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**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME PREVENTION, CORRECTIONS & SAFETY
ANALYSIS**

BILL #: HB 163
RELATING TO: Sexual Offenses/Consent Defense
SPONSOR(S): Representative Paul

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME PREVENTION, CORRECTIONS & SAFETY
 - (2) HEALTHY COMMUNITIES
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

HB 163 amends the sexual battery and lewd or lascivious offenses statutes to provide that there shall be no defense to a charge of sexual battery or lewd or lascivious offenses based upon consent when the accused is 16 years of age or older and the accused knew or had reason to know that the victim was "mentally disabled" when the victim's "effective mentality was less than 18 years of age" at the time of the offense.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |

For any principle that received a "no" above, please explain:

The bill may have the effect of preventing a person with a mental disability with an effective mentality of less than 18 from being able to consent to sexual activity. This could arguably be seen as negatively impacting individual freedom.

B. PRESENT SITUATION:

Sexual Offenses Against Children

There are several statutes that prohibit sexual offenses against children. The severity and name given to the offense depend on the age of the victim, the age of the offender and the circumstances of the offense. Section 794.011 makes it a crime to commit "sexual battery" on any person under the age of twelve. The term "sexual battery" is defined as "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". s. 794.011(1)(h), F.S. Chapter 794 also prohibits an offender who is over the age of 24 or an offender who is in a position of familial authority over the victim, from committing sexual battery on a victim under the age of 18. See also, s. 794.05, F.S. Consent of the victim is not a defense to these offenses.

Sexual battery committed a child age 12 or over and under the age of 16 is prohibited under section 800.04. Also prohibited in this section are other sexual offenses against children less than 16 including lewd or lascivious molestation, lewd or lascivious conduct and lewd or lascivious molestation. Consent is not a defense to any offense within this section.

In summary, a person under the age of 16 cannot consent to sexual activity under any circumstance. Further, a person under the age of 18 cannot consent to sexual battery with a person in custodial or familial authority or to a person over the age of 24. s. 794.011(8), F.S.

Sexual Battery

Section 794.011 also prohibits sexual battery on a person over the age of 12 which occurs without the victim's consent. The statute defines the term consent in the following manner:

"Consent" means intelligent, knowing and voluntary consent and does not include coerced submission. Consent shall not be deemed or construed to mean the failure of the alleged victim to offer physical resistance to the offender.

The Standard Jury Instruction further clarifies the definition of consent in sexual battery cases to include the following:

“Consent” means intelligent, knowing and voluntary consent and does not include forced submission. Evidence of the victim’s mental incapacity or defect, if any, may be considered in determining whether there was an intelligent, knowing and voluntary consent.

In other words, if the “consent” given by a person with a mental incapacity or defect is not intelligent, knowing and voluntary, an offender can be convicted of the offense of sexual battery. Further, section 794.011(4) specifically provides enhanced penalties for sexual battery upon a person over the age of 12 without that person’s consent, “when the offender is mentally defective and the offender has reason to believe this or has actual knowledge of this fact.” The term mentally defective is defined to mean a “mental disease or defect which renders a person temporarily or permanently incapable of appraising the nature of his or her conduct”. s. 794.011, F.S. See Wilburn v. State, 763 So.2d 353 (Fla. 4th DCA 1998); Schimele v. State, 784 So.2d 591 (Fla. 4th DCA 2001)(affirming conviction and holding that sufficient evidence existed to find that the victim had a mental disease or defect rendering him incapable of appraising the nature of his conduct at the time of the incident and therefore his consent could not have been intelligent, knowing and voluntary).

Lewd or Lascivious Offenses Against Disabled Adults

Section 825.1025 prohibits various sexual offenses committed against “an elderly person or disabled adult”. The term “disabled adult” is defined as:

A person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one of more physical or mental limitations that restrict the person’s ability to perform the normal activities of daily living.

In relevant part, the section prohibits “lewd or lascivious battery” upon a disabled adult and provides that it occurs when a person encourages, forces, or entices a disabled adult to engage in any act involving sexual activity when the person knows or reasonably should know that the disabled adult either lacks the capacity to consent or fails to give consent. s. 825.1025(2)(a), F.S. The chapter defines the term “lacks capacity to consent” as meaning:

An impairment by reason of mental illness, developmental disability, organic brain disorder, physical illness or disability, chronic use of drugs, chronic intoxication, short term memory loss, or other cause, that causes an elderly person or disabled adult to lack sufficient understanding or capacity to make or communicate reasonable decisions concerning the elderly person’s or disabled adult’s person or property.

C. EFFECT OF PROPOSED CHANGES:

The bill amends the sexual battery statute to provide that “there shall be no defense to a charge of sexual battery based upon consent when the accused is 16 years of age or older and the accused knew or had reason to know that the victim was mentally disabled when the victim’s effective mentality was less than 18 years of age at the time of the offense.” The bill also places this language within the lewd or lascivious offenses statute.

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Committee staff does not expect this bill to have a prison bed impact on the Department of Corrections.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

HB 163 does not define the terms "mentally disabled" or "effective mentality" and the terms are not used elsewhere in the Florida statutes.

This bill could prevent a person with a mental disability who has an effective mentality of less than 18 from legally being able to consent to sexual activity.

In light of the fact that current law already requires a jury to consider a victim's mental defect in determining whether the person gave knowing and voluntary consent, it is not clear how this bill will afford any further protection to those with mental disabilities than what is already afforded.

Further, it is not clear how this bill would work in the context of the lewd or lascivious statute. A person cannot be charged with a violation of that section unless the victim is less than 16 years old. Consent is not a defense to any offense contained within this section. In other words, even under the bill, a person could not be charged with a lewd or lascivious act for engaging in sexual activity with a 25 year old, even if the victim has a mental age of less than 18, because the plain language of the statute requires that the victim be less than 16.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON CRIME PREVENTION, CORRECTIONS & SAFETY:

Prepared by:

Staff Director:

Trina Kramer

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