

HOUSE BILL REPORT

ESHB 1267

As Passed House:

March 3, 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:

Committee Activity:

Public Safety: 1/26/21, 2/4/21 [DPS];

Appropriations: 2/18/21, 2/19/21 [DPS(PS)].

Floor Activity:

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

Brief Summary of Engrossed Substitute Bill

- Establishes the Office of Independent Investigations within the Office of the Governor for the purpose of investigating deadly force incidents involving peace officers.

HOUSE COMMITTEE ON PUBLIC SAFETY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Goodman, Chair; Johnson, J., Vice Chair; Davis, Hackney, Lovick, Orwall, Ramos and Simmons.

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.

Minority Report: Do not pass. Signed by 5 members: Representatives Mosbrucker, Ranking Minority Member; Klippert, Assistant Ranking Minority Member; Graham, Griffey and Young.

Staff: Kelly Leonard (786-7147).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill by Committee on Public Safety be substituted therefor and the substitute bill do pass. Signed by 19 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Chopp, Cody, Dolan, Fitzgibbon, Frame, Hansen, Johnson, J., Lekanoff, Pollet, Ryu, Senn, Springer, Stonier, Sullivan and Tharinger.

Minority Report: Do not pass. Signed by 9 members: Representatives MacEwen, Assistant Ranking Minority Member; Boehnke, Chandler, Dye, Hoff, Jacobsen, Rude, Schmick and Steele.

Minority Report: Without recommendation. Signed by 4 members: Representatives Stokesbary, Ranking Minority Member; Corry, Assistant Ranking Minority Member; Caldier and Harris.

Staff: Yvonne Walker (786-7841).

Background:

Criminal Liability of Peace Officers.

"Deadly force" means the intentional application of force through the use of firearms or any other means reasonably likely to cause death or serious physical injury. Whether a peace officer is criminally liable for using deadly force depends on the specific crime alleged and any applicable defense. A peace officer has the same right of self-defense as others. In addition, deadly force is justifiable when used by a peace officer in certain circumstances so long as he or she operated in good faith. "Good faith" is an objective standard which must consider all the facts, circumstances, and information known to the peace officer at the time to determine whether a similarly situated reasonable peace 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.

The circumstances where deadly force is justifiable includes, for example, when necessarily used to: arrest a suspect who the peace officer reasonably believes has committed a felony; prevent escape or recapture an escapee from prison or jail; or suppress a riot involving a deadly weapon. When deadly force is used to arrest a suspect who may have committed a felony, the peace officer must have probable cause to believe the suspect poses a threat of

serious physical harm if not arrested. Evidence that the suspect poses such a threat could include that the suspect has threatened a peace officer with a weapon, or that there is probable cause to believe the suspect has committed a crime involving threatened or actual serious physical harm. In such cases, deadly force may also be used if necessary to prevent the suspect's escape after a warning has been issued, if possible.

Independent Investigations of Incidents Involving Use of Deadly Force by Peace Officers.

State law requires an independent investigation to be completed whenever a peace officer's use of deadly force results in death, great bodily harm, or substantial bodily harm. The investigation informs the determination of whether the use of deadly force met the objective good faith test and satisfied other applicable laws and policies. The Criminal Justice Training Commission (CJTC) adopts rules to ensure that investigations are carried out completely independent of the agency whose officer was involved in the use of deadly force.

Under the current rules adopted by the CJTC, independent investigation teams (IITs) are responsible for conducting investigations. An IIT is made up of qualified and certified peace officer investigators, civilian crime scene specialists, and at least two nonlaw enforcement community representatives who operate completely independent of any involved agency to conduct investigations of police deadly force incidents. When a qualifying incident occurs, the agency must immediately report to the IIT and preserve the scene until the IIT arrives. The agency employing the involved officer 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 camera video or other investigation information of urgent public interest, with the agreement of the jurisdiction's prosecutor.

Definitions.

