

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL: SB 1890

INTRODUCER: Senator Storms

SUBJECT: Sexual Predator Identifiers

DATE: March 30, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Pre-meeting
2.			JU	
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill amends statutes concerning reporting requirements of sexual predators and sexual offenders. The most significant change requires these persons to report more types of identifiers used for activities on the Internet than are currently required. The current requirement to report any “instant message name” applies only to communications in real time, such as instant messaging and Internet chats. The new requirement to report any “Internet identifier” includes communications that are not in real time, such as posting on a social networking site or on a newspaper comment board. Therefore, the bill will result in law enforcement having more information to identify sexual predators and sexual offenders if they engage in unlawful activities on the Internet.

The bill also creates the offense of “unlawful electronic communication between minors” (sexting) in new s. 847.0141, F.S. “Sexting” is a term that describes the act of sending sexually explicit messages, photographs, or videos of oneself or another person by electronic means. The bill prohibits a minor from transmitting a video depiction of himself or herself that depicts nudity and that is harmful to minors, or from possessing a visual depiction of another minor that depicts nudity and that is harmful to minors. A minor who commits sexting is subject to penalties that are less than the punishment that could be assessed for the same conduct under existing law.

This bill substantially amends sections 775.21, 943.0435, 943.0437, 944.606, and 944.607, of the Florida Statutes. The bill creates section 847.0141, of the Florida Statutes.

II. Present Situation:

Sexual Predator and Sexual Offender Reporting Requirements

The distinction between a sexual predator and a sexual offender is based on the offense, the date the offense occurred or when sanctions were completed, and whether the person was previously convicted of a sexual offense. Conviction of committing or attempting to commit any of the following offenses would require registration as either a sexual offender or a sexual predator¹:

- Kidnapping, false imprisonment, or luring or enticing a child where the victim is a minor and the defendant is not the victim's parent (ss. 787.01, 787.02, and 787.025(2)(c), F.S.).
- Sexual battery [s. 794.011, F.S., except false accusation of another under subsection (10)].
- Sexual activity by a person who is 24 years old or older with a minor who is 16 or 17 years old (s. 794.05, F.S.).
- Procuring a person under the age of 18 for prostitution (s. 796.03, F.S.).
- Selling or buying of minors into sex trafficking or prostitution (s. 796.035, F.S.).
- Lewd or lascivious offenses upon or in the presence of a person under the age of 16 (s. 800.04, F.S.).
- Lewd or lascivious offenses upon an elderly or disabled person (s. 825.1025, F.S.).
- Enticing, promoting, or possessing images of sexual performance by a child (s. 827.071, F.S.).
- Distribution of obscene materials to a minor (s. 847.0133, F.S.).
- Computer pornography [s. 847.0135, F.S., except owners or operators of computer services liable under subsection (6)].
- Selling or buying of minors for child pornography (s. 847.0145, F.S.).
- Sexual misconduct by a Department of Juvenile Justice (DJJ) employee with a juvenile offender (s. 985.701(1), F.S.).
- Violating a similar law of another jurisdiction.

Designation as a sexual predator requires either: (1) conviction of one of the enumerated offenses after having previously been convicted of one of the offenses, or (2) conviction of a capital, life, or first-degree felony violation of s. 787.01, F.S. or s. 787.02, F.S.; where the victim is a minor and the defendant is not the victim's parent or guardian; s. 794.011, F.S.; s. 800.04, F.S.; s. 847.0145, F.S.; or conviction for violating a similar law of another jurisdiction. Sexual predator status can only be conferred as the result of offenses committed on or after October 1, 1993.

The requirement to register as a sexual offender is triggered by conviction of committing or attempting, soliciting, or conspiring to commit one of the offenses, transmission of child pornography by electronic device (s. 847.0137, F.S.), or transmission of material harmful to minors to a minor by electronic device (s. 847.0138, F.S.). It applies only when the offender was released from the sanction for the offense on or after October 1, 1997.

¹ The criteria for designation as a sexual predator is found in s. 775.21, F.S. The criteria for registration as a sexual offender is found in s. 943.0435, F.S.

A sexual predator or sexual offender is required to comply with a number of statutory requirements.² Those in custody will be registered by the agency by which they are held. Persons under the supervision of the Department of Corrections (DOC) or the Department of Juvenile Justice (DJJ) must register with the respective department. All others must register at the county sheriff's office within 48 hours of either: (1) being designated as a sexual predator; (2) convicted of an offense that requires registration as a sexual offender; or (3) establishing a residence in the county.

