

HOUSE BILL REPORT

ESSB 5466

As Reported By House Committee On:

Law & Justice

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

Brief Description: Protecting children from sexually explicit films, publications, and devices.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Smith, Oke, Heavey, Winsley and Franklin).

Brief History:

Committee Activity:

Law & Justice: 3/22/95, 3/24/95 [DPA].

HOUSE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass as amended. Signed by 11 members: Representatives Padden, Chairman; Delvin, Vice Chairman; Hickel, Vice Chairman; Campbell; Carrell; Chappell; Lambert; McMahan; Robertson; Sheahan and Smith.

Minority Report: Do not pass. Signed by 6 members: Representatives Appelwick, Ranking Minority Member; Costa, Assistant Ranking Minority Member; Cody; Morris; Thibaudeau 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, which 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 labelled "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 a recent case, Soundgarden v. Eikenberry, 123 Wn.2d 750 (1994), the Washington Supreme Court held the current erotic materials statute unconstitutional. The court held that, although the state may regulate speech which is obscene as to minors, the provisions of the erotic materials statute violate due process and freedom of speech.

Both the federal and state constitutions protect freedom of speech. However, "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 has 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.

Summary of Amended Bill: The statutory prohibitions on distribution and display of erotic materials to minors and providing for the labelling 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 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.

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 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 on-line access to matter stored in an electronic form, if the matter is stored in a restricted area where access is allowed only to persons reasonably believed to be 18 years of age or older and who have obtained a password for access, or if restricted access is not possible, is stored in an area labelled "adults only."

Materials that can be harmful to minors include 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.

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 of Washington 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.

Amended Bill Compared to Engrossed Substitute Bill: The amended bill adds definitions of "sexually explicit conduct," "sexually explicit nudity," and "sexual conduct," amends the definition of "sexual device," and adds sound recordings to the definition of "publication."

The amended bill deletes exemptions for historical societies, museums, libraries, public schools, health care providers, cable operators, providers of on-line services, devices designed for contraceptive purposes, and depictions of breast-feeding.

The amended bill adds that matter is not displayed, in the case of on-line access to information stored in a computer form, if access is restricted to persons 18 or older or the matter is displayed in an area labelled "adults only." The amended bill deletes the provision stating that matter is not displayed, in the case of cable operators, if the cable operator provides a device by which a subscriber can prohibit viewing of a particular transmission.

The amended bill adds an emergency clause.

Appropriation: None.

Fiscal Note: Not requested.

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

Testimony For: Parents have the right to protect their children from harmful material, and parents should have the power of the state to back them up. Children currently have access to pornography and they are being groomed with it for sexual abuse. Sound recordings should be included because the lyrics in some of these recordings are instructional and teach minors about sexual conduct they otherwise would not know about. Libraries should be included because they contain pornographic material and do not restrict children's access to it.

Testimony Against: This bill is unconstitutional censorship of protected material. It is vague because there is no way to know what material is included. There is no prior judicial determination that an item is harmful, and there is no possible way that a store owner can read or review all material that is received. Channels of communication should be opened, not closed by restricting access to information. The state should not and cannot effectively be involved in parenting.

Testified: Steve Hubbard and Joy Jones, Naturist Action Committee (pro); Chris Quinn-Brintnall, Washington Association of Prosecuting Attorneys and Pierce County Prosecuting Attorney's Office (pro); Andrea Vangor, Washington Together Against Pornography (pro); Michele Ray, Citizenship Committee (pro); Celia Fritz, Motion Picture Association of America (pro); Bob Seeber, Washington Publications Distributors (con); Winnie Boland, Washington Coalition Against Censorship (con); Gretta Harley, Home Alive (con); Richard T. White, Washington Music Industry Coalition (con); and Stu Halsan, Recording Industry Association of America (with amendment).