

STORAGE NAME: h0895.jj
DATE: January 31, 2000

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUVENILE JUSTICE
ANALYSIS**

BILL #: HB 895 (PCB JJ 00-03A)
RELATING TO: Child pornography and exploitation
SPONSOR(S): Committee on Juvenile Justice, Representative Merchant and Others
TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUVENILE JUSTICE YEAS 12 NAYS 0
 - (2)
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

The bill amends ch. 847, F.S., which relates to obscene literature and profanity. The bill adds the definition of "child pornography" to s. 847.001, F.S. The bill also amends s. 847.0135, F.S., the "Computer Pornography and Child Exploitation Prevention Act of 1986." The amendment gives effect to the prohibition against computer pornography found in s. 847.0135(2). The bill adds a new subsection (5) to s. 847.0135, F.S., which requires any person who knows, or has reasonable cause to believe, that a computer contains images of child pornography or evidence of violations ss. 847.0135(2) or (3), F.S., to report such knowledge or belief to the Florida Department of Law Enforcement. Certain mandatory reporters are specified.

Under the bill, any person who knows, or has reasonable cause to believe, that a computer contains images of child pornography, evidence of computer pornography, or evidence that a computer service has been used in a manner prohibited under s. 847.0135(3), F.S., and fails to report that knowledge or belief to the Florida Department of Law Enforcement commits a misdemeanor of the second degree. However, no person shall be held civilly liable for making a report in good faith to the Florida Department of Law Enforcement pursuant to the requirements of the bill. Any person who knowingly and willfully makes a false report pursuant to the requirements of the bill commits a felony of the third degree.

The Florida Department of Law Enforcement is specified as the repository for all reports made pursuant to the requirements of the bill. The Florida Department of Law Enforcement is authorized to promulgate rules for the purpose of carrying out its obligations under the bill.

By giving effect to s. 847.0135(2), F.S., and by mandating reporting of certain offenses, the bill should result in more cases being reported and prosecuted. There may be a fiscal impact associated with the cost of receiving and investigating reports of child pornography, computer pornography, and certain uses of computer services. There may also be a cost associated with the enforcement of specified sanctions. However, increased revenues may be generated through civil forfeiture proceedings and by the imposition of fines against those sentenced for violating the provisions of s. 847.0135, F.S.

The bill takes effect on October 1, 2000.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |

For any principle that received a "no" above, please explain:

The bill requires any person who knows, or has reasonable cause to believe, that a computer contains certain information to immediately make a report to the Florida Department of Law Enforcement or face criminal penalties. Criminal penalties are also provided for any person who knowingly and willfully makes a false report. Some government involvement will be needed to receive reports and to enforce sanctions. Although the bill may create more government, the involvement by the government furthers interests of family empowerment and the protection of children.

B. PRESENT SITUATION:

Section 847.0135, F.S., is cited as the "Computer Pornography and Child Exploitation Prevention Act of 1986 (henceforth, "the Act")." The Act is intended to prevent computers and computer on-line services from being used as tools for the exploitation and abuse of children.

Section 847.0135(2), F.S., relates to computer pornography and addresses offenders who use a computer to facilitate, encourage, offer, or solicit sexual conduct with a minor. Subsection (2) of the Act provides that any person who violates the provisions of the subsection commits a felony of the third degree. However, there is no language in the subsection that actually prohibits any of the conduct which is specified in s. 847.0135(2), F.S. This failure makes it impossible to actually demonstrate a violation under this subsection.

Section 847.0135(3), F.S., prohibits the use of computer services for the purpose of seducing, soliciting, luring, or enticing, or attempting to seduce, solicit, lure, or entice, a child, or a person who is or is believed to be a child, to commit any illegal act described in ch. 794, F.S., (sexual battery), ch. 800, F.S., (lewdness; indecent exposure), or ch. 827, F.S., (child abuse). Any person who violates the provisions of s. 847.0135(3), F.S., commits a felony of the third degree.

Section 847.0135(4) provides any owners or operators of computer on-line services who knowingly permit subscribers to use their computer services to commit violations of the Act are subject to first degree misdemeanor penalties.

The Act does not address the use of computers and/or computer on-line services as tools for obtaining and storing images of child pornography.

C. EFFECT OF PROPOSED CHANGES:

Section 1 of the bill amends s. 847.001, F.S., which provides definitions for the chapter. The bill adds "child pornography," to the section, providing a new subsection (1). The bill defines "child pornography" to mean any image depicting, or intended to depict, a minor engaged in 'sexual conduct' as defined in subsection (12)." The bill specifically excludes from the definition of "child pornography" any image of a mother breast-feeding her baby.

Section 1 of the bill renumbers the remaining subsections and amends a cross-reference for conformity.

Section 2 of the bill amends s. 847.0135, F.S., giving effect to subsection (2) and providing a new subsection (5).

In amending s. 847.0135(2), F.S., the bill provides language which actually prohibits the conduct specified in the subsection. Without such an amendment, it is impossible to prosecute offenses under s. 847.0135(2). The bill provides a third degree felony penalty for any person who:

- (a) knowingly compiles, enters into, or transmits by means of a computer;
- (b) makes, prints, publishes, or reproduces by other computerized means;
- (c) knowingly causes or allows to be entered into or transmitted by means of a computer; or
- (d) buys, sells, receives, exchanges, or disseminates,

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 section of the bill also corrects an apparent typographical error in the section by replacing the word "or" before the phrase "any minor's name . . ." with the word "of."

The bill creates mandatory reporting requirements, adding a new subsection (5) to s. 847.0135, F.S. The bill requires that any person who knows, or has reasonable cause to believe, that a computer contains images of child pornography as specified in the new definition provided in s. 847.001(1), F.S., or evidence of a violation of s. 847.0135(2), F.S., relating to computer pornography, or evidence of a violation of s. 847.0135(3), F.S., relating to prohibited uses of computer services, to immediately report that knowledge or belief to the Florida Department of Law Enforcement. The bill specifies certain mandatory reporters to include any computer repair technician, computer system administrator, or Internet service provider. The bill provides second degree misdemeanor sanctions for any person who has such knowledge or belief and fails to make a report. A third degree felony penalty is provided for any person who knowingly and willfully makes a false report under the requirements of the subsection.

The bill gives authority to the Florida Department of Law Enforcement to promulgate necessary rules for processing reports made in accordance with these requirements. Any person who makes a report in good faith pursuant to the requirements of the bill is afforded immunity from any civil liability that may arise in connection with the report and its disclosures.

The language in the bill related to false reporting penalties and to good faith immunity is identical to the language found in s. 39.203(1)(a), F.S., and s. 39.205, F.S., which relate to child abuse reporting. Many courts have espoused the view that child pornography is a form of child abuse. See, e.g., U.S. v. Tillmon, D.C. Docket No. 98-00229-CR-PT-S (11th Cir. Nov. 10, 1999). There are many common interests which both ch. 39, F.S. and the bill seek to protect.

The bill may have a fiscal impact associated with the cost of receiving and investigating reports of child pornography, computer pornography, and certain uses of computer services. There may also be a cost associated with the enforcement of specified sanctions. However, by giving effect to s. 847.0135(2) and by mandating reporting, the bill should result in more cases being reported and prosecuted. As a result, increased revenues may be generated through civil forfeiture proceedings, in accordance with ss. 932.701 - 932.707, F.S., and by the imposition of fines against those sentenced for violating the provisions of s. 847.0135, F.S., in accordance with s. 775.083, F.S. There may also be revenues generated through fines imposed against those sentenced for failing to make a report or for intentionally making a false report pursuant to the bill.

Section 3 of the bill provides an enactment date of October 1, 2000.

D. SECTION-BY-SECTION ANALYSIS:

Please refer to Paragraph II-C (Effect of Proposed Changes) above.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

By giving effect to s. 847.0135(2) and by providing a mandatory reporting requirement, the bill should result in more cases being reported and prosecuted. As a result of an increase in the number of prosecutions, revenues may be generated pursuant to the provisions of s. 775.083, F.S., which allows for the imposition of fines at sentencing. Additionally, any personal property used as an instrumentality in the commission of a felony is subject to forfeiture under the Florida Contraband Forfeiture Act, ss. 932.701 - 932.707, F.S. Such proceedings may be an additional source of revenues. Increased revenues may also be generated through fines imposed against those sentenced for failing to make a report or for intentionally making a false report pursuant to the bill.

2. Expenditures:

The bill gives effect to s. 847.0135(2), F.S., and provides mandatory reporting requirements. Reports of a person's knowledge or reasonable belief that a computer contains images of child pornography are to be received, documented and catalogued by the Florida Department of Law Enforcement. Presently, there is no agency

designated as the central repository for receiving such reports. Expenditures associated with establishing and staffing a repository for receiving, documenting, and cataloging this information pursuant to the provisions of the bill may be required. There may also be additional expenditures associated with investigation and prosecution because the mandatory reporting requirement may bring more of these offenses to the attention of law enforcement.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Please refer to Paragraph III-A(1) (FISCAL IMPACT ON STATE GOVERNMENT: Revenues) above.

2. Expenditures:

Please refer to Paragraph III-B(2) (FISCAL IMPACT ON STATE GOVERNMENT: Expenditures) above.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Criminal Justice Economic Conference has not yet evaluated the fiscal impact of the bill.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds. Additionally, the bill is a criminal law and exempt from the mandates provision.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority of counties or municipalities to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18 of the Florida Constitution.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

The bill directs the Florida Department of Law Enforcement to promulgate rules pursuant to the ss. 120.54 and 120.536(1) that will be necessary for cataloguing and documenting reports of information received pursuant to the requirements of s. 847.0135(5).

The reporting requirements contained in the bill and the interests which they seek to protect share many commonalities with issues addressed in ch. 39, pt. II, F.S., which relates to the reporting of child abuse. In fact, many courts have espoused the view that child pornography is a form of child abuse. See, e.g., U.S. v. Tillmon, D.C. Docket No. 98-00229-CR-PT-S (11th Cir. Nov. 10, 1999). However, the bill leaves to the rule-making authority of the Florida Department of Law Enforcement several issues that are covered by statute in ch. 39, F.S. These issues include the manner in which reports are received, the time line for responding to reports, the type of information the report should include, maintaining the confidentiality of reports and reporters. Some of these issues may be equally relevant to reports required by the bill.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUVENILE JUSTICE:

Prepared by:

Staff Director:

Lori Ager

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