

HOUSE BILL REPORT

ESSB 5628

As Passed House - Amended:

March 3, 2022

Title: An act relating to cyber harassment, addressing concerns in the case of Rynearson v. Ferguson, and adding a crime of cyberstalking.

Brief Description: Concerning cyber harassment, addressing concerns in the case of Rynearson v. Ferguson, and adding a crime of cyberstalking.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Dhingra, Frockt, Kuderer, Stanford, Trudeau, Wellman and Wilson, C.).

Brief History:

Committee Activity:

Public Safety: 2/18/22, 2/24/22 [DPA].

Floor Activity:

Passed House: 3/3/22, 97-1.

Brief Summary of Engrossed Substitute Bill (As Amended by House)

- Renames the crime of Cyberstalking "Cyber Harassment" and makes changes to components of the offense.
- Creates a new crime of Cyberstalking applicable when a person knowingly and without consent utilizes an electronic tracking device allowing the person to remotely determine or monitor the position and movement of another person, vehicle, device, or other personal possession.
- Allows election officials and criminal justice participants who have been the target of Cyber Harassment to apply for the Address Confidentiality Program through the Office of the Secretary of State.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON PUBLIC SAFETY

Majority Report: Do pass as amended. Signed by 10 members: Representatives Goodman, Chair; Johnson, J., Vice Chair; Mosbrucker, Ranking Minority Member; Davis, Griffey, Hackney, Orwall, Ramos, Simmons and Thai.

Minority Report: Without recommendation. Signed by 2 members: Representatives Klippert, Assistant Ranking Minority Member; Graham.

Staff: Omeara Harrington (786-7136).

Background:

Cyberstalking.

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:

- use lewd, lascivious, indecent, or obscene words, images or language, or suggest the commission of any lewd or lascivious acts;
- be made anonymously or repeatedly whether or not conversation occurs; or
- 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 a harassment offense 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. Stalking is generally a gross misdemeanor; however, it is punishable as a class B felony under certain circumstances.

Address Confidentiality Program.

The Address Confidentiality Program allows a person meeting certain criteria to apply to the Secretary of State for a separate address to be designated to serve as the person's public address in order to keep his or her actual address confidential. An address can be designated for persons who have a good reason to believe that they are a victim of domestic violence, sexual assault, trafficking, or stalking, and are in fear for their safety. A person may apply on their own behalf or on behalf of a minor or incapacitated person who meets these criteria. An address can also be designated for applicants who are targets for threats or harassment because of their involvement in the criminal justice system.

A court order for disclosure of Address Confidentiality Program participant information may only be issued upon a finding of probable cause that release is necessary for a criminal investigation or to prevent immediate risk to a minor.

Summary of Amended Bill:

Cyber Harassment.

The crime of Cyberstalking is renamed Cyber Harassment, and changes are made to the conduct required to commit an offense. A person must act with intent to harass or intimidate another person in order to commit the offense; intent to torment or embarrass another person are removed. Commission of the offense by means of a threat may be a threat to any person, rather than only a threat to the person contacted or a family or household member of that person, and the threat may be a threat to cause damage immediately or in the future. With respect to offenses involving a threat, communication must be one that would cause a reasonable person with knowledge of the sender's history to suffer emotional distress or fear for the safety of the person threatened, or to reasonably cause the threatened person to suffer emotional distress or fear for their safety.

Additional circumstances are identified in which Cyber Harassment is elevated from a gross misdemeanor to a class C felony. In addition to current law circumstances, Cyber Harassment is a felony offense if:

- the victim is a criminal justice participant or election official who is performing official duties at the time the threat is made;
- the victim is a criminal justice participant or election official and is targeted because of an action taken or decision made during the performance of official duties; or
- the perpetrator commits the offense in violation of any protective order protecting the victim.

Criminal justice participants include judges and court staff, law enforcement, prosecutors, staff of adult or juvenile corrections or detention facilities, community corrections officers, probation officers, parole officers, members of the Indeterminate Sentence Review Board, advocates from crime victim/witness programs, and defense attorneys. Election officials include any staff member of the office of the Secretary of State or staff member of the county auditor's office, regardless of whether the member is employed on a temporary or

part-time basis, whose duties relate to voter registration or the processing of votes.

Cyberstalking.

