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HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: HB 49

RELATING TO: Sexual Offenders

SPONSOR(S): Representative Albright

STATUTE(S) AFFECTED: Section 944.606, F.S.

COMPANION BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) CRIME AND PUNISHMENT
(2)
(3)
(4)
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I. SUMMARY:

Florida Statutes contain two distinct provisions regarding sexual offender notification. Chapter 775, F.S., contains provisions which establish a select criteria for sexual ***predator*** designation, registration, and public notification. Section 944.606, the subject of this bill, requires the Department of Corrections (DOC) to notify certain law enforcement officials of the release into the community of specified felony sexual ***offenders***.

Public notification is mandatory for offenders designated as sexual ***predators***. The sexual ***predator*** (Chapter 775) provisions address a subset of sexual ***offenders***. This subset represents the most dangerous offenders as determined by the statutory criteria which earn them the designation of sexual predator***.***

Any citizen can obtain criminal history information on a sexual offender under Florida's public records law. Nonetheless, agency-initiated public notification was specifically prohibited of sexual ***offenders*** in 1996 as part of legislation which revised the sexual ***predator*** provisions. This bill deletes the prohibition against agency-initiated public notification of sexual ***offenders*** inserted into section 944.606, F.S. (1996 Supp.) It maintains language in section 944.606 which reaffirms that FDLE and other law enforcement agencies *must* initiate public notification of sexual ***predators*** under chapter 775.

However, unlike a previous version of section 944.606, F.S., the bill does not expressly authorize notification. Consequently, the bill is ambiguous on whether an agency, such as a Sheriff's or police department, may initiate public notification. See Comments, part A, page 8.

This bill raises *ex post facto* and due process clause considerations. See Comments, part B and C, page 8-9.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Florida Statutes contain two distinct provisions regarding sexual offender notification. Chapter 775, F.S., contains provisions which establish a select criteria for sexual ***predator*** designation, registration, and mandatory public notification. Section 944.606, F.S., the subject of this bill, requires the Department of Corrections (DOC) to notify certain law enforcement officials of the release into the community of all felony sexual ***offenders***. Section 944.606, currently prohibits law enforcement agencies from initiating any notification other than through the procedures established in chapter 775 for sexual ***predators***. However, anyone can obtain criminal history information on a sexual offender under Florida's public records law.

The sexual ***predator*** (Chapter 775) provisions address a subset of sexual ***offenders***. This subset represents the most dangerous offenders as determined by the statutory criteria which earn them the designation of sexual ***predator.***

In 1993, the Legislature enacted *The Florida Sexual Predators Act* in Chapter 775. The Act was amended in 1995 and again in 1996. Since the original Act and the two subsequent amendments apply to offenses committed after separate effective dates, three different tiers of notification and due process procedures are currently in place. The sexual offender provisions of Section 944.606 were first enacted in 1992. Like the sexual predator provisions, Section 944.606 has been amended in 1995 and 1996. The original Section 944.606 and subsequent amendments have never limited their application to offenses committed after their effective dates. A brief review of the history is helpful.

1. Legislative History of Sexual Offender / Sexual Predator Provisions:

The 1992 version of section 944.606, required DOC, the Parole Commission and the Control Release Authority to notify certain law enforcement officials of the release of a sexual offender six months before discharge from custody. This law required notification to the sheriff of the county from which the offender was sentenced, the sheriff of the county in which the offender planned to reside and, if applicable, the chief of police of the municipality in which the offender planned to reside. Similar notification to law enforcement agencies and to any victims of ***all*** inmates released by DOC was required by the provisions of section 944.605, (this provision remains in statute). The 1992 version of section 944.606, specifically singled out sexual offenders convicted of any felony sexual offense. It did not specify whether law enforcement agencies could initiate public notification of sexual offenders released to the community at large. [s.3, ch. 92-76, Laws of Florida; s. 944.606, F.S. (1993)]

In 1993 the Legislature enacted *The Florida Sexual Predators Act*. The Act required a select class of sexual offenders, who met the specified criteria for sexual predator designation, to register with the Florida Department of Law Enforcement (FDLE) within 48 hours after entering a county of permanent or temporary residence. This Act provided for notification by FDLE to local law enforcement officials similar to that required of DOC by the provisions of section 944.606. Thus, after 1993, DOC was required to notify local law enforcement of the imminent release into the community of felony sexual ***offenders*** and FDLE was required to notify local law enforcement of a certain class of sexual

offenders who fit the criteria of sexual ***predators***. Like the section 944.606 provision, *The Florida Sexual Predators Act* did not specify whether law enforcement agencies could *initiate* notification of a sexual predator's release to the community at large. Note: A citizen may obtain criminal history information through Florida's public records law. See ss. 119.07; 943.0575, F.S.

