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**Governor's Task Force on Independent Investigations of
Police Use of Force**

Meeting Minutes

Thursday, October 15, 2020

1:00-4:00pm

Zoom Meeting

Facilitator: LueRachelle Brim-Atkins

Task Force Members Present: Emma Catague, Jordan Chaney, Livio De La Cruz, Monisha Harrell, Sanetta Hunter, Katrina Johnson, Pastor Walter Kendricks, Teri Rogers Kemp, Ben Krauss, Darrell Lowe, Kim Mosolf, Tim Reynon, Eric Richey, Pua Savusa, James Schrimsher, Teresa Taylor, Jay Hollingsworth, Waldo Waldron-Ramsey, Brian Moreno, Nina Martinez, Spike Unruh, Chris Jordan.

Task Force Members Absent:

Advisory Group Members Present: Jim Bloss, Rob Huss, Deborah Jacobs, Sharon Swanson, Yasmin Trudeau, Maria Sigüenza, Toshiko Hasegawa, Ed Prince, Frank Cuthbertson, John Hutchings.

Advisory Group Members Absent: Monica Alexander.

Task Force Staff Present: LueRachelle Brim-Atkins, Sonja Hallum, Leah Landon, Dontae Payne.

Guests: Todd Foglesong, John Allgire, Eric Drever, Elizabeth Thomas, Bart Freedman, John Hillman, and Mike McKay.

Welcome

LueRachelle Brim-Atkins welcomed everyone to the meeting and stated that the meeting was being recorded and livestreamed on TVW and reminded attendees to use the Raise Your Hand function when they would like to speak and asked that people remain muted until invited to speak. LueRachelle then reminded the participants that we are stolen lands and to keep that in mind and that the ground rules for these meetings are still in place over video and in the chat room. LueRachelle shared a quote from Professor Derek Bell.

Review of Ground Rules

LueRachelle asked for a volunteer to review the ground rules. The ground rules are available on the Governor's website.

- **Yasmin Trudeau** volunteered to read the ground rules.

Meeting Overview

LueRachelle invited **Sonja Hallum** to discuss the changes to today's meeting format.

Sonja reminded those watching on TVW of the purpose of the task force. Sonja said the present meeting would be dense in terms of material. A survey that had been sent out asked if the group would like a presentation on investigations and process used for these. Sonja said the group voted to have this conversation, and the meeting would start with homicide investigations and independent investigation teams and prosecutions. Sonja added that the remainder of the meeting would be used for discussing legal issues for the group to consider. Sonja introduced guests from the K&L Gates Law Firm, as well as from the AGO.

Sonja also reminded members to fill out their worksheets to help sort items for discussion at the final two meetings, and to fill out the survey that would be coming out after the meeting regarding meeting length.

Presentation on Homicide Investigations and IITs

LueRachelle introduced John Allgire, a detective with the Whatcom County Sheriff's Office, Eric Drever, Chief of the Tukwila Police Department, and Eric Richey, Whatcom County Prosecuting Attorney. All three were asked to provide a brief introduction before their presentation.

- Detective Allgire presented on general homicide investigations.
- Chief Drever presented on investigations specific to police use of force incidents.
- Eric Richey presented on prosecuting cases involving officers.

Darrell Lowe mentioned his background in CA and said that as we look at I-940, one of the challenges here is that the IIT comes and looks at the actions of the officer. There is typically another individual involved whose actions need to be looked at. In the case this individual did commit a crime, this would need to be followed up. This would typically be done by the involved agency but because of the IIT this same team is looking at the actions of the other involved person as well. This is a gap that exists, there should be a second team that gets activated to look at the actions of the other person involved.

Q&A

- **Livio De La Cruz** said it appears investigations are pretty fragile and that investigators need to be experienced. But because it is so fragile, it must be hard for someone who wanted to sabotage an investigation to do so. Livio asked what mechanisms for accountability there are.
 - **Chief Drever** said there has to be an assumption that someone would want to sabotage an investigation. Chief Drever said he is familiar with the concerns of

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cops investigating themselves and how they might want to cover it up. The reality though, is that cops want justice for everyone, and they do not want someone committing crimes to be in their uniform and in their ranks. The type of conversations that are going on right now, that erode their credibility, are taking place because of people like this. Measures that are in place per WAC 139-12 requires the team to do conflict of interest statements. If they are aware that an officer has any type of association that could be viewed as a conflict of interest they are removed from the investigation. They also remove any individual from the involved agency, from the team. You are investigating someone you do not know, and simply because they are law enforcement, at least to him, does not rise to the level of willing to risk public scrutiny, loss of credibility, and loss of a job. There are too many factors at play that would make it so someone would not want to sabotage one of these investigations. Law enforcement speaks out when violence against individuals is not justified. Chief Drever added that someone could taint an investigation either way. There needs to be protocols in place regardless of who does the investigation to ensure this does not happen.

