

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 605

Exploited Children

SPONSOR(S):

Rivera

TIED BILLS:

IDEN./SIM. BILLS: SB 1442

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Homeland Security &amp; Public Safety</u>	<u>10 Y, 0 N</u>	<u>Cunningham</u>	<u>Kramer</u>
2) <u>Safety &amp; Security Council</u>	<u></u>	<u></u>	<u></u>
3) <u>Policy &amp; 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 605 provides a civil cause of action for victims of certain sexual abuse crimes if:

- Any portion of such abuse was used in the production of images of child pornography; and
- The victim suffers personal or psychiatric injury as a result of the production, promotion, or possession of such images.

The bill provides a statute of limitations for such actions and specifies that victims who are awarded damages pursuant to a civil suit and who are thereafter exploited by the further production, possession, or promotion of pornographic images of his or her own victimization are deemed to have sustained damages of no less than \$150,000. The Office of the Attorney General is designated to pursue cases on behalf of any victim.

HB 605 also amends the definition of the term "crime" for victim compensation purposes and adds the following categories of people to the definition of the term "victim":

- A child less than 18 years of age who is a victim of online sexual exploitation under any provision of s. 827.071, s. 847.0135, s. 847.0137, or s. 847.0138 and who suffers psychiatric or psychological injury as a direct result of that crime, but who does not otherwise sustain a personal physical injury or death.
- Any resident of this state of any age who, while under the age of 18, was depicted in any image or video, regardless of length, of child pornography as defined in s. 847.001 and who has been identified by law enforcement and the National Center for Missing and Exploited Children as a known victim of child pornography, which image or video is recovered by a law enforcement investigation or is related to a criminal prosecution.

The bill requires law enforcement officers who submit for prosecution a case that involves the creation, possession, or promotion of child pornography to provide the certain information to prosecutors. The bill also requires prosecutors, in every filed case in that involves child pornography, to enter certain information into the Victims in Child Pornography Tracking Repeat Exploitation database that will be developed and maintained by the Office of the Attorney General.

HB 605 moves the offense of "lewd of lascivious exhibition" that involves the use of the Internet from s. 800.04(7)(b), F.S., to a newly created statute (s. 847.01355, F.S.) and makes conforming changes throughout the statutes.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Provide Limited Government** – This bill requires law enforcement officers to provide certain information to state attorneys when submitting cases that involve the creation, possession, or promotion of child pornography for prosecution. The bill also requires state attorneys, in every filed case involving child pornography, to enter certain information into a database maintained by the Office of Attorney General. The bill also designates the Office of the Attorney General to pursue certain sexual exploitation cases on behalf of certain victims.

**Safeguard Individual Liberty** – This bill creates a civil cause of action for certain persons who are victims of certain sexual abuse crimes wherein any portion of such abuse was used in the production of child pornography. The bill also expands the category of persons who are eligible to receive victim compensation awards.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Whereas Clauses**

HB 605 provides the following:

Whereas, children who are sexually abused and then exploited by the creation of permanent images of that sexual abuse through child pornography are further harmed by the continued possession, promotion, and distribution of those images on the Internet, and

Whereas, the possession of child pornography is not a victimless crime, and over 1,200 victims of child pornography are known by law enforcement, over 30 of whom were citizens of this state at the time of their abuse, and

Whereas, victims of child pornography suffer repeated unending abuse not only as children, but throughout their lives, by those individuals who engage in the collection and distribution of the image of the victim's sexual abuse and exploitation, and

Whereas, victims of child pornography currently do not receive notice, consideration, compensation, or any other rights assured to crime victims in this state pursuant to chapter 960, F.S., and

Whereas, victims of child pornography are entitled to be heard and considered in any case involving the production, possession, and promotion of an image of their sexual-abuse, and these victims are due all the rights and protections afforded every other crime victim in this state.

