those whom we all serve expect law enforcement officers to respond when summoned, and to take actions to effect public safety. Whether it be the growing number of domestic violence calls or a call reporting a suspicious person, the public expects law enforcement officers to show up and take action where action is necessary. Sometimes the interests of public safety require the officer to use force, sometimes it requires that a person be taken into custody, and sometimes it simply requires the presence of an officer to defuse a tense circumstance or prevent the commission of a criminal act. HB 1310 substantially deteriorates this expectation of the public, and their trust in law enforcement.

If the legislature wishes to substantially change the provision and public expectation of law enforcement, so that officers would routinely "stage", like a fire department, and gather all necessary resources prior to engaging in any situation, there are positives and negatives to that approach. It may be worthy of further exploration and discussion, and we would like to have that conversation. Elements of this approach are already part of policy and training for many agencies, but this would extend that to all calls and all situations, with unknown unintended consequences.

In the end, we recognize that law enforcement is a public service. You, the elected members of the Legislature, have been given the authority to determine the nature of this public service that we provide. We sincerely hope, however, that your decisions do not result in further harm to crime victims and contribute to the erosion of the public's trust in their law enforcement agencies.

We look forward to working with you to improve the public service of law enforcement in our state.

Respectfully submitted,

James McMahan
Policy Director

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Thursday, February 4, 2021

Senate Law & Justice Committee
John A. Cherberg Building
PO Box 4066
Olympia, WA 98504-0466

RE: Supplemental Testimony to SB 5263

Chair Pedersen, Ranking Member Padden, and Members of the Law & Justice Committee,

Please accept this letter as a supplement to my verbal testimony to the committee this morning.

On behalf of the Washington Association of Sheriffs and Police Chiefs (WASPC), I respectfully request that you oppose SB 5263.

The felony bar is a statute that was enacted by the Legislature as part of a broader package of reforms to, among other things, "create a more equitable distribution of the cost and risk of injury." (*Chapter 305, Laws of 1986, Section 100*) More specifically, RCW 4.24.420, commonly referred to as the felony bar, was intended to protect victims of crime from being sued by those who victimized them. These principles continue to exist today, and we request that they not be amended.

**Limited to convictions**

Limiting the felony bar defense to circumstances where the person injured or killed has been convicted unfairly leverages the rights and liabilities of a respondent on the willingness and ability of a prosecutor to charge a case, and for a court to convict. We know that there are times when a criminal case can be unprosecutable due to uncooperative or unavailable witnesses, mishandled evidence, inappropriate statements during trial proceedings, and numerous other scenarios, and such dismissals can sometimes be with prejudice, meaning that a retrial cannot be sought. In any case, the rights of a person who has been victimized by felonious conduct – particularly when sued by their offender - should not be predicated on a government action outside their control.

Furthermore, the limitation of the felony bar defense to circumstances where the person injured or killed has been convicted specifically eliminates this defense when the victim lawfully defended themselves and the offender lost their life. Such is the case whether the offender's loss of life comes as the result of an entirely unrelated incident. Suffice it to say that Washington does not seek to convict deceased persons of a crime. Victims of felonies should not have their right to defend themselves in litigation eliminated as a result of defending themselves – even if the offender is killed in the process.

**Further limited to Class A or B felony conviction**
Further limiting the felony bar as a defense to circumstances where the plaintiff was convicted of a Class A or Class B felony offense exacerbates the unfairness described above. It is widely known that prosecutors, as a primary strategy to managing caseloads, make plea agreements in all but the smallest number of cases. In most instances, these plea agreements include a conviction for a lesser offense than the offender's conduct would otherwise merit in trial (Class A felonies are commonly pleaded down to Class B, and Class B felonies are commonly pleaded down to Class C). Limiting a victim's right to assert the felony bar defense to a prosecutor's willingness and ability to secure a conviction for the two most serious classes of criminal conduct does not, in our view, facilitate a fair judicial system.

