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Bill Analysis
Legislative Service Commission

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(As Reported by H. Criminal Justice)

Sens. Schaffer, Coughlin, Austria, Cates, Clancy, Faber, Gardner, Grendell, Padgett, Fedor, Harris, Mason, R. Miller, Mumper, Spada, Wilson

Reps. Sears, Dyer

BILL SUMMARY

- Requires the imposition of a mandatory prison term for the offense of "importuning" if the offender previously has been convicted of a sexually oriented offense or a child-victim oriented offense.
- Prohibits any person from knowingly (1) inducing, procuring, encouraging, soliciting, requesting, or otherwise facilitating a person the offender believes to be a minor to engage in sexual activity for hire, whether or not the person is a minor, (2) paying or agreeing to pay a person the offender believes to be a minor, either directly or through the person's agent, so that the person will engage in sexual activity, whether or not the person is a minor, (3) paying a person the offender believes to be a minor, either directly or through the person's agent, for the person having engaged in sexual activity pursuant to a prior agreement, whether or not the person is a minor, or (4) allowing a person the offender believes to be a minor to engage in sexual activity for hire if the person allowing the person to engage in sexual activity for hire is the parent, guardian, custodian, person having custody or control, or person in loco parentis of the person the offender believes to be a minor, whether or not the person is a minor, and makes a violation of any of those prohibitions "compelling prostitution," a felony of the third degree.
- Modifies the definition of "adult cabaret" for purposes of the offenses of "illegally operating a sexually oriented business" and "illegal sexually oriented activity in a sexually oriented business" to mean a nightclub, bar, juice bar, restaurant, bottle club, or similar commercial establishment, whether or not alcoholic beverages are served, that

regularly features persons who appear in a state of nudity or seminudity (existing law), live performances that are characterized by the exposure of specified anatomical areas or specified sexual activities, or films, motion pictures, video cassettes, slides, or other photographic reproductions that are distinguished or characterized by their emphasis upon the exhibition or description of specified sexual activities or specified anatomical areas.

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CONTENT AND OPERATION

Importuning

Existing law

Existing R.C. 2907.07 contains a series of prohibitions that relate, in a variety of circumstances, to a person's solicitation of another to engage in sexual activity. A violation of any of the prohibitions is the offense of "importuning." The penalty for the offense varies, depending upon the prohibition violated. The prohibitions and the penalties that apply to them are as follows:

(1) One prohibition prohibits a person from soliciting a person who is less than 13 years of age to engage in "sexual activity" (see **COMMENT 1**) with the offender, whether or not the offender knows the age of such person. A violation of this prohibition is a felony of the third degree on a first offense and a felony of the second degree on each subsequent offense. In either case, there is a presumption that a prison term must be imposed for the offense as described in division (D) of R.C. 2929.13 (see **COMMENT 2**). (R.C. 2907.07(A) and (F).)

(2) Another prohibition prohibits a person from soliciting another, not the spouse of the offender, to engage in "sexual conduct" (see **COMMENT 1**) with the offender, when the offender is 18 years of age or older and four or more years older than the other person, and the other person is 13 years of age or older but less than 16 years of age, whether or not the offender knows the age of the other person. A violation of this prohibition is a felony of the fifth degree on a first offense and a felony of the fourth degree on each subsequent offense. (R.C. 2907.07(B) and (F).)

(3) A third prohibition prohibits a person from soliciting another by means of a "telecommunications device" (see **COMMENT 3**) to engage in sexual activity with the offender when the offender is 18 years of age or older and either of the following applies: (a) the other person is less than 13 years of age, and the offender knows that the other person is less than 13 years of age or is reckless in that regard, or (b) the other person is a law enforcement officer posing as a person who is less than 13 years of age, and the offender believes that the other person is less than 13 years of age or is reckless in that regard. This prohibition applies to any solicitation contained in a transmission via a telecommunications device that either originates or is received in Ohio. A violation of this prohibition is a felony of the third degree on a first offense and a felony of the second degree on each subsequent offense. In either case, there is a presumption that a prison term must be imposed for the offense as described in division (D) of R.C. 2929.13 (see **COMMENT 2**). (R.C. 2907.07(C), (E), and (F).)

