



# SEATTLE CITY COUNCIL

## Public Safety and Human Services Committee

### Agenda

Tuesday, December 8, 2020

9:30 AM

Remote Meeting. Call 253-215-8782; Meeting ID: 586 416 9164; or  
Seattle Channel online.

Lisa Herbold, Chair  
M. Lorena González, Vice-Chair  
Andrew J. Lewis, Member  
Tammy J. Morales, Member  
Kshama Sawant, Member  
Alex Pedersen, Alternate

Chair Info: 206-684-8801; [Lisa.Herbold@seattle.gov](mailto:Lisa.Herbold@seattle.gov)

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<http://seattle.gov/cityclerk/accommodations>.



**SEATTLE CITY COUNCIL**  
**Public Safety and Human Services Committee**  
**Agenda**  
**December 8, 2020 - 9:30 AM**

**Meeting Location:**

Remote Meeting. Call 253-215-8782; Meeting ID: 586 416 9164; or Seattle Channel online.

**Committee Website:**

<http://www.seattle.gov/council/committees/public-safety-and-human-services>

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This meeting also constitutes a meeting of the City Council, provided that the meeting shall be conducted as a committee meeting under the Council Rules and Procedures, and Council action shall be limited to committee business.

**Register online to speak during the Public Comment period at the 9:30 a.m Public Safety and Human Services Committee meeting at <http://www.seattle.gov/council/committees/public-comment>.**

Online registration to speak at the Public Safety and Human Services Committee meeting will begin two hours before the 9:30 a.m. meeting start time, and registration will end at the conclusion of the Public Comment period during the meeting. Speakers must be registered in order to be recognized by the Chair.

Submit written comments to Councilmember Herbold at [Lisa.Herbold@seattle.gov](mailto:Lisa.Herbold@seattle.gov)

Sign-up to provide Public Comment at the meeting at <http://www.seattle.gov/council/committees/public-comment>

Watch live streaming video of the meeting at <http://www.seattle.gov/council/watch-council-live>

Listen to the meeting by calling the Council Chamber Listen Line at 253-215-8782 Meeting ID: 586 416 9164

One Tap Mobile No. US: +12532158782,,5864169164#

*Please Note: Times listed are estimated*

**A. Call To Order**

**B. Approval of the Agenda**

**C. Public Comment**

(15 minutes)

**D. Items of Business**

**1. 2020 Semi-Annual Accountability Report**

Supporting Documents: [Presentation](#)

**Briefing and Discussion** (30 minutes)

**Presenters:** Lisa Judge, Inspector General, Office of Inspector General; Shayleen Morris, Community Police Commission; Anne Bettsworth, Office of Police Accountability; Rebecca Boatright, Seattle Police Department

**2. [CB 119974](#) AN ORDINANCE relating to civilian and community oversight of the police; creating a subpoena process for the Office of Police Accountability and Office of Inspector General for Public Safety while ensuring due process for individuals who are the subject of the subpoena; and adding new Sections 3.29.126 and 3.29.245 to the Seattle Municipal Code.**

Supporting Documents: [Summary and Fiscal Note](#)

**Briefing and Discussion** (30 minutes)

**Presenters:** Lisa Judge, Inspector General, Office of Inspector General; Anne Bettsworth, Office of Police Accountability; Michele Chen, Mayor's Office; Ghazal Sharifi, City Attorney's Office; Dan Eder and Greg Doss, Council Central Staff

**3. Proposal for Misdemeanor Basic Need Defense**

Supporting Documents: [Central Staff Memo](#)

**Briefing and Discussion** (30 minutes)

**Presenters:** Anita Khandelwal, Director of King County Department of Public Defense; John Schochet, City Attorney's Office; Asha Venkataraman, Council Central Staff

**E. Adjournment**



Legislation Text

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**File #:** Inf 1728, **Version:** 1

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2020 Semi-Annual Accountability Report



# 2020 Accountability Report

December 8, 2020

Public Safety & Human Services Committee



# Two Transformational Events in One Year

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Redefining Accountability and  
Oversight (Institutionally and  
Logistically)



# (Mid-)Yearly Reporting Requirement



Highlighting budget, state legislative agenda, and collective bargaining agenda issues



Status of recommendations issued by OPA, OIG, and CPC

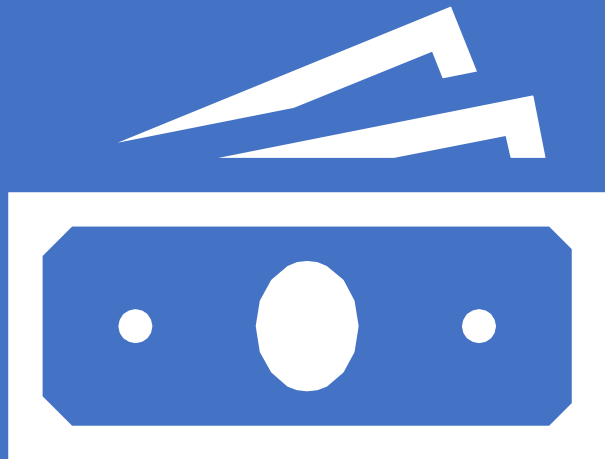


Whether recommendation follow-through was timely and effectively addressed needed improvements



# Budget Issues & Oversight

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- Budget work for 2022 needs to start early.
- Accountability activity related to the consent decree and oversight recommendations will have resource implications.
- Civilian-led Community Safety and Communications Center - 911 Call Center and Parking Enforcement Unit relocation require increased oversight.

