



March 15th, 2021

House Judiciary Subcommittee on Civil Law
Oregon State Legislature
900 Court St. NE
Salem, OR 97301

RE: Testimony in Support of HB 2204¹: Qualified Immunity

Chair Power, Vice-Chair Wallan, and members of the committee,

My name is Kelly Simon (she/her) and I am here as the interim legal director for the American Civil Liberties Union of Oregon (ACLU of Oregon). We are a nonpartisan, nonprofit organization dedicated to the preservation and enhancement of civil liberties and civil rights, with more than 28,415 members statewide. We are here today in support of HB 2204 with recommendations for necessary changes.

When the Supreme Court read the doctrine of qualified immunity into law in the 1960's it was intended to be a modest exception for those government actors who acted in good faith and reasonably believed their conduct was legal. Since then, the doctrine has expanded to provide broad immunity for law enforcement officers' acts of violence and discrimination. Similarly, absolute immunity for prosecutors has left no recourse for those facing unconstitutional prosecutorial abuse. Both of these immunities have created an imbalance of power that allow law enforcement abuses to go unchecked.

We applaud Representative Wilde's effort to give the public an accountability tool for holding our government officers accountable for misconduct, and we would like to continue engaging about how we strengthen and clarify that intent. Police officers and prosecutors often escape liability because of qualified immunity, a legal doctrine that prevents the community from holding police responsible when they violate laws, policies, and community trust. Police officers and prosecutors are government officials who should be held accountable to the people they serve.

In my 5 years at the ACLU of Oregon, we have filed seven cases under the Oregon Tort Claims Act to challenge police abuse of Oregonians, including one in which I was the plaintiff. In seeking justice for our clients who have had their noses broken on the ground, direct pepper spray shots to the face while already detained, and injuries from grenade-like weapons, we have faced significant legal barriers because of the lack of a clear accountability tool. HB 2204 is a good start to build an effective tool, but it doesn't go far enough to begin to restore the balance of public's and government's interests.

¹ <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/HB2204/Introduced>



First, HB 2204 should expand what misconduct will be subject to civil actions. Currently, there is no statute that clearly offers Oregonians the ability to go to court when their state constitutional rights are violated. And HB 2204 does not cure that. If we want to remove the barriers of immunity, we first have to offer a cause of action. While HB 2204's cause of action against police for misconduct (which includes excessive force) is a helpful step, misconduct is currently too narrowly defined. There is still no recourse for unreasonable seizures of property, for cruel and unusual punishment, for prosecutorial misconduct, or for treating people swept into the criminal system with "unnecessary rigor" (as prohibited by Article I, section 13). To address this, misconduct could be defined to include all constitutional rights violations or the OTCA could be separately amended to allow for causes of action for constitutional harms.

Federally, 42 U.S.C. 1983 allows for civil actions for federal constitutional violations. This is the law under which the United States Supreme Court has allowed police officers to hide behind qualified immunity and prosecutors to hide behind absolute immunity. Last year, Colorado passed Senate Bill 20-217², which created a state law parallel to 1983 and provided a new venue for discrimination and brutality claims under their state constitution in state court, by creating a damages action and providing for attorneys' fees. The law also made expressly clear that qualified immunity was not available to police officers. This is a clean and straightforward path that Oregon could follow with express provision for actions against members of law enforcement units, police and prosecutors included, who violate Oregon's constitution and clear denials of immunities for the same.

Additionally, the current slate of immunities that the OTCA affords too often swallow public attempts for vindicating constitutional rights. Too often, when we see blatant constitutional violations at protests, local bodies raise civil commotion immunities in their defense. In my case, the public body relied on worker's compensation immunity because I was acting as an ACLU of Oregon legal observer. *Even if* there is a riot or civil commotion, law enforcement should not be granted free rein to violate the rights of Oregonians. That is the imbalance that our current law allows. The Constitution is the floor, our foundational values, and there should not be immunity for violating Oregon's core values. Neither should government officers be afraid of being held accountable to these minimum standards.

Qualified immunity is not expressly *unavailable* in HB 2204, but it should be. Federal courts read the doctrine of qualified immunity into law, and to prevent that from happening in Oregon, we should make it expressly unavailable.

² Colorado SB 20-217, Section 3, 2020:
http://leg.colorado.gov/sites/default/files/2020a_217_signed.pdf



Finally, HB 2204 should clarify to whom it applies. The ACLU of Oregon supports the removal of immunities for all law enforcement, including but not limited to police, corrections officers *and* prosecutors. Currently, HB 2204 adopts the definition of “public safety officer” from ORS 181A.355. That same statute separately defines “law enforcement unit” to include a district attorney’s office. As currently drafted, investigators in DA offices would be subject to this accountability mechanism, but not the attorneys with whom those investigators work. We also have seen police cooperating directly with deputy district attorneys to deny constitutional rights to Oregonians, and see no justifiable distinction between the officer and district attorney in that situation.

Removing the shield of qualified immunity is a bipartisan issue throughout the country. We hope that the Oregon legislature will unify around this common-sense reform to restore balance and public trust.