(4) The final prohibition prohibits a person from soliciting another by means of a telecommunications device to engage in sexual activity with the offender when the offender is 18 years of age or older and either of the following applies: (a) the other person is 13 years of age or older but less than 16 years of age, the offender knows that the other person is 13 years of age or older but less than 16 years of age or is reckless in that regard, and the offender is four or more years older than the other person, or (b) the other person is a law enforcement officer posing as a person who is 13 years of age or older but less than 16 years of age, the offender believes that the other person is 13 years of age or older but less than 16 years of age or is reckless in that regard, and the offender is four or more years older than the age the law enforcement officer assumes in posing as the person who is 13 years of age or older but less than 16 years of age. This prohibition applies to any solicitation contained in a transmission via a telecommunications device that either originates or is received in Ohio. A violation of this prohibition is a felony of the fifth degree on a first offense and a felony of the fourth degree on each subsequent offense. (R.C. 2907.07(D), (E), and (F).)

Operation of the bill

The bill requires the imposition of a mandatory prison term for the offense of "importuning" if an offender previously has been convicted of a sexually oriented offense or a child-victim oriented offense. Specifically, under the bill:

(1) A violation of the prohibition described above in paragraph (1) or the prohibition described above in paragraph (3) remains a felony of the third degree for a first offense as under existing law. The bill removes the increased penalty for each subsequent offense and retains the provision in existing law that there is a presumption that a prison term must be imposed as described in R.C. 2929.13(D) (see **COMMENT 2**). The bill further provides that if an offender previously has been convicted of a sexually oriented offense or a child-victim oriented offense, a violation of the prohibition described above in paragraph (1) or the prohibition described above in paragraph (3) is a second degree felony, and the court must impose upon the offender as a mandatory prison term one of the prison terms described in R.C. 2929.14 for a second degree felony (two, three, four, five, six, seven, or eight years). (R.C. 2907.07(A), (C), and (F)(2).)

(2) A violation of the prohibition described above in paragraph (2) or the prohibition described above in paragraph (4) remains a felony of the fifth degree on a first offense as under existing law. The bill removes the increased penalty for each subsequent offense. It provides that there is a presumption that a prison term must be imposed as described in R.C. 2929.13(D) (see **COMMENT 2**). The bill further provides that if the offender previously has been convicted of a sexually oriented offense or a child-victim oriented offense, a violation of the prohibition described above in paragraph (2) or the prohibition described above in paragraph (4) is a fourth degree felony, and the court must impose upon the offender as a mandatory prison term one of the prison terms described in R.C. 2929.14 for a fourth degree felony that is not less than 12 months in duration (12, 13, 14, 15, 16, 17, or 18 months). (R.C. 2907.07(B), (D), and (F)(3).)

The bill makes a conforming change in R.C. 2929.13(F), which generally lists the offenses for which a mandatory prison term is required, to reflect the mandatory prison term changes described in the two preceding paragraphs (R.C. 2929.13(F)).

Compelling prostitution

Continuing law

R.C. 2907.21(A) contains a series of prohibitions that constitute the offense of "compelling prostitution." The prohibitions are as follows:

(1) One prohibition prohibits any person from knowingly compelling another to engage in "sexual activity" (see **COMMENT 1**) for hire.

(2) A second prohibition prohibits any person from knowingly inducing, procuring, encouraging, soliciting, requesting, or otherwise facilitating a minor to engage in sexual activity for hire, whether or not the offender knows the age of the minor.

(3) A third prohibition prohibits any person from knowingly paying or agreeing to pay a minor, either directly or through the minor's agent, so that the minor will engage in sexual activity, whether or not the offender knows the age of the minor.

(4) A fourth prohibition prohibits any person from knowingly paying a minor, either directly or through the minor's agent, for the minor having engaged in sexual activity, pursuant to a prior agreement, whether or not the offender knows the age of the minor.