- **Nina Martinez** said police investigations of each other are unique because police are investigating their colleagues. Nina asked for more clarity on how the investigation of an officer-involved shooting would be different from an investigation without an officer?
 - **Chief Drever** said they are not done in the same way, and the differences lie in the administrative aspects of all these questions. People are not asking the questions as to whether law enforcement is properly investigating an incident involving an officer. You still need to have the standard of expertise and the same standard of protocol, but you have to add extra checks and balances because of the scrutiny of the investigation when an officer is being investigated. Protocols are being added by the state and by the IIT to make sure they are creating credibility. The difference lies in the IIT wanting to make sure that when an investigation is done, there is no question as to the credibility of it.
- **Kim Mosolf** said she was troubled that the premise of the conversation is that the only people who have the expertise to do these investigations are law enforcement. Kim added that some people are interested in understanding non-law enforcement investigations. She asked if any of the presenters have had an opportunity to look at any of the investigations that have been done since I-940 was implemented, and see whether they hit the levels that were described as meeting best practice and expectations. Kim added that some community members who have looked at some of these cases and found holes here. There is research and lived experience to support people's concerns that when police are investigating each other they are not necessarily following the steps and being as thorough.
 - **Chief Drever** said he has not looked at these cases because he has been involved in his own investigations. He added that if you look across the country, there are cases that were not handled well. Aside from just making mistakes, he is sure that there are some cases that were swept under the rug. The Pacific Northwest and west coast law enforcement, he has yet to see this. Bringing this law in has been to make sure these things don't happen, and it is still being implemented. He added that personally, he would like an opportunity to fix this. Law enforcement has gotten a public view of the way they investigate things and it hasn't been

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good, and they cannot allow this to happen anymore. He added that the investigations he has been involved he would open up to others. They are about transparency and would like to start eroding the negative perceptions.

- **Eric Richey** said he has reviewed some cases throughout the state that have been brought forth through WAPA and there have been varying degrees with compliance with I-940. The reason for this is that it is a new law, and agencies are working to get “their ducks in a row”. As the year has gone along, they are doing better.
- **Kim** said there has been a long time for police to be investigating themselves, but existing expectations should have been in place throughout.
- **John Allgire** said the nuts and bolts of the investigation that he talked about, do not change if an officer is involved. He added that he has been involved in investigations where an off-duty officer assaulted someone, and they asked him on the stand if it was awkward. A little bit, but he wants the public’s trust and he is looking for that transparency. Through communication, hopefully we can get back to there. The point is, some of the investigations across the country may not have been investigated well, maybe because the scrutiny was not there as it should have been. But we are learning from that and he and his team welcome transparency. John added that his group is doing what they have been asked to do and they welcome the scrutiny and they want someone independent who can help with the transparency. There are checks and balances in the system.
- **Chris Jordan** asked Eric Richey if he believes that breaking the law should have consequences commensurate with the crime committed.
 - **Eric** said we should be making sure people are not going to commit crimes again, and for some, this take a very light touch. We do not need to be hammering people or use retribution to respond to someone breaking the law. He added that he wants to make sure we are making our communities safe.
 - **Chris** said this is how systemic racism shows up in our system because there is discretion around where a light touch is deserved and where a heavy touch is deserved. We see disparities like this in convictions for crack vs cocaine possession.
 - **Eric** said this was an important comment.
 - **Chris** asked Eric if we have police departments that are breaking the law of I-940, what kind of consequences does he think are necessary in order to discourage people from violating this law?
 - **Eric** said this was a good question, but he had not thought about it enough to answer it at that time. He added that Chris is correct and there is nothing within the law to require law enforcement agencies to comply.
- **Brian Moreno** asked where Eric sees experts brought in by someone like the defense, when compared to those doing the investigations. Is it trainable, and if it is, in what period of time?
 - **Eric** said it depends on the field he is referring to. He added that he has found law enforcement and the crime lab to be superior to defense experts.
 - **Brian** clarified that there was nothing though in the realm of chain of custody, blood spatter analysis, etc.

