

SUBJECT: Revising the offense of improper photography

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 5 ayes — Herrero, Moody, Leach, Shaheen, Simpson

0 nays

2 absent — Canales, Hunter

WITNESSES: For — Jennifer Tharp, Comal County Criminal District Attorney; Richard Groff, New Braunfels Police Department; Joseph Tovar, New Braunfels Police Department; Halie Powell; Glenn Powell; (*Registered, but did not testify*: William Squires, Bexar County District Attorney; Justin Wood, Harris County District Attorney's Office; Lon Craft, Texas Municipal Police Association)

Against — None

BACKGROUND: Penal Code, sec. 21.15 establishes a criminal offense for improper photography or visual recording. It is an offense for a person:

- to photograph or by videotape or other electronic means to record, broadcast, or transmit a visual image of another at a location that is not a bathroom or private dressing room without the other person's consent and with intent to arouse or gratify the sexual desire of any person;
- to photograph or by videotape or other electronic means to record, broadcast, or transmit a visual image of another in a bathroom or private dressing room without the other person's consent and with intent to invade the privacy of the other person or with the intent to arouse or gratify the sexual desire of any person; or
- knowing the character and content of a photograph, recording, broadcast, or transmission, to promote one of these items described above.

Offenses are state-jail felonies (180 days to two years in a state jail and an optional fine of up to \$10,000).

DIGEST:

CSHB 3196 would revise the offense of improper photography. It would eliminate provisions that draw distinctions between photographs taken in a bathroom or private dressing room, would add a requirement relating to what a reasonable person would believe about an action, add rebuttable presumptions to the offense, and increase the penalty if the victim was younger than 18.

Under the revisions, it would be an offense if a person knowingly photographed or by videotape or other electronic means knowingly recorded, broadcast, or transmitted a visual image of the sexual or intimate parts of another or a visual image of another person engaged in sexual conduct, under certain circumstances. The actions would have to be done without consent and when a reasonable person would believe that the person's sexual or other intimate parts or the person's sexual conduct would not be visible to the public. Current provisions would remain that make it an offense to promote the content of photographs or other items described in the law if the character and content of the material was known.

The bill would create seven rebuttable presumptions that a person's conduct was without the consent of the other person. It would be a rebuttable presumption in a prosecution for the offense if:

- one person compelled another to submit or participate by specified ways and the other person believed that the person compelling them had the ability to execute the threat;
- the other person did not consent and the individual knew that either the other person was unconscious or physically unable to resist or that the other person was unaware of what was occurring;
- the individual knew that as a result of mental disease or defect the other person was incapable of either appraising the nature of the act or resisting it;
- the individual intentionally impaired the other person by

- administering a substance without the other's knowledge;
- the individual was a public servant who coerced the other person to submit or participate;
- the offense was accomplished by certain specified means, including deception or conduct that was hidden, that used equipment such as a telephoto lens to take certain kinds of sexual, non-public images; or
- the victim was younger than 18 years old.

The bill would state that signs posted in bathrooms or changing rooms indicating monitoring would not negate a person's reasonable expectation that their sexual or other intimate parts would not be visible to the public.

Offenses would be third-degree felonies (two to 10 years in prison and an optional fine of up to \$10,000) if the victim was younger than 18. Offenses that constituted an offense under another law could be prosecuted under either law or both.

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

**SUPPORTERS
SAY:**

CSHB 3196 would revise Texas law on improper photography to address problems with the statute identified by the courts. It would update the law to address the use of cell phones and other electronic devices used to take inappropriate photographs and videos without consent. Taking invasive and improper photographs of others without their consent is harmful conduct appropriately addressed by the Penal Code. CSHB 3196 is crafted to improve the law and address, in a legal and constitutional way, issues identified by the Texas Court of Criminal Appeals in its 2013 opinion that found part of the law unconstitutional.

Concerns that current law is broadly written would be addressed by describing the type of visual images that would be included and including a requirement that a reasonable person would believe the photographs or other items would not be publically visible. The bill would better define the offense by listing rebuttable presumptions for when an action would

be considered to take place without consent. CSHB 3196 would include language to help the statutes keep up with the widespread use of cell phones and other devices used to take pictures in public.

This bill would better protect children by increasing the penalty if the offense were committed against someone younger than 18. This would be in line with other Penal Code provisions that recognize that children are more vulnerable than others and offer extra protection.

**OPPONENTS
SAY:**

CSHB 3196 would be a content-based restriction on speech, which would be presumptively unconstitutional. The bill would broadly prohibit certain types of images and circumstances in which individuals might not have a privacy expectation and could lead to unfair convictions.

The state should be cautious about enhancing a penalty to a third-degree felony for nonviolent behaviors.