

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1029

Protection of Minors Online

SPONSOR(S):

Kravitz and others

TIED BILLS:

IDEN./SIM. BILLS: SB 2232

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Homeland Security & Public Safety</u>	<u>10 Y, 0 N</u>	<u>Cunningham</u>	<u>Kramer</u>
2) <u>Safety & Security Council</u>	<u></u>	<u></u>	<u></u>
3) <u>Policy & Budget Council</u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

HB 1029 requires Internet access providers (defined by the bill as an entities that provide consumers with public access to the Internet) who know that a subscriber resides within this state, to make available to the subscriber a product or service that enables the subscriber to regulate a minor's use of the service to access the Internet. Requirements for such products and services are specified by the bill.

HB 1029 also requires interactive computer services to:

- Upon the request of any law enforcement agency investigating certain sex offenses involving minor children, take all necessary steps to preserve records and all other evidence in its possession pending issuance of a court order or other legal process;
- Make a report of such facts and circumstances to the National Center for Missing and Exploited Children.

The bill also states that no provider of an interactive computer services shall be held liable for taking certain actions or failing to take certain actions that affect a user based on a good faith belief that such user's electronic mail address, instant message name, or other similar Internet identifier appeared in the National Sex Offender Registry or any analogous state registry.

The bill also specifies that it is not a defense to certain lewd and lascivious exhibition offenses and certain child pornography offenses that the victim was actually a law enforcement officer posing as a minor.

This bill creates a condition of probation requiring that certain sex offenders be subject to lifetime supervision. Such supervision shall be conducted by a probation officer, law enforcement officer, or an assigned computer information technology specialist in a form or manner prescribed by the Attorney General. Such supervision involves monitoring of an offender's e-mail or other Internet-based communications and history of websites an offender has visited. Such supervision also involves periodic, unannounced inspections of an offender's computer.

The bill also requires that Internet safety for students be taught at least once to students in grade 3 or above, and requires the Department of Education to develop a model curriculum and provide each school district with materials for parents regarding child online safety.

On March 14, 2008, the Criminal Justice Impact Conference determined that this bill will have a potentially moderate prison bed impact. See "Fiscal Comments" section for additional fiscal impact information.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government – This bill requires Internet access providers to make certain products and services available to subscribers. It also requires interactive computer services to preserve records and evidence upon a law enforcement agency's request and to report certain information to the National Center for Missing and Exploited Children. The bill requires FDLE to provide certain sexual offender information through a formal mechanism to specified entities. This bill also requires the Department of Education to develop a curriculum relating to Internet safety for students and to provide parents materials regarding relating to child online safety.

Promote Personal Responsibility – This bill creates a condition of probation requiring that certain sex offenders be subject to lifetime supervision and provides penalties for violating such condition.

B. EFFECT OF PROPOSED CHANGES:

Requiring Internet Providers to Provide Regulation Products and Services

HB 1029 requires Internet access providers, who know or have reasonable cause to believe that a subscriber resides within this state, to make available to the subscriber a product or service that enables the subscriber to regulate a minor's use of the service to access the Internet. Internet access providers must only make such product or service available if such a product or service is reasonably and commercially available for the technology used by the subscriber to access the Internet.

Additionally, such product or service must, subject to availability, enable the subscriber to do the following:

- Block access to specific websites or domains disapproved by the subscriber.
- Restrict access exclusively to specific websites or domains approved by the subscriber.
- Allow the subscriber to monitor a minor's use of the Internet by providing a report to the subscriber of the specific websites or domains that the minor has visited or has attempted to visit but could not access because the websites or domains were blocked or restricted by the subscriber.

If such product or service is reasonably and commercially available for the technology used by the subscriber to access the Internet, the Internet access provider:

- Shall provide to the subscriber, at the time of subscription, information concerning the availability of the product or service.
- May make the product or service available to the subscriber either directly or through a third-party vendor.

The bill defines the term "Internet access provider" as "an entity that provides consumers with public access to the Internet," and specifies that and Internet access provider is deemed to know that a subscriber resides within this state if the subscriber identifies this state as his or her place of residence at the time of subscription.