- **Eric** said no, the experts within law enforcement and the local crime lab are superior.
- **James Schrimpscher** brought up what Darrell said previously about a second team being brought in. He said that for those who were part of the rulemaking on I-940, they know this was a large part of the discussion and they leaned to WAPA on this. Things were agreed upon about this and the originating agency can look at the original occurrence or crime. So this is something new that has morphed as the process has moved forward and the drivers behind it seem to be more driven by attorneys than law enforcement. James added that Chief Drever is a big proponent for civilian involvement as part of the process. He has advocated to other chiefs strongly for civilian involvement. James said he couldn't think about a better person to talk about the current process. James brought about Chris' question about no enforcement. He said this is correct and it was brought up by law enforcement and other stakeholders. The only remedy that exists is if the rules aren't followed you can sue in civil court. James said the FOP would be in favor of adding more bite to this and to holding more people accountable.
- **Waldo Waldron- Ramsey** asked if the group was to create an independent agency that was staffed solely with civilians that were sent through the law enforcement training academy, would they find anything wrong... while they do not have the years of experience... anything wrong with law enforcement acting as advisors for several years until the agency has enough experience to carry on by themselves.
 - **John Allgire** said the crime lab has civilians trained in this process. So there is a model similar to this, the crime lab comes out and work the crime scenes already. As for the training model, there is really no timeline. It takes many years to get to a point that even if you are trained you do not make mistakes. He said he does not know, if the panel came up with that process and that is the road they went down, John added that he would assist in any way he could.

Potential Legal Issues Related to Investigations and Prosecutorial Authority

LueRachelle asked each of the speakers to introduce themselves.

- Elizabeth Thomas, K&L Gates Law Firm
- Bart Freedman, K&L Gates Law Firm
- Mike McKay, K&L Gates Law Firm
- Yasmin Trudeau, Office of the Attorney General
- John Hillman, Office of the Attorney General
- Eric Richey, Whatcom County Prosecuting Attorney

Sonja said staff are still working on modifications and they may follow up with other materials as well. Sonja said the goal of the discuss is to provide the group with input on potential legal issues that surrounds the various options for investigations and prosecution structures. She added that it is important to understand that for both prosecution and the investigation, the issues have not be squarely addressed by the courts. What the group will be hearing is a discussion about the potential challenges or legal issues that may arise with the different options the group is considering. She added that while the [chart](#) is color coded there is no certainty with any of the decisions. Sonja added that something to remember is that if a system is created and a conviction is achieved, if the system is found to be unconstitutional that conviction may be overturned.

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The chart is available here:

<https://www.governor.wa.gov/sites/default/files/IIPUFTFLegalIssuesChart.pdf>

Green = no legal or constitutional issues at this time.

Yellow = potential legal or constitutional issues at this time.

Orange = potential legal or constitutional issues that are more likely to be upheld by a court.

Red = legal or constitutional issues that make this structure not advisable.

Each legal group was asked to give a short overview of their analysis and how they came to arrive at their recommendations.

- **Eric Richey** said that WAPA is divided on how they feel on a separate agency investigating these cases, or a separate prosecutor. Some people though, would like to see things remain the same. Eric brought up that statute says we may not authorize another agency to perform the duties assigned to a constitutionally created office. This has been upheld in a supreme court decision, so it is clear this is not something the legislature can do. According to law, we cannot create another agency to stand in for another constitutionally created agency. There are some examples though, for concurrent jurisdiction and we should be talking about this more.
- **Liz Thomas** said K&L Gates feels their role is not to provide perspective on what the task force should do, but an independent look at the law. The group started from the constitutional perspective. The question is, does the constitution make existing roles exclusive, it has been determined that they are not. The next question is then, so who else can perform investigations and prosecutions under the constitution. The group concluded that with appropriate legislation, the attorney general could be tasked with prosecution of these cases, as well as investigations. Liz added that the constitution does not expressly bar legislation that would grant similar authority to a newly formed agency, but it does not grant either. The firm did not focus much on practical issues though they did think about potential consequences if legislation is later found to not be constitutional. Liz said that as Eric mentioned, if a statute that prosecutes someone is later found to be unconstitutional, not only the person who is convicted, but anyone convicted under the statute could challenge their conviction. The firm believes there may be ways to mitigate this risk, such as bringing a test case under the state declaratory judgement act in order to get a determination on the validity of the law. It may also be possible to reduce the risk by seeking a formal opinion of the AGO once the task force determines their final recommendations. Liz said they also acknowledge there may be concerns about witness becoming immunized, and there may be concerns that evidence could be contaminated. These are not legal concerns though.
- **Yasmin Trudeau** said the AGO lands a bit more conservative in their approach than K&L Gates. Their concerns are not as significant as WAPA's. the AGO agrees that a lot of this is untested and this is part of why they are being careful. The AGO also agrees that concurrent jurisdiction could be a solution.
 - **John Hillman** said this was accurate and that the constitution is fairly vague on these things. He added that WAPA has legitimate concerns. There is a legal issue here if a new entity is created to review and prosecute these things outside of the