A variety of personally identifying information must be provided to the sheriff's office as part of the registration process. This information includes the address of a legal residence or temporary residence or the address, location or description of a transient residence, any electronic mail address, and any instant message name.

The sheriff's office provides this information to the Florida Department of Law Enforcement (FDLE) for inclusion in the statewide database. The offender or predator must also register at a driver's license office within 48 hours of the initial registration at the sheriff's department.

Both sexual predators and sexual offenders must report any change of permanent, temporary, or transient residence within the state to the driver's license office within 48 hours. If a new permanent, temporary, or transient residence is not established, the sheriff's office must be given the address for the residence or other location that will be occupied until a new residence is established. Transient residence is defined as:

A place or county where a person lives, remains, or is located for a period of 5 or more days in the aggregate during a calendar year and which is not the person's permanent or temporary address. The term includes, but is not limited to, a place where the person sleeps or seeks shelter and a location that has no specific street address.

The predator or offender must also report his or her intent to establish a residence in another state or jurisdiction within 48 hours of the intended change. However, this notice must be given in person to the county sheriff, not to the driver's license office.

Predators and offenders are also required to keep information concerning electronic mail addresses and instant message names in the same manner as is required for a change of residence. This includes providing the information within 48 hours of establishing or changing an electronic mail address or instant message name.

The county sheriff or municipal police chief must notify child care centers and schools within a one-mile radius of the sexual predator's permanent, temporary, or transient residence within 48 hours of the notification by the predator. In addition, the sheriff or police chief is required to notify the community of the presence of the predator in an appropriate manner, which is often by posting on the sheriff's website. Both notices must include the predator's address, including the name of the municipality or county.

² The specific offender reporting requirements and law enforcement reporting and notification requirements are found in ss. 775.21, 943.0435, 944.606, 944.607, 985.481, and 985.4815, F.S.

The DOC and DJJ are required to provide FDLE with information including the offender's intended residence address, if known six months prior to release from custody or commitment. The agencies must also provide FDLE with the current or intended permanent, temporary, or transient address, if known during the time of incarceration or residential commitment.

Sexting

Florida law currently contains various statutes that prohibit the creation, possession, and transmission of sexual materials depicting minors. Some of these laws address photographs or videos that do not rise to the level of child pornography, which is statutorily defined as "any image depicting a minor engaged in sexual conduct."³ Section 847.001(16), F.S., defines "sexual conduct" as:

[A]ctual 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. A mother's breastfeeding of her baby does not under any circumstance constitute "sexual conduct."⁴

Sexual Performance by a Child

Section 827.071(5), F.S., provides that it is a third degree felony for any person to knowingly possess a photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child. The statute specifies that the possession of each photograph, motion picture, exhibition, show, representation, or presentation is a separate offense.

Prohibition of Acts Relating to Obscene and Lewd Materials

Section 847.011(1)(a), F.S., provides that it is a first degree misdemeanor for a person to knowingly sell, lend, give away, distribute, transmit, show, or transmute, or have in his or her possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, or transmute, specified obscene items, including pictures, photographs, and images. However, s. 847.011(1)(c), F.S., provides that it is a third degree felony if the violation of s. 847.011(1)(a) or (2), F.S., is based on materials that depict a minor⁵ engaged in any act or conduct that is harmful to minors.⁶

Section 847.011(2), F.S., provides that it is a second degree misdemeanor for a person to have in his or her possession, custody, or control specified obscene items, including pictures, photographs, and images, without the intent to sell, etc., such items.

³ See ss. 775.0847(1)(b) and 847.001(3), F.S.

⁴ "Sexual conduct" is defined identically in ss. 775.0847 and 827.071, F.S. It has a more limited definition in s. 365.161, F.S., which relates to obscene or indecent communications made by a telephone that describe certain sexual acts.

⁵ The term "minor" is defined as "any person under the age of 18 years." Section 847.001(8), F.S.

⁶ The term "harmful to minors" is defined in s. 847.001(6), F.S. For a more detailed definition, see the "Effect of Proposed Changes" section of this bill analysis.

Protection of Minors

Section 847.0133, F.S., provides that it is a third degree felony for a person to knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene⁷ material to a minor. “Material” includes pictures, photographs, and images.

Computer Pornography

Section 847.0135(2), F.S., provides that it is a third degree felony for a person to:

- Knowingly compile, enter into, or transmit the visual depiction of sexual conduct with a minor by use of computer;
- Make, print, publish, or reproduce by other computerized means the visual depiction of sexual conduct with a minor;
- Knowingly cause or allow to be entered into or transmitted by use of computer the visual depiction of sexual conduct with a minor; or
- Buy, sell, receive, exchange, or disseminate the visual depiction of sexual conduct with a minor.

