



**Senate Fiscal Agency**  
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BILL ANALYSIS



Telephone: (517) 373-5383  
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Senate Bill 762 (Substitute S-2 as reported)  
Senate Bill 763 (Substitute S-1 as reported)  
House Bill 5076 (Substitute S-1 as reported)  
Sponsor: Senator Joe Conroy (S.B. 762 & 763)  
Representative Clyde LeTarte (H.B. 5076)  
House Committee: Judiciary and Civil Rights (H.B. 5076)  
Senate Committee: Judiciary

Date Completed: 2-13-96

**RATIONALE**

Reportedly, before 1974, when the criminal sexual conduct (CSC) provisions of the Michigan Penal Code replaced the older "carnal knowledge" statute, incest was prohibited by law regardless of the ages of the people involved. While the CSC provisions of the Penal Code do criminalize sexual penetration and sexual contact with children under 16 years old, the Code does not prohibit this conduct between relatives who are 16 years old or older, unless the victim is mentally or physically disabled. According to a recent Detroit News article, the National Conference of State Legislatures says that this leaves Michigan and New Jersey as the only two states in which incest is not against the law. Two recent highly publicized incest cases, one in Holly and one in Hillsdale County, have brought attention to Michigan's CSC laws.

In the Holly case, a man evidently impregnated his three daughters over a dozen times, but he escaped legal penalties until he was convicted for repeatedly raping his granddaughter (who may also be his daughter) over a three-year period starting when she was 10. Reportedly, four of the children the man allegedly fathered with his daughters died from severe congenital defects, while others suffer from medical problems ranging from mild disabilities, such as club feet and webbed fingers, to severe mental retardation and a serious muscle disorder that prevents one child from breathing without a ventilator. Many of these abnormalities apparently are typically associated with children conceived during incest.

In the Hillsdale incident, a man reportedly fathered eight children, two of whom apparently died of natural causes, with his daughter, who was 27

years old when she gave birth to their eighth child in March 1995. In this case, too, the father was not charged in connection with any of the births resulting from the incestuous relationship. Instead, he and his daughter were arrested on charges of child abuse for not adequately feeding their then-youngest child. According to the Detroit News article, the father was convicted of third-degree child abuse, and served a year in jail.

Some people believe that, in order to discourage incestuous relationships and punish those who engage in incestuous behavior, as well as to avoid the genetic deficiencies and medical abnormalities that often are characteristic of children of incestuous relationships, sexual activity between close relatives, regardless of age, should be prohibited.

**CONTENT**

**Senate Bill 762 (S-2) and House Bill 5076 (S-1) would amend the Michigan Penal Code to criminalize as criminal sexual conduct "sexual penetration" and "sexual contact" that occurred between persons related by blood or affinity to the third or fourth degree. The violations would not apply if both persons were lawfully married to each other at the time of the alleged violation. Also, it would be an affirmative defense to a prosecution for any of the offenses that the other person was in a position of authority over the defendant and used that authority to coerce the defendant to violate the prohibition. The defendant would have the burden of proving this defense by a preponderance of the evidence.**

**Senate Bill 763 (S-1) would amend Public Act 189 of 1966, which provides procedures for obtaining and executing search warrants, to provide for the issuance of a warrant for the search and seizure of hair, tissue, or blood or other fluid samples in a CSC investigation involving relatives.**

The bills would take effect on June 1, 1996. Senate Bill 762 (S-2) and House Bill 5076 (S-1) are tie-barred to each other, and Senate Bill 763 (S-1) is tie-barred to Senate Bill 762 and House Bill 5076.

### **Senate Bill 762 (S-2)**

Under the bill, a person would be guilty of first-degree CSC if he or she engaged in sexual penetration with another person who was at least 13 but less than 18 years of age and related to the actor by blood or affinity to the fourth degree. First-degree CSC is a felony, punishable by imprisonment for life or any term of years.

A person would be guilty of second-degree CSC if he or she engaged in sexual contact with another person who was at least 13 but less than 18 years of age and related to the actor by blood or affinity to the fourth degree. Second-degree CSC is a felony, punishable by up to 15 years' imprisonment.

Currently, an instance of sexual penetration is first-degree CSC, and an instance of sexual contact is second-degree CSC, when the actor is related to the victim by blood or affinity to the fourth degree, but only if the victim either is at least 13 but less than 16 years of age or is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless. The bill would delete that prohibition, with respect to age, but would retain the violation with respect to mental or physical disabilities. The bill's affirmative defense provision, described above, would apply to this violation.

