

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1277 Sexual Offenders and Predators

SPONSOR(S): Glorioso

TIED BILLS: None **IDEN./SIM. BILLS:** SB 1890

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		Cunningham	Cunningham
2) Appropriations Committee			
3) Judiciary Committee			

SUMMARY ANALYSIS

HB 1277 amends the definition of the term “sexual offender” in ss. 943.0435, 944.606, and 944.607, F.S., to add the offense of incest, where the victim is a minor and the defendant is 18 years of age or older, to the list of offenses that, upon conviction, qualify a person as a sexual offender.

The bill also amends the definition of the term sexual offender in s. 943.0435, F.S., to include a person who has been released on or after October 1, 2011, from any sanction imposed for any felony conviction or similar offense in another jurisdiction, and who has a prior qualifying sexual conviction. Similarly, the bill amends the definition of the term “sexual offender” in s. 944.607, F.S., to include a person who is in the custody or control of, or under the supervision of, DOC on or after October 1, 2011, as a result of committing any felony, if the offender has a prior conviction for committing, or attempting, soliciting, or conspiring to commit, a prior qualifying sexual conviction.

These changes to the definitions of “sexual offender” in ss. 943.0435, 944.606, and 944.607, F.S. will have the effect of expanding the number of persons who qualify as sexual offenders. Such persons will immediately be subject to the sexual offender registration requirements contained in ss. 943.0435, 944.606, and 944.607, F.S.

The bill also:

- Requires sexual offenders to report to the sheriff of the county of current residence within 21 days before the offender’s planned departure if the intended residence of 7 days or more is outside the United States.
- Requires sexual predators and offenders to provide the sheriff and FDLE any Internet identifier the offender uses. The bill defines “Internet identifier” as “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 PIN number.”
- Requires state agencies and governmental subdivisions to search the name of people hired to work in specified locations through the Dru Sjodin National Sex Offender Public Website.
- Provides an additional way in which sexual predators and offenders can have the requirement to register as a sexual predator or offender removed.
- Creates s. 847.0141, F.S., which makes it unlawful for a minor to:
 - o Intentionally or knowingly use an electronic communication device to transmit, distribute, or display a visual depiction of himself or herself that depicts nudity and is harmful to minors.
 - o Intentionally or knowingly possess a visual depiction of another minor that depicts nudity and is harmful to minors.
- Specifies that s. 948.31, F.S., which mandates that the court require sex offender treatment as a term or condition of supervision in certain instances for any person who is required to register as a sexual predator or sexual offender, is a standard condition of supervision and does not require oral pronouncement at the time of sentencing.

The bill may have a significant fiscal impact on state government (see Fiscal Impact on State Government) and is effective upon becoming a law.

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

STORAGE NAME: h1277.CRJS

DATE: 3/28/2011

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Qualifying Offenses (Sections 3, 7 and 8)

Section 943.0435, F.S., which contains various registration requirements for sexual offenders, defines the term “sexual offender” as a person who:

1. Has been convicted of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes in this state or similar offenses in another jurisdiction:
 - Section 787.01, F.S. (kidnapping)
 - Section 787.02, F.S. (false imprisonment)
 - Section 787.025(2)(c), F.S., (luring or enticing a child) where the victim is a minor and the defendant is not the victim’s parent or guardian
 - Section 794.011, F.S., (sexual battery) excluding s. 794.011(10), F.S.¹
 - Section 794.05, F.S. (unlawful activity with certain minors)
 - Section 796.03, F.S. (procuring a person under the age of 18 for prostitution)
 - Section 796.035, F.S. (selling or buying of minors into sex trafficking or prostitution)
 - Section 800.04, F.S. (lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age.)
 - Section 825.1025, F.S. (lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person.)
 - Section 827.071, F.S. (sexual performance by a child)
 - Section 847.0133, F.S. (prohibition of certain acts in connection with obscenity)
 - Section 847.0135, F.S., (computer pornography and traveling to meet a minor) excluding s. 847.0135(6), F.S.²
 - Section 847.0137, F.S. (transmission of pornography by electronic device or equipment)
 - Section 847.0138, F.S. (transmission of material harmful to minors to a minor by electronic device or equipment)
 - Section 847.0145, F.S. (selling or buying of minors)
 - Section 985.701(1), F.S. (sexual misconduct with a juvenile offender)

And has been released on or after October 1, 1997, from the sanction imposed for any conviction of an offense described above. A sanction imposed in this state or in any other jurisdiction includes, but is not limited to, a fine, probation, community control, parole, conditional release, control release, or incarceration in a state prison, federal prison, private correctional facility, or local detention facility;

2. Establishes or maintains a residence in this state and who has not been designated as a sexual predator by a court of this state but who has been designated as a sexual predator, as a sexually violent predator, or by another sexual offender designation in another state or jurisdiction and was, as a result of such designation, subjected to registration or community or public notification, or both, or would be if the person were a resident of that state or jurisdiction, without regard to whether the person otherwise meets the criteria for registration as a sexual offender;
3. Establishes or maintains a residence in this state and who is in the custody or control of, or under the supervision of, any other state or jurisdiction as a result of a conviction for committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses listed above or a similar offense in another jurisdiction, or any similar offense committed in this state which has been redesignated from a former statute number to one of those listed above; or

¹ Section 794.011(1), F.S., relates to falsely accusing specified persons of sexual battery.

