

## CHAPTER 530

## H.B. No. 626

An Act relating to offenses involving sexual conduct or sexual performance by a child, revising the definitions and elements of certain offenses, and creating an offense for the possession of certain material that depicts a child engaged in sexual conduct.

*Be it enacted by the Legislature of the State of Texas:*

**SECTION 1.** Section 43.25, Penal Code, is amended to read as follows:

Sec. 43.25. **SEXUAL PERFORMANCE BY A CHILD.** (a) In this section:

(1) "Sexual performance" means any performance or part thereof that includes sexual conduct by a child younger than 17 years of age.

(2) ~~["Obscene sexual performance" means any performance that includes sexual conduct by a child younger than 17 years of age of any material that is obscene, as that term is defined by Section 43.21 of this code.~~

~~(3)~~ "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.

(3) ~~(4)~~ "Performance" means any play, motion picture, photograph, dance, or other visual representation that *can be* ~~is~~ exhibited before an audience of one or more persons.

(4) "Produce" with respect to a sexual performance includes any conduct that directly contributes to the creation or manufacture of the sexual performance.

(5) "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do any of the above.

(6) "Simulated" means the explicit depiction of sexual conduct that creates the appearance of actual sexual conduct and during which a person ~~the persons~~ engaging in the conduct ~~exhibits~~ ~~exhibit~~ any uncovered portion of the breasts, genitals, or buttocks.

(7) "Deviate sexual intercourse" has the meaning defined by Section 43.01 of this code.

(8) "Sado-masochistic abuse" has the meaning defined by Section 43.24 of this code.

(b) A person commits an offense if, knowing the character and content thereof, he employs, authorizes, or induces a child younger than 17 years of age to engage in *sexual conduct* or a sexual performance. A parent or legal guardian or custodian of a child younger than 17 years of age commits an offense if he consents to the participation by the child in a sexual performance.

(c) An offense under Subsection (b) of this section is a felony of the second degree.

~~(d) [A person commits an offense if, knowing the character and content of the material, he produces, directs, or promotes an obscene performance that includes sexual conduct by a child younger than 17 years of age.~~

~~(e)~~ A person commits an offense if, knowing the character and content of the material, he produces, directs, or promotes a performance that includes sexual conduct by a child younger than 17 years of age.

~~(e) [(f)]~~ An offense under Subsection (d) ~~(or (e))~~ of this section is a felony of the third degree.

~~(f) [(g)]~~ It is an affirmative defense to a prosecution under this section that:

(1) the defendant, in good faith, reasonably believed that the *child* ~~person~~ who engaged in the sexual conduct was 17 years of age or older;

(2) *the defendant was the spouse of the child at the time of the offense;*

(3) *the conduct was for a bona fide educational, medical, psychological, psychiatric, judicial, law enforcement, or legislative purpose; or*

(4) *the defendant is not more than two years older than the child.*

~~(g) [(h)]~~ When it becomes necessary for the purposes of this section *or Section 43.26 of this code* to determine whether a child who participated in sexual conduct was younger than 17 years of age, the court or jury may make this determination by any of the following methods:

(1) personal inspection of the child;

(2) inspection of the photograph or motion picture that shows the child engaging in the sexual performance;

(3) oral testimony by a witness to the sexual performance as to the age of the child based on the child's appearance at the time;

(4) expert medical testimony based on the appearance of the child engaging in the sexual performance; or

(5) any other method authorized by law or by the rules of evidence at common law.

**SECTION 2.** Subchapter B, Chapter 43, Penal Code, is amended by adding Section 43.26 to read as follows:

*Sec. 43.26. POSSESSION OF CHILD PORNOGRAPHY. (a) A person commits an offense if:*

*(1) the person knowingly or intentionally possesses material containing a film image that visually depicts a child younger than 17 years of age at the time the film image of the child was made who is engaging in sexual conduct; and*

*(2) the person knows that the material depicts the child as described by Subdivision (1) of this subsection.*

*(b) In this section:*

*(1) "Film image" includes a photograph, slide, negative, film, or videotape, or a reproduction of any of these.*

*(2) "Sexual conduct" has the meaning assigned by Section 43.25 of this code.*

*(c) The affirmative defenses provided by Section 43.25(f) of this code also apply to a prosecution under this section.*

*(d) An offense under this section is a Class A misdemeanor.*

**SECTION 3.** (a) The change in law made by Section 1 of this Act applies only to an offense committed on or after the effective date of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

(b) An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for this purpose.

**SECTION 4.** This Act takes effect September 1, 1985.

**SECTION 5.** The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed by the House on April 24, 1985, by a non-record vote; House concurred in Senate amendments to H.B. No. 626 on May 27, 1985, by the following vote: Yeas 136, Nays 1, 1 present, not voting; passed by the Senate, with amendments, on May 27, 1985, by a viva-voce vote.

Approved: June 12, 1985

Effective: September 1, 1985