

JOINT COMMITTEE ON WAYS AND MEANS – 2007 SESSION
PUBLIC SAFETY SUBCOMMITTEE

MEETING INDEX

June 15, 2007

Hearing Room H-170

MEMBERS PRESENT:

Rep. Shields, Chair	Sen. Westlund, Vice-Chair
Rep. Barker	Sen. Brown
Rep. Cameron	Sen. Burdick
Rep. Hanna	Sen. Nelson
Rep. Nathanson	Sen. Winters

MEMBER EXCUSED: Sen. Brown

STAFF PRESENT: Doug Wilson, Budget Analyst, Legislative Fiscal Office
Tim Walker, Budget Analyst, Legislative Fiscal Office
Sue Cook, Committee Assistant, Legislative Fiscal Office

HB 2843 – PUBLIC HEARING

Tape 112A – Counter at 1500

REP. OLSON: Well, Mr. Chair, committee, thank you. My name is Andy Olson. I'm a State Representative out of the Albany area. And House Bill 2843 comes to you from...well, the full committee passed it on the House Judiciary a few months ago. And it had heard testimony a couple of different occasions. Senator Kate Brown and I began working on this Bill probably...well, it's been over 15 months ago, maybe 16 months ago. But I'll just give you a quick little picture of how this all occurred. Several law enforcement officers around the State about a year and a half ago approached me. They were concerned about the issue of when they went out to a physical abuse or a sexual abuse investigation and in that they happened to see some videos, pornography...I mean really hardcore stuff which is described in 2843...and not really being able to do much with it. So from that point, a number of us got together – Bill Taylor from Judiciary Counsel and several other folks including members from Oregon Criminal Defense

Lawyers Association OCDLA, ACLU, Department of Justice, as well as Ron Mannheim from the Library Association and also the D.A.'s Association were there. And we met several different times during the interim. And today is what you have in front of you, 2843. It has been modified a little bit. There's been an extreme amount of testimony in front of judiciary, you have two of your members that are here that had chance to listen to it. And during that time period, they had expert testimony come in and share the harm. And that's where we were really wanting to go with the description of what some very hardcore stuff does on children. There's two portions to the Bill – there's one that deals with furnishing sexually explicit material to a child, and then there's also a grooming statute or a luring or a minor statute. So I'll let you jump in there, Senator.

SEN. BROWN: Thanks, Mr. Chair. The real chair...just kidding, Representative Shields. For the record, State Senator Kate Brown represent Senate District 21. Thanks so much for hearing this Bill. As Representative Olson talked about, we have been working on this Bill for a lengthy period of time. We think it's a really good product. You should have or you will have tomorrow or Monday an amendment to the Bill that I think Representative Olson and I have agreed upon which will strengthen the protections of for lawful use of material under both Article I, Section 8 of the Oregon Constitution and the First Amendment. The amendment will strengthen the protections for persons who are lawfully using persons. It will eliminate language about simulated sexual acts in response to a concern by the Media Coalition which includes the Motion Picture Association. I've decided in working on this Bill that I don't see enough movies. Our intent in that piece of the amendment is in using the word simulated was to address computer-generated images, but in working with judiciary and legislative counsel, we

believe that computer images are included under the Bill without specifically identifying it. We're working on some of the defense issues, but in summary, I think we've created a really strong Bill. For me, it's a really straightforward issue that the current Oregon law regarding child pornography is unconstitutional. We believe we have a constitutional version that would prohibit furnishing sexually explicit material to a child and luring a minor, which would be a Class C felony. And colleagues, for me this is about the fact that we have a number of children in our society today that have been sexually abused. This is about criminalizing the precursor behavior that is very harmful. And I think it's extremely important that we act on this Bill this session. So, happy to answer any questions. And thank you very much.

CHAIR SHIELDS: Thank you, Senator Brown and Representative Olson.

Questions? Senator Burdick.

SEN. BURDICK: Thank you, Mr. Chair. You said that the current statutes on child pornography were unconstitutional. I had thought that we had changed those to become...to limit it to obscenity and that they were constitutional. Could you elaborate on that?

SEN. BROWN: That's my understanding. I'm sure someone else could, I can't.

SEN. BURDICK: Okay, I'll wait.

CHAIR SHIELDS: Any other questions? Thank you very much for bringing this Bill forward.

SEN. BROWN: Mr. Chair, if I can briefly. Both legislative counsel and judiciary counsel worked with us extensively on this Bill. And I just want to say thank you.

CHAIR SHIELDS: Would you like them to testify on any aspects of this Bill? It's up to you, Senator. Okay, why don't you come on up then. We have somebody from the Attorney General's Office that can respond to Senator Burdick's question.

