

HOUSE BILL REPORT

SHB 1735

As Passed House:

January 28, 2022

Title: An act relating to modifying the standard for use of force by peace officers but only with respect to providing that physical force may be used to the extent necessary, clarifying that deadly force may be used in the face of an immediate threat, authorizing the use of physical force to take a person into custody or provide assistance in certain circumstances involving a civil or forensic commitment, authorizing the use of physical force to take a minor into protective custody, authorizing the use of physical force to execute or enforce a court order, defining de-escalation tactics, clarifying when de-escalation tactics and less lethal alternatives must be used by a peace officer, specifying that the standard does not limit or restrict a peace officer's authority or responsibility to perform lifesaving measures or perform community caretaking functions, and specifying that the standard does not prevent a peace officer from responding to requests for assistance or service.

Brief Description: Modifying the standard for use of force by peace officers.

Sponsors: House Committee on Public Safety (originally sponsored by Representatives Johnson, J., Rule, Wicks, Bateman, Callan, Goodman, Macri, Orwall, Ramel, Ramos, Santos, Shewmake, Wylie, Simmons and Stonier).

Brief History:

Committee Activity:

Public Safety: 1/11/22, 1/20/22 [DPS].

Floor Activity:

Passed House: 1/28/22, 90-5.

Brief Summary of Substitute Bill

- Expands the authority for a peace officer to use physical force, subject to the requirement to exercise reasonable care, in additional specific circumstances.
- Modifies the requirement to exercise reasonable care before using force,

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including defining "de-escalation tactics" and clarifying when de-escalation tactics and less lethal alternatives must be used by a peace officer before using physical or deadly force.

- Provides that the standard for use of force by peace officers does not limit or restrict a peace officer's authority or responsibility to perform lifesaving measures or perform community caretaking functions to protect health and safety, and does not prevent a peace officer from responding to requests for assistance or service by specified individuals and members of the public.

HOUSE COMMITTEE ON PUBLIC SAFETY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 13 members: Representatives Goodman, Chair; Johnson, J., Vice Chair; Mosbrucker, Ranking Minority Member; Klippert, Assistant Ranking Minority Member; Davis, Graham, Griffey, Hackney, Orwall, Ramos, Simmons, Thai and Young.

Staff: Kelly Leonard (786-7147).

Background:

Constitutional restrictions on the use of force by peace officers. The United States Constitution protects citizens from excessive force by the government. Depending on the custodial status of the person against whom force is being used, the Fourth or Fourteenth Amendment provides the legal standard for determining whether the use of force is permissible. For example, when a person is subject to arrest or detained pretrial, courts have held that the use of force by a peace officer must be reasonable under the totality of the circumstances. Whether a peace officer's actions are considered reasonable depends upon several factors. This may include the severity of the crime, the threat to the safety of the peace officer or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. When a person is injured by excessive force, the primary legal remedy is to seek damages through a civil cause of action for deprivation of constitutional rights under 42 U.S.C. §1983.

State standard for the use of force by peace officers. In 2021 the state enacted a standard for use of force by peace officers, including separate restrictions on the use of physical force and deadly force. Under the standard, a peace officer may use physical force against another person when necessary to: protect against criminal conduct where there is probable cause to make an arrest; effect an arrest; prevent an escape offense; or protect against an imminent threat of bodily injury to the peace officer, another person, or the person against whom force is being used.

A peace officer may use deadly force against another person only when necessary to protect against an imminent threat of serious physical injury or death to the officer or another person. "Necessary" means that, under the totality of the circumstances, a reasonably effective alternative to the use of deadly force does not exist, and that the amount of force used was a reasonable and proportional response to the threat posed to the officer and others. "Imminent threat of serious physical injury or death" means that, based on the totality of the circumstances, it is objectively reasonable to believe that a person has the present and apparent ability, opportunity, and intent to immediately cause death or serious bodily injury to the peace officer or another person. "Totality of the circumstances" means all facts known to the peace officer leading up to and at the time of the use of force, and includes the actions of the person against whom the peace officer uses such force, and the actions of the peace officer.

