

HOUSE BILL REPORT

HB 2712

As Reported by House Committee On:
Public Safety & Emergency Preparedness

Title: An act relating to criminal street gangs.

Brief Description: Concerning criminal street gangs.

Sponsors: Representatives Hurst, Ross, Dickerson, Newhouse, Conway, Morrell, Roach, Kelley and Ormsby.

Brief History:

Committee Activity:

Public Safety & Emergency Preparedness: 1/21/08, 1/24/08 [DPS].

Brief Summary of Substitute Bill

- Requires the Governor's Juvenile Justice Advisory Committee to issue a request for proposal to implement five pilot projects designed to prevent, intervene, and suppress street gangs and gang violence and appropriates \$10 million for the purpose.
- Requires the Washington Association of Sheriffs and Police Chiefs (WASPC) to establish a gang grant program and appropriates \$2 million for the purpose.
- Requires the WASPC to establish a grant program to support local graffiti and tagging abatement programs and appropriates \$1 million for the purpose.
- Requires the Washington State Patrol to create a statewide, multi-agency, information sharing gang database.
- Authorizes local jurisdictions to seek civil injunctions to suppress criminal street gang activity.
- Creates the crime of Criminal Gang Recruiting.
- Expands the list of illustrative aggravating factors in the Sentencing Reform Act to include any crime that is committed for the benefit of a criminal street gang.

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.

- Requires community custody for those convicted of an offense involving a firearm.
- Creates a new crime of Criminal Street Gang Tagging and Graffiti.
- Authorizes special civil penalties and costs that may be recovered by a property owner from the person causing the physical damage to the property.
- Requires the Office of Crime Victims Advocacy to establish a gang relocation assistance program.
- Requires the Department of Corrections to study the best practices to reduce gang involvement and recruitment among its incarcerated offenders.
- Requires the Task Force on Gangs in Schools to create a brochure on gang activity.

HOUSE COMMITTEE ON PUBLIC SAFETY & EMERGENCY PREPAREDNESS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives O'Brien, Chair; Hurst, Vice Chair; Pearson, Ranking Minority Member; Ross, Assistant Ranking Minority Member; Ahern, Goodman and Kirby.

Staff: Yvonne Walker (786-7841).

Background:

In 2007 the Legislature passed legislation (SSB 5987) that required the Washington Association of Sheriffs and Police Chiefs (WASPC) to establish a work group to evaluate the problem of gang-related crime in Washington. The work group included members from both the House of Representatives and the Senate as well representatives from the following groups: the Office of the Attorney General, local law enforcement, prosecutors and municipal attorneys, criminal defense attorneys, court administrators, prison administrators and probation officers, and experts in gang and delinquency prevention.

The work group was charged with evaluating and making recommendations regarding additional legislative measures to combat gang-related crime, the creation of a statewide gang information database, possible reforms to the juvenile justice system for gang-related juvenile offenses, best practices for prevention and intervention of youth gang membership, and the adoption of legislation authorizing civil anti-gang injunctions. The WASPC and the work group met monthly during the 2007 interim and on December 11, 2007, provided a report to the Legislature on its findings and recommendations regarding criminal gang activity.

Sentencing.

A variety of statutory provisions exist with respect to criminal gang activity. For example, a person is guilty of Criminal Gang Intimidation if he or she threatens another person because that person refused to join a gang. Criminal Gang Intimidation is a seriousness level III, class C felony offense.

Aggravating Factors. The standard sentencing range is presumed to be appropriate for the typical felony case. However, the law provides that in exceptional cases, a court has the discretion to depart from the standard range and may impose an exceptional sentence below the standard range (with a mitigating circumstance) or above the range (with an aggravating circumstance). The Sentencing Reform Act (SRA) provides a list of illustrative factors that a court may consider in deciding whether to impose an exceptional sentence outside of the standard range. Some of the illustrative aggravating factors provided by the SRA include: behavior that manifested deliberate cruelty to a victim; vulnerability of a victim; sexual motivation on the part of the defendant; and an ongoing pattern of multiple incidents of abuse to a victim.

Community Custody. The term "community custody" refers to the period following release from total confinement in which an offender is supervised by the Department of Corrections (DOC). Community custody is that portion of an offender's sentence served in the community, subject to conditions imposed by the sentencing court and the DOC. An offender may be sanctioned administratively by the DOC for violating his or her conditions of release.

