Washington Association of
SHERIFFS &
POLICE CHIEFS

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Monday, April 5, 2021

Members of the Senate
Legislative Building
Olympia, WA 98504

RE: HB 1310 – Concerning permissible uses of force by law enforcement and correctional officers.

Senators,

On behalf of the Washington Association of Sheriffs and Police Chiefs (WASPC), I respectfully request your consideration of our recommended amendments to the Law & Justice Committee's striking amendment to E2SHB 1310.

Please note that we recognize that we have many concerns with the impacts of HB 1310. We feel that our concerns have been heard by the Legislature, and while several of those concerns have been addressed, we acknowledge that the Legislature does not share other concerns that remain in the bill. The amendments requested here represent our best attempts to resolve what we believe to be possible *unintended consequences* of HB 1310. Please do not interpret these recommendations as conditions to our support of HB 1310.

We respectfully request your consideration of amendments to four provisions of the bill *(recommended amendment language provided at the end of this document)*:

1. Allow the use of force when an officer is exercising their community caretaking function;
2. Amend the duty of reasonable care for leaving the area to allow an officer to remain if a crime has been committed or is about to be committed;
3. Amend the duty of reasonable care to require a "reasonable" amount of force to be used (rather than "the least amount"); and
4. Establish that subjective terminology in the bill be interpreted using a reasonable officer standard.

Allow the use of force when an officer is exercising their community caretaking function

Section 3 (1)(a) establishes the circumstances upon which a peace officer may use physical force against another person. Taken literally, physical force means any force. We appreciate that this language was clarified to allow physical force to be used against a person posing an imminent threat of bodily injury to themselves, but this language fails to acknowledge a peace officer's community caretaking function. A law enforcement officer may find the need to use

physical force in more circumstances than the mere enforcement of criminal law. For example, the need to use force to take a person into involuntary custody pursuant to chapter 71.05 RCW, taking an endangered child into custody pursuant to chapter 13.34 RCW, or other state law or a court order.

We believe that it is not the Legislature's intent to prohibit a peace officer from using physical force – at any level – in the aforementioned scenarios.

Amend the duty of reasonable care for leaving the area to allow an officer to remain if a crime has been committed or is about to be committed

Section 3 (2) establishes a "duty of reasonable care" for Washington peace officers. Subsection (a) of that section requires that an officer "when possible, exhaust available and appropriate de-escalation tactics prior to using any physical force, such as…leaving the area if there no threat of imminent harm or no crime is being committed." This language uses the present tense when referring to the commission of a crime, and does not accommodate for circumstances when a crime has been committed, or is about to be committed.

We believe that it is not the intent of the Legislature to require a law enforcement officer to leave the area if a crime is not being committed, but has been committed or is about to be committed.

Amend the duty of reasonable care to require a "reasonable" amount of force to be used (rather than "the least amount")

Section 3 (2) establishes a "duty of reasonable care" for Washington peace officers. Subsection (b) of that section requires a peace officer to "use the least amount of physical force necessary to overcome resistance under the circumstances." Requiring an officer to use the least amount of force necessary could unnecessarily prolong a physical confrontation, resulting in increased injuries to both the officer and the individual.

We believe that the Legislature's intent is to reduce the necessity to use force, not to prolong these altercations. To that end, we recommend that officers be required to use a "reasonable amount of force necessary to overcome resistance" rather than the "least amount."

Establish that subjective terminology in the bill be interpreted using a reasonable officer standard

HB 1310 uses terminology such as "appropriate," "available," and "possible" a total of ten times. We ask this: possible, available, and appropriate as determined by whom?

The bill does not establish a means by which to interpret these subjective terms. Absent a means to interpret this subjective terminology, we must presume that the legislature intends these terms to be interpreted by a pure objective standard. A pure objective interpretation fails to acknowledge the real world environment that peace officers work in every day. What may be objectively possible may at the same time be patently unreasonable.

