

SENATE BILL REPORT

E2SHB 1310

As Passed Senate - Amended, April 10, 2021

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: Passed House: 3/6/21, 55-42.

Committee Activity: Law & Justice: 3/16/21, 3/18/21 [DPA-WM, DNP].

Ways & Means: 3/30/21, 4/02/21 [DPA (LAW), DNP, w/oRec].

Floor Activity: Passed Senate - Amended: 4/10/21, 26-23.

Brief Summary of Amended Bill

- Establishes a civil standard for peace officer use of force.
- Requires the attorney general to develop model policies on law enforcement's use of force and de-escalation tactics and requires individual law enforcement agencies to adopt policies consistent with the model policies.
- Authorizes the use of tear gas when necessary to alleviate a present risk of serious harm posed by a riot.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.
Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Darneille, Kuderer and

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.

Salomon.

Minority Report: Do not pass.

Signed by Senators Padden, Ranking Member; McCune, Assistant Ranking Member; Holy and Wagoner.

Staff: Shani Bauer (786-7468)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended by Committee on Law & Justice.

Signed by Senators Rolfes, Chair; Frockt, Vice Chair, Capital; Robinson, Vice Chair, Operating & Revenue; Carlyle, Conway, Darneille, Dhingra, Hasegawa, Hunt, Keiser, Lias, Mullet, Pedersen and Wellman.

Minority Report: Do not pass.

Signed by Senators Wilson, L., Ranking Member; Brown, Assistant Ranking Member, Operating; Honeyford, Assistant Ranking Member, Capital; Schoesler, Assistant Ranking Member, Capital; Gildon, Muzzall, Rivers, Van De Wege, Wagoner and Warnick.

Minority Report: That it be referred without recommendation.

Signed by Senator Braun.

Staff: Julie Murray (786-7711)

Background: Federal Civil Actions—Deprivation of Constitutional Rights. Federal law, under 42 U.S.C. §1983, provides a civil cause of action to redress violations of federal constitutional rights caused by persons acting under color of state law. This cause of action is often referred to as a section 1983 action. The legal standard for determining whether actions violate constitutional rights depends on the particular constitutional right at issue. Section 1983 actions against law enforcement officers often involve claims of excessive use of force, unlawful search or seizure, or false arrest in violation of Fourth Amendment rights.

The general standard for evaluating Fourth Amendment claims is whether or not the officer's actions were objectively reasonable. In making this determination, the court must balance the nature and quality of the intrusion on the individual's rights against the state's interests in the case. Court decisions indicate that reasonableness is highly dependent on the particular facts and circumstances of each case including: the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. The reasonableness of a particular use of force is examined from the perspective of a reasonable officer on the scene, and not with the benefit of hindsight.

Qualified immunity in the context of section 1983 actions is a doctrine that originated in

federal case law. It provides government officials performing discretionary functions immunity from civil suits unless the plaintiff shows that the officer violated clearly established rights. When determining whether or not a right was clearly established, courts consider whether the constitutional right alleged to have been violated was sufficiently clear so that a reasonable officer would have known that his or her conduct violated the rights. This is an objective standard, meaning that the standard does not depend on the officer's subjective state of mind.

Section 1983 actions are suits generally brought against the individual officer who committed the alleged violation since the doctrine of vicarious liability of employers does not apply in section 1983 actions. An officer's employing agency may only be held liable in a section 1983 action when the injury is the result of the execution of a policy or custom adopted by the agency.

Washington Civil Actions. The Washington Constitution contains provisions that protect individual rights of state residents, including Article 1, section 7, which provides that "[n]o person may be disturbed in his private affairs, or his home invaded, without authority of law." Washington does not have a statute that specifically creates a cause of action for violation of state constitutional rights, and Washington courts have consistently refused to recognize a private cause of action for damages for state constitutional violations absent legislative guidance.

However, a civil suit in Washington based on excessive use of force or other police misconduct could be brought under state common law tort actions. These include actions for intentional torts, such as assault, battery, false arrest, false imprisonment, or trespass, or a negligence cause of action. In a 2019 case, the Washington Supreme Court held that the fact that an officer's conduct constitutes an intentional tort does not preclude a negligence claim based on an officer's failure to use ordinary care to avoid unreasonably escalating an encounter to the use of deadly force.

Washington courts recognize a common law qualified immunity for government officers exercising discretionary functions. A police officer is entitled to immunity from civil liability where the officer carries out a statutory duty according to procedures dictated to the officer by statute and superiors and where the officer acts reasonably.

An employer may be held vicariously liable for an employee's tortious act if the employee was acting within the scope of employment when the act was committed. An employer may also be liable for the conduct of an employee based on negligent hiring, training, or supervising of the employee. However, a claim based on negligent hiring, training, or supervising applies only where the officer acts outside of the scope of employment.

