ACLU
AMERICAN CIVIL LIBERTIES UNION of VERMONT

Testimony of Allen Gilbert, executive director, ACLU-Vermont on S. 9, child protection bill, March 19, 2015

For testimony on S. 9, the child protection bill, witnesses have been asked to address four questions. The questions relate to reaching the goal of the bill – improving Vermont's child protection responses.

The first question asks what sections of the bill are essential in meeting this goal. I am not intimately familiar with current DCF procedures and practices, so I must defer to DCF staff or others more knowledgeable than I in this area.

The second question is what pieces of the bill are helpful but not essential. Again, without intimate knowledge of current procedures and practices, this is difficult for me to answer, as is question 3, which concerns what is missing to move the state towards reaching its goal.

Question 4 is what sections do not move us towards the goal. **My testimony is that Sections 3 and 4 might move the state closer towards the goal, but the requirements of these two sections impose what the ACLU considers to be unreasonable burdens on Vermont's citizens.** We think Section 3 in particular is unworkable.

Section 3 deputizes every person in the state – regardless of experience, gender, or knowledge – who at any point has custody or care of a child, to make judgments that they may or may not be capable of making. We think people will be uncomfortable being put in this role. Anyone would be if they could be incarcerated for 10 years for making the wrong judgment. It's a sledge hammer approach to address a very complex problem.

That's the first reason we don't think Section 3 will be successful. There is a second reason. It is that we think the law will be applied selectively. The sledge hammer given prosecutors creates discretion so broad that I think only in the rarest of cases will charges under this provision be brought. However, as with any heavy weapon, mention of the law and its penalty might cause fear that leads the accused to essentially incriminate him or herself. Someone who has, him or herself, not done harm, could be greatly harmed through prosecution and prison. **People will be made to prove their innocence, which turns a central tenet of our criminal justice system on its head.**

If this provision were aggressively utilized by prosecutors, and the maximum prison sentence imposed, a half-million-dollar expense would be created for the state upon every conviction. Such a result is exactly what the state is trying to reverse, in terms of incarceration. We want fewer people in jail, not more – especially when their offense is a non-violent one.

As we heard yesterday, the requirements of Section 3 are vague. The verb "act" is not defined, and there is no standard for what "failure to act" means. Indeed, one is not required to "prevent" harm to a child, just "act to prevent a child from suffering any of the outcomes as set forth in subdivision (1) of this subsection."

These outcomes range from "death" to "substantial risk of death," "substantial loss or impairment of the function of any bodily member or organ," "substantial disfigurement,"

"strangulation," and "substantial impairment of health." How does a lay person judge what a "substantial impairment of health" might be? In testimony before Senate committees, it was noted that interpreting Section 3 requires a knowledge of this particular statute, other statutes, and Vermont Supreme Court decisions. That's a lot to ask of an average citizen of this state.

The affirmative defenses one can raise if accused of the crime of "failure to protect" place a heavy burden on any defendant. In effect, the defendant must prove his or her innocence. Doing so is difficult. One must show, by a "preponderance of the evidence," that she had a "reasonable fear" that she "or another person" would "suffer death, bodily injury, or serious bodily injury … or sexual assault … as a result of acting to prevent harm to the child".

And the medical defense: How does one prove that a decision NOT to give medicine to a child or take him to the doctor was – after the child has been injured or died -- a "reasonable decision"?

Let me offer three examples that I think illustrate challenges posed by Section 3.

- An example yesterday concerned a babysitter and a set of stairs. The sitter notices there is no gate at the top of the stairs. Let's say that she finds a gate in the basement and puts it at the top of the stairs. She notices the tension spring on the gate isn't working and figures she'll wedge the gate between the banister and wall. But as the child is playing, he breaks through the gate, falls down the steps, and fractures his skull. Is the babysitter guilty of "failure to protect?" What if the gate DOES hold, although it's clearly defective: If the babysitter fails to tell the parents or someone else about this problem, and the child is subsequently seriously injured, is the babysitter guilty of "failure to protect?"

- What if my son and daughter-in-law oppose certain medications because they believe the medications can cause severe harm to their young child. If I sometimes watch over my grandchild, must I report what the state believes is potential harm being done to the child because prescribed medications aren't being taken? Must a school nurse provide a list of students she knows, from records at the school, who haven't been vaccinated?

- Once a report of suspicion of potential harm is made, does the person to whom the report is made also become liable? Is a chain of liability created? How does that work? A DCF worker faces a 10-year jail sentence if s/he gets a report from a babysitter or a school nurse, feels the report is unfounded because the reporter has been reporting all sorts of suspicions to the DCF worker, but it's found this one report is accurate – does the DCF worker face a jail sentence?

In addition to our concerns about Section 3, we are also concerned about the breadth of Section 4 and the very heavy penalties it carries. We're unclear what "actually present at the site of methamphetamine manufacture" means. Someone cooks meth in their garage and not in their house; does the law apply? Also unclear to us is the justification for the draconian penalties.

Finally, if I could, in Section 5, which calls for reporting by the judiciary: It only calls for reporting about how Section 3 is being applied. I would suggest it also report on how Section 4 is being applied. Additionally, the language of what the judiciary must track seems inconsistent. In the first sentence, the requirement is, "The Judicial Branch shall track all prosecutions and convictions pursuant to ……." However, in (1), the charge is to "the number of arrests, prosecutions, and convictions," and in (2), "the disposition of all cases prosecuted…." We would suggest language that calls for the reporting of "all arrests, charges, prosecutions, convictions, and sentences pursuant to 13 VSA 1304a and 18 VSA 4236 (a)(2)."