

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1823 (PCB FFF 04-07) w/CS Developmental Services and Mental Health
SPONSOR(S): Future of Florida's Families and Murman
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Future of Florida's Families</u>	<u>16 Y, 0 N</u>	<u>Walsh</u>	<u>Liem</u>
2) <u>Public Safety & Crime Prevention</u>	<u>14 Y, 0 N w/CS</u>	<u>Kramer</u>	<u>De La Paz</u>
3) <u>Appropriations</u>	<u>41 Y, 0 N w/CS</u>	<u>Ekholm</u>	<u>Baker</u>
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

HB 1823 creates the offense of sexual misconduct with certain developmentally disabled and mental health clients of the Department of Children and Families (DCF). It requires mandatory reporting of sexual misconduct and adds sexual misconduct to the list of offenses that bar employment on Level 1 and 2 screening standards. The bill prohibits the sealing or expunction of criminal history records of the offense of sexual misconduct.

The bill reenacts various sections of Florida Statutes for the purpose of incorporating the amendments contained in the bill.

The bill was amended in the Appropriations Committee on April 23, 2004, to create an Agency for Persons with Disabilities with resources currently administered by the Department of Children and Family Services. The provisions of this amendment are described in this bill analysis.

There is no fiscal impact associated with the bill and there is no appropriation of funds in the bill.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1823d.ap.doc
DATE: April 24, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

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

The bill creates the offenses of sexual misconduct with certain developmentally disabled and mental health clients of the Department of Children and Families and provides criminal penalties for violations. It also expands employment background screening requirements to include sexual misconduct.

B. EFFECT OF PROPOSED CHANGES:

Current Law

Sexual Battery: Section 794.011 creates the offense of sexual battery. The term “sexual battery” is defined as “oral, anal, or vaginal penetration by, or union with, the sexual organ of another of the anal or vaginal penetration of another by any other object”. s. 794.011(1)(h), F.S. The severity of the offense depends on the age of the victim, the age of the offender and the circumstances of the offense.

Lewd or Lascivious Offenses: Section 800.04 proscribes various lewd or lascivious offenses including lewd or lascivious battery¹, lewd or lascivious molestation², lewd or lascivious conduct³ and lewd or lascivious exhibition⁴. These offenses are applicable to victims under the age of 16. The section provides that the victim’s consent is not a defense to these crimes. The severity of the offense depends on the age of the offender, the age of the victim and the act that was committed.

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

¹ Lewd or lascivious battery is a second degree felony. The defense is committed when a person: 1) engages in “sexual activity” which is defined 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” with a person 12 years of age or older but less than 16 or 2) encourages, forces, or entices any person less than sixteen to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity.

² Lewd or lascivious molestation is committed when a person intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person under 16 years of age or forces or entices a person under 16 years of age to so touch the perpetrator. The offense is classified as follows: 1) a first degree felony if the offender is 18 or older and the victim is less than twelve; 2) a second degree felony if the offender is less than 18 and the victim is less than twelve; 3) a second degree felony if offender is older than 18 and the victim is between age 12 and age 16 and; 4) a third degree felony if the offender is less than 18 and the victim is between age 12 to 16.

³ Lewd or lascivious conduct is committed when a person intentionally touches a person under 16 years of age in a lewd or lascivious manner or solicits a person under 16 years of age to commit a lewd or lascivious act. The offense is a second degree felony if the offender is over the age of 18 and a third degree felony if the offender is under the age of 18.

⁴ Lewd or lascivious exhibition is committed when a person in the presence of a victim who is less than 16 years of age, intentionally masturbates, intentionally exposes the genitals in a lewd or lascivious manner or intentionally commits any other sexual activity 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. The offense is a second degree felony if the offender is over 18 years of age and a third degree felony if the offender is under 18 years of age

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.

Section 985.4045, F.S. prohibits sexual misconduct between an employee of the Department of Juvenile Justice or a program operated by a provider under contract and a juvenile offender who is detained, supervised or committed to the custody of the department. The term "sexual misconduct" is defined to mean:

Fondling the genital area, groin, inner thighs, buttocks, or breasts of a person;
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.

The consent of the juvenile offender to any act of sexual misconduct is not a defense to prosecution under this section.

Section 944.35, F.S. prohibits sexual misconduct by an employee of the Department of Corrections with an inmate or an offender supervised by the department. The offense is a third degree misdemeanor and consent of the victim is not a defense. Section 951.221, F.S. prohibits sexual misconduct by an employee of a county or municipal detention facility or of a private detention facility with an inmate.

