

2022 Policing Legislative Update

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Disclaimer



- This presentation is informational in nature and does not constitute legal advice
- No attorney-client relationship created
- We strongly recommend seeking advice from agency legal counsel regarding the application of these laws to your agencies

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Introduction

- HB 2037: Permitting force to effect *Terry* Stops
- HB 1735: Clarifying De-Escalation and Community Caretaking/ITA
- HB 1719: Clarifying Less Lethal Tools

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Introduction

Clarifications to last year's bills related to law enforcement

- Permitting officers to use force during *Terry* stops based on reasonable suspicion of a crime
- Clarifying that officers can still detain people in crisis under the Involuntary Treatment Act (ITA), even if they are only a threat to themselves
- Fixed drafting errors that appeared to ban many less lethal tools

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HB 1310: Background and Context

- In 2021 the legislature created a Statewide Use of Force standard (HB 1310)
- Under the new standard, officers:
 - Could only use force when they had **probable cause** to believe a crime was occurring or risk of imminent bodily injury
 - Had to exhaust "available and appropriate" de-escalation techniques
- Probable cause requirement read to prohibit *Terry* stops of noncompliant subjects

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HB 1310: Background and Context

- The bill also created doubt about officers' ability to detain under the Involuntary Treatment Act (ITA)
 - Generally, ITA subjects are not actively committing a crime or assaulting someone
 - Instead, the ITA is designed to allow officers to take a person for an involuntary mental health evaluation where that person is unable to take care of him- or herself
- Created uncertainty about enforcing a court order, such as taking children into protective custody, if force required to do so

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HB 1735 and HB 2037: Clarifying the Law

- Because of the concerns raised by law enforcement, cities, and other stakeholders, the legislature passed two bills:
 - HB 1735 focuses on behavioral health and community caretaking functions
 - HB 2037 focuses on enforcement practices and defines “physical force”

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HB 2037: Definition of “Physical Force”

- Under HB 1310, no definition of “physical force,” which meant that even incidental touching could constitute “force” requiring probable cause
- HB 2037’s definition has two main parts:
 - “Reasonably likely to cause physical pain or injury”; and
 - “Act exerted upon a person’s body to compel, control, constrain, or restrain” movement
- As a general matter, similar to CALEA and other standard law enforcement policies (e.g. SPD’s Type I force and above)

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House Bill 2037: Defining “Force” and Permitting Terry Stops

- Defines “Physical Force”:

16 (6) "Physical force" means any act reasonably likely to cause
17 physical pain or injury or any other act exerted upon a person's body
18 to compel, control, constrain, or restrain the person's movement.
19 "Physical force" does not include pat-downs, incidental touching,
20 verbal commands, or compliant handcuffing where there is no physical
21 pain or injury.

- Permits force to effect *Terry* stops:

38 (d) Prevent a person from fleeing or stop a person who is
39 actively fleeing a lawful temporary investigative detention, provided
1 that the person has been given notice that he or she is being
2 detained and is not free to leave;

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HB 2037: Definition of “Physical Force”

- Most important for what it does not include:

- Pat downs
- Incidental Touching (e.g., *de minimis* contact used to guide/control compliant subjects)
- Compliant handcuffing
- Verbal commands

- Reduces risk/uncertainty faced by officers in community caretaking

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HB 2037: Definition of “Physical Force”

- One area of continued uncertainty:

19 "Physical force" does not include pat-downs, incidental touching,
20 verbal commands, or compliant handcuffing where there is no physical
21 pain or injury.

- “Handcuff discomfort” or complaints of pain associated with handcuffing is common, even where officer’s tactics are not likely to cause injury
 - Unclear under this language if constitutes “physical force”

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HB 2037: Permitting Force During *Terry* Stops

- Officers can use force necessary to detain someone for investigation

28 (1) ~~((a))~~ PHYSICAL FORCE. Except as otherwise provided under
29 this section, a peace officer may use physical force against a person
30 ~~((when))~~ to the extent necessary to:

...

