

HOUSE BILL REPORT

HB 1569

As Reported By House Committee On:
Judiciary

Title: An act relating to malicious harassment.

Brief Description: Changing provisions relating to malicious harassment.

Sponsors: Representatives Appelwick, Veloria, Wineberry, Romero, Wang, Locke, Thibaudeau, Wolfe, Brough, Miller, Leonard, Campbell, Cothorn, L. Johnson, J. Kohl and Anderson.

Brief History:

Reported by House Committee on:
Judiciary, February 24, 1993, DPS.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 14 members: Representatives Appelwick, Chair; Ludwig, Vice Chair; Ballasiotes, Assistant Ranking Minority Member; Campbell; Forner; Johanson; Locke; Long; Mastin; H. Myers; Riley; Schmidt; Scott; and Wineberry.

Minority Report: Do not pass. Signed by 3 members: Representatives Padden, Ranking Minority Member; Chappell; and Tate.

Staff: Patricia Shelledy (786-7149).

Background:

INTRODUCTION.

The malicious harassment statute is a criminal statute which 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.

DEFINITION OF THE CRIME OF MALICIOUS HARASSMENT.

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:

- (1) Injures another person;
- (2) Damages or destroys another person's property; or
- (3) By words or conduct, places the victim in reasonable fear of injury.

1989 AMENDMENTS TO THE MALICIOUS HARASSMENT STATUTE.

In 1989, the malicious harassment statute was amended in two significant ways. First, language was added to provide that "words or conduct" that could place a victim in reasonable fear included cross burnings and defacement of a victim's property with symbols that historically or traditionally have connoted hatred towards the class of which the victim is a member. Second, cross burnings and defacement of the property of the victim or a third person with hate symbols became *per se* violations of the statute. The *per se* provisions relieved the state of the responsibility to prove that the person intended to maliciously harass the victim or that the victim was afraid.

As a result of the amendments, the state has two avenues for prosecution if the facts involve a swastika placed on the victim's property or a cross burning, whether or not the cross is burned on the victim's property: The state can either prove that the totality of the circumstances indicate the defendant intended to maliciously harass the victim, or the act was a *per se* violation, or both.

INCIDENTS CHARGED AS MALICIOUS HARASSMENT AND RELATED COURT RULINGS.

In 1991, two separate incidents involving cross burnings occurred in King County. Two Superior Court judges heard the different cases. Prior to going to trial in both cases, the defendants made motions to dismiss the cases alleging the malicious harassment statute is unconstitutional. One Superior Court judge held that the *per se* provision is unconstitutional but that the rest of the statute is constitutional. The other Superior Court judge held that the entire statute is unconstitutional. Those cases were consolidated on appeal. The Washington State Supreme Court heard oral argument on the cases on February 17, 1993. It is unlikely that the court will render a decision before the end of the legislative session. The Washington State Supreme Court will also consider the impact of a United States Supreme Court decision invalidating another state's hate crimes statute.

OTHER PROVISIONS CONCERNING 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 in the list of protected classes.

A victim may file a civil suit against the defendant for malicious harassment. The defendant may be liable for actual damages and punitive damages of up to \$10,000. The statute does not provide for an award of costs or reasonable attorneys' fees.

The Washington Association of Sheriffs and Police Chiefs can monitor the frequency of various crimes. Under a voluntary reporting program, the association has monitored some incidents of crimes of bigotry and bias.

Both the adult sentencing and the juvenile offender disposition provisions have provisions in which certain crimes are given a particular "seriousness level" or "rank." Malicious harassment is not specifically ranked in the juvenile offender disposition provisions. The seriousness level of juvenile offenses that are not explicitly ranked are determined by reference to the crimes "class." Consequently, because malicious harassment is a class C felony, its seriousness level under the Juvenile Code is a "C" for completed offenses and a "D" for attempted offenses.

Summary of Substitute Bill: A number of changes are made to the malicious harassment statute to address constitutional concerns and new policy considerations.

A. AMENDMENTS TO ADDRESS CONSTITUTIONAL CONCERNS.

LEGISLATIVE FINDINGS.

The Legislature makes findings concerning the seriousness of hate crimes. The Legislature finds that the state interest in preventing hate crimes extends beyond the state interest in preventing felonies and misdemeanors that are not motivated by hatred, and that prosecution of those crimes is inadequate to protect citizens from hate crimes. The Legislature also finds that historically and traditionally cross burnings have been used to threaten African Americans and swastikas have been used to threaten Jewish people. The Legislature finds that a person who burns a cross or displays a swastika on the victim's property or does so as part of a series of acts that are directed toward a

particular victim, knew or should know that the act may create a reasonable fear of harm in the victim.

A NEW DEFINITION OF HARASSMENT.

The current definition is revised to strike reference to "the intent to intimidate or harass ... by words or conduct." The list of words or conduct that may violate the statute is deleted. Instead, the state must prove that the defendant maliciously and intentionally threatened the victim. The victim must be placed in reasonable fear of harm. "Reasonable fear" is defined to mean the fear that a reasonable person would experience under all the circumstances. A "reasonable person" is a person who is a member of the class of which the victim is a member. Words alone do not constitute malicious harassment unless the context or circumstances surrounding the words indicate the words are a threat. Threatening words do not constitute malicious harassment if it is apparent to the victim that the person does not have the apparent ability to carry out the threat. Evidence of expressions or associations of the accused may not be introduced as substantive evidence at trial unless the evidence specifically relates to the crime charged or unless the evidence is used to impeach a witness.

