

# SENATE BILL REPORT

## SSB 5885

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As Passed Senate, March 11, 2019

**Title:** An act relating to the admissibility of testimony of children in criminal and dependency proceedings.

**Brief Description:** Creating an exemption to hearsay for child sex trafficking victims.

**Sponsors:** Senate Committee on Law & Justice (originally sponsored by Senators Padden, Dhingra, O'Ban, Wilson, C. and Nguyen).

**Brief History:**

**Committee Activity:** Law & Justice: 2/18/19, 2/21/19 [DPS].

**Floor Activity:**

Passed Senate: 3/11/19, 48-0.

### Brief Summary of First Substitute Bill

- Authorizes the admission of a hearsay statement in a criminal court proceeding when the statement is made by a child under the age of sixteen describing an act of trafficking or an act associated with commercial sexual abuse of a minor.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Majority Report:** That Substitute Senate Bill No. 5885 be substituted therefor, and the substitute bill do pass.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Padden, Ranking Member; Holy, Kuderer, Salomon and Wilson, L..

**Staff:** Shani Bauer (786-7468)

**Background:** Hearsay is the legal term for certain statements—offered as evidence during a trial or hearing for the purpose of attempting to prove the truth of the matter asserted in the statements—that were not made while testifying at the trial or hearing itself. Hearsay is not allowed in a court hearing as it is considered to be generally unreliable, and because the person who made the original statement is not available for cross-examination. For example,

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a police officer cannot testify as to what they heard a witness say while investigating a crime. The witness must testify as to their own observations.

There are various evidentiary exceptions to the hearsay rule. In a criminal case, the U.S. Supreme Court has provided guidance over time under what circumstances hearsay evidence is admissible against a criminal defendant, setting forth a two-part test:

- the declarant generally must be shown to be unavailable; and
- the statement must have been made under circumstances providing sufficient "indicia of reliability."

Further, when statements are directly accusatory, the defense needs an opportunity to explore the accuser's motives. Where statements are the product of police interrogation, there is a need to ensure the testimony is not the product of improper coercion or intimidation.

In Washington, the Legislature has codified an exception to the hearsay rule for the admission of statements in a dependency proceeding, adult criminal proceeding, or juvenile offense adjudication. That exception includes statements made by a child under the age of ten describing any act of sexual contact performed with or on the child by another or any act of physical abuse of the child by another that results in substantial bodily harm if:

- the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- the child either (1) testifies at the proceeding, or (2) is unavailable as a witness and there is corroborative evidence of the act.

The adverse party must be given advance notice of the intent to offer the statement with sufficient opportunity to prepare a defense.

Specifically as it related to a minor, a person will be guilty of trafficking when they recruit, harbor, transport, transfer, provide, obtain, buy, purchase, or receive, by any means, another person who is under the age of eighteen and causes the underage person to engage in a sexually explicit act or a commercial sex act.

**Summary of First Substitute Bill:** A hearsay statement made by a child under the age of sixteen is admissible evidence in a dependency proceeding, adult criminal proceeding, or juvenile offense adjudication if the statement describes one of the following crimes performed with or on the child:

- trafficking under RCW 9A.40.100;
- commercial sexual abuse of a minor under RCW 9.68A.100;
- promoting commercial sexual abuse of a minor under RCW 9.68A.101; or
- promoting travel for the commercial sexual abuse of a minor under RCW 9.68A.102.

The procedures in current law relating to the admission of statements by a child, describing sexual or physical abuse, apply to the admission of statements relating to trafficking or commercial sexual abuse of a minor.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**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 Original Bill:** *The committee recommended a different version of the bill than what was heard.* PRO: Trafficking is sometimes thought of as an international problem, but it is also a problem in America. Trafficking is a violation of human rights. Washington has been an example and a leader in working to address laws in this area, including working to remove any law that would call a child a prostitute. This bill addresses another deficiency in law. These children have gone through an unbelievable amount of trauma as part of the crime of trafficking, from abduction, rape, and physical abuse.

These youth are homeless for months at a time and when hearings come up it is sometimes impossible to track them down. Even adults have an extremely difficult time testifying in these cases. Sometimes these victims face abuse from their own family members and who have sold them to members of the public. Children do not always have the ability to face their accuser.

The U.S. Supreme Court decision in Crawford v. Washington changes how prosecutors were able to use hearsay statements. Washington appellate courts have affirmed that the underlying statute is constitutional but there is a difference in how prosecutors treat testimonial statements versus non-testimonial statements. We want to caution that the statute should not promise more than it can deliver. It is unlikely that statements to a detective alone will supplant for testimony of a child.

CON: Victims of trafficking are subjected to heinous crimes, but this bill goes too far. There is a reason we have the hearsay exception at age ten or less. Age ten is generally the age of adolescence. At sixteen-years-old, a person can be charged as an adult.

There is not enough evidence that a trafficking victim in particular is more deserving of this exception than victims of other crimes. Many crimes are traumatic and would be difficult for a youth to testify, but we have not deemed it a sufficient reason to negate a person's right to confront their accuser. The more you chip away at constitutional protections, the greater the likelihood for abuse. These victims are subject to complicated life circumstances. Those circumstances should be subject to cross-examination. We would be less concerned if the statements allowed were non-testimonial.

**Persons Testifying:** PRO: Senator Mike Padden, Prime Sponsor; Andy Miller, Washington Association of Prosecuting Attorneys; Linda Smith, Shared Hope International; Kyra Doubek, Kent Youth and Family Services.

CON: Elissa Brine, Washington Association of Criminal Defense Lawyers.

**Persons Signed In To Testify But Not Testifying:** No one.