

May 13, 2019

MEMORANDUM

To: Members of the Civil Rights, Economic Development, Utilities & Arts Committee
From: Asha Venkataraman, Council Central Staff
Subject: Council Bill 119288: Hate Crimes

On May 14, 2019, the Civil Rights, Economic Development, Utilities & Arts Committee (CRUEDA) will discuss [Council Bill \(CB\) 119288](#) to amend the City's malicious harassment law. This law makes criminal the intentional and malicious act of property destruction, assault, or harassment because of a person's perception of another person's homelessness status, marital status, political ideology, age or parental status. The bill proposes to replace the crime of malicious harassment with a new special allegation of hate crime motivation. A special allegation is a charge added to a crime when specific aggravating factors can be proven. The bill would also remove the element of malice from the misdemeanor charge. Lastly, as proposed, CB 119288 would permit the City Attorney's Office's (CAO) to levy this special allegation based on all the City's protected classes (race, color, religion, ancestry, national origin, gender, sexual orientation, mental handicap, physical handicap, and sensory handicap, homelessness, marital status, political ideology, age, and parental status) rather than just the five classes included in the current law. This memo provides background on existing City and State of Washington criminal laws establishing hate crimes and describes the content of, proposed amendments to, and potential effects of CB 119288. Proposed amendment language is included Attachment A.

Background

The Seattle Municipal Code (SMC) 12A.06.115 provides that a person is guilty of the misdemeanor crime of [malicious harassment](#) if they maliciously and intentionally commit assault, harassment, or property destruction because of their perception of another person's homelessness, marital status, political ideology, age, or parental status. The CAO is responsible for prosecuting misdemeanors and gross misdemeanors.

At the State level, RCW 9A.36.080 provides that a person is guilty of [felony-level malicious harassment](#) if a person maliciously and intentionally commits assault, property destruction, or harassment based on their perception of another person's protected class. The RCW covers the following protected classes: race, color, religion, ancestry, national origin, gender, sexual orientation, mental handicap, physical handicap, and sensory handicap. In the 2019 legislative session, the State Legislature passed [Engrossed Substitute House Bill 1732](#), which renamed the felony malicious harassment offense to a "hate crime" offense, updated terminology used from mental, physical, and sensory "handicap" to "disability," and included a definition of "gender expression or identity." The King County Prosecuting Attorney's Office (KCPO) is responsible for prosecuting felonies.

CB 119288

CRUEDA members first heard CB 119288 in a committee meeting on June 19, 2018 and discussed how the bill would change the ability of the CAO to prosecute this crime, described below.

CB 119288 would make three changes to the existing criminal code: (1) Structurally alter how the CAO charges these crimes; (2) Remove malice as one of the elements that the CAO would need to prove to successfully prosecute a hate crime; and (3) Expand the protected classes for which the CAO is able to prosecute hate crimes.

Restructuring Malicious Harassment as a Special Allegation

The bill would replace the crime of malicious harassment with a special allegation. Rather than charging a person with malicious harassment and proving all the elements of that crime to obtain a conviction, the CAO would be prosecuting underlying charges of assault, harassment, and property destruction and add the special allegation to the charge when the facts of the case warrant it. The legislation requires that the special allegation be proven beyond a reasonable doubt, which is the standard of proof required in a criminal prosecution. Any crime that the CAO could have charged as malicious harassment will be chargeable under the special allegation. Even if the special allegation is not proven, the CAO could still succeed in convicting the person with the underlying crime.

In addition, though the sentencing range for assault, harassment, and property destruction with the special allegation is the same as that for malicious harassment, as all are misdemeanors, the CAO anticipates asking for higher sentences within the sentencing range in those cases where they can prove the special allegation.

Removing Malice

The state malicious harassment law covers State-protected classes and the City's malicious harassment law covers classes the City exclusively protects. The separation is necessary because a person cannot be charged for both a misdemeanor and a felony based on the same act. The elements the prosecution must prove beyond a reasonable doubt must be different for each type of offense. Misdemeanor charges are less serious than felony-level charges; the act a person allegedly commits can either be charged as a less serious misdemeanor offense or charged as a more serious felony offense, but not both.

