

# SENATE BILL REPORT

## SB 5073

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As of February 23, 2017

**Title:** An act relating to recommendations from the joint legislative task force on the use of deadly force in community policing.

**Brief Description:** Concerning recommendations from the joint legislative task force on the use of deadly force in community policing.

**Sponsors:** Senators Frockt, McCoy, Pedersen, Hasegawa, Darneille, Chase, Hunt and Wellman.

**Brief History:**

**Committee Activity:** Law & Justice: 2/02/17, 2/16/17 [DPS-WM, DNP].  
**Ways & Means:** 2/22/17.

### Brief Summary of Substitute Bill

- Removes lack of malice as a justifiable homicide defense for law enforcement and defines good faith.
- Requires development of a model policy listing best practices for agencies to consider when seeking public input.
- Defines deadly force.
- Directs law enforcement agencies to facilitate completion of independent investigations.
- Mandates updates to training on de-escalation techniques, implicit bias, cultural competency interaction with people with disabilities, and use of less than lethal force.
- Eliminates the 25 percent copay from agencies sending people to the Criminal Justice Training Commission (CJTC) for training.
- Directs the Attorney General (AG) to report on the use of deadly force every other year.
- Creates a grant program to equip law enforcement with less lethal weapons.
- Engages an accredited university in Washington to develop a methodology for analyzing data regarding disparate impact on diverse communities.

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

- Creates the Public Safety Enhancement account and directs a portion of the funds to be used to provide advanced patrol tactics and scenario-based simulations.

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## SENATE COMMITTEE ON LAW & JUSTICE

**Majority Report:** That Substitute Senate Bill No. 5073 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Padden, Chair; O'Ban, Vice Chair; Pedersen, Ranking Minority Member; Darneille and Frockt.

**Minority Report:** Do not pass.

Signed by Senators Angel and Wilson.

**Staff:** Aldo Melchiori (786-7439)

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## SENATE COMMITTEE ON WAYS & MEANS

**Staff:** Travis Sugarman (786-7446)

**Background:** In 2016, the Legislature established the Joint Legislative Task Force on the Use of Deadly Force in Community Policing (Task Force). The Legislature charged the Task Force with: reviewing laws, practices, and training programs regarding use of deadly force in Washington and other states; reviewing current policies, practices, and tools used by or otherwise available to law enforcement as an alternative to lethal uses of force; and recommending best practices to reduce the number of violent interactions between law enforcement officers and members of the public.

The Task Force membership included representatives from law enforcement, public defenders, prosecutors, civil rights groups, community representatives, and legislators. Four meetings were held in 2016. Each Task Force member was given the opportunity to submit recommendations for a vote of the Task Force membership. Fifteen recommendations were adopted by a majority of the Task Force. The Task Force published its final report to the Legislature and the Governor on December 1, 2016.

Currently, homicide or the use of deadly force is justifiable if:

- a public officer is acting in obedience to the judgment of a competent court;
- necessarily used by a peace officer 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; or
- necessarily used by a peace officer or person acting under the officer's command and in the officer's aid:
  - 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;

- to prevent the escape of a person from a federal or state correctional facility or in retaking a person who escapes from such a facility;
- to prevent the escape of a person from a county or city jail or holding facility if the person has been arrested for, charged with, or convicted of a felony; or
- to lawfully suppress a riot if the person or another participant is armed with a deadly weapon.

In considering whether to use deadly force to arrest or apprehend any person for the commission of any crime, the officer must have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or a threat of serious physical harm to others. Among the circumstances which may be considered by peace officers as a threat of serious physical harm are:

- the suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening; or
- there is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm.

Under these circumstances deadly force may also be used if necessary to prevent escape from the officer, where, if feasible, some warning is given.

An officer is not to be held criminally liable for using deadly force without malice and with a good faith belief that such an act is justifiable. A law enforcement agency may adopt standards pertaining to its use of deadly force that are more restrictive than provided by statute.

