

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 559 Distribution of Material Harmful to Minors

SPONSOR(S): Safety & Security Council; Schenck and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 1128

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|--|-------------------------|-------------------------|-----------------|
| 1) <u>Committee on Homeland Security & Public Safety</u> | <u>11 Y, 0 N</u> | <u>Cunningham</u> | <u>Kramer</u> |
| 2) <u>Safety & Security Council</u> | <u>13 Y, 0 N, As CS</u> | <u>Cunningham/Davis</u> | <u>Havlicak</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

There is currently a three-pronged test to determine whether material is harmful to minors. Specifically, material is harmful to minors if it depicts nudity, sexual conduct, or sexual excitement that:

- (a) Predominantly appeals to the prurient, shameful, or morbid interest of minors;
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

CS/HB 559 expands what materials might be determined harmful to minors by amending paragraph (b) to read, "Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material *or conduct* for minors."

The bill also provides that ignorance of a minor's age, a minor's misrepresentation of his or her age, a bona fide belief of a minor's age, or a minor's consent may not be raised as a defense in certain prosecutions relating to using minors in the production of certain materials and distributing obscene materials and materials that are harmful to minors.

CS/HB 559 also increases the penalties related to the distribution of obscene materials when the materials depict a minor engaged in any act or conduct that is harmful to minors, and creates 3rd degree felony offense that prohibits a person from knowingly using a minor in the production of certain materials that are harmful to minors.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote Personal Responsibility – This bill increases penalties related to the distribution of obscene materials when the materials depict a minor engaged in any act or conduct that is harmful to minors.

Safeguard Individual Liberty - The bill makes it a crime to knowingly use a minor in the production of any material that is harmful to minors.

B. EFFECT OF PROPOSED CHANGES:

There are a variety of statutes relating to the sexual exploitation of children. Sections 847.012, 847.0125, and 847.013, F.S., criminalize selling, distributing, or exposing minors to materials that are “harmful to minors.” Section 827.071(4) and (5), F.S., criminalize the possession of certain materials that depict a child engaging in sexual conduct¹. Section 827.071(2) and (3), F.S., make *using* a child in a sexual performance² a crime.

Definition – “Harmful to Minors”

Section 847.001, F.S., defines “harmful to minors” as:

Any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- (a) Predominantly appeals to the prurient, shameful, or morbid interest of minors;
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

Effect of the Bill

CS/HB 559 expands what materials might be determined harmful to minors by amending paragraphs (a) and (b) of the above definition as follows:

- (a) Predominantly appeals to the prurient, shameful, or morbid interest ~~of minors~~;
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and

As a result of the above changes, material, including material displaying conduct, may be deemed harmful to minors if it predominantly appeals to the prurient, shameful, or morbid interest *of the community as a whole*.

Obscene Materials

¹ Section 827.071, F.S., defines “sexual conduct” as “actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.”

² Section 827.071, F.S., defines “sexual performance” as “any performance or part thereof which includes sexual conduct by a child of less than 18 years of age.”

Section 847.001, F.S., defines “obscene” as:

The status of material which:

- (a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
- (b) Depicts or describes, in a patently offensive way, sexual conduct; and
- (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

Currently, it is a 1st degree misdemeanor³ for a person to distribute, sell, lend, give away, transmit, transmute, or show certain obscene materials.⁴ It is a 2nd degree misdemeanor⁵ for a person to knowingly have certain obscene material in one’s possession, custody, or control.⁶

Effect of the Bill

CS/HB 559 increases the above penalties to a 3rd degree felony⁷, ranked in level 6 of the Criminal Punishment Code, offense severity ranking chart, if the violation was based on materials that depict a minor engaged in any act or conduct that is harmful to minors. The bill also provides that ignorance of a minor’s age, a minor’s misrepresentation of his or her age, a bona fide belief of a minor’s age, or a minor’s consent may not be raised as a defense in a prosecution for the above-described crimes.

Selling / Distributing Harmful Materials to Minors

Section 847.012, F.S., makes it a 3rd degree felony for a person to knowingly to sell, rent, or loan for monetary consideration to a minor:

- Any picture, photograph, drawing, sculpture, motion picture film, videocassette, or similar visual representation or image of a person or portion of the human body which depicts nudity or sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors; or
- Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter defined in s. 847.001, explicit and detailed verbal descriptions or narrative accounts of sexual excitement, or sexual conduct and which is harmful to minors.

The term “knowingly” is defined as having the general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

- The character and content of any material (described above) which is reasonably susceptible of examination by the defendant; and
- The age of the minor; however, an honest mistake shall constitute an excuse from liability if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.⁸

Effect of the Bill

CS/HB 559 removes language from the definition of “knowingly” relating to the age of the minor. Specifically, the bill removes language providing that “an honest mistake shall constitute an excuse

³ A first degree misdemeanor is punishable by a term of imprisonment not exceeding 1 year and a \$1,000 fine. *See* ss. 775.082 and 775.083.