² Section 947.0135(6), F.S., provides that it is unlawful for any owner or operator of a computer online service, Internet service, or local bulletin board service knowingly to permit a subscriber to use the service to commit a violation of s. 947.0135, F.S.

4. On or after July 1, 2007, has been adjudicated delinquent for committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes in this state or similar offenses in another jurisdiction when the juvenile was 14 years of age or older at the time of the offense:
- Section 794.011, F.S., (sexual battery) excluding s. 794.011(10), F.S.;
 - Section 800.04(4)(b), F.S., (encouraging, forcing, or enticing any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity) where the victim is under 12 years of age or where the court finds sexual activity by the use of force or coercion;
 - Section 800.04(5)(c)1., F.S., (related to lewd and lascivious molestation) where the court finds molestation involving unclothed genitals; or
 - Section 800.04(5)(d), F.S., (related to lewd and lascivious molestation) where the court finds the use of force or coercion and unclothed genitals.

Sections 944.606 and 944.607, F.S., which contain provisions relating to sexual offenders in the custody of or under the supervision of the Department of Corrections (DOC), also contain definitions of the term “sexual offender” that include the list of offenses enumerated above.

Effect of the Bill

HB 1277 amends the definition of the term “sexual offender” in ss. 943.0435, 944.606, and 944.607, F.S., to add the offense of incest,³ where the victim is a minor and the defendant is 18 years of age or older, to the list of offenses that, upon conviction, qualify a person as a sexual offender.

The bill amends the definition of the term sexual offender in s. 943.0435, F.S., to add a fifth category of persons who qualify as a sexual offender. This fifth category includes a person who has been released on or after October 1, 2011, from any sanction imposed⁴ for any felony conviction or similar offense in another jurisdiction, and;

- Has been convicted of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses enumerated above in this state or similar offenses in another jurisdiction, or any similar offense committed in this state which has been redesignated from a former statute number to one of those listed in above; or
- Has been adjudicated delinquent for committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes in this state or similar offenses in another jurisdiction when the juvenile was 14 years of age or older at the time of the offense:
 - Section 794.011, F.S., excluding s. 794.011(10), F.S.;
 - Section 800.04(4)(b), F.S., where the victim is under 12 years of age or where the court finds sexual activity by the use of force or coercion;
 - Section 800.04(5)(c)1., F.S., where the court finds molestation involving unclothed genitals; or
 - Section 800.04(5)(d), F.S., where the court finds the use of force or coercion and unclothed genitals.

The bill also amends the definition of the term “sexual offender” in s. 944.607, F.S., to include a person who is in the custody or control of, or under the supervision of, DOC or is in the custody of a private correctional facility on or after October 1, 2011, as a result of committing any felony, if the offender has a prior conviction for committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses enumerated above in this state or similar offenses in another jurisdiction or any similar offense committed in this state which has been redesignated from a former statute number to one listed above.

³ Currently, s. 826.04, F.S., provides that whoever knowingly marries or has sexual intercourse with a person to whom he or she is related by lineal consanguinity, or a brother, sister, uncle, aunt, nephew, or niece, commits incest. Incest is punishable as a 3rd degree felony.

⁴ The bill specifies that any sanction imposed in this state or any other jurisdiction includes, but is not limited to, a fine, probation, community control, parole, conditional release, control release, or incarceration in a state prison, federal prison, private correctional facility, or local detention facility.

The above changes to the definitions of “sexual offender” in ss. 943.0435, 944.606, and 944.607, F.S. will have the effect of expanding the number of persons who qualify as sexual offenders. Such persons will immediately be subject to the sexual offender registration requirements contained in ss. 943.0435, 944.606, and 944.607, F.S.

Sexual Predator / Offender Registration - Address (Sections 1 and 3)

In very general terms, the distinction between a sexual predator and a sexual offender depends on what offense the person has been convicted of, whether the person has previously been convicted of a sexual offense and the date the offense occurred. A sexual predator or sexual offender must comply with a number of statutory registration requirements.⁵ Failure to comply with these requirements is a third or second degree felony, depending of the offense.

Sexual predators and offenders must register at the sheriff’s office within 48 hours of establishing or maintaining a residence.⁶ During initial registration, a sexual predator or sexual offender is required to provide certain information, including the address of the predator or offender’s permanent or temporary residence, to the sheriff’s department.⁷ The sheriff’s department then provides this information to the Florida Department of Law Enforcement (FDLE) for inclusion in the statewide database.

A sexual predator or sexual offender is also required to report any changes to his or her registration information. For example, a sexual predator or offender who changes his or her residence must, within 48 hours after such change, report in person to a Department of Highway Safety and Motor Vehicles (DHSMV) driver license office as well as the sheriff’s office of the county in which the predator or offender is located.⁸

Effect of the Bill

As noted above, ss. 775.21 and 943.0435, F.S., require sexual predators and offenders who change residences to, within 48 hours after such change, report in person to a DHSMV driver license office. Failure to do so is a 3rd degree felony.⁹ The bill amends these sections of statute to provide that a sexual predator or offender does not commit a 3rd degree felony if he or she reports an address or location change to the local sheriff’s office within 48 hours after such change with proof that he or she also promptly reported such information to the DHSMV.

