

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government--this bill creates a ten member task force that sunsets on July 1, 2006.

B. EFFECT OF PROPOSED CHANGES:

Current situation

Florida law provides a three-part definition of the term "drug paraphernalia." First, s. 893.145, F.S., defines the term's general meaning. Second, this section provides a non-exclusive list of items that meet the term's definition. Some items on the list are specifically designed to aid drug use but others have legitimate, non-drug-related uses, such as balloons and duct tape. Third, s. 893.146, F.S., provides a non-exclusive list of factors for determining whether an item or object is drug paraphernalia.

Section 893.147, F.S., proscribes the possession, use, manufacture, delivery, transportation, and advertisement of drug paraphernalia and provides for penalties. For example:

- It is a first degree misdemeanor to use or possess with intent to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of ch. 893, F.S.
- It is a third degree felony to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of ch. 893, F.S.; or to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of ch. 893, F.S.¹
- It is a third degree felony to use, possess with the intent to use, or manufacture with the intent to use drug paraphernalia, knowing or under circumstances in which one reasonably should know that it will be used to transport a controlled substance in violation of ch. 893, F.S., or contraband, as defined in s. 932.701(2)(a)1., F.S.

However, proving requisite intent is often difficult because some items sold have multiple and legal uses² or contain features that may suggest a use other than an illegal use or support a claim that the item is not being sold for an illegal use.³

A "head shop" is a term defining a type of establishment allegedly specializing in selling drug paraphernalia. There has been a longstanding tension between "head shop" owners and law enforcement, prosecutors, and some communities over the sale of such items. Head shop owners

¹ "The statute does not require that a person unequivocally know that the paraphernalia will be used for an illicit purpose; rather the state must only show that the defendant knew or reasonably should have known that the drug paraphernalia would be used for such purposes. It is important to note that the intent at issue in the statute is that of the seller/defendant, not that of the buyer." *Baldwin v. State*, 498 So.2d 1385, 1386 (Fla. 5th DCA 1986).

² In *Subuh v. State*, 732 So.2d 40, 44 (Fla. 2d DCA 1999), the court noted that a glass pipe sold by the defendant and which police claimed was a crack pipe was "very similar to the 'glass tube' or 'pipette' commonly found in any chemistry laboratory or glass 'straw' formerly used in hospitals for patients to drink liquids, except this one was shorter." The court stated that "[a]lthough we are hard pressed to think of a probable lawful use for this tube when purchased from this location, there are many lawful uses for glass tubing."

³ For example, store owners arrested in a drug paraphernalia sting claim that they are selling glass tubes with miniature roses as "ornamental novelty items"; the police claim the tubes are "nothing but ready-made crack pipes." Stores accused of selling glass tubes for crack pipes. *St. Petersburg Times* (December 31, 1998).

argue that they only engage in legitimate business activities and that they only sell such items for legitimate uses, such as for use in smoking tobacco. They contend that possession, sale, and purchase of such items are not per se illegal. They further contend that many of the same items they sell in their shops are also sold in convenience stores and general retail stores and over the Internet.

Law enforcement, prosecutors, and opponents of head shops argue that, despite the claims of head shop owners that they sell such items only for legitimate uses, the owners are really engaged in selling drug paraphernalia to illicit substance users and producers. They contend that some of the items sold by head shop owners have little or no real use to the general public outside of the illicit drug trade. Further, they contend that the prevalence or number of such items within one establishment and as part of the establishment's total inventory indicate that the true motive of head shop owners is to profit from the illicit drug trade under the pretext of engaging in a legitimate business.

Some communities have raised concerns that head shops adversely affect quality of life, increase accessibility to drug paraphernalia, and attract or engage in criminal activity. Communities throughout the nation have taken different approaches to address concerns about head shops, including outright prohibition; moratoriums on new licenses; special business classifications; nuisance abatement; fees and compliance checks on head shops that sell tobacco paraphernalia; limitations on hours of operation, window displays, and signage; lighting or security requirements; zoning; annexation of commercial properties; development standards; separation buffers; public education campaigns; media advisories of enforcement actions; and enforcement actions relating to violations of local ordinances or state laws.

Proposed changes

This bill creates the Drug Paraphernalia Abatement Task Force within the Executive Office of the Governor. The task force is to recommend strategies and actions for abating access to and the use and proliferation of drug paraphernalia, as that term is defined in s. 893.145, F.S.

The task force consists of six members appointed by the Governor:

- A representative of a corporation that is licensed to do business in this state and that sells any of the items described in s. 893.145, F.S.;
- A local law enforcement official or officer;
- A member of a faith-based community;
- A superintendent of a school district or a principal of a secondary school;
- A member of a community organization concerned about issues relating to illicit activities involving controlled substances; and
- A former or recovering drug addict.

These members must be representative of the geographic regions and ethnic and gender diversity of this state.

Other members include the Secretary of Business and Professional Regulation or his or her designee and the director of the Office of Drug Control within the Executive Office of the Governor.

The first meeting of the task force must be held by July 15, 2005, at which time the members must select by majority vote a chairperson from among the task force members. All recommendations of the task force are by majority vote. The task force meets at the call of the chairperson and must conduct at least three public meetings in localities throughout this state which have a significant urban business district or have experienced problems with illicit controlled-substance activity resulting, in part, from access to and the use and proliferation of drug paraphernalia.

Meetings of the task force are open to the public and are subject to the requirements of ch. 119, F.S. Records of the task force are public records and subject to the requirements of ch. 119, F.S., except to the extent that public access to any of those records may be restricted pursuant to that chapter.

Members of the task force serve without compensation, but are entitled to reimbursement for per diem and travel expenses in accordance with s. 112.061, F.S. The task force is staffed by the Office of Drug Control within existing appropriations.

The task force is required to study and take testimony regarding:

- The problem of access to and the use and proliferation of drug paraphernalia in this state;
- Businesses that sell items that may be used as drug paraphernalia;
- Current laws and rules and current efforts by regulatory agencies and law enforcement agencies to abate access to, use and proliferation of drug paraphernalia, including, whether new or amended laws and rules are needed; and
- Approaches to abate access to and the use and proliferation of drug paraphernalia.

The task force must submit a preliminary draft report of its findings and recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives at least 45 days before the first day of the 2006 Regular Session of the Legislature and must submit its final report 15 days later. In addition to findings and recommendations, the report must include any proposed legislation or rules necessary to implement recommendations.

The task force is abolished July 1, 2006.

C. SECTION DIRECTORY:

Section 1 creates the Drug Paraphernalia Abatement Task Force and provides for its membership and responsibilities.

Section 2 provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Minimal. Task force members are entitled to per diem.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Members of the task force serve without compensation but are entitled to reimbursement for per diem and travel expenses in accordance with s. 112.061, F.S. The task force is staffed by the Office of Drug Control within existing appropriations.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The reference on line 163 to "chapter 119" should be to "chapter 286".

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

At the April 13, 2005, meeting of the Governmental Operations Committee, the committee adopted an amendment and reported the bill favorably with a committee substitute. The amendment removed the two legislatively-appointed members from the task force's to address separation of powers concerns.