Transmission of Pornography

Section 847.0137(2), F.S., provides that any person in this state who knew or reasonably should have known that he or she was transmitting child pornography to another person in this state or another jurisdiction commits a third degree felony.

Transmission of Material Harmful to Minors

Section 847.0138(2), F.S., provides that any person who knew or believed that he or she was transmitting an image, information, or data that is harmful to minors to a specific individual known or believed by the defendant to be a minor commits a third-degree felony.

Both minors and adults can be charged with any of the offenses described above.

Sexting

“Sexting” is a recently coined term that combines the words “sex” and “texting.”⁸ It is used to describe the act of sending sexually explicit messages, photographs, or videos of oneself or another person by electronic means. As the name suggests, “sext” messages are most commonly sent by a cell phone text message. Media reports and other studies indicate that sexting is a growing trend among teenagers. In a 2008 survey of 1,280 teenagers and young adults of both sexes, 20 percent of teens (ages 13-19) and 33 percent of young adults (ages

⁷ Section 847.001(10), F.S., defines the term “obscene” as the status of material which the average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest; depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and taken as a whole, lacks serious literary, artistic, political, or scientific value. A mother’s breastfeeding of her baby is not under any circumstance “obscene.”

⁸ Stacey Garfinkle, Sex + Texting = Sexting, *The Washington Post*, Dec. 10, 2008, available at <http://voices.washingtonpost.com/parenting/2008/12/sexting.html> (last visited March 7, 2011).

20-26) had sent nude or semi-nude photographs of themselves electronically.⁹ Additionally, 39 percent of teens and 59 percent of young adults had sent sexually explicit text messages.¹⁰

There is no Florida law that specifically addresses sexting. Under current law, a person who knowingly sends certain sexually explicit images of a minor to another person, or a person who knowingly receives such images, could be charged with any number of different offenses that relate to sexual material depicting minors. For example, in 2007, 18-year-old Phillip Alpert was arrested and charged with transmitting child pornography (among other things) after he sent a nude photo of his 16-year-old girlfriend to her friends and family after they had an argument. In total, Alpert was charged with 72 offenses, sentenced to five years of probation, and was required to register as a sexual offender.¹¹

Similarly, in other jurisdictions, some law enforcement officers and district attorneys have begun prosecuting teens who “sext” under laws generally reserved for producers and distributors of child pornography. For example, in Pennsylvania, a district attorney gave 17 students who were either pictured in images or found with “provocative” images on their cell phones the option of either being prosecuted under child pornography laws or agreeing to participate in a five-week after school program and probation.¹² Similar incidents have occurred in other states, e.g., Massachusetts, Ohio, and Iowa.¹³

As a result, state legislatures have considered making laws that downgrade the charges for sexting from felonies to misdemeanors. For example, in 2009, Vermont and Utah passed laws that downgraded the penalties for minors and first-time perpetrators of sexting.¹⁴

III. Effect of Proposed Changes:

Reporting Requirements for Sexual Predators and Sexual Offenders

Internet identifiers

The bill replaces the term “instant message name” with “Internet identifier” wherever it is used in relation to sexual predators or sexual offenders. “Internet identifier” encompasses more Internet-related activity than the current “instant message name,” so this will require sexual predators and sexual offenders to report more types of identifiers used for activities on the Internet than are currently required. The terms are defined as follows:

⁹ National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults*, 1, available at http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf (last visited March 7, 2011).

¹⁰ *Id.*

¹¹ Vicki Mabrey and David Perozzi, ‘Sexting’: Should Child Pornography Laws Apply?, *ABC NEWS* (Apr. 1, 2010), available at <http://abcnews.go.com/Nightline/philip-alpert-sexting-teen-child-porn/story?id=10252790> (last March 2, 2011); Deborah Feyerick and Sheila Steffen, ‘Sexting’ lands teen on sex offender list, *CNN* (Apr. 8, 2009), available at <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html> (last visited March 7, 2011).

¹² Amanda Lenhart, *Teens and Sexting: How and why minor teens are sending sexually suggestive nude or nearly nude images via text messaging*, *Pew Research Ctr.*, 3 (Dec. 15, 2009), available at http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf (last visited March 7, 2011).

¹³ *Id.*; see also Mabrey and Perozzi, *supra* note 10.

¹⁴ Lenhart, *supra* note 11, at 3.

- In the current statute, an “instant message name” is “an identifier that allows a person to communicate in real time with another person using the Internet.”
- In the bill, an “Internet identifier” is “any electronic mail, chat, instant messenger, social networking, or similar name used for Internet communication, but does not include date of birth, social security number, or Personal Identification Numbers (PIN).”¹⁵

The current requirement to report any “instant message name” applies only to communications in real time, such as instant messaging and Internet chats. The new requirement to report any “Internet identifier” includes communications that are not in real time, such as posting on a social networking site or on a newspaper comment board. It is also expected that it will include any future advancements in Internet communications. Therefore, the bill will result in law enforcement having more information to identify sexual predators and sexual offenders who engage in unlawful activities on the Internet.

The bill replaces the current requirement that a sexual predator or sexual offender report an instant message name with the new requirement to report an Internet identifier in the following places:

- Section 775.21, F.S. (the Florida Sexual Predators Act) in Section 1 of the bill.
- Section 943.0435, F.S. (sexual offenders required to register with FDLE) in Section 3 of the bill.
- Section 943.0437, F.S. (commercial social networking websites) in Section 4 of the bill.
- Section 944.607, F.S. (notification to FDLE of information on sexual offenders) in Section 5 of the bill.
- Section 944.606, F.S. (notification upon release of sexual offenders) in Section 6 of the bill.

Reporting of Change of Address

Sections 775.21(6)(g)1. and 943.0435(4)(a), F.S., require sexual predators and sexual offenders, respectively, to report any change of permanent, temporary, or transient residence within the state to the driver’s license office within 48 hours. Sections 1 and 3 of the bill state that a predator or offender does not violate this provision if he or she reports the change of address to the local sheriff’s office within 48 hours after the change, along with proof of also promptly reporting the change to the driver’s license office. The purpose of this provision is unclear, but it may be intended to allow compliance by a reporting individual when he or she moves at a time that the driver’s license office will be closed, such as the beginning of a holiday weekend.

Notification Before Establishing Residence in Another State or Jurisdiction

Currently, a predator or offender must give in-person notification to the county sheriff of his or her intent to establish a residence in another state or jurisdiction within 48 hours of the intended change. Section 1 of the bill amends s. 775.21(6)(i), F.S., to require that a sexual predator give this notification within 21 days before the planned departure date if he or she intends to reside outside of the United States for 7 days or more. This means that the offender can give notice at any time from 21 days before departure up until the actual departure.

¹⁵ FDLE recommends insertion of language providing that the voluntary use of a birth date, social security number, or PIN as an Internet identifier constitutes a waiver of the right of non-disclosure of such information. See Florida Department of Law Enforcement Analysis of Senate Bill 1890, March 25, 2011, p. 2.

Sexting

The bill creates the offense of “unlawful electronic communication between minors” (sexting) in new s. 847.0141, F.S. A minor who commits sexting is subject to penalties that are less than the punishment that could be assessed for the same conduct under existing law. Also, a conviction of sexting would not result in the requirement to register as a sexual offender or to comply with existing residency restriction laws or other laws that apply to persons who are convicted of certain sexual offenses.

The new offense of sexting can occur in two different ways:

- A minor commits the offense of sexting when he or she intentionally or knowingly uses an electronic communication device to transmit, distribute or display a visual depiction of himself or herself which depicts nudity and is harmful to minors; or
- A minor commits the offense of sexting when he or she intentionally or knowingly possesses a visual depiction of another minor which depicts nudity and is harmful to minors. However, a minor does not commit this possession offense if he or she: (1) did not solicit the visual depiction; (2) took reasonable steps to destroy or eliminate the visual depiction or report it to his or her parent or guardian or to a school or law enforcement official; and (3) did not transmit or distribute the visual depiction to a third party.

The term “nudity” is defined in s. 847.001(9), F.S., to mean:

[T]he showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. A mother’s breastfeeding of her baby does not under any circumstance constitute “nudity,” irrespective of whether or not the nipple is covered during or incidental to feeding.

Section 847.001(6), F.S., defines “harmful to minors” as:

[A]ny 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 a prurient, shameful, or morbid interest;
- (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
- (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

A mother’s breastfeeding of her baby is not under any circumstance “harmful to minors.”

The bill provides the following graduated punishment schedule for a violation of sexting:

- A first sexting violation is a noncriminal violation, punishable by eight hours of community service or a \$60 fine if ordered by the court in lieu of community service. The court may also order the minor to participate in suitable training concerning such offenses and prohibit the use or possession of electronic devices.¹⁶
- A sexting violation that occurs after being found to have committed a noncriminal violation for sexting is a second degree misdemeanor. A second degree misdemeanor is punishable by a jail term of not more than 60 days and may include a fine of not more than \$500.¹⁷ The court is also required to order suitable training for such offenses and to prohibit the use or possession of electronic devices.
- A sexting violation that occurs after being found to have committed a second degree misdemeanor violation for sexting is a first degree misdemeanor. A first degree misdemeanor is punishable by a jail term of not more than one year and may include a fine of not more than \$1,000.¹⁸ The court is also required to order either suitable training for such offenses or counseling, and to prohibit the use or possession of electronic devices.
- A sexting violation that occurs after being found to have committed a first degree misdemeanor violation for sexting is an unranked third degree felony. A third-degree felony is punishable by state imprisonment for not more than five years and may include a fine of not more than \$5,000.¹⁹ However, because the felony is unranked, the offender may be sentenced to a term of probation under supervision by the Department of Corrections.²⁰ In addition, the court must order a mental health evaluation by a qualified practitioner as defined in s. 948.001, F.S. The court must also order treatment if it is recommended by the qualified practitioner.

A law enforcement officer who arrests any person for sexting must seize the prohibited material and keep it until the court's sentence. In all cases, a sentence for committing sexting requires the court to authorize the law enforcement agency to destroy the prohibited material.

The bill specifies that the sexting provisions do not prohibit the prosecution of a minor for conduct relating to material that includes the depiction of sexual conduct or sexual excitement, and does not prohibit the prosecution of a minor for stalking under s. 784.048, F.S.

The bill is substantially similar to CS/SB 2560 which passed the Senate last year. According to FDLE's analysis of that bill, the minor will not have an FDLE record after a first offense because it is a noncriminal violation. Therefore, if the offenses occur in different jurisdictions, prosecutors may be unaware of a previous noncriminal violation and the minor may not be charged with the proper offense.²¹

¹⁶ The bill includes, but is not limited to, cellular telephones, cameras, computers, or other electronic media devices.

¹⁷ Sections 775.082 and 775.083, F.S.

¹⁸ *Id.*

¹⁹ Sections 775.082 and 775.083, F.S.

²⁰ "Unranked" is a descriptive term for a noncapital felony that is not specifically ranked in the offense severity ranking chart in s. 921.0022, F.S. If the felony is not ranked in the chart, it is ranked pursuant to s. 921.0023, F.S., based on its felony degree. An unranked third degree felony is a Level 1 offense. *Id.* A first-time offender convicted of only the unranked third degree felony would score a nonprison sanction as the lowest permissible sentence. Section 921.0024, F.S. Further, in this first-time offender scenario, a non prison sanction would be required unless the sentencing court made written findings that this sanction could present a danger to the public. Section 775.082(10), F.S.

²¹ Florida Department of Law Enforcement, Senate Bill 2560 Relating to Sexting (Mar. 17, 2010).

Under the bill, the offense of sexting and its reduced penalties do not include the conduct of a minor who re-transmits a sexted photograph or video. Therefore, the state attorney would continue to have discretion in the prosecution of such conduct.

Severability Clause

Section 7 of the bill is a severability clause providing that a finding that any portion of the bill is found to be invalid will not affect the validity of any other portion of the bill.

Effective Date

Section 8 of the bill provides that it will take effect on July 1, 2011. In its analysis, FDLE requests that the date be changed to February 1, 2012, to allow time for it to meet the requirements.²²

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There appears to be no private sector fiscal impact.

C. Government Sector Impact:

FDLE reports that changes to the sexual offender/sexual predator reporting requirements will require a non-recurring expenditure of \$27,725.

The Criminal Justice Impact Conference assessed Senate Bill 888, a similar bill concerning the sexting provisions of this bill, as having an insignificant fiscal impact.

²² *Id.*, note 12 on p. 4.

VI. Technical Deficiencies:

- The bill should be amended throughout to require reporting of “all” Internet identifiers rather than “any” Internet identifiers wherever such reference is made in the bill.
- Lines 156-162 and 466-471 should be amended to clarify the intent of the provision regarding satisfaction of reporting requirements by reporting a change of address to the sheriff’s office with proof of promptly reporting the change to the driver’s license office.
- On line 466, the reference to “predator” should be changed to “offender,” because it is in the statute concerning sexual offender reporting requirements.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.