

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1167
SPONSOR(S): Bean and others
TIED BILLS:

Sexual Predators

IDEN./SIM. BILLS: SB 1834

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee		Cunningham	Kramer
2) Justice Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

Section 775.21, F.S., provides that a person convicted of certain enumerated sexual offenses must be designated a "sexual predator." Currently, there do not appear to be any statutory provisions prohibiting persons (e.g. physicians, pharmacists, drug store clerks, etc...) from prescribing, dispensing, or selling erectile dysfunction drugs to sexual predators. Nor do there appear to be any statutory provisions limiting or prohibiting sexual predators from possessing erectile dysfunction drugs (prescription or otherwise).

This bill would prohibit persons from *distributing* any drug treating erectile dysfunction to a person designated a sexual predator. A person who violates this provision once commits a second degree misdemeanor, and any subsequent violations are first degree misdemeanors. However, the bill provides an affirmative defense to this charge if the sexual predator was not listed on the sexual predator registry at the time the drug was distributed.

The bill also prohibits a sexual predator from *possessing* an erectile dysfunction drug. A sexual predator who violates this provision commits a second degree misdemeanor, and any subsequent violations are first degree misdemeanors.

This bill takes effect July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government → This bill prohibits the distribution of any erectile dysfunction drug to a person designated a sexual predator.

Safeguard Individual Liberty → This bill prohibits a sexual predator from possessing an erectile dysfunction drug.

B. EFFECT OF PROPOSED CHANGES:

Sexual Predators

Section 775.21, F.S., provides that a person convicted of an enumerated sexual offense must be designated a "sexual predator." Specifically, a person must be designated a sexual predator if he or she has been convicted of:

1. A capital, life, or first-degree felony violation, or any attempt thereof, of one of the following offenses:
 - a. kidnapping or false imprisonment¹ where the victim is a minor and the defendant is not the victim's parent;
 - b. sexual battery;²
 - c. lewd or lascivious offenses;³
 - d. selling or buying a minors for child pornography;⁴ or
 - e. a violation of a similar law of another jurisdiction.
2. Any felony violation of one of the following offenses where the offender has previously been convicted of or found to have committed, or has pled nolo contendere or guilty to, regardless of adjudication one of the following offenses:
 - a. kidnapping, false imprisonment or luring or enticing a child⁵ where the victim is a minor and the defendant is not the victim's parent,
 - b. sexual battery;⁶
 - c. procuring a person under the age of 18 for prostitution;⁷
 - d. lewd or lascivious offenses;
 - e. lewd or lascivious battery on an elderly person;⁸
 - f. promoting sexual performance by a child;⁹
 - g. selling or buying a minors for child pornography; or
 - h. a violation of a similar law of another jurisdiction.¹⁰

In order to be counted as a prior felony, the felony must have resulted in a conviction sentenced separately or an adjudication of delinquency entered separately, prior to the current offense and sentenced or adjudicated separately from any other felony conviction that is to be counted as a prior felony.

¹ s. 787.01, F.S. or s. 787.02, F.S.,

² See chapter 794. F.S.

³ s. 800.04, F.S.

⁴ s. 847.0145, F.S.

⁵ s. 787.025, F.S.

⁶ Excluded are offenses contained in ss. 794.011(10) and 794.0235, F.S.

⁷ s. 796.03, F.S.

⁸ s. 825.1025(2)(b), F.S.

⁹ s. 827.071, F.S.

¹⁰ Additionally, a person must be designated as a sexual predator if he or she committed one of the offenses listed in a. through h. above and has previously been convicted of the offense of selling or showing obscenity to a minor or using a computer to solicit sexual conduct of or with a minor [ss. 847.0133 or 847.0135, F.S.]

If the sexual predator is in the custody or control of, or under the supervision of, the Department of Corrections (DOC), or is in the custody of a private correctional facility, the predator must register with the DOC and provide specified information. Private correctional facilities are also governed by these requirements.

If the sexual predator is not in the custody or control of, or under the supervision of, the DOC, or is not in the custody of a private correctional facility, and the predator establishes or maintains a residence in this state, the predator must initially register in person at an Florida Department of Law Enforcement (FDLE) office, or at the sheriff's office in the county of residence within 48 hours after establishing permanent or temporary residence.

Within 48 hours of initial registration, a sexual predator who is not incarcerated and who resides in the community, including a predator under DOC supervision, must register at a driver's license office of the Department of Highway Safety and Motor Vehicles (DHSMV) and present proof of registration, provide specified information, and secure a driver's license, if qualified, or an identification card. Each time a sexual predator's driver's license or identification card is subject to renewal, and within 48 hours after any change in the predator's residence or name, he or she must report in person to a driver's license facility of the DHSMV and is subject to specified registration requirements. This information is provided to FDLE which maintains the statewide registry of all sexual predators and sexual offenders (discussed further below). The department maintains a searchable web-site containing the names and addresses of all sexual predators and offenders as well as a toll-free telephone number.

A sexual predator's failure to comply with registration requirements is a third degree felony.¹¹ A sexual predator is required to maintain registration for the duration of his or her life, unless the sexual predator has received a full pardon or has had a conviction set aside in a postconviction proceeding.

Erectile Dysfunction

The term erectile dysfunction (ED) covers a range of disorders, but usually refers to the inability to obtain an adequate erection for satisfactory sexual activity.¹² Approximately 30 million men in the United States have erectile dysfunction.¹³ According to the Department of Health (DOH), some ED drugs must be obtained by prescription while others (e.g. herbal remedies, etc...) may be obtained over-the-counter without a prescription.