**Summary of Bill:** The bill as referred to committee not considered.

**Summary of Bill (Proposed Second Substitute):** Justifiable Homicide. A lack of malice is removed as a defense to justify homicide or the use of deadly force by a law enforcement officer. An officer is not to be held criminally liable for using deadly force if a reasonable officer, relying upon the facts and circumstances known by the officer at the time of the incident, would have used deadly force.

Deadly force means: (1) the intentional application of force through the use of firearms or any other means reasonably likely to cause death or great bodily harm by a law enforcement officer, regardless of the outcome; and (2) the application of force by a law enforcement officer that results in death or great bodily harm.

Accountability. The Washington Association of Sheriffs and Police Chiefs (WASPC) must develop a model policy listing best practices and recommended options for law enforcement agencies to consider when seeking public input into policing policies and accountability practices.

Law enforcement agencies must facilitate completion of independent criminal investigations in all instances when deadly force is used by law enforcement if its use results in death. The agency may use an external police agency with investigative competency.

Training, Community Outreach, and Modern Policing. The CJTC must update and provide basic and in-service training for peace and corrections officers anchored in critical thinking and the development of sound judgement that:

- emphasizes de-escalation in patrol tactics and interpersonal communication;
- supports alternatives to arrest or citation;
- develops an understanding of implicit and explicit bias;
- develops an understanding of cultural competency and the historical intersection of race and policing;
- develops an understanding and skills to effectively and safely interact with people with disabilities and behavioral health issues;
- includes shoot/don't shoot scenario training; and
- uses less than lethal force and technologies.

The CJTC must make sure that implicit bias training becomes an integral part of the training of law enforcement personnel.

The CJTC must also incorporate a training component that includes veteran officers monitoring recruits and sharing insights about working effectively with community members. This may include ride-alongs or working in community programs where appropriate.

The Washington State Institute for Public Policy conducts a study to determine what actions can be taken by law enforcement agencies to increase diversity among law enforcement officers. The study must include a survey of research literature and models used in other states. A report of findings is due by December 1, 2017.

Law enforcement agencies do not have to reimburse the CJTC for 25 percent of the cost of initial training.

Data Collection. The AG must develop and prepare a reporting mechanism for law enforcement and corrections officers to use when reporting the use of deadly force. The AG must report, by December 1st every other year regarding the use of deadly force by law enforcement and corrections officers.

All law enforcement agencies and the Department of Corrections must report all officer-involved uses of deadly force to the AG within five business days after the conclusion of the independent criminal investigation. The report must contain all information requested in a format approved by the AG.

Less Than Lethal Weapons. The WASPC administers a program for distributing funds to local law enforcement agencies to equip primary responding law enforcement officers with less than lethal weapons. An annual report must be made to the appropriate committees of the Legislature, the Governor, and the CJTC regarding the agencies receiving funds, the amounts distributed, and the equipment purchased.

The WASPC must engage with researchers from an accredited university in Washington to develop a methodology for collecting and analyzing demographic data in several key enforcement areas in order to monitor trends that may indicate disparate impact on diverse

communities. Protocols must then be developed for law enforcement agencies to submit data for analysis by qualified researchers and for reporting with recommendations for mitigating any disparate impact without sacrificing public safety. The WASPC must submit a report by December 1, 2018.

**Funding.** The Public Safety Enhancement account (Account) is created in the custody of the State Treasurer. Revenues to the Account consist of: transfers and appropriations by the Legislature; private gifts, grants, and donations; federal funds; and all other sources directed by law to the Account. Expenditures from the Account may be used only to carry out the duties of the CJTC. A portion of the funds must be used to provide training in advanced patrol tactics and scenario-based simulations and some funds must be distributed for training Washington State Patrol regarding de-escalation and the use of less than lethal force.

If the Act is not funded by December 30, 2017, the Act is null and void. If any provision of the Act is held by a court to be invalid, the remainder of the Act is incapable of accomplishing the legislative purpose and is also invalid

**EFFECT OF CHANGES MADE BY LAW & JUSTICE COMMITTEE (First Substitute):**

- Returns to current law for reimbursing law enforcement agencies the cost of temporary replacement of officers enrolled in basic law enforcement training.

