

# HOUSE BILL REPORT

## ESHB 1732

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### As Amended by the Senate

**Title:** An act relating to identifying and responding to bias-based criminal offenses.

**Brief Description:** Concerning identifying and responding to bias-based criminal offenses.

**Sponsors:** House Committee on Public Safety (originally sponsored by Representatives Valdez, Entenman, Ramos, Wylie, Gregerson, Dolan, Frame, Jenkins, Ortiz-Self, Orwall, Peterson, Ryu, Stanford, Kilduff, Santos, Thai, Senn, Macri and Pollet).

#### **Brief History:**

##### **Committee Activity:**

Public Safety: 2/12/19, 2/19/19 [DPS].

##### **Floor Activity:**

Passed House: 3/7/19, 85-12.

Senate Amended.

Passed Senate: 4/10/19, 35-11.

#### **Brief Summary of Engrossed Substitute Bill**

- Changes the name of the criminal offense of "Malicious Harassment" to "Hate Crime Offense" and makes other terminology changes.
- Expressly includes "gender identity or expression" as a protected category under the Hate Crime Offense statute, rather than including this category by cross-reference.
- Adds circumstances to the list of acts that allow the trier of fact in a criminal prosecution for a Hate Crime Offense to infer that a threat was intended.
- Increases the maximum punitive damages available in a civil action brought by a victim of a Hate Crime Offense from \$10,000 to \$100,000.
- Creates a multidisciplinary hate crime advisory working group within the Office of the Attorney General.

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### HOUSE COMMITTEE ON PUBLIC SAFETY

*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Goodman, Chair; Davis, Vice Chair; Appleton, Lovick, Orwall, Pellicciotti and Pettigrew.

**Minority Report:** Do not pass. Signed by 4 members: Representatives Klippert, Ranking Minority Member; Sutherland, Assistant Ranking Minority Member; Graham and Griffey.

**Staff:** Omeara Harrington (786-7136).

## **Background:**

### Criminal Liability for Malicious Harassment.

A person is guilty of Malicious Harassment if the person maliciously and intentionally commits one of the following acts because of his or her perception of the victim's race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap:

- causes physical injury to the victim or another person;
- causes physical damage to or destruction of the property of the victim or another person; or
- threatens a specific person or group of persons and places that person, or members of the specific group of persons, in reasonable fear of harm to person or property. The fear must be a fear that a reasonable person would have under the same circumstances. For purposes of the offense, a "reasonable person" is a reasonable person who is a member of the victim's race, color, religion, ancestry, national origin, gender, or sexual orientation, or who has the same mental, physical, or sensory handicap as the victim. Threatening words do not constitute malicious harassment if it is apparent to the victim that the person does not have the ability to carry out the threat.

In any prosecution for Malicious Harassment, absent evidence that the person did not intend to threaten the victim, the trier of fact may infer that a threat was intended if the person: (1) burns a cross on the property of a victim who is, or whom the actor perceives to be, of African American heritage; or (2) defaces with a swastika the property of a victim who is, or whom the actor perceives to be, of Jewish heritage.

The category of "sexual orientation," as defined, includes heterosexuality, homosexuality, bisexuality, and gender expression or identity. "Gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

Malicious Harassment is a class C felony carrying a maximum sentence of five years of imprisonment and/or a \$10,000 fine. Malicious Harassment is ranked as a seriousness level IV offense on the sentencing grid, carrying a standard range sentence of three to nine months of imprisonment for a first offense.

If a person commits another crime during the commission of Malicious Harassment, the person may be punished and prosecuted for the other crime separately.

#### Civil Liability for Malicious Harassment.

In addition to being subject to criminal penalties, a person who commits a Malicious Harassment offense may be civilly liable. The victim of a Malicious Harassment offense may bring a civil cause of action against the harasser for actual damages, punitive damages of up to \$10,000, and reasonable attorneys' fees and costs incurred in bringing the action.

#### Law Enforcement Training and Reporting of Malicious Harassment.

The Criminal Justice Training Commission (CJTC) provides basic law enforcement training and educational programs for law enforcement, corrections officers, and other public safety professionals in Washington. The CJTC is required to provide training for law enforcement officers in identifying, responding to, and reporting all Malicious Harassment offenses, and any other crimes of bigotry or bias.

The Washington Association of Sheriffs and Police Chiefs (WASPC) is required to maintain a central repository for the collection and classification of information regarding Malicious Harassment violations and other crimes of bigotry and bias. All law enforcement agencies must file monthly reports of Malicious Harassment and other bias offenses to the WASPC for compilation into an annual report to the Governor and the Legislature.

#### **Summary of Engrossed Substitute Bill:**

The criminal offense of Malicious Harassment is renamed "Hate Crime Offense." References to "handicap" in the Hate Crime Offense statute are removed and replaced with the term "disability." "Gender identity or expression" is independently listed as a protected category under the Hate Crime Offense statute, rather than being included as part of the definition of "sexual orientation." Definitions of "sexual orientation" and "gender identity or expression" are included in the Hate Crime Offense statute itself, rather than by cross-reference to another statutory definition.

The acts that allow the trier of fact in a criminal prosecution for a Hate Crime Offense to infer that a threat was intended are expanded to include the following acts:

- defacing religious real property with words, symbols, or items that are derogatory to persons of the faith associated with the property;
- placing a vandalized or defaced religious item or scripture on the property of a victim who is, or whom the actor perceives to be, of the faith with which that item or scripture is associated; and
- damaging, destroying, or defacing religious garb or other faith-based attire belonging to the victim, or removing or attempting to remove religious garb or other faith-based attire from the victim's person without the victim's authorization.

