

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: CS/SB 1238

INTRODUCER: Criminal Justice Committee and Senator Martin

SUBJECT: Lewd or Lascivious Grooming

DATE: January 31, 2024

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Parker</u>	<u>Stokes</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	_____	_____	<u>ACJ</u>	_____
3.	_____	_____	<u>FP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1238 creates s. 800.045, F.S., to provide that a person 18 years of age or older who engages in a pattern of inappropriate communication or conduct directed toward a person less than 16 years of age for the purpose of preparing, encouraging, or enticing such person to engage in any unlawful sexual activity, sexual conduct, or sexual performance commits lewd or lascivious grooming.

Lewd or lascivious grooming is a third degree felony.¹

The bill amends s. 921.0022, F.S., by adding “Lewd or lascivious grooming” as a 3rd degree felony and ranks the 3rd degree felony as a level 3 in the offense severity ranking chart.

The bill defines the terms “inappropriate communication or conduct,” “sexual activity,” “sexual conduct,” and “sexual performance.”

The bill may have a positive indeterminate fiscal impact due to an increase in prison beds. See Section V. Fiscal Impact Statement.

The bill becomes effective October 1, 2024.

¹ A third degree felony is punishable by a term of imprisonment not exceeding 5 years pursuant to s. 775.082, s. 775.083, and s. 775.084, F.S.

II. Present Situation:

Child Sex Crimes

The prevalence of child sexual abuse is difficult to determine due to underreporting. One study shows that one in five girls and one in twenty boys is a victim of child sex abuse.²

Grooming Children for Sexual Abuse

Child sexual abuse is often effectuated following a period of ‘grooming’ and the sexualization of the relationship.³ “Grooming” refers to deliberate actions taken by a defendant to expose a child to sexual material; the ultimate goal of grooming is the formation of an emotional connection with the child and a reduction of the child’s inhibitions in order to prepare the child for sexual activity.⁴

During the desensitization phase the perpetrator typically introduces sexual content disguised as jokes or discussions, or through exposure to pornography or other explicit material,⁵ and utilizes frequent non-sexual touch to desensitize the victim to physical contact. Post-abuse, the offender may engage in maintenance strategies in order to facilitate future sexual abuse and to prevent disclosure.⁶

While there are several offenses in current law which prohibit a person from encouraging, enticing, soliciting, or inducing a minor to engage in sexual activity, lewd or lascivious behavior, or a sexual performance, current law does not specifically criminalize the preparation of a child to engage in sexual activity, sexual conduct, or a sexual performance through a pattern of inappropriate communication or conduct directed toward the child.

Consent

Florida has various laws with age requirements for offenders and victims. While certain laws permit persons under the age of 24 years old to engage in sexual activity with 16 or 17 year olds, other laws prohibit sexual activity with a person under the age of 16.⁷ A person who is 18 may consent to sexual activity with a person of any age, provided the person is not under the age of 16.

When an individual engages in consensual sexual activity with a minor, even if they are a minor themselves, they may be charged with an offense. In *State v. J.A.S.*, the District Court of Appeal of Florida, Fifth District held that minors cannot consent to sexual activity even in a minor-to-minor situation. The court held that sexual activity between minors is prohibited whether or not

² National Center for Victims of Crime, *Child Sex Abuse Statistics*, available at, <https://victimsofcrime.org/child-sexual-abuse-statistics/> (last visited January 31, 2024).

³ *State v. Brown*, 299 So.3d 561 (5th DCA 2020).

⁴ *United States v. Chambers*, 642 F.3d 588, 593 (7th Cir. 2011).

⁵ Helping Survivors, *Sexual Grooming*, available at, <https://helpingsurvivors.org/grooming/> (last visited January 23, 2024).

⁶ Psychology Today, *How to Recognize the Sexual Grooming of a Minor*, July 7, 2023, available at, <https://www.psychologytoday.com/us/blog/protecting-children-from-sexual-abuse/202010/how-to-recognize-the-sexual-grooming-of-a-minor> (last visited January 23, 2024).

