

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 583 Single-Sex Public Facilities  
**SPONSOR(S):** Civil Justice Subcommittee; Artiles and others  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1464

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	9 Y, 4 N, As CS	Bond	Bond
2) Government Operations Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

Commonly held social conventions provide that persons should honor single-sex facilities such as bathrooms, locker rooms, changing rooms, and other similar facilities. However, no statute specifically prohibits a person of one sex from entering a facility intended for use by the other sex. Recently, local governments have enacted ordinances specifically allowing persons to use any single-sex facility that that such person identifies with. The bill:

- Provides that it is a second degree misdemeanor criminal offense for a person of one sex to enter into a single-sex facility designated for persons of the opposite sex;
- Creates a civil cause of action against a person of one sex who enters a single-sex facility designated for persons of the opposite sex;
- Creates a civil cause of action against an entity that does not take steps to prevent persons of one sex from entering a single-sex facility designated for persons of the opposite sex;
- Provides exceptions that appear to conform to social norms allowing persons of one sex who enter into a single-sex facility of the opposite sex;
- Provides that exclusion of a person from a single-sex facility of the opposite sex does not violate state discrimination laws;
- Recognizes for purposes of this law a gender change that qualifies as a gender change reflected in either a state driver license or a United States Passport; and
- Pre-empts local ordinances that are in conflict.

The bill does not appear to have a fiscal impact on state government. The bill may have an indeterminate negative fiscal impact on local governments.

The bill has an effective date of July 1, 2015.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

Commonly held social conventions provide that persons should honor single-sex facilities such as bathrooms, locker rooms, changing rooms, and other similar facilities, with certain exceptions. However, no current law specifically prohibits a person of one sex from entering a facility intended for use by the opposite sex.

It is possible that current criminal laws on voyeurism<sup>1</sup> and trespass<sup>2</sup> may provide for punishment of a person of one sex who enters a facility designated for the opposite sex in violation of social norms; however, there would be barriers to prosecution.<sup>3</sup> It is possible that common law civil causes of action for intentional infliction of emotional distress or invasion of privacy might apply to situations where a person of one sex enters a facility designated for the opposite sex.

Some persons born to one sex identify themselves as a person of the opposite sex. These persons are commonly referred to as "transgender."<sup>4</sup> The United States Department of State will issue a passport designating the opposite sex of birth if the gender transition is certified by a physician to be in process or complete.<sup>5</sup> The Florida Department of Highway Safety and Motor Vehicles will issue a driver license in the other sex if the "customer is undergoing appropriate clinical treatment for gender transition."<sup>6</sup> The department's policy provides that "[s]exual reassignment surgery is not a prerequisite for a driver license or identification card issuance," and the "Department's policy on gender change requirements follow standards established by the World Professional Association for Transgender Health (WPATH), recognized as the authority in this field by the American Medical Association."<sup>7</sup>

### Effect of the Bill

The bill creates the following legislative intent:

The purpose of this act is to secure privacy and safety for all individuals using single-sex public facilities. The Legislature finds that:

- There is a longstanding history of restricting access to single-sex public facilities on the basis of sex.
- There is an expectation of privacy in single-sex public facilities.
- Users of single-sex public facilities reasonably expect not to be exposed to individuals of the other sex while using those facilities.
- Single-sex public facilities are places of increased vulnerability and present the potential for crimes against individuals using those facilities, including, but not limited to, assault, battery, molestation, rape, voyeurism, and exhibitionism.

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<sup>1</sup> Section 810.14, F.S.

<sup>2</sup> Section 810.08, F.S.

<sup>3</sup> Voyeurism requires proof that observation of the victim be done with "lewd, lascivious, or indecent intent" and requires that the observation be secret. Trespass requires either unauthorized entry or refusal to leave after request. No Florida case has found that trespass law means that a person is not authorized to enter a single sex facility of the opposite sex.

<sup>4</sup> The term "transgender" is an "umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth." Definition from the GLAAD Media Reference Guide at: <http://www.glaad.org/reference/transgender> (last accessed March 5, 2015).

