

DAIL proposed mark-ups for H.171 APS Bill

6902 Page 2 Line 18

(1) "Abuse" means:

(A) Any treatment administered purposely, knowingly, recklessly, or negligently that places the life, health, or welfare of a vulnerable adult in jeopardy and is likely to result in impairment of health to the vulnerable adult.

Proposed edit:

(1) "Abuse" means:

(A) Any treatment administered purposely, knowingly, recklessly, or negligently that places the life, health, or welfare of a vulnerable adult in jeopardy **or** is likely to result in impairment of health to the vulnerable adult.

Including "and" instead of "or" means both are required to be present for something to be abuse.

6902 Page 7

(D) acquiring possession or control of or an interest in funds or property of a vulnerable adult through the use of deception, force, threat, undue influence, harassment, duress, or fraud;

Proposed edit:

(D) acquiring or **attempting to acquire** possession or control of or an interest in funds or property of a vulnerable adult through the use of deception, force, threat, undue influence, harassment, duress, or fraud;

Reason for mark-up: The process of attempting to acquire possession or control is distressing even if unsuccessful if under these means.

6902 Page 8

(16) "Interested person" means a representative of the vulnerable adult; Adult Protective Services staff; the Commissioner of Disabilities, Aging, and Independent Living; or the Commissioner's designee.

Proposed edit:

(16) “Interested person” means an individual whose rights or relationship could be affected by the action. This could include, but is not limited to, representative of the vulnerable adult; Adult Protective Services staff; the Commissioner of Disabilities, Aging, and Independent Living; or the Commissioner’s designee.

Reason for mark-up: The as-introduced definition unduly narrowed the term to exclude usage common elsewhere.

6902 Page 8

(18) “Mandatory reporter” means all employees, contractors, grantees, or volunteers who directly provide health care, law enforcement, caregiving, counseling, education, banking, or social services to vulnerable adults.

Proposed edit: (18) “Mandatory reporter” means an individual with an obligation to report allegations of maltreatment of vulnerable adults as described in 6903 of this title.

Reason for mark-up: Consistency and brevity in definitions.

6902 page 12

Language as introduced:

(30)“Substantiated report” means that the Commissioner or the 6Commissioner’s designee has determined, after the investigation, that a report is based upon accurate and reliable information that would lead a reasonable person to believe demonstrates, by a preponderance of the evidence, that the vulnerable adult has been abused, neglected, or exploited by the alleged perpetrator.

Proposed edit:

(30)“Substantiated ~~report~~” means that the Commissioner or the Commissioner’s designee has determined by a preponderance of the evidence and after the investigation, that a reasonable person would believe the vulnerable adult has been abused, neglected, or exploited by the alleged perpetrator.

Reason for mark-up: Substantiation is a concept that stands alone, irrespective of a report; inclusion of “report” also results ambiguity since “report” may refer to both an initial report made to APS and also the resulting document following an APS investigation. Also, APS substantiates people, not reports, and this distinction is easily lost by linking “reports” and “substantiated”. [Note: reordered sentences for clarity.]

6902 page 14

Language as introduced:

(33) C) (ii) some impairment of the adult’s ability to protect the adult from abuse, neglect, or exploitation.

Proposed edit:

(33) C) (ii) some impairment of the adult’s ability to protect the adult from **the** abuse, neglect, or exploitation.

Reason for mark-up: The Vermont Supreme Court has repeatedly found that it is necessary to establish whether the alleged victim’s disability or infirmity impaired their ability to protect themselves from the alleged perpetrator’s actions. (Smith v. Wright, 2013; Farr v. Searles, 2006.) For example, needing to wear eyeglasses would not necessarily make an alleged victim more vulnerable to emotional abuse. If “the” is not included, APS’ jurisdiction could become overly broad, requiring a major expansion of operations to address allegations of maltreatment that have no relation to the alleged victim’s actual impairments. [See Attachment A]

6903 page 14

Language as introduced:

(a) Any of the following, other than a crisis worker acting pursuant to 12 V.S.A. § 1614 and the State Long-Term Care Ombudsman or a representative of the Office, as defined in section 7501 of this title, who knows of or has received information of abuse, neglect, or exploitation of a vulnerable adult or who has reason to suspect that any vulnerable adult has been abused, neglected, or exploited shall report in accordance with the provisions of section 6904 of this title within two business days after concluding that a report is required:

