

SENATE BILL REPORT

ESHB 1267

As Reported by Senate Committee On:
Law & Justice, March 18, 2021

Title: An act relating to investigation of potential criminal conduct arising from police use of force, including custodial injuries, and other officer-involved incidents.

Brief Description: Concerning investigation of potential criminal conduct arising from police use of force, including custodial injuries, and other officer-involved incidents.

Sponsors: House Committee on Public Safety (originally sponsored by Representatives Entenman, Hackney, Senn, Dolan, Leavitt, Berry, Fitzgibbon, Valdez, Simmons, Ramel, Ortiz-Self, Ramos, Chopp, Davis, Thai, Bergquist, Peterson, Kloba, Callan, Lekanoff, Macri, Goodman, Gregerson, Johnson, J., Lovick, Slatter, Ryu, Berg, Harris-Talley, Sells, Tharinger, Orwall, Pollet, Santos and Ormsby; by request of Office of the Governor).

Brief History: Passed House: 3/3/21, 57-39.

Committee Activity: Law & Justice: 3/15/21, 3/18/21 [DPA-WM, DNP].

Brief Summary of Amended Bill

- Creates the Office of Independent Investigations (OII) within the Office of the Governor for conducting fair and competent investigations of police use of force incidents.
- Imparts OII with jurisdiction to investigate any deadly force incident occurring after July 1, 2022, involving a general authority or limited authority peace officer, adult corrections officer, or juvenile detention officer.
- Outlines qualifications and training for investigators as well as parameters for the investigatory process.
- Establishes an advisory board to assist the Governor with selecting a director, assisting the director with plans for implementation, and receiving data to make recommendations on future expansion of OII

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.

jurisdiction.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Darneille, Kuderer and Salomon.

Minority Report: Do not pass.

Signed by Senators Padden, Ranking Member; McCune, Assistant Ranking Member; Holy and Wagoner.

Staff: Shani Bauer (786-7468)

Background: Peace Officer Use of Deadly Force. Initiative 940 and subsequent legislation amended the circumstances for when use of deadly force by a Washington peace officer is justified. Deadly force is the intentional application of force through use of a firearm or other means reasonably likely to cause death or serious injury.

A peace officer may use deadly force when necessary to arrest or apprehend a person the officer believes to have committed a felony, prevent escape, or lawfully suppress a riot if the person is armed with a deadly weapon. The peace officer must have a good faith belief the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual. Good faith is an objective standard, considering all the facts, circumstances, and information known to the officer at the time.

Independent Investigations. In any case where the use of deadly force results in death, substantial bodily harm, or great bodily harm to an individual, an independent investigation must be completed to determine whether the officer was acting within applicable laws and policies and whether the use of force met the good faith standard. The Criminal Justice Training Commission (CJTC) was tasked with establishing criteria to determine what qualifies as an independent investigation. The CJTC finalized those rules in December 2019.

An independent investigation team (IIT) must investigate any deadly force incident by a peace officer. The IIT must be comprised of members who operate completely independently of the law enforcement agency under investigation and must include:

- a peace officer certified as an IIT qualified lead investigator; and
- at least two non-law enforcement community representatives who have credibility with and ties to communities impacted by police use of deadly force.

An agency under investigation may not participate in the IIT's investigation except to:

- share specialized equipment when no reasonable alternative exists, the equipment is critical to the investigation, and the use is approved by the IIT commander;
- receive briefings given to the chief or sheriff of the involved agency about the progress of the investigation; and
- release body cam video or other investigation information of urgent public interest, with the agreement of the jurisdiction's prosecutor.

Applicable Definitions. "General authority Washington law enforcement officer" means a full-time officer employed by a general authority Washington law enforcement agency who is commissioned to enforce the criminal laws of the state of Washington generally. The Washington State Patrol and the Department of Fish and Wildlife are general authority Washington law enforcement agencies.

"Limited authority Washington law enforcement officer" means a full-time officer of a limited authority Washington law enforcement agency empowered by that agency to detect or apprehend violators of the laws in some or all of the limited subject areas for which that agency is responsible. Examples of limited authority law enforcement agencies include the Department of Natural Resources, Gambling Commission, Lottery Commission, State Parks and Recreation Commission, and the Liquor and Cannabis Board.

Summary of Amended Bill: Creation of the Office of Independent Investigations. The Office of Independent Investigations (OII) is created within the Office of the Governor as an investigative law enforcement agency. OII is responsible for conducting fair and competent investigations of police use of force incidents and other incidents that may be authorized in law. OII is authorized to conduct investigations of deadly force cases occurring after July 1, 2022. After July 1, 2023, OII may investigate prior investigations if new evidence becomes available that was not included in the initial investigation.

The Governor shall appoint the director of OII from a list of three candidates recommended by the advisory board, taking into consideration the results of a background check, an assessment of criminal history, and research of social media and affiliations to check for racial bias and conflicts of interest. A director shall serve a three year term.

Duties of the Director. Duties of the director are outlined, to include hiring or contracting with investigators and other personnel to perform investigations, coordinating training for personnel and advisory board members, publishing reports, and adopting rules to carry out the purposes of the office.