In 1995 and 1996, the Legislature amended the Chapter 775 sexual ***predator*** registration provisions to ***require*** local law enforcement agencies to initiate public notification. The 1995 law provided for public notification in a newspaper of general circulation. The 1996 law provides for public notification of any type deemed appropriate by the law enforcement agency.

2. Public Notification Restricted to Registered Sexual Predators:

However, the Legislature took opposing positions in those same years on public notification of sexual ***offenders***, the provisions contained in section 944.606. In 1995, the Legislature amended section 944.606 to authorize DOC or any law enforcement agency to release verified information about a sexual offender, "in the interest of public safety." s.944.606(3), F.S. 1995. As well, the Legislature provided immunity from civil liability for the release of such information. s.944.606(4), F.S. 1995.

In 1996, the Legislature amended the sexual ***predators*** provisions (Chapter 775) to require local law enforcement agencies to notify the public in any manner deemed appropriate. At the same time, the Legislature amended the sexual ***offender*** provisions in 944.606 to expressly prohibit DOC or law enforcement agencies from notifying the public of a sexual offender's presence. This amendment provided that public notification was restricted to sexual ***predators***, as provided by chapter 775. *Consequently, today a Sheriff or police chief is prohibited from publicizing the presence of a sexual* ***offender*** *in the community.*

Note: Public notification and registration laws are sometimes referred to as "Megan's law". These laws were triggered across the country in response to the 1994 killing of a young New Jersey girl named Megan Kanka by a released sexual offender living near her home. In 1996, the Congress enacted a federal statute which requires all states, when necessary for public safety, to release all relevant information on a sexual offender. Public Law 104-145 [H.R. 2137] May 17, 1986.

B. EFFECT OF PROPOSED CHANGES:

This bill deletes the prohibition against agency-initiated public notification of sexual ***offenders*** contained in section 944.606, F.S. (1996 Supp.) This prohibition was inserted by the Legislature last session. It maintains language in section 944.606 which reaffirms that FDLE and other law enforcement agencies *must* initiate public notification of sexual ***predators*** under chapter 775.

The effect of this change will be to provide no statement in section 944.606 on whether law enforcement agencies can initiate public notification on sexual ***offenders*** as that term is defined. Presumably, by removing the express prohibition, law enforcement agencies will have the discretion to notify the public of a sexual offender's presence.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No. This bill neither authorizes nor requires law enforcement agencies to initiate public notification of sexual offenders. It deletes a prohibition against such agency action.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

Not applicable.

(2) what is the cost of such responsibility at the new level/agency?

Not applicable.

(3) how is the new agency accountable to the people governed?

Not applicable.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

Not applicable.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Not applicable.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

This bill deletes the prohibition against agency-initiated public notification of sexual offenders. To the extent that a community is notified of the presence of a sexual offender in a given location, the individuals of that community are better informed. Those individuals will thus enhance their decision making when conducting their own affairs.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

While the bill does not authorize the government to prohibit an offender from moving into the community, it does allow law enforcement agencies to publicize their presence in a community. Some might consider this government interference with a sexual offender's privacy rights.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

Not applicable.

(2) Who makes the decisions?

Not applicable.

(3) Are private alternatives permitted?

Not applicable.

(4) Are families required to participate in a program?

Not applicable.

(5) Are families penalized for not participating in a program?

Not applicable.

b. Does the bill directly affect the legal rights and obligations between family members?

Not applicable.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

Not applicable.

(2) service providers?

Not applicable.

(3) government employees/agencies?

Not applicable.