# State Legislative Agenda Recommendation Highlights

## TOP PRIORITIES IN 2021 SESSION

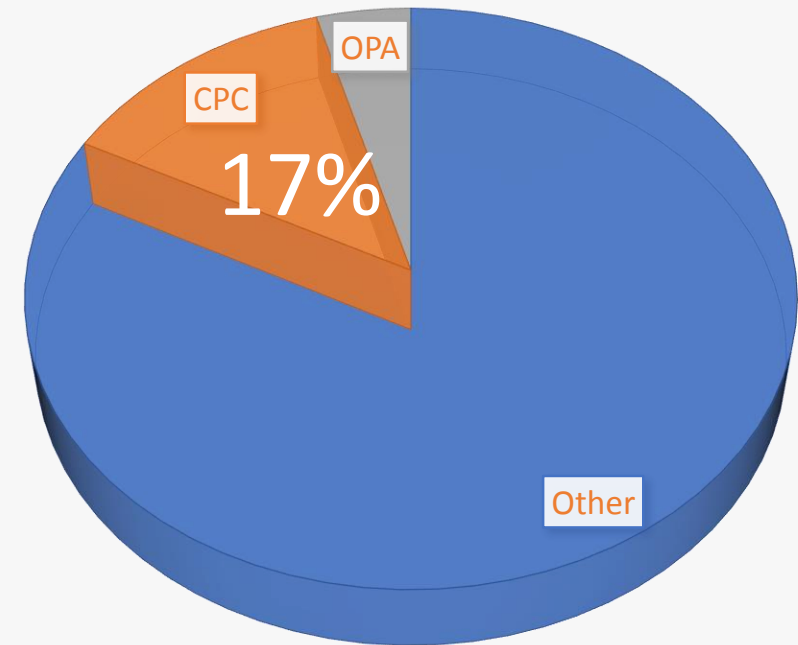
- Reform the police certification and **decertification** process.
- Establish a **special prosecutor** to prosecute police misconduct cases.
- Establish a **statewide investigative entity** for serious/deadly use of force.

## OTHER HIGHLIGHTS

- Create a **duty to intervene** when officers witness police misconduct.
- Create a **clearinghouse**/database for use of force data.
- Remove accountability elements from the **collective bargaining** process.
- Remove barriers to allowing **civilian personnel** to take on more roles traditionally restricted to sworn officers.

# Governor's Task Force on Independent Investigations of Police Use of Force

## Accountability Partner members (present & past) on Taskforce



# CPC Advocacy Activities



## **CPC Advocacy Authority**

“Identify and advocate for reforms to state laws that will enhance public trust and confidence in policing and the criminal justice system.” 3.29.300

# City Draft Agenda vs. CPC State Legislative Agenda

## Aligned

- Remove police accountability from the collective bargaining process
- Repair Washington's broken decertification system
- Institute truly independent investigations
- Strengthen requirements for officers to intervene when they witness police misconduct

## Not Aligned

- Remove arbitration as a route of appeal for police misconduct
- Ensure community is represented on the WSCJTC

## Disagree

- Ban tear gas in Washington State
- End qualified immunity

# Collective Bargaining Accountability

- Oversight technical advisors in bargaining process for the first time in City history
- Bargaining commencing



## 2020 Collaboration Highlights

- Quarterly Accountability Partner Meetings to coordinate oversight efforts
- Officer-Involved-Shooting Community Protocols
- State Legislative Agenda conversations
- Crowd Control Weapons Ordinance recommendations
- Sentinel Event Review
- Innovations in Effective Interviewing Training



CPC



# CPC Publications and Reports

- CPC Response to 21st Century Policing Assessment of Police Accountability
- Crowd Control Weapons Ban Recommendations
- State Legislative Agenda recommendations
- Letter to City Attorney to end attempts of subpoenas to journalists
- CPC recommendations on next steps for police accountability

# Challenges



Lack of recommendation implementation



Unfulfilled information and data requests

# Community Engagement & Events

- Demonstration Management Committee
- Webinar Series: Cultivating Resilience in the Time of Coronavirus
- Re-engagement of the Community Engagement Workgroup
- RE-engagement of the Community Engagement System Partners Group
- Support of Mi'Chance Dunlap-Gittens Youth Rights Ordinance
- Completion of the Arts Partnership with Creative Justice



# CPC Recommendation Tracker

## WHAT DOES IT LOOK LIKE?

- 20 columns with recommendation, status, and supporting documentation

## WHAT ARE THE NEXT STEPS?

- Complete updates, clean data, track response and action taken, iron out process with partners
- Create a public-facing version with metrics and data visualizations

Recommendation	Recipient ...	Date of...	Recommendation on	SPD Policy Nu...	Description
	Other	10/7/2020	State Legislative Agenda	Not an SPD Policy	• Amend RCW 41.56.100 to create "effects-only" bargaining for acc... statutory provisions so that only provisions affecting employees, e.g... be bargained. In the alternative, specify accountability provisions th... decisional bargaining (e.g., appellate process, disciplinary timelines, disciplinary files).
	Other	10/7/2020	State Legislative Agenda	Not an SPD Policy	• Expand the state's criteria on disqualifying misconduct to include... and misdemeanors involving "moral turpitude" that breach the pub... • Require periodic local auditing of agencies' notice of police officer

