

SENATE BILL REPORT

2SHB 1579

As Reported by Senate Committee On:
Law & Justice, March 22, 2023

Title: An act relating to establishing a mechanism for independent prosecutions within the office of the attorney general of criminal conduct arising from police use of force.

Brief Description: Establishing a mechanism for independent prosecutions within the office of the attorney general of criminal conduct arising from police use of force.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Stonier, Bateman, Lekanoff, Reed, Pollet and Macri).

Brief History: Passed House: 3/4/23, 52-44.

Committee Activity: Law & Justice: 3/20/23, 3/22/23 [DPA-WM, DNP].

Brief Summary of Amended Bill

- Establishes the Office of Independent Prosecutions (OIP), led by an independent counsel, as a separate division within the Office of the Attorney General.
- Provides OIP with jurisdiction concurrent with county prosecuting attorneys to review investigations, and initiate and conduct prosecutions of crimes involving use of deadly force by involved officers.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.
Signed by Senators Dhingra, Chair; Trudeau, Vice Chair; Kuderer, Pedersen, Salomon and Valdez.

Minority Report: Do not pass.
Signed by Senators Padden, Ranking Member; McCune, Torres, Wagoner and Wilson,

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

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Staff: Tim Ford (786-7423)

Background: Use of Deadly Force by a Police Officer. Deadly force means the intentional application of force using firearms or any other means reasonably likely to cause death or serious physical injury. Whether a police officer may be held criminally liable for use of deadly force depends on the specific crime alleged and any applicable defense. An officer has the same right of self-defense as other individuals. An officer's use of deadly force is justified when, in good faith, the deadly force is:

- applied without malice in obedience to the judgment of a competent court;
- used to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty;
- used to arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony;
- used to prevent escape from a federal or state correctional facility;
- used to prevent escape from a county or city jail or holding facility if the person escaping has been arrested for, charged with, or convicted of a felony; or
- used to lawfully suppress a riot if the actor or another participant is armed with a deadly weapon.

Good faith exists when, objectively considering all facts, circumstances, and information known to the officer at the time, a similarly situated, reasonable officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual.

Office of Independent Investigations. In 2021, the Legislature established the Office of Independent Investigations (OII) within the Office of the Governor and authorized OII to conduct investigations into any incident:

- of a use of deadly force by an involved officer occurring after July 1, 2022, including any incident involving use of deadly force by an involved officer against or upon a person who is in-custody or out-of-custody; or
- involving prior investigations of deadly force by an involved officer if new evidence is brought forth that was not included in the initial investigation.

After July 1, 2024, OII may also report recommendations, if any, for expanding its scope of investigations or jurisdiction.

Criminal Prosecutions by the Office of the Attorney General. The Office of the Attorney General (AGO) is authorized, with jurisdiction concurrent with county prosecuting attorneys, to investigate crimes and conduct prosecutions upon the request or with the concurrence of the county prosecuting attorney, the Governor, or a majority of the committee charged with the oversight of the organized crime intelligence unit.

If both the county prosecuting attorney and AGO file an information or indictment charging an individual with substantially the same offense, the court must determine whose prosecution of the case will best promote the interests of justice and enter an order designating the prosecuting authority in the case and dismissing the duplicative information or indictment.

Upon the written request of the Governor, the AGO must investigate violations of criminal law. If the AGO believes after the investigation that criminal laws are being improperly enforced in any county, and that the county prosecuting attorney has failed or neglected to prosecute criminal actions, the AGO must direct the county prosecuting attorney to take any remedial action the AGO deems necessary and proper. If the county prosecuting attorney fails or neglects to comply with the AGO's directions in a reasonable timeframe, the AGO may prosecute those criminal actions in place of the county prosecuting attorney. If the AGO initiates or takes over a criminal prosecution, the county prosecuting attorney may not take any legal steps relating to the prosecution, except as authorized or directed by the AGO.

Summary of Amended Bill: Office of Independent Prosecutions. The Office of Independent Prosecutions (OIP), led by an independent counsel, is established as a separate division within the AGO. OIP has jurisdiction concurrent with prosecuting attorneys to review investigations, and initiate and conduct prosecutions of crimes involving use of deadly force by involved officers, as those terms are defined in OII statute. The independent counsel is authorized to review investigations of applicable cases, decline or file criminal charges when appropriate, and prosecute applicable cases to conclusion, including appeals and collateral attacks.

Advisory Board. An Office of Independent Prosecutions Advisory Board (Advisory Board) is created with 11 members, including three members of the general public, two members representing families affected by an incident within OIP's jurisdiction, one representative of a federally recognized tribe, one defense attorney, two prosecuting attorneys, and two active or retired law enforcement members.

The Advisory Board must recommend three candidates for the position of independent counsel. It must also, in consultation with the independent counsel, submit a report to the Legislature and Governor by November 1, 2026, on cases reviewed by OIP and whether changes in state law are needed to increase public confidence.

Attorney General. The Attorney General is authorized to select the independent counsel from the candidates put forward by the Advisory Board. If the Attorney General declines to select one of the recommended candidates, they may request that the Advisory Board provide additional qualified nominees for consideration, or offer an alternative candidate, who may be approved by a majority vote of the Advisory Board.

The Attorney General is also authorized to set the independent counsel's compensation and remove the independent counsel for misconduct or inability to perform the duties of the role. If the independent counsel resigns, becomes incapacitated, or is removed, the Attorney General must appoint an interim independent counsel. The Attorney General is otherwise screened from the work of OIP including that the Attorney General may have no input or decision-making authority over whether criminal charges are filed in a case within OIP's jurisdiction.

