

HOUSE BILL REPORT

HB 1025

As Reported by House Committee On:
Civil Rights & Judiciary

Title: An act relating to creating a private right of action for harm from violations of the state Constitution or state law by peace officers.

Brief Description: Creating a private right of action for harm from violations of the state Constitution or state law by peace officers.

Sponsors: Representatives Thai, Reed, Berry, Ryu, Simmons, Bateman, Fitzgibbon, Farivar, Peterson, Alvarado, Pollet, Street, Cortes, Doglio, Macri, Gregerson, Stonier, Kloba and Santos.

Brief History:

Committee Activity:

Civil Rights & Judiciary: 1/25/23, 2/10/23 [DPS].

Brief Summary of Substitute Bill

- Provides a cause of action against any peace officer who acts under color of authority, engages in conduct that is unlawful under the state Constitution or specific state laws, and causes injury.
- Provides an additional cause of action against any other peace officers who could have prevented the injury or aided in preventing the injury, but failed to do so.
- Establishes and limits vicarious and independent liability for peace officer employers.
- Establishes and limits defenses for peace officers and their employers.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass.

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 6 members: Representatives Hansen, Chair; Farivar, Vice Chair; Entenman, Goodman, Peterson and Thai.

Minority Report: Do not pass. Signed by 5 members: Representatives Walsh, Ranking Minority Member; Graham, Assistant Ranking Minority Member; Cheney, Rude and Walen.

Staff: John Burzynski (786-7133).

Background:

Federal Civil Actions—Deprivation of Constitutional Rights.

Federal law provides a civil cause of action to redress violations of federal constitutional and statutory 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 depends on the legal right at issue.

The doctrine of qualified immunity provides government officials performing discretionary functions with immunity from section 1983 actions unless the plaintiff shows that the officer violated "clearly established" rights. When determining whether a right was clearly established, courts consider whether the right at issue was sufficiently clear such that every reasonable official would have known that his or her conduct violated the right.

Section 1983 actions are generally brought against the individual officer who committed the alleged violation. The doctrine of vicarious liability of employers does not apply in section 1983 actions. However, an officer's employing agency may 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.

Washington has not enacted a statute authorizing a general cause of action against government officials for conduct that is unlawful under the state Constitution or state law. Washington courts have refused to recognize a private cause of action for damages for state constitutional violations absent legislative guidance. However, a civil suit against state agents and employees can be brought under state common law for tort actions. These include actions for intentional torts, such as assault, battery, false arrest, false imprisonment, or trespass; and for unintentional torts, such as a negligence claim based on an officer's failure to use reasonable care.

Washington courts recognize a distinct state variant of qualified immunity in some instances. A peace officer is generally entitled to state qualified immunity from civil liability for certain claims, including claims for false arrest and imprisonment, when the officer carries out a statutory duty according to procedures dictated to the officer by statute and superiors, and the officer acts reasonably. However, this immunity does not apply to

claims of assault and battery arising out of the use of excessive force to effectuate an arrest.

Generally, an employer may be held vicariously liable for an employee's tortious acts if the employee was acting within the scope of employment when the acts were 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 when the officer acts outside of the scope of employment.

Peace Officer Reasonable Care and Use of Force.

Peace officers must use reasonable care when determining whether to use physical or deadly force and when using physical or deadly force against another. Peace officers must:

- when possible, use all de-escalation tactics that are available and appropriate under the circumstances before using physical force;
- when using 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 less lethal alternatives that are available and appropriate under the circumstances before using deadly force; and
- make less lethal alternatives issued to the officer reasonably available for his or her use.

Peace Officer Use of Immigration and Citizenship Status.

State law limits the authority of law enforcement agencies to enforce immigration law and take action against a person based on their immigration status. Among other restrictions, and subject to limited exceptions, state and local law enforcement agencies may not:

- inquire into or collect information about an individual's immigration or citizenship status, or place of birth;
- provide information pursuant to notification requests from federal immigration authorities for the purposes of civil immigration enforcement;
- give federal immigration authorities access to interview individuals about a noncriminal matter while they are in custody;
- detain an individual solely for the purpose of determining immigration status;
- take an individual into custody or hold an individual in custody solely for the purpose of determining immigration status based solely on a civil immigration warrant or immigration hold request; or
- deny services, benefits, privileges, or opportunities to individuals in custody or in probation status, on the basis of the presence of an immigration detainer, hold, notification request, or civil immigration warrant.

