

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1772

SPONSOR: Children and Families Committee and Senator Lynn

SUBJECT: Sexual Misconduct

DATE: March 31, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Collins</u>	<u>Whiddon</u>	<u>CF</u>	<u>Fav/CS</u>
2.	_____	_____	<u>HC</u>	_____
3.	_____	_____	<u>CJ</u>	_____
4.	_____	_____	<u>JU</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The Committee Substitute for SB 1772 creates legislation prohibiting the sexual misconduct of an employee with certain clients who receive services from the Department of Children and Families (DCF or the department). The committee substitute provides a definition for sexual misconduct and specifies that sexual misconduct is a second degree felony. A defendant is prohibited from using the consent of the individual as a defense for the charge of sexual misconduct. Sexual misconduct is added to the list of offenses that ban employment if identified as part of Level 1 and 2 screening.

Persons having knowledge of incidents of sexual misconduct are required to make a report to the abuse line. Knowingly or willfully either failing to report sexual misconduct or submitting an inaccurate, incomplete, or untruthful report is a first degree misdemeanor. A person who knowingly or willfully threatens or coerces another to alter testimony or a written report commits a third degree felony. The committee substitute also prohibits the sealing or expunction of criminal history records relating to sexual misconduct.

The committee substitute amends other sections to conform to the new legislation and re-enacts sections that are specifically referenced in the proposed legislation.

Sections 393.135, 394.4593 and 916.1075, of the Florida Statutes applies to offenses committed on or after the effective date of the act.

This committee substitute creates sections 393.135, 394.4593, and 916.1075 of the Florida Statutes. It also amends sections 400.215(2)(a)(b)(c) and (3), 943.0585, of the Florida Statutes. The committee substitute also re-enacts sections ss.400.4174, 400.509(4)(a)(b)(c)(d)(f) and (g), 400.556, 400.6065, 400.980, 409.175, 409.907, 435.05(1) and (3), 744.3135, 985.04, 400.512,

400.619, 400.6194(1), 400.953, 409.912, 435.07(4), 464.018(1)(e), 744.474(12), 985.407, 39.821(1), 110.1127(3)(a) and(c), 112,0455(12)(a), 381.0059(1)(2) and (4), 381.60225(1)(a)(b)(c)(d)(f) and (g), of the Florida Statutes.

II. Present Situation:

Concerns have been raised regarding employees of the Department of Children and Families who engage in sexual misconduct with clients who are in the care of the department. Particular concerns have been expressed regarding the vulnerability of persons with developmental disabilities who live in residential facilities, developmental services institutions, foster care facilities, group homes, intermediate care facilities, residential habilitation centers, and family care centers. There is also concern for persons with mental illness who may be temporarily residing at a receiving facility or living for longer periods of time at a treatment facility.

National statistics indicate that between 70 and 90 percent of these vulnerable individuals will be the victims of sexual abuse, assault, and/or exploitation at some point of their lives.¹ Many times this abuse comes from persons who are charged with providing care to these persons with disabilities. Because of functional limitations that are experienced by individuals with developmental disabilities or mental illness, they can be particularly vulnerable to these types of crimes.

Currently, s. 825.102, F.S., addresses the sexual abuse of elderly or disabled persons and specifies the penalties for these crimes. Depending upon the offense, the sexual abuse of an elderly or disabled person is a 2nd or 3rd degree felony that is punishable as provided in ss. 775.082, 775.083, or 775.084, of the Florida Statutes. The current law also requires that certain persons who know or have a reasonable suspicion to suspect that a vulnerable adult is being abused immediately make a report to the abuse hotline (s. 415.1034, F.S.). If an investigation reveals that an incident occurred, subsequent actions include the notification of law enforcement, and the state attorney's office. Further, s. 794.011, F.S., addresses the crime of sexual battery and specifies penalties for that crime if the victim is "mentally defective" and the offender has knowledge of this fact. These provisions have not been considered strong enough to put a stop to the sexual victimization of clients who are in the care of the department.

It has been difficult to prosecute offenders because in many instances the perpetrator argues that the victim provided consent. It has been suggested that strengthening the penalties associated with staff sexual misconduct would be a way to help ensure the safety of these vulnerable clients. Strengthening the penalties associated with sexual misconduct would also have an impact on employee screening and termination practices as well as criminal penalties.

¹ *Behind Locked Doors – Institutional Sexual Abuse*, Crossmaker, M., Sexuality and Disability, Vol. 9, No. 3, 1991.

Effect of Proposed Changes:

The committee substitute for SB 1772 prohibits an employee² of the department or the Agency for Healthcare Administration from engaging in sexual misconduct with a client (who is in the custody of the department or living in certain facilities) and provides for mandatory reporting of sexual misconduct. The offense of sexual misconduct is a second degree felony, and the failure of a person having knowledge of such a crime to report it is a first degree misdemeanor. A defendant is prohibited from using the consent of the individual as a defense for the charge of sexual misconduct. The crime of sexual misconduct is also added to the list of offenses that prohibit employment if identified through Level 1 and 2 background screening. The committee substitute forbids the sealing or the expunction of criminal records when the offense of sexual misconduct has been committed.