Currently, there do not appear to be any statutory provisions prohibiting persons (e.g. physicians, pharmacists, drug store clerks, etc...) from prescribing, dispensing, or selling ED drugs to a specific group of persons (e.g. sexual predators). Nor do there appear to be any statutory provisions limiting or prohibiting a specific group of persons from possessing an ED drug (prescription or otherwise).¹⁴

Effect of the Bill

This bill would prohibit persons from *distributing* any drug treating ED to a person designated as a sexual predator. A person who violates this provision once commits a second degree misdemeanor,¹⁵ and any subsequent violations are first degree misdemeanors¹⁶. However, the bill provides an affirmative defense to this charge if the sexual predator was not listed on the sexual predator registry at the time the drug was distributed.

¹¹ s. 775.21(10), F.S.

¹² <http://www.mayoclinic.com/health/erectile-dysfunction/DS00162>

¹³ <http://www.mmhc-online.com/articles/impotency.html>

¹⁴ There is a statute that limits *how many doses* of ED drugs Medicaid recipients may receive. See s. 409.912(39), F.S.

¹⁵ A second degree misdemeanor is punishable by a maximum of 60 days in jail and a maximum fine of \$500. See ss. 775.082, 775.083, F.S.

¹⁶ A first degree misdemeanor is punishable by a term of imprisonment not exceeding 1 year and a \$1,000 fine. See ss. 775.082 and 775.083.

The bill also prohibits a sexual predator from *possessing* an ED drug. A sexual predator who violates this provision once commits a second degree misdemeanor, and any subsequent violations are first degree misdemeanors.¹⁷

C. SECTION DIRECTORY:

Section 1. Creates s. 794.075, F.S.; prohibiting distribution of any drug treating erectile dysfunction to a person designated a sexual predator; providing an affirmative defense; prohibiting a sexual predator from possessing an erectile dysfunction drug.

Section 2. This act takes effect July 1, 2006.

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:

The ED drug market may lose revenue in that sexual predators will no longer be able to possess ED drugs.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution, because it is a criminal law.

2. Other:

See "Drafting Issues or Other Comments".

B. RULE-MAKING AUTHORITY:

None.

¹⁷ *Id.*

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill would prohibit persons from *distributing* any drug treating ED to a person designated as a sexual predator. Sections 499.003 and 893.02, F.S., define “distribute” as selling; offering to sell; giving away; transferring, whether by passage of title, physical movement, or both; delivering, or offering to deliver. The statute specifies that the term does not mean “dispense”. Throughout Florida’s statutes, the term “dispense” applies to the transfer of possession of drugs by licensed physicians and pharmacists.¹⁸ Because the bill uses the term “distribute”, everyone *except* licensed physicians and pharmacists would be prohibited from giving an ED drug to a sexual predator. It is unclear whether this is the intent of the bill.

The bill states that it is a second degree misdemeanor for someone to distribute any drug treating ED to a sexual predator. The bill then defines the term “drug” as provided in s. 499.003, F.S. According to DOH, this definition would include both prescription ED drugs as well as over-the-counter ED drugs (e.g. herbal remedies sold at drug stores). Thus, a clerk at a drug store would be required to determine whether the person he or she is selling ED drugs to is a sexual predator.

It should be noted that ED drugs can be obtained (with or without a prescription) via the Internet. It is unclear how the bill would address this scenario (e.g. would an Internet sale of an ED drug fall within the definition of “distribute”, etc...).

The bill references the “sexual predator registry” and provides an affirmative defense to a criminal charge if the sexual predator was not listed on the sexual predator registry at the time the drug was distributed. However, it is unclear what the term “sexual predator registry” is referring to. There are sexual offender/predator registries on both the state and national level. In Florida, the Florida Department of Law Enforcement maintains the statewide registry of all sexual predators and sexual offenders.

Although ED drugs are primarily used to treat ED, they have recently been found to help treat certain cardiac conditions (hypertension, enlarged heart, etc...) and Crohn’s disease.¹⁹ Prohibiting sexual predators from possessing a drug that could help treat cardiac, or other non-ED related conditions could raise Equal Protection concerns.

There are a number of prescription and over-the-counter drugs that may cause erectile dysfunction (e.g. diuretics and antihypertensives, antidepressants, anti-anxiety drugs and antiepileptic drugs, antihistamines, Parkinson’s disease medications, prostate cancer medications, and chemotherapy medications).²⁰ Many people take such drugs to treat medical conditions (e.g. Epilepsy, depression, Parkinson’s disease, etc...).

The bill’s effective date is July 1, 2006. Generally, criminal bills have an effective date of October 1.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

¹⁸ See e.g. ss. 465.003(6) and 893.02(6), F.S.,

¹⁹ “Viagra may offer help for enlarged hearts”, <http://www.msnbc.msn.com/id/6858619/>; “Viagra may treat heart failure”, <http://www.medicinenet.com/script/main/art.asp?articlekey=55034>; “Viagra may help Crohn’s disease”, <http://www.webmd.com/content/article/119/113246>; “Viagra reduces heart stress”, http://www.nelh.nhs.uk/hth/viagra_heart_stress.asp.

²⁰ <http://www.webmd.com/content/article/57/66229.htm>