

SUBJECT: Creation of the offense of assault with bodily fluids

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Gallego, Fletcher, Kent, Miklos, Moody, Pierson, Riddle
0 nays
4 absent — Christian, Hodge, Vaught, Vo

WITNESSES: (*On original version:*)
For — Patrick M. Wilson, Ellis County, Ellis County District Attorney’s Office; (*Registered, but did not testify:* Charley Wilkison, Combined Law Enforcement Associations of Texas)
Against — Rebecca Berhardt, American Civil Liberties Union of Texas
On — Beth Engelking, Department of Family and Protective Services

DIGEST: CSHB 1482 would amend Penal Code, ch. 22 by adding sec. 22.03 which would create the offense of assault with bodily fluids (ABF). A person would commit an offense if the person:

- with the intent to assault, harass, or alarm, caused another to contact the blood, seminal or vaginal fluid, urine, or feces of the actor, any other person, or animal; or
- with the intent to arouse or gratify the sexual desire of any person, caused another person, without that person’s consent, or a child, to contact the blood, seminal or vaginal fluid, urine, or feces of the actor, any other person, or animal.

An offense committed with the intent to assault, harass, or alarm would be a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000); an offense committed with the intent to arouse or gratify sexual desire would be a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000), or a second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000) if the victim was a child.

An offense committed with the intent to arouse or gratify sexual desire, whether the victim was a child or adult, would be increased to the next higher category of offense if it was shown at trial that, at the time of the offense, the actor was a peace officer, corrections officer employed by a secure correctional facility, health care services provider, mental health services provider, or an employee of a facility such as a nursing home, assisted living facility, or facility for persons with mental retardation.

It would be a defense to prosecution that:

- the actor was not more than three years older than the victim;
- the victim was 14 years of age or older, and not a person the actor was prohibited from marrying under the bigamy statute, Penal Code, sec. 25.01; and
- at the time of the offense, the actor was not required to register for life as a sex offender, or did not have a reportable conviction or adjudication for assault with bodily fluids.

The victim's effective consent or the actor's reasonable belief that the victim consented would be a defense to prosecution of ABF with intent to assault, harass or alarm if the conduct did not threaten or inflict serious bodily injury, or the victim knew the conduct was a risk of his occupation, recognized medical treatment, or a scientific experiment conducted by recognized methods.

If conduct constituted an offense of ABF and an offense under another section of the Penal Code, the actor could be prosecuted under either or both sections.

"Child" would be defined as person younger than 17 years of age who was not the spouse of the actor.

An offense of ABF with intent to arouse against a child could run consecutively or concurrently when a defendant was found guilty of more than one offense arising out of the same criminal episode.

Any offense of ABF with the intent to arouse would be added to the list of felony convictions that would result in a life sentence in the Texas Department of Criminal Justice if the defendant was convicted of such an offense, and the defendant had been previously convicted of such an offense in this state or of a substantially similar offense in another state, or

had been previously convicted of burglary and had committed the burglary with the intent to commit any offense of ABF with the intent to arouse.

A person would commit the offense of criminal solicitation of a minor if, with intent that ABF with intent to arouse be committed, the person by any means requests, commands, or attempts to induce a minor or another whom the person believes to be a minor to engage in specific conduct that, under the circumstances surrounding the actor's conduct as the actor believes them to be, would constitute such an assault or would make the minor or other believed by the person to be a minor a party to the commission of such an offense.

Code of Criminal Procedure. A person indicted for, or who waived indictment for, any offense of ABF with intent to arouse could be ordered by the court to be tested for sexually transmitted diseases, HIV, or AIDS, and could be ordered to have a subsequent test following conviction. The results would be made available to the local health authority, the victim of the alleged offense, and the defendant.

Certain special protections for child-witnesses younger than 13 whom the court determined would be unavailable to testify in the presence of the defendant at a hearing or proceeding would be extended to children testifying about an ABF with intent to arouse.

An offense of ABF with intent to arouse committed against a child would be added to the list of offenses for which a court could not grant community supervision.

A judge could not order deferred adjudication if the defendant was charged with any offense of ABF with intent to arouse, and had been previously placed on community supervision for that offense, indecency with a child, sexual assault, or aggravated sexual assault.

If a judge granted a defendant community supervision for ABF with intent to arouse against child, the judge would be required to establish a child safety zone as a condition of supervision, requiring that the defendant:

- not supervise or participate in any program that regularly provided athletic, civic, or cultural activities and included as participants or recipients persons 17 years of age or younger; or

- not go in, on, or within 1,000 feet of a place children commonly gathered; and
- would attend psychological counseling sessions for sex offenders.

For the purposes of sex offender registration, a conviction or adjudication for any offense of ABF with intent to arouse, or a violation of the laws of another state, federal or foreign law, or United Code of Military Justice substantially similar to that offense would be considered a reportable conviction or adjudication, and such an offense would be included in the definition of “sexually violent offense” when committed by a person 17 years of age or older.

Upon conviction of ABF with intent to arouse against a child, a defendant would be required to pay \$100.

Education Code. At the request of the victim’s parent or guardian, a student convicted of or placed on deferred adjudication for any offense of ABF with the intent to arouse against another student at the same school would be transferred to another campus in the district or the district’s disciplinary alternative education program or juvenile justice alternative education program, if there was only one campus in the district serving the grade level in which the student who engaged in the conduct was enrolled. The student-victim of such an offense would be transferred, upon request, to another campus in the district or a neighboring district that was agreeable to the student’s parent or guardian.

Engaging in conduct that contained the elements of any offense of ABF with intent to arouse would be added to the list of conduct for which a student would be expelled, if the conduct occurred on school property or while attending a school-sponsored or related activity on or off school property.

