

Legislative Analysis



FALSE REPRESENTATION IN ASSISTED REPRODUCTION

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

House Bill 5713 as introduced
Sponsor: Rep. Karen Whitsett

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

House Bill 5714 as introduced
Sponsor: Rep. Bronna Kahle

House Bill 5715 as introduced
Sponsor: Rep. Kelly Breen

House Bills 5716 (proposed substitute H-2)
and 5717 as introduced
Sponsor: Rep. John R. Roth

1st Committee: Health Policy
2nd Committee: Judiciary
Complete to 3-21-22

SUMMARY:

House Bill 5716 would prohibit providing false or misleading information related to an assisted reproduction procedure; prohibit a health professional from using an embryo, sperm, or egg in such a procedure that is not the one the patient consented to; and provide that it is criminal sexual conduct in the third degree for a health professional to use their own embryo, sperm, or egg in such a procedure without the patient's knowledge and consent. House Bills 5713, 5714, 5715, and 5717 would make related changes concerning, respectively, statutes of limitations, civil liability, health professional sanctions, and sentencing guidelines.

House Bill 5716 would amend the Michigan Penal Code to create three felonies related to *assisted reproduction*, defined as a method of causing pregnancy other than sexual intercourse.

False representation in assisted reproduction

First, the bill would provide that a person who engages in a practice or act the person *knows* or reasonably should know provides false or misleading information related to an assisted reproduction procedure is guilty of a felony punishable by imprisonment for up to five years or a fine of up to \$50,000, or both. Such a practice or act would include making a false or misleading representation relating to any of the following:

- The *human embryo* or *gamete* used or provided for assisted reproduction.
- The identity of a *donor* of the human embryo or gamete used or provided for assisted reproduction, including the donor's name, birthdate, or address at the time of donation.
- A donor's medical history, including present illness at the time of donation; any past illnesses of the donor; the *social history*, genetic history, or *family history of the donor*; or the donor's education, ethnicity, or religious background.

Know or *knowingly* would mean that a health professional or other person undertook an action with knowledge and not because of mistake, accident, or other innocent reason.

Human embryo would mean a human organism at any stage of development from fertilized ovum to embryo.

Gamete would mean sperm, egg, or any part of a sperm or egg.

Donor would mean an individual who provides gametes intended for use in assisted reproduction, regardless of whether the individual receives financial compensation for the donation.

Social history of the donor would mean the personal and sexual history of the donor pertaining to risk factors for relevant communicable disease transmissible via gamete donation.

Family history of the donor would mean the complete medical history of the first-, second-, and third-degree relatives of the donor.

Use of another embryo or gamete

Second, the bill would provide that a ***health professional*** who ***knowingly*** or recklessly uses or provides a human embryo or gamete for assisted reproduction other than the specific one the ***patient*** expressly consented to in writing is guilty of a felony punishable by imprisonment for up to five years or a fine of up to \$100,000, or both.

Health professional would mean an individual licensed, registered, certified, or otherwise authorized to engage in a health profession under Article 15 (Occupations) of the Public Health Code.¹

Patient would mean an individual under the care of a health professional.

Criminal sexual conduct in the third degree

Third, the bill would provide that a health professional who knowingly or recklessly causes the health professional's own human embryo or gamete to be implanted into a patient through assisted reproduction without the patient's prior knowledge and express written consent is guilty of criminal sexual conduct in the third degree. (The term "knowingly" would not be specifically defined for purposes of this provision.)

Criminal sexual conduct in the third degree is a felony punishable by imprisonment for up to 15 years, with a mandatory minimum sentence of at least five years for a conviction for a second or subsequent offense.² In addition, a person convicted for criminal sexual conduct in the third degree is subject to specific provisions of other Michigan laws, such as concerning seizure and forfeiture under the Revised Judicature Act, registration under the Sex Offenders

¹ Health care professions licensed or registered under Article 15 of the Public Health Code include acupuncturists, athletic trainers, audiologists, behavior analysts, chiropractors, counselors, dental assistants, dental hygienists, dentists, genetic counselors, marriage and family therapists, massage therapists, midwives, nurses, nursing home administrators, occupational therapists and occupational therapy assistants, optometrists, pharmacists and pharmacy technicians, physical therapists and physical therapy assistants, physician's assistants, physicians, podiatrists, psychologists, respiratory therapists, sanitarians, social workers and social service technicians, speech-language pathologists, and veterinarians and veterinarian technicians.

