

# SENATE BILL REPORT

## ESB 5919

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As Amended by House, March 4, 2022

**Title:** An act relating to the standard for law enforcement authority to detain or pursue persons.

**Brief Description:** Concerning the definition of "physical force," "necessary," and "totality of the circumstances," and the standard for law enforcement authority to use physical force and providing the authority for a peace officer to engage in a vehicular pursuit when there is reasonable suspicion a person has violated the law and the officer follows appropriate safety standards. [**Revised for 1st Substitute:** Concerning the definition of "physical force," "necessary," and "totality of the circumstances," and the standard for law enforcement authority to use physical force.]

**Sponsors:** Senators Van De Wege, Mullet, Conway, Gildon, Honeyford, Lovick, Randall, Salomon and Wagoner.

**Brief History:**

**Committee Activity:** Law & Justice: 2/01/22, 2/03/22 [DPS, DNP, w/oRec].

**Floor Activity:** Passed Senate: 2/9/22, 31-18.

Passed House: 3/4/22, 86-12.

**Brief Summary of Engrossed Bill**

- Adds definitions related to the use of physical force.
- Amends when a peace officer may use physical force.
- Amends the standard for reasonable care.
- Amends when a peace officer may engage in a vehicular pursuit.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Majority Report:** That Substitute Senate Bill No. 5919 be substituted therefor, and the substitute bill do pass.

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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.*

Signed by Senators Dhingra, Chair; Padden, Ranking Member; McCune, Assistant Ranking Member; Kuderer, Pedersen, Salomon and Wagoner.

**Minority Report:** Do not pass.

Signed by Senator Trudeau, Vice Chair.

**Minority Report:** That it be referred without recommendation.

Signed by Senator Honeyford.

**Staff:** Joe McKittrick (786-7287)

**Background:** Use of Force. In 2021, the legislature passed, and the governor signed into law, E2SHB 1310. In part, that bill, created a standard for the use of force by peace officers. A peace officer may use physical force against another person when necessary to protect against criminal conduct where there is probable cause to make and arrest; effect an arrest; prevent an escape; 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.

A peace officer 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 the officer's use.

**Summary of Engrossed Bill:** Use of Force. The definitions relating to the use of force are amended. "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. "Physical force" means any act likely to cause physical pain or injury or any other act exerted upon a person's body to compel, control, constrain, or restrain the person's movement. "Physical force" does not include pat downs, incidental touching, verbal commands, or compliant handcuffing where there is no physical pain or injury. "Necessary" means that, under the totality of the circumstances, a reasonably effective alternative to the use of force does not appear to exist, and that the amount of force used was a reasonable and proportional response to the effect the legal purpose intended or to protect against the threat posed to the officer or others.

The situations where a peace officer may use physical force are expanded. A peace officer may use physical force against a person when necessary to:

- protect against criminal conduct where there is probable cause to make an arrest;
- effect an arrest;
- prevent an escape;
- effect an investigative detention, with less than probable cause if the peace officer has reasonable and articulable facts that point towards criminal activity, including when, under the totality of the circumstances, the situation escalates so that there are now facts sufficient to effectuate an arrest, whether or not an arrest is carried out; or
- protect against an imminent threat of bodily injury to the peace officer, another person, or the person against whom force is being used.

The standard for reasonable care is amended. 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, employ available and appropriate de-escalation tactics prior to using any physical force;
- use a proportional 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 their use.

Vehicle Pursuits. The standard for vehicular pursuits is amended. A peace officer may not conduct a vehicular pursuit unless four factors are met:

- there is reasonable suspicion that a person in the vehicle has committed, or is committing a violent offense, sex offense, an escape offense, a driving under the influence offense, a crime against persons offense, or another criminal offense where the public safety risks of failing to apprehend or identify the person are considered to be greater than the safety risks of the vehicular pursuit under the circumstances;
- the pursuit must be necessary for the purpose of identifying or apprehending the person;
- the person poses a public safety risk, and the safety risk of failing to apprehend or identify the person is greater than the safety risks of the vehicular pursuit under the circumstances; and
- the officer receives authorization to continue the pursuit from a supervising officer and there is supervisory control of the pursuit.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

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

**Staff Summary of Public Testimony on Proposed Substitute:** *The committee recommended a different version of the bill than what was heard.* PRO: Last year the Legislature passed the police reform laws, and we need to continue to refine them, and this bill goes a long way towards holding bad officers accountable and not confining all officers.

