

## **BILL ANALYSIS**

C.S.H.B. 3196  
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Criminal Jurisprudence  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Concern has been raised that current law does not explicitly recognize or provide adequate punishment for the offense of improper photography or visual recording, specifically relating to photographs taken with cell phone cameras without the consent of all parties. C.S.H.B. 3196 seeks to make the law more clear and address this issue by amending applicable law.

### **CRIMINAL JUSTICE IMPACT**

It is the committee's opinion that this bill expressly does one or more of the following: creates a criminal offense, increases the punishment for an existing criminal offense or category of offenses, or changes the eligibility of a person for community supervision, parole, or mandatory supervision.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

C.S.H.B. 3196 amends the Penal Code to establish that knowingly is the requisite state of mind for the offense of improper photography or visual recording involving photographing, recording, broadcasting, or transmitting an improper visual image of another person without the other person's consent. The bill adds as conditions of the offense that the visual image be a visual image of the sexual or other intimate parts of another person or a visual image of another person engaged in sexual conduct and that the conduct occur 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. The bill removes from the conduct constituting the offense the conditions that the actor commits the offense with the intent to invade the privacy of the other person or arouse or gratify the sexual desire of any person, depending on whether the offense is committed at a location in a bathroom or private dressing room.

C.S.H.B. 3196 establishes that, in a prosecution for an improper photography or visual recording offense, there is a rebuttable presumption that the actor's conduct is without the consent of the other person if one or more of the following circumstances are shown on the trial of the offense:

- the actor compelled the other person to submit or participate by the use of physical force or violence or by threatening to use force or violence against the other person or another person and the other person believed that the actor had the ability to execute the threat;
- the other person did not consent and the actor knew the other person was unconscious or physically unable to resist or knew the other person was unaware that the conduct was occurring;
- the actor knew that as a result of mental disease or defect the other person was at the

time of the offense incapable either of appraising the nature of the act or of resisting it;

- the actor intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge;
- the actor was a public servant who coerced the other person to submit or participate;
- the offense was accomplished by conduct that was hidden or conducted secretly or an attempt of such conduct, by conduct that used equipment such as a telephoto lens that allowed a visual image of another person's sexual or other intimate parts or another person's sexual conduct to be made, when such conduct would not ordinarily be visible to the public, or by deception, including misrepresenting how the photograph, recording, broadcast, or transmission would be used or disseminated; or
- the victim of the offense was younger than 18 years of age at the time of the offense.

C.S.H.B. 3196 enhances the penalty for improper photography or visual recording from a state jail felony to a third degree felony if it is shown on the trial of the offense that the victim was younger than 18 years of age at the time of the offense. The bill establishes that, if conduct that constitutes the offense also constitutes another offense, the actor may be prosecuted for both offenses. The bill specifies that for purposes of conduct constituting the offense occurring in a bathroom or changing room, a sign or signs posted indicating that the person is being photographed or that a visual image of the person is being recorded, broadcast, or transmitted is not sufficient to negate the person's reasonable expectation that the person's sexual or other intimate parts or the person's sexual conduct would not be visible to the public.

#### **EFFECTIVE DATE**

September 1, 2015.

#### **COMPARISON OF ORIGINAL AND SUBSTITUTE**

While C.S.H.B. 3196 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and formatted in a manner that indicates the substantial differences between the introduced and committee substitute versions of the bill.

##### INTRODUCED

SECTION 1. Sections 21.15(a) and (b), Penal Code, are amended to read as follows:

(a) In this section:

**No equivalent provision.**

(1) "Promote" has the meaning assigned by Section 43.21.

**No equivalent provision.**

(2) "Sexual or other intimate parts," means

##### HOUSE COMMITTEE SUBSTITUTE

SECTION 1. Section 21.15, Penal Code, is amended to read as follows:

Sec. 21.15. IMPROPER PHOTOGRAPHY OR VISUAL RECORDING. (a) In this section:

(1) "Changing room" means a room or partitioned area provided or primarily used for the changing of clothing, including a dressing room, locker room, or swimwear changing area.

(2) "Promote" [~~,"promote"~~] has the meaning assigned by Section 43.21.

(3) "Sexual conduct" has the meaning assigned by Section 43.25.

(4) "Sexual or other intimate parts" means

the human genitals, anus, buttocks, pubic area or any portion of the female breast below a point immediately above the tiptop of the areola, whether naked or covered by clothing or undergarments.

