

HOUSE BILL REPORT

E2SHB 1310

As Amended by the Senate

Title: An act relating to permissible uses of force by law enforcement and correctional officers.

Brief Description: Concerning permissible uses of force by law enforcement and correctional officers.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Johnson, J., Lovick, Ryu, Simmons, Berry, Fitzgibbon, Hackney, Wylie, Sells, Wicks, Cody, Callan, Gregerson, Santos, Senn, Ortiz-Self, Chopp, Davis, Valdez, Dolan, Bateman, Ormsby, Bergquist, Morgan, Ramel, Ramos, Lekanoff, Frame, Harris-Talley, Pollet, Macri and Peterson).

Brief History:

Committee Activity:

Public Safety: 1/29/21, 2/11/21 [DPS];
Appropriations: 2/18/21, 2/19/21 [DP2S(w/o sub PS)].

Floor Activity:

Passed House: 3/6/21, 55-42.
Senate Amended.
Passed Senate: 4/10/21, 26-23.

Brief Summary of Engrossed Second Substitute Bill

- Establishes a standard for use of physical force by 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.

Minority Report: Do not pass. Signed by 3 members: Representatives Mosbrucker,

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.

Ranking Minority Member; Klippert, Assistant Ranking Minority Member; Graham.

Minority Report: Without recommendation. Signed by 2 members: Representatives Griffey and Young.

Staff: Kelly Leonard (786-7147).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Public Safety. 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 11 members: Representatives MacEwen, Assistant Ranking Minority Member; Boehnke, Caldier, Chandler, Dye, Harris, Hoff, Jacobsen, Rude, Schmick and Steele.

Minority Report: Without recommendation. Signed by 3 members: Representatives Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member.

Staff: Yvonne Walker (786-7841).

Background:

Use of Force by Peace Officers. The United States Constitution, and in particular the Bill of Rights, 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 persons subject to arrest or detained pretrial, the standards require the use of force by a peace officer to be reasonable under the totality of the circumstances. Whether an officer's actions are reasonable depends upon several factors. This may include, for example, the severity of the crime at issue; whether the suspect poses an immediate 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.

State law does not contain separate standards for use of physical force by peace officers, though it generally authorizes an officer to use all necessary means to effect the arrest of a suspect who flees or resists arrest. This authorization is subject to the limitations under the United States Constitution as well as the restrictions in the state criminal code governing justifiable homicide and use of deadly force. Law enforcement agencies and correctional facilities typically adopt policies on the use of force, including the types of force allowed

and when force may be used.

Civil Remedies. Under federal law, the primary legal remedy for the excessive use of force by a peace officer is to seek damages through a civil cause of action for deprivation of constitutional rights under 42 U.S.C. §1983. Though state law does not provide a specific cause of action for state constitutional rights, a person may file a tort claim for assault or battery based on the intentional actions of a peace officer. In 2019 the State Supreme Court held that an injured party could also file a negligence claim premised on a peace officer's unreasonable failure to follow police practices calculated to avoid use of deadly force, so long as allegations support a negligence claim concerning the peace officer's actions leading up to the decision to use deadly force.

Criminal Liability of Peace Officers. Whether a peace officer is criminally liable for using 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 is operating 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 include, 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.

Training. All peace officers are required to complete basic training through the Criminal Justice Training Commission (CJTC). Basic training consists of a 720-hour program covering a wide variety of subjects including: criminal law and procedures; traffic enforcement; cultural awareness; communication and writing skills; emergency vehicle operations; firearms; crisis intervention; patrol procedures; criminal investigation; and defensive tactics. In addition, all peace officers are required to complete violence de-escalation training through the CJTC within the first 15 months of employment, and then must complete updated violence de-escalation training periodically thereafter.

Summary of Engrossed Second Substitute Bill:

Use of Force by Peace Officers. A civil standard for use of force by peace officers is established. 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; or protect against an imminent threat of bodily injury to the peace officer or another person.

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" 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 only the minimal degree 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 minimal degree of force;
- 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.

Examples of de-escalation tactics, as well as the types of characteristics and conditions an officer must consider when determining the appropriate degree of force, are included.

A peace officer may not use any force tactics prohibited by applicable departmental policy, the bill, or otherwise by law, except to protect his or her life or the life of another person.

Agency Policies. Agencies may adopt policies or standards with additional requirements for de-escalation and greater restrictions on the use of physical and deadly force than those provided in the bill.

