

SUBJECT: Creating the offense of online sexual solicitation of a minor.

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Keel, Pena, Denny, Escobar, Hodge, Raymond, Reyna
0 nays
2 absent — Riddle, P. Moreno

WITNESSES: For —Shane Phelps; David Weeks.
Against — Ann Del Llano, ACLU of Texas.

BACKGROUND: The sexual assault of a child is a second-degree felony under Section 22.011 of the Texas Penal Code, punishable by two to 20 years in prison plus a fine not to exceed \$10,000. Attempting to commit a criminal act is punishable by one category lower than the penalty for actually committing the act. Attempted sexual assault of a child, therefore, is a third-degree felony, punishable by two to 10 years in prison plus a fine of up to \$10,000.

To prove attempt to commit a criminal act, the state must show that an individual, with the specific intent to commit an offense, performs an act amounting to more than mere preparation for the crime.

Solicitation of a minor is a criminal offense under Section 15.031 of the Penal Code, punishable by one category lower than the solicited offense. To prove criminal solicitation of a minor under section 15.031(b), the prosecution must show that the individual intended to induce the minor to engage in sexual conduct. In the case of criminal solicitation of a child for the purpose of sexual activity, the penalty is a third-degree felony. One may also be charged for exposing oneself to the child or forcing the child to expose him/herself to the individual for the purpose of sexual gratification. Criminal solicitation of a child for this purpose is punishable by a state jail felony, punishable by 180 days to two years in a state jail and an optional fine of up to \$10,000.

DIGEST: CSHB 2228 would amend ch. 33 of the Penal Code to add the prohibition of online sexual solicitation of a minor.

The bill would prohibit intentionally communicating with a minor over the Internet, via email, or through a commercial online service in a sexually explicit manner, or distributing sexually explicit material to a minor through the Internet. To violate this section, an individual would have to do so with the intent to sexually arouse any person. The offense would be a state jail felony. If the minor were younger than 14 years old, the offense would be a second-degree felony.

The bill also would prohibit the use of the Internet knowingly to solicit a minor to meet another person for the purpose of engaging in any sexual contact with the minor. Violation of this section would be a third-degree felony. If the minor were younger than 14 years old, the offense would be a second-degree felony.

It would not be a defense to prosecution if the meeting with the minor did not occur or if the offender did not intend for the meeting to occur. It would be a defense if the offender were married to the minor or if the offender was not more than three years older than the minor and the minor consented to the conduct.

The bill would define a "minor" as anyone who represented himself or herself to be younger than 17 years old or an individual whom the offender believed to be younger than 17 years old.

Those who committed an offense under the bill also could be prosecuted under any other applicable law.

CSHB 2228 also would amend art. 62.01 of the Code of Criminal Procedure to require those convicted of online sexual solicitation of a minor to register as sex offenders.

The bill would take effect September 1, 2005.

**SUPPORTERS
SAY:**

In recent years, Texas has seen an upsurge in the use of the Internet to solicit children for sex. Widespread use of the Internet and chat rooms among minors and the difficulty of monitoring a child's Internet use have made the Internet a haven for those wishing to prey on children. The Attorney General's Office established the Cyber Crimes Unit precisely to

address this problem, and since 2003, 59 arrests of this type have been made. This bill would facilitate law enforcement's ability to protect children from online predators. According to the National Conference of State Legislatures, 34 other states now have laws that prohibit online solicitation of minors.

Usually individuals go through a series of "grooming" steps when soliciting sex with a child through the Internet. This process begins with befriending a child online, developing trust, then engaging in sexually explicit conversation, and finally meeting with the child. By criminalizing online sexually explicit communication with a child, the bill would allow law enforcement to stop an offender before the offender could injure the child. It also would serve as a deterrent to potential offenders. According to the criminal justice impact statement, any increase in workload or demand on the criminal justice system from the bill would not be substantial.

Current law makes it difficult to charge individuals who make arrangements to meet children for sexual activity. While some cases successfully have been prosecuted under the criminal solicitation law, the law does not address specifically this kind of offense. While it is possible to charge someone with attempted sexual assault of a child, it can be difficult to do so in this circumstance. To prove attempt to commit an act, it is necessary to show more than mere preparation for a crime, making it difficult to prove attempt when someone chats online with a child in a sexually explicit manner without any other acts in furtherance of commission of a crime.

By clearly defining as criminal the act of using the Internet to schedule a meeting with a minor to engage in sexual activity, the bill would give law enforcement a tool to prosecute and deter offenders who use the Internet to engage in sexual activity with children. CSHB 2228 would allow law enforcement to prosecute sex offenders without having to rely on laws that are not specifically designed to address this particular kind of offense.

Additionally, the bill would not require a child to be put in harm's way in order to charge the offender. It would clarify that even if the individual did not actually meet the child, or intend to meet the child, the mere setting up of a meeting with the child would be punishable.

While the bill could criminalize those who make arrangements to meet with children but never do and do not intend to, adults should not make such arrangements with minors in the first place. Practically speaking, it would be difficult to prosecute someone who did not try to meet with the child because it usually is difficult to connect an individual with online activity.

If a minor were convicted under this law, it would be unlikely that the minor would be sentenced to a state jail felony because in most cases, minors are punished under the juvenile laws .

Finally, it is not necessary to define what it means to communicate in a "sexually explicit manner." If a common term like "sexually explicit manner" is not defined precisely in the law, the term would take on its common meaning.

OPPONENTS
SAY:

While the bill has good intentions, laws on the books already address this problem. Moreover, the breadth of the bill leaves it open to potential abuse.

Solicitation of a minor already is a third-degree felony under section 15.031 of the Penal Code. If an individual uses the Internet to induce a minor to engage in sexual conduct, it may in fact be easier to prove intent because the crime is in writing. This law has been used successfully by law enforcement to convict individuals who have sexually explicit online discussions with minors. Also, attempted sexual assault and attempted aggravated sexual assault have been used to charge offenders who try to meet with minors. It is useless and confusing to duplicate existing law.

The bill also would make it a state jail felony for one minor to send sexually explicit material to another online unless the minor consented. This punishment would be too harsh for children who may not intend harm or may not be fully aware of the consequences of their actions.

CSHB 2228 would allow prosecutors to charge someone with a second- or third-degree felony, depending on the age of the child, for arranging online to meet a child to engage in sexual conduct, even if the individual had no real intention for the meeting to occur and did not meet the child. While such conduct with a minor is inappropriate, it would be excessive to charge someone had no intent actually to assault a child with a second- or third-degree felony.

In addition, the bill would not define what constitutes communicating online with a minor in a "sexually explicit manner." This vagueness in the law would leave it open to abuse and possibly a constitutional challenge. Texans have the right to know exactly what type of conduct is criminalized.

CSHB 2228 would increase demands upon the state correctional resources. Establishing a new offense would have serious consequences on an already overcrowded prison system. As it is, Texas correctional facilities are pressed to their limit. Creating a new felony would increase costs to taxpayers and exacerbate an already serious prison overcrowding problem.

NOTES:

The committee substitute differs from the original version by changing the definition of a minor to a person who represents himself or herself to be younger than age 17 rather than who is younger than 17. It added as an element of the offense communication with a minor in a sexually explicit manner, rather than simply communicating. Solicitation of a minor for a meeting would have to be with the intent that the minor would engage in sexual conduct, rather than for the purpose of engaging in sexual conduct. The substitute changed the defense to prosecution to being three years older than the minor rather than two and added the new offense to those for which an offender would be required to register as a sex offender.