

**Report to
The Vermont Legislature**

**Report of the Working Group on Policies Pertaining to Individuals with
Intellectual Disability Who Are Criminal-Justice Involved**

In accordance with Act No. 27 (2023), Sec. 6

Submitted to: House Committee on Judiciary
House Committee on Human Services
Senate Committee on Judiciary
Senate Committee on Health and Welfare

Submitted by: The Working Group on Policies Pertaining to Individuals with
Intellectual Disability Who Are Criminal-Justice Involved

Prepared by: The Working Group on Policies Pertaining to Individuals with
Intellectual Disability Who Are Criminal-Justice Involved

Report Date: December 6, 2023

Legislative Language

Sec. 6. WORKING GROUP ON POLICIES PERTAINING TO INDIVIDUALS WITH INTELLECTUAL DISABILITY WHO ARE CRIMINAL-JUSTICE INVOLVED

(a) Creation. There is created the Working Group on Policies Pertaining to Individuals with Intellectual Disabilities Who Are Criminal-Justice Involved. The Working Group shall assess whether a forensic level of care is needed for individuals with intellectual disabilities who are charged with a crime of violence against another person, have been determined incompetent to stand trial or adjudicated not guilty by reason of insanity, and are committed to the custody of the Commissioner of Disabilities, Aging, and Independent Living. If it is determined that forensic-level care is needed for such individuals, the Working Group shall propose legislation establishing the process and criteria for committing such individuals to a forensic facility. In developing legislation, the Working Group shall refer to earlier drafts of this act discussed by the General Assembly in 2023.

(b) Membership.

(1) The Working Group shall be composed of the following members:

(A) a representative, appointed by the Disability Law Project of Vermont Legal Aid;

(B) a representative, appointed by the Developmental Disabilities Council;

(C) a representative, appointed by the Green Mountain Self Advocates;

(D) a representative, appointed by Vermont Care Partners;

(E) a representative, appointed by the Vermont Crisis Intervention Network;

(F) the Commissioner of Disabilities, Aging, and Independent Living or designee;

(G) the Commissioner of Mental Health or designee;

(H) a representative, appointed by the Center for Crime Victim Services;

(I) the President of the Vermont State Employees' Association or designee;

(J) the Executive Director of the Office of Racial Equity or designee;

(K) the Chief Superior Judge or designee;

(L) two members of the House of Representatives, one of whom is from the House Committee on Human Services and one of whom is from the House Committee on Judiciary, appointed by the Speaker; and

(M) two members of the Senate, one of whom is from the Senate Committee on Health and Welfare and one of whom is from the Senate Committee on Judiciary, appointed by the Committee on Committees.

(2) In completing its duties pursuant to this section, the Working Group, to the extent feasible, shall consult with the following individuals:

(A) a psychiatrist or psychologist with experience conducting competency evaluations under 1987 Acts and Resolves No. 248;

(B) individuals with lived experience of an intellectual disability who have previous experience in the criminal justice system or civil commitment system, or both;

(C) family members of individuals with an intellectual disability who have experience in the criminal justice system or with competency evaluations under 1987 Acts and Resolves No. 248;

(D) the Executive Director of the Department of State's Attorneys and Sheriffs;

(E) the Defender General; (F) the Commissioner of Corrections; and

(G) the State Program Standing Committee for Developmental Services.

(c) Powers and duties. The Working Group shall assess the need for a forensic level of care for individuals with an intellectual disability, including:

(1) the extent to which a forensic facility addresses any unmet needs or gaps in resources for individuals with intellectual disabilities;

(2) if the Working Group determines there is a need for individuals with an intellectual disability to receive programming in a forensic facility, the specific circumstances under which an individual committed to the custody of the Commissioner of Disabilities, Aging, and Independent Living could be placed in a forensic facility;

(3) any amendments to 18 V.S.A. chapter 206, including amendments needed to ensure due process prior to and during the commitment process, regardless of whether the Working Group determines that a need for forensic level care exists;

(4) the roles of Vermont Legal Aid, an ombudsman, or Disability Rights Vermont in serving individuals with intellectual disabilities placed in a forensic facility;

(5) necessary changes to 13 V.S.A. chapter 157; and

(6) investments, policies, and programmatic options for high-quality community-based supports for at-risk individuals committed to the custody of the Commissioner of Disabilities, Aging, and Independent Living.

Executive Summary

The *Working Group on Policies Pertaining to Individuals with Intellectual Disability Who Are Criminal-Justice Involved* (“Working Group”) was tasked with addressing whether there exists a need for a forensic facility for individuals with an intellectual disability who are charged with a crime of violence, have been determined to be incompetent to stand trial or adjudicated not guilty by reason of insanity, and are committed to the custody of the Commissioner of Disabilities, Aging, and Independent Living. In considering that issue, Working Group members were further directed to identify how a forensic facility addresses unmet needs or gaps in services for persons with intellectual disabilities, to discuss potential investments, policies, and programmatic options for high-quality community-based supports for those committed to the DAIL Commissioner’s custody, and to recommend statutory changes to 13 V.S.A. chapter 157 and 18 V.S.A. chapter 206.

Starting in June of 2023, the Working Group engaged in spirited discussions, which were enhanced by the contributions of others who regularly attended these public meetings. While a great deal of time and attention was afforded to all who wished to share their perspectives, the Working Group remained unable to reach consensus on several issues; however, as identified below, members did reach agreement on some statutory language and on other important questions.

As to whether there is a need for a forensic facility, nine (9) members answered in the affirmative, four (4) answered in the negative, one (1) abstained, and one (1) was absent. Those members who concluded there exists a need asserted that the facility would serve as an alternative placement to jail when a community-based setting is not appropriate to meet the needs of the individual or to protect the public. These members asserted that such a facility, designed for continued placement of the most violent, must provide ongoing supports and services for its residents. Those who concluded that a forensic facility is not needed argued, in part, that individuals have been successfully served in community-based (non-institutional) settings since the closing of the Brandon Training School, that living in the community is the least restrictive setting, that living in the community provides individuals with a higher quality of life, and that individuals will get “stuck” in the facility.

In addressing the extent to which the forensic facility addresses unmet needs or gaps in resources, some members noted that, on occasion, the current community-based, including crisis, options for individuals who present a danger of harm to others can be quite restrictive and do not offer the level of support the forensic facility would be designed to provide, including psychiatric, nursing, and medical care.

Members present voted unanimously [11-0] in support of robust Protection and Advocacy (P&A) system-level access to services in the forensic facility. At a subsequent meeting, also by a vote of 11-0, members present concluded there is a need for a financially sound roadmap for the creation of community-based services and a workforce to provide those services.

Next, the Working Group turned toward a review of earlier drafts of Act No. 27 to address its duties to identify necessary changes to 13 V.S.A. chapter 157 and to recommend amendments to 18 V.S.A. chapter 206. As to the composition and powers of the proposed

Human Services Community Safety Panel, members expressed that, at a minimum, the Panel should include access to clinical expertise, and one member suggested that Panel members should have clear authority to timely access to information needed to make placement decisions. In reviewing 13 V.S.A. §§ 4821 and 4823, many members agreed that hearing procedures for individuals with an intellectual disability being considered for commitment to the custody of the DAIL Commissioner and/or for placement in the forensic facility must be more clearly articulated in statute, and, to avoid disparate treatment of individuals and to ensure due process, those hearing procedures should be aligned with those applied to individuals with mental illness who are subject to commitment to the Commissioner of Mental Health. Members agreed on many of the proposed amendments to 18 V.S.A chapter 206, which govern the commitment process, including for review and discharge, before the Family Division.