No later than February 1, 2022, and in consultation with the advisory board, the director must develop a plan to implement regional IITs. The plan must include a system for law enforcement agencies to notify the OII of any deadly force incidents under the jurisdiction of the office and for promptly responding to those incidents.

The investigatory process must include:

- an intake process;
- assessment and response to the notification of the incident;
- determination and deployment of necessary resources for the IIT to conduct the investigation;
- a determination of any conflicts with OII investigators to ensure no investigator has an existing conflict with an assigned case;
- protocol and direction to the involved agency;
- protocol and direction to the IIT;
- protocol and guidelines for contacts and engagement with the involved agency; and
- protocol for finalizing the completed investigation and referral to the entity responsible for the prosecutorial decision, including communication with the family and public regarding completion of the investigation.

The director must establish a plan for OII interactions and communications with the involved officer, the subject of the involved officer's conduct under investigation, the subject's family, the public, and other interested parties or stakeholders. Specific considerations are outlined, including training requirements.

No later than December 1, 2023, and in consultation with the advisory board, the director shall develop a proposal for training individuals who are nonlaw enforcement officers to conduct competent, thorough investigations of cases under the jurisdiction of the OII. The proposal must establish a training plan with the objective that all deadly force investigations will be conducted by nonlaw enforcement officers no later than July 1, 2027.

The Office of Independent Investigations Personnel. The director may employ or enter into contracts with investigators to conduct investigations of cases under the jurisdiction of the OII. The director shall consider relevant experience and qualifications including:

- extensive experience with criminal investigations, including homicide;
- behavioral health issues;
- youth cognitive development;
- trauma-informed interviewing;
- de-escalation techniques and utilization; and
- knowledge of Washington practices, including laws, policies and procedures related to criminal law, criminal investigations, and policing.

An applicant who has prior law enforcement experience should not have been a commissioned law enforcement officer within 24 months prior to the date of application. If the applicant has prior law enforcement experience, the director must review any prior bias related disciplinary actions or complaints against the officer.

Investigator positions must be designated as limited authority Washington peace officers with the authority to investigate any case within the jurisdiction of the OII and any criminal activity related to, or discovered in the course of, the investigation of the case under OII jurisdiction. The lead investigator for any case under OII jurisdiction must be a limited

authority peace officers.

Training requirements for investigators are specified. CJTC shall collaborate with OII to ensure investigators receive sufficient training.

The director may employ or enter into contracts for additional personnel as needed including forensic services and crime scene investigators; liaisons for community, family, and tribal relations; analysts, mental health experts, and translators; and interpreters.

Jurisdiction and Scope of the Office of Independent Investigations. OII has the jurisdiction to investigate any incident:

- involving the use of deadly force by an involved officer including use of force incidents against a person in or out of custody; and
- involving prior investigations of deadly force by an involved officer if new evidence becomes available not included in the initial investigation.

An involved officer includes any general authority or limited authority Washington peace officer, whether on or off duty, if the person is exercising their authority as a peace officer; or an individual employed in a city, county, or regional adult or juvenile institution, correctional, jail, holding, or detention facility.

The director shall determine prioritization of investigations based on resources and other criteria established in consultation with the advisory board. Incidents occurring after July 1, 2022 shall receive the highest priority.

Upon receiving notice of an incident, the director has the discretion to commence investigation, determine the incident is not within the jurisdiction of the OII, or decline to investigate the incident. Once commenced, an investigation must be completed within 120 days.

Notification of the Office of Independent Investigations. After July 1, 2022, an involved agency must notify OII of any incident involving the use of deadly force that results in death, substantial bodily harm, or great bodily harm. The agency must notify OII immediately after the involved agency or other first responders have rendered the scene safe.

Until the IIT arrives, the involved agency must take all lawful measures to protect and preserve evidence. Upon arrival, control of the scene will be relinquished to the IIT. No member of the involved agency may participate in the investigation except for specifically outlined exceptions.

Reporting and Administrative Matters. OII must conduct analyses of use of force and other data to the extent available. On an annual basis, OII should report any identified trends, patterns, or other situations identified by the data and recommendations for improvements.

After July 1, 2024, OII should also report any recommendations for expanding the scope of investigations or jurisdiction of the office.

The director and any investigator, employee, or contractor of the OII is immune from civil liability for performing the person's duties if the duties were executed in good faith. Positions within the OII are exempt from civil service provisions. Contracts for investigators awarded by OII are not subject to competitive bid.

The Office of Independent Investigations Advisory Board. An OII advisory board is created and membership is specified. The purpose of the advisory board is to provide input to the Governor on the selection of the director, provide input to the director on plans for implementation, participate in employment interviews as requested by the Governor or director, and receive briefings or reports from the director relating to data, trends, and other relevant issues.

The advisory board must assess whether the jurisdiction of OII should be expanded to conduct investigations of other types of incidents committed by involved officers, including but not limited to, other types of in-custody deaths not involving the use of force, but other criminal acts committed by involved officers.

