

January 25, 2021

MEMORANDUM

To: Members of the Public Safety and Human Services Committee
From: Lise Kaye, Analyst
Subject: Draft Bill on Less Lethal Weapons

On January 26, 2021 the Public Safety and Human Services (PSHS) Committee will consider a motion sending a draft bill (Attachment 1), which would restrict the use of some less lethal weapons, to the Court-appointed Monitor (Monitor) and the Department of Justice (DOJ) for review.¹ The draft bill would replace the total ban on less lethal weapons imposed by [Ordinance 126102](#), which was passed by Council on June 15, 2020 and is currently subject to a preliminary injunction by the US District Court. The draft bill has not been introduced for formal referral to the PSHS Committee but is intended to comply with the Consent Decree procedures and inform the Monitor and the DOJ of Council's policy intent with respect to less lethal weapons. Should the PSHS Committee approve the motion, legal counsel would convey the draft bill to the Monitor and the DOJ. This will coincide with the Monitor and the DOJ's review of the Seattle Police Department's (SPD's) newly revised policies on crowd control and the use of less lethal weapons.²

This memorandum:

1. summarizes the current status of the Consent Decree and Ordinance 126102;
2. describes SPD's annual use of force policy review for 2020;
3. describes key elements of the proposed draft bill; and
4. identifies several options for the PSHS Committee's consideration.

Background

In 2018, U.S. District Judge James Robart found the SPD to be in "full and effective compliance" with reforms mandated by a 2012 Consent Decree, kicking off a two-year "sustainment period" during which the Court would evaluate whether the policy changes were likely to be permanent. In May 2020, the City Attorney filed a motion to terminate the sustainment plan but withdrew that motion on June 3, 2020, to allow an assessment of SPD's response to the prior week's demonstrations against racially disproportionate policing.³ On June 15, the City Council adopted passed Ordinance 126102, banning the use of crowd control weapons. The

¹ The Seattle Police Department (SPD) has been under federal oversight since 2012 after a Department of Justice investigation found that SPD had a pattern of using excessive force and also had policies and practices that could result in bias against minorities.

² The Consent Decree requires the Monitor and the Department of Justice to review SPD's revised policies relating to the use of force.

³ See June 3, 2020 [statement](#) issued by the City Attorney.

ordinance requested, consistent with the advisory roles established in the Accountability Ordinance ([Ordinance 125315](#)), subsection 3.29.030.B, that the City's three accountability agencies, the Community Police Commission (CPC), the Office of Inspector General for Public Safety (OIG), and the Office of Police Accountability (OPA) make a formal recommendation to the City Council on whether SPD should be reauthorized to use less-lethal weapons for crowd dispersal purposes. The ordinance also requested that notice of Council's action be submitted by the City Attorney to the DOJ, the Court and the Monitor, consistent with the Consent Decree provisions.

On June 17, 2020, Judge Robart issued a temporary restraining order (TRO) against Ordinance 126102, which prevented it from going into effect, on the grounds that the policy changes mandated by the Ordinance impacted the Consent Decree but had not been properly submitted to the Monitor prior to implementation, as required. The Court also expressed concerns that Ordinance 126102 would not improve public safety (as required by one of the Consent Decree's threshold principles regarding use of force) and that Ordinance 126102 did not provide SPD adequate time to train officers on new use of less lethal weapons policies. Judge Robarts suggested that the City retain outside counsel to help resolve the TRO issues, and the City Attorney's Office retained the Pacifica Law Group to assist the City Council in addressing the TRO. Judge Robart also asked the CPC, OIG and OPA to provide recommendations with respect to the City's use of less lethal weapons. On October 1, 2020, Judge Robart approved a joint motion by the City and DOJ to convert the TRO to a preliminary injunction, which remains in effect until terminated by the Court (either because the policy review process under the Consent Decree has been completed or upon joint motion by the parties.)

Concurrent with the TRO developments, SPD has been conducting an annual use of force policy review, as mandated by the Consent Decree. According to the Consent Decree, any revised policies must be reviewed by the DOJ and approved by the Monitor prior to implementation. SPD posted a set of [revised use of force polices](#) for community feedback on the SPD Blotter, a webpage maintained by SPD's Public Affairs Office to provide police news and information to the public. Earlier this month, the CPC asked SPD to consider altering its timelines to allow Council time to make its recommendations through the PSHS Committee prior to completion of the SPD policy review. SPD recently reported to the Monitor that it will submit its revised policies on February 11, 2021 for formal consideration by the Monitor and the DOJ.