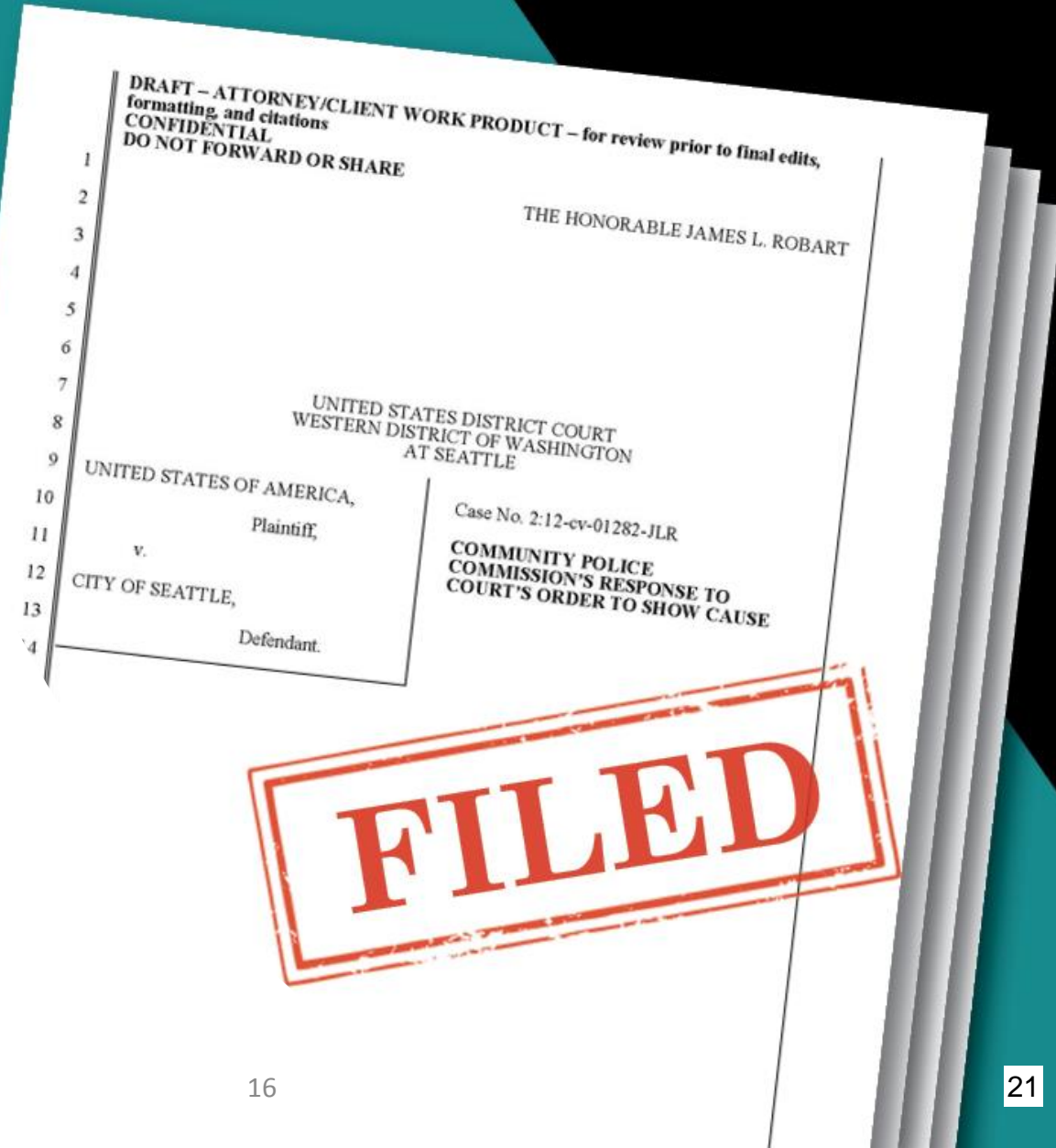
# Consent Decree Compliance

## City remains out of compliance on accountability

- City was found out of compliance in May 2019
- City was ordered to work with the DOJ, Monitor, and CPC to create a plan to come back into compliance by August 2019
- That has not been completed, as was pointed out in multiple CPC court filings in 2020

## CPC opposed City and DOJ motion to discharge substantive commitments of the Consent Decree

- City withdrew that motion in June after protests began



# Other CPC Priorities

## **Community Engagement**

- District liaison program, youth engagement, virtual community engagement during pandemic

## **Police Practices**

- Arbitration and PSCSC, surveillance, CSO program, public disclosure, 911 dispatch, crisis intervention, officer wellness, academy training, de-escalation training

## **Collaboration**

- Police contract negotiations, SPD ruses, recommendation tracking database, in-service trainings for SPD officers about the accountability system, officer professionalism

## **CPC Internal Business**

- Permanent executive director search, new commissioner onboarding, new policy team

OIG



# OIG Protest Response Oversight

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- **Crowd Control Weapons Ordinance recommendations**
  - Less Lethal Weapons Usage in Protests information summary
- **Sentinel Event Review**
  - Community-centered systemic examination of mass protest sentinel events
  - Review by community, SPD, and additional experts
  - Informing SPD protest response





# OIG Audits & Assessments in 2020

- 2020 Projects
  - Canine Unit
  - Police Case Management System Vulnerability
  - DNA Destruction
  - Secure Firearms Storage
- Ongoing/Recurring
  - Chapter 14.18 Surveillance Ordinance
  - Chapter 14.12 Compliance and Follow-Up
  - Mutual Aid
  - Effectiveness of Discipline

# OPA Review

- Regular review of OPA classifications
- Certification of OPA investigations
- Other OPA oversight areas:
  - Unsubstantiated misconduct review
  - Bias reviews
  - Mediations
  - Rapid adjudication
- Quarterly reporting
- Annual report

# Joint Project: Improving Investigative Interviewing of Suspects and Witnesses

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- Partnering with an international expert to develop a program to enhance interview skills
- OIG, OPA, and SPD Force Investigation Team investigators to undergo virtual training beginning in December - January



OPA

# OPA 2020 Policy Recs

- 13 policy recs issued so far in 2020 (including 2 just last week)
- SPD has fully implemented 2 and is close to completing many others
- SPD has requested extensions on some due to COVID, protests, and staffing issues
- OPA & SPD meet quarterly to discuss the status of these recs