Changes proposed by HB 1823

HB 1823 creates the offense of sexual misconduct with three client groups:

- An individual with a developmental disability who is in DCF's custody; or who resides in a residential facility⁵; or who receives services from a family care program (Chapter 393);
- A mental health patient who is in DCF's custody; or who resides in a receiving or treatment facility (Chapter 394);
- A client who resides in a civil or forensic facility (Chapter 916).

The bill defines employee to include:

- Any paid staff member, volunteer, or intern of the Agency for Health Care Administration (AHCA) or DCF;
- Any person under contract with AHCA or DCF;
- Any person providing care or support to a client on behalf of DCF or its providers.

⁵ The bill specifically refers to the following terms relating to a residential facility: comprehensive transitional education program, developmental services institution, foster care facility, group home facility, intermediate care facility for the developmentally disabled, or residential habilitation center.

The bill provides that an employee who engages in sexual activity with a client commits a felony of the second degree.⁶ The term “sexual activity” is defined to include:

1. Fondling the genital area, groin, inner thighs, buttocks, or breasts of a person.
2. 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.
3. Intentionally touching in a lewd or lascivious manner the breasts, genitals, the genital area, or buttocks, or the clothing covering them, of a person, or forcing or enticing a person to touch the perpetrator.
4. Intentionally masturbating in the presence of another person.
5. Intentionally exposing the genitals in a lewd or lascivious manner in the presence of another person.
6. 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.

An employee may be found guilty of sexual misconduct without having committed the crime of sexual battery. The bill provides that consent of the client is not a defense to prosecution of the crime. The bill excludes from prosecution employees who are legally married to the client or who have no reason to believe that the person with whom the employee engaged in sexual misconduct is a DCF client.

The bill requires that any employee who witnesses sexual misconduct, or who otherwise knows or has reasonable cause to suspect a person has engaged in sexual misconduct, immediately report the offense to the department’s central abuse hotline and to the appropriate law enforcement agency. The employee is also required to prepare an “independent report” that describes the sexual misconduct. Failure to make a report required under the section is a first degree misdemeanor. Submitting an inaccurate, incomplete, or untruthful report is a first degree misdemeanor. Coercing or threatening a person with the intent to alter a report is a third degree felony.

The bill amends section 435.03, F.S. to add the newly created sexual misconduct offenses to the list of offenses that bar employment on Level 1 and 2 screening standards. The bill prohibits the sealing or expunction of criminal history records of the newly created sexual misconduct offenses.

The bill also amends s. 393.067(3), F.S.; to clarify that a residential facility or comprehensive transitional education program license is not a professional license, does not create a property right in the recipient, and is not an entitlement

C. SECTION DIRECTORY:

Section 1: Creates s. 393.135, F.S.; relating to sexual misconduct with an individual with a developmental disability..

Section 2: Creates s. 394.4593, F.S; relating to sexual misconduct with a patient of DCF.

Section 3: Creates s. 916.1075, F.S.; relating to sexual misconduct with a client who resides in a civil or forensic facility.

Section 4: Amends s. 435.03(2), F.S.; adds to Level 1 screening standards offenses under newly-created ss. 393.135, 394,4593, and 916.075; renumbers subparagraphs.

Section 5: Amends s. 435.04(2), F.S.; adds to Level 2 screening standards offenses under newly-created ss. 393.135, 394,4593, and 916.075; renumbers subparagraphs.

⁶ S. 775.082(3)(c): For a felony of the second degree, by a term of imprisonment not exceeding 15 years. S. 775.083(1)(b): In addition to the term of imprisonment in s. 775.082, payment of a fine not exceeding \$10,000. S. 775.084(4)(a)(2), relating to a habitual offers: For a felony of the second degree, by a term of imprisonment not exceeding 30 years.

Section 6: Amends s. 393.0655(1), F.S.; applies the amended screening requirements to developmental disabilities direct service providers.

Section 7: Amends s. 393.067(3), F.S.; clarifies that a residential facility or comprehensive transitional education program license is not a professional license, does not create a property right in the recipient, and is not an entitlement; reenacts ss. 393.067(6)(a), (b), (c), (d), (f), and (g) for the purpose of incorporating the amendment to s. 435.04.

Section 8: Amends s. 394.4572, F.S.; applies the amended screening requirements to mental health personnel.

Section 9: Amends s. 943.0585, F.S.; prohibits expunction of criminal history record that relates to violation of newly-created sexual misconduct statutes.

Section 10: Amends s. 943.059, F.S.; prohibits sealing of criminal history record that relates to violation newly-created sexual misconduct statutes.

