

HOUSE BILL REPORT

HB 2267

As Reported By House Committee On:

Law & Justice

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

Brief Description: Regulating matter that is harmful to minors.

Sponsors: Representatives McMahan, Sheahan, Mulliken, Hargrove, McMorris, Talcott, Thompson, Backlund, Mastin, Robertson, D. Sommers, Johnson, Casada and Boldt.

Brief History:

Committee Activity:

Law & Justice: 1/17/96, 2/2/96 [DPS].

HOUSE COMMITTEE ON LAW & JUSTICE

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Sheahan, Chairman; Delvin, Vice Chairman; Hickel, Vice Chairman; Campbell; Carrell; Chappell; Lambert; McMahan; Morris; Robertson; Smith and Sterk.

Minority Report: Do not pass. Signed by 5 members: Representatives Dellwo, Ranking Minority Member; Costa, Assistant Ranking Minority Member; Cody; Murray and Veloria.

Staff: Edie Adams (786-7180).

Background: Current Washington law prohibits the sale, distribution, or exhibition of "erotic materials" to minors (erotic materials statute). This prohibition applies only to materials determined by a court to be "erotic."

Erotic material is defined as printed material, photographs, pictures, motion pictures, sound recordings, or other material which, taken as a whole, appeals to the prurient interest in sex, is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sadomasochistic abuse, and which is utterly without redeeming social value.

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 is permissible under the Washington State Constitution. The Court has held that the state constitution does not provide to "obscene" speech greater protection 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 Substitute 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 which is harmful to minors or present to a minor or participate in presenting to a minor any live performance which 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 state-wide 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. Matter that may be harmful to minors includes motion picture films, sexual devices, books, magazines, pamphlets, writings, printings, illustrations, pictures, sound recordings, telephonic communications, or coin-operated machines.

Any 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 any public-controlled libraries 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 which are inconsistent, more restrictive, or less restrictive are preempted and repealed.

Substitute Bill Compared to Original Bill: The substitute bill defines "community" as the state-wide community. The substitute bill provides that, in the case of cable transmissions, matter is not displayed if the cable operator informs subscribers of the availability of a device that allows subscribers to prohibit the viewing of a particular cable service. The substitute bill exempts from the act (1) museums, historical

societies, college and university libraries, and any public-controlled library; and (2) providers of electronic communications and telecommunications access or connection.

Appropriation: None.

Fiscal Note: Not requested.

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

Testimony For: Children should not have access to pornographic and obscene material. Currently, the state does not have a constitutionally valid law preventing distribution of obscene material to children. Children become desensitized to obscenity and incorporate it into their lives. Parents should have control over what their children see, and they should have the power of the state to back them up. Thirty-nine other states have laws similar to this, and these laws are being upheld.

Testimony Against: This bill is an unconstitutional restriction on the freedom of speech. It is vague because there is no prior judicial determination that the material is harmful to minors. Libraries and bookstore clerks and owners aren't going to know everything that is in the thousands of books they have, and they won't be able to determine what materials would be considered harmful to minors. This means that people will self-censor material to protect themselves. The intrusion of the government into the realm of artistic expression is offensive.

Testified: Representative McMahan, prime sponsor; Chris Quinn-Brintnall, Pierce County Deputy Prosecuting Attorney (pro); Andrea Vangor, Washington Together Against Pornography (pro); Jean Follow, National Campaign for Freedom of Expression (con); Mark Crawford, Washington State Arts Alliance (con); Richard White, Washington Music Industry Coalition (con); Krist Novacelic, JAMPAC (con); Magda Hitzroth, Pacific Northwest Booksellers Association (con); Winnie Boland, Washington Coalition Against Censorship (con); Bob Seeber, Washington Publication Distributors Association (con); Gary Gardner, Association of Internet Professionals (con, in part); Sharon Hammer, Washington Library Association (suggests amendment); John Veblen, Friends of Seattle Public Library (suggests amendment); Steve Duncan, Washington Software Association (suggests amendment); Ian McGowan, American Electronics Association (suggests amendment); Celia Fritz, Motion Picture Association of America (suggests amendment); Barry Anton, Washington State Psychological Association (with comments); Ron Main, Washington State Cable Association (with concerns); and Marci Gorman, TCI Cablevision (with concerns).