

DISCUSSION MEMORANDUM

Department of State's Attorneys & Sheriffs

To: Timothy Lueders-Dumont, Esq.
From: Rory Thibault, Esq.
Date: February 7, 2023
Re: H. 173 An act relating to prohibiting manipulating a child for the purpose of sexual contact

While the intent of the bill seems fairly clear, it has inadvertently opened the door to a definitional maelstrom in the world of sexual offenses. The proposed amendment of the luring statute requires assessment of the statutory definitions of “child” versus “minor,” the various age specific carve outs provided under Vermont’s sexual offense crimes, and the differences between “sexual contact,” “sexual conduct,” and “sexual act.” Further, the term “manipulate” as a new construct requires consideration as well.

By attempting to extend 13 V.S.A. § 2828 to cover minors in certain circumstances (e.g. when there is a trust relationship of some form) creates some greater complexity in applying the statute.

Definitions

Child & Minor

13 V.S.A. § 2821(1) defines “child” as “any person under 16 years of age.” This definition is then, *de facto*, extended by referencing a “child under 18 years of age” mirroring the treatment under 13 V.S.A. § 32

The term “minor” is defined under 13 V.S.A. § 2801(1) as “any person less than 18 years old” – under the obscenity chapter of Title 13, not under the chapters defining sexual assault, lewd and lascivious conduct, or sexual exploitation of children.

Sexual Acts & Sexual Conduct (& Sexual Contact)

13 V.S.A. § 3251(1) defines “sexual act” as “conduct between persons consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any intrusion, however slight, by any part of a person’s body or any object into the genital or anal opening of another.”

13 V.S.A. § 2821(2) defines the term “sexual conduct” to include:

(A) any conduct involving contact between the penis and the vulva, the penis and the penis, the penis and the anus, the mouth and the penis, the mouth and the anus, the vulva and the vulva, or the mouth and the vulva;

(B) any intrusion, however slight, by any part of a person's body or any object into the genital or anal opening of another with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desire of any person;

(C) any intentional touching, not through the clothing, of the genitals, anus, or breasts of another with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desire of any person;

(D) masturbation;

(E) bestiality;

(F) sadomasochistic abuse for sexual purposes; or

(G) any simulation of the conduct described in subdivisions (2)(A)-(F) of this section.

In contrast to the robust definition of "sexual conduct" there is no formal statutory definition of "sexual contact" in any of the three relevant chapters of Title 13 – rather, the common law understanding of lewd and lascivious conduct is generally applied or understood to constitute "sexual contact."

Age Contingencies in Sexual Offense Statutes

There are several statutory constructs that limit criminal liability when an actor is a young adult, or minor. For example, under 13 V.S.A. § 3252(c), Vermont's statutory rape offense, "[n]o person shall engage in a sexual act with a child who is under the age of 16, except: (1) where the persons are married to each other and the sexual act is consensual; or (2) where the person is less than 19 years old, the child is at least 15 years old, and the sexual act is consensual."

13 V.S.A. § 3252(d) provides that "[n]o person shall engage in a sexual act with a child who is under the age of 18 and is entrusted to the actor's care by authority of law or is the actor's child, grandchild, foster child, adopted child, or stepchild." This codifies that under such circumstances an individual under 18 cannot legally consent.

13 V.S.A. § 3252(e) provides that: "[n]o person shall engage in a sexual act with a child under the age of 16 if: (1) the victim is entrusted to the actor's care by authority of law or is the actor's child, grandchild, foster child, adopted child, or stepchild; or (2) the actor is at least 18 years of age, resides in the victim's household, and serves in a parental role with respect to the victim." Again, there is

a carve out that raises the effective age of consent when the victim is a family or household member.

13 V.S.A. § 3258(a), which criminalizes the sexual exploitation of a “minor” provides that “[n]o person shall engage in a sexual act with a minor if: (1) the actor is at least 48 months older than the minor; and (2) the actor is in a position of power, authority, or supervision over the minor by virtue of the actor’s undertaking the responsibility, professionally or voluntarily, to provide for the health or welfare of minors, or guidance, leadership, instruction, or organized recreational activities for minors.”

Finally, 13 V.S.A. § 2602, defining lewd or lascivious conduct with a child, provides that “[t]his section shall not apply if the person is less than 19 years old, the child is at least 15 years old, and the conduct is consensual.”

Manipulation

There is no other statutory definition of this term under existing Vermont criminal law. The Black’s Law Dictionary definition is centered on market manipulation and is used exclusively in a financial context.

