House Committee on Judiciary

Disability Rights Vermont Testimony on S. 193

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Honorable Chair, Vice Chair, and Representatives,

Good morning, I am Laura Cushman, an attorney at Disability Rights Vermont (DRVT). As you may know, Disability Rights Vermont is the Protection and Advocacy (or P&A) agency for the State of Vermont. The United States Congress established the P&A system and P&As receive federal grants to investigate and remedy abuse, neglect, and serious rights violations impacting individuals with disabilities, whether perpetrated by state actors, private facilities, caregivers, employers, or others. Given our role as the P&A, DRVT is also designated by the Governor as Vermont's Mental Health Care Ombudsman (MHCO).

I have previously provided in-person testimony and written opposition to this bill. DRVT continues to stand in strong opposition to S. 193. While amendments have been made, this bill remains a proposal to create a specialized prison for disabled individuals who have not been convicted of crimes, violating the integration mandate of the Americans with Disabilities Act[1] and the U.S. Supreme Court's decision in *L.C. v. Olmstead* [2]. DRVT remains committed to holding the State accountable to comply with those legal mandates which say that individuals with disabilities have the right to receive services in the most integrated setting appropriate to their needs.

Regarding competency restoration within the forensic facility, Sec. 1, 13 V.S.A. § 4815 (b)(2)(A), of the current amended version of the bill reads, "If the court finds by clear and convincing evidence that the person cannot be restored to competency, the court shall order continued commitment of the person, taking into account the least restrictive conditions applicable, . . ." The bill language should be amended from "taking into account the least restrictive conditions applicable," to simply say, "in the least restrictive conditions applicable." Because when a person with disabilities is placed in a facility for their care and treatment, that it is the least restrictive setting is not just something to consider, it is mandated by law.

[1]Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (1990)

[2] Olmstead v. L.C., 527 U.S. 581 (1999)

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Indefinite commitment of a person who has not been convicted of a crime still raises Cruel and Unusual Punishment concerns under the 8th Amendment[3] and Article 18 of the Vermont Constitution[4]. A forensic facility within a prison is not the least restrictive setting and will not adequately provide treatment for the needs of the disabled people it is designed to house.

This bill targets individuals with intellectual disabilities, traumatic brain injuries, or neurocognitive disorders who are found incompetent to stand trial (IST) or not guilty by reason of insanity (NGRI). We have already existing, underutilized, secure facilities for people with mental health conditions. For individuals with other disabilities, we have Act 248 and the Department for Disabilities Aging and Independent Living (DAIL) has the authority to design programs to provide for the care, custody and habilitation of those individuals who pose a risk to themselves or others. See the attached description of the existing Act 248 process that allows for restrictions along a spectrum depending on the individual's needs and risks[5].

The bill misplaces the responsibility for these individuals to the Department of Corrections. These individuals should be under the care of the Department of Aging and Independent Living (DAIL) or the Department of Mental Health (DMH), but not the Department of Corrections (DOC). The proposed forensic facility is a Band-Aid for our systemic failures. The "need" for this facility arises only because Vermont lacks sufficient residential treatment, supported living options and outpatient care in the community. A forensic facility is a carceral solution to a healthcare shortage. Addressing the healthcare shortage must take priority over creating yet another facility at the highest level of restriction. And the Departments that traditionally have had responsibility for the care and treatment of these individuals should not be able to pass the buck of their responsibility onto the DOC to avoid fixing the issues in our current system of care. The more appropriate solution would be to invest in services for and oversight of disabled people who are on orders of non-hospitalization (ONH).

Section 4819a of the bill (Placement for Persons Acquitted of Certain Crimes) violates Due Process under the 14th Amendment. The bill states placement shall be for an "indeterminate period and shall not have a specified end date". Indeterminate duration of commitment to a forensic facility leads to "unending" incarceration without the procedural safeguards of a criminal sentence. Care and treatment for these accused should be prioritized over imprisonment and punishment.

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[3] U.S. Const. amend. VIII.

[4] Vt. Const. ch. I, art. 18

[5] https://legislature.vermont.gov/Documents/2024/WorkGroups/Senate%20Health%20and%20Welfare/Subject/Act%20248%20of%202022/W~Virginia%20Lyons~Act%20248%20Info~1-5-2024.pdf

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Under Section 4819a(c) of the bill, a person cannot be released until they establish by "clear and convincing evidence" that they are no longer a risk. The burden should remain on the State to justify continued deprivation of liberty and not shift to the person who lacks capacity. We would not stand for or support this burden shifting for people with capacity, why do we support it for people who are mentally ill or disabled?