A peace officer must use reasonable care when determining whether to use physical force and when using any physical force against another person. To that end, a peace officer must:

- when possible, exhaust available and appropriate de-escalation tactics prior to using any physical force;
- when using physical force, use the least amount of physical force necessary to overcome resistance under the circumstances, which includes a consideration of the characteristics and conditions of the person for the purposes of determining whether to use force against that person and, if force is necessary, determining the appropriate and least amount of force possible to effect a lawful purpose;
- terminate the use of physical force as soon as the necessity for such force ends;
- when possible, use available and appropriate less lethal alternatives before using deadly force; and
- make less lethal alternatives issued to the officer reasonably available for his or her use.

The standard delineates types of de-escalation tactics, including: creating physical distance by employing tactical repositioning and repositioning as often as necessary to maintain the benefit of time, distance, and cover; when there are multiple officers, designating one officer to communicate in order to avoid competing commands; calling for additional resources such as a crisis intervention team or mental health professional when possible; calling for back-up officers when encountering resistance; taking as much time as necessary, without using physical force or weapons; and leaving the area if there is no threat of imminent harm and no crime has been committed, is being committed, or is about to be committed.

By July 1, 2022, the Attorney General must develop and publish model policies on use of force and de-escalation tactics consistent with the standard. By December 1, 2022, all law enforcement agencies must adopt the model policy or otherwise adopt policies consistent with the standard. Law enforcement agencies may adopt policies or standards with additional requirements for de-escalation and greater restrictions on the use of physical and

deadly force. Law enforcement agencies must provide copies of policies and additional information to the Attorney General, including any future modifications.

Summary of Substitute Bill:

The standard for use of force by peace officers is modified. A peace officer may use physical force against a person to the extent necessary to carry out specified acts. The authority of a peace officer to use physical force against a person, subject to the requirement to exercise reasonable care, is expanded to include the following circumstances:

- taking a person into custody, transporting a person for evaluation or treatment, or providing other assistance under civil or forensic commitment laws;
- taking a minor into protective custody when authorized or directed by statute;
- executing or enforcing a court order authorizing or directing a peace officer to take a person into custody;
- executing a search warrant; or
- executing or enforcing an oral directive issued by a judicial officer in the courtroom or a written order where the court expressly authorizes a peace officer to use physical force to execute or enforce the directive or order.

The provision regarding use of deadly force is modified by replacing the term "imminent threat" with "immediate threat," distinguishing it from the restrictions on the use of physical force. A peace officer may use deadly force against another person only when necessary to protect against an immediate threat of serious physical injury or death to the officer or another person.

The requirement to exercise reasonable care is modified so as to apply to both physical force and deadly force. A peace officer must, when possible, use all de-escalation tactics that are available and appropriate under the circumstances before using physical force. The list of de-escalation tactics in the standard are removed and replaced. "De-escalation tactics" are defined as actions used by a peace officer that are intended to minimize the likelihood of the need to use force during an incident.

Depending on the circumstances, "de-escalation tactics" may include, but are not limited to:

- using clear instructions and verbal persuasion;
- attempting to slow down or stabilize the situation so that more time, options, and resources are available to resolve the incident;
- creating physical distance by employing tactical repositioning to maintain the benefit of time, distance, and cover;
- when there are multiple officers, designating one officer to communicate in order to avoid competing commands; and
- requesting and using available support and resources, such as a crisis intervention team, a designated crisis responder or other behavioral health professional, or back-up officers.

A peace officer must use less lethal alternatives that are available and appropriate under the circumstances before using deadly force.

A provision is added specifying that the standard does not limit or restrict a peace officer's authority or responsibility to perform lifesaving measures or perform community caretaking functions to protect health and safety, and specifying that the standard does not prevent a peace officer from responding to requests for assistance or service by specified individuals and members of the public. Furthermore, the standard does not permit a peace officer to use physical force or deadly force in a manner or under such circumstances that would violate the United States Constitution or state Constitution.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) Legislators met with law enforcement professionals, city and county officials, behavioral health professionals, interest groups, and many concerned members of the public over the past several months regarding the implementation of Engrossed Second Substitute House Bill (E2SHB) 1310 (2021). This bill responds to their concerns, and it is designed to improve public safety while also maintaining the goals of E2SHB 1310. The bill specifically authorizes the use of force in certain contexts where officers are already authorized or directed to detain persons in certain circumstances.