⁷ See ss. 800.04, and 794.05, F.S.,

each of the participants believe that they have consented.⁸ The Florida Supreme Court in *J.A.S.*, ruled that s. 800.04, F.S., was not unconstitutional as applied to two 15-year-old boys who engaged in “consensual” sex with two 12-year-old girls.⁹

The constitutionality of this statute has been upheld, and a minor may be charged with violating the statute.^{10,11}

Lewd and Lascivious Offenses

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.^{12,13}

Neither the victim’s lack of chastity nor the victim’s consent is a defense to lewd or lascivious offenses. Additionally, 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 cannot be raised as a defense.^{14,15}

Lewd or Lascivious Offenses Targeting Persons Under 16 Years of Age

Section 800.04, F.S., criminalizes various acts targeting persons under 16 years of age, including: lewd or lascivious battery;¹⁶ lewd or lascivious molestation;¹⁷ lewd or lascivious conduct;¹⁸ and lewd or lascivious exhibition.¹⁹ An individual convicted of violating section 800.04, F.S., is required to register as a sex offender.²⁰

⁸ *State v. J.A.S.*, 686 So.2d 1366, 1369, (Fla. 5th DCA) (1997).

⁹ *Id.*

¹⁰ *Jones v. State*, 640 So.2d 1084 (Fla. 1994).

¹¹ See also, *State v. Metzler*, 791 So.2d 565 (Fla. 5th DCA)(2001).

¹² *Chesebrough v. State*, 255 So.2d 675, 677 (Fla. 1971).

¹³ Whether an act or conduct is lewd or lascivious is a factual issue to be decided on a case -by-case basis. *Andrews v. State*, 130 So. 3d 788, 790 (Fla. 1st DCA 2014).

¹⁴ Section 800.04(2), F.S.

¹⁵ Section 800.04(3), F.S.

¹⁶ Section 800.04(4), F.S., defines lewd or lascivious battery as engaging in sexual activity with a person 12 years or older but less than 16 years of age; or encouraging, forcing, or enticing any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity. An offender who commits lewd or lascivious battery commits a felony of the second degree.

¹⁷ Section 800.04(5), F.S., defines lewd or lascivious molestation as a person who intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the perpetrator, commits lewd or lascivious molestation.

¹⁸ Section 800.04(6), F.S.

¹⁹ Section 800.04(7), F.S.

²⁰ Section 943.0435, F.S., provides that “Sexual offender” means a person who meets the criteria in sub-subparagraph a., sub-subparagraph b., sub-subparagraph c., or sub-subparagraph d., as follows: a.(I) Has been convicted of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes in this state or similar offenses in another jurisdiction: s. 393.135(2); s. 394.4593(2); s. 787.01, s. 787.02, or s. 787.025(2)(c), where the victim is a minor; s. 787.06(3)(b), (d), (f), or (g); former s. 787.06(3)(h); s. 794.011, excluding s. 794.011(10); s. 794.05; former s. 796.03; former s. 796.035; s. 800.04; s. 810.145(8); s. 825.1025; s. 827.071; s. 847.0133; s. 847.0135, excluding s. 847.0135(6); s. 847.0137; s. 847.0138; s. 847.0145; s. 895.03, F.S., if the court makes a written finding that the racketeering activity involved at least one sexual offense listed in this sub-sub-subparagraph or at least one offense listed in this sub-sub-subparagraph with sexual intent or motive; s. 916.1075(2); or s. 985.701(1), F.S.; or any similar offense

Lewd or Lascivious Conduct

A person who intentionally touches a person under 16 years of age in a lewd or lascivious manner²¹ or solicits a person under 16 years of age to commit a lewd or lascivious act commits lewd or lascivious conduct.²²

An offender who is:

- Eighteen years of age or older who commits lewd or lascivious conduct commits a second degree felony.²³
- Less than 18 years of age who commits lewd or lascivious conduct commits a third degree felony.²⁴

The Florida Standard Jury Instructions for soliciting a person under 16 years of age to commit a lewd or lascivious act provides that to “solicit” means to command, encourage, hire, or request another person to engage in specific conduct.²⁵

Lewd or Lascivious Battery

A person commits lewd or lascivious battery by:

- Engaging in sexual activity with a person 12 years of age or older but less than 16 years of age;²⁶ or
- Encouraging, forcing, or enticing any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity.²⁷

An offender who commits Lewd or Lascivious Battery commits a second degree felony.

