

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB's 1284, 1476, 1528 and 1616

SPONSOR: Criminal Justice Committee and Senators Geller, Saunders and Latvala

SUBJECT: Improper Activity Over the Internet

DATE: April 14, 2000

REVISED: 4/18/00 \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable/CS</u>
2.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Fav/2 amendments</u>
3.	_____	_____	<u>CM</u>	_____
4.	_____	_____	<u>FP</u>	_____
5.	_____	_____	_____	_____

## I. Summary:

The Committee Substitute for Senate Bills 1284, 1476, 1528 and 1616 is intended to codify specified recommendations of the legislatively created "Information Service Technology Development Task Force" regarding consumer protection for businesses and governmental entities and improper activity over the Internet, as follows:

- Increase public awareness of potential dangers of Internet use and inform the public about precautionary measures that may be taken to avoid being victimized by on-line criminal activity,
- Protect all consumers including businesses and governmental entities against fraud, abuse and other criminal activity through commerce which would include commerce conducted via the Internet,
- Criminalizes as a third degree felony offense, the transmission of child pornography via the Internet, from within the state or from out-of-state, to any person in the state, or the transmission via the Internet, from within the state or from out-of-state, of images harmful to a minor in the state, and
- Provides immunity from civil liability to a person who reports to law enforcement what the person reasonably believes to be child pornography.

This CS substantially amends the following sections of the Florida Statutes: 501.203; 501.207; 501.2075; 501.211; 501.212; and 847.001. This bill also creates ss. 847.0137 and 847.0139 of the Florida Statutes. Section 501.2091, F.S., is repealed.

## **II. Present Situation:**

### **A. Creation and Responsibilities of the Information Service Technology Task Force**

In 1999, the Legislature created the Information Service Technology Development Task Force (Task Force) within the Department of Management Services . *See* Chapter 99-354, L.O.F. The Task Force, whose two-year term expires on June 11, 2001, is comprised of 34 bipartisan members from the public and private sector. Since its creation, the task force has held at least 4 meetings throughout the state. The purpose of the Task Force is to develop policies to benefit state residents by fostering free market development and beneficial use of advanced communication networks and information technologies within this state. The Task Force parceled its stated directives among eight subcommittees.

### **B. Responsibilities of the Subcommittees**

Each subcommittee developed policy recommendations in accordance with its stated directive. On February 14, 2000, the Task Force issued its first of two reports containing numerous policy recommendations, and implementation strategies to carry out those recommendations. *See 1999 Annual Report to the Legislature, Information Service Technology Task Force* (February 14, 2000). Much of the information included in this section is drawn from this report.

### **C. General Findings of the Civil and Criminal Subcommittee**

The self-titled "Elaws: Civil and Criminal Subcommittee (Subcommittee 7) was charged with the responsibility of evaluating state laws, rules, and procedures to determine if there was a need to create new laws or amend or repeal existing laws, rules, or procedures to reflect the impact of electronic commerce (e-commerce). The term "e-commerce" is the buying or selling of products and services by businesses and consumers over the Internet. Three typical ecommerce transactions take place over the Internet: business to business; business to consumer; and consumer to consumer.

The subcommittee noted that most of Florida's laws were created prior to the rapid proliferation of the Internet and e-commerce, and stressed that it was important to ensure that the many protections against fraud, child abuse, and other victimization apply in the new world of ecommerce. The subcommittee also recognized the importance of the Florida courts maintaining jurisdiction over perpetrators of crimes in order to protect Florida businesses and residents. In addition to the need for changes to criminal laws, the subcommittee stressed that Florida needed to amend its civil laws to protect its citizens and businesses. The subcommittee issued the following general policy statement:

Sellers of goods and services to businesses and individuals in Florida should be regulated in the same manner, regardless of the method used to contact or deliver the goods or services to that business or individual. The person's right to equal protection under the laws of this state should not be diminished because of the type of sales transaction having changed due to technological advances.