A new crime of Cyberstalking is created. A person commits the crime of Cyberstalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime, the person knowingly and without consent installs or monitors an electronic tracking device or causes an electronic tracking device to be installed, placed, or used with the intent to track the location of another person. In addition, to commit the offense: the person must know or reasonably should know that knowledge of the installation or monitoring of the tracking device would cause the other person reasonable fear; the person must have notice that the other person does not want to be contacted or monitored by the person; or there must be a protective order in effect protecting the person being stalked from the person committing the offense. An "electronic tracking device" is an electronic device that permits a person to remotely determine or monitor the position and movement of another person, vehicle, device, or other personal possession, and includes computer code or other digital instructions that once installed on a digital device, allows a person to remotely track the position of that device.

It is not a defense to the crime that the person was not given actual notice that the other person did not want to be contacted or monitored by the person, or that the person did not intend to frighten, intimidate, or harass the other person.

Cyberstalking is generally a gross misdemeanor; however, it is punishable as a class C felony under certain circumstances, including circumstances in which:

- the person has previously been convicted of any crime of harassment of the same victim, members of the victim's family or household, or any person specifically named in a protective order;
- there is a protective order in effect protecting the person being stalked from contact with the person committing the offense;
- the person has previously been convicted of a gross misdemeanor or felony stalking offense for stalking another person; or
- the person has previously been convicted of a gross misdemeanor or felony cyberstalking offense for cyberstalking another person.

Cyberstalking is also a class C felony when: (1) The victim is or was a law enforcement officer; judge; juror; attorney; victim advocate; legislator; community corrections officer; employee, contract staff person, or volunteer of a correctional agency; court employee, court clerk, or courthouse facilitator; or an employee of the Child Protective, Child Welfare, Adult Protective Services Division within the Department of Social and Health Services, or a current, former, or prospective witness in an adjudicative proceeding; and (2) The person committed the offense to retaliate against the victim for an act the victim performed during the course of official duties or to influence the victim's performance of official duties, or in cases in which the victim is a witness, the person committed the offense to retaliate against the victim as a result of the victim's testimony or potential testimony.

It does not constitute Cyberstalking when an electronic tracking device is installed, placed, or used:

- by a law enforcement officer, judicial officer, probation or parole officer, or other public employee who is engaged in the lawful performance of official duties and acting in accordance with state or federal law;
- as authorized by an order of a state or federal court;
- by a legal guardian for a disabled adult, or a legally authorized individual or organization designated to provide protective services to a disabled adult, for the purpose of tracking the location of the disabled adult;
- by a parent or legal guardian of a minor for the purpose of tracking the location of that minor unless the parent or legal guardian is subject to a court order that orders the parent or legal guardian not to assault, threaten, harass, follow, or contact that minor;
- by an employer, school, or other organization, who owns the device on which the tracking device is installed and provides the device to a person for use in connection with the person's involvement with the employer, school, or other organization and the use of the device is limited to recovering lost or stolen items; or
- by the owner of fleet vehicles, when tracking such vehicles.

Address Confidentiality Program.

Any election official or criminal justice participant who is a target for threats or harassment from Cyber Harassment, as well as any family member residing with such person, is eligible to participate in the Address Confidentiality Program.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed, except for sections 8, 9, 11, and 13, and 15, which are amendatory sections containing cross references to the substantive portions of the bill, which due to delayed effective dates in prior legislation take effect July 1, 2022.

Staff Summary of Public Testimony:

(In support) The current Cyberstalking statute is due for an update, as it was written in 2003 and modeled after Telephone Harassment. It also contains overbroad, unconstitutional provisions. This bill renames the offense to better describe the harassment conduct it involves, removes the unconstitutional provisions, and moves the offense to the chapter of the RCW on cybercrimes. Hate is on the rise, especially in the digital space, and can involve sexual harassment, stalking, and threats. Such conduct causes harm to physical and professional safety. One person was targeted after championing certain legislative measures and suffered harassment on the Internet, including her address being published and private and personal information about herself and her minor child being made public. This bill

addresses the threat of cyber harassment conduct while maintaining First Amendment rights. The provisions adding additional protections to election officials are important. Harassment of election officials has happened and it is serious. No person should be harassed or fear for their safety just for doing their job. The bill also brings emphasis to actual cyberstalking conduct. True cyberstalking conduct is not addressed in Washington. There is now more technology available that can be used to harass victims. As an example, a woman discovered her abuser had zip tied an Apple iWatch to the undercarriage of her car. There is currently no crime for utilizing tracking devices to harass another person.

(Opposed) None.

Persons Testifying: Senator Manka Dhingra, prime sponsor; Cher Scarlett; Gary Ernsdorff, King County Prosecuting Attorney's Office; Matthew Kanter, Anti Defamation League; and Brian Hatfield, Office of Secretary of State.

Persons Signed In To Testify But Not Testifying: None.