The committee substitute for SB 1772 creates three new sections (ss. 393.135, 394.4593, and 916.1075, F.S.) of statute that prohibit sexual misconduct by employees with certain clients who receive services provided by the Developmental Disabilities and Mental Health programs within the department. These sections provide definitions for the terms “employee”, “sexual activity”, and “sexual misconduct.” This committee substitute defines “sexual activity” as:

- 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;
- Intentionally touching in a lewd or lascivious manner the breasts, genitals, the genital area, or buttocks, or the clothing covering them, or a person or forcing or enticing the person to touch the perpetrator;
- Intentionally masturbating in the presence of another person;
- Intentionally exposing the genitals in a lewd or lascivious manner in the presence of another person;
- 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 in the presence of a victim;

This committee substitute specifies that an employee who engages in sexual misconduct with a client or a patient as specified commits a felony of the second degree that is punishable as provided in ss. 775.082, 775.083, or 775.083, F.S. The committee substitute further provides that an employee may be found guilty of violating sexual misconduct without having committed the crime of sexual battery. For the purposes of this committee substitute, the term “client” refers to persons in the custody of the department who reside in certain facilities or receive services from a family care program. The term “patient” refers to persons committed to the custody of the department or who are temporarily residing in a receiving facility defined in s. 394.455(26), F.S., or a treatment facility defined in s. 394.455(30), F.S.

The consent of the client or patient to sexual activity does not prohibit prosecution in accordance with this proposed legislation. However, these requirements are not applicable if the

² The term “employee” for the purposes of this legislation includes any person under contract with the agency or the department and any paid staff member, volunteer, or intern of the agency or the department, or any person under contract with the agency or department or any person providing care or support to a client or patient on behalf of the department or its providers.

employee is legally married to the client or the employee had no reason to believe that the individual was a client receiving services in accordance with the specifications of this committee substitute.

The committee substitute requires that an employee who witnesses sexual misconduct or otherwise knows or has reasonable cause to suspect a person has engaged in sexual misconduct must immediately report the incident to the department's central abuse hotline and to law enforcement. The employee must then prepare, sign and date a report that specifically describes the nature of the misconduct including the time and location the incident occurred and the persons involved in the incident. The written report is to be delivered to the employee's supervisor or program director who then must provide copies to the department's inspector general. The inspector general is required to immediately conduct an administrative investigation and notify the state attorney if there is reasonable cause to believe the incident occurred.

An employee who knowingly or willfully fails to report sexual misconduct, or prevents another person from doing so, or submits an inaccurate, incomplete, or untruthful report, commits a first degree misdemeanor that is punishable as provided for in ss. 775.082, or 775.083, F.S. Further, a person who threatens or coerces another person to alter testimony or a written report commits a third degree felony that is punishable as provided in ss. 775.082, or 775.083, or 775.084, F.S.

Currently, there are procedures for abuse reporting of incidents relating to sexual abuse of clients in the care of the department (ch. 415, F.S.). It is unclear how employees will make a determination to report a violation based on "reasonable cause." It is also questionable whether these same employees will actually make a report to law enforcement if they have not personally observed the incident.

The committee substitute further specifies that, notwithstanding prosecution, any violation of sexual misconduct, as determined by the Public Employees Relations Commission constitutes sufficient cause under s. 110.227 F.S., for dismissal from employment and that the person may not be employed again in any capacity working in the developmental disabilities or mental health service systems. However, the committee substitute does not specify whether these sanctions apply to employees who engage in sexual misconduct who do not make an appeal to the Public Employees Relations Commission. This committee substitute does not specify how employers are to obtain information relating to employee dismissal for reasons of sexual misconduct.

Sections 435.03, and 435.04, F.S., pertaining to employee background screening requirements are amended to include sexual misconduct as an offense banning employment. This committee substitute also amends s. 943.0585, F.S., prohibiting the court-ordered expunction of criminal history records relating to the sexual misconduct of an employee as specified by of ss. 393.135, 394.4593, or 916.1075, F.S., without regard to whether adjudication was withheld or the defendant was found guilty or plead nolo contendere to the offense or whether the defendant committed this crime as a minor and was found guilty or plead nolo contendere to the crime. Based upon the requirement of ch. 916, F.S., it appears that background screening is only required for institutional security personnel; there is no specified screening for other employees.

The committee substitute also re-enacts sections that are specifically referenced in this legislation in order to incorporate the amendments of this committee substitute (ss.400.4174, 400.509(4)(a)(b)(c)(d)(f) and (g), 400.556, 400.6065, 400.980, 409.175, 409.907, 435.05(1) and (3), 744.3135,985.04, 400.512, 400.619, 400.6194(1), 400.953, 409.912, 435.07(4), 464.018(1)(e), 744.474(12), 985.407, 39.821(1), 110.1127(3)(a) and(c), 112,0455(12)(a), 381.0059(1)(2) and (4), 381.60225(1)(a)(b)(c)(d)(f) and (g), of the Florida Statutes).

III. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

IV. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Agency for Health Care Administration reports that 4 additional staff positions will be needed to perform the background screening and review that are required by this committee substitute. An expense of \$218,574 is projected for these positions for the first year.

This committee substitute may result in an undetermined increase in administrative procedures relating to employee appeals as allowed for under s. 110.227, F.S.

This committee substitute may result in an undetermined increase in court hearings relating to the crime of sexual misconduct.

Staff training will need to be developed and delivered for employees working in areas affected by this committee substitute.

V. Technical Deficiencies:

None.

VI. Related Issues:

The sexual misconduct provisions of this committee substitute may increase reporting to the central abuse hotline. In addition, Current law already provides for the prosecution of offenses related to sexual battery. Further, current employee regulations prohibit sexual activity with clients of the department and require dismissal for infractions. Finally, certain professional and licensing standards prohibit sexual activities with clients. Infractions can result in the license being revoked and possible civil penalties.

VII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