The bill also amends s. 943.0435(7), F.S., which requires a sexual offender who intends to establish a residence in another state or jurisdiction other than Florida to report in person to the sheriff of the county of current residence within 48 hours before the date he or she intends to leave the state. The bill permits such offenders to report to the sheriff of the county of current residence within 21 days before his or her planned departure if the intended residence of 7 days or more is outside of the United States.

Sexual Predator / Offender Registration - Instant Message Name (Sections 1, 3, 6, 7, and 8)

In addition to providing address information during initial registration, a sexual predator or sexual offender is required to provide the sheriff any instant message name the offender wants to use.¹⁰ Sexual predators and offenders must also register any instant message name with FDLE prior to using such name.¹¹

⁵ See generally, ss. 775.21, 943.0435 and 944.607, F.S.

⁶ Sexual predators or sexual offenders who are in the custody of or under the supervision of DOC or a local jail are required to register with DOC and the jail, respectively. Sections 775.21 and 944.607, F.S.

⁷ See generally, ss. 775.21, 943.0435 and 944.607, F.S.

⁸ *Id.*

⁹ See ss. 775.21(10) and 943.0435(9), F.S. A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

¹⁰ See generally, ss. 775.21, 943.0435, 944.606, and 944.607, F.S.

¹¹ FDLE maintains an online system through which sexual predators and offenders can update their instant message name information. Sections 775.21 and 943.0435, F.S.

Sections 775.21, 943.0435, 944.606, and 944.607, F.S., define the term “instant message name” as “an identifier that allows a person to communicate in real time with another person using the Internet.”

Effect of the Bill

The bill amends ss. 775.21, 943.0435, 944.606, and 944.607, F.S., to replace the term “instant message name” with “Internet identifier.” The bill defines the term “Internet identifier” as “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 PIN number.” Sexual predators and offenders will now be required to register their Internet identifiers with the sheriff and with FDLE.

The bill also replaces the term “instant message name” with the term “Internet identifier” in s. 943.0437, F.S., which authorizes FDLE to provide information relating to electronic mail addresses and Internet identifiers maintained as part of the sex offender registry to commercial social networking websites.¹²

Search of Registration Information (Section 4)

Section 943.04351, F.S., requires states agencies and governmental subdivisions, prior to making any decision to appoint or employ a person to work, whether for compensation or as a volunteer, at specified locations,¹³ to conduct a search of that person’s name or other identifying information against the registration information regarding sexual predators and sexual offenders maintained by FDLE.

Effect of the Bill

The bill amends s. 943.04351, F.S., to require states agencies and governmental subdivisions to also search the person’s name through the Dru Sjodin National Sex Offender Public Website maintained by the United States Department of Justice.

Removal of the Requirement to Register as a Sexual Offender (Section 5)

Generally, sexual predators and offenders must maintain registration with FDLE for the duration of the offender’s life unless the sexual offender has received a full pardon or has had a conviction set aside in a postconviction proceeding for any offense that met the criteria for the sexual predator designation or that met the criteria for classifying the person as a sexual offender for purposes of registration.¹⁴ However, there are ways in which the registration requirement can be removed.

Section 943.0435(11), F.S.

Sexual offenders who have been lawfully released from confinement, supervision, or sanction, whichever is later, for at least 25 years and have not been arrested for any felony or misdemeanor offense since release may petition the criminal division of the circuit court of the circuit in which the sexual offender resides for the purpose of removing the requirement for registration as a sexual offender, provided that the offender’s requirement to register was not based on an adult conviction:

- For a violation of ss. 787.01 or 787.02, F.S.;
- For a violation of s. 794.011, F.S., excluding s. 794.011(10), F.S.;
- For a violation of s. 800.04(4)(b), F.S., where the court finds the offense involved a victim under 12 years of age or sexual activity by the use of force or coercion;
- For a violation of s. 800.04(5)(b), F.S.;
- For a violation of s. 800.04(5)c.2., F.S., where the court finds the offense involved unclothed genitals or genital area;
- For any attempt or conspiracy to commit any such offense; or
- For a violation of similar law of another jurisdiction.¹⁵

¹² Such websites can use this information for the purpose of comparing users and potential users of the website against the list provided by FDLE. Section 943.0437(2), F.S.

¹³ These locations include parks, playgrounds, day care centers, or other places where children regularly congregate.

¹⁴ Sections 775.21(6) and 943.0435(11), F.S.

¹⁵ The court may grant or deny relief if the offender demonstrates to the court that he or she has not been arrested for any crime since release; the requested relief complies with the provisions of the federal Adam Walsh Child Protection and Safety Act of 2006 and any other federal standards applicable to the removal of registration requirements for a sexual offender or required to be met as a condition for the receipt of federal funds by the state; and the court is otherwise satisfied that the offender is not a current or potential threat to

Sexual offenders defined in 943.0435(1)(a)1.b., F.S., can have the registration requirement removed if he or she provides FDLE with an order issued by the court that designated the person as a sexual predator, as a sexually violent predator, or by another sexual offender designation in the state or jurisdiction in which the order was issued that states that such designation has been removed or demonstrates to FDLE that such designation, if not imposed by a court, has been removed by operation of law or court order in the state or jurisdiction in which the designation was made, and provided such person no longer meets the criteria for registration as a sexual offender under the laws of Florida.¹⁶

Section 943.04354, F.S.