We have seen unintended consequences from the passing of last year's legislation. Currently officers do not have the authority to use physical force when needed, for example while dealing with an individual in a mental health crisis. Crime has increased over the last year. We need accountability and this bill would bring back reasonable suspicion as a consideration when determining whether to use physical force.

The safety of the public is a paramount duty of the government, and when crimes are committed against innocent people, we need to give law enforcement authority to take action to protect them. We have tipped the scales in the wrong direction. This bill provides clarity to officers.

This bill strikes a much needed balanced approach that provides our law enforcement with the tools they need to keep our communities safe, while retaining police accountability. There has been a dangerous increase of crime since last year. This is common sense legislation that will keep our communities safe while maintaining oversight and police accountability by providing a clear definition of physical force.

When the Legislature passed policing reform, it had unintended consequences that forced police to not intervene in the very instances in which we want them to intervene. This bill establishes clear definitions and a blueprint for when officers can detain a suspect. We must give law enforcement the tools they need.

Last year's laws created an over correction, and this bill would bring much needed direction to officers. Those laws prevented officers from using force unless they had probable cause. Washington State is the only state that has departed from the reasonable suspicion standard. Probable cause is a fairly high legal standard.

Following the reforms from last year, it has become a common occurrence for individuals to flee from officers. These efforts are a step in the right direction.

The legitimate use of reasonable physical force has long been a hallmark of community safety.

This bill provides much needed clarification for officers. The law enforcement community understands and embraces that it needs to evolve and develop best practices. This bill maintains accountability and provides the tools law enforcement needs.

Officers in Washington respect the value of all human life and dignity without prejudice to anyone. Vesting police officers with the authority to use reasonable force and to protect the public welfare requires monitoring and evaluation and a careful look of all interests. This bill does this.

This bill strikes a proper balance between what physical force is and is not.

While this bill does much to bring policing and the use of physical force in the right direction, it is only a first step. The definition of physical force should be clarified further. Likewise, this bill should address officers' ability to engage in reasonable vehicular pursuits. Lastly, this bill should encompass more clarity on when an officer may use force while engaged in an investigatory detention.

CON: This bill rolls back the protections put in place last year. My son was a victim of police profiling. Including the use of physical force in investigatory stops, including for traffic infractions, opens the law to racial profiling and more harm and discriminatory policing. The use of force is disproportionately enacted upon communities of color.

My son was killed by police in 2015. He was unarmed. Underlying the issue of the use of force is the issue of discriminatory policing. In Pierce County black people are five times more likely to have force used against them than is a white person. There is already bias in police interactions and this bill would allow an increase in the use of force in those situations.

There is significant evidence that throughout the United States black men are perceived as more aggressive. Many times, this misperception is coupled with the misidentification of objects in their hands, leading to tragic results. The laws passed last year have not been given the proper amount of time to settle and be processed. Police officers rely too heavily on the threat of physical force to enact compliance. The current law encourages officers to use alternatives to force. This bill negates those efforts.

This bill rolls back the work we did last year to protect our most marginalized community members. This bill is akin to a broken windows policy. The bills passed last year should be allowed to run their course.

This bill is a dangerous step backwards and would create a danger to communities of color, increase police violence, and make police less accountable. This bill is unnecessary as the legislation passed last year gave police the ability to use force while engaged in an investigatory stop. This bill expands the authority to use physical force in all investigatory stops based on reasonable suspicion, the lowest standard of proof. It allows for considerable officer discretion which will increase racial profiling.

While I agree with the need for a definition for physical force, handcuffing should be within the definition of physical force. The use of deadly force should only be used when

necessary. Deadly force should always be a last resort.

This bill allows officers to use physical force even when an individual is cooperating. There are numerous incidents of deadly miscommunications between individuals and officers because the officer did not recognize the impact of the person's disability. People experiencing a disability, especially those suffering a mental health crisis, are often fearful of law enforcement. This legislation gives people more of a reason to be fearful of law enforcement and goes too far. Washington needs clear laws that hold officers accountable.