(1) all employees, contractors, grantees, or volunteers who directly provide health care, law enforcement, caregiving, counseling, education, banking, or social services to vulnerable adults; and

(2) any other concerned person not listed in subsection (a) of this section who knows of or has received a complaint of abuse, neglect, or exploitation of a vulnerable adult or who has reason to suspect that any vulnerable adult has been abused, neglected, or exploited

Proposed edit:

- (a) All employees, contractors, or grantees, who directly provide health care, law enforcement, caregiving, counseling, education, banking, or social services to vulnerable adults, other than a crisis worker acting pursuant to 12 V.S.A. § 1614 and the State Long-Term Care Ombudsman or a representative of the Office, as defined in section 7501 of this title, who knows of or has received information of abuse, neglect, or exploitation of a vulnerable adult or who has reason to suspect that any vulnerable adult has been abused, neglected, or exploited shall report in accordance with the provisions of section 6904 of this title within two business days:
- 1) Any person listed in (a) who is a direct witness to the incident shall report or be party to a report;
 - 2) Any person listed in (a) who knows of or has received information of abuse, neglect, or exploitation of a vulnerable adult or who has reason to suspect that any vulnerable adult has been abused, neglected, or exploited shall report if the person does not have affirmative knowledge a report has been made.
- (b) Any other concerned person not listed in subsection (a) of this section who knows of or has received a complaint of abuse, neglect, or exploitation of a vulnerable adult or who has reason to suspect that any vulnerable adult has been abused, neglected, or exploited may report or cause a report to be made in accordance with the provisions of section 6904 of this title

Reason for make-up: Correction of error produced in transposition of language to bill as introduced. Also, persons professionally engage to provide care should be mandated to make reports regardless of job title. Witnesses to the allegation should report directly as they are best positioned to testify to the

6906 page 18

Language as introduced:

ASSESSMENT AND INVESTIGATION

(a) Report of maltreatment.

- (1) Upon receipt of a report of maltreatment, the Department shall determine whether the report constitutes an allegation of abuse, neglect, or exploitation as defined in section 6902 of this title. The Department shall respond to reports of alleged abuse, neglect, or exploitation that occurred in Vermont and to out-of-State conduct when the vulnerable adult is a resident of Vermont.

(2) If notification is made to the Commissioner or designee and is accepted as a report of abuse, neglect, or exploitation of a vulnerable adult, the Department shall determine whether to conduct an assessment or an investigation, as provided for in this section, or whether to screen out the report. An assessment may be used to determine whether an investigation is necessary. The Department shall begin either an assessment or an investigation within two business days after the receipt of an accepted report made pursuant to section 6904 of this title.

(3) The decision to conduct an assessment shall include consideration of the following factors:

- (A) the severity of any alleged maltreatment and any injuries;
- (B) the relationship between the alleged victim and alleged perpetrator; and
- (C) the known history of the report;

(4) The Department shall investigate when an accepted report involves allegations indicating maltreatment. The Department may investigate any report of maltreatment Adult Protective Services receives.

Proposed edit:

ASSESSMENT AND INVESTIGATION

(a) Report of maltreatment.

(1) Upon receipt of a report of maltreatment, the Department shall determine whether the report constitutes an allegation of abuse, neglect, or exploitation as defined in section 6902 of this title. The Department shall respond to reports of alleged abuse, neglect, or exploitation that occurred in Vermont and to out-of-State conduct when the vulnerable adult is a resident of Vermont.

~~(2) If notification is made to the Commissioner or designee and the report is accepted as a report of abuse, neglect, or exploitation of a vulnerable adult, t~~The Department shall determine whether to conduct an assessment or an investigation, as provided for in this section, or whether to screen out the report. An assessment may be used to determine whether an investigation is necessary. The Department shall begin either an assessment or an investigation within one (1) business day in all cases in which an Alleged Victim has suffered life-threatening or severe injuries; required hospitalization as a result of maltreatment; or was the Alleged Victim of sexual abuse. The Department shall begin either an assessment or an investigation within two (2) business days after the day of the receipt of all other accepted reports made pursuant to section 6904 of this title.

(3) The decision to conduct an assessment shall include consideration of the following factors:

- (A) the severity of any alleged maltreatment and any injuries;
- (B) the relationship between the alleged victim and alleged perpetrator; and

(C) the known history of the report;

(D) the detail and specificity of information provided in the report regarding the alleged victim's vulnerability and the alleged maltreatment.

