

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 341 Sexual Offenses Definitions

**SPONSOR(S):** Judiciary Committee, Criminal Justice & Public Safety Subcommittee, Slosberg-King

**TIED BILLS:** IDEN./SIM. BILLS: CS/CS/SB 692

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice & Public Safety Subcommittee	18 Y, 0 N, As CS	Frost	Hall
2) Justice Appropriations Subcommittee	14 Y, 0 N	Smith	Keith
3) Judiciary Committee	15 Y, 0 N, As CS	Frost	Kramer

### SUMMARY ANALYSIS

Currently, the terms “vagina” and “vaginal” are not defined under Florida law, but are used to describe prohibited sexual conduct in various sections of law. Without a definition to specify what the Legislature intends to be included in the meaning of the terms, determining a meaning is left to the courts. Currently, the Florida District Courts of Appeals (DCA) have conflicting opinions on the definition of the term “vagina.” Specifically, the Second and Fourth DCAs have held that the term “vagina” has a specific anatomical meaning, and that it includes only the internal canal between the vulva and the uterus, while the Fifth DCA has held the term “vagina” includes the entire vulva area not just the internal passageway. As such, the lack of a statutory definition for the term may lead to disparate outcomes for the same conduct, based on the circuit in which the offense occurs.

The terms “vagina” and “vaginal” are currently used in the following sections of law without being specifically defined:

- Section 39.01, F.S., which uses the term in its definition of “sexual abuse of a child” for purposes of finding a child to be dependent;
- Section 365.161, F.S., which prohibits certain obscene telephone communications;
- Section 491.0112, F.S., relating to sexual misconduct by a psychotherapist;
- Section 775.0847, F.S., relating to the possession or promotion of certain images of child pornography;
- Section 794.011, F.S., relating to sexual battery;
- Section 794.05, F.S., relating to unlawful sexual activity with certain minors;
- Section 796.07, F.S., relating to the prohibition of prostitution;
- Section 800.04, F.S., relating to lewd or lascivious offenses upon or in the presence of a person under 16;
- Section 825.1025, F.S., relating to lewd or lascivious offenses upon or in the presence of an elderly or disabled person;
- Section 827.071, F.S., relating to sexual performance by a child;
- Section 847.001, F.S., which provides definitions relating to obscenity;
- Section 872.06, F.S., relating to abuse of a dead human body;
- Section 944.35, F.S., relating to malicious battery and sexual misconduct by a correctional facility employee; and
- Section 951.27, F.S., relating to blood testing of inmates charged with a sexual offense.

CS/CS/HB 341 amends each of the above-listed statutes relating to prohibited sexual conduct to replace the terms “vagina” or “vaginal” with the terms “female genital” or “female genitals,” and to provide that “female genitals” include the: labia minora; labia majora; clitoris; vulva; hymen; and vagina.

The Criminal Justice Impact Conference met on February 7, 2022, and determined the bill would have a positive indeterminate impact on the prison population by replacing the terms “vagina” and “vaginal” with the newly defined term “female genitals,” which may capture more conduct than under current law.

The bill provides an effective date of October 1, 2022.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

Under Florida law, the terms “vagina” and “vaginal” are used within the descriptions and definitions of numerous prohibited sexual activities, however, the term is not statutorily defined. Currently, several of Florida’s District Courts of Appeal (DCA) have released conflicting opinions on the meaning of the term “vagina.” The Second and Fourth DCAs have held that the term “vagina” has a specific anatomical meaning, and that it includes only the internal canal between the vulva and the uterus,<sup>1</sup> while the Fifth DCA has held that the term “vagina” includes the entire vulva area and not just the internal passageway.<sup>2</sup>

#### Sexual Battery

Section 794.011, F.S., criminalizes sexual battery offenses. Sexual battery 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.<sup>3</sup> The offense level for sexual battery differs based on the offender’s age, the victim’s age, and the presence of other specified circumstances, as follows:

Subsection	Offender’s Age	Victim’s Age	Special Circumstances Present	Felony Level
(2)(a)	≥ 18 yrs.	< 12 yrs.	Injures the victim’s sexual organs	Capital
(2)(b)	< 18 yrs.	< 12 yrs.	Injures the victim’s sexual organs	Life
(3)	No age requirement	≥ 12 yrs.	Uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury	Life
(4)(a)	≥ 18 yrs.	≥ 12 yrs., but < 18 yrs.	Any circumstance listed in s. 794.011(4)(e), F.S.	First
(4)(b)	≥ 18 yrs.	≥ 18 yrs.	Any circumstance listed in s. 794.011(4)(e), F.S.	First
(4)(c)	< 18 yrs.	≥ 12 yrs.	Any circumstance listed in s. 794.011(4)(e), F.S.	First
(4)(d)	No age requirement	≥ 12 yrs.	Any circumstance listed in s. 794.011(4)(e), F.S., and offender was previously convicted of an enumerated sexually motivated offense against a minor	First
(5)(a)	≥ 18 yrs.	≥ 12 yrs., but < 18 yrs.	No physical force or violence likely to cause serious personal injury	First
(5)(b)	≥ 18 yrs.	≥ 18 yrs.	No physical force or violence likely to cause serious personal injury	Second
(5)(c)	< 18 yrs.	≥ 12 yrs.	No physical force or violence likely to cause serious personal injury	Second
(5)(d)	No age requirement	≥ 12 yrs.	No physical force or violence likely to cause serious personal injury but offender was previously convicted of an enumerated sexually motivated offense against a minor	First

Section 794.011(4)(e), F.S., lists specified aggravating factors, including:

<sup>1</sup> See *Richards v. State*, 738 So.2d 415, 419 (Fla. 2d DCA 1999) (holding that the vagina should be defined as “the canal between the vulva and the uterus.”); *Firekey v. State*, 557 So.2d 582 (Fla. 4th DCA 1989) (holding that penetration of the labia does not constitute sexual battery).

<sup>2</sup> See *Palumbo v. State*, 52 So.3d 834 (Fla. 5th DCA 2011).

<sup>3</sup> S. 794.011(1)(h), F.S.

- The victim is physically helpless to resist;
- The offender coerces the victim to submit by threatening the use of force or violence likely to cause serious personal injury to the victim, and the victim reasonably believes that the offender has the present ability to execute the threat;
- The offender coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim reasonably believes that the offender has the ability to execute the threat in the future;
- The offender, without the prior knowledge or consent of the victim, administers or has knowledge of someone else administering to the victim any narcotic, anesthetic, or other intoxicating substance that mentally or physically incapacitates the victim;
- The victim is mentally defective, and the offender has reason to believe this or has actual knowledge of the fact;
- The victim is physically incapacitated;
- The offender is a law enforcement officer, correctional officer, or correctional probation officer,<sup>4</sup> or is an elected official exempt from such certification,<sup>5</sup> or any other person in a position of control or authority in a probation, community control, controlled release, detention, custodial, or similar setting, and such officer, official, or person is acting in such a manner as to lead the victim to reasonably believe that the offender is in a position of control or authority as an agent or employee of the government.

### Obscenity, Sexual Performance by a Child, and Child Pornography

The following definitions apply to offenses related to obscenity, sexual performance by a child, and child pornography:

- “Sexual battery” 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; however, “sexual battery” does not include an act done for a bona fide medical purpose.<sup>6</sup>
- “Sexual bestiality” means any sexual act, actual or simulated, between a person and an animal involving the sex organ of the one and the mouth, anus, or *vagina* of the other.<sup>7</sup>
- “Sexual conduct” means actual or simulated<sup>8</sup> sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or if such person is female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother’s breastfeeding of her baby does not under any circumstances constitute “sexual conduct.”<sup>9</sup>

Because the definition of the term “sexual conduct” includes the terms “sexual battery” and “sexual bestiality” within chapters 847, 827, and 775, F.S., and the terms “sexual battery” and “sexual bestiality” include the terms “vagina” and “vaginal,” the prohibited conduct related to obscenity, sexual performance by a child, and child pornography may also be subject to the same uncertainty regarding the meaning of the terms “vagina” and “vaginal.”

<sup>4</sup> As defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9), F.S., and who is certified under s. 943.1395, F.S.

<sup>5</sup> Under s. 943.253, F.S.

<sup>6</sup> Ss. 775.0847(1)(d), 827.071(1)(f), and 847.001(14), F.S.

<sup>7</sup> Ss. 775.0847(1)(e), 827.071(1)(g), and 847.001(15), F.S.

<sup>8</sup> For purposes of chapters 847 and 827, F.S., the term “simulated” means the explicit depiction of conduct described in subsection (16) which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

<sup>9</sup> Ss. 775.0847(1)(f), 827.071(1)(h), and 847.001(16), F.S.

## Obscenity

Chapter 847, F.S., governs offenses relating to obscenity, and includes in part, laws relating to: the prohibition of certain acts in connection with obscene or lewd materials; the regulation of materials harmful to minors and the sale or distribution of materials harmful to minors; and computer pornography, prohibited computer usage, and traveling to meet minors.

Under ch. 847, F.S., the term “obscene,” means the status of material which:

- The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interests;
- Depicts or describes, in a patently offensive way, *sexual conduct*; and
- Taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>10</sup>

### *Sexual Performance by a Child*

Section 827.071(4), F.S., makes it a second degree felony<sup>11</sup> for a person to possess with the intent to promote<sup>12</sup> any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes any *sexual conduct* by a child.<sup>13</sup> Possession of three or more copies of such photographs, etc., is prima facie evidence of a person’s intent to promote.<sup>14</sup>

Section 827.071(5), F.S., makes it a third degree felony<sup>15</sup> for any person to knowingly possess, control, or intentionally view<sup>16</sup> a photograph, motion picture, or other image that, in whole or in part, he or she knows includes any *sexual conduct* by a child.<sup>17</sup>

### *Child Pornography*

Section 775.0847, F.S., reclassifies violations relating to: sexual performance by a child;<sup>18</sup> computer pornography, prohibited computer usage, and traveling to meet a minor;<sup>19</sup> transmission of pornography by electronic device or equipment;<sup>20</sup> and transmission of material harmful to minors to a minor by electronic device or equipment<sup>21</sup> to the next highest degree felony offense if:

- The offender possesses 10 or more images of any form of child pornography<sup>22</sup> regardless of content; and
- The content of at least one image contains one or more of the following:
  - A child who is younger than the age of 5.
  - Sadoomasochistic abuse<sup>23</sup> involving a child.
  - *Sexual battery* involving a child.
  - *Sexual bestiality* involving a child.
  - Any movie involving a child, regardless of length and whether the movie contains sound.<sup>24</sup>

<sup>10</sup> A mother’s breastfeeding of her baby is not under any circumstance “obscene.” S. 847.001(10), F.S.

<sup>11</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

<sup>12</sup> “Promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do the same. S. 827.071(1)(d), F.S.

<sup>13</sup> “Simulated” means the explicit depiction of sexual conduct which creates the appearance of such conduct and which exhibits an uncovered portion of the breasts, genitals, or buttocks. S. 827.017(1)(j), F.S.

<sup>14</sup> S. 827.071(4), F.S.

<sup>15</sup> A third degree felony is punishable by up to five years in prison and a \$5,000 fine. Ss. 775.082 and 775.083, F.S.

<sup>16</sup> Section 827.071(1)(b), F.S., defines “intentionally view” as to deliberately, purposefully, and voluntarily view. Proof of intentional viewing requires establishing more than a single image, motion picture, exhibition, show, image, data, computer depiction, representation, or other presentation was viewed over any period of time.

<sup>17</sup> The statute also specifies that the possession, control, or intentional viewing of each such photograph, or other image, is a separate offense. If such photograph or other image includes sexual conduct by more than one child, then each child in each photograph or image that is knowingly possessed, controlled, or intentionally was viewed is a separate offense.

<sup>18</sup> S. 827.071, F.S.

<sup>19</sup> S. 847.0135, F.S.

<sup>20</sup> S. 847.0137, F.S.

<sup>21</sup> S. 847.0138, F.S.

<sup>22</sup> Section 775.0847(1)(b), F.S., defines “child pornography” to mean any image depicting a minor engaged in sexual conduct.

<sup>23</sup> Section 775.0847(1)(c), F.S., defines “sadoomasochistic abuse” to mean flagellation or torture by or upon a person or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction, or satisfaction brought about as a result of sadistic violence, from inflicting harm on another or receiving such harm oneself.

## Unlawful Sexual Activity with Certain Minors

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.<sup>25</sup> 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. Unlawful sexual activity with certain minors is punishable as a second degree felony, and a person convicted of the offense must register as a sexual offender under s. 943.0435, F.S.

## Lewd or 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.<sup>26</sup> Sections 800.04 and 825.1025, F.S., criminalize specified lewd or lascivious offenses committed upon or in the presence of specified persons, and both sections define 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.<sup>27</sup>

### *Lewd or Lascivious Battery – Victim Younger than 16*

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.<sup>28</sup>

Lewd or lascivious battery is generally a second degree felony,<sup>29</sup> unless the offender was previously convicted of lewd or lascivious battery or another specified offense,<sup>30</sup> in which case the offense is reclassified as a first degree felony.<sup>31</sup>

### *Lewd or Lascivious Exhibition – Victim Younger than 16*

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.<sup>32</sup>

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<sup>24</sup> S. 775.0847(2), F.S.

<sup>25</sup> However, a person 16 or 17 years of age who has been emancipated under ch. 743, F.S., is not considered a victim of unlawful sexual activity with minors. S. 794.05(2), F.S.

<sup>26</sup> *Chesebrough v. State*, 255 So.2d 675, 677 (Fla. 1971).

<sup>27</sup> Sexual activity does not include an act done for a bona fide medical purpose. Ss. 800.04(1)(a) and 825.1025(1) F.S.

<sup>28</sup> S. 800.04(4)(a), F.S.

<sup>29</sup> 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.

<sup>30</sup> 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.

<sup>31</sup> 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.

<sup>32</sup> S. 800.04(7), F.S.

Lewd or lascivious exhibition is either a second or third degree felony depending on the offender's age.<sup>33</sup>

### *Lewd or Lascivious Battery or Exhibition – Elderly or Disabled Victim*

Under s. 825.1025, F.S., a person commits lewd or lascivious battery or exhibition upon an elderly or disabled person in the same manner as an offense of lewd or lascivious battery or exhibition involving a victim younger than 16, except that the offense is committed against an elderly or disabled person whom the perpetrator knew or reasonably should have known either lacked the capacity to consent or failed to give consent.<sup>34</sup>

Lewd or lascivious battery against an elderly or disabled victim is a second degree felony<sup>35</sup> and lewd or lascivious exhibition against an elderly or disabled person is a third degree felony.<sup>36</sup>

### Sexual Misconduct Committed by Certain Professionals

Florida prohibits certain professionals from engaging in sexual misconduct with specified persons, regardless of whether the sexual activity is consensual. Sexual misconduct under these circumstances 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.<sup>37</sup>

#### *Psychotherapists*

Section 491.0112, F.S., prohibits a psychotherapist from engaging in sexual misconduct with a:

- Client;<sup>38</sup> or
- Former client when the professional relationship between the psychotherapist and the client was terminated primarily for the purpose of engaging in sexual contact.

A psychotherapist commits a:

- Third degree felony by committing a first offense of sexual misconduct with a client.<sup>39</sup>
- Second degree felony by committing:<sup>40</sup>
  - A second or subsequent offense of sexual misconduct with a client; or
  - Any offense of sexual misconduct with a client by means of therapeutic deception.<sup>41</sup>

A psychotherapist is prohibited from raising a client's consent as a defense to a prosecution for any offense of sexual misconduct by a psychotherapist.<sup>42</sup>

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<sup>33</sup> S. 800.04(7)(b)–(c), F.S.

<sup>34</sup> S. 825.1025(2) and (4), F.S.

<sup>35</sup> S. 825.1025(2)(b), F.S.

<sup>36</sup> S. 825.1025(4)(b), F.S.

<sup>37</sup> See ss. 491.0112 and 944.35, F.S.

<sup>38</sup> "Client" means a person to whom the services of a psychotherapist are provided. S. 491.0112(4)(d), F.S.

<sup>39</sup> S. 491.0112(1), F.S.

<sup>40</sup> *Id.*; S. 491.112(2), F.S.

<sup>41</sup> "Therapeutic deception" means a representation to the client that sexual contact by the psychotherapist is consistent with or part of the treatment of the client. S. 491.0112(4)(b), F.S.

<sup>42</sup> S. 491.0112(3), F.S.

## *Correctional Facility Employees*

Section 944.35, F.S., prohibits an employee of the Department of Corrections (DOC) or a private correctional facility from engaging in sexual misconduct with an inmate or offender who is supervised by DOC in the community. An employee who engages in sexual misconduct, without committing the crime of sexual battery, commits a third degree felony.<sup>43</sup> An employee is prohibited from raising the consent of the inmate or offender as a defense to a prosecution for an offense of sexual misconduct.<sup>44</sup>

### Blood Tests of Inmates

Section 951.27, F.S., requires each county and municipal detention facility to have a written procedure establishing the conditions under which an inmate will be tested for infectious diseases.<sup>45</sup>

Except as otherwise provided, the results of such blood tests are confidential and exempt from public records requirements. One exception to this exemption provides that a victim, or the victim's parent or legal guardian, may request the results of any human immunodeficiency virus test performed on an inmate who has been arrested for a sexual offense involving the oral, anal, or *vaginal* penetration by, or union with, the sexual organ of another.<sup>46</sup>

### Prostitution

Prostitution means the giving or receiving of the body for sexual activity for hire.<sup>47</sup> For purposes of prostitution, sexual activity means oral, anal, or *vaginal* penetration by, or union with, the sexual organ of another; anal or *vaginal* penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation.<sup>48</sup>

Section 796.07(2), F.S., prohibits various acts relating to prostitution, providing in part, that a person may not:

- Offer to commit, commit, or engage in prostitution, lewdness, or assignation if he or she is 18 years of age or older.
- Solicit, induce, entice, or procure another to commit prostitution, lewdness, or assignation.
- Purchase the services of any person engaged in prostitution.

### Abuse of a Dead Human Body

A person who mutilates, commits sexual abuse upon, or otherwise grossly abuses a dead human body commits a second degree felony.<sup>49</sup>

For purposes of abuse of a dead human body, "sexual abuse" means:

- Anal or *vaginal* penetration of a dead human body by the sexual organ of a person or by any other object;
- Contact or union of the penis, *vagina*, or anus of a person with the mouth, penis, *vagina*, or anus of a dead human body; or
- Contact or union of a person's mouth with the penis, *vagina*, or anus of a dead human body.<sup>50</sup>

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<sup>43</sup> S. 944.35, F.S. Sexual misconduct does not include acts done for bona fide medical purposes.

<sup>44</sup> Unless the employee: is legally married to the inmate or offender; or has no knowledge, and would have no reason to believe, that the person with whom the employee has engaged in sexual misconduct is an inmate or an offender.

<sup>45</sup> S. 951.27(1), F.S.

<sup>46</sup> S. 951.27(2), F.S.

<sup>47</sup> Excluding any sexual activity between spouses. S. 796.07(1)(a), F.S.

<sup>48</sup> S. 796.07(1)(d), F.S. Sexual activity does not include acts done for bona fide medical purposes.

<sup>49</sup> An act done for a bona fide medical purpose or any other lawful purpose is not a criminal offense. S. 872.06(2), F.S.

<sup>50</sup> S. 872.06(1), F.S.

## Sexual Abuse of a Child in Dependency Proceedings

Chapter 39, F.S., governs proceedings relating to children who are abused, abandoned, or neglected. The goal is for the dependency court and all parties involved in the child's case to ensure the child remains safe.<sup>51</sup> The Department of Children and Families (DCF) operates the Florida central abuse hotline (hotline), which accepts reports of known or suspected child abuse,<sup>52</sup> abandonment,<sup>53</sup> or neglect.<sup>54, 55</sup> A person who knows or suspects that a child has been abused, abandoned, or neglected or who knows, or has reasonable cause to suspect that a child is the victim of sexual abuse or juvenile sexual abuse must make a report to the hotline.<sup>56</sup>

A child protective investigation begins if the hotline determines the allegations meet the statutory definition of abuse, abandonment, or neglect.<sup>57</sup> If, after conducting an investigation in response to receiving a call to the hotline, the child protective investigator determines that the child is in need of protection and supervision that necessitates removal, the investigator may initiate formal proceedings to remove the child from his or her home. The proceeding, known as a shelter hearing, results in a court determining if probable cause exists to keep a child in shelter<sup>58</sup> status pending further investigation of the circumstances leading to the detention of a child.<sup>59</sup> When the DCF removes a child from the home, a series of dependency court proceedings must occur before a child may be found to be dependent.<sup>60</sup>

For purposes of finding a child to be dependent under ch. 39, F.S., "sexual abuse of a child" means one or more of the following acts:

- Any penetration, however slight, of the *vagina* or anal opening of one person by the penis of another person, whether or not there is the emission of semen.
- Any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person.

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<sup>51</sup> S. 39.001(1)(a), F.S.

<sup>52</sup> Section 39.01(2), F.S., defines "abuse" as any willful act or threatened act that results in any physical, mental, or sexual abuse, injury, or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired. Abuse of a child includes the birth of a new child into a family during the course of an open dependency case when the parent or caregiver has been determined to lack the protective capacity to safely care for the children in the home and has not substantially complied with the case plan towards successful reunification or met the conditions for return of the children into the home. Abuse of a child also includes acts or omissions. Corporal discipline of a child by a parent or legal custodian for disciplinary purposes does not in itself constitute abuse when it does not result in harm to the child.

<sup>53</sup> Section 39.01(1), F.S., defines "abandonment," in part, to mean a situation in which the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the caregiver, while being able, has made no significant contribution to the child's care and maintenance or has failed to establish or maintain a substantial and positive relationship with the child, or both. It further defines, "establish or maintain a substantial and positive relationship" to include, but not be limited to, frequent and regular contact with the child through frequent and regular visitation or frequent and regular communication to or with the child, and the exercise of parental rights and responsibilities. The definition specifically provides that marginal efforts and incidental or token visits or communications are not sufficient to establish or maintain a substantial and positive relationship with a child.

<sup>54</sup> Section 39.01(50), F.S., defines "neglect" to mean when a child is deprived of, or is allowed to be deprived of, necessary food, clothing, shelter, or medical treatment or a child is permitted to live in an environment when such deprivation or environment causes the child's physical, mental, or emotional health to be significantly impaired or to be in danger of being significantly impaired. Circumstances are not to be considered neglect if caused primarily by financial inability unless actual services for relief have been offered to and rejected. Further, a parent or legal custodian legitimately practicing religious beliefs in accordance with a recognized church or religious organization who thereby does not provide specific medical treatment for a child may not, for that reason alone, be considered a negligent parent or legal custodian, unless a court orders the following services to be provided, when the health of the child so requires: medical services from a licensed physician, dentist, optometrist, podiatric physician, or other qualified health care provider; or treatment by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well-recognized church or religious organization. The definition further provides that neglect of a child includes acts or omissions.

<sup>55</sup> S. 39.101(1)(a), F.S.

<sup>56</sup> S. 39.201(1)(a)1., F.S.

<sup>57</sup> S. 39.201(4), F.S.

<sup>58</sup> Section 39.01(78), F.S., defines "shelter" to mean a placement with a relative or a nonrelative, or in a licensed home or facility, for the temporary care of a child who is alleged to be or who has been found to be dependent, pending court disposition before or after adjudication.

<sup>59</sup> S. 39.01(79), F.S.

<sup>60</sup> See s. 39.01(14), F.S., for the definition of "child who is found to be dependent".



- Any intrusion by one person into the genitals or anal opening of another person including the use of any object for this purpose, except that this does not include any act intended for a valid medical purpose.
- The intentional touching of the genitals or intimate parts, including the breasts, genital area, groin, inner thighs, and buttocks, or the clothing covering them, of either the child or the perpetrator, except that this does not include any act which may reasonably be construed to be a normal caregiver responsibility, any interaction with, or affection for a child, or any act intended for a valid medical purpose.
- The intentional masturbation of the perpetrator's genitals in the presence of a child.
- The intentional exposure of the perpetrator's genitals in the presence of a child, or any other sexual act intentionally perpetrated in the presence of a child, if such exposure or sexual act is for the purpose of sexual arousal or gratification, aggression, degradation, or other similar purpose.
- The sexual exploitation of a child, which includes the act of a child offering to engage in or engaging in prostitution, or the act of allowing, encouraging, or forcing a child to solicit for or engage in prostitution, engage in sexual performance, or participate in the trade of human trafficking.<sup>61</sup>

### Prohibition of Certain Obscene Phone Calls

A person commits a second degree misdemeanor<sup>62</sup> if he or she makes, or knowingly permits the use of a telephone or telephone facility under his or her control to make any obscene or indecent communication by means of a telephone, in person or through an electronic recording device, in exchange for payment.<sup>63</sup>

For purposes of s. 365.161, F.S., "obscene" means the status of communication which:

- The average person applying contemporary community standards would find, taken as a whole, appeals to the prurient interests;
- Describes, in a patently offensive way, deviate sexual intercourse, sadomasochistic abuse, sexual battery, bestiality, sexual conduct, or sexual excitement; and
- Taken as a whole, lacks serious literary, artistic, political, or scientific value.

Additionally, s. 365.161, F.S., provides, in part, the following definitions:

- "Sexual battery," means oral, anal, or *vaginal* penetration by, or union with, the sexual organ of the one and the mouth, anus, or *vagina* of the other.<sup>64</sup>
- "Sexual bestiality," means any sexual act between a person and an animal involving the sex organ of the one and the mouth, anus, or *vagina* of the other.<sup>65</sup>

### **Effect of Proposed Changes**

CS/CS/HB 341 amends the following statutes relating to prohibited sexual conduct, to replace the terms "vagina" or "vaginal" with "female genital" or "female genitals":

- Section 39.01, F.S., which uses the term in its definition of "sexual abuse of a child" for purposes of finding a child to be dependent;
- Section 365.161, F.S., which prohibits certain obscene telephone communications;
- Section 491.0112, F.S., relating to sexual misconduct by a psychotherapist;
- Section 775.0847, F.S., relating to the possession or promotion of certain images of child pornography;
- Section 794.011, F.S., relating to sexual battery;
- Section 794.05, F.S., relating to unlawful sexual activity with certain minors;
- Section 796.07, F.S., relating to the prohibition of prostitution;

<sup>61</sup> S. 39.01(77), F.S.

<sup>62</sup> A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Ss. 775.082 and 775.083, F.S.

<sup>63</sup> S. 365.161(2), F.S.

<sup>64</sup> S. 365.161(1)(d), F.S.

<sup>65</sup> S. 365.161(1)(e), F.S.

- Section 800.04, F.S., relating to lewd or lascivious offenses upon or in the presence of a person under 16;
- Section 825.1025, F.S., relating to lewd or lascivious offenses upon or in the presence of an elderly or disabled person;
- Section 827.071, F.S., relating to sexual performance by a child;
- Section 847.001, F.S., which provides definitions relating to obscenity;
- Section 872.06, F.S., relating to abuse of a dead human body;
- Section 944.35, F.S., relating to malicious battery and sexual misconduct by a correctional facility employee; and
- Section 951.27, F.S., relating to blood testing of inmates charged with a sexual offense.

Under the bill, the term “female genitals” includes the:

- Labia minora;
- Labia majora;
- Clitoris;
- Vulva;
- Hymen; and
- Vagina.

The bill removes any ambiguity in the meaning of the terms “vagina” or “vaginal” and resolves the conflict between the Florida DCAs regarding the definition of the term “vagina,” which may lead to more equivalent outcomes amongst the circuits based on the same conduct.

The bill also amends ss. 395.0197, 415.102, and 847.0141, F.S., to make conforming cross-reference changes.

The bill provides an effective date of October 1, 2022.

#### B. SECTION DIRECTORY:

- Section 1:** Amends s. 39.01, F.S., relating to definitions.
- Section 2:** Amends s. 365.161, F.S., relating to prohibition of certain obscene telephone communications; penalty.
- Section 3:** Amends s. 491.0112, F.S., relating to sexual misconduct by a psychotherapist; penalties.
- Section 4:** Amends s. 775.0847, F.S., relating to possession or promotion of certain images of child pornography; reclassification.
- Section 5:** Amends s. 794.011, F.S., relating to sexual battery.
- Section 6:** Amends s. 794.05, F.S., relating to unlawful sexual activity with certain minors.
- Section 7:** Amends s. 796.07, F.S., relating to prohibiting prostitution and related acts.
- Section 8:** Amends s. 800.04, F.S., relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age.
- Section 9:** Amends s. 825.1025, F.S., relating to lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person.
- Section 10:** Amends s. 827.071, F.S., relating to sexual performance by a child; penalties.
- Section 11:** Amends s. 847.001, F.S., relating to definitions.
- Section 12:** Amends s. 872.06, F.S., relating to abuse of a dead human body; penalty.
- Section 13:** Amends s. 944.35, F.S., relating to authorized use of force; malicious battery and sexual misconduct prohibited; reporting required; penalties.
- Section 14:** Amends s. 951.27, F.S., relating to blood tests of inmates.
- Section 15:** Amends s. 395.0197, F.S., relating to internal risk management.
- Section 16:** Amends s. 415.102, F.S., relating to definitions of terms used in ss. 415.101-415.113.
- Section 17:** Amends s. 847.0141, F.S., relating to sexting; prohibited acts; penalties.
- Section 18:** Provides an effective date of October 1, 2022.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference met on February 7, 2022 and determined the bill may have a positive indeterminate impact on the prison population by replacing the terms “vagina” or “vaginal” with the newly defined term “female genitals” in a number of statutes, which may capture more conduct than that which is prohibited under current law.<sup>66</sup>

Per the Department of Corrections, there were 700 new commitments to prison under the statutes amended in the bill in fiscal year 2018-19. In fiscal year 2019-20, there were 602 new commitments, and in fiscal year 2020-21, there were 436 new commitments. However, it is unknown how many additional offenses will be captured under the bill.<sup>67</sup>

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may have an insignificant impact on jail beds by replacing the term “vagina” or “vaginal” with the newly defined term “female genitals” for the crime of making certain obscene phone calls.

### 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. 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:

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<sup>66</sup> Criminal Justice Impact Conference, *SB 692 – Sexual Offenses Definitions (Similar to HB 341)*, February 7, 2022, <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/SB692.pdf> (last visited Feb. 23, 2022).

<sup>67</sup> *Id.*

None.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

On February 8, 2022, the Criminal Justice & Public Safety Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment replaced the term “genitals” with the term “female genitals,” throughout the bill to avoid any conflict with the use of the term “genitals” under current law when intended to refer to both male and female genitalia.

On February 23, 2022, the Judiciary Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Replaced the terms “vagina” or “vaginal” with “female genital” or “female genitals” and provided a definition for the term “female genitals” in the following additional statutes:
  - Section 491.0112, F.S., relating to sexual misconduct by a psychotherapist;
  - Section 794.05, F.S., relating to unlawful sexual activity with certain minors;
  - Section 796.07, F.S., relating to the prohibition of prostitution;
  - Section 800.04, F.S., relating to lewd or lascivious offenses upon or in the presence of a person under 16;
  - Section 825.1025, F.S., relating to lewd or lascivious offenses upon or in the presence of an elderly or disabled person;
  - Section 944.35, F.S., relating to malicious battery and sexual misconduct by a correctional facility employee; and
  - Section 951.27, F.S., relating to blood testing of inmates charged with a sexual offense.
- Made technical changes to the bill.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.