

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 170

SPONSOR: Criminal Justice Committee and Senator Bronson

SUBJECT: Children's Protection Act of 1999

DATE: February 2, 1999 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Barrow</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>FP</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

Committee Substitute for Senate Bill 170 would create the "Children's Protection Act of 1999." It would break down the current criminal offenses of "lewd, lascivious, or indecent assault or act upon or in the presence of a child" into separate and more precisely delineated crimes. The newly categorized criminal offenses would be included in the Criminal Punishment Code's Offense Severity Ranking Chart.

Certain defenses would be prohibited. Generally, the penalties for "lewd and lascivious" types of offenses would be greater if the offender is 18 years of age or older than in instances when the offender is under the age of 18 years.

Conforming changes to other statutory references that have the current "general" lewd, lascivious, and indecent assault or act upon or in the presence of a child would be made to reflect the newly created offenses in this CS.

The CS would take effect on October 1, 1999.

This CS substantially amends the following sections of the Florida Statutes: 119.07, 775.084, 775.15, 787.01, 787.02, 787.025, 800.04, 914.16, 921.0022, 944.606, 947.146, 948.03, 985.03, 985.227, and 985.313.

## II. Present Situation:

### Sexual Battery

Section 794.011 (1) (h), F.S., defines *sexual battery* 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; however, sexual battery does not include an act done for a bona fide medical purpose. Criminal penalties for sexual battery offenses vary based on factors including the age of the

victim, the offender's age, and the nature of the offense. If the victim of a sexual battery offense is less than 12 years of age, the penalties are as follows:

- ▶ A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age, commits a capital felony under s. 794.011 (2) (a), F.S. An offender convicted of a capital felony sexual battery offense committed on or after October 1, 1995, must be sentenced to life imprisonment. Such offender has no chance for parole or discretionary early release.
- ▶ A person under the age of 18 who commits sexual battery upon a person less than 12 years of age, commits a life felony under s. 794.011 (2) (b), F.S. This life felony is ranked in Level 9 of the Offense Severity Ranking Chart of the Criminal Punishment Code. Under the Criminal Punishment Code, a first-time offender could receive the statutory maximum sentence upon conviction, which is incarceration for the rest of the offender's natural life.

The consent of a person less than 12 years of age cannot be raised as a defense in a sexual battery prosecution because a person less than 12 years of age is deemed too young to consent to sexual activity. In short, if a person engages in sexual activity (as described in the definition of sexual battery) with a person less than 12 years of age, it is either a capital felony or a life felony.

A person who commits sexual battery upon a person 12 years of age or older and in the process does not use physical force and violence likely to cause serious personal injury commits a second degree felony under s. 794.011(5), F.S. The consent of the victim *may* be raised as a defense in a prosecution for this sexual battery offense.

### **Lewd, Lascivious, or Indecent Assault or Act Upon or in the Presence of a Child**

Section 800.04, F.S., defines the offense of *lewd, lascivious, or indecent assault or act upon or in the presence of a child*. Any person who:

- ▶ Handles, fondles, or assaults any child under the age of 16 years in a lewd, lascivious, or indecent manner;
- ▶ Commits actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulates that sexual battery is being or will be committed upon any child under the age of 16 years or forces or entices the child to commit any such act;
- ▶ Commits an act defined as sexual battery under s. 794.011 (1) (h), F.S., upon any child under the age of 16 years; or
- ▶ Knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years,

*without committing the crime of sexual battery*, commits a second degree felony. The victim's lack of chastity or the victim's consent cannot be raised as a defense in a prosecution for a violation of s. 800.04, F.S.

Under current law, a person who “commits an act defined as sexual battery *upon a child* without committing the crime of sexual battery” and a person who commits a lewd or lascivious act *in the presence of a child* both commit a second degree felony. Section 800.04, F.S., is ranked in Level 7 of the Offense Severity Ranking Chart of the Criminal Punishment Code. Under the Criminal Punishment Code, an offender can receive the statutory maximum sentence for his or her first offense, which is 15 years.