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county prosecutor. And we do not want to enact a new law where we find out there are legal issues later on. John added that the AGO has a small group of prosecutors and they are not the original prosecutor of jurisdiction. They do not have the resources at this time to handle these cases, such as victim advocates and commissioned peace officers.

- **On a separate agency in the executive branch:**
 - **Liz Thomas** said they found that this was probably acceptable. The legislature has the ability to create exclusive jurisdiction for agencies over specific crimes. It has been confirmed that the state legislature has the broad authority to assign duties to the attorney general.
 - **Eric Richey** said WAPA is concerned about exclusive jurisdiction being created within a new agency. However, if concurrent jurisdiction was created within say WSP, this may work. This would also be effective. Developing exclusive jurisdiction for anyone would require a constitutional amendment.
 - **Mike McKay** provided more information on his background and spoke about his time as U.S. Prosecutor.
 - **Yasmin Trudeau** answered a question in the chat around what the AGO can or can't do. Nina asked a question about referring and resources. Yasmin said the AGO has to have a referral right now to take a case. Another way this works is that the Governor may refer a case to the AGO, and they do have the opportunity to decline cases. Yasmin talked about limited resources briefly, and added that the AGO is not staffed to do this.
 - **John Hillman** said the AGO aligns with the things expressed by K&L Gates and there is a potential legal argument that could be made around taking authority from the locals. This could be delegated to the Governor though to essentially oversee and investigate these crimes.
- **On a separate agency not in the executive branch:**
 - **Liz Thomas** said this is different because the constitution specifically describes powers for the executive branch and for the AGO. If you do not create your agency within either of those then the questions are broader on whether you are infringing on constitutionally established agencies.
 - **Eric Richey** said he agreed with Liz, and WAPA has concerns about the agency being outside of the executive branch.
 - **John Hillman** said he agreed with K&L Gates and there is not clear authority on this point. The governor is recognized as a supreme leader of the executive branch whereas if you take the agency outside of that there will be some questions about the constitutionality.
- **A division within the AGO:**
 - **Liz Thomas** said they are equally as comfortable here as they were with an agency inside the executive branch. The legislature has broad authority to delegate certain duties to the AGO. Liz said there could be conflict of interest issues but these could be managed with legislative drafting and rulemaking.
 - **Eric Richey** said WAPA has concerns about this being something not handled by the Sheriff and having exclusive jurisdiction. There are concerns about conflict of interest as Liz mentioned as well. Separations could be made and this could work

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but the major concern is an exclusive jurisdiction with someone other than the Sheriff.

- **Yasmin Trudeau** said the AGO does not have concerns as great as WAPA on the issue but there are things that would require statutory authority in order to make sure the AGO is equipped with what they need.
 - **John Hillman** added that the legislature would need to fund this as they do not have the resources to do this at this moment. Nor does the AGO have the authority to commission peace officers.
 - **Yasmin** added that limited commission status was sought for their Medicaid fraud unit but this is very limited.
 - **Sonja** clarified that the legislature could direct certain groups to be commissioned.
 - **John** agreed and said this is what was done with the Medicaid fraud division.
- **On a division within the Auditor's Office:**
 - **Liz** said they thought this was a non-starter. Case law indicated that the auditor only has authority for financial matters.
 - **Eric** said WAPA agreed.
 - **Yasmin** said the AGO did not examine this option.
- **On a division within in Washington State Patrol:**
 - **Liz** and **Mike** said there should be no major legal issues here.
 - **Eric** said WAPA believes the state patrol has general and concurrent authority to handle and investigate these cases. The state patrol currently works under concurrent jurisdiction with the sheriff. If this is authorized for WSP to have concurrent jurisdiction with them for these cases, WAPA would have no issues.
 - **Yasmin** said they largely agreed with K&L Gates. **John Hillman** agreed, saying they have always taken the position that the state patrol has general authority throughout the state.
- **Eric** added that it makes sense that people are nervous about officers investigating officers. He added that internal affairs officers may treat things differently, and they try to do their jobs well. There has been a lot of talk about civilians only doing these investigations, and Eric added that an agency developed within the state patrol that is a combination of peace officers and civilians. This would make sense and do exactly what the group would like.