**Appropriation:** None.

**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 Proposed Substitute (Law & Justice):** *The committee recommended a different version of the bill than what was heard.* PRO: This bill is the product of 26 hours of cooperation and deliberation. In order to find common ground, people need to work together. Removing malice would bring Washington in line with the statutes in other states. No state other than Washington has the malice requirement. Across the country, law enforcement officers perform well under the good faith standard. State supported and centralized training has contributed to making Washington officers some of the best in the nation. Officers should not face prison for making an honest mistake. Removing malice and retaining good faith strikes the right balance between protecting officers and members of the public. Officers need the trust and confidence of the community and the community needs confidence that law enforcement is working for them. The definition of good faith clarifies that the prosecutor will look at the totality of the circumstances. This will help make officers more responsible and skilled in community policing. Officers have become de facto mental health counselors and they need this additional training to handle that task. Good faith is an objective standard. Total immunity does not enhance justice or trust. There does not need to be a dichotomy between officers and the communities they

serve. Sometimes training is not enough to prevent officers from making bad decisions. Malice is nearly impossible to prove. This change will help stop the epidemic of unconscious violence.

CON: In Seattle, there were 400,000 calls and deadly force was only used 4 times. It is difficult to establish a single training solution that works throughout the state. This will result in increased costs to local agencies because the officers getting the training will need to be backfilled. Law enforcement need the training funding. Officers oppose the elimination of malice and the definition of good faith in the bill. Officers should not be subjected to the same standards as others because they cannot run from the danger. Officers are already accountable to the counties, cities and people. Changes should not be based on hyperbole and anecdotes.

OTHER: It is always the goal of law enforcement to reduce the use of deadly force. We need to reduce all violent interactions. Trust in officers suffers because of the malice standard. This is a statewide problem, so it calls for a statewide solution. Each version of the bill is getting better.

**Persons Testifying (Law & Justice):** PRO: Senator David Frockt, Prime Sponsor; Sue Rahr, Executive Director, Criminal Justice Training Center; Mark Roe, Prosecuting Attorney, Snohomish County Prosecutor's Office; Jon Tunheim, Prosecuting Attorney, Thurston County Prosecutor's Office; Felix Vargas, Retired US Officer; Kim Molsolf, Attorney, Disability Rights Washington; Toshiko Hasegawa, Washington State Commission on Asian Pacific American Affairs; Leslie Cushman, Reform Deadly Force Washington; Karen Johnson, Chair, Black Alliance of Thurston County; Brad Towers, Washington for Good Policing; Lanna Covarrubias, citizen; Lisa Earl, citizen; Chester Earl, citizen; Joyce Ostling, citizen; Bill Ostling, citizen; R. Peggy Smith, League of Women Voters Washington; Howard Gale, citizen; Larry Jefferson, Criminal Defense Attorney & WSBA Member; Kim Miles, citizen.

CON: Representative Morgan Irwin, 31st Legislative District; Jason Southard, WACOPS and Monroe Police Guild; Grant Southard, citizen.

OTHER: Neil Martin, President, WACOPS; Marco Monteblanco, President, WSFOP; Jeff Merrill, President, WSPTA; Steve Eggert, President, COMPAS; James McMahan, Policy Director, WASPC; Travis Adams, Fraternal Order of Police; Michael Sargent, Fraternal Order of Police; Theresa Scheimesher, Fraternal Order of Police, COMPAS; Kelly Monteblanco, Fraternal Order of Police; Glen Carpenter, WACOPS.

**Persons Signed In To Testify But Not Testifying (Law & Justice):** PRO: Haley Bennett, citizen; Ron Posthuma, citizen; Noah Seidel, SAIL; Courtney Weaver, Washington for Good Policing

CON: Bob Lurry, King County Police Officer's Guild.

OTHER: Park McCann, citizen.