PER SE PROVISIONS STRICKEN AND REPLACED WITH A REASONABLE INFERENCE PROVISION.

The "per se" language is stricken and replaced with a provision that the trier of fact may draw a reasonable inference that the defendant intended to threaten the victim if the defendant:

- (1) Burns a cross on the property of a victim who is or who the actor perceives to be of African American heritage; or
- (2) Defaces the property of a victim who is or who the defendant perceives to be of Jewish heritage by defacing the property with a swastika.

The state will continue to bear the burden of proof beyond a reasonable doubt on all elements of the crime. Even if the facts do not support a reasonable inference, the state may still prosecute a defendant if the totality of evidence indicates that the person intended to threaten the victim and the victim was placed in reasonable fear of harm.

B. CLARIFYING LANGUAGE.

The law is clarified in three ways: First, it is clarified to provide that it is not a defense that the defendant was

mistaken about the person's membership in a protected class. Second, the law is clarified to expressly provide that a person who commits another crime during the commission of a crime may be punished and prosecuted for the other crime separately. Third, the law is clarified that the term "another person" means the victim as well as any other person the defendant injures or harasses. These additions are not changes to existing law, simply clarifications.

C. NEW POLICY PROVISIONS.

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

In a civil action, the plaintiff may be awarded reasonable attorneys' fees and costs, as well as actual damages, and punitive damages up to \$10,000.

D. DATA COLLECTION.

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.

E. LAW ENFORCEMENT TRAINING.

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.

F. ADDITIONAL CIVIL RIGHTS NOT CREATED UNDER THIS ACT.

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.

G. RANKING MALICIOUS HARASSMENT IN THE JUVENILE CODE.

The Juvenile Offender Code is amended to expressly rank the crime of malicious harassment at a seriousness level of a "C" for a completed crime and a "D+" for an attempted crime. The disposition that any particular juvenile offender will receive for committing the offense of malicious harassment depends on the age of the juvenile, the juvenile's prior

criminal history, and the length of time that has elapsed since the last offense the juvenile committed, if any. The code revisor has added technical amendments to clean up erroneous references to crimes and cites in the disposition grid.

Substitute Bill Compared to Original Bill: The proposed substitute makes several changes as follows: (1) the findings section is amended to correspond more closely to the reasonable inference provision concerning burning crosses or displaying swastikas on the property of the victim; (2) the provision governing threatening words is revised to provide that words alone are not malicious harassment unless the words are a threat, and that threatening words do not constitute malicious harassment if it is apparent to the victim that the defendant did not have the apparent ability to carry out the threat; (3) subsection 2(c) of the reasonable inference section is deleted entirely; (4) a new provision is added which provides that evidence of expressions or associations of the accused may not be introduced as substantive evidence at trial unless the evidence specifically relates to the crime charged. The provision does not obviate the rules of evidence governing impeachment of a witness; (5) a provision requiring the Superintendent of Public Instruction to develop a program to be included in the curriculum to educate children and teachers about crimes of malicious harassment is deleted; (6) gender is deleted from the list of protected categories; and (7) the Juvenile Code is amended to list the offense of malicious harassment among the offenses with a specified seriousness level. The seriousness level remains at a "C" for a completed offense and is increased from a "D" to a "D+" for attempted offenses.

Fiscal Note: Available.

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

Testimony For: A clear message needs to be sent that hate crimes will not be tolerated. A constitutional statute can be drafted to criminalize hate crimes. The number of hate crimes is increasing and are committed on the basis of the sexual orientation or gender of the victim as well as against members of the other currently designated groups.

Testimony Against: Some constitutional issues remain in the current draft. The Legislature should exercise caution before amending the substantive provisions of the statute because the Washington State Supreme Court may decide on the constitutionality of our existing law within the next year. It is unclear how "gender" will be construed and applied.

Sexual orientation should not be added to the list of protected classes.

Witnesses: Bill Wasmuth, Executive Director, Northwest Coalition Against Malicious Harassment (pro); Norm Maleng, King County Prosecutor (pro, with concerns); Christine Gregoire, Attorney General (pro); Professor George Nock, University of Puget Sound professor, Tacoma Hate Crimes Task Force Legislative Committee (pro); Ed Murrey, Privacy Fund (pro); Andrea Brenneke, Northwest Women's Law Center (pro); James Kelly, Executive Director, Washington State Commission on African American Affairs (pro); Brian Lock, Commission on Asian American Affairs (pro); Veronica Barber, Commission on Asian Pacific American Affairs (pro); Elaine Ko, city of Seattle (pro); Mark Downing, Populist Party of Washington State (con); Chris Taylor, private citizen (con); Jerry Sheehan, American Civil Liberties Union (pro, with concerns); Adam Gravely, American Civil Liberties Union (pro, with concerns); Dominick White, private citizen (pro); Carol White, private citizen (pro); Mr. S. Don Phelps, attorney (pro); and Richard Chapin, citizen and former legislator (pro).