We respectfully request that these subjective terms be interpreted using a reasonable officer standard. This is the same standard that the Legislature adopted regarding the use of deadly force, which states is an objective standard which considers all the facts, circumstances, and information known to the officer at the time to determine whether a similarly situated

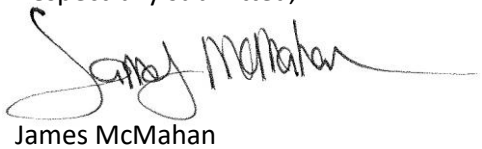
reasonable officer would have determined the action was appropriate, available, or possible.

Interpreting these terms using a reasonable officer standard would also align the bill with the United States Supreme Court's ruling in *Graham v Connor*, a landmark decision governing the use of force by law enforcement officers, which ruled "The 'reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."

We believe that the Legislature does not intend these subjective terms to be interpreted using a pure objective standard, and we believe the Legislature does intend these subjective terms to be interpreted according to a reasonable officer standard.

Thank you for considering our input. We appreciate that, while the Legislature has not agreed with all of our requests on HB 1310, the Legislature has taken the time to listen to our concerns and address several of them.

Respectfully submitted,



James McMahan
Policy Director

WASPC REQUESTED AMENDMENTS TO HB 1310

Written to Law & Justice Committee Striking Amendment (S-2115.3)

- On page 2, line 9 after “9A.76 RCW;” strike “or” and insert “in a community caretaking capacity;”

- On page 2, line 11 after “used” insert “; or as authorized pursuant to chapter 71.05 RCW, chapter 13.34 RCW, or other state law; or a court order”

- On page 2, line 29 after “committed” insert “, has been committed, or is about to be committed”

- On page 2, line 30 after “use” strike “the least” and insert “a reasonable”

- On page 1, line 22, after "(1)", insert ""Appropriate," "available," and "possible" must be interpreted according to an objective standard which considers all the facts, circumstances, and information known to the officer at the time to determine whether a similarly situated reasonable officer would have determined the action was appropriate, available, or possible.
  (2)"

  Renumber the remaining subsections consecutively and correct any internal references accordingly.

- On page 3, line 29, after "circumstances," insert "a similarly situated reasonable officer would have determined that"

-END-

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Monday, March 29, 2021

Members of the Senate
Legislative Building
Olympia, WA 98504

RE: HB 1054 - Establishing requirements for tactics and equipment used by peace officers.

Senators,

On behalf of the Washington Association of Sheriffs and Police Chiefs (WASPC), I respectfully request your consideration of our recommended amendments to Senator Pedersen's proposed striking amendment to ESHB 1054 (amendment #493).

Please note that we recognize that we have many concerns with the impacts of HB 1054. We feel that our concerns have been heard by the Legislature, and while several of those concerns have been addressed, we acknowledge that the Legislature does not share other concerns that remain in the bill. The amendments requested here represent our best attempts to resolve what we believe to be possible *unintended consequences* of HB 1054. Please do not interpret these recommendations as conditions to our support of HB 1054.

We respectfully request your consideration of amendments to three provisions of the bill *(recommended amendment language provided at the end of this document)*:

1. Chokeholds and neck restraints where the use of deadly force is authorized;
2. The definition of "military equipment"; and
3. Conditions upon which a vehicular pursuit is authorized.

CHOKEHOLDS AND NECK RESTRAINTS WHERE THE USE OF DEADLY FORCE IS AUTHORIZED

Section 2 prohibits the use of a chokehold and neck restrains in any circumstance. We recognize the inherent danger associated with chokeholds and neck restraints, and respectfully request that both techniques be authorized only when the use of deadly force is justifiable under chapter 9A.16 RCW.

We believe that all use of force policies should be centered on the cornerstone principle of the sanctity of human life, and that officers should be encouraged and empowered to use less lethal force when appropriate and available under the circumstances. The prohibition on chokeholds under any circumstance establishes a public policy that an officer should discharge their firearm or use another form of deadly force against a person – even when a chokehold could have been applied. This is not consistent with our 'sanctity of human life' position.

These concerns are not simply hypothetical – in fact, there have been circumstances in Washington state where a law enforcement officer was justified in the use of deadly force but instead chose to utilize a chokehold as a less lethal alternative. Had the provisions of HB 1054 been law at the time, the individual with whom the officer was struggling would likely not be alive today. Such choices affirm our support of the sanctity of human life, and should be both authorized and encouraged.

