

SENATE BILL REPORT

ESHB 2327

As Reported by Senate Committee On:
Higher Education & Workforce Development, February 25, 2020
Ways & Means, March 2, 2020

Title: An act relating to addressing sexual misconduct at postsecondary educational institutions.

Brief Description: Addressing sexual misconduct at postsecondary educational institutions.

Sponsors: House Committee on College & Workforce Development (originally sponsored by Representatives Pollet, Kilduff, Frame, Bergquist, Orwall, Wylie and Appleton).

Brief History: Passed House: 2/13/20, 94-4.

Committee Activity: Higher Education & Workforce Development: 2/20/20, 2/25/20 [DPA-WM, w/oRec].

Ways & Means: 2/28/20, 3/02/20 [DPA, w/oRec].

Brief Summary of Amended Bill

- Requires the public four-year institutions to submit a report on certain sexual misconduct assessments, efforts to understand systemic oppression, and impacts of certain policy changes.
- Disallows the use of an agreement prohibiting a person from disclosing that an employee was the subject of an investigation, allegation, or findings of sexual misconduct.
- Requires institutions, prior to an official offer of employment, to ask applicants to sign a statement regarding history of sexual misconduct and ask previous employers certain information about an applicant.
- Exempts personal identifying information of a witness or complainant of sexual misconduct at institutions from the Public Records Act.

SENATE COMMITTEE ON HIGHER EDUCATION & WORKFORCE DEVELOPMENT

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.
Signed by Senators Randall, Chair; Stanford, Vice Chair; Liias.

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.

Minority Report: That it be referred without recommendation.

Signed by Senators Holy, Ranking Member; Brown.

Staff: Kellee Gunn (786-7429)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended.

Signed by Senators Rolfes, Chair; Frockt, Vice Chair, Operating, Capital Lead; Mullet, Capital Budget Cabinet; Billig, Carlyle, Conway, Darneille, Dhingra, Hasegawa, Hunt, Keiser, Lias, Muzzall, Pedersen, Schoesler, Van De Wege, Wagoner and Warnick.

Minority Report: That it be referred without recommendation.

Signed by Senators Braun, Ranking Member; Brown, Assistant Ranking Member, Operating; Honeyford, Assistant Ranking Member, Capital; Becker and Wilson, L..

Staff: Michele Alishahi (786-7433)

Background: Public Records Act. Washington's Public Records Act (PRA) requires state and local agencies to disclose all public records upon request, unless the record is explicitly exempt under the PRA or by another law.

Non-Disclosure Agreements. A nondisclosure agreement (NDA) is a form of contract between two or more parties that restricts the disclosure of confidential material or information to third parties. There are certain limitations to NDAs under state and federal law.

Sexual Misconduct Policies at Higher Education Institutions. Every higher education institution that receives federal funds must comply with certain federal laws related to campus safety and sexual violence including the Clery Act and Title IX.

In 2015, the Legislature enacted two laws that created procedures to address and prevent campus sexual violence. As a result, certain disciplinary processes and confidentiality protocols were developed and a uniform campus climate survey was conducted at the public baccalaureate institutions and the community and technical colleges.

Summary of Amended Bill: Sexual Misconduct Assessment and Impact Report. By December 1, 2023, the public four-year institutions are required to report to the appropriate committees of the Legislature and the Governor on the following:

- summaries on the prevalence of sexual misconduct on college and university campuses, if a climate assessment was conducted after the effective date of this act;
- efforts to reach out to and capture information from students who have traditionally been marginalized or have experienced disproportionate impacts of systemic oppression;
- how information obtained by an assessment was used to improve the policies, programs, and resources of the campus community; and
- the impacts of this act on hiring practices, campus safety, and other relevant considerations.

Use of Nondisclosure Agreements. Any agreement between an institution and an employee is against public policy and void and unenforceable if it prohibits the employee, institution, survivor, or another person from disclosing that the employee has been the subject of an investigation, allegation, or findings of sexual misconduct.

Investigations of Sexual Misconduct and Personnel Files. An institution must complete investigations of complaints or allegations of sexual misconduct committed by an employee against a student regardless of whether the employee voluntarily or involuntarily leaves employment with the institution, unless the victim requests otherwise. When the investigation is complete, the institution must make written findings of whether the complaint or allegation is substantiated. Institutions must use a preponderance of the evidence standard when determining whether findings are substantiated. An employee's personnel file or employment records must include any substantiated findings of sexual misconduct committed by the employee while employed with that institution.

Hiring Practices at Postsecondary Educational Institutions. Beginning October 1, 2020, prior to a postsecondary educational institution offering an official offer of employment to an applicant, the institution must request the applicant to sign a statement declaring whether they have been subject of any substantiated finding of sexual misconduct with a current or former employer with an explanation of the situation. The applicant must provide authorization to permit the applicant's current and past employers to disclose any sexual misconduct committed by the applicant and to make copies of all documents in the previous employer's personnel, investigative, or other files relating to sexual misconduct by the applicant available to the hiring institution. Additionally, the applicant must provide a release from liability for the applicant's current and past employers, and employees acting on behalf of the employer, for providing information regarding the applicant's previous or current employment. An institution may not hire an applicant who does not sign the statement attesting to any sexual misconduct findings or investigations.

Beginning July 1, 2021, prior to offering an official offer of employment to an applicant, an institution must request that the applicant's current and past postsecondary educational institution employers provide copies of all documents, if any, related to sexual misconduct in an employee's personnel file before hiring the applicant. The request must include the signed statement by the applicant. The institution may only use the information received for the purpose of evaluating the applicant's qualifications for the position for which they applied.