### III. Effect of Proposed Changes:

The Committee Substitute for Senate Bills 1284, 1476, 1528 and 1616 is intended to codify law recommendations of the Information Service Technology Development Task Force regarding consumer protection and improper activity over the Internet. A number of whereas clauses are set forth in a preamble to the bill to describe the relationship between the recommendations and the proposed legislation. The Task Force's recommendations that were incorporated into this bill fall into three major categories:

- 1) Enhancement of public awareness of the potential dangers of Internet use and of the precautionary measures that the public may take to mitigate those dangers;
- 2) Clarification or extension of protection under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) to businesses, companies and governmental entities who may use or engage, and may be potentially victimized commercial transactions, including on-line or Internet activity; and
- 3) Prohibition of Internet transmission of pornography to minors in this state and child pornography to anyone in this state or outside the state, and provision of an incentive through civil immunity for those who report to law enforcement what they reasonably believe to be evidence of child pornography.

The following section-by-section analysis incorporates a brief restatement of the relevant Task Force's recommendations in their February 2000 report, includes a brief summary of current law, and presents the effects of the proposed statutory changes:

#### ■Public Awareness Campaign on Internet Security and Safety

##### Recommendation

The subcommittee addressed the issue of greater public awareness regarding Internet safety and security. The subcommittee cautioned that despite the enormous positive opportunities for Florida's citizens offered by the Internet, there were also many opportunities for criminal activity and victimization through the use of the Internet. The subcommittee noted that computer crime today is a multi-billion dollar problem. Acknowledging that many citizens are already aware of the potential dangers and act cautiously, the subcommittee believed that a majority of Internet users are not aware of the dangers of on-line crimes and do not realize their vulnerability until they become victimized. To instill a sense of confidence and security as they use the Internet, children and adults need to recognize the potential dangers of Internet use and follow guidelines on how to avoid becoming an on-line victim. This sense of confidence and security may further proliferate the use of the Internet, enhance e-commerce, and mitigate criminal activity.

The subcommittee recommended that the Florida Department of Law Enforcement's (FDLE) Computer Crime Center coordinate the development of a comprehensive safety-public awareness campaign related to on-line crime. This campaign is to be conducted in partnership with the Office of the Attorney General, the Department of Education, and other necessary agencies. The campaign should include guidelines for the safe and secure use of the Internet, including the best means to prevent users from becoming the victims of on-line crime, and detailed guidelines for

parents to consider for the protection of their children from on-line encounters with molesters, pedophiles and other criminal elements.

The subcommittee also recommended that the campaign include the development of an on-line or Internet crime reporting mechanism through the FDLE's web site. The FDLE would be responsible for working closely with local law enforcement agencies in the investigation and prosecution of reported on-line or Internet crimes.

#### Effect of Proposed Changes

**Section 1** directs the Computer Crime Center within the Florida Department of Law Enforcement to coordinate the development of a public awareness campaign on Internet safety in accordance with the recommendations stated above.

### **■ Definition of Consumer for Purposes of Enforcement and Remedies for Consumer Protection**

#### Recommendation

The subcommittee made several recommendations to amend the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), relating to its application to businesses and governmental entities, to

- Clarify that businesses are protected as are all other consumers under FDUTPA,
- Ensure that governmental entities are afforded the same protection from those who deceive or defraud them as is afforded to other consumers under FDUTPA,
- Include currently exempted telecommunications companies regulated by the Florida Public Service Commission (PSC) within the enforcement and application of FDUTPA, and
- Prohibit misuse of a venue provision by Internet businesses located out-of-state.

#### Effect of Proposed Changes

**Section 2** amends s. 501.203, F.S., relating to definitions for the chapter on consumer protection. The term "consumer" is revised to clarify that the term includes "businesses" or "any commercial entity, however denominated" for purposes of enforcement and remedies under chapter 752, F.S.

**Section 3** amends s. 502.207, F.S., relating to remedies of enforcing authority. This section extends to governmental entities the same status and rights afforded consumers to have an enforcing authority power bring actions under FDUTPA on their behalf. Thus, the "enforcing authority" may:

- Bring an action on behalf of a governmental entity for the actual damages caused the entity by a violation of FDUTPA,
- Move in any such action for the court to order an appropriate remedy, including reimbursement for damages or a requirement that a transaction be carried out in accordance with the governmental entity's reasonable expectations,

- Terminate an investigation or action upon acceptance of a person's voluntary compliance with FDUTPA which may be conditioned reimbursement for the governmental entity, and
- Waive a civil penalty (or the court may waive such civil penalty) incurred as a result of the violation of FDUTPA if the person has previously made full restitution or reimbursement or has paid actual damages to the governmental entity that has been injured.