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 September 31, 2022, all law enforcement agencies must adopt the model policy or otherwise adopt policies consistent with the standard. Law enforcement agencies must provide copies of policies and additional information to the Attorney General, including any future modifications. The Attorney General must publish annual reports on agencies' policies.

Training. Basic training and mandatory violence de-escalation training through the CJTC

must be consistent with the standard for use of physical force and the model policy established by the Attorney General. In addition, the CJTC must submit semiannual reports to the Legislature and Governor on the implementation and compliance with violence de-escalation training requirements, including data on compliance by agencies and officers.

EFFECT OF SENATE AMENDMENT(S):

The Senate amendment modifies the intent section by providing that it is the intent of the Legislature that, when practicable, peace officers will use the least amount of physical force necessary to overcome actual resistance under the circumstances. The Senate amendment further provides that it is the fundamental duty of law enforcement to preserve and protect all human life.

The Senate amendment expands the authorization to use physical force by allowing an officer to use force when necessary to protect against an imminent threat of bodily injury to the person against whom force is being used. The Senate amendment modifies the reasonable care standard established in the underlying bill by:

- specifying that the de-escalation tactic providing that an officer should leave the area in certain circumstances is limited to when no crime has been committed or is about to be committed;
- requiring the officer to use the least amount of physical force necessary to overcome resistance under the circumstances (rather than requiring the officer to use only the minimal degree of physical force necessary to overcome resistance under the circumstances);
- modifying language relating to the consideration of certain characteristics and conditions of persons when determining the appropriate degree of force by specifying that the consideration is for determining the "appropriate and least amount of force possible to effect a lawful purpose" (rather than the "appropriate and minimal degree of force"); and
- modifying the definition of "less lethal alternatives" to provide that the term includes verbal warnings and de-escalation tactics (in addition to other tools provided in the underlying bill), thereby requiring peace officers to use verbal warnings and de-escalation tactics prior to using any deadly force when possible.

The Senate amendment limits the exception to the restriction against using any prohibited force tactics, which applies when necessary for an officer to protect his or her own life or the life of another person, to circumstances involving "an imminent threat." The Senate amendment further provides that the bill does not prevent any political subdivision (in addition to any law enforcement agency as provided in the underlying bill) from adopting policies or standards with additional requirements for de-escalation and greater restrictions on the use of physical and deadly force.

The Senate amendment adds new, separate restrictions on the use of tear gas, including:

- providing that, notwithstanding any contrary provisions in the underlying bill, a law

- enforcement agency may not use or authorize its peace officers or other employees to use tear gas unless necessary to alleviate a present risk of serious harm posed by a: Riot; barricaded subject; or hostage situation;
- requiring an officer or employee, prior to deploying any tear gas, to: exhaust alternatives to the use of tear gas that are available and appropriate under the circumstances; obtain authorization to use tear gas from the supervising officer, who must determine whether the present circumstances warrant the use of tear gas and whether available and appropriate alternatives have been exhausted; announce to the subject or subjects the intent to use tear gas; and allow sufficient time and space for the subject or subjects to comply with the officer's or employee's directives; and
 - defining "barricaded subject," "hostage situation," and "tear gas."

The Senate amendment reorganizes subsections to improve clarity.

Appropriation: None.

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) The killings of Breonna Taylor, George Floyd, Manuel Ellis, and many others over the past year have brought the issue of excessive force to the attention of the entire nation. However, communities of color have been sounding the alarm on this crisis for decades. Protecting and preserving human life should be the paramount duty of law enforcement officers. Initiative No. 940 (I-940) was enacted two years ago. Since then, there have been 100 killings by law enforcement in the state, and only one prosecution. These cases demonstrate the importance of establishing clear standards for and systemic oversight over law enforcement.

Officers are more likely to use excessive force against persons of color, and therefore these incidents have a disproportionate impact on persons of color. Local studies have confirmed this. The state needs to develop objective standards rooted in safety in order to address equity. Black lives matter because all lives matter.

Many of the incidents involve persons with disabilities or persons experiencing a mental health crisis. Officers' actions often escalated situations, ultimately causing the use of deadly force. In other incidents, officers responded to reports of criminal activity, but did so with unnecessary violence. There are numerous examples where officers did not follow de-escalation standards or comply with their training. Police officers need to understand that this is not a video game. For the families, their sons and daughters are gone forever, yet the police get to move on without feeling the magnitude of their actions.

