VERMONT

Department of Disabilities, Aging and Independent Living
Commissioner's Office
280 State Drive/HC 2 South
Waterbury, VT 05671-2020
www.dail.vermont.gov

[phone] 802-241-2401
[fax] 802-241-0386

Agency of Human Services

TO: Senate Committee on Health and Welfare
FROM: Stuart Schurr, Joe Nusbaum and John Gordon, Department of Disabilities, Aging and Independent Living (DAIL)
DATE: April 12th, 2023
SUBJECT: H:171, Mission Critical Language

The Department of Disabilities, Aging and Independent Living (the Department) requests that the Senate Committee on Health and Welfare address three mission-critical issues during its review of H.171. The first two issues are definitions in V.S.A. § 6902, one regarding "vulnerable adult" and the other "caregiver," and both involve changes made to the draft language originally proposed by APS. The third is a procedural issue in in V.S.A. § 6902 that could inadvertently create a loophole allowing alleged perpetrators to undermine legitimate cases against them.

Vulnerable Adult: 33 V.S.A. § 6902(34)(C)(ii)

Current: "some impairment of the adult's ability to protect the adult from abuse, neglect, or exploitation."

Requested: "some impairment of the adult's ability to protect the adult from the reported act of abuse, neglect, or exploitation."

The definition of "Vulnerable Adult" is an issue that is at the very core of the APS mission and establishes the very purpose for this bill. This definition has been discussed for hundreds of hours (through hearings, higher court cases, stakeholder review meetings, and in the drafting of this bill), and has received extensive attention from both the Department and advocate groups in the House Human Services Committee. Despite this attention, the bill's current definition does not make clear who is or, perhaps more importantly, is *not* a vulnerable adult. This lack of clarity in existing statute, and the proposed bill, has caused endless confusion and has failed to provide the Department with a clear scope of APS operations.

The debate has been (and will continue to be if the current bill language becomes law) whether there needs to be a legal nexus (a relevant connection) between the nature of reported abuse and the nature of the individual's vulnerability. Some advocate groups have suggested that other states have no such nexus, and therefore that Vermont should not have one either. While this argument is technically true, it ignores that no other state has as broad a definition that renders any adult with any general impairment to protect oneself from any potential maltreatment (whether alleged or not) a vulnerable adult.

Other states have narrowly drawn their definition of the class of individuals that can be considered vulnerable adults. Although every state does this differently, common approaches include restricting the category of "vulnerable adult" to individuals who are institutionalized or in residential homes, individuals who receive or are in the process of applying for disability-

related benefits, individuals with prior diagnoses, or individuals who require specific levels of assistance to complete daily tasks.
Vermont lists every one of these categories in V.S.A. § 6902(34). Following these standard definitions, however, is subsection (C)(ii), which broadens vulnerable adult to include every Vermonter with "some impairment of the adult's ability to protect the adult from abuse, neglect, or exploitation." The debate hinges on whether a connection, or "the," should be added, changing the language to "some impairment of the adult's ability to protect the adult from ***the*** reported act of abuse, neglect, or exploitation."

The proposed definition of vulnerable adult currently in the bill is so sweeping and unrestricted that in theory it could include nearly every adult in Vermont. Virtually all adults have some form of diminished capacity to some form of hypothetical maltreatment. Wearing glasses, experiencing depression, or even being short of stature may all result in a diminished capacity to protect oneself from some hypothetical instances of maltreatment, but all individuals with these attributes should not be universally deemed *vulnerable adults* absent a specific allegation of maltreatment for which they are vulnerable. The only rational approach is to tie the definition to the aforementioned nexus, requiring a connection between the nature of the impairment and the nature of the alleged abuse. Anything else would decrease the efficiency of APS by creating a statutory framework in which APS cannot definitively say who is and who is not a vulnerable adult.