(5) A fifth prohibition prohibits any person from knowingly allowing a minor to engage in sexual activity for hire if the person allowing the child to engage in sexual activity for hire is the parent, guardian, custodian, person having custody or control, or person in loco parentis of the minor.

Compelling prostitution generally is a felony of the third degree. If the offender commits a violation of the prohibition described above in (1) and the person compelled to engage in sexual activity for hire in violation of that prohibition is less than 16 years of age, compelling prostitution is a felony of the second degree. (R.C. 2907.21(B).)

Operation of the bill

The bill adds the following prohibitions that would constitute the offense of "compelling prostitution" (R.C. 2907.21(A)(2)(b), (3)(b), (4)(b), and (5)(b)):

(1) It prohibits any person from knowingly inducing, procuring, encouraging, soliciting, requesting, or otherwise facilitating a person the offender believes to be a minor to engage in "sexual activity" for hire, whether or not the person is a minor.

(2) It prohibits any person from knowingly paying or agreeing to pay a person the offender believes to be a minor, either directly or through the person's agent, so that the person will engage in sexual activity, whether or not the person is a minor.

(3) It prohibits any person from knowingly paying a person the offender believes to be a minor, either directly or through the person's agent, for the person having engaged in sexual activity pursuant to a prior agreement, whether or not the person is a minor.

(4) It prohibits any person from knowingly allowing a person the offender believes to be a minor to engage in sexual activity for hire if the person allowing the person to engage in sexual activity for hire is the parent, guardian, custodian, person having custody or control, or person in loco parentis of the person the offender believes to be a minor, whether or not the person is a minor.

The bill provides the same penalty for a violation of the above prohibitions as under continuing law for "compelling prostitution," i.e., a felony of the third degree (R.C. 2907.21(B)).

Illegally operating sexually oriented business; illegal sexually oriented activity in sexually oriented business

Existing law

Existing R.C. 2907.40 contains the following prohibitions pertaining to operating, or conducting sexually oriented activity in, a sexually oriented business:

(1) One prohibition prohibits a "sexually oriented business" (see definition below) from being or remaining open for business between 12:00 midnight and 6:00 a.m. on any day, except that a sexually oriented business that holds a liquor permit pursuant to R.C. Chapter 4303. may remain open until the hour specified in that permit if it does not conduct, offer, or allow sexually oriented entertainment activity in which the performers appear nude. A violation of this prohibition is "illegally operating a sexually oriented business," a misdemeanor of the first degree. (R.C. 2907.40(B) and (D).)

(2) Another prohibition prohibits any patron who is not a member of the employee's immediate family from knowingly touching any employee while that employee is nude or seminude or touching the clothing of any employee while that employee is nude or seminude (R.C. 2907.40(C)(1)).

(3) A third prohibition prohibits any employee who regularly appears nude or seminude on the premises of a "sexually oriented business," (see definition below) while on the premises of that sexually oriented business and while nude or seminude, from knowingly touching a patron who is not a member of the employee's immediate family or another employee who is not a member of the employee's immediate family or the clothing of a patron who is not a member of the employee's immediate family or another employee who is not a member of the

employee's immediate family or allowing a patron who is not a member of the employee's immediate family or another employee who is not a member of the employee's immediate family to touch the employee or the clothing of the employee.

A violation of the prohibitions described above in (2) or (3) is "illegal sexually oriented activity in a sexually oriented business." If the offender touches a specified anatomical area of the patron or employee, or the clothing covering a specified anatomical area, a violation of either prohibition is a misdemeanor of the first degree. If the offender does not touch a specified anatomical area of the patron or employee, or the clothing covering a specified anatomical area, a violation of either prohibition is a misdemeanor of the fourth degree. (R.C. 2907.40(C)(2) and (E).)

For purposes of the above provisions, "sexually oriented business" means an adult bookstore, adult video store, "adult cabaret," (see next sentence for the definition), adult motion picture theater, sexual device shop, or sexual encounter center, but does not include a business solely by reason of its showing, selling, or renting materials that may depict sex. "Adult cabaret" means a nightclub, bar, juice bar, restaurant, bottle club, or other similar commercial establishment, regardless of whether alcoholic beverages are served, that "regularly" features individuals who appear in a "state of nudity or seminudity" (see **COMMENT 4**). (R.C. 2907.40(A)(2) and (15).)

