

SENATE BILL REPORT

ESSB 5628

As Amended by House, March 3, 2022

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

Brief Description: Concerning cyber harassment, addressing concerns in the case of Ryneerson 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: Law & Justice: 1/13/22, 1/20/22 [DPS].

Floor Activity: Passed Senate: 2/9/22, 49-0.

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

Brief Summary of Engrossed First Substitute Bill

- Renames the crime of cyberstalking to cyber harassment and amends the elements of that crime.
- Creates the crime of cyberstalking
- Permits certain victims of cyber harassment to apply to the secretary of state's address confidentiality program.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5628 be substituted therefor, and the substitute bill do pass.

Signed by Senators Dhingra, Chair; Trudeau, Vice Chair; Padden, Ranking Member; McCune, Assistant Ranking Member; Honeyford, Kuderer, Pedersen, Salomon and Wagoner.

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.

Staff: Joe McKittrick (786-7287)

Background: Cyberstalking. An individual may be convicted of cyberstalking by three distinct means. If, with the intent to harass, intimidate, torment, or embarrass any other person, an individual makes an electronic communication to that person or a third party (1) using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act; (2) anonymously or repeatedly; or (3) threatening to inflict injury on the person or property of the person contacted or any member of his or her household, that individual is guilty of the gross misdemeanor crime of cyberstalking.

If the perpetrator has previously been convicted of the crime of harassment with the same victim, or a member of the victim's family or household, or any person specifically named in a no-contact order or no-harassment order in this or any other state, the crime of cyberstalking is a class C felony. If the perpetrator threatens to kill the person threatened or any other person, the crime of cyberstalking is likewise a class C felony.

First Amendment. Under the First Amendment to the United States Constitution, Congress, and state legislatures by way of the Fourteenth Amendment, are prohibited from restricting the rights of individuals to speak freely. While the First Amendment broadly allows individuals to express themselves without fear of reprisal from the state, over the years the United State Supreme Court has carved out certain well-defined and narrowly limited classes of speech that remain unprotected. Obscenity, defamation, fraud, incitement, true threats, and speech integral to criminal conduct remain classes of speech not protected under the First Amendment.

Rynearson v. Ferguson. In February of 2019, the United States District Court for the Western District of Washington heard the case of *Rynearson v. Ferguson*. The plaintiff in that case asked the court to find cyberstalking by way of anonymous or repeated communication unconstitutional under the First Amendment, arguing the statute, as written, was overbroad and prohibited protected forms of speech.

The court found the statute unconstitutional because it criminalizes a large range of non-obscene, non-threatening speech, based solely on purported bad intent and repetition or anonymity. The court reasoned that under this statute, public criticisms of public figures and public officials could be subject to criminal prosecution and punishment if they are seen as intended to persistently vex or annoy those public figures, or to embarrass them.

Summary of Engrossed First Substitute Bill: Cyber Harassment. The current crime of cyberstalking is renamed cyber harassment. A person is guilty of the crime of cyber harassment if the person, with the intent to harass or intimidate another, makes an electronic communication to that person, or any other person, and the communication:

- uses lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act;

- is made anonymously or repeatedly;
- contains a threat to inflict bodily injury immediately or in the future on the person threatened or to any other person; or
- contains a threat to damage, immediately or in the future, the property of the person threatened or of any other person.

The communication must be such that would cause a reasonable person, with knowledge of the sender's history, to suffer emotional distress or to fear for the safety of the person threatened, or such that the communication reasonably caused the threatened person to suffer emotional distress or fear for the threatened person's safety.

In addition to the current factors that raise this crime from a gross misdemeanor to a class C felony, the following likewise raise the crime to a class C felony:

- the person cyber harasses a criminal justice participant or election official who is performing their official duties at the time the threat is made;
- the person cyber harasses a criminal justice participant or election official because of an action taken or decision made by the criminal justice participant or election official during the performance of their official duties; or
- the person commits cyber harassment in violation of any protective order protecting the victim.

Criminal justice participants include any federal, state, or local law enforcement agency employee, prosecuting attorney, or deputy prosecuting attorney; staff member of any adult or juvenile corrections institution or local adult or juvenile detention facility; community corrections, probation, or parole officer; member of the indeterminate sentence review board; advocate from a crime victim or witness program; or defense attorney.

Election official includes 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 related to voter registration or the processing of votes.

As the crime of cyber harassment relates to criminal justice participants and election officials, the fear from the threat must be a fear a reasonable criminal justice participant would have under all the circumstances. Without the present and future ability to carry out the threat, threatening words alone do not constitute cyber harassment.

The laws of Washington state are updated to reflect the change in name of the crime of "cyberstalking" to "cyber harassment".

Cyberstalking. The crime of cyberstalking is created. A person commits the gross misdemeanor crime of cyberstalking if they:

- knowingly and without consent install or monitor 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; and

- the perpetrator knows or reasonably should know that knowledge of the installation or monitoring would cause the person reasonable fear, the perpetrator has notice that the person does not want to be contacted or monitored by the perpetrator, or there is a protective order in effect protecting the person being stalked from the perpetrator.

