

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 379 Indecent, Lewd, or Lascivious Touching
SPONSOR(S): Judiciary Committee, Criminal Justice & Public Safety Subcommittee, Chaney
TIED BILLS: IDEN./SIM. **BILLS:** CS/SB 444

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice & Public Safety Subcommittee	17 Y, 0 N, As CS	Frost	Hall
2) Justice Appropriations Subcommittee	14 Y, 0 N	Smith	Keith
3) Judiciary Committee	18 Y, 1 N, As CS	Frost	Kramer

SUMMARY ANALYSIS

The Florida Supreme Court has held that the terms "lewd" and "lascivious" mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act. Section 800.04, F.S., criminalizes the following lewd or lascivious offenses committed on or in the presence of a person under 16 years of age: lewd or lascivious battery; lewd or lascivious molestation; lewd or lascivious conduct; and lewd or lascivious exhibition. A person commits lewd or lascivious molestation by: intentionally touching in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person under 16; or forcing or enticing a person under 16 to so touch the perpetrator.

The penalty for lewd or lascivious molestation ranges from a third degree felony up to a life felony depending on the offender's age, the victim's age, and the circumstances surrounding the commission of the offense, and a victim's consent is not a defense. Additionally, under s. 794.05, F.S., sexual activity between a person who is 24 or older and a victim who is 16 or 17 years old is a second degree felony, regardless of consent. Sexual activity means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object, excluding an act done for legitimate medical purposes.

A battery occurs when a person: actually and intentionally touches or strikes another person against the other person's will; or intentionally causes bodily harm to another person. Battery is generally a first degree misdemeanor, however, if an offender has a prior conviction for battery, felony battery, or aggravated battery, a battery offense may be enhanced to a third degree felony.

As such, under current law, a person older than 24 commits a second degree felony by engaging in sexual activity with a 16 or 17 year old victim, regardless of consent, and a person who touches, in a lewd or lascivious manner, the clothed or unclothed breasts or genital area of a person *under* 16 commits a felony offense, but a person who intentionally touches the breasts, genitals, genital area, or buttocks of a 16 or 17 year old may only be charged with a misdemeanor battery.

CS/CS/HB 379 creates s. 794.051, F.S., to create the crime of indecent, lewd, or lascivious touching of certain minors (ILLT of minors). Under the bill, a person 24 years of age or older who intentionally touches a 16 or 17 year old victim, regardless of the victim's consent, in a lewd or lascivious manner on the breasts, genitals, genital area, or buttocks, or the clothing covering them, or forces or entices a 16 or 17 year old to so touch the perpetrator commits ILLT of minors, a third degree felony, ranked as a level 4 offense on the OSRC.

The Criminal Justice Impact Conference met on February 7, 2022, and determined a prior similar version of bill would have a positive indeterminate impact on prison beds.

The bill provides an effective date of October 1, 2022.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The Florida Supreme Court has held that the terms "lewd" and "lascivious" mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.¹ While Florida criminalizes specified lewd or lascivious contact with a person under the age of 16 as a felony offense, the same type of contact committed upon a person 16 or 17 years of age may only be charged as a misdemeanor battery.

Lewd or Lascivious Molestation

A person commits lewd or lascivious molestation by:

- Intentionally touching in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person under 16; or
- Forcing or enticing a person under 16 to so touch the perpetrator.²

The penalty for lewd or lascivious molestation varies depending on the offender's age, the victim's age, and the circumstances surrounding the commission of the offense. However, the offense is always punishable as a felony and only applies when a victim is younger than 16.³

An offender who is 18 years of age or older when he or she commits lewd or lascivious molestation upon a victim:⁴

- Younger than 12 years of age, commits a life felony.⁵
- 12 years of age or older but younger than 16 years of age, commits a second degree felony.
- 12 years of age or older but younger than 16 years of age, and the perpetrator was previously convicted of a specified offense, commits a first degree felony.

An offender who is younger than 18 years of age when he or she commits lewd or lascivious molestation upon a victim:⁶

- Younger than 12 years of age, commits a second degree felony.
- 12 years of age or older but younger than 16 years of age, commits a third degree felony.

In a prosecution for any lewd or lascivious offense under s. 800.04, F.S., a perpetrator is prohibited from raising any of the following as a defense:

- The victim's lack of chastity;
- The victim's consent;
- The perpetrator's ignorance of the victim's age;
- The victim's misrepresentation of his or her age; or
- The perpetrator's bona fide belief of the victim's age.