The goal of I-940 was to save lives by improving officers' skills and behavior. These goals have yet to be realized. Prosecutors are interpreting the standard differently. In addition, current state law authorizes officers to execute an arrest by any means necessary. This is too broad. This policy without clear definitions will not work. The citizen sponsor of I-940 and families impacted by police violence have gathered over the last six months to take the next steps towards improving public safety. It needs to be clear that officers must de-escalate situations, and that peace officers must only use deadly force as a last resort.

The bill establishes a new statewide standard that limits physical force to only certain circumstances, and limits deadly force to a last resort. Further, it establishes the requirement of reasonable care, including taking into account the unique characteristics of persons with whom law enforcement officers interact. This is particularly important for persons with disabilities. These standards represent a shift toward a guardian and harm reduction model in policing. The bill does not hinder the ability of police to respond to calls and dangerous situations. No one is asking officers to stay in their cars. This is about balance. If this law had been in place years ago, people would not have died at the hands of police.

Policies should help officers avoid the need to make split-second decisions. This bill encourages the use of patrol tactics that will give officers more time to make informed decisions. Better policies and training will reshape the approaches to policing in order to reduce violent interactions. De-escalation should be the first step in every situation, and deadly force should be the absolute last resort. Police need to slow down, make more space, ask more questions, and de-escalate situations before reaching for their guns. This is the only way to end situations peacefully. This makes communities safer for the public and police officers. While the bill is not comprehensive, it aims to address every type of interaction affecting people of color on a regular basis. This is necessary and overdue.

Many law enforcement agencies are relying on policies developed by Lexipol, a private business. This is inappropriate. There is an imbalance of power between state-sanctioned officers and the public. The state equips officers with training and tools; therefore, the state should enact standards for officer interactions with the public. Policies should be developed by the state and agencies should be accountable to the public. The state has a responsibility to public safety, not just officer safety. This bill will save lives.

There should be statewide standards for use of force and de-escalation designed to implement I-940 training. Local governments support the creation of a statewide standard for use of force, while allowing local governments to establish more restrictive standards if they so choose. This bill achieves this. However, the bill needs more work and compromise to satisfy the concerns of law enforcement officers. The sponsor of this legislation should work toward building an alliance with law enforcement and communities, similar to the process used for I-940.

The integrity of the Legislature is important, including the code of the conduct. All persons deserve to be treated with respect and civility.

(Opposed) Every person should be able to go home safely at the end of each day, and people who need help should also be able to receive help. These ideas are not mutually exclusive, but this bill fails to accomplish both of these separate and important goals. This bill inhibits the ability of law enforcement to help victims. As written, this bill will also incentivize officers to make arrests in order to justify use of force at any level. This bill could contribute to the erosion of public trust of law enforcement agencies.

The bill does not recognize the unique situations that law enforcement officers face on a daily basis. Adopting these standards would put Washington out of sync with Supreme Court rulings. This would constitute an unprecedented change to how use-of-force incidents are judged by courts. These are dynamic situations. The state should not throw out a reasonableness standard and replace it with an unreasonable one. Officers should be judged based on an objective evaluation of the facts. These situations should be based on what they are, not what people want them to be. The state should not have goals for prosecutions of officers. Every situation is different. The state cannot continue to change laws in pursuit of prosecutions while losing sight of objectivity.

House Bill 1064 and I-940 were a historic achievement between law enforcement and communities. This symbolized a shared commitment to work towards change and building trust. The Legislature should honor this prior achievement and pursue implementation of those policies and standards.

This bill is extremely concerning for corrections officers. It does not take into account the unique situations inside jails and prisons. Staff do not carry firearms or tasers, and staff are outnumbered by significant ratios. If the state wants to reduce incidents inside facilities, then more training is the answer.

Law enforcement officers are expected to run toward danger. Officers are judicious and conscientious in their decisions. Officers always aim to use de-escalation tactics. No one wants encounters to result in injuries to the officers or the public. This bill, however, will require officers to retreat from danger. This will endanger officers and the public, and it does not take into account the reality of split-second decisions. More training and education are essential for new and veteran officers. Peace officers are being asked to react to more complex situations and should be better prepared for doing this.

The grief of families who have lost loved ones is heart-breaking. The state needs to address their concerns, and the state needs to ensure these cases are investigated properly. The state needs to do more to help officers avoid these situations and also find a way to objectively review these incidents. Yet the hardships faced by law enforcement officers and their families should also be recognized. Many law enforcement officers have died or been injured in the line of duty, and many others have anguished over having to use force on

others.