Members' opinions diverged when the Group began discussing the conditions upon which an individual could be placed in the forensic facility and the scope of a court order placing an individual in the facility. Members in opposition to the use of a forensic facility for individuals with an intellectual disability argued that in the event such a facility is created for this population:

- All lower levels of care must be tried and exhausted before considering placement in the forensic facility;
- To be considered dangerous, there must be evidence of repeated dangerousness and not mere reliance on the conduct that led to the individual's commitment to the custody of the DAIL Commissioner; and
- Orders placing an individual in the forensic facility must be for no more than 90 days, and DAIL should bear the burden of demonstrating to the court before the expiration of any order as to why it should be extended.

Some of the members who support the creation of a forensic facility responded as follows:

- The risk of having to exhaust, as a precondition to placement in the forensic facility, all lower levels of care for an individual whose behaviors are known to be violent, and from whom it is reasonably believed the public and caregivers cannot be protected in a community-based setting, is too great.
- Dangerousness should consider whether there is a reasonable probability that the conduct will occur/be repeated if admission to the forensic facility is not ordered; actual repeated conduct should not be required.
- Initial orders for forensic facility placement should be for a period of 90 days, and, to fully align with the duration of orders described in 18 V.S.A chapter 181, upon a showing by DAIL that continued placement is required, should be extended for up to one (1) year.

Finally, Appendix B contains links to presentations and perspectives. The documents referenced in Appendix C include proposed statutory language that speaks to some of the comments highlighted in the body of this Report. The Working Group acknowledges that there is much information to digest. As members and other interested stakeholders devoted

much effort to articulating their positions and developing their recommendations, we urge the Legislature to review this Report in its entirety.

Contents

Report of the Working Group on Policies Pertaining to Individuals with Intellectual Disability Who Are Criminal-Justice Involved	1
Legislative Language	2
Executive Summary	4
Introduction	8
Discussion	8
A. Is There a Need For a Forensic Level of Care?	8
B. The extent to which a forensic facility addresses any unmet needs or gaps in resources for individuals with intellectual disabilities	14
C. What are the roles of Vermont Legal Aid, an ombudsman, or Disability Rights Vermont in serving individuals with I/DD placed in the forensic facility?	17
D. What investments, policies, and programmatic options are necessary for high-quality community-based supports for those committed to Act 248?	17
E. Necessary changes to 13 V.S.A. chapter 157	18
F. Any amendments to 18 V.S.A. chapter 206, including amendments needed to ensure due process prior to and during the commitment process, regardless of whether the Working Group determines that a need for forensic level care exists	23
Appendix A	30
Appendix B	31
Appendix C	32

Introduction

In accordance with the requirements of Act No. 27 (2023), the Department of Disabilities, Aging, and Independent Living (DAIL) called the first meeting of the Working Group, which took place on June 14, 2023, and selected a chair and a vice-chair from among its members. The Working Group met a total of 11 times, with each meeting scheduled for two hours. Members of the Working Group are listed in Appendix A.

In addition to considering the perspectives of its members, as directed by the Legislature, the Working Group consulted with other individuals and entities, including the Department of Corrections (DOC), the Department of State's Attorneys and Sheriffs (SAS), victims/survivors of crime, and the State Program Standing Committee for Developmental Services (SPSC). While the Working Group did not consult with a psychiatrist or psychologist with experience conducting competency evaluations, it heard from a licensed social worker with experience treating individuals with mental illness and intellectual/developmental disabilities who present with challenging behaviors, and a summary of that presentation is more fully set forth below. Further, despite efforts to identify individuals or family members of individuals with an intellectual disability who have experience with the criminal justice system, members were unsuccessful in securing their attendance and input.

Discussion

A. Is There a Need For a Forensic Level of Care?

At the outset, based upon the varying levels of familiarity with the issues presented, the Working Group requested background regarding the process for committing justice-involved individuals with intellectual disability to the custody of the Commissioner of Disabilities, Aging, and Independent Living ("Act 248") and the current System of Care for individuals with Intellectual or Developmental Disabilities (I/DD). These initial presentations, which served to inform the members, also led to the Group's consideration of its core objective (i.e., to decide whether there is a need for any of the nine beds at the proposed forensic facility to be available for individuals committed pursuant to Act 248). To address this question, the Working Group spent a significant amount of time at several subsequent meetings hearing from both its members and invited guests, through both formal presentations and discussion. Those perspectives are more fully set forth below, and links to presentations provided to the Working Group are contained in Appendix B. After the Working Group had received substantial input and considered diverse perspectives, each member was asked to express their position on whether such a need for the forensic facility exists. The results were as follows: 9 members answered "yes;" 4 members answered "no;" 1 member abstained; and 1 member was absent.

1. Yes, there is a need for the forensic facility.

In presenting its overview, DAIL staff explained that the Developmental Services System of Care is a "no refusal" system, meaning that the Designated Agencies (DAs) must serve all eligible individuals in their catchment area, within the limits of available resources,

regardless of the complexity of an individual's needs or their level of dangerousness. In FY 2022, approximately 3,300 adults with developmental disabilities received home- and community-based services. DAIL staff noted that supports are provided in a variety of residential models, which are overseen by the DAs and Specialized Service Agencies (SSAs). Shared Living, the predominant model in Vermont, involves an individual residing with another person or couple. In FY 2022, there were over 1,200 shared living arrangements. Other residential models include Staffed Living, in which the individual receives support from agency staff; Group Homes, which are limited to 6 individuals in the same location, support a variety of different populations; Supervised Living, in which individuals are supervised up to 24/7; Independent Living, in which an individual lives with their family, which is receiving supports; and In-home Family Supports, where individuals are living with their family for support.

DAIL's overview of Act 248 included a discussion of the statutory criteria for eligibility, the processes for initial commitment, judicial review and discharge, and the efforts to build community-based designated programs to address both the needs of the individual who is being placed in the Commissioner's custody and the protection of the public.

DAIL staff explained that an individual who commits an act of extreme physical or sexual violence, and who has been deemed incompetent to stand trial or cannot be held criminally responsible for that conduct due to Intellectual Disability, can be ordered into the custody of the Commissioner of Disabilities, Aging, and Independent Living for an indefinite or limited period if the Commissioner agrees that s/he is able to assemble a "designated program" of treatment and supervision for the person. 13 V.S.A. § 4823; 18 V.S.A. § 8839(3). To be eligible for commitment, the individual must present a danger of harm to others, meaning that "the person has inflicted or attempted to inflict serious bodily injury to another or has committed an act that would constitute a sexual assault or lewd and lascivious conduct with a child." 18 V.S.A. §8839(1).

DAIL relies on its partnerships with DAs to provide all services and supports to individuals under Act 248, and the developmental services divisions of the DAs are charged with designing and implementing individualized plans of services. Each of these "designated programs" must be tailored to meet the person's needs, ensure public safety, and monitor the person's compliance with the specific provisions of their Act 248 order. The Commissioner is required by statute to place the person committed in the least restrictive environment, consistent with the need to protect public safety. 18 V.S.A. §8843(c).

The specific needs and circumstances of the individual—and the associated public safety implications—drive the development of a designated program. Homes, neighborhoods, and job sites are screened to avoid situations which could present risks to the public. The level of supervision provided, and the specific activities, therapies, and services offered, all depend on the specific needs and risks associated with the individual. Many designated programs provide 24/7 supervision, education and day activities, employment support, and individual and group therapy.

After the Criminal Division of the Superior Court has determined that a defendant is a "person in need of custody, care and habilitation," it issues an order committing the

individual to the custody of the Commissioner. Every order requires the person to comply with their treatment plan and behavior support plan, as those plans are developed by the treatment team. Additionally, all orders authorize law enforcement and hospital staff to arrest the person and return them to their designated program in case of elopement. Act 248 court orders also contain specific conditions that the person must follow, which are tailored to the specific risks associated with the individual. For example, most orders include conditions prohibiting violent or threatening behavior and the possession/use of weapons, and sexual offenders will have conditions tailored to those specific concerns. The Commissioner has the authority to determine, for any individual under commitment and in accordance with the court order, the extent of supervision and restrictions. If restrictions appear insufficient to protect public safety, the Commissioner has the authority to increase them.