**Section 4** amends s. 501.2075, F.S., relating to civil penalties under the FDUTPA. As is the case with other consumers who have received full restitution, been reimbursed or recovered actual damages, the court may waive the civil penalties for violations of the FDUTPA, if a governmental entity has been similarly made whole.

**■Application of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA)  
to Exempted Persons or Entities**

Recommendation

The subcommittee made two recommendations to amend the FDUTPA as applied to Internet businesses and specified providers. The FDUTPA provides for civil enforcement of provisions relating to consumer protection. The FDUTPA is intended to apply to all industries and business activities generally conducted in any medium, including the Internet. Scores of persons and entities including telecommunications providers are entering the Internet market to provide Internet services or to market goods and services. The following two recommendations are made to reflect the changes in commerce through the Internet medium:

1. The subcommittee recommended repeal of s. 501.2091, relating to venue of proceedings brought under the FDUTPA. Section 501.2091, F.S., currently provides that anyone made a party to a pending (administrative or judicial) proceeding under the FDUTPA may file a civil action to have the matter addressed instead in the circuit court of the county of his or her residence. According to the subcommittee, s. 501.2091, F.S., is outdated. It existed in tandem with an administrative enforcement provision under chapter 120, F.S., which has since been repealed. Reportedly, this venue provision has posed difficulties in at least one case. *See Maddox v. State*, 709 So.2d 611 (Fla. 1st DCA 1998). The concern was that the statutory language may be manipulated by an out-of-state Internet provider to assert that venue in any case, administrative or otherwise, is only proper in the provider's home state.
2. The subcommittee also recommended closing a potential loophole that allows a FPSC-certificated company doing business over the Internet to assert an exemption from FDUTPA as a PSC-regulated "person" under s. 501.212(4), F.S. Under the FDUTPA, any person or activity regulated under laws administered by the PSC, the Department of Insurance, banks and savings and loan associations regulated by the Department of Banking and Finance or federal agencies, is exempt from the application of FDUTPA. According to the subcommittee, the exemption was part of the original 1973 version of FDUTPA which antedates the era of telecommunications deregulation and the Internet.

No Florida state court has addressed the PSC exemption although one Florida federal court has noted but did not rule on whether the exemption applied not only to any activities regulated by the

PSC but also to any person regulated by the PSC. *See City of Gainesville v. Florida Power and Light Co.*, 488 F.Supp. 1258 (S.D. Fla. 1980). The court framed the issue as being whether Florida Power and Light Co. was a “person” under the exemption, and if so whether all of its actions were therefore exempt. The issue remained unresolved as the court found it to be a question of state, rather than federal law.

Based on this court case and the PSC’s position that it does not regulate Internet activities, including activities engaged in by persons holding PSC certificates, the subcommittee noted a potential burgeoning “loophole.” According to the subcommittee, companies of all sizes and backgrounds are becoming PSC-certificated and operating diversified businesses involving the Internet and other telecommunications endeavors. These persons or entities could potentially escape scrutiny and enforcement by claiming an exemption as a person regulated by the PSC, regardless of their legitimate or illegitimate activity.

#### Effect of proposed changes

**Section 5** repeals s. 501.2091, F.S., relating to the stay of proceedings. The repeal of this section precludes any person regardless of the nature of his or her business from having any matter arising under FDUTPA in a pending administrative or judicial proceeding from being addressed in the circuit court of the county of the person’s residence within or outside the state.

**Section 6** amends s. 501.211, F.S., relating to other remedies available to someone suffering a loss under the FDUTPA, including the right to recover directly actual damages plus attorneys fees and costs. It is uncertain whether this change broadens or narrows the category of those consumers who are allowed the other remedies.