If this bill is adopted, officers will leave the profession in pursuit of safer employment. If the good officers leave the profession, then the ones that are left will be there for a paycheck. This will not benefit public safety.

Staff Summary of Public Testimony (Appropriations):

(In support) Police violence traumatizes communities and erodes trust in law enforcement. There have been too many unnecessary deaths in cases where deadly force was the first approach that was used. Protecting life should be law enforcement's highest priority. Current law allows police to make an arrest by any means necessary, which is a broad authorization of power to use an unlimited amount of force. Since Initiative 940 passed there have been over 100 deaths related to police use of force in Washington. This bill is a continued evolution of Initiative 940 as it tries to clarify the totality of circumstance in every unique case that can be presented to an officer.

This bill emphasizes de-escalation over confrontation and authorizes police to use force only when necessary. The creation of a clear statewide standard for use of force will instill a clear trust in the community and will benefit everyone, including peace officers. This bill is not only a lifesaving policy because it puts in place a statewide standard for use of force, but it also meets the public's expectation that alternatives will be exhausted before deadly force is used by police. There is a priority to allow the state to set the standard for use of force by law enforcement officers while preserving the rights of cities to have more restrictive standards if they choose. Although this bill needs more work, it is trending in the right direction. This is a step that will help ensure policing builds trust in communities.

(Opposed) The Washington Association of Sheriffs and Chiefs has proposed a statewide standard that should be considered. Provisions of the current bill fail to acknowledge reasonable circumstances where an officer might use force and will likely result in additional arrests that do not happen under current law today. In another provision of the bill, the duty of reasonable care uses subjective standards without incorporating a reasonable officer standard, thereby subjecting officers to a lay person's interpretation of circumstances without the benefit of knowledge and experience faced by officers. In addition, the Attorney General's Office is not the appropriate entity to develop model policies on use of force by law enforcement.

(Other) This bill has been worked hard by many passionate people and it has improved since its original version. This bill is connected to civil liability so drafting the correct wording is important for both policy and fiscal reasons. This bill proposes changes on how officers approach the use of force and outlines the expectations concerning use of force. However, proper training for officers is necessary if officers and their agencies are going to be held accountable. Lastly, not only does the local government fiscal note not appear to clearly define local cost, but the fiscal note also does not accurately reflect the funds needed

for training law enforcement officers.

Persons Testifying (Public Safety): (In support) Representative Johnson, prime sponsor; Sakara Remmu, The Washington Black Lives Matter Alliance; Laura Van Tosh; Danielle Bargala Sanchez, DeVitta Briscoe, Tim Reynon, and Leslie Cushman, Washington Coalition for Police Accountability; Alexis Francois; Frank Gittens; Monisha Harrell and Alison Holcomb, Equal Rights Washington; Andrew Myerberg, Office of Police Accountability; David Owens, Loevy & Loevy; Darya Farivar, Disability Rights Washington; Enoka Herat, American Civil Liberties Unions of Washington; Ryan Drevaskrat, Galanda Broadman, PLLC; Sharon Swanson, Association of Washington Cities; Breean Beggs, Spokane City Council; Tammy Morales, Seattle City Council; Lisa Parshley, Olympia City Council; and Leslie Braxton, New Beginnings Christian Fellowship.

(Opposed) James McMahan, Washington Association of Sheriffs and Police Chiefs; Todd Miller; Marco Montebalco, Washington Fraternal Order of Police; Jeff DeVere, Washington Council of Police and Sheriffs; Austin McCombs, Sedro-Woolley Police Department; Brenda Wiest, Teamsters 117; and Spike Unruh, Washington State Patrol Troopers Association.

Persons Testifying (Appropriations): (In support) Representative Johnson, prime sponsor; Enoka Herat, American Civil Liberties Union of Washington; Leslie Cushman and Nickeia Hunter, Washington Coalition for Police Accountability; Sakara Remmu, Washington Black Lives Matter Alliance; and Sharon Swanson, Association of Washington Cities.

(Opposed) James McMahan, Washington Association Sheriffs and Police Chiefs.

(Other) Jeff DeVere, Washington Council of Police and Sheriffs.

Persons Signed In To Testify But Not Testifying (Public Safety): Lyn Idahosa, Federal Way Black Collective; Paula Sardinias, Washington Build Back Black Alliance; and Leanne Kunze, Washington Federation of State Employees and American Federation of State, County & Municipal Employees, Council 28.

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