Defense and Indemnification of Public Employees. When a civil action is brought against a state or local government officer or employee, the state or a local government must defend the officer or employee in the proceeding if his or her actions were within the scope of his

or her duties. Monetary damages awarded against the officer or employee must be paid by the state or local governmental entity if the court finds that the officer or employee was acting within the scope of his or her duties, and the judgement may not become a lien upon any property of the officer or employee.

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. Deadly force is justifiable when used by a peace officer in certain circumstances so long as they are 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 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. 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 Amended 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 as defined under chapter 9A.76 RCW; 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 only when necessary to protect against an imminent threat of serious physical injury or death to the officer or another person.

The provisions are created in a new chapter in Title 10 of the RCW and are applicable to any general authority, limited authority, or specially commissioned Washington law enforcement officer and any community corrections officer.

A peace office must use reasonable care in determining when and whether to use physical force and to that end, must:

- when possible, exhaust available and appropriate de-escalation tactics prior to using any physical force;
- use the least amount of physical force necessary to overcome resistance under the

- circumstances;
- 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.

A peace officer may not use any force tactics prohibited by applicable departmental policy, this chapter, or otherwise provided by law, except to protect his or her life or the life of another person from an imminent threat. Nothing in this section prevents a law enforcement agency or political subdivision from adopting policies or standards with additional requirements for de-escalation and greater restrictions on the use of physical and deadly force than provided in this section.

Applicable Definitions. The following definitions apply to a peace officer's use of deadly force:

- "Imminent threat of serious physical injury or death" means, based on the totality of the circumstances, it is objectively reasonable to believe 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;
- "Necessary" means, under the totality of the circumstances, a reasonably effective alternative to the use of deadly force does not exist, and the amount of force used was a reasonable and proportional response to the threat posed to the officer and others.; and
- "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.

Model Policy. By July 2, 2022, the attorney general must develop and publish model policies on law enforcement's use of force and de-escalation tactics. By December 1, 2022, all law enforcement agencies must adopt policies consistent with the model policies and submit copies of the applicable policies to the attorney general. If the agency departs from the model policy, the agency must provide notice and reasons for the departure. Within 60 days of any future modification of its policy, the agency must provide notice to the attorney general. The attorney general must make copies of the agency policies available on its website and on December 31st of each year, publish a report on the status of individual agencies and compliance with this section.

Training. Basic law enforcement academy training and violence de-escalation training provided by the CJTC must be consistent with this act and the model policies established by the attorney general. The CJTC must submit a report to the legislature and the Governor by January 1st and July 1st of each year on the implementation of and compliance with the training requirements. The report must include data on compliance by agencies and officers and recommendations for any changes to laws and policies necessary to improve

compliance.

Use of Tear Gas. Law enforcement may use tear gas to alleviate a present risk of serious harm posted by a riot if, prior to deployment, the officer:

- exhausts alternatives to the use of tear gas that are available and appropriate under the circumstances;
- obtains authorization to use tear gas from the supervising officer;
- announces to the subject or subjects the intent to use tear gas; and
- allows sufficient time and space for the subject or subjects to comply with the officer's or employee's directives.

Appropriation: The bill contains a null and void clause requiring specific funding be provided in an omnibus appropriation act.

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 Engrossed Second Substitute House Bill (Law & Justice): *The committee recommended a different version of the bill than what was heard.* PRO: Protecting human life should be of the utmost importance. The standard crafted in the bill allows police to use deadly force after alternatives have been exhausted. Peace officers must take into account circumstances—disability, mental health issues, whether child is present, or language barriers. Having a clear standard will reduce instances of police violence.

If standards were in place a few years ago, several individuals would still be alive. Have to consider impact of racism in policing. Police did not use less lethal alternatives in these circumstances. The focus should be on using only the amount of force necessary. In so many situations, an officer has escalated the situation. This bill institutes standard of care for how peace officers should do their jobs. De-escalation needs to be part of the decision making. Presumable use of force needs to be extremely narrow.

Over 1000 people are killed a year by the use of deadly force. Use of physical force is of greater concern. Deadly force is just the tip of the iceberg. Do not want police to pretend to be military. The Fourth Amendment is inadequate at regulating use of force. This is a strong reason to regulate use of force by police. This is a modest but necessary step forward.

No uniform standard for each of the municipalities to comply. Best practices as a floor and not a ceiling and this bill would help to create one state standard. This bill will reduce the number of violent police interactions and make our communities safer. People in crisis are

not thinking logically. Peace officers should be trained to react with care and not out of fear.

I support having a statewide standard as long as it preserves the right for cities to have more restrictive standards. Language clarifying minimal force; language to make clear that law enforcement may use physical force to prevent person from harming self.

This bill is about the protection and liberation of black life. Washington State regulates countless professions more closely than peace officers. This is a step in right directions to build trust for law enforcement in communities. A path for higher accountability.

In all of these violent interactions, I cannot recall one where the person did not have a physical or mental disability. De-escalation tactics reduce threat of harm to peace officers as well.

CON: Policies should be centered on the cornerstone of human life. Bill has made significant improvements. Section 3(1)(a) fails to acknowledge custody pursuant to involuntary treatment or when person is alleging harm against themselves. Reasonable officer standard to be put into place—available, appropriate, and other standards.