(4) The Department shall investigate when an accepted report involves allegations indicating serious maltreatment or ongoing risk of harm to the alleged victim. The Department may investigate any report of maltreatment Adult Protective Services receives.

Reason for mark-up: These changes were arrived at with consensus and as a compromise with advocates (VT Legal Aid, DRVT, COVE) who provided testimony and requested the two-business day timeframe be altered to a shorter timeframe for emergency situations of maltreatment. This compromise allows for a one-business day response time for those emergent cases. This section also clarifies the ability for APS to conduct an "assessment" irrespective of an "investigation", and the severity of the maltreatment to be an additional criteria for consideration. DAIL agrees with all of these proposed modifications.

6906 page 27

Language as introduced:

(8) Within seven calendar days of the decision to reject or accept the 16 recommendation of substantiation or to defer the substantiation in accordance with subdivision (6) of this subsection,

And:

...and a decision shall be issued within seven calendar days after the hearing.

Proposed edit:

(8) Within seven (7) calendar days of the decision to reject or accept the 16 recommendation of substantiation or to defer the substantiation in accordance with subdivision (6) of this subsection,

And:

...and a decision shall be issued within seven (7) calendar days after the hearing.

Reason for mark-up: consistency in formatting with other numbered days, one through twenty (1-20).

6913 page 42

Language as introduced:

(c) Whenever the Department finds that a mandatory reporter willfully or knowingly withheld information, or provided false or inaccurate information, the Commissioner may impose an administrative penalty not to exceed \$1,000.00 per violation.

Proposed edit:

(c) Whenever the Department finds that a mandatory reporter willfully **purposefully**, knowingly, **recklessly, or negligently** withheld information, or provided false or inaccurate information, the Commissioner may impose an administrative penalty not to exceed \$1,000.00 per violation.

Reason for mark-up: Testimony suggested this criteria be brought into alignment with the definition of "Neglect" in 6902 as failure to report shall be investigated under neglect. DAIL agrees with this change.

6931 page 51-52

Language as introduced:

(a)(3)(G) evidence of a transaction conducted by electronic or telephonic means.

Proposed edit:

(a)(3)(G) evidence of a transaction conducted **directly or** by electronic or telephonic means, **including surveillance video, access logs, IP addresses, and any other digital logs, documents, or metadata.**

Reason for mark-up: Prior difficulties in obtaining evidence from financial institutions that was outside the scope of typical document or paperwork requests. This evidence can be instrumental in showing that an alleged victim made transactions under duress or that others accessed the alleged victim's financial accounts without their consent.

6931 page 52

Language as introduced:

(b)(1) A person having custody or control of the financial information of a vulnerable adult shall make the information or a copy of the information available to an Adult Protective Services investigator upon receipt of a court order or receipt of the investigator's written request.

Proposed edit:

(b)(1) A person having custody or control of the financial information of a vulnerable adult shall make the information or a copy of the information available to an Adult Protective Services investigator upon receipt of the investigator's written request, or in instances described in (d) or (e) of this section, upon receipt of a court order.

Reason for mark-up: Clarifies that a court order is only required for APS to receive relevant financial evidence when a guardian or agent is uncooperative with the APS investigation.

6931 page 55

Proposed addition:

(l) the Commissioner may impose an administrative penalty of not more than \$1,000.00 for each violation of this subchapter resulting from willful conduct of financial institutions, or from a failure by a financial institution to provide reasonable supervision of its employees to prevent violations of this section.

(m) the Commissioner may open a consumer complaint with the Department of Financial Regulation on behalf of the alleged victim for any violation of this subchapter resulting from willful conduct of financial institutions, or from a failure by a financial institution to provide reasonable supervision of its employees to prevent violations of this section.

Reason for addition: APS has consistently faced issues of noncompliance by financial institutions. As a result, greater enforcement options are required to ensure the protection of alleged victims.