² For purposes of these provisions, an offense is considered a second or subsequent offense if, prior to conviction of the second or subsequent offense, the actor has at any time been convicted under section 520b, 520c, or 520d of the Michigan Penal Code or under any similar statute of the United States or any state for a criminal sexual offense, including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense. Sections 520b, 520c, and 520d respectively prohibit criminal sexual conduct in the first, second, and third degrees.

Registration Act, parole under the Corrections Code, and expungement under 1965 PA 215, among several others.

The bill would take effect 90 days after the date it is enacted.

MCL 750.520d and proposed MCL 750.219g

House Bill 5717 would amend the Code of Criminal Procedure to add the felonies that would be created under HB 5716 to the sentencing guidelines as follows:

- False representation with regard to specific circumstances regarding an assisted reproduction procedure would be a class E crime against a person with a statutory maximum term of imprisonment of five years.
- Knowingly using a human embryo or gamete other than the one agreed to by the patient in an assisted reproduction procedure would be a class E crime against a person with a statutory maximum term of imprisonment of five years.
- Criminal sexual conduct in the third degree by a health professional using their own human embryo or gamete for assisted reproduction without consent would be a class A crime against a person with a statutory maximum term of imprisonment of fifteen years. (Criminal sexual conduct in the third degree is now and otherwise a class B crime against a person.)

The bill would take effect 90 days after the date it is enacted and would not take effect unless HB 5716 were also enacted.

MCL 777.16l and 777.16y

House Bill 5713 would amend statute of limitations provisions in the Code of Criminal Procedure to provide that an indictment for criminal sexual conduct in the third degree by a health professional using their own human embryo or gamete for assisted reproduction without consent could be found and filed within 15 years after the offense. However, if evidence of the offense were obtained and that evidence contained DNA determined to be from an unidentified individual, an indictment could be found and filed at any time after the offense was committed, except that it would have to be filed within 15 years after the identification of the individual.

The bill would take effect 90 days after the date it is enacted and would not take effect unless HB 5716 were also enacted.

MCL 767.24

House Bill 5714 would amend the Revised Judicature Act to provide that a *person* that engages in *false representation in assisted reproduction* is liable to an individual injured by that false representation (as described below) for one or more of the following:

- Economic and noneconomic damages.
- Punitive damages.
- Reasonable attorney fees and costs.

False representation in assisted reproduction would mean conduct or a practice of conduct described in section 219g(1) of the Michigan Penal Code. (This provision

would be added by HB 5716 and is described above under “False representation in assisted reproduction.”)

Person would mean an individual or a partnership, corporation, limited liability company, association, or other legal entity.

Any individual who is injured by a false representation in assisted reproduction could bring an action under the bill, including any of the following individuals:

- The patient who gives birth to a child conceived through assisted reproduction as a result of the false representation.
- The patient’s spouse at the time the patient used the assisted reproduction services.
- An individual conceived through assisted reproduction as a result of the false representation.
- A donor whose gamete or human embryo resulted in the birth of a child as a result of the false representation.

An individual bringing an action under the bill would have a separate cause of action for each child born as a result of the false representation in assisted reproduction. An action under the bill would have to be brought no later than three years after the individual bringing the action discovers the false representation in assisted reproduction. An action under the bill would be in addition to any other criminal or civil penalties or remedies provided by law.

The bill would not take effect unless HB 5716 were also enacted.

