

Legislative Analysis



ELIMINATE CRIME OF SODOMY BETWEEN CONSENTING ADULTS

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4431 as reported from committee
Sponsor: Rep. Noah Arbit

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4432 as reported from committee
Sponsor: Rep. Emily Dievendorf

House Bill 4433 (H-2) as reported from committee
Sponsor: Rep. Carrie Rheingans

Committee: Criminal Justice
Complete to 12-13-24

SUMMARY:

House Bill 4431 would amend the Michigan Penal Code to remove its prohibition against sodomy (anal sex). The law currently prohibits both sodomy and bestiality (sex with an animal) in the same provision, under the terms “sodomy” and “the crime against nature.” The bill would keep the prohibition against bestiality. As currently, violation would be a felony punishable by imprisonment for up to 15 years or, for a sexually delinquent person (see **Background**, below), an indeterminate term of one day to life. As currently, any sexual penetration, however slight, would constitute an offense. It would not be necessary to prove emission (ejaculation).

MCL 750.158 and 750.159

House Bill 4432 would amend 1925 PA 289, which deals with the collection and retention of the biometric data (fingerprints, palm prints, photographs, descriptions of physical identifiers such as scars or tattoos) of individuals arrested for crimes punishable by imprisonment for 93 days or more. The act requires this data to be destroyed if the person is found not guilty of the offense (or, for a juvenile, found not to be under the jurisdiction of the court). However, this does not apply to a person arraigned for sodomy or bestiality, whose biometric data is destroyed only if the charge is dismissed before trial and the prosecutor and judge do not object. The bill would remove sodomy from this exception (it would still apply for bestiality).

MCL 28.243

House Bill 4433 would amend the Code of Criminal Procedure to remove sodomy from the sentencing guidelines. Bestiality would remain a Class E felony against the public order with a statutory maximum term of imprisonment of 15 years. The bill also would remove sodomy from a provision that allows an examining magistrate to close to the public the preliminary examination of individuals charged with certain crimes. This provision also would continue to apply with regard to bestiality.

MCL 766.9 and 777.16i

BACKGROUND:

Sodomy

While sodomy has generally come to refer to anal sex, historically and legally it has included several different kinds of sexual activity that are other than heterosexual sexual intercourse. The definition of sodomy that applies under Michigan law is derived from the common law and includes anal sex and bestiality, but does not include oral sex.¹

Michigan's prohibition against sodomy, while still on the books, is not enforceable regarding sex between consenting adults. In 2003, in *Lawrence v Texas*, the United States Supreme Court ruled that state laws that criminalize private sexual acts between consenting adults are unconstitutional based on a due process right of privacy.

Sexual delinquency

As described above, the penalties for violation of the prohibition against sodomy are different if the offender is a *sexually delinquent person*, which is defined in section 10a of the Penal Code as “any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or by the commission of sexual aggressions against children under the age of 16.”

A defendant has to be charged with and convicted of sexual delinquency. The charge can be brought only in conjunction with a charge for sodomy, indecent exposure, or gross indecency, and the defendant can be convicted of sexual delinquency only in conjunction with a conviction on that principal charge. Even when a defendant pleads guilty to the principal charge, a separate hearing must be held on the sexual delinquency charge. Sexual delinquency must generally be proved beyond a reasonable doubt. If the trial court determines it necessary, proceedings can be split in half or separate trials can be held on the principal charge and the sexual delinquency determination. However, sexual delinquency is a matter of sentencing and not an element of the principal offense or itself a separate criminal offense. A defendant found to be a sexually delinquent person is subject to an indeterminate term of imprisonment with a minimum of one day and a maximum of life.² This is an alternative sentencing option available to the court in those cases. The court also has the discretion to sentence the defendant under the terms of the principal offense.

¹ See *People v Dexter* (1967), 6 Mich App 247, which provides this overview of the relationship between sodomy and oral sex in Michigan law: “Michigan follows the common-law definition of sodomy. *People v. Hodgkin* (1892), 94 Mich 27. At common law, sodomy covered only copulation *per anum*. ‘Penetration *per os* did not constitute sodomy, or the “crime against nature”,’ *People v. Schmitt* (1936), 275 Mich 575, 577, and cases therein cited. The legislature has shown no inclination to depart from the common-law definition of sodomy. Penetration *per os*, fellatio, is prohibited by the gross indecency statute. *People v. Schmitt*, supra. The elements of gross indecency and sodomy differ.” (https://scholar.google.com/scholar_case?case=12829077089295999180)

The provisions of the Michigan Penal Code that prohibit oral sex (“gross indecency”) are sections 338 (male-male), 338a (female-female), and 338b (male-female). As related to private consensual acts, those prohibitions are also at this time unenforceable under *Lawrence v Texas*.

² This does not mean that the court can choose any minimum and maximum in determining a sentence, but rather that the sentence must literally be “imprisonment for a term of one day to life.”

FISCAL IMPACT:

The bill would have no fiscal impact on state or local government.

POSITIONS:

The following entities indicated support for the bills (12-3-24):

- ACLU Michigan
- Equality Michigan Action Network
- Prosecuting Attorneys Association of Michigan

Legislative Analyst: Rick Yuille
Fiscal Analyst: Robin Risko

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