



Legislative Fiscal Bureau

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March 30, 2006

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Assembly Bill 942: Increasing Penalties for Certain Child Sex Offenses

On January 24, 2006, Assembly Bill 942 (AB 942) was introduced, relating to penalties for child pornography, sexual exploitation of a child, using a computer to facilitate a child sex crime, and child sex offenders working with children. The bill was referred to the Assembly Committee on Criminal Justice and Homeland Security, where Assembly Amendment 1 to AB 942 (AA 1) was offered. On February 20, 2006, that Committee recommended adoption of AA 1 by a vote of 11 to 0, and recommended passage as amended by a vote of seven to four. The bill was referred to the Joint Committee on Finance on the same day.

BACKGROUND

Below is a summary of the current felony offenses affected by the provisions of AB 942 and AA 1:

1. *Sexual Exploitation of a Child.* An individual is guilty of a Class F felony if he or she, with knowledge of the character and content of the sexually explicit conduct involving the child, either: (a) employs, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct for the purpose of recording or displaying in any way the conduct; or (b) records or displays in any way a child engaged in sexually explicit conduct. It is an affirmative defense to prosecution if the individual has reasonable cause to believe that the child had attained the age of 18 years. The individual has the burden of proving this defense by a preponderance of the evidence. A Class F felony is punishable by a maximum sentence of 12.5 years, including a maximum term of imprisonment of 7.5 years and a maximum term of extended supervision of five years.

It is also a Class F felony if an individual: (a) produces, performs in, profits from, promotes, imports into the state, reproduces, advertises, sells, distributes, or possesses with intent to sell or distribute, any recording of a child engaging in sexually explicit conduct; (b) knows the character and content of the sexually explicit conduct involving the child; and (c) knows or reasonably should know that the child engaging in the sexually explicit conduct has not attained the age of 18 years.

Further, an individual is guilty of a Class F felony if he or she knowingly permits, allows, or encourages the child to engage in sexually explicit conduct for a purpose described above, and he or she is responsible for the child's welfare. It is an affirmative defense to prosecution if the individual has reasonable cause to believe that the child had attained the age of 18 years. The individual has the burden of proving this defense by a preponderance of the evidence.

2. *Possession of Child Pornography.* An individual is guilty of a Class I felony if he or she possesses any undeveloped film, photographic negative, photograph, motion picture, videotape, or other recording of a child engaged in sexually explicit conduct under all the following circumstances: (a) the individual knows that he or she possesses the material; (b) the individual knows the character and content of the sexually explicit conduct in the material; and (c) the individual knows or reasonably should know that the child engaged in sexually explicit conduct has not attained the age of 18 years. A Class I felony is punishable by a maximum sentence of 3.5 years, including a maximum term of imprisonment of 1.5 years and a maximum term of extended supervision of two years.

An individual is also guilty of a Class I felony if he or she exhibits or plays a recording of a child engaged in sexually explicit conduct, if all the following apply: (a) the individual knows that he or she has exhibited or played the recording; (b) before the individual exhibited or played the recording, he or she knew the character and content of the sexually explicit conduct; and (c) before the individual exhibited or played the recording, he or she knew or reasonably should have known that the child engaged in sexually explicit conduct had not attained the age of 18 years.

3. *Child Sex Offender Working with Children.* An individual is guilty of a Class F felony if he or she has been convicted of a serious child sex offense and subsequently engages in an occupation or participates in a volunteer position that requires him or her to work or interact primarily and directly with children under 16 years of age. Evidence that a person engages in an occupation or participates in a volunteer position relating to any of the following is prima facie evidence that the occupation or position requires him or her to work or interact primarily and directly with children under 16 years of age: teaching children, child care, youth counseling, youth organization, coaching children, parks or playground recreation, or school bus driving.

An individual who has been convicted of either second-degree sexual assault of a child or engaging in repeated acts of sexual assault of the same child may petition the court in which he or she was convicted for exemption and permission to engage in an occupation or participate in a volunteer position that requires the person to work or interact primarily and directly with children under 16 years of age. The court may grant the petition if the court finds that all the following

apply: (a) at the time of the crime, the person had not attained the age of 19 years and was not more than four years older or not more than four years younger than the child with whom the person had sexual contact or sexual intercourse; (b) the child had attained the age of 13 years; and (c) it is not necessary, in the interest of public protection, to require the person to comply with this provision. If the person has received an exemption, he or she is not guilty of the offense of being a child sex offender working with children.