38 (d) Prevent a person from fleeing or stop a person who is
39 actively fleeing a lawful temporary investigative detention, provided
1 that the person has been given notice that he or she is being
2 detained and is not free to leave;

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HB 2037: Permitting Force During *Terry* Stops

- Represents legislature’s attempt to clarify that officers can still use force to detain for investigation
- Requires notice that subject is being detained
- Permits force “to the extent necessary” to effect detention
 - As a practical matter, consistent with *Graham v. Connor*: force greater than necessary to achieve law enforcement objective is not reasonable within the meaning of the Fourth Amendment

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House Bill 1735: Community Caretaking, De-Escalation, and ITA

- HB 1735 made two major changes to existing law:
 - Clarifies that use of force is permitted to carry out detentions under the Involuntary Treatment Act (ITA) or to enforce court orders
 - Defines “de-escalation” and clarifies that officers must only attempt de-escalation tactics that are “available and appropriate” in the circumstances

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HB 1735: Community Caretaking/ITA

- Expanded HB 1310's Use of Force provisions to allow force to the degree necessary to:

33 (d) Take a person into custody, transport a person for evaluation
34 or treatment, or provide other assistance under chapter 10.77, 71.05,
35 or 71.34 RCW;

- Chapters 10.77, 71.05 (Involuntary Treatment Act), and 71.34 all relate to people suffering from mental illness or behavioral crisis
- Provision permits officers to use force when necessary to carry out detentions under the ITA and related provisions, even *without probable cause* that the individual in question is committing a crime

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HB 1735: Force During Detentions

- Additional provisions to reduce uncertainty related to detentions authorized by law:

36 (e) Take a minor into protective custody when authorized or
37 directed by statute;

38 (f) Execute or enforce a court order authorizing or directing a
39 peace officer to take a person into custody;

1 (g) Execute a search warrant;

2 (h) Execute or enforce an oral directive issued by a judicial
3 officer in the courtroom or a written order where the court expressly
4 authorizes a peace officer to use physical force to execute or
5 enforce the directive or order; or

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HB 1735: Community Caretaking/ITA

- Another concern with the original language was that it would prevent officers from conducting welfare checks or other community caretaking duties:

33 ~~((4))~~ (5) Nothing in this section (~~(prevents)~~):
34 (a) Limits or restricts a peace officer's authority or
35 responsibility to perform lifesaving measures or perform community
36 caretaking functions to ensure health and safety including, but not
37 limited to, rendering medical assistance, performing welfare checks,
38 or assisting other first responders and medical professionals;

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HB 1735: Community Caretaking

- Similarly, officers permitted to render aid when requested by EMS, designated crisis responders, or the public:

~~((4))~~ (5) Nothing in this section (~~(prevents)~~):

...

39 (b) Prevents a peace officer from responding to requests for
40 assistance or service from first responders, medical professionals,
1 behavioral health professionals, social service providers, designated
2 crisis responders, shelter or housing providers, or any member of the
3 public;

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HB 1735: Community Caretaking

- Legislature giving a clear statement that ITA and Community Caretaking functions still permitted
 - Consistent with statements from legislators last year that they didn't intend to prevent officers from rendering aid to people in crisis

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HB 1735: De-Escalation

- Original language of HB 1310 required officers to “exhaust available and appropriate de-escalation tactics” prior to force
 - “Exhaust” language created concerns that officers had to run through a “checklist” of de-escalation tactics named in the statute
- Legislature made two major clarifications:
 - Removing “exhaustion” language
 - Open definition of “de-escalation” ensures that officers can use any appropriate de-escalation tactic, not just the ones named in statute

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HB 1735: De-Escalation

- Legislature struck “exhaust” language:

3 ~~committed, is being committed, or is about to be committed)~~ use **all**
4 **de-escalation tactics that are available and appropriate** under the
5 **circumstances before using physical force;**

