



**House
Legislative
Analysis
Section**

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OBSCENITY CRIMES, CIVIL ACTIONS

House Bill 4642

Sponsor: Rep. Lloyd F. Weeks **RECEIVED**

House Bill 4643

Sponsor: Rep. Bart Stupak

JUL 19 1989

Mich. State Law Library

House Bill 4650

Sponsor: Rep. Wilfred Webb

House Bill 4651

Sponsor: Rep. Debbie Stabenow

House Bill 4653

Sponsor: Rep. Joseph Palamara

Committee: Judiciary Complete to 4-25-89

**A SUMMARY OF HOUSE BILLS 4642,
4643, 4650-4651, and 4653 AS
INTRODUCED 4-13-89**

The bills are part of a twelve-bill antipornography package which in general would emphasize local standards over statewide standards in determinations of obscenity, allow various civil remedies (such as damage suits and property forfeiture actions) to be pursued against alleged purveyors of pornography, increase criminal penalties for distributing obscene material and related activities, and strengthen protections against minors obtaining obscene material. Other bills in the package are House Bills 4644 through 4649, in the House Committee on Towns and Counties, and House Bill 4652, in the House Committee on Consumers. The bills are not tie-barred.

House Bill 4642 would amend the existing obscenity law, Public Act 343 of 1984, to authorize local units of government to enact and enforce obscenity ordinances, redefine the "contemporary community standards" that are used to determine whether material is obscene, establish penalties with regard to "hard-core" material, ban obscene and hard-core performances, subject employees to penalties for disseminating pornography, provide for obscenity-related damage suits, and increase various criminal penalties. A more detailed description follows.

Community standards, enforcement. Figuring in the test for obscenity formulated by the United States Supreme Court and used in the statute is the idea of "contemporary community standards." (For example, one of the three criteria that must be met is that the average individual, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest.) The bill would redefine "contemporary community standards" to apply the standards existing in the vicinity from which the jury was drawn, rather than those of the state as a whole. In addition, the bill would do away with a prohibition against municipalities enacting obscenity ordinances, and explicitly allow municipalities to adopt and enforce the act as an ordinance.

Hard-core pornography. Hard-core performances and dissemination of hard-core material would be subject to the same penalties as obscene performances Page 1 of 4 Pages and material. "Hard-core material" would be

material that the reasonable individual would find, taken as a whole, lacked serious literary, artistic, political, or scientific value, and was one or more of the following: material that showed actual sex acts between individuals, if penetration was visible; material that showed actual penetration of an individual's vagina or rectum with an object, for purposes of sexual gratification for any individual; material showing actual bestiality, if penetration was visible; and, material that showed actual manipulation of the genitals or that showed actual ejaculation. "Hard-core performance" would be similarly defined, but with regard to performances, rather than material.

Obscenity crimes. The law at present distinguishes between obscenity in the first degree, punishable by a fine of up to \$100,000, and obscenity in the second degree, punishable by a fine of up to \$5,000. A second or subsequent first degree offense carries a minimum fine of \$50,000 and a maximum of \$5 million. All of the offenses are misdemeanors punishable by up to one year in jail. When dissemination of obscene material is a predominant part of a person's business, it is obscenity in the first degree. Obscenity in the second degree is dissemination of obscene material to the public.

The bill would dispense with separate degrees of obscenity, and make obscenity a felony punishable by imprisonment for up to four years. A second or subsequent offense would be punishable by imprisonment for up to eight years. Fines would be what they are now for first-degree obscenity, namely a \$100,000 maximum for a first offense, and from \$50,000 to \$5 million for a second or subsequent offense.

A person would be guilty of obscenity if he or she owned or managed a place used for the purpose of disseminating any hard-core material or obscene material, for the purpose of disseminating a sexual device, or for the presentation of a hard-core or obscene performance. A person also would be guilty of obscenity if he or she, with knowledge of content and character, disseminated hard-core or obscene material, disseminated a sexual device, or presented a hard-core or obscene performance.

