

# SENATE BILL REPORT

## 3SHB 1579

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As of February 14, 2024

**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:** Passed House: 2/6/24, 53-44.

**Committee Activity:** Law & Justice: 3/20/23, 3/22/23 [DPA-WM, DNP]; 2/15/24.

### Brief Summary of 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 OIP with jurisdiction concurrent with county prosecuting attorneys to review investigations, and initiate and conduct prosecutions, of cases arising from investigations of deaths conducted by the Office of Independent Investigations.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Staff:** William Bridges (786-7312)

**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, whether the deadly force was applied in

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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.*

good faith as defined by statute, and any applicable defense, such as the right of self-defense.

County Prosecutors. The Washington State Constitution requires the Legislature to provide for the election of prosecuting attorneys in the several counties and to prescribe their duties. Among their duties, as set out in statute, prosecuting attorneys must prosecute all criminal and civil actions in which the state or the county may be a party. In *State v. Rice* the Washington Supreme Court has held a prosecutor's broad charging discretion is a core function of the office that may not be "usurped" by the Legislature. This was cited approvingly by *Snaza v. State*.

Conflict of Interest Under the Rules of Professional Conduct. The Washington Supreme Court has promulgated rules regarding conflicts of interest between lawyers and their clients. In general, a lawyer shall not represent a client if the lawyer's interest conflicts with the interests of the client.

Independent Investigations of Incidents Involving Use of Deadly Force by Peace Officers. State law requires an independent investigation to be completed whenever a peace officer's use of deadly force results in death, great bodily harm, or substantial bodily harm. Under rules adopted by the Criminal Justice Training Commission, independent investigation teams (IITs) are responsible for conducting investigations. An IIT is made up of qualified and certified peace officer investigators, civilian crime scene specialists, and at least two non-law enforcement community representatives who operate completely independent of any involved agency to conduct investigations of police deadly force incidents. Completed investigations are referred to the prosecutor where the action occurred, who then reviews all the facts and makes a charging decision.

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.

The OII is the lead investigative body for any incidents within its jurisdiction that it selects for investigation. When OII's investigation is complete, a detailed summary of the course of the investigation is made public and available to the involved law enforcement agency, the impacted person or their families, and the community. The summary and the case investigation file will be referred to the relevant prosecuting attorney to determine if the action was justified, or if there was criminal action such that criminal charges should be filed. OII does not make charging recommendations.

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 Bill:** Establishing an Office of Independent Prosecutions. The Office of Independent Prosecutions (OIP), led by an independent counsel, is established as a separate division within the AGO. The OIP has jurisdiction concurrent with prosecuting attorneys to review investigations and initiate and conduct prosecutions of applicable use of force cases, which are cases arising from investigations of deaths conducted by the OII. The OIP 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.

Creating an Office of Independent Prosecutions Advisory Board. An OIP 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 personnel.

The Advisory Board must recommend three candidates for the position of independent counsel who must meet specified professional criteria. The Advisory Board 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.

Authorizing the Attorney General to Select an Independent Counsel. 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 provide 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.

Defining the Terms, Duties, and Qualifications of the Independent Counsel. The independent counsel serves a term of three years and continues to hold office until reappointed or replaced by a successor. The independent counsel is authorized to: (1) oversee the OIP, (2) hire personnel as needed, (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.

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

If the OIP receives a report from the OII where the use of force was by (1) a general authority peace officer at a state agency, or (2) an employee of the Department of Corrections, a limited authority law enforcement agency, or a police department at a public institution of higher education; the OIP must contract with a special assistant attorney general to perform or review investigations and to prosecute if charged.

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.

Exempting Office of Independent Prosecutions Advisory Board Records from Public Disclosure. The OIP's case records 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.

Defining the Role of County Prosecuting Attorneys in Use of Force Cases. In any applicable use of force case, the county prosecuting attorney has a duty to determine whether recusal is necessary to preserve public confidence or prevent a conflict of interest. In making this determination, the prosecuting attorney must consider whether the presence of any of the following would impact the determination of whether criminal charges should be filed or prosecuted:

- 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;
- 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; or
- the case has been reopened by the OII. 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 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 will best promote the interests of justice. The court must prioritize the public's interest in ensuring a fair and impartial prosecution and trial that is free from bias, prejudice, or conflict of interest. A county prosecuting attorney must also overcome a presumption that the prosecuting attorney has an inherent conflict of interest. Upon its determination, a court must enter an order designating the prosecuting authority in the case and dismissing the duplicative charges.