In addition, a person is not guilty of the offense until 90 days after the date on which the person received written notice from a law enforcement agency of the offense, if all the following apply: (a) the only serious child sex offense the person has been convicted of is second-degree sexual assault of a child; (b) the person was convicted of the offense before May 7, 2002; and (c) the person is eligible to petition for an exemption described above.

Relating to child sex offenders working with children, serious child sex offenses include any of the following, if the victim is under 18 years of age at the time of the offense; (a) sexual contact by a person holding himself or herself out to be a therapist with a patient or client during any ongoing therapist-patient or therapist-client relationship; (b) sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the actor's conduct, and the actor knows of such condition; or (c) sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of appraising the actor's conduct, and the actor knows of such condition. Further, a serious child sex offense includes any of the following offenses: (a) first-degree sexual assault of a child; (b) second-degree sexual assault of a child; (c) engaging in repeated acts of sexual assault of the same child; (d) sexual exploitation of a child; (e) incest with a child; (f) child enticement; or (g) use of a computer to facilitate a child sex crime.

4. *Use of a Computer to Facilitate a Child Sex Crime.* An individual is guilty of a Class D felony if he or she uses a computerized communication system to communicate with a person, who the individual believes or has reason to believe has not attained the age of 16 years, with intent to have sexual contact or sexual intercourse with the person. In order to prove intent, proof is necessary that the individual committed an act to effect that intent, other than use of a computerized communication system to communicate with the person. A Class D felony is punishable by a maximum sentence of 25 years, including a maximum term of imprisonment of 15 years and a maximum term of extended supervision of 10 years. This section does not apply if, at the time of the communication, the individual reasonably believed that the age of the person was not more than 24 months less than his or her own age.

SUMMARY OF BILL

Felony Offense Modifications

Assembly Bill 942 would modify the offenses identified above as follows.

1. *Sexual Exploitation of a Child.* The bill would modify the felony offense of sexual exploitation of a child from a Class F felony to a Class C felony. A Class C felony is punishable by a maximum sentence of 40 years, including a maximum term of imprisonment of 25 years and a maximum term of extended supervision of 15 years.

Further, AB 942 would provide that the court, in imposing a bifurcated sentence, would be required to impose a term of confinement in prison of at least five years. The court could not place a defendant on probation.

2. *Possession of Child Pornography.* The bill would modify the felony offense of possession of child pornography from a Class I felony to a Class C felony. In imposing a bifurcated sentence, the court would be required to impose a term of confinement in prison of at least three years, and could not place a defendant on probation.

3. *Child Sex Offender Working with Children.* Assembly Bill 942 would delete the word "primarily" from the statutory language for this offense. With this modification, it would be a Class F felony if an individual has been convicted of a serious child sex offense and subsequently engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with children under 16 years of age.

4. *Use of a Computer to Facilitate a Child Sex Crime.* The bill would require that, in imposing the bifurcated sentence for use of a computer to facilitate a child sex crime, the court must impose a term of confinement in prison of at least five years. The court could not place the individual on probation.

In addition, the bill would specify examples of acts that may be used as proof that the individual intended to have sexual contact or sexual intercourse with the person. For the examples, summarized below, AB 942 would provide that "representation" means a photograph, exposed film, motion picture, videotape, other visual representation, or data that represents a visual image.

Under AB 942, the examples of acts that may be used to prove intent include: (a) traveling any distance with the intent to meet the individual; (b) reserving accommodations at any hotel with the intent to meet the individual; (c) making other arrangements related to travel with the intent to meet the individual, including making a reservation or purchasing a ticket for bus, train, or airplane travel; (d) transmitting a representation of any lewd act to the individual through a computerized communication system; (e) orally communicating with the individual, including through a telephone or a voice other internet service; (f) obtaining any representation of the individual or a person whom the actor believes is the individual through the internet; (g) sending any item by any means, including mail, delivery service, or personal delivery, with the intent that it be delivered to the individual; (h) soliciting and receiving any item by any means, including mail, delivery service, or personal delivery, from the individual (i) engaging in surveillance of, or a course of conduct, directed at the individual or a person the actor believes is the individual; (j) causing another person to engage in conduct described under (i) for the purpose of enabling the actor to avoid detection by

law enforcement; and (k) acquiring sex toys, intimate apparel, or other items that are used primarily in the course of sexual activity.