Peace Officer Requirements to Intervene and Report.

Identifiable on-duty peace officers who witness another peace officer engaging or attempting to engage in the use of excessive force against another person are required to intervene, when in a position to do so, to end the use of excessive force or attempted use of

excessive force, or to prevent the further use of excessive force, and render aid at the earliest safe opportunity. Additionally, identifiable on-duty peace officers who witness another peace officer engaged in conduct that is unlawful or contrary to agency policy are required to report the conduct to their supervisor.

Defense of Public Employees.

When a civil action is brought against a state or local government officer or employee, the state or 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 judgment may not become a lien upon any property of the officer or employee.

Summary of Substitute Bill:

Peace Office Liability and Defenses.

Any person injured in person or property by a peace officer acting under color of authority has a cause of action against the peace officer, and against any other peace officer who had the power through reasonable diligence to prevent or aid in preventing the injury from occurring and failed to do so, if the peace officer engaged in conduct that is unlawful under: (1) the state Constitution; (2) the state statute governing peace officer use of immigration or citizenship status; or (3) the state statute governing peace officer reasonable care and use of force.

A peace officer has a defense if, when the injury occurred, the officer substantially complied with a regulation, practice, procedure, policy, or training that was established by the peace officer's employer or approved or condoned by superior officers.

Employer Liability and Defenses.

A plaintiff may also name a peace officer's employer as a defendant. The employer is vicariously liable for a peace officer's unlawful conduct causing injury if that conduct was within the scope of the peace officer's employment.

If a peace officer proves a defense of substantial compliance with a regulation, practice, procedure, policy, or training that was established by the peace officer's employer or approved or condoned by superior officers, then the employer is independently liable for the injury proximately caused by the regulation, practice, procedure, policy, or training at issue, unless the training was provided by the Criminal Justice Training Center or the policy was model guidance drafted by the Attorney General's Office at the specific request of the Legislature.

Peace officer employers are also independently liable for injuries proximately caused by the employer's failure to use reasonable care in:

- hiring, training, or supervising a peace officer; or
- retaining or disciplining a peace officer, unless the employer proves that it took disciplinary action against the peace officer and that action was appealed by the officer and reduced or overturned by an independent arbitrator or court.

Prohibited Defenses.

It is not an immunity or defense that the rights, privileges, or immunities sued upon were not clearly established at the time of the act, omission, or decision by the peace officer or employer.

Remedies.

A prevailing plaintiff has a right to recover actual damages as determined by the trier of fact and nominal damages. A court may award a prevailing plaintiff costs and reasonable attorney's fees, and may grant declaratory and injunctive relief.

Peace Officer's Rights.

Nothing in this act limits the right of a peace officer to have a legal defense provided at the expense of their employer or to have a judgment for a violation of this act satisfied by their employer.

Reporting Requirements.

If a peace officer's employer asserts an approved training or policy defense, it must within 30 days provide notice of the defense, and all relevant claims and facts in the underlying litigation, to the Attorney General and director of the Criminal Justice Training Commission.

Beginning December 1, 2025, and annually thereafter, the Attorney General's Office must provide a report to the chairs of the House Civil Rights and Judiciary Committee and Senate Law and Justice Committee, or the chairs of any successor committees, regarding all approved-training-or-policy defenses raised by peace officer employers and reported to the Attorney General in the preceding 12 months.

Felony Bar Exception.

An exception is added to the Felony Bar statute, which provides a complete defense to certain actions for personal injury or death when the plaintiff was engaged in the commission of a felony that proximately caused the injury or death. The existing exception for federal section 1983 actions is extended to also cover actions brought under this act.

Other Provisions.

The act must be liberally construed. Nothing therein affects any other common law or statutory right of action available to the plaintiff.

A cause of action under this act must commence within three years of the action accruing.

The act applies to causes of action arising on or after the effective date of the act.