Lewd or Lascivious Molestation

A person who intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the perpetrator, commits lewd or lascivious molestation.²⁸

committed in this state which has been redesignated from a former statute number to one of those listed in this sub-sub-paragraph.

²¹ Section 800.04(6)(a)1., F.S.

²² Section 800.04(6)(a)2., F.S.

²³ A felony of the second degree is generally punishable by a term of imprisonment not exceeding 15 years, as provided in s. 775.082, s. 775.083, and s. 775.084, F.S.

²⁴ A felony of the third degree is generally punishable by a term of imprisonment not exceeding 5 years, as provided in s. 775.082, s. 775.083, and s. 775.084, F.S.

²⁵ Fla. Std. Jury Instr. (Crim.) 11.10(d), Lewd or Lascivious Conduct, s. 800.04(6), F.S.

²⁶ Section 800.04(4)(a)1., F.S.

²⁷ Section 800.04(4)(a)2., F.S.

²⁸ Section 800.04(5)(a), F.S.

A person who commits Lewd or Lascivious Molestation commits a second degree felony if the person is 18 years of age or older against a victim 12 years of age or older but less than 16 years of age.²⁹

An offender who is 18 years of age or older who commits lewd or lascivious molestation against a victim less than 12 year of age commits a life felony.

Lewd or Lascivious Exhibition

A person commits lewd or lascivious exhibition by performing any of the following acts in the presence of a person under 16:

- Intentionally masturbating;
- Intentionally exposing the genitals in a lewd or lascivious manner; or
- Intentionally committing any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity.³⁰

An offender 18 years of age or older who commits lewd or lascivious conduct commits a second degree felony.

An offender less than 18 years of age who commits lewd or lascivious conduct commits a third degree felony.

Lewd or Lascivious Written Solicitation of Certain Minors

A person 24 years of age or older who solicits a person who is 16 or 17 years of age in writing to commit a lewd or lascivious act commits a third degree felony.³¹

Transmission of Material Harmful to Minors

Section 847.0138, F.S., prohibits a person, in this state or in any jurisdiction other than this state, from knowingly transmitting or believing that he or she is transmitting an image, information, or data that is harmful to minors to a specific individual known by the defendant to be a minor, as a third-degree felony.

Section 847.001(7), F.S., defines “harmful to minors” as any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement³² when it:

- Predominantly appeals to a prurient, shameful, or morbid interest;
- Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and
- Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

²⁹ A felony of the first degree is punishable by a term of imprisonment not exceeding 30 years, pursuant to s. 775.082, s. 775.083, or s. 775.084, F.S.

³⁰ Section 800.04(7)(a), F.S.

³¹ Section 794.053, F.S.

³² Section 847.001(20), F.S., defines “sexual excitement” as the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

Prohibited Computer Usage

Any person who knowingly uses a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:

- Seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to commit any illegal act described in ch. 794, ch. 800, or ch. 827, F.S., or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the person to be a child;³³ or
- Solicit, lure, or entice, or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed to be a parent, legal guardian, or custodian of a child to consent to the participation of such child in any act described in ch. 794, ch. 800, or ch. 827, F.S., or to otherwise engage in any sexual conduct, commits a felony of the third degree.³⁴

Traveling to Meet a Minor

Any person who travels any distance either within this state, to this state, or from this state by any means, who attempts to do so, or who causes another to do so or to attempt to do so for the purpose of engaging in any illegal act described in ch. 794, ch. 800, or ch. 827, F.S., or to otherwise engage in other unlawful sexual conduct with a child or with another person believed by the person to be a child after using a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:

- Seduce, solicit, lure, or entice or attempt to seduce, solicit, lure, or entice a child or another person believed by the person to be a child, to engage in any illegal act described in ch. 794, ch. 800, or ch. 827, F.S., or to otherwise engage in other unlawful sexual conduct with a child;³⁵ or
- Solicit, lure, or entice or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed to be a parent, legal guardian, or custodian of a child to consent to the participation of such child in any act described in ch. 794, ch. 800, or ch. 827, F.S., or to otherwise engage in any sexual conduct, commits a felony of the second degree.³⁶

III. Effect of Proposed Changes:

The bill creates s. 800.045, F.S., to provide that a person 18 years of age or older who engages in a pattern of inappropriate communication or conduct directed toward a person less than 16 years of age for the purpose of preparing, encouraging, or enticing such person to engage in any unlawful sexual activity, sexual conduct, or sexual performance commits lewd or lascivious grooming.

Lewd or lascivious grooming is a third degree felony.³⁷

³³ Section 847.0135(3)(a), F.S.

³⁴ Section 847.0135(3)(b), F.S.

³⁵ Section 847.0135(4)(a), F.S.

³⁶ Section 847.0135(4)(b), F.S.

³⁷ A third degree felony is punishable by a term of imprisonment not exceeding 5 years pursuant to s. 775.082, s. 775.083, and s. 775.084, F.S.

The bill defines the term “inappropriate communication or conduct,” to mean any verbal, written, or electronic communication or any conduct in which a person describes, depicts, or demonstrates sexual conduct or sexual excitement.

The bill defines the following terms:

- “Sexual activity” has the same meaning as in s. 800.04(1), F.S.³⁸
- “Sexual conduct”³⁹ has the same meaning as in s. 847.001, F.S.
- “Sexual excitement”⁴⁰ have the same meanings as in s. 847.001, F.S.
- “Sexual performance”⁴¹ has the same meaning as in s. 827.071(1), F.S.

The bill amends s. 921.0022, F.S., to rank the 3rd degree felony as a level 3 in the offense severity ranking chart.

The bill becomes effective October 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

³⁸ Section 800.04(1), F.S., “Sexual activity” means the oral, anal, or female genital penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.

³⁹ Section 847.001(19), F.S., “Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”

⁴⁰ Section 847.001, F.S., “Sexual excitement” means the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

⁴¹ Section 827.071(1)(m), F.S., “Sexual performance” means any performance or part thereof which includes sexual conduct by a child.

E. Other Constitutional Issues:

The First Amendment of the U.S. Constitution prevents the government from creating laws that restrict the speech of citizens.⁴² “Congress shall make no law ... abridging the freedom of speech.” The rights guaranteed by the First Amendment apply with equal force to state governments through the due process clause of the Fourteenth Amendment.⁴³

The state has a compelling interest in protecting the physical and psychological well-being of children. Courts have recognized that speech used to further the sexual exploitation of children does not enjoy constitutional protection.⁴⁴ The state also has a compelling interest in protecting minors from being seduced to perform sexual actions, and no legitimate commerce is burdened by penalizing the transmission of harmful sexual material to known minors in order to seduce them.⁴⁵

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill may have a positive indeterminate impact on jail and prison beds by expanding the scope of prohibited conduct under s. 800.04, F.S.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 800.045 of the Florida Statutes.

⁴² U.S. Const., amend I.

⁴³ U.S. Const. amend XIV. *See also* Art. I, Fla. Const.

⁴⁴ *Cashatt v. State*, 873 So.3d 430, (1st DCA 2004).

⁴⁵ *Pike v. Bruce Church*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on January 30, 2024:

The committee substitute:

- Revises the crime of lewd or lascivious grooming to prohibit a person 18 years or older from engaging in a pattern of inappropriate communication or conduct directed toward a person less than 16 years of age.
- Reduces the penalty for violation from a 2nd degree felony to a 3rd degree felony and ranks the 3rd degree felony as a level 3 on the offense severity ranking chart.
- Defines the terms “inappropriate communication or conduct,” “sexual activity,” “sexual conduct,” and “sexual performance.”

- B. **Amendments:**

None.