

VERMONT LEGAL AID

Long Term Care Ombudsman Project

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To: Laura Pelosi
Jill Olson
From: Jackie Majoros
Date: February 10, 2016
Re: S.40

We write as Senator Ayer requested to address and attempt to resolve the specific issues regarding S.40 that you raised in your testimony last week. Representatives from the other proponents of the bill, including DAIL, the Office of the Chief Medical Examiner and the Office of the Attorney General met to prepare this response. We look forward to your reply at your soonest opportunity to further narrow issues.

Issue No. 1: § 6961(b)(1)- membership of the review team- no hospital or long term care facility representation. Makeup of the team as proposed does not contain the relevant expertise that would be necessary to understand the operations, practices, policies, and care delivery.

We agree that the work of the proposed Vulnerable Adult Fatality Review team (“Team”) would be enhanced by expanding the membership to include hospital and long term care facility representatives. We propose that the DAIL Commissioner, in consultation with the relevant provider associations, appoint these members.

Issue No. 2: § 6961(c)- meetings are to be convened by the Attorney General’s Office, the chief law enforcement office, which underscores provider concerns about the intent of the bill- enforcement minded rather than educational and informational.

This issue appears to be based on a misreading of the proposed statute. Under §6961(c), the Office of the Attorney General will convene only the **inaugural** Team meeting. It is anticipated that the Team chair, elected by the membership at the first meeting, will convene all subsequent meetings.

Your objection also raises a larger concern about the intent of the bill as “enforcement-minded.” We respectfully disagree. The proposed bill does not expand the jurisdiction of the Attorney General’s Office or provide any state agency with additional regulatory or enforcement authority.

Issue No. 3: § 6962(a)- the Team is given the authority to determine its own policies and procedures for the review of deaths – this should be clear so that providers understand what procedures will be used- it should not be subject to the discretion and whim of the team.

Issue No. 5: § 6962(3)- allows the team to determine which criteria it will use to select which deaths to review- again, the team should not be given the discretion to determine this as it sees fit. The criteria to be used for selection should be clearly spelled out in the bill.

We believe that the team membership, with its multi-disciplinary expertise and experience, is best suited to identify and establish specific review procedures and selection criteria. Your concern appears to be that providers will be surprised or uncertain about the Team's procedures and case selection criteria. We agree that consistent and predictable selection criteria and review procedures are important. We are confident that end will be achieved for the reasons following below.

First, we note that § 6962(C)(3) already provides guidance in this area, instructing the Team to implement selection criteria that will "ensure the analysis of fatalities occurring in both institutional and home and community-based settings."

Second, hospital and long term care providers, having been added to the Team's membership, will have a full voice in establishing the Team's review procedures and case selection criteria.

Third, S.40 is modeled on the statutory language and success of the Domestic Violence Fatality Review Team (15 V.S.A. § 1140), and similar fatality review teams in other jurisdictions, which leaves operational details such as case selection criteria and review procedures to the discretion of the team membership. We do not believe that the proposed Vulnerable Adult Fatality Review Team should operate differently.

Issue No. 4: § 6962(b)(2)- allows for initiation of a review before the conclusion of a pending APS or law enforcement investigation or criminal prosecution. Again raises questions about the intent of the bill, does not mesh with the critical confidentiality provisions §6963 which protect the proceedings and records of the team from discovery or admissibility as evidence in a civil or criminal case.

We believe the bill as presently written represents a reasonable approach. It envisions that the Team will only review cases that have been investigated and adjudicated unless extraordinary circumstances exist and the investigating authority requests an earlier review. The exception is meant to address a case that, while ripe for review and with many potential lessons to teach, may otherwise be tied up in litigation for a prolonged period. Although we think the exception is appropriate, on this issue we would defer to the determination of the Health & Welfare Committee.

Issue No. 6: § 6963(a)- need to know who on the team is responsible for maintaining records and confidentiality, and how.

We do not anticipate that the Team will retain any records from a case review and, therefore, will not maintain records. Typically, if any records, such as meeting minutes, are generated, they would be maintained by the Secretary. Similarly, the Chair would be responsible for obtaining and maintain confidentiality agreements.

Issue No. 7: § 6963(b)- this section needs to clearly state that no person or provider shall be identified.

This clause already prohibits the identification of any person. We have no objection to

adding language prohibiting the identification of any entity.

Issue No. 8: § 6964 needs to include language that makes it clear that provider peer review material and internal quality assurance and review material is exempt from access by the team. This section should also make it clear that protected health information cannot be produced unless it otherwise meets disclosure requirements under the patient privilege law. This section should also clearly state who on the team has the authority to request information from 3rd parties.

We share your interest in protecting privileged and confidential information. Although provider peer review materials are already immune from discovery under 26 V.S.A. § 1443, we have no objection to adding language specifically exempting peer review and internal quality assurance materials from disclosure to the team.

With respect to protected health information, the proposed bill already states that the obligation of third parties to provide information upon the Team's request is "subject to the limitations of other State and Federal laws." We believe that language, which plainly includes HIPAA, is sufficient, but would be happy to consider alternative language if you have a proposal.

Last, we have no objection to identifying the team chair as the individual empowered to request information from third parties.