We believe that the Legislature does not intend to prevent a law enforcement officer's ability to utilize a less lethal alternative where the use of deadly force is justifiable. To be clear, this request does not seek to authorize chokeholds or neck restraints to be used in any circumstance other than where the use of deadly force is justifiable.

DEFINITION OF "MILITARY EQUIPMENT"

Section 5 (3) (a) defines "military equipment" that law enforcement agencies are prohibiting from using, and required to return or destroy. Mine resistant ambush protected ("MRAP") vehicles are listed among prohibited "military equipment."

Let us first be clear that Washington's law enforcement agencies are not concerned with encountering a mine during the course of their duties. It is also important to note that a mine resistant ambush protected vehicle acquired by a law enforcement agency does not come equipped with any armed capabilities – it comes with defensive and protective capabilities only. Mine resistant ambush protected vehicles are utilized by Washington law enforcement agencies as a less expensive alternative for de-escalation purposes, and search and rescue purposes.

Less expensive alternative

Mine resistant ambush protected vehicles are effectively equivalent, for law enforcement purposes, to commercially available vehicles that are not prohibited in HB 1054. For example, the Lenco Bearcat, a commercially available vehicle not prohibited by HB 1054, is available for law enforcement purchase for approximately $450,000 each. The availability of mine resistant ambush protected vehicles have saved Washington taxpayers more than $20 million since 2013.

De-Escalation

Since the enactment of Initiative 940, all Washington law enforcement officers must participate in de-escalation training. A core component of de-escalation in this state-mandated and state-provided training, is that de-escalation opportunities require "time, distance, and shielding." Time, distance, and shielding enable officers to verbally engage a person for de-escalation opportunities. Simply put, law enforcement officers cannot de-escalate a situation without time, distance and shielding.

Particularly in situations with armed and barricaded subjects, the ballistic protection of mine resistant ambush protected vehicles provides the shielding necessary for de-escalation. Officers have engaged in many situations where a mine resistant ambush protected vehicle, or its commercially available 'Bearcat' counterpart, have been an essential component to saving lives. Prohibiting the use of many of these vehicles based only on their source removes opportunities to de-escalate a volatile scene.

Search and Rescue

Mine resistant ambush protected vehicles have also been proven to be particularly effective in search and rescue operations. The wide wheelbase of these vehicles, combined with their weight and ground clearance, make them especially effective in flooded waters where other law enforcement vehicles would not be capable.

For these reasons, we respectfully request that mine resistant ambush protected vehicles be removed from this definition.

CONDITIONS UPON WHICH A VEHICULAR PURSUIT IS AUTHORIZED

Section 7 prohibits a law enforcement officer from engaging in a vehicular pursuit except in specifically identified circumstances. We believe that the circumstances provided in the bill will create consequences that the Legislature may not intend.

Probable cause

HB 1054 requires that an officer have "probable cause" to believe that a person has committed an offense for which a vehicular pursuit is authorized. The probable cause standard is the highest standard in the field of law enforcement. It is the standard a law enforcement officer must establish to arrest a person without a warrant.

Take the example of a reported robbery. An officer responding to the scene who witnesses a vehicle leaving the area at a high rate of speed that matches the victim's description of the vehicle would have reasonable suspicion, but <u>not</u> probable cause, to pursue. As such, HB 1054 would prohibit the officer from engaging in a pursuit of that vehicle.

These examples are not simply hypothetical. The 2019 Crime in Washington Report demonstrates that there were 5,235 robberies reported in Washington in 2019.

Requiring an officer to have probable cause to engage in vehicular pursuit would prohibit pursuits in nearly every circumstance. We respectfully request that officers be required to have "reasonable suspicion" rather than "probable cause" as a prerequisite to a vehicular pursuit.

Offenses where pursuit is authorized

HB 1054 prohibits a vehicular pursuit for any offense other than a violent offense, sex offense, DUI offense, and escape, as those terms are defined. We believe that this list of offense categories does not accurately reflect the Legislature's intent.