Requiring the Office of Independent Investigations to Send Completed Investigations to the Office of Independent Prosecutions Advisory Board. In addition to the relevant county prosecuting attorney, the OII must also send its completed investigations and referrals to the OIP. A completed investigation must include information, if known, regarding the presence of a conflict of interest. The OII and the OIP are also encouraged to cooperate regarding requests for interviews or provision of additional information and transport of evidence.

**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:** The bill contains several effective dates. Please refer to the bill.

**Staff Summary of Public Testimony on Second Substitute House Bill (Law & Justice) (Regular Session 2023):** *The committee recommended a different version of the bill than what was heard.* PRO: The intent is to mirror the transparent process of the Office of Independent Investigation and bring that to prosecution. The Office of Independent Prosecution is insulated from AGO with an advisory board that recommends an independent counsel. AGO will be screened from any cases. There is a concern about a conflict of the prosecutor who works very closely with the help of law enforcement to prosecute crime. There is a heightened ethical consideration for the county prosecutor due to that relationship, when having to investigate and prosecute law enforcement. The bill provides clarity on when county prosecutors should send their cases to the Office of Independent Prosecution, transparency, and integrity. The Attorney General will also have a presumption to overcome when investigating and prosecuting officers of state agencies.

CON: The perception that law enforcement officers are not regularly prosecuted should be an indication that officers are complying with the law, training, process, procedures. Prosecutors do charge law enforcement with crimes in the rare circumstances when they violate the law. If the Attorney General is to be the watchdog of law enforcement then the Attorney General should not have any law enforcement duties to avoid a conflict. Prosecuting crimes is the constitutional duty of county prosecutors. The Attorney General can only do that function with the concurrence of the county prosecutor. The independent authority without concurrence of the county prosecutor is not constitutional. Potential conflicts are handled through the WA Supreme Court.

OTHER: There is no threshold of error that is acceptable. These are real conflicts, not presumptive conflicts. There are campaign donations from law enforcement to elected prosecutors. There is misconduct in law enforcement and it needs social distancing from the county prosecutor.

**Persons Testifying (Law & Justice):** PRO: Representative Monica Jurado Stonier, Prime Sponsor; Fred Thomas, Next Steps Washington; Tonya Isabell, Washington Coalition for Police Accountability; Sonia Joseph, My Advocate; Debra Novak, Washington Coalition for Police Accountability; Victoria Woodards, Mayor, City of Tacoma; Roger Rogoff, Office of Independent Investigations; Barbara Serrano, Senior Policy Advisor - Public Safety - Office of Governor Jay Inslee.

CON: Taylor Gardner, WA Assn of Sheriffs and Police Chiefs; Kari Reardon, WDA/WACDL; Russell Brown, WA Association of Prosecuting Attorneys; Laurie Layne; James McDevitt.

OTHER: Sai Samineni.

**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) (Regular Session 2023):** PRO: This bill will help address and reduce police violence, increase accountability, and address an inherent conflict of interest between the local prosecutor and law enforcement.

This bill is a priority for the Governor and an important step towards rebuilding community trust in our justice system with their support.

This bill will create a framework to ensure cases are screened off from potential political considerations by the attorney general and local prosecutors. The Attorney General's Office needs sufficient funding to accomplish this important work. Regardless of where the Office of Independent Prosecutor exists, we need to adopt guidelines and allocate the resources to fulfill the promise of real police reform.

It is important for the public to clearly understand where the Office of Independent Investigations will send completed investigations. The bill accomplishes that and creates more independence than currently exists and heightened standards for ethical considerations.

CON: Lawmakers should not invest in the promise of independent prosecutions from organizations that are morally corrupt. We disagree with the perception that there aren't many law enforcement officers charged with crimes because of corruptions. Prosecutors are not shy about charging and convicting them. The Legislature should divest the Attorney General's Office of any law enforcement activities if it is to also pass this bill. This body has crafted says for the attorney general to handle certain types of cases. The Attorney General's Office has criminal authority, but only with the concurrence of the county prosecutor. There is a presumptive conflict added not just for county prosecutors, but also for the attorney general when handling State Patrol cases.

OTHER: We are expressing our concerns with the House funding level for this bill and the consequences of passing this legislation without dedicating the necessary resources to do this work. The lack of funding is an injustice to victims and their families and law enforcement officers who all deserve swift resolution and justice in their cases.

**Persons Testifying (Ways & Means):** PRO: Paul Benz, Wa coalition for police accountability; Barbara Serrano, Office of the Governor; Roger Rogoff, Office of Independent Investigations.

CON: James McMahan, WA Assoc Sheriffs & Police Chiefs; Paul Giuglianotti; Russell Brown, WA Association of Prosecuting Attorneys.

OTHER: Haylee Anderson, WA State Attorney General's Office.

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