MR. SLAUSON: Chair Shields, members of the committee, my name is Michael Slauson from the Department of Justice. I'm Assistant Attorney General assigned to the Criminal Justice Division, and I'm the Internet Crimes Against Children prosecutor. Chair Shields, Senator Burdick, just in response to your question, you sounded like you were asking specifically about our child pornography statutes. And those are constitutional. The Court found as such in *State v. Stonemen*. And this deals with a slightly different issue, this particular legislation.

SEN. BURDICK: So this isn't...Mr. Chair, to follow-up...this isn't replacing some unconstitutional provision in the statutes. This is a separate issue, is that correct?

MR. SLAUSON: Chair Shields, Senator Burdick, it does replace particular provisions dealing with furnishing obscene materials to minors which is a different statutory scheme than what we deal with with child pornography, which we call sexually explicit images of children.

SEN. BURDICK: Okay, this was just my...Mr. Chair or whatever you are, Mr. Other Chair...I just was trying to refresh my memory because I had thought we had corrected the unconstitutional child pornography statutes. But what I'm hearing you say is the statutes that are on the books now are constitutional, but this is another approach, is that correct?

MR. SLAUSON: Chair Shields, members of the committee, Senator Burdick. Yes, I think in 2001, the legislature modified some of the current provisions in response

to a court case, *State v. Maynard*. It didn't make all the changes though that over the years the court sort of identified as being problematic. So what this current legislation does is take that guidance that was given to us by the court and make sure that our statutes comply with that guidance.

CHAIR SHIELDS: Thank you very much.

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Tape 112A – Counter at 3100

CHAIR SHIELDS: Alright, Ms. Meyer.

MS. MYER: Chair Shields, members of the committee, Andrea Myer, Legislative Director for the ACLU of Oregon. I actually think that we've been involved in talking about this issue for longer than anyone else when John Minnis approached the ACLU years ago and we agreed that there was an area of the law that needed to be fixed. And that is what is Section 3. But that is when a person provides sexually explicit material to a minor with the intention of grooming the minor for sexual assault, sexual abuse. So there is a criminal intent by the person who is providing it, and a clear intent at wholly inappropriate intent. And it was years ago, we attempted to come to language and we weren't able to. So we are very pleased to see that part of the law addressed. But unfortunately, I am here today in opposition to the final product that is before you today because of our concerns around Section 2. And that's been...so Section 3 is the Luring, and that's the one that again has the criminal intent. But Section 2 concerns us because while it requires that the person...it creates a crime for a person who furnishes sexually explicit material to a child if the person intentionally furnishes it or permits a child to view it.

SEN. BROWN?: We just got some amendments handed to us, and I'm not sure if they address your concerns or not, but I want to make sure you have them.

MS. MYER: Chair Shields, members of the committee. No, my amendments I don't think are coming forward. I think...if I could ask Senator Brown, is this the accumulation of the...there were apparently a number of them floating around for the last few weeks and I think this is...and he said he wasn't involved in some of this, some of them. And I believe, and I'll let other speak, but Ms. Christian is representing the Juvenile Rights Project Amendment. I don't believe it's in here in what you have. And there are some improvements in that, but I want to focus on Section 2 and our concerns now. Without going into the history too much, when we had our...you know, we're so used to looking at Article I, Section 8 focus that indeed when we finally had our National...and I will acknowledge that we should have done it earlier to allow Senator Brown and Representative Olson the opportunity for us to convey our more current concerns which we did a number of months ago at this point...but when our National ACLU looked at it, they determined in their wisdom and extensive experience in this area of law federally that Section 2 did not pass muster under the First Amendment. Now I know, I believe there is some revised language before you today. There was earlier some new language put forward that some...I believe the motion picture industry said well, this fixes our concerns federally. Well, I understand when it was looked at, folks thought it ran afoul of Article I, Section 8, our free speech provision. I assume that this latest attempt is to try to...someone said that thin thread through the needle...but I would raise significant concerns with this. We don't like importing federal law language into our statutes. Our Oregon courts don't interpret our free expression in the same manner as the

federal. So if they did and we used the same federal language, we could be pretty sure it passes muster under the Oregon Constitution. But when it comes to our free expression provision, we have a very distinct case law and interpretation. And what concerns us with what is otherwise a very good law, we believe at least at the best raises some constitutional questions and concerns us in terms of the policy decision unfortunately that you're to make which is the assumption that if a person intentionally allows someone to view what is sexually explicit material, it should be a crime. There are exceptions in this. I think there may be some...you know, that you'll see so there are exceptions just for folks that are...it talks about sex education, art education, medical treatment. So I don't want to misrepresent that this would happen in all situations – it's narrowed. But again, we are very concerned. We hate to see what has been such hard work and an attempt to deal with the fact that Oregon has statutes on the books that are unconstitutional, that we put something else there that's likely going to be challenged and poses a risk. And if we had our druthers, we would urge you to move forward by omitting Section 2. We think it's a great Bill. It gets to what had always been the concern starting with John Minnis, again, about going after those people who have evil criminal intent and capturing them even if they have not been successful in engaging in the actual assault of the minor. I'm happy to answer any questions, and appreciate the opportunity today to express our concerns.