(3) A person commits an offense if the person intentionally or knowingly photographs, videos, or by other electronic means records, broadcasts, or transmits a visual image of the sexual or other intimate parts of another person or another person engaged sexual conduct, without that person's effective consent and when a reasonable person would believe that the person's sexual or other intimate parts or sexual conduct would not be visible to the public.

(a) An act described above is presumed to be without effective consent as defined by Section 22.011(b)(1), (2), (3), (4), (5), (6), (7), and (8) or if it is accomplished by:

the human genitals, pubic area, anus, buttocks, or any portion of the female breast below the top of the areola, regardless of whether those parts are naked or covered by undergarments or other clothing.

(b) A person commits an offense if the person:

(1) knowingly photographs or by videotape or other electronic means knowingly records, broadcasts, or transmits a visual image of the sexual or other intimate parts of another person or a visual image of another person engaged in sexual conduct [at a location that is not a bathroom or private dressing room]:

(A) without the other person's consent; and  
(B) 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 [with intent to arouse or gratify the sexual desire of any person]; or

(2) [photographs or by videotape or other electronic means records, broadcasts, or transmits a visual image of another at a location that is a bathroom or private dressing room:

[(A) without the other person's consent; and

[(B) with intent to:

[(i) invade the privacy of the other person; or

[(ii) arouse or gratify the sexual desire of any person; or

[(3)] knowing the character and content of the photograph, recording, broadcast, or transmission, promotes a photograph, recording, broadcast, or transmission described by Subdivision (1) [or (2)].

(b-1) In a prosecution for an offense under this section, there is a rebuttable presumption that the actor's conduct is without the consent of the other person if it is shown on the trial of the offense that:

(1) the actor compelled the other person to submit or participate by:

(A) the use of physical force or violence; or

(B) threatening to use force or violence against the other person or another person, and the other person believed that the actor had the ability to execute the threat;

(2) the other person did not consent and the actor knew:

(A) the other person was unconscious or physically unable to resist; or

1. Conduct which is hidden or conducted secretly, or an attempt thereof;
  2. Conduct which Uses equipment such as telephoto lens which allows the recording of the sexual or other intimate parts or another person's sexual conduct when such would not ordinarily be visible to the public;
  3. Deception, including but not limited to misrepresenting how the photograph, video, or electronic record will be used or disseminated; or
- (b) Conduct directed towards a child as defined by Section 43.251(a)(1).

(c) An offense under this section is a state jail felony, except that the offense is a felony of the third degree if it is shown on the trial of the offense that the victim was younger than 18 years of age at the time of the commission of the offense.

(d) If conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section, the other law, or both.

No equivalent provision.

- (B) the other person was unaware that the conduct was occurring;
- (3) the actor knew that as a result of mental disease or defect the other person was at the time of the offense incapable either of appraising the nature of the act or of resisting it;
- (4) the actor intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge;
- (5) the actor was a public servant who coerced the other person to submit or participate;
- (6) the offense was accomplished by:
- (A) conduct that was hidden or conducted secretly or an attempt of such conduct;
- (B) conduct that used equipment such as a telephoto lens that allowed a visual image of another person's sexual or other intimate parts or another person's sexual conduct to be made, when such conduct would not ordinarily be visible to the public; or
- (C) deception, including misrepresenting how the photograph, recording, broadcast, or transmission would be used or disseminated; or
- (7) the victim of the offense was younger than 18 years of age at the time of the offense.

(c) An offense under this section is a state jail felony, except that the offense is a felony of the third degree if it is shown on the trial of the offense that the victim was younger than 18 years of age at the time of the offense.

(d) If conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section, [or] the other law, or both.

(e) In the application of this section to conduct in a bathroom or changing room [For purposes of Subsection (b)(2)], a sign or signs posted indicating that the person is being photographed or that a visual image of the person is being recorded, broadcast, or transmitted is not sufficient to establish the person's consent or to negate the person's reasonable expectation that the person's sexual or other intimate parts or the person's

sexual conduct would not be visible to the public [~~under that subdivision~~].

SECTION 2. The change in law made by this Act applies only to an offense committed on or after the effective date of this Act.

SECTION 2. The change in law made by this Act applies only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date.

SECTION 3. This Act takes effect September 1, 2015.

SECTION 3. Same as introduced version.