A person can be considered for removal of the requirement to register as a sexual offender or sexual predator if the person:

- Was or will be convicted or adjudicated delinquent of a violation of ss. 794.011, 800.04, 827.071, or 847.0135(5), F.S., or the person committed a violation of ss. 794.011, 800.04, 827.071, or 847.0135(5), F.S., for which adjudication of guilt was or will be withheld, and the person does not have any other conviction, adjudication of delinquency, or withhold of adjudication of guilt for a violation of ss. 794.011, 800.04, 827.071, or 847.0135(5), F.S.;
- Is required to register as a sexual offender or sexual predator solely on the basis of this violation; and
- Is not more than 4 years older than the victim of this violation who was 14 years of age or older but not more than 17 years of age at the time the person committed this violation.

If a person meets the above criteria, and the violation of ss. 794.011, 800.04, 827.071, or 847.0135(5), F.S., was committed on or after July 1, 2007, the person may move the court that will sentence or dispose of this violation to remove the requirement that the person register as a sexual offender or sexual predator.¹⁷ At sentencing or disposition of this violation, the court must rule on this motion and, if the court determines the person meets the above criteria and the removal of the registration requirement will not conflict with federal law, it may grant the motion and order the removal of the registration requirement.¹⁸

A person who meets the above criteria and who is subject to registration as a sexual offender or sexual predator for a violation of ss. 794.011, 800.04, or 827.071, F.S., that occurred before July 1, 2007, may petition the court in which the sentence or disposition for the violation of ss. 794.011, 800.04, or 827.071, F.S., occurred for removal of the requirement to register as a sexual offender or sexual predator.¹⁹ The court shall rule on the petition and, if the court determines the person meets the above criteria and removal of the registration requirement will not conflict with federal law, it may grant the petition and order the removal of the registration requirement.²⁰

public safety. The state attorney in the circuit in which the petition is filed must be given notice of the petition at least 3 weeks before the hearing on the matter. The state attorney may present evidence in opposition to the requested relief or may otherwise demonstrate the reasons why the petition should be denied. If the court denies the petition, the court may set a future date at which the sexual offender may again petition the court for relief. Section 943.0435(1)(a), F.S.

¹⁶ Section 943.0435(1)(b), F.S.

¹⁷ The person must allege in the motion that he or she meets the above criteria and that removal of the registration requirement will not conflict with federal law. The state attorney must be given notice of the motion at least 21 days before the date of sentencing or disposition of this violation and may present evidence in opposition to the requested relief or may otherwise demonstrate why the motion should be denied. Section 943.04354(2), F.S.

¹⁸ If the court denies the motion, the person is not authorized under this section to petition for removal of the registration requirement. Section 943.04354(2), F.S.

¹⁹ The person must allege in the petition that he or she meets the above criteria and that removal of the registration requirement will not conflict with federal law. The state attorney must be given notice of the petition at least 21 days before the hearing on the petition and may present evidence in opposition to the requested relief or may otherwise demonstrate why the petition should be denied. Section 943.04354(3)(a) and (b), F.S.

²⁰ If the court denies the petition, the person is not authorized under this section to file any further petition for removal of the registration requirement. Section 943.04354(3)(b), F.S.

Effect of the Bill

The bill creates s. 943.04355, F.S., entitled "Juvenile and youthful sex offender and predator registration; exceptions." The statute provides an additional way in which sexual predators and offenders can have the registration requirement removed.

The bill provides that if a person obligated to register as a sexual offender or sexual predator was less than 22 years of age at the time he or she committed the act or acts giving rise to the requirement to register, the offender may petition the circuit court of the circuit in which he or she resides for the purpose of the removal of the registration obligation or for an exemption from community and public notification.

To be eligible for removal from the obligation to register as a sexual offender or sexual predator, the petitioner must show by clear and convincing evidence that all of the following criteria have been met:

- The requested relief complies with the provisions of the federal Adam Walsh Child Protection and Safety Act of 2006 and any other federal standards applicable to the removal of registration requirements for a sexual offender or sexual predator or required to be met as a condition for the receipt of federal funds by the state and that the removal of the registration obligation requirement will not otherwise conflict with federal law.
- The petitioner was less than 22 years of age when he or she committed the sex offense subjecting him or her to the obligation to registration.
- The circumstances surrounding the crime requiring registration did not involve a child less than 13 years of age while the offender was 18 years of age or older but less than 22 years of age.
- The petitioner demonstrates to the satisfaction of the court that he or she does not pose a risk or danger to the community.
- The petitioner has not been arrested for any crime since being released from the sanctions relevant to the qualifying offense requiring registration.
- The petitioner has participated in and satisfactorily completed a sexual offender treatment program obtained from a qualified practitioner as defined in s. 948.001, F.S.
- The petitioner has paid restitution to either the victim or crimes compensation trust fund, if applicable.
- The petitioner successfully completed the terms of supervision and substantially complied with registration requirements.
- The petitioner is not required to register as a sexual offender or sexual predator in another state or jurisdiction as a result of committing a sexual offense in a jurisdiction outside of this state.