Draft Bill

On September 11, 2020, the PSHS Committee heard recommendations from the three accountability agencies with respect to the SPD's crowd dispersal policy and less lethal weapons. On December 17, 2020, the PSHS Committee reviewed a "base bill" structured around the four recommendations agreed to by all three of the accountability agencies: to allow specific, non-crowd control uses for Pepper Spray, 40-millimeter Launchers and Noise

Flash Diversionary Devices, and to ban Patrol use of Tear Gas⁴ (The base bill was written to ban all uses of tear gas, with the understanding that the PSHS Committee intended to have further deliberation on whether to provide any exceptions). At its January 12, 2021 meeting, the PSHS Committee discussed potential additional policies, and the attached draft bill reflects that discussion.⁵ A draft of the bill has been shared with the accountability agencies.

The draft bill would:

- 1. Add recitals recognizing the role of SPD management and the Court with respect to control of the police department and use of force policies;**
- 2. Ban without condition the use of:**
 - a. kinetic impact launchers used to deploy chemical irritants for crowd control in any demonstration or rally;
 - b. noise flash diversionary devices for crowd control during any demonstration or rally;
 - c. tear gas and chemical irritants other than pepper spray; and
 - d. acoustic weapons; directed energy weapons; water cannons; disorientation devices including blast balls (but not noise flash diversionary devices); ultrasonic cannons; and any other device primarily designed to be used on multiple individuals for crowd control and to cause pain or discomfort.
- 3. Impose the following specific conditions on the deployment of pepper spray:**
 - a. Pepper spray may not be used for crowd control in a non-violent demonstration or rally;
 - b. Only Special Weapons and Tactics (SWAT) officers may deploy pepper spray products using a 40-millimeter launcher and only for purposes other than crowd control in a demonstration or rally; and
 - c. Pepper spray may only be deployed only in circumstances in which the risk of serious injury from violent actions outweighs the risk of harm to bystanders.⁶

⁴ During that discussion, PSHS Committee members also requested additional research as to legislation enacted by other cities across the country. Attachment 2 to this memo provides a brief summary of staff's initial research.

⁵ Attachment 3 to this memo modifies the table summarizing the accountability agencies' positions with respect to banning specific less lethal weapons with an additional a row illustrating how the legislation would address those specific less lethal weapons.

⁶ SPD and OIG/OPA have expressed concerns about the feasibility of preventing pepper spray (whether via launcher or otherwise) from landing on another person, as had been legislated in Ordinance 126102. OPA noted in its August 14, 2020 report to Council that "Due to the difficulty of preventing cross contamination when using OC spray and the creation of a legal cause of action where this occurs, SPD informed OPA on July 29 that it will order officers to cease the use of OC spray if the ordinance [126102] goes into effect."

- 4. Impose the following specific condition on the deployment of noise flash diversionary devices:**
 - a. Only SWAT officers may deploy noise flash diversionary devices and only for purposes other than crowd control in a demonstration or rally.
- 5. Prohibit law enforcement agencies operating under mutual aid agreements with SPD from using less lethal weapons and require SPD's mutual aid agreements for crowd control to prohibit other law enforcement agencies from using less lethal weapons for crowd dispersal; and**
- 6. Modify the Right of Action clause to exclude a person who, in the judgment of a reasonable person, commits a criminal offense at or immediately prior to the use of less lethal force; and**
- 7. Establish the effective date for 30 days after it has been reviewed and approved by the Court and approved by the Mayor.**

Next Steps

At its January 26 meeting, the PSHS Committee will consider approving a motion to send a draft bill to the Monitor and the DOJ for review. The PSHS Committee may consider the following options:

1. Approve a motion sending the draft bill (Attachment 1) to the Monitor and DOJ;
2. Approve one or more amendments to the draft bill and approve a motion to send the revised draft bill to the Monitor and DOJ;
3. Reject the motion;
4. Defer action to a future date; or
5. Take no action.

