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BILL ANALYSIS

Senate Fiscal Agency

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Senate Bill 288 (as reported without amendment)

Sponsor: Senator William Sederburg

Committee: Judiciary

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RATIONALE

According to the Department of State Police, the sale of drug paraphernalia—such as cocaine spoons, water pipes, and kits for growing marijuana—is a multi-million dollar business that glamorizes the use of illegal drugs. Reportedly, the growth of this industry coincides with the growth of substance abuse. In addition to the 30,000 “head shops” nationwide (as of November 1979), numerous other retailers carry drug paraphernalia—such as roach clips—as a sideline. In order to combat the increasing misuse of drugs, especially by minors, many advocate outlawing the sale of items that are intended or designed for use with controlled substances. A model law to that effect has been prepared by the Drug Enforcement Administration (DEA), and laws limiting the sale of drug paraphernalia have been adopted by some 36 other states as well as the city of Detroit.

CONTENT

Senate Bill 288 would amend the controlled substances Act within the Public

Health Code to do the following:

- Make it a crime to use, deliver, or advertise drug paraphernalia, with certain exceptions.
- Define “drug paraphernalia”.
- Specify factors that would have to be considered in determining whether an object was drug paraphernalia.
- Prescribe penalties.
- Include drug paraphernalia in the Act’s forfeiture of property provisions.

Prohibited Activities/Penalties

The bill would prohibit a person from using, or possessing with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, analyze, pack, store, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. (“Controlled substance” is currently defined in the controlled substances Act, MCL 333.7104.)

A person could not deliver, or possess or manufacture with intent to deliver, drug paraphernalia, knowing or having reason to know that it would be used to plant, grow, harvest, manufacture, etc., or introduce into the human body a controlled substance. In addition, a person would be prohibited from placing in any newspaper, magazine, handbill, or other publication, any advertisement knowing or having reason to know that the purpose of the advertisement was to promote the sale of drug paraphernalia.

A person who engaged in a prohibited activity would be guilty of a misdemeanor and subject to imprisonment for

up to 90 days, a maximum fine of \$5,000, or both. A person aged 18 or older who delivered drug paraphernalia to a person under 18 would be guilty of a misdemeanor, punishable by up to one year in prison and/or a maximum fine of \$7,500.

“Drug Paraphernalia”

“Drug paraphernalia” would be defined as any equipment, product, material, or combination of those items, that is used, or intended or specifically designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, analyzing, packaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance. Drug paraphernalia would include, but not be limited to, the following items that were used, intended for use, or specifically designed for use in the described ways:

- An isomerization device used in increasing the potency of any species of plant that is a controlled substance.
- Testing equipment used in identifying, or analyzing the strength, effectiveness, or purity of a controlled substance.
- A weight scale or balance used in weighing or measuring a controlled substance.
- A dilutant or adulterant used with a controlled substance.
- A separation gin or sifter used in removing twigs and seeds from, or used in otherwise cleaning or refining marijuana.
- A blender, bowl, container, spoon, or mixing device used in compounding a controlled substance.
- A capsule, balloon, envelope, or other container used in packaging a controlled substance.
- A container or other object used in storing or concealing a controlled substance.
- A hypodermic syringe, needle, or other object used in injecting a controlled substance into the human body.
- A kit used in planting, propagating, cultivating, growing, or harvesting any species of plant that is a controlled substance or from which a controlled substance can be derived.
- A kit used in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.
- An object used in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, including all of the following:
 - A metal, wooden, acrylic, glass, stone, plastic, or ceramic pipe.
 - A water, chamber, carburetor, electric, or air-driven pipe.

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- A carburetion tube or device.
- A smoking or carburetion mask.
- A roach clip, i.e., an object used to hold burning material, such as a marijuana cigarette that has become too small or too short to be held in the hand.
- A miniature cocaine spoon or cocaine vial.
- A chillum.
- A bong.
- An ice pipe or chiller.

In determining whether an object was drug paraphernalia, all of the following, in addition to all other "logically relevant factors", would have to be considered:

- Statements by an owner or by anyone in control of the object concerning its use.
- Prior convictions of an owner or of anyone in control of the object under any State or Federal law relating to any controlled substance.
- The proximity of the object to a controlled substance or a violation of the Act.
- The existence of any residue of a controlled substance on the object.
- Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver the object to a person whom he or she knew intended to use the object in violation of the bill. The innocence of an owner or of anyone in possession of the object as to a violation would not prevent a finding that the object was intended or specifically designed for use as drug paraphernalia.
- Instructions or descriptive materials accompanying the object concerning, explaining, or depicting its use.
- National and local advertising concerning the object's use.
- The manner in which the object was displayed for sale.
- The existence and scope of legitimate uses for the object.
- Expert testimony concerning the use of the object.
- Whether the owner, or anyone in control of the object, was a legitimate supplier of similar objects to the community, such as a licensed distributor or dealer of tobacco products.
- Direct or circumstantial evidence of the ratio of sales by the owner of the object to the total sales of the business enterprise.