The bill requires that the state attorney in the circuit in which the petition is filed be given notice of the petition at least 3 weeks before the hearing on the matter. As soon as practicable after a petition has been filed, the state attorney must make a reasonable effort to notify the victim of the crime that the person has filed a petition seeking relief under this section. The bill authorizes the state attorney to present evidence in opposition to the requested relief or to otherwise demonstrate the reasons why the petition should be denied. If the court denies the petition, the court may set a future date at which the sexual offender or sexual predator may again petition the court for relief, subject to the standards for relief provided in this section. A subsequent petition for relief may not be submitted unless a future date for eligibility to file such a petition is set by the court. The court must order removal of the sexual offender or sexual predator from classification as a sexual offender or sexual predator for the purpose of registration if the petition is granted. The court may also grant the petition, in part, and order nonpublic registration.

The bill defines the term "nonpublic registration" as an exemption from community and public notification." The bill specifies that an offender or predator is still obligated to report in person and register with the local sheriff's office and DHSMV pursuant to ss. 775.21 and 943.0435, F.S. The offender's or predator's registration information will not be visible on the public registry, but it will continue to be updated; however, the information will only be available for use by law enforcement agencies for investigative purposes.

The bill requires FDLE to remove an offender or predator from classification as a sexual offender or sexual predator for purposes of registration if he or she provides FDLE with a certified copy of the court's written findings or order that indicates that he or she is no longer required to comply with the requirements for registration as a sexual offender or sexual predator. If the sexual offender or sexual predator is granted nonpublic registration or a court order or findings exempt him or her from community and public notification, FDLE must promptly remove the offender's or predator's registration information from the public registry of sexual offenders and sexual predators maintained by FDLE. However, the removal of this information from the public registry of sexual offenders and sexual predators shall not prevent public access to information about the person's criminal history or record that is otherwise available as a public record.

The bill authorizes the court to order nonpublic registration for a juvenile sexual offender as defined in s. 985.475, F.S., at any time if he or she has completed a juvenile sexual offender commitment program or if the court is satisfied that he or she is not a current or potential threat to public safety. The court may revoke a nonpublic registration order made under this subsection for any reason.

Sexting (Section 2)

The act of electronically sending sexually explicit messages or photos of oneself is generally referred to as sexting. In a 2008 survey of 1,280 teenagers and young adults of both sexes, 20% of teens (ages 13-19) and 33% of young adults (ages 20-26) had sent nude or semi-nude photographs of themselves electronically.²¹ Additionally, 39% of teens and 59% of young adults had sent sexually explicit text messages.²²

There are no statutes that specifically address sexting. Under current law, a person who “sexts” another could be charged with a variety of offenses, such as transmission of pornography²³ or computer pornography,²⁴ depending on the nature of the image sexted and the age of the person to whom the image was sent. Additionally, a person who receives and possesses an image that is the result of sexting could be charged with a criminal offenses, depending on the nature of the image sexted. For example, in 2007, 18-year old Phillip Alpert was charged with a violation of s. 847.0137(2), F.S., (transmitting child pornography) after he sent a nude photograph of his then 16-year old girlfriend to his girlfriend's friends and family after an argument. The girlfriend had taken the photograph and sent it to Alpert. Alpert was sentenced to more than four years probation and was required to register as a sexual offender.

Similarly, in other jurisdictions, law enforcement officers and district attorneys have begun prosecuting teens who sext under laws generally reserved for those who produce, distribute, or possess 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 5-week after school program and probation.²⁵ Similar incidents have occurred in Massachusetts, Ohio, and Iowa.²⁶ As a result, state legislatures have considered making laws that downgrade the charges for sexting from felonies to misdemeanors.

²¹ “Sex and Tech: Results from a survey of teens and young adults.” The National Campaign to Prevent Teen and Unplanned Pregnancy. December 10, 2008.

²² *Id.*

²³ Section 847.0137(2), F.S., specifies that any person who knew or reasonably should have known that he or she was transmitting child pornography to another person commits a 3rd degree felony.

²⁴ Section 847.0135, F.S., makes it a 3rd 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.

²⁵ 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 Jan. 24, 2011).

²⁶ *Id.* See also, Vicki Mabrey and David Perozzi, ‘Sexting’: Should Child Pornography Laws Apply?, ABC NEWS (Apr. 1, 2010), available at <http://abcnews.go.com/Nightline/phillip-alpert-sexting-teen-child-porn/story?id=10252790> (last visited Jan. 24, 2011)

Effect of the Bill

The bill creates s. 847.0141, F.S., entitled “Unlawful electronic communication between minors; possession of visual depiction of another minor.” The bill makes it unlawful for a minor to:

- Intentionally or knowingly use an electronic communication device to transmit, distribute, or display a visual depiction of himself or herself that depicts nudity and is harmful to minors.
- Intentionally or knowingly possess a visual depiction of another minor that depicts nudity and is harmful to minors.