Q&A

- **Chris Jordan** said it is important that we are seeing these constitutional issues come up, as he is of the belief that we have no rights if the police have the power to kill people with impunity. Chris shared that he had posted a link in the chat about a domestic violence incident where a woman did not have the ability to call for help. Chris said if there is no one who investigates the police and they can only be charged and convicted by the people they work and partner with every day, then there is no one you can call. Chris asked if we are analyzing this through the lens of needing a constitutional amendment since we have no real rights or protections. If you don't survive these encounters, you never get to have your day in court. Without this law or amendment, none of our other rights exist.

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- **Eric Richey** said a constitutional amendment is necessary if the group does want a truly independent agency.
- **Yasmin** added that their concerns are that they are uncertain, as these are primarily untested legal issues.
 - **John Hillman** added that a constitutional amendment would require a 2/3 vote by both the House and Senate, in addition to a vote of the people.
- **Mike McKay** encouraged the group to think about this in a different way. Instead of thinking about a constitutional amendment, though it may be necessary in the end, Mike told the group to think about the best way to address the problem. And from there, let the legal people work to help them do it.
- **Livio De La Cruz** asked how K&L Gates allocated time for this project, if it was an arrangement with the Governor's Office, Pro Bono, etc. Livio asked because he was wondering what options were available for follow up research and questions.
 - **Liz** said this was done on a pro bono basis and a cap on hours was not assigned. If there is follow up work they would have to check back, but within reason the group can do follow up.
- **Waldo Waldron-Ramsey** asked that given the current climate, what does WAPA think the solution to the community demands would be?
 - **Eric Richey** said right now WAPA is providing a legal analysis for what they think some of the problems are with some of the suggestions that have been made. This is not great, but he thinks there can be a compromise with having WSP and local law enforcement having concurrent jurisdiction. An agency within the WSP could be a mixture of law enforcement and civilian as well.
- **Monisha Harrell** added that the people that are being asked for the solutions and presenting, are the same people who are currently embedded in the system and structure. So, to ask them to come up with the solutions to fix something they are embedded in is difficult. Monisha added that Thomas Jefferson wrote a lot about the need for constitutions to change and evolve with society. She added that this work is hard and constitutions are not meant to be changed all the time, but if now is the time the group must be prepared to do that work.
 - **Yasmin** said this was correct and of course this is surmountable. Professionally though, there are constraints she and others operate in and no one is trying to make statements to guide anyone in a certain direction.
 - **Eric** said a constitutional amendment would be the safest move, it is a burden, but it is a conservative and cautious move.
- **Kim Mosolf** asked with regards to setting up the agency within another agency outside of the executive branch or not, what are examples of non-executive branch agencies within Washington?
 - **Sonja** said the State Auditor's Office would be an example.
 - **Yasmin** said the AGO is a weird agency because they are not considered a cabinet agency and may fall under that category as well.
- **Frank Cuthbertson** asked for more on the history of the WSP. It seems this may be one of the best places to house the investigations and seems to have evolved over the years, in addition to having concurrent jurisdiction already. In terms of anticipated legal fight once the agency is stood up, it seems that WSP may be the best insulation from local law

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enforcement. Frank also reminded the group that they may be looking at a bifurcated system, where the investigations and prosecutions are in different locations.