Additional sections [These sections are in the existing APS Statute, and were proposed again by DAIL without editing since they adequately serve the purpose of granting needed authority to the Courts, Law Enforcement, and other service providers. Chater and Section numbers reflect existing statute and will need to be updated.]:

§ 6920. Findings and order

(1) If the Court finds that the defendant has abused, neglected, or exploited the vulnerable adult, the Court shall make such order as it deems necessary to protect the vulnerable adult. The plaintiff shall have the burden of proving abuse, neglect, or exploitation by a preponderance of the evidence. Relief shall be granted for a fixed period of time, at the expiration of which the Court may extend any order, upon motion of the plaintiff, for such additional time as it deems necessary to protect the vulnerable adult from abuse, neglect, or exploitation. The Court may modify its order at any subsequent time upon motion by either party and a showing of a substantial change in circumstances. If the motion for extension or modification of the order is made by an interested person, notice shall be provided to the vulnerable adult, and the Court shall determine whether the vulnerable adult is capable of expressing his or her wishes with respect to the motion and, if so, whether the vulnerable adult wishes to request an extension or modification. If the Court determines the vulnerable adult is capable of expressing his or her wishes and does not wish to pursue the motion, the Court shall dismiss the motion.

(2) Every order under this subchapter shall contain the name of the Court, the names of the parties, the date of the petition, the date and time of the order, and shall be signed by the judge.

(3) Form complaints and form orders shall be provided by the Court Administrator and shall be maintained by the clerks of the Courts.

(4) Every order issued under this subchapter shall bear the following language: "VIOLATION OF THIS ORDER IS A CRIME SUBJECT TO A TERM OF IMPRISONMENT OR A FINE, OR BOTH, AND MAY ALSO BE PROSECUTED AS CRIMINAL CONTEMPT PUNISHABLE BY FINE OR IMPRISONMENT, OR BOTH."

§ 6921. Emergency relief; hearings

(1) In accordance with the Rules for Family Proceedings, temporary orders under this subchapter may be issued ex parte, without notice to the defendant, upon motion and findings by the Court that the defendant has abused, neglected, or exploited the vulnerable adult and that serious and irreparable harm to the physical health or financial interests of the vulnerable adult will result without ex parte relief.

(2) If the petition is made by an interested person, notice shall be provided to the vulnerable adult and the Court shall determine whether the vulnerable adult is capable of expressing his or her wishes with respect to the petition and if so, whether the vulnerable adult wishes to pursue the petition. If the Court determines that the vulnerable adult is capable of expressing his or her opinion and does not wish to pursue the petition, the Court shall dismiss the petition.

(3) In addition to the information required under subsection 6935(b) of this title, every order issued under this section shall state upon its face a date, time, and place when the defendant may appear to petition the Court for modification or discharge of the order. When service of the temporary order cannot be made before the scheduled hearing, the Court shall continue the hearing and extend the terms of any temporary order upon request of the plaintiff for such additional time as it deems necessary to achieve service on the defendant. The defendant's opportunity to contest shall be scheduled as soon as reasonably possible, but in no event later than 10 days from the date of issuance of the order.

§ 6922. Service

(1) A petition or ex parte temporary order or final order issued under this subchapter shall be served by any sheriff or constable or any municipal or State Police officer in accordance with the Vermont Rules of Civil Procedure. A court that issues an order under this chapter during court hours shall promptly transmit the order electronically or by other means to a law enforcement agency for service.

(2) A defendant who attends a hearing held under section 6935 of this title at which a temporary or final order under this chapter is issued and who receives notice from the Court on the record that the order has been issued shall be deemed to have been served. A defendant notified by the Court on the record shall be required to adhere immediately to the provisions of the order. However, even when the Court has previously notified the defendant of the order, the Court shall transmit the order for additional service by a law enforcement agency.

(3) The person making service shall file a return of service with the Court stating the date, time, and place at which the order was delivered personally to the defendant.

§ 6923. Procedure

(1) Except as otherwise provided in this subchapter, proceedings commenced under this subchapter shall be in accordance with the Rules for Family Proceedings and shall be in addition to any other available civil or criminal remedies.

(2) If the petition is filed by an interested person, the Court may in its discretion appoint a guardian ad litem for the vulnerable adult.

(3) The Court administrator shall establish procedures to ensure access to relief after regular court hours, or on weekends and holidays. The Court Administrator is authorized to contract

with public or private agencies to assist persons to seek relief and to gain access to Superior Court judges. Law enforcement agencies shall assist in carrying out the intent of this section.

§ 6924. Filing orders with law enforcement personnel; Department of Public Safety Protective Order Database

(1) Police departments, sheriff's departments, and State Police district offices shall establish procedures for filing orders issued under this subchapter and for making personnel aware of the existence and contents of such orders.

(2) Any court in this State that issues an order under this subchapter shall transmit a copy of the order to the Department of Public Safety Protective Order Database.