This bill responds to an urgent need to address implementation issues, especially for responding to persons experiencing behavioral health crises. Over the past several months, there have been countless incidents where peace officers have not responded or refused to provide assistance to behavioral health professionals and residents in crisis. Designated crisis responders have been left unable to do their jobs. In some instances, peace officers have told designated crisis responders that they are on their own. These jobs cannot be done without them. While most situations are resolved without violence, most interactions still require some law enforcement support. Without this support, many residents in our communities have been left in dangerous situations. Engrossed Second Substitute House Bill 1310 has had the unfortunate effect of eroding important professional partnerships and endangering the public.

This bill acknowledges the important roles and responsibilities that peace officers have in supporting behavioral health professionals and our residents in crisis. In effect, it clears up the confusion and puts officers back in the business of community caretaking. By restoring the authority of law enforcement officers to use reasonable physical force to take a person into custody or provide other assistance under the Involuntary Treatment Act, behavioral

health professionals and officers can return to working collaboratively in helping the most vulnerable members of our communities. In addition, the bill restores law enforcement partnerships with firefighters, emergency medical services providers, and other first responders.

The bill makes changes to the standard for use of force by distinguishing between "imminent" and "immediate" in the context of physical force and deadly force. This change is important to provide clear guidance to officers, but it also aligns with training goals. Alongside this bill, the Legislature also needs to support funding for training through the Criminal Justice Training Commission to help support consistent implementation.

The bill is an important step forward, but it does not go far enough to address the many concerns raised by stakeholders. In particular, the term "physical force" should be defined. If the goal is to provide consistency, then agencies need to be working from the same definition. Even if the Attorney General issues a formal opinion on this matter, it will not have the force of law. Providing a definition is critical, as it may determine whether peace officers actually have the authority to effect Terry stops. Other terms also warrant clarification, and the bill should be amended to clearly allow officers to use force to effect community caretaking. Furthermore, the Legislature should be careful when distinguishing between the authority to use force and the authority to detain a person. This approach has created significant confusion. Officers should be able to carry out lawful detentions.

The bill should be amended to specifically authorize law enforcement officers to transport a person for evaluation or treatment under the Involuntary Treatment Act.

The bill should be broadened to address concerns around court orders. The courts have faced issues with dangerous situations arising in courtrooms, and it has been unclear whether officers can use force when directed by a judicial officer. Officers should have clear authority to enforce the oral commands of judicial officers.

The current language on court orders should be narrowed. Physical force is not appropriate for addressing certain orders, including orders regarding payment of fees or evictions.

Stakeholders would like to be included on any conversations regarding changing the provision on court orders. Sometimes physical force is necessary in these contexts, including for evictions, as those can evolve into dangerous situations.

(Opposed) None.

(Other) This bill contains important and necessary public policy changes, but it does not sufficiently address the concerns raised by law enforcement officers, and it does not allow officers to provide the level of safety our communities need and expect. These issues will not be resolved until the Legislature defines "physical force." There has been considerable time spent on discussing when officers can use physical force, but no time spent discussing

what it actually is. However, it appears that the title of the bill is crafted so narrowly that it would preclude any amendments to address this.

The Legislature should be cautioned against any approach where it references specific statutes and carves out narrow circumstances in which force is authorized to carry out detentions. This approach is impractical and unworkable. There are missing statutory references already. If the goal is to authorize officers to use force to carry out lawful detentions, then this can be achieved without referencing specific statutes.

Persons Testifying: (In support) Representative Jesse Johnson, prime sponsor; Flo Beaumon, Catholic Housing Services; Steve Brooks, Washington Fire Chiefs Association; Sharon Swanson, Association of Washington Cities; Jeff Myers, Hoquiam Police Department; Brian Smith, Port Angeles Police Department; Diane Ostrander; Annaliese Harksen, City of Olympia; Joan Miller, Washington Council for Behavioral Health; Cherie Harris, Kirkland Police Department; Michael Transue, Washington Fraternal Order of Police; Enoka Herat, American Civil Liberties Union of Washington; and Celia Jackson, King County.

(Other) James McMahan, Washington Association of Sheriffs and Police Chiefs; Brittany Gregory, Administrative Office of the Courts; Doug Levy, Outcomes By Levy LLC, City of Renton, City of Lake Stevens, and City of Fife; and Stacy Roark, Washington Council of Police and Sheriffs .

Persons Signed In To Testify But Not Testifying: None.