

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1397 Lewd or Lascivious Acts with Minors
SPONSOR(S): Criminal Justice & Public Safety Subcommittee, Brannan
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice & Public Safety Subcommittee	17 Y, 0 N, As CS	Frost	Hall
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

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. Section 800.04, F.S., criminalizes the following lewd or lascivious offenses committed on or in the presence of a person less than 16 years of age:

- Lewd or lascivious battery;
- Lewd or lascivious molestation;
- Lewd or lascivious conduct; and
- Lewd or lascivious exhibition.

Under s. 794.05, F.S., sexual activity between a person who is 24 or older and a victim who is 16 or 17 years old is a second degree felony, regardless of whether the 16 or 17 year old victim consents to such sexual activity. Sexual activity means 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, but does not include an act done for a bona fide medical purpose.

While a person older than 24 years of age commits a second degree felony by engaging in sexual activity with a 16 or 17 year old victim, regardless of consent, current law does not similarly criminalize lewd or lascivious acts with such minors.

CS/HB 1397 amends s. 794.05, F.S., to create the crime of lewd or lascivious acts with certain minors. Under the bill, a person 24 or older commits a third degree felony if he or she:

- Intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person 16 or 17 years of age; or
- Forces or entices a person 16 or 17 years of age to so touch the perpetrator.

A person convicted of committing lewd or lascivious acts with certain minors must register as a sexual offender under s. 943.0435, F.S.

The bill may have an indeterminate positive impact on prison beds by creating the new felony offense of lewd or lascivious acts with certain minors.

The bill provides an effective date of October 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

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.¹ Section 800.04, F.S., criminalizes the following lewd or lascivious offenses committed on or in the presence of a person less than 16 years of age:

- Lewd or lascivious battery;
- Lewd or lascivious molestation;
- Lewd or lascivious conduct; and
- Lewd or lascivious exhibition.

Lewd or Lascivious Battery

Sexual activity in s. 800.04, F.S., means 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.² A person commits lewd and lascivious battery by:

- Engaging in sexual activity with a person 12 years of age or older but younger than 16; or
- Encouraging, forcing, or enticing any person under 16 to engage in:
 - Sadomasochistic abuse;
 - Sexual bestiality;
 - Prostitution; or
 - Any other act involving sexual activity.³

Lewd or lascivious battery is generally a second degree felony,⁴ unless the offender was previously convicted of lewd or lascivious battery or another specified offense,⁵ in which case the offense is reclassified as a first degree felony.⁶

Lewd or Lascivious Molestation

A person commits lewd or lascivious molestation by:

- Intentionally touching in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person under 16; or
- Forcing or enticing a person under 16 to so touch the perpetrator.⁷

The penalty for lewd or lascivious molestation varies depending on the offender's age, the victim's age, and the circumstances surrounding the commission of the offense, but always requires that a victim be younger than 16.⁸

Lewd or Lascivious Conduct

¹ *Chesebrough v. State*, 255 So.2d 675, 677 (Fla. 1971).

² S. 800.04(1)(a), F.S.

³ S. 800.04(4)(a), F.S.

⁴ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082, 775.083, or 775.084, F.S.

⁵ Other offenses include a violation of: ss. 787.01(2) or 787.02(2), F.S., when victim who was a minor and, in the course of committing that violation, the defendant committed sexual battery under ch. 794, F.S., or a lewd act under ss. 800.04 or 847.0135(5), F.S.; s. 787.01(3)(a)2. or 3., F.S.; s. 787.02(3)(a)2. or 3., F.S.; ch. 794, F.S., excluding s. 794.011(10), F.S.; s. 825.1025, F.S.; or s. 847.0135(5), F.S.

⁶ A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Ss. 775.082, 775.083, or 775.084, F.S.

⁷ S. 800.04(5)(a), F.S.

⁸ See s. 800.04(5)(b)-(e), F.S.