While a person who touches, in a lewd or lascivious manner, the clothed or unclothed breasts, genitals, genital area, or buttocks of a person under 16 commits a third degree felony up to a life felony offense, current law does not specifically criminalize similar touching of a 16 or 17 year old victim as any crime other than a misdemeanor battery.

Unlawful Sexual Activity with a Minor

¹ *Chesebrough v. State*, 255 So.2d 675, 677 (Fla. 1971).

² S. 800.04(5)(a), F.S.

³ See s. 800.04(5)(b)-(e), F.S.

⁴ S. 800.04(5)(b), (c)2., and (e), F.S.

⁵ A life felony is punishable by up to life in prison and a \$15,000 fine. Ss. 775.082, 775.083, or 775.084, F.S.

⁶ S. 800.04(c)1. and (d), F.S.

Section 794.05, F.S., criminalizes sexual activity between a person who is 24 or older and a victim who is 16 or 17 years old, regardless of whether the 16 or 17 year old victim consents to such sexual activity.⁷ Sexual activity means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object, but does not include an act done for a bona fide medical purpose. A person convicted of unlawful sexual activity with a minor must register as a sexual offender under s. 943.0435, F.S.

Evidence of a victim's prior sexual conduct is not relevant in a prosecution for unlawful sexual activity with a minor. If an offender's unlawful sexual activity with a minor directly results in the victim giving birth to a child, paternity of the child must be determined under ch. 742, F.S., and the offender must pay child support as provided in ch. 61, F.S.

While a person 24 years of age or older commits a second degree felony by engaging in sexual activity with a 16 or 17 year old victim, regardless of consent, current law does not similarly criminalize touching the breasts, genitals, genital area, or buttocks of such a minor as any crime other than a misdemeanor battery.

Battery

A battery occurs when a person:

- Actually and intentionally touches or strikes another person against the other person's will; or
- Intentionally causes bodily harm to another person.⁸

Battery is generally punishable as a first degree misdemeanor,⁹ however, if an offender has a prior conviction for battery, felony battery, or aggravated battery, the offense may be enhanced to a third degree felony.^{10, 11}

Felony battery occurs when a person: actually and intentionally touches or strikes another person against the will of the other person and, in so doing, causes great bodily harm, permanent disability, or permanent disfigurement; or commits domestic battery by strangulation.¹²

Aggravated battery, a second degree felony, occurs when a person committing a battery:

- Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement;
- Uses a deadly weapon; or
- Knows or should have known that the victim was pregnant at the time of the offense.¹³

A battery offense does not distinguish touching another person on the breasts, genitals, genital area, or buttocks from touching a person anywhere else on his or her body.

⁷ However, a person 16 or 17 years of age who has been emancipated under ch. 743, F.S., is not considered a victim of unlawful sexual activity with minors. S. 794.05(2), F.S.

⁸ S. 784.03, F.S.

⁹ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Ss. 775.082 and 775.083, F.S.

¹⁰ "Conviction" means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of nolo contendere is entered. S. 784.03, F.S.

¹¹ A misdemeanor battery offense may also be reclassified as a felony offense when committed upon specified persons or specified persons engaged in the lawful performance of their duties, such as a law enforcement officer, a person older than 65 years of age, or a code inspector. See ss. 162.04(2), 784.07, 784.074, 784.08, 784.081, 784.082, 784.083, and 1000.04, F.S.

¹² S. 784.041, F.S.

¹³ S. 784.045, F.S. Additionally, an aggravated battery committed by a person acting in furtherance of a riot or an aggravated riot prohibited under s. 870.01, F.S., is ranked one level above the ranking under s. 921.0022, F.S., for the offense committed.

Criminal Punishment Code

Felony offenses which are subject to the Criminal Punishment Code¹⁴ are listed in a single offense severity ranking chart (OSRC),¹⁵ which uses 10 offense levels to rank felonies from least severe to most severe. Each felony offense listed in the OSRC is assigned a level according to the severity of the offense.^{16, 17} A person's primary offense, any other current offenses, and prior convictions are scored using the points designated for the offense severity level of each current offense.^{18, 19} The final score calculation, following the scoresheet formula, determines the lowest permissible sentence that a trial court may impose, absent a valid reason for departure.²⁰

Effect of Proposed Changes

CS/CS/HB 379 creates s. 794.051, F.S., to create the crime of indecent, lewd, or lascivious touching of certain minors.