Family Code. A court, guardian ad litem, or attorney ad litem for a minor involved in a judicial bypass proceeding would be required to report to the appropriate authority conduct reasonably believed to constitute ABF with intent to arouse against a child. Notwithstanding any other law, such information obtained by the Department of Family and Protective Services would be confidential except to the extent necessary to prove an offense.

A conviction of a conservator or an order deferring adjudication with regard to the conservator, for ABF with intent to arouse against a child,

would be a material and substantial change of circumstances sufficient to justify a temporary order and modification of an existing child custody court order or decree.

A court could order termination of the parent-child relationship if the court found by clear and convincing evidence that:

- the parent had been convicted or placed on community supervision for being criminally responsible for the death or serious injury of a child under the statute regarding ABF with intent to arouse against a child; or
- adjudicated for conduct that caused the death or serious injury of a child and that would constitute a violation of the statute regarding ABF against a child with intent to arouse.

A court could order the termination of a parent-child relationship if the court found that the parent had been convicted of ABF with intent to arouse against a child, that the victim became pregnant with the parent's child as a result of the offense, and termination was in the best interest of the child.

For the purposes of investigating a report of child abuse or neglect, the definition of "abuse" would be amended to include ABF with intent to arouse against a child.

For the purposes of proceedings where a child had been removed from a parent's custody by an authorized agency, ABF with intent to arouse against a child would be added to the list of aggravated circumstances which, if a court found a parent had subjected a child, would allow the court to waive the requirement to make reasonable efforts to return the child to a parent, to make a service plan, and could accelerate the trial schedule to result in a final order for a child under the care of the Department of Family and Protective Services at an earlier date than otherwise provided.

Government Code. A defendant indicted for or who waived indictment for any offense of ABF with intent to arouse would be required by the court to provide to a law enforcement agency one or more specimens for the purpose of creating a DNA record. A defendant arrested for ABF with intent to arouse against a child after having been previously convicted of certain felonies would be required to give one or more samples

immediately after fingerprinting, at the same location as the fingerprinting occurred.

For purposes of the Sexual Assault Prevention and Crisis Service, the definition of “sexual assault” would be amended to include any offense of ABF with intent to arouse.

A conviction for ABF with intent to arouse against a child would be added to the list of conditions that would have to be met before an inmate’s request for an orchiectomy (castration) could be granted.

To release on parole an inmate who was convicted of ABF with intent to arouse against a child, all members of the parole board would have to vote, and at least two-thirds of them would have to vote in favor of the release.

An inmate convicted of ABF with intent to arouse against a child would not be eligible for release on parole until the inmate's actual calendar time served equaled one-half of the sentence or 30 calendar years, whichever was less, without consideration of good conduct time. In no event would the inmate be eligible for release on parole in less than two calendar years.

An inmate could not be released to mandatory supervision if the inmate was serving a sentence for or had been previously convicted of a felony ABF.

A parole panel would be required to establish a child safety zone if the releasee was serving a sentence for ABF with intent to arouse against a child, by requiring as a condition of parole or mandatory supervision that the releasee:

- not supervise or participate in any program that regularly provided athletic, civic, or cultural activities and included as participants or recipients persons 17 years of age or younger; or
- not go in, on, or within 1,000 feet of a place children commonly gather; and
- would attend psychological counseling sessions for sex offenders.

As a condition of parole or mandatory supervision, a parole panel would require a releasee convicted of any offense of ABF with intent to arouse to pay the division a supervision fee of \$5 each month during the period of supervision.

Health and Safety Code. If a complaint alleged that a resident of a convalescent, nursing home, or related institution had been a victim of any offense of ABF with intent to arouse or an attempt of such an offense, the appropriate agency would be required to begin an investigation of that complaint within 24 hours of the receipt of the complaint.

A conviction for any offense of ABF with the intent to arouse would be added to the list of offenses that would preclude employment at certain nursing home and other facilities, if the facility was entitled to obtain criminal history record information for that person.

For purposes of commitment of sexually violent predators, the definition of “sexually violent offense” would be amended to include any offense of ABF with the intent to arouse.

In the event of any conflict relating to non-substantive additions to and corrections in enacted codes, this bill would prevail over another of the 81st Legislature.

The bill would take effect September 1, 2009, and would apply only to offenses committed on or after this date.

**SUPPORTERS
SAY:**

By creating the offense of assault with bodily fluids, CSHB 1482 would close a gap in current sexual assault law. Current law requires penetration of the mouth, anus, or sexual organ to prove an allegation of sexual assault. In reality, an offender can sexually violate a victim without penetration. Current law only allows conduct constituting assault with bodily fluids to be prosecuted as assault and does not provide an adequate penalty. This bill would recognize the serious nature of this conduct, and punish it accordingly, providing deterrence for would-be offenders and justice for victims.

Prosecutorial discretion and the bill’s intent requirements would prevent truly petty juvenile conduct from being prosecuted as an assault with bodily fluid.

**OPPONENTS
SAY:**

CSHB 1482 is too broad and would do more than close a loophole in existing law. This bill could have the unintended negative consequence of criminalizing what would previously have been considered petty juvenile conduct. Existing law is adequate to punish the conduct covered by the

bill. The creation of new felonies would cost the state money it cannot afford to spend in the current economic climate.

NOTES:

The substitute differs from the original by removing saliva from the bodily fluids included in the conduct that constitutes an offense with bodily fluids. The substitute adds a provision that, in the event of a conflict, the provisions of the bill would prevail over another act of the 81st Legislature relating to non-substantive additions to and corrections in enacted codes.