Despite best efforts, however, on rare occasions the current System of Care has been unable to meet the needs of the individual and protect the public. DAIL identified several examples of behaviors, including repeated violent conduct toward staff and repeated elopements from the program, which have frustrated the ability to serve a small number of individuals in a community-based setting.

The Working Group then heard additional perspectives, which reflected a need for a forensic facility for certain individuals committed to the custody of the DAIL Commissioner. First, staff from the Department of Corrections (DOC) presented the Department's perspective, noting that individuals with I/DD who are charged with violent crimes are often held in DOC custody. This may occur as the individual awaits a competency evaluation or a competency hearing, or following a finding of incompetency, as DAIL attempts to identify a provider able to develop a designated program and support the individual in a community-based setting. Even when a provider indicates a willingness and capacity to support the individual, significant time may be needed to build a designated program to meet the specific needs of the individual committed to the custody of the Commissioner. In addition, DOC often holds individuals in custody who were previously found incompetent and committed to the custody of the DAIL Commissioner, who subsequently eloped from their community-based designated program and committed a new violent crime.

DOC stated that in the last two years, there have been three individuals with I/DD who have exceeded the capacity of care for them at DOC. One individual stayed in the corrections facility for nearly 250 days for lack of an appropriate community placement. The second individual was in DOC custody at two different times. The first time, the individual was in custody for 100 days before moving to a community placement. The individual then returned to DOC custody, where they have remained since April 2023. The third individual was incarcerated in late July and is awaiting a competency evaluation but was previously found incompetent to stand trial.

DOC faces challenges in meeting the wide-ranging treatment needs of individuals with intellectual and developmental disabilities. First, DOC training on how to support these individuals is limited to a single day. Next, corrections facilities are not well designed as trauma-informed institutions. As a result of the work of DOC, law enforcement, and the

Legislature, the number of incarcerated individuals has been reduced; however, those remaining in DOC custody are more violent and predatory. As such, individuals with intellectual disability who are placed in DOC custody are even more vulnerable and at greater risk of harm. DOC concluded that this evidences the need for an alternative placement for individuals with I/DD to receive appropriate care.

Vermont Care Partners: Representing Vermont Care Partners (VCP), a statewide network of sixteen non-profit-community based agencies that provide mental health, substance use, and intellectual and developmental disability services and supports, Rutland Mental Health Services (RMHS) reported that there is a small number of Act 248 participants who do not engage clinically with the DAs and will not participate in a healthy and safe way. Although only a few of the ten individuals under Act 248 whom RMHS supports exhibit extremely challenging behaviors, the behaviors of one such individual included: aggravated assault with a deadly weapon; repeated assaults on staff, caregivers, emergency personnel, law enforcement, and the public; repeated elopements from the program without adequate clothing for the weather conditions and for prolonged periods of time; trespassing on, and damaging, the property of others; and arson. A lack of staff/caregivers willing and available to support this individual, coupled with a lack of an alternative suitable placement, have resulted in the absence of designated programming for this individual.

RMHS reported that over the last 11 months, 3 of the individuals it served under Act 248 presented to the Emergency Department a total of 84 times with non-medical-related emergencies. None of these visits resulted in admissions but utilized the limited resources these health care facilities have available to the public. Further, while law enforcement is authorized to return to their program an individual on Act 248 who has eloped, a lack of resources often makes it difficult for law enforcement to respond as needed.

Concluding that there is a need for a forensic facility, RMHS offered that a stabilization and step-down program is more beneficial than a forensic facility alone and that stabilization and treatment at the forensic facility would allow the individual to determine the trajectory of their care and program.

The Vermont Crisis Intervention Network (VCIN), a three-tiered service delivery system intended to prevent, stabilize, and treat crises experienced by individuals with I/DD within Vermont, supports 3 statewide crisis beds in addition to the HCBS residential supports identified by DAIL. VCIN's Working Group representative spoke to each of the three tiers of the Network's system. Tier I is Clinical Foundation Building, which aims to reduce and potentially prevent crises throughout the state by increasing the level of clinical expertise within the agencies. Tier II, On-Site Consultation, focuses on stabilizing a potential crisis through early intervention. Finally, Tier III, Residential Crisis Services, strives to keep individuals out of institutions by providing treatment in a calm, non-secure environment, with the goal of a rapid return to the community.

In its 32 years, VCIN has declined to serve only 8 people, due to concerns that those individuals were motivated and capable of leaving VCIN's care and, upon eloping, could pose a risk of harm to the community or to themselves. In 2018, the average stay in the

Moretown and Wardsboro beds was 16 days. The Moretown bed has served the same individual for more than 3 years, while the Wardsboro bed has served the same person for 327 days and counting. The third bed has served the same individual for 339 days and counting.

Arguing that the system is no longer working as intended or how it did for decades, and that agencies lack the human resources needed to support these most challenging individuals, VCIN's position is that something more and different is needed.

Joanne Kortendick and Kelly Carroll provided a victim's perspective on these issues. Citing to the presentations from DOC, VCP, and VCIN, Joanne and Kelly noted the gap in the system's ability to serve the most dangerous individuals committed to Act 248 while ensuring the safety of those individuals, their caregivers, and the public. Accordingly, in recognizing that, from a dangerousness perspective, there is no difference between an individual with an intellectual disability and one with a mental health diagnosis, they advocated for a forensic facility that provides treatment and competency restoration to eligible persons with an intellectual disability and a process that fully informs victims of the status of the accused. Joanne and Kelly also included legislative recommendations in their presentation and would like to see provisions in the adopted statute for the forensic facility that include input by victims when placing and discharging individuals from the forensic facility.

Other Work Group members who concluded that there is a need to have this forensic facility available for this population opined as follows:

Justice Carroll, speaking in her capacity as a judicial officer and not on behalf of the Judiciary, advised that this facility is needed if the desire is to limit sending those with disabilities to jail or Corrections because they present a danger to the public or to care providers and cannot remain safely in the community. A need also exists when an individual hasn't committed a new crime but is an elopement and violence risk and isn't willing to engage in programming, putting the community support systems at risk.

Department of Mental Health: The Department of Mental Health supports creating a forensic facility for those in both populations; DMH realizes restrictive systems are helpful to those with complex needs to get support for greater independence. There is a population of people that DMH cannot serve. When serving people in the community isn't possible, a temporary, secure setting provides safety for the participant and the community. A forensic facility would allow DMH to serve people they can't serve right now. Some people in the community need extra supports and services and this is an area of care in our system that is lacking.

Senate Health and Welfare: The forensic facility should be used as a short-term placement if a determination is made that a community-based setting is better able to support the individual, but it is specifically designed for continued placement of the most violent. The forensic facility must have the capacity to provide, and must provide, ongoing diagnostics, supports and services for its residents.

Senate Judiciary: The alternative to someone with I/DD who commits a serious crime is jail, and, for many reasons, corrections facilities are not an appropriate place for those with disabilities.

2. *No, there is no need for the forensic facility.*

The Working Group also heard presentations from its members representing Vermont Legal Aid-Disability Law Project (VLA-DLP) and the Vermont Developmental Disabilities Council (VDDC), both of which opined that there is no need for a forensic facility.