### **Statutory Rape**

Section 794.05, F.S., describes the offense of *unlawful sexual activity with certain minors*. *Unlawful sexual activity* is consensual sexual activity that is unlawful because of the difference in the ages of the participants. A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits this second degree felony offense. The law defines *sexual activity*, provides that the prior sexual conduct of the 16 or 17 year old person is not a relevant issue in a prosecution for this offense, and provides an exception for persons 16 or 17 years of age who have had the disabilities of nonage removed under ch. 743, F.S., which would include married persons. This offense is ranked in Level 6 of the Offense Severity Ranking Chart. Under the Criminal Punishment Code, a first-time offender convicted of this offense may receive the statutory maximum sentence of 15 years.

If an offense under this section directly results in the victim giving birth to a child, the paternity of that child must be established as provided in ch. 742, F.S. If it is determined that the offender is the father of the child, the offender must pay child support as required by the child support guidelines described in ch. 61, F.S.

Additionally, the evidence code provides that when a person less than 18 years of age gives birth to a child and the paternity of that child is established under ch. 742, F.S., such evidence of paternity is admissible in a criminal prosecution under ss. 794.011 (*sexual battery*), 794.05 (*unlawful sexual activity with certain minors*), or 800.04 (*lewd, lascivious, or indecent assault or act upon or in the presence of a child*), F.S.

Offenders who are supervised in the community for committing certain sexual offenses must make restitution to their victims for all necessary medical and related professional services relating to physical, psychiatric, and psychological care, as ordered by the court under s. 775.089, F.S.

### **Florida’s Sexual Predator Act**

“Sexual predator” is defined as an offender who is convicted on the current offense of or is found to have committed a capital, life, or first degree felony violation of ch. 794 or s. 847.0145, F.S., or any second degree felony or greater violation of ch. 794, ss. 800.04, 827.071, or 847.0145, F.S., or has previously committed a violation of ss. 800.04, 827.071, or 847.0145, F.S.

Florida Sexual Predator Act, s. 775.21, F.S. (Supp. 1998), provides that an offender shall be designated as a “sexual predator” for certain statutorily designated sexual offenses. The sentencing court makes the designation subject to statutory procedures for making a written finding. The sexual predator is required to register directly with the Florida Department of Law Enforcement (FDLE) and provide certain information, including address, social security number, a photograph, dates and places of convictions, and fingerprints, among other information. In lieu of initially registering with the FDLE, the sexual predator must register with the Department of Corrections (DOC) or a sheriff’s office that has custody of the defendant through incarceration.

Each sexual predator who is residing permanently or temporarily in the state outside a correctional facility, jail, or secure treatment facility must register or be registered within 48 hours after entering the county of permanent or temporary residence. Written notification by the sexual predator must be provided to the FDLE of any change in permanent or temporary residence within 48 hours after arrival at the new place of permanent or temporary residence. The FDLE must notify the sheriff and the state attorney and, if applicable, the police chief of the municipality, where the sexual predator resides within 48 hours after the sexual predator registers with FDLE or provides change of location information to the department.

Offenders who were formerly registered as sexual predators, and whose current qualifying offense was committed either on or after October 1, 1993, and before October 1, 1995 (the period from the enactment of the Sexual Predator Act to its amendment in 1995), or for a current offense committed on or after October 1, 1995, and before October 1, 1996 (the period from the 1995 amendment of the law to the 1996 amendment of the law) are no longer designated as sexual predators unless a court makes a written finding that designates them to be sexual predators. So designated, they are subject to the same registration procedures briefly outlined here.

A designated sexual predator must maintain registration with the FDLE for the duration of the offender’s life, unless the offender’s civil rights are restored, a full pardon has been granted for the qualifying conviction, the conviction has been set aside, or the offender’s petition to have his designation removed is granted. A petition may be filed by a sexual predator who was “so designated” before October 1, 1998, and who has been lawfully released from confinement, supervision, or sanction, whichever is later, for at least 10 years, and has not been arrested for any felony or misdemeanor offense since release. For any sexual predator that was designated a predator on or after October 1, 1998, such predators must wait for at least 20 years after being arrest-free for that period to petition the court requesting that the sexual predator designation be removed.