The above-described acts are not unlawful if all of the following apply:

- The minor did not solicit the visual depiction.
- The minor took reasonable steps to destroy or eliminate the visual depiction or report the visual depiction to the minor's parent or guardian or to a school or law enforcement official.
- The minor did not transmit or distribute the visual depiction to a third party.

Violations of the above-described prohibited acts are punishable as:

- A noncriminal violation for a first violation, punishable by 8 hours of community service or, if ordered by the court in lieu of community service, a \$60 fine. The bill authorizes the court to also order suitable training concerning such offenses and to prohibit the use or possession of electronic devices.²⁷
- A 2nd degree misdemeanor²⁸ for a violation that occurs after being found to have committed a noncriminal sexting offense. The bill requires the court to order suitable training concerning such offenses and to prohibit the use or possession of electronic communication devices.
- A 1st degree misdemeanor²⁹ for a violation that occurs after being found to have committed a 2nd degree misdemeanor sexting offense. The court must order suitable training concerning such offenses or, if ordered by the court in lieu of training, counseling. The court must also prohibit the use or possession of electronic devices.
- A 3rd degree felony³⁰ for a violation that occurs after being found to have committed a 1st degree misdemeanor sexting offense. The court must order a mental health evaluation by a qualified practitioner, as defined in s. 948.001, F.S., and treatment, if recommended by the practitioner.

The bill requires a law enforcement officer who arrests any person charged with any offense described above to seize the prohibited material and take the material into his or her custody to await the sentence of the court. The bill requires the court to order the confiscation of the unlawful material and authorizes the law enforcement agency in which the material is held to destroy the unlawful material.

The bill specifies that the above provisions do not prohibit the prosecution of a minor for a violation of any law of this state if the electronic communication 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.

Definition of Risk Assessment (Section 9)

Section 947.1405(7), F.S., requires the Parole Commission (Commission) to impose specified special conditions of supervision on certain conditional releasees. One of these conditions prohibits contact with children under the age of 18, if the victim was under the age of 18, without review and approval by the Commission. The Commission may approve supervised contact with a child under the age of 18 if the approval is based upon a recommendation for contact issued by a qualified practitioner who is basing the recommendation on a risk assessment.

²⁷ Electronic devices include but are not limited to cellular telephones, cameras, computers, or other electronic media devices.

²⁸ A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Sections 775.082 and 775.083, F.S.

²⁹ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

³⁰ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

Section 947.005, F.S., currently defines the term “risk assessment” as “an assessment completed by an independent qualified practitioner to evaluate the level of risk associated when a sex offender has contact with a child.”

Effect of the Bill

The bill amends the definition of the term “risk assessment” to remove the requirement that the assessment be completed by *an independent* qualified practitioner.

Conditions of Supervision – Sex Offender Treatment (section 10)

Section 948.03, F.S., sets forth the standard conditions of probation that offenders must comply with. Standard conditions of probation do not require oral pronouncement at sentencing.³¹ In contrast, special conditions of probation, those conditions that are not specifically authorized by statute, must be imposed by oral pronouncement at sentencing and be included in the written sentencing order.³²

Section 948.31, F.S., mandates that courts require an evaluation by a qualified practitioner to determine the need of a probationer or community controllee for treatment. If the court determines that such a need is established by the evaluation process, the court must require sex offender treatment as a term or condition of probation or community control for any person who is required to register as a sexual predator or sexual offender.

Effect of the Bill

The bill specifies that the provisions of s. 948.31, F.S., are standard conditions of supervision and do not require oral pronouncement at the time of sentencing.

Severability Clause (Section 11)

The bill provides the following severability clause:

If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

B. SECTION DIRECTORY:

Section 1. Amends s. 775.21, F.S., relating to the Florida Sexual Predators Act.

Section 2. Creates s. 847.0141, F.S., relating to unlawful electronic communication between minors; possession of visual depiction of another minor.

Section 3. Amends s. 943.0435, F.S., relating to sexual offenders required to register with the department; penalty.

Section 4. Amends s. 943.04351, F.S., relating to search of registration information regarding sexual predators and sexual offenders required prior to appointment or employment.

Section 5. Creates s. 943.04355, F.S., relating to juvenile and youthful sex offender and predator registration; exceptions.

Section 6. Amends s. 943.0437, F.S., relating to commercial social networking websites.

Section 7. Amends s. 944.606, F.S., relating to sexual offenders; notification upon release.

³¹ Section 948.03(1), F.S.

³² Section 948.039, F.S.

Section 8. Amends s. 944.607, F.S., relating to notification to the Department of Law Enforcement of information on sexual offenders.

Section 9. Amends s. 947.005, F.S., relating to definitions.

Section 10. Amends s. 948.31, F.S., relating to evaluation and treatment of sexual predators and offenders on probation or community control.

Section 11. Provides for severability.

Section 12. This bill takes effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Prison Bed Impact

The Criminal Justice Impact Conference has not met to determine the prison bed impact of the bill. However, the bill will likely have a prison bed impact on the Department of Corrections in that it:

- Increases the number of people subject to sex offender registration requirements (failure to register is generally punishable as a 3rd degree felony).
- Creates a 3rd degree felony related to sexting.