For example, it wasn't too long ago that news headlines detailed numerous incidents where thieves would steal copper wiring and other non-ferrous metals to trade for their high scrap value. Such thieves specifically sought copper wiring from places such as buildings and utility poles. Unfortunately, some of these thieves lost their lives as a result of being electrocuted during the course of their theft (stealing live power lines). Under SB 5263, the victim of such theft could be sued by their offender or their heirs, and could not assert the felony bar defense, even if the thief survived – Theft 2 is a Class C felony.

**Retroactivity**
Applying such changes retroactively unfairly changes the rules after the fact, and further subjects crime victims to litigation by their offender. Such a change would also further contribute to the backlog of cases in our judicial system, and cause unnecessary expense and burden on Washington's local governments.

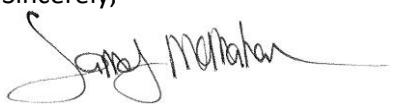
Clearly our interest is to preserve the felony bar as a defense to circumstances where a law enforcement officer or a law enforcement agency is sued by a person whose injuries occurred during, and were the proximate cause of, their commission of a felony. It is entirely appropriate for our officers and agencies to assert this defense.

It should not be the public policy of Washington that a person committing a felony can sue their victim for injuries sustained as a direct result of their own felonious conduct – whether the victim was a law enforcement officer or a member of the public.

Our association has submitted to you our 13 recommendations to improve the public service of law enforcement in our state, and we stand ready to work with you to that end. We do not, however, believe that amending RCW 4.24.420 improves the public service of law enforcement, and we respectfully request that you oppose SB 5263.

We look forward to working with you to improve the public service of law enforcement in our state.

Sincerely,



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Tuesday, January 19, 2021

Senate Law & Justice Committee
John A. Cherberg Building
PO Box 4066
Olympia, WA 98504-0466

RE: Supplemental Testimony to SB 5066

Chair Pedersen, Ranking Member Padden, and Members of the Law & Justice Committee,

Please accept this letter as a supplement to my verbal testimony to the committee this morning.

On behalf of the Washington Association of Sheriffs and Police Chiefs (WASPC), I want to thank Senator Dhingra for introducing SB 5066. As you know, our association has proposed 13 recommendations to improve the public service of law enforcement in our state includes a recommendation to "Require all law enforcement officers to intervene and report to their agency whenever another law enforcement officer uses excessive force or knowingly violates the rights of any person. Violation of this duty should be cause for discipline, up to and including termination."

To this extent, we believe that the Legislature should enact a bill creating a duty to intervene for law enforcement officers, though we request the opportunity to work with you to perfect SB 5066.

We have authored a bill draft consistent with our recommendations on the topic of decertification and encourage the Committee to give this proposal due consideration. That draft is appended to this letter.

The areas of the bill we would like to help you perfect include the following:

**Status of observing officer** (Section 1 (1))
A duty to intervene needs to be carefully crafted so as to not require an observing officer's duty to intervene to inadvertently escalate a situation, or cause the observed officer to perceive the intervening officer as a threat. As such, we recommend that "immediately identifiable" be supplemented with "uniformed and on duty."

**Status of observed officer** (Section 1 (1))
The bill language does not specify whether the observed officer is on duty in the conduct of their official business or off duty. We request that this language be clarified to apply to officers who are on duty in the conduct of their official business and perceived to be using excessive force.

**Duty to render first aid** (Section 1 (1))
It is unclear to us whether Section 1 (1) incorporates the existing duty to render first

aid into the duty to newly created duty to intervene, and whether an officer's failure to render first aid pursuant to RCW 36.28A.445 also subjects the officer to decertification proceedings pursuant to RCW 43.101.105. We request that the language be clarified as to the Legislature's intent.

**Status of observing officer** (Section 1 (2))
The bill language does not specify whether the duty to report wrongdoing applies to observations by an officer who is on duty or off duty, or both. We recommend that, in the context of our proposed definition of wrongdoing below, this duty apply to observing officers who are either on duty or off duty.

