

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1135 Lewd or Lascivious Grooming
SPONSOR(S): Criminal Justice Subcommittee, Yarkosky and others
TIED BILLS: IDEN./SIM. BILLS: SB 1238

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	15 Y, 2 N, As CS	Leshko	Hall
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

It is estimated that in about half of all child sexual abuse cases the abuse is preceded by sexual grooming. Sexual grooming is a preparatory process in which a perpetrator selects a victim, gains access to and isolates the victim, develops trust with the victim and often other adults in the victim's life, and desensitizes the victim to sexual content and physical contact. Post-abuse, the offender may engage in maintenance strategies in order to facilitate future sexual abuse and to prevent disclosure.

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. Under s. 800.04(6), F.S., a person commits lewd or lascivious conduct by soliciting a person under 16 to commit a lewd or lascivious act. Lewd or lascivious conduct is a second-degree felony if the offender is 18 years of age or older.

Under s. 800.04(7), F.S., a person commits lewd or lascivious exhibition by intentionally performing any of the following acts in the presence of a person under 16: masturbating; exposing the genitals in a lewd or lascivious manner; or committing any other sexual act that does not involve actual physical or sexual contact with the victim. Lewd or lascivious exhibition is a second-degree felony if the offender is 18 years of age or older.

Under s. 847.0135(3), F.S., a person commits a third-degree felony if he or she knowingly uses a computer online service, internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the offender to be a child, to commit any illegal act described in chapter 794 (sexual battery), chapter 800 (lewdness/indecent exposure), or chapter 827 (abuse of children) or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the offender to be a child.

While there are several offenses in current law which prohibit a person from encouraging, enticing, soliciting, or inducing a minor to engage in sexual activity, lewd or lascivious behavior, or a sexual performance, current law does not specifically criminalize the preparation of a child to engage in sexual activity, sexual conduct, or a sexual performance through a pattern of inappropriate communication or conduct directed toward the child.

CS/HB 1135 creates s. 800.045, F.S., to prohibit a person 18 years of age or older from committing lewd or lascivious grooming by engaging in a pattern of inappropriate communication or conduct directed toward a person less than 16 years of age for the purpose of preparing, encouraging, or enticing such person to engage in any unlawful sexual activity, sexual conduct, or sexual performance. A violation of the prohibition is a third-degree felony.

The bill may have an indeterminate positive impact on jail and prison beds. See Fiscal Comments.

The bill provides an effective date of October 1, 2024.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Grooming

It is estimated that in about half of all child sexual abuse cases the abuse is preceded by sexual grooming. Sexual grooming is a preparatory process in which a perpetrator selects a victim, gains access to and isolates the victim, develops trust with the victim and often other adults in the victim's life, and desensitizes the victim to sexual content and physical contact.¹ During the desensitization phase, the perpetrator typically introduces sexual content disguised as jokes or discussions, or through exposure to pornography or other explicit material,² and utilizes frequent non-sexual touch to desensitize the victim to physical contact. Post-abuse, the offender may engage in maintenance strategies in order to facilitate future sexual abuse and to prevent disclosure.³

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.^{4, 5}

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.

Neither the victim's lack of chastity nor the victim's consent is a defense to lewd or lascivious offenses. Additionally, 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 cannot be raised as a defense.⁶

Lewd or Lascivious Battery

A person commits lewd and lascivious battery by:

- Engaging in sexual activity⁷ 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.⁸

¹ Psychology Today, *How to Recognize the Sexual Grooming of a Minor*, (July 7, 2023) <https://www.psychologytoday.com/us/blog/protecting-children-from-sexual-abuse/202010/how-to-recognize-the-sexual-grooming-of-a-minor> (last visited Jan. 16, 2024).

² Helping Survivors, *Sexual Grooming*, <https://helpingsurvivors.org/grooming/> (last visited Jan. 16, 2024).

³ Psychology Today, *supra*, at note 1.

⁴ *Chesebrough v. State*, 255 So.2d 675, 677 (Fla. 1971).

⁵ Whether an act or conduct is lewd or lascivious is a factual issue to be decided on a case-by-case basis. *Andrews v. State*, 130 So. 3d 788, 790 (Fla. 1st DCA 2014).

⁶ S. 800.04(2-3), F.S.

⁷ Sexual activity means oral, anal, or female genital penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object. S. 800.04(1)(d), F.S.

⁸ S. 800.04(4)(a), F.S.