Vermont Legal Aid- Disability Law Project (VLA-DLP) describes its role as “help[ing] people with civil legal problems related to their disability” by “[giving] legal advice, [supporting] self-advocacy, and [representing] clients and their families in courts, hearings and other settings.” In asserting a lack of need for a forensic facility for individuals with I/DD, VLA-DLP’s representative on the Working Group asserted that being in the community enables individuals to practice social and safety skills and self-regulation, and participating in the community allows for a higher quality of life. VLA-DLP argued that a home-based setting is the least-restrictive setting, and expressed a concern that individuals will fall through the cracks in an institutional setting. VLA-DLP expressed concern that individuals committed under Act 248 often go for more than one year between judicial reviews of their continued need for commitment, which review is supposed to occur annually. VLA-DLP believes that the housing shortage may add pressure to place individuals in the forensic facility and prefers that funding be directed to the DAs, instead of the forensic facility, to ensure the community-based setting is safe.

Vermont Developmental Disabilities Council (VDDC), created under the federal Developmental Disabilities Assistance and Bill of Rights Act and whose mission is... “to help build connections and supports that bring people with developmental disabilities and their families into the heart of Vermont communities,” asserted that the state of Vermont had failed to invest enough in community-based residences since the closing of the Brandon Training School in 1993 and that the State’s *Olmstead Plan* does not provide a long-term financial plan to increase community living options. VDDC argued that there is no need for the forensic facility; instead, the State should invest in community placement, in our underfunded system to keep people out of crisis, and to keep people safe in the community.

This prompted a discussion of the ruling in *Olmstead v. L.C.*, a case in which two women from Georgia, who had spent years in institutions, asked the United States Supreme Court whether the anti-discrimination provision in the Americans with Disabilities Act of 1990 (ADA) requires a state to discharge people with disabilities to community settings once their treatment providers determine community placement is appropriate. In answering with a qualified “yes,” the Supreme Court held that “undue institutionalization qualifies as discrimination “by reason of...disability” and that the ADA requires community placement when: 1) the “State’s treatment professionals have determined that community placement is appropriate”; 2) The community placement is not “opposed by the affected individual”; and 3) the “placement can be reasonably accommodated taking into account the

resources available to the State and the needs of others with mental disabilities.”

VDDC noted that *Olmstead* applies to the planning, design, and funding of the State’s service systems, as well as to programs that are funded through Medicaid and other government programs. In response, the Agency of Human Services commented that the Supreme Court’s holding in *Olmstead* was not condoning the termination of institutional-based settings across the board; rather, states may continue to rely on the reasonable assessments of its own professionals in determining whether an individual is eligible for community-based programs. The forensic model contemplates a short-term placement to stabilize individuals who present a high level of dangerousness, many of whom present with co-occurring disorders, until community-based programming can be developed which meets their needs while ensuring the safety of the community.

Others, who concluded that there is no need for this forensic facility for this population, opined as follows:

Green Mountain Self-Advocates: Vermont has fewer service providers for people with intellectual and developmental disabilities than most other states, including other rural states. Vermont needs to find new providers to serve people in community-based programs.

House Human Services: There is a gap in the system; however, it is not clear if the forensic facility addresses those gaps. Concerns include: the need to place people in less-restrictive environments as soon as possible after admittance to the facility; that people will stay longer than necessary in the facility because of the staffing and community-placement shortages; that the facility will be too small in the near future, and that other residents in the facility could re-ignite trauma for individuals.

State Program Standing Committee (SPSC): The Working Group consulted with the SPSC, which strongly opposes the plan to place and treat individuals committed under Act 248 at the proposed forensic facility and recommends “that the State of Vermont allocate the necessary resources into the Home and Community Based Services System, which supports people with I/DD in the least restrictive setting. In the 1990’s, the State of Vermont recognized that placing people with I/DD in institutional settings was wrong, and, subsequently, the Brandon Training Center was closed. Since that time, housing, supports, and services have been successfully implemented in community-based settings.”

B. The extent to which a forensic facility addresses any unmet needs or gaps in resources for individuals with intellectual disabilities.

In addressing this second charge, the Working Group identified ways in which the forensic facility fulfills unmet needs and gaps in resources for the individuals eligible for placement.

Vermont Care Partners (VCP): The current programming that is created to keep these individuals and the community safe is very restrictive and very secure and may not be

the best option. This scenario, with its high level of security, may start to look like the forensic environment that some are opposed to, and it may still not offer the level of support the forensic facility would be designed to provide.

Vermont Crisis Intervention Network (VCIN): A forensic facility could be designed to be sensitive to those with I/DD who present an extreme risk of harm, and someone in that facility, even for a short time, would receive psychiatric, psychological, nursing, and medical care at a level that exceeds what is available in the VCIN crisis beds.

Despite anecdotal evidence, there are no data to demonstrate that workers supporting individuals committed under Act 248 in community-based settings are leaving their jobs as a direct result of having been assaulted by these individuals. Nonetheless, one member hypothesized that such data may support the need for a more restrictive setting (i.e., a forensic facility) to address a gap in staff resources in community-based settings.

The Working Group invited Hilary Ward, LICSW, who has been working for 12 years with individuals spanning all levels of cognitive functioning who exhibit challenging behaviors, to address the potential impact, if any, of being placed in the forensic facility on individuals with I/DD. In doing so, Ms. Ward discussed the limitations of current community-based programming, the potential benefits of the forensic facility, and the importance of continuing engagement and planning to ensure a smooth reintegration into the community.

Specifically, Ms. Ward offered the following:

- Community-based settings often use entry level staff positions, and those staff have minimal experience and receive only basic training.
- Community-based staff can provide 24/7 eyes-on, but there is little they can do to intervene if dangerous or unsafe behaviors occur, including violence and elopement.
- In a community-based setting, coordinating individual specialists for an observation is difficult and time-consuming.
- The proposed forensic facility could offer 24/7 observation and behavioral intervention by an experienced, core team for those individuals with complex and acute needs who present more dangerous behaviors. This level of observation in one location could offer more accurate diagnoses, more timely medication adjustments, and holistic observation of the whole person for medical, psychiatric, substance-use struggles, trauma reaction, and cognitive functioning. Staff could also create an accountability plan for undesirable behaviors that is consistent with the behavior support plan. A single location with a core staff team could provide a consistent approach.
- People with I/DD experience difficulty with transitions. Moving to a new place, changing routines and support staff, and preparing for discharge could all

present challenges. Further, a strong routine, increased structure, and familiarity with staff over time could decrease the interest in discharge.

- Transitioning back into the community with increased autonomy and decreased support can spark a return to old patterns. As such, ensuring that the community team remains engaged with the individual and involving the individual in their discharge planning, which would begin at the time of admission to the facility, is critical. By identifying the goals for discharge and demonstrating that the community team is supportive of the transition, residents would experience positive reinforcement and a focus on the future.
- The key to this proposed facility is to support the regulation of emotions and the development of skills to tolerate distress and communicate effectively in order to be safe in the community. A “Level System,” designed to determine readiness and assess safety for discharge, could facilitate the transition from 24/7 “eyes-on” supervision to a less restrictive community-based placement. For example, individuals at Level 1 may be unable to leave the premises. Level 2 might require an individual to obtain permission to go out into the community with staff, and Level 3 may allow the individual to spend time on their own to evaluate their skills in those areas.
- Only after the provision of basic support, skill development, and 24/7 staffing are found to be unsuccessful, and an individual continues to struggle with emotional regulation and being safe, should the forensic facility be considered. Since being placed in a locked facility is not ideal, all options with fewer restrictions should be tried before considering placement in the facility.
- It is important to look at the many factors that lead someone to become violent or dysregulated. Factors such as what was going on before the charge, their environment, environmental influences, were they under the influence of substances? These considerations and more need to be evaluated holistically before making a determination about whether someone should go directly to the facility upon initial commitment to Act 248.
- Nonetheless, when asked if there are circumstances under which an individual, who cannot be safely served in the community and from whom the public cannot be protected, should be considered for the forensic facility *without the need to exhaust all other options*, Ms. Ward responded that she could envision a situation where someone could be recommended to go directly to the facility, but she emphasizes the need for a careful study, perhaps by a team that includes a medical director, a clinical professional, and someone from developmental services.