Certain crimes, including sex offenses not qualifying for determinate-plus sentencing, serious violent offenses, crimes against a person, and some drug offenses carry a mandatory term of community custody. Unless waived by the court, certain mandatory conditions are required to be included in the term of community custody. Special conditions, such as crime related prohibitions, may also be included. The DOC assesses an offender's risk of reoffense, and may modify or impose conditions of community custody in addition to those imposed by the court, provided they do not contravene or decrease the court's order. For example, the DOC may require an offender to participate in rehabilitative programs or perform affirmative conduct according to the offender's risk of reoffense.

Malicious Mischief. A person is guilty of Malicious Mischief in the first degree if he or she knowingly and maliciously causes physical damage to the property of another in an amount exceeding \$1,500. Malicious Mischief in the first degree is a seriousness level II, class B felony offense. Malicious Mischief in the second degree occurs if the damage exceeds \$250. Malicious Mischief in the second degree is a seriousness level I, class C felony offense. Malicious Mischief in the third degree is a gross misdemeanor offense if the damage to the property exceeds \$50. It is a misdemeanor offense if the damage to the property is less than \$50. Generally, cases involving graffiti or tagging are charged as misdemeanor Malicious Mischief in the third degree offenses.

When a defendant is prosecuted in a criminal action for a misdemeanor offense, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised in certain specified instances. In these cases, if the party injured appears in court, at any time before the final judgment, and acknowledges in writing that he or she has

received satisfaction for the injury, the court may order all proceedings to be discontinued and the defendant to be discharged.

Civil Penalties. Criminal and civil penalties may be imposed for certain offenses such as shoplifting and related thefts of property or services. The special civil penalties apply to shoplifting and theft of restaurant or lodging services. In addition to actual damages, which include the value of services or property taken, certain penalties and costs may be recovered by a merchant from the person taking the goods or services. If the defendant is an adult or emancipated minor, those additional penalties and costs include:

- the retail value of the goods or services, to a maximum of \$1,000;
- a penalty of at least \$100 but not more than \$200; and
- reasonable attorneys' fees and court costs.

Vicarious liability is also imposed on the parent of an unemancipated minor who steals such goods or services. However, in the case of parental liability, the additional "retail value" penalty maximum of \$1,000 is reduced to \$500.

Claims, as well as judgments, may be assigned by a merchant who has suffered the theft of goods or services. Pursuit of these civil remedies by a merchant is independent of whether criminal charges are filed or prosecuted.

If a merchant gets a civil judgment under these provisions, that judgment may be assigned to another party for collection. Collection of the judgment debt may be accomplished through a debt collection agency. However, a claim that has not been reduced to a judgment cannot be assigned.

Summary of Substitute Bill:

I. Sentencing.

The crime of Criminal Gang Recruiting is created. It occurs when an adult, convicted of a felony, has compensated, threatened, or solicited a minor in order to involve that minor in the commission of the felony. The adult offender's standard sentencing range is determined by multiplying the general standard sentencing range for the completed offense by 125 percent. If the new calculated standard sentence range exceeds the statutory maximum sentence for the offense, the statutory maximum sentence is the presumptive sentence unless the offender is a persistent offender.

The prosecutor must file a special allegation proving that the felony committed involved the compensation, threatening, or solicitation of a juvenile in the commission of the felony offense.

Aggravating Factors. The list of illustrative aggravating factors in the Sentencing Reform Act is expanded to include any crime that is intentionally committed directly or indirectly for the benefit, aggrandizement, gain, profit, advantage, reputation, membership, or influence of a gang.

Community Custody. In the instance of an offender convicted of an offense involving the unlawful possession of a firearm the court must sentence the offender to a term of community custody.

Malicious Mischief Offenses. A new crime called "Criminal Street Gang Tagging and Graffiti" is created. A person is guilty of Criminal Street Gang Tagging and Graffiti if he or she has multiple current or prior convictions for Malicious Mischief in the third degree offenses.

When a defendant is prosecuted in a criminal action for a misdemeanor offense, other than a violation of Malicious Mischief in the third degree offense, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised in certain specified instances.

Civil Penalties. The same special civil penalties imposed for shoplifting and related thefts of property or services are created for offenses involving Malicious Mischief in the third degree. In addition to actual damages to the property, penalties and costs may be recovered by the property owner from the person causing the physical damage to the property. If the defendant is an adult or emancipated minor, those additional penalties and costs include: the value of the damage property, to a maximum of \$1,000; a penalty of at least \$100, but not more than \$200; and reasonable attorneys' fees and court costs. In the case of parental liability, the additional "property value" penalty maximum of \$1,000 is reduced to \$500.

Definitions. The following terms are defined:

"Criminal street gang" is defined as any ongoing organization, association, or group of three or more persons, whether formal or informal, having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity.

