

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 194

INTRODUCER: Senator Berman and others

SUBJECT: Crimes Evidencing Prejudice

DATE: February 15, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Jones</u>	<u>CJ</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 194 amends ss. 775.085 and 775.0863, F.S., Florida’s hate crimes statutes. Section 775.085, F.S., reclassifies the felony or misdemeanor degree of an offense if the commission of the offense evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, or advanced age of the victim of the crime. Section 775.0863, F.S., is similar to s. 775.085, F.S., but only addresses hate crimes based on a victim’s mental or physical disability.

The bill specifies that a violation of ss. 775.085 or 775.0863, F.S., occurs if the commission of a crime evidences prejudice “in whole or in part” based on a characteristic of any person specified in either statute.

The bill also expands s. 775.085, F.S., to include gender and gender identity as relevant characteristics of any person. Therefore, a violation of s. 775.085, F.S., occurs if the commission of a crime evidences prejudice “in whole or in part” based on the gender or gender identity of any person. The bill defines the term “gender identity.”

The bill also amends s. 775.0863, F.S., to remove reference to “mental or physical” in regard to the term “disability.” The bill repeals the current definition of “mental or physical disability” and provides a definition of “disability” that is more expansive than the current definition of “mental or physical disability.”

The Legislature’s Office of Economic and Demographic Research preliminarily estimates that the bill will have a “positive insignificant” prison bed impact (an increase of 10 or fewer prison beds). See Section V. Fiscal Impact Statement.

The bill takes effect July 1, 2021.

II. Present Situation:

Florida's Hate Crimes Laws

Section 775.085, F.S., reclassifies the felony or misdemeanor degree of an offense if the commission of the offense evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, or advanced age of the victim.¹ Offenses are reclassified as follows:

- A second degree misdemeanor is reclassified to a first degree misdemeanor;
- A first degree misdemeanor is reclassified to a third degree felony;
- A third degree felony is reclassified to a second degree felony;
- A second degree felony is reclassified to a first degree felony; and
- A first degree felony is reclassified to a life felony.²

Reclassification of the degree of an offense has the effect of increasing the maximum sentence that a judge may impose for the offense. The maximum sentence for:

- A second degree misdemeanor is 60 days in jail and a \$500 fine;
- A first degree misdemeanor is 1 year in jail and a \$1,000 fine;
- A third degree felony is 5 years in state prison and a \$5,000 fine;
- A second degree felony is 15 years in state prison and a \$10,000 fine;
- A first degree felony is generally 30 years in state prison and a \$10,000 fine; and
- A life felony is generally a term of imprisonment for life or imprisonment for a term of years not exceeding life imprisonment and a \$15,000 fine.³

Additionally, felony reclassification may impact the scored lowest permissible sentence under the Criminal Punishment Code. For example, a primary offense that is a second degree felony would typically score more sentence points than a primary offense that is a third degree felony.

Section 775.0863, F.S., is similar to s. 775.085, F.S., but only addresses hate crimes based on a victim's mental or physical disability. Section 775.0863(1)(b), F.S., defines the term "mental or physical disability" as a condition of mental or physical incapacitation due to a developmental disability, organic brain damage, or mental illness, and one or more mental or physical limitations that restrict a person's ability to perform the normal activities of daily living. The reclassification provisions of s. 775.0863, F.S., are identical to the reclassification provisions of s. 775.085, F.S.

¹ Section 775.0863, F.S., provides for reclassification of the felony or misdemeanor degree of an offense if the commission of the offense evidences prejudice based on the victim's mental or physical disability.

² Section 775.085(a), F.S.

³ Sections 775.082 and 775.083, F.S. However, if a defendant is sentenced for an offense that was committed on or after July 1, 2009, which is a third degree felony that is not a forcible felony, as defined in s. 776.08, F.S., and excluding a felony violation of ch. 810, F.S., and if total sentence points pursuant to s. 921.0014, F.S., are 22 points are fewer, the court must sentence the offender to a nonstate prison sanction unless it makes written findings that such sanction could present a danger to the public. Section 775.082(10), F.S.

According to the Florida jury instruction for ss. 775.085 and 775.0863, F.S.,⁴ the jury should find a defendant guilty of the crime charged (or a lesser included crime) aggravated by the defendant intentionally selecting the victim based on prejudice if the jury finds that the defendant committed the crime charged (or lesser included crime) and also finds beyond a reasonable doubt that the defendant:

- Perceived, knew, or had reasonable ground to perceive or know the victim’s race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, mental or physical disability, or advanced age; and
- Intentionally selected the victim because of that perception or knowledge.⁵

Coverage of Gender and Gender Identity in Federal Hate Crime Laws and Other States’ Hate Crime Laws

The federal Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, which is codified at 18 U.S.C. s. 249, extends federal hate crime prohibitions to crimes committed because of actual or perceived gender or gender identity of any person.⁶

According to information compiled by the Brennan Center for Justice, 25 states, the District of Columbia, and Puerto Rico include gender (sometimes referred to as “sex”) in their hate crime laws. Further, such information indicates that 11 states, the District of Columbia, and Puerto Rico include gender identity in their hate crime laws.⁷