**Staff Summary of Public Testimony on Proposed Second Substitute (Ways & Means):**  
PRO: Advocates say it is not an objective standard and officers say it puts them in the same

standard as the public. I believe that both are inaccurate. This is an issue that affects all of us regardless of race. By our numbers, 26 individuals were shot and killed in 2016. This bill is a good balance of prevention and accountability. The training costs are a critical component in this bill. We support bringing the charging standards in line with other states and independent reviews and investigations. I am here on behalf of my daughter who was the second fatality in 2016, leaving behind four children. The police took her life, knowing that she was a victim of domestic violence. Officers should be held to a higher standard because they are in the position to change and redirect lives. We need to invest in law enforcement by providing them tools and policies and procedures to keep them safe as well as the public. With proper training of police to meet diverse needs of the public, these deaths could have been avoided. Training to identify people in need rather than committing a crime could avoid these deaths. Make our communities a safe place to live by training police. I ask you to ask yourself what steps would you take if this happened to your family member. Right now, the police officer is the judge, jury, and executioner. They need a justice system. The system is flawed, and we need to bridge the gap in our communities. My son who struggled with mental illness was shot and killed in his room through a closed wooden door by an officer who could not see what he shot at in 2010. CIT training had not been provided. Establishing best practices would help to provide safer communities. The data component of this bill is very important. Very little data exists to date. Measurable data and training will change police officer behavior. The Officer in our case never filed a written report even though required to do so. Everyone in WA gets the protection of self defense statute. This bill amends the statute that gives officers an added layer of protection which acknowledges the officer's need to go into situations that the rest of don't need to. Controversial shootings are rare in this state, but this bill basically says consider all of the circumstances in making a decision on whether the officer acted in a reasonable manner. Independent investigations section allows flexibility to use internal or external independent bodies. Data collection is hugely important. We remain focused on reducing the number of violent interactions between law enforcement and the public and this bill works towards that effort. The proposed substitute brings the fiscal note down considerably. In Washington, we have a unique training model that allows the legislature to have a direct impact on training and practices of police officers all over the state. In section 6, there is a study that was just released that I believe would make it unnecessary to require and pay for another study. The training staff at our academy who have over a 100 years of experience combined and they generally believe this is a fair standard. Prosecution has the burden of proof to show that there was not good faith beyond a reasonable doubt, so it will need egregious facts to be proven.

CON: We oppose this bill based on some the questions asked today. We do support the data collection. I was a member of the task force. There are things in this bill that we agree with. Certainly advanced training is important, but I don't see in this bill what that training exactly is or have a clear grasp of where that is going. We also support data collection. We do not agree with the removal of malice. We are opposed to the removal of malice which offers our officers and members protection from prosecution. It also has a chilling effect, making officers hesitate before they will act and puts them in increasing amounts of danger. We stand united with the others here that oppose this bill. We echo the thoughts of the prior speakers in opposition of this bill. Troopers oppose any legislation that takes away current safeguards in law, that protects officers, this includes the weakening of the criminal liability standards for peace officers using deadly force. These are the first responders to 911 calls

and they should not be held to the same standards as the public. We are not aware of any definition that would allow the removal of malice and we disagree with prosecutors and think that they believe that they will be able to prosecute officers more easily and that scares us.

**Persons Testifying (Ways & Means):** PRO: Senator David Frockt, Prime Sponsor; Brad Tower, Washington for Good Policing; James Rideout, citizen; Lisa Earl, citizen; Ygnacio Covarrubius, Family of Daniel Covarrubius; Joyce Ostling, citizen; William Ostling, citizen; James McMahan, WA Assoc Sheriffs and Police Chiefs; Tom McBride, WA Assoc Prosecuting Attorneys; Sue Rahr, Criminal Justice Training Commission.

CON: Davor Gjurasic, WSP Troopers Assoc.; Travis Adams, Fraternal Order of Police; Renee Maher, Council Of Metropolitan Police and Sheriffs; Carl Nelson, Washington Council of Police and Sheriffs.

**Persons Signed In To Testify But Not Testifying (Ways & Means):** No one.