"Criminal street gang associate or member" is defined as, any person who actively participates in any criminal street gang and who intentionally promotes, furthers, or assists in any criminal act by the criminal street gang.

"Criminal street gang-related offense" is defined as the conviction of any felony or misdemeanor offense, whether in this state or elsewhere, that is committed with intent for one or more of the following reasons:

- for the benefit of or at the direction of any criminal street gang, with the intent to gain admission or promotion within the gang or with the intent to promote, further, or assist in any criminal act by the gang;
- to increase or maintain the gang's size, membership, prestige, dominance, or control in any geographical area;
- to exact revenge or retribution for the gang or any member of the gang;
- to obstruct justice, or intimidate or eliminate any witness against the gang or any member of the gang;

- to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage for the gang, its reputation, influence, or membership; or
- to provide the gang with any advantage in, or any control or dominance over any criminal market sector, including, but not limited to, manufacturing, delivering, or selling any controlled substance; arson; trafficking in stolen property; promoting prostitution; human trafficking; or promoting pornography.

"Pattern of criminal street gang activity" is defined as:

- any attempt, commission, or conspiracy to commit, two or more of the following criminal street gang-related offenses: a serious violent felony offense (excluding Homicide by Abuse and Assault of a Child I), a violent offense (excluding Assault of a Child II), delivering or possessing with intent to deliver a controlled substance, any violation of the Firearms and Dangerous Weapon Act, Theft of a Firearm, Possession of a Stolen Firearm, Malicious Harassment, Harassment where a subsequent violation or deadly threat is made, Criminal Gang Intimidation, Criminal Gang Recruiting, Involving a Juvenile in a Criminal Offense; Residential Burglary, Burglary II, Malicious Mischief I and II, Theft of a Motor Vehicle, Possession of a Stolen Motor Vehicle, Taking a Motor Vehicle Without Permission I and II, Extortion I and II, Intimidating a Witness, Tampering with a Witness, Reckless Endangerment, Coercion, Harassment, or Malicious Mischief III;
- the conviction for at least one of the offenses must have occurred after July 1, 2008;
- the offender's current conviction for the most recent committed offense must have occurred within three years of his or her prior offense; and
- of the offenses that were committed, the offenses must have occurred on separate occasions or by two or more persons.

The definitions of "criminal street gang," "criminal street gang associate or member," "criminal street gang-related offense," and "pattern of criminal street gang activity" preempts any conflicting city or county codes ordinances. Cities, towns, counties, or other municipalities may only enact laws and ordinances relating to criminal street gangs that contain definitions that are consistent with definitions in state law.

II. Grants.

Five Pilot Projects Funded by the Governor's Juvenile Justice Advisory Committee. The Governor's Juvenile Justice Advisory Committee (GJJAC) must issue a request for proposal to implement five pilot projects designed to prevent, intervene, and suppress street gangs and gang violence. Consideration for grant awards must be given to those applicants that show that gang violence is an increasing problem and that addressing gang activity is a priority within their community. Grant applications must include project processes and protocols for defining objections and measurable results.

The GJJAC must convene and consult quarterly with a 20-member gang work group to provide oversight of the pilot projects. The work group must include one member from each of the two largest caucuses from both the House of Representatives and the Senate, as well as representatives from the Office of the Attorney General, the Washington Association of Prosecuting Attorneys, the Washington Defender Association or the Washington Association

of Criminal Defense Lawyers, the Office of the Superintendent of Public Instruction (OSPI), the Department of Corrections (DOC), the Department of Social and Health Services (DSHS), the Washington State Patrol (WSP), the Washington Association of Cities, the Washington Association of Counties, and other such members, appointed by the Governor, that include but are not limited to representing law enforcement, court administrators, and experts in gang or delinquency prevention. Members of the work group are eligible for reimbursement for limited travel and mileage expenses related to the work group.

A total of \$10 million is appropriated from the State General Fund to the DSHS for purposes of implementing the five pilot projects. No more than 4 percent of the appropriated funding may be used for administrative purposes for implementing the grant program.

The Washington Association of Sheriffs and Police Chiefs' Gang Grant Program. The WASPC must establish a gang grant program for local law enforcement agencies with the goal of targeting gang crime. Grant applicants are encouraged to utilize multi-jurisdictional efforts and each applicant must show, within their jurisdiction that:

- a significant gang problem exists;
- grants awarded would be sufficient to cover prosecution and jail costs;
- the enforcement program being proposed in the application would specifically suit their gang problem; and
- there is community coordination focusing on prevention, intervention, and suppression of gang activity.

