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SFA**BILL ANALYSIS**

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Senate Bill 1071 (Substitute S-1 as reported)
Sponsor: Senator Michael J. Bouchard
Committee: Judiciary

Date Completed: 11-20-98

RATIONALE

Second-degree criminal sexual conduct (CSC) and fourth-degree CSC involve "sexual contact" rather than "sexual penetration". "Sexual contact" includes the intentional touching of a victim's or actor's "intimate parts" or the intentional touching of the clothing covering the immediate area of those parts, if the intentional touching can reasonably be construed as being for "the purpose of sexual arousal or gratification". ("Intimate parts" includes the primary genital area, groin, inner thigh, buttock, or breast of a human being.) Second-degree CSC is a felony punishable by up to 15 years' imprisonment, while fourth-degree CSC is a misdemeanor punishable by up to two years' imprisonment.

Reportedly, there have been CSC cases that were lost, or in which a charge of simple assault (a 90-day misdemeanor) was pursued as an alternative, because of the difficulty in proving that an assault on a person's intimate parts could reasonably be construed as being for the purpose of sexual gratification or arousal. If an offender's intent, for example, were anger toward, revenge against, or humiliation of a victim, rather than sexual pleasure, it could be difficult to convince a jury to convict on a CSC charge. Indeed, this problem has occurred despite the fact that the Michigan Court of Appeals has ruled that, under the definition of "sexual contact", the jury may find that the accused's actual purpose was other than sexual gratification but still find that sexual contact occurred within the meaning of the Penal Code's CSC provisions (*People v Fisher*, 77 Mich App 6 (1977)). Some people believe that, in order to ensure that CSC offenders receive the proper criminal penalties and that juries clearly understand the elements of second- and fourth-degree CSC, reference to sexual arousal or gratification should be removed from the statutory definition of "sexual contact".

CONTENT

The bill would amend the Michigan Penal Code to revise the definition of "sexual contact" in the Code's CSC provisions. Under the bill, the definition would apply if the intentional touching could reasonably be construed as being for "a sexual or assaultive purpose" and reference to sexual arousal or gratification would be deleted.

MCL 750.520a

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The Michigan Penal Code's CSC provisions include degrees of the offense that involve sexual penetration and degrees that merely involve sexual contact. An assault on a person that involves, for instance, the grabbing of a person's breasts, buttocks, or genital area could constitute second- or fourth-degree CSC, depending on the circumstances surrounding the assault. Reportedly, prosecutors sometimes have difficulty securing a conviction under the "sexual contact" CSC provisions because the Penal Code's definition of that term includes reference to touching a person's intimate parts for the purpose of sexual gratification or arousal. According to testimony before the Senate Judiciary Committee, the touching of a person's intimate parts often is not perpetrated for the purpose of sexual pleasure, but to harass or humiliate the person due to the offender's anger toward or desire for revenge against the victim for some perceived wrong done to the offender. Rather than being convicted of, or even charged with, CSC, the offender in such a case might be acquitted or charged with an assaultive offense that carries a less severe penalty. In order to ensure proper punishment, the

Penal Code's definition of "sexual contact" should be revised to refer to an action taken for an assaultive or sexual purpose, rather than specifying a desire for sexual arousal or gratification.

Supporting Argument

Although the statutory definition of "sexual contact" refers to intentional touching "for the purpose of sexual arousal or gratification", case law over 20 years ago established that the charge of second-degree CSC, which involves sexual contact as opposed to sexual penetration, "does not require the prosecutor to prove the defendant's purpose or specific intent" (*People v Fisher*). The *Fisher* Court held that "the defendant's specific intent is not an essential element of the crime" but that it is sufficient to show that, as the definition states, the "intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification" (emphasis in original). In a footnote, the Court even indicated that the definition of "sexual contact" must "be read as a substantial lessening of the prosecutor's burden of proof: the touching must be intentional, but the actor's purpose need not be proven to the jury".

Since Michigan courts have recognized that the specific purpose of sexual arousal or gratification need not be proven in order to secure a conviction under the sexual contact provisions of the CSC offenses, the presence of that language in the Penal Code seems unnecessary. Further, the continued existence of that portion of the definition seems merely to confuse juries. According to testimony before the Senate Judiciary Committee by a representative of the Macomb County Prosecutor's office, many CSC cases have been lost and others have resulted in lesser charges because of a defendant's claim of a motive of anger, revenge, or humiliation rather than sexual gratification or arousal. Under the *Fisher* ruling, those distinctions in motive should be irrelevant, but juries appear to be confused by the subtleties in the law with respect to a CSC offender's intent. The definition of "sexual contact" in the Penal Code's CSC provisions should be changed to be consistent with the *Fisher* ruling and to clarify to juries the elements of second- and fourth-degree CSC.

Opposing Argument

The substitute, in effect, would broaden Michigan's criminal sexual conduct statute to apply to assaults that were not sexual in nature. The bill, as introduced, would have removed the sexual arousal or gratification references, but provided that a CSC sexual contact offense would have to be for "a sexual purpose". Adding "or assaultive" to the

bill's provision would give that purpose the same weight as a sexual purpose, thereby allowing simple or aggravated assault and battery to be prosecuted as a CSC offense. For example, if during a fight, one male kicked another male in the buttocks, that could constitute fourth-degree CSC under the bill. Another possibility would be the prosecution for a CSC offense of a woman who fended off an aggressive male by kicking or kneeing him in the groin. Neither of these incidents would necessarily be sexual in nature, but easily could be construed as assaultive and certainly would involve touching of an intimate body part under the Penal Code's CSC definitions. In attempting to alleviate juror confusion as to what might constitute sexual contact, the bill goes too far in broadening the circumstances under which a CSC charge could apply.

Response: In the case of a fight that involved nonsexual touching of an intimate body part, CSC charges likely would not be pursued because a prosecutor and court would examine the totality of the incident, not just one aspect of it, in charging and trying the offense. As for a woman defending herself, if she were charged with assaulting a man--whether on a CSC or a battery charge--a claim of self-defense would continue to be available to her.

Legislative Analyst: P. Affholter

FISCAL IMPACT

Senate Bill 1071 (S-1) would change the definition of the crime, not the criminal penalties. Assuming that the change in the definition would increase the number of people convicted of second- or fourth-degree CSC, the cost of incarceration for State and local government would increase. There are no data to indicate the increased number of people who would be found guilty of this crime.

Fiscal Analyst: K. Firestone

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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.