Attachments:

1. Draft Bill
2. Sample City Legislation pertaining to less lethal weapons
3. Oversight Agencies' Positions on Banning Less Lethal Weapons and Draft Bill Provisions

cc: Dan Eder, Central Staff Interim Director

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CITY OF SEATTLE

ORDINANCE _____

COUNCIL BILL _____

..title

AN ORDINANCE relating to the Seattle Police Department; banning the ownership, purchase, rent, storage, or use of less lethal weapons; and amending Section 3.28.146 to the Seattle Municipal Code.

..body

WHEREAS, in 2020, tens of thousands of community members joined mass demonstrations in Seattle in support of black lives and against police violence; and

WHEREAS, the Seattle Police Department (SPD) responded to these protests against police violence with devices designed to cause severe discomfort and/or pain, including tear gas, pepper spray and explosive devices such as blast balls and stun grenades; and

WHEREAS, Seattle’s Office of Professional Accountability reported on June 3, 2020 that it had received 15,000 complaints of police misconduct related to SPD’s response to these protests; and

WHEREAS, studies into the impacts of policing at protests have determined that escalating force by police at protests leads to increasing violence; and

WHEREAS, on June 15, 2020, the City Council adopted Ordinance 126102 banning the ownership, purchase, rent, storage, or use of crowd control weapons, defined as kinetic impact projectiles, chemical irritants, acoustic weapons, directed energy weapons, water cannons, disorientation devices, ultrasonic cannons, or any other device that is designed to be used on multiple individuals for crowd control and is designed to cause pain or discomfort; and

WHEREAS, on July 24, 2020, the Honorable Judge James L. Robart of the U.S. District Court for the Western District of Washington imposed a temporary restraining order against

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1 enactment of Ordinance 126102, expressing concern that “by removing all forms of less
2 lethal crowd control weapons from virtually all police encounters, the Directive and the
3 CCW Ordinance will not increase public safety,” and asked the Office of Police
4 Accountability, the Community Police Commission, and the Office of the Inspector
5 General to review its possible impact on court-mandated police reforms; and

6 WHEREAS, on August 10, 2021, the Honorable Judge Richard Jones of the U.S. District Court
7 for the Western District of Washington issued a preliminary injunction extending a ban
8 on SPD’s use of less lethal chemical and projectile weapons against peaceful protesters;
9 and

10 WHEREAS, on September 11, 2020, as requested in Ordinance 126102 and consistent with the
11 advisory roles established in the Accountability Ordinance (Ordinance 125315),
12 subsection 3.29.030.B, the Office of Police Accountability, the Community Police
13 Commission, and the Office of the Inspector General reported their findings with respect
14 to the impact of banning less lethal weapons to the Council’s Public Safety and Human
15 Services Committee. The findings showed consensus among the three reports to allow
16 specific non-crowd control uses of pepper spray, 40-millimeter launchers and noise flash
17 diversionary devices, and to ban patrol officers’ use of tear gas; and

18 WHEREAS, on October 1, 2020, the Honorable Judge James L. Robart converted the Court’s
19 temporary restraining order regarding Ordinance 126102 into a preliminary injunction in
20 order to facilitate review under the process set forth in paragraphs 177 to 181 of the
21 Consent Decree (“Policy Review Process”); and

22 WHEREAS, on December 7, 2020, the Honorable Judge Richard Jones found the Seattle Police
23 Department in contempt of court for the indiscriminate use of blast balls and noted that

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1 “Of the less lethal weapons, the Court is most concerned about SPD’s use of blast balls”
2 and;

3 WHEREAS, the City Council recognizes the role of the Chief of Police to prescribe rules and
4 regulations for the government and control of the police department; and

5 WHEREAS, at the time of passing this ordinance, pursuant to a federal consent decree, the
6 United States Department of Justice, the Honorable James L. Robart of the U.S. District
7 Court for the Western District of Washington, and the court-appointed Seattle Police
8 Monitor exercise oversight of SPD’s policies related to the use of force;

9 NOW, THEREFORE,

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

11 Section 1. Section 3.28.146 of the Seattle Municipal Code, enacted by Ordinance 126102,
12 is amended as follows:

13 **3.28.146 Prohibition of the use of less lethal weapons**

14 A. Unless exempted or excepted, no City department shall own, purchase, rent, store or
15 use(~~crowd control~~) less lethal weapons.

16 B. Law enforcement agencies operating under mutual aid agreements are prohibited from
17 using(~~crowd control~~) less lethal weapons while rendering aid to the Seattle Police Department.