**Section 7** amends s. 501.212, F.S., relating to persons, entities or activities exempt from the application of the FDUTPA. It eliminates the exemption for persons regulated under the laws administered by the FPSC, the Department of Insurance, the PSC, banks and savings and loan associations regulated by the Department of Banking and Finance or federal agencies. This amendment is broader than the intended effect of the recommendation. Consequently, only “activities” regulated under laws administered by those entities will be exempt from FDUTPA.

### **■Regulation of Internet Transmission of Child Pornography**

#### Recommendation

The subcommittee examined the issue of transmission of adult and child pornography over the Internet as a subset of the criminal activity facilitated through use of the Internet. At the outset, the subcommittee found this to be a difficult issue to resolve, finding that many considerations were involved, including First Amendment issues, as applied to adult pornography and jurisdictional issues regarding child pornography.

The subcommittee issued statements that certain transmissions of pornography constitute crimes over which Florida has jurisdiction and therefore, legislation should be enacted to support that

statement. No specific recommendation on the definition of “pornography” or “child pornography” for the purpose of any new offenses were provided.

Chapter 847, F.S., currently governs criminal prosecution for specified offenses relating to obscene literature and profanity. Section 847.012, F.S., prohibits a person from knowingly selling or otherwise distributing harmful materials to a minor<sup>1</sup>, which includes printed or audio matter, and visual representations (i.e., pictures, photographs, drawing, sculpture, motion picture film, videocassette) which depict nudity or sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors.

In 1986, the Legislature enacted the Computer Pornography and Child Exploitation Prevention Act. *See* ch. 86-238, *L.O.F.*, s. 847.0135, F.S. It prohibits, in part, the “transmission” of “obscene material” to a minor for purposes of solicitation. It is a third degree felony for any person who knowingly uses or attempts to use a computer on-line service, Internet service, or local bulletin board service to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, or to commit any illegal act under chapter 794, F.S., relating to sexual battery, under chapter 800, relating to lewdness and indecent exposure, or chapter 827, relating to child abuse.

Subsection (2) of the Act, as read in its entirety, provides that it is a third degree felony offense to violate the subsection as it applies to “computer pornography.”<sup>2</sup> Computer pornography is defined as applying to any person who:

- ▶ Knowingly compiles, enters into, or transmits by means of a computer;
- ▶ Makes, prints, publishes, or reproduces by other computerized means;
- ▶ Knowingly causes or allows to be entered into or transmitted by means of computer; or
- ▶ Buys, sells, receives, exchanges, or disseminates,

any notice, statement or advertisement, or any minor’s name, telephone number, place of residence, physical characteristic 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. *See* s. 847.0135(2), F.S.

### Effect of Proposed Changes

**Sections 8 and 9** of the bill cumulatively implement the subcommittee’s recommendation to criminalize interstate and out-of-state transmission of child pornography to a person or harmful images to a minor within this state, and to establish Florida jurisdiction over persons for such

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<sup>1</sup>The term “harmful to minors” means that quality of any description, exhibition, presentation, or representation, in whatever form, of nudity, sexual conduct, or sexual excitement when it: (a) predominantly appeals to the prurient, shameful, or morbid interest of minors; (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and (c) taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

<sup>2</sup>Notably, computer pornography is defined as a person who commits one of the enumerated acts. The subsection does not expressly prohibit the acts listed but states that violation of the subsection gives rise to a third degree felony offense. At least one court, in dicta, has interpreted the subsection as creating a criminal offense in *State v. Cohen*, 696 So.2d 435 (Fla. 4th DCA 1997).

transmissions. Specifically, the new section 847.0137, F.S., creates a third degree felony offense, notwithstanding existing sections 847.012, F.S., and 847.0133, F.S., for:

- 1) The transmission via the Internet by any person *within the state* of:
  - ▶ *Child pornography* to another person in the state or in another jurisdiction, or
  - ▶ *Harmful images*, which a person knew or should have known, under the circumstances, to a minor or to a person believed to be a minor in this state,
- 2) The transmission via the Internet by any person *outside this state*:
  - ▶ *Child pornography* which a person knew or should have known, under the circumstances, to another person in the state or in another jurisdiction, or
  - ▶ *Harmful images* a person knew or should have known, under the circumstances, are harmful to a minor or to a person believed to be a minor in this state.

