

July 17, 2020

Honorable Aaron Michlewitz
Chair, House Committee on Ways and Means
State House, Room 243
Boston, Massachusetts 02133

Honorable Claire Cronin
House Chair, Joint Committee on the Judiciary
State House, Room 136
Boston, Massachusetts 02133

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

Dear Chair Michlewitz and Chair Cronin,

I write to you today to offer my testimony on S.2820, *An Act to reform police standards and shift resources to build a more equitable, fair and just Commonwealth that values Black lives and communities of color*. As you lead the House's efforts in crafting historic police reform and racial equity legislation, I know you have many important choices before you. This letter will focus on my recommendations for refining and building upon the language of S.2820. My requests center around three crucial issues that disproportionately impact Black and Brown communities: **closing the custodial sexual assault loophole, updating the youth expungement statute, and raising the age of criminal majority to 19.**

No one measure can dismantle systemic racism in our society. However, our national reckoning around race and police brutality is calling upon us as leaders to initiate bold and necessary policies to make the Commonwealth a just and equitable place for communities of color. For these reasons, I respectfully request the inclusion of my three recommendations in legislation put forward by the House.

Thank you for your consideration of my suggestions. I have great confidence in your leadership and would welcome the opportunity to speak with you directly about these issues.

Sincerely,



Kay Khan
State Representative
11th Middlesex District

Custodial Sexual Assault:

I strongly urge the inclusion of language similar to H.1483 (see attached) to close to custodial sexual assault loophole in any police reform bill drafted by the House Committee on Ways and Means. Shamefully, Massachusetts is one of 35 states in which the law allows police officers to claim that sexual relations with people in their custody were consensual (see map attached). That is why I, along with Representative Marjorie Decker, introduced H.1483, *An Act promoting the safety of individuals in custody*, and welcomed the strong support of former Salem police chief Representative Paul Tucker.

The proposed language would close an existing statutory loophole by prohibiting public safety personnel who have arrest and detention powers from engaging in sexual conduct with those in their custody, supervision or with whom they interact in their professional capacity. **The bill closely mirrors existing law (M.G.L. c. 268 § 21A) already in place for penal and correctional officers, which indicates that a person shall be deemed incapable of consent to sexual relations with officers in those circumstances.** H.1483 is also modeled after the federal Prison Rape Elimination Act (2003), which established a zero-tolerance policy for sexual relations between employees of correctional institutions and inmates.

The current language of the bill was strengthened from last session's version (H.4472, *An Act prohibiting police officers from engaging in sexual relations while on duty*), to incorporate recommendations offered by former Suffolk District Attorney Daniel Conley. **The new language ensures that this legislation would apply to all public safety personnel whose position of authority could render an arrestee, defendant, prisoner, or detainees incapable of consent.** In addition to police officers, such personnel include court officers, parole and probation officers, deputy sheriffs, and campus and hospital police officers.

While I am glad the Senate engrossed legislation to classify sexual intercourse with people in custody as rape (Sec. 57c), it is important to note that this bill **does not** include indecent assault and battery. Sexual intercourse is not the only kind of sexual violence experienced by individuals in custody. Those who commit acts of sexual touching with people in their custody who cannot consent must also be held accountable under the law. In order to adequately close this loophole, **it is critical the House strengthen the Senate's proposal by criminalizing both sexual intercourse AND indecent assault and battery committed by public safety personnel while on duty. The bill should also include appropriate criminal penalties for those convicted of such crimes.**

Without a custodial sexual assault law on the books, we will continue to fail survivors. Alarming, there have been several recent cases of custodial sexual assaults in Massachusetts. Here are some publicized examples:

- Presently, a former Lowell police officer is facing rape charges following alleged sexual assaults on a teen girl who was experiencing homelessness.¹
- In 2017, a court officer assigned to the Lawrence District Court who testified that he engaged in sexual conduct with a female defendant while she was in his custody was acquitted of rape under the existing law.²
- In 2012 rape charges were dropped against a court officer assigned to the Center Division of the Boston Municipal Court, who admitted to engaging in sexual contact with two female inmates, one of whom was shackled and handcuffed at the time.³
- In Salem, Massachusetts, a police officer defended rape charges on the grounds that his sexual activity with a detainee was consensual. While this officer was found guilty of indecent assault and battery, he was cleared of rape.⁴ The verdict rendered in this case clearly did not reflect the power and authority he over his victim at the time of the assault.

According to a 2015 Cato Institute study of police misconduct throughout the United States, sexual offenses were second only to excessive use of force complaints.⁵ Sexual assault by law enforcement is a complex matter on many levels. When the law allows police to defend sexual relations with individuals in their custody as consensual acts, how can any survivor, let alone a Black or Brown person, feel safe reporting that assault to the police? As Michelle Jacobs aptly notes in *The Violent State: Black Women's Invisible Struggle Against Police*: “the realities of community relationships formed with the police dramatically impact a Black woman’s ability to gain legal protection when her rapist is a cop.”⁶ Considerable research also demonstrates that prosecutors may be reluctant to take a case of rape forward where the victim is a Black woman.⁷ It is clear our justice system’s reactions to Black sexual assault survivors is deeply connected to this issue.

It is incumbent upon the Commonwealth to enact a custodial sexual assault law that would eliminate any ambiguity around issues of consent, hold abusers accountable, and help sexual assault survivors feel more empowered to come forward.

