

**OFFICE OF THE DEFENDER GENERAL
2009 GREEN MOUNTAIN JUVENILE AND
CRIMINAL DEFENSE INSTITUTE**

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The Inn at Essex
70 Essex Way
Essex Jct., VT 05452

NEW SEX LAWS: YIPES!!

S.13

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S.13 - SUMMARY

<http://www.leg.state.vt.us/docs/2010/bills/Passed/S-013.pdf>

**AN ACT RELATING TO IMPROVING
VERMONT'S SEXUAL ABUSE RESPONSE SYSTEM**

EFFECTIVE 3/4/09 UNLESS OTHERWISE NOTED.

I. EDUCATION

- A. The Act makes any person convicted of a sex offense that requires registration pursuant to chapter 167, subchapter 3 of Title 13 ineligible to be a work study student.
- B. Effective 7/1/09:
 - A. A "criminal record" shall include whether or not any convictions in Vermont include an offense requiring sex offender registration.
- C. Effective 7/1/10 the Act:
 - a. Establishes a subscription service whereby authorized requestors may be notified of changes to an individual's criminal conviction record.
- D. Effective 12/31/10 the Act:
 - 16 V.S.A. §255 – related to schools and their contractors:
 - a. Extends criminal background checks from initial educator licensure to reinstatement and renewal, and allows for a recheck at any time during the course of the person's employment in the capacity for which the original check was required. Continued checking may be conducted through a subscription service.
 - b. Expands required checks to the child protection registry maintained by the Dept. for Children and Families (DCF), as well as the vulnerable adult abuse, neglect, and exploitation registry maintained by the Dept. of Disabilities, Aging and Independent Living. The two departments will adopt rules governing the process for obtaining such registry information. Anyone denied a license based upon the registry information has the right of appeal.
 - c. Makes any person convicted of a sex offense that requires registration pursuant to chapter 167, subchapter 3 of Title 13 ineligible for educator licensure or employment as a superintendent.

II. SEXUAL CRIMES EXPANSION

- A. Act creates the crime of sexual exploitation of a minor (13 V.S.A. §3258). The "actor" must:
 - a. engage in a sexual act with a minor,
 - b. be at least 48 months older than the minor, and
 - c. be "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

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for the health or welfare of minors, or guidance, leadership, instruction, or organized recreational activities for minors.”

If no abuse of that power, authority or supervision occurs in order to engage in the sexual act, the crime is a one-year misdemeanor. If such abuse occurs, the crime is a five-year felony.

- B. Aggravated sexual assault of a child is now a listed crime under 13 V.S.A. § 5301(7)(CC).
- C. Definition of sex offender in 13 V.S.A. § 5401(10) includes aggravated sexual assault of a child.

III. SEX OFFENDER REPORTING – Effective 7/1/09

- A. DOC must report to the Dept. of Public Safety (DPS) and DCF whether a sex offender will be living with a child under the age of 18. DOC and DCF will “work together to determine whether such a placement is appropriate.” If the offender is no longer under DOC supervision and DOC knows the offender will be residing with a person under the age of 18, DOC will notify DCF at least 24 hours prior to releasing the offender into the community.
- B. When there is a change of address, the offender has three days to notify DOC if a child will be residing at the same address.
- C. While under DOC supervision, the sex offender must notify DOC within three days of any child moving into the same residence.

IV. SPECIAL INVESTIGATION UNITS.

- A. SIUs are now responsible (along with local law enforcement) for investigation of registry requirements and are authorized to conduct in-person registry compliance checks.
- B. Multidisciplinary Teams empanelled under 33 V.S.A. §4917 must participate and cooperate with SIUs in regard to (A).

V. DNA

- A. Expansion to “designated” rather than “violent” crimes, which now include:
 - a. Misdemeanor domestic assault (13 V.S.A. §1042).
 - b. Any crime requiring sex offender registration.
- B. Expansion of those required to submit samples:

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- a. Effective upon passage - Anyone convicted prior to 4/29/98 and after 4/29/08 is in the custody of DOC; or on parole, serving a supervised community sentence, or on probation for a designated crime unless the person has already submitted a DNA sample.
- b. Effective 7/1/11 - Anyone arraigned for a felony where the court finds probable cause that the person has committed the felony.