**Status of observed officer** (Section 1 (2))
The bill language referencing the observed peace officer does not specify whether the observed officer is on duty in the conduct of their official business or off duty. We recommend that, in the context of our proposed definition of wrongdoing below, this duty apply to observed officers who are either on duty or off duty.

**Notice to the criminal justice training commission** (Section 1 (4))
The requirement that a law enforcement agency send notice to the Criminal Justice Training Commission of "any disciplinary decision" resulting from a peace officer's failure to intervene or failure to report seems to be inclusive of decisions where it was determined that an officer did not fail to intervene or fail to report. Such instances, in our view, need not be reported to the commission. Requiring agencies to report decisions that upheld the actions of the officer in such circumstances seems to unnecessarily consume time and resources in our law enforcement agencies and the Criminal Justice Training Commission. We request that this section be amended to only require such notice when the agency determines that an officer failed to intervene or failed to report pursuant to this act.

**Definition of excessive force** (Section 1 (5) (a))
The definition of excessive force seems excessively restrictive and could result in unintended physical altercations between law enforcement officers.

> **Exceeds the degree**
> The definition of excessive force references "the degree" of force permitted. The use of this term in the singular, and the use of the term "degree" requires an officer to intervene if the officer perceives the use of force to exceed their understanding of the situation in any manner whatsoever. This does not take into consideration what the observing officer may not know or may not see that the officer using force knows or sees. Requiring intervention, which may often come in the form of physical intervention, in such cases places both officers in potential danger. To this end, we recommend defining excessive force as "force that is clearly beyond that which is objectively reasonable under the circumstances."
>
> **Policy or law**
> The definition of excessive force utilizes the phrase "permitted by policy or law" to serve as the baseline to determine what force does and does not require intervention. We ask this question: Whose policy? It is not only common, but regular, that officers from one agency respond to the same scene to back up officers from another agency. Those agencies may have differing policies as to what tactics and level of force are authorized under certain circumstances. As written, SB 5066 would require an observing officer whose employing agency does not allow a particular tactic or level of force to intervene, which may often come in the form of physical intervention, against an officer from another agency who is perfectly in sync with their employing agencies policy on authorized tactics and level of force for that situation. We again recommend defining excessive force as "force that is clearly beyond that which is objectively reasonable under the circumstances."

**Definition of wrongdoing** (Section 1 (5) (b))
The definition of wrongdoing in SB 5066 is, in our opinion, too subjective and too broad to be properly implemented. Particularly given the consequences for failure to report wrongdoing, a law enforcement officer would be required to report a great number of perfectly reasonable actions that would overwhelm the effective administration of the law enforcement agency. This would not allow our agencies to properly serve the public. We recommend that this definition be amended to define wrongdoing to mean "conduct is a knowing violation of clearly established rights of any person or any conduct that constitutes a criminal act."

**Subjective terms**
Objective terms such as "contrary to law" is something that can be fairly and consistently implemented. Subjective terms such as "harmful" or "in violation of the public's trust" create circumstances where an officer would, understandably, feel obligated to report any circumstance where any person, whether reasonable or not, might interpret conduct as wrongdoing. For example, if an officer fails to respond to the scene of a reported property crime, would that conduct be a violation of the public's trust? Perhaps. However, several law enforcement agencies have instituted practices to not respond to certain property offenses, instead recommending that the victim submit a report online.

**Professional standards or ethical rules**
We are not aware of any uniform professional standards or ethical rules for law enforcement officers. Unlike other professions where such uniform standards exist, such as the Rules of Professional Conduct for attorneys, the standards and rules for law enforcement officers are found in statutory law, case law, and agency policy. As such, the reference to professional standards or ethical rules appears to reference standards or rules that do not exist in a single source.

**5th Amendment protections**
A duty to report wrongdoing, both as proposed in the current bill language and under our proposed definition, would include conduct that constitutes a criminal act. As the Committee is aware, law enforcement agencies are authorized to compel statements from an officer, though the 5th amendment to the US Constitution protects those statements from being used against the officer in a criminal proceeding. We respectfully request that language be included in this bill to specify that "Nothing in this act requires an officer to be compelled to incriminate themselves in violation of the officer's rights under the 5th amendment to the United States Constitution."

