MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Eighty-first Session
May 7, 2021

The Senate Committee on Judiciary was called to order by Chair Melanie Scheible at 1:07 p.m. on Friday, May 7, 2021, Online and in Room 2135 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Melanie Scheible, Chair
Senator Nicole J. Cannizzaro, Vice Chair
Senator James Ohrenschall
Senator Dallas Harris
Senator James A. Settelmeyer
Senator Ira Hansen
Senator Keith F. Pickard

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nicolas Anthony, Counsel
Pam King, Committee Secretary

OTHERS PRESENT:

Aaron Ford, Attorney General
Jessica Adair, Chief of Staff, Office of the Attorney General
Kyle George, First Assistant Attorney General, Office of the Attorney General
Holly Welborn, American Civil Liberties Union of Nevada
Reverend Michael Willoughby, Battle Born Progress
Jim Hoffman, Nevada Attorneys for Criminal Justice
Christine Saunders, Progressive Leadership Alliance of Nevada
Troyce Krumme, Las Vegas Metro Police Managers & Supervisors Association
Kendra Bertschy, Washoe County Public Defender's Office; Clark County Public Defender's Office
Jennifer Noble, Nevada District Attorneys Association
Alina Shell, Nevada Open Government Coalition

CHAIR SCHEIBLE:
The meeting of the Senate Committee on Judiciary is now open. We have one bill on hearing today and a couple of bills on work session. We will start on the consent agenda first.

PATRICK GUINAN (Policy Analyst):
I will summarize the work session documents for Assembly Bill (A.B.) 30 (Exhibit B), A.B. 33 (Exhibit C), A.B. 43 (Exhibit D) and A.B. 64 (Exhibit E).

ASSEMBLY BILL 30 (1st Reprint): Revises provisions relating to the Account for Aid for Victims of Domestic Violence. (BDR 16-260)

ASSEMBLY BILL 33 (1st Reprint): Authorizes the establishment of paternity in proceedings concerning the protection of children. (BDR 11-436)

ASSEMBLY BILL 43 (1st Reprint): Requests that the Nevada Supreme Court study certain issues relating to the Commission on Judicial Discipline. (BDR S-393)

ASSEMBLY BILL 64 (1st Reprint): Revises provisions relating to certain crimes. (BDR 15-407)

There are no amendments on these bills.

SENATOR HARRIS MOVED TO DO PASS A.B. 30, A.B. 33, A.B. 43 AND A.B. 64.

SENATOR OHRENSCHALL SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR SCHEIBLE:
I now open the work session on A.B. 27.

ASSEMBLY BILL 27: Revises provisions relating to the administration of child support. (BDR 11-300)

MR. GUINAN:
Assembly Bill 27 was heard on April 13 as an Assembly Committee on Judiciary bill on behalf of the Division of Welfare and Supportive Services of the Department of Health and Human Services, as referenced in the work session document (Exhibit F).

SENATOR PICKARD:
In section 1 of A.B. 27 where it allows the support-enforcement agency to issue a request for an order, they said they do that. I checked with judicial officers and others, who all said the most they can do is to make recommendations. They do not actually have the authority to issue orders, and this would be an improper delegation of that judicial authority.

With that representation, it makes me nervous. So I will be voting no with reservation. I want to do a little bit more digging, but it sounds to me like this would not be a good way to go.

SENATOR HARRIS MOVED TO DO PASS A.B. 27.

SENATOR OHRENSCHALL SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS PICKARD AND SETTELMEYER VOTED NO.)

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CHAIR SCHEIBLE:
The next bill is A.B. 60.

ASSEMBLY BILL 60 (1st Reprint): Makes certain provisions of a contract or settlement agreement void and unenforceable. (BDR 4-422)

MR. GUINAN:
Assembly Bill 60 was heard in this Committee on April 30. This is also an Assembly Committee on Judiciary bill, as referenced in the work session document (Exhibit G). This bill was brought on behalf of the Office of the Attorney General (OAG). Attorney General Aaron Ford is here today.

SENATOR SETTELMEYER:
I apologize, but I had my bill numbers mixed up, and I have no problem with A.B. 60. If you are ready for a motion, I would move to do pass.

SENATOR SETTELMEYER MOVED TO DO PASS A.B. 60.

SENATOR OHRENSCHALL SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR SCHEIBLE:
That concludes our work session for today. I will now open the hearing on A.B. 58, which is a bill from the Attorney General (AG).

ASSEMBLY BILL 58 (1st Reprint): Makes changes relating to the authority and duties of the Attorney General. (BDR 3-417)

ATTORNEY GENERAL AARON FORD:
Joining me today virtually and in person are members of my staff, Chief of Staff Jessica Adair, First Assistant Kyle George, Second Assistant Christine Jones Brady and Special Assistant Theresa Harr.