C. Expungement of DNA record:

- a. Effective upon passage -- For convictions: the DNA sample and any records of that person related to the sample shall be expunged if the conviction is reversed and the case is dismissed, or the person is granted a full pardon, except if that sample matched another DNA sample "during the course of a criminal investigation." In that case, the record of the match shall not be expunged even if the sample itself is expunged, and the department may confirm that match.
- b. Effective 7/1/11 -- The DNA sample and any records of that person related to the sample shall be expunged if the sample was taken post-arraignment and
 - i. The felony charge is downgraded to a misdemeanor by the prosecuting attorney upon a plea agreement or the person is convicted of a lesser offense that is a misdemeanor other than domestic assault or a sex offense for which registration is required. (or)
 - ii. The person is acquitted after trial of the charges which required the taking of the DNA sample. (or)
 - iii. The charges which required the taking of the DNA sample are dismissed by either the court or state after arraignment unless the attorney for the state can show good cause why the sample should not be destroyed.

V. DEPOSITIONS – RULE 15 – RULES OF CRIMINAL PROCEDURE

Effective 7/1/09; Sunsets 7/1/011

- A. No deposition of a victim under the age of 16 shall be taken in a prosecution under 13 V.S.A. §§2601 (LL), 2602 (LLC), 3252 (SXA), 3253 (ASXA) or 3253a (ASXAC) except:
 - a. By agreement of the parties. (or)
 - b. After approval of the court where "the court finds that the testimony of the child is necessary to assist the trial, that the evidence sought is not reasonably available by any other means, and that the probative value of the testimony outweighs the potential detriment to the child being deposed." The court must "consider the availability of recorded statements of the victim and the complexity of the issues involved."
- B. If a deposition is taken, "the court shall issue a protective order to protect the deponent from emotional harm, unnecessary annoyance, embarrassment, oppression, invasion of privacy, or undue burden of expense or waste of time." Such an order may include that the deposition be taken with any or all of the following:

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- a) On specified terms and conditions, including designation of time, place and manner.
 - b) By written questions.
 - c) Related to certain matters or within a specified scope.
 - d) With certain persons present as designated by the court.
 - e) With sealing of the deposition tape or transcript until further order of the court.
- C. Any restrictions of 13 V.S.A. §3255(a) (evidence in sexual assault cases) shall apply to such depositions.
- D. The court shall appoint an attorney to represent the child for the purposes of the deposition.
- E. The Act broadens sensitive witnesses to any person under the age of 16 who is a victim in a prosecution for an offense not listed in (A) above, as well as anyone aged 16 or older who is a victim in a prosecution for 13 V.S.A. §§2601 (LL), 3252 (SXA), 3253 (ASXA) or 3253a (ASXAC).
- F. Pro se defendants in a prosecution for an offense listed in (A) or (E) cannot directly depose the victim, and the court shall appoint counsel for the defendant for deposition purposes.

VI. HEARSAY – RULE 804a – VERMONT RULES OF EVIDENCE – Effective 7/1/09

- A. Changes putative victim from age 10 to age 12 or under.
- B. Changes to person “in need of guardianship” rather than mentally retarded or mentally ill.
- C. Adds aggravated sexual assault of a child (13 V.S.A. §3253a) and sexual abuse of a vulnerable adult (13 V.S.A. §1379) to list of crimes.

VII. HUMAN SERVICES BOARD HEARING (33 V.S.A. §4916b) – Effective 7/1/09

- A. Rule 804a of the Vermont Rules of Evidence shall apply to such hearings only as follows:
 - a. Subsections (a)(1) and (4).
 - b. Subsection (a)(2), except that any depositions or testimony given under oath at another proceeding shall be admissible evidence in a hearing held under this subsection.
 - c. Subsection (a)(3) unless hearing officer determines, based on preponderance of the evidence, that requiring child to testify will present a substantial risk of trauma to the child.
 - d. Subsection (b) does not apply.
- B. “Convictions and adjudications which arose out of the same incident of abuse or neglect for which the person was substantiated, whether by verdict, by judgment, or by a plea of

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any type, including a plea resulting in a deferred sentence, shall be competent evidence in a hearing held under this subchapter.”