Substitute Bill Compared to Original Bill:

The substitute bill:

- modifies the intent section by replacing a reference to violations of criminal statutes with a reference to violations of law, and by replacing a reference to state law with a reference to certain state laws;
- modifies the definition of "employer" to mean, in relevant part, the State of Washington and all political subdivisions and agencies thereof that act as a peace officer's employing agency or entity;
- limits liability to only arise from violations of the state Constitution and two specific state statutes: RCW 10.93.160 (law enforcement restrictions regarding immigration and citizenship status); and RCW 10.120.020 (law enforcement restrictions on use of force);
- reorganizes the liability and defenses established in sections 3(3) and (4), creating multiple subsections therein;
- modifies employer liability on the basis of an officer's substantial compliance with a regulation, practice, procedure, policy, or training, by requiring the regulation, practice, procedure, policy, or training to have been established by the employer, or approved or condoned by superior officers;
- modifies the employer defense of using a model policy drafted by the Office of the Attorney General to require the policy at issue to conform to published model guidance drafted by the Office of the Attorney General at the specific request of the Legislature;
- modifies the employer's defense of inability to use reasonable care in retaining or disciplining an officer as a result of binding arbitration, replacing it with a defense based on the employer taking disciplinary action against a peace officer and the action being appealed by the officer and then reduced or overturned by an arbitrator or court;
- modifies the provision prohibiting certain immunities or defenses by: (a) striking the restriction on an immunity or defense based on the state of the law being such that a peace officer or employer could not reasonably have been expected to know whether an act, omission, or decision was lawful; and (b) retaining the restriction on an immunity or defense based on the rights, privileges, or immunities sued upon not being clearly established at the time;
- adds a requirement for employers asserting a qualifying training or policy defense to provide notice of the defense, and all relevant claims and facts, to the Attorney General and director of the Criminal Justice Training Commission;
- adds a requirement for the Attorney General to provide the chairs of the House Civil Rights and Judiciary committee and Senate Law and Justice committee with an annual report regarding the assertion of qualifying training or policy defenses by employers;
- clarifies section 4 regarding remedies to state it applies to actions brought under the

- new chapter created by this act; and
- modifies the Felony Bar statute by adding an exception for claims brought under the new chapter created by this act.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect on January 1, 2025.

Staff Summary of Public Testimony:

(In support) This bill is informed by the experience of family members living under a communist regime, where the police can enter a home at will simply because of the political affiliations of a household member and violate privacy and rights with no recourse. The state has a responsibility to check its own actions and hold itself to account. Those who violate constitutional rights should be held accountable. Faith in government is eroded when public officials are not held responsible for their acts. If police officers violate rights or break laws, there must be consequences.

Wrongful convictions are pervasive and the leading cause is official misconduct. When a wrongful conviction occurs, typically nothing happens to the officers involved. Accountability is the basis of our system. Good officers who follow their training will have nothing to worry about under this bill.

This bill will provide compensation to victims. When a person is injured, someone always pays—the only question is who: the person who suffered the harm or the government?

This bill does not rely on federal law. It allows victims to bring lawsuits under state law and gain the protection and promise of the Washington Constitution.

This bill is similar to others across the country. Colorado recently passed a similar law and the state had no increase in officers quitting, lawsuits, or liability payments. In states that have eliminated qualified immunity like Colorado and New Mexico, there has been no parade of horrors or massive increase in civil litigation.

This bill is narrowly tailored to solve problems; it is about change, not punishment. It is a tool to improve policing culture and practices, and build trust. Qualified immunity has the effect of insulating both the officer and municipality from liability, so there is no need to improve. In a recent case in Washington, a woman who was seven months pregnant was tasered three times and the officer was not held accountable because a court had not previously held that specific conduct was unconstitutional.

Arguments against bills like this are often about qualified immunity, but these arguments have no basis in reality. Qualified immunity is not needed to protect officers from personal liability because the state indemnifies officers. Over 99 percent of judgments are paid from government funds. Additionally, qualified immunity is not needed to protect municipalities from bankruptcy. A study of 100 jurisdictions of various sizes showed liability costs make up less than 1 percent of most government budgets. Further, qualified immunity is not needed to protect officers from being punished for making good faith mistakes because they are already protected against reasonable mistakes.