C. What are the roles of Vermont Legal Aid, an ombudsman, or Disability Rights Vermont in serving individuals with I/DD placed in the forensic facility?

Those Working Group members present at the November 15, 2023, meeting voted unanimously [11-0] in support of robust protection and advocacy (P&A) system-level access to services in the forensic facility. Specific comments on this topic included the following:

VLA-DLP: Currently, the Long-Term Care Ombudsman program does not go into Therapeutic Community Residences because there is no federal mandate, nor is there funding for Vermont Legal Aid to cover those programs as Ombudsman. Vermont Legal Aid serves as court-appointed counsel in Act 248 initial and continued commitment proceedings.

VDDC: Individuals placed in the forensic facility should have 24/7 access to independent advocates, whose work is funded. Those advocates should have the same access authority as the Protection and Advocacy (P&A) system guarantees for people with psychiatric or other disabilities who are held in similar facilities.

House Human Services asserted that residents of the forensic facility need access to robust legal advocacy services with the same powers, access authorities, and duties as Vermont's P&A system.

D. What investments, policies, and programmatic options are necessary for high-quality community-based supports for those committed to Act 248?

Those Working Group members present at the November 29, 2023, meeting agreed, by a vote of 11-0 that there is a need for a community-based services and a workforce to provide those services to individuals committed to the custody of the DAIL Commissioner and that there is a need for a financially-sound roadmap for creating an adequate system of care for those individuals. Specific comments on this topic included the following:

VLA-DLP would like to see the funding that would go into a forensic facility instead be given to the DAs to invest in safe community-based placements and provide better pay and benefits for the staff who support those on the Act 248 program.

Senate Health and Welfare expressed concern about the increased need for community-based services and a workforce to provide those services, which the administration, Legislature, and interested parties should work to ameliorate.

Vermont Developmental Disabilities Council and Green Mountain Self Advocates expressed concern about the lack of availability of community-based options to which individuals placed in a forensic facility can be discharged.

DAIL proposes community-based step-down options to include a hardware- and

technology-secure, transition home and additional group homes to support individuals who represent a public safety risk.

House Human Services identified a need to review and, perhaps, revise Vermont's *Olmstead* Plan to ensure that it is current and includes a financially sound roadmap for creating an adequate community-based system of care.

E. Necessary changes to 13 V.S.A. chapter 157

At the Legislature's direction, the Working Group referred to prior drafts of S. 89, including Draft 3.1, that contained proposed substantive changes to 13 V.S.A. chapter 157 and 18 V.S.A. chapter 206. More specifically, the Working Group focused its attention on the statutory provisions in each of these chapters that pertain to individuals to be committed, or already committed, to the custody of the Commissioner of DAHL. Although the Working Group was unable to reach consensus on many changes to these provisions, members, and entities with which the Group consulted, expressed strong opinions on these issues. What follows are summaries of the positions and recommendations of the Working Group members in response to each statutory section examined.¹ See Appendix C for specific statutory recommendations.

Prior to identifying recommended changes to 13 V.S.A. chapter 157, the Working Group considered the proposed addition of 3 V.S.A. § 3098, which would create a Human Services Community Safety Panel for the purpose of assessing the potential placement of individuals in the forensic facility.

○ 3 V.S.A. § 3098. HUMAN SERVICES COMMUNITY SAFETY PANEL

(a) There is hereby created the Human Services Community Safety Panel within the Agency of Human Services. The Panel shall be designated as the entity responsible for assessing the potential placement of individuals at a forensic facility pursuant to 13 V.S.A. § 4821 for individuals who:

(1) present a significant risk of danger if not held in a secure setting; and
(2)(A) are charged with a crime for which bail is not available; or

(B) were charged with a crime for which bail is not available and adjudicated not guilty by reason of insanity.

(b)(1) The Panel shall comprise the following members:

(A) the Secretary of Human Services;

(B) the Commissioner of Mental Health;

(C) the Commissioner of Disabilities, Aging, and Independent Living; and

¹ Justice Carroll, as designee of the Chief Superior Judge, abstained from any discussion about the language of the statute.

(D) the Commissioner of Corrections.

(2) The Panel shall have the technical, legal, fiscal, and administrative support of the Agency of Human Services and the Departments of Mental Health; of Disabilities, Aging, and Independent Living; and of Corrections.

Members commented as follows:

DAIL proposed that the above language be modified to read that the forensic facility is... for “individuals who: are/were charged with a crime for which there is no right to bail pursuant to 13 V.S.A. §§ 7553 and 7553a...”

House Human Services expressed the need for transparent, independent oversight of, and accountability for, the forensic facility. DAIL and AHS must not be the regulator, inspector, and service provider.

VDDC would like to see one or more independent (i.e., outside of the Agency of Human Services) experts on the panel with clinical expertise in the areas of psychiatry, developmental disability, intellectual disability, and competency restoration.

House Human Services opined that the Panel should include a clinician with subject matter expertise.

Senate Health and Welfare noted that legislation frequently assigns responsibility for making such determinations to appointing authorities of departments and agencies. Concurred that this section should list the desired qualifications to ensure the Panel possesses the necessary clinical expertise; however, supported leaving it to the Commissioners to help make those decisions. Suggested that a Panel member, or a consultant, with knowledge of the subject matter, could assist the Panel and Commissioners.

VSEA agreed with VDDC and Senate Health and Welfare’s suggestions and proposed that the statute authorize the Panel to have access to personal information in assessing potential placements. The VSEA representative noted, in her experience as a prosecutor, that legal process for individuals can be hampered by barriers to important information (e.g., process is slowed by requiring releases, agreements, authorization to share information, including between and among state entities). VSEA highlighted that those making decisions on behalf of these individuals must have access to all the information necessary and on a timely basis to fully evaluate backgrounds in dangerousness. In addition, VSEA suggests that the Panel include a member of law enforcement, or, at a minimum, the statute should authorize the Panel to have access to criminal history and other law enforcement databases.

When considering the changes needed to 13 V.S.A. chapter 157, the Working Group discussed the proposed amendments to 13 V.S.A. § 4821, as set forth in the draft bill, which detailed the procedure for requesting and/or conducting a review regarding whether placement of an individual in the forensic facility is appropriate, as well as the criteria to be

considered by the Human Services Community Safety Panel in assessing whether such a placement is appropriate.

- 13 V.S.A. § 4821 reads as follows:

§ 4821. Notice of hearing; procedures

The person who is the subject of the proceedings, his or her attorney, the legal guardian, if any, the Commissioner of Mental Health or the Commissioner of Disabilities, Aging, and Independent Living, and the State's Attorney or other prosecuting officer representing the State in the case shall be given notice of the time and place of a hearing under 4820 of this title. Procedures for hearings for persons with a mental illness shall be as provided in 18 V.S.A. chapter 181. Procedures for hearings for persons with an intellectual disability shall be as provided in 18 V.S.A. chapter 206, subchapter 3.

Members commented as follows:

DAIL noted that 18 V.S.A. chapter 206, subchapter 3 lacks clear procedures for hearings concerning the initial commitment of individuals to the custody of the DAIL Commissioner and the placement of individuals in the forensic facility.

VCIN observed that since many individuals with I/DD experience psychiatric disorders, any disparate treatment of these populations, including through procedures applied to hearings, contributes to an ongoing and longstanding failure to provide adequate psychiatric services, especially inpatient care.