Operation of the bill

The bill modifies the definition of "adult cabaret" for purposes of the above described prohibitions that constitute the offenses of "illegally operating a sexually oriented business" and "illegal sexually oriented activity in a sexually oriented business." It defines "adult cabaret" as a nightclub, bar, juice bar, restaurant, bottle club, or similar commercial establishment, whether or not alcoholic beverages are served, that "regularly" features any of the following: (1) persons who appear in a "state of nudity or seminudity" (see **COMMENT 4**), (2) live performances that are characterized by the exposure of "specified anatomical areas" or "specified sexual activities" (see **COMMENT 5**), or (3) films, motion pictures, video cassettes, slides, or other photographic reproductions that are distinguished or characterized by their emphasis upon the exhibition or description of "specified sexual activities" or "specified anatomical areas" (see **COMMENT 5**). (R.C. 2907.40(A)(2) by reference to R.C. 2907.39(A)(3).)

COMMENT

1. Existing R.C. 2907.01, not in the bill, provides the following definitions for use in R.C. Chapter 2907., including R.C. 2907.07 and 2907.21:

(a) "Sexual activity" means "sexual conduct" or "sexual contact" (see below), or both.

(b) "Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(c) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

2. Existing R.C. 2929.13(D), not in the bill, provides as follows:

(D)(1) Except as provided in division (E) or (F) of this section, for a felony of the first or second degree, for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, and for a violation of division (A)(4) of section 2907.05 of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code. Division (D)(2) of this section does not apply to a presumption established under this division for a violation of division (A)(4) of section 2907.05 of the Revised Code.

(2) Notwithstanding the presumption established under division (D)(1) of this section for the offenses listed in that division other than a violation of division (A)(4) of section 2907.05 of the Revised Code, the sentencing court may impose a community

control sanction or a combination of community control sanctions instead of a prison term on an offender for a felony of the first or second degree or for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable if it makes both of the following findings:

(a) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.

(b) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense.

3. As used in these provisions, "telecommunications device" means any instrument, equipment, machine, or other device that facilitates "telecommunication" (see below), including, but not limited to, a computer, computer network, computer chip, computer circuit, scanner, telephone, cellular telephone, pager, personal communications device, transponder, receiver, radio, modem, or device that enables the use of a modem. "Telecommunication" means the origination, emission, dissemination, transmission, or reception of data, images, signals, sounds, or other intelligence or equivalence of intelligence of any nature over any communications system by any method, including, but not limited to, a fiber optic, electronic, magnetic, optical, digital, or analog method. (R.C. 2907.07(C) and (D), by reference to existing R.C. 2913.01, not in the bill.)

4. For purposes of this definition, R.C. 2907.40(A)(10) defines "regularly" as consistently or repeatedly. R.C. 2907.40(A)(6) and (11) define "nudity," "nude," or "state of nudity" as the showing of the human male or female genitals,

pubic area, vulva, anus, anal cleft, or cleavage with less than a fully opaque covering, or the showing of the female breasts with less than a fully opaque covering of any part of the nipple and "seminude" or "state of seminudity" as a state of dress in which opaque clothing covers not more than the genitals, pubic region, and nipple of the female breast, as well as portions of the body covered by supporting straps or devices (by reference to R.C. 2907.39(A)(10) and (12), not in the bill).

5. For purposes of the definition of "adult cabaret," R.C. 2907.39(A)(14) and (15), not in the bill, define "specified anatomical areas" as the cleft of the buttocks, anus, male or female genitals, or the female breast and "specified sexual activity" as any of the following: (a) sex acts, normal or perverted, or actual or simulated, including intercourse, oral copulation, masturbation, or sodomy, or (b) excretory functions as a part of or in connection with any of the activities described in (a), above.

HISTORY

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