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**Re: Public Comment on Proposed Use of Force by Law Enforcement Officers
Regulations 550 C.M.R. 6.00 and 555 C.M.R. 6.00**

In the summer of 2020, the repeated killings of people of color by police officers consumed the American consciousness. The Black Lives Matter activists who mobilized for justice in the names of George Floyd, Breonna Taylor, Daniel Prude and countless others have fundamentally questioned the institution of policing in America. In the wake of nationwide protests and calls for reform, a number of states enacted legislation to rein in abusive police practices. We are proud that Massachusetts joined that list, enacting state-wide use of force standards and creating the commonwealth's first POST Commission to oversee policing in Massachusetts.

The 2020 police reform legislation established for the first time state-wide use of force standards. Among other things, the legislation prohibited the use of chokeholds; required police to use de-escalation techniques and tactics; limited force to the minimum amount necessary to accomplish a lawful purpose; required that any use of force be proportional; and required other officers to intervene if they witness an excessive use of force. We are glad to see that the proposed implementing regulations include a similarly strong prohibition on chokeholds, only authorizes the use of deadly force when there is an imminent threat of harm to a person, creates strong reporting requirements, and defines and prohibits kettling. However, as detailed below, there are several provisions that could be strengthened and further clarified to better implement the new law.

The final regulation should include the proposed definitions and three additional definitions.

We strongly support the definitions included in the proposed regulations, especially the definitions of chokehold and kettling. We urge MTPC and POSTC to strengthen the regulations by adding the following definitions.

Imminent harm. When a person creating a risk has the present ability, opportunity and apparent intent to immediately cause serious physical injury or death; provided, that imminent harm shall not be merely a fear of future harm, but is a risk that, based on the information available at the time, must be instantly confronted and addressed.

Kinetic Impact Projectile. An item or instrument fired from a gun or launcher intended to disorient and/or incapacitate and inflict pain without penetrating the skin, including, but not limited to, rubber bullets, sponge grenades, stun grenades, concussion grenades, flash grenades or flash-bangs, beanbag rounds, Super-Sock rounds, wax bullets, and plastic bullets.

Necessary. When, after all available alternatives have been exhausted, no available, effective alternative was known or should have been known to a reasonable person in the circumstances, without regard to the subjective beliefs of the law enforcement officer.

Of particular importance is the definition of imminent harm, which clarifies that officers should specifically consider imminent harm *to a person*, rather than imminent harm to property. The Use of Deadly Force section of the proposed regulation makes clear that deadly force is only permissible to prevent imminent harm to a person, but other sections of the proposed regulations just say “imminent harm,” which could lead an officer to mistakenly believing that the force is justified when there is a risk of harm to property rather than people. This would be best clarified by including the definition of imminent harm, but could also be addressed by adding “to a person” after each mention of “imminent harm” throughout the proposed regulations.

Finally, we appreciate the specificity of the definition of “Officer involved injury or death” and suggest adding a tenth event to the definition:

(x) operates a motor vehicle in such a way that actually or proximately cause injury or death of another.

The final regulation should make clear that in all instances the use of force is only authorized when it is *necessary and proportionate*.

M.G.L. Ch. 6E, Section 14 generally prohibits the use of physical force upon another person. The statute allows for the use of force only after de-escalation tactics fail, and when force is deployed it must be necessary and proportionate.¹ The Use of Non-Deadly Force, Use of Deadly Force, and Duty to Intervene sections of the proposed regulation should be amended to clarify that force can only be used when necessary and that the amount of force must always be proportionate to the threat at hand.

First, in the Use of Non-Deadly Force section, the final regulations should clearly state the proportionality requirement. We suggest adding one sentence to the end of the first paragraph:

In each instance, an officer shall only use the amount of force necessary and proportionate to achieve the goals authorized by the statute and regulations.

Second, the Use of Deadly Force section appears to set forth two standards: a “necessary and proportionate to the threat of imminent harm” standard and an “objectively reasonable to bring an incident under control” standard. Given the high bar set by the legislature, the inclusion of the weaker “objectively reasonable” standard likely conflicts with the statute and should be struck from the proposed regulation.

¹ M.G.L. Ch. 6E, Section 14. (a) A law enforcement officer shall not use physical force upon another person unless de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances and such force is *necessary* to: (i) effect the lawful arrest or detention of a person; (ii) prevent the escape from custody of a person; or (iii) prevent imminent harm and the amount of force used is *proportionate* to the threat of imminent harm; provided, however, that a law enforcement officer may use *necessary, proportionate* and non-deadly force in accordance with the regulations promulgated jointly by the commission and the municipal police training committee pursuant to subsection (d) of section 15.

(b) A law enforcement officer shall not use deadly force upon a person unless de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances and such force is *necessary* to prevent imminent harm to a person and the amount of force used is *proportionate* to the threat of imminent harm. (emphasis added).

