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HB 353

February 10, 2021

TO: Members of the House Judiciary Committee
FROM: Natasha Mehu, Director of Government Relations
RE: HOUSE BILL 353 - Civil Actions – Violation of Rights - Governmental Liability
POSITION: OPPOSE

Chair Clippinger, Vice Chair Atterbeary, and Members of the Committee, please be advised that the Baltimore City Administration (BCA) **opposes** House Bill (HB) 353.

House Bill 353 removes certain law enforcement officers from the immunity provisions of the LGTCA and the MTCA and provides that they are civilly liable for all damages awarded to a plaintiff for actions against the law enforcement officer who, under color of law, deprives an individual of or infringes on an individual's rights secured by the Maryland Declaration of Rights or the Maryland Constitution. The bill allows for an award of attorney's fees and costs to a prevailing plaintiff in a civil action or in an action for injunctive relief, if the plaintiff's suit is a significant factor in the State ceasing an action. If a claim is frivolous the Court may award attorney's fees to the prevailing defendant. Finally, the bill provides that the law enforcement officer's employer must indemnify the officer if a court determines that the officer acted in good faith, with a reasonable belief that his actions were lawful. If a court finds that the officer's actions were not in good faith and with a reasonable belief that they were lawful, the officer is personally liable for a certain amount and the employer is liable for the remainder. Any amount that is uncollectable from the officer is the employer's responsibility. The employer is not responsible to indemnify the officer if the officer is convicted of a crime for the conduct that gave rise to the claim.

This bill would be expected to prompt an increase of hundreds of new cases. The cost of trying each case varies, but would be, minimally, in the tens of thousands of dollars per case. The increased legal expense to defend these cases would be well into the millions of dollars per year with no foreseeable end. This work could be performed either by hiring many additional lawyers to the City Law Department (in which case these costs would be salaries, benefits and pensions) or by assigning outside counsel (in which case the costs would be contractual services). Note that this speaks only to the Law Department's cost of defending the cases and does not address the likely tens of millions of dollars the City would expend each year satisfying judgments and attorneys' fee awards.

With respect to the attorney's fees provisions of the bill, most, if not all, of the cases involving Baltimore City, are filed by low-income plaintiffs who are represented by lawyers. The value of their claims varies from small amounts to more significant claims. In Baltimore City, which has one highest low-income populations in the State, individuals asserting these claims have attorneys to represent them. Based upon our experiences, there is no indication that low-income individuals are being denied access to legal representation in cases involving a right

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secured by the Maryland Constitution or Declaration of Rights so there is no need to incentivize lawyers to take these cases by providing for the award of attorney's fees.

Across the country, most jurisdictions, including Maryland, have adopted the American Rule. The American rule provides that each party is responsible for paying its own attorney's fees, unless specific authority granted by [statute](#) or [contract](#) allows the assessment of those fees against the other party. House Bill 353 is contrary to the American Rule.

Additionally, House Bill 353 proposes to provide attorneys' fees as a means to enforce a right secured by a provision of the Maryland Constitution or Declaration of Rights. The reality is that the provisions of the Maryland Declaration of Rights are so broadly written that almost anyone can bring a claim under it. So rather than supporting constitutional claims, the bill will actually encourage the proliferation of tort claims veiled as constitutional claims. Beyond the obvious proliferation of tort actions arising from the lure of attorneys' fees, the bill will have the effect of diminishing the importance of a Maryland Constitutional claim. Noting this concern with respect to the United States Constitution, the United States Supreme Court has repeatedly warned since 1819 that nothing should be done to treat the constitution as a "font of tort law" See *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819), and reaffirmed recently in *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005). Accordingly, the federal court has taken painstaking steps to assure that only true constitutional claims are brought. Due to the breadth of the language in the Maryland Declaration of Rights, that will prove nearly impossible to do.

House Bill 353 will also affect the way the City and other jurisdictions approach their decisions to settle a case or take it to trial. Under this bill, cases with low damages but potentially high attorney's fees that may have been taken to trial would likely be settled to avoid liability for attorney's fees. This will lead to a significant increase in settlement costs to the City in cases where the City may have prevailed at trial but instead is required to reevaluate its vigorous defense of these kinds of claims in light of the potential liability for attorney fees.

Baltimore City already receives a significant number of cases that are of questionable legal merit. The vast majority of these cases brought against the City result in zero liability. This indicates there is no need to create additional economic incentives to bring such claims. Adding the incentive of attorneys' fees would increase the number of invalid claims brought and would create pressure on the City to settle claims simply to avoid the risk of potential attorneys' fees.

The current system is working fairly. Valid claims result in reasonable verdicts or settlements in favor of the plaintiffs. Substantial civil rights claims are already well protected by both State law and the existing Federal civil rights laws generally litigated in Federal courts. The net effect of this legislation would not be to benefit citizen plaintiffs who are already well- served, but instead to shift funds from local government budgets (and therefore from taxpaying citizens) into the pockets of plaintiff's attorneys.

In conclusion, this bill removes cases brought under the Maryland Bill of Rights or the Maryland Constitution from the protection of the LGTCA and the MTCA and the allows for the proliferation of claims against officers and governments. The situation is further exacerbated by authorizing a court to award attorney's fees. Finally, the provisions making the officer personally liable do little to take the financial burden off of the City because the City would be responsible for any amount uncollectible for the officer. Under the bill, the officer is personally liable for \$25,000 or 5% of any judgment /settlement whichever is less. Given the number of claims and the potential that some could result in substantial awards that an office will only be liable for \$25,00 at the most, the City could be responsible for millions of dollars in claims.

We respectfully request an **unfavorable** report on House Bill 353.