Computer Evidence Preservation

HB 1029 requires interactive computer services¹, upon the request of any law enforcement agency investigating an offense involving a minor victim that is listed in ss. 775.21(4)^{1,2} or 943.0435(1)(a)^{1,3},

¹ Section 668.602, F.S., defines to term "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically, but not limited to, a

F.S., to take all necessary steps to preserve records and all other evidence in its possession pending issuance of a court order or other legal process. The bill specifies that such records must be retained for a period of 90 days, which may be extended for an additional 90 days upon a renewed request by the law enforcement agency.

The bill requires interactive computer services, after receiving a search warrant relating to an investigation of an offense involving a minor victim that is listed in ss. 775.21(4)1., or 943.0435(1)(a)1., F.S., to provide information identified in 18 USC 2703(c)(2)⁴ that is in its possession.

The bill also authorizes law enforcement agencies to issue a request, without compulsory legal process or court order, to a designated recipient of the interactive computer service to disclose, consistent with 18 USC 2702(c)(4)⁵, information identified in 18 USC 2703(c)(2). Such request may only be made in connection with a criminal investigation regarding a sex offense involving a minor that is listed in ss. 775.21(4)1., or 943.0435(1)(a)1., F.S. that involves danger or death or serious bodily harm.

The bill specifies that the above provisions relating to interactive computer services must be interpreted in a manner consistent with the requirements of federal law that apply to providers of an electronic communications service, including, but not limited to, 18 USC 2701⁶ and 42 USC 13032⁷.

Reporting Child Pornography

HB 1029 requires interactive computer services that are doing business in Florida and who obtain knowledge of facts or circumstances from which a violation of any law prohibiting child pornography is apparent to make a report of such facts and circumstances to the National Center for Missing and Exploited Children consistent with the requirements of 42 USC 13032.

service or system that provides access to the Internet and the systems operated or services offered by libraries or educational institutions.”

² It appears that the bill incorrectly cites s. 775.21(4)(a)1., F.S., as s. 775.21(4)1., F.S. Section 775.21(4)(a)1., F.S., includes the following offenses: a capital, life, or first-degree felony violation, or any attempt thereof, of s. 787.01 or s. 787.02, where the victim is a minor and the defendant is not the victim's parent or guardian, or s. 794.011, s. 800.04, or s. 847.0145, or a violation of a similar law of another jurisdiction; or any felony violation, or any attempt thereof, of s. 787.01, s. 787.02, or s. 787.025(2)(c), where the victim is a minor and the defendant is not the victim's parent or guardian; s. 794.011, excluding s. 794.011(10); s. 794.05; s. 796.03; s. 796.03; s. 800.04; s. 825.1025(2)(b); s. 827.071; s. 847.0145; or s. 985.701(1); or a violation of a similar law of another jurisdiction, and the offender has previously been convicted of or found to have committed, or has pled nolo contendere or guilty to, regardless of adjudication, any violation of s. 787.01, s. 787.02, or s. 787.025(2)(c), where the victim is a minor and the defendant is not the victim's parent or guardian; s. 794.011, excluding s. 794.011(10); s. 794.05; s. 796.03; s. 796.035; s. 800.04; s. 825.1025; s. 827.071; s. 847.0133; s. 847.0135, excluding s. 847.0135(4); s. 847.0145; or s. 985.701(1); or a violation of a similar law of another jurisdiction;

³ Section 943.0435(1)(a)1., F.S., includes the following offenses: s. 787.01, s. 787.02, or s. 787.025(2)(c), where the victim is a minor and the defendant is not the victim's parent or guardian; s. 794.011, excluding s. 794.011(10); s. 794.05; s. 796.03; s. 796.035; s. 800.04; s. 825.1025; s. 827.071; s. 847.0133; s. 847.0135, excluding s. 847.0135(4); s. 847.0137; s. 847.0138; s. 847.0145; or s. 985.701(1); or any similar offense committed in this state which has been redesignated from a former statute number to one of those listed in this sub-sub-subparagraph; s. 794.011, excluding s. 794.011(10); s. 800.04(4)(b) where the victim is under 12 years of age or where the court finds sexual activity by the use of force or coercion; s. 800.04(5)(c)1. where the court finds molestation involving unclothed genitals; or s. 800.04(5)(d) where the court finds the use of force or coercion and unclothed genitals.