At the request of the advisory board, OII shall conduct analyses of available data relevant to in-custody deaths, sexual assaults, and other types of incidents requested by the advisory board. The advisory board shall submit a report to the Legislature, with recommendations, no later than November 1, 2023.

EFFECT OF LAW & JUSTICE COMMITTEE AMENDMENT(S):

Tribal references are updated throughout the bill to clarify that references apply to a federally recognized tribe.

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: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Engrossed Substitute House Bill: *The committee recommended a different version of the bill than what was heard.* PRO: This is Governor request legislation based on task force recommendations made up of stakeholders. If you look at the case of Manuel Flores—the law enforcement agency investigated themselves rather than turn over the investigation to independent investigators.

This bill would create teams that would respond to incidents around the state. After transition period, current law enforcement officers would be prohibited from acting as investigators to ensure lack of bias. Hope that this will be one step in increasing and rebuilding trust between law enforcement and communities.

Renee Davis was killed in her bed during a welfare check. Recognizes the difficulty of police investigating police. Police and prosecutors will all benefit from structured unbiased process. Leonard Thomas killed in 2018. Wiley officer confronts a man and killed him while in seat belt. IIT are still police investigating police. All police actions are ruled justified. Must have impartial investigations. Persons killed after 940 was passed—law enforcement agencies have been investigating themselves and not honoring the process or intent that was set up. These are not true investigations. They did not look into the officer's intent or past behavior. The officer had continual contact with investigators. These cases should be reopened. I support creation of a tribal liaison.

In 132 years there still has not been one officer prosecuted for the use of deadly force. In conversations with unbiased investigators, referred to officer being investigated as "my officer." There is an incredible amount of bias in current system. Police practically never held responsible for taking lives. There are civilian investigators around the country and world that have this responsibility. No secret sauce to learning to conduct a proper investigation. Recent audit concluded that over 70 percent of offices have not complied with I-940. Toxic ideology in police culture that want zero accountability. Meaningful reform by imposing independent investigations.

Lack of public trust in investigative process when law enforcement is involved. We would not be here today if the current system was working. Want the highest levels of integrity, accountability, and transparency. We want to ensure professional and competent investigations. Need office that works for our entire public. These recommendations are the culmination of many hours of work, research, and discussion. People demand a higher level of public safety, accountability, and transparency.

Bill squarely addresses qualifications of investigator. Allows former officer to be an investigator. Sets parameters to ensure that there is separation between investigator and current law enforcement.

CON: Civilian investigation would jeopardize potential prosecution; investigations are discretionary not mandatory. Much work has been done since February 2019 to institute firewalls and independent investigations. Rules were only updated a year ago. Audit proposal is sound. Need to take inventory of whether current process is working. You jeopardize the viability of criminal prosecution when you utilize investigators that do not have the proper training to conduct homicide investigations.

Independent investigations became a requirement after 940. This is a significant step in creating public trust. This bill would undermine the current efforts underway to establish

independent investigation teams. Excluding training investigators will jeopardize investigations. Instead of creating new office, 940 should be allowed to be fully implemented.

OTHER: Support the principal of independent investigations. Raise concerns about how drafted—presumptive that law enforcement not be involved. Allows an officer who used deadly force to be investigated and prosecuted if necessary. If law enforcement is not involved, may be a problem. Most law enforcement not involved in homicide investigation. Learning curve for writing reports, testifying, and more. This is complex. Concern in asking someone who has not investigated any crime to investigate a complex homicide. Also concerns with transfer of authority at scene and the timing of how that occurs.

Fraternal order of police should be on the task force. Statewide investigator and statewide prosecutor need to go hand in hand and be passed together. 1507 has not moved along in legislative process. To be successful, must be passed in conjunction with other bill.

Persons Testifying: PRO: Representative Debra Entenman, Prime Sponsor; Victoria Woodards, City of Tacoma; Nina Martinez, Latino Civic Alliance; Trishandra Pickup, Washington Coalition for Police Accountability; Danielle Bargala, Washington Coalition for Police Accountability; Jennifer Hernandez, Institute for Community Leadership; Alpha Sherif, Institute for Community Leadership; Jennifer Tran, Institute for Community Leadership; Annalesa Thomas, Washington Coalition for Police Accountability; Jordan Chaney, Washington Coalition for Police Accountability; Deborah Jacobs, Washington Coalition for Police Accountability; Livio De La Cruz, Washington Coalition for Police Accountability; Joseph Martino, Ministry of the Attorney General; Monisha Harrell, Equal Rights Washington, Board Chair; James Bible, Family of Manny Ellis; James Rideout, Puyallup Tribe of Indians/Councilmember; Sakara Remmu, The Washington Black Lives Matter Alliance; Sonja Hallum, Governor's Office.

CON: James McMahan, Washington Association of Sheriffs and Police Chiefs; Teresa Taylor, Washington Council of Police and Sheriffs; Spike Unruh, Washington State Patrol Troopers Association.

OTHER: Russell Brown, Washington Assoc of Prosecuting Attorneys; Michael Transue, Washington Fraternal Order of Police.

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