§ 6925. Enforcement

(1) Law enforcement officers shall enforce orders issued under this subchapter.

(2) Violation of an order issued under this subchapter may be prosecuted as a criminal contempt under Rule 42 of the Vermont Rules of Criminal Procedure. The prosecution for criminal contempt may be initiated by the State's Attorney in the Family Division of the Superior Court in the county which issued the order. The maximum penalty which may be imposed under this subsection shall be a fine of \$1,000.00 or imprisonment for six months, or both. A sentence of imprisonment upon conviction for criminal contempt may be stayed in the discretion of the Court pending the expiration of the time allowed for filing notice of appeal or pending appeal if any appeal is taken.

§ 6926. Appeals

An order of the Court issued under section 6935 of this title shall be treated as a final order for the purposes of appeal. Appeal may be taken by either party to the Supreme Court under the Vermont Rules of Appellate Procedure and the appeal shall be determined forthwith.

Attachment A: Importance of Abuse-Vulnerability Nexus

The Vermont Supreme Court has repeatedly found that it is necessary to establish whether the alleged victim's disability or infirmity impaired their ability to protect themselves from the alleged perpetrator's actions. (Smith v. Wright, 2013; Farr v. Searles, 2006.)

This distinction is necessary to prevent APS from being statutorily obligated to pursue absurd investigations. For example, needing to wear eyeglasses would not necessarily make an alleged victim more vulnerable to emotional abuse.

Smith v. Wright:

The strongest precedent for adding “the” is that the Court has chosen to add it itself while interpreting the statute. SCVT chooses to use the proposed “the” language, stating “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 (1) to provide for their own care without assistance **or (2) to protect themselves from the abuse, exploitation, or neglect.**”

Farr v. Searles:

In this case, the Court specifically states that it must evaluate the evidence of impairment to decide whether the alleged abuse falls under the 33 V.S.A. “A mere listing of physical ailments, which many people suffer, was not sufficient to establish that plaintiff was unable to protect herself from abuse, neglect, or exploitation.” “The trial court... **could not have concluded from this evidence that plaintiff was unable to protect herself from abuse.**”

Attachment B: DAIL explanation for language choices

To: The House Human Services Committee
From: Department of Disability Aging and Independent Living
Date: February 14, 2023
Re: Rationale for Language in H. 171

1. (Page:Line) 2:19 - § 6902 (1)(A)

(1) “Abuse” means:

(A) Any treatment administered purposely, knowingly, recklessly, or negligently that places the life, health, or welfare of a vulnerable adult in jeopardy and is likely to result in impairment of health to the vulnerable adult.

- “Treatment” has been interpreted to mean medical treatment. Negligence, as described in the Model Penal Code, means a failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances. In treatment settings we believe negligence to be the appropriate level of intent.

2. 8:17 - § 6902 (20)(A)

(20)(A) “Neglect” means purposeful , knowing, reckless, or negligent failure or omission by a caregiver that has resulted in, or could be expected to result in, physical or psychological harm, including a failure or omission to”

- Negligence, as described in the Model Penal Code, means a failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances. We believe negligence to be the appropriate level of intent when considering whether an individual should be caring for vulnerable adults.

3. 14:12 - §6903

- Regarding discretion on reporting: Allowing discretion on whether to report based upon reasonableness potentially places the reporter in a conflict of interest. If the reporter has information which refutes the report the reporter can share the refuting information with the report.
- Regarding harmonizing the DCF reporting and the APS reporting: The current APS statute identifies mandatory reporter by title. This is problematic when the title is not reflective of

the actual work individual are doing. Also, the definitions of maltreatment differ greatly between the two statutes. There is no need to arbitrarily treat children and vulnerable adults as equivalent.

- Proposed mark-up language addresses multiple aims including concerns raised in testimony by other stakeholders. Persons professionally engage to provide care should be mandated to make reports regardless of job title. Witnesses to the allegation should report directly as they are best positioned to testify to the allegation. Duplication of reporting should be avoided when possible.
- “Cause a report to be made” language was removed because this language allows organizations to move reporting away from the individual with the most direct information. This has had the effect of reports being submitted lacking important details.

4. 19:11 - §6906(a)(2)

- The two-business day response time is a reflection of the fact that APS is not conceived, resourced, or empowered as an emergency response entity. It has not been established that there is a need that justifies the resource commitment it would take to establish APS as an emergency response entity.