##### **Confidentiality of Judicial Proceedings – Pseudonyms**

###### Public Records

Currently, court records that reveal the photograph, name, or address of the victim of an alleged offense described in chapter 794<sup>1</sup> or chapter 800<sup>2</sup>, or an act of child abuse, aggravated child abuse, or sexual performance by a child as described in chapter 827, are confidential and exempt from the

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<sup>1</sup> Chapter 794, F.S., is entitled, "Sexual Battery."

<sup>2</sup> Chapter 800, F.S., is entitled, "Lewdness, Indecent Exposure."

provisions of s. 24(a), Art. I of the State Constitution<sup>3</sup> and may not be made public if, upon a showing to the trial court with jurisdiction over the alleged offense, the state or the victim demonstrates that:

1. The identity of the victim is not already known in the community;
2. The victim has not voluntarily called public attention to the offense;
3. The identity of the victim has not otherwise become a reasonable subject of public concern;
4. The disclosure of the victim's identity would be offensive to a reasonable person; and
5. The disclosure of the victim's identity would:
  - a. Endanger the victim because the assailant has not been apprehended and is not otherwise known to the victim;
  - b. Endanger the victim because of the likelihood of retaliation, harassment, or intimidation;
  - c. Cause severe emotional or mental harm to the victim;
  - d. Make the victim unwilling to testify as a witness; or
  - e. Be inappropriate for other good cause shown.<sup>4</sup>

#### *Effect of the Bill*

HB 605 provides that in civil or criminal proceedings that involve the production, possession, or promotion of child pornography where the victim depicted in the image is a party to the case or a witness to the case, the above-described showing is waived. Thus, all court records in such cases will be confidential and exempt regardless of whether the victim demonstrates any of the above.

#### Pseudonyms

Section 92.56(3), F.S., provides that in all court records and court proceedings, the state may use a pseudonym instead of the victim's name to designate the victim of a crime described in chapter 794, F.S., or chapter 800, F.S., or of child abuse, aggravated child abuse, or sexual performance by a child as described in chapter 827, F.S.

#### *Effect of the Bill*

HB 605 provides that the state may also use a pseudonym instead of the victim's name to designate the victim of a crime involving the "production, possession, or promotion of child pornography as described in chapter 827 or chapter 847."

### **Lewd or Lascivious Exhibition Using a Computer**

Currently, s. 800.04(7)(b), (c), and (d), F.S., provide the following:

(b) A person who:

1. Intentionally masturbates;
2. Intentionally exposes the genitals in a lewd or lascivious manner; or
3. 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

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

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<sup>3</sup> "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution." Section 24(a), Art. I of the Florida Constitution

<sup>4</sup> s. 92.56(1), F.S.

viewed on a computer or television monitor by a victim in this state who is less than 16 years of age, commits lewd or lascivious exhibition. 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.

(c) An offender 18 years of age or older who commits a lewd or lascivious exhibition commits a felony of the second degree<sup>5</sup>, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(d) An offender less than 18 years of age who commits a lewd or lascivious exhibition commits a felony of the third degree<sup>6</sup>, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

#### *Effect of the Bill*

HB 605 removes the above provisions from s. 800.04(7)(b), (c), and (d), F.S., and places them in newly-created s. 847.01355, F.S., entitled "Lewd or lascivious exhibition using a computer." The bill also makes conforming changes to ss. 90.404, 92.565, 394.912, 409.2355, 775.082, 775.084, 775.15, 775.21, 784.048, 787.01, 787.02, 787.025, 794.065, 914.16, 921.0022, 921.244, 938.10, 943.0435, 943.04354, 943.0585, 943.059, 944.606, 944.607, 947.1405, 948.013, 948.03, 948.06, 948.101, 948.30, 948.31, and 948.32, F.S.

