SUBJECT: Offense for physical contact with a child that is offensive, sexual in nature

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 6 ayes — Herrero, Carter, Burnam, Canales, Leach, Moody

2 nays — Schaefer, Toth

1 absent — Hughes

WITNESSES: For — PD Jackson, Allen Police Department; Eric Vickers, Abilene Police Department; (*Registered, but did not testify:* Lauren Donder, Children's Advocacy Centers of Texas, Inc.; Daniel Earnest, San Antonio Police Officers Association; Stephanie LeBleu, Texas CASA; Diana Martinez, TexProtects, The Texas Association for the Protection of Children; James McLaughlin, Texas Police Chiefs Association; Washington Moscoso, San Antonio Police Officers Association; Glenn Stockard, Texas Association Against Sexual Assault; Charley Wilkison, Combined Law Enforcement Associations of Texas; Columba Wilson)

Against — David Gonzalez, Texas Criminal Defense Lawyers Association; (*Registered, but did not testify:* Kristin Etter, Texas Criminal Defense Lawyers Association; Bobby Allen; Herman Buhrig; Richard Carden; Sharon Carden; GB Wardian)

On — (*Registered, but did not testify:* Shannon Edmonds, Texas District and County Attorneys Office)

BACKGROUND: Penal Code, sec. 21.11 makes indecency with a child a crime, including engaging in sexual contact with a child. Sexual contact is defined as touching, including through clothing, of the anus, breast, or any part of the genitals of a child or touching any part of the body of a child, including through clothing, with the anus, breast, or any part of the genitals of a person. The offense must be committed with the intent to sexually arouse or gratify someone and is a second-degree felony (two to 20 years in prison and an optional fine of up to $10,000).

Under the assault statute in Penal Code, sec. 22.01 it is a class C

misdemeanor (maximum fine of $500) to intentionally or knowingly cause physical contact with another when one knows or should reasonably believe that the other will regard the contact as offensive or provocative.

Penal Code, sec. 22.011 establishes an affirmative defense to prosecution under the sexual assault statute if the defendant was the spouse of the child at the time of the offense or:

- if the defendant was not more than three years older than the victim at the time of the offense and was not required to register for life on the state's sex offender registry or was not required to register as a sex offender because of a sexual assault conviction; and
- the victim was 14 years old or older and not someone whom the defendant would be prohibited from marrying under the state's bigamy laws.

DIGEST:

CSHB 1010 would make it a class A misdemeanor (up to one year in jail and/or a maximum fine of $4,000) for a person at least 17 years old who intentionally or knowingly caused physical contact with a child in such a way that a reasonable person would regard the contact:

- as offensive and sexual in nature and;
- as likely to precede sexual conduct prohibited under sections of the Penal Code governing sexual offenses and assaultive offenses.

The bill would extend the current affirmative defense to prosecution in the sexual assault statute to the offense in CSHB 1010.

The bill would take effect September 1, 2013, and would apply to offenses committed on or after that date.

SUPPORTERS SAY:

CSHB 1010 would address the serious problem of the sexual "grooming" of children. This occurs when sexual predators use inappropriate acts of a sexual nature, such as touching or massage, to build trust and desensitize children for later sexual abuse. CSHB 10 would protect Texas children and prevent sexual abuse by giving law enforcement authorities a way to punish those who commit these harmful and dangerous acts and to deter them in the first place.

Current law is inadequate to address this problem. While the offense of

indecency with a child makes it a crime to engage in sexual contact with a child, the contact that must occur is narrowly defined and involves touching specific parts of a child that may not occur during grooming. The crimes of sexual assault and aggravated sexual assault of a child also do not cover grooming.

The offense of assault also is inadequate to address grooming. While assault allows for offensive or provocative touching to be a crime, it is a class C misdemeanor carrying only a fine of up to $500 and no jail time, a mere slap on the wrist for acts that constitute grooming. Offensive touching can be punished as a class A misdemeanor if committed against an elderly or disabled person, and children deserve the same level of protection with a class A misdemeanor against grooming. Creating a specific offense under the assault statute would allow the crime to encompass the sexual nature of grooming, which differs from other offensive touching.

Prosecuting attempted assault or indecency with a child does not work in the context of prosecuting grooming actions. Absent a confession, it is too easy for persons accused of grooming to argue that their actions were not directed toward currently defined criminal conduct. CSHB 1010 would address this adequacy in the law by expanding the assault statute to make it a crime to perform certain acts likely to precede a sexual assault. No child should have to wait until a crime escalates to sexual assault to be protected under the law.

CSHB 1010 contains safeguards that would ensure that only acts related to grooming children for sexual purposes would be considered a crime. First, the act would have to be committed intentionally and knowingly. In addition, the act would have to be regarded as offensive and sexual in nature and likely to precede illegal sexual conduct. This language is specific enough to apply only to sexual, abusive touching but broad enough to cover grooming actions, which often are tailored to a particular child and situation. Taken together, these checks and balances would ensure that purely innocent, non-sexual acts would not fall under the bill.

Standards for prosecuting crimes also would provide protections for actions that were not sexual abuse. Law enforcement authorities and prosecutors would exercise their discretion and would not bring cases that consisted of innocent, non-criminal behavior or those with weak or

questionable evidence. Prosecuted cases would have to be proved beyond a reasonable doubt.

The bill would include other safeguards, including requiring offenders to be at least 17 years old and extending the affirmative defensive in sexual assault statute, sometimes called the "Romeo and Juliet" defense, to the offense in CSHB 1010.

OPPONENTS SAY:

While grooming is a serious problem and the state should do all it can to protect children, language in the bill could be too broad to capture only behaviors leading up to sexual abuse. The bill would use vague and undefined language, such as requiring actions to be "likely to precede sexual conduct," making it both hard to prove and hard to defend against. The broad language could allow some innocent actions to be interpreted as criminal.

The bill is unnecessary. Current crimes of indecency with a child, assault, or attempts to commit these crimes could be used to address these situations.