

Legislative Analysis



PROHIBIT SURVEILLANCE AND TAKING CERTAIN VISUAL IMAGES

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House Bill 5692 as enrolled
Public Act 156 of 2004
Sponsor: Rep. Fran Amos

House Bill 5693 as enrolled
Public Act 157 of 2004
Sponsor: Rep. Sandra Caul

Senate Bill 918 as enrolled
Public Act 155 of 2004
Sponsor: Sen. Alan Sanborn

House Committee: Criminal Justice
Senate Committee: Judiciary

Second Analysis (2-25-05)

BRIEF SUMMARY: House Bills 5692 would make it a crime to use camera phones, video recorders, and other devices to look at, record, transmit, or disseminate images of people under certain circumstances. Senate Bill 918 would prohibit surveilling and photographing another individual under certain circumstances and prohibit the distribution of any recording, photograph, or visual image made of that individual. House Bill 5693 would make complementary amendments to the Code of Criminal Procedure.

FISCAL IMPACT: Depending on how the bills affected felony convictions and sentencing, they could increase state or local correctional costs. State costs of felony probation supervision are approximately \$1,800 per year, while appropriated costs of prison incarceration are approximately \$28,000 per year. The cost of any jail term imposed would be borne by the county; jail costs vary from county to county.

THE APPARENT PROBLEM:

As telecommunication technology advances, the ingenuity of individuals to abuse the new technology also advances. In particular, laws have not kept pace with the illicit use of video recorders and camera phones. For example, Michigan prohibits the unauthorized installation of devices in private places for the purpose of observing, photographing, or eavesdropping upon unsuspecting persons; a violation is a two-year felony with a possible fine of up to \$2,000. But smaller mobile video recorders, digital cameras, and camera phones are now presenting privacy problems. According to media reports, a man was arrested in Texas last year for sliding his camera phone underneath women's skirts, and another man was arrested in a Seattle grocery store for the same offense. In Michigan, prosecutors already have been frustrated in fitting existing laws to crimes such as the incident in which a man placed a small video recorder in a gym-type bag and walked down the street swinging the bag seemingly in a random manner; however, in reality, he was swinging the camera in such a manner as to videotape

glimpses under the skirts of passing women. As the camera was neither installed nor being used in a “private place,” prosecutors were forced to charge him with a much lower misdemeanor offense.

Unfortunately, as the ownership and use of these devices proliferate, so does the risk of abuse. Some schools and health clubs have already banned camera phones and other small recording devices from school grounds and club locker rooms, but many feel that due to the high risk of abuse, state law should be changed to appropriately punish those who would use technology to invade the privacy of others.

THE CONTENT OF THE BILLS:

Currently, it is illegal to install in any private place, without the consent of the person entitled to privacy, any device for observing, photographing, or eavesdropping upon the sounds or events in that place. A “private place” is defined in the code as a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance but does not include a place to which the public or substantial group of the public has access. If convicted, a person is guilty of a felony punishable by up to two years imprisonment and/or a fine of not more than \$2,000.

House Bill 5692 would amend the Penal Code (MCL 750.539d) to expand the current prohibition to include the actions of placing or using a device and would also include recording and transmitting the sounds or events as prohibited acts. The bill would also prohibit distribution, dissemination, or transmission of a recording, photograph or visual image of a person, for access by another person, that the person (i.e., the distributor) knows or had reason to know is in violation of the law. Further, the bill would expand the scope of the statute to include acts that occurred in places other than a private place.

A violation or attempted violation of the new provisions involving distributing and transmitting would be a felony punishable by imprisonment for not more than five years and/or a fine of not more than \$5,000. The bill would also apply the same penalties to a second or subsequent violation of the observing, photographing, recording, and eavesdropping offense. (The penalty for a first violation would remain two years and/or \$2,000.)

Security monitoring in a residence that was conducted by or at the direction of the owner or principal occupant of that residence, unless conducted for a lewd or lascivious purpose, would not be prohibited.

Senate Bill 918 would add a new section to the Michigan Penal Code (MCL 750.539j) to prohibit a person from doing any of the following:

- Surveil another individual clad only in undergarments, another individual's unclad genitalia or buttocks, or a female individual's unclad breasts under circumstances in which the individual would have a reasonable expectation of privacy.

- Photograph, or otherwise capture or record, the visual image of the undergarments worn by another individual, another individual's unclad genitalia or buttocks, or a female individual's unclad breasts under circumstances in which the individual would have a reasonable expectation of privacy.
- Distribute, disseminate, or transmit for access by any other person a recording, photograph, or visual image that the person knew or had reason to know was obtained in violation of the bill.

"Surveil" would mean "to secretly observe the activities of another person for the purpose of spying upon and invading the privacy of the person observed."

The penalties in the bill would be similar to those in House Bill 5692. A first offense of the surveilling violation would be a felony punishable by imprisonment for not more than two years and/or a fine of not more than \$2,000. A second or subsequent offense would be punishable by up to five years and/or not more than \$5,000. The five year and \$5,000 penalties would apply to the photographing/recording and distributing/transmission offenses, including first offenses.

As before, security monitoring in a residence that was conducted by or at the direction of the owner or principal occupant of that residence unless conducted for a lewd or lascivious purpose would not be prohibited; and the bill would not apply to a state or federal peace officer, or the officer's agent, while in the performance of duties.

House Bill 5693 would make complementary amendments to the Code of Criminal Procedure (MCL 777.16z). Installing, placing, or using an eavesdropping device and lewd surveillance or capturing lewd images, would be class H felonies against the public order with a maximum term of imprisonment of two years. Subsequent offenses of installing, placing, or using an eavesdropping device and lewd surveillance or capturing lewd images would be class E felonies against the public order with a maximum term of imprisonment of five years. In addition, distributing, disseminating, or transmitting a visual image obtained by surveillance would be class E felonies against the public order with a maximum term of imprisonment of five years.

The bills were all tie-barred and have an effective date of September 1, 2004.

ARGUMENTS:

For:

Michigan's laws have not kept pace with technological advances in the area of telecommunication devices. As a result, prosecutors may be hard-pressed to find a punishment that fits the crime of using these newer devices on the market to see or record people showering or changing in locker rooms and dressing rooms, or to prosecute those who would stick these devices under bathroom stall doors or up women's skirts on public streets.

The bills would expand the current statute to include devices that are not installed, such as hand-held camcorders (or camcorders hidden in gym bags, etc.), digital and other small cameras, camera phones, and so forth. Also, the bill would appear to include incidents that do not occur in the traditional places deemed to be private, such as bedrooms, bathrooms, and changing rooms, but also in public places such as on the street or when using public transportation if the act involved photographing, recording, transmitting, etc. images of a person's undergarments or private areas without authorization. In so doing, Michigan will be proactive in creating penalties to both deter such behaviors and also to appropriately punish offenders.

Response:

The bills do not define "reasonable expectation of privacy" and some may argue that there is no expectation of privacy when in a public place. Others may argue that a person does indeed have a "reasonable expectation of privacy" regarding his or her undergarments or certain body parts. Without a definition, some feel it may be up to a court's interpretation when a case comes to trial.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.