HB 1054, as currently written, categorically prohibits a vehicular pursuit for the following non-exclusive offenses:

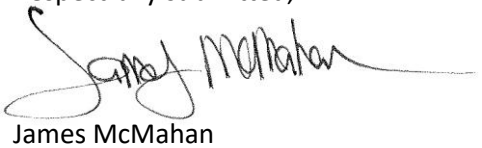
- Criminal Mistreatment 1
- Abandonment of a Dependent Person 1
- Malicious Explosion of a Substance 3
- Hit and Run - Death
- Hit and Run – Injury
- Hit and Run – Unattended Vehicle
- Malicious Placement of Explosive 2
- Promoting Prostitution 1
- Introducing Contraband 1
- Malicious Placement of an Explosive 3
- Unlawful Possession of a Firearm 1
- Malicious Placement of an Imitation Device 2

- Theft of a Firearm
- Bail Jumping with Class A Felony
- Criminal Mistreatment 2
- Domestic Violence Court Order Violation
- Possession of a Stolen Firearm
- Rendering Criminal Assistance 1
- Stalking
- Taking Motor Vehicle without Permission 1
- Assault 4 DV
- Hate Crime Offense
- Residential Burglary
- Threats to Bomb
- Trafficking in Stolen Property 1
- Vehicular Assault-non DUI
- Animal Cruelty 1
- Assault of Child 3
- Bail Jumping – Class B or C felony
- Burglary 2
- Extortion 2
- Possession of Incendiary Device
- Possession of Machine Gun, Bump-fire Stock, Undetectable Firearm, or Short-Barreled Shotgun or Rifle
- Promoting Prostitution 2
- Unlawful Imprisonment
- Unlawful Possession of a Firearm 2
- Vehicular Assault
- Failure to Register as a Sex Offender
- Malicious Mischief 1
- Possession of a Stolen Vehicle
- Possession of Stolen Property 1
- Theft 1
- Theft of a Motor Vehicle
- Malicious Mischief 2
- Possession of Stolen Property 2
- Reckless Burning 1
- Taking Motor Vehicle without Permission 2
- Theft 2
- Vehicle Prowl 1
- Reckless Driving
- Negligent Driving 1
- Negligent Driving 2

We understand and acknowledge that vehicular pursuits, like most duties of a law enforcement officer, can be dangerous. We are concerned, however, that the pursuit language in HB 1054 is overly restrictive, and will unintentionally create additional, avoidable, public safety risks in our communities.

Thank you for considering our input. We appreciate that, while the Legislature has not agreed with all of our requests on HB 1054, the Legislature has taken the time to listen to our concerns and address several of them.

Respectfully submitted,



James McMahan
Policy Director

WASPC REQUESTED AMENDMENTS TO HB 1054

Written to Senator Pedersen's Proposed Striking Amendment #493

- On page 1, line 24 after "officer" insert "unless the use of deadly force is justifiable under chapter 9A.16 RCW"

- On page 4, beginning on line 24 after "tanks," strike "mine resistant ambush protected vehicles,"

- On page 5, beginning on line 14 after "(a)" strike everything through "applicable" on page 6 line 21 and insert:

  "There is reasonable suspicion to believe a person in the vehicle has committed or is committing a felony or gross misdemeanor criminal offense, and the safety risks of failing to apprehend or identify the person are considered to be greater than the safety risks associated with the vehicular pursuit under the circumstances;

  (b) The officer notifies a supervising officer immediately upon initiating the vehicular pursuit, informing the supervisor of the justification for the vehicular pursuit and other safety considerations, including but not limited to speed, weather, traffic, road conditions, and the known presence of minors in the vehicle;

  (c) The officer complies with any agency procedures for designating the primary pursuit vehicle and determining the appropriate number of vehicles permitted to participate in the vehicular pursuit; and

  (d) The officer complies with any agency procedures for coordinating operations with other jurisdictions, including available tribal police departments when applicable.

  (2) A supervising officer shall order the termination of any vehicular pursuit not meeting the requirements under subsection (1) of this section."

