

To: The House Judiciary Committee

From: The Vermont Association of Hospitals and Health Systems, Vermont Health Care Association, Vermont Medical Society, VNAs of Vermont, Vermont Association of Adult Days, American Nurses Association - Vermont

Date: March 1, 2023

Re: Comments Regarding H. 171, Draft 2.1, An Act Relating to Adult Protective Services

Thank you for considering our comments as you review Draft 2.1 of H. 171 and provide feedback to the House Human Services Committee.

We are writing you collectively as a coalition of health care provider organizations. We have two concerns remaining with the current draft of the bill, both in the definitions section: (1) adding negligent medical care to the definitions of abuse and neglect and (1) defining denials of medical care as abuse.

1. (Page:Line) 2:10-14, and 8:12-15 - Definitions of Abuse and Neglect

It is hard to adequately stress how adding “negligently” to the definitions of Abuse and Neglect dramatically expands the scope of mandatory reports to include mistakes or errors that occur within a medical setting and thereby threatens patient safety. Medical mistakes can have serious repercussions for patients and are taken very seriously by providers, accrediting bodies, CMS, and professional licensing bodies. There are extensive processes in place to address medical errors and improve patient safety without villainizing individual practitioners for mistakes or discouraging reporting. Treating such mistakes as Abuse or Neglect that must be reported by peers or supervisors to APS to be investigated will have a chilling effect on reporting, pit individual clinicians against each other, and add a regulatory process that is in conflict with existing quality and safety processes and regulations and all of which makes care less safe.

- Draft 2.1 of the bill continues to expand the definitions of Abuse and Neglect to include **negligent** actions or omissions. In fact, the definition of Abuse now clearly applies to “any **medical treatments**” that “negligently...places the life, health, or welfare of a vulnerable adult in jeopardy or is likely to result in impairment of health to the vulnerable adult.”
- Neglect includes “negligent failure or omission by a caregiver that has resulted in or could be expected to result in, physical or psychological harm” including to “carry out a plan of care.”
- This language will capture one-time mistakes such as giving the wrong medication or omitting a medication dose when needed. This is especially the case since the reporting standard includes only “reason to suspect” abuse.
- **The entire premise of preventing medical errors is based on encouraging staff or employees to come forward to report that a mistake was made.** This is then subject to rigorous processes by other health care professionals examining why the mistake was made and how to prevent errors in the future. All certified health care providers are required to have peer review and, and/or quality assurance and performance improvement (QAPI) programs. These peer review/QAPI processes depend on legally protected confidentiality to support blame free open discussions to identify root cause of errors to

improve health care quality and safety. The confidentiality of these candid self-assessments are protected by statutory and regulatory privilege (See as examples 26 VSA § 1441-1443, Nursing Home Licensing Rule Section 16, 42 C.F.R. section 483.75). While protecting the confidentiality of the quality improvement processes, the Vermont Patient Safety Surveillance and Improvement System requires hospitals to report errors and identify process improvement related corrective actions. (See 18 VSA § 1912-1919.) If colleagues know that mistakes will be reported to APS, leading to an investigation and possibly being placed on a Registry and preventing future employment, we will return to a culture of hiding medical errors and placing patient safety at increased risk.

- **It is unclear that APS has the expertise to evaluate medical errors.** While APS likely has expertise evaluating the impact of a medical error – for example, if a patient experienced an adverse outcome that impaired their health – it is unclear that they have access to medical experts to determine if this was due to negligence or the same type of decision another medical provider in the same situation would have made. Licensing boards (investigating unprofessional conduct) have the expertise to determine if medical care was delivered negligently or according to the standard of care.
- **Health care facilities and providers are already extensively regulated and avenues exist for patient or family member complaints about quality of care.**

Any individual can – and is encouraged to – submit a complaint regarding the conduct of a licensed health care professional to the Board of Medical Practice or the Office of Professional Regulation. This includes patients, family members, peer health care workers or others involved in the care of an individual. A complaint to either entity triggers a mandatory investigation of the quality of care provided, and disciplinary action based on unprofessional conduct. We encourage the Committee to hear from OPR and the Board of Medical Practice about the disciplinary process.

Hospitals, skilled nursing facilities, and home health agencies are subject to extensive oversight and regulation by the Centers for Medicare and Medicaid Services under extensive standards known as the “Conditions of Participation.” This oversight includes on-site, unannounced audits every three years by trained surveyors and investigations of complaints that can occur at any time. Skilled nursing facilities are subject to survey annually. Surveyors are deployed under the auspices of the Division of Licensing and Protection, a department also under DAIL. Failure to comply with federal standards – including quality and patient safety standards – can result in monetary penalties and a loss of “certification” by Medicare and Medicaid, meaning the provider can no longer be paid by government insurers. It can also result in a report to the Board of Nursing or other professional oversight entity for breach of professional standards of care, which may have disciplinary implications.

Home health and hospice agencies are also subject to additional state regulations under the Regulations for the Designation and Operations of Home Health Agencies. Failure to comply can result in substantial monetary penalties and loss of designation.

State regulation of long-term care facilities are governed by the Nursing Home Licensing and Operating Rules, Residential Care Home Licensing Regulations and Assisted Living Residence Regulations. These regulations address quality of care in all aspects, including requirements for storage, administration and disposal of medication. Failure to comply

with state regulations can result in monetary penalties and loss of a state license to operate a long-term care facility. Licensed long-term care facilities are required to file self-reports with the survey agency, Division of Licensing and Protection, in a wide variety of instances including accidents, injury, and untimely deaths.

2. 4:4-5 Definition of Abuse – Denying or withholding care

- Our coalition continues to oppose stating that Abuse includes “denial or withholding of necessary medication, care, durable medical equipment, or treatment.” This definition of abuse conflicts with a patient’s individual rights. Under the Merriam Webster Dictionary, withhold means “to hold back from action” or “refrain from granting, giving, or allowing.” This means reporting every time a patient leaves a hospital or other health care facility against medical advice or refused medication/treatment. This would not only trigger a report by health care providers but would then be investigated as abuse, despite this being a recognized patient right.
- We also continue to believe that this definition could be interpreted to include appropriate denials of therapeutic interventions such as where the medication or device is not available, or where the patient or guardian believes that the intervention is necessary but the prescriber believes that the medication or device is not medically appropriate.
- **Propose:** Narrow abuse to include only wrongful denials or withholding of treatment.

Thank you for considering our comments. Please reach out to any of us for further clarification.