

# HOUSE BILL REPORT

## 2SHB 1579

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**As Passed House:**

March 4, 2023

**Title:** An act relating to establishing a mechanism for independent prosecutions within the office of the attorney general of criminal conduct arising from police use of force.

**Brief Description:** Establishing a mechanism for independent prosecutions within the office of the attorney general of criminal conduct arising from police use of force.

**Sponsors:** House Committee on Appropriations (originally sponsored by Representatives Stonier, Bateman, Lekanoff, Reed, Pollet and Macri).

**Brief History:**

**Committee Activity:**

Community Safety, Justice, & Reentry: 1/31/23, 2/9/23 [DPS];

Appropriations: 2/22/23, 2/24/23 [DP2S(w/o sub CSJR)].

**Floor Activity:**

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

**Brief Summary of Second Substitute Bill**

- Establishes the Office of Independent Prosecutions (OIP), led by an independent counsel, as a separate division within the Office of the Attorney General.
- Provides the OIP with jurisdiction concurrent with county prosecuting attorneys to review investigations, and initiate and conduct prosecutions of crimes involving use of deadly force by involved officers.

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**HOUSE COMMITTEE ON COMMUNITY SAFETY, JUSTICE, & REENTRY**

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 6 members: Representatives Goodman, Chair; Simmons, Vice Chair; Davis,

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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.*

Farivar, Fosse and Ramos.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Mosbrucker, Ranking Minority Member; Griffey, Assistant Ranking Minority Member; Graham.

**Staff:** Michelle Rusk (786-7153).

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## 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 Community Safety, Justice, & Reentry. Signed by 19 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Berg, Chandler, Chopp, Davis, Fitzgibbon, Lekanoff, Pollet, Riccelli, Ryu, Senn, Simmons, Slatter, Springer, Stonier and Tharinger.

**Minority Report:** Do not pass. Signed by 11 members: Representatives Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; Connors, Couture, Dye, Harris, Rude, Sandlin, Schmick and Steele.

**Staff:** Jessica Van Horne (786-7288).

### **Background:**

#### Use of Deadly Force by a Police Officer.

Deadly force means the intentional application of force using firearms or any other means reasonably likely to cause death or serious physical injury. Whether a police officer may be held criminally liable for use of deadly force depends on the specific crime alleged and any applicable defense. An officer has the same right of self-defense as other individuals. In addition, an officer's use of deadly force is justified when, in good faith, the deadly force is:

- applied without malice in obedience to the judgment of a competent court;
- used to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty;
- used to arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony;
- used to prevent escape from a federal or state correctional facility;
- used to prevent escape from a county or city jail or holding facility if the person escaping has been arrested for, charged with, or convicted of a felony; or
- used to lawfully suppress a riot if the actor or another participant is armed with a deadly weapon.

Good faith exists when, objectively considering all facts, circumstances, and information

known to the officer at the time, a similarly situated, reasonable officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual.

#### Office of Independent Investigations.

In 2021 the Legislature established the Office of Independent Investigations (OII) within the Office of the Governor and authorized the OII to conduct investigations into any incident:

- of a use of deadly force by an involved officer occurring after July 1, 2022, including any incident involving use of deadly force by an involved officer against or upon a person who is in-custody or out-of-custody; or
- involving prior investigations of deadly force by an involved officer if new evidence is brought forth that was not included in the initial investigation.

After July 1, 2024, the OII may also report recommendations, if any, for expanding the scope of investigations or jurisdiction of the OII.

#### Criminal Prosecutions by the Office of the Attorney General.

The Office of the Attorney General (AGO) is authorized, with jurisdiction concurrent with county prosecuting attorneys, to investigate crimes and conduct prosecutions upon the request or with the concurrence of:

- the county prosecuting attorney;
- the Governor of Washington; or
- a majority of the committee charged with the oversight of the organized crime intelligence unit.

If both the county prosecuting attorney and the AGO file an information or indictment charging an individual with substantially the same offense, the court must determine whose prosecution of the case will best promote the interests of justice and enter an order designating the prosecuting authority in the case and dismissing the duplicative information or indictment.

Upon the written request of the Governor, the AGO must investigate violations of criminal law. If the AGO believes after the investigation that criminal laws are being improperly enforced in any county, and that the county prosecuting attorney has failed or neglected to prosecute criminal actions, the AGO must direct the county prosecuting attorney to take any remedial action the AGO deems necessary and proper. If the county prosecuting attorney fails or neglects to comply with the AGO's directions in a reasonable timeframe, the AGO may prosecute those criminal actions in place of the county prosecuting attorney. If the AGO initiates or takes over a criminal prosecution, the county prosecuting attorney may not take any legal steps relating to the prosecution, except as authorized or directed by the AGO.

