

HOUSE BILL ANALYSIS

HB 1407

Title: An act relating to the well-being of children.

Brief Description: Regulating matter that is harmful to minors.

Sponsors: Representatives Sheahan and Mulliken.

HOUSE COMMITTEE ON LAW & JUSTICE

Staff: Edie Adams (786-7180).

Background: The sale, distribution, or exhibition of erotic materials to minors is prohibited by statute (erotic materials statute). This prohibition applies only to materials determined by a court to be "erotic." Following notice to a dealer, distributor, or exhibitor, a county prosecuting attorney may seek a judicial determination that material is erotic. If the material is determined to be erotic, it must be labeled "adults only" and may not be displayed in a manner that makes the material readily accessible to minors. Any person who sells, distributes, or exhibits to a minor material determined by a court to be erotic is guilty of a criminal offense.

In 1994, the Washington Supreme Court held that the erotic materials statute violates the federal constitution. The court held that, although the federal constitution permits states to regulate speech that is obscene as to minors, the provisions of the erotic materials statute violate due process and freedom of speech protections. The court did not rule on whether the erotic materials statute violates the state constitution.

The First Amendment of the federal constitution and Article 1, Section 5 of the state constitution protect freedom of speech. Under both the federal and state constitutions, obscenity is not a protected form of speech and may be regulated or completely prohibited. Protected forms of speech may be regulated to a certain extent depending on the type of speech, the means of regulation, and the government's interest in regulating the speech.

The United States Supreme Court recognizes that protecting children from sexually explicit material is a legitimate governmental purpose which may justify regulation of some protected speech. The Court upheld the use of a variable obscenity standard for minors under the federal constitution. This standard recognizes that material that is not obscene as to adults may be obscene as to minors. States may regulate this

protected material as long as the regulations do not impose unduly burdensome or significant restrictions on adult access to the material.

The Washington Supreme Court has not determined whether and to what extent regulation of protected forms of speech that are obscene as to minors, but not as to adults, is permissible under the Washington State Constitution. The Court has held that the state constitution does not provide greater protection to obscene speech than the federal constitution. However, the court has held that the state constitution provides greater protection than the federal constitution to some forms of protected speech.

Summary of Bill: The statutory prohibitions on distribution and display of erotic materials to minors and providing for the labeling of materials determined by a court to be erotic are repealed. These provisions are replaced with provisions prohibiting the display, sale, or distribution to minors of materials which are "harmful to minors."

No person shall, with knowledge of its character, display, sell, furnish, present, distribute, or disseminate to a minor matter that is harmful to minors, or present to a minor or participate in presenting to a minor any live performance that is harmful to minors.

Material is harmful to minors if it meets the following three-part test: (1) the average adult person applying contemporary community standards would find it appeals to the prurient interest of minors; (2) it explicitly depicts or describes, by prevailing standards in the adult community with respect to what is suitable for minors, patently offensive representations or descriptions of specifically defined conduct; and (3) when considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors.

"Minor" means a person under the age of 18 years. "Community" means the statewide community.

Examples of specifically defined conduct or activity that may be patently offensive include ultimate sexual acts, sexually explicit conduct, sexually explicit nudity, or sexual acts that are violent or destructive. Material that may be harmful to minors includes motion picture films, sexual devices, books, magazines, pamphlets, writings, printings, illustrations, pictures, telephonic communications, or coin-operated machines.

A violation of the act is a gross misdemeanor punishable by up to one year in jail or a \$5,000 fine, or both. Each day a violation continues constitutes a separate offense. Matter is deemed not to be "displayed" if it is kept behind blinder racks that cover the lower two-thirds of the matter, or in the case of cable transmissions, if the operator

notifies the subscriber of the availability of a device that allows a subscriber to prohibit the viewing of a particular cable service.

Providers of electronic communications and telecommunications access or connection are exempt from the act. Museums, historical societies, college and university libraries, and publicly-controlled libraries and archives are exempt from the act.

It is an affirmative defense to an alleged violation of the act that the matter or performance was displayed or disseminated to a minor by the minor's parent or guardian, or with the written permission of the minor's parent or guardian, for bona fide purposes. It is also an affirmative defense that the person made a bona fide attempt to ascertain the true age of the minor by not relying solely on the oral allegations or apparent age of the minor.

The state entirely preempts the field of regulation of matter that is harmful to minors. Local laws that are inconsistent, more restrictive, or less restrictive are preempted and repealed.

Fiscal Note: Not requested.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Office of Program Research