18 Seattle Police Department mutual aid agreements for crowd control must prohibit other law
19 enforcement agencies from using (~~crowd control~~) less lethal weapons-for the purpose of crowd
20 dispersal; and

21 C. As used in this Section 3.28.146, “(~~crowd control~~) less lethal weapons” means
22 kinetic impact (~~projectiles~~) launchers used to deploy chemical irritants, chemical irritants,
23 including but not limited to pepper spray and tear gas, acoustic weapons, directed energy

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1 weapons, water cannons, disorientation devices including but not limited to blast balls and noise
 2 flash diversionary devices, ultrasonic cannons, or any other device that is primarily designed to
 3 be used on multiple individuals for crowd control and is designed to cause pain or discomfort.

4 D. ((Oleoresin capsicum (OC) spray, ~~forty millimeter launchers and noise flash~~
 5 ~~diversionary devices are not ((is not a crowd control weapon))less lethal ((crowd~~
 6 ~~control))weapons for purposes of owning, purchasing, renting, or storing under subsection~~
 7 3.28.146.A., ~~unless such weapons are used for crowd dispersal purposes.))~~ Neither 40-millimeter
 8 launchers to deploy chemical irritants nor noise flash diversionary devices are banned as less
 9 lethal weapons for purposes of subsection 3.28.146.A. with the exception that they may not be
 10 used for crowd control in a demonstration or rally. Only Special Weapons and Tactics (SWAT)
 11 officers may deploy such 40-millimeter launchers to deploy chemical irritants and noise flash
 12 diversionary devices and only for purposes other than crowd control in demonstration or rally.

13 E. Oleoresin capsicum (OC) spray is not banned as a less lethal weapon for purposes of
 14 subsection 3.28.146.A. with the exceptions that a) it may not be used for crowd control in a non-
 15 violent demonstration or rally and b) it may be used only in circumstances in which the risk of
 16 serious injury from violent actions outweighs the risk of harm to bystanders.

17 ~~((Use of OC spray is prohibited under subsection 3.28.146.A if~~

18 ~~1. It is used in a demonstration, rally, or other First Amendment-protected event;~~

19 or

20 ~~2. When used to subdue an individual in the process of committing a criminal act or~~
 21 ~~presenting an imminent danger to others, it lands on anyone other than that individual.))~~

22 ((()F. A person shall have a right of action against the City for physical or emotional
 23 injuries proximately caused by the use of ((~~crowd control~~)) less lethal weapons((~~for crowd~~