# OPA 2020 Policy Recs

Date Issued	Case #	Topic	OPA Status
December 2, 2020	2020OPA-0369 2020COMP-0014	<a href="#">Racial Equity</a>	Active
December 2, 2020	2020OPA-0305 2020COMP-0013	<a href="#">Surveillance</a>	Active
September 28, 2020	2019OPA-0922 2020COMP-0012	<a href="#">Traffic Contact Reports</a>	Active
September 28, 2020	2019OPA-0422 2020COMP-0011	<a href="#">Leadership Expectations</a>	Active
August 3, 2020	2020OPA-0199 2020COMP-0009	<a href="#">Mental Health Transport</a>	<b>Fully Implemented</b>
April 21, 2020	2017OPA-0089 2020COMP-0008	<a href="#">Court Dispositions</a>	Active
April 8, 2020	2019OPA-0190 2020COMP-0007	<a href="#">Sound Transit Response</a>	Active
March 30, 2020	2018OPA-0395 2020COMP-0006	<a href="#">Special Commission Permits</a>	Active
March 30, 2020	2018OPA-0358 2020COMP-0005	<a href="#">Special Commission Permits</a>	Active
March 30, 2020	2019OPA-0034 2020COMP-0004	<a href="#">Employee Timekeeping</a>	Active
March 30, 2020	2018OPA-0742 2020COMP-0003	<a href="#">Handling Money Evidence</a>	Active
January 17, 2020	2019OPA-0383 2020COMP-0002	<a href="#">Employee Wellness</a>	<b>Fully Implemented</b>
January 9, 2020	2019OPA-0479 2020COMP-0001	<a href="#">Body-Worn Video Recording</a>	Active

SPD

# Peer Intervention Program

- Responsive to OIG 2018 recommendation
- Provide SPD members with tools, training and authority to intervene when fellow officers engage in unprofessional or improper conduct
- One successful national model is the Active Bystandership for Law Enforcement (ABLE) program, based on New Orleans Ethical Policing is Courageous (EPIC) program
- SPD has commenced Train the Trainer participation in Q4 2020







Any Questions?



Legislation Text

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**File #:** CB 119974, **Version:** 1

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**CITY OF SEATTLE**

**ORDINANCE \_\_\_\_\_**

**COUNCIL BILL \_\_\_\_\_**

AN ORDINANCE relating to civilian and community oversight of the police; creating a subpoena process for the Office of Police Accountability and Office of Inspector General for Public Safety while ensuring due process for individuals who are the subject of the subpoena; and adding new Sections 3.29.126 and 3.29.245 to the Seattle Municipal Code.

WHEREAS, The City of Seattle requires a strong independent civilian oversight system to ensure constitutional policing and a police department that has the public trust, confidence, respect, and support of the community; and

WHEREAS, the City reaffirms its intention to build a strong civilian-led police accountability system with authority to independently review and investigate individual police misconduct cases, as well as to conduct departmental audits and reviews that critically evaluate the effectiveness of the Seattle Police Department (SPD) in delivering constitutional policing; and

WHEREAS, The City of Seattle is a first-class city in the state of Washington pursuant to chapter 35.22 RCW and has the legal authority to issue administrative subpoenas; and

WHEREAS, subpoenas are crucial information-gathering mechanisms for investigations into police misconduct in the event of an inability to obtain information from department staff due to lack of cooperation from the individual or department, or due to a need to obtain information from a third party on matters related to the investigation; and

WHEREAS, subpoenas are crucial information-gathering mechanisms for audits and reviews of matters of

systemic issues of public concern, in the case of an uncooperative witness or other barriers to obtaining relevant information from the individual, department, or third parties; and

WHEREAS, critical to police accountability is the willingness of complainants and individuals to come forward and provide information in an investigation without the chilling effect of the information later being used against them or having government engage in a fishing expedition for information that may compromise an individual's privacy, civil liberty, and due process rights when they are the subject of a government subpoena; and

WHEREAS, the City desires to strengthen and empower its civilian police oversight entities investigatory authority to gain access to information needed for police accountability, while also protecting the public's right to individual privacy, civil liberty, and due process rights when they are the subject of a government subpoena; and

WHEREAS, nothing in this ordinance shall be construed to weaken constitutional protections, specifically Fourth and Fifth Amendment requirements and those protections afforded by Article 1, Section 7 of the Washington State Constitution that pertain to information that requires a search warrant based on probable cause and judicial review. In the event that any criminal investigation or prosecution is initiated, either subsequent or parallel, to an OPA or OIG investigation, all evidence obtained via subpoena remains subject to constitutional or criminal procedure requirements for a search warrant or other judicially authorized search or seizure prior to use in any criminal proceeding against the individual subject of the subpoena; and

WHEREAS, on May 22, 2017, the City Council unanimously passed the landmark Ordinance 125315 (Accountability Ordinance) establishing a robust, civilian-led, and independent system of community oversight of the police department; and

WHEREAS, subsection 3.29.125.E in the Accountability Ordinance authorizes the Office of Police Accountability (OPA) to issue subpoenas during its investigation if evidence or testimony material to

the investigation is not provided voluntarily to OPA; and

WHEREAS, subsection 3.29.240.K in the Accountability Ordinance provides the Office of Inspector General for Public Safety (OIG) parallel subpoena power; and

WHEREAS, the purpose of this ordinance is to ensure the police oversight system is as strong as originally intended by confirming and making explicit the authority of the OPA and OIG to issue administrative subpoenas and create a clear process for exercise of such authority that respects the constitutional due process rights of individuals who are subject to these subpoenas; NOW, THEREFORE,

**BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:**

Section 1. A new Section 3.29.126 is added to the Seattle Municipal Code as follows:

**3.29.126 Office of Police Accountability and Office of Inspector General - Subpoena authority**

A. The OPA Director or the Inspector General may issue a subpoena under subsection 3.29.125.E or subsection 3.29.240.K respectively, or when the Inspector General is performing duties under its authority to act in lieu of the OPA Director pursuant to subsection 3.29.240.D. This authority is subject to any collective bargaining agreement limitations.

B. If the subject of the subpoena fails to comply with the subpoena issued, then the OPA Director or Inspector General may refer the matter to the City Attorney to seek a court order enforcing the subpoena in a court of competent jurisdiction.

