

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

The bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background

It is a misdemeanor to commit a lewd act. The courts have found the definition of a lewd act includes a requirement that some other person be offended by the lewd act.

Section 796.07(1)(b), F.S., defines "lewdness" as "any indecent or obscene act." At least eight other statutes prohibit lewdness, none of which define the term. The courts have further defined lewdness, as applied to all of the statutory prohibitions on lewdness, in more specific terms. The latest Florida Supreme Court case discusses lewdness as follows:

Under Florida criminal law the terms "lewd" and "lascivious" are synonymous: Both require an intentional act of sexual indulgence or public indecency, when such act causes offense to one or more persons viewing it or otherwise intrudes upon the rights of others. The terms "lewd" and "lascivious" thus mean something more than a negligent disregard of accepted standards of decency, or even an intentional but harmlessly discreet unorthodoxy. Acts are neither "lewd" nor "lascivious" unless they substantially intrude upon the rights of others.

Schmitt v. State, 590 So.2d 404, 410 (Fla. 1991) (internal citations and footnotes omitted), *cert. denied*, 503 U.S. 964 (1992).

As to the requirement that the lewd act substantially intrude upon the rights of others, a person must witness the act and be offended thereby. One circuit court has specifically held that a law enforcement officer may be a person offended by a lewd act¹, but courts in a neighboring county have ruled otherwise.² Later court opinions have recognized that there is no clear consensus.³

In a somewhat similar vein, the crime of disorderly conduct may also have a requirement that someone other than a law enforcement officer be offended by the conduct.⁴

Section 796.07(2), F.S., provides that it is unlawful:

- To own, establish, maintain, or operate any place, structure, building, or conveyance for the purpose of lewdness, assignation, or prostitution.
- To offer, or to offer or agree to secure, another for the purpose of prostitution or for any other lewd or indecent act.

¹ *State v. Katherine Willits*, 4 Fla.L.Weekly Supp. 586 (Fla. 15th Circuit, January 17, 1997) (Palm Beach County).

² *State v. Altice*, 7 Fla.L.Weekly Supp. 222 (Fla. 17th Circuit, November 1999); *State v. Silvers*, 7 Fla.L.Weekly Supp. 592 (Fla. 1st Circuit June 15, 2000) (Broward County).

³ Two courts have indicated that both positions are arguable. *Mailly v. Jenne*, 867 So.2d 1250 (Fla. 4th DCA 2004); and *Hall v. Stewart*, 297 F.Supp.2d 1328 (S.D. Fla. 2004). Both arise out of dismissal of civil suits filed against the Broward County Sheriff after the Circuit Courts dismissed criminal lewdness charges.

⁴ *Harbin v. State*, 358 So.2d 856 (Fla. 1st DCA 1978).

- To receive, or to offer or agree to receive, any person into any place, structure, building, or conveyance for the purpose of prostitution, lewdness, or assignation, or to permit any person to remain there for such purpose.
- To direct, take, or transport, or to offer or agree to direct, take, or transport, any person to any place, structure, or building, or to any other person, with knowledge or reasonable cause to believe that the purpose of such directing, taking, or transporting is prostitution, lewdness, or assignation.
- To offer to commit, or to commit, or to engage in, prostitution, lewdness, or assignation.
- To solicit, induce, entice, or procure another to commit prostitution, lewdness, or assignation.
- To reside in, enter, or remain in, any place, structure, or building, or to enter or remain in any conveyance, for the purpose of prostitution, lewdness, or assignation.
- To aid, abet, or participate in any of the acts or things enumerated in this subsection.
- To purchase the services of any person engaged in prostitution.

Section 796.07(4), F.S., provides that a first offense under s. 796.07, F.S., is a 2nd degree misdemeanor, a second offense is a 1st degree misdemeanor, and a third or subsequent offense is a third degree felony. This felony offense is not classified in the offense severity ranking chart, and is thus a Level 1 offense.⁵

Effect of Bill

The bill redefines “lewdness” as;

“any indecent or obscene act that may cause substantial offense to one or more persons viewing it or may otherwise substantially intrude upon the rights of others. A lewd act may be offensive to, or may intrude upon the rights of, a person who is a law enforcement officer. Lewdness is to be determined based on what a reasonable member of the public might find substantially offensive”

There are two effects to this change:

- A law enforcement officer may be the only witness to a lewd act.
- The question of whether a lewd act is offensive will not be based on whether the actual witness to the act found it offensive, but will be a question for the finder of fact (the jury, or the judge if the defendant has waived a jury trial). The finder of fact will have to determine whether a reasonable member of the public would be substantially offended by the act.

C. SECTION DIRECTORY:

Section 1 amends s. 796.07, F.S., to redefine the definition of lewdness.

Section 2 provides an effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

⁵ See ss. 921.0022 and 921.0023(1), F.S.
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DATE: 3/28/2005

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:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 9, 2005, the Criminal Justice Committee adopted an amendment specifying the requirement that the act be offensive to a person witnessing the act, providing that a law enforcement officer may be a person offended by a lewd act, and adding that lewdness is determined based on what a reasonable member of the public might find offensive. The bill was the temporarily postponed.

On March 16, 2005, the Criminal Justice Committee adopted a substitute amendment that adds a requirement that a lewd act must be "substantially" offensive. The bill was then reported favorably with a committee substitute.