The Sexual Predator Act requires law enforcement to notify the community and the public of the “presence” of the sexual predator in a manner deemed appropriate by the sheriff or chief of police. The Sexual Predator Act provides that, within 48 hours of notification of the presence of a sexual predator, the sheriff of the county, or the police chief of the municipality, where the sexual predator resides shall notify each licensed day care center, elementary school, middle school, and high school within a 1-mile radius of the temporary or permanent residence of the sexual predator of the presence of the sexual predator. This information must include the sexual predator’s name, physical description (including photograph), current address, circumstances of the offense or offenses, and age of the victim of the offense or offenses.

A sexual predator who fails to register or be registered, or who fails, after registration, to provide location information, commits a third degree felony which is punishable by up to 5 years in prison.

The sexual predator registration list is a public record and the FDLE is authorized to disseminate to the public by any means deemed appropriate. Sexual predator information and a photograph of each designated sexual predator are available on the Internet.

### **Current “Habitualization” Statutes in Florida**

Florida currently has several “habitualization” statutes that provide for enhanced sentences for offenders who qualify and may also provide for minimum mandatory sentences. To be sentenced under these statutes, an offender must be noticed and must have a separate hearing pursuant to s. 775.084 (3), F.S., to determine whether the offender qualifies for application of one of these sentencing enhancements.

A “habitual felony offender” is a defendant who the court may impose an extended term of imprisonment if it finds that:

- ▶ the defendant has previously been convicted of any combination of 2 or more felonies in Florida or other qualified offenses;
- ▶ the felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the defendant’s last prior felony or other qualified offense, or within 5 years of the defendant’s release from a prison sentence;
- ▶ the felony for which the defendant is to be sentenced, and one of the 2 prior felony convictions, is not a violation of s. 893.13, F.S.;
- ▶ the defendant has not received a pardon for any felony that is necessary to sentence the offender as a habitual felony offender; and
- ▶ a conviction of a felony or other qualified offense that is necessary to apply the habitual statute has not been set aside in any postconviction proceeding.

A “habitual felony offender” *must* be sentenced under s. 775.084 (4) (a), F.S., as follows:

- ▶ in the case of a life felony or a felony of the first degree, for life.
- ▶ in the case of a second degree felony, for a term of years not exceeding 30 years.
- ▶ in the case of a third degree felony, for a term of years not exceeding 10 years.

A “habitual violent felony offender” is a defendant for whom a court may impose an extended term of imprisonment if it finds that:

- ▶ the defendant has previously been convicted of a felony or an attempt or conspiracy to commit a felony and one or more of such convictions was for: arson; **sexual battery**; robbery; kidnaping; aggravated child abuse; aggravated assault; murder; manslaughter;

unlawful throwing, placing, or discharging of a destructive device or bomb; armed burglary; aggravated battery; or aggravated stalking;

- ▶ the felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior enumerated felony or within 5 years of the defendant's release from a prison sentence or other commitment imposed as a result of a prior conviction for an enumerated felony;
- ▶ the defendant has not received a pardon on the ground of innocence for any crime that is necessary for habitualization; and
- ▶ a conviction of a crime necessary to the operation of the habitual statute has not been set aside in any postconviction proceeding.

A "habitual violent felony offender" *may* be sentenced under s. 775.084 (4) (a), F.S., as follows:

- ▶ in the case of a life felony or first degree felony, for life, and such offender must not be eligible for release for 15 years.
- ▶ in the case of a second degree felony, for a term of years not exceeding 30 years, and such offender must not be eligible for release for 10 years.
- ▶ in the case of a third degree felony, for a term of years not to exceed 10 years, and such offender shall not be eligible for release for 5 years.