Under the bill, a person 24 years of age or older who intentionally touches a 16 or 17 year old victim, regardless of the victim's consent, in a lewd or lascivious manner on the breasts, genitals, genital area, or buttocks, or the clothing covering them, or forces or entices a 16 or 17 year old to so touch the perpetrator, commits the offense of indecent, lewd, or lascivious touching of certain minors. This offense is punishable as a third degree felony and is ranked as a level 4 offense on the OSRC.

The bill provides an effective date of October 1, 2022.

B. SECTION DIRECTORY:

Section 1: Creates s. 794.051, F.S., relating to indecent, lewd, or lascivious touching of certain minors.

Section 2: Amends s. 921.0022, F.S., Criminal Punishment Code; offense severity ranking chart.

Section 3: Provides an effective date of October 1, 2022.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference met on February 7, 2022, and determined a prior similar version of the bill²¹ would have a positive indeterminate impact on prison beds.²²

¹⁴ All felony offenses, with the exception of capital felonies, committed on or after October 1, 1998, are subject to the Criminal Punishment Code.

¹⁵ S. 921.0022, F.S.

¹⁶ S. 921.0022(2) and (3)(e), F.S.

¹⁷ Felony offenses that are not listed in the OSRC default to statutorily assigned levels, as follows: an unlisted third degree felony defaults to a level 1; an unlisted second degree felony defaults to a level 4; an unlisted first degree felony defaults to a level 7; an unlisted first degree felony punishable by life defaults to a level 9; and an unlisted life felony defaults to a level 10. S. 921.0023, F.S.

¹⁸ Ss. 921.0022 and 921.0024, F.S.

¹⁹ A person may also accumulate points for factors such as victim injury points, community sanction violation points, and certain sentencing multipliers. S. 921.0024(2), F.S.

²⁰ If a person scores more than 44 points, the lowest permissible sentence is a specified term of months in state prison, determined by a formula. If a person scores 44 points or fewer, the court may impose a nonprison sanction, such as a county jail sentence, probation, or community control. *Id.*

²¹ The prior version of the bill: contained an additional offense of indecent battery, punishable as a first degree misdemeanor for a first offense and a third degree felony for a second offense; and required a person convicted of an offense indecent, lewd, or lascivious touching of certain minors to register as a sexual offender.

²² Criminal Justice Impact Conference, *CS/HB 379 – Indecent, Lewd, or Lascivious Touching*, February 7, 2022, <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/CSHB379.pdf> (last visited Mar. 1, 2022).

Per the Florida Department of Law Enforcement, there were 125 people arrested for the second degree misdemeanor offenses of lewd and lascivious behavior (s. 798.02, F.S.) and unnatural and lascivious act (s. 800.02, F.S.) in FY 18-19. In FY 19-20, there were 63 people arrested, and in FY 20-21, there were 50 people arrested. It is not known how many of those arrested would fall within the age requirements for the conduct prohibited under the new section of law created by the bill.²³ It is possible that this conduct might currently fall under simple battery, a high-volume misdemeanor offense that elevates to a Level 1, third degree felony if a second or subsequent battery occurs after a prior conviction. There were 168,345 arrests for misdemeanor battery over the last three fiscal years.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On February 3, 2022, the Criminal Justice & Public Safety Subcommittee adopted a proposed committee substitute (PCS) and report the bill favorably as a committee substitute. The PCS differed from the original bill as it:

- Made the following changes to the offense of lewd or lascivious molestation committed upon persons 16 years of age or older:
 - Renamed the offense indecent battery and revised elements of the offense;
 - Moved the offense from s. 800.06, F.S., to s. 784.0355, F.S.;
 - Provided that a person may be charged with both battery and indecent battery, but a jury may only return a verdict for one offense, not both; and

²³ *Id.*

- Ranked a second or subsequent offense as a level 3 offense on the OSRC.
Created the crime of lewd or lascivious touching of certain minors, a third degree felony, ranked as a level 4 on the OSRC.

On February 28, 2022, the Judiciary Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Removed the crime of indecent battery from the bill.
- Retained the elements, criminal penalty, and OSRC ranking for lewd or lascivious touching of certain minors but moved the crime to a new section of law so that an offender is not required to register as a sexual offender upon conviction.
- Renamed the offense indecent, lewd, or lascivious touching of certain minors.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.