While I have advocated for and worked on criminal justice reform, our efforts reached a new urgency after the killing of George Floyd and the public outcry that immediately followed.

Most of us in law enforcement are horrified, saddened and angered by videos of police brutality. We do not want to be associated with bad actors or bad apples who use their status as law enforcement to act above the law. But we cannot use the phrase "a few bad apples" to excuse law enforcement officers who have been engaged in excessive force, unlawful policing or who have openly violated the constitutional rights of individuals. After all, the entire saying is "one bad apple spoils the barrel." The objective of a pattern-or-practice investigation is to identify the barrels and to reform practices and patterns in those barrels of, among other things, excessive force, bias or discriminatory policing or violations of any constitutional rights, including First Amendment

rights to peacefully protest or to assemble or Fourth Amendment rights to be free from unreasonable searches, stops, seizures, arrests and otherwise.

Pattern-or-practice investigations will allow us to effectively determine whether claims of misconduct were isolated incidences by individual officers or a symptom of larger deficiencies prevalent in an agency's customs, training or culture.

Before I turn to the content of A.B. 58, let me tell you what it is and what it is not. Our goal is not to "name and shame" law enforcement agencies. That would only further deepen community mistrust. Rather, this bill is about accountability. It is about fixing problems where they exist. These investigations allow an agency to remedy, identify problems, rebuild trust between the police and the communities that we serve, and strengthen lawful and effective police and practices.

It also allows officers to ensure that they have the training and the policies they need to be the best law enforcement officers in their communities.

The United States Department of Justice (USDOJ) has federal authority to conduct pattern-or-practice investigations of state and local law enforcement agencies. Since 1994, the USDOJ has conducted 70 investigations into police departments which resulted in 41 reform agreements or court-ordered consent decrees.

In January 2017, then-Attorney General Jeff Sessions announced that the USDOJ believed that these investigations should be conducted at the state level. He also said that the USDOJ would no longer conduct them. As a part of this new posture, the USDOJ issued new guidance that limited the scope and usefulness of future consent decrees. Since January 2017, the USDOJ has not initiated a single investigation into a law enforcement agency. It has only entered into one consent decree, and that was from an investigation that began in 2015.

As administrations change, so may policies. Even though Attorney General Merrick Garland has indicated that the USDOJ will resume, and in fact, is resuming, exercising its pattern-or-practice authority, there are other reasons to pass A.B. 58 at the State level.

First, and obviously, this tool should not depend on the whim of a particular administration. Having pattern-or-practice authority resides at both a federal and state level doubles the likelihood that public complaints would be reviewed or investigated.

Additionally, this bill addresses one of the shortcomings of the federal investigatory authority, namely the lack of subpoena power. Under the federal version, if an agency declines to cooperate, the USDOJ is limited in its ability to effectively gather information. This version remedies that shortcoming.

Another reason to extend this authority to the State level is that the Nevada Attorney General's Office is obviously more familiar with the people and agencies of our State than the federal government. To our Office, "Home Means Nevada," and we have a vested interest in ensuring Nevadans are safe and that their constitutional rights are protected. My Office is also better positioned than our federal partners to understand the diversity of communities and local agencies across the State.

Other states have given their attorneys general the ability to conduct pattern-or-practice investigations, and even more states are seeking such ability. We are asking you to add Nevada to that list of states that have given their attorneys general the authority to conduct pattern-or-practice investigations.

The bill before you is a culmination of a collaborative process between law enforcement leaders, police union representatives, law enforcement management, district attorneys, members of the U.S. Justice Department and Criminal Defense Bar, the American Civil Liberties Union, and community organizations and organizers.

I was before you on another bill that was just heard and passed in the Assembly, Senate Bill 50.

SENATE BILL 50: Revises provisions relating to warrants. (BDR 14-405)

As you will recall, I worked with all these entities to ensure that we would present to you a bill that was well thought out and would move the ball forward. I am proud to say we did the exact same work with A.B. 58. What is before you is a culmination of that work. I have prepared a short presentation (Exhibit H).

Section 1, subsection 1 of A.B. 58 provides that no law enforcement agency or agency responsible for juvenile justice shall engage in a pattern-or-practice that deprives people of their rights under the United States Constitution or the Nevada Constitution or any other law.

Subsection 2 provides that the Nevada Attorney General's Office may investigate claims that an agency covered by this bill has a pattern-or-practice of violating people's rights. This investigatory power is discretionary, and the Attorney General's Office is not required to investigate every complaint. But, before a deputy attorney general can take any action against an agency, he or she must conduct an investigation and have a factual basis that shows that there is an unlawful pattern-or-practice at the agency.