The words “notwithstanding ss. 847.012 and 847.0133” are intended to indicate that, to the extent the conduct prohibited by this new section is also covered by one or both of the cited sections, the conduct may be prosecuted as a violation of this new section.

In order to implement these provisions, section 8 of the bill revises the definition section for chapter 847, F.S. A new definition is provided for “child pornography” to mean any image depicting, or intending to depict a minor engaged in sexual conduct. Under current law, sexual conduct is defined as “actual 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; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.” An exception is made for mothers who breast-feed their children.

The bill also amends the definition for “sexual conduct.” The term is included as a part of the new definition for “child pornography” and is a part of the existing statutory definition for the term “harmful to minors.” This amendment clarifies that actual physical contact with the clothed or unclothed specified parts of a person’s body must be made with *the intent to arouse or gratify the sexual desire of either party in order to constitute sexual conduct*.

This new section will not preclude prosecution of the violative conduct under another section that provides for greater penalties. In addition, the same provisions in chapter 910, F.S., relating to state criminal jurisdiction and venue, that allow for prosecution in this state of a person who commits a crime while either in or outside the state shall apply in prosecutions for conduct in violation of the new section. This provision is patterned after a similar provision in s. 847.0135, F.S., relating to the Computer Pornography and Child Exploitation Prevention Act of 1986.

## ■ Civil Immunity for Reporting Child Pornography to Law Enforcement



### Recommendation

The subcommittee addressed the issue of third party reporting of child pornography to law enforcement and the extent of the existing obligation to report any pornography to law enforcement. Certain third parties are in a position to locate pornography during the course of their business. For example, computer repair shops may locate pornography during the repair of a customer's computer. A commercial photo developer may come across digital or regular photographs of pornography during film or digital development.

Agreeing that any incidence of child pornography should be reported, the subcommittee could not agree on requiring third parties to report child pornography. However, the subcommittee did agree that third parties voluntarily reporting child pornography should be immune from civil liability.

### Effect of proposed changes

**Section 10** creates s. 847.0139, F.S., to grant immunity from civil liability to any person who reports to law enforcement what the person reasonably believes to be child pornography. Reporting child pornography may include furnishing the officer with a copy of a photograph or other evidence.

The bill's effective date is July 1, 2000.

## **IV. Constitutional Issues:**

### A. Municipality/County Mandates Restrictions:

None.

### B. Public Records/Open Meetings Issues:

None.

### C. Trust Funds Restrictions:

None.

### D. Other Constitutional Issues:

- The offenses under this bill may raise some constitutional concern as to overbreadth as relates to the offense for transmission of materials "harmful to minors." As a content based regulation of speech, there is concern that the prohibition could have a chilling effect on otherwise constitutionally protected speech, including expressive conduct.

The current definition for the term "harmful to minors" does incorporate in part the 3-pronged standard for determining obscenity which was established in *Miller v.*

*California*, 413 U.S. 15. However, as acknowledged by the U.S. Supreme Court in reviewing the Communications Decency Act of 1996 (CDA), the courts recognize the governmental interest does not justify an unnecessarily broad suppression of speech addressed to adults which may reach protected speech. *See Reno v. American Civil Liberty Union*, 521 U.S. 844 (1997). Arguably, the bill could apply whether or not the parent consented or even participated in the transmission. As suggested by the Court in *Reno* in construing the CDA, such restriction could interfere with the free flow of information and material such as text, pictures or chats relating to broadcasts of movies, posting of photographs such as the controversial Robert Mapplethorpe exhibit on an art museum website or the dissemination of instructional or educational programs relating to safe sex, rape, or domestic violence.