#### **Summary of Second Substitute Bill:**

### Office of Independent Prosecutions.

The Office of Independent Prosecutions (OIP), led by an independent counsel, is established as a separate division within the Office of the Attorney General (AGO). The OIP has jurisdiction concurrent with prosecuting attorneys to review investigations, and initiate and conduct prosecutions of crimes involving use of deadly force by involved officers, as those terms are defined in the Office of Independent Investigations (OII) statute. The independent counsel is authorized to review investigations of applicable cases, decline or file criminal charges when appropriate, and prosecute applicable cases to conclusion, including appeals and collateral attacks.

### *Advisory Board.*

An Office of Independent Prosecutions Advisory Board (Advisory Board) is created with 11 members, including three members of the general public, two members representing families affected by an incident within OIP's jurisdiction, one representative of a federally recognized tribe, one defense attorney, two prosecuting attorneys, and two active or retired law enforcement.

The Advisory Board must recommend three candidates for the position of independent counsel. It must also, in consultation with the independent counsel, submit a report to the Legislature and Governor by November 1, 2026, on cases reviewed by the OIP and whether changes in state law are needed to increase public confidence.

### *Attorney General.*

The Attorney General is authorized to select the independent counsel from the candidates put forward by the Advisory Board. If the Attorney General declines to select one of the recommended candidates, they may request that the Advisory Board provides additional qualified nominees for consideration, or offer an alternative candidate, who may be approved by a majority vote of the Advisory Board.

The Attorney General is also authorized to set the independent counsel's compensation and remove the independent counsel for misconduct or inability to perform the duties of the role. If the independent counsel resigns, becomes incapacitated, or is removed as provided for, the Attorney General must appoint an interim independent counsel. The Attorney General is otherwise screened from the work of the OIP including that the Attorney General may have no input or decision-making authority over whether criminal charges are filed in a case within the OIP's jurisdiction.

### *Independent Counsel.*

The independent counsel must meet specified professional criteria and is authorized to: (1) oversee the OIP; (2) hire personnel as needed, including assistant attorneys general; (3) provide trainings that promote recognition and respect for diverse races, ethnicities, and cultures of the state; (4) enter into contracts and memoranda of understanding; (5) ensure persons subjected to use of deadly force or their survivors are kept apprised of a case's status and charging decisions; (6) establish policies to ensure personnel with actual or

apparent conflicts are screened from the review of investigations for criminal charges; and (7) make charging decisions. No action may be instituted against the independent counsel or the independent counsel's employees for any act done in good faith in the execution of the person's duty.

*Public Records Act.*

The case records of the OIP are confidential and exempt from disclosure under the Public Records act until:

- a decision is made to decline charges;
- a charged case is dismissed;
- a not guilty verdict is entered; or
- there is entry of judgement and sentence following a guilty plea or verdict.

If the independent counsel decides not to file criminal charges in an applicable case, they must issue a public report with the results of the investigation and an explanation of the decision, and post it on the OIP's website.

County Prosecuting Attorneys.

In any case involving use of deadly force by an involved officer, the county prosecuting attorney has a duty to determine whether recusal is necessary to preserve public confidence or prevent a conflict of interest. A conflict of interest exists if:

- the prosecutor has a personal or professional relationship with the officer or the officer's employer such that the prosecutor's decision or pursuit of charges may be affected;
- the prosecutor has a duty to represent the officer's employing agency in any civil action arising from the same underlying incident and the prosecutor's decision or pursuit of charges might be affected by the duty to defend; or
- there is a risk that the prosecutor's ability to consider or carry out an appropriate course of action will be limited due to the prosecutor's other responsibilities or interests.

If recusal is necessary, the county prosecuting attorney must transfer the case to the OIP within 30 days of receiving it from the OII. If the county prosecuting attorney fails to transfer the case when recusal is necessary, a court must order the OIP to discharge the responsibilities of the county prosecuting attorney.

Designating the Prosecuting Authority.

If both the county prosecuting attorney and the OIP file charges for substantially the same offense in an applicable case, a court must determine whose prosecution of the case will best promote the interests of justice and enter an order designating the prosecuting authority in the case and dismissing the duplicative charges.

In making its determination, the court must prioritize the public's interest in ensuring a fair and impartial prosecution and trial that is free from bias and even the appearance of bias,

prejudice, or conflict of interest, and the county prosecuting must overcome a presumption that they have an inherent conflict of interest in any matter arising from an investigation within the scope of the OII.

The Office of Independent Investigations.

The OII is directed to send its completed investigations and referrals to both the county prosecuting attorney of the jurisdiction where the offense occurred and the OIP, which must include information, if known, regarding the presence of a conflict of interest. The OII is also encouraged to cooperate with the OIP with respect to requests for interviews or provision of additional information and transport of evidence.

