

Date of Hearing: April 21, 2021

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Lorena Gonzalez, Chair
AB 48 (Lorena Gonzalez) – As Amended March 16, 2021

Policy Committee: Public Safety

Vote: 6 - 2

Urgency: No

State Mandated Local Program: Yes

Reimbursable: Yes

SUMMARY:

This bill prohibits, except in specific circumstances, the use of kinetic energy projectiles (KEP) or chemical agents by any law enforcement agency to disperse an assembly, protest or demonstration. Specifically, this bill:

- 1) Requires, beginning January 1, 2023, any law enforcement agency that uses KEP or chemical agents to report on a monthly basis, its use to the Department of Justice (DOJ) when the use of KEP results in a report of injury to any person.
- 2) Requires law enforcement agencies to report to the DOJ specific use of force incidents monthly instead of annually.
- 3) Authorizes the use of KEP and chemical agents for purposes of crowd control only where the officer has received training on the proper use of KEP and chemical agents and where the use of KEP or chemical agents is objectively reasonable to defend against a threat to life or serious bodily injury to any individual, including any peace officer, and in compliance with the following requirements:
 - a) De-escalation techniques or other alternatives to force have been attempted, when objectively reasonable, and have failed.
 - b) Repeated, audible announcements are made announcing the intent to use KEPs and chemical agents and the type to be used. The announcements shall be made from various locations, if necessary, and delivered in multiple languages, if appropriate.
 - c) Persons are given an objectively reasonable opportunity to disperse and leave the scene.
 - d) An objectively reasonable effort has been made to identify persons engaged in violent acts and persons who are not, and KEP or chemical agents are only targeted toward individuals engaged in violent acts.
 - e) Kinetic energy projectiles and chemical agents are used only with the frequency, intensity and in a manner that is proportional to the threat and objectively reasonable.

- f) An objectively reasonable effort has been made to extract individuals in distress.
- g) Medical assistance is promptly procured or provided for injured persons.
- 4) Prohibits use of KEP and chemical agents for violation of an imposed curfew, a verbal threat or noncompliance with a law enforcement directive.
- 5) Provides the restrictions on use of KEP and chemical agents listed in this bill do not apply to a correctional facility operated by California Department of Corrections and Rehabilitation.

FISCAL EFFECT:

- 1) Costs (General Fund (GF)) possibly in the low hundreds of thousands of dollars annually in additional staff and resources for state enforcement agencies to report use of force information and information about the use of KEP and chemical agents to the DOJ on a monthly basis. State and local law enforcement is currently required to report use of force incidents to DOJ on an annual basis. Local costs may be subject to reimbursement. GF costs will depend on whether the duties imposed by this bill constitute a reimbursable state mandate, as determined by the Commission on State Mandates.
- 2) Possible one-time costs (GF) in the tens of thousands of dollars to lower hundreds of thousands of dollars for all state law enforcement agencies to update their policies and procedures to comply with the requirements of this bill. Some agencies employ a contract legal service to ensure policies reflect recent changes in statutory and case law. Actual costs to each agency would vary depending on how aligned their current policies are with this bill.
- 3) One-time costs (GF/special funds) of \$62,000 to the DOJ for an external consultant to upgrade the California Justice Statistics Center to collect and store data reported by law enforcement agencies related to use of KEP and chemical agents.
- 4) Annual costs (GF) of approximately \$140,000 to the California Highway Patrol (CHP) in additional staff to comply with the newly proposed reporting requirements. CHP also estimates minor costs to amend policies, procedures and internal forms to reflect changes in the use of force reporting requirements.

COMMENTS:

- 1) **Purpose.** According to the author:

No one who is simply exercising their right to protest should be scared to face serious injury or death because police officers are indiscriminately firing rubber bullets or harmful chemical agents. AB 48 will set clear standards on when and how these weapons are used by law enforcement in order to increase the safety of Californians exercising their right to assemble and protest.