### **Senate Bill 763 (S-1)**

If a court had probable cause to believe that a person committed first-, second-, third-, or fourth-degree CSC involving someone related to the actor by blood or affinity to the third or fourth degree, the court, upon proper petition for a search warrant, would have to authorize the search and seizure of hair or tissue, or blood or other fluid samples from all of the following:

- Any individual whom the court had probable cause to believe had committed the violation.
- A child, if the court had probable cause to believe that the violation resulted in the birth of that child.
- The remains of an unborn child, if the court had probable cause to believe that the violation resulted in a pregnancy that was terminated before the birth of the child.

The bill would not prohibit the court from issuing a search warrant for other evidence as considered appropriate by the court.

### **House Bill 5076 (S-1)**

Under the bill, a person would be guilty of third-degree CSC if he or she engaged in sexual penetration with another person who was at least 18 years of age and related to the actor by blood or affinity to the third degree. Third-degree CSC is a felony, punishable by up to 15 years' imprisonment.

A person would be guilty of fourth-degree CSC if he or she engaged in sexual contact with another person who was at least 18 years of age and related to the actor by blood or affinity to the third degree. Fourth-degree CSC is a misdemeanor, punishable by up to two years' imprisonment, a maximum fine of \$500, or both.

MCL 750.520b & 750.520c (S.B. 762)  
Proposed MCL 780.652a (S.B. 763)  
MCL 750.520d & 750.520e (H.B. 5076)

### **SENATE COMMITTEE ACTION**

The House-passed version of House Bill 5076 would have classified as third-degree CSC engaging in sexual penetration with a person related to the actor by blood or affinity to the third-degree, regardless of age. Similarly, engaging in sexual contact with a person related to the actor by blood or affinity to the third-degree, regardless of age, would have been classified as fourth-degree CSC.

The Senate Judiciary Committee adopted a substitute (S-1) to House Bill 5076 that would classify those acts as third- and fourth-degree CSC only if the other person were at least 18 years of age. (This distinction complements Senate Bill 762 (S-2), which would make the offenses first- or second-degree CSC if the other person were at

least 13 but less than 18 years old and related to the actor by blood or affinity to the fourth degree.) The Senate substitute also provides that a defendant would have the burden of proving the bill's affirmative defense by a preponderance of the evidence. The House-passed version of House Bill 5076 included the affirmative defense, but did not specify the burden or standard of proof.

## **BACKGROUND**

Degrees of Criminal Sexual Conduct. The Michigan Penal Code divides CSC crimes into four degrees. First- and third-degree CSC involve "sexual penetration"; second- and fourth-degree CSC involve "sexual contact". First-degree CSC is a felony, punishable by imprisonment for life or any term of years; second- and third-degree CSC are felonies, punishable by up to 15 years' imprisonment; and fourth-degree CSC is a misdemeanor, punishable by up to two years' imprisonment and/or a \$500 fine.

"Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required". "Sexual contact" is defined as "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification".

Degrees of Relationship. People related to the *first degree* are one's parents or children. *Second-degree* relatives include siblings, grandparents, and grandchildren. *Third-degree* relations include aunts, uncles, nieces, nephews, great-grandparents, and great-grandchildren. *Fourth-degree* relatives include first cousins, great uncles, great aunts, grand nieces, grand nephews, great-great grandparents, and great-great grandchildren. "Affinity" refers to relationships by marriage.

## **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 bills would close a significant gap in the existing criminal sexual conduct law, which does not prohibit incest between presumably consenting individuals at least 16 years of age. The two fathers in the recent incest cases in Holly and in Hillsdale County were never charged with any crime in connection with the births that apparently resulted from their sexual relations with their daughters. Instead, one father was prosecuted for raping his granddaughter over a three-year period starting when she was 10 years old. In the other case, the father was arrested for child abuse for failing adequately to feed one of the children resulting from the incest. Although the inability to prosecute for incest evidently was partly due to the difficulty of gathering more than circumstantial evidence and to an expired statute of limitations, it also was due to the fact that the daughters involved were 16 or older when at least some of the children resulting from the incestuous relationships were born.