(Opposed) The focus on stopping police misconduct should be preventative, not remedial. Court orders do not make for good statewide policy. Legal rights should not change based on particular courts and the area one lives. Policy changes in recent years, including the development of model policies and the focus on improving outcomes, are preferable to litigation.

Counties do not have complete oversight over the officers they will be held accountable for, including independent sheriffs. The county pays, but has no control over day to day operations. Sometimes, the counties hear about problems but lack the authority to make changes.

There is a disconnect in holding the employer accountable for the employee in these cases.

As drafted, the bill provides no remedy if an unlawful harm followed a model policy.

This bill should provide attorney's fees for both sides, not just a prevailing plaintiff.

Federal courts are the right place for these lawsuits. Federal courts are strict, federal judges are not elected, and juries come from a wide pool.

Qualified immunity is an important defense and allows dismissal of frivolous claims. Frivolous lawsuits will create endless stress and damage. Without qualified immunity, defendants' remaining options are settlement or trial. The Legislature, judges, the Governor, and all other government employees benefit from immunity, but this bill strips immunity from law enforcement. Removing qualified immunity from only police is terrible public policy. Without it, police may hesitate at a critical moment, jeopardizing safety and lives. This bill will create a system of perpetual lawsuits and endanger public safety.

If this bill is enacted, it should go further by stripping qualified immunity from limited authority peace officers and the Legislature. It's far easier to strip protections from others than to take them from yourself.

This bill will increase costs for agencies, taxpayers, and officers without reaching accountability. Cities face an overwhelming number of claims, many of which lack merit. The costs of litigation push cities towards settlement. The liability environment in

Washington is different than in other states. Cities in Washington face greater risks, and do not benefit from the liability limitations that exist in other states. Insurance costs are skyrocketing for local governments and insurers are leaving the state or threatening to do so. This bill will result in a nightmare of costs for agencies.

Law enforcement officers handle the most difficult situations and have mere moments to make the right decision. Every law enforcement interaction involves significant constitutional questions. There is a hazy border between constitutional and unconstitutional use of force. This bill stacks the deck against law enforcement by providing attorney's fees and eliminating qualified immunity. This bill has the effect of defunding the police. Peace officers are family and community members who have dedicated their lives to protecting the citizens of Washington and enforcing the laws the Legislature creates. Peace officers should not be held personally liable. This legislation will sever the trust of the peace officers working to make changes under new laws.

It is becoming more difficult to find and hire peace officers. Washington State Patrol applicant numbers have substantially fallen, and the patrol is currently down 235 officers. This bill will have a negative effect on applications and retention.

(Other) Qualified immunity is a court-created doctrine that provides a defense for public officials that have violated constitutional rights, but does not apply if the right was clearly established. To be clearly established, there must be a prior decision where constitutional rights were violated in nearly identical factual circumstances. Qualified immunity is not needed to protect against frivolous lawsuits. The defense applies to meritorious claims, not frivolous claims. Other procedural tools exist to weed out meritless claims. Qualified immunity is an impediment to meritorious claims, which means section 1983 is not functioning properly in the federal courts. State court alternatives are important to assure victims of misconduct have a way of vindicating their constitutional rights.

Persons Testifying: (In support) Representative My-Linh Thai, prime sponsor; Lara Zarowsky, Washington Innocence Project; Lorena Gonzalez, American Civil Liberties Union of Washington; Tammy Morales; Sonia Joseph, Washington Coalition for Police Accountability; Joanna Schwartz, University of California Los Angeles School of Law; Eliana Machevsky, National Police Accountability Project; Breean Beggs, Spokane City Council; and Larry Shannon, Washington State Association for Justice.

(Opposed) Michael McKinley; Mike Hoover, Washington State Association of Counties; Derek Bryan, Washington Counties Risk Pool; Ryan Lufkin, Washington Council of Police and Sheriffs; James McMahan, Washington Association of Sheriffs and Police Chiefs; Spike Unruh, Washington State Patrol Troopers Association; and Candice Bock, Association of Washington Cities.

(Other) Jay Schweikert, Cato Institute.

Persons Signed In To Testify But Not Testifying: None.