Proposed MCL 600.2980

House Bill 5715 would amend sections 16221 and 16226 of the Public Health Code. Section 16221 requires the Department of Licensing and Regulatory Affairs (LARA) to investigate an allegation that one or more grounds for disciplinary subcommittee action exist concerning a licensee, registrant, or applicant for licensure or registration under the code. The investigation includes conducting hearings, administering oaths, and ordering relevant testimony to be given, and its findings are then reported to the appropriate disciplinary subcommittee. After finding the existence of one or more grounds for disciplinary subcommittee action, a disciplinary subcommittee must impose one or more of the sanctions listed in section 16226 that apply to the specific violation.

The bill would provide that a final order or judgment against a licensee or registrant under the provisions of House Bill 5714 constitutes grounds requiring subcommittee action, with sanctions for a violation including probation; limitation, denial, suspension, revocation, or permanent revocation of the health professional’s license or registration; restitution; or a fine.

The bill also would provide that a conviction for a violation of section 219g of the Michigan Penal Code constitutes grounds requiring disciplinary subcommittee action. (Section 219g would be added to the Penal Code by HB 5716 and is described above under “False representation in assisted reproduction” and “Use of another embryo or gamete.”) Sanctions for a violation would include probation; limitation, denial, suspension, revocation, or permanent revocation of the health professional’s license or registration; restitution; or a fine.

(Note that a conviction for criminal sexual conduct in the third degree is currently grounds for disciplinary subcommittee action, with a mandatory sanction of permanent license or registration revocation if the violation occurred while the licensee or registrant was acting within the health profession for which licensed or registered, and sanctions that otherwise include probation; limitation, denial, suspension, or revocation of the license or registration; restitution; or a fine.)

The bill would not take effect unless HBs 5714 and 5716 were also enacted.

MCL 333.16221 and 333.16226

FISCAL IMPACT:

House Bill 5713 is a companion bill to HB 5716 that would establish a 15-year statute of limitations provision for an indictment of a health professional who used their own human embryo or gamete for assisted reproduction without the knowledge and consent of the patient. The bill would not have a direct or immediate fiscal impact on the state or on local units of government.

House Bill 5714 would have an indeterminate fiscal impact on local court systems to the extent provisions of the bill affected court caseloads and related administrative costs. It is difficult to project the actual fiscal impact to courts due to variables such as law enforcement practices, prosecutorial practices, judicial discretion, case types, and complexity of cases.

House Bill 5715 would be unlikely to have a significant fiscal impact on any unit of state or local government. Under the bill, convictions related to providing false or misleading information regarding an assisted reproduction procedure or final orders or judgments regarding engaging in false representation in assisted reproduction would be grounds for departmental disciplinary action under the Public Health Code. Such disciplinary action could include action against an individual's license or imposition of restitution or a fine. The impacts of any fine collections or future losses of revenue from licensure revocation would likely be negligible, given that violations would be expected to be infrequent.

House Bill 5716 would have an indeterminate fiscal impact on the state and on local units of government. Under the bill, violations for false representation in assisted reproduction, a health professional's use of another embryo or gamete for assisted reproduction, and/or a health professional's use of their own human embryo or gamete for assisted reproduction without the patient's knowledge and consent would be felonies with varying imprisonment terms and fine amounts.

New felony convictions would result in increased costs related to state prisons and state probation supervision. In fiscal year 2021, the average cost of prison incarceration in a state facility was roughly \$44,400 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$4,600 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue.

The fiscal impact on local court systems would depend on how provisions of the bill affected court caseloads and related administrative costs. It is difficult to project the actual fiscal impact

to courts due to variables such as law enforcement practices, prosecutorial practices, judicial discretion, case types, and complexity of cases.

Any increase in penal fine revenue would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

House Bill 5717 is a companion bill to HB 5716 and amends sentencing guidelines to include false representation in assisted reproduction, a health professional's use of another embryo or gamete for assisted reproduction, and a health professional's use of their own human embryo or gamete for assisted reproduction without the patient's knowledge and consent. The bill would not have a direct fiscal impact on the state or on local units of government.

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■ 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.