

Who this law applies to

- In paragraph (a), this crime applies to any person having the custody or care of a child
 - We are very concerned about the breadth of this new crime and that it could potentially apply to DCF caseworkers, foster parents, child care and day care providers, kin who have assumed guardianship through a minor guardianship proceeding, educators, residential treatment providers, babysitters, camp counselors and even the Commissioner of DCF
 - We are hearing from many concerned DCF social workers, staff and supervisors who fear that if a child in their care is harmed, they will be charged with a felony
 - This new crime as written will have a negative impact on the ability of DCF and others to recruit and retain staff. In addition, we are concerned that it will negatively impact our ability recruit care providers and foster parents for children in DCF custody.
- Is the intent to draft this new crime to apply to everyone just mentioned?
 - All cases of children who are in DCF custody are high risk. That is the nature of our work.
- Examples of where we can see this crime as written applying include:
 - (1) A social worker working with a family arranges for visitation with a birth mother who is seeking to regain custody. The birth father and mother are not a couple and the birth father has been ordered by the court to stay away from the child and the mother, but shows up to the mother's house during the visitation uninvited and seriously injures the child and the mother. The social worker may be charged with a felony even though she or he was following an approved case plan. The mother who did not invite the father over to her house could also be charged with a felony under this new crime of failure to protect.
 - (2) A child in foster care in DCF custody has not received all medical vaccinations as the birth parent did not believe in vaccines. DCF does not seek to get the vaccinations out of respect for the parents' philosophical wishes and the child contracts measles and dies. Will the DCF commissioner, whose custody the child is in, and the social worker, whose care the child was in, all be charged a felony for failing to vaccinate the child against measles?

Affirmative defense

- DCF does not support adding DCF staff, foster parents, etc. to the affirmative defense.
- The affirmative defense can be used after a person is arrested and charged with the crime. They may raise the affirmative defense in the course of defending themselves. This means that in order to prevail they must prove by a preponderance of the evidence that they failed to act out of a reasonable fear of injury or sexual assault or if the harm was caused by a lack of medical treatment, that the decision to not seek medical treatment was reasonable.
- In the first example above where the birth father shows up uninvited and unannounced to a visitation and seriously harms the child and birth mother, the social worker was not at the home of the birth mother when the serious injury by the birth father occurred. This means that the social worker could not invoke the affirmative defense that she failed to act because she feared for her life. Seeking medical treatment was not an issue in this example, so that would also not

apply. The birth mother may have acted to protect the child, but was not able to prevent the harm. She could still be charged under this new crime and forced to prove that she tried to act to prevent the harm to the child.

- In the measles vaccination example, is it reasonable for DCF to honor the birth parents' philosophical exemption for vaccinations? Under current Vermont law, parents and guardians may invoke this philosophical exemption. Would it still be reasonable to invoke this exemption and not vaccinate a child when measles has been spreading in the United State from an exposure in Disneyland in California? The fact finder in the court of law would have to decide.
- DCF would prefer the approach suggested by the VT Network for victims of domestic violence. This approach was an exemption from the crime and could also include DCF staff, foster parents and others. An exemption means that they could not be charged in the first place with failure to protect.
- It should be noted that there already exists in current law a crime that applies to DCF staff who fail to carry out their duties– criminal neglect of duty by a state officer:

Title 13 : Crimes And Criminal Procedure
Chapter 067 : Public Justice And Public Officers

§ 3006. Neglect of duty by public officers

A state, county, town, village, fire district or school district officer who wilfully neglects to perform the duties imposed upon him or her by law, either express or implied, shall be imprisoned not more than one year or fined not more than \$1,000.00, or both.

Jerry Sandusky case

- We would like to talk about the example that has been cited a few times as one of the reasons that we need this new crime. This is the Jerry Sandusky case. If those facts and case happened in Vermont and we had the new crime of failure to protect, the college-level administrators in the Jerry Sandusky case potentially would not be charged under this new crime as drafted.
 - The coach who witnessed JS molesting a child reported to his superiors what he saw and the supervisors did nothing. They did not report the incident to DCF or the police.
 - The supervisors of the coach do not have the “care or custody” of the children that JS molested, so would meet the definition in paragraph (a) of someone who may be charged with failure to protect.
 - Also, it should be noted that the college level administrators are not necessarily mandated reporters under Vermont’s definition in 33 VSA 4913, which applies to school staff employed by a school district or an approved independent school under title 16 (which is defined as elementary or secondary education – k through 12), so would not be subject to the penalty of failing to report.

DCF has resources now under current law to protect children

- We would like to note that DCF currently has tools to protect children when we believe they are in a home or living situation in which they may be harmed.
 - DCF may work with SAs to seek a CHINS petition to protect the child
 - DCF can also substantiate a parent or caregiver for risk of harm

DCF understands the desire to hold culpable the person who fails to affirmatively protect a child

- That is understandable, but extremely difficult to define narrowly enough to avoid imposing the fear and risk of criminal prosecution on persons doing their best, including DCF social workers, to care for children
- Relying on prosecutorial discretion is clearly of great concern to social workers and others who already have a challenging role.

Last thoughts

- Service providers working with children and families, including social workers, educators, foster parents, etc., make critical decisions every day in their work for the best interests of the children. For that matter, so does the non-perpetrator parent.
- Having the potential of criminal prosecution and liability hanging over them due to the actions of someone else who harms a child may change the basis for decision-making from the best interest of the child to avoidance of the risk of criminal liability.
- Other sections of S.9 improve our ability to prosecute perpetrators by improving the law on SIUs and enhancing DCF's ability to utilize the child protection system by clarifying definitions and improving communication. The changes proposed around the Cruelty to a Child statute also strengthen our currently available tools.
- Let's focus our efforts on stopping and prosecuting the perpetrators of assaults on children, not prosecuting those who are working every day to parent, care for, nurture, educate and protect children.

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