Independent Counsel. The independent counsel must meet specified professional criteria and is authorized to:

- oversee OIP;
- hire personnel as needed, including assistant attorneys general;
- provide trainings that promote recognition and respect for diverse races, ethnicities, and cultures of the state;
- enter into contracts and memoranda of understanding;
- ensure persons subjected to use of deadly force or their survivors are kept apprised of a case's status and charging decisions;
- establish policies to ensure personnel with actual or apparent conflicts are screened from the review of investigations for criminal charges; and
- make charging decisions.

No action may be instituted against the independent counsel or the independent counsel's employees for any act done in good faith in the execution of the person's duty.

Public Records Act. The case records of OIP are confidential and exempt from disclosure under the Public Records Act until:

- a decision is made to decline charges;
- a charged case is dismissed;
- a not guilty verdict is entered; or
- there is entry of judgement and sentence following a guilty plea or verdict.

If the independent counsel decides not to file criminal charges in an applicable case, they must issue a public report with the results of the investigation and an explanation of the decision, and post it on OIP's website.

County Prosecuting Attorneys. In any case involving use of deadly force by an involved officer, the county prosecuting attorney has a duty to determine whether recusal is necessary to preserve public confidence or prevent a conflict of interest. A conflict of interest exists if:

- the prosecutor has a personal or professional relationship with the officer or the officer's employer such that the prosecutor's decision or pursuit of charges may be affected;
- the prosecutor has a duty to represent the officer's employing agency in any civil action arising from the same underlying incident and the prosecutor's decision or

- pursuit of charges might be affected by the duty to defend; or
- there is a risk that the prosecutor's ability to consider or carry out an appropriate course of action will be limited due to the prosecutor's other responsibilities or interests.

If recusal is necessary, the county prosecuting attorney must transfer the case to OIP within 30 days of receiving it from OII. If the county prosecuting attorney fails to transfer the case when recusal is necessary, a court must order OIP to discharge the responsibilities of the county prosecuting attorney.

Designating the Prosecuting Authority. If both the county prosecuting attorney and OIP file charges for substantially the same offense in an applicable case, a court must determine whose prosecution of the case will best promote the interests of justice and enter an order designating the prosecuting authority in the case and dismissing the duplicative charges.

When making its determination, the court must prioritize the public's interest in ensuring a fair and impartial prosecution and trial that is free from bias and even the appearance of bias, prejudice, or conflict of interest, and the county prosecuting authority must overcome a presumption that they have an inherent conflict of interest in any matter arising from an investigation within the scope of OII.

The Office of Independent Investigations. OII is directed to send its completed investigations and referrals to both the county prosecuting attorney of the jurisdiction where the offense occurred and OIP, which must include information, if known, regarding the presence of a conflict of interest. OII is also encouraged to cooperate with OIP with respect to requests for interviews or provision of additional information and transport of evidence.

EFFECT OF LAW & JUSTICE COMMITTEE AMENDMENT(S):

- Requires the Attorney General to overcome a presumption of an inherent conflict of interest in any investigation of employees of state agencies.

Appropriation: The bill contains a null and void clause requiring specific funding be provided in an omnibus appropriation act.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains several effective dates. Please refer to the bill.

Staff Summary of Public Testimony on Second Substitute House Bill: *The committee recommended a different version of the bill than what was heard.* PRO: The intent is to mirror the transparent process of the Office of Independent Investigation and bring that to

prosecution. The Office of Independent Prosecution is insulated from AGO with an advisory board that recommends an independent counsel. AGO will be screened from any cases. There is a concern about a conflict of the prosecutor who works very closely with the help of law enforcement to prosecute crime. There is a heightened ethical consideration for the county prosecutor due to that relationship, when having to investigate and prosecute law enforcement. The bill provides clarity on when county prosecutors should send their cases to the Office of Independent Prosecution, transparency, and integrity. The Attorney General will also have a presumption to overcome when investigating and prosecuting officers of state agencies.

CON: The perception that law enforcement officers are not regularly prosecuted should be an indication that officers are complying with the law, training, process, procedures. Prosecutors do charge law enforcement with crimes in the rare circumstances when they violate the law. If the Attorney General is to be the watchdog of law enforcement then the Attorney General should not have any law enforcement duties to avoid a conflict. Prosecuting crimes is the constitutional duty of county prosecutors. The Attorney General can only do that function with the concurrence of the county prosecutor. The independent authority without concurrence of the county prosecutor is not constitutional. Potential conflicts are handled through the WA Supreme Court.

OTHER: There is no threshold of error that is acceptable. These are real conflicts, not presumptive conflicts. There are campaign donations from law enforcement to elected prosecutors. There is misconduct in law enforcement and it needs social distancing from the county prosecutor.

Persons Testifying: PRO: Representative Monica Jurado Stonier, Prime Sponsor; Fred Thomas, Next Steps Washington; Tonya Isabell, Washington Coalition for Police Accountability; Sonia Joseph, My Advocate; Debra Novak, Washington Coalition for Police Accountability; Victoria Woodards, Mayor, City of Tacoma; Roger Rogoff, Office of Independent Investigations; Barbara Serrano, Senior Policy Advisor - Public Safety - Office of Governor Jay Inslee.

CON: Taylor Gardner, WA Assn of Sheriffs and Police Chiefs; Kari Reardon, WDA/WACDL; Russell Brown, WA Association of Prosecuting Attorneys; Laurie Layne; James McDevitt.

OTHER: Sai Samineni.

Persons Signed In To Testify But Not Testifying: No one.