All information on substantiated findings of sexual misconduct, or investigations into sexual misconduct about a current or previous employee, must be disclosed by the institution upon request. An institution must disclose information about substantiated findings of sexual misconduct to any employer conducting reference or background checks on a current or former employee, regardless of whether they specifically ask for such information. The institution is presumed to be acting in good faith, and are not liable for any cause of action arising from the disclosure of information.

Disclosure. Institutions must keep personal identifying information of the complainant and any witness confidential, unless the complainant or witness agree to disclose their identifying information. A person under investigation may not be considered a witness. The disclosure

requirements do not restrict expungement from a personnel file or employment records of information about alleged sexual misconduct that has not been substantiated.

Definitions. Applicant, employee, employer, postsecondary educational institution, sexual misconduct, and student are all defined.

EFFECT OF WAYS & MEANS COMMITTEE AMENDMENT(S):

- Removes requirement for each postsecondary educational institution to administer a climate assessment on the prevalence of sexual misconduct on their campuses.
- Requires the public four-year higher education institutions, by December 1, 2023, to report to the appropriate committees of the Legislature and the Governor on assessments conducted after the enactment of this legislation, impacts on hiring practices as a result of this legislation, and the institution's efforts to understand traditionally marginalized students' experiences.
- Changes the requirement of an applicant to sign the statement, pertaining to substantiated findings of sexual misconduct or current investigation of sexual misconduct, from "before hiring" to "prior to an official offer of employment".
- Clarifies that the request for information on an applicant is to other postsecondary educational institutions, rather than to any current and past employers of an applicant.
- Changes the requirement of a postsecondary educational institution to request certain information from past employers and applicants from "before hiring" to "prior to an official offer of employment".

EFFECT OF HIGHER EDUCATION & WORKFORCE DEVELOPMENT COMMITTEE AMENDMENT(S):

- Requires the assessment, administered by the postsecondary institutions, to review and consider best practices for responding to, and preventing, sexual misconduct on campus.
- Establishes that postsecondary institutions may make policy changes in response to certain assessment results and that WSAC report on those changes to the Governor and Legislature.
- Removes an employee under investigation for allegations of sexual misconduct from being considered a witness.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on February 26, 2020.

Creates Committee/Commission/Task Force that includes Legislative members: No.

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

Staff Summary of Public Testimony on Engrossed Substitute House Bill (Higher Education & Workforce Development): *The committee recommended a different version of the bill than what was heard.* PRO: This is a serious problem. Sexual assault and harassment is prevalent on college campuses. The Seattle Times investigated a situation at

the University of Washington between faculty and a student. That faculty member is now at a postsecondary educational institution in Arizona. If there are formal findings of sexual misconduct, that information must be shared with prospective employers. In this version of the bill, there was a change with the applicability of other laws. And definitions were tightened, to ensure it only effects employees in a supervisory role with students. The University of Washington has an amendment to lower to fiscal note. It is vital that this applies equally to public and private institutions.

This bill will cost money and necessitate the hiring of new staff. The climate assessment should be changed. Low student response the last time postsecondary educational institutions conducted a climate assessment allowed us to learn that there needs to be professional expertise while conducting these surveys to ensure the assessment is accessible to students. This will require funding. This is a top priority for students. One in ten college students will experience sexual assault. Graduate students are placed in clinical settings and labs and may not report sexual misconduct because of their relationship with their faculty members. This is a problem. Passing this bill will create a safe place for these students.

OTHER: Student safety is important to us. We are working to address the issues raised in the bill. There are two requests. The first is to make section 3, regarding climate assessments, be limited to public colleges. Second, in section 6, the requirement on hiring processes should be limited to public institutions unless there is access to funding for startup costs.

Persons Testifying (Higher Education & Workforce Development): PRO: Representative Gerry Pollet, Prime Sponsor; Joe Dacca, Director of State Relations, University of Washington; Chris Mulick, Director of State Relations, Washington State University; Ed McCallister, State Board for Community & Technical Colleges; Bengisu Cicek, Associated Students of the University of Washington Tacoma; Spencer Lively, Associated Students of UW.

OTHER: Terri Standish-Kuon, Independent Colleges of Washington.

Persons Signed In To Testify But Not Testifying (Higher Education & Workforce Development): No one.

Staff Summary of Public Testimony on Bill as Amended by Higher Education & Workforce Development (Ways & Means): *The committee recommended a different version of the bill than what was heard.* PRO: There has been a considerable amount of work done over the interim on this bill. We are now working with the prime sponsor to prioritize those changes to reduce the fiscal impact. Please fund the fiscal note. This bill will create more work for employees involved in the hiring process to monitor, process, and maintain the quality control necessary. This is about centralizing information and having the ability to quickly access that information. There are parts of this bill, such as the declaration, which do not cost anything. When the institution is sending out queries to prior employers about an applicant it will require us to establish a process and hire staff to administer that. This bill will give us a legal mandate to share information on former employees.

OTHER: Student safety is important to us. The requirements of the legislation lead to real costs. Private institutions cannot submit a fiscal note. If the Legislature intends to require the campus climate survey, please give non-public institutions options to pay for it. We also request financial assistance in implementing Section 6. This could be done through a grant program. We are concerned about the financial resources necessary to comply with this bill.

Persons Testifying (Ways & Means): PRO: Joe Dacca, University of Washington; Chris Mulick, Washington State University.

OTHER: Terri Standish-Kuon, President and CEO, Independent Colleges of Washington.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.