**Appropriation:** None.

**Fiscal Note:** Available. New fiscal note requested on February 28, 2023.

**Effective Date:** The bill contains multiple effective dates. Please see the bill. However, the bill is null and void unless funded in the budget.

**Staff Summary of Public Testimony (Community Safety, Justice, & Reentry):**

(In support) This policy comes to you with a lot of hard work, a lot of history from the last several years, but it comes to you with an interest in making sure the public has an independent process they can believe in and does not call into question constitutional concerns raised previously. We want to continue to foster trust, we want to make sure that processes are independent of politics, conflicts, and are transparent to the people impacted by decisions that are made. With assistance from the Attorney General's Office (AGO) the proposed substitute insulates the independent prosecutions office from concerns relating to operating independently within the AGO.

The AGO is primarily a civil office, with a small team of criminal prosecutors, a dozen state agency clients with law enforcement functions, six university clients with their own police departments, and sexually violent predator cases in 38 of the 39 counties. The AGO appreciates that the proposed substitute addresses two significant concerns of the AGO: the creation of the independent counsel and the independent prosecutor's office is a substantial step forward to addressing conflicts that would naturally arise if this work were in the AGO. The concern that hasn't been addressed is the time it will take to stand up the independent prosecutions office and the independent counsel position. Please consider delaying the effective date to allow the AGO time to set up the Advisory Board, allow time for the Advisory Board to do a national search for the independent counsel candidates, hire the independent counsel and then allow the independent counsel to staff up.

Washington's system was written and implemented with different intent and impact for BIPOC communities. The vicious killing of George Floyd and Tyre Nichols gave everyone else a look into the culture of policing. The 2021 reform package was not an end-all

solution. More restructuring is desperately needed, and an independent prosecutor is needed to hold cities and counties accountable for the actions, or cover-ups, or harm or murder of another. Advocates are continuing to work with the sponsor to strengthen the language in the proposed substitutes.

Many families feel there have not been impartial investigations into incidents involving police use of deadly force or decisions not to file charges in these incidents. There are many accounts of conflicts of interest due to the close relationship a county prosecuting attorney holds with police. The Governor's task force on independent investigations speaks to how the newly created Office of Independent Investigations (OII) was meant to turn over their investigation to a special, independent prosecuting attorney. In that task force report, there was a recommendation for both an Office of Independent Investigations and an Office of Independent Prosecutions (OIP) because of the inherent conflict of interest present for local prosecuting attorneys. It is time to create the independent counsel so families and survivors can be able to trust the entire process. We would prefer exclusive jurisdiction within the OIP and to keep the county prosecuting attorneys out of this process altogether.

(Opposed) This proposal presumes incorrectly that prosecutors are not capable of charging law enforcement officers with criminal offenses, and that the AGO can be a neutral arbiter. If the Legislature sees the AGO as the watch dog of Washington law enforcement agencies, then please divest the AGO of all law enforcement and law enforcement-related activities, to provide clear and true objectivity.

There are three areas where the proposed substitute bill raises constitutional concerns. First, it creates a presumptive conflict of interest. Prosecuting attorneys do have to be screened from some conflicts of interest, but creating a presumptive conflict may have potential constitutional issues, if taking a core duty from a prosecuting and providing it to someone else. Second, there is a requirement that if there is a conflict of interest, a case must be transferred to the AGO independent counsel. The *Drummond* case casts doubt on this provision, and it is potentially unconstitutional to force a case transfer to one specific entity instead of letting a prosecuting attorney select a special deputy or an independent prosecutions office. Third, in current law, concurrent jurisdiction between county prosecuting attorneys and the AGO is triggered by a request from the Governor or a county prosecuting attorney; the AGO doesn't have original criminal jurisdiction.

Both local county prosecuting attorneys and the AGO have inherent conflicts of interest in making charging decisions in these cases and should be as far removed from charging decisions as possible. The OIP is more appropriately located outside of the AGO, and a policy from last year put it in the executive branch. Proposed Substitute House Bill 1579 from last session had the appropriate and necessary safeguards, instilling the greatest level of transparency, accountability, freedom from conflict of interest, and fairness. Having 39 counties making charging decisions in 39 different ways is not helpful for transparency, consistency, or for the community and involved officers.

(Other) More time is needed to evaluate the proposed substitute. With respect to potential constitutional problems that have been raised concerning sole jurisdiction for an OIP over cases involving use of deadly force by an involved officer, there are exceptions: (1) county prosecuting attorneys can be removed from a case against their objection if they are disabled from prosecuting, and the Washington State Supreme Court has said a conflict of interest is a disability; and (2) county prosecuting attorneys are prohibited from handling cases in which they have a conflict of interest, and they almost always have a conflict of interest from prosecuting police. The AGO also stated last year that the Supreme Court of Washington would probably give wide latitude given the importance of the objective of this policy and the lack of case law directly on point.