Exceptions

The provisions of the bill regarding prohibited activities and drug paraphernalia would not apply to any of the following:

- An object sold to a licensed physician, osteopath, dentist, veterinarian, nurse, pharmacist, podiatrist, chiropractor, psychologist, physical therapist, embalmer, or funeral director, or any intern, trainee, apprentice, or assistant in any of those professions, for use in that profession.
- An object sold to any hospital, sanitarium, clinical laboratory, or other health care institution including a penal, correctional, or juvenile detention facility, for use in that institution.
- A hypodermic syringe or needle sold for the purpose of injecting or otherwise treating livestock or other animals, or for the purpose of injecting a substance other than a controlled substance.
- A smoking pipe if the seller reasonably believed the pipe was for the purpose of display, decoration, or smoking a substance other than a controlled substance.
- An object sold to a dealer in medical, dental, surgical, or pharmaceutical supplies.
- A hypodermic syringe, needle, or other object possessed by a diabetic or other person for the treatment of disability or disease under the authorization of a licensed health care professional.

Forfeiture

Public Act 251 of 1982 amended the controlled substances Act to expand the list of items related to drug-trafficking that are subject to forfeiture, and to give the State and local governments the authority to retain forfeited property for official use or sell it and apply the proceeds as required by law. The bill would include drug paraphernalia among the items subject to forfeiture.

MCL Reference 333.7521 et al.

FISCAL IMPACT

The bill would have an indeterminate impact on State and local government. Local enforcement costs and increased fine revenue are not determinable. The bill also would result in an indeterminate loss of State sales tax revenues from previously legal sales of certain drug paraphernalia.

ARGUMENTS

Supporting Argument

Illegal drug use by the nation's youth has reached epidemic proportions and is fostered by the proliferation of drug paraphernalia. The industry is so well entrenched, in fact, that it even has its own trade magazines and associations. With the sale of drug paraphernalia in "head shops", convenience stores, and gas stations, its ready availability can only arouse curiosity about drugs, glamorize drug use, educate impressionable youths on how to use drugs, and help finance an already flourishing drug trade. At the same time that millions of dollars are being spent on enforcing drug laws, airing anti-drug commercials, and rehabilitating users, the paraphernalia shops are thriving, selling items intended solely to promote the use of illicit substances. This paradox sends a message that use of the drugs is actually condoned; and the legality and ubiquity of drug paraphernalia contradict everything that the rest of society attempts to teach.

Prohibiting the open sale of drug paraphernalia would send a clear message that drug use is not, in fact, permissible, and would allow the State to adopt a more consistent approach toward the drug trade. By taking drug paraphernalia off the shelves and criminally penalizing those who continue to sell it, the bill would remove a blatant encouragement to use illegal drugs and would bring the State another step closer to a drug-free society.

Supporting Argument

Illegalizing the sale of drug paraphernalia could result in increased convictions of those who use drugs. While it may be easy to get rid of the drugs themselves—by flushing them down a toilet, for example—during a drug bust, disposing of the equipment is harder.

Opposing Argument

Instead of taking a superficial approach to the drug abuse problem by outlawing the sale of drug paraphernalia, the State would do better to improve drug education programs in the schools and to focus law enforcement efforts on convicting the pushers. Enforcement of this bill would fragment already strained resources and get at only the "little guy". Moreover, outlawing the sale of drug paraphernalia would not necessarily reduce the actual use of drugs, as many of the items in question can be made at home.

Opposing Argument

By prohibiting the advertisement of drug paraphernalia, the bill could unconstitutionally infringe upon First Amendment rights to free speech, and could thereby jeopardize the entire proposal. Further, such a prohibition

would have no effect on large national magazines, such as High Times, that not only advertise drug paraphernalia, but also publicize the "market price" of illegal drugs in various parts of the country. Finally, if retailers could not sell drug paraphernalia, there would be nothing to advertise.

Response: In upholding an ordinance that regulated the commercial marketing of drug paraphernalia, the U.S. Supreme Court stated, "The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed "speech," then it is speech proposing an illegal transaction, which a government may regulate or ban entirely" (emphasis in original) (Village of Hoffman Estates v Flipside, Hoffman Estates, Inc., 102 S Ct 1186, 1192 (1982)). Like the activity in that case, the advertisement of drug paraphernalia also promotes an illegal enterprise and may be similarly regulated.

Opposing Argument

The bill could be strengthened by removing many of the enumerated items that have legitimate uses, in addition to their use with drugs, such as blenders, pipes, and containers. Further, objects should be prohibited if they are designed and intended for use as drug paraphernalia, instead of merely designed or intended for such use. The bill could still outlaw the use or sale of otherwise innocuous objects due to the presence of a controlled substance on or in an object, while avoiding potential civil liberties violations.

Response: Enumerating specific objects that may be drug paraphernalia actually strengthens, not weakens, the bill. Not only does the specificity preclude claims of vagueness, it also is consistent with the DEA's model bill. Further, similar language was upheld by the U.S. Supreme Court in the 1982 case.

Opposing Argument

Imposing criminal penalties on those who sell drug paraphernalia would be too severe. The bill's goals could be achieved by economic sanctions, such as stiff fines or license revocation.

Response: Without criminal penalties, the bill would stand little chance of being enforced and would fail to send a strong message that society disapproves of drug abuse.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.