Child Pornography Surcharge

Assembly Bill 942 would create a \$500 child pornography surcharge to be assessed against offenders convicted of sexual exploitation of a child or possession of child pornography. Under the bill, the court would be required to impose the surcharge for each image or each copy of an image associated with the crime. The court would determine the number of images or copies of images associated with the crime by a preponderance of the evidence and without a jury. Under current law, statutes require the clerks of court to collect payment of surcharges in a specified order. The bill would require that the courts place full payment of the child pornography surcharge after full payment of the following: (a) the penalty surcharge; (b) the jail surcharge; (c) Parts A and B of the crime victim and witness surcharge; (d) the crime laboratories and drug law enforcement surcharge; and (f) the DNA analysis surcharge.

The clerk of the court would be required to collect the surcharge and transmit the amount to the county treasurer, who would forward the revenue to the Secretary of the Department of Administration (DOA). The bill would create continuing, program revenue (PR) appropriations under the Department of Corrections, Department of Justice, and the Child Abuse and Neglect Prevention (CANP) Board under which the DOA Secretary would credit the surcharge revenue as follows: (a) 50% to Corrections to operate institutions and to provide field and administrative services; (b) 30% to the Department of Justice for investigating offenses of sexual exploitation of a child and possession of child pornography; and (c) 20% to the CANP Board for grants to organizations for child abuse and neglect prevention and family support programs. Revenue to the CANP Board would be deposited in the Children's Trust Fund.

The bill specifies that if a prisoner has not paid the child pornography surcharge, the Department of Corrections would be required to collect the amount owed from the inmate's wages or other monies and transmit these amounts to the Secretary of DOA. The order of payment would be similar to that of the courts identified above.

SUMMARY OF ASSEMBLY AMENDMENT 1

Assembly Amendment 1 to AB 942 would delete the requirement that all part C revenues of the child pornography surcharge be deposited to the Children's Trust Fund. The amendment would also delete an associated PR continuing appropriation under the CANP Board to which these part C revenues would have been credited for the purpose of providing grants to organizations for child abuse and neglect prevention activities.

The amendment would instead create a PR continuing appropriation under the Department of Administration's Office of Justice Assistance (OJA) funded from part C revenues. The

appropriation would support grants to nonprofit organizations for services to victims of sexual assault. The Secretary of Administration would be directed to credit all part C revenues to this new OJA appropriation.

Under this new OJA grant program, the Office would be authorized to utilize up to 10% of the part C revenues to cover the costs of administering the program. Further, OJA would be required to develop criteria and procedures for use in selecting grantees and for administering the grant program. The amendment would stipulate that these criteria and procedures would not have to be promulgated as administrative rules.

FISCAL EFFECT

Fiscal estimates associated with AB 942 and AA 1 are summarized below.

Department of Corrections. For its fiscal estimate, the Department reviewed the number of convictions for sexual exploitation of a child, possession of child pornography, and use of a computer to facilitate a child sex crime in calendar year 2005. According to Corrections, in fiscal year 2004-05, the annual average cost per inmate was \$26,200, while the average annual cost per offender on probation was \$2,030. It should be noted that the Department's estimate assumes that offenders who currently are being placed on probation for the offenses or sentenced to prison for less than the mandatory minimum sentence created in the bill would only be sentenced to the mandatory minimum. To the extent that offenders are sentenced to additional confinement time as a result of the increased penalty provisions, costs could be higher. While no additional funding is appropriated to the Department, Corrections' estimated fiscal impact of AB 942, by offense, is as follows:

1. *Sexual Exploitation of a Child.* In 2005, seven offenders were convicted of sexual exploitation of a child. Three of those convicted were placed on probation and four offenders were sentenced to prison. Based on the 2004-05 cost difference between prison and probation (\$24,170), first year costs would increase by \$72,500 for placing the three offenders in prison instead of probation. Costs would continue to increase by an additional \$72,500 as three new offenders enter the prison system each year.

Of the four offenders sentenced to prison for sexual exploitation of a child, Corrections indicates that only one offender received a sentence less than the five-year minimum required under AB 942. Thus, costs would not increase until the third year (when the offender would otherwise have been released), after which costs would annually increase by \$24,200 for a two-year period.

