DISABILITY RIGHTS VERMONT

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To: Senate Judiciary Committee
From: Disability Rights Vermont
Re: S. 3
Date: March 11, 2021

Dear Senate Judiciary Committee Members,

Please accept the following information from Disability Rights Vermont (DRVT) regarding your consideration of S. 3. DRVT is the federally authorized disability protection and advocacy system in Vermont pursuant to 42 U.S.C. 10801 et seq., and the Mental Health Care Ombudsman for the State of Vermont pursuant to 18 V.S. A. §7259. DRVT has extensive experience working with people who have been found not guilty by reason of insanity or not competent to stand trial and subsequently ordered into the Custody of the Commissioner of Mental Health. Based on this experience, DRVT offers the following information on S. 3 for your consideration.

Section 2: For many years there has been apparent consensus that MHLP attorneys, and not Public Defenders, should be required to represent criminal defendants in proceedings aimed at determining health care issues (need for commitment for medical treatment) instead of criminal liability and consequences. S. 3 finally takes action on this best practice and should herald a vast improvement in efficiency and outcomes for this population if fully funded and implemented.

Section 3: This section has significant concerns as it attempts to vastly expand protected health information (PHI) that will be disseminated to the public without the patient's consent. This is a significant expansion that may not be permitted under the federal HIPAA law.

HIPAA 45 C.F.R.§160 Subpart B Preemption of State Law does not clearly allow for disclosure of PHI under the circumstances proposed by S. 3. Specifically, Section 160.203 provides exceptions to the prohibition against disseminating PHI pursuant to State law, but the listed exceptions do not appear to fit the language or intention currently in S. 3 at pages 6 – 7.

At page 6, Section 3 of S. 3 the bill **(with the changes proposed by Asst. AG Scherr)** proports to expand the current the types of defendants the law will apply to, now proposing that any crime, not limited to the serious offenses currently listed at 13 V.S.A. §4822(c)(2), will be subject to disclosure if the prosecuting authority choses to not dismiss the charges after commitment to DMH. In addition to the current law's list of events that must be reported to the State's Attorney regarding subject individuals (discharge from DMH custody), S. 3 requires disclosure of the additional PHI of subject individuals to now include when the person is released from a hospital to the community under an Order of Non-Hospitalization; if DMH decides NOT to seek renewal of a Commitment Order; and any time the subject individual 'absconds' for any period of time from custody. The State's Attorney is required to provide this information to the person(s) who were harmed by the subject individual's actions resulting in their DMH Commitment. This expansion of who will be subject to non-consensual release of PHI is concerning as it can now apply to person's whose criminal offense, if they had been convicted, may be de minimis but for any reason the prosecuting authority could chose to not dismiss the case and retain the ability to receive PHI about the person. DRVT suggests providing more parameters around this discretion, or continuing the current list of serious offenses, would be more likely to avoid legal challenges to this expansion.

At page 7, under 3(A), S. 3 intends to again greatly expand the PHI that is provided to the public without consent of the subject individual by creating a new requirement that information regarding individual compliance with, and benefit from, Orders of Non-hospitalization resulting from a criminal prosecution must be provided to the relevant Court and prosecutorial authority. S. 3 proposes that if the Commissioner of DMH becomes aware that a subject individual is "not complying" with the ONH or the ONH is not "meet[ing] treatment needs", the Commissioner must notify the relevant court and prosecuting authority. Concerns about this section should include that these new terms triggering disclosure of PHI are vague and undefined. Also, the mechanism under which DMH is supposed to obtain this information from the subject individual's actual treatment providers about these triggering events is unspecified. Additionally, there is not a clear explanation as to why the current public avenue to assert that a subject individual is dangerous to self or others due to non-compliance or treatment failure (i.e. a Motion to Revoke an ONH) is insufficient.

As noted above, HIPAA 45 C.F.R.§160 Subpart B does not obviously permit the expansion of PHI that S. 3 proposes to require be disseminated, as those exceptions are limited to data collection, financial regulation, and preventing imminent harm. See 45 C.F.R. §160.203. DRVT suggests additional research be conducted prior to implementing this aspect of S. 3 if passed, again to avoid unnecessary legal challenges or Federal intervention.

Sections 5 and 6: The mental health services survey and Forensic Work Group aspects of S. 3 are important actions to take in order to make the achievable improvements that are available if the appropriate focus and resources are applied. DRVT, as the Vermont Mental Health Ombudsman, will be honored and eager to participate on the Work Group.

Thank you for your consideration of this information. DRVT is available to provide additional clarification or information as the Committee wishes. Please contact A.J. Ruben (aj@disabilityrightsvt.org) for more information.