#### **National Center for Missing and Exploited Children – Child Victim Identification Program**

The National Center for Missing & Exploited Children (NCMEC) was established in 1984 as a private, nonprofit organization to provide services nationwide for families of abducted, endangered, and sexually exploited children.<sup>7</sup> NCMEC's mission is to help prevent child abduction and sexual exploitation; help find missing children; and assist victims of child abduction and sexual exploitation, their families, and the professionals who serve them.<sup>8</sup> Currently, NCMEC:

- Serves as a clearinghouse of information about missing and exploited children;
- Operates a CyberTipline that the public may use to report Internet-related child sexual exploitation;
- Provides technical assistance to individuals and law-enforcement agencies in the prevention, investigation, prosecution, and treatment of cases involving missing and exploited children;
- Assists the U.S. Department of State in certain cases of international child abduction in accordance with the Hague Convention on the Civil Aspects of International Child Abduction;
- Offers training programs to law-enforcement and social-service professionals;
- Distributes photographs and descriptions of missing children worldwide;
- Coordinates child-protection efforts with the private sector;
- Networks with nonprofit service providers and state clearinghouses about missing-persons cases; and
- Provides information about effective state legislation to help ensure the protection of children.<sup>9</sup>

In 2002, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the U.S. Supreme Court determined that computer-generated child pornography is not considered illegal if no actual child was used in the production of the images.<sup>10</sup> The Supreme Court held that these images are not criminal because there

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> See [www.ncmec.org](http://www.ncmec.org)

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

is no live victim, hence no “real” child.<sup>11</sup> As a result, defendants often argue that confiscated child-pornography images are “virtual” and do not depict real children. Thus prosecutors try to establish the child’s actual identity when they have an image of child pornography. Because determining the identity of children seen in child pornography may be difficult or even impossible, this requirement presents additional challenges when prosecuting cases.<sup>12</sup>

In 2003, NCMEC created the Child Victim Identification Program and Child Recognition and Identification System (CVIP).<sup>13</sup> CVIP assists with child-pornography cases across the country by using NCMEC’s Child Recognition & Identification System (CRIS). When law enforcement agencies seize child pornography, they may submit copies of seized images to NCMEC, accompanied by a written request that the images be reviewed for identified children. Files containing identified child victims are listed in a report, which CVIP provides to the submitting law-enforcement agency.<sup>14</sup>

## **Child Pornography Prosecutions**

### Law Enforcement Duties

HB 605 creates s. 847.002, F.S., which requires law enforcement officers who submit for prosecution a case that involves the creation, possession, or promotion of child pornography to provide the prosecutor, within 30 days of arrest, a detailed list of images in the case which contain the depiction of a known victim<sup>15</sup> of child pornography. Law enforcement officers must also include the law enforcement contact information provided for that victim by the National Center for Missing and Exploited Children’s Child Victim Identification Program.

### State Attorney Duties

HB 605 also requires state attorneys and the statewide prosecutor to pursue prosecution of those involved in the creation, possession, or promotion of child pornography in which a known victim from within Florida is depicted. The bill also requires prosecutors, in every filed case that involves child pornography, to enter the following information into the Victims in Child Pornography Tracking Repeat Exploitation database:

- The case number and agency file number;
- The named defendant;
- The circuit court divisions and county;
- Current court dates and the status of the case;
- Contact information for the prosecutor assigned;
- Verification that the prosecutor is or is not in possession of a victim impact statement and will use the statement in sentencing.

This database does not currently exist and will be created and maintained by the Office of the Attorney General (OAG):

## **Civil Remedies**

### Masha’s Law

Masha Allen was adopted from a Russian orphanage at the age of five by Matthew Mancuso, an American man. Soon after Masha arrived in the United States, Mancuso began sexually abusing her

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> The terms “known victim of child pornography” is defined by the bill as “any person who, while under the age of 18, was depicted in any image of child pornography and who has been identified through a report generated by a member of law enforcement and provided to the National Center for Missing and Exploited Children’s Child Victim Identification Program.”

and posting pornographic images of her on the Internet. Although Mancuso was convicted of several sexual abuse-related crimes, the pornographic images he took of Masha are still widely disseminated on the Internet.