- The bill revises the definition for “sexual conduct” under Florida’s obscenity law in chapter 847, F.S. This revision attempts to correct a constitutional infirmity held by the Florida Supreme Court which found that the language was overbroad and violated due process as it encompassed constitutionally protected conduct and it lacked a rational relationship to its obvious purpose, respectively. *See Schmitt v. State*, 590 So.2d 404, 413 (Fla. 1991). Subsequent to *Schmitt*, the definition of “sexual conduct” in s. 827.071(1)(g), F.S., was amended to read: “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*” but this change was not made to the definition in chapter 847, F.S. The modified definition in chapter 827, F.S., has not been challenged.
- The issue of criminal jurisdiction of a person is addressed in part under s. 910.005, F.S.<sup>3</sup> A person is subject to prosecution in this state for an offense that he or she commits, while either within or outside the state, if:
  - a) The offense is committed wholly or partly within the state;
  - b) The conduct outside the state constitutes an attempt to commit an offense within the state,
  - c) The conduct outside the state constitutes a conspiracy to commit an offense,
  - d) The conduct within the state constitutes a conspiracy to commit an offense in another jurisdiction,
  - e) The conduct constitutes a knowing violation of s. 286.011, F.S., relating to public meetings and records.

An offense is committed partly within this state if either the conduct that is an element of the offense or the result that is an element occurs, within the state. It is indeterminate to what degree the state may be able to enforce jurisdiction over this type of on-line crime initiated from out-of-state particularly as this may fall within the pre-emptive jurisdiction of the federal government which has attempted to regulate this area as one of interstate commerce. At any rate, the burden is still on the state to establish beyond a reasonable

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<sup>3</sup>This essentially codified the holding in *Lane v. State*, 388 So.2d 1022 (Fla. 1980) that a person who commits a crime partly in one state and partly in another state may be tried in either state under the sixth amendment of the United States Constitution. The Court, however, acknowledged that this broader jurisdiction still required the prosecution to establish beyond a reasonable doubt that essential elements of the offense were committed within the jurisdiction of the State of Florida.

doubt that the essential elements of the offense were committed within the State of Florida. *See Ross v. State*, 665 So.2d 1004 (Fla. 4th DCA 1996), *rehearing and rehearing en banc denied*, *review granted* 682 so.2d 1100, *review dismissed* 696 So.2d 701.

- One of the offenses under section 9 of the bill does not contain an express scienter requirement for the transmission via the Internet of child pornography to another person in the state. [See p. 13, lines 25-29]. Although a scienter requirement or the presence of mens rea<sup>4</sup> is typically a requirement for the proof of a crime, the courts have generally implied a scienter requirement even if not expressly stated in the statutory language. *See U.S. v. X Citement Video, Inc.*, 115 S.Ct. 464 (1994)(Court read the Protection of Children Against Sexual Exploitation Act of 1977 which prohibits the interstate transportation, shipping, receipt, distribution or reproduction of visual depictions of minors engaged in sexually explicit conduct, to include an implied scienter requirement that the defendant know that one of the person's depicted was a minor.)

Other sections of Florida's obscenity law in chapter 847, F.S., do include an express scienter requirement and define "knowingly" for purposes of specified offenses. The term "knowingly" is defined as "having general knowledge or, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both: a) The character and content of any motion picture which is reasonably susceptible of examination by the defendant, or the character of any exhibition, presentation, representation, or show which is reasonably susceptible of being ascertained by the defendant, and b) The age of the minor, although an honest mistake, shall constitute an excuse from liability if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor." *See e.g.*, s. 847.012, F.S. (prohibition of sale or other distribution of harmful materials), and s. 847.013(1), F.S.(exposure of minors to harmful motion pictures, exhibitions, shows, presentations, and representations).

The issue of age verification may arise. There is no fool-proof way to determine the identity or the age of a user who is accessing material through the Internet, bulletin board or other on-line service. At least one court has found that ignorance of the victim's age is not a viable defense for someone who was charged with the offense of sexual performance with a child, and the possession of photographic materials of the sexual conduct by a child although in that case there was actual physical and visual contact with the minor. *See Nicholson v. State*, 25 Fla. L. Weekly D85 (Fla. 4th DCA January 5, 2000); *see also Thibeault v. State*, 732 So.2d 28 (Fla. 2nd DCA 1999)(conviction for computer on-line solitication of a minor who was actually a sheriff representing a minor was upheld and not challenged on that ground).

