

HB 1901: Updating civil protection orders

Dear Members of the Civil Rights & Judiciary Committee:

I write today to request much needed changes to HB 1901. If these changes are not made, last year's ESSHB 1320 will lead to unintended consequences with respect to possession of firearms. I am writing on behalf of myself, my clients, the Washington Association of Criminal Defense Lawyers, the Washington Defender Association, and reintegration activists everywhere.

Firearm law is the bread and butter of my legal practice and to date, I have helped over five thousand people deal with various firearm issues in every corner of this state. I am the leading firearms lawyer in Washington state and have unmatched expertise in state and federal firearm laws. I have written articles, presented Continuing Legal Education programs to other lawyers, litigated and won key decisions in state and federal appellate courts, and have a unique perspective on the subject matter.

I did not have the opportunity to review ESSHB 1320 last year until the bill had already passed, and by then it was too late. ESSHB 1320 has language in it that leads to unintended negative consequences for firearm rights, and those problems should be addressed in HB 1901.

The principal issue with ESSHB 1320 is that it retroactively expands the list of criminal convictions that prohibit the possession of a firearm without giving any notice to individuals that may be affected by this change in the law. In short, ESSHB 1320 turns law-abiding individuals into felons without notice.

The problem is section 72's amendment of RCW 9.41.040(2)(a)(i). Currently, that provision prohibits the possession of a firearm by anyone convicted of a "violation of the provisions of a protection order or no-contact order restraining the person or excluding the person from a residence (RCW 26.50.060, 26.50.070, 26.50.130, or 10.99.040)," where the offense occurred on or after July 1, 1993. This language clearly limits the types of protection orders to those issued under RCW 26.50.060, 26.50.070, or 10.99.040. This is a limited universe of protection orders. So, if the person is convicted of violating an order that was issued under one of these RCWs, that person loses gun rights. And if the person is convicted of violating an order that was not issued under one of these RCWs, that person does not lose gun rights.

ESSHB 1320 changes this by prohibiting possession of a firearm for a person convicted of violating any of the protection orders listed in what will be RCW 7.78. The point of ESSHB 1320 is to consolidate all types of protection orders into one chapter. So now, the conviction for violation of essentially any type of protection order will become firearm prohibitive. This, by itself, is not objectionable. What's objectionable is that ESSHB 1320 states that this change is made for all offenses committed on or after July 1, 1993. In other words, it expands the list of crimes that prohibit the possession of a firearm and makes that change retroactive to 1993.

This same thing almost happened in 2018 with the passage of SB 6298. The legislature sought to make misdemeanor harassment a firearm prohibitor, but did not account for the effective date. If that legislation had passed as originally drafted, it would have encompassed all misdemeanor harassment convictions all the way back to July 1, 1993. However, at our urging, the legislature did redraft the bill to

add that only misdemeanor harassment that occurs on or after the effective date of the legislation is prohibitive. That language was ultimately codified as RCW 9.41.040(2)(a)(ii).

We need that exact same thing here. We can leave RCW 9.41.040(2)(a)(i) as-is, and add a new subparagraph (ii) or (iii) and add that violations of a protection order issued under new RCW 7.78 committed on or after July 1, 2022, are firearm prohibitive.

There are other important issues.

Section 2 of ESSHB 1320 changes the definition of "intimate partner" to include dating partners as young as thirteen, whereas the age cutoff is currently sixteen. This means that a person who had been adjudicated at fifteen of assaulting his or her dating partner (who was also fifteen) did not lose his or her gun rights at the time of the adjudication, but will have now lost his or her gun rights when the session law goes into effect, without any notice.

Likewise, Section 2 of ESSHB 1320 changes the definition of "family or household member" to remove the requirement that family members and roommates must be adults. This means that a person who had been adjudicated as a juvenile of assaulting his or her sibling did not lose his or her gun rights at the time of the adjudication, but will have now lost his or her gun rights when the session law goes into effect, again without any notice.

The Washington Supreme Court has already ruled that such changes to firearm laws do not violate the *ex post facto* clause of the Constitution, so it's imperative that these changes be made legislatively, because a court challenge is out of the question. If ESSHB 1320 is not amended as stated previously, the consequences to law-abiding citizens will be dire, and none of these consequences are even intended by this legislature.

Finally, ESSHB 1320 imposes two different definitions of "family or household member" and "intimate partner." Section 2 of ESSHB 1320 has one definition (I touched on this above), but ESSHB 1320 is also amending RCW 10.99.020 to include *different* definitions of those terms. The definitions are very similar, but not the same. The principal differences are the "adult" relationships for blood/marriage and the age cut off of 13/16 for dating relationships. This is going to lead to a wave of confusion about which definitions apply in which scenarios and is completely unnecessary.

Given that HB 1901 aims to fix parts of ESSHB 1320, these changes should also be included. The expansion of crimes that prohibit firearm possession should not be retroactive, and there should only be one uniform definition of "family or household member" and "intimate partner." ESSHB 1320 takes effect on July 1, 2022, and HB 1901 is likely the last chance to amend 1320 into something workable. Let's not waste this opportunity.

I remain committed and available for further consultation with members of this committee and the legislature. I can be reached at vitaliy@kertchenlaw.com or 253-905-8415.

Thank you for your time and consideration.

Sincerely,

Vitaliy Kertchen
Attorney at Law