A total of \$2 million is appropriated from the Public Safety and Education Account to the WASPC through the Criminal Justice Training Commission (CJTC) for the purpose of establishing the gang grant program. No more than 4 percent may be used for administering the grants. Grant applications must be reviewed and awarded through peer review panels.

Graffiti and Tagging Abatement Grant. The WASPC must establish a gang grant program for law enforcement to support local graffiti and tagging abatement programs. Grant applicants are encouraged to utilize multi-jurisdictional efforts and each applicant must:

- demonstrate that a significant gang problem exists within the community;
- show how the funds awarded will be used to reduce, dispose of, or eliminate any current or ongoing tagging or graffiti in the community; and
- show how the local citizens and business owners will benefit from the proposed graffiti or tagging abatement process being presented in the application.

The cost of administering the program must not exceed 4 percent. A total of \$1 million is appropriated from the Public Safety and Education Account to the WASPC through the CJTC for the purpose of implementing the gang grant program.

III. Database.

The WSP is required to create or contract with a vendor to create and administer a statewide gang database for assessing and addressing the problems associated with criminal street gangs.

The database shall provide an Internet-based multi-agency, multi-location, information sharing application. Information in the gang database must be available to all local, state, and federal general authority law enforcement agencies, the DOC, and the Juvenile Rehabilitation Administration, solely for gang enforcement and for tracking gangs, gang members, and gang incidents. Information in the database is not available for public use and is prohibited from being used in any criminal or civil proceeding.

Information about specific individuals in the database must be automatically expunged every five years if: (1) the individual's file in the database has been inactive for a minimum of five years; (2) no new or updated information has been entered into the database within the previous five years; (3) there are no pending criminal charges against such person in any court; (4) the person has not been convicted of a new crime; and (5) it has been five years since the person completed his or her sentence, including all legal financial obligations and community supervision requirements. Information entered into the database may only include data on gang members that are 12 years or older.

Each law enforcement and criminal justice agency using the database is required to ensure that all users of the database receive training on the use of the database before granting the users access to the database.

IV. Civil Injunctions.

Local jurisdictions may seek a civil injunction to prevent criminal street gang activity, whether it is a private or public nuisance, upon a showing of the following elements by a preponderance of the evidence: a gang is named as a defendant and contains at least five members, at least two of whom possess active leadership roles at the time of application, and that any person sought to be enjoined is an active or current member of the gang; the gang is a cohesive organization with a historical relationship to the described geographical area for at least the past five years with known leadership, membership, and criminal practices; the defendants and other gang members have committed, during the five years immediately prior to the filing of the petition, a pattern of criminal street gang activity; a significant number of non-gang members residing within the described geographical area are in reasonable fear of their physical security or of significant damage to their property; and the plaintiffs have engaged in prevention and intervention services to divert gang members from gang activity.

The complaint for equitable relief must contain a statement of specific relief requested and specified activities sought to be enjoined, which may include such activities as: associating with other gang members; confronting, intimidating, harassing, threatening, or assaulting any person; possessing or knowingly remaining in the presence of anyone who is in possession of any firearm, deadly weapon, any controlled substance, or drug paraphernalia; consuming alcohol in public; being on any private property without the written consent of the owner; defacing property; violating any court defined curfew; using hand or other gestures associated with the gang; wearing colors or symbols associated with the gang; or any other activity or behavior contributing to an atmosphere that has in the past caused the intimidation of non-gang members.

A court of competent jurisdiction must conduct an evidentiary hearing on the complaint for equitable relief filed under this act. The hearing may be conducted *ex parte*. However, the injunction is not effective as to any person unless that person has been personally served with a copy of the summons.

A person served in the representative capacity of the gang, if indigent, may request that an attorney be appointed to represent him or her at public expense. If the court grants the request, the plaintiff must pay the cost of representation. The person must receive notice of his or her right to request counsel in the summons. It is not necessary for the person to testify, but he or she may testify, cross-examine witnesses, and present testimony and other evidence on his or her own behalf.

The final order of injunction must contain an opt out provision, by which an alleged member previously included in the order may petition at any time for removal from the injunction after a period of five years in which no act by the alleged member has resulted in either a contempt finding or a conviction of crime, and there is no criminal charge pending at the time of the hearing. In the petition, the alleged member may request a court hearing on the matter.

Any violation of a civil gang injunction is prosecuted as a contempt of court offense.

V. Witness Relocation Program.

The Office of Crime Victims Advocacy (OCVA) within the Department of Community, Trade and Economic Development is required, within available funds, to establish a gang relocation assistance program. The OCVA must work with each local prosecuting agency to determine how funding and temporary relocation and shelter assistance should be provided to witnesses of felony gang related offenses.