Therefore, the City prosecutes only the crimes based on the classes protected by the City but not by the State. Throughout the years, as the State added more protected classes to its malicious harassment law, the City Council removed those protected classes from the misdemeanor law. Accordingly, the Seattle Police Department (SPD) refers hate crimes based on race, color, religion, ancestry, national origin, gender, sexual orientation, mental handicap, physical handicap, and sensory handicap to KCPO to charge as felony-level offenses. If KCPO

declines to file a charge because the case does not rise to the level of a felony, the City cannot file a misdemeanor charge with a hate or bias crime designation.

By amending the law to remove the element of malice, the elements of the misdemeanor charge would no longer be the same as the felony charge. The CAO would only need to prove that the person committed the act intentionally, rather than both intentionally and maliciously. The CAO describes this change as a technical legal distinction but will allow the City to add all its protected classes to a hate crime charge, which is described below.

Adding Protected Classes

Removing malice from the elements of the crime would allow the additional change in the bill to add race, color, religion, ancestry, national origin, gender, sexual orientation, mental handicap, physical handicap, and sensory handicap to the list of motivations on which the special allegation is based. The change broadens the protected classes the CAO can use as the basis for prosecuting persons accused of hate crimes from classes exclusively protected by the City to all City-level protected classes. With this change, the CAO will be able to prosecute these cases on a misdemeanor level and SPD can continue to refer charges they believe to be at a more serious felony level to KCPO.

Proposed Amendments

Councilmember Herbold proposes to further amend the bill further in several ways:

1. Adding recitals (Attachment A P1 Li 9 – P2 Li 11)

This amendment adds recitals to the bill regarding the current state of the law in Washington State and Seattle as described in the background section above and discusses some of the findings in Office of the City Auditor’s Phase 2 report on bias crimes. SPD recognizes and tracks three types of bias related cases: (1) malicious harassment crimes, which are criminal acts motivated by bias; (2) crimes with bias elements, which are criminal acts involving bias, but that are not bias motivated; and (3) non-criminal bias incidents, which are offensive bias comments. The City Auditor’s findings include recognizing the rise in the number of hate crimes and incidents reported to SPD since 2012:¹

- 346 percent increase in reports of malicious harassment crimes;
- 378 percent increase in reports of crime with bias elements; and
- 448 percent increase in reports of non-criminal bias incidents.

¹ Seattle Office of the City Auditor, *Review of Hate Crime Prevention, Response, and Reporting in Seattle: Phase 2 Report*, May 9, 2019, available at https://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/2017-09%20Hate%20Crimes%20Ph2_Final.pdf.

2. Updating terminology (Attachment A P2 Li 22-23)

This amendment would change the terminology used from mental, physical, and sensory “handicap” to “disability” to reflect the more up to date terms used for people with disabilities.

3. Broadening the scope of the crime (Attachment A P2 Li 16-18)

The third amendment would allow the CAO to apply the special allegation not only to assault, harassment, and property destruction cases, but to all misdemeanors or gross misdemeanors under the SMC. CAO has observed that hate crime cases falling outside malicious harassment at the state or City level are not common. However, the CAO indicates that it has seen a sufficient number to believe that more than just the three existing underlying crime types need to be covered by the special allegation. This amendment allows the special allegation to be applied to any misdemeanor, but the CAO notes that it plans to apply the special allegation to specific crimes related to assault, harassment, or property destruction, such as phone harassment, unlawful use of a weapon to intimidate, stalking, and cyberstalking.

4. Sentencing, conditions, or diversion requirements (Attachment A P3 Li 22 – P4 Li 7)

This amendment adds a new subsection 12A.06.115.D directing the Court to require as part of sentencing, imposing conditions, or diversion, that the person allegedly committing the offense participate in a program, course of training, or community service that educates the person about the negative consequences of hate or bias crimes against the victim’s protected class. This requirement may be waived if such an opportunity is unavailable or impractical, or for good cause.