-END-

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Monday, April 5, 2021

House of Representatives
PO Box 40600
Olympia, WA 98504-0600

RE: SB 5051

Honorable Representatives,

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 oppose the provisions in SB 5051.

We acknowledge that the Legislature has heard our policy concerns with SB 5051, but does not share them. To that end, this letter seeks to request amendments within the existing construct of the bill to address our most pressing concerns in a manner that we believe to be consistent with the Legislature's intent. Please do not interpret the following requested amendments as a condition of our endorsement of the bill.

We respectfully request the following amendments *(presented in the order that these provisions appear in the Appropriations Committee striking amendment)*:

"Reserve Officers"

Section 1 (11) defines a reserve officer to specifically include a specially commissioned peace officer, a limited authority Washington peace officer, and civilians employed as security officers in an educational institution. We understand that the intent of this definition is to require background checks for such officers, however, including such officers in this definition creates a number of unintended consequences, including:

- Requiring specially commissioned peace officers, limited authority Washington peace officers, and civilians employed as security officers in an educational institution to attend the Basic Law Enforcement Academy (BLEA) pursuant to RCW 43.101.200. Such individuals are not currently required to attend the BLEA, and requiring their attendance would exacerbate chronic wait times at BLEA; and

- Requiring K-12 and higher educational employees to undergo an extensive background investigation, psychological examination, and polygraph examination by law enforcement agencies. We anticipate that a law enforcement agency would find it improper to conduct such activities for civilian employees of an educational institution, which would leave such educational institutions unable to employ such individuals.

To accomplish this same purpose without these unintended consequences, we would recommend that the Legislature:

- Strike subsections (a), (b), (c), and (d) from Section 1 (11);
- Amend Section 6 (15) to insert "specially commissioned peace officer, limited authority Washington peace officer," after "reserve officer," both at the beginning and the end of that subsection; and
- Amend RCW 43.43.837 to require "Persons employed as security by public institutions of higher education as defined in RCW 28B.10.016; and Persons employed for the purpose of providing security in the K-12 Washington state public school system as defined in RCW 28A.150.010 and who are authorized to use force in fulfilling their responsibilities" to undergo a fingerprint-based background check through both the Washington State Patrol and the Federal Bureau of Investigation."

Other Tests or Assessments

Section 8 (2)(b)(vii) makes two different changes to existing background check requirements for law enforcement personnel:

1. Removes authority for the Criminal Justice Training Commission to establish standards for any other pre-employment background check that a law enforcement agency may require; and
2. Grants authority for the Criminal Justice Training Commission to require, by administrative rule, that every law enforcement agency conduct any additional tests or assessments as part of a background check for law enforcement personnel.

We do not believe the Legislature intends either of these effects, and would therefore recommend that current law be reinstated in this respect.

Prohibition on Termination Based Solely on Action by CJTC

Section 9 (8) prohibits a law enforcement agency from terminating a peace officer's employment based solely on the imposition of suspension or probation by the Criminal Justice Training Commission. SB 5051 does not limit how long the Commission may suspend a peace officer's certification. Additionally, seven of the nine suspensions issued by the Arizona Peace Officer Standards and Training Board during the last six months of 2020 were for six months or longer.

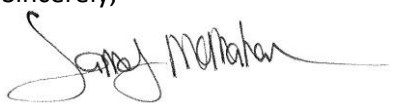
The Legislature is well aware that Washington state has the fewest number of law enforcement officers per capita than any other state in the country – a fact that has remained true for the past ten consecutive years.

We believe that the Legislature does not intend to require Washington's law enforcement agency to employ officers who are prohibited from working for an extended period of time. Therefore, we respectfully request that Section 9 (8) be amended to allow a law enforcement

agency to terminate a peace officer's employment if the officer's certification is suspended for more than 90 days (prohibiting terminations based solely on a suspension by the Commission for 90 days or fewer).

Thank you for considering our input. We appreciate that, while the Legislature has not agreed with all of our requests on SB 5051, the Legislature has taken the time to listen to our concerns and address several of them.

Sincerely,



James McMahan
Policy Director