The Department acknowledges that the current statute does not include the word "the" before "abuse, neglect, or exploitation." And, while in *Smith v. Wright*, 2013 VT 68, ¶ 18, the Vermont Supreme Court did not rule on the legal question as to whether a linkage was required between the nature of the alleged victim's impairment and her ability to protect herself, the reason the Court did not address the issue was that the defendant had failed to raise that argument below and, therefore, did not preserve the issue for appeal. In citing to the definition of "vulnerable adult," however, one cannot ignore the Vermont Supreme Court's recognition of a linkage between an individual's ability to protect oneself and the alleged maltreatment. Specifically, the Court stated, "The relevant part of the definition of 'vulnerable adult' states that a person over eighteen years of age is a vulnerable adult if they suffer from a physical, mental, or developmental disability that impairs their ability…to protect themselves from **the** abuse, exploitation, or neglect." Id. at ¶ 19 [Emphasis added]. In fact, the Supreme Court held that the lower court had "specifically concluded that plaintiff's disability impaired her ability to protect herself [against not any and all generalized abuse, exploitation, or neglect, but rather] against **defendant's sexual advances**. Id. [Emphasis added].

Regardless of how, or whether, the Vermont Supreme Court has interpreted the definition of "vulnerable adult," the Department asserts that, in addition to the above, the statute should require a linkage between the ability to protect oneself and the alleged abuse, neglect, or exploitation for the following reasons:

•Adding a "the" serves to respect the dignity of persons with disabilities by acknowledging that not every disability or infirmity renders one vulnerable to every type of alleged maltreatment. For example, an individual with a physical disability or infirmity of aging, without more, may be unable to protect themselves from abuse or neglect, but there may be no evidence of an inability to protect themselves from financial exploitation. Omitting such a linkage requirement

from the statute sends the wrong message not only to individuals with disabilities but also to the public at large.

•The inclusion of the word, "the" places the burden of proof on the Department, where it currently exists and belongs. The Department should be required to demonstrate a nexus between the ability to protect oneself and the alleged maltreatment before substantiating an alleged perpetrator for the abuse, neglect, or exploitation of a vulnerable adult and placing the individual's name on the Adult Abuse Registry. And, when relying on this definition and such a linkage cannot be shown, a substantiation should not follow.

Caregiver: 33 V.S.A. § 6902(9)(C)

Current: "a person providing care to a person that is required because of the person's age or disability."

Requested: "(C) a person <u>with a designated responsibility for</u> providing care to a person that is required because of the person's age or disability."

This proposed language was always intended to be included, and it was only removed by a formatting issue as the bill was being prepared for introduction.

Without this change, the definition of caregiver will be overbroad. It would include individuals who never intended to become a "caregiver" and who may not be aware that they have become one. An individual could fall into the category after offering a passing kindness to a vulnerable adult, such as providing a meal or shoveling their snow, and then become liable for not providing the same care in the future.

Perpetrator Interviews: 33 V.S.A. § 6906(c)(3)

Current: "Prior to substantiation, the Department shall interview the alleged perpetrator unless the alleged perpetrator declines."

Requested: Strike language entirely OR *"Prior to substantiation, the Department shall interview the alleged perpetrator unless the alleged perpetrator declines <u>or fails to respond</u>."*

The proposed bill includes language which requires the Department to interview an alleged perpetrator before recommending that an allegation of abuse be substantiated. While the intent of the language is to ensure the Department receives the alleged perpetrator's version of events, it inadvertently allows alleged perpetrators to terminally stall investigations simply by avoiding this interview. This language is redundant because the requirement to interview alleged perpetrators is already addressed by a preceding subsection, 33 V.S.A. § 6906(c)(2)(B), which avoids the issue by including "failure to respond" as a method of declining an interview.

The Department recommends striking the above underlined text in § 6906(c)(3). If the highlighted language in § 6906(c)(3) is maintained, it would allow the alleged perpetrator to

avoid substantiation despite ample evidence. In the alternative, the Department advises that 6906(c)(3) could be amended with the addition of the underlined text as found above.