AHS Testimony for S 61 – A Bill Relating to Offenders with Mental Illness

Introductions:

After discussion with Senator Sears and Senator Kitchel last week we thought it appropriate to discuss S 61 in light of other related legislative activities.

The Objectives of this testimony are:

1) To provide the AHS perspective on S 61
2) Connect S 61 to other related legislative activities
3) Make recommendations on S 61 in light of the related legislation

- This bill touches on three departments within the Agency (DOC, DMH and DAIL)

- It is also significantly connected to three other legislative activities including;
    1. The AHS Report on the Commission on Offenders with Mental Illness submitted to the legislature on December 15 2016.
    2. Act 158 of 2014 which is an Act relating to the Commitment of a Criminal Defendant who is Incompetent to Stand Trial because of a Traumatic Brain Injury.
    3. Act 248 which refers to the collection of laws (generally in titles 13 and 18) for civil commitment for people who have committed serious offenses but are not competent to stand trial.

I would like to briefly discuss all three and their connection to S 61 and then offer recommendations.

Commission on Offender on Mental Illness

- First, This Commission Report seems to have influenced the development of S 61.

- We are happy to come in and present on the entire report. Please note the commission was made up of multiple stakeholders including advocates convened by AHS.

- To briefly review: The report's five Strategies received the broadest endorsement
    - **i.** Enhancing Community Resources

    - ii. Reconfiguring Facilities

        a. This includes the issue of the Middlesex Therapeutic Community Residence

    - iii. Legislative approaches to appropriately diverting people with mental health conditions to treatment outside of corrections

iv. Better calibrating our definitions of SFI designation

v. Increasing the use of alternative resources, ex) community justice centers

- All five of these are very connected to the intent of Act 158 and S 61.

<u>Act 158 - an Act relating to the Commitment of a Criminal Defendant who is Incompetent to Stand Trial because of a Traumatic Brain Injury</u>.

- This Act was scheduled to go into effect July 1, 2017. We submitted a report on November 30, 2016 after a discussion in April of 2016 where we expressed our concerns with the treatment, financial and legal impacts for the State of Vermont.
- In the report we provided analysis and recommended two options. The first was to authorize new programs and funding to develop this expanded system of care.
- The second recommendation was to repeal the Act.

Challenges with Act 158

1. Lack of Definition
    - Act 158, as currently written, doesn't define any nuances related to the severity, timing or impact of a TBI on an individual's criminogenic behavior.
    - There is no process or eligibility standard to determine if TBI was the root cause for the criminal behavior and therefore the root diagnosis to be treated.
    - Without that, any TBI, at any time, at any level of severity, could be arguably brought to bear as a reason for incompetence to stand trial.
    - Without a more nuanced definition of what level of TBI falls into this act, we are concerned that defense attorneys will seek to use this defense for individuals for whom it is inappropriate.

2. Evaluations
    - There is not an adequate provider system available to conduct the necessary evaluations in a timely fashion and there is not an appropriate place to place people until those evaluations occur and their diagnosis can be confirmed as a precursor to the competency evaluation.

3. Expanding DAIL's Mandate
    - Implementation of ACT 158 would expand DAIL's current mandate around TBI significantly as current program eligibility is built on an occurrence of TBI

within 5 years; the window we have deemed reasonable for some level of rehabilitation.

- We do not have a stand-alone, long term TBI program This also expands our responsibility related to public safety vs. rehabilitation. And we ask if this (public safety) is the appropriate use of our community based system.

4. Cost
    - This expansion would be of significant cost. Estimates put this cost at approximately 9 million to add services beyond our current system for individuals with TBI.
        - Medicaid Funding – In addition, Act 158 does not specify that individuals being served must be eligible for Medicaid, if that were not specified, we are concerned about the match rate and the impact on general fund.