⁴ 18 USC 2703(c)(2), requires a provider of electronic communication service or remote computing service to disclose to a governmental the following subscriber information when the governmental entity provides certain documents (e.g., subpoena): name, address, local and long distance telephone connection records, or records of session times and durations, length of service (including start date) and types of service utilized, telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and means and source of payment for such service (including any credit card or bank account number).

⁵ 18 USC 2702(c)(4), sets forth the circumstances in which an entity providing electronic communication services or remote computing services may voluntarily divulge contents of communications.

⁶ 18 USC 2701, describes offenses relating to the unlawful access of stored communications.

⁷ 42 USC 13032, provides child pornography reporting requirements.

Lewd and Lascivious Exhibition

Current Situation

Section 800.04(7), F.S., is entitled "Lewd or Lascivious Exhibition." A person commits lewd or lascivious exhibition if, in the presence of a victim who is less than 16 years of age, the person:

- Intentionally masturbates;
- Intentionally exposes the genitals in a lewd or lascivious manner; or
- Intentionally commits any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity.⁸

A person also commits lewd or lascivious exhibition if a person does any of the following live over a computer online service, Internet service, or local bulletin board service and who knows or should know or has reason to believe that the transmission is viewed on a computer or television monitor by a victim in this state who is less than 16 years of age:

- Intentionally masturbates;
- Intentionally exposes the genitals in a lewd or lascivious manner; or
- Intentionally commits any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity.⁹

Offenders 18 years of age or older who commit lewd or lascivious exhibition commit a 2nd degree felony¹⁰. Offenders less than 18 years of age who commit lewd or lascivious exhibition commit a 3rd degree felony¹¹.

The statute specifies that the fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense under this paragraph shall not constitute a defense to a prosecution under this paragraph.

Effect of the Bill

HB 1029 adds language to s. 800.04(7), F.S., to specify that it is not a defense that the victim was actually a law enforcement officer posing as a person less than 16 years of age.

Computer Pornography – s. 847.0135, F.S.

Current Situation

Section 847.0135, F.S., establishes a variety of crimes relating to child pornography. Subsection (2) of the statute makes it a 3rd degree felony for a person to:

- Knowingly compile, enter into, or transmit by use of computer;
- Make, print, publish, or reproduce by other computerized means;
- Knowingly cause or allow to be entered into or transmitted by use of computer; or
- Buy, sell, receive, exchange, or disseminate,

any notice, statement, or advertisement of any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any minor, or the visual depiction of such conduct. This subsection specifies that the fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense does not constitute a defense to a prosecution.

⁸ s. 800.04(7), F.S.

⁹ *Id.*

¹⁰ A second-degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. ss. 775.082, 775.083, and 775.084, F.S.

¹¹ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082, 775.083, and 775.084, F.S.

Section 847.0135(3), F.S., makes it a 3rd degree felony for a person to knowingly use a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:

- Seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to commit any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the person to be a child; or
- Solicit, lure, or entice, or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed to be a parent, legal guardian, or custodian of a child to consent to the participation of such child in any act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any sexual conduct.

Subsection (4) of the statute makes it a 2nd degree felony for a person to travel any distance either within this state, to this state, or from this state by any means, to attempt to do so, or to cause another to do so or to attempt to do so for the purpose of engaging in any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in other unlawful sexual conduct with a child or with another person believed by the person to be a child after using a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:

- Seduce, solicit, lure, or entice or attempt to seduce, solicit, lure, or entice a child or another person believed by the person to be a child, to engage in any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in other unlawful sexual conduct with a child; or
- Solicit, lure, or entice or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed to be a parent, legal guardian, or custodian of a child to consent to the participation of such child in any act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any sexual conduct.

