

# HOUSE BILL REPORT

## 2ESHB 1037

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*As Amended by the Senate*

**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):** By 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;  
Passed House, February 10, 1992, 75-19;  
Amended by Senate.

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**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 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.

**EFFECT OF SENATE AMENDMENT(S):** The House provisions are stricken entirely. The Senate version: 1) deletes "sexual orientation" and adds "gender" to the list of protected classes; 2) provides that "cross burning" and "defacement of the property of the victim or a third person" with hate symbols constitutes a rebuttable presumption of a violation. In contrast, the House version required the cross burning or display of symbols to occur on the victim's property and, if so, the prohibited behavior would constitute "prima facie" evidence of a violation; and 3) provides that crime reports prepared by the Washington Association of Sheriff and Police Chiefs must comply with federal requirements. In contrast, the House version statutorily required the association to establish a central repository and required the association to issue an annual report summarizing the information. In addition, the House version required the Criminal Justice Training Commission to train law enforcement officers to identify and respond to malicious harassment. Finally, the House version provided that the act does not confer or expand any civil rights or protections to any of the protected classes that do not currently exist under other laws.

***Fiscal Note:*** Available.

***Effective Date:*** 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).

**VOTE ON FINAL PASSAGE:**

Yeas 75; Nays 19; Excused 3; Absent 1

Nays: Representatives Ballard, Bowman, Brumsickle, Carlson, Casada, Chandler, Fuhrman, Hargrove, Hochstatter, Johnson P, Lisk, Mielke, Morton, Nealey, Neher, Padden, Silver, Sommers D, Tate

Excused: Representatives Basich, Betrozoff, Wineberry

Absent: Representative King R