**Exempt from collective bargaining**
We respectfully request that language be included in this bill to specify that "the act does not constitute personnel matters, working conditions, or any other change that requires collective bargaining."

We look forward to partnering with you and others to improve the public service of law enforcement in our state.

Sincerely,

James McMahan
Policy Director

# 1499 Summary

**If we build out the system, it makes the criminal justice system moot when it comes to drug possession.**

**Sec. 1 - Intent:**

"(The Legislature) intends to develop a robust system to provide rapid access to evidence-based and innovative substance use treatment and comprehensive recovery support services in lieu of criminal penalties for individuals in possession of drugs."

**Sec. 2 - Substance use recovery services plan:**

Directs HCA to establish a substance use recovery services plan, anticipating the decriminalization of personal use amounts of controlled substances (see section 5).

- Include potential new community-based care access points, including the safe station model in partnership with fire departments, and strategic grant making to community organizations.
- Supports diversion to community-based care for individuals who may face criminal consequences for other drug-related law violations.

Directs HCA to submit the substance use recovery services plan to the governor and the legislature by December 1, 2021. After submitting the plan, the authority shall adopt rules and enter into contracts with providers to **implement the plan by December 1, 2022.**

**Sec. 3 – Advisory committee:**

Directs HCA to establish the substance use recovery services advisory committee to advise the authority in the development and implementation of the substance use recovery services plan.

- Advisory committee must include a representative of urban police chiefs and a representative of rural county sheriffs. Indeterminate number of total members.
- Advisory committee must design a referral mechanism for referring people with substance use disorder or problematic behaviors resulting from drug use into the supportive services described in this section, including intercepting individuals who likely would otherwise be referred into the criminal legal system.

**Section 4 - Funding:**

Provides that outreach and engagement services and recovery support services that are not reimbursable through insurance will be funded through a combination of: appropriations from a yet-to-be-created recovery pathways account; targeted investments from the federal substance abuse block grant, if permissible under the grant; funds recovered by the state through lawsuits against opioid manufacturers, if permissible; and appropriations from the state general fund based on a calculation of the savings captured from reduced expenses for the department of corrections resulting from this act.

**Section 5 – Personal use rules:**

Directs that the HCA director, in consultation with the department and the pharmacy quality assurance commission, shall adopt rules establishing maximum personal use amounts of controlled substances,

counterfeit substances, and legend drugs known to be used by people for recreational or nonmedical and non-prescribed purposes by September 1, 2022.

- In adopting these rules, the director must consult with a workgroup which shall include representatives from law enforcement and a representative of prosecutors.

**Section 6 - Definitions:**

"Personal use amount" means the maximum amount of a particular controlled substance, legend drug, or counterfeit substance that the authority has determined to be consistent with personal, non-prescribed use patterns of people with substance use disorder, as provided under section 5 of the act.

**Section 7 – Decriminalizing personal use:**

RCW 69.50.4011 and 2003 c 53 s 332 are each amended to read as follows: (1) Except as authorized by this chapter, it is unlawful for any person to create or deliver a counterfeit substance, or possess a counterfeit substance in excess of the applicable personal use amount.

**Section 8 - Decriminalizing personal use:**

RCW 69.50.4013 and 2017 c 317 s 15 are each amended to read as follows: (1) It is unlawful for any person to possess a controlled substance in excess of the applicable personal use amount, unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

**Section 9 - Decriminalizing personal use:**

RCW 69.50.4014 and 2015 2nd sp.s. c 4 s 505 are each amended to read as follows: Except as provided in RCW 69.50.401(2)(c) ((~~or as otherwise authorized by this chapter~~)), any person found guilty of possession 33 of forty grams or less of marijuana is guilty of a misdemeanor, unless the amount of marijuana does not exceed the applicable personal use amount or is otherwise authorized by this chapter.