2. *Possession of Child Pornography.* There were 49 offenders placed on probation for possession of child pornography in calendar year 2005. Under AB 942, these offenders would be sentenced to a minimum of three years in prison. As such, Corrections estimates that costs would increase by \$1,184,300 annually, as a result of 49 additional offenders being placed in prison instead of on probation each year.

In addition, 17 offenders were sentenced to prison for possession of child pornography. Of those offenders, six were sentenced to prison for a period of less than three years. Since these offenders would remain in prison longer, the Department estimates increased costs of \$60,500 in the second year, with increased costs of \$205,400 annually in subsequent years.

3. *Use of a Computer to Facilitate a Child Sex Crime.* In 2005, 33 offenders were placed on probation and four offenders were sentenced to prison for use of a computer to facilitate a child sex crime. Assuming 33 offenders would instead be placed in prison instead of on probation, Corrections estimates additional costs of \$797,600, increasing annually.

The four offenders sentenced to prison in 2005 received sentences of less than the five-year minimum required under AB 942. Based on increasing these offenders' sentences to the five-year minimum, Corrections estimates increased costs of \$12,100 in the second year, \$48,300 in the third year, \$120,900 in the fourth year, and an additional \$217,500 annually thereafter.

In addition to increased costs associated with the mandatory minimum sentences, Corrections also estimated the potential revenue that could be generated from the child pornography surcharge. Based on the 2005 data, there were seven offenders convicted of sexual exploitation of a child and 66 offenders convicted of possession of child pornography, a total of 73 offenders. Assuming the child pornography surcharge was assessed against each offender for a single image, and assuming a 100% collection rate, Corrections estimates that \$36,500 could be generated, with the Department receiving 50%. While it is likely that the number of images associated with each conviction will vary by offender, it is unknown how many images would be associated with each conviction, and how much additional revenue would actually be generated.

The Department concludes its fiscal estimate with the following summary:

- Based on calendar 2005 convictions, an additional 85 offenders would be admitted to prison in the first year after enactment of AB 942, at a cost of \$2,054,500. Costs would increase to \$8,399,100 by the fifth year for an additional 351 offenders. As an alternative to housing the additional inmates in state facilities, if the Department were to contract for prison beds at the current rate of \$51.46, total costs would increase by \$1,423,800 in the first year and \$5,879,600 annually after the fifth year.

- "Costs in subsequent years will be higher if judges increase sentence lengths and/or extended supervision terms as a result of the imposition of the mandatory minimum sentences and the increases in maximum sentence lengths in the bill for some of the offenses. While the Department is likely to see offenders on community supervision for longer periods as a result of these changes, the fiscal impact of this cannot be determined."

It should be noted that Corrections' estimate of additional costs is based on the current average annual cost per inmate of \$26,200; that is, it assumes that \$26,200 annually would be

needed for each additional inmate. The current average cost, however, includes overhead costs (for example, certain administrative costs and fuel and utilities) that may not increase as a result of the bill's provisions. To the extent that Corrections could support a nominal increase in prison population without increasing certain overhead costs, the cost for some additional inmates would be less than the current per inmate average cost.

Department of Justice. Under AB 942, all part B revenues of the child pornography surcharge would be credited to a DOJ appropriation to support the costs of investigating offenses involving the sexual exploitation of a child and the possession of child pornography. The bill would not authorize any additional positions for the agency's Division of Criminal Investigation to carry out these responsibilities. However, funding credited to the new appropriation could be utilized to offset supplies and services costs associated with such activities.

CANP Board/Office of Justice Assistance. The provisions of AB 942 would allocate 20% of the revenues from the child pornography surcharge to the CANP Board to be used for the Board's grant programs: (a) family resource center grants; and (b) family resource and support community-based program grants. The Board's Executive Director indicates that the Board would use the surcharge revenue to support child sexual abuse prevention strategies, as recommended in the *2006 Wisconsin State Plan to Prevent Child Maltreatment*. These activities would include: (a) identification and intervention with potential child sexual abuse perpetrators; and (b) promoting adult responsibility for protecting children from child sexual abuse. In 2005-06, the Board allocated \$150,000 to support this initiative.

Under AA 1 to AB 942, the part C revenue would instead be credited to a new appropriation under OJA to provide grants to nonprofit organizations for services to victims of sexual assault. Under the original bill, no part C revenue could be used by the CANP Board for administration costs relating to the grant program. Under AA 1, OJA would be authorized to utilize up to 10% of part C revenues for administration costs relating to the grant program.

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