Section 2. A new Section 3.29.245 is added to the Seattle Municipal Code as follows:

**3.29.245 Notice of due process protections for individuals and complainants who are the subject of the subpoena**

When issuing a subpoena pursuant to Section 3.29.126, the issuing agency shall include a written notice containing the following information attached to the subpoena, with a copy sent to the individual whose information is the subject of the subpoena if the individual is not the recipient of the subpoena:

A. The purpose of the subpoena and the basis for seeking the information requested under the subpoena;

B. A statement acknowledging the opportunity to contest the subpoena in a court of competent jurisdiction;

C. A statement acknowledging that a person who provides oral or documentary information requested by the director shall be accorded the same privileges and immunities as are extended to witnesses in the courts of this state; and

D. A statement acknowledging that the evidence shall not be used against the subject in a separate criminal proceeding against the individual without a search warrant or other judicially authorized search or seizure.

Section 3. This ordinance shall take effect and be in force 30 days after its approval by the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it shall take effect as provided by Seattle Municipal Code Section 1.04.020.

Passed by the City Council the \_\_\_\_\_ day of \_\_\_\_\_, 2020, and signed by me in open session in authentication of its passage this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

\_\_\_\_\_  
President \_\_\_\_\_ of the City Council

Approved by me this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

\_\_\_\_\_  
Jenny A. Durkan, Mayor

Filed by me this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

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Monica Martinez Simmons, City Clerk

(Seal)

**SUMMARY and FISCAL NOTE\***

<b>Department:</b>	<b>Dept. Contact/Phone:</b>	<b>CBO Contact/Phone:</b>
MO	Michelle Chen/ 4-5452	

*\* Note that the Summary and Fiscal Note describes the version of the bill or resolution as introduced; final legislation including amendments may not be fully described.*

**1. BILL SUMMARY**

**Legislation Title:** AN ORDINANCE relating to civilian and community oversight of the police; creating a subpoena process for the Office of Police Accountability and Office of Inspector General for Public Safety while ensuring due process for individuals who are the subject of the subpoena; and adding new Sections 3.29.126 and 3.29.245 to the Seattle Municipal Code.

**Summary and background of the Legislation:** This ordinance permits direct issuance of administrative subpoenas by the Office of Police Accountability (OPA) and Office of Inspector General (OIG) as part of their investigatory authority to provide civilian oversight of the police accountability system, subject to any collective bargaining agreement limitations. It requires that notice be issued along with the subpoena containing information about legal rights for individuals who are the subject of the subpoena and to the third-party records holder with information about existing legal rights afforded to them under the law, including their right to quash or challenge the subpoena. The ordinance permits subpoena enforcement by OPA/OIG in a court of competent jurisdiction by the City Attorney.

**2. CAPITAL IMPROVEMENT PROGRAM**

**Does this legislation create, fund, or amend a CIP Project?** \_\_\_ Yes  No

**3. SUMMARY OF FINANCIAL IMPLICATIONS**

**Does this legislation amend the Adopted Budget?** \_\_\_ Yes  No

**Does the legislation have other financial impacts to the City of Seattle that are not reflected in the above, including direct or indirect, short-term or long-term costs?**  
No.

**Is there financial cost or other impacts of *not* implementing the legislation?**  
No.

**4. OTHER IMPLICATIONS**

**a. Does this legislation affect any departments besides the originating department?**  
OPA, OIG and City Attorney’s Office.

**b. Is a public hearing required for this legislation?**

No.

**c. Does this legislation require landlords or sellers of real property to provide information regarding the property to a buyer or tenant?**

No.

**d. Is publication of notice with *The Daily Journal of Commerce* and/or *The Seattle Times* required for this legislation?**

No.

**e. Does this legislation affect a piece of property?**

No.

**f. Please describe any perceived implication for the principles of the Race and Social Justice Initiative. Does this legislation impact vulnerable or historically disadvantaged communities? What is the Language Access plan for any communications to the public?** Strengthening the civilian police oversight and accountability system by making explicit the authority of OPA and OIG to issue administrative subpoenas has an RSJI impact on communities of color, because these communities have historically been disproportionately represented in the criminal legal system. Further, the due process notice and protections afforded under this ordinance impacts vulnerable and disadvantaged communities, because individuals from these communities are more likely to be witnesses or complainants of police misconduct investigations.

**g. If this legislation includes a new initiative or a major programmatic expansion: What are the specific long-term and measurable goal(s) of the program? How will this legislation help achieve the program's desired goal(s).**

No.

**List attachments/exhibits below:** None.





Legislation Text

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**File #:** Inf 1727, **Version:** 1

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Proposal for Misdemeanor Basic Need Defense

December 7, 2020

## MEMORANDUM

**To:** Members of the Public Safety and Human Services Committee  
**From:** Asha Venkataraman, Analyst  
**Subject:** Proposal for a new defense against prosecution of misdemeanors

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On December 8, 2020, the Public Safety and Human Services Committee will discuss the concept of amending the Seattle Municipal Code (“code”) to add a defense against prosecution of misdemeanors on the basis that an individual committed a crime to meet an immediate basic need.

During the Council’s consideration of the 2021 budget, the Council discussed advancing a proposal described as “duress legislation” that would have codified a defense against prosecution of crimes committed due to poverty or behavioral health issues and included such crimes as eligible for dismissal as de minimis crimes (crimes a judge can dismiss if a defendant’s conduct meets certain standards). However, the Council ultimately decided to discuss such a bill after the budget process concluded.

The focus of this memorandum is the concept of creating a poverty defense: making meeting an individual’s immediate basic need an affirmative defense to a crime. The memo provides some background to provide context about how an affirmative defense fits into the criminal legal system, identifies some policy considerations for a potential future bill, and outlines next steps. Later committee meetings and memos could address other parts of the original proposal, such as a defense related to behavioral health issues.