Section 11: Amends s. 400.215(2)(a), F.S.; corrects cross-reference; reenacts ss. 400.215(2)(b) and (c) and 400.215(3) for the purpose of incorporating the amendments to ss. 435.03 and 435.04.

Section 12: Amends s. 400.964(7), F.S.; corrects cross-reference; reenacts ss. 400.964(1), (2), and (7) for the purpose of incorporating the amendments to ss. 435.03 and 435.04.

Section 13: Amends s. 435.045(1)(a), F.S.; corrects cross-reference; reenacts the subsection for the purpose of incorporating the amendment to s. 435.04.

Section 14: Reenacts s. 400.414(1)(f) and (g), F.S., for the purpose of incorporating the amendments to ss. 435.03 and 435.04.

Section 15: Reenacts s. 400.4174, F.S., for the purpose of incorporating the amendments to ss. 435.03 and 435.04.

Section 16: Reenacts ss. 400.509(4)(a), (b), (c), (d), (f), and (g), F.S., for the purpose of incorporating the amendments to ss. 435.03 and 435.04.

Section 17: Reenacts s. 400.556(2)(c), F.S., for the purpose of incorporating the amendments to ss. 435.03 and 435.04.

Section 18: Reenacts ss. 400.6065(1), (2), and (4), F.S., for the purpose of incorporating the amendments to ss. 435.03 and 435.04.

Section 19: Reenacts ss. 400.980(4)(a), (b), (c), (d), (f), and (g), F.S., for the purpose of incorporating the amendments to ss. 435.03 and 435.04.

Section 20: Reenacts s. 409.175(2)(k), F.S., for the purpose of incorporating the amendments to ss. 435.03 and 435.04.

Section 21: Reenacts s. 409.907(8)(d), F.S., for the purpose of incorporating the amendments to ss. 435.03 and 435.04.

Section 22: Reenacts ss. 435.05(1) and (3), F.S., for the purpose of incorporating the amendments to ss. 435.03 and 435.04.

Section 23: Reenacts s. 744.3135, F.S., as amended by Chapter 2003-402, Laws of Florida, for the purpose of incorporating the amendments to ss. 435.03 and 435.04.

Section 24: Reenacts s. 985.04(2), F.S., for the purpose of incorporating the amendments to ss. 435.03 and 435.04.

Section 25: Reenacts s. 400.512, F.S., for the purpose of incorporating the amendments to ss. 435.03 and 435.04.

Section 26: Reenacts s. 400.619(4), F.S., for the purpose of incorporating the amendment to s. 435.03.

Section 27: Reenacts s. 400.6194(1), F.S., for the purpose of incorporating the amendments to s. 435.03.

Section 28: Reenacts s. 400.953, F.S., for the purpose of incorporating the amendments to s. 435.03.

Section 29: Reenacts s. 409.912(32), F.S., for the purpose of incorporating the amendments to s. 435.03.

Section 30: Reenacts s. 435.07(4), F.S., for the purpose of incorporating the amendments to s. 435.03.

Section 31: Reenacts s. 464.018(1)(e), F.S., for the purpose of incorporating the amendments to s. 435.03.

Section 32: Reenacts s. 744.309(3), F.S., for the purpose of incorporating the amendments to s. 435.03.

Section 33: Reenacts s. 744.474(12), F.S., for the purpose of incorporating the amendments to s. 435.03.

Section 34: Reenacts s. 985.407(4), F.S., for the purpose of incorporating the amendments to s. 435.03.

Section 35: Reenacts s. 39.001(2)(b), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 36: Reenacts s. 39.821(1), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 37: Reenacts ss. 110.1127(3)(a) and (c), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 38: Reenacts s. 112.0455(12)(a), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 39: Reenacts ss. 381.0059(1), (2), and (4), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 40: Reenacts ss. 381.60225(1)(a), (b), (c), (d), (f) and (g), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 41: Reenacts ss. 383.305(7)(a), (b), (c), (d), (f) and (g), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 42: Reenacts ss. 390.015(3)(a), (b), (c), (d), (f) and (g), F.S. for the purpose of incorporating the amendments to s. 435.04.