A person commits lewd or lascivious conduct by:

- Intentionally touching a person under 16 in a lewd or lascivious manner; or
- Soliciting a person under 16 to commit a lewd or lascivious act.⁹

Lewd or lascivious conduct is either a second or third degree felony depending on the offender's age.¹⁰

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;
- 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.¹¹

Lewd or lascivious exhibition is either a second or third degree felony depending on the offender's age.¹²

Unlawful Sexual Activity with a Minor

Section 794.05, F.S., criminalizes sexual activity between a person who is 24 or older and a victim who is 16 or 17 years old, regardless of whether the 16 or 17 year old victim consents to such sexual activity.¹³ Sexual activity means 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, but does not include an act done for a bona fide medical purpose.

Evidence of a victim's prior sexual conduct is not relevant in a prosecution for unlawful sexual activity with a minor. If an offender's unlawful sexual activity with a minor directly results in the victim giving birth to a child, paternity of the child must be determined under ch. 742, F.S., and the offender must pay child support as provided in ch. 61, F.S.

While a person older than 24 years of age commits a second degree felony by engaging in sexual activity with a 16 or 17 year old victim, regardless of consent, current law does not similarly criminalize lewd or lascivious acts with such minors.

Florida Sexual Offender Registration

Under Florida law, a person is a sexual offender if he or she is convicted of a qualifying offense and:

- Was released on or after October 1, 1997, from the criminal sanction resulting from a qualifying conviction.¹⁴
- Establishes or maintains a residence in Florida and has not been designated a sexual predator by a court of this state but has been designated a sexual predator, sexually violent predator, or another sexual offender designation in another state or jurisdiction, if such designation subjects or would subject him or her to registration or public notification in that state or jurisdiction.¹⁵

⁹ S. 800.04(6)(a), F.S.

¹⁰ S. 800.04(6)(b)–(c), F.S.

¹¹ S. 800.04(7), F.S.

¹² S. 800.04(7)(b)–(c), F.S.

¹³ However, a person 16 or 17 years of age who has been emancipated under ch. 743, F.S., is not considered a victim of a lewd or lascivious offense under s. 800.04, F.S.

¹⁴ S. 943.0435(1)(h)1.a.(II), F.S. A sanction imposed in this state or in any other jurisdiction includes, but is not limited to: a fine; probation; community control; parole; conditional release; control release; or incarceration in a state prison, federal prison, private correctional facility, or local detention facility.

¹⁵ S. 934.0435(1)(h)1.b., F.S.

- Establishes or maintains a residence in this state and is in the custody or control of, or under the supervision of, any other state or jurisdiction as a result of a qualifying conviction.¹⁶
- Has been adjudicated delinquent on or after July 1, 2007, for a qualifying offense, if the juvenile was at least 14 years old at the time he or she committed the offense.¹⁷
- 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.¹⁸

A conviction for lewd or lascivious battery, molestation, conduct, or exhibition under s. 800.04, F.S., and unlawful sexual activity with certain minors under s. 794.05, F.S., requires sexual offender designation.¹⁹

Sexual Offender Registration Requirements

All sexual offenders are required to comply with a number of statutory registration requirements. A sexual offender must report in person to the sheriff's office to register within 48 hours of:

- Establishing a permanent, temporary, or transient residence in Florida; or
- Being released from the custody, control, or supervision of DOC or from the custody of a private correctional facility.²⁰

Additionally, within 48 hours of registration, a sexual offender who is not incarcerated and resides in the community must register in person at a driver license office of the Department of Highway Safety and Motor Vehicles and: secure or renew a Florida driver license, or secure an identification card, if otherwise qualified; identify himself or herself as a sexual offender; provide his or her permanent, temporary, or transient residence; and submit to a photograph.²¹

During his or her initial registration, a sexual offender must provide specified information such as his or her name, date of birth, social security number, race, sex, height and weight, vehicle information, addresses, and places of employment.²² A sexual offender must also report in person to reregister at specified intervals,²³ and must update, within 48 hours, specified changes in information such as his or her address, name, vehicles owned, travel information, and internet identifiers.²⁴

Generally, failing to comply with registration requirements is a third degree felony,²⁵ punishable by up to five years in prison and a \$5,000 fine.²⁶

¹⁶ S. 934.0435(1)(h)1.c., F.S.

¹⁷ S. 934.0435(1)(h)1.d., F.S.

¹⁸ S. 944.607(1)(f), F.S.

¹⁹ Other qualifying convictions include: sexual misconduct with an individual with a developmental disability; sexual misconduct with a mental health patient by an employee; kidnapping or false imprisonment, where the victim is a minor and there is a sexual component to the crime; luring or enticing a child, with a prior sexual conviction; human trafficking; sexual battery; video voyeurism with a prior video voyeurism conviction; lewd or lascivious offense on an elderly person; sexual performance by a child; providing obscene materials to a minor; computer pornography involving minors; soliciting a minor over the Internet; traveling to meet minors; lewd or lascivious exhibition over the Internet; transmission of child pornography by electronic device or equipment; transmission of material harmful to minors; selling or buying minors to engage in sexually explicit conduct; racketeering involving at least one sexual offense; sexual misconduct with a forensic client; and sexual misconduct by an employee on a juvenile offender. S. 943.0435(1)(h)1.a.(l), F.S.

²⁰ S. 943.0435(2)(a)1., F.S.

²¹ S. 775.21(6)(f)1., F.S.

²² Ss. 775.21(6)(a) and 943.0435(2)(b), F.S.

²³ Ss. 775.21(6)(g)2.a., 775.21(8)(a), 943.0435(4)(b)2., and 943.0435(14), F.S.

²⁴ Ss. 943.0435(4)(e) and 775.21(6), F.S.

²⁵ Ss. 775.082 and 775.083, F.S.

²⁶ Ss. 775.21(10) and 943.0435(9)(a), F.S.; but see, ss. 775.21(6)(f)3., 775.21(6)(j), 943.0435(4)(c), and 943.0435(8), F.S. (providing for circumstances in which failure to comply with registration requirements is a second degree felony, punishable by up to 15 years in prison and a \$10,000 fine).

Effect of Proposed Changes

CS/HB 1397 amends s. 794.05, F.S., to create the crime of lewd or lascivious acts with certain minors. Under the bill, a person 24 or older commits a third degree felony if he or she:

- Intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person 16 or 17 years of age; or
- Forces or entices a person 16 or 17 years of age to so touch the perpetrator.

The bill does not define the terms “lewd” or “lascivious,” however, both terms already have a widely accepted definition provided in case law and current jury instructions.²⁷

A person convicted of committing lewd or lascivious acts with certain minors must register as a sexual offender under s. 943.0435, F.S.

The bill provides an effective date of October 1, 2021.

B. SECTION DIRECTORY:

Section 1: Amends s. 794.05, F.S., relating to unlawful sexual activity with certain minors.

Section 2: Provides an effective date of October 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate positive impact on prison beds by creating the new felony offense of lewd or lascivious acts with certain minors.

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:

²⁷ Under Florida’s standard jury instructions, the words “lewd” and “lascivious” mean the same thing: a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act. See Fla. Std. Jury Insr. (Crim.).

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 7, 2021, the Criminal Justice & Public Safety Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Changed the crime of lewd or lascivious acts with certain minors to a third degree felony, to make the penalty for the new crime proportional to the existing crime of sexual activity with certain minors which is a second degree felony.
- Removed the definition of “lewd” or “lascivious” for consistency across the criminal statutes as the terms are not defined elsewhere in statute, and the terms already have a widely accepted definition both in case law and current jury instructions.

This analysis is drafted to the committee substitute as passed by the Criminal Justice & Public Safety Subcommittee.