

HOUSE BILL REPORT

HB 2254

As Reported by House Committee On:
Public Safety

Title: An act relating to crimes of harassment.

Brief Description: Addressing the crimes of harassment.

Sponsors: Representatives Graves, Johnson, Muri, Macri and Stokesbary.

Brief History:

Committee Activity:

Public Safety: 1/8/18, 1/30/18 [DPS].

Brief Summary of Substitute Bill

- Changes the name of the crime of "Cyberstalking" to "Cyber Harassment" and narrows the type of conduct that is criminalized under the offense.
- Makes changes to the elements of the crime of Stalking to include placing another person under electronic surveillance and intending to unlawfully surveil another person.
- Modifies the circumstances in which Cyber Harassment and Stalking offenses elevate from a gross misdemeanor to a felony.

HOUSE COMMITTEE ON PUBLIC SAFETY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Goodman, Chair; Pellicciotti, Vice Chair; Klippert, Ranking Minority Member; Hayes, Assistant Ranking Minority Member; Appleton, Chapman, Griffey, Holy, Orwall, Pettigrew and Van Werven.

Staff: Omeara Harrington (786-7136).

Background:

Cyberstalking.

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.

A person commits the crime of Cyberstalking if he or she makes an electronic communication to another person or a third party with the intent to harass, intimidate, torment, or embarrass another person, and under circumstances not constituting telephone harassment. To qualify as Cyberstalking, the communication must:

1. use lewd, lascivious, indecent, or obscene words, images or language, or suggest the commission of any lewd or lascivious acts;
2. be made anonymously or repeatedly whether or not conversation occurs; or
3. threaten to inflict injury on the person or property of the person called or any member of his or her family or household.

An "electronic communication" for purposes of Cyberstalking is the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. This includes, but is not limited to, electronic mail, Internet-based communications, pager services, and text messaging.

Cyberstalking is a gross misdemeanor unless the case involves a threat of death or the defendant has previously been convicted of Harassment against the same victim, a member of the victim's family, or anyone named in a no-contact or no-harassment order, in which case it is a class C felony.

Stalking.

A person commits the crime of Stalking if he or she intentionally and repeatedly harasses or repeatedly follows another person, and as a result places the other person in reasonable fear that the stalker intends to injure his or her person or property, or the person or property of another person. The stalker must either intend to frighten, intimidate, or harass the other person, or must know or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker does not intend to place the person in fear or intimidate or harass the person. Attempts to contact or follow a person after being given actual notice that the person does not want to be contacted or followed is prima facie evidence that the stalker intends to intimidate or harass the person. "Contact" includes the sending of an electronic communication.

Stalking is generally a gross misdemeanor; however, it is punishable as a class B felony under certain circumstances. Stalking is a class B felony if: the stalker has previously been convicted of a crime of harassment involving the same victim, a member of the victim's family or household, or a person named in a protective order; the stalking violates any protective order protecting the person being stalked; the stalker has previously been convicted of Stalking; the stalker was armed with a deadly weapon; the stalking was associated with the victim's performance of certain official duties; or the stalking was intended to interfere with a witness.

Summary of Substitute Bill:

Cyberstalking.

The crime of Cyberstalking is renamed "Cyber Harassment," and changes are made to narrow the types of behavior that qualify under the offense. Intent to embarrass another

person is removed from the possible outcomes the defendant may intend to bring about in order to commit the crime. The offense may only be committed by means of communication through a third party in cases involving a threat of harm to person or property, and it is an affirmative defense if an electronic communication made to a third party was not intended to be disseminated. If the offense is committed on other grounds not involving the threat of harm to person or property, the defendant must have known or should have known that the recipient did not want to receive the electronic communication.

The list of circumstances in which the offense is elevated to a felony is modified. Rather than elevating the offense to a felony in circumstances in which the defendant has had a previous conviction for Harassment against any person named in a no-contact or no-harassment order, the offense is a felony when the behavior is in violation of a protective order protecting the victim.

Stalking.