⁴ *See* s. 847.011(1)(a), F.S.

⁵ A second degree misdemeanor is punishable by a term of imprisonment not exceeding 60 days and a \$500 fine. *See* ss. 775.082 and 775.083.

⁶ *See* s. 847.011(2), F.S.

⁷ 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.

⁸ s. 847.012, F.S.

from liability if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.” The bill adds a provision stating that “a person’s ignorance of a minor’s age, a minor’s misrepresentation of his or her age, a bona fide belief or a minor’s age, or a minor’s consent may not be raised as a defense in a prosecution” for the above-described crimes.

CS/HB 559 also makes it a 3rd degree felony, ranked in level 6 of the Criminal Punishment Code, offense severity ranking chart, for a person to knowingly use a minor in the production of any of the above-described material regardless of whether the material is intended for distribution to minors or is actually distributed to them.

Exposing Minors to Harmful Materials

Section 847.013, F.S., makes it a 1st degree misdemeanor for a person to:

- Knowingly exhibit for a monetary consideration to a minor or knowingly to sell or rent a videotape of a motion picture to a minor or knowingly sell to a minor an admission ticket or pass or knowingly admit a minor for a monetary consideration to premises whereon there is exhibited a motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts nudity, sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors; or
- Knowingly rent or sell, or loan to a minor for monetary consideration, a videocassette or a videotape of a motion picture, or similar presentation, which, in whole or in part, depicts nudity, sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors.

The term “knowingly” is defined as having general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

- The character and content of any motion picture (described above) which is reasonably susceptible of examination by the defendant, or the character of any exhibition, presentation, representation, or show (described above), other than a motion picture show, which is reasonably susceptible of being ascertained by the defendant; and
- The age of the minor; however, an honest mistake shall constitute an excuse from liability if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.⁹

Effect of the Bill

CS/HB 559 removes language from the definition of “knowingly” relating to the age of the minor. Specifically, the bill removes language providing that “an honest mistake shall constitute an excuse from liability if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.” The bill then adds a provision stating that “a person’s ignorance of a minor’s age, a minor’s misrepresentation of his or her age, a bona fide belief of a minor’s age, or a minor’s consent may not be raised as a defense in a prosecution” for the above-described crimes.

CS/HB 559 also adds to the legislative intent language of s. 847.013, F.S., to specify that it is the intent of the Legislature to preempt the field, to the exclusion of counties and municipalities, insofar as it concerns exposing persons under 17 years of age to harmful motion pictures, exhibitions, shows, representations, presentations, and commercial or sexual exploitation.

C. SECTION DIRECTORY:

Section 1. Amends s. 847.001, F.S., relating to definitions.

Section 2. Amends s. 847.011, F.S., relating to prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty.

⁹ s. 847.013, F.S.

Section 3. Amends s. 847.012, F.S., relating to harmful materials; sale or distribution to minors or using minors in production prohibited; penalty.

Section 4. Amends s. 847.013, F.S., relating to exposing minors to harmful motion pictures, exhibitions, shows, presentations, or representations.

Section 5. Amends s. 847.0133, F.S., relating to protection of minors; prohibition of certain acts in connection with obscenity; penalty.

Section 6. Amends s. 921.0022, F.S., relating to the Criminal Punishment Code; offense severity ranking chart.

Section 7. This bill takes effect July 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:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

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

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

Representative Schenck submitted the following statement:

House Bill 559, relating to the distribution of material harmful to minors, has been introduced to help protect innocent minors from being exploited by questionable “teen modeling agencies”. There have been cases where our State’s Attorney’s offices have tried to prosecute such agencies but have been shot down due to an unclear definition of obscene material. House Bill 559, will provide a tool for the State Attorney’s offices to prosecute individuals who take provocative photographs of children under the age of 21. This bill will help cease the existence of these suspect modeling agencies. In turn, these provocative photos of our youth, which are sometimes displayed on the internet, will be destroyed. As a father of two, I am devoted to making Florida a better, safer environment for our children, which House Bill 559 does.

The chair of the Safety & Security Council chose not to submit any further comments regarding the council substitute.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 12, 2008, the Homeland Security & Public Safety Committee adopted a strike-all amendment and reported the bill favorably as amended. The strike-all amendment:

- Amends the definition of the term “harmful to minors” to require that the material predominantly appeals to the *prurient, shameful, or morbid interest* rather than the prurient, shameful, or morbid interest *of minors*;
- Removes the provisions in section 5 of the bill that prohibit a person from showing any material displaying erotic nudity or erotic fondling to a minor; and
- Makes technical changes

On March 19, 2008, the Safety & Security Council reported the bill favorably as a council substitute. This analysis is drafted to the council substitute.