- **Eric** said WSP has been established for a long time and it may be most appropriate for K&L Gates to address this. He added that he does think WSP has the power and this could work with concurrent jurisdiction.
- **Mike** said he agreed with the memo and it makes sense that the agency would end up somewhere like WSP. If the task force and legislature decide that WSP should take this on they would likely bring in additional expertise. Mike added that what worries him with a separate agency is accountability. If it is with the WSP, the Governor is ultimately responsible and can be held accountable. A separate agency may be elected or appointed, and you want to make sure whoever does this is accountable.
- **John Hillman** said something that came to his mind would be the Office of the Insurance Commissioner. They do have limited commissioned officers who conduct investigations. This may be a model to consider.
- **Frank Cuthbertson** said he hoped ultimately, he hopes the entity has a deterrent effect. It really will need to have credibility with local law enforcement, and the WSP has this now, though John Hillman raised an interesting point.
- **Eric Richey** said we need to consider what Chris Jordan mentioned in the chat which is what do we do then when it is the WSP who is causing harm.
- **Chris Jordan** said this is the same problem, you are just putting the bullet in a different person's hand and it is no different than the IITs. It is police investigating police. We have to stop cowering back towards the same reflexes and thinking we need cops to do this. We have to start looking this in a different way. Chris added that the group needs to be courageous because there are lives on the line. Our failure to imagine genuine justice is preventing the group from being as courageous and strategically minded about how this needs to go as possible. Chris added that WSP was at the scene when Manuel Ellis was murdered, and the group should not continue to talk about cops investigating cops. There are lives on the line.
- **Sonja Hallum** asked the presenters to talk more about the issue of concurrent jurisdiction. A separate agency could be created without a constitutional amendment with concurrent jurisdiction, which would allow a separate agency to do the investigation. She asked the presenters to talk about how this would work. Would it be possible for this separate agency to be the lead investigator?
 - **Eric** said exclusive jurisdiction is WAPA's biggest issue and his position is that if there was some sort of agency that is set up as concurrent with the sheriff, they wouldn't be fighting this the way they are. Eric said he would like to see how this looks and talk about it more.
 - **Teri Rogers Kemp** asked what is meant by concurrent jurisdiction.
 - **Eric** said this means that they have the same authority as the sheriff, but they do not stand in their shoes.
- **Brian Moreno** asked for task force members thoughts on starting with prior law enforcement and training up civilian investigators. Brian wondered what members felt like year one would look like.

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- **Monisha Harrell** said that the group's responsibility is to create the right system and then to figure out the timing that will allow them to get there. Some of these things are done during the rulemaking process and we just have to provide enough information to lead up to that. Monisha said the group should not be held up by a timeline in their effort to do what is right.
- **Liz Thomas** responded to the question on concurrent jurisdiction, and said one of their memos talked about a place where this already exists. The obvious question with concurrent jurisdiction is what happens if there is a disagreement. In the statute, a process is described there where if both agencies file charges a judge will decide on whose goes forward. The validity of this statute has not been tested constitutionally.

Prosecutions

- **Regarding a separate prosecutorial agency:**
 - **Liz Thomas** said they considered many sides of this and that they felt that this could work as there are many agencies other than the AGO who do prosecutions now.
 - **Eric Richey** said their analysis is the same, going back to the way the constitution was written and the way agencies were originally developed and who was given authority. Looking at whether another agency could stand in the shoes of the original agencies created by the constitution, WAPA believes they cannot. This is why they are concerned about another agency being given exclusive jurisdiction to handle prosecutions.
 - **Yasmin Trudeau** said she had made a few changes to this and their level of concern is just greater with a non-executive branch agency and whether the prosecutors are properly authorized.
 - **John Hillman** said it comes down to whether the constitution allows the taking away of the authority from the county prosecutors. He added that he is not trying to tell the group what to do, but they are just trying to help identify some of the roadblocks they have discovered from their research.
 - **Sonja** asked if the group thinks there is a difference in the level of constitutional concerns between the investigations and prosecutions. She also asked Liz for more information on other agencies that have been given prosecutorial authority and if the constitution limits the ability to grant investigative authority to the sheriff and prosecutorial authority to the county prosecutor, how then can we have agencies like LCB authorized to enforce criminal offenses and how is it the legislature could have created a statute that allows the governor to ask the AGO to intervene in a case.
 - **Liz** said she thinks they had comfort with the AGO in particular because they think if even it is the prosecutor is housed somewhere else, the other agency could be directed to rely on the AGO to prosecute the case. This is the way it works now with a number of state agencies. They are optimistic that this could pass constitutional muster.
 - **Eric** said he reviewed the K&L Gates memo on different agencies and factually these agencies do not do the same things or handle criminal law.
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LCB does not have jurisdiction to impose criminal penalties and this is the core of the prosecutorial duty. This is not stepping in the shoes of the prosecutorial duty.