The maximum punitive damages available in a civil action brought by the victim of a Hate Crime Offense are increased from \$10,000 to \$100,000.

A multidisciplinary hate crime advisory working group is created within the Office of the Attorney General for the purpose of developing strategies to raise awareness of and appropriate responses to hate crime offenses. The Office of the Attorney General must convene the working group by September 1, 2019.

The working group's membership must include, four community members, one appointed by each of the two largest caucuses of the Senate and the House of Representatives, and three members appointed by the Governor, with two representing groups protected under the Hate Crime Offense statute and one representing law enforcement. The working group is encouraged to solicit participation and feedback from nonmember groups and individuals with relevant experience as needed.

The working group must develop recommended best practices for:

- preventing hate crimes, especially those occurring in public K–12 schools and in the workplace, through public awareness and anti-bias campaigns;
- increasing identification and reporting of hate crimes, including recommendations for standardization of data collection and reporting;
- strengthening law enforcement, prosecutorial, and public K–12 school responses to hate crime offenses through enhanced training and other measures; and
- supporting victims of hate crime offenses—in particular, identifying ways of strengthening law enforcement, health care, and educational collaboration with, and victim connection to, community advocacy and support organizations.

The working group must hold at least four meetings. The Office of the Attorney General must report the working group's recommendations to the Governor and the Legislature by July 1, 2020.

#### **EFFECT OF SENATE AMENDMENT(S):**

The list of circumstances that allow the trier of fact in a criminal prosecution for a Hate Crime Offense to infer that a threat was intended is further expanded to include the placement of a noose on the property of a victim who is or whom the actor perceives to be of a racial or ethnic minority group.

The multidisciplinary hate crime advisory working group's purpose and duties are modified to include development of recommended best practices relating to hate incidents (in addition to Hate Crime Offenses). The working group must undertake its work with a view toward restorative justice. The working group's membership is modified in the following ways: (1) four legislators appointed by the each of the largest caucuses (rather than four community members appointed by each of the largest caucuses) must be included as members; (2) six, rather than two, members must be appointed by the Governor to represent groups protected under the Hate Crime Offense statute; and (3) four members, to be appointed by the Governor, are added, representing prosecutors, K-12 educators, the Attorney General's Office, and a local organization with national expertise legislating against, tracking, and responding to hate crimes and hate incidents.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) It is time to update laws targeting perpetrators who are motivated by hate in assaulting others. Taking steps to address and prevent these attacks is long overdue. Based on 2017 data, hate crimes are up by 17 percent, and by 42 percent in Washington. Washington ranks third in the nation for hate crimes. Individual cities are reporting increases as well. In Seattle, hate crimes have nearly doubled. This is not an Eastern Washington or Western Washington issue. The data is based only on crimes that have been reported. Underreporting is a known problem with these offenses and may be particularly pronounced in communities with limited English proficiency, cultural barriers, and distrust of government. Some of the most alarming incidents cannot be shared because victims are too afraid to come forward. The best numbers from law enforcement are those collected by the Federal Bureau of Investigation, but that agency is also targeting communities for random interviews and checks. This is a step in the right direction, and discussions should continue to ensure Washington is not an outlier in terms of the number of hate crime incidents.

There is a large stakeholder group working on this bill. This bill is a path forward to combat hate, and one that updates the criminal justice system response to these offenses and enhances community strength. This bill will improve the identification of and response to hate crimes, and sends a message of deterrence. The bill will declare Washington to be a hate-free zone and allow affected persons to seek damages of up to \$250,000. It also identifies hate crime by its true name. This is appropriate for these crimes that are specifically targeted and demonstrate bigotry. Combatting bias-based offenses is important to the Office of the Attorney General, which supports the work group that the bill asks it to house. This bill takes important steps to create social parity. If well funded and well executed, an anti-bias campaign could do a lot of good.

Religious groups have noted a steady increase in hate crimes since 2016. Last year saw the biggest increase in these offenses since the Anti-Defamation League began tracking them. Many people have painful personal experience with hate crimes. People have been told to go back to their country, when the United States is their country. Adults and children have been spit on, bullied, and threatened. Children have decided not to report out of fear that the harassment will get worse, and some have become suicidal. Some people do not want to leave their homes. Teachers have suffered personal threats. Jewish buildings have been defaced with swastikas. In 2006 a gunman burst into the offices of the Jewish Federation in Seattle and killed a person. People have been physically assaulted for their sexual orientation. These incidents instill long-lasting fear in victims and are becoming all too common in the current political climate. Professional counselors are seeing a spike in depression and anxiety. Regardless of personal beliefs, no person and no organization has the right to act out or encourage violence. Hate crimes rip the fabric of communities apart. Washington must chart a new course away from bias and bigotry.

(Opposed) None.

(Other) The purpose of this bill is good, but there is some concern that changing the name of the offense will make a crime that is already hard to prove even harder to prove. The public has preconceived notions of what a crime is. Under the current name of Malicious Harassment, something that would not jump off the charts in terms of severity would still be prosecutable. This could make it hard to reach a conviction in some cases that are not as serious.

**Persons Testifying:** (In support) Representative Valdez, prime sponsor; Nina Martinez, Latino Civic Alliance; Emilia Jones, Office of the Attorney General; Masih Fouladi, Council on American Islamic Relations; Maxima Patashnik, Jewish Federation; Michael Byun, Asian Counseling and Referral Service; Seth Goldstein, Temple Beth Hatfiloh; and Daniel Goodman, Gender Justice League.

(Other) Russell Brown, Washington Association of Prosecuting Attorneys.

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