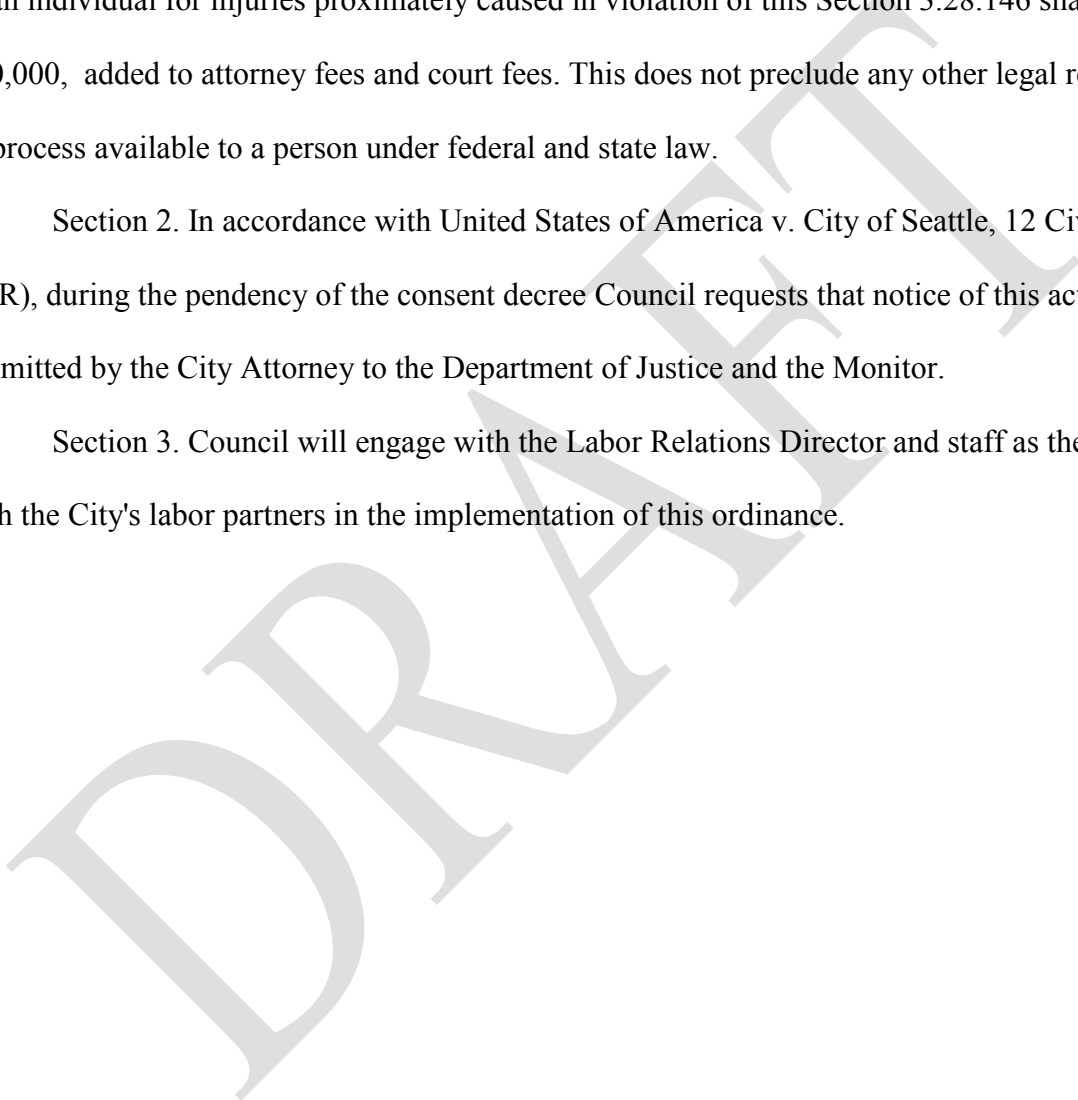
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1 ~~dispersal~~) that occur in a non-violent demonstration or rally after this ordinance takes effect. A
2 person who, in the judgment of a reasonable person, commits a criminal offense at or
3 immediately prior to the use of less lethal force may not recover under this Section 3.28.146.

4 ((F))G. Absent evidence establishing a greater amount of damages, the damages payable
5 to an individual for injuries proximately caused in violation of this Section 3.28.146 shall be
6 \$10,000, added to attorney fees and court fees. This does not preclude any other legal recovery
7 or process available to a person under federal and state law.

8 Section 2. In accordance with United States of America v. City of Seattle, 12 Civ. 1282
9 (JLR), during the pendency of the consent decree Council requests that notice of this action be
10 submitted by the City Attorney to the Department of Justice and the Monitor.

11 Section 3. Council will engage with the Labor Relations Director and staff as they work
12 with the City's labor partners in the implementation of this ordinance.



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1 Section 4. This ordinance shall take effect and be in force 30 days after it has been
2 reviewed and approved by the Court and approved by the Mayor, but if not approved and
3 returned by the Mayor within ten days after presentation, it shall take effect as provided by
4 Seattle Municipal Code Section 1.04.020.

5 Passed by the City Council the _____ day of _____, 2021,
6 and signed by me in open session in authentication of its passage this _____ day of
7 _____, 2021.

8 _____
9 President _____ of the City Council

10 Approved/returned unsigned/vetoed this _____ day of
11 _____, 2021.

12 _____
13 Jenny A. Durkan, Mayor

14 Filed by me this _____ day of _____, 2021.

15 _____
16 Monica Martinez Simmons, City Clerk

17 (Seal)
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19
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Attachment 2:

Sample City Legislation pertaining to less lethal weapons

City	Legislation	Chemical	Kinetic Impact Projectiles
Berkeley, CA	Moratorium and Police Review Commission policy	Use of tear gas is banned except for use by trained Special Response Team members during operations or in response to attacks.	
Boston, MA	Ordinance - Vetoed ¹	Prohibits use of Chemical Crowd Control Agent or Kinetic Impact Projectile against any person or persons engaged in a protest, demonstration or other gathering of any kind involving more than 10 persons, unless authorized in specific circumstances ²	
Columbus, OH	Mayor Directive	Police may not use tear gas as a crowd-control measure and pepper spray is limited to “clear instances of violence.”	
Iowa City, IA	Resolution No. 20-159	Council commits to prohibit the use of tear gas, rubber bullets and flashbangs against peaceful protesters.	
Milwaukee, WI	Directive from Fire and Police Commission ³	Police Chief is to work with the Board of the Commission to amend the proper procedures to discontinue the use of tear gas and OC (pepper) spray.	
New Orleans, LA	Ord. No. 33106	Prohibits use of a “riot control agent” ⁴ except when reasonably necessary to prevent threat of imminent loss of life or serious bodily injury, or to dislodge a barricaded violent criminal suspect. Must announce use and provide opportunity to retreat.	
Philadelphia, PA	Bill No. 200538	Philadelphia PD is to establish a written policy to prohibit the use of Chemical Weapons and Kinetic Energy Munitions on any individual engaging in First Amendment Activities. ⁵	
Springfield, IL	Ord. No. 2020-356	The Police Department shall ban the use of tear gas, pepper spray, rubber bullets and stun grenades to disperse any assembled group of individuals unless necessary to protect persons, property, or effect an arrest or used in conjunction with an emergency order issued by the Mayor. ⁶	

Source: [International Center for Not for Profit Law](#), Reforms Introduced to Project the Freedom of Assembly, January 5, 2021

¹ Vetoed by Mayor Walsh January 4, 2021; Councilmembers plan to refile legislation.

² Chemical Crowd Control Agents or Kinetic Impact Projectiles may be used if authorized by an on-scene supervisor of Deputy Superintendent or higher rank who has personally witnessed specific acts of violence or destruction of property and if two separate warnings are provided by loudspeaker.

³ Wisconsin state law, Sec. 62.60(23), provides that the Board of Fire and Police Commissioners may issue written directives to a chief based on a review of the chief’s department and that the chief shall implement the directive unless it is overruled in writing by the Mayor.

⁴ “Riot control agent” means tear gas and other chemical compounds intended to disable individuals temporarily by causing irritation to the eyes, mouth, throat, lungs, or skin. [Section 90-40 of the Code of the City of New Orleans](#)

⁵ Chemical Weapons. Any type of device designed as Less Lethal, to be launched or thrown as a projectile, in order to cause injury or trauma to the intended target through the action of chemicals as an eye, throat, respiratory, and/or skin irritant, as a means of crowd control. The term specifically includes, but is not limited to, any item commonly referred to as or having similar effects to “tear gas”. [Chapter 10-2600 of the Philadelphia Code](#)

⁶ One of a series of reform measures that “shall be considered and used as guidance by the Police Department in drafting, adopting, implementing and enforcing its General Orders. [Section 2, Ordinance 220-356](#)

Attachment 3:

Oversight Agencies' Positions on Banning Less Lethal Weapons and Draft Bill Provisions

Use Category	Ban CS Gas (Tear Gas)			Ban OC Spray (Pepper Spray)			Ban Blast Balls			Ban 40mm Launcher			Ban Noise Flash Diversionary Devices (NFDD)		
	CPC	OPA	OIG	CPC	OPA	OIG	CPC	OPA	OIG	CPC	OPA	OIG	CPC	OPA	OIG
Patrol	Yes	Yes	Yes	No	No	No	Yes	No	No, but see note at end of presentation	No	No	No	No	N/A*	N/A*
Tactical/ SWAT	Yes	No	No, but See report; limited to life safety or SWAT non-crowd situations like barricaded people.	No	No	No	Yes	No	No	No	No	No	No	No	No
Crowd Dispersal	Yes	Yes	No, but see report; limited to life safety.	Yes	No	No	Yes	No	No	Yes	No	No, but see note at end of presentation	Yes	No	No

Draft Bill	Full ban	Banned from use for crowd control in a non-violent demonstration or rally ; otherwise may be used only if risk of serious injury from violent actions outweighs the risk of harm to bystanders	Full ban	Banned from use to project chemical irritants during any demonstration or rally; only SWAT may use to deploy pepper spray but only for purposes other than crowd control in a demonstration or rally	Banned from use for crowd control during any demonstration or rally; otherwise only SWAT may deploy for purposes other than crowd control in a demonstration or rally
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