Investigations are only as good as our ability to collect evidence. For this reason, subsection 5 grants the OAG the power to subpoena witnesses, documents and other information held by the agency. Authorities similarly grant this power to several other units within the OAG. This subsection also provides for judicial oversight over the use of the subpoenas and exercising powers pursuant to A.B. 58.

I would like to emphasize two important aspects of this subpoena provision. First, this subpoena power extends only to evidence maintained by the agency being investigated. It does not extend to an officer's personal devices. Second, this subpoena power does not displace long-standing constitutional considerations against self-incrimination such as the Fifth Amendment and the U.S. Supreme Court decision, *Garrity v. New Jersey*, 385 U.S. 493 (1967).

Section 1, subsection 8 makes explicit that Nevada's whistleblower statutes are applicable to this bill and prohibits retaliation against a State or local employee who discloses evidence of an unlawful pattern-or-practice.

If, after an investigation has been conducted, the OAG has a reasonable cause to believe there is a pattern-or-practice of unlawful policing at an agency, the Attorney General must first notify the agency of that belief and the factual basis for alleging the agency has a pattern-or-practice of unlawful policing. The agency then has 30 days to respond. The goal here is to start a productive dialogue between the OAG and the agency to identify the pattern-or-practice that is unlawful or any systemic deficiencies at the agency and to work with the

agency to correct those deficiencies. The agency will then have 60 days to make a good faith effort to change the identified deficiencies.

In the event the OAG and the agency are unable to agree on a plan to reform the problematic activity, the AG has the authority to initiate a civil lawsuit against the agency. The court would then be empowered to impose injunctive relief compelling the agency to adopt certain corrective measures or to stop certain actions. Please note, this bill is limited only to injunctive relief, and it does not call for monetary damages.

The investigation and authority to bring a civil action is directed at law enforcement agencies, not law enforcement officers. Agencies still rightly retain the power to discipline their own officers and local city attorneys, and district attorneys still rightly retain the power to prosecute an officer who is alleged to have broken the law. The investigation takes a comprehensive look at the agency as a whole, and if necessary, the action brought is a civil lawsuit, not a criminal prosecution against the agency and not against any particular officer.

As Attorney General, I recognize that our office must also be accountable to the public as any other law enforcement agency is in the State. For this reason, subsection 9 requires that the OAG participate in any federal pattern-or-practice investigation of the AG's office. This is important because the federal law that gives the USDOJ pattern-or-practice authority does not require agencies to cooperate with the investigation. This bill would legally require the OAG to cooperate with any federal investigation of our agency and our peace officers.

Section 1, subsection 3 allows the court to enforce the terms of this agreement between the Attorney General and an agency to remedy and identify pattern-or-practice that violates the U.S. or Nevada Constitution or any applicable laws.

Section 1, subsection 7 requires at the conclusion of a pattern-or-practice investigation, the Attorney General must publically disclose one of four conclusions: Either an agency does not have an identified pattern-or-practice of unlawful policing; or an unlawful pattern-or-practice could not be factually substantiated by the evidence in the investigation; that the agency does have an identified pattern-or-practice of unlawful policing, and it has agreed to rectify that pattern-or-practice in ways laid out in the report, and

that the agency did not agree to rectify the pattern-or-practice and the Attorney General has decided to file a civil action.

These public reports are important for accountability and transparency of taxpayer-funded agencies, and they will help to augment, restore and create public trust in law enforcement.

Section 1, subsection 6 addresses the confidentiality of the investigation itself. While a final report will be made public, the details of the investigation will remain confidential. Some of the information gathered in a pattern-or-practice investigation will be highly sensitive and could compromise active criminal investigations. For example, investigative material could identify the personal details of not just individual officers but also of civilians who have interacted with the police. A lack of confidentiality would undoubtedly lead to a chilling effect on people willing to come forward to disclose information about unlawful policing. That said, confidentiality can be waived by the disclosing party or by the court.

That concludes my presentation on the provisions of A.B. 58. For this bill to pass again, it is important to note that the pattern-or-practice authority this bill grants will not solve all of our problems. This bill is just one tool in the toolbox to help build a better justice system in Nevada, and it is a tool that works.

As a law enforcement leader, I have had the pleasure of working with other law enforcement leaders across our State who are ready and willing to take up the mantle of reform. You heard from many of them during the justice and injustice forum that my office held in the immediate aftermath of George Floyd's death. It was refreshing and reassuring that law enforcement stated with one voice that Mr. Floyd's killing was unjust and that we needed to recommit ourselves to adopting tools to augment, restore and create trust between law enforcement and the communities we serve.

This bill is a direct result of that recommitment. We are not afraid of high standards of excellence—we are not afraid of public scrutiny of our methods or actions—and we are not afraid of examining those patterns-or-practices of our agencies that can and should be better to protect and serve all communities in Nevada.

