

MEMORANDUM

TO: Senate Committee on Health and Welfare

FROM: Stuart G. Schurr, General Counsel, Department of Disabilities, Aging, and Independent Living (DAIL) *SGS*

RE: H. 171, An act relating to adult protective services

DATE: April 24, 2023

Thank you again for your consideration of this Bill and for the opportunity to comment on its content. This memo supplements the Department of Disabilities, Aging, and Independent Living's (the Department) submission, dated April 13, 2023, and addresses the following two issues: first, the concerns raised by The American Nurses Association-Vermont and Vermont Care Partners in their testimony to the Committee on April 19, 2023, regarding the definitions of "Abuse" and "Neglect," found at 33 V.S.A. §§ 6902(1)(A) and (21)(A), respectively; and second, the language contained in 33 V.S.A. § 6911(a)(1), which can be found on page 34 of the Bill. Appreciating the competing interests in these matters, the Department proposes multiple **options** for the Committee's consideration to address each of the issues below.

1. The Inclusion of a Negligence *Mens Rea* in the Definitions of "Abuse" and "Neglect"

When the Department undertook the efforts to update Vermont's Adult Protective Services (APS) statute approximately four years ago, the two greatest identified needs were updates to outdated definitions of "vulnerable adult" and to the areas of maltreatment (i.e., "abuse," "neglect," and "exploitation"). More specifically, the definitions of "abuse" and "neglect" include a heightened *mens rea*, or mental state, requirement.¹

The resulting substantiation rate in Vermont dramatically falls short of national averages, where typically 15-20% of abuse and neglect reports are substantiated. In Vermont, due, in part, to the existing statutory *mens rea* requirements, substantiations for both abuse and neglect represented 1% of the 876 APS investigations conducted in State Fiscal Year 2022. The inherent challenges in proving that alleged perpetrators acted with the statutorily required mental state has frustrated APS' ability to protect vulnerable adults through the use of its primary tool: the Adult Abuse Registry.

¹ The current definition of "Abuse," found at 33 V.S.A. § 6902(1)(B), requires a showing of intent or reckless disregard; similarly, the current definition of "Neglect," found at 33 V.S.A. § 6902(7)(A), requires the Department to demonstrate that the alleged perpetrator's failure to act was done with purpose or reckless disregard.

APS' review of many other states' statutes revealed that most do not contain a *mens rea* element in their definitions of "abuse" and "neglect;" rather, they rely on the effects of the maltreatment and not the mental state. The few other statutes APS identified that do address a level of *mens rea* in their definitions include "negligence" to allow for a distinction between accidental acts and professional negligence.

In recent years, many cases in which APS has recommended substantiation for abuse and neglect have been reversed on appeal due to an inability to demonstrate that the alleged perpetrator acted with the *mens rea* required under the current statutory definitions of abuse and neglect. Many of those cases involved professionals, hired to care for vulnerable adults, who neglected to perform the jobs they were hired to do, which often resulted in injury to and/or the death of the vulnerable adult. Under the current definitions of "abuse" and "neglect," if an alleged perpetrator says, "I forgot to [perform some duty]," the Department is unable to substantiate. The Department believes this represents a serious deficiency in the existing statute. For APS to fulfill its statutory obligation to protect vulnerable adults, it must have the tools necessary to ensure that an individual whose conduct leads to the injury or death of vulnerable adults cannot avoid culpability by simply asserting that they "forgot" to perform some aspect of their job.

APS staff often hear from professionals that APS does not have the expertise to look at others' jobs and determine if an act of maltreatment deviates from typical professional practice. It is also suggested that APS investigations may interfere with other investigations, such as those conducted by bodies looking at professional licensure. APS is responsible for protecting vulnerable adults from alleged perpetrators, regardless of the alleged perpetrator's profession. Investigations, which may take several months, determine if an act of alleged maltreatment constitutes abuse, neglect, or exploitation to a *reasonable person*. Precluding APS from investigating individuals who are subject to licensure and/or credentialing, simply because oversight and disciplinary processes are available through the licensing or credentialing entity, would mean that many reports of maltreatment would never be investigated.

APS also hears that investigating a professional service provider will have a chilling effect on other professionals coming forward to report identified problems within their organization. This argument could be raised by those in any profession and should not (and does not) form the basis for determining which cases APS investigates. Likewise, an obligation to report to APS should not be contingent upon the potential effects on the reporter as a result of making a report.

The Department believes that an inability to hold a caregiver (or any alleged perpetrator) responsible for their negligence would lead to an absurd reading of "neglect," which is defined as a "failure or omission" to act and would lead to APS' continued inability to substantiate all but a few alleged reports of neglect where there is a preponderance of the evidence to demonstrate that the alleged perpetrator's failure to act was done purposefully or with reckless disregard. APS is aware of no other statute that defines "neglect" in this way.