State statutes rely upon different definitions of peace officer or law enforcement agency, depending on the context. The Mutual Aid Peace Officers Power Act contains definitions for general authority, limited authority, and specially commissioned peace officers, as well as general authority and limited authority law enforcement agencies.

"General authority peace officer" means any full-time, fully compensated and elected, appointed, or employed officer of a general authority law enforcement agency who is commissioned to enforce the criminal laws of the state generally. "Limited authority peace officer" means any full-time, fully compensated officer of a limited authority 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. "Specially commissioned peace officer" means any officer, whether part-time or full-time,

compensated or not, commissioned by a general authority law enforcement agency to enforce some or all of the criminal laws of the State of Washington, who does not qualify as a general authority peace officer for that commissioning agency, specifically including reserve peace officers, and specially commissioned full-time, fully compensated peace officers duly commissioned by Oregon or Idaho.

"General authority law enforcement agency" means any agency, department, or division of a municipal corporation, political subdivision, or other unit of local government of this state, and any agency, department, or division of state government, having as its primary function the detection and apprehension of persons committing infractions or violating the traffic or criminal laws in general, as distinguished from a limited authority law enforcement agency, and any other unit of government expressly designated by statute as a general authority law enforcement agency. Among others, the Washington State Patrol and the Department of Fish and Wildlife are general authority law enforcement agencies.

"Limited authority law enforcement agency" means any agency, political subdivision, or unit of local government of this state, and any agency, department, or division of state government, having as one of its functions the apprehension or detection of persons committing infractions or violating the traffic or criminal laws relating to limited subject areas, including but not limited to, the Department of Natural Resources, Department of Social and Health Services, Gambling Commission, Lottery Commission, Parks and Recreation Commission, Utilities and Transportation Commission, Liquor and Cannabis Board, Office of the Insurance Commissioner, and the Department of Corrections.

Summary of Engrossed Substitute Bill:

The Office of Independent Investigations (OII) is established as a limited authority law enforcement agency within the Office of the Governor for the purpose of investigating certain incidents involving peace officers.

Investigations of Officer-Involved Incidents.

Jurisdiction. The OII has jurisdiction to conduct an investigation of any incident involving 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. The OII may also investigate prior incidents, if new evidence is brought forth that was not included in the initial investigation.

"Involved officer" means any general authority, limited authority, or specially commissioned officer, or any employee of a city, county, or regional institution, correctional, jail, holding, or detention facility, who is involved in an incident as an actor or custodial officer. The OII has jurisdiction to investigate the incident only if: (1) the involved officer was on duty; or (2) where the involved officer was off duty, he or she engaged in the investigation, pursuit, detention, or arrest of a person or otherwise exercised officer powers, or the incident involved equipment or other property issued to the officer in

relation to his or her duties.

Duties of Involved Agencies. "Involved agency" means any general authority or limited authority law enforcement agency or other facility that employs or supervises an involved officer. An involved agency must notify the OII of any incident under OII jurisdiction according to requirements established by the OII Director. If the incident involves use of deadly force by an involved officer resulting in death, substantial bodily harm, or great bodily harm, the involved agency must immediately contact the OII once the involved agency personnel and other first responders have rendered the scene safe and provided or facilitated lifesaving first aid to persons at the scene who have life-threatening injuries.

The involved agency must ensure that any of its officers or employees who are at the scene of the incident take all lawful measures necessary to protect, obtain, and preserve evidence relating to the incident until an OII investigator, or the IIT at the request of the OII, takes charge of the scene. The primary focus of the involved agency is to protect and preserve evidence. The involved agency must relinquish control of the scene upon the arrival of the OII or IIT, after which no member of the involved agency may participate in any way in the investigation. If the OII declines to investigate a case, the authority and duty for the investigation remains with the IIT or local law enforcement authority with jurisdiction over the incident.

Investigation Process. The OII is the lead investigative body for any incidents it selects for investigation. The investigation should include a review of the entire incident, including but not limited to events immediately preceding the incident that may have contributed to, or influenced the outcome of, the incident that are directly related to the incident under investigation.