Effect of the Bill

HB 1029 creates s. 847.0135(8), F.S., to specify that it is not a defense that the victim was actually a law enforcement officer posing as a minor.

Sex Offender Registration Information – Interactive Computer Service Liability

Current Situation

Florida statutes contain numerous registration requirements for sexual offenders and sexual predators. For example, sexual offenders and sexual predators must register in person at the sheriff's office in the county where he or she establishes or maintains a residence within 48 hours after establishing or maintaining a residence in this state.¹² In addition to registering with the sheriff, sexual offenders and sexual predators must register any electronic mail address¹³ or instant message¹⁴ name with FDLE prior to using such electronic mail address or instant message name.¹⁵

Section 943.0437, F.S., authorizes FDLE to provide electronic mail address and instant message name information maintained as part of the sexual offender registry to commercial social networking websites¹⁶ or third parties designated by commercial social networking websites. Commercial social

¹² See, ss. 775.21 and 943.0435, F.S.

¹³ Section 943.0435, F.S., defines "electronic mail address" as "a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered."

¹⁴ Section 943.0435, F.S. defines "instant message name" as "an identifier that allows a person to communicate in real time with another person using the Internet."

¹⁵ FDLE has established an online system through which sexual offenders may securely access and update all electronic mail address and instant message name information. See s. 943.0435(4)(d), F.S.

¹⁶ Section 943.0437, F.S. defines "commercial social networking websites" as "a commercially operated Internet website that allows users to create web pages or profiles that provide information about themselves and are available publicly or to other users and that offers a mechanism for communication with other users, such as a forum, chat room, electronic mail, or instant messenger."

networking websites may use this information for the purpose of comparing registered users and screening potential users of the commercial social networking website against the list of electronic mail addresses and instant message names provided by the department.¹⁷ Section 943.0437, F.S., specifies that its provisions shall not be construed to impose any civil liability on a commercial social networking website for:

- Any action voluntarily taken in good faith to remove or disable any profile of a registered user associated with an electronic mail address or instant message name contained in the sexual offender registry.
- Any action taken to restrict access by such registered user to the commercial social networking website.

Effect of the Bill

HB 1029 requires FDLE to make the electronic mail address and instant message name information collected from sexual offenders and sexual predators available through a formal mechanism to any commercial or nonprofit entity, including child safety organizations, educational institutions, and interactive computer services, for the purpose of protecting minors.

The bill also states that no provider of an interactive computer service shall be held liable for:

- Identifying, removing, disabling, blocking, or otherwise affecting a user based on a good faith belief that such user's electronic mail address, instant message name, or other similar Internet identifier appeared in the National Sex Offender Registry or any analogous state registry; or
- Failing to identify, block, or otherwise prevent a person from registering for its service, or for failing to remove, disable, or otherwise affect a registered user, whose electronic mail address, instant message name, or other similar Internet identifier appears in the National Sex Offender Registry or any analogous state registry.

Online Monitoring of Sexual Offenders

Current Situation

Section 948.30, F.S. sets forth terms and conditions of probation or community control for offenders convicted of certain sex offenses. The statute requires the court to impose the following condition on probationers and community controllees whose crime was committed on or after October 1, 1997, and who are placed on community control or sex offender probation for a violation of chapter 794, s. 800.04, s. 827.071, or s. 847.0145, F.S.:

- Electronic monitoring when deemed necessary by the community control or probation officer and his or her supervisor, and ordered by the court at the recommendation of the Department of Corrections.

The statute also requires the court to order mandatory electronic monitoring for probationers and community controllees whose crime was committed on or after September 1, 2005, and who:

- Are placed on probation or community control for a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s. 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older;
- Are designated a sexual predator pursuant to s. 775.21; or
- Have previously been convicted of a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s. 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older.

In addition to electronic monitoring conditions, the statute requires judges to order the following condition on probationers and community controllees whose crime was committed on or after July 1, 2005:

¹⁷ s. 943.0437, F.S.