Gender and Gender Identity

Laws may treat the terms “gender” and “sex” as interchangeable terms⁸ and may only recognize a gender binary of “male” and “female.”⁹ One court has described this gender binary as “an individual’s biological sex in the binary sense -either male or female- that is assigned at birth, as reflected on that individual’s birth certificate, and typically assigned on the basis of an individual’s genitalia.”¹⁰

“Increasingly in medicine and sociology, gender is distinguished from sex.”¹¹ For example, according to information provided by the American Psychological Association (APA), “[g]ender refers to the attitudes, feelings, and behaviors that a given culture associates with a person’s

⁴ Fla. Std. Jury Instr. (Crim.) 3.3(f).

⁵ Proof that the defendant intentionally selected the victim is required by *State v. Stalder*, 630 So.2d 1072, 1077 (Fla. 1994). However, “[t]o qualify criminal conduct for sentencing enhancement under section 775.085, *Stalder* does not require that prejudice be the sole motivating factor for the underlying crime.” *State v. Hart*, 677 So.2d 385, 386 (Fla. 4th DCA 1996).

⁶ *Hate Crime Laws*, U.S. Department of Justice, (updated on March 7, 2019), available at <https://www.justice.gov/crt/hate-crime-laws> (last visited on Feb. 5, 2021).

⁷ *State Hate Crime Statutes*, Brennan Center for Justice, (last updated on July 2, 2020), available at <https://www.brennancenter.org/our-work/research-reports/state-hate-crimes-statutes> (last visited on Feb. 5, 2021).

⁸ See, e.g., Yamuna Menon, “The Intersex Community and the Americans with Disabilities Act,” 43 *Conn. L. Rev.* 1221, 1226, n. 24. (2010) (asserting that “federal and Supreme Court cases use the terms ‘sex’ and ‘gender’ interchangeably”).

⁹ *Id.* at p. 1227. See also *Bostock v. Clayton County, Georgia*, 140 S.Ct 1731, 1747 (2020), in which the U.S. Supreme Court found in a Title VII action that “homosexuality and transgender status are distinct concepts from sex” but “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”

¹⁰ *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 672 (W.D. Pa. 2015).

¹¹ *Id.*

biological sex.”¹² In contrast, “[s]ex refers to a person’s biological status and is typically categorized as male, female, or intersex (i.e., atypical combinations of features that usually distinguish male from female). There are a number of indicators of biological sex, including sex chromosomes, gonads, internal reproductive organs, and external genitalia.”¹³

Sex is typically assigned at birth (or before [or] during ultrasound) based on the appearance of external genitalia. When the external genitalia are ambiguous other indicators (e.g., internal genitalia, chromosomal and hormonal sex) are considered to assign a sex with the aim of assigning a sex that is most likely to be congruent with the child’s gender identity.... For most people, gender identity is congruent with sex assigned at birth (see cisgender); for ... [transgender and gender-nonconforming] individuals, gender identity differs in varying degrees from sex assigned at birth.”¹⁴

III. Effect of Proposed Changes:

The bill amends ss. 775.085 and 775.0863, F.S., Florida’s hate crimes statutes. Section 775.085, F.S., reclassifies the felony or misdemeanor degree of an offense if the commission of the offense evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, or advanced age of the victim of the crime. Section 775.0863, F.S., is similar to s. 775.085, F.S., but only addresses hate crimes based on a victim’s mental or physical disability.

The bill also specifies that a violation of ss. 775.085 or 775.0863, F.S., occurs if the commission of a crime evidences prejudice “in whole or in part” based on a characteristic of any person specified in either statute.

The bill also expands s. 775.085, F.S., to include gender and gender identity as relevant characteristics of any person. Therefore, a violation of s. 775.085, F.S., occurs if the commission of a crime evidences prejudice “in whole or in part” based on the gender or gender identity of any person. The bill defines the term “gender identity” as a person’s gender-related identity, appearance, or behavior, regardless of whether such gender-related identity, appearance, or

¹² *Definitions Related to Sexual Orientation and Gender Diversity in APA Guidelines and Policy Documents*, American Psychological Association, available at <http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> (last visited on Feb. 5, 2021).

¹³ *Id.* However, one legal commentator has noted that “the definition of intersex is shifting and changing alongside the corresponding shifts and changes in societal definitions of ‘male’ and ‘female.’ Intersex individuals have congenital anomalies of the reproductive and sexual system that bring into question their categorization as either male or female. Whether a given anomaly is sufficient to bring male or female categorization into question and whether the anomaly is required to introduce some combination of ‘male’ and ‘female’ characteristics into a single body are both disputed and socially determined questions. What is clear is that the intersex body fits the definition of neither a male nor a female body - and that it defies the gender binary so commonly assumed by individuals and the law.” Ilana Gelfman, “Because of Intersex: Intersexuality. Title VII, And The Reality Of Discrimination ‘Because of ... [Perceived] Sex,’” 34 *N.Y.U. Rev. L. & Soc. Change* 55, 62 (2010) (citation omitted).