VI. The DOC's Study to Reduce Gang Involvement.

The DOC is required to study the best practices to reduce gang involvement and recruitment among its incarcerated offenders. The study and recommendations must include intervention and successful re-entry programs for gang members seeking to opt-out of gangs. Such programs can include, but are not limited to, tattoo removal, anger management, and obtaining a GED. The DOC must provide a report on its findings to the Legislature by January 1, 2009.

VII. The OSPI's Criminal Gang Brochures.

The Task Force on Gangs in Schools must create a brochure and make it available to the OSPI. The OSPI must produce the brochures in bilingual or multilingual languages and make the brochures available for parents, teachers, students, and others interested in trying to understand criminal gang activity.

Substitute Bill Compared to Original Bill:

Technical corrections were made. The dates are amended for when the grant funds are to be appropriated. Percentage limits are established for the total amount of grant funds that may be used for administrative purposes. Since the WASPC is not a state agency, it requires the grant funds to be appropriated first to the CJTC and then passed on to WASPC. In the section relating to the database, the language is clarified to state that information in the database be

limited to all "general authority law enforcement agencies, the Juvenile Rehabilitation Administration, and the DOC" instead of to "all law enforcement and criminal justice agencies" in general and prohibits the database from being used in any criminal or civil case.

In the section on civil injunctions, when applying to the courts for an injunction, a provision is added that states that it is "necessary to show a nexus between the gang activity and crime within the area" as opposed to just stating the "it is insufficient to show merely an increase in crime within the area." Special allegation language is added for the new crime of Criminal Gang Recruiting stating that the prosecutor must file a special allegation that the felony offense committed involved the "compensation, threatening, or solicitation of a juvenile in the commission of the felony offense."

Preemption language is added to ensure that the gang definitions are uniform and applied consistently statewide in municipal courts and superior courts as well as by all local law enforcement agencies for purposes of the database. A provision is added to require the Task Force on Gangs in Schools to create a brochure on criminal gangs and make it available to the OSPI for public distribution. The provision in the original bill that required the courts to notify the DOC when a defendant is a gang member is eliminated.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) Gangs are like a cancer throughout Washington and it is the number one issue in many communities today. Prevention, intervention, and suppression has been the over arching theme of putting this bill together. Gang activity may be an expensive crime to victims. However, this bill addresses many issues that communities have been waiting for over the last several years. There is a lot of hope for kids and many of them do want to get out of gangs. The problem is once a child has turned 16 or 17 years old and has ended up in the courtroom it is too late. That is the reason some of the funds in the bill should be targeted to kids at a younger age.

There is a need for a comprehensive smart approach to dealing with the suppression of gangs. The bill provides funding for pilot programs for suppression, intervention, and prevention, as well as funds to clean up graffiti which are all important. This bill also provides a gang definition, a database, and requires the OCVA to assist those trying to get out of gangs. The grants in the bill need to be funded not only this year, but also in future years as permanent and adequate resources must be put forth to support the bill.

Cities are struggling financially to deal with gang problems. Law enforcement is dedicated to help rid the state of the gangs terrorizing many communities. Today is a day of opportunity

and this bill is a needed tool to help citizens take back their communities. This bill should be enacted in honor of those that have been victims of gang related violence in Washington.

(With concerns) There are concerns that the five-year waiting period is too long for documenting gang activity for a civil injunction. Five years could cause a small city to perish as small cities struggle with resources to fight the gang problem.

There may also be a potential single subject or scoping problem in the bill. In addition, there is a court case that states that there is no right to counsel in a civil action so this may be a problem in the civil injunction section of the bill.

(Opposed) Most of the initial concerns have been addressed in the substitute version of the bill including the provision in the bill that required courts to notify the DOC as to whether a defendant is a gang member. This would have opened any kind of felony trial to this type of issue regardless of whether those issues were specifically a part of the trial at the beginning.

Persons Testifying: (In support) Representative Hurst, prime sponsor; Representative Ross; Rebecca Lambert; Terry Hayes; Janice O'Mahony, Governor's Juvenile Justice Advisory Committee; Sheriff Ken Irwin and James McMahan, Washington Association of Sheriffs and Police Chiefs; Dan Fessler, Yakima County Public Defender; and Tom McBride, Washington Association of Prosecuting Attorneys.

(With concerns) Jennifer Shaw, American Civil Liberties Union.

(Opposed) Robert Quillian, Washington Association of Criminal Defense Lawyers and Washington Defender Association.

Persons Signed In To Testify But Not Testifying: None.