It is not clear whether there are currently local programs, trainings, or organizations that provide education about how commission of bias crimes affect victims and the community of their protected class. Engagement of and outreach to communities most impacted by hate crimes and their prosecution may shed light on whether these programs exist and potential investment in communities most impacted to further existing work in this area may be warranted.

5. Reporting requirements (Attachment A P 4 Li 8-10)

This amendment adds a new subsection 12A.06.115.E, requiring that the CAO to provide an annual report to the Council regarding the special allegations filed, including data on the demographics of defendants and the protected class status of victims. This reporting requirement will allow the Council to track both the frequency of prosecution of this crime as well as whether the disproportionality already present in charging crimes is decreasing, remaining the same, or increasing (discussed below).

6. Severability (Attachment A P 4 Li 11-15)

Lastly, an amendment adds Section 2 to the bill to ensure that if one part of the bill is found invalid, the remaining portions of the bill will remain valid.

Race and Social Justice Impacts

Since the time this bill was first proposed in 2018, stakeholders communicated concerns to the Office for Civil Rights about the racial equity impact of expanding the criminal code and broadening the CAO's ability to charge individuals. Specifically, the concerns include the current racial disproportionality in the criminal legal system and the role of this legislation, given that it is unlikely to mitigate the current disproportionality but rather maintain or exacerbate it. Though a racial equity toolkit has not been conducted for this legislation, data from the Seattle Municipal Court and SPD indicate that there are high levels of racial disproportionality in suspects/arrests and charges filed. Data from SPD also indicates that reports of bias crimes and incidents are highest in the Black and gay and lesbian communities.

Defendants

According to the 2012-2016 American Community Survey, the Black or African-American population is about 7.0 percent of Seattle's population and the American Indian/Alaska Native population is 0.5 percent of Seattle's population.² SPD data showed that between 2012 and October of 2018, 31.7 percent of suspects and persons arrested for malicious harassment were Black and 3.1 percent were Native American.³ Black people were suspected of or arrested for malicious harassment at a rate 4.5 times their proportionate share of the Seattle population. Native American people were suspected of or arrested for malicious harassment at a rate 6.2 times their proportionate share of the Seattle population.

The racial disproportionality of charges filed by the CAO against Black defendants (Figure 1) and Native American defendants (Figure 2) for property destruction, assault, and harassment in 2016 and 2017 are shown below. The data is not specific to malicious harassment charges, as there have been only seven cases filed since 2012, but rather the underlying conduct in the malicious harassment charge.

² Seattle Office of Planning and Community Development, *Race and Ethnicity Quick Statistics, 2012-2016 American Community Survey (ACS)*, last visited May 9, 2019, available at <http://www.seattle.gov/opcd/population-and-demographics/about-seattle#tabs-4>.

³ Seattle Police Department, *City of Seattle and SPD Offender Demographics* (as of December 7, 2018).

Figure 1: Percentage of Property Destruction, Harassment, and Assault Charges Filed Against Black Defendants Compared to Percentage of Population (2016-2017)⁴