<sup>5</sup> <http://travel.state.gov/content/passports/english/passports/information/gender.html> (last accessed March 5, 2015).

<sup>6</sup> <http://fdhsmv.rapidinsites.com/answer/gender-reassignment> (last accessed March 5, 2015).

<sup>7</sup> *Id.*

## Definitions

The bill defines:

- "Female" to mean either a biological female or a person recognized as female in a driver license or U.S. Passport.
- "Male" to mean either a biological male or a person recognized as male in a driver license or U.S. Passport.
- "Person" to mean a natural person or human being.
- "Public accommodations" to have the same meaning as provided in s. 760.02, F.S.<sup>8</sup>
- "Single-sex public facilities" to mean bathrooms, restrooms, dressing rooms, fitting rooms, locker rooms, showers, and other similar facilities where there is a reasonable expectation of privacy; that are maintained by a government or by an owner of public accommodations, a school, or a place of employment; that are conspicuously designated with appropriate signage for use by persons of only one sex; and that are designed or designated to be used by more than one person at a time.
- "Sex" to mean a person's gender as male or female.

## Criminal Penalty

The bill provides that a single-sex public facility designated for females are restricted to females, and facilities for males are restricted to males.

A person who knowingly and willfully enters a single-sex public facility designated for or restricted to persons of the other biological sex commits a second degree misdemeanor. A second degree misdemeanor is punishable by up to 90 days confinement in the county jail and/or a fine up to \$500.

The bill contains exceptions (see below) by which a person entering a single-sex public facility of the opposite sex would not be prosecuted.

## Civil Cause of Action

The bill creates two separate civil causes of action:

- A person who knowingly and willfully enters a single-sex public facility designated for the other biological sex is liable in a civil action to any person who is lawfully using the same single-sex public facility at the time of the unlawful entry for the damages caused by the unlawful entry, together with reasonable attorney fees and costs.
- An owner of public accommodations, a school, or a place of employment who maintains single-sex public facilities and advertises, who promotes or encourages use of those facilities by persons of the opposite sex, or fails to take reasonable remedial measures after learning of such use, is liable in a civil action to any person who is lawfully using those facilities at the time

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<sup>8</sup> Section 760.02, F.S., defines the term to mean: "places of public accommodation, lodgings, facilities principally engaged in selling food for consumption on the premises, gasoline stations, places of exhibition or entertainment, and other covered establishments. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this section:

(a) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than four rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his or her residence.

(b) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station.

(c) Any motion picture theater, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment.

(d) Any establishment which is physically located within the premises of any establishment otherwise covered by this subsection, or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment."

of the unlawful entry for the damages caused by the unlawful entry, together with reasonable attorney fees and costs.

### Exemptions Applicable to Criminal and Civil Actions

The bill creates numerous exemptions that are applicable to both criminal and civil actions:

- The prohibitions do not apply to public facilities that are conspicuously designated for unisex or family use.
- The prohibitions do not to a public facility that is designated to be used by only one person at a time.
- A person may use an opposite-sex facility if it is the only facility reasonably available at the time.
- A family member or designee may enter an opposite-sex facility as necessary to assist a person.
- A person who needs assistance may ask a person of the opposite sex to help.
- A person may enter an unoccupied facility designate for persons of the opposite sex provided that the person asks someone to stands at the door to warn others that an opposite-sex person is in the single sex facility;
- A person may enter an unoccupied facility designate for persons of the opposite sex provided that the person locks the door.
- An employee who is performing cleaning or maintenance may enter an opposite-sex facility.

### Relation to Other Laws

The bill provides that it does not require any place of public accommodation, school, or place of employment to construct or maintain single-sex public facilities or to modify existing public facilities; and provides that restricting access to single-sex public facilities in the manner required by the bill is not unlawful discrimination under s. 760.08, F.S.<sup>9</sup>

### Preemption of Local Ordinances

The provisions of this bill specifically preempt any law, regulation, policy, or decree enacted or adopted by any city, county, municipality, or other political subdivision within the state that purports to permit or require owners of public accommodations, schools, or places of employment to permit use of single-sex public facilities by persons whose biological sex is different from the sex for which such facilities are designated.

#### B. SECTION DIRECTORY:

Section 1 provides legislative intent.

Section 2 creates s. 760.55, F.S., regarding privacy for persons using single-sex public facilities.

Section 3 provides an effective date of July 1, 2015.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to have any impact on state revenues.

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<sup>9</sup> Section 760.08, F.S., entitled "Discrimination in places of public accommodation," provides that: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this chapter, without discrimination or segregation on the ground of race, color, national origin, sex, handicap, familial status, or religion."

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill creates a new misdemeanor offense that may increase the local expenditures related to local law enforcement and jail costs. The potential cost is indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Local governments have broad authority to legislate on any matter that is not inconsistent with federal or state law. Where state preemption applies, however, it precludes a local government from exercising authority in that particular area. Preemption may be either express or implied.<sup>10</sup> The bill appears to create express preemption over certain local ordinances.

This bill may implicate the Equal Protection Clause of the United States Constitution<sup>11</sup> and/or the similar clause in the Florida Constitution.<sup>12</sup> No controlling court has ruled on the appropriate standard of review of a law regarding public facilities, and no controlling court has ruled on whether a law like the one created by this bill violates the Equal Protection Clause. Case law in this area has focused on employment discrimination. In general, sex-based discrimination by a state government is subject to intermediate scrutiny. This standard requires the government to show that its gender classification is substantially related to a sufficiently important government interest. Federal courts have found that employment discrimination based on "gender stereotype"<sup>13</sup> or based on an employee's status as a transgender person<sup>14</sup> violate the federal Equal Protection Clause. It is possible that the legislative findings in Section 1 of the bill provide sufficiently important government interests to justify the sex-based discrimination created by this bill.

B. RULE-MAKING AUTHORITY:

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<sup>10</sup> Wolf, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009).

<sup>11</sup> The 14th Amendment reads in pertinent part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

<sup>12</sup> Article I, s. 2, Fla.Const., reads in pertinent part: "All natural persons, female and male alike, are equal before the law . . ."

<sup>13</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>14</sup> *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

Several Florida local governments have enacted ordinances prohibiting discrimination based on "gender identity or gender expression." Some are explicit, and others appear, to have the effect, in part, of allowing persons of one sex to access public facilities designated for use by persons of the opposite sex where the person assumes the opposite gender identity. Those ordinances would be partially affected by the preemption provision in this bill.<sup>15</sup> It is believed that there are approximately twenty local government ordinances as of December 2014<sup>16</sup> that may be affected by the preemption created by this bill.

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 4, 2015, the Civil Justice Subcommittee adopted three amendments and reported the bill favorably as a committee substitute. The amendments:

- Recognize that a person who has changed his or her sexual category on their passport or their driver license are classified as a person of the opposite or new sex. The bill had required persons to use the public facility of their sex at birth.
- Specify that government-owned public facilities are covered.
- Lower the criminal offense level from a first degree misdemeanor to a second degree misdemeanor.
- Add exceptions that allow use of the opposite sex public facility if it is the only facility reasonably available at the time; as necessary to assist a family member or other person in need; if another person stands at the door to warn others that an opposite-sex person is in the single-sex facility; if the facility is unoccupied when entering and the person locks the door; and entry by cleaning and maintenance employees.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

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<sup>15</sup> See, e.g., Miami-Dade ordinance at art. III, s. 11A-19, as amended by Legislative Item File Number 141932 on December 2, 2014.

<sup>16</sup> *Miami-Dade commission to hold final vote on transgender-protections law*, The Miami Herald, December 1, 2014, viewable at <http://www.miamiherald.com/news/local/community/miami-dade/article4232851.html> (last accessed March 5, 2015)(access may be limited without subscription).