

HOUSE BILL REPORT

ESHB 1037

*As Reported By House Committee on:
Judiciary*

Title: An act relating to crimes motivated by bigotry or bias.

Brief Description: Creating a procedure to monitor crimes of bigotry or bias.

Sponsor(s): House Committee on Judiciary (originally sponsored by Representatives Appelwick, Prince, Wineberry, Belcher, Heavey, R. Meyers, Dorn, H. Myers, Phillips, Wang, Miller, Ludwig, Prentice, Leonard, Locke, Riley, Fraser, R. King, Nelson, Pruitt, G. Fisher, Jacobsen, Anderson and Brekke; by request of Governor Gardner).

Brief History:

Reported by House Committee on:
Judiciary, January 24, 1992, DPA.

**HOUSE COMMITTEE ON
JUDICIARY**

Majority Report: *Do pass as amended.* Signed by 14 members: Representatives Appelwick, Chair; Ludwig, Vice Chair; Paris, Assistant Ranking Minority Member; Belcher; Broback; Forner; Inslee; Locke; R. Meyers; H. Myers; Riley; Scott; Vance; and Wineberry.

Minority Report: *Do not pass.* Signed by 5 members: Representatives Padden, Ranking Minority Member; Hargrove; Mielke; D. Sommers; and Tate.

Staff: Pat Shelledy (786-7149).

Background: The malicious harassment statute is intended to prevent and punish harassment, motivated by bigotry and bias, against people of a certain race, color, religion, ancestry, or national origin, or against people with a mental, physical, or sensory handicap. A person is guilty of malicious harassment if the person maliciously and with intent to intimidate or harass the victim due to the victim's membership in a protected category, injures another person's person or property; or, by words or conduct, places the victim in reasonable fear of injury. Cross burning and

defacement of property of the victim with hate symbols are evidence of malicious harassment.

The statute does not explicitly state whether a person is guilty of malicious harassment if the person harasses someone due to the harasser's mistaken impression that the victim was a member of a protected class. For example, in one celebrated case, the murderer mistakenly believed the family he murdered was Jewish.

Sexual orientation is not one of the protected classes.

The Washington Association of Sheriffs and Police Chiefs can monitor the frequency of various crimes. The association has not established a repository for monitoring crimes of bigotry and bias.

Two superior court judges in King County have held that the statute is unconstitutional. One court invalidated section two, which provides that cross burning is per se a violation, which means that the state does not have to prove that the person who burned the cross intended to maliciously harass anyone or that in fact anyone was harassed. The second court invalidated section one as constitutionally overbroad. Both decisions are on appeal.

Summary of Amended Bill: The "per se" language in section two is stricken and replaced with a provision that cross burning on the victim's property or defacement of the victim's property with hate symbols is only prima facie evidence of malicious harassment. Therefore, the state will continue to bear the burden of proof beyond a reasonable doubt on all elements of the crime. The state may still prosecute under section one if the cross burning or display of hate symbols do not occur on the victim's property but are evidence of malicious harassment given the totality of evidence before the jury.

The malicious harassment statute is amended to avoid a failure to charge, a dismissal, or a finding of not guilty because the defendant, who maliciously harassed a victim, was mistaken about the person's membership in a protected class.

Sexual orientation is added to the list of protected categories under the act. Sexual orientation means heterosexuality, homosexuality, or bisexuality.

The Washington Association of Sheriffs and Police Chiefs must establish a central repository of information regarding malicious harassment. The association must summarize the information and annually report to the governor, the Senate

Law and Justice Committee, and the House Judiciary Committee.

The Criminal Justice Training Commission must train law enforcement officers to identify, respond to, and report crimes of malicious harassment and bigotry and bias. If funding is not provided in the budget, this provision is null and void.

The act is to be liberally construed.

Nothing in the act confers or expands any civil rights or protections to any group or class identified in the statute beyond those rights or protections that exist under the federal or state constitutions or the civil laws of the state of Washington.

Amended Bill Compared to Engrossed Substitute Bill: The "per se" section is changed in response to the constitutional challenge to provide that cross burning and defacement of property with hate symbols on the victim's property is only prima facie evidence of malicious harassment. Clarifying language is added to clarify that: 1) Under existing law even if the state cannot proceed under the prima facie section, the state may prosecute under section one; 2) the state is not prohibited from prosecuting other crimes committed when the harasser attacked the victim, such as assault or robbery; 3) a person is guilty of malicious harassment if the harasser attacks the victim because the harasser thinks that the victim is of a certain race, but is wrong about the victim's race. For example, the man who murdered the Goldmark family on Christmas eve in 1985 mistakenly believed the family was Jewish and communist. Finally, section one is amended to provide that if the state proceeds under section one, the cross burning and the defacement of property do not have to occur on the victim's property but will be considered under the totality of the evidence presented about the intent of the harasser.

Fiscal Note: Available.

Effective Date of Amended Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: The change to prima facie evidence should correct the constitutional challenge to section two of the statute but adding the requirement that the act occur on the victim's property may be unnecessary. Section one should be upheld on appeal, and the Legislature should refrain from amending it unless the court on appeal finds the statute unconstitutional. Some changes should be made so that law

enforcement and prosecutors can protect the public while the appeal is pending.

Testimony Against: Homosexuals should not be protected under this bill. The American Civil Liberties Union recommends different language than that proposed to increase the likelihood that the law will be constitutional. The law violates First Amendment rights.

Witnesses: Norm Maleng, King County Prosecutor's Office (in favor with concerns); Carol Gregory, Governor's Office; Representative Jesse Wineberry; Paul O. Cowles, Mayor, City of Bothell; Mark Ericks, Chief of Police, City of Bothell; and Tobias Washington (all in favor). Zorka Fowler; Kirk Fowler; Jerry Gurke; Harry Schmidt, Populist Party of Washington; and Richard Kurton, Washington Freedom Coalition (all opposed). Jerry Sheehan, American Civil Liberties Union; and Adam Gravley (both opposed with suggestions for revision).