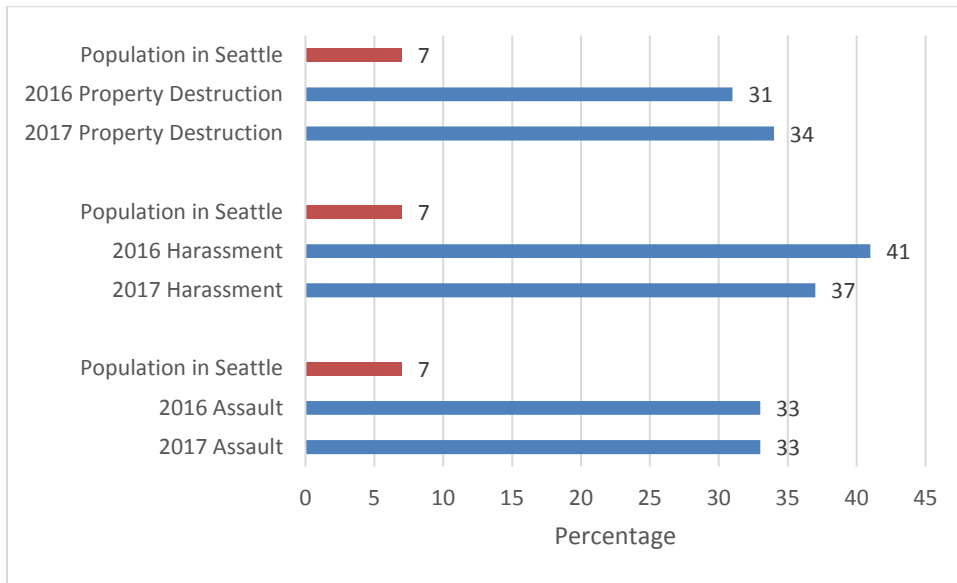
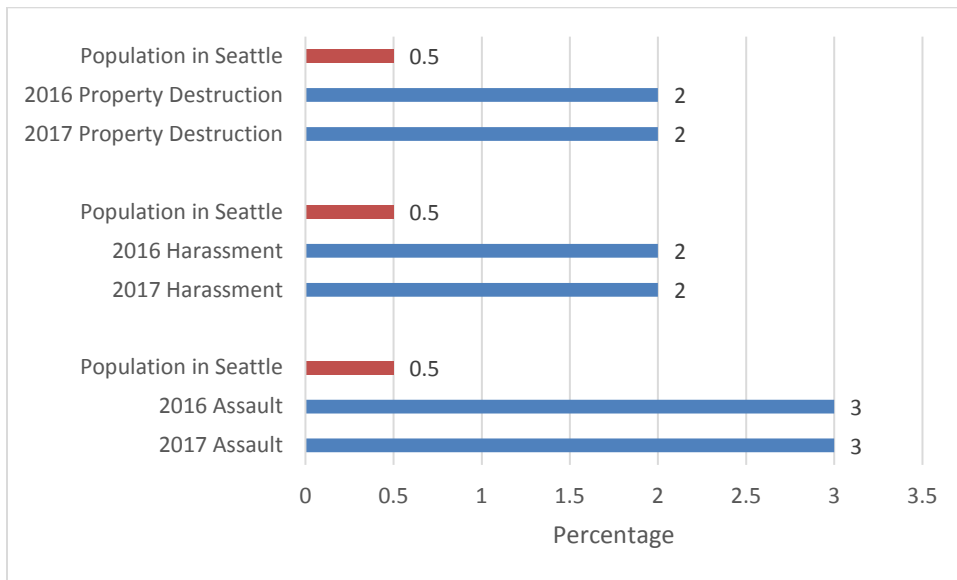


Figure 2: Percentage of Property Destruction, Harassment, and Assault Charges Filed Against Native American Defendants Compared to Percentage of Population (2016-2017)⁵



The data indicates that in 2016 and 2017, the CAO charged Black defendants between four and six times their proportionate share of the Seattle population and charged Native American defendants between three and five times their proportionate share of the Seattle population.

