House
Legislative
Analysis
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DRUG ANALOGUES; "CAT"

Senate Bill 220 (Substitute H-2)
First Analysis (2-1-94)

Sponsor: Sen. John J.H. Schwarz, M.D.
Senate Committee: Family Law, Criminal, and Corrections
House Committee: Judiciary

THE APPARENT PROBLEM:

The Public Health Code prohibits manufacturing, delivering, and possessing with intent to deliver a controlled substance analogue (that is, a synthetic drug with a chemical structure substantially similar to a controlled substance). However, the prohibition is inadequate to combat the growing trade in at least one highly addictive designer drug, the substance known as methcathinone or "cat." "Cat" is a powerful stimulant that produces feelings of exhilaration, heightened awareness, and invincibility that can last for hours or days. "Cat" evidently emerged from an Ann Arbor laboratory in 1988 or 1989, and has since gained wide popularity in the Upper Peninsula. According to a Department of State Police memorandum of September 30, 1992, the Iron River State Police Post participated in 25 cases related to cat in the first nine months of 1992, and police departments in that area were investigating subjects for cat at least weekly. In fact, the Upper Peninsula apparently has become the "cat" capital of the United States; according to one report, the state police raided 10 "cat" laboratories in the Upper Peninsula between May and September 1992. Concerns exist not only about the extent of the problem in Michigan's north, but also its potential to spread downstate, especially to large urban areas.

In response to growing concerns about "cat," the legislature enacted Public 25 of 1993 (enrolled House Bill 4103), which added "cat" to the list of Schedule 1 controlled substances, thus subjecting possession or delivery to felony penalties. However, problems with "cat" have served to illustrate various shortcomings of the law on controlled substance analogues. First, it can be difficult to prosecute for analogue violations, because possession is not a crime. Further, although the Public Health Code provides for classification of federally scheduled substances, statutory language only contemplates Board of Pharmacy action following publication of a final order in the federal register. Thus, even though cat was temporarily placed on the federal Schedule 1 list on May 1, 1992, the state pharmacy board lacked authority to control it under the applicable section of the Public Health Code. Amendments have been proposed to address various shortcomings of the law on controlled substance analogues.

In addition, problems with "cat" continue. One of the aspects of the drug that makes its control so difficult is that it can be manufactured using cheap and easily available household chemicals and ephedrine, a bronchial dilator that is widely available without a prescription. While ephedrine may be most widely available in mixtures such as Bronkaid and Primatene mist, it also is available in tablet form. Large shipments of those tablets have been tracked to the Upper Peninsula. To help to control the manufacture of "cat," criminalization of the possession of excessive quantities of ephedrine has been proposed.

THE CONTENT OF THE BILL:

The bill would amend the Public Health Code to do the following:

** increase the maximum fine for manufacture or delivery of a schedule 1, 2, or 3 controlled substance from $5,000 to $10,000; the offense, which is a felony, would continue to be additionally punishable by up to seven years in prison. (Separate sanctions apply to manufacture or delivery of cocaine or certain narcotics.)

** criminalize possession of a controlled substance analogue. Possession would be a felony punishable by imprisonment for up to two years, a fine of up to $2,000, or both.

** criminalize use of a controlled substance analogue. Use without a prescription would be a misdemeanor punishable by up to one year in jail, a fine of up to $1,000, or both.

** criminalize possession of more than ten grams of ephedrine alone or in a mixture. The offense would be a felony punishable by up to two years in prison, a fine of up to $2,000, or both. This provision would not apply to certain licensees or to an individual who possessed ephedrine under a prescription.

** delete language conditioning pharmacy board scheduling action on publication of a final order in the federal register. Pharmacy board review would instead be triggered by receipt of notice of a substance's designation, rescheduling, or deletion as a controlled substance under federal law.

** redefine "controlled substance analogue." An analogue is at present something that either has a chemical structure substantially similar to a Schedule 1 or 2 controlled substance, or was specifically designed to produce an effect substantially similar to a Schedule 1 or 2 controlled substance. Under the bill, an analogue would be a substance that both was chemically substantially similar to a Schedule 1 or 2 drug and produced a substantially similar effect on the central nervous system. (However, with respect to a particular individual, a substance would not have to be shown to have a substantially similar effect if it could be shown that the substance had been represented to have substantially similar effect.) A controlled substance analogue specifically would not be: a controlled substance; a substance for which there was an approved new drug application; a substance exempted by the federal Food and Drug Administration for investigational use; or any substance "to the extent not intended for human consumption before an exemption takes effect with respect to the substance."

The bill would take effect June 1, 1994.

MCL 333.7104 et al.

HOUSE COMMITTEE ACTION:

The House Judiciary Committee adopted a substitute bill that differed from the Senate-passed version in not amending the definition of "controlled substance" to include substances designated by the U.S. attorney general; in provisions conditioning pharmacy board review on receipt of federal notice regarding a scheduling change; in retaining the current penalty for creating an analogue, and in criminalizing the possession of certain quantities of ephedrine.

FISCAL IMPLICATIONS:

There is no fiscal information at present. (1-31-94)

ARGUMENTS:

For:

The bill would remedy various problems with the law on controlled substance analogues. It would criminalize possession of an analogue and it would clarify the pharmacy board's authority to act to place an analogue on a schedule of controlled substances. It would further help combat continuing problems with "cat" by criminalizing possession of excessive quantities of ephedrine, the "cat" precursor; authorities thus would be able to act more effectively to stem production of the problem drug.

Against:

By creating new crimes, the bill would increase costs to the criminal justice system. Absent a comprehensive and consistent system of sentencing guidelines, the legislature should forbear from creating new crimes and criminal punishments that would worsen prison and jail overcrowding, fail to reduce crime, and drain money away from effective preventative and rehabilitative programs such as education, substance abuse services, family services, and job training.

Against:

The bill should leave the problem of distribution of ephedrine, the nonprescription precursor of "cat," to federal authorities. A new federal law, enacted on December 17, 1993, provides for recordkeeping and reporting of large shipments of ephedrine, thus enabling federal authorities to track sales of the drug.

Response:

The bill would provide local authorities with the ability to make arrests and shut down "cat" factories that have proscribed amounts of ephedrine on hand.

POSITIONS:

The Department of State Police supports the bill. (1-26-94)

The Michigan Association of Chiefs of Police supports the bill. (1-28-94)

The Prosecuting Attorneys Association of Michigan supports the bill. (1-31-94)

The Nonprescription Drug Manufacturers Association opposes the permanent scheduling of nonprescription precursor chemicals such as ephedrine approved by the Food and Drug Administration. (1-27-94)