SENATOR HARRIS:
Where do you see the level of activity rising to your office's intervention? Do you hear use-of-force complaints? When do you estimate that it is time that you jump in and look at whether there is a pattern-or-practice? I would imagine that is a thin line to walk.

ATTORNEY GENERAL FORD:
It is unfortunately going to be case specific. It is entirely dependent upon the volume and types of complaints we receive. If the complaints reiterate some comparable and common themes, then we can glean from those complaints. One complaint may not be enough, but in the context of the law sometimes one complaint is more than enough. We will have to look at the facts and circumstances that arise during the complaint process and make that determination individually. That is why it is a discretionary act that the OAG would be able to utilize in effectuating this bill.

SENATOR HARRIS:
That is a great answer. These areas are nuanced, and it is appropriate that the analysis be nuanced as well.

SENATOR OHRENSCHALL:
Let us say you see a pattern-or-practice of a law enforcement agency not requiring officers to keep the body cameras on or not archiving that body camera footage, and when a constituent or citizen complains about something that may have happened, the footage is not available. If A.B. 58 passes, and you file a civil action against that agency, and it still does not remedy it, do you think that you would be able to ask for financial penalties against that agency or something to try to make sure that they do comply?

ATTORNEY GENERAL FORD:
The short answer is no. Monetary penalties will not be afforded under the bill. It is purely injunctive relief that can be awarded by a court. I would highly doubt a law enforcement agency would disregard a court order. If the court order enjoins someone from turning on body cameras or requires an entity to retain footage and the agency violates that, there are judicial remedies associated with violating court orders that could certainly be imposed under those circumstances. But no, we do not seek monetary damages under this particular pattern-or-practice authority bill.

SENATOR OHRENSCHALL:
I recall that we have body cameras thanks to your legislation. Thank you for your work in the Senate.

SENATOR HANSEN:
Several agencies in Nevada that have police powers are also represented by your own deputy attorneys general (DAG). I am wondering if those types of police agencies that have police powers as their main focus, when those cases occur, and you have a DAG that represents that agency, are you guys going to recuse yourselves? How does that work?

JESSICA ADAIR (Chief of Staff, Office of the Attorney General):
When you initially asked that question, I thought you were referring to local agencies, but when you listed the State agencies, I completely understand where you are going. You are correct. However, in our Office, we frequently deal with conflicts of interest between State agencies and with the OAG. We have protocols in place to ensure that those who are representing an agency never have access to information or are even supervised by the same people who are conducting other activities against that agency.

Here is an example. We have jurisdiction to criminally prosecute State employees for crimes that occur within the scope of their work, but we also then represent those agencies. The DAGs who represent the agencies are supervised by First Assistant Kyle George, and the prosecutors and investigators who were involved in the criminal activity are supervised by Second Assistant Christine Jones Brady. We also set up internal protocols, so they will not even be able to access files that relate to those matters. Those conflicts of interest are overseen by a separate, independent person, our General Counsel, Leslie Nino Piro.

You are absolutely correct that those conflicts of interest could arise, but we do have internal protocols to address them.

SENATOR HANSEN:
I am a big proponent of Brittany Miller's idea of having an Inspector General position. That would help eliminate these sorts of situations. I know you guys are not big on that, but down the road, I think that is something the State should look into for these exact kinds of situations. From an outsider looking in, I know you have confidence that you can separate everything internally.

Anybody else may look at it and say, "What, the Office of the Attorney General is defending ... one agency and the other part of the Attorney General's Office is potentially filing a civil action against the other."

I would suggest that we get an Inspector General position in Nevada, so we can have an outside agency that people would feel comfortable contacting when they have issues involving a government agency that currently has a deputy attorney general defending them.

MS. ADAIR:
Thank you, Senator. I would also add that in a case that we cannot resolve a conflict of interest, we do have the statutory authority to engage outside counsel, so they are completely separate from our Office entirely. I wanted to supplement the record with that in case it ever comes up.

SENATOR PICKARD:
After reading A.B. 58, and particularly after your presentation, I must say that this is the most reasonable approach to police reform I have seen.

I have one question that has to do with section 1, subsection 5 in dealing with subpoenas. Under paragraph (c), if the witness fails to cooperate, you can seek an order compelling that witness to appear and to testify. My concern has to do with the Fifth Amendment rights. My experience has been the individual has the Fifth Amendment right and an agency does not. Where do we draw the line for purposes of compelling a witness when that witness may ultimately end up being part of the agency with responsibilities and a certain level of authority? Since this is a civil suit, the witness would be designated as a Rule 30(b)(6) witness, and the agency could potentially open themselves up to personal liability even though the agency does not have a Fifth Amendment protection. Can you explain how that would work?

ATTORNEY GENERAL FORD:
I will begin by reiterating the point that you made. Under no circumstance does this bill displace long-standing constitutional considerations against self-incrimination such as the Fifth Amendment in the Garrity case.

I mentioned that in my opening testimony. To the extent there are circumstances that arise where the Fifth Amendment needs be to asserted, we

need to be sure it is going to take precedent over any request that might contravene it.

KYLE GEORGE (First Assistant Attorney General, Office of the Attorney General):
Senator Pickard, as you indicated, the Fifth Amendment is an individual right. It does not extend to agencies, so any individual compelled to testify on behalf of the agency can always assert it if, at any point, a question posed to the individual would implicate the individual's own Fifth Amendment rights.

For example, if I am asked to testify on behalf of the OAG and asked a question that could get me in trouble, I can turn around and say on that specific question, "I assert the Fifth Amendment." It is important to note, however, that the Fifth Amendment does not extend to documents held in the possession of the agency.

SENATOR PICKARD:
You hit the nail on the head in that you can always get the documents. You can subpoena the public records and documents, and there probably would be in camera exception for any ongoing investigations.

My concern is dealing with small agencies where there may only be one appropriate 30(b)(6) witness. There may be concerns that the witness might get roped in because the witness may be the supervising authority within the agency, and may get roped into both a criminal and a subsequent civil action. The witness is going to claim the right under the Fifth Amendment, and now we lose the ability to obtain a 30(b)(6) witness. The court will want to compel that 30(b)(6) witness to provide testimony, but in small agencies this may preclude that. So how do you anticipate working in that kind of environment?

ATTORNEY GENERAL FORD:
You highlight an example that poses a difficulty. I suspect investigations into large agencies will not be without particular difficulties. The one that you have outlined would be one that would require our Office to figure out strategies to address the issues and to try to get information in a way that can still allow us to make a determination as to whether there has been a pattern-or-practice that unconstitutionally infringes upon the residents of a particular jurisdiction.

This is not to say that this is going to be easy, Senator Pickard. There are small agencies that may only have four or five people, and that can make it difficult. But I do not suspect that it will be impossible. We would look elsewhere to figure out ways in which to accommodate those issues, but still address our concerns.

SENATOR PICKARD:
I appreciate that. I just want to make sure we are solid and such an individual would retain his or her Fifth Amendment rights. I cannot imagine a court would agree with the compulsion of testimony in spite of it, but wanted to make sure I was clear on that. Assembly Bill 58 is well-drafted and appropriate.

SENATOR CANNIZZARO:
I want to commend you for finding the right balance from a policy perspective yet addressing some of the concerns which exist in a way that will bring clarity.

You mentioned a lot of this came as a result of your justice and injustice town hall meetings. It is the right way to go about crafting smart policy which will allow your Office and the public to have faith in what you are doing, and the folks who work with you.

ATTORNEY GENERAL FORD:
Thank you for participating in the justice and injustice forums. Some of this conversation came from those forums and we could tangibly enact laws that were responsive to what the community was demanding.

I have a staff of 400 folks who are all my bosses. They have been able to convene a working group to ensure we get this done. I have a vision of what justice looks like, and I have communicated it to my staff. I am proud of the work to be able to get law enforcement, public defenders, district attorneys and everyone on the same page to work this out.

CHAIR SCHEIBLE:
We are all thankful to have you and your staff here working hard to make justice more accessible in Nevada. Assembly Bill 58 is a good step in that direction and an important part.

You did a great job explaining how it could be an agency or a community member who brings the possible pattern-or-practice violation to your attention,

and then the OAG does the initial review of whether an investigation is warranted. If, in that initial review, it is determined that there is not enough evidence for an investigation, what happens to that initial complaint or report?

MS. ADAIR:
It will be treated like other complaints within the division of Constituent Services Unit. That division receives tens of thousands of complaints every year. We anticipate this will add to that workload.

Our process when we receive a complaint is to have it processed into our system database to make it readily accessible to Office staff. We then use that data to find patterns, for lack of a better word. As the complaint is processed, reviewed and researched, and if investigated by our criminal investigators, the applicant(s) and defendant(s) will receive periodic status. Anyone can call our Office at any time to follow up on the status. An acknowledgement letter is sent out to all parties to the complaint. If our Office decides to not move forward, another letter is sent which will confirm the complaint has been closed. Such a letter includes any resources that are related to that complaint.

For example, if someone were to make this type of complaint, we also might refer them to the Citizen Review Board of that particular agency, which is our process. I do not imagine it changing in any way other than to make it custom to this type of investigation. But people will receive acknowledgement of receipt, a closeout letter or if it is investigated, the parties will be contacted by a member of our Office to walk through that investigation.