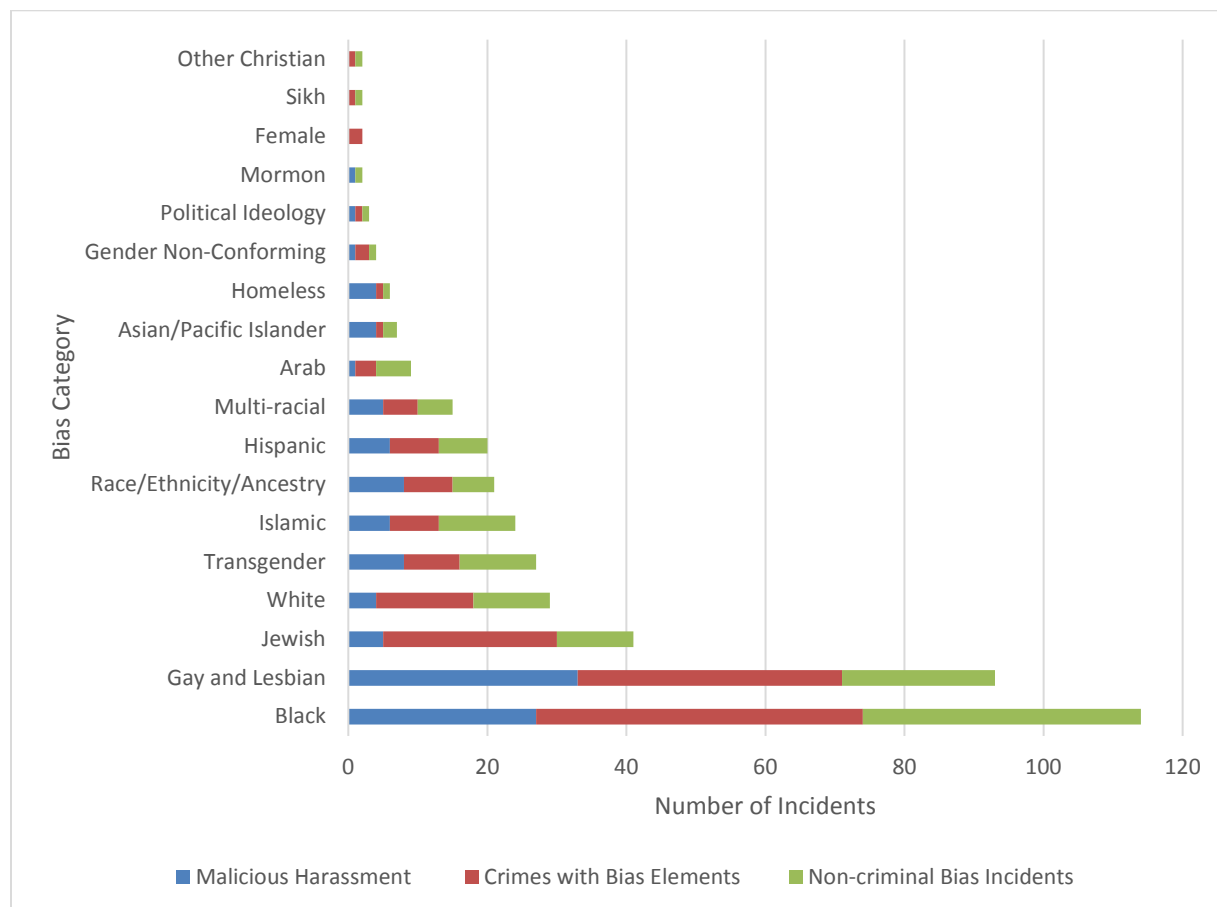
⁴ Adapted from data in Seattle Municipal Court, *Percentage of Charges Filed for Top 10 Most Frequent Violations Filed at SMC by Defendant Race, 2016-2017*.

⁵ *Id.*

Victims

SPD data from 2017, shown in Figure 3, also indicates that the racial group most targeted for hate crimes and bias incidents was the Black community.

Figure 3: SPD Count of Bias Incidents in 2017 by Bias Category



23.7 percent of malicious harassment incidents, 27.6 percent of crimes with bias incidents, and 29 percent of non-criminal bias incidents were perpetrated against Black victims. The Auditor's report found that between 2012 and 2018, half of the assault offenses with a hate element involved racial bias and within the racial bias category, anti-black crimes accounted for over half of the hate crimes.⁶

Impacts

⁶ Seattle Office of the City Auditor, *Review of Hate Crime Prevention, Response, and Reporting in Seattle: Phase 2 Report*, P 3, May 9, 2019, available at https://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/2017-09%20Hate%20Crimes%20Ph2_Final.pdf.

Passage of the bill as proposed would remove malice as one of the elements that the CAO would need to prove to successfully prosecute a hate crime, allowing CAO to expand the protected classes for which it is able to prosecute property destruction, assault, and harassment with the special allegation. If the Council passes the proposed amendment to apply the special allegation not only to assault, harassment, and property destruction cases, but to all misdemeanors or gross misdemeanors, this will further broaden the scope of the CAO's authority to prosecute crimes.