D. SECTION-BY-SECTION ANALYSIS:

1. Section 1: Amends section 944.606, F.S. (1996 Supp), by deleting the prohibition against agency-initiated public notification of sexual offenders.

2. Section 2: Provides that this act shall take effect upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See fiscal comments.

2. Recurring Effects:

See fiscal comments.

3. Long Run Effects Other Than Normal Growth:

See fiscal comments.

4. Total Revenues and Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See fiscal comments.

2. Recurring Effects:

See fiscal comments.

3. Long Run Effects Other Than Normal Growth:

   See fiscal comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   See fiscal comments.

2. Direct Private Sector Benefits:

   See fiscal comments.

3. Effects on Competition, Private Enterprise and Employment Markets:

   See fiscal comments.

D. FISCAL COMMENTS:

This bill does not require state or local law enforcement agencies to expend funds to initiate public notification of sexual offenders. To the extent that law enforcement agencies choose to initiate such notification, this bill could have an indeterminate fiscal impact.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not impose a mandate on local government and thus the mandates provision is inapplicable.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the revenue raising authority of local governments.

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

This bill does not reduce the state tax shared with counties and municipalities.

V. COMMENTS:

A. AMBIGUITY MAY EXIST DUE TO LEGISLATIVE HISTORY:

If the objective of this bill is to authorize agency-initiated public notification of all sexual offenders, merely deleting the prohibition inserted in 1996 may create ambiguity. Deleting language specifically prohibiting an action is normally good evidence that the Legislature is

authorizing the action. Nonetheless, because of the unique legislative history of section 944.606, questions could arise about the Legislature's actual intent.

The 1992 version of 944.606, was silent on whether agencies may initiate public notification. The 1995 version expressly authorized public notification. By merely deleting the 1996 prohibition a court may question whether this Legislature is choosing to return to the 1992 or the 1995 version. Moreover, if this Legislature does not expressly authorize notification, as it did in the 1995 version, this leaves open the argument that an agency is not authorized to initiate public notification. If the bill's objective is to authorize public notification, the least ambiguous method is to restore the language contained in the 1995 version, along with its more detailed description of civil immunity.

B. *EX POST FACTO* CONSIDERATIONS:

The *ex post facto* clause of the Federal and Florida Constitutions provide that the Legislature cannot increase the punishment of a crime and apply the increase retroactively. The sexual predator provisions in Chapter 775 apply prospectively. Whether an offender is designated a predator and is subject to public notification depends on *when* he committed the sexual offense qualifying him for sexual predator designation. This has resulted in the three tiers of differing procedures, discussed above. Consequently, no *ex post facto* challenges have ever been made in Florida.

This bill does not specify that its provisions apply to offenses committed after the effective date. The 1995 version of section 944.606, which expressly authorized public notification, likewise did not contain such a limitation. There exists no reported Florida case which challenged the 1995 version on *ex post fact* grounds. Courts from other jurisdictions have split on whether public notification of a sexual offender violates the *ex post facto* clause. e.g., Doe v. Poritz, 142 N.J. 1, 662 A 2d 367(1995) (New Jersey Supreme Court holding that public notification's retroactive application does not violate *ex post facto* clause); Doe v. Pataki, 65 USLW 2243 (S.D.N.Y 1996) (Court overturning New York statute's retroactive application of public notification for sexual offenders). In analyzing whether a law violates *ex post facto*, the Courts have taken into account the Legislature's intention when passing the law. An *ex post facto* violation is more apparent when the Legislature's intent was to punish. An *ex post facto* violation is less obvious where the Legislature's intent was to regulate or protect the public.

C. DUE PROCESS CONSIDERATIONS:

The sexual predator provisions provide for hearings or for written court findings before designation and public notification is required. No hearing or written court findings are required by this bill. No hearing procedure was provided by the provisions of the 1995 version of section 944.606. A sexual ***offender*** who challenged public notification as a result of this bill could argue that he or she was denied due process or that sexual ***predators*** have been afforded more due process under the statutory scheme. On the other hand, one could argue that sexual predators are afforded hearings or written court findings because the designation as a ***predator*** is much more onerous. Further, this bill simply allows a law enforcement agency to publicize a public record.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

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