CHAIR SCHEIBLE:
That is a great answer. It is a robust system. Can people make anonymous complaints?

MS. ADAIR:
Unfortunately, no. The reason for this is we will not have the ability to verify anything in the complaint. We would not be able to contact the applicant to ask, "Tell us more about this." We do get anonymous complaints, which makes it difficult for our Office to do our job.

Should A.B. 58 pass, we can work with other entities in the community that will allow us to receive complaints if people do not want to be associated with those complaints. The Citizen Review Board would be a good example as well

as other community organizations. We are leaving the door open for future opportunities.

CHAIR SCHEIBLE:
That makes perfect sense. If an agency does agree to the plan at the beginning, and you do not have to file a civil suit, and the agency says, "Our plan is to include .... We are going to increase our body camera usage by 25 percent," but then they do not do that. I was not clear on whether section 1, subsection 3 gives the court the authority to enforce that agreement, or if you go back to step two where you proceed as if they had never agreed to the program for the remedy in the first place.

MS. ADAIR:
Yes. That is in section 1, subsection 3, paragraph (b). When we were talking about this with our stakeholders, we called this the "With All Deliberate Speed Problem." We want to ensure there is a statutory mechanism to make that agreement enforceable with the court.

If an agency engages in this collaborative process with our Office, it is in a good faith effort. That is why we included the 60-day marker in statute—the agency would have to make good faith efforts within that 60 days. But just in case, we added that specific provision.

HOLLY WELBORN (American Civil Liberties Union of Nevada):
This bill is incredibly responsive to the community outcry for intervention by the Attorney General in a lot of issues that were taking place last summer.

We received many of the same complaints that would typically go through a pattern-or-practice office for review. I have had conversations with the OAG, but there was not a path to file those types of complaints—or a path for the OAG to look into some of these matters. Now we clearly have that tool.

As an organization, we speak at times about passing laws that have no teeth, no real accountability or oversight of law enforcement. These are feel-good measures, but this measure before us today is quite different and does provide tools to dive into systemic issues that are occurring in Nevada's police departments. For these reasons, we support A.B. 58.

REVEREND MICHAEL WILLOUGHBY (Battle Born Progress):
We are in support of A.B. 58. We would like to reiterate the widespread support for this bill. It is imperative that we take this important first step on the road to making sure our communities are safer.

This data-driven approach is important and will pave the way to future reforms. It is a great first step and a great foundation for Nevada, and we could not be happier to be part of the support for this bill.

JIM HOFFMAN (Nevada Attorneys for Criminal Justice):
Nevada Attorneys for Criminal Justice supports A.B. 58. I echo the comments of others testifying in support. We believe this bill is a good step forward for Nevada.

CHRISTINE SAUNDERS (Progressive Leadership Alliance Nevada):
A plan where we constructively transform Nevada's criminal justice system by bringing people together who have direct experience with mass incarceration, will help increase police accountability in Nevada.

Moments following police violence, we often hear the phrase, "It was just a few bad apples." However, these problems continue to happen over and over. Pattern-or-practice investigations are an important tool to address systemic racism and discrimination in law enforcement agencies. We urge your support of A.B. 58.

TROYCE KRUMME (Las Vegas Metro Police Managers & Supervisors Association):
Thank you for asking about our input on this bill. You have listened to our concerns and allowed those concerns to be reflected in the negotiations that produced the bill.

Assembly Bill 58 is the result of many hours of hard work. We believe it hits the mark in improving accountability and increasing public trust in our great police professionals within our State. We would encourage this Committee to support this bill.

KENDRA BERTSCHY (Washoe County Public Defender's Office; Clark County Public Defender's Office):
This bill reflects a lot of hard work and negotiations. We are proud of what the bill has become to help ensure our community members feel safe, feel their

voices are being heard and have an opportunity to go to someone to address their complaints, if any arise. We support A.B. 58.

JENNIFER NOBLE (Nevada District Attorneys Association):
We support A.B. 58 for the record.

ALINA SHELL (Nevada Open Government Coalition):
I wear two hats. I am a civil rights attorney in Las Vegas and, I have been involved in civil rights litigation against law enforcement agencies in Clark and Nye County. I am also a member of the Nevada Open Government Coalition (NOGC), a nonpartisan organization that supports governmental transparency.

I find myself in a position of testifying against A.B. 58. As a civil rights attorney and as someone who is in support of open government, I support the principle of this bill—the idea of increasing transparency and accountability for law enforcement. However, the NOGC remains concerned that the confidentiality provisions in the current version of the bill needs some adjustments.