- **Regarding prosecutions with the attorney general (transfer of primary prosecutorial authority):**
 - **John Hillman** said they are concerned that this could be challenged as taking away a core function from prosecutors. Since this is untested, they are unsure though.
 - **Yasmin** added they may fall closer to green on this item.
 - **Liz Thomas** said they agree with the AGO that the prosecutor has primary decision-making authority. They think it would be possible to draft legislation that carefully defines a class of crimes, so the prosecutors are not being deprived of their core functions. They are just defining a class of crimes that are prosecuted by those with the expertise in this division. If this is done and the scope of things in this bucket are narrowly defined and the legislature makes clear their findings on why it is in the public interest to transfer these specific crimes, this could pass constitutional muster.
 - **Eric Richey** said WAPA is concerned that this would intrude on the core functions of prosecuting attorneys. The AGO is created by the constitution and the legislature can direct what they can do. WAPA is concerned that this takes the core duty from the county prosecutors and a constitutional amendment would be required. Concurrent jurisdiction though would work.
- **Regarding a special prosecutor designated by the Legislature:**
 - **Liz** said they had not examined this issue.
 - **Eric** said WAPA is concerned that this takes away the core functions of the prosecuting attorney again and would require a constitutional amendment.
 - **Yasmin** said this is their greatest concern and if the Legislature lacks power to create an agency with criminal prosecutorial authority, then it would presumably also lack power to appoint an unelected special prosecutor.
- **Regarding a special prosecutor designated by the Governor:**
 - **Liz** said they feel this would work because the governor is an elected official and can designate prosecutors. They do agree with the AGO that this would be less risky if someone with constitutional authority like the AGO could prosecute these.
 - **Eric** said WAPA is concerned that this takes away the core functions of the prosecuting attorney again and would require a constitutional amendment.
 - **Yasmin** said they are more of a light green; they agree with Liz, but the legality has not been tested.
 - **John** added that the governor has supreme executive power, and this would be more palatable legally to the court.

Q&A

- **Chris Jordan** asked if it was possible to have a policy failsafe, so empower the agency to have concurrent jurisdiction but then have a separate law that grants them exclusive jurisdiction in case of a constitutional challenge?
 - **Liz** said they would have to think about this but wondered if there was a way to have a severability provision that could operate under this circumstance.

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- **Yasmin** said she was not sure in her role if this is possible, but she was happy to look into it.
- **Kim Mosolf** said in looking at the third option of sole prosecutorial decision-making authority to the AGO, we are essentially looking at changing the RCW to say that in these cases the prosecutorial authority is with the AGO?
 - **Sonja** said this is the intention of this and the difference in this and the next option which is concurrent is exactly what she is asking. The first one, the primary jurisdiction, the case would be investigated and turned over to the AGO not the prosecutor. Under concurrent jurisdiction they would both have it, but then you need to get into a discussion about sequencing and how it would work.
 - **Kim** said in her mind it would be preferable to have it clear who has primary decision making. She asked if anyone has thoughts on whether the structure of primary decision-making with having the AGO versus a potential special prosecutor living inside the AGO.
 - **John** said the distinction would be that the AGO is recognized in the constitution as an elected official who could take these things whereas the special prosecutor would be created by the legislature.
 - **Yasmin** said when thinking about concurrent jurisdiction, that no matter how many prosecutors look at it is there will always be an unknown but maybe two different analyses on these cases may be helpful.
 - **Mike McKay** said when he was a US Attorney they dealt with this issue on a daily basis and encouraged the task force to keep the option on the table and provided an example from his experience.
 - **John** added that if a special prosecutor is housed in the AGO then they would be part of the AGO, but a county prosecutor could deputize an assistant attorney to handle these cases.
 - **Sonja** added that there is another way of looking at prosecution, as current jurisdiction as an oversight function. If WAPA is concerned about exclusive jurisdiction there could be concurrent jurisdiction so if the prosecutor opted not to file charges, there could be an entity tasked with reviewing the case and making a separate filing decision.
 - **Eric** added that this should be the AGO.
- **Nina Martinez** asked for clarification from WAPA on prosecutors and how they manage cases. Since WAPA is mixed on some of the opinions, has there been a conversation or a survey of prosecutors of if they believe there is a conflict of interest to prosecute an officer-involved shooting considering they have existing relationships with law enforcement. If no, then how can the public be assured that prosecutors are looking out for their best interests?
 - **Eric** said currently when prosecutors know the officer, they conflict the case out. This doesn't happen all the time, but it happens regularly. Eric added that the legislature is looking at recommending to prosecutors what a conflict is. With a recommendation saying that a law enforcement officer within your jurisdiction in is a conflict, that would move the case. We should be considering defining what a conflict is.