The OII must have access to all reports and information necessary or related to the investigation, including, but not limited to, voice or video recordings, body camera recordings, and officer notes, as well as disciplinary and administrative records except those that might be statements conducted as part of an administrative investigation related to the incident.

The investigation must be concluded within 120 days of acceptance of the case for investigation. If the OII is not able to complete the investigation within 120 days, the OII must report to the OII Advisory Board (Advisory Board) the reasons for the delay.

Administration of the Office of Independent Investigations.

Advisory Board. The OII Advisory Board is established and consists of 11 members appointed by the Governor and representing specified interests or entities or having specified background. The Advisory Board must provide input to the Governor and OII Director on certain matters, including for example, staffing, training, and procedures for engagement with individuals involved in cases. Advisory Board members have a duty of

confidentiality and must agree in writing not to disclose certain information. Advisory Board members must complete training to utilize an antiracist lens in their duties.

Director. The Governor appoints the OII Director by selecting a person from a list of candidates recommended by the Advisory Board, or by offering an alternative candidate to be approved by the Advisory Board. Candidates must meet certain qualifications, including, for example, having sound judgment, objectivity, and integrity, and also having experiences in conducting criminal investigations or prosecutions. The powers and responsibilities of the OII Director are established, including for example, overseeing investigations and other functions of the OII, implementing the requirements for investigations and regional investigation teams, hiring of investigators and other necessary personnel, and ensuring proper training.

Investigators and Personnel. Investigators hired by the OII Director must meet certain qualifications. The OII Director must consider candidates' experience or understanding of criminal investigations, behavioral health issues, youth cognitive development, trauma-informed interviewing, and de-escalation techniques, and knowledge of laws, policies, procedures, and practices. The OII Director may not hire an investigator who has been a commissioned law enforcement officer employed by any law enforcement agency in the previous 24 months or at the time of his or her application, unless otherwise approved by the Advisory Board. Further, OII investigators may not be simultaneously employed, commissioned, or have any business relationship with another law enforcement agency or county or city corrections agency. The OII investigators are limited authority peace officers, and must receive training on criminal investigations, interviewing techniques, and state laws, policies, and practices. The CJTC must collaborate with the OII to ensure investigators receive sufficient training. By December 1, 2023, the OII Director must develop a plan for training nonlaw enforcement officers to conduct OII investigations, including an objective for OII investigations to be conducted by nonlaw enforcement officers within five years.

The OII Director may also hire additional personnel necessary for conducting investigations, including, for example, forensic specialists; liaisons for community, family, and tribal relations; data analysts; mental health experts; and interpreters.

Any personnel involved in investigations must engage in trainings on the history of racism in policing, implicit and explicit bias, intercultural competency, antiracism, undoing institutional racism, and the use of a racial equity lens in conducting the work of the OII.

Data Analysis. The OII must conduct analysis of use of force and other available data. If data is available, the OII should, at a minimum, analyze and report annually: analysis and research regarding any identified trends, patterns, or other situations; recommendations for improvements; and recommendations, if any, for expanding the scope of investigations or jurisdiction of the OII based on trends, data, or reports.

Advisory Board Evaluation on Office of Independent Investigations Jurisdiction.

In consultation with the OII Director, the Advisory Board must assess whether the OII jurisdiction 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 use of force but otherwise involving criminal acts committed by involved officers and sexual assaults committed by involved officers. The Advisory Board must submit a report with related recommendations to the Legislature and Governor by November 1, 2023.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed. However, the bill is null and void unless funded in the budget.

Staff Summary of Public Testimony (Public Safety):

(In support) This bill arises from the work of the Governor's Task Force on Independent Investigations on Police Use of Force (Task Force). The Task Force was formed following the death of Manuel Ellis in Tacoma. The Pierce County Sheriff's Office was involved in the related investigation, even though a Pierce County deputy was at the scene at the time of the incident. This directly violated the requirement for a completely independent investigation pursuant to Initiative No. 940. There were also issues with the quality of the investigation itself. The failure to properly investigate and respond to the death of Manuel Ellis, as well as the deaths of other persons across the state and country, has angered communities. There is a lack of trust and confidence in the policing system. The legitimacy of the entire system hangs in the balance.