The NOGC submitted a proposed amendment to A.B. 58 to the Assembly Committee on Judiciary. We also provided a copy to the OAG and his staff. I just want to quickly address what we are proposing in that amendment.

We are proposing amending section 1, subsection 6, paragraph (b) regarding when records can be made public. Under subsection 6, paragraph (b) as currently written says investigative records are confidential unless, "Disclosure is authorized by the district court ...."

In our proposed amendment, the NOGC proposed tethering that requirement by putting a standard against it—the standard that is set forth by the Nevada Public Records Act (NPRA).

I want to bring this Committee's attention to our other proposed amendment which relates to section 1, subsection 6, paragraph (c), and is to clarify the confidentiality provision cannot be interpreted to mean that a record, which would otherwise become public, somehow becomes confidential simply because it becomes a part of the Attorney General's investigation. We proposed this during the March 16 hearing before the Assembly Committee on Judiciary.

I encourage the Committee to consider our proposed amendments when looking at A.B. 58.

SENATOR PICKARD:
The supportive testimony for this bill reminded me that we are looking at a pattern-or-practice element that existed in the past. How far back would that go?

For example, the Las Vegas Metropolitan Police Department (LVMPD) had been struggling a decade ago and was subjected to an investigation by the USDOJ. They went through a number of iterations of improvements, and went from one of the worst to one of the best.

How far back will that scope go, or is it assumed to be limited to the current practice that is under investigation?

ATTORNEY GENERAL FORD:
Senator Pickard, this will be case specific. If we get a complaint after the effective date of the bill, which alleges something happened ten years ago but we have not seen anything since then, it is not likely that the complaint initiates a pattern-or-practice investigation, especially from ten years ago. The LVMPD underwent some internal changes that have addressed those issues. If that complaint was related to something more recent, then maybe it would warrant an initial investigation. It is case specific. I do not know if it is fair to put a timeframe on it because if it is still happening, we want to address it.

SENATOR PICKARD:
I completely agree. But, if someone alleges something today, and the OAG were to look back 15 years, concluding that behavior has since been rectified—we are not looking at history that might go back ad infinitum, but we are talking about a recent pattern-or-practice.

MS. ADAIR:
To your question, Senator Pickard, the key point there is the injunctive relief. If we are seeking injunctive relief, we can only seek things that can change. To Attorney General Ford's correct point, something could have been ongoing and as long as it is currently ongoing, that injunctive relief would be appropriate.

Regarding the testimony in opposition from the NOGC, I find myself similarly in a strange position being in opposition of groups that advocate for transparency because all of us at the OAG's office feel similar.

The proposed amendment was brought to us the day before the Assembly Committee Judiciary hearing, and after diligent review, it did not get support from our other stakeholders. This was critical since we spent so much time working in good faith negotiations with our stakeholders to come to a consensus. If they could not support the amendment, we, in good faith, could not adopt it.

The goal of all our negotiations with our stakeholders was to increase transparency and accountability. We do not want to do anything that would further grow distrust in the community. There are significant logistical problems of that proposed amendment.

CHAIR SCHEIBLE:
In case it was not clear to members of the Committee, that proposed amendment is not available on the legislative website for this meeting, but if you go back to the Assembly meeting, you will see similar amendments. That is where you can find the precise language.

MS. ADAIR:
The caller mentioned the need for a specific statutory legal standard regarding disclosure. There already is a legal standard for the disclosure of public records and the Nevada Supreme Court spoke about that in *Donrey of Nevada, Inc. v. Bradshaw,* 106 Nev. 63, 798 P.2d 144 (1990). It adopted a balancing test to determine whether records should be kept confidential. It balances an agency's public policy interests in withholding the document against the general policy in favor of open government. The court acknowledged that following public policy concerns may justify an agency's refusal to disclose. These factors are important for this type of information; which is pending or anticipated criminal proceedings, confidential sources or investigative methods and techniques, or the possibility of denying someone a fair trial and jeopardy to law enforcement personnel. This caselaw should govern whether a record in this specific instance is disclosed.

I will walk through a hypothetical situation of a pattern-or-practice investigation and how the confidentiality provision would play out. Let us say we received

enough information to initiate an investigation of an agency for a pattern-or-practice of abusing chokeholds. As you know, the Legislature has banned chokeholds. Thus, using a chokehold is an example of unlawful policing in this State.

To conduct such an investigation, we would collect the following information: the agency's policy manual, training materials, statements from civilians who have been subjected to chokeholds or from people who witnessed the incident(s), statements from officers, including those who were charged with training and those who have used chokeholds on civilians, body camera footage of chokeholds being used, emails between agency employees discussing chokeholds, disciplinary records of officers who have used chokeholds, and constituent complaints to that agency and records indicating whether that agency responded.