VIII. AGGRAVATED SEXUAL ASSAULT OF A CHILD

- A. Actor must be at least 18 years of age and commit sexual assault against a child under the age of 16 in violation of 13 V.S.A. §3252 and at least one of the following circumstances must exist:
- a. Serious bodily injury is caused to the victim or another at time of the sexual assault.
 - b. Actor is joined or assisted by one or more persons in physically restraining, assaulting, or sexually assaulting victim.
 - c. Actor commits sexual act under circumstances which constitute kidnapping.
 - d. Actor has previously been convicted in Vermont of sexual assault, aggravated sexual assault, aggravated sexual assault of a child, or convicted in any U.S. jurisdiction or territory of an offense that would constitute one of the same offenses if committed in Vermont.
 - e. Actor is armed with deadly weapon and uses or threatens to use deadly weapon on victim or another.
 - f. Actor threatens to cause imminent serious bodily injury to victim or another, and victim reasonably believes actor has the present ability to carry out the threat.
 - g. Actor applied deadly force to victim at time of sexual assault.
 - h. Victim is subjected to repeated nonconsensual sexual acts as part of the same occurrence or is subjected to repeated nonconsensual sexual acts as part of the actor's common scheme and plan.
- B. 25 year mandatory min, life max, and fine of not more than \$50,000. 25 year min must be served and may not be suspended, deferred, or served as a supervised sentence. Defendant is not eligible for probation, parole, furlough, or any other type of early release until expiration of 25-year min.

IX. DEFERRED SENTENCE – Effective 7/1/09 unless otherwise noted.

- A. Crimes where the court cannot defer a sentence:
- a. 13 V.S.A. §3253a (aggravated sexual assault of a child).
 - b. Effective 7/1/14 - 13 V.S.A. §§ 2602 (lewd and lascivious conduct with a child unless the victim and the defendant were within five years of age and the act was consensual), 3252(c) (sexual assault of a child unless the victim and the defendant were within five years of age and the act was consensual), 3252(d) or (e) (sexual assault of a child), 3253(a)(8) (aggravated sexual assault), or 3253a (aggravated sexual assault of a child).
- B. Except as noted in (C) and (D) below, the record of the criminal proceeding shall be expunged upon discharge from probation for a deferred sentence. The court shall send

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copies of the order to each agency, department or named official. The court and all such entities shall reply to requests for information that no record exists.

- C. From 7/1/09 to 7/1/14: upon discharge from probation for the following: 13 V.S.A. §§ 2602, 3252(c), (d) or (e), or 3253(a)(8) the entities are permitted to retain their own records and files related to the arrest, citation, investigation, and charge that led to the deferred, and may share them with other investigating agencies. [Note: Retention of these records and files expires on 7/1/14.]
- D. Expungement exceptions:
 - a. Restitution must be paid in full.
 - b. Vermont Criminal Information Center (VCIC) will retain a special index of deferred sentences for registrable sex offenses. The index will include name, DOB, offense, and docket number, and is confidential and only accessed by two people in VCIC for the purpose of providing information to DOC in preparation of presentence investigation reports.

X. JUVENILE RECORDS – Effective 7/1/09

- A. The Act amends 33 V.S.A. § 5117(b)(1) to allow the commissioner of corrections access to juvenile delinquency records “if the information would be helpful in preparing a presentence report, in determining placement, or in developing a treatment plan for a person convicted of a” registrable sex offense.
- B. The Act allows an additional exception to inspection of juvenile records for anyone convicted of a registrable offense. The court in which the person was convicted:
 - a. may inspect its own files and records for the purpose of imposing sentence upon or supervising the person for a registrable offense, and
 - b. shall examine court indices developed under 33 V.S.A. § 5119(e)(2)(A) and if the offender appears on the indices, the court shall unseal any court files and records and make them available to the commissioner of DOC for preparation of a PSI, determining placement, or developing a treatment plan. DOC can only use the information relating to adjudications relevant to a sex offense conviction.