- 2) **Use of Force Generally.** Under existing California law, a peace officer may use reasonable force to effect an arrest if it is to prevent escape or to overcome resistance. Penal Code section 196 allows a police officer to use deadly force when it is to overcome actual resistance to the execution of some legal process or discharge of some legal duty. Deadly force is also authorized if a person charged with a felony is fleeing or resisting arrest. Reasonable force is a question for the trier of fact. In *Graham v. Connor* (1989) 490 U.S. 386, the U.S. Supreme Court defined “reasonable force” for purposes of determining whether a person’s Fourth Amendment rights were violated. Reasonableness is determined from the perspective of a “reasonable officer” at the scene and “not 20/20 hindsight.”

The courts balance “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” The *Graham* court laid out four factors for consideration: (1) the need for force; (2) the relationship between that need and the amount of force used; (3) the extent of injury inflicted; and (4) whether the force was applied was in good faith or just intended to inflict injury. The *Graham* standard focuses on the “totality of the circumstances” to determine if the force was reasonable. The *Graham* standard is applied in civil and administrative actions against police officers for excessive use of force. AB 392 (Weber), Chapter 170, Statutes of 2019, provided that an officer may use deadly force in order to prevent an imminent threat of death or serious bodily injury to the officer or to another person, or to apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended.

- 3) **Injuries Caused by KEPs and Chemical Agents.** KEPs and chemical agents can cause serious injuries and even death. According to data published by Physicians for Human Rights, rubber bullets can travel at the same velocity as live ammunition and have the capacity to break bones and cause skull fractures. KEPs in general do not have a predictable trajectory, given their size and shape and, when fired into a crowd, could inadvertently hit someone other than the person intended. Chemical agents such as tear gas and pepper spray can also cause lasting harm to a person’s eyes and lungs. This is particularly concerning during the current COVID-19 pandemic. Use of KEPs and chemical weapons to disperse crowds significantly increased last summer during nationwide protests over the treatment of Black Americans by the police. In several cases, use of KEPs and tear gas resulted in serious, even fatal, injuries to several people simply for failing to disperse when requested by law enforcement and where there was no evidence of any criminal activity. This included several members of the press who were injured while trying to report on the protests. This bill creates standards for use of KEPs and chemical agents that are consistent with other use of force requirements.
- 4) **Arguments in Support.** According to SEIU California:

[AB 48] is in response to the recent use of kinetic projectiles, chemical agents, and tear gas to control crowds at racial justice protests, which resulted in several widely reported instances of serious injury. What made these occurrences so shocking was both that those engaged in the protests were exercising their legal rights,

but that many Americans had no idea how truly dangerous these ‘less lethal’ crowd control forms were. The freedom to peaceably assemble is a right not only guaranteed under the Constitution, but a right held dear by organized labor; such right cannot be effectively exercised if it is under looming threat of great bodily injury, albeit ‘less lethal.’

5) **Arguments in Opposition.** According to the California State Sheriffs Association:

Restricting the use of less-lethal options limits the tools that are at an officer’s disposal to protect public safety. Different circumstances may call for different responses and more or less force may be required. However, by restricting when an officer may use those tools, their response to a particular situation may end up being guided by choices about practices that may be acceptable or unacceptable to some instead of what measure is most appropriate in the context of the event.

6) **Prior Legislation.**

- a) AB 66 (Gonzalez), of the 2019-2020 Legislative Session, was nearly identical to this bill, except that it would have allowed the use of rubber bullets and tear gas in situations where it was necessary to protect against all injuries, rather than just situations necessary to protect against a threat to life or serious bodily injury. AB 66 was never heard on the Senate floor.
- b) AB 392 (Weber), Chapter 170, Statutes of 2019, revises the standards for use of force by police officers.
- c) SB 230 (Caballero), Chapter 285, Statutes of 2019, requires law enforcement agencies to maintain a policy that provides guidelines on the use of force, utilizing de-escalation techniques and other alternatives to use of force, specific guidelines for the application of deadly force, and factors for evaluating and reviewing all use of force incidents.
- d) AB 1237 (Leno), of the 2005-2006 Legislative Session, would have required every law enforcement agency to report to the DOJ, specified information about the use of tasers by each agency. AB 1237 failed passage on the Assembly Floor.

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