No law can completely prevent incest or the sexual abuse of children, but the bills would make it clear that incest was a crime and would allow its prosecution regardless of the ages of the people involved. Also, although both partners in adult incestuous relationships conceivably could be charged with a crime, the bills recognize that often one of the two supposedly consenting partners really is a victim in the incestuous relationship and would provide for an affirmative defense in those circumstances. As is the case with abusive relationships in general, some incest victims apparently stay in the relationship with their partner long after reaching the age of consent because the established pattern of sexual abuse makes it difficult, if not impossible, for the victim to escape the relationship. In fact, according to one law review article, incestuous conduct usually begins when a child is quite young, and progresses to sexual intercourse as the child grows older and matures physically. Since the victim fails to recognize the subtle coercion being used by the family member (especially if this is the only warmth and affection available in the family), overt force usually is absent, and there is at least the appearance that the victim is consenting to the incestuous relationship (Katz, *Incestuous Families*, Detroit College of Law Review, 1:79, 1983). By providing that coercion by an authority figure would be an affirmative defense, the bills would protect

the real victim in the relationship. So, if a woman were charged with incest but could show that she had been coerced into the relationship by her father, for instance, she would not be in violation of the bills.

### **Supporting Argument**

The bills could prevent medical problems arising from the expression of recessive genes that incest makes more likely. While incest does not actually cause genetic problems, incestuous unions increase the likelihood that recessive genes carried by members of the same family will be expressed in the offspring of those unions. Recessive genes can carry traits that can cause medical problems or even be life-threatening to a child born of an incestuous union. By allowing the prosecution of incest even between legal adults, the bills could deter that activity and thereby reduce the possibility of producing these medically at-risk children.

### **Supporting Argument**

By extending the prohibition at the 18-and-over level only to people related to the third degree (instead of to the fourth degree, as with the current, limited CSC prohibitions) and by exempting lawfully married people, the bills would recognize legal marriages. At least one state (Kentucky) reportedly permits marriage between first cousins (who are related to the fourth degree), and, in some foreign cultures, marriages between first cousins apparently are customary. In addition, Michigan's law regarding marriage (MCL 551.3) is not as restrictive as the bill, at least regarding those related by affinity. For instance, a man may marry his brother's former wife (a first-degree relative by affinity). The bills would recognize the legality of these marriages.

### **Supporting Argument**

Prohibiting all incestuous relationships, including those between consenting adults, would not be sufficient to address the problem without giving the law enforcement community the tools needed to investigate effectively cases of suspected incest. By providing for court-ordered search warrants for the search and seizure of hair, tissue, blood, or other fluid samples, Senate Bill 763 (S-1) would facilitate genetic testing that could prove the existence of an incestuous relationship.

### **Opposing Argument**

Even if all incest were criminalized, some experts argue that the ideal intervention system for incest, while keeping criminal sanctions for extreme situations, would be to expand therapeutic, noncriminal alternatives as well. As the Detroit

College of Law Review article noted, "For the child and family, the court process can be as difficult as the sexual abuse itself." The child often is removed from the home as a protective measure, but even while providing at least temporary protection from incestuous sexual abuse, removal from the home also is disruptive for the child, who may feel isolated and frightened. The child also may be subjected to repeated questioning by strangers in order to prepare for various court procedures; being required repeatedly to describe the abusive behavior can be quite embarrassing for the child and can result in "a creeping suspicion of the victim's veracity", according to the article. Perhaps there should be more of an emphasis in incest cases on family rehabilitation through therapeutic treatment, instead of just punishment of offenders through criminal sanctions.

Legislative Analyst: P. Affholter

### **FISCAL IMPACT**

Senate Bill 762 (S-2) and House Bill 5076 (S-1) could result in additional costs for the Department of Corrections for incarcerating violators of the bills' provisions.

There are no data readily available on the potential number of new commitments that might result from the bills' new provisions regarding incest. For information, in 1994, there were 287 commitments to the Department of Corrections for first-degree CSC, with an average minimum sentence of 13 years; 262 commitments for second-degree CSC, with an average minimum sentence of just over four years; 270 prison commitments for third-degree CSC, with an average minimum sentence of four years; and 46 prison commitments for fourth-degree CSC, with an average minimum sentence of 1.3 years.

If one assumed an increase of five new annual prison admissions for each degree of criminal sexual conduct (first through fourth) involving incest, then costs of incarceration in the long term could increase by approximately \$1.65 million.

Senate Bill 763 (S-1) would have no fiscal impact on State or local government.

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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.