Almost every single one of these records would be under the custody of that agency and subject to the NPRA. I do not believe it is necessary to statutorily include it in A.B. 58 because there is nothing in the bill to indicate the agency that holds those records would not have to follow the NPRA.

In this example, all of the agency's documents, including body camera footage, would already be subject to the NPRA. The key distinction in this scenario is that the agency itself, not the OAG, would be in the best position to respond to a public records request and determine if there was any confidentiality privilege that should apply.

If, in such an investigation, we are going to be looking at any body camera footage to see if a chokehold was used, but that same body camera footage might also be used as relevant evidence in another active criminal investigation. It would still be up to that agency to claim any confidentiality privilege.

At the OAG, we will not know all of the criminal investigations that are currently occurring at that agency and the status of whether the investigations are closed.

These same documents might also be involved in a Section 1983 civil litigation action by a plaintiff and the agency. The OAG is not the appropriate office to determine if those documents would be privileged under litigation privilege.

This is why we thought it is most appropriate for the NPRA and those public records requests to be made at the agency, and not the OAG. It certainly would not encourage a collaborative process of reform between the agency and the OAG if we were battling over what should or should not be disclosed pursuant to a public records request.

In this hypothetical situation, the only records that would not already exist at the agency would be the witness and officer statements. While we agree there is a strong public interest in the transparency of these investigations, we have to weigh in other important factors, including the quality of our investigations. We are extremely concerned about the chilling effect that this would have on witnesses and victims of unlawful policing.

If the Committee members have questions about this provision, I am happy to answer. I know that we did not go into detail within the presentation, but it will be the product of significant negotiations between the custodians of these records and groups that are interested in government transparency. This is the compromise that our office came up with.

ATTORNEY GENERAL FORD:
The proposed amendment was presented to us right before the bill passed in the Assembly, and it passed unanimously. These considerations are simply unfounded at this juncture, and we respectfully request that you pass A.B. 58 as presented to you.

CHAIR SCHEIBLE:
Since we have opened up a new line of discussion, I am going to allow Committee members to ask questions now instead of having a second meeting on the bill.

SENATOR HARRIS:
Ms. Adair or Attorney General Ford, I am hoping one of you would be willing to put on the record that it is not the intent of the OAG to allow police departments to consider documents confidential that otherwise would not be, simply because they are part of an ongoing pattern-or-practice investigation.

ATTORNEY GENERAL FORD:
So moved.

MS. ADAIR:
Yes, that is our intent. It was also the intent of the departments we worked with on this bill. Nobody was trying to use this as a shield. What was important to those agencies is that they have the ability to determine what records are produced, and the ability to redact information which might be privileged. That is their legal privilege, not the OAG. That is the distinction there. It is not our intent or that of any law enforcement agencies we worked with on this bill to use this as a large shield over the NPRA.

CHAIR SCHEIBLE:
Would it also not prohibit the OAG from sharing some of this information if it wanted to—if you are working with another agency in the investigation or if there was some other reason? If something had already been published, it would still give the OAG the discretion within the NPRA—it would not require any additional disclosures. Am I reading that correctly?

MS. ADAIR:
It does not give the OAG the ability to unilaterally disclose this information. It does, however, give the entity the ability to disclose. If a public record is already in the public sphere, then we do not have to worry about this.

If we are working with an agency and we publish a report together about a pattern-or-practice investigation, and what we are going to do to fix it, that agency would probably include some of that information in the final report.

There is also a huge exception if there is a civil action and we are filing a lawsuit against the agency where we have to include all sorts of exhibits to establish that pattern-or-practice. All of that information is going to be part of the court record. In that way, the OAG could disclose, but we would not have the unilateral ability to disclose.

In the amendment proposed by the NOGC, our agency and any other State agency, including agencies in any other state, would have the ability to disclose this information.

CHAIR SCHEIBLE:
This concludes the hearing on A.B. 58. We are adjourned at 2:23 p.m.

RESPECTFULLY SUBMITTED:

Pam King,
Committee Secretary

APPROVED BY:

Senator Melanie Scheible, Chair

DATE:

EXHIBIT SUMMARY				
Bill	**Exhibit Letter**	**Begins on Page**	**Witness / Entity**	**Description**
	A	1		Agenda
A.B. 30	B	1	Patrick Guinan	Work Session Document
A.B. 33	C	1	Patrick Guinan	Work Session Document
A.B. 43	D	1	Patrick Guinan	Work Session Document
A.B. 64	E	1	Patrick Guinan	Work Session Document
A.B. 27	F	1	Patrick Guinan	Work Session Document
A.B. 60	G	1	Patrick Guinan	Work Session Document
A.B. 58	H	1	Attorney General Aaron Ford	Pattern-or-Practice Presentation