Lewd or lascivious battery is generally a second-degree felony,⁹ unless the offender is 18 years of age or older and was previously convicted of lewd or lascivious battery or another specified offense,¹⁰ in which case the offense is reclassified as a first-degree felony.^{11, 12}

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.¹³

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 as follows:

- If the offender is 18 years of age or older and the victim is less than 12 years of age, the offense is a life felony.^{14, 15}
- If the offender is less than 18 years of age and the victim is less than 12 years of age, the offense is a second-degree felony.¹⁶
- If the offender is 18 years of age or older and the victim is 12 years of age or older but less than 16 years of age, the offense is a second-degree felony.¹⁷
- If the offender is less than 18 years of age and the victim is 12 years of age or older but less than 16 years of age, the offense is a third-degree felony.^{18, 19}
- If the offender is 18 years of age or older and the victim is 12 years of age or older but less than 16 years of age and the offender has previously been convicted of lewd or lascivious molestation or another specified offense,²⁰ the offense is a first-degree felony.²¹

Lewd or Lascivious Conduct

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.²²

Lewd or lascivious conduct is a second-degree felony if the offender is 18 years of age or older²³ and a third-degree felony if the offender is younger than 18 years of age.^{24, 25}

⁹ S. 800.04(4)(b), F.S.; 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.

¹⁰ Other offenses include a violation of: ss. 787.01(2) or 787.02(2), F.S., when the victim 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.

¹¹ S. 800.04(4)(c), F.S.; 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.

¹² Both a second-degree and first-degree felony lewd or lascivious battery are ranked as a level 8 offense on the Criminal Punishment Code's offense severity ranking chart (OSRC).

¹³ S. 800.04(5)(a), F.S.

¹⁴ A life felony is punishable by life imprisonment and a \$15,000 fine. Ss. 775.082, 775.083, or 775.084, F.S.

¹⁵ Ranked as a level 9 offense on the OSRC.

¹⁶ Ranked as a level 7 offense on the OSRC.

¹⁷ Ranked as a level 7 offense on the OSRC.

¹⁸ A third-degree felony is punishable by up to five years' imprisonment and a \$5,000 fine. Ss. 775.082, 775.083, or 775.084, F.S.

¹⁹ Ranked as a level 6 offense on the OSRC.

²⁰ Other offenses include a violation of: ss. 787.01(2) or 787.02(2), F.S., when the victim 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.

²¹ Ranked as a level 7 offense on the OSRC.

²² S. 800.04(6)(a), F.S.

²³ Ranked as a level 6 offense on the OSRC.

²⁴ S. 800.04(6)(b)–(c), F.S.

²⁵ Ranked as a level 5 offense on the OSRC.

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.²⁶

Lewd or lascivious exhibition is a second-degree felony if the offender is 18 years of age or older²⁷ or a third-degree felony if the offender is less than 18 years of age.^{28, 29}

Lewd or Lascivious Written Solicitation of Certain Minors

Section 794.053, F.S., prohibits a person 24 years of age or older from soliciting a person who is 16 or 17 years of age in writing to commit a lewd or lascivious act as a third-degree felony.³⁰

Sexual Performance by a Child

Section 827.071(2), F.S., prohibits a person from using a child in a sexual performance³¹ if, knowing the content and character thereof, he or she employs, authorizes, or induces a child to engage in a sexual performance or, being a parent, legal guardian, or custodian of such child, consents to the participation by such child in a sexual performance. A violation of this prohibition is a second-degree felony.³²

Prohibited Acts in Connection with Obscene Materials

Under s. 847.0133, F.S., a person commits a third-degree felony if he or she knowingly sells, rents, loans, gives away, distributes, transmits, or shows any obscene material to a minor.³³

Under this section, “obscene material” means any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing paper, card, picture, drawing, photograph, motion picture film, figure, image, videotape, videocassette, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose.

Section 847.001(12), F.S., defines “obscene” as the status of material which:

- The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
- Depicts or describes, in a patently offensive way, sexual conduct;³⁴ and

²⁶ S. 800.04(7)(a), F.S.

²⁷ Ranked as a level 5 offense on the OSRC.

²⁸ S. 800.04(7)(b)–(c), F.S.

²⁹ Ranked as a level 4 offense on the OSRC.

³⁰ Ranked as a level 3 offense on the OSRC.

³¹ Section 827.071(1)(m), F.S., defines “sexual performance” as any performance or part thereof which includes sexual conduct by a child.

³² Ranked as a level 6 offense on the OSRC.

³³ This offense is unranked on the OSRC, and as such, defaults to the statutorily assigned level as described in s. 921.0023, F.S. Accordingly, because the offense is punishable as a third-degree felony it will be ranked as a level 1 offense on the OSRC.

³⁴ “Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a 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 circumstance constitute “sexual conduct.” S. 847.001(19), F.S.