The crime of cyberstalking is elevated to a class C felony if any of the following apply:

- the perpetrator has previously been convicted in this or any other state of any crime of harassment of the same victim or 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 perpetrator;
- the perpetrator has previously been convicted of a gross misdemeanor or felony stalking offense for stalking another person;
- the perpetrator was armed with a deadly weapon while stalking the person;
- the perpetrator's victim is or was a law enforcement officer; judge; juror; attorney; victim advocate; legislator; community corrections' officer; an 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, or adult protective services division within the Department of Social and Health Services; and the perpetrator stalked the person 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
- the perpetrator's victim is a current, former, or prospective witness in an adjudicative proceeding, and the perpetrator stalked the victim to retaliate against the victim as a result of the victim's testimony or potential testimony.

An electronic tracking device means 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. Electronic device 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 of cyberstalking that the perpetrator was not given actual notice that the person does not want to be contacted or monitored, nor is it a defense that the perpetrator did not intend to frighten, intimidate, or harass the person.

The provisions of this section do not apply to the following:

- public employees when any such person is engaged in the lawful performance of official duties and in accordance with state and federal law;
- the installation, placement, or use of an electronic tracking device authorized by an order of a state or federal court;
- a legal guardian designated to provide protective services to a disabled adult when used to track the location of the disabled adult;
- a parent or legal guardian of a minor when used to track the location of that minor,

unless the parent or guardian is subject to a court order that prohibits the parent or legal guardian from assaulting, threatening, harassing, following, or contacting the minor;

- an employer, school, or other organization tracking a device owned by the organization for the limited purpose of recovering the device if it is lost or stolen; or
- the owner of fleet vehicles, when tracking such vehicles.

Address Confidentiality program. The statutory address confidentiality program, which allows those who are the target of threats or harassment to petition the secretary of state to have an address be designated as the person's address, is amended to allow criminal justice participants and election officials who are victims of cyber harassment to apply to the address confidentiality program.

Appropriation: None.

Fiscal Note: Available.

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: This is an ever-evolving area of prosecution. The current cyberstalking statute is based on the telephone harassment statute and does not actually address cyberstalking. True cyberstalking is not addressed by any current statute. Likewise, placing the cyberstalking statute under the malicious mischief section of Title 9, as it currently is, diminishes its importance and the impact this crime has in the victims. Due to the language of the current statute, prosecutors have only pursued these prosecution cautiously. Changing the name of the current cyberstalking crime to cyber harassment calls the crime what it actually is. This bill removes unconstitutional language from the statute, moves the crime to the cyber crimes section of Title 9 where it belongs, brings the law in line with other harassment laws, and creates a brand new section targeting true cyberstalking. As new technologies have become more available, stalking by electronic means has increased. Often these perpetrators are domestic violence perpetrators tracking their victims, and the tools prosecutors have to pursue these individuals are severely limited. This bill provides a significant tool to prosecutors to combat the stalkers of today and of the future.

OTHER: While this bill does make the language of the current cyberstalking statute better, even with the changes this bill contains there are still First Amendment concerns.

Persons Testifying: PRO: Senator Manka Dhingra, Prime Sponsor; Gary Ernsdorff, King County Prosecuting Attorney's Office.

OTHER: Rebecca Faust.

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

EFFECT OF HOUSE AMENDMENT(S):

- Specifies that, for cyber harassment, the requirement that the communication cause emotional distress or reasonable fear for the safety of the person threatened applies only in cases involving a threat.
- Modifies language related to elevating cyber harassment to a felony when the victim is an election official or criminal justice participant to: (a) clarify that the reclassification is not limited to cases involving the threat; (b) remove language requiring the perpetrator's present and future ability to carry out the threat; and (c) remove language requiring reasonable fear in the victim but retains the underlying bill's general requirement that cyber harassment by threat elicit reasonable fear.
- Modifies the list of persons who qualify as "criminal justice participants" for purposes of cyber harassment and eligibility for the Address Confidentiality Program to include law enforcement and prosecutors.
- Provides that, as it relates to cyberstalking, the requirement that the perpetrator act with the intent to track the location of another person applies to circumstances in which the perpetrator installs or monitors an electronic tracking device in addition to circumstances in which the perpetrator causes a tracking device to be installed in the underlying bill.
- Removes circumstances in which the person was armed with a deadly weapon at the time of the offense from the list of circumstances elevating cyberstalking to a felony, and adds circumstances in which the person has a previous cyberstalking conviction.
- Modifies the terminology to use consistent terms for the actor and the victim.
- Modifies provisions related to eligibility for the Address Confidentiality Program by removing references to another measure currently pending before the Legislature.
- Amends the Address Confidentiality Program eligibility provisions to add a reference to family members residing with an election official who has been cyber harassed.
- Makes clarifying amendments related to the definition of "criminal justice participant."
- Makes technical changes and minor wording changes for clarity and consistency among provisions of the bill.