A "violent career criminal" is a defendant for whom the court must impose minimum mandatory sentences if it finds that:

- ▶ the defendant has previously been convicted as an adult 3 or more times for an offense in Florida or other qualified offense that is: **any forcible felony, as described in s. 776.08, F.S. (which includes sexual battery)**; aggravated stalking; aggravated child abuse; **lewd, lascivious, or indecent conduct, as described in s. 800.04, F.S.**; escape; or a felony violation of ch. 790, F.S., involving the use of a firearm;
- ▶ the defendant has been incarcerated in a state prison or a federal prison;
- ▶ the primary felony offense for which the defendant is to be sentenced is a felony enumerated above and was committed on or after October 1, 1995, and within 5 years after the conviction of the last prior enumerated felony or within 5 years after the defendant's release from a prison sentence or other commitment imposed as a result of a prior conviction for an enumerated felony;
- ▶ the defendant has not received a pardon for any felony that is necessary for the application of the violent career criminal statute.
- ▶ a conviction of a felony or other qualified offense necessary for the application of the violent career criminal statute has not been set aside in any postconviction proceeding.

A “violent career criminal” *must* be sentenced under s. 775.084 (4) (c), F.S., as follows:

- ▶ in the case of a life felony or a first degree felony, for life.
- ▶ in the case of a second degree felony, for a term of years not exceeding 40 years, with a mandatory minimum term of 30 years imprisonment.
- ▶ in the case of a third degree felony, for a term of years not exceeding 15 years, with a mandatory minimum term of 10 years imprisonment.

### III. Effect of Proposed Changes:

Lewd, lascivious, or indecent assault or act upon or in the presence of a child under s. 800.04, F.S., would be amended to provide definitions and to break down the offense to clearly indicate the different types of criminal behavior that would be prohibited under s. 800.04, F.S. Different criminal penalties would be assessed depending on the age of the offender.

As used under s. 800.04, F.S., “sexual activity” would be defined as the oral, anal, or vaginal penetration by, or in union with, the sexual organ of another or the anal or vaginal penetration of another by any other object. However, the definition would specifically exclude such acts that are done for a bona fide medical purpose. “Consent” would be defined as intelligent, knowing, and voluntary consent, and would not include submission by coercion. “Coercion” would mean the use of exploitation, bribes, threats of force, or intimidation to gain cooperation or compliance. “Victim” would be defined as a person upon whom an offense described in s. 800.04, F.S., was committed or attempted or a person who has reported a violation of s. 800.04, F.S., to a law enforcement officer.

Committee Substitute for Senate Bill 170 addresses consent of the victim. The victim’s lack of chastity or the victim’s consent to the acts proscribed in s. 800.04, F.S., cannot be raised as a defense to prosecution under s. 800.04, F.S. Committee Substitute for Senate Bill 170 would also prohibit ignorance, misrepresentation, or a bona fide belief about the victim’s age for purposes raising a defense to the violation of s. 800.04, F.S.

The current “lewd, lascivious, or indecent assault or act upon or in the presence of a child” would be broken out into four distinct categories: lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, and lewd or lascivious exhibition.

Lewd or lascivious battery would be committed if any person either (a) engages in sexual activity with a person 12 years of age or older but less than 16 years of age; or (b) encourages, forces, or entices any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity. Lewd or lascivious battery would be a second-degree felony, punishable by up to 15 years in prison and up to a \$10,000 fine, as well as habitualized sentencing under s. 775.084, F.S. Lewd and lascivious battery would be ranked under the Offense Severity Ranking Chart as a level 8 offense under the Criminal Punishment Code.

Lewd or lascivious molestation would be committed if any person intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age. If the offender is 18 years of age or older and commits lewd and lascivious molestation against a victim less than 12 years of age, it would be a first degree felony, punishable by up to 30 years in prison and up to a \$10,000 fine as well as habitualized sentencing under s. 775.084, F.S. Under these circumstances, lewd or lascivious molestation would be ranked under the Offense Severity Ranking Chart as a level 9 offense under the Criminal Punishment Code.