- A prohibition on accessing the Internet or other computer services until the offender's sex offender treatment program, after a risk assessment is completed, approves and implements a safety plan for the offender's accessing or using the Internet or other computer services.

Effect of the Bill

HB 1029 requires persons who are subject to any of the conditions of supervision contained within s. 948.30, F.S., for an offense committed on or after October 1, 2008, against a victim who was under 18 years of age at the time of the offense, to be subject to lifetime supervision. This condition of supervision does not require oral pronouncement at the time of sentencing and shall be considered standard conditions of probation or community control for offenders specified in this section. The bill specifies that the supervision shall be conducted by a probation officer, law enforcement officer, or an assigned computer information technology specialist in a form and manner prescribed by the Attorney General.

The bill further provides that persons subject to lifetime supervision under this section shall be subject to:

- Continued supervision, whether in person or remotely, of his or her incoming and outgoing e-mail or other Internet based communication.
- Continued supervision, either in person or remotely, of his or her history of websites visited.
- Periodic, unannounced inspections of the contents of his or her computer and any other device with Internet access owned or used by the offender. Such inspections may include, but are not limited to, retrieval and copying of all data from the device and any internal or external storage or portable media and the removal of such information, computer, device, or media to conduct an examination for evidence relevant to any offense that is listed in s. 948.30 committed against a victim who was under 18 years of age at the time of the offense.
- Allowing for the use of technologies to create a unique identifier of his or her computer that will allow law enforcement to track and monitor online activity.

If the Internet was used by the offender in the commission of the offense, the bill authorizes the judge, as a part of the offender's sentence, to limit or restrict the offender's Internet access.

Offenders who violate any of the above-described conditions of supervision commit a 3rd degree felony, and, upon conviction, shall be sentenced to a mandatory minimum term of imprisonment of 5 years unless the court finds that in that particular case the interests of justice outweigh the need to deter the qualifying sex offender crimes and that such a sentence of imprisonment would be a manifest injustice.

The bill authorizes an offender subject to lifetime supervision to petition for release from supervision to the circuit court having jurisdiction over the original offense. The offender may not be released from supervision unless he or she shows by clear and convincing evidence that he or she has not committed a felony or misdemeanor of any type for 15 years since his or her last conviction or release from incarceration, whichever is later, and that the offender is not likely to pose a threat to the safety of others if released from supervision.

Internet Safety Education

Current Situation

Section 1003.42, F.S., requires members of the instructional staff of the public schools, subject to the rules of the State Board of Education and the district school board, to teach a variety of topics, such as the elements of civil government, the history of the United States, the elementary principles of agriculture, and the conservation of natural resources.

Effect of the Bill

HB 1029 adds to the list of topics that public school instructional staff must teach. Specifically, the bill requires that Internet safety for students be taught at least once to students in grade 3 or above in a

way that is integrated in the instructional program. The bill requires the Department of Education (DOE) to develop a model curriculum, taking into consideration similar curricula developed by other states as well as any other curricular materials suggested by education experts, child psychologists, or technical companies working on child online safety issues. The bill also requires DOE to provide each school district with materials for parents regarding child online safety.

C. SECTION DIRECTORY:

Section 1. Relating to Internet access provider; parental controls.

Section 2. Relating to evidence preservation.

Section 3. Creates s. 847.0141, F.S., relating to reporting child pornography violations.

Section 4. Amends s. 800.04, F.S., relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age.

Section 5. Amends s. 847.0135, F.S., relating to computer pornography; traveling to meet minor; penalties.

Section 6. Amends s. 943.043, F.S., relating to toll-free telephone number; Internet notification; sexual predator and sexual offender information.

Section 7. Creates s. 948.33, F.S., relating to online monitoring of certain sexual offenders.

Section 8. Amends s. 1003.42, F.S., relating to required instruction.