1 CBS Boston. (2019, June 28). Lowell Police Officer Charged With Raping 16-Year-Old Homeless Girl. Retrieved from <https://boston.cbslocal.com/2019/06/27/lowell-police-officer-rape-arrest-kevin-garneau/>

2 BREAKING: Court Officer Acquitted on Rape, Indecent Assault Charges but Convicted of Withholding Evidence.” *Eagle*, 4 Apr. 2017, www.eagletribune.com/news/breaking-court-officer-acquitted-on-rape-indecent-assault-charges-but/article_a97d13a4-1942-11e7-ac83-6fc7f766abe9.html

3 *Commonwealth v. Michael J. Rubino*

4 Croteau, Scott. “Court Finds Former Police Officer Brian Butler Sexually Assaulted, but Didn't Rape Prisoner and Should Serve Three Years in Prison.” *Masslive.com*, Masslive.com, 26 June 2018, www.masslive.com/news/2018/06/former-police-officer_brian_bu.html.

5 Jacobs, Michelle. *The Violent State: Black Women's Invisible Struggle Against Police Violence*. 2017. Retrieved from <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1462&context=wmjowl>

6 Jacobs, Michelle. *The Violent State: Black Women's Invisible Struggle Against Police Violence*. 2017. Retrieved from <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1462&context=wmjowl>

7 Jacobs, Michelle. *The Violent State: Black Women's Invisible Struggle Against Police Violence*. 2017. Retrieved from <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1462&context=wmjowl>

Raising the Age & Expungement:

H.3420/S.825, *An Act To Promote Public Safety and Better Outcomes for Young Adults*, that I filed this session with Representative O'Day, and H.1386/S.900, *An Act Relative To Expungement, Sealing and Criminal Records Provisions*, that I filed with Representative Decker, are two critical ways to promote public safety, better outcomes for youth and tackle racial disparities in the juvenile justice system. There is overwhelming evidence that the over-policing of predominantly Black and Latinx communities and schools has devastating consequences on the educational outcomes of children and youth and also on their trajectory into the school to prison pipeline. According to the Sentencing Project, Massachusetts has the sixth worst Black-White disparity in youth incarceration, with Black youth 10 times more likely to be incarcerated than White youth. Additionally, LGBTQ youth, those who are girls, transgender youth and/or youth of color are overrepresented in the juvenile justice system.⁸

In 2017, the Departments of Youth Service (DYS) and Probation partnered to answer one question: *"Is the disproportionate incarceration of Black and Latinx youth compared to White youth explained by a difference in offending or a difference in the legal system's response to similar offenses?"*

They found that Black youth were 91% more likely to be incarcerated for similar offenses than White youth, with the disparities rising to 2.5 times in some counties. ⁹ Youth of color have double the recidivism rate of similar teens in the juvenile system. Youth of color exiting the adult criminal legal system are not only burdened by a public criminal record limiting their educational and economic opportunities, the adult system's lack of focus and expertise on positive youth development, the crux of the juvenile justice system, means that they are less likely to engage in rehabilitative programming while incarcerated. Moreover, young people in the adult system have the worst outcomes of any age group in our legal system; a 55% re-conviction rate compared to 22% for a similar profile of teens in the juvenile system.

In 2013, Massachusetts ended the automatic prosecution of 17-year-olds as adults. We have since learned that the state's cost estimate for this change was 37% above the actual costs and the juvenile justice system's caseload is now lower than before the introduction of 17-year-olds.¹⁰ DYS has been successful in reducing its recidivism rate with almost four decades of reforms emphasizing treatment and focusing on ensuring a young people's positive development into adulthood. **With this in mind, we respectfully ask that you end the automatic prosecution of Massachusetts' older teens as adults and adopt the first section of H.3420 that would raise the age of**

⁸ Himmelstein, K. &. (2011). Criminal Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study. *Journal of Pediatrics*, 127(1), 48-56; Massachusetts Commission on Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning Youth. FY 2021 Report and Recommendations (July 1, 2020 - June 30, 2021).

⁹ <https://www.cfjj.org/s/Detention-Utilization-Study-RED-Excerpt.pdf>.

¹⁰ Court Capacity. (n.d.). from <https://www.raisetheagama.org/court-capacity>

“criminal majority” to the youth’s 19th birthday thereby encompassing a full cohort of high school age peers.

I also support the expungement expansion language included in S.2820, and hope to see it in the House bill. Updating the expungement statute is vital to rectifying the collateral consequences of a criminal record and over-policing communities of color. Expungement allows individuals to fully re-integrate into society. In 2018, Massachusetts passed legislation that created an opportunity to expunge juvenile and adult criminal records for individuals whose offense was charged prior to their 21st birthday, but the law created a significant limit. It only allows for one charge on the record.

The current law also makes no distinction between expungement eligibility for charges that result in a conviction or a non-conviction. The mere presence of a court record is neither an indication of guilt nor a public safety risk. The risk of re-offending of individuals whose last arrest was as a youth, and who did not get re-arrested within the subsequent four years, is equal to those with no prior record according to Citizens for Juvenile Justice. Therefore, I ask that the expungement statute be amended to allow expungement for multiple records and for cases that ended in a non-conviction.

CC: Speaker Robert DeLeo
Representative Marjorie Decker
Representative James O’Day