For these reasons, the Department prefers that the definitions of "abuse" and "neglect" remain in the bill as passed by the House. In light of the concerns expressed by medical professionals, however, in the alternative, DAIL proposes the following two options:

- A. **Strike, in its entirety, including the "negligence" standard for medical treatment, the definition of "Abuse" in § 6902(1)(A),** as this subsection of the definition of abuse seems to cause the most concern and is least impactful to the operations of APS. The

Department, however, believes that the definition of “neglect” must contain a *mens rea* of “negligence” to meet the intent of this statute and to align with national standard practices in this area. As amended, those sections would read as follows:

18 V.S.A. § 6902:

- (1) “Abuse” means:
 - (A) Any medical treatment that purposely, knowingly, recklessly, or negligently 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.
- (21)(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:

OR

B. As noted in the Department’s testimony on April 19, **provide a *temporary carve-out* to the “negligence” *mens rea* for medical professionals under the definitions of “Abuse” and “Neglect” pending a report prepared by DAIL (see below) and any subsequent statutory changes.** As amended, those sections would read as follows:

18 V.S.A. § 6902:

- (1) “Abuse” means:
 - (A) Any medical treatment, other than medical treatment provided by a licensed medical professional, that purposely, knowingly, recklessly, or negligently 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.
- (21)(A) “Neglect” means purposeful or, knowing, reckless, or, except for the negligent failure or omission by a licensed medical professional, 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:

If the temporary carve-out option is selected, the Department would respectfully request the addition of language, similar to that which is contained in Sec. 4 of the Bill, which could read as follows:

On or before November 1, 2023, the Department of Disabilities, Aging, and Independent Living, in consultation with interested parties, shall report to the Senate Committee on Health and Welfare and the House Committees on Judiciary and Human Services as to whether additional statutory language is needed to protect vulnerable adults from abuse and neglect and, if so, provide recommendations, which take into consideration the impact of any such proposed language on the individuals providing medical treatment to vulnerable adults.

For purposes of the report required by the section, the Department of Department of Disabilities, Aging, and Independent Living shall consult with:

(a) A representative of the Vermont Association of Hospitals and Health Systems;

(b) A representative of the Vermont Medical Society;

(c) A representative of Vermont Care Partners;

(d) A representative of the American Nurses Association-Vermont;

(e) A representative of the Office of Professional Regulation;

(f) A representative of the Board of Medical Practice;

(g) A representative of Vermont Legal Aid, Inc;

(h) A representative of the Coalition of Vermont Elders; and

(i) A representative of Disability Rights Vermont.

2. APS' Access to Records Necessary to the Performance of its Duties

APS does not have the power to subpoena records. Under current law, APS investigators must frequently rely on the willingness of a custodian of records to disclose requested information that APS deems "necessary to the performance of [its statutory] duties." Without access to such information in a timely manner, APS' efforts to protect vulnerable adults by completing its investigation can be thwarted.

As passed by the House, H.171 seeks to address this need. 33 V.S.A. § 6911(a) specifically provides, "A person, agency, or institution that has a record or document that the Department needs to perform its duties under this chapter shall, without unnecessary delay, make the record or document available to the Department," establishing what appears to be a requirement that the custodian of records produce them, without exception and in a timely fashion. Notwithstanding this provision, the inclusion of the phrase, "*Subject to confidentiality or privilege protections*" at the beginning of this subsection (a), creates ambiguity as to whether the phrase, "... *shall*, without unnecessary delay, make the record or document available" is, in fact, a requirement. Emphasis added.

Why is this important? A vast majority of the records APS requests are medical records of the alleged victim, which may be essential to satisfying the Department's obligation to demonstrate that the alleged victim meets the statutory definition of a vulnerable adult. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule states that, while, for purposes of treatment, payment, or health care operations, protected health information (PHI) may be disclosed without the consent of the individual, the individual's written authorization is required in most other circumstances. One exception to the authorization requirement exists if the disclosure of the record is "required by law." See 45 C.F.R. 164.512(a)(1). It is for this reason that clarity as to whether § 6911(a) constitutes a *requirement* to disclose records to APS is critical. Anything less than a clear indication in the statute that records *must* be disclosed would likely result in the assertion by a custodian of records

containing PHI that such records are not subject to disclosure and that a written authorization from the individual must first be provided. The inability to obtain such an authorization from the individual, due to the individual's lack of capacity to grant authorization and the absence of a guardian, would leave APS no option but to seek a court order, thereby delaying the ability to conduct its investigation.

To resolve such ambiguity, DAIL proposes that 33 V.S.A. § 6911(a) provide APS broad and timely access to the records needed to perform its statutory duties and that it be amended to read as follows:

- A. Subject to confidentiality or privilege protections, tThe Department's Adult Protective Services shall have access to any records or documents, including client-identifying information, financial records, and medical and psychological records, necessary to the performance of the Department's duties under this chapter. The duties include the investigation of abuse, neglect, or exploitation or the provision of protective services to a vulnerable adult. A person, agency, or institution that has a record or document that the Department needs to perform its duties under this chapter shall, without unnecessary delay, make the record or document available to the Department. For the purposes of this subsection, "financial records" does not include records developed or maintained by the Department of Financial Regulation.
- B. **In the alternative, DAIL would find acceptable the following language, which avoids striking the clause added by the House and affirms that the requirement in the subsequent sentence of subsection (a) serves to except from the HIPAA confidentiality protections PHI that is in the custody of a records custodian:**

Subject to confidentiality or privilege protections recognized by law, except those provided by the Health Insurance Portability and Accountability Act of 1996, its corresponding regulations, and 18 V.S.A. section 1881, the Department's Adult Protective Services shall have access to any records or documents, including client-identifying information, financial records, and medical and psychological records, necessary to the performance of the Department's duties under this chapter. The duties include the investigation of abuse, neglect, or exploitation or the provision of protective services to a vulnerable adult. A person, agency, or institution that has a record or document that the Department needs to perform its duties under this chapter shall, without unnecessary delay, make the record or document available to the Department. For the purposes of this subsection, "financial records" does not include records developed or maintained by the Department of Financial Regulation.

I am available to answer any questions you may have. Thank you for your consideration.