

SUBJECT: Affirmative defense to prosecution for certain child sex offenses

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 10 ayes — Gallego, Christian, Fletcher, Kent, Miklos, Moody, Pierson, Riddle, Vaught, Vo

0 nays

1 absent — Hodge

WITNESSES: For — Isidro Alaniz, Webb County District Attorney Office; Oscar Hale; (*Registered, but did not testify*: Marc Chavez, Lubbock County District Attorney's Office; Katrina Daniels, Bexar County District Attorney Susan Reed; Ruth Epstein, ACLU of Texas; Kevin Petroff, Harris County District Attorney's Office

Against — Allen Place, Texas Criminal Defense Lawyers Association

On — Shannon Edmonds, Texas District and County Attorneys Association

BACKGROUND: Under Penal Code sec. 21.11, the indecency with a child offense, a person may not engage in certain actions with a child younger than 17 who is not the person's spouse.

Under Penal Code sec. 21.12, the improper sexual relationships between educators and students offense, employees of public or private primary or secondary schools may not engage in certain types of sexual acts with persons enrolled in the schools at which the employee works if the person is not the employee's spouse.

Under Penal Code sec. 22.011, the sexual assault offense, certain sexual acts are crimes if committed against children, who are defined as persons younger than 17 years old who are not a person's spouse.

Under Penal Code sec. 39.04, the improper sexual activity with a person in custody offense, employees of the Texas Department of Criminal Justice, the Texas Youth Commission, and local juvenile probation departments

may not engage in certain sexual acts with persons who are not their spouse and are under the supervision of the entity.

DIGEST:

HB 549 would establish an affirmative defense to prosecution for certain sex offenses against children younger than 17 if the defendant was the spouse of the child at the time of the offense. The bill would eliminate references in these offenses' current statutes that define the offenses as having to be committed against children who are not the person's spouse.

The affirmative defense would apply to indecency with a child, sexual assault of a child, improper sexual relationships between educators and students, sexual assault against children, and improper sexual activity with a person under TDCJ, TYC, or local probation department supervision.

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

**SUPPORTERS
SAY:**

HB 549 would eliminate a step in the prosecution of some sex offenses against children that causes embarrassment and trauma for child victims and their families and confusion among jurors. HB 549 would not change what constitutes any sex crime against a child, but only how certain elements are handled during prosecution of case.

Currently, when trying cases of indecency with a child, sexual assault of a child and certain other sex offenses, prosecutors must establish that the child and the defendant were not spouses. Often prosecutors do this by asking the child while testifying whether they are married to the defendant. This often causes confusion, stress, and trauma to children, who may be quite young. Jurors and victims' families often do not understand why the question is being asked.

HB 549 would solve this problem by making the fact that the defendant was married to a child an affirmative defense to prosecution. In the extremely unlikely event that a case in which a defendant was the spouse of a child proceeded to trial, an affirmative defense would allow defendants to raise the issue and, if proved, would be legally sufficient to justify actions that otherwise would be a crime. Defendants would raise the issue if it were pertinent in a case, and in other cases, prosecutors would not have to ask child victims to testify publicly about whether they were married to someone accused of abusing them. The additional

and unnecessary trauma for child victims relating to this question would be eliminated.

HB 549 would not result in an increase of the prosecutions of persons who are spouses of children and have not violated the law. The fact that a defendant was married to a victim would surface during investigations or preliminary parts of a prosecution of a case, and prosecutions would not move forward. There would be no reason for law enforcement authorities or prosecutors to proceed with these cases.

While there are other ways under current law that that prosecutors could establish the fact that a defendant was not a child's spouse, most ask the direct question to child victims to ensure the case is handled properly. In some cases, there may be no one else to ask the question of because witnesses may be limited to the child and law enforcement authorities. In other cases, such as in family abuse cases, prosecutors may not want to call the child's family as witnesses.

Defendants would not be unduly burdened by HB 549. In cases in which it was applicable, the affirmative defense would require only a preponderance of the evidence.

**OPPONENTS
SAY:**

By changing certain language in the Penal Code dealing with sex crimes against children to affirmative defenses, HB 549 could result in some persons being caught in prosecutorial nets who should not be there. HB 549 could lead to spouses who have committed no crime being charged, indicted, and brought to trial before they were able to raise the affirmative defense that they are the spouse of the alleged victim. In cases that proceeded to trial, spouses would not have a formal opportunity to beat the charge until the trial. Although these cases may be rare, the criminal justice system should not be designed to draw into prosecutions those who should not be there.

Leaving current law intact does not mean that children have to be asked during a trial whether they are the spouse of a defendant. Other means can be used to establish that fact, including having members of the victim's family or others testify.

Unfortunately, child victims often are traumatized by a crime and a trial, and not just by being asked the question about whether they were married to a defendant.