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Tape 111B – Counter at 405

SEN. BROWN: Thanks, Mr. Chair. So Ms. Myer, my recollection from the numerous work group meetings before session were that at least the Oregon ACLU had a comfort level with Section 2 under the Oregon Constitution. Is that not right?

MS. MYER: Chair Shields, Senator Brown, I want to answer that in two ways. The ACLU was never comfortable with this language. Whether we were comfortable, what we should have done is shared it more with folks who could give us a better opportunity to look at the Oregon. And that is our...and I take full responsibility for our not...you know, we had focused on Section 3 and we felt very comfortable and very knowledgeable in that area as to what would pass muster. And, you know, we didn't on Section 2. You know, I think it does have problems under Article I, Section 8, but if it can't pass muster under the First Amendment, it's not going to stand up then.

CHAIR SHIELDS: Senator Brown, follow-up?

SEN. BROWN: Yes, so I guess what I thought I heard you say is that...or at least in my recollection it was my understanding that the ACLU, at least of Oregon, felt some comfort level that this met Oregon constitutional requirements and your work in the work group that there was a level of neutrality in terms of meeting Oregon constitutional requirements.

MS. MYER: Right. Chair Shields, Senator Brown, again ACLU, we probably didn't do our due diligence that we should have when this Bill was finally in final form. And we have gone on the record, and Senator Brown...and I don't know if you had a chance to listen to hearing tapes. I know at the last hearing when I was before judiciary, and I know David Fidanque when he spoke on this when it first came up, and we apologize because we look at it both. And so to answer your question specifically, I

don't know that we really properly vetted this section under Article I, Section 8 to say that we felt it was neutral or it complied. And that was our mistake, and I acknowledge that.

SEN. BROWN: Mr. Chair, I think my last question would be is my understanding of Oregon constitutional law at least in this arena is that it is broader than the federal constitution. Is that an incorrect understanding?

MS. MYER: Chair Shields, Senator Brown. It's broader in terms of protecting people's expression. I want to frame it, yes. We provide more free speech protections. A quick example – commercial speech is protected the same as political speech in our constitution, not the same under the federal.

SEN. BROWN: Again, with nudity and other issues, more protection or for some they say too much protection or not enough protection. I want to make sure we've seen it from each of our perspectives.

CHAIR SHIELDS: Thank you very much, Ms. Myer. We do need to move on. There's nobody else on the list, but Senator Brown, would you like to have anybody else testify or shall we...

SEN. BROWN: Well, Mr. Shields, I don't know if the committee has it. Ms. Slauson from the Department of Justice has worked extensively on this if the committee wants to hear from him regarding the constitutional issues. Mr. Stanford from judicial legal counsel, as well as our legislative counsel whose last name I cannot recall...I know his first name is Josh...can respond to any of the committee's concerns regarding the constitutional issues.

CHAIR SHIELDS: Would it be okay if you could chose one, and just bring him up for two or three minutes? Who would like to?

SEN. BROWN: One of you guys come up. I don't care.

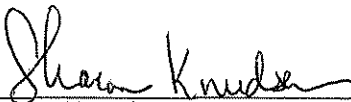
CHAIR SHIELDS: And if you could just try to keep it brief because we do have a number of bills that we need to get through.

MR. SLAUSON: Chair Shields, members of the committee, again my name is Michael Slauson from the Department of Justice. We have talked a lot about the constitutional issues. And Article I, Section 8 does provide a much broader protection than the First Amendment. There was an issue of importing some First Amendment language that dealt with obscenity as it relates to adults into this particular statute. The language that would have imported though, the Oregon Supreme Court in a case *State v. Henry* found was not the type of words that you could use. They were too ambiguous and too nebulous to use under Oregon law. So what this particular section does, it does comport with Article I, Section 8, and it does...based on the Department of Justice opinion...does comport with the First Amendment. If you have any more questions, I can try and answer them.

CHAIR SHIELDS: I think your position is very clear. Thank you very much. I will close the public hearing on House Bill 2843. Thank you very much.

I, Sharon Knudsen, do hereby certify that these HB 2843 Public Hearing Excerpts were tape recorded on June 15, 2007, supplied to me by the Oregon Department of Justice, and thereafter reduced to typewriting by me, and that the foregoing is an accurate and complete transcript to the best of my ability of such recorded proceedings.

IN WITNESS WHEREOF I have hereunto set my hand in the City of Albany, County of Linn, State of Oregon, this 20th day of May, 2008.



Sharon Knudsen
Court Transcriber