

# HOUSE BILL REPORT

## 2SHB 1579

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**As Reported by House Committee On:**  
Appropriations

**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:**

**Committee Activity:**

Community Safety, Justice, & Reentry: 1/31/23, 2/9/23 [DPS];

Appropriations: 2/22/23, 2/24/23 [DP2S(w/o sub CSJR)], 1/22/24 [DP3S].

**Brief Summary of Third Substitute 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 the OIP with jurisdiction concurrent with county prosecuting attorneys to review investigations, and initiate and conduct prosecutions, of cases arising from investigations of deaths conducted by the Office of Independent Investigations.

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### HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** The third substitute bill be substituted therefor and the third substitute bill do pass. Signed by 19 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Berg, Callan, Chopp, Davis, Fitzgibbon, Lekanoff, Pollet, Riccelli, Ryu, Senn, Simmons, Slatter, Springer, Stonier and Tharinger.

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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 part of the legislation nor does it constitute a statement of legislative intent.*

**Minority Report:** Do not pass. Signed by 11 members: Representatives Corry, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Connors, Assistant Ranking Minority Member; Couture, Assistant Ranking Minority Member; Chandler, Dye, Rude, Sandlin, Schmick, Stokesbary and Wilcox.

**Staff:** Jessica Van Horne (786-7288).

**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. In addition, 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 the 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, the OII may also report recommendations, if any, for expanding the scope of investigations or jurisdiction of the OII.

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 of Washington; or
- a majority of the committee charged with the oversight of the organized crime intelligence unit.

If both the county prosecuting attorney and the 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.

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**Summary of Bill (Third Substitute):**

Office of Independent Prosecutions.

The Office of Independent Prosecutions (OIP), led by an independent counsel, is established as a separate division within the Office of the Attorney General (AGO). The OIP has jurisdiction concurrent with prosecuting attorneys to review investigations, and initiate and conduct prosecutions of "applicable use of force cases," which are cases arising from investigations of deaths conducted by the Office of Independent Investigations. 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 personnel.

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 the 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 provides 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 as provided for, the Attorney General must appoint an interim independent counsel. The Attorney General is otherwise screened from the work of the OIP including that the Attorney General may have no input or decision-making authority over whether criminal charges are filed in a case within the OIP's jurisdiction.

*Independent Counsel.*

The independent counsel must meet specified professional criteria and is authorized to: (1) oversee the OIP; (2) hire personnel as needed, including assistant attorneys general; (3) provide trainings that promote recognition and respect for diverse races, ethnicities, and cultures of the state; (4) enter into contracts and memoranda of understanding; (5) ensure persons subjected to use of deadly force or their survivors are kept apprised of a case's status and charging decisions; (6) establish policies to ensure personnel with actual or apparent conflicts are screened from the review of investigations for criminal charges; and (7) 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 the 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 the OIP's website.

The OIP must contract with a special assistant attorney general to review an investigation and prosecute the case, if charged, if the OIP receives a report from the OII in a matter where the use of force in the applicable use of force case was by: (1) a general authority peace officer at a state agency; or (2) an employee of the Department of Corrections, a limited authority law enforcement agency, or a police department at a public institution of higher education.

#### 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. In making this determination, the prosecuting attorney must consider whether the presence of any of the following would impact the determination of whether criminal charges should be filed or prosecuted:

- 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;
- 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; or
- the case has been reopened by the OII.

If recusal is necessary, the county prosecuting attorney must transfer the case to the OIP within 30 days of receiving it from the OII.

#### Designating the Prosecuting Authority.

If both the county prosecuting attorney and the 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.

In making its determination: (1) 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 (2) the county prosecuting must overcome a presumption that they have an inherent conflict of interest in any matter arising from an investigation within the scope of the OII.

#### The Office of Independent Investigations.

The OII is directed to send its completed investigations and referrals to both the county prosecuting attorney of the jurisdiction where the offense occurred and the OIP, which must

include information, if known, regarding the presence of a conflict of interest. The OII is also encouraged to cooperate with the OIP with respect to requests for interviews or provision of additional information and transport of evidence.

### **Third Substitute Bill Compared to Second Substitute Bill:**

The third substitute bill makes the following changes:

- The jurisdiction of the Office of Independent Prosecutions (OIP) is modified to include only cases arising from investigations of deaths conducted by the Office of Independent Investigations (OII).
- The OIP is required to contract with a special assistant attorney general if it receives an OII report for a matter involving a general authority peace officer at a state agency; or an employee of the Department of Corrections, a limited authority law enforcement agency, or a police department at a public institution of higher education.
- The standards by which a county prosecuting attorney must determine if recusal is necessary in an applicable use of force case are modified, including considering whether the case has been reopened by the OII.
- The requirement in the second substitute bill that all independent investigation reports conducted as required under state law must be handled according to the OII's distribution procedures is removed.
- The requirement in the second substitute bill that a court must order the OIP to discharge a prosecuting attorney's duties if the prosecuting attorney has not transferred a case where they have a conflict of interest to the OIP is removed and replaced by a requirement that the prosecuting authority for an applicable use of force case must be decided according to the procedures established for when both a prosecuting attorney and the Attorney General file an information or an indictment in an applicable use of force case.
- The effective date for provisions establishing concurrent jurisdiction of the OIP with county prosecuting attorneys for applicable use of force cases is changed from July 1, 2024, to January 1, 2026.

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**Appropriation:** None.

**Fiscal Note:** Available. New fiscal note requested on January 24, 2024.

**Effective Date of Third Substitute Bill:** The bill contains multiple effective dates. Please see the bill. However, the bill is null and void unless funded in the budget.

### **Staff Summary of Public Testimony:**

See House Bill Report in the 2023 Legislative Session.

**Persons Testifying:** See House Bill Report in the 2023 Legislative Session.

**Persons Signed In To Testify But Not Testifying:** See House Bill Report in the 2023 Legislative Session.