The Task Force included 23 members, and also formed an advisory group with additional expertise. The Task Force met 12 times in the past six months. The bill reflects the recommendations supported by a majority of the Task Force members. The bill is not a statement against law enforcement. To the contrary, by creating the OII, the state can begin to rebuild trust between law enforcement and communities. The OII will investigate deadly force incidents. Independent, fair, and competent investigations will benefit everyone, including law enforcement, the families of those who have died, and the broader community. After a transition period, current and former law enforcement officers will not be hired as OII investigators in order to avoid conflicts of interest. Investigators must have proper training, including on implicit and explicit bias and racial equity.

The deaths of many community members have gone unaddressed. Investigations were not conducted independently or properly, and charges were not filed. These investigations have no credibility with communities. This is what happens when police are tasked with policing

themselves. There are too many conflicts of interest. Initiative No. 940 has proved to be inadequate to address inherent and systemic problems. The state must do more by establishing this statewide office and shifting away from investigative teams managed by law enforcement agencies.

In addition, the families of victims have not been treated with compassion. They have been forced to rely on the media for reports about the death of their son or daughter. This bill addresses these issues by requiring communication channels between the OII and the families.

It is important to tell the truth. There have been coverups by law enforcement. Further, policing has a long history of engaging in discriminatory practices against people of color. There are white nationalists operating within law enforcement who are profiling and targeting certain groups. For this reason, it is important for the OII to operate at a state level without the involvement of law enforcement officers. These criminal investigations must be impartial and professional. The bill should be amended to manage the OII transition to nonlaw enforcement professional investigations, and ITTs (required through Initiative No. 940) should not continue to have a role in these cases.

The bill should be amended to allow the OII to investigate prior incidents without requiring new evidence. Prior investigations have been incomplete or not credible. The families of these victims demand action on these cases. In many instances, there has been no oversight or review of prior investigations. This is sloppy. There must be a way go back and shed light on what happened to lost loved ones. They deserve a path to justice too.

The bill should be amended to require OII investigators to use body cameras. There should be mandatory documentation and preservation of evidence.

Other governments have adopted similar models to what is proposed in this bill. In particular, an office in Ontario has a similar role. It was established in the early 1990s in response to public pressure. While its early years were marked with controversy and criticism, it has become a critical part of the justice system. The government allocated sufficient resources and capabilities for the office to carry out investigations, and since then, it has served to advance the interests of justice and improve community relations.

Independent investigations conducted by a statewide office will serve to ensure accountability, transparency, and integrity. Neither communities nor law enforcement want ideology to drive the outcomes of investigations or the perceptions of those outcomes. All sides should be able to support this. This bill is not perfect, but it will begin to help restore the trust that has been lost on all sides. Justice delayed is justice denied.

(Opposed) Law enforcement officers want good leadership and accountability, and officers have remained committed to conversations on reforms over the last several years. However, the recommendations of the Task Force are disappointing. The recommendations

undermine Initiative No. 940. The current system of independent investigations is newly mandated as of 2019 and is still in the process of being implemented. This system is already a significant change from past practices. The Task Force did nothing to investigate the current system or identify any problems with it. Instead of passing this bill, the Legislature should advance House Bill 1089, which would establish auditing requirements for the current system. The state should evaluate the current system before creating something new.

The bill seeks to transition the responsibilities for conducting criminal investigations to nonlaw enforcement officers. Civilians should not be conducting criminal investigations.

The Legislature should recognize that officers have a tremendously difficult job. The vast majority of officers are true public servants and seek to protect the community. The state should recognize their many acts of heroism. Law enforcement must be a part of the solution and their voices should be included in the process. House Bill 1267 negates the hard work associated with passing Initiative No. 940 and the intensive rule-making that followed it.

The state should seek to improve rules and empower local responses. Perhaps an oversight body would be a more appropriate way to address these issues.

(Other) It is important for the Legislature to explore models for a statewide investigation team to conduct independent investigations. However, as written, this bill seeks to transition the responsibilities for conducting criminal investigations to nonlaw enforcement officers. This would undermine the outcome of any investigation and could jeopardize criminal prosecutions. Further, the bill should be modified to establish a governing board, rather than an advisory board, to oversee the OII. The OII should be free from political influence. The OII should be required to conduct these investigations, rather than having the option to do so.

The OII should be accountable to the public, and its records should be fully open to the public through public records requests.

Staff Summary of Public Testimony (Appropriations):

(In support) Policing is broken and there is an urgent need to bring accountability, independence, and an anti-racist lens into the process of excessive force incidents by law enforcement. Five years ago, a tribal member was killed by police and the initial investigation stated that it was justified. However, after establishment of Initiative 940, an independent investigation team demonstrated that it is not possible for police to investigate other police and remain impartial. Establishing an office of independent investigations is a priority for the City of Tacoma. The establishment of a statewide office for use-of-force cases, that is separate from law enforcement, will create more accountability and transparency for all involved and especially for those that have lost a family member at the

hands of law enforcement. However, it is suggested that the policy bill should be amended to allow this new independent office to be able to also investigate in-custody deaths and sexual assault investigations.

(Opposed) The creation of an office on deadly force investigations is one of several recommendations that the Washington Association of Sheriffs and Police Chiefs submitted for consideration. However, first this bill does not insulate this new entity from political influence. Secondly, there are also concerns that this new office will be able to choose which investigations that it wants to take on. Third, civilians should not be able to take on complex investigations which could jeopardize the viability of any prosecution. Lastly, law enforcement should not have to flee the scene when an incident takes place.

Reforms need to be meaningful and safe to improve public safety services. The one-year-old process that resulted from Initiative 940 was not fully implemented and there is not a clear understanding of what facts are and are not working. Until those facts are known, considering further reform is not prudent. There is support for auditing investigative processes in compliance with current statute pursuant to the Criminal Justice Training Commission rules.

Persons Testifying (Public Safety): (In support) Representative Entenman, prime sponsor; Victoria Woodards, City of Tacoma; Sonja Hallum, Office of the Governor; Sharon Swanson, Association of Washington Cities; Sakara Remmu, Washington Black Lives Matter Alliance; Katrina Johnson, Tim Reynon, and Marilyn Covarrubias, Washington Coalition for Police Accountability; Devitta Briscoe, Not This Time; Joseph Martino, Ministry of the Attorney General; James Bible and Sheley Secrest, National Association for the Advancement of Colored People; James Rideout, Puyallup Tribe of Indians; Samuel Martin, Washington for Black Lives; Monish Harrell, Equal Rights Washington; and Nina Martinez, Latino Civic Alliance.

(Opposed) Spike Unruh, Washington State Patrol Troopers Association; Teresa Taylor, Washington Council of Police and Sheriffs; and James Schrimpsheer, Washington State Fraternal Order of Police.

(Other) James McMahan, Washington Association of Sheriffs and Police Chiefs; and Rowland Thompson, Allied Daily Newspapers of Washington.

Persons Testifying (Appropriations): (In support) Paul Benz, Faith Action Network; Tim Reynon, Washington Coalition for Police Accountability; Victoria Woodards, City of Tacoma; and Sakara Remmu, Washington Black Lives Matter Alliance.

(Opposed) James McMahan, Washington Association of Sheriffs and Police Chiefs; and Jeff DeVere, Washington Council of Police and Sheriffs.

Persons Signed In To Testify But Not Testifying (Public Safety): Jim Bloss, National Alliance On Mental Illness–Washington; Susan Griggs, Kitsap ERACE; Paula Sardinas,

Washington Build Back Black Alliance; Albert Sardinas, FMS Global Strategies; and Robert Churchill, National Association for the Advancement of Colored People.

Persons Signed In To Testify But Not Testifying (Appropriations): None.