

HOUSE BILL REPORT

3SHB 1579

As Passed House:
February 6, 2024

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].

Floor Activity:

Passed House: 3/4/23, 52-44.

Floor Activity:

Passed House: 2/6/24, 53-44.

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.

HOUSE COMMITTEE ON APPROPRIATIONS

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.

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.

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: Michelle Rusk (786-7153).

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.

Summary of Third Substitute Bill:

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.

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 OIP is led by an independent counsel who 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.

The independent counsel must meet specified professional criteria and is authorized to: (1) oversee the OIP; (2) hire personnel as needed; (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 OIP's case records 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, the independent counsel must issue a public report with the results of the investigation including 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 a case, if charged, if the OIP receives a report from the OII where the use of force 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 applicable use of force case, 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 will best promote the interests of justice. The court must prioritize the public's interest in ensuring a fair and impartial prosecution and trial that is free from bias, prejudice, or conflict of interest. A county prosecuting must also overcome a presumption that the prosecuting attorney has an inherent conflict of interest. Upon its determination, a court must enter an order designating the prosecuting authority in the case and dismissing the duplicative charges.

The Office of Independent Investigations.

The OII must send its completed investigations and referrals to both the county prosecuting

attorney of the jurisdiction where the offense occurred and the OIP. A completed investigation must include information, if known, regarding the presence of a conflict of interest. The OII and the OIP are also encouraged to cooperate regarding requests for interviews or provision of additional information and transport of evidence.

Appropriation: None.

Fiscal Note: Available.

Effective Date: 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.