



October 12, 2017

Hon. Xavier Becerra  
Attorney General  
1300 I Street, 17<sup>th</sup> Floor  
Sacramento, California 95814

Attention: Ms. Ashley Johansson  
Initiative Coordinator

Dear Attorney General Becerra:

Pursuant to Elections Code 9005, we have reviewed the proposed constitutional initiative regarding the criminal prosecution of law enforcement officers (A.G. File No.17-0022).

## **Background**

***Law Enforcement Agencies.*** California currently has about 600 law enforcement agencies employing about 83,000 full-time sworn officers. These include state agencies (such as the California Highway Patrol) and local agencies (such as county sheriffs, city police, and school district police).

***Use of Force by Law Enforcement Officers.*** Federal, state, and local laws and policies govern law enforcement activities. For example, state law authorizes law enforcement officers to use reasonable force to make an arrest or to overcome resistance of an individual who is believed to have committed an offense. Federal, state, and local laws and policies also specify how force may be used, such as what actions constitute “reasonable” force and when such force should be utilized. Law enforcement officers are generally required to complete use of force related training—such as courses on controlling individuals during an arrest—both at the beginning of their careers and at regular intervals thereafter.

***Criminal Prosecutions and Jury Trials.*** Criminal cases can be resolved through plea bargains—agreements for the defendant to plead guilty, typically in exchange for the prosecutor reducing charges or recommending a specific sentence—or through trials. Trials can be decided by a judge or by a jury. Jury trials generally take more time, and thus cost more, than trials decided by judges. Federal and state law guarantee defendants the right to a jury trial in criminal cases. However, state law allows a jury trial to be waived upon the agreement of both the prosecutor and the defendant.

***Burden of Proof in Certain Criminal Prosecutions.*** For convictions in criminal proceedings, prosecutors are required to prove beyond a reasonable doubt—the highest burden of proof required in court cases—that defendants committed a particular crime. While both sides may

agree in some cases that a defendant committed a particular act, such as killing an individual, the defendant may argue that the act was justified (such as because the act was done in self-defense). In such circumstances, the prosecutor is required to prove beyond a reasonable doubt that the criminal action was not justifiable. Specifically, the prosecutor must prove that a reasonable person in a comparable situation with similar knowledge as the defendant would not have similarly felt in danger and/or reacted in the same manner as the defendant (commonly referred to as the “reasonable person standard”).

## **Proposal**

This measure requires that law enforcement officers subject to criminal prosecution related to the use of lethal or near-lethal force be held to “a reasonable person standard that is—both in theory and in practice—equal to or higher than that required for an ordinary citizen to prevail on a self-defense claim.” The measure also requires that any criminal prosecution of a law enforcement officer for a criminal offense must be resolved in a jury trial if related to (1) an abuse of power or authority, (2) an unlawful or excessive use of force while on duty, or (3) a violent felony regardless of whether it occurs while the officer is on-duty.

## **Fiscal Effects**

The implementation of the measure’s provisions would likely be subject to legal interpretation by the courts, particularly given the way that the measure is written. For example, it is uncertain whether it would be legal to require that all violent felony cases involving off-duty law enforcement officers be resolved by a jury. This is because courts might rule that this subjects officers to legal treatment (or due process) that is different than that given to other citizens. For the purpose of our analysis, we assume that the measure would be fully implemented as proposed. To the extent that the measure’s provisions are not fully implemented, the measure’s fiscal impacts would be minor.

***State and Local Court-Related Workload.*** This measure would impact state and local court-related workload. The actual impact would primarily depend on how district attorneys and defendants respond to this measure. For example, on the one hand, the measure’s requirement to resolve certain cases through jury trials could increase the number of jury trials that occur. This would result in increased workload for state courts as well as county district attorneys and public defenders. On the other hand, the measure could result in prosecutors and defendants agreeing to more plea bargains in order to avoid jury trials—resulting in a reduction of court-related workload. The overall impact on state and local costs would depend on how the various entities accommodate such potential workload changes. (We note that data is not currently available on the number of criminal cases that are filed each year against law enforcement officers.) On net, the annual fiscal impact on state and local court-related entities would likely be minor.

***Other Criminal Justice Impacts.*** This measure could impact state and local correctional populations. The actual impact would depend upon how various entities—such as prosecutors and defendants—respond to this measure. On the one hand, correctional populations could increase to the extent that this measure results in more convictions for criminal offenses than would otherwise have occurred under existing law. This could occur to the extent that prosecutors win convictions in more cases because of the change in the standard for self-defense.

On the other hand, correctional populations could decrease to the extent that this measure results in shorter prison or jail sentences than would otherwise have occurred. Shorter sentences could potentially result to the extent that the measure results in more cases being resolved through plea bargains for less serious charges than originally filed. The actual impact on state and local costs would depend on how state prisons and county jails accommodate such changes in population. In addition, the measure could increase or decrease state and local law enforcement costs to the extent that the implementation of the measure impacts the total amount of civil damages that are paid by state and local law enforcement agencies. On net, the potential annual fiscal impact of the above effects would likely be minor.

*Summary of Fiscal Effects.* We estimate this measure would have the following fiscal effect:

- Likely minor net fiscal impact on annual state and local criminal justice costs.

Sincerely,

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Mac Taylor  
Legislative Analyst

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Michael Cohen  
Director of Finance