The only place where reasonableness should come into the standard is when defining the perspective for evaluating whether the use of deadly force was necessary and proportional—i.e. that a reasonable officer in the circumstances, knowing only what the officer actually knew at the time, would have found the deadly force both necessary and proportional. For this reason, we recommend adding a definition of “necessary” to the proposed regulations (see above).

Also in the Use of Deadly Force section, the language on shooting into moving vehicles is unnecessarily confusing and creates a troubling exception authorizing deadly force. We urge the Commission to adhere to the Guiding Principles on Use of Force set forth by the Police Executive Research Forum (PERF), an organization of law enforcement officials and others dedicated to improving the profession of policing. Those principles recommend a prohibition on shooting into moving vehicles and create an exception only when the person in the vehicle is threatening deadly force through means other than the vehicle itself.² PERF has expressed openness to an exception for mass casualty situations (i.e. a person driving to deliberately strike large numbers of people, such as driving into a large crowd) but not situations where the number of people under threat from the vehicle is small. PERF reasons that shooting at a moving vehicle and successfully killing the driver of the vehicle is unlikely and carries a high risk of killing others. Moreover, even if the officer succeeds in killing the driver, a car with a dead driver will continue moving toward the intended victim.

The Mass Demonstration section should be strengthened to better protect due process, health, and safety.

We strongly support the prohibition on kettling and urge the commission to keep this prohibition in the final regulations. We also support the restrictions on other tactics and weapons, but are concerned that some of the language on less-lethal weapons in mass demonstrations and exceptions are troublingly broad.

As a general matter, police response to protests and other mass assemblies should not involve militarized displays or mass violence by the government, and law enforcement should never deploy indiscriminate weapons, such as tear gas, on any mass gathering or assembly. In addition to posing serious risks to people’s health and safety, such weapons almost by definition violate the right to due process and will seldom, if ever, constitute the least restrictive means available to regulate unlawful conduct in the context of a protest or mass assembly.

² Police Executive Research Forum, *Guiding Principles on Use of Force*, March 2016, available at <https://www.policeforum.org/assets/30%20guiding%20principles.pdf> (Guiding Principle #8: Shooting at vehicles must be prohibited).

In the proposed regulations, the less-lethal weapon restrictions don't distinguish between use of individually-targeted weapons (kinetic impact projectiles, ECWs, etc.) against specific individuals, use of individually-targeted weapons in an indiscriminate manner against an entire crowd, and area-effect chemical weapons that can inherently be deployed only in an indiscriminate manner against a crowd. The language here may be appropriate if it applied only to individually-targeted weapons against individuals within a crowd. However, because this provision fails to distinguish between individually-targeted weapons and area-effect chemical weapons, it authorizes indiscriminate force against individuals who pose no threat of harm, merely because they happen to be standing in the same crowd as a person who does pose a threat of imminent harm.

The City of Boston recently enacted an ordinance that regulates the use of kinetic impact projectiles and chemical crowd control agents.³ We urge MPTC and POSTC to adopt this model, which more specifically articulates the steps that law enforcement must take before deploying kinetic or chemical weapons. The statewide regulations should be at least as protective as the standards followed by the largest municipal police department. From a practical standpoint, it would also make sense for the State Police to be guided by the same standards as the Boston Police since officers from both departments are often present at mass demonstrations.

Additionally, the restrictions on individually-targeted weapons should apply to all kinetic impact projectiles, not just rubber pellets. To that end we recommend replacing the term "rubber pellet" with "kinetic impact projectiles" throughout and adding a definition for kinetic impact projectiles (see recommended definition above).

Finally, while we support the general prohibition against using canines for crowd control, the exceptions seem to swallow the general rule. Immediately following the general prohibition, the proposed regulation *authorizes* the use of dogs "for crowd control, restraint, or management of peaceful demonstrations in isolated circumstances related to bomb detection, pursuit of suspects in buildings, and related situations." From the text of the proposed regulation, it's unclear how and when "bomb detection" or "pursuit of suspects in buildings" is related to crowd control. And the unrestricted, catch-all "related situations" is so vague that it seemingly authorizes the use of dogs in any situation. We suggest the following edits, in red, to clarify the limited circumstances in which canines can be used:

Canines should not be deployed for crowd control, restraint, or management of peaceful demonstrations -- but may be deployed

³ Boston, Mass. Ordinances ch. XI, sec. 11-1.10 (2021).

~~for crowd control, restraint, or management of peaceful demonstrations~~ in isolated circumstances related to bomb detection, ~~in which there is a specific reason to believe a bomb is present~~, pursuit of suspects in buildings, and related situations.

We thank the MPTC and POSTC for the opportunity to provide comment on the proposed regulations. We hope the final regulations will retain many of the strong definitions and substantive provisions of the proposed regulation, and incorporate amendments to further protect due process, health, and safety.

Sincerely,

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