- **Chris Jordan** said he liked the conversation about the conflict piece. In the SIU in Ontario they eliminate prosecutorial discretion to protect the prosecutor from political backlash for prosecuting those from SIU cases. If this was housed in the AGO, would it be possible to still eliminate the prosecutorial discretion?
 - **John Hillman** said it is unethical to file charges if they do not believe there is cause to do so. In addition, under the current law if you file a charge and there is not sufficient evidence to support it, it will get dismissed before you ever get to trial. In short there may be rules that get in the way of doing this.
 - **Chris** said there are two different challenges to this and that one is the discretion to charge someone when there is evidence and then if you are actually going to prosecute the case. Can we say though, if there is sufficient evidence, you must prosecute the case?
 - **John** said this is kind of what the statute says, and this is what prosecutors try to do. They are human and they fail sometimes, but they try to do this.
 - **Eric** said he does not think it is possible for the legislature to take away the prosecutor's discretion.
 - **Yasmin** said in terms of crafting that, you could say we want to determine what sufficient is, and you may lock yourself in and not include certain things. This could lead to issues down the road.
- **James Schrimpscher** said there is mechanism in state law if there is a conflict with a county prosecutor and you have to find another prosecutor. What is wrong with the legislature saying an officer-involved shooting in a county is an inherent conflict of interest for that prosecutor?
- **Brian Moreno** said the SIU in Ontario has the ability not to force the prosecution but to at least make the recommendation. This is worth considering with this entity. Some local agencies have been asking for a peer-review process the reason being that their IITs are finishing investigations in about 45 days, but prosecutions are taking a couple of years. There ought to be a mechanism to speed this up. There are many issues delaying this and it becomes quite problematic.
 - **Eric** said this was a good question and said this could be done. There can be all sorts of recommendations, from virtually everyone. The legislature could even make a recommendation that cases be charged within a certain amount of time.
 - **Liz** added that in *State v. Rice* it was determined that as long as something is not mandatory it passes constitutional muster.
- **Teri Rogers Kemp** asked Mike McKay a question in the chat.
 - **Teri** said she was speaking of the RCW that Eric Richey mentioned earlier on filing standards for prosecutors. She said she feels like we are not articulating the standards precisely and wants to make sure she has an understanding of the standards. Additionally, there are two different standards in that subsection, and why would this be so?
 - **Mike** said he agreed with Eric and others who have indicated that the prosecutor does have discretion. This is an important part of their role and to require prosecution in certain settings is problematic.
 - **John Hillman** added that this gives filing standards for crimes against persons and crimes against property. Crimes against persons they require the

consideration of the most likely reasoning, in these cases that would likely be justifiable homicide. This is not required for crimes against property.

- **Chris Jordan** said Liz mentioned a narrowly defined mandate for the specific cases that would rest within the exclusive jurisdiction of this agency. Chris said the group is interested in an agency that can respond to any crimes by officers and asked if it is possible to have broad concurrent jurisdiction, but a narrowly defined exclusive jurisdiction in combination with that?
 - **Liz** said they would have to take a closer look at it but it might work.
 - **John Hillman** said if the legislature created another agency and it was constitutional to do so they could define the agency's authority.
- **Frank Cuthbertson** asked if anyone considered the coroner statute in terms of the delegation of powers or the inquest statute?
 - **Yasmin** said in certain parts of the state the prosecutor acts as the coroner.
 - **Eric** said he has not reviewed this recently but currently 9 prosecutors also have the title of coroner. He added that he is interested in learning more about this.
 - **Liz** said they had not considered this.
 - **John** said the AGO did not consider this. He added that only large counties have a county coroner's office, smaller counties contract.
- **Teri Rogers Kemp** said that the RCW they had been considering with the standard to prosecute, the statute and the subsection places human life above property. It says crimes against persons will be filed if sufficient admissible evidence exists. She added that there seems to be more latitude when we are talking about crimes committed against persons, and we have seen with local prosecutors that even when the evidence we can see in public is enough that if a jury convicted, even then they would be justified by the evidence. We have seen local prosecutors decline to file charges, and in those circumstances the governor and AGO not step in, so the concern with concurrent jurisdiction is that if the local prosecutor is still involved there is still this danger even with the statute.
 - **Eric** said the terms are not defined well and "justifying conviction" may mean something different to each prosecutor. For him, it is generally if he can prove his case beyond a reasonable doubt.
 - **John** said it typically is beyond a reasonable doubt because that is the only way a jury is able to convict. He added that the prosecutor has discretion, but every case is different, and they are all difficult. At the end of the day you have to believe you have enough evidence to prove the case beyond a reasonable doubt.
- **Chris Jordan** asked if there is a way for this agency to be housed in the executive branch and guarantee a certain amount of funding?
 - **Yasmin** said you cannot obligate future legislatures to do something. While the governor proposes a budget, the legislature votes and adopts it.
 - **Sonja** said that a change in leadership should not have an impact on the overall budget because it is the legislative body that produces the final budget.

Closing Comments and Adjournment

Sonja thanked the panelist for joining and sharing their knowledge.

Meeting was adjourned.

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