Masha's law was signed into law in July, 2006 as part of the Adam Walsh Child Protection and Safety Act<sup>16</sup>. Prior to its enactment, federal law provided a civil cause of action for minors who were victims of certain sexual abuse-related crime and who suffered personal injury as a result of such abuse. Such minors were deemed to have sustained damages of no less than \$50,000 in value. Masha's law raises the civil penalties from \$50,000 to \$150,000. It also changed existing law to allow victims ages 18 or older to recover damages from those who downloaded images of them taken while they were children.

### *Effect of the Bill*

HB 605 contains provisions similar to Masha's law. The bill provides a civil cause of action for victims of certain sexual abuse crimes<sup>17</sup> if:

- Any portion of such abuse was used in the production of images of child pornography; and
- The victim suffers personal or psychiatric injury as a result of the production, promotion, or possession of such images.

The bill specifies that such persons have a civil cause of action regardless of whether the sexual abuse occurred while such person was a minor. Victims who are awarded damages pursuant to a civil suit and who are thereafter exploited by the further production, possession, or promotion of pornographic images of his or her own victimization are deemed to have sustained damages of no less than \$150,000. The bill also provides that it is not a defense to a civil cause of action that the respondent did not know the complainant or did not commit the abuse depicted in any image of child pornography.

HB 605 further provides that any civil action commenced must be filed within three years of the later of:

- The conclusion of a related criminal case;
- The notification to the victim by a member of law enforcement of the creation, possession, or promotion of pornographic images; or
- In the case of a person under the age of 18, within 3 years after the person reaches the age of 18.

The bill specifies that victims with a bona fide claim shall, upon request, be provided a confidential pseudonym which shall be issued and maintained by the Department of Legal Affairs for use in all legal proceedings. Additionally, HB 605 designates the OAG to pursue cases on behalf of any victim. All damages obtained in such cases go to the victims and the OAG may seek reasonable attorney fees and costs for itself. Currently, the OAG does not have statutory authority to bring civil suits on behalf of an individual victim.

### **Victims Assistance**

Florida law authorizes the Florida Attorney General's Division of Victim Services to serve as an advocate for crime victims and victims' rights and to administer a compensation program to ensure financial assistance for innocent victims of crime.<sup>18</sup> Currently, injured crime victims may be eligible for financial assistance for medical care, lost income, funeral expenses and other out-of-pocket expenses directly related to the injury.<sup>19</sup> Payment is made from the Crime Compensation Trust Fund.<sup>20</sup>

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<sup>16</sup> Public Law 109-248.

<sup>17</sup> Crimes listed in chapters 794, 800, 827, and 847, F.S.

<sup>18</sup> <http://myfloridalegal.com/victims>

<sup>19</sup> *Id.*

<sup>20</sup> s. 960.21, F.S.

While the Crime Compensation Trust Fund is primarily used to compensate victims who have suffered *physical* injuries, certain victims who suffer *mental* injuries are also compensated. Children under 16 who are present at the scene of a crime, saw or heard the crime, and suffered a psychiatric or psychological injury because of the crime but who are not physically injured are considered “victims” for compensation purposes, as are people who suffer a psychiatric or psychological injury as a direct result of a forcible felony<sup>21</sup> being committed upon them.<sup>22</sup> The Department of Legal Affairs may adopt rules establishing compensation award limits; however, compensation awards may not exceed \$10,000 for treatment, or \$10,000 for continuing or periodic mental health care of a minor victim whose normal emotional development is adversely affected by being the victim of a crime.<sup>23</sup>

Section 960.03(3), F.S., defines the term “crime” for victim assistance purposes. Subsection (a) of that definition provides that “crime” means “a felony or misdemeanor offense committed by either an adult or a juvenile which results in physical injury or death. The term also includes any such criminal act which is committed within this state but which falls exclusively within federal jurisdiction.”