Section 9. This bill takes effect October 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

There may be a fiscal impact on Internet service providers in that the bill requires them to:

- Make products and services that enable subscribers to regulate a minor's use of the service to access the Internet available to subscribers; and

- Provide to subscribers information concerning the availability of such products and services.

There may be a fiscal impact on interactive computer services in that the bill requires them to:

- Preserve records and evidence upon the request of law enforcement agencies; and
- Make reports to the National Center for Missing and Exploited Children.

D. FISCAL COMMENTS:

This bill requires FDLE to provide certain sexual offender information through a formal mechanism to specified entities. In their fiscal analysis of this bill, FDLE stated that it would cost approximately \$6,000 to do so.

This bill creates a condition of probation requiring that certain sex offenders be subject to lifetime supervision. The bill specifies that such supervision shall be conducted by a probation officer, law enforcement officer, or an assigned computer information technology specialist in a form or manner prescribed by the Attorney General. Such supervision involves monitoring of an offender's e-mail or other Internet-based communications and history of websites an offender has visited. Such supervision also involves periodic, unannounced inspections of an offender's computer. In their analysis of this bill, DOC stated the following:

- While the impact to DOC's Community Supervision program is indeterminate, it has the potential to be very significant.
- If DOC was required to provide the computer search inspections and monitoring, additional staff would be required to provide this supervision. The Department would also need to be funded for the training necessary to gain this skill (note that in their fiscal analysis of this bill, FDLE contemplated having to provide probation officers with such training and estimated that it would cost approximately \$19,000 in non-recurring funds to do so).

This bill requires DOE to develop a curriculum relating to Internet safety for students and to provide parents materials relating to child online safety. In their analysis of this bill, DOE stated the following:

- Requiring the Department of Education to develop a curriculum would require additional workload for staff, training, resources, and potential contracts. The cost estimate would include one Program Specialist I Supervisor or a contract for the work.

	Program Specialist IV 1.0 FTE
Salaries and Benefits	\$73,497
Standard #3 Expense	9,915
Standard #3 OCO	1,300
Standard #3 Human Services	401
Contracted Services	500
Totals for positions	\$85,613

- The Department of Education would be required to research, produce, and distribute materials for parents regarding online safety to districts. This activity could be accomplished with existing resources, using the World Wide Web for distribution.

On March 14, 2008, the Criminal Justice Impact Conference determined that this bill would have a potentially moderate prison bed impact.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

Additionally, portions of this bill appear to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because they are criminal laws.

2. Other

This bill creates a condition of probation requiring that certain sex offenders be subject to lifetime supervision.

Unless expressly provided by law, a probationary term may not exceed the maximum sentence prescribed for the crime.¹⁸ Similarly, when a combination of incarceration and probation is imposed, the combined periods cannot exceed the maximum period of incarceration provided by statute for the offense charged.¹⁹ While there are certain sexual crimes which have a statutory maximum of life imprisonment, many of the potential crimes which would qualify an offender for the lifetime supervision required by the bill do not have such a maximum.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The following comments are applicable to the bill as filed. The strike-all amendment traveling with the bill addresses these issues.

Section 2

It appears that s. 775.21(4)(1)1., F.S. should be cited on line 88 rather than s. 775.21(4)1., F.S.

The language is unclear on lines 98-108 as to whether interactive computer services are required to provide the specified information to law enforcement within 15 days of the request.

Section 4

This section provides that it is not a defense to a lewd and lascivious exhibition charge that the victim was actually a law enforcement officer posing as a person less than 16 years of age. By placing this language in subsection (7)(e), it applies to lewd and lascivious exhibition offenses that do not involve a computer as well as those that do. If the intent was that this provision only apply to the lewd and lascivious exhibition offenses that involve the use of a computer, then the language should be placed in subsection (7)(b).

Additionally, the bill provides that it is not a defense to a lewd and lascivious exhibition charge that the victim was actually a law enforcement officer posing as a person less than 16 years of age. However, the current lewd and lascivious exhibition statute (that involves the use of a computer) already states that the fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense shall not constitute a defense to a prosecution.