- “Available and appropriate” requires officers to assess situation and use reasonable de-escalation
- Does not require officers to use de-escalation tactics that would not be applicable or appropriate to the situation

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HB 1735: De-Escalation Definition

- Moved definition of de-escalation to statute’s “definitions” section (RCW 10.120.010)
 - Definition expressly indicates that de-escalation tactics vary with circumstances of incident
 - Includes, but not limited to:
 - Time
 - Distance/cover
 - Designating one officer to communicate with subject
 - Backup, including designated crisis responders

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HB 1735: De-Escalation Definition

- Eliminated “leaving the area” requirement from HB 1310:
 - HB 1310 included “leaving the area if there is no threat of imminent harm and no crime has been committed...” as a component of de-escalation
 - Because of how statute was originally drafted, not clear that this was discretionary for law enforcement
 - New definition of de-escalation (RCW 10.120.010(1)) does not include this language, so no requirement to disengage from ongoing incident scene

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Criteria for Using Force in Washington

- After HB 1310, 1735, and 2037, where does this leave us?
 - Officers can use force when
 - PC to believe crime occurring
 - Conducting an arrest
 - Preventing escape from prison/jail
 - Conducting an ITA/involuntary detention
 - Taking children into protective custody
 - Carrying out arrest/search warrants
 - Carrying out other oral/written court order that authorizes force
 - During a *Terry* stop, when person attempts to resist/flee
 - Protect against imminent threat of harm to officer, subject, or member of the public

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House Bill 1719:

8 (3) For the purposes of this section:

9 (a) "Military equipment" means (~~firearms and ammunition~~) rifles
10 of .50 caliber or greater, machine guns, armed helicopters, armed or
11 armored drones, armed vessels, armed vehicles, armed aircraft, tanks,
12 long range acoustic hailing devices, rockets, rocket launchers,
13 bayonets, grenades, missiles, directed energy systems, and
14 electromagnetic spectrum weapons.

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House Bill 1719:

- Modifies last year's HB 1054: Police Officer Tactics and Equipment
 - HB 1054 banned "Military Equipment" including "firearms and ammunition of .50 caliber or greater"
- Included less lethal tools like shotguns firing "beanbag" rounds, 40mm "blue nose" projectiles/launchers, and other less lethal tools needed to deal with people in crisis and crowd control
- Created significant concern in law enforcement
- Many legislators, including HB 1054's proponents, agreed that clarification was necessary to prevent unintended consequences

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House Bill 1719

- Changed HB 1054's "military equipment" ban to no longer include all "firearms and ammunition" but only "rifles" of .50 caliber or greater
 - Statute defines "rifle" consistent with other statutes: semiautomatic long rifle that fires bullets
- Rifle does **not** include:
 - Any shotgun;
 - Any device designed to deploy less lethal munitions including nonpenetrating impact rounds (e.g. "blue nose" or beanbag rounds); or
 - **Any** less lethal equipment. Includes blast balls, gas canisters, flashbangs deployed using a launcher (and separately clarifying ban on "grenades" does not include flashbangs or blast balls).

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House Bill 1719

- Key Takeaways:
 - The legislature has tried to make clear that **departments can acquire and use less lethal tools**
 - Consistent with HB 1054's stated goal of reducing the types of serious force used
- Some **exceptions** remain:
 - There are still special rules for using CS/CN gas for crowd control
 - Some tools, like the LRAD, are still prohibited

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Key Takeaways

- Legislature attempting to address many of the big issues with its 2021 law enforcement reform bills
- Definitions of “physical force” and de-escalation bring Washington state standard closer to model policies (CALEA, Lexipol)
- Community caretaking and ITA detentions permitted within new force framework
- Work with your city attorneys/department advisors to identify remaining issues and concerns—this may not be the last time the Legislature has to clarify



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