Section 960.03(13), F.S., also defines the term “victim” as:

- A person who suffers personal physical injury or death as a direct result of a crime;
- A person less than 16 years of age who was present at the scene of a crime, saw or heard the crime, and suffered a psychiatric or psychological injury because of the crime, but who was not physically injured; or
- A person against whom a forcible felony was committed and who suffers a psychiatric or psychological injury as a direct result of that crime but who does not otherwise sustain a personal physical injury or death.

#### *Effect of the Bill*

HB 605 amends the definition of the term “crime” to include offenses which result in *psychological injury or trauma*. As a result, the term “crime,” for victim assistance purposes, would be defined, in part, as a “felony or misdemeanor offense committed by either an adult or a juvenile which results in psychological injury or trauma, physical injury, or death.”

HB 605 also adds the following categories of people to the definition of the term “victim”:

- A child less than 18 years of age who is a victim of online sexual exploitation under any provision of s. 827.071, s. 847.0135, s. 847.0137, or s. 847.0138 and who suffers psychiatric or psychological injury as a direct result of that crime, but who does not otherwise sustain a personal physical injury or death; or
- Any resident of this state of any age who, while under the age of 18, was depicted in any image or video, regardless of length, of child pornography as defined in s. 847.001 and who has been identified by law enforcement and the National Center for Missing and Exploited Children as a known victim of child pornography, which image or video is recovered by a law enforcement investigation or is related to a criminal prosecution.

HB 605 also creates a definition of “known victim of child pornography” within the victim assistance definitions section. The term is defined as, “any person who, while under the age of 18, was depicted in any image of child pornography and who has been identified through a report generated by a

<sup>21</sup> The term “forcible felony” means “treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.” s. 776.08, F.S.

<sup>22</sup> s. 960.03, F.S.

<sup>23</sup> s. 960.13, F.S.

member of law enforcement and provided to the National Center for Missing and Exploited Children's Child Victim Identification Program.”

C. SECTION DIRECTORY:

**Section 1.** Amends s. 92.56, F.S., relating to judicial proceedings and court records involving sexual offenses.

**Section 2.** 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 3.** Creates s. 847.002, F.S., relating to child pornography prosecutions.

**Section 4.** Creates s. 847.01357, F.S., relating to exploited children's civil remedy.

**Section 5.** Amends s. 960.03, F.S., relating to definitions; ss. 960.01-960.28.

**Section 6.** Amends s. 90.404, F.S., relating to character evidence; when admissible.

**Section 7.** Amends s. 92.565, F.S., relating to admissibility of confession in sexual abuse cases.

**Section 8.** Amends s. 394.912, F.S., relating to definitions.

**Section 9.** Amends s. 409.2355, F.S., relating to programs for prosecution of males over 21 who commit certain offenses involving girls under age 16.

**Section 10.** Amends s. 775.082, F.S., relating to penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.

**Section 11.** Amends s. 775.084, F.S., relating to violent career criminals; habitual felony offenders and habitual violent felony offenders; three-time violent felony offenders; definitions; procedure; enhanced penalties or mandatory minimum prison terms.

**Section 12.** Amends s. 775.15, F.S., relating to time limitations; general time limitations; exceptions.

**Section 13.** Amends s. 775.21, F.S., relating to the Florida Sexual Predators Act.

**Section 14.** Amends s. 784.048, F.S., relating to stalking; definitions; penalties.

**Section 15.** Amends s. 787.01, F.S., relating to kidnapping; kidnapping of child under age 13, aggravating circumstances.

**Section 16.** Amends s. 787.02, F.S., relating to false imprisonment; false imprisonment of child under age 13, aggravating circumstances.

**Section 17.** Amends s. 787.025, F.S., relating to luring or enticing a child.

**Section 18.** Amends s. 794.065, F.S., relating to unlawful place of residence for persons convicted of certain sex offenses.

**Section 19.** Amends s. 914.16, F.S., relating to child abuse and sexual abuse of victims under age 16 or persons with mental retardation; limits on interviews.