- Taken as a whole, lacks serious literary, artistic, political, or scientific value.³⁵

Prohibited Computer Usage

Under s. 847.0135(3), F.S., a person commits a third-degree felony if he or she knowingly uses a computer online service, internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:

- Seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child³⁶ or another person believed by the offender to be a child, to commit any illegal act described in chapter 794 (sexual battery), chapter 800 (lewdness/indecent exposure), or chapter 827 (abuse of children) or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the offender to be a child; or
- Solicit, lure, or entice, or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed by the offender to be the same, to consent to such child's participation in any act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any sexual conduct.³⁷

Transmission of Material Harmful to Minors

Section 847.0138, F.S., prohibits a person, in this state or in any jurisdiction other than this state, from knowingly transmitting or believing that he or she is transmitting an image, information, or data that is harmful to minors to a specific individual known by the defendant to be a minor, as a third-degree felony.³⁸

Section 847.001(7), F.S., defines "harmful to minors" as any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement³⁹ when it:

- Predominantly appeals to a prurient, shameful, or morbid interest;
- Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and
- Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.⁴⁰

While there are several offenses in current law which prohibit a person from encouraging, enticing, soliciting, or inducing a minor to engage in sexual activity, lewd or lascivious behavior, or a sexual performance, current law does not specifically criminalize the preparation of a child to engage in sexual activity, sexual conduct, or a sexual performance through a pattern of inappropriate communication or conduct directed toward the child.

Criminal Punishment Code

Felony offenses which are subject to the Criminal Punishment Code⁴¹ are listed in a single offense severity ranking chart (OSRC),⁴² 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

³⁵ A mother's breastfeeding of her baby is not under any circumstance "obscene."

³⁶ "Child" means any person, whose identity is known or unknown, younger than 18 years of age. S. 847.001(10), F.S.

³⁷ Ranked as a level 7 offense on the OSRC.

³⁸ Ranked as a level 5 offense on the OSRC.

³⁹ Section 847.001(20), F.S., defines "sexual excitement" as the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

⁴⁰ A mother's breastfeeding of her baby is not under any circumstance "harmful to minors."

⁴¹ All felony offenses, with the exception of capital felonies, committed on or after October 1, 1998, are subject to the Criminal Punishment Code. S. 921.002, F.S.

⁴² S. 921.0022, F.S.

offense.^{43, 44} 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 offense.^{45, 46} 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.⁴⁷

Effect of Proposed Changes

CS/HB 1135 creates s. 800.045, F.S., to prohibit a person 18 years of age or older from committing lewd or lascivious grooming by engaging in a pattern of inappropriate communication or conduct directed toward a person less than 16 years of age for the purpose of preparing, encouraging, or enticing such person to engage in any unlawful sexual activity, sexual conduct, or sexual performance. A violation of the prohibition is a third-degree felony.

The bill defines the following terms:

- "Inappropriate communication or conduct" means any verbal, written, or electronic communication or any conduct in which a person describes, depicts, or demonstrates sexual conduct or sexual excitement.
- "Sexual activity" means the oral, anal, or female genital penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.
- "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a 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 circumstance constitute "sexual conduct."
- "Sexual excitement" means the condition of the human male or female genitals when in a state of sexual stimulation or arousal.
- "Sexual performance" means any performance or part thereof which includes sexual conduct by a child.

The bill ranks the new third-degree felony as a level 3 offense on the OSRC.

The bill provides an effective date of October 1, 2024.

B. SECTION DIRECTORY:

Section 1: Creates s. 800.045, F.S., relating to lewd or lascivious grooming.

Section 2: Amends s. 921.0022, F.S., relating to criminal punishment code; offense severity ranking chart.

Section 3: Provides an effective date of October 1, 2024.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

⁴³ S. 921.0022(2), F.S.

⁴⁴ 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.

⁴⁵ Ss. 921.0022 and 921.0024, F.S.

⁴⁶ A person may also accumulate points for factors such as victim injury points, community sanction violation points, and certain sentencing multipliers. S. 921.0024(1), F.S.

⁴⁷ 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. S. 921.0024(2), F.S.

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill may have an indeterminate positive impact on jail and prison beds by creating a new felony offense for lewd or lascivious grooming of a child, which may result in more jail and prison admissions.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

CS/HB 1135 may implicate the First Amendment. The First Amendment of the U.S. Constitution guarantees that “Congress shall make no law ... abridging the freedom of speech.”⁴⁸ The rights guaranteed by the First Amendment apply with equal force to state governments through the due process clause of the Fourteenth Amendment.⁴⁹

However, “the State clearly has a compelling interest in protecting minors from being lured to engage in illegal sexual acts, and speech that is used to further the sexual exploitation of children most certainly does not enjoy constitutional protection.”⁵⁰

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 19, 2024, the Criminal Justice Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Clarified that in order to be considered lewd or lascivious grooming, a person 18 years of age or older must be engaging in inappropriate communication or conduct directed at a person under the

⁴⁸ U.S. Const., amend. I.

⁴⁹ U.S. Const. amend. XIV. See *also* Art. I, Fla. Const.

⁵⁰ *Senger v. State*, 200 So. 3d 137, 147 (Fla. 5th DCA 2016).

age of 16 for the purpose of preparing, encouraging, or enticing such a person to engage in any unlawful sexual activity, sexual conduct, or sexual performance.

- Reduced the penalty from a second-degree felony to a third-degree felony and ranked the new offense as a level 3 offense on the OSRC.
- Added definitions for the following terms:
 - Inappropriate communication or conduct;
 - Sexual activity;
 - Sexual conduct; and
 - Sexual performance.

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