### **Background on Affirmative Defenses<sup>1</sup>**

When an individual commits an act that could be a crime, there are multiple stages at which a person can exit the criminal legal system without a conviction. Generally speaking, an affirmative defense is raised in the trial phase. The stages are as follow:

- (1) Arrest: The police have the discretion whether to arrest that individual;
- (2) Prosecution: The prosecutor can choose whether to file charges or in Seattle’s case, refer the individual to a pre-filing diversion program;
- (3) Pre-Trial: If the prosecution files charges, the judge can choose whether to dismiss a case or refer the individual to a pre-trial diversion program (in Seattle, the individual

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<sup>1</sup> Please note that this is not a legal memo and does not contain every potential procedural or substantive option within the criminal legal system. Rather, this memo is designed to provide a basic overview of how the system commonly functions. Please see further footnotes explaining legal terms of art.

may also be eligible for a specialty court such as Mental Health Court or Community Court); or

(4) Trial: If the case goes to trial, a judge or jury can find that individual not guilty.

If a case reaches the trial stage, the prosecution bears the burden of proving every element of a crime beyond a reasonable doubt. A defendant is not required to prove their innocence but can argue that the prosecution did not meet its burden of proof<sup>2</sup> for each element of the crime or they can assert an affirmative defense.

An affirmative defense allows the defendant to share with the jury the circumstances under which an individual committed a crime and operates to excuse or justify what is otherwise unlawful conduct by an individual.<sup>3</sup> In other words, an individual accused of the crime concedes that the crime was committed but asserts a justification for the crime that would excuse them from criminal liability for committing it.

The defendant must prove an affirmative defense by a preponderance of the evidence standard,<sup>4</sup> which is lower than the reasonable doubt standard. Assuming that there is sufficient evidence that the jury should consider the affirmative defense, the judge then provides the jury instructions about how to consider the affirmative defense. The jury is responsible for determining whether each party has met the standard required and can find the individual guilty, not guilty, or innocent.

For example, the code currently contains an affirmative defense of [duress](#), in which a judge or jury can find that an individual committed an otherwise criminal act but is not guilty if all of the following circumstances apply:

- (1) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he/she or another would be exposed to immediate death or immediate grievous bodily injury; and
- (2) That such apprehension was reasonable upon the part of the actor; and
- (3) That the actor would not have participated in the crime except for the duress involved.<sup>5</sup>

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<sup>2</sup> The burden of proof describes who has the duty to provide evidence and the level of evidence required to support a claim. As noted in the text, in a criminal case, the prosecution bears the burden of proving that an individual committed a crime beyond a reasonable doubt.

<sup>3</sup> Other times in which a defendant can share their circumstances include sentencing, but this occurs after conviction.

<sup>4</sup> The party must demonstrate that the claim is probably more true than not (greater than a 50% chance).

<sup>5</sup> See SMC §12A.04.170.A. The defense is “not available if the actor intentionally or recklessly places himself/herself in a situation in which it is probable that he/she will be subject to duress” or solely if a married person acted on their spouse’s command. SMC §§12A.04.170.B, C.

In addition, Washington State also recognizes the common law<sup>6</sup> defense of necessity. Common law necessity is a defense to a charge if:

- (1) The defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm;
- (2) The harm sought to be avoided was greater than the harm resulting from a violation of the law;
- (3) The threatened harm was not brought about by the defendant; and
- (4) No reasonable legal alternative existed.<sup>7</sup>

Any affirmative defense brought in a case before the Seattle Municipal Court would only apply to misdemeanor crimes, as those are the crimes over which the Court has jurisdiction.

### **Proposal for Legislation**

The proposal for discussion is whether and how to codify a new affirmative defense that would allow an individual to assert that they committed a crime to meet an immediate basic need. The criminal legal system is ill-suited to address the root cause of “crimes of poverty” and any involvement in the criminal legal system and incarceration causes harm. As such, Central Staff understands that the intent of the proposal is to provide an exit from the system at trial and without further involvement in the system for those crimes committed because a person cannot otherwise afford to meet their immediate basic needs.

The City Attorney has stated that he has been exercising his discretion to move away from prosecuting property crimes that appear to be committed out of survival necessity.<sup>8</sup> However, existing practice does not guarantee future exercise of discretion by another City Attorney in this way, nor does it solve for cases that the City Attorney continues to prosecute when there is a disagreement about whether an individual was committing the crime to fulfill their basic needs. The affirmative defense would provide another potential way for an individual to exit out of the criminal legal system.

### **Issues Identified**

Though the concept of an affirmative defense based on poverty may be straightforward, drafting language to reflect the appropriate procedural and legal intent can be more nuanced and have substantive impacts. There are several potential issues associated with this proposal for the Council to consider. Each is accompanied by options, the list of which is not exclusive and could be further explored based on Councilmember interest.

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<sup>6</sup> Common law can be described as law derived from custom and judicial precedent rather than codified within statute or ordinance. The defense does not need to be codified for a defendant to raise it.

<sup>7</sup> 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.02 (4th Ed).

<sup>8</sup> See Attachment A (Letter from Seattle City Attorney Pete Holmes to Seattle City Councilmembers, *Re duress and de minimis proposal*, October 30, 2020).

## 1. Location in the Code

There are several potential locations in the code where the Council could place such a defense.

If within the definition of duress, it would automatically become part of the existing defense. However, existing jury instructions would need to change to reflect the addition; and it could be difficult to apply existing duress case law, as previous precedent will not have accounted for this new part of the definition. If in a new section of the code, wholly new jury instructions would likely be required.

### Options:

- A. Place the new affirmative defense within the existing duress defense by broadening the definition of duress.
- B. Create a new section of the code in the criminal defenses chapter.
- C. Place within another code location based on further research and engagement.

## 2. Elements of the Defense

Policy choices could materially affect the likelihood of a defendant successfully employing the new affirmative defense. In general, the more elements a defendant has the burden of proving, the harder it could be to use the defense, depending on the content of the additional elements. Following is an example of how this might play out:

If the Council's policy is that the only element that the individual would need to prove is that they participated in the crime with the intent to meet an immediate basic need, the defendant would have to prove that their need met the definition of "immediate basic need" (either a codified definition or interpretation of existing case law) and show that their intent was to meet this need.