5. Disproportionate Impact to DMH
    - Although this is TBI and DAIL related we need to remind you of the law's disproportionate impact on The Department of Mental Health. DMH has statutory obligations currently and which would expand under 158.
    - Specifically, DMH is mandated to pay and arrange for psychiatrists and psychologists to conduct psychiatric evaluations of criminal defendants, as well as to provide temporary custody for defendants.
    - This includes examinations for those who are believed to suffer from a developmental disabilities or traumatic brain injuries (TBI), conditions traditionally not considered to be a mental illness. Please note, there is a lack of specialists to perform the required assessments.
    - This disproportionate impact on DMH and lack of resources is current and will deepen and spread under the provisions of Act 158
    - VPCH and other level I facilities already see delays in discharge related to court procedures. Increasing the number of defendants using the TBI defense has the potential of creating significant burden on inpatient capacity.
    - A backup in emergency rooms could impact funding as hospitals need to certify that they are providing active treatment for someone with a TBI, autism, and/or developmental disabilities, but there is no psychiatric treatment component that can be provided by a hospital unless there is a dual-diagnosis.
    - There is also the issue of capacity as there is only one locked facility in the community (non-hospital setting) and it is not a suitable place for the care of someone with a TBI.

Act 248 - Act 248 refers to the collection of laws (generally in titles 13 and 18) that permit a criminal court to civilly commit persons who have committed certain serious offenses but are not competent to stand trial to the custody of DAIL's commissioner.

- In regards to act 248 and S 61 we are concerned that S 61 by assigning DMH AAGs to represent the State, and Vermont Legal Aid Mental Health attorneys to defend respondents, in all mental health commitments as well as all Act 248 and TBI commitments that this will generate confusion regarding Act 248.
- In addition, those AAGs and Legal Aid attorneys are specialized in mental health law, not in TBI, autism or intellectual disabilities –if the idea was to help find appropriate placements using their expertise, that only works in mental health cases
- S 61 modifies corrections statutes to permit confinement in a therapeutic setting and requires that an inmate who needs "treatment or services" shall receive them. It is unclear what this means for both DAIL and DMH in terms of service provision.

AHS Recommendations

1. **We support S 61 with Modifications**
    A. 4820(c): Special Mental Health Counsel
        - We agree on the need to appoint specialized mental health counsel however the current language is too broad. We would want to clarify that DMH AAGs and the Mental Health Law Project will only be appointed in cases where a person is found incompetent due to a mental illness.
            - Without this clarification DMH AAGs and the MH Law Project would be assigned to those with intellectual disabilities, autism and TBI. Those are conditions these two groups have expertise in.
            - Last year 197 people were found incompetent due to mental health conditions. The number would be a lot higher if we included these other conditions.
            - There would also be a need additional funding – both for DMH to hire more AAGs and for us to increase our contract with Vermont Legal Aid for them to provide representation in these additional cases.

    B. Segregation
        - There is agreement on the need to change the definition of segregation so it does not include treatment settings such as a correctional facility infirmary.

C. Treatment Services

- We think section 907(1)(B) is unnecessary. DOC is already required to provide services to those with mental health conditions. This Act seems to expand this to people with TBI, autism, and intellectual disabilities and this merits a further discussion.
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- We are concerned about the inclusion of the term "mental illness" because it is not statutorily defined. It is unclear to us how this would expand the scope of screening particularly in terms of severity. We would like to continue to lead our efforts regarding screening. This is especially true if DOC would do inpatient evaluation and services. This would necessitate more financial resources.

- In addition, mandating inpatient treatment is concerning. There may be people who seek inpatient treatment and DOC may agree but the admitting hospital may not agree. DOC does not control the system of care. This provision could lead to lawsuits.

2. We recommend using 248, S 61 and the five consensus strategies of the Commission on Mental Illness Report as a proxy for Act 158. We recommend repealing Act 158. However, Act 158 makes a number of worthwhile, and non-objectionable, changes to 13 VSA Chapter 157 and 18 VSA Chapter 206. For that reason, we would want to work with Legislative Council on any repeal language.