FDLE Impact

FDLE reports that because the bill expands the group of persons required to register as a sexual offender or predator, the bill will have a significant impact on the Sexual Offender/Predator Registry that will require the following funding.³³

- \$317,977 in recurring dollars to fund 5 FTE (\$298,487 in recurring dollars for FY 12-13 and FY 13-14) to process, research, and quality control the increased workload as well as to support law enforcement, state attorneys, and the courts in prosecuting case for failure of a sexual offender/predator to register.
- \$45,500 in non-recurring dollars to hire contract programming staff to complete the 580 hours of programming and testing necessary to implement the requirements of this bill.

FDLE's analysis states the following:

Based upon a search of Florida's criminal history records on 3/11/2011, it was determined that there are 10,100 individuals with a criminal history record that includes a conviction for one of the listed qualifying offenses in Florida's Sexual Offender Registration statute, s. 943.0435, F.S., but currently do not meet the requirements to register as a sexual offender. If these individuals were convicted of a new felony and are serving sanctions for the new offenses on or after 10/1/2011, they would be subject to registration as sexual offenders under the retroactivity provision of this bill.

Of the 10,100 individuals listed above, 2,200 may immediately qualify for registration upon implementation of the bill. FDLE will need to conduct a manual review of each of these individuals to determine whether they are currently under sanction.

³³ 2011 FDLE analysis of House Bill 1277 (on file with Criminal Justice Subcommittee staff).

Additionally, historical statistics from the Florida Sexual Offender/Predator Registry, estimate that 19% of offenders registered in Florida have out-of-state convictions. These are offenders who either have a requirement to register in another state or jurisdiction, or are required to register in Florida solely based on Florida's registration requirements. This population includes offenders registered and listed on the Dru Sjodin National Sexual Offender Site or a state sexual offender site, offenders not registered or listed on a public internet site, and offenders with federal convictions, military convictions, or convictions from another country. For the majority of these offenders, the Registry must request court documentation from the other state or jurisdiction. In many cases, these documents have been purged or there is a court cost to obtain the documents. In addition, arrest or incident reports are needed to compare the out-of-state crime with a Florida qualifying offense to determine registration eligibility, as well as documentation from the other state or jurisdiction's corrections or probation/parole agencies to determine the end of an individual's sanction from the qualifying crime that requires registration.

Although in most cases, the potential offenders listed will require a new felony conviction (exception would be those 2,200 individuals who already have a felony conviction who may qualify for registration on 10/1/2011, if they are still serving sanctions or are released from a sanction for that felony on or after the 10/1/2011) to meet the requirements of this bill, the volume of those who could meet the requirements of this bill and the time necessary to identify and research these populations by running criminal history records, requesting registration documentation from other state registries, gathering court documents (especially, in cases where the crime was committed 20 or 30 years ago), requesting arrest or incident reports, and other documents necessary to ensure that a subject meets the requirements to register as a sexual offender would pose a major additional responsibility for the Registry. In order to properly research and review offenders to determine their registration requirements in our state, the FORTS will need (5) GA I positions to process, research, and quality control the increased workload as well as supporting law enforcement, state attorneys, and the courts in prosecuting case for failure of a sexual offender/predator to register.

The Registration Information and Research Section of FORTS would need (3) GA I's to conduct the research necessary to ensure an individual's registration requirements by requesting court documents from Florida courts or courts from another jurisdiction to obtain the sentence/judgment, arrest or incident reports, contact other state registries to acquire registration documentation (if registered in another state or jurisdiction), corrections departments in Florida or another state, including probation/parole offices and states attorneys or prosecutors in Florida and in other jurisdictions. This research is necessary to ensure that FDLE is acting in good faith in verifying that an individual meets the requirements to register as a sexual offender. These GA's will also conduct the same quality assurance checks to research and review those individuals who are granted relief from registration as outlined in this bill under the juvenile and youthful sexual offender and sexual predator registration exceptions. This review will ensure that those individuals granted relief from registration under this provision meet the requirements of this provision and/or the requirements of the federal Adam Walsh Child Protection Act and are updated in the Registry and all related systems appropriately.

The Registration & Compliance Unit of FORTS will need (1) GA I to assist in researching incoming registrants provided by the Florida Department of Corrections and by registration with a local sheriff's office or police department. Currently, the Florida Registry adds, an average, 218 sexual offenders to the Registry on a monthly basis. Processing these offenders requires researching the criminal history of the individual, requesting/review of court documents, and following up with the Florida Department of Corrections, local law enforcement, and other state registries to ensure the offender

meets the requirements to register as a sexual offender under Florida's laws as well as notification to all related criminal justice agencies.

The Registration, Tracking & System Development Unit of FORTS will need (1) GA I to conduct quality control measures within the sexual offender database and working with the Information Resource Management programming staff in assisting with developing, testing, and implementing database changes.

Programming funding is necessary to hire contract programming staff to complete the 580 hours of programming and testing necessary to implement the requirements of this bill. FDLE recommends the effective date of this bill be moved to April 30, 2012 to allow time to complete previous legislatively mandated enhancements, to advertise, interview, hire and train the new programmer to perform the work, test and implement the system, and conduct a knowledge transfer.