We also disagree that the criminal court is the appropriate venue for hearings on involuntary treatment, due to the sensitive and protected private information that will be shared in hearings on the public record. The family court remains the more appropriate venue for these proceedings.

While the bill requires a court to find that medication is "clinically appropriate" and "likely to aid restoration" (pp. 3, 11), it fails to meet the strict standard from *Sell v. United States*[6], which requires the government to prove that the medication is necessary to significantly further an important government interest and that no less intrusive treatments are available. Although the bill notes a person's refusal to receive services isn't grounds for release (p. 3), it also limits a person's right to refuse. Forcing psychotropic medication is a severe intrusion on an individual's physical and mental integrity, and fundamental freedom.

Section 4826 of the bill mandates that the Commissioner of Corrections establish a "locked secure forensic facility" (p. 14). Simply placing mental health evaluation and treatment under the Department of Corrections (p. 15) rather than the Department of Mental Health "criminalizes" disability. Treating justice-involved individuals who are not convicted of crimes in a prison environment, regardless of a separate entryway, even if it is "trauma-informed", is counter-therapeutic and violates the mandate of the *Olmstead* decision.

Section 6 amends Vermont Rule of Evidence 1101 to make the rules of evidence inapplicable in proceedings concerning competency restoration or the revocation of conditional release (p. 17). We argue that by limiting the applicability of evidence rules the bill could allow for the admission of hearsay or other less reliable information in hearings that determine whether an individual remains confined in a locked facility, and will dilute the reliability of the evidence, and lead to unjust outcomes. Changing this rule in these cases will undermine the purpose of the Rules of Evidence, which is to ensure that legal proceedings are fair, efficient, and focused on reliable information.

The definition of a "Qualifying Condition**"** in Section 4826(a)(1)(B) is broad, including "any condition whether mental, congenital, or traumatic, however acquired or

[6] *Sell v. United States*, 539 U.S. 166 (2003)

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developed" (p. 14). This definition is "void for vagueness," as it could theoretically apply to a vast range of neurodivergent or cognitive conditions that do not necessarily equate to a need for locked forensic confinement.

If this legislature proceeds with S. 193 despite these objections, it is imperative that the facility be subject to the same oversight as all other mental health settings. Emergency Involuntary Procedures (EIPs), restraint, seclusion, and involuntary medication, are not therapeutic, they are severe infringements on constitutional liberties.

Under the current proposal, because many residents would be in DOC custody rather than DMH custody, there would be no independent oversight of these aggressive practices. To prevent abuse, the following statutory changes are non-negotiable: Reporting Requirements in 18 V.S.A. § 7257 must be amended. The forensic facility must be explicitly added to the list of entities required to report "adverse events" (death or serious injury) to the DMH and the MHCO. Also, under 18 V.S.A. § 7703 & § 7259 every instance of restraint, seclusion, or involuntary medication must generate a Certificate of Need (CON) to be sent to the MHCO, DRVT. A person's custodial status (DOC vs. DMH) must not dictate the level of quality oversight they receive, and minimum standards must require that forensic facility staff be trained to the same level as psychiatric unit staff when implementing EIPs. There should be no undocumented or permissible use of force by corrections officers or facility staff in the forensic facility.

I ask that you consider this bill related to competency restoration and the creation of a DOC administered forensic facility, from a disability perspective. So much of what I have heard said in the previous Committee meetings about this bill has been imbued with a subtext that people with disabilities need fixing. I have heard not so subtle ablism embedded in the conversation, and bias that has fostered a pre-determination of guilt for this small population of people who cannot be convicted, so much so that the possibility of the many rights violations I have outlined in this testimony has been excused or disregarded. We would not look past the potential for rights violations for other people, why are we so willing to disregard them where these individuals are concerned? I ask you to please recognize and set aside any disability or mental illness bias in considering this bill. S. 193 prioritizes restriction over restoration and risks "warehousing" disabled individuals in the most restrictive setting available. We urge the Committee to instead invest in a coordinated continuum of care that allows individuals to receive individualized healthcare in appropriate settings with adequate support. A carceral solution is not on that continuum.

Thank you for your consideration of this testimony.

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