Our criminal justice system must be equitable, effective, transparent and just. The laws passed last year have moved us in that direction. We are concerned with the safety of all involved and understand that there may be some implementation issues that need to be resolved. We urge caution in passing this bill because it would reverse some of the work done last year.

OTHER: The laws passed last year represent a step backwards in officers' abilities to help the mentally ill and victims of crime. This has presented a difficult situation for officers to navigate. Under current law people suspected of crimes can simply walk away and inhibit officer from gaining control of chaotic situations to determine who may or may not be involved.

**Persons Testifying:** PRO: Senator Kevin Van De Wege, Prime Sponsor; Ken Roske, City of Pasco, Police Chief; Taylor Gardner, WASPC; Bill Elfo, Whatcom County Sheriff's Office; Jason Whalen, Mayor, City of Lakewood; Armondo Pavone, Mayor, City of Renton; Brett Gailey, City of Lake Stevens - Brett Gailey, Mayor; Nadine Woodward; James Schrimpsheer, Fraternal Order of Police; Michael Transue, Fraternal Order of Police; Craig Meidl, Spokane PD; Dee Dee Gethers, Deputy Mayor, City of Fife.

CON: Marilyn Covarrubias, Washington Coalition for Police Accountability; Sonia Joseph, Washington Coalition for Police Accountability; Enoka Herat, ACLU of Washington; Darya Farivar, Disability Rights Washington; Kelly Vomacka, WDA/WACDL; Abiel Woldu; Carmen Rivera; Susan Fleming, League of Women Voters of WA.

OTHER: Jeff DeVere, WACOPS - Washington Council of Police and Sheriffs.

**Persons Signed In To Testify But Not Testifying:** PRO: James McDevitt; Steve Turcott.

CON: Heather Kelly, N/A; Robert Wardell, self advocates; Vivian Korneliussen.

#### **EFFECT OF HOUSE AMENDMENT(S):**

- Removes the intent section.
- Removes all amendatory provisions pertaining to the standard for use of force by peace officers.
- Modifies the restrictions on vehicular pursuits by: limiting the authority to engage in

pursuits to when there is reasonable suspicion that a person in the vehicle has committed or is committing a violent offense, sex offense, escape offense, or driving under the influence offense, rather than reasonable suspicion that a person in the vehicle has committed or is committing any criminal offense where the public safety risks of failing to apprehend or identify the person are considered to be greater than the safety risks of the vehicular pursuit under the circumstances, as provided in the underlying bill.

- Reinstates requirement that the pursuit be necessary for the purpose of identifying or apprehending the person.
- Prohibits pursuits unless a person in the vehicle poses a serious risk of harm to others rather than poses a public safety risk, as provided in the underlying bill, or an imminent threat to the safety of others, as provided in current law.
- Modifies the supervisory requirements for vehicular pursuits by requiring the pursuing officer to notify a supervising officer immediately upon initiating a pursuit; requiring supervisory oversight of the pursuit; and removing current law alternatives for when a supervisor is not on duty, thereby requiring supervisory oversight in all pursuits.
- Restores current law that exempts jurisdictions with fewer than ten commissioned officers from the supervisory requirements for vehicular pursuits when a supervisor is not on duty and modifies other safety requirements to account for a pursuit occurring without a supervisor is not on duty.
- Requires the supervising officer, the pursuing officer, or dispatcher to notify other law enforcement agencies or surrounding jurisdictions that may be impacted by the vehicular pursuit or called upon to assist with the vehicular pursuit.
- Requires the pursuing officer to be able to directly communicate with other officers engaging in the pursuit, the supervising officer, and the dispatch agency, such as being on a common radio channel or having other direct means of communication.
- Requires the pursuing officer, supervising officer, or responsible agency, as soon as practicable after initiating a vehicular pursuit, to develop a plan to end the pursuit through the use of available pursuit intervention options, such as the use of the pursuit intervention technique, deployment of spike strips or other tire deflation devices, or other department authorized pursuit intervention tactics.
- Specifies that the pursuing officer must have completed an emergency vehicle operator's course, have completed updated emergency vehicle operator training in the previous two years, and be certified in at least one pursuit intervention option.