Analysis of H.173

This proposal offers the opportunity to clean up and clarify the language and definitions under 13 V.S.A. § 2828. Eliminating the cross reference to other sections, and relying on the definition of “sexual conduct” makes the most sense under the circumstances. The imprecise reference to “sexual contact” in the proposal should be changed to this definition and, presently, is out of place.

For purposes of conformity, the term “minor” should be used as appropriate, in lieu of “child under the age of 18” which conflicts with the overall definition and understanding of child.

In practical terms, I assess the legislative intent to be two-fold:

- (1) include manipulation of a victim as a basis for criminal liability;
- (2) create a lesser offense for sexual exploitation of a minor, premised upon abuse of power or circumstances where an authority figure engages in “grooming” of a putative victim.

Turning to the age carve outs, there does not appear to be a basis to change the standard for circumstances where a child (under 16 years of age) is the victim – and there is value in maintaining consistency with other existing sexual offense statutes (e.g. lewd and lascivious conduct and sexual assault).

In contrast, the 48-month differential concerning a minor may need narrowing to avoid implication of a broader set of potential offenders. Take for example a college or university environment, where it is increasingly common for 17-year olds to attend as part of early college or early graduation from high school. The age cohort may span up to 21 or 22 years of age within the same social sphere. Ultimately, this is a policy decision – but it seems that primary concern and need for criminal liability is reserved to older or more predatory scenarios than near-peers in age.

Finally, the term “manipulate” is not defined elsewhere in Vermont statute, and few (if any) other states have formally attempted to define this term in the context of sexual conduct. One example comes from Michigan, where the term “manipulate” is used as part of a definition for “exploit,” specifically: “[e]xploit means to manipulate a victim for selfish or unethical purposes.” Mich. Comp. Laws Ann. § 777.40 (West).

Vermont’s most analogous term is “coerce,” used in the sexual assault statute and integration here may be useful for interpretation by courts and for creation of sentencing instructions. Further, clarifying that manipulation may be a process, rather than a discrete act or two, providing that it may entail a “course of conduct” may be appropriate and ensure a broad scope of potentially admissible and relevant evidence in a trial setting. Ultimately, the present definition is a bit vague and susceptible to a challenge that a defendant may not have adequate notice of what behaviors are covered by “manipulation.”

Recommendations

1. Amend the statute to refer to “sexual conduct” rather than the cross-referenced definitions of lewd and lascivious conduct or sexual acts in conformity with the definition provided for under the chapter the offense is defined.
2. Refine the definition of “manipulate” or consider use of another existing term – e.g. “coerce.” Also, clarify that it may be a “course of conduct” in lieu of one discrete act.
3. Establish consistency between the descriptor of positions of power/authority with the 13 V.S.A. § 3258(a) language concerning sexual exploitation of a minor.
4. Tailor the age qualifiers to the specific offenses, rather than attempt to modify the existing statutory standard.
5. Update the definitions in 13 V.S.A. § 2821 to include “minor” and any other pertinent terms.

§ 2828. LURING A CHILD **OR MINOR**

(a) No person shall knowingly solicit, lure, manipulate, or entice, or to attempt to solicit, lure, manipulate, or entice, a child under the age of 16 years of age or another person believed by the person to be a child under the age of 16, years of age to engage ~~in a sexual act as defined in section 3251 of this title or engage in lewd and lascivious conduct as defined in section 2602 of this title~~ **in sexual conduct. This section shall not apply if the person is less than 19 years old, the child is at least 15 years old, and the conduct is consensual.**

~~(d)~~**(b)** No person shall knowingly solicit, lure, manipulate, or entice, or attempt to solicit, lure, manipulate or entice, a **minor child under 18 years of age or another person believed by the person to be a child under 18 years of age** to engage in a **sexual act as defined in section 3251 of this title or engage in lewd and lascivious conduct as defined in section 2602 of this title** **sexual conduct** if:

(1) the person is in a position of power, authority, or supervision over the minor by virtue of the person's professional or voluntary role as a provider of health care, guidance, leadership, instruction, organized recreational activities, or religious activity for minors; **and**

(2) there is an age difference of 48 months or greater between the actor and the minor.

~~(b)~~**(c)** This section applies to solicitation, luring, manipulating, or enticement by any means, including in person, through written or telephonic correspondence, or through electronic communication.

~~(c)~~ This section shall not apply if the person is less than 19 years old, the child is at least 15 years old, and the conduct is consensual and there is an age difference of less than 48 months, unless the person and alleged victim meet the criteria outlined in subsection (d) of this section.

~~(e)~~**(d)** As used in this section, "manipulate" and "manipulating" means an action, or actions, **or course of conduct** undertaken for the purpose of facilitating or coercing sexual ~~contact~~ **conduct** with a child or student **minor**.