



State of Vermont
Office of the Secretary of State

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MEMORANDUM

To: Senator Jeannette White, Chair, Senate Committee on Government Operations

From: S. Lauren Hibbert, Director, Office of Professional Regulation

Date: January 18, 2020

Re: S. 270, An act relating to the professional regulation of massage therapy

The Office of Professional Regulation (“OPR” or the “Office”) thanks you for the opportunity to testify before you on this matter.

Report Recommendation: Mandatory Registration.

In its recent Addendum to the 2015-2016 Preliminary Sunrise Assessment on Massage Therapy, OPR applied the policy and criteria set forth in 26 V.S.A. Chapter 57 (“Chapter 57 Criteria”, attached) and concluded that (a) professional regulation of massage therapists could protect the public from the specific harm of sexual misconduct perpetrated by massage therapists; and (b) “the least restrictive method of regulation...consistent with the public interest” is requiring a mandatory registration of massage therapists, rather than a qualifications-based license. This reason for this latter recommendation is that OPR found that registration of massage therapists could provide two necessary public protections to address sexual misconduct potentially perpetrated by massage therapists:

1. **Discipline and Prohibitions on Practice:** Registration provides a mechanism through which the Office can act against massage therapists charged with engaging in unprofessional conduct, including sexual misconduct, and prohibit these individuals from continuing to practice (i.e., by revoking a registration).
2. **Public Notice and Voice:** Registration also provides a way for the public to determine whether a massage therapist is properly registered with the State and whether the massage therapist has been disciplined by the Office (and the reason for the discipline). This form of regulation also provides a forum for individuals who have experienced sexual misconduct by a massage therapist to submit complaints and voice their concerns about the provider.

OPR determined, however, that qualifications-based licensure of massage therapists would result

in significant barriers to entering the professional field of massage therapy without offering additional public protections. It is OPR's assessment, following from this current report and those conducted in 2010 and in 2015-2016, that requiring individuals to complete costly education courses on massage techniques and practice, and/or passing an examination on such material, will not protect the public from sexual misconduct or injury.

S. 270

OPR supports and agrees with many of the proposals in S. 270. We, too, recommend professional regulation of massage therapists in an effort to address sexual misconduct and other unprofessional conduct perpetrated by these professionals. There are, however, several provisions of the licensing model proposed in S. 270 that OPR believes are more intrusive into the massage therapy profession than necessary to protect the public. OPR has provided a chart, attached, that compares the registration model of licensing massage therapists recommended by OPR, and the licensing model proposed in S. 270. OPR believes that the following requirements included in the S. 270 licensure model are more intrusive than necessary and should not survive a chapter 57 analysis:

- **Qualifications:** S. 270 would require applicants for a massage therapy license to complete an educational program offered by an accredited school or complete a director-approved apprenticeship, pass an examination, and complete “continuing competence” requirements prior to renewing a license. In its three sunrise review assessments, OPR has repeatedly found that educational requirements simply impose a barrier to entering a profession without offering public protection.
 - The costs for attending a professional school of massage, in 2015-2016, was between \$7,000 and \$15,000. Additional costs would be incurred by licensees for taking an examination, reporting scores, and completing continuing education courses. There is also a significant amount of time required to complete these requirements.
 - There do not appear to be any public safety benefits to counterbalance or justify these costs. The massage therapist notorious for perpetrating sexual misconduct against Vermonters was certified by a national association that only accepts members who have “graduated from an approved massage training program, met...eligibility requirements, and agreed to abide by [the association’s] Code of Ethics.” Further, many school curricula and continuing education courses are focused on the proper practice of massage in an effort to teach massage therapists how to be an effective and successful practitioner. Though perhaps offering ethics courses in passing, these programs and continuing education courses are not focused on unprofessional conduct.
- **Criminal Background Checks:** S. 270 would permit OPR to conduct a review of a massage therapist applicant’s criminal history.
 - Typically, state policy favors not requiring a criminal background check before

permitting professional licensure. Such checks pose significant barriers to licensure because those with prior convictions are more reticent to even apply for a license (assuming they will be denied based on their criminal history) and those with prior convictions that are unrelated to the practice of a profession may be denied a license.