Total Costs: \$43,500 for programming costs + \$2,000 for equipment = Total Estimate \$45,500

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may impact local jails in that it creates new misdemeanor offenses related to sexting.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

1. FDLE stated in its analysis of this bill that they believe Section 5 of the bill (creating s. 943.04355, F.S., - entitled "Juvenile and youthful sex offender and predator registration; exceptions") will violate

the provisions of the federal Adam Walsh Child Protection and Safety Act by allowing relief from registration for individuals who are not eligible for relief or removal according to the provisions of the Adam Walsh Act and Florida's Sexual Offender/Predator Registration laws, ss 775.21 and 943.0435, F.S. FDLE states that this may jeopardize Florida's current status as being in substantial compliance with the federal Adam Walsh Act and could suffer a loss of federal Byrne Grant funds.

2. In its analysis of the bill, FDLE suggested that language be added to the definition of "Internet identifier" to prevent sexual offenders and predators from using his or her date of birth, social security number, or personal identification number as an Internet identifier to avoid the obligation to report the use of the Internet identifier. FDLE suggested the following language:

"Voluntary disclosure by the offender of his or her date of birth, social security number, or personal identification number (PIN) as an Internet identifier waives the disclosure exemption for such personal information."

3. The bill's requirement that sexual offenders notify the sheriff's office within 21 days before the planned departure for international travel or relocation is only in s. 943.0435, F.S., and thus only applies to sexual offenders, and not to sexual predators. This provision would need to be added to s. 775.21, F.S., to apply to sexual predators. Additionally, FDLE suggests that the bill be amended to require the offender to provide "travel and immigration documents" during registration in order to comply with federal law.
4. FDLE provided the following comments regarding the bill's provisions that expand the number of people required to register as a sexual offender or predator:

By extending the definition of "sexual offender" to include an offender serving a sanction on or after 10/1/2011, for any felony conviction or similar offense in another jurisdiction and who has a prior qualifying sexual conviction, the language would impose retroactivity of Florida's sexual offender registration requirements first enacted on 10/1/1997. The application of retroactivity of Florida's sexual offender registration laws could create complications for the Florida Registry and the law enforcement community to implement.

- a. As written, the retroactivity language may dramatically increase the volume of registrants added to the Florida Registry. FDLE could anticipate an initial 2,200 new offenders being added to the FDLE Sexual Offender database. Each one of these new offenders will need to be researched to verify they meet the criteria for sexual offender registration. The research of each of these new offenders will require obtaining court documentation, arrest reports, and probation information for those offenders who committed their crime in Florida and those in another state or jurisdiction.
- b. It should be noted that in the federal Sex Offender Sentencing, Monitoring, Apprehending, Registration and Tracking (SMART) Office with the United States Department of Justice, detailed description of Florida's Substantial Implementation of the federal Adam Walsh Child Protection and Safety Act, the SMART Office noted regarding the requirement for Retroactivity:

Florida meets SORNA requirements with respect to the retroactive registration of offenders, with one exception: Florida does not re-capture offenders who simply re-enter the system with a new non-sex offense. Because of Florida's long standing lifetime registration requirement for all registered offenders, the number of offenders who would evade re-capture under this exception does not substantially disserve the purposes of this SORNA requirements."

- c. As written, the retroactivity language may dramatically increase the volume of sexual offenders required to register at a Florida Sheriff's Office and DHSMV, thus, creating a significant increased workload for these agencies to register and conduct address verifications.

- d. As written, the retroactivity language places additional responsibilities on the judicial system to obtain the conviction and other case information for the qualifying sexual offense to prove that an individual has a conviction for a qualifying sexual offense and is now required to register as a sexual offender. In many states, conviction information is purged after 10 years from the date of the conviction. This could be difficult to obtain on cases that were terminated 20 or 30 years ago. The fact that a person has an arrest and conviction listed in the individual's criminal history record is not necessarily proof that a person has a conviction for a qualifying sex crime that would require registration. The court documentation proving a conviction for a qualifying sex crime is necessary to determine the individual's requirement to register as a sexual offender.
 - e. As written, the retroactivity language also places additional requirements on the State Attorney's Office to have to argue the requirements of a person to register as a sexual offender for those cases terminated many years ago when the sexual offender registration laws were not in effect. Any case where there was a plea agreement to plea guilty to a crime that now, due to the new felony conviction, will require sexual offender registration, may increase the number of individuals filing court action to seek to have the original sex conviction set aside.
 - f. As written, the retroactivity language impacts those local city/county residency ordinances that restrict/prohibit where sexual offenders/predators can live. Many of the city/county ordinances are written based on the date of conviction or the date released from the sanction imposed for the qualifying sex offense that requires sexual offender/predator registration. The majority of these offenders now required to register retroactively may have convictions that pre-date the city/county ordinances, thus, offenders/predators may be allowed to live near schools, parks, playgrounds or where children congregate.
 - g. As written, the retroactivity language does not address circumstances where an individual originally required to register as a sexual offender but granted relief from registration by an application of the law or by court order/written finding, such as in a Romeo and Juliet type case or who received a pardon by the Governor, who now has a new felony conviction and is serving sanctions for this offense on or after 10/1/2011.
5. FDLE recommends extending the effective date of the bill to April 30, 2012, to provide time to implement the bill's provisions.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES