

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 379 Indecent, Lewd, or Lascivious Touching
SPONSOR(S): Criminal Justice & Public Safety Subcommittee, Chaney
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 444

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		Smith	Keith
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 under 16 years of age: lewd or lascivious battery; lewd or lascivious molestation; lewd or lascivious conduct; and lewd or lascivious exhibition. 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.

The penalty for lewd or lascivious molestation ranges from a third degree felony up to a life felony depending on the offender's age, the victim's age, and the circumstances surrounding the commission of the offense, and a victim's consent is not a defense. Additionally, 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 consent. 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, excluding an act done for legitimate medical purposes.

A battery occurs when a person: actually and intentionally touches or strikes another person against the other person's will; or intentionally causes bodily harm to another person. Battery is generally a first degree misdemeanor, however, if an offender has a prior conviction for battery, felony battery, or aggravated battery, a battery offense may be enhanced to a third degree felony. As such, under current law, a person older than 24 commits a second degree felony by engaging in sexual activity with a 16 or 17 year old victim, regardless of consent, and a person who touches, in a lewd or lascivious manner, the clothed or unclothed breasts or genital area of a person under 16 commits a felony offense, but a person who intentionally touches the breasts, genitals, genital area, or buttocks of a person 16 or older may only be charged with a misdemeanor battery.

CS/HB 379 creates s. 784.0355, F.S., to create the crime of indecent battery and amends s. 794.05, F.S., to create the crime of lewd or lascivious touching of certain minors (LLT of minors). Under the bill, a person commits indecent battery by intentionally touching a person 16 or older against his or her will on the breasts, genitals, genital area, or buttocks, or on the clothing covering them or forcing a person 16 years of age or older to so touch the perpetrator. A first offense of indecent battery is punishable as a first degree misdemeanor and a second or subsequent offense is punishable as a third degree felony, ranked as a level 3 offense on the Criminal Punishment Code offense severity ranking chart (OSRC). The bill also provides that a person may be charged with both battery and indecent battery, but a jury may only return a verdict for one offense.

Under the bill, a person 24 or older who intentionally touches a 16 or 17 year old person in a lewd or lascivious manner on the breasts, genitals, genital area, or buttocks, or the clothing covering them, or forces or entices a 16 or 17 year old to so touch the perpetrator commits LLT of minors, a third degree felony, ranked as a level 4 offense on the OSRC. A person convicted of LLT of minors must register as a sexual offender.

The Criminal Justice Impact Conference met on February 7, 2022, and determined the bill would have a positive indeterminate impact on prison beds.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

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 While Florida criminalizes specified lewd or lascivious contact with a person under the age of 16 as a felony offense, the same type of contact committed upon a person 16 years of age or older may only be charged as a misdemeanor battery.

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.²

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. However, the offense is always punishable as a felony and only applies when a victim is younger than 16.³

An offender who is 18 years of age or older when he or she commits lewd or lascivious molestation upon a victim:⁴

- Younger than 12 years of age, commits a life felony.⁵
- 12 years of age or older but younger than 16 years of age, commits a second degree felony.
- 12 years of age or older but younger than 16 years of age, and the perpetrator was previously convicted of a specified offense, commits a first degree felony.

An offender who is younger than 18 years of age when he or she commits lewd or lascivious molestation upon a victim:⁶

- Younger than 12 years of age, commits a second degree felony.
- 12 years of age or older but younger than 16 years of age, commits a third degree felony.

In a prosecution for any lewd or lascivious offense under s. 800.04, F.S., a perpetrator is prohibited from raising any of the following as a defense:

- The victim's lack of chastity;
- The victim's consent;
- The perpetrator's ignorance of the victim's age;
- The victim's misrepresentation of his or her age; or
- The perpetrator's bona fide belief of the victim's age.

While a person who touches, in a lewd or lascivious manner, the clothed or unclothed breasts, genitals, genital area, or buttocks of a person under 16 commits a third degree felony up to a life felony offense, current law does not specifically criminalize similar touching upon a victim 16 or older.

Unlawful Sexual Activity with a Minor

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

² S. 800.04(5)(a), F.S.

³ See s. 800.04(5)(b)-(e), F.S.

⁴ S. 800.04(5)(b), (c)2., and (e), F.S.

⁵ A life felony is punishable by up to life in prison and a \$15,000 fine. Ss. 775.082, 775.083, or 775.084, F.S.

⁶ S. 800.04(c)1. and (d), F.S.

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.⁷ 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. A person convicted of unlawful sexual activity with a minor must register as a sexual offender under s. 943.0435, F.S.

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 24 years of age or older 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 specifically criminalize touching the breasts, genitals, genital area, or buttocks of such a minor.

Battery

A battery occurs when a person:

- Actually and intentionally touches or strikes another person against the other person's will; or
- Intentionally causes bodily harm to another person.⁸

Battery is generally a first degree misdemeanor,⁹ however, if an offender has a prior conviction for battery, felony battery, or aggravated battery, the offense may be enhanced to a third degree felony.¹⁰

¹¹

Felony battery occurs when a person: actually and intentionally touches or strikes another person against the will of the other person and, in so doing, causes great bodily harm, permanent disability, or permanent disfigurement; or commits domestic battery by strangulation.¹²

Aggravated battery, a second degree felony, occurs when a person committing a battery:

- Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement;
- Uses a deadly weapon; or
- Knows or should have known that the victim was pregnant at the time of the offense.¹³

A battery offense does not distinguish touching another person on the breasts, genitals, genital area, or buttocks from touching a person anywhere else on his or her body.

⁷ 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.

⁸ S. 784.03, F.S.

⁹ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Ss. 775.082 and 775.083, F.S.

¹⁰ "Conviction" means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of nolo contendere is entered. S. 784.03, F.S.

¹¹ A misdemeanor battery offense may also be reclassified as a felony offense when committed upon specified persons or specified persons engaged in the lawful performance of their duties, such as a law enforcement officer, a person older than 65 years of age, or a code inspector. See ss. 162.04(2), 784.07, 784.074, 784.08, 784.081, 784.082, 784.083, and 1000.04, F.S.

¹² S. 784.041, F.S.

¹³ S. 784.045, F.S. Additionally, an aggravated battery committed by a person acting in furtherance of a riot or an aggravated riot prohibited under s. 870.01, F.S., is ranked one level above the ranking under s. 921.0022, F.S., for the offense committed.

Criminal Punishment Code

Felony offenses which are subject to the Criminal Punishment Code¹⁴ are listed in a single offense severity ranking chart (OSRC),¹⁵ which uses 10 offense levels to rank felonies from least severe to most severe. Each felony offense listed in the OSRC is assigned a level according to the severity of the offense.^{16, 17} A person's primary offense, any other current offenses, and prior convictions are scored using the points designated for the offense severity level of each current offense.^{18, 19} The final score calculation, following the scoresheet formula, determines the lowest permissible sentence that a trial court may impose, absent a valid reason for departure.²⁰

Effect of Proposed Changes

CS/HB 379 creates s. 784.0355, F.S., to create the new crime of indecent battery and amends s. 794.05, F.S., to create the new crime of lewd or lascivious touching of certain minors. Under the bill, a person commits indecent battery by:

- Intentionally touching a person 16 years of age or older against his or her will on the breasts, genitals, genital area, or buttocks, or on the clothing covering them; or
- Forcing a person 16 years of age or older to so touch the perpetrator on the breasts, genitals, genital area, or buttocks, or on the clothing covering them.

A first offense of indecent battery is punishable as a first degree misdemeanor, and after a conviction for a first offense, a second or subsequent offense is punishable as a third degree felony, and is ranked as a level 3 offense on the OSRC. This distinguishes the offense from a felony battery based on a prior conviction, which is not ranked on the OSRC and therefore defaults to a level 1. The bill also provides that a person may be charged with both battery and indecent battery, but a jury may only return a verdict for one offense, not both,²¹ based on whether it is proven beyond a reasonable doubt that the victim was 16 years of age or older and the perpetrator: intentionally touched the victim on the breasts, genitals, genital area, or buttocks, or the clothing covering them; or forced the victim to so touch the perpetrator.

Additionally, under the bill, a person 24 years of age or older who intentionally touches a 16 or 17-year-old in a lewd or lascivious manner on the breasts, genitals, genital area, or buttocks, or the clothing covering them, or forces or entices a 16 or 17-year-old to so touch the perpetrator commits lewd or lascivious touching of certain minors. This offense is punishable as a third degree felony, is ranked as a level 4 on the OSRC, and a person convicted of this offense is required to register as a sex offender.²²

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

B. SECTION DIRECTORY:

Section 1: Creates s. 784.0355, F.S., relating to indecent battery.

¹⁴ All felony offenses, with the exception of capital felonies, committed on or after October 1, 1998, are subject to the Criminal Punishment Code.

¹⁵ S. 921.0022, F.S.

¹⁶ S. 921.0022(2) and (3)(e), F.S.

¹⁷ Felony offenses that are not listed in the OSRC default to statutorily assigned levels, as follows: an unlisted third degree felony defaults to a level 1; an unlisted second degree felony defaults to a level 4; an unlisted first degree felony defaults to a level 7; an unlisted first degree felony punishable by life defaults to a level 9; and an unlisted life felony defaults to a level 10. S. 921.0023, F.S.

¹⁸ Ss. 921.0022 and 921.0024, F.S.

¹⁹ A person may also accumulate points for factors such as victim injury points, community sanction violation points, and certain sentencing multipliers. S. 921.0024(2), F.S.

²⁰ If a person scores more than 44 points, the lowest permissible sentence is a specified term of months in state prison, determined by a formula. If a person scores 44 points or fewer, the court may impose a nonprison sanction, such as a county jail sentence, probation, or community control. *Id.*

²¹ S. 812.025, F.S., provides a similar provision relating to charging both theft and dealing in stolen property.

²² Under s. 943.0435, F.S., a person is a sexual offender if he or she is convicted of a qualifying offense and has been released from a sanction imposed after a specified date, or if no sanction is imposed, the person is deemed to be released upon conviction. All sexual offenders are required to comply with a number of statutory reporting requirements. Generally, failing to comply with these registration requirements is punishable as a third degree felony. A conviction for any lewd or lascivious acts listed under s. 800.04, F.S., requires a person to register as a sexual offender.

Section 2: Creates s. 784.036, F.S., relating to charging battery and indecent battery.

Section 3: Amends s. 794.05, F.S., relating to unlawful sexual activity with certain minors.

Section 4: Amends s. 921.0022, F.S., Criminal Punishment Code; offense severity ranking chart.

Section 3: 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 would have a positive indeterminate impact on prison beds.²³

Per FDLE, there were 125 people arrested for the second degree misdemeanors of lewd and lascivious behavior (s. 798.02, F.S.) and unnatural and lascivious act (s. 800.02, F.S.) in FY 18-19. In FY 19-20, there were 63 people arrested, and in FY 20-21, there were 50 people arrested. It is not known how many of those arrested fit the definition of the conduct described under s. 784.0355, F.S. or the new language under s. 794.05, F.S. It is possible that this conduct might currently fall under simple battery, a high volume misdemeanor offense that elevates to a Level 1, 3rd degree felony if a second or subsequent battery occurs after a prior conviction. However, it cannot be determined where these offenses are currently captured, nor how many arrests occur for these acts in a given year.²⁴

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate positive impact on jail beds by creating a new misdemeanor offense for indecent battery. However, any impact will likely be insignificant as such conduct may currently be charged as a battery.

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:

²³ Criminal Justice Impact Conference, *CS/HB 379 – Indecent, Lewd, or Lascivious Touching*, February 7, 2022, <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/CSHB379.pdf>, last accessed on February 10, 2022.

²⁴ *Id.*

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On February 3, 2022, the Criminal Justice & Public Safety Subcommittee adopted a proposed committee substitute (PCS) and report the bill favorably as a committee substitute. The PCS differed from the original bill as it:

- Made the following changes to the offense of lewd or lascivious molestation committed upon persons 16 years of age or older:
 - Renamed the offense indecent battery and revised elements of the offense;
 - Moved the offense from s. 800.06, F.S., to s. 784.0355, F.S.;
 - Provided that a person may be charged with both battery and indecent battery, but a jury may only return a verdict for one offense, not both; and
 - Ranked a second or subsequent offense as a level 3 offense on the OSRC.

- Created the crime of lewd or lascivious touching of certain minors, a third degree felony, ranked as a level 4 on the OSRC.

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