**Section 20.** Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.



**Section 21.** Amends s. 921.244, F.S. relating to order of no contact; penalties.

**Section 22.** Amends s. 938.10, F.S., relating to additional court cost imposed in cases of certain crimes against minors.

**Section 23.** Amends s. 943.0435, F.S., relating to sexual offenders required to register with the department; penalty.

**Section 24.** Amends s. 943.04354, F.S., relating to removal of the requirement to register as a sexual offender or sexual predator in special circumstances.

**Section 25.** Amends s. 943.0585, F.S., relating to court-ordered expunction of criminal history records.

**Section 26.** Amends s. 943.059, F.S., relating to court-ordered sealing of criminal history records.

**Section 27.** Amends s. 944.606, F.S., relating to sexual offenders; notification upon release.

**Section 28.** Amends s. 944.607, F.S., relating to notification to Department of Law Enforcement of information on sexual offenders.

**Section 29.** Amends s. 947.1405, F.S., relating to conditional release program.

**Section 30.** Amends s. 948.013, F.S., relating to administrative probation.

**Section 31.** Amends s. 948.03, F.S., relating to terms and conditions of probation.

**Section 32.** Amends s. 948.06, F.S., relating to violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.

**Section 33.** Amends s. 948.101, F.S., relating to terms and conditions of community control and criminal quarantine community control.

**Section 34.** Amends s. 948.30, F.S., relating to additional terms and conditions of probation or community control for certain sex offenses.

**Section 35.** Amends s. 948.31, F.S., relating to diagnosis, evaluation, and treatment of offenders placed on probation or community control for certain sex offenses or child exploitation.

**Section 36.** Amends s. 948.32, F.S., relating to requirements of law enforcement agency upon arrest of persons for certain sex offenses.

**Section 37.** 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:

See "Fiscal Comments."

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill creates a civil cause of action for victims of certain sexual abuse crimes if any portion of such abuse was used in the production of images of child pornography, and the victim suffers personal or psychiatric injury as a result of the production, promotion, or possession of such images. There will likely be a fiscal impact on parties to such actions.

**D. FISCAL COMMENTS:**

This bill requires law enforcement officers to provide information to prosecutors in certain cases. It also requires state attorneys to enter information into a newly-created database in certain cases. To the extent that these requirements increase the workload on law enforcement officers and state attorneys, the bill may have a negative fiscal impact on these entities. At this time we do not have a fiscal impact statement from either group.

Additionally, the bill places several requirements on the Office of Attorney General. First, it requires the OAG to develop and maintain the "Victims in Child Pornography Tracking Repeat Exploitation" database. It also creates a civil cause of action for victims of certain sexual abuse crimes in certain circumstances, whereby the OAG would pursue these cases on behalf of victims and seek reasonable attorney's fees and costs for itself in such actions. In their analysis of the bill, the OAG reports that the database development and maintenance costs will be insignificant and covered with existing resources. Similarly, they estimate that there are approximately 30-40 victims in Florida that would fall under these new provisions. While it is indeterminate how many of these victims would require assistance from the OAG, existing staff could handle the workload.

The bill expands the definition of the term "crime" for victim compensation purposes to include "psychological injury or trauma." It also expands the definition of the term "victim" for victim compensation purposes. In their analysis of the bill, the OAG stated that the bill adds "known victims of child pornography to the victims eligible to receive compensation within the limits set in statute." To that extent, the OAG stated the following:

Victim compensation for mental health services is limited to a maximum of \$10,000 per victim. The Cyber Crime unit has determined that there are currently 30 victims in Florida under this section. If an estimated 80% of the victims require Victim Compensation Assistance from the Office of the Attorney General in a given year and reached the maximum, this would require approximately \$240,000. This would have an insignificant impact on the Crimes Compensation Trust Fund.