**Section 10 - Decriminalizing personal use:**

RCW 69.50.412 and 2019 c 64 s 22 are each amended to read as follows: HB 1499 1 (1) It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance other than marijuana, unless the drug paraphernalia is used to prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a personal use amount of a controlled substance other than marijuana. Any person who violates this subsection is guilty of a misdemeanor.

**Section 11 - Decriminalizing personal use:**

RCW 69.41.030 and 2020 c 80 s 41 are each amended to read as follows: (1) It shall be unlawful for any person to sell ((~~,~~)) or deliver any legend drug, or possess any legend drug in excess of an applicable personal use amount, except upon the order or prescription of a physician under chapter 18.71 RCW…

**Section 12 – Direction to law enforcement:**

As an alternative to arrest, encourages police officers to take an individual to a crisis stabilization unit, triage facility, and refer them to a designated crisis responder. Agreement to participate in treatment is inadmissible in any criminal or civil proceeding, but does not create immunity from prosecution for the alleged criminal activity.

- Provides immunity from liability for officers for any good faith conduct under this section.

**Section 13 – Direction to CJTC:**

Requires CJTC to develop training on law enforcement interaction with persons with substance use disorders for all law enforcement personnel, beginning July 1, 2022.

**Section 14-17 – Vacating convictions:**

Provides that any person convicted of possession of a controlled substance or counterfeit substance before December 1, 2022, may apply to the sentencing court for a vacation of the applicant's record of conviction for the offense, regardless of whether the person completed any applicable sentencing conditions or received a certificate of discharge under RCW 9.94A.637.

- Vacated convictions may not be included in the person's criminal history.
- Creates exceptions for vacation for violent offenses, crimes against children, and certain felonies, gross misdemeanors, and misdemeanors.

**Section 18 - Preemption:**

State law preempts cities, towns, counties, and other municipalities in the entire field of setting penalties for establishing policies pertaining to personal use amounts. Local jurisdictions can create additional channels for diversion.

**Section 19 - Construction:**

Establishes severability in construction.

**Section 20 – Effect date:**

Sections 6-12 (decriminalization) and 14-19 (vacated convictions) take effect **Dec. 1, 2022.**

Washington Association of
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Friday, February 12, 2021

House Public Safety Committee
John L. O'Brien Building
Olympia, WA 98504

RE: Supplemental Testimony on HB 1499

Chair Goodman, Ranking Member Mosbrucker, and Members of the Public Safety Committee,

On behalf of the Washington Association of Sheriffs and Police Chiefs (WASPC), I respectfully request that you oppose HB 1499. Let us make clear, Washington's Sheriffs and Police Chiefs would actively support the bill if the provisions legalizing the possession of controlled substances were removed.

We have long actively supported, and continue to ask for, better community investments and system improvements to assist those with substance use disorder; but such efforts should not be at the expense of public safety. We encourage the legislature to focus these efforts on what we should do to address the problem, rather than what we should stop doing. We are very concerned that decriminalization will lead to law enforcement still being the only real response available, and our officers and deputies will be left with even fewer tools to assist victims, address public safety, and reduce addiction.

WASPC is at the forefront of efforts to assist those whose criminal behavior is driven by substance use disorder, including administering programs that offer opportunities to avoid arrest and/or jail in favor of treatment. We acknowledge that the criminal justice system is not an appropriate or effective strategy to broadly address those with substance use disorder. We also agree that the criminal justice system should not be the most accessible path toward treatment. We must also acknowledge, however, that the criminal justice system has proven to be the only effective mechanism to intervene and treat many with substance use disorder. Our collective efforts should be focused to create additional community resources for intervention and treatment, rather than eliminating one of the few mechanisms that has shown to be effective in some cases.

HB 1499 does not just decriminalize possession of illicit substances such as heroin, methamphetamine, cocaine, and unprescribed scheduled drugs such as OxyContin and oxycodone; HB 1499 makes the possession of such controlled substances legal. Such legalization applies to all person, including children.