VDDC asserted that, from a civil rights perspective, those with developmental disabilities and mental illness or brain injury should be treated the same in terms of due process and protections. Further, all those with developmental or intellectual disabilities should receive the highest standard we offer in due process.

VLA-DLP, in addressing the proposed inclusion of clinical and dangerousness factors to be considered by the Panel in assessing whether to seek placement of a person in the forensic facility, stated that, if the Panel is making the recommendation for placement in the facility, the clinical factors for admittance to the forensic facility should include evidence that lower levels of care have been tried and exhausted *before* it may be determined that the forensic facility is the least restrictive option. Further, "dangerousness" should consider evidence of one's *repeated* dangerousness, as opposed to using the conduct that led to the individual's commitment under Act 248.

In addition, if an assessment of dangerousness must consider "whether the results of any applicable evidence-based violence risk assessment tool indicates that the person's behavior is deemed a significant risk to others," the term "evidence-based violence risk assessment tool" must be defined, as does what constitutes "evidence-based." VLA-DLP could be more comfortable with the Panel having the authority to make such a recommendation if the Panel were required to consider the

recommendations of a clinician who administers the “evidence-based violence tool.” For example, VLA-DLP suggested that the clinician could help identify the most appropriate assessment tool to use for an individual with ID.

GMSA concurred with the due process concerns articulated by VDDC and reiterated its opposition to the use of a forensic facility for individuals with I/DD. Further GMSA agreed with VLA-DLP that any consideration of an individual’s dangerousness should require that one have committed repeated acts, as opposed to basing eligibility for placement in the forensic facility on a single act that may have occurred years earlier.

DAIL disagreed with the proposed requirement that all lower levels of care be tried and exhausted before considering an individual for placement in the forensic facility. DAIL noted that the conduct of an individual placed in the custody of the DAIL Commissioner may have been so egregious that the risk of attempting a community-based placement would be too great. Further, DAIL disagreed that repeated threats or acts of violence should be required before one could be considered dangerous and eligible for placement in the forensic facility, noting that, as provided in the Draft 3.1 of the bill, an assessment of dangerousness must consider “whether... there is a reasonable probability that the conduct will [occur/be repeated] if admission to a forensic facility is not ordered.” Finally, DAIL questioned whether requiring a risk assessment by a psychologist is appropriate, given the potential challenges in finding a readily available psychologist qualified to opine as to whether the person’s specific behavior is deemed a significant risk if the person is not admitted to the forensic facility.

The Vermont Center for Crime Victim Services (VCCVS), Joanne Kortendick, and Kelly Carroll spoke in agreement with DAIL that exhaustion of all levels of care should not be a prerequisite to considering an individual for placement in a forensic facility. They also agree that repeated acts of violence should not be required to establish a “dangerousness” standard for placement eligibility.

Next, the Working Group discussed 13 V.S.A. § 4823, which addresses the role of the Criminal Division of the Superior Court in committing an individual to the custody of the DAIL Commissioner and the rights of such individuals.

- 13 V.S.A. § 4823 reads as follows:

§ 4823. Findings and order; persons with an intellectual disability

(a) If the court finds that such person is a person in need of custody, care, and habilitation as defined in 18 V.S.A. § 8839, the court shall issue an order of commitment directed to the Commissioner of Disabilities, Aging, and Independent Living for care and habilitation of such person for an indefinite or limited period in a designated program.

(b) Such order of commitment shall have the same force and effect as an order issued under 18 V.S.A. § 8843 and persons committed under such an order shall have the same status, and the same rights, including the right to

receive care and habilitation, to be examined and discharged, and to apply for and obtain judicial review of their cases, as persons ordered committed under 18 V.S.A. § 8843.

(c) Section 4822 of this title shall apply to persons proposed for discharge under this section; however, judicial proceedings shall be conducted in the Criminal Division of the Superior Court in which the person then resides, unless the person resides out of State in which case the proceedings shall be conducted in the original committing court.

Members commented as follows:

VLA-DLP² noted that the proposed amendments in this section of Draft 3.1 of the bill do not distinguish between an Act 248 commitment, in which one would be placed in a designated program in community-based setting, and placement in a forensic facility. Without such a distinction, VLA-DLP is concerned that an individual placed in the forensic facility would likely need to wait for their annual review to challenge a facility placement. VLA-DLP encourages the use of language similar to that in 18 V.S.A. chapter 181, including that which requires a court review before extending the individual's placement in the forensic facility beyond an initial ninety (90) days. If the Department believes that continued placement in the forensic facility is needed beyond ninety (90) days, the Department should have the burden of demonstrating, *to the Family Division*, that the person's continued placement in the forensic facility is the person's least restrictive environment.

In addition to having rights similar to those set forth in 18 V.S.A. chapter 181 that are afforded to individuals with mental illness, individuals considered for placement in the forensic facility should have the right to an independent examination by a psychologist to determine if that level of care is necessary.

Citing to the proposed amendment to 18 V.S.A. § 7101(31)(A), VLA-DLP asserted that, if a forensic facility is intended to be a transitional placement until an individual's behaviors are regulated, any definition of "forensic facility" should not state that it is "for an extended period of time."

DMH commented that a psychiatrist, who is conducting a required independent evaluation, is *not* looking at level of care. Rather, the psychiatrist is assessing whether the individual is a person in need of treatment, in need of continued treatment, or in need of involuntary medication. They do not make placement recommendations.

GMSA agreed with VLA-DLP that a judge should be authorized to initially place a person with ID in this facility for an initial period of no more than ninety (90) days, and that the burden should be on the State to justify continued placement.

² Please see Appendix C for VLA-DLP's proposed statutory changes.

DAIL noted that the proposed amendments to this section of Draft 3.1 contemplate potential placement in the forensic facility only at the time of the initial commitment by the Criminal Division. Advocating for the option of seeking the placement of an individual in the forensic facility subsequent to this initial commitment hearing, DAIL supports the inclusion of language in 18 V.S.A. § 8845, similar to what is proposed in Draft 3.1, which makes clear that such an option is available and describes the nature and content of a petition to the Family Division. The Vermont Center for Crime Victim Services (VCCVS), Joanne Kortendick, and Kelly Carroll concurred with DAIL's position in advocating for the option of seeking placement of an individual in the forensic facility subsequent to the initial commitment hearing, asserting that the Legislature should adopt a version of the Bill that includes this option and sets forth a process for this later placement to be considered when appropriate.

Finally, DAIL seeks to exclude any language that requires the court to find that a community-based placement is the least restrictive environment for the individual. A designated program, by definition, must provide appropriate custody, care, and habilitation "in an individual manner." See 18 V.S.A. § 8839(2).

DAIL is keenly aware of its obligation under federal law to ensure that an individual is placed in the least restrictive environment, and the sanctions for failing to do so, but DAIL envisions that requiring courts to make a "least restrictive environment" determination in matters in which an individual is not being considered for placement at the forensic facility could significantly alter the nature of the commitment proceedings, by authorizing the court to weigh in on staffing, placement, and programming decisions, which, to date, have not been a focus of the courts and could lead to both frequent litigation regarding the individual's specific treatment needs and the issuance of commitment orders directing that DAIL/agencies provide services in very specific ways.

F. Any amendments to 18 V.S.A. chapter 206, including amendments needed to ensure due process prior to and during the commitment process, regardless of whether the Working Group determines that a need for forensic level care exists

Finally, the WG turned its attention to 18 V.S.A. chapter 206 (a.k.a. "Act 248"), which, among other things, contains definitions applicable to court's determination as to whether an individual will be committed or remain committed to the custody of the DAIL Commissioner, identifies where jurisdiction and venue for judicial reviews lie, and describes certain rights afforded to the individual. **The Working Group's proposed changes to the existing statutory language** are inserted below, with members' perspectives included at the end of each statutory section where consensus was not reached.

