

SUBJECT: Intent to commit online solicitation of a minor

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Herrero, Moody, Canales, Hunter, Leach, Shaheen, Simpson  
0 nays

WITNESSES: For — Joel Pridgeon, Austin Police Department; Jeff Lee, Harris County Constable Pct. 4; Alan Curry, Harris County District Attorney's Office; *(Registered, but did not testify: Donald Baker, Austin Police Department; William Squires, Bexar County District Attorney's Office; Tim Anderson, National Center for Missing and Exploited Children; Rick Ramirez, City of Sugarland; Melinda Smith, Combined Law Enforcement Associations of Texas; Bruce Moats, Fort Bend County, Internet Crimes Against Children Task Force; Steve Dye, Grand Prairie Police Department; Gary Spurger, Harris County Constables Pct. 4; Jeff Pietsch, Harris County Sheriff's Office, ICAC; Mark Seals, David Nettles, Shannon Taylor, and James Huckabee, Houston Metro Internet Crimes Against Children Task Force; Jessica Anderson, Houston Police Department; Bill Elkin, Houston Police Retired Officers Association; Nancy Jones, HPD, ICAC; William Brewster and Sarah Wyatt, Internet Crimes Against Children Task Force; Cynthia Pulcher, Montgomery County District Attorney's Office; Martinez, Montgomery County Pct. 3 Constables Office; Cory Arnold, Montgomery County Pct. 4 Constables Office; Chris Kaiser, Texas Association Against Sexual Assault; Lon Craft, Heath Wester, Texas Municipal Police Association; Gary Tittle, Texas Police Chiefs Association; Susan Patten, Time Warner Cable; Warren Diepraam, Waller County District Attorney's Office; Jeffery Jones; Sprague)*  
  
Against — None  
  
On — Brenda Cantu, Office of Attorney General

BACKGROUND: Penal Code, sec. 33.021 makes the online solicitation of a minor a criminal offense. Under sec. 33.021(b), it is a crime for someone 17 years

of age or older to use the Internet, electronic mail, text messages, other electronic message service or system, or a commercial online service to intentionally:

- communicate in a sexually explicit manner with a minor; or
- distribute sexually explicit material to a minor.

The offense must be done with the intent to arouse or gratify the sexual desire of any person.

Under Penal Code, sec. 33.021(c), individuals also commit the offense if they use the electronic means listed above to knowingly solicit a minor to meet, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse. It is not a defense to prosecution under subsection (c) that the meeting did not occur, the person did not intend for the meeting to occur, or that the actor was engaged in a fantasy at the time the offense was committed.

It is a defense to prosecution under both subsections (b) and (c) that at the time of the conduct, the person accused of soliciting the minor was married to the minor or was not more than three years older than the minor and the minor consented.

Under the offense, a minor is defined as someone who represents himself or herself to be younger than 17 years old or someone believed to be younger than 17 years old.

**DIGEST:**

CSHB 861 would revise the offense of on-line solicitation of a minor. The offense under Penal Code, sec. 33.021(b), relating to communicating with a minor or distributing sexually explicit material to a minor, would have to be committed with the intent to induce a minor to engage in conduct that would constitute certain crimes. It would have to be done with the intent to engage in the offenses of indecency with a child, sexual assault, aggravated sexual assault, sexual performance by a child, or possession or promotion of child pornography. The current defenses to prosecution that a person was married to a minor or was not more than three years older

than the minor and the minor consented would no longer apply to sec. 33.021(b).

The bill would remove two circumstances from the list of those which currently cannot be defenses to prosecution under Penal Code, sec. 33.021(c): not intending for a meeting to occur and being engaged in a fantasy at the time of the offense.

The bill would take effect September 1, 2015, and would apply only to offenses committed on or after that date.

**SUPPORTERS  
SAY:**

CSHB 861 is needed to revise the state's law prohibiting the online solicitation of a minor to address a portion of the law found unconstitutional. In 2013, the Texas Court of Criminal Appeals found in *Ex Parte Lo* that sec. 33.021(b) of the Texas law was unconstitutionally overbroad because it prohibited constitutionally protected speech and was not narrowly drawn to achieve only the objective of protecting children from sexual abuse. CSHB 861 would revise the law to address the court's concerns and to ensure that Texas could continue to protect children from online sexual predators.

CSHB 861 would revise the online solicitation statute to address problems the Court of Criminal Appeals identified with the part of the offense involving communications with a minor. The bill would address the court's concern with the intent that is required to commit the offense by replacing current language with a requirement that a person must have the intent to induce a minor to engage in specified illegal sex crimes. This change would track language in the court opinion and would ensure that conduct that was not being targeted by the law or that was protected by the First Amendment would not fall under its provisions. The five crimes listed in the bill would cover the offenses that most often arise in these cases, some of which were listed in the court opinion. The offenses would be limited and listed in the statute so that the law would be narrowly tailored, as required by the court.

The bill also would narrow the current law by eliminating the listing of

certain situations that are not permitted to be used as defenses to prosecution for the portion of the crime dealing with luring children to meetings. With this change, the law would be focused on those actually soliciting minors for meetings, not on those engaged in fantasies or fictional scenarios. Defendants would continue to be unable to raise the fact that a meeting did not occur as a defense.

CSHB 861 would remove some redundancies and potential conflicts in the Penal Code by eliminating the applicability of existing defenses to prosecutions for the part of online solicitation that would be changed by the bill. Some of the specific offenses carry the same or similar defenses to prosecution, and CSHB 861 would ensure there is no conflict in these provisions.

CSHB 861 would not amend the current definition of a minor because the Texas Court of Criminal Appeals' 2013 decision did not suggest any changes were needed. Current law defining a minor is not overly broad and would not lead to the prosecution of two adults pretending to be children. Under CSHB 861, there would have to be intent to induce a minor to engage in a sexual offense, and two adults pretending to be children would be communicating about a consensual act, not a crime involving a minor. Law enforcement authorities would not pursue such cases.

**OPPONENTS  
SAY:**

CSHB 861 would not address problems with the current definition of a minor as it is defined for the online solicitation statute. By allowing the definition to include those who represent themselves to be younger than 17, the law could be overly broad and cover two adults pretending to be children. It would be best to limit the law to applying to those who are actually younger than 17 and those believed to be younger than 17.

**OTHER  
OPPONENTS  
SAY:**

CSHB 861 could be expanded without becoming too broad by listing additional offenses that could lead to charges of online solicitation. For example, compelling prostitution, sex trafficking, and similar offenses could be added to give children additional protections.

NOTES:           The companion bill, SB 344 by Huffman, was passed by the Senate on April 9 on the local and uncontested calendar.