However, it should be noted that the OAG's analysis of this bill did not address the fiscal impact of expanding the definition of the term "crime." If the bill were not amended to remove the expansion of the definition of the term "crime," it would likely have a significant fiscal impact.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

This bill requires law enforcement officers to provide certain information to prosecutors in certain cases. To the extent that these requirements increase the workload on law enforcement officers, this bill may require counties and cities to take action that may require the expenditure of funds. There are no data available to estimate the potential increased workload on law enforcement officers. Thus, data to calculate the cost of this bill are unavailable. However, if the bill is determined to have a significant<sup>24</sup> fiscal impact, the act may not be binding upon local governments unless the legislature finds that it fulfills an important state interest and the bill passes by 2/3 vote of each house.

## 2. Other:

Only the Legislature is authorized to create exemptions to open government requirements.<sup>25</sup> Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. A bill enacting an exemption<sup>26</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject, and must be passed by a two-thirds vote of both houses.<sup>27</sup>

Currently, court records that reveal the photograph, name, or address of the victim of an alleged offense described in chapter 794, F.S., or chapter 800, F.S., or act of child abuse, aggravated child abuse, or sexual performance by a child as described in chapter 827, F.S., are confidential and exempt from the provisions of s. 24(a), Art. I of the State Constitution and may not be made public if certain showings are made. The bill waives the requirement that such showings be made in certain cases. To the extent that this bill could be interpreted to expand an exemption to open government requirements, such language should be removed and made into a separate bill.

## 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 1

- The references to subparagraph (a)1. on line 112 appears to be incorrect. It should refer to paragraph (a).

### Section 3.

- Lines 199-212 require prosecuting agencies to enter certain information into a database in *every filed case involving child pornography*. If the intent of the bill was only to require prosecuting agencies to enter information into the database in every filed case involving a *known victim of child pornography*, the language could be amended to reflect such.

### Section 4.

- The bill provides a civil cause of action for victims of certain sexual abuse crimes if:
  - o Any portion of such abuse was used in the production of images of child pornography;  
and

<sup>24</sup> For purposes of legislative application of Article VII, Section 18, the term “significant” means an amount greater than the average statewide population for the applicable fiscal year times ten cents. In 2007, the Office of Economic and Demographic Research reported that the estimate of Florida’s population was 18,680,367. This number, multiplied by \$0.10, equals \$1,868,036.70.

<sup>25</sup> Article I, s. 24(c) of the State Constitution.

<sup>26</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>27</sup> Art. I, s. 24(c) of the State Constitution.

- The victim suffers personal or psychiatric injury as a result of the production, promotion, or possession of such images.

Lines 221-222 specify that such persons have a civil cause of action *regardless of whether the sexual abuse occurred while such person was a minor*. The crimes at issue are crimes against *children*, thus it is incongruous that the bill creates a civil cause of action for persons who meet the above requirements *regardless of whether the sexual abuse occurred while such person was a minor*.

- While the bill clearly creates a civil cause of action, the bill is unclear on *who* may be sued under the newly-created civil cause of action.
- On line 239, the term “person” should be replaced with the term “victim” to be consistent.
- Line 243 appears to contain an incorrect statutory citation – the correct citation is 92.56(3).

#### D. STATEMENT OF THE SPONSOR

HB 605 will give victims of child pornography a voice in the courts. It will also provide victims with a remedy to help them cope with the lifetime of exploitation they suffer due to the continued distribution of the images of their sexual abuse.

#### 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 correcting statutory citations and clarifying language relating to civil causes of actions for certain sexual abuse crimes;
- Removes language relating to the confidentiality of court records;
- Adds language prohibiting persons from selling minors knowing that as a result of such sale the minor will perform naked for compensation;
- Requires law enforcement to provide certain information to the National Center for Missing and Exploited Children;
- Adds offenses related to online sexual exploitation and child pornography to the definition of “crime” for victim compensation purposes; and
- Authorizes the Office of Attorney General to award compensation for counseling and other mental health services to certain victims of online sexual exploitation and child pornography crimes.