



NATIONAL CENTER ON SEXUAL EXPLOITATION

Testimony by Eleanor Kennelly Gaetan

Director of Government Relations, National Center on Sexual Exploitation

on

H. 936 - An Act Relating to Sexual Exploitation of Children

Before the Vermont Senate Judiciary Committee

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Good morning Chairman Sears and members of the committee. My name is Eleanor Kennelly Gaetan and I am Director of Government Relations at the National Center on Sexual Exploitation (NCOSE) in Washington DC, a nonpartisan non-profit organization founded in 1962.

I'm also active in New Englanders Against Sexual Exploitation (NEASE), which requested that NCOSE's Law Center analyze H 936, An Act Relating to Sexual Exploitation of Children.

Having grown up in Connecticut, where I still have property and extensive ties, some of my most precious memories are of ski trips to Killington and Stowe. Your state is a wonderland that all who visit, treasure. Unless, their experience in Vermont involves sexual exploitation. Hopefully, I'm joined this morning by Tricia Grant, founder of *If Only One*, who is also active in NEASE. Tricia was a victim of sex trafficking in Vermont.

NCOSE commends the Vermont House for opening up your state law related to the sexual exploitation of children in order to reflect current understanding of the nature of this abuse.

Across the country, we are seeing states changing legal terminology from "child pornography" to "child sexual abuse material" or CSAM, in order to reflect the tragic reality that every instance of child pornography is documentation of a crime—a crime with lifelong negative consequences for the psychological and physical wellbeing of the child victimized in the photograph, video, or other digital record. As the title of a report issued last year by the National Center on Missing and Exploited Children makes clear—"Captured on Film: Survivors of Child Sex Abuse Material are Stuck in a Unique Cycle of Trauma"—the pain and suffering experienced by victims of CSAM rarely goes away.

H 936 adopts this new term, CSAM. It also includes three other improvements: a) It broadens the scope of the CSAM crime by adding terms "make available" and "file sharing, or peer-to-peer networks," which update the way CSAM is typically exchanged online; b) It adds language "knowingly access with intent to view" which is broader than just possession, and would include watching a video even without downloading/storing it;

and, c) It broadens the scope of the crime by adding language "with or on" instead of just "conduct by a child" so law will read "conduct by, with or on a child."

What concerns NCOSE is that the improvements made by H 936 simply do not go far enough to strengthen Vermont's statute in order to protect the very people the term CSAM seeks to highlight, the victims. This bill is like a person setting out to improve safety hazards in a playground, who finds the playground with dangerous equipment, strewn with glass, and the response is to plant a few flowers.

Please allow me to highlight four major weaknesses in Vermont's current CSAM statute, which could be strengthened by a more comprehensive reform.

1. H 936 retains Vermont's existing definition of a child as under age 16 while **federal law on CSAM applies to "minors," under age 18**, as does law in neighboring Massachusetts, for example. Only five other states fail to protect youth ages 16 and 17: Connecticut [§ 53a-193 (13)]; Maine [§283 (1)(b)]; Maryland [§ 11-208 (b)]; Nevada (NRS 200.730); and New York (§ 263.16). Two states, Alabama and Louisiana, define children as under age 17 for the purposes of CSAM statutes. **NCOSE believes youth ages 16 and 17 should be protected** from a form of sexual abuse that causes deep and long-lasting psychological and physical harm, as 42 states do.
2. H 936 retains the "mistake of age" defense for recording CSAM.
3. H 936 retains the "mistake of age" defense given to perpetrators for use of a child in sexual performance.
4. Additionally, H 936 could be adding a new problem to Vermont's statute: It adds "simulated conduct" to the definition of CSAM, a term that **could be unconstitutional** in light of *Ashcroft v. Free Speech Coalition*, 536 U.S. 234 (2002), which found "virtual child porn" constitutionally protected.

Overall, the flaws in Vermont's current law are not remedied by the small improvements made by H 936. The two versions of affirmative defense in your statute remove responsibility for due diligence from the defendant, creating bad policy that prioritizes and protects the accused over the child who was sexually exploited. Prosecutors face challenges in meeting the burden of proof to establish that the perpetrator had prior knowledge of the age of the child. Such a defense serves to shield exploiters while increasing the burden on prosecutors.

Every year, Shared Hope International publishes a state-by-state report card, analyzing child sexual abuse material statutes under three components: obtaining and addressing CSAM, creating and distributing CSAM, and promoting and selling CSAM. According to the 2019 Protected Innocence Challenge, Vermont received a "C" grade on its overall legislative approach to the sexual exploitation of children, raising their grade only one level since 2011.

NCOSE urges you to set aside H 936 in order to do a deeper, more meaningful reform of the statute, an effort to which NCOSE would be very happy to contribute ideas and language.