Expanding the scope of the criminal code and the authority of the CAO will likely increase the scale of the charges for those already involved in the criminal justice system. The practice of asking for increased sentences, regardless of the amendment to specialize sentencing, will likely also lengthen the amount of time spent in the system. These consequences will likely continue to fall upon and potentially exacerbate disproportionate impacts on people of color.

Though prosecuting hate crimes can send a message to the community that bias crimes will not be tolerated, it is unclear whether increasing the scope of the criminal code and allowing the CAO to prosecute more crimes will be sufficient to deter further hate crimes in Seattle or decrease the disproportionality of the communities experiencing bias incidents. More research about the deterrent effect of hate crimes laws may be warranted to determine how making prosecution easier affects deterrence.

Implementing the recommendations of the City Auditor to increase the City's ability to address hate crimes may allow the City to better track disproportionality and implement ways to battle it. Investment in communities most impacted by hate crimes who are already doing work to combat bias and mitigate its effects may also help to ameliorate the disproportionality in the criminal legal system.

Next Steps

Committee members may vote on amendments and vote on moving CB 119288 out of committee on May 14. If a vote does not take place, the committee will likely discuss this bill again at the next CRUEDA meeting on May 28.

Attachments:

- A. Proposed Amendments to CB 119288

cc: Kirstan Arestad, Central Staff Director
Erik Sund, Supervising Analyst

CITY OF SEATTLE

ORDINANCE _____

COUNCIL BILL _____

..title

AN ORDINANCE relating to the City’s criminal code; removing the separate crime of malicious harassment and creating a special allegation of hate crime motivation; and amending Section 12A.06.115 of the Seattle Municipal Code.

..body

WHEREAS, hate crimes in Washington state are currently prosecuted as “malicious harassment”

in both felony and misdemeanor forms; and

WHEREAS, Seattle’s misdemeanor malicious harassment law is limited to covering crimes

based on the protected classes of homelessness, marital status, political ideology, age, or

parental status; and

WHEREAS, the state felony malicious harassment law covers the protected classes of race,

color, religion, ancestry, national origin, gender, sexual orientation, mental handicap,

physical handicap, and sensory handicap; and

WHEREAS, the Seattle City Auditor released a report on May 9, 2019, finding that reports of

hate crimes have risen by almost 400 percent since 2012; and

WHEREAS, the City Auditor’s report indicated that reports of crimes of malicious harassment

increased 346 percent since 2012; and

WHEREAS, the City Auditor’s report found that reports of crime with bias elements increased

378 percent since 2012 and reports of non-criminal bias incidents increased 448 percent

since 2012; and

WHEREAS, in the 2019 legislative session the Washington Legislature enacted Engrossed

Substitute House Bill 1732, which changed the name of the felony malicious harassment

1 offense to “hate crime offense” and clarified terms for people with disabilities and for
2 gender identity; and

3 WHEREAS, creating a misdemeanor special allegation for hate crimes in Seattle would allow for
4 hate and bias crimes that are prosecuted as misdemeanors to be designated and identified
5 as hate crimes; and

6 WHEREAS, removing malice from the elements to be proven in the special allegation allows
7 prosecution of hate or bias crimes at the misdemeanor level for protected classes
8 currently covered by the state felony law and City-level protected classes, which are race,
9 color, religion, ancestry, national origin, gender, sexual orientation, mental handicap,
10 physical handicap, and sensory handicap, homelessness, marital status, political ideology,
11 age, or parental status; NOW, THEREFORE,

12 **BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:**

13 Section 1. Section 12A.06.115 of the Seattle Municipal Code, last amended by Ordinance
14 123395, is amended as follows:

15 **12A.06.115 ((~~Malicious harassment.~~) Hate crime motivation**

16 ((~~A. A person is guilty of malicious harassment if he or she~~)) In a prosecution for ~~assault~~
17 ~~under Section 12A.06.010, harassment under Section 12A.06.040, or property destruction under~~
18 ~~Section 12A.08.020~~ any misdemeanor or gross misdemeanor under the Seattle Municipal Code,
19 the City Attorney may file a special allegation of hate crime motivation when the defendant
20 ((~~maliciously and~~)) intentionally commits ((~~one (1) of the following acts~~)) the act because of
21 ((~~his or her~~)) the defendant’s perception of another person's race, color, religion, ancestry,
22 national origin, gender, sexual orientation, gender expression or identity, mental ~~handicap~~
23 ~~disability~~, physical ~~handicap disability~~, sensory ~~handicap disability~~, homelessness, marital status,

1 political ideology, age, or parental status. Such a special allegation must be proved beyond a
2 reasonable doubt, with either the court making a finding of fact as to this special allegation if it
3 finds the defendant guilty of the crime or, if a jury trial is had, the jury finding a special verdict
4 as to this special allegation if it finds the defendant guilty of the crime. ((:

5 1. ~~Causes physical injury to another person; or~~

6 2. ~~By threat places another person in reasonable fear of harm to his or her person~~
7 ~~or property or harm to the person or property of a third person; provided however, that it shall~~
8 ~~not constitute malicious harassment for a person to speak or act in a critical, insulting, or~~
9 ~~deprecatory way so long as his or her words or conduct do not constitute a threat of harm to the~~
10 ~~person or property of another person; or~~

11 3. ~~Causes physical damage to or the destruction of the property of another person.~~

12 B. ~~"Threat" means to communicate, directly or indirectly, the intent to:~~

13 1. ~~Cause bodily injury immediately or in the future to another; or~~

14 2. ~~Cause damage immediately or in the future to the property of another; or~~

15 3. ~~Subject another person to physical confinement or restraint.~~

16 C.)) For purposes of this ((section: "Homelessness")) Section 12A.06.115,

17 "homelessness" means the status or condition of being without a home, including, but not limited
18 to, the state of living in the streets.

19 ((D. ~~Every person who, in the commission of malicious harassment, shall commit any~~
20 ~~other crime, may be punished therefor as well as for the malicious harassment, and may be~~
21 ~~prosecuted for each crime separately.))~~

22 D. When sentencing or imposing conditions on a person convicted of or given a
23 deferred sentence or a deferred prosecution or who has entered into a statutory or non-statutory

1 diversion agreement on a misdemeanor or gross misdemeanor with a special allegation of hate
2 crime motivation, the court must require, as part of the sentence or conditions, that the person
3 fulfill the terms of a program, attend a training, or perform community service designed to
4 educate persons committing the offense about the negative consequences of hate crimes or bias
5 crimes committed against the protected class of the victim of the offense. The court may waive
6 this requirement where such a program, training, or community service opportunity is
7 unavailable or impractical or upon a finding of good cause by the court.

8 E. The City Attorney's Office shall provide an annual report to the City Council each
9 year on the special allegations filed under this Section 12A.06.115. This report shall include
10 data on the demographics of defendants and the protected class status of victims.

11 Section 2. The provisions of this ordinance are declared to be separate and severable. The
12 invalidity of any clause, sentence, paragraph, subdivision, section, or portion of this ordinance,
13 or the invalidity of its application to any person or circumstance, does not affect the validity of
14 the remainder of this ordinance or the validity of its application to other persons or
15 circumstances.

1 Section ~~23~~. This ordinance shall take effect and be in force 30 days after its approval by
2 the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it
3 shall take effect as provided by Seattle Municipal Code Section 1.04.020.

4 Passed by the City Council the _____ day of _____, ~~2018~~
5 2019, and signed by me in open session in authentication of its passage this ____ day of
6 _____, ~~2018~~ 2019.

7 _____
8 President _____ of the City Council

9 Approved by me this _____ day of _____, ~~2018~~ 2019.

10 _____
11 Jenny A. Durkan, Mayor

12 Filed by me this _____ day of _____, ~~2018~~ 2019.

13 _____
14 Monica Martinez Simmons, City Clerk

15 (Seal)