- In each of its programs, OPR asks an applicant to attest to their criminal history. This is true for registration and licensure programs. On an application, an individual is asked whether they have any prior criminal convictions and whether their license to practice the profession has been sanctioned in any other state. If the answer is yes to either of these questions, OPR asks for and reviews background and supporting information. OPR can then opt to deny or grant a license. If an applicant answers these questions dishonestly, OPR can deny a license and/or seek sanctions against the individual.
- **Infection-Control and Hygiene Requirements:** S. 270 directs the Director, in consultation with the Department of Health, to promulgate infection-control rules for massage therapy establishments and would require such establishments to undergo annual inspections to ensure compliance. The promulgation of infection-control regulations and the establishment of an inspection program would require the investment of significant resources with little evidence that there is a threat of harm to the public or that the public is unable to avoid such a harm if it does exist. Despite engaged in significant outreach to the massage therapy community and to their clients over the past 10 years, OPR has never received a complaint about unsanitary conditions in a massage therapy establishment. If such conditions do exist, a massage therapy client is able to readily assess the lack of sanitation and to decline services.

That said, there are also many areas of overlap between OPR's recommendations of a mandatory registration model of licensure for massage therapists and the approach proposed in S. 270. OPR supports the following proposals set forth in S. 270:

- Requiring that all individuals obtain a license (whether a registration or a qualifications-based license) prior to offering massage services to the public obtain a license
- Mandating massage therapists and massage therapy establishments post the state registration in a conspicuous place where clients can see it;
- Mandating that massage therapists provide new clients with a disclosure stating the actions that constitute unprofessional conduct, how to review whether a massage therapist is properly registered, and a method for filing a complaint against a massage therapist;
- Establishing immunity from civil liability for those individuals who file a complaint against a massage therapist with the Office (OPR can see this also being included in Title 3 so that it applies to all professions); and
- Subjecting massage therapists to the unprofessional conduct standards set forth in 3 V.S.A. §129a and, when necessary, to the disciplinary process established in Title 3.

Based on these overlapping policy goals, OPR would support S. 270 with some revisions to the regulatory model proposed.

Resources

OPR would be remiss not to discuss the resources that would be required to properly administer a registration or qualifications-based licensure program for massage therapists. Based on estimates from the U.S. Bureau of Labor Statistics, there are approximately 370 massage therapists employed in Vermont. OPR would need the staff resources to properly register these individuals (e.g., creating an application, outreach, advising applicants on completion of the application, receiving and reviewing out-of-state sanctions and criminal histories, reviewing qualifications if required, etc.). Additionally, if the licensure program is to address the issue of public safety, OPR will need resources to process complaints, investigate allegations, and to prosecute misconduct.

Currently, OPR does not have the resources necessary to implement this program in a manner that is efficient and accessible to the public and that offers adequate protection against harms. For a registration program, OPR believes that it will need an additional 1.5 FTE, including a 0.5 FTE to administer the registration and 1 law enforcement FTE for the purpose of investigating complaints. For the licensing program proposed in S. 270, OPR believes it will need at least 2.5 FTE positions – 1 in licensing administration (because of the additional need to verify qualifications), 1 in law enforcement, and 0.5 in inspections.

Thank you for the allowing OPR to provide this explanation and for the opportunity to testify before you on S. 270. Our Office believes that S. 270 is a great start to the conversation about how to build a professional regulation program that allows massage therapist professionals to continue to practice their craft while protecting the public from harm, and we look forward to working with you and others further.

Registration	Licensure
Mandatory for all who want to practice	Same
Could include mandatory registration for establishments	Mandatory licensure for all establishments that employ or contract with more than one massage therapist
Allows for a broad definition of “massage therapy” because the Office is not charged with verifying credentials. A blanket requirement that all individuals engaged in “X” practice must register with the Office is possible to assess and enforce.	<p>The definition has to be limited to what could be shown through identifiable qualifications that the Office can review and confirm.</p> <p>For example, how would OPR know that an individual is qualified to do “energy-work”? The applicant would need to provide documentation of education, the Office would need to verify that documentation, and the public would need to be satisfied that this education is sufficient to qualify the individual to do “energy work”.</p>
Would be a simpler licensing process because it would not require examination of qualifications of already practicing individuals; all individuals engaged in “x” practice would be required to register immediately	Would require examination of already practicing individual's qualifications, possibly excluding those who are currently safely providing massage therapy services. The bill includes a “grandfathering provision” through a peer – review process which will be challenging to administer.
Would not require specific education or experience	Would require specific education (here, an accredited, professional massage therapy education program or an apprenticeship approved by the director)
Would not require an exam	Would require passage of an exam (generally, a national exam)
Though not typical, could require mandated ethics continuing education	The bill requires the adoption of continuing competence requirements
Would allow easy endorsement from other states (because there would be no requirement to determine substantial equivalency to other state’s laws)	The Director would need to make a determination that the licensure laws in other jurisdictions are “substantially equivalent” to Vermont’s before granting an endorsement
Generally, does not require inspections of businesses but could do so	An inspection requirement is included in the bill to ensure compliance with hygiene rules