¹⁴ *Supra*, n. 12. According to information from the American Psychological Association, “gender identity” refers to “[a] person’s deeply-felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female; or an alternative gender (e.g., genderqueer, gender nonconforming, gender neutral) that may or may not correspond to a person’s sex assigned at birth or to a person’s primary or secondary sex characteristics. Since gender identity is internal, a person’s gender identity is not necessarily visible to others.” *Id.*

behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth.¹⁵

The bill also amends s. 775.0863, F.S., to remove reference to “mental or physical” in regard to the term “disability.” The bill repeals the current definition of “mental or physical disability” and provides a definition of “disability.” A “disability” is a physical or mental impairment that substantially limits one or more of a person’s major life activities. Several definitions in Florida law incorporate similar language¹⁶ as does the definition of “disability”¹⁷ relevant to the Americans with Disabilities Act.¹⁸

This definition of “disability” is more expansive than the definition of “mental or physical disability” that is currently in s. 775.0863, F.S., which requires a condition of mental or physical incapacitation due to a developmental disability, organic brain damage, or mental illness. For example, a crime victim’s paralysis may not be covered by the current definition but appears to be covered by the amended definition in the bill if it substantially limits one or more of a person’s major life activities.

The effective date of the bill is July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, s. 18, of the State Constitution.

B. Public Records/Open Meetings Issues:

None.

¹⁵ This definition is very similar to a definition of “gender identity or expression” in Connecticut law (CT Gen Stat s. 1-1n) and almost identical to a definition of “gender identity” in Massachusetts law (Mass. Gen. L. ch. 4, s. 7).

¹⁶ Section 97.021(27), F.S., defines “persons with disabilities” as individuals who have *a physical or mental impairment that substantially limits one or more major life activities*. Section 110.215(2)(b), F.S., defines “disability” with respect to an individual as *a physical or mental impairment that substantially limits one or more of the major life activities of the individual*, or an individual having a record of having such an impairment, or an individual being regarded as having such an impairment. Section 413.08(1)(b), F.S., defines “individual with a disability” as a person who has *a physical or mental impairment that substantially limits one or more major life activities of the individual*. Section 760.22(3), F.S., defines “disability” to include a person who has *a physical or mental impairment that substantially limits one or more major life activities of the individual*, or a person who has a record of having, or is regarded as having, such physical or mental impairment. Section 1004.02(6), F.S., defines “adult with disability” as an individual who has *a physical or mental impairment that substantially limits one or more major life activities*, has a record of such impairment, or is regarded as having such an impairment, and who requires modifications to the educational program, adaptive equipment, or specialized instructional methods and services in order to participate in workforce development programs that lead to competitive employment.

¹⁷ The term “disability” means, with respect to an individual, *a physical or mental impairment that substantially limits one or more major life activities of such individual*, a record of such impairment, or being regarded as having such impairment (as further defined in this section). 42 U.S.C. s. 12102(1)(A) to (C).

¹⁸ The Americans with Disabilities Act of 1990, as amended, is codified at 42 U.S.C. ss. 12101 *et seq.*

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, has not yet reviewed the bill. The Legislature's Office of Economic and Demographic Research (EDR) preliminarily estimates that the bill will have a "positive insignificant" prison bed impact (an increase of 10 or fewer prison beds).¹⁹

The EDR provides the following information relevant to its preliminary estimate:

Nationwide, the Uniform Crime Reports (UCR) for 2019 note that there were 67 known offenders who committed offenses with Anti-Male/Anti-Female motivations. There were 233 known offenders who committed offenses with Anti-Transgender/Anti-Gender Non-Conforming motivations. However, it is unknown how many states currently have these laws. Per [Florida Department of Law Enforcement's (FDLE)] statewide UCR, in 2019, there were 8 offenses motivated by Anti-Lesbian, Gay, Bisexual, Transgender (Mixed Group), with 3 arrests, and no offenses based on mental disabilities. There were no offenses based on physical disabilities. Also[,] per FDLE's Computerized Criminal History (CCH) files, in FY 19-20, there were 5 arrests and no convictions under s. 775.085, F.S., with arrests possibly overlapping with UCR. In FY 18-19, there were four arrests and one conviction under this statute. There were no arrests under s. 775.0863, F.S., and nobody has been sentenced for evidencing prejudice during an offense against someone with a mental or physical disability. However, since these statutes reclassify felonies, such acts might not be captured in the initial arrest.

¹⁹ The EDR's preliminary estimate is on file with the Senate Committee on Criminal Justice.

Since July 1, 2012 there have been 3 adjudications withheld for 3rd degree felonies under s. 775.085, F.S., and one 1st degree misdemeanor guilty conviction and one 3rd degree felony conviction. Per [Department of Corrections (DOC)], in FY 18-19 and FY 19-20, there were no new commitments for a misdemeanor that was elevated to a felony by this statute. Furthermore, DOC does not have data available on those felonies that were increased due to this statute.²⁰

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 775.085 and 775.0863.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

²⁰ *Id.*