For the offense of lewd or lascivious molestation, if the offender is less than 18 years of age and commits the offense against a victim less than 12 years of age, or if the offender is more than 18 years of age and commits the offense against a victim who is older than 12 years of age and less than 16 years of age, it would be a second-degree felony, punishable by up to 15 years in prison and up to a \$10,000 fine as well as habitualized sentencing under s. 775.084, F.S. Under these circumstances, lewd or lascivious molestation would be ranked under the Offense Severity Ranking Chart as a level 7 offense under the Criminal Punishment Code.

For the offense of lewd or lascivious molestation, if the offender is less than 18 years of age and commits the offense against a victim that is older than 12 years of age and less than 16 years of age, it would be a third-degree felony, punishable by up to 5 years in prison and up to a \$5,000 fine as well as habitualized sentencing under s. 775.084, F.S. Under these circumstances, lewd or lascivious molestation would be ranked under the Offense Severity Ranking Chart as a level 6 offense under the Criminal Punishment Code.

Lewd or lascivious conduct would be committed if any person intentionally touches a person under 16 years of age in a lewd or lascivious manner or solicits a person under 16 years of age to commit a lewd or lascivious act. If an offender is 18 years of age or older and commits the offense of lewd or lascivious conduct it would be a second-degree felony, punishable by up to 15 years in prison and up to a \$10,000 fine as well as habitualized sentencing under s. 75.084, F.S. (Supp. 1996). Under these circumstances, lewd or lascivious conduct would be ranked under the Code's Offense Severity Ranking Chart as a level 6 offense. If an offender is less than 18 years of age and commits the offense of lewd or lascivious conduct, it would be a third-degree felony punishable by up to 5 years in prison and up to a \$5,000 fine as well as habitualized sentencing under s. 775.084, F.S. Under these circumstances, lewd or lascivious molestation would be ranked under the Code's Offense Severity Ranking Chart as a level 5 offense.

Lewd and lascivious exhibition would be committed if any person who, in the presence of a victim who is less than 16 years of age, either: (a) intentionally masturbates; (b) intentionally exposes the genitals in a lewd or lascivious manner; or (c) intentionally commits 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. If the offender is 18 years of age or older, it would be a second-degree felony, punishable by up to 15 years in prison and up to a \$10,000 fine as well as habitualized sentencing under s. 775.084, F.S. Under these circumstances, lewd or lascivious exhibition would be ranked under the Code's Offense Severity Ranking Chart as a level 5 offense. If an offender is less than 18 years of age and commits the offense of lewd or lascivious exhibition, it would be a third-degree felony punishable by up to 5 years in prison and up to a \$5,000 fine as well as habitualized sentencing under

s. 775.084, F.S. Under these circumstances, lewd or lascivious exhibition would be ranked under the Code's Offense Severity Ranking Chart as a level 4 offense.

Under the proposed lewd or lascivious statutory scheme under s. 800.04, F.S., there would be an express exception for mothers who are breast-feeding their babies for the application of that statute.

Other statutory references to "lewd, lascivious, or indecent assault or act upon or in the presence of a child" would be amended to reflect the changes to that offense that break out the different types of conduct for lewd and lascivious behavior. Thus, the statutes pertaining to false imprisonment, kidnapping, violent career criminal sentencing, Criminal Punishment Code's Offense Severity Ranking Chart, control release, juvenile intensive residential treatment programs, juvenile maximum-risk residential programs, direct filings on juvenile offenders, and conditions of probation or community control would be conformingly amended to reflect the proposed changes.

The act would take effect on October 1, 1999.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

None anticipated.

##### **C. Government Sector Impact:**

The Criminal Justice Impact Conference determined that there would be an "insignificant" impact upon the prison population. Insignificant is defined by the Criminal Justice Impact Conference as a "very small additional bed impact."

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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