On the other hand, potential legislation could add other required elements, substantively increasing what a party would need to prove. The existing common law necessity defense, which has some similarity to the new proposed affirmative defense, requires proof of no reasonable alternative to committing the act. One potential approach would be to codify the proposed defense (that the individual participated in the crime with the intent to meet an immediate basic need) and add that the individual had no reasonable alternative to committing the act to satisfy the immediate basic need. Doing so would require determining what entails a reasonable alternative, whether the standard is what the defendant actually knew or what a reasonable person should have known, and as discussed in the next section, upon whom the burden of proof should lie for each element.

### Options:

- A. The legislation requires that the defendant must only prove that they had an immediate basic need and they committed the crime to satisfy it.

- B. The legislation requires Option A and that a party must prove that the defendant had had no reasonable alternative to committing the crime.
- C. The legislation requires either Option A or Option B and adds additional elements to the affirmative defense.
- D. The legislation requires some other version of elements described in the preceding options to be proven, to be determined with further research and engagement.

### 3. Burden of proof

Any legislation would need to determine whether the burden of proof for more than the primary elements of a new affirmative defense lies with the defense or the prosecution. For example, if the Council wanted to add the “no reasonable alternative” to the analysis of the defense, the Council might consider how placing the burden of proof on one party or the other would affect the case.

Adding a “no reasonable alternative” element and requiring the defendant to prove it could create a heavy burden on a defendant whose focus in committing the crime is purportedly trying to meet their basic and immediate needs—spending the time to exhaust alternatives might imply that the need itself is not immediate. Shifting the burden back on the prosecution to prove that a reasonable alternative did exist could be one way to solve for this problem. Theoretically, the Council could add to every misdemeanor the requirement that the defendant had no reasonable alternative, making it an element to prove beyond a reasonable doubt for each crime.

Alternatively, the burden could shift back to the prosecution to prove no reasonable alternative existed after the defendant argues that the individual participated in the crime with the intent to meet an immediate basic need. But the Council may also consider the challenge in placing the burden on the prosecutor to determine what reasonable alternatives did exist, and further research regarding how prosecutors prove state of mind or intent in other crimes could inform whether this is a similar burden or a new and larger challenge.

#### Options:

- A. The burden of proof for all elements of the affirmative defense lies with the defendant.
- B. The prosecution has an opportunity to rebut the affirmative defense or prove additional elements to defeat the affirmative defense.
- C. The burden of proof is distributed in some other way, to be determined with further research and engagement.

#### 4. Applicability to all misdemeanors

Another potential issue involves whether this affirmative defense should apply broadly to all misdemeanors, with a few, if any, exceptions (an inclusive approach) or should not apply broadly and only apply to a select number of misdemeanors (an exclusive approach).

An inclusive approach would allow a defendant to raise the defense for any misdemeanor under the Court's jurisdiction, even if the likelihood of success of asserting the defense is low or in cases where it seems logically unlikely to be applicable to the charge. But it also allows the defendant the option of determining for themselves whether to assert the defense and a judge or jury would make the ultimate decision as to whether the defense has been sufficiently raised and would succeed.

An exclusive approach would tailor the applicability of the defense to the most likely charges to which it should apply and could potentially remove the possibility of unlikely hypotheticals within which it could be asserted. However, it does remove the choice from the defendant about whether to assert it in those misdemeanor cases to which it does not statutorily apply and does not allow the defendant to perform their own weighing and analysis of what the best approach to their case should be. It also removes the ability of the judge or jury to even consider the circumstances under which a crime was committed if it turns out that the defense would be appropriate for a crime to which it is not legally applicable.

##### Options:

- A. Inclusive approach.
- B. Exclusive approach.
- C. Some other approach, to be determined with further research and engagement.

#### 5. Basic needs vs. resale

Lastly, there is a potential for a new affirmative defense to be used not only in those cases where a defendant is trying to meet an immediate basic need (i.e., stealing a sandwich because the defendant is hungry) but also in cases where merchandise is stolen for resale (i.e., stealing cell phones to resell so that the defendant can pay rent). Depending on the Council's intent, potential legislation could include or exclude resale from the defense's applicability.

##### Options:

- A. Do not apply the defense to resale by defining the term "immediate basic need" to be clear that the need itself is literally immediate such that the time it would take to resell an item would rule out the basic need qualifying as "immediate" and/or stating that sale, resale, or trade of an item is not within the scope of the defense.
- B. Apply the defense to resale by removing the term "immediate" and/or do not include a statement providing exclusions from the scope of the defense.
- C. Some other approach, to be determined with further research and engagement.

**Next Steps**

The issues described above are an initial step in analyzing this proposal. Central Staff anticipates the need for analysis of additional options for resolution of these issues, identification of other issues associated with this proposal, and further analysis and issue identification addressing the remaining parts of the original proposal. Councilmembers will continue to engage in discussion with stakeholders and determine whether and how to move forward after the conclusion of Council recess, in 2021.

**Attachments:**

- A. Letter from Seattle City Attorney Pete Holmes to Seattle City Councilmembers, Re duress and de minimis proposal, October 30, 2020

cc: Dan Eder, Interim Director





**Seattle**  
**City Attorney's Office**

Peter S. Holmes, City Attorney

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October 30, 2020

Seattle City Council President M. Lorena González  
Seattle City Councilmember Lisa Herbold  
Seattle City Councilmember Debora Juarez  
Seattle City Councilmember Andrew Lewis  
Seattle City Councilmember Tammy Morales  
Seattle City Councilmember Teresa Mosqueda  
Seattle City Councilmember Alex Pedersen  
Seattle City Councilmember Kshama Sawant  
Seattle City Councilmember Dan Strauss  
Seattle City Hall  
600 4<sup>th</sup> Avenue, 2<sup>nd</sup> Floor  
Seattle, WA 98104

*Via email*

Dear Councilmembers:

I am writing regarding the proposal to redefine the terms “duress” and “de minimis” to create new means of defense for certain misdemeanor-level offenses rooted in poverty, behavioral health crises, or substance abuse. I understand model language was developed by the King County Department of Public Defense (DPD) in partnership with other advocacy organizations, and some of that content may inform a forthcoming refined proposal to be sponsored by Councilmember Herbold. DPD’s model legislation has received significant attention over the past few days, so in the interests of transparency and candor I am writing all of you to share my and my office’s thoughts and suggestions regarding this proposal. These legislative decisions are yours to make, and I hope my perspective provides you some insight that may help shape your decisions should you decide to adopt a bill.