XI. PRESENTENCE INVESTIGATIONS (PSI) – Effective 7/1/09

- A. The act adds aggravated sexual assault of a child and kidnapping with intent to commit a sexual assault to the list of offenses requiring a PSI.
- B. PSIs must include offender records maintained by DCF in the child protection registry if offenders were substantiated for child abuse or neglect.

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- C. If prepared in connection with a conviction for a registrable sex offense, PSIs must include any information:
 - a. pertaining to the person's juvenile record, and
 - b. regarding deferred sentences for registrable sex offenses.
- D. Upon completion, a copy of the PSI must also go to DCF.
- E. The Act notes that authorized copies of PSIs are privileged and not subject to public inspection.
- F. The court may no longer waive a PSI for required offenses.

X. PROBATION – Effective 7/1/09

- A. If an offender is convicted of a sexual offense requiring a PSI and the offender has a split sentence with more than a year to serve, the court may impose conditions of probation to commence while the offender is incarcerated. Prior to the offender's release to probation, the court must review the probation conditions imposed at sentencing and consider the offender's conduct while incarcerated.
- B. For offenders with such conditions, DOC shall prepare a prerelease probation report for the court at least 30 days prior to the offender's release to probation. The report shall include participation in treatment, compliance with probation conditions, and any other relevant information. Copies will be provided to the offender's attorney and prosecutor.
- C. If DOC thinks a VOP has occurred, DOC may recommend a change to the original probation order. The court must schedule a modification hearing and may modify the conditions or add further requirements.
- D. Offenders convicted of a registrable sex offense must submit to periodic polygraph testing if placed on probation.
- E. If a probation officer has reasonable grounds to believe a VOP has occurred, the officer or designee may "monitor or examine the offender's activities, communications, and use of any computer or other digital or electronic media."
- F. The offender must satisfy any other conditions imposed by the court related to rehabilitation. Notably, the conditions may include "permitting a probation officer access to all computers or other digital or electronic media, mail covers, subscription services, and credit card statements."
- G. A court hearing shall be held prior to discharging an offender from probation for a registrable sex offense.

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RULE 32.1 – REVOCATION & MODIFICATION OF PROBATION – RULES OF CRIMINAL PROCEDURE

H. An offender on probation for a registrable sex offense who violates a risk-related condition of probation may be held in custody until the revocation hearing.

XI. HIGH-RISK SEX OFFENDERS – Effective 7/1/09

An offender sentenced to an incarcerative sentence for any sex offense requiring a PSI and who is designated by DOC as high-risk pursuant to 13 V.S.A. §5411b while serving his or her sentence shall not be eligible for parole, furlough, or any other type of early release until the expiration of 70 percent of his or her maximum sentence.” [An interesting question: What is 70% of life? The legislature did not resolve this question, although it was raised.]

XII. PAROLE – Effective 7/1/09

- A. The Act clarifies that parole conditions must be “designed to protect the victim, potential victims, and the public, and to reduce the risk of reoffense.”
- B. If a probation officer has reasonable grounds to believe a violation of parole conditions has occurred, the officer may “monitor or examine the offender’s activities, communications, and use of any computer or other digital or electronic device.”
- C. Conditions of parole may include “permitting a probation officer access to all computers or other digital or electronic media, mail covers, subscription services, and credit card statements.”

XIII. MANDATORY REPORTERS – Effective 7/1/09

The Act expands mandatory reporters of suspected child abuse and neglect to “any employee, contractor, and grantee of the agency of human services who have contact with clients.”

XIV. SEX OFFENDER RESIDENCY RESTRICTIONS

The Act includes the legislature’s concern about sex offender residency restrictions and the lack of efficacy of such laws, and encourages local communities to focus on prevention and other strategies to improve community safety.