- This bill may violate the single subject limitation as provided in article III, section 6 of the *Florida Constitution*. Although the single subject may be as broad as the Legislature chooses, the matters must have a natural or logical connection. *See State v. Thompson*,

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<sup>4</sup>"Mens rea" is defined as the state of mind that the prosecution must prove that a defendant had when committing a crime and is known as the second of two essential elements of every crime at common law, the other being the actus reus. *See Black's Law Dictionary* (7th ed. 1999).

No. 92,381 (Fla. Dec. 22, 1999); *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla. 1969). The bill relates to “improper activity over the Internet.” However, the bill amends provisions of part II of chapter 501, F.S., relating to consumer protection under the Florida Deceptive and Unfair Trade Practices Act. Although trade or commerce as defined would include trade or commerce conducted under any medium including the Internet, all of the amendments to this part do not expressly relate to or limits its affect to criminal activity and victimization arising under Internet trade or commerce.

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

This bill creates another statutory basis upon which a person can be charged for the offense of transmitting specified pornographic material.

### C. Government Sector Impact:

An analysis of the fiscal impact of the new offense created by this CS was not available at the time this analysis was completed. However, the fiscal impact is anticipated by staff to be indeterminate.

This bill will broaden the authority of law enforcement and the offices of the state attorney to charge and prosecute a person for the offense of transmitting specified pornographic material under more than one statute, provided that each statute contains an element not contained in the other.<sup>5</sup>

The Florida Department of Law Enforcement (FDLE) states that the CS will require the department to develop a mechanism for the public to report Internet crimes through the FDLE Internet web site. This will require the development of a web-based “form” for input of the information and a database for storage and management of the reports. FDLE estimates the CS will require \$80,000 for the department to implement the bill: \$45,000 for a contract web developer for four months; and \$35,000 for a contract database analyst for three months. Maintenance of the system will be subsumed under routine operations. FDLE has informed staff that this fiscal analysis by the department is not intended to reflect all costs FDLE might incur as a result of this legislation but only the costs of the web-based form and database.

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<sup>5</sup>The same conduct may be punishable under more than one statute as long as each offense contains an element not contained in the other; if not, they are the same offense and double jeopardy bars subsequent punishment or prosecution. See *Boler v. State*, 678 So.2d 319, 321 (Fla. 1996); *State v. Cohen* (Fla. 4th DCA 1997).

The language relevant to transmission of an image harmful to minors to a person believed to be a minor in this state is an attempt to accommodate legal law enforcement operations in which a law enforcement officer poses as a minor for the purpose of apprehending persons who use the Internet to prey on children. "Minor" is defined in the CS as a person under 18 years of age.

#### **VI. Technical Deficiencies:**

None.

#### **VII. Related Issues:**

- Committee Substitute for Senate Bill 1618 creates a new offense that prohibits the live transmission of certain sexual acts over a computer on-line service, Internet service, or local bulletin board service. There may be some cross-over between the new offense created by this CS and the offense created by CS/SB 1618. However, this CS provides that the new section shall not prohibit prosecution of the conduct under a section providing for a greater penalty. The offense created by this new section is a third degree felony; the offense created by CS/SB 1618 is a second degree felony. Therefore, there is no conflict.
- Several sections might have unintended consequences broader than the original intent of the Task Force's recommendations. For example:
  1. Persons regulated by enumerated entities other than PSC will now be subject to FDUTPA. [See section 7, amending s. 501.212(4), F.S., p. 10, lines 11-19]
  2. Repeal of venue provision will affect in-state and out-of-state persons who seek to have a civil proceeding brought in the circuit court of the county of residence regardless of the medium in which the trade or commerce is conducted. [See section 5, repealing s. 501.2091, F.S., p. 9, lines 28-29]

#### **VIII. Amendments:**

# 1 by Judiciary:

Technical amendment to remove redundant whereas clauses.

# 1 by Judiciary:

Provides a definition for transmission to mean the sending of an electronic communication to a specified electronic mail address or addresses. (WITH TITLE AMENDMENT)