### **Staff Summary of Public Testimony (Appropriations):**

(In support) Creating the Office of the Independent Prosecutor (OIP) will provide transparency and a process by which cases can be handled outside the jurisdiction in which they occur. Providing an independent prosecutor will build trust where trust has been lost and provide justice. The bill strikes a balance between recognizing that the state Constitution directs the responsibility to bring cases to local prosecutors, and providing information from the independent investigation process and allowing for a case to be taken up by an independent entity when necessary. The bill also provides for independence within the Office of the Attorney General (AGO). The Legislature has the authority to determine the role of the county prosecutor. Delaying the effective date and phasing in the funding will be helpful.

Creating an OIP, in addition to the Office of Independent Investigations (OII), were two of the recommendations that came out of the Governor's task force on independent investigations from 2020. There is an inherent conflict of interest when a local prosecutor is investigating their local law enforcement agency because prosecutors work closely with law enforcement. In many cases, it appears that the facts of a case of use of deadly force have no impact on the prosecutor's charging decision. Fatalities appear to always be determined to be justified. For families who have lost loved ones, it was very painful when the local prosecuting attorney rendered that the death of their loved one was justified. The system is broken. Providing for independent prosecution will prevent other families from losing their loved ones. It is time for change and accountability.

(Opposed) This bill is deceptive and does not create a truly independent prosecutor. So long as the bill allows for concurrent jurisdiction for local prosecutors to bring cases, it will not provide a meaningful solution for continuing incidents of inappropriate use of deadly force. The bill would empower the persons at the center of the problem: county prosecutors and local courts. It relies on the goodwill of county prosecutors to evaluate if they have a conflict of interest and it is likely that courts will defer to their assessment. Police could avoid accountability by pleading to a lesser charge. The Attorney General can already be asked to prosecute a case under current law. Creating a truly independent prosecutor with sole jurisdiction to handle use of deadly force cases is preferred. A new



office that does not have exclusive jurisdiction is a waste of state resources.

Prosecutors would appreciate the AGO having additional resources to handle case requests from local prosecutors when those prosecutors have a conflict of interest. However, this bill presumes there is a conflict of interest. The Legislature does not have the authority to define conflicts of interest for prosecutors or to give the AGO original concurrent authority. Only the executive branch can provide concurrent authority to the AGO through a request by county prosecutors or the Governor.

The perception that officers are not being prosecuted is not proof that the entire system is corrupt. It is more likely that officers are following the law. The bill incorrectly assumes that county prosecutors are not charging officers. The AGO is not a neutral arbitrator. If the AGO is made into a watchdog for law enforcement, it should also be divested of law enforcement and related duties.

(Other) The AGO has concerns about fully funding the work of the OIP and delaying their authority so they have sufficient time to create and staff the OIP. The AGO cannot do this work unless fully funded. It would mislead the public and do grave injustice to communities seeking healing and justice if this effort is not sufficiently funded. It is critical to build up the OIP's capacity before it is required to make charging decisions and handle cases. As the experience of the OII shows, starting a new agency takes more than a year.

**Persons Testifying (Community Safety, Justice, & Reentry):** (In support)

Representative Monica Jurado Stonier, prime sponsor; Victoria Woodards, City of Tacoma; Nickeia Hunter, Po Leapai, Leslie Cushman, and Debbie Novak, Washington Coalition for Police Accountability; Sonia Joseph, My Advocate; and Paul Benz, Partners for Social Change.

(Opposed) Paul Giuglianotti; James McMahan, Washington Association of Sheriffs and Police Chiefs; Russell Brown, Washington Association of Prosecuting Attorneys; and Michael Transue, Washington Fraternal Order of Police.

(Other) David Trieweiler, Washington Association of Criminal Defense Lawyers and Washington Defender Association; and Mike Webb, Office of the Attorney General.

**Persons Testifying (Appropriations):** (In support) Representative Monica Jurado Stonier, prime sponsor; and Paul Benz, Fred Thomas, and Debbie Novak, Washington Coalition for Police Accountability.

(Opposed) Paul Giuglianotti; Teri Rogers Kemp; Russell Brown, Washington Association of Prosecuting Attorneys; James McMahan, Washington Association of Sheriffs and Police Chiefs; and Ali Hohman, Washington Defender Association and Washington Association of Criminal Defense Lawyers.

(Other) Joyce Bruce, Washington State Attorney General's Office.

**Persons Signed In To Testify But Not Testifying (Community Safety, Justice, & Reentry):** Valerie Norman and Ellen Dimbat.

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