We all need to find better ways forward so people do not end up in these situations. Standard of review must be in place regardless of whether it is a criminal or civil cause of action. There must be perspective in totality of the circumstances. Also concerned with absence of training requirements. If you change the standard, you need to acknowledge the change in training. Members support looking for ways to decrease violent interactions. Cannot take away judgment that supports officers in keeping themselves and others safe.

Section 3 mandates when physical force can be used. Minimal amount should be the amount of force that is reasonable. Officers have several tools available, each of them could be reasonable under circumstances. Using some tools earlier may reduce the danger and amount of force necessary in the long run.

OTHER: There needs to be a balance between community expectations and police officers ability to do job. No longer change in force standard established by 940. Page 2, line 18 probable cause to make arrest, replace with where there is a reasonable basis to lawfully detain. If retaining current language, it will change the basis that perpetrators are detained.

Reasonable officer standard mirrors the language in 940. The objective standard takes into account reasonable peace officer would have believed that the use of force was necessary under the circumstances. Many terms are used—appropriate, and such —that do not have definition.

Persons Testifying (Law & Justice): PRO: Representative Jesse Johnson, Prime Sponsor; Sharon Swanson, Association of Washington Cities; Laura Van Tosh; Elaine Simons,

WCPA/Justice for Jesse Sarey; Noel Parrish, WCPA/Justice for Joel Nelson; Trishandra Pickup, WCPA/Justice for Stonechild Chiefstick; DeVitta Briscoe, WCPA/Not This Time; Castill Hightower, WCPA/Justice for Herbert Hightower Jr.; Camille Baldwin-Bonney, People Power Washington - police accountability workgroup; Annalesa Thomas, WCPA/Mother of Leonard Thomas; Brandon Garrett, Duke University School of Law; David Owens, Loevy & Loevy, The Exoneration Project; Ryan Dreveskracht, Galanda Broadman, PLLC; Enoka Herat, ACLU-WA; Liz Vogeli; Sakara Remu, Washington Black Lives Matter Alliance; Darya Farivar, Disability Rights Washington; Douglas Wagoner, Seattle Community Police Commission; John Barry, Seattle Office of Police Accountability.

CON: James McMahan, Washington Association of Sheriffs and Police Chiefs; Jeff DeVere, Washington Council of Police and Sheriffs; Spike Unruh, Washington State Patrol Troopers Association.

OTHER: Michael Transue, Washington Fraternal Order of Police.

Persons Signed In To Testify But Not Testifying (Law & Justice): No one.

Staff Summary of Public Testimony on Bill as Amended by Law & Justice (Ways & Means): PRO: The Association of Washington Cities (AWC) strongly supports this bill. One of AWC's priorities for policing reform was the establishment of a statewide standard on use of force for law enforcement officers so long as there was the ability for jurisdictions to establish more restrictive policies if they chose. Deadly force should be rarity. This bill would authorize officer use of force only when necessary to protect themselves and the public. The fiscal note does not account for the lives saved by this bill or the harm reduction. This bill will reduce police violence. The bill emphasizes de-escalation and reducing confrontation. A uniform standard on force will bring consistency across law enforcement agencies and improve practices and outcomes. The cost is a good investment in public safety. I strongly support funding this bill. With this bill permissible use of force will become extremely narrow, require de-escalation tactics and mandate officers use the least amount of physical force necessary to overcome resistance. This issue is personal. My son was killed in 2013. He was unarmed. The judge in our civil trial stated that my son's death was unnecessary, and the officers involved were reckless. This bill could potentially save someone's life.

CON: While the bill has improved substantially, we still cannot support it. Initiative 940 and subsequent legislation made substantial changes and increased the need for training for de-escalation and how we want officers to do their jobs. It was estimated that funding for that training would require seven years to train all officers. We do not believe the true cost of training is noted in this bill. If we want officers to change, we must train them. Language seems to focus only on criminal enforcement of the law. Officers also have a community caretaking function and we believe the language will not allow the officers to use force in this instance. We would also like the subjective terminology such as available and appropriate be interpreted through a reasonable officer standard.

OTHER: The bill has changed considerably, and we appreciate the legislators work to strike the right balance. The bill no longer uses the use of force standard created in Initiative 940 and subsequent legislation and we would like that standard to be maintained wherever possible. We think defense of necessity standard should look at totality of the circumstances. We would like to see the requirement that the attorney general submit to the Legislature any additional policies for its consideration to establish other statewide standards to minimize inconsistencies among law enforcement agencies.

Persons Testifying (Ways & Means): PRO: Sharon Swanson, Association of Washington Cities; Enoka Herat, WCPA and ACLU; Annalesa Thomas, WCPA and mother of Leonard Thomas.

CON: Jeff DeVere, Washington Council of Police and Sheriffs; James McMahan, Washington Association of Sheriffs and Police Chiefs.

OTHER: Michael Transue, Washington Fraternal Order of Police.

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