¹⁸ 15 Fla. Jur 2d Criminal Law § 2182

¹⁹ *Id.*

Section 5

This section provides that it is not a defense to any of the crimes listed in s. 847.0135, F.S., that the victim was actually a law enforcement officer posing as a minor. If the intent was that this provision only apply to subsection (4) of the statute rather than to all of the crimes established by the statute, the language should be placed in s. 847.0135(4), F.S.

Section 7

This bill creates a condition of probation requiring that certain sex offenders be subject to lifetime supervision. Such supervision involves monitoring of an offender's e-mail or other Internet-based communications and history of websites an offender has visited. Such supervision also involves periodic, unannounced inspections of an offender's computer. The bill specifies that offenders who violate any of the above-described conditions of supervision commit a 3rd degree felony, and, upon conviction, shall be sentenced to a mandatory minimum term of imprisonment of 5 years unless the court finds that in that particular case the interests of justice outweigh the need to deter the qualifying sex offender crimes and that such a sentence of imprisonment would be a manifest injustice. It is unclear whether the minimum mandatory term of imprisonment is in addition to the sentence that could be imposed for violating probation.

State Agency Concerns

In their analysis of the bill, DOC stated the following concerns:

- The bill is not clear on which entity will be providing the computer/internet monitoring. Specifically, how law enforcement and the Department would jointly supervise these offenders.
- The bill is not clear as to which agency the computer information technology specialists would work for. How and to what extent would the Attorney General be involved?
- Currently, the Department's officers conduct very basic computer searches, due to minimal computer search training and expertise. Probation officers are not computer experts and rely on law enforcement to assist with the more detailed and complicated computer searches since law enforcement have staff dedicated and specifically trained and assigned to forensic examinations of computers and other electronic devices. The language in this bill is not clear who would employ an assigned computer technology specialist and how that person would be qualified.
- It would be recommended that this computer specialist have the arrest authority in s. 948.06(1)(a), F.S.
- It is recommended that the bill address how these offenders's computer use will be monitored when they live with other people who are allowed access to a computer in the residence and how these offenders's computer use will be monitored at their employment site.
- To the extent that this legislation would require lifetime supervision, it may raise serious constitutional concerns. Generally, an offender may not be placed on probation for a term which exceeds the statutory maximum for the crime committed. While there are certain sexual crimes which have a statutory maximum of life imprisonment, all of the potential crimes which would qualify an offender for this lifetime computer monitoring (or supervision as it is called in the bill) do not have such a maximum.

In their analysis of the bill, FDLE stated the following concerns:

- Clarification is needed regarding the term "entities" (Line 31) and child safety organizations (lines 159-161). This portion of the bill requires instant messages name information collected from sexual predator and offenders available to certain entities for specified purposes.
- The bill refers to online monitoring of certain sexual offenders. The supervision will be conducted by "probation officers, law enforcement officers and assigned computer information technology specialist in a form and manner prescribed by the Attorney General" (Line 178). A concern exists regarding why the bill allows "Assigned computer information technology specialist" to review a criminals computer and if this position is sworn or non-sworn.
- Remote monitoring is very complex and problematic, in addition it creates security issues on both ends of the connection. From a technical stand point the bill needs additional language on

procedures to regarding how a monitoring entity can remotely access a suspect's computer system without causing potential privacy and security issues.

In their analysis of the bill, DOE stated the following:

- Requiring the DOE to develop curriculum is costly and not something that is typically done by the DOE. The State Board of Education adopts standards and districts choose which curriculum to provide.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 19, 2008, the Homeland Security & Public Safety Committee adopted a strike-all amendment and reported the bill favorably as amended. The strike-all amendment:

- Makes technical changes that correct statute citations, provide definitions, and relocate sections of the bill into the appropriate statutes.
- Requires Internet providers to make products available that will allow subscribers to control a minor's use of the Internet
- Deletes duplicative language relating to defenses to certain sex crimes.
- Deletes language that imposes requirements upon FDLE and DOE as well as language requiring lifetime supervision of certain offenders.