

SUBJECT: Sexual assault committed by employees of certain facilities

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 6 ayes — Keel, Riddle, Ellis, Hodge, Pena, Talton

0 nays

3 absent — Denny, Dunnam, P. Moreno

WITNESSES: For — None

Against — None

BACKGROUND: Under Penal Code, sec. 22.011 (sexual assault), it is a second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000) to intentionally or knowingly :

- cause the penetration of the anus or female sexual organ of another person by an means, without that person's consent;
- cause the penetration of the mouth of another person by the sexual organ of the actor, without the person's consent;
- cause the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or
- cause certain kinds of sexual contact between the person and a child.

A sexual assault is regarded as being without the consent of the other person in many circumstances, including the following:

- the other person has not consented and the actor knows the other person is unconscious or physically unable to resist;
- the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it;
- the actor is a public servant who coerces the other person to submit or participate;

- the actor is a mental health services provider or a health care services provider who causes the other person, who is a patient or former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor; or
- the actor is a clergyman who causes the other person to submit or participate by exploiting the other person's emotional dependence on the clergyman in the clergyman's professional character as spiritual adviser.

Health care services provider means a physician, a chiropractor, a licensed vocational nurse, a physical therapist, a physician's assistant, or a registered or advanced practice nurse. Mental health services provider includes a licensed social worker, chemical dependency counselor, licensed professional counselor, licensed marriage and family therapist, member of the clergy, or psychologist.

DIGEST:

HB 1425 would add to the list of sexual assaults that are regarded as being without the consent of the other person to include situations where the actor was an employee of a facility where the other person was a resident, unless the employee and resident were formally or informally married to each other. Employee of a facility would mean a person who was an employee, or any other person who provided services for a facility for compensation, including a contract laborer, of a nursing home, assisted living facility, home health agency, adult day care facility, facility for persons with mental retardation, adult foster care provider, or a facility that provided mental health services and was operated by or contracted with the Texas Department of Mental Health and Mental Retardation.

The bill would take effect on September 1, 2003.

**SUPPORTERS
SAY:**

HB 1425 would bring consistency to the law by prohibiting employees of long-term care facilities, such as nursing homes, from engaging in sexual contact with residents. Current law already includes health care service and mental health service providers among the list of those who act without consent when engaging in sexual acts with patients. It was a legislative oversight to exclude employees at facilities because they also have direct access to patients and easily can take advantage of them. If chaplains are

included in the list, then employees of long-term facilities also should be included.

HB 1425 would take the next logical step and give prosecutors more tools to address the problems of sexual assault at facilities such as nursing homes. Patients at mental health facilities and those with serious infirmities, such as Alzheimer's, are particularly vulnerable to this kind of abuse, and employees should not be allowed to have inappropriate relationships with them simply because the employee did not fall within the technical definition of a health services or mental health services provider.

HB 1425 is necessary because employees of long-term care facilities have sexually assaulted residents, and this problem should not go unchecked. Certified medication aides and nurses aides are not included within the definition of health service providers, yet they interact with patients more often than registered nurses or doctors. Furthermore, employees in the housekeeping, laundry services, or maintenance divisions easily can access patients and need a clear signal that such behavior is inappropriate. The bill's language is not overly broad because any employee with access to a resident could take advantage of a resident's vulnerability and prey on him or her sexually. These persons are responsible for caring for physically or mentally impaired individuals, and any sexual contact with a resident should be considered non-consensual.

**OPPONENTS
SAY:**

HB 1425 is not necessary. The current definition of health services or mental health services provider is broad enough to include all persons who have direct access to residents of long-term care facilities, such as physical therapists, a physician's assistant, nurses, and counselors of all types. Furthermore, sexual contact already is considered non-consensual if the other person is unconscious or physically unable to resist or the actor knows that as a result of mental disease or defect the other person is incapable of resisting the sexual act.

HB 1425 is overly broad. The prohibition in current law against sexual contact with clergy, for example, is limited to cases where the clergyman causes the other person to submit by exploiting the other person's emotional dependency on the clergyman in his professional character as spiritual adviser. Likewise, there is no consent in a situation where a health care

service or mental health service provider caused a patient to submit by exploiting the other person's emotional dependency on the actor. However, HB 1425 would not contain such limiting language for an employee of a facility. It could apply to groundskeepers, food service workers, employees in the business office, or contract workers, who had no regular contact with the resident and no direct role in their long-term care.

NOTES:

The companion bill, SB 825 by Whitmire, passed the Senate on April 10 on the Local and Uncontested Calendar and is scheduled for public hearing in the House Criminal Jurisprudence Committee today.

A similar bill, HB 532 by Giddings, passed the House on May 5. It would make it a state-jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000) for an employee of a public or private primary or secondary school to engage in sexual contact, sexual intercourse, or deviate sexual intercourse with a person under 18 who was enrolled in a public or private primary or secondary school and who was not the employee's spouse.