Placing a person under electronic surveillance is included in the types of conduct that may support a Stalking offense. "Electronic surveillance" means using tracking or spyware technology to track or monitor another person. "Tracking or spyware technology" is defined as computer software that aids in gathering information about a person without that person's knowledge and that may send the information to another person or entity without the person's consent, or that asserts control over a computer or device without the person's knowledge or consent. Electronic surveillance does not include lawful monitoring of, or interaction with, a subscriber's Internet or other network connection or service, or a computer, by a telecommunications carrier or other types of listed service providers.

The intent element required in a Stalking offense may be satisfied by the defendant's intent to unlawfully surveil another person. "Unlawful surveillance" is defined as keeping a person or place under surveillance for no lawful purpose as a means of tracking, following, or harassing a person. Lawful surveillance as part of a criminal investigation that is conducted by a law enforcement agency is not unlawful surveillance. Attempts to electronically surveil a person after receiving actual notice that the person does not want to be contacted, followed, or surveilled, is prima facie evidence of intent to intimidate or harass.

The list of circumstances under which Stalking is raised to a felony is expanded to include circumstances in which the stalker has threatened to kill the victim or another person.

"Electronic communication" is defined for purposes of Stalking to mirror the definition applicable to Cyber Harassment.

Substitute Bill Compared to Original Bill:

An affirmative defense to the crime of Cyber Harassment is provided for circumstances in which an electronic communication was made to a third party and was not intended to be disseminated.

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) In 2004 the Legislature passed a Cyberstalking law. Since then, technology has progressed, and this bill makes a number of timely updates. The bill does three broad things: it provides additional protection for victims; rationalizes the stalking law; and protects against infringing on free speech rights. As to protecting victims, the bill makes unlawfully surveilling another person a crime and elevates certain conduct to a felony. With respect to rationalizing the Cyberstalking law, some components are moved into the Stalking offense. The bill also reduces double jeopardy problems and makes reforms to the law to ensure that it is constitutional. Currently, posting something online to embarrass someone is technically a crime. Consistent with federal case law, the bill narrows the non-threat circumstances in which an offense may be committed to only include communications that the sender knows the person does not want to receive.

This is a great cleanup bill that prevents a problem that has not yet occurred from occurring in the future. To date, there is no case in Washington in which this crime has been prosecuted in an overbroad or vague way, and prosecutors are trained on what cases are appropriate to prosecute. This bill narrows the conduct included in the offense, and fixes a trap in which cases could be brought that should not be. For instance, intent to embarrass is stricken from the statute. Embarrassing someone is usually never grounds for a conviction. With this offense, mental states and conduct are tied. A person must act with intent to harass, torment, or intimidate. These are not necessarily minor offenses. They can cause victims to drop out of school or commit suicide. In the one area of the law that contemplates third-party communications, an affirmative defense should be added for circumstances in which an electronic communication is made to a third party and is not intended to be disseminated.

(Opposed) Free speech is very important. The revisions to the Cyberstalking statute do not go far enough, and Washington does not need a new crime of Cyber Harassment. No other state has this crime, and this creates an untested law. The statute is unconstitutionally broad and vague, and any revisions should have the goal of making the law constitutional.

Amendments should be made to comply with case law on true threats. According to the United States Supreme Court, true threats are statements in which the speaker means to communicate a threat of unlawful violence to an individual or group. An intent to injure must be expressed. Here, threats to picket or political commentary could be a crime. Anonymous speech is constitutionally protected and that reference should be removed. It could be easy to commit a criminal offense under the provisions of this bill, as all that is required is to place someone under surveillance and cause fear to that person. Conduct like hanging around too long on a Facebook page could qualify. The definition of spyware technology is too broad, and the terms track and monitor are not defined. More care should be taken to not capture innocuous situations.

Persons Testifying: (In support) Representative Graves, prime sponsor; and Tom McBride, Washington Association of Prosecuting Attorneys.

(Opposed) Elisabeth Smith, American Civil Liberties Union of Washington.

Persons Signed In To Testify But Not Testifying: None.