Washington's Sheriffs and Police Chiefs have witnessed first-hand the devastation

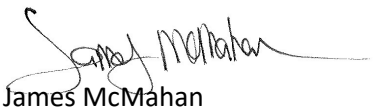
that substance use disorder brings to the lives of those who suffer from these drugs, as well as the devastation to their loved ones and communities. Drug use is not a victimless crime. We cannot remain silent on a proposal that we feel would enable this continued victimization.

HB 1499 proposes a very ambitious plan to create and implement comprehensive community-based strategies for intervention and treatment – a goal that many of us have contemplated for years. We have seen such efforts falter in different contexts. Eliminating one of the few mechanisms that has proven to be successful now in exchange for the promise of creating something better in the future is not an effective public safety strategy.

We strongly encourage the Legislature to remove the provisions of HB 1499 that legalize the possession of controlled substances and enact the provisions that create investments in community programs that offer opportunities for intervention and treatment for those with substance use disorders. In other words, we should help those who need help.

A comprehensive and effective community-based strategy to prevent and eliminate substance use disorder would make moot any concerns about criminal sanctions for those who possess narcotics. That should be our collective purpose, and where our collective efforts should focus. These are important issues and we appreciate they are being raised. We need to get the system in place and we advocate for that approach.

Respectfully submitted,



James McMahan
Policy Director

FOR RELEASE
February 12, 2021

Statement attribution:
Steven D. Strachan, Executive Director

**WASHINGTON ASSOCIATION OF SHERIFFS AND POLICE CHIEFS**
**STATEMENT ON HB1499**

(Lacey, WA) – The Washington Association of Sheriffs and Police Chiefs (WASPC) supports a robust wrap around system for those with serious substance abuse issues, untreated mental and behavioral health problems. We would actively support HB1499 if the provisions legalizing the possession of controlled substances were removed.

We have long actively supported, and continue to ask for, better community investments and system improvements to assist those with substance use disorder; but such efforts should not be at the expense of public safety. We encourage the legislature to focus these efforts on what we should do to address the problem, rather than what we should stop doing.

The criminal justice system is not an appropriate or effective strategy to broadly address those with substance use disorder and should not be the most accessible path toward treatment. However, the criminal justice system has proven to be the only effective mechanism to intervene and treat many with substance use disorder. Our collective efforts should be focused to create additional community resources for intervention and treatment, rather than eliminating one of the few mechanisms that has shown to be effective in some cases.

HB 1499 does not just decriminalize possession of illicit substances such as heroin, methamphetamine, cocaine, and unprescribed scheduled drugs such as OxyContin and oxycodone; HB 1499 makes the possession of such controlled substances legal to all persons, including children.

WASPC asks the legislature to remove the provisions of HB 1499 that legalize the possession of controlled substances and enact the provisions that create investments in community programs that offer opportunities for intervention and treatment for those with substance use disorders. In other words, support should be provided to those that need support.

Washington's Sheriffs and Police Chiefs have witnessed first-hand the devastation that substance use disorder brings to the lives of those who suffer from these drugs, as well as the devastation to their loved ones and communities. Drug use is not a victimless crime. We cannot remain silent on a proposal that we feel would enable this continued victimization.

WASPC has been at the forefront of efforts to assist those whose criminal behavior is driven by substance use disorder, including administering programs that offer opportunities to avoid arrest and/or jail in favor of treatment or other support services. The Arrest and Jail Alternatives grant program is an example of this type of behavioral service program that deserves more support while the infrastructure of a robust and comprehensive statewide behavior health support system is established.

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*About WASPC:*

WASPC was founded in 1963 and consists of executive and top management personnel from law enforcement agencies statewide. With more than 900 members it includes the 39 elected county sheriffs, and 240 police chiefs, as well as the Washington State Patrol, the Washington Department of Corrections, and representatives of Tribal and federal agencies.

WASPC is the only association of its kind in the nation combining representatives from local, state, tribal, and federal law enforcement into a single body, working toward a common goal. WASPC's function is to provide specific materials and services to all law enforcement agencies in the state, members, and non-members alike.