The law makes it a misdemeanor to demand acceptance of obscene material as a condition to a sale or franchise, or to threaten any penalty for failing or refusing to accept

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H.B. 4642, 4643, 4650, 4651 (4-25-89)

obscene material. The maximum penalty for this offense is at present one year in jail and a \$500 fine. The bill would increase these penalties to two years and \$100,000, and extend them to demands for acceptance of hard-core material and sexual devices, as well as of obscene material. A second or subsequent offense would be a felony punishable by imprisonment for up to eight years and a fine of between \$50,000 and \$5 million (these are equal to the penalties that would attach to a second or subsequent conviction for obscenity).

Civil remedies. A person who disseminated hard-core or obscene material, disseminated a sexual device, or presented a hard-core or obscene performance would be civilly liable for injuries proximately caused by the offense.

Evidence. The bill would explicitly provide that expert testimony or other ancillary evidence is not required to determine whether material is obscene, providing the material itself had been placed into evidence. The fact that sexually explicit material was being distributed in the community would not be admissible as evidence of contemporary community standards, unless the material enjoyed a reasonable degree of acceptance in the community and was substantially similar to the allegedly obscene material. The way that material or a performance was advertised or produced could be used as evidence in determining whether it was hard-core or obscene, providing the information was otherwise admissible.

Exemptions. The crime of obscenity generally does not apply to employees of institutions of higher learning or libraries; the bill would add protection for employees of public art museums or art institutes. The bill would delete existing protection for employees of other places; the deleted language protects an individual who disseminates obscene material in the course of his or her employment and does not have discretion with regard to that dissemination or is not involved in the management of the employer. In addition, the bill would protect the dissemination of sexual devices for legitimate therapeutic purposes by a person licensed under the Public Health Code.

Severability. If any part of the act were to be found invalid, the court would sever that part of the act or that application of the act.

Advisory opinions. The bill would repeal sections of the act providing for advisory opinions of the attorney general and prosecuting attorneys. Those sections allow a person intending to distribute possibly obscene material to obtain an advisory opinion on the legality of the intended dissemination. Someone who has sought an advisory opinion may also, under certain circumstances, seek a declaratory judgment in court. A favorable advisory opinion or declaratory judgment can protect against prosecution for disseminating the material.

MCL 752.362 et al.

House Bill 4643. The bill would amend the Revised Judicature Act to include obscenity offenses among the crimes covered by the general forfeiture law. That law provides for the seizure and forfeiture to the authorities of property used for or obtained through the commission of any of the specified crimes.

MCL 600.4701

House Bill 4650. The bill would amend the obscenity law, Public Act 343 of 1984, to provide civil procedures under which a business could be closed following the conviction

of a person for obscenity. If a person was convicted of obscenity, whether under the statute or a corresponding local ordinance, the prosecutor could file a civil complaint with the circuit court to close a business or theater. The court would have to order a business closed if it found by a preponderance of the evidence that the convicted defendant was professionally connected with that business and that the violation occurred in the course of the commercial activities of that business. The bill would establish similar standards under which various sorts of establishments would be closed following convictions for various obscenity offenses, including performances. First-time violations would be subject to closings of from 30 to 60 days; second-time violations, 60 to 90 days; third and subsequent violations, 90 days to one year.

MCL 752.365B

House Bill 4651. The bill would amend the obscenity law, Public Act 343 of 1984, to declare it a public nuisance to do any of the following: disseminate hard-core or obscene material or a sexual device; present any hard-core or obscene performance; knowingly permit a commercial establishment to disseminate hard-core or obscene material; knowingly permit a place to be used for presenting a hard-core or obscene performance. To abate the nuisance, a person could file a complaint with the circuit court; the complaint could be prosecuted by the local prosecutor or the attorney general. The court could issue a temporary restraining order, preliminary injunction, or injunction to abate the nuisance; certain restrictions would apply to each.

MCL 762.365E

House Bill 4653. Public Act 33 of 1978 prohibits the dissemination or display of sexually explicit material to minors. In the case of a business enterprise, that prohibition applies when a manager knowingly permits a minor to examine the material. The bill would in addition prohibit a business from knowingly displaying material in a manner that makes it visible or accessible to minors. The bill would take effect July 1, 1989.

MCL 722.677