Could require establishments comply with infection-control, cleanliness and sanitation rules if desired by the Legislature	Would require compliance with infection-control, cleanliness and sanitation rules promulgated by OPR in consultation with the Department of Health
Could allow rulemaking authority related to public health with the Department of Health	Same
Could require a massage therapist provide a mandatory disclosure to clients of ethics/boundaries and where to complain about a licensee	Same
Could require the conspicuous posting of massage therapists' registration in a business	Same
Would provide protection against civil lawsuits for individuals who file a complaint against a massage therapist – this could be included in a registration program or in Title 3 for all professions	Same
Would have Unprofessional Conduct Standards both with Title 3 and Title 26	Includes some unprofessional conduct standards and Title 3 would still apply
OPR would have the ability to investigate, prosecute and remove people from the practice	Same
OPR would have a licensee/business look-up including public discipline information	Same
Would ask applicants about previous criminal convictions and actions taken against their licenses in other states, which are then verified by OPR. Any inconsistencies between what an applicant reports and what is found in verification would lead to a disciplinary investigation.	Allows a criminal background check for massage therapists
Would be an “easier” licensing program to administer and, therefore, OPR could take on this work with only 2 positions or maybe 1.5 FTEs	If we needed to inspect every business before we licensed them, OPR will need at least 2 FTEs and possibly a part-time inspector for the purposes of initially licensing the profession.

Could have a faster effective date – particularly with the addition of a delayed effective date for the unlicensed practice section in 3 to apply to this profession. (This is currently in the pending registration bill for Home Contractors)

A quick effective date would be very challenging to comply with, particularly with inspection and qualification review.

26 V.S.A. Chapter 57 – Vermont Sunrise Review Policy and Criteria

26 V.S.A. § 3101

(a) It is the policy of the State of Vermont that regulation be imposed upon a profession or occupation solely for the purpose of protecting the public. The General Assembly believes that all individuals should be permitted to enter into a profession or occupation unless there is a demonstrated need for the State to protect the interests of the public by restricting entry into the profession or occupation.

(b) If such a need is identified, the form of regulation adopted by the State shall be the least restrictive form of regulation necessary to protect the public interest. If regulation is imposed, the profession or occupation may be subject to review by the Office of Professional Regulation and the General Assembly to ensure the continuing need for and appropriateness of such regulation.

26 V.S.A. § 3105

(a) A profession or occupation shall be regulated by the State only when:

- (1) it can be demonstrated that the unregulated practice of the profession or occupation can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is recognizable and not remote or speculative;
- (2) the public can reasonably be expected to benefit from an assurance of initial and continuing professional ability; and
- (3) the public cannot be effectively protected by other means.

(b) After evaluating the criteria in subsection (a) of this section and considering governmental and societal costs and benefits, if the General Assembly finds that it is necessary to regulate a profession or occupation, the least restrictive method of regulation shall be imposed, consistent with the public interest and this section:

- (1) if existing common law and statutory civil remedies and criminal sanctions are insufficient to reduce or eliminate existing harm, regulation should occur through enactment of stronger civil remedies and criminal sanctions;
- (2) if a professional or occupational service involves a threat to the public and the service is performed primarily through business entities or facilities that are not regulated, the business entity or the facility should be regulated rather than its employee practitioners;
- (3) if the threat to the public health, safety, or welfare, including economic welfare, is relatively small, regulation should be through a system of registration;
- (4) if the consumer may have a substantial interest in relying on the qualifications of the practitioner, regulation should be through a system of certification; or
- (5) if it is apparent that the public cannot be adequately protected by any other means, a system of licensure should be imposed...