This letter reflects my policy input regarding this proposal, not my office’s legal advice, so we do not consider it attorney-client privileged. My attorneys are always available to provide privileged legal advice regarding any proposed legislation through a separate communication.

First, several of the provisions in this bill codify what my office already practices. Since I became City Attorney in 2010, I have worked to move the City Attorney's Office away from prosecuting property crimes that appeared to be committed out of survival necessity; for example, no city prosecutor is interested in sending an impoverished new parent to jail for stealing baby food. It's not only a just choice by prosecutors, it's also one reenforced by Seattle jurors who are loath to convict for crimes committed out of pure necessity. I have also long supported efforts to divert defendants with behavioral health issues to appropriate treatment rather than traditional prosecution when there is evidence that treatment may help address the defendant's behavior.

My office has made great strides in expanding diversion opportunities, thanks in large part to our strong collaboration with DPD, the Seattle Municipal Court, and community stakeholders. While codifying many of the elements in DPD's proposal isn't necessary to continue reducing traditional prosecution and expanding diversion opportunities, I can appreciate your interest in adding permanency to the way Seattle approaches prosecution alternatives. Thank you again, Councilmembers, for recently allocating my office funding to conduct a racial equity toolkit to expand pre-filing diversion opportunities to those older than 24-years-old.

I do have concerns that other elements of DPD's draft proposal could negatively impact our existing diversion efforts and our specialty court programs such as Mental Health Court and Veterans Treatment Court. However, with some revisions, which I discuss below, I believe you could make constructive additions to Seattle's criminal legal code.

Currently, the proposal treats both "meeting an immediate basic need" and "experiencing symptoms of a behavioral health disorder" the same. We suggest treating them separately because in the courtroom context poverty and mental health issues present distinct challenges.

We believe "meeting an immediate basic need" is best structured exclusively as an affirmative defense that a defendant can raise at trial, while "experiencing symptoms of a behavioral health disorder" is better structured as a diversion alternative that a judge can order where certain criteria are present. When a behavioral health crisis causes a person to assault a stranger, dismissing the case without the judge also directing the person to treatment could potentially leave that person's unique condition unaddressed. A new statutory diversion structure would better complement Seattle Municipal Court's existing mental health programs and, in our view, better serve defendants.

We also suggest removing the amendments to the "de minimis infraction" section of the Seattle Municipal Code – that section is a little-used provision stemming from amendments to the Seattle Municipal Code in the early 1970s with no parallel in Washington state law, and the concepts raised in the proposal could be better implemented with different statutory structure.

For the “meeting an immediate basic need” defense, rather than amending the existing “duress” affirmative defense, we suggest the common law “necessity” affirmative defense be codified into the Seattle Municipal Code. The necessity defense, the elements of which are as follows (taken from Washington Pattern Criminal Jury Instruction 18.02), largely addresses the issues raised in the proposed additions to the “duress” defense:

- (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
- (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law; and
- (3) the threatened harm [to the defendant] was not brought about by the defendant; and
- (4) no reasonable legal alternative existed.

On the mental health provisions, we recommend removing the “experiencing symptoms of a behavioral health disorder” language from the proposed affirmative defense and “de minimis” sections and instead placing it within a new statutory diversion structure, which could formalize an approach similar to that already used by Seattle’s therapeutic Mental Health Court and Veterans Treatment Court. We suggest structuring this so a defendant could ask a judge to order diversion (with treatment) in lieu of prosecution (i.e., with dismissal of charges upon completion of a diversion/treatment program) if the defendant can establish that (1) the facts underlying the elements of the charged offense were a result of the defendant experiencing symptoms of a behavioral health disorder, (2) diversion/treatment in lieu of prosecution is reasonably likely to address the defendant’s conduct that led to the charges, (3) diversion/treatment in lieu of prosecution does not present a demonstrated risk to public safety, and (4) a suitable diversion/treatment program is available. We recommend including the Municipal Court (along with the CAO and DPD) in discussions regarding the specifics of this language and identifying appropriate diversion/treatment programs.

We believe restructuring DPD’s proposed legislation along these lines would keep it consistent with the spirit of the proposal while setting it up to function more practically and effectively within the Seattle Municipal Court’s structure. More important than any legislation you could adopt or amendment I could recommend is that resources must be provided to assist individuals with the underlying issues that led to them to committing the crime. Whether the funds are federal, state, county, local, or philanthropic, there is a very real need. My office has been in dialogue with DPD regarding their proposal earlier this week, and we are happy to participate in further discussions with Councilmembers and staff, DPD, the Municipal Court, and all other stakeholders as these concepts develop.

Very truly yours,



Peter S. Holmes  
Seattle City Attorney

cc: Director Anita Khandelwal, King County Department of Public Defense  
Presiding Judge Willie Gregory, Seattle Municipal Court  
Judge Faye Chess, Seattle Municipal Court  
Judge Andrea Chin, Seattle Municipal Court  
Judge Anita Crawford-Willis, Seattle Municipal Court  
Judge Adam Eisenberg, Seattle Municipal Court  
Judge Catherine McDowall, Seattle Municipal Court  
Judge Damon Shadid, Seattle Municipal Court  
Mayor Jenny Durkan