- Subchapter 3: Judicial Proceeding; Persons with an Intellectual Disability Who Present a Danger of Harm to Others reads as follows:
§ 8839. Definitions

As used in this subchapter:

(1) ~~“Danger of harm to others” means the person has inflicted or attempted to inflict serious bodily injury to another or has committed an act that would constitute a sexual assault or lewd or lascivious conduct with a child.~~ “Commissioner” means the Commissioner of Disabilities, Aging, and Independent Living.

(2) “Designated program” means a program designated by the Commissioner as adequate to provide in an individual manner appropriate custody, care, and habilitation to persons with intellectual disabilities receiving services under this subchapter.

(3) “Forensic facility” has the same meaning as in section 7101 of this title.

~~(34)~~ “Person in need of custody, care, and habilitation” means a person:

(A) ~~a person~~ with an intellectual disability, which means significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior that were manifest before 18 years of age;

(B) ~~who presents a danger of harm to others~~ has inflicted or attempted to inflict serious bodily injury to another or who has committed an act that would constitute a sexual assault or lewd and lascivious conduct with a child; and

(C) for whom appropriate custody, care, and habilitation can be provided by the Commissioner in a designated program.

(5) Person in need of continued custody, care, and habilitation” means a person who was previously found to be a person in need of custody, care, and habilitation who poses a danger of harm to others and for whom the Commissioner has, in the Commissioner’s discretion, consented to or approved the continuation of the designated program. A danger of harm to others shall be shown by establishing that, in the time since the last order of commitment was issued, the person:

(A) has inflicted or attempted to inflict physical or sexual harm to another;

(B) by the person’s threats or actions, has placed another person in reasonable fear of physical or sexual harm; or

(C) has exhibited behavior demonstrating that, absent treatment or programming provided by the Commissioner, there is a reasonable

likelihood that the person would inflict or attempt to inflict physical or sexual harm to another.

(6) "Victim" has the same meaning as in 13 V.S.A. § 5301(4).

Members commented as follows:

DAIL:

- (4)(B) should cite to the statutory definitions of "sexual assault" and "lewd and lascivious conduct with a child."
- (5)(A) should read, "inflicted or attempted to inflict bodily injury to another or has engaged in or attempted to engage in sexual behavior that harmed another or, in the case of an attempt, would have been reasonably likely to harm another if the attempt had been completed"

§ 8840. ~~Jurisdiction and venue~~

~~Proceedings brought under this subchapter for commitment to the Commissioner for custody, care, and habilitation shall be commenced by petition in the Family Division of the Superior Court for the unit in which the respondent resides. [Repealed.]~~

§ 8841. ~~Petition; procedures~~

~~The filing of the petition and procedures for initiating a hearing shall be as provided in sections 8822-8826 of this title. [Repealed.]~~

§ 8842. ~~Hearing~~

~~Hearings under this subchapter for commitment shall be conducted in accordance with section 8827 of this title. [Repealed.]~~

§ 8843. ~~Findings and order~~

~~(a) In all cases, the court shall make specific findings of fact and state its conclusions of law.~~

~~(b) If the court finds that the respondent is not a person in need of custody, care, and habilitation, it shall dismiss the petition.~~

~~(c) If the court finds that the respondent is a person in need of custody, care, and habilitation, it shall order the respondent committed to the custody of the Commissioner for placement in a designated program in the least restrictive environment consistent with the respondent's need for custody, care, and habilitation for an indefinite or a limited period. [Repealed.]~~

§ 8844. Legal competence

No determination that a person is in need of custody, care, and habilitation or in need of continued custody, care, and habilitation and no order authorizing commitment shall lead to a presumption of legal incompetence.

§ 8845. Judicial review

(a) Manner of discharge. A person committed under 13 V.S.A. § 4823 or this subchapter may be discharged from custody by:

- (1) a Superior judge after judicial review as provided herein in subsection (b) of this section; or
- (2) by administrative order of the Commissioner.

~~(b) Judicial Review. Procedures for judicial review of persons committed under this subchapter shall be as provided in section 8834 of this title, except that proceedings shall be brought in the Criminal Division of the Superior Court in the unit in which the person resides or, if the person resides out of state, in the unit that issued the original commitment order.~~

~~(e)(1) Commitment. A person committed under 13 V.S.A. § 4823 or this subchapter shall be entitled to a judicial review annually. If no such review is requested by the person, it shall be initiated by the Commissioner. However, such a person may initiate a judicial review under this subsection after beginning 90 days after initial commitment but before the end of the first year of the commitment, or if commitment has been continued under this subchapter, the person may petition for review after 90 days from the date of an order for continued commitment.~~

~~(e2)(A) Continued commitment. If at the completion of the hearing and consideration of the record, the court finds by clear and convincing evidence that at the time of the hearing that the person is still in need of continued custody, care, and habilitation, commitment shall continue for an indefinite or limited period. If the court finds at the time of the hearing that the person is no longer in need of custody, care, and habilitation, it shall discharge the person from the custody of the Commissioner. An order of discharge may be conditional or absolute and may have immediate or delayed effect.~~

~~(B) In determining whether a person is in need of continued custody, care, and habilitation, the court shall consider the degree to which the person has engaged in or complied with the treatment and supervision provided by the Commissioner.~~

~~(C) When the Commissioner seeks an order of continued custody in a forensic facility, the Commissioner shall provide a statement expressly stating that such placement is being sought and setting forth the reasons for the Commissioner's determination that clinically appropriate~~

treatment and programming can be provided safely only in a forensic facility, including the recommendation of the Human Services Community Safety Panel pursuant to 13 V.S.A. § 4821. Placement at a forensic facility pursuant to this section shall constitute the designated program. Nothing in this section shall be construed as prohibiting the Human Services Community Safety Panel from recommending additional services and habilitation.

(3) Attendance at hearing. The Commissioner or the Commissioner's designee shall attend the commitment or continued commitment hearing and be available to testify. All persons to whom notice is given may attend the commitment or continued commitment hearing and testify, except that the court may exclude those persons not necessary for the conduct of the hearing.

(4) Rules of evidence. The Vermont rules of evidence and procedure applicable in civil cases shall apply in all judicial review proceedings brought under this subchapter.

(5) Notice of discharge. Notice of judicial discharge shall be provided to the prosecuting office, which shall provide notice to the victim, unless the victim has opted not to receive notice.

(c) Discharge from forensic facility by judicial review. The State's Attorney, or the Attorney General's Office, and the victim are entitled to appear and provide their opinion as to whether the person should be discharged from a forensic facility. The prosecutor may call witnesses and present evidence.

(d) Administrative discharge.

(1)(A) At least 10 days prior to the effective date of any administrative order for discharge by the Commissioner, the Commissioner shall give notice of the discharge to the committing court and to either the State's Attorney of the county where the prosecution originated or to the Office of the Attorney General if that office prosecuted the case.

(B) When the State's Attorney or the Attorney General receives notification pursuant to subdivision (A) of this subdivision (d)(1), the respective office shall provide notice of the action to the victim of the offense for which the person has been charged, unless the victim has opted not to receive notice.

(2)(A) If the Commissioner issues a notice of discharge from the forensic facility, the State's Attorney of the county where the prosecution originated, or the Office of the Attorney General if that office prosecuted the case, or the victim, or any combination thereof, may request a hearing on the discharge from the forensic facility to be held by the committing court within 10 days of receiving the notice under subdivision (1)(A) of this subsection (d). The

pending discharge from the facility shall be stayed during this 10-day notice period.

(B) The State's Attorney, or the Attorney General's Office, and the victim are entitled to appear to provide their opinion as to whether the person should be discharged from a forensic facility. The prosecutor may call witnesses and present evidence.

Members commented as follows:

VLA-DLP: Please see Appendix C for proposed statutory amendments.

DAIL:

- § 8845(b)(2)(A) should include “in a designated program” but **not** “in the least restrictive environment consistent with the person’s need for custody, care, and habilitation.” DAIL does not oppose, however, a requirement that the court find that the placement *in a forensic facility* is the least restrictive environment for the individual when the Commissioner is seeking such a placement.
- § 8845(b)(2)(C): To avoid disparate treatment and ensure consistency with existing processes applicable to individuals committed to the custody of the Commissioner of Mental Health (see 18 V.S.A. chapter 181), DAIL recommends that an initial order placing an individual with an intellectual disability in the forensic facility be for a period of 90 days from the hearing. If, prior to the expiration of this order, the Commissioner believes and asserts that continued placement in the forensic facility is required, and the Family Division agrees, the court shall order continued placement in the facility for up to one (1) year.
- Recognizing its ongoing obligation to ensure the individual is placed in the least restrictive environment, DAIL supports language requiring the Department to review and report to the court every 90 days after the date of the order for continued placement in the forensic facility. A person may initiate quarterly judicial reviews beginning 90 days from the date of the order for continued placement.
- Seeks an additional process, beyond the annual judicial review process described in § 8845(b)(2)(C), by which an individual, who was committed to the custody of the DAIL Commissioner by the Criminal Division and placed in a community-based designated program, may be considered for placement in the forensic facility at a later date by the Family Division.

Senate Health and Welfare:

- The statutes, including those that address the procedures for placing a justice-involved individual in the forensic facility, must afford the individual due process, and, according to the holding in *Olmstead*, those

protections apply equally to those with mental health issues and those with intellectual disabilities.

Appendix A

Working Group Members

A representative, appointed by the Disability Law Project of Vermont Legal Aid	Susan Garcia Nofi
A representative, appointed by the Developmental Disabilities Council	Susan Aranoff
A representative, appointed by the Green Mountain Self Advocates	Max Barrows
A representative, appointed by Vermont Care Partners	Mary-Graham McDowell
A representative, appointed by the Vermont Crisis Intervention Network	Patrick Frawley
The Commissioner of Disabilities, Aging, and Independent Living or designee	Stuart Schurr
The Commissioner of Mental Health or designee	Karen Barber
A representative, appointed by the Center for Crime Victim Services	Jennifer Poehlmann
The President of the Vermont State Employees' Association or designee	Eliza Novick-Smith
The Executive Director of the Office of Racial Equity or designee	Tiffany North Reid
The Chief Superior Judge or designee	Hon. Karen Carroll
A member from the House Committee on Human Services, appointed by the Speaker	Rep. Rey Garofano
A member of the House Committee on Judiciary, appointed by the Speaker	Rep. Ela Chapin
A member of the Senate Committee on Health and Welfare, appointed by the Committee on Committees	Sen. Ginny Lyons
A member of the Senate Committee on Judiciary, appointed by the Committee on Committees	Sen. Richard Sears

Appendix B
Working Group Members and Guests'
Presentations and Perspectives

Department of Disabilities, Aging, and Independent Living (DAIL):

- [Commitment to the Custody of the DAIL Commissioner Under Act 248](#)
- [Developmental Disabilities Services System of Care](#)
- [Developmental Disabilities Services Division Overview](#)

Department of Corrections (DOC):

- [Department of Corrections Perspective on Act 248 for the Act No. 27 Working Group](#)

Vermont Care Partners (VCP):

- [The Provider Perspective](#) Mary-Graham McDowell, Rutland Mental Health Services (RMHS)
- [VT Care Partners Position Letter](#)
- [A Victim's Response](#)

Vermont Crisis Intervention Network (VCIN):

- [The Vermont Crisis Intervention Network Overview](#), Pat Frawley, Ph.D.

Vermont Legal Aid-Disability Law Project (DLP):

- [Vermont Legal Aid Perspective](#), Susan Garcia Nofi

Hilary Ward, LICSW

- [Use of the Forensic Facility for those with I/DD](#)

Vermont Developmental Disabilities Council (VDDC)

- [Vermont Developmental Disabilities Council](#), Susan Aranoff

Joanne Kortendick and Kelly Carroll

- [A Victim's Perspective](#)

Vermont Center for Crime Victim Services (VCCVS)

- [Act 27 Victim Survivor Response](#)

VT State Program Standing Committee for Developmental Disabilities Services

- [Letter from Members of the VT State Program Standing Committee for Developmental Disabilities Services](#)

Appendix C

Specific Statutory Recommendations

- [DRAFT SAS \(Department of State's Attorneys and Sheriffs\) Comments](#)
- [VT Legal Aid Proposed Changes to DRAFT 3.1 of S.89](#)

Commissioner's Office

280 State Drive/HC 2 South

Waterbury, VT 05671-2020


www.dail.vermont.gov

[phone] 802-241-2401

[fax] 802-241-0386

MEMORANDUM

TO: Rep. Martin LaLonde and Members of the House Judiciary Committee; Rep. Theresa Wood and Members of the House Human Services Committee; Sen. Dick Sears and Members of the Senate Judiciary Committee; and Sen. Ginny Lyons and Members of the Senate Health & Welfare Committee

FROM: Monica White, Commissioner, Department of Disabilities, Aging & Independent Living (DAIL) 

DATE: December 6, 2023

RE: DAIL's response to the Act 27 Working Group Report

DAIL is grateful to the many participants across the Act 27 Working Group for their time, commitment, and engagement with this process. We heard many varied and valued perspectives through the Working Group meetings and through direct conversations with stakeholders. While the Working Group did not reach consensus, there was a clear majority opinion that a Forensic Facility is a needed addition to Vermont's system of care.

In response to positions set forth in the Act 27 Working Group Report, DAIL asserts its position and recommendations as follows:

- A Forensic Facility is needed in Vermont's system of care, to support the rare occurrence when a person who has been committed to the custody of the DAIL Commissioner under Act 248 cannot safely be served in a community-based setting. This includes situations in which an individual who presents an extreme risk of harm elopes from their community-based program and/or threatens or inflicts serious bodily injury on their caregivers or members of the public.
- The Forensic Facility would offer high-quality psychiatric, nursing, and medical care that is not available at current community-based programs, including short-term crisis beds.

- Current community-based secure settings and programs labeled as secure are misleading: The settings are not as secure as a Forensic Facility, and community-based secure programs can be isolating, therefore not truly "community" in nature.
- A Forensic Facility offers an alternative to detention in DOC custody and provides a therapeutic environment with the goal of returning individuals to community-based living when it is safe for the person and the public to do so.
- Individualized plans created by the individual's care team for transitioning to a community-based setting will begin at admission to the Forensic Facility.
- Community-based step-down options to include a hardware- and technology-secure, transition home and additional group homes to support individuals who represent a public safety risk should be explored.
- AHS/DAIL supports the creation of a Human Services Community Safety Panel for assessing the potential placement of individuals in a Forensic Facility.

Further, it is DAIL's position that Courts should not be required to make a "least restrictive environment" determination when the person's designated program is in a community-based setting. While such a finding is appropriate when considering placement in a Forensic Facility, requiring courts to find that community-based placements are the least restrictive environment invites courts to weigh in on staffing, placement, and programming decisions, which have historically been left to the Commissioner and the person's treatment team. Procedures for hearings related to the commitment to, and discharge of persons from, the custody of the DAIL Commissioner, as well as to placement in the Forensic Facility, must be more clearly articulated in statute to ensure all parties are afforded their rights and protections.