



TO: Senate Judiciary Committee
House Judiciary Committee

FROM: Hon. Thomas A. Zonay, Chief Superior Judge
Chair, Vermont Sentencing Commission
(the “Commission”)

RE: Report of Vermont Sentencing Commission pursuant to Section 3a of Act 102
(H. 694) (2024) Review of Definitions for Sexually Based Offenses.

DATE: October 29, 2024

Report Requirements

Pursuant to Section 3a of Act 102 (H. 694) (2024), not later than December 1, 2024, the Vermont Sentencing Commission shall review definitions in 13 V.S.A. chapters 59 (lewdness and prostitution), 64 (sexual exploitation of children), and 72 (sexual assault) for the purpose of updating and harmonizing the definitions as they are used in those chapters. As part of the review, the Commission shall, in particular, consider the definitions of “sexual conduct” as defined in 13 V.S.A. § 2821 and “sexual act” as defined in 13 V.S.A. § 3251.

Membership

The Members of the Commission are:

- (1) Thomas A. Zonay, Chief Superior Judge (Chair)
- (2) Rebecca Turner, Office of the Defender General (vice-chair)
- (3) Superior Judge Mary Morrissey
- (4) Superior Judge John Treadwell
- (5) Senator Nader Hashim
- (6) Representative Barbara Rachelson
- (7) Domenica Padula, Attorney General’s Office
- (8) Matthew Valerio, Defender General

- (9) Timothy Lueders-Dumont, Department of State’s Attorney’s
- (10) Marshall Pahl, Juvenile Defender
- (11) Ian Sullivan, Rutland County State’s Attorney
- (12) Jordana Levine, Esq.
- (13) Joshua Rutherford, Department of Corrections
- (14) Tucker Jones, Department of Public Safety
- (15) Jennifer Poehlmann, Executive Director of the Vermont Center for Crime Victim Services
- (16) Monica Weeber, Exec. Director of Vermont Crime Research Group

Commission Meetings

The review required under Act 102 was considered by the Commission at its meetings held on July 31, 2024, and September 23, 2024.

Select Existing Definitions

I. 13 V.S.A. § 2821. Definitions (Chapter 064, Sexual Exploitation of Children)

As used in this chapter:

(2) “Sexual conduct” means any of the following:

(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.

II. 13 V.S.A. § 3251. Definitions. (Chapter 072, Sexual Assault)

As used in this chapter:

(1) A “sexual act” means 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.

(2) "Sexual conduct" means any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual acts, use of contraceptives, living arrangement, and mode of living.¹

Commission Recommendation

In conducting the review under Sec. 3a of Act 102, the Commission members relied upon their examination of the chapters and statutes at issues, as well as their expertise, knowledge, and experience in criminal cases involving the particular definitions which it is charged with reviewing. They also relied upon information provided to them by colleagues in the field regarding the definitions.

A number of reasons were advanced by members of the Commission in opposition to making any recommendations for changes to the definitions at issue:

- (1) The current definitions were each enacted to address specific different conduct and there is a necessary reason they are not the same.
- (2) Practitioners in the courts have not reported concerns or confusion regarding application of the different definitions.
- (3) There is significant caselaw which provides guidance in the application of the current definitions.
- (4) No member of the Commission advanced any reason to support making any changes to the current definitions or to harmonize them.

After considering the question the Commission unanimously voted to recommend that there be no changes to the current definitions.

¹ The Commission observes that this definition of "sexual conduct" is used in Chapter 72 at 13 V.S.A. § 3255. *Evidence*, which sets forth the Rape Shield statute. Notably, the use of the term "sexual conduct" is also found in Chapter 72 at 13 V.S.A. § 3259. *Sexual exploitation of a person who is being investigated, detained, arrested, or is in the custody of a law enforcement officer*, but the statute specifically sets forth that the definition of "sexual conduct" found at 13 V.S.A. § 2821 is to be used for application of the statute. Thus, the definition of "sexual conduct" in Chapter 72 is used only in connection with application of the Rape Shield statute.