Section 43: Reenacts ss. 394.875(13)(a), (b), (c), (d), (f) and (g), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 44: Reenacts ss. 395.0055(1), (2), (3), (4), (6) and (8), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 45: Reenacts ss. 395.0199(4)(a), (b), (c), (d), (f) and (g), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 46: Reenacts s. 397.451(1)(a), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 47: Reenacts ss. 400.071(4)(a), (b), (c), (d) and (f), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 48: Reenacts ss. 400.471(4)(a), (b), (c), (d), (f) and (g), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 49: Reenacts ss. 400.506(2)(a), (b), (c), (d), (f) and (g), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 50: Reenacts s. 400.5572, F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 51: Reenacts s. 400.607(3)(a), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 52: Reenacts ss. 400.801(4)(a), (b), (c), (d), (f) and (g), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 53: Reenacts ss. 400.805(3)(a), (b), (c), (d), (f) and (g), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 54: Reenacts ss. 400.906(5)(a), (b), (c), (d), (f) and (g), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 55: Reenacts ss. 400.931(5)(a), (b), (c), (e) and (f), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 56: Reenacts ss. 400.962(10)(a), (b), (c), (d) and (f), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 57: Reenacts ss. 400.991(7)(b) and (d), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 58: Reenacts s. 402.302(2)(e), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 59: Reenacts s. 402.305(2)(a), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 60: Reenacts s. 402.3054(3), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 61: Reenacts ss. 483.30(2)(a), (b), (c), (d), (f) and (g), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 62: Reenacts ss. 483.101(2)(a), (b), (c), (d), (f) and (g), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 63: Reenacts s. 744.1085(5), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 64: Reenacts s. 984.01(2)(b), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 65: Reenacts s. 985.01(2)(b), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 66: Reenacts ss. 1002.36(7)(a) and (b), F.S., for the purpose of incorporating the amendments to s. 435.04.

Section 67: Reenacts ss. 943.0582(2)(a) and 943.0582(6), F.S., for the purpose of incorporating the amendments to ss. 943.0585 and 943.059.

Section 68: Reenacts ss. 943.053(7), (8) and (9), F.S., for the purpose of incorporating the amendment to s. 943.059.

Section 69: Provides that the creation of ss. 393.135, 394.4593 and 916.1075, F.S., apply to offenses committed on or after the effective date.

Section 70: Provides an effective date of July 1, 2004.

II. 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:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

At its March 17, 2004, meeting, the Committee on the Future of Florida's Families adopted PCB FFF 04-07 without amendment.

The original bill provided that notwithstanding prosecution, any violation of any of the newly creates sexual misconduct provisions, as determined by the Public Employees Relations Commission, constitutes sufficient cause for dismissal from employment and prohibits the person from any future employment within the developmental disabilities, mental health services, or developmental disabilities and mental health services systems, respectively. The Committee on Public Safety & Crime Prevention adopted an amendment to remove this language from the bill.

At its April 23, 2004, meeting, the Appropriations Committee amended the bill to create an Agency for Persons with Disabilities with resources currently administered by the Department of Children and Family Services. The provisions of this amendment are described below.

This amendment establishes the Agency for Persons with Disabilities (APD) and removes responsibility for developmental disabilities (DD) programs from DCFS. The DD program is currently one of 8 program offices in DCFS. The DD director is under the direct supervision of the Deputy Secretary for Community Based Care and Family Self Sufficiency. The Director of the Agency for Persons with Disabilities created in this amendment will be appointed by and report to the Governor. The agency will be administratively housed at DCF. The agency is responsible for administering programs and services provided in chapter 393, Florida Statutes, including services provided in the four Developmental Services Institutions and the Mentally Retarded Defendant program. The amendment:

- Sets the effective date for the creation of the new agency as July 1, 2004, and October 1, 2004, as the date for the transfer of responsibilities from DCF to the new agency;
- Updates Chapter 363, including definitions, to establish the new agency;

- Requires APD to execute an interagency agreement so that AHCA will provide the financial management of the Medicaid waivers and adds new provisions to enhance AHCA's capacity to manage the waivers within appropriations;
- Provides that AHCA and agency staff will be co-located;
- Deletes references to DCF's district structure;
- Amends the redesign provisions of the home and community based services to delete obsolete language, modify provisions relating to the assessment instrument, and to add new provisions relating to the ability of AHCA to keep waiver costs within appropriations;
- Requires review of in-home subsidies be conducted annually, not quarterly;
- Adds legislative intent to reduce the use of sheltered workshops and to promote gainful employment;
- Eliminates language prohibiting the transfer of funds without a finding that developmental disabilities services will not be affected (not needed in single purpose agency), and the development of new disability programs if it compromises financial commitment for specified developmental conditions (restricts future legislatures);
- Deletes provision permitting appointment of Family Care Council members if Governor does not act within 45 day to make appointments;
- Updates provisions relating to the relationship of AHCA to other agencies which serve persons with special needs; and,
- Repeals outdated provisions in the statutes relating to plans, Intermediate Care Facilities for the Developmentally Disabled (ICF/DDs), homes for special services, and comprehensive day treatment projects.