

PROTECTING VULNERABLE ADULTS FROM POTENTIALLY ABUSIVE WORKERS

An Issue Paper

Long-Term Care Implementation Leadership Council
convened by the
South Carolina Institute of Medicine and Public Health
June 15, 2018

The Appendices are official responses to the Issue Paper from

- A) SC Department of Social Services, Office of Adult Protective Services
- B) SC Lieutenant Governor's Office on Aging
- C) SC Department of Health and Human Services

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BACKGROUND

The current system of Long-Term Services and Supports (LTSS) in South Carolina needs sufficient safeguards for protecting vulnerable adults from direct care workers (DCWs) and any others who may have a proven history of abuse, neglect or exploitation. Without safeguards, it is possible for individuals with a history of abuse, neglect or exploitation to move from employer to employer without a record of these actions. A Vulnerable Adult Abuse Registry would provide needed information to consumers and families, providers, regulators and enforcement agencies to help protect recipients of LTSS.

As home and community-based services (HCBS) provided by unlicensed individuals are expanding rapidly to serve adult consumers with caregiving needs, a registry would be a valuable resource for the protection of vulnerable adults, regardless of the locations where services are delivered. DCWs represent the largest segment of the LTSS workforce. As such, it is essential that efforts are undertaken to ensure that the unlicensed and unregulated workers who have been found to have abused, neglected, or exploited people in their care are adequately identified and screened across the state. This is a common practice within the U.S. as twenty-seven other states have created vulnerable adult abuse registries via legislation.

Creating Direction: A Guide for Improving Long-Term Care in South Carolina—the 2015 report of the Long-Term Care Taskforce convened by the South Carolina Institute of Medicine and Public Health (IMPH)—presented 30 actionable recommendations for improving long-term care in South Carolina over a five-year horizon. For the second and third years of its work, the Long-Term Care Implementation Leadership Council (LTC ILC), charged with overseeing the implementation of the report, included the development of an adult abuse registry among its priorities (Recommendation #14).¹

¹Please refer to Addendum 2 for additional details regarding Recommendations 14. The full report is accessible at <http://imph.org/wordpress/wp-content/uploads/2015/06/creatingdirectionreportfinal.pdf>

PROTECTING VULNERABLE ADULTS

In focusing on this recommendation, the LTC ILC sought to underscore the benefit of a registry to assure consumers have access to a qualified workforce with sufficient safeguards. A 15-member workgroup was convened in early January 2017 and met regularly to research previous work, discuss opportunities and challenges for South Carolina and inform legislation for the establishment of an adult abuse registry. In an effort to streamline and coordinate its work with other stakeholders, the workgroup merged its efforts with the SC Bar's Vulnerable Adult Taskforce, which shared a strong interest in this and other adult protection issues.

In South Carolina, there have been multiple recommendations for over 20 years across different entities in South Carolina to establish a Vulnerable Adult Abuse Registry. The Adult Protection Coordinating Council (APCC) first recommended the need for a Vulnerable Adult Abuse Registry in a research report released in 2000. The report reviewed model statutes from other states. At that time, the most significant challenges identified by the APCC in developing a registry in South Carolina were securing stable funding, establishing an appropriate host agency for the registry, defining the criteria for placement on the registry and outlining a mechanism for due process for people placed on the registry. The APCC restated its recommendation in a subsequent research report published in 2008.²

Additionally, the South Carolina Legislative Audit Council called for the establishment of a Vulnerable Adult Abuse Registry in its 2008 and 2014 audits of the South Carolina Department of Disabilities and Special Needs (DDSN).³ *A Pro Bono Analysis of the South Carolina Adult Protective Services System* published in November 2016 recommended the creation of a registry that balances protection of vulnerable adults and due process.⁴ In 2017, State Representative Garry Smith prefiled a bill (H4413) to develop a Vulnerable Adult Abuse Registry in South Carolina that did not pass in the 2017-2018 legislative session. On the federal level, the

² The APCC website is accessible at <https://www.scdhhs.gov/committees/adult-protection-coordinating-council>

³ The 2014 Legislative Audit Council report is accessible at: http://lac.sc.gov/LAC_Reports/2014/Documents/DDSN.pdf

⁴ The full report can be accessed at: <http://imph.org/wordpress/wp-content/uploads/2016/11/APS-Final-Report1.pdf>

PROTECTING VULNERABLE ADULTS

Senior Citizens Protection Act of 2017 was introduced in the U.S. House of Representatives to establish guidelines for all 50 states to create adult abuse registries.⁵

RECOMMENDED SCOPE OF THE VULNERABLE ADULT ABUSE REGISTRY

The Registry should reflect independent investigative findings of abuse, willful neglect or exploitation against any vulnerable adult in any setting. A vulnerable adult is defined in the Omnibus Adult Protection Act (OAPA) as “a person 18 years or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person’s own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction.”⁶ The Registry could be a source of information for all employers, including individuals or families privately employing direct care workers. When conducting background checks of DCW job candidates, all employers would benefit from verification that candidates have not been found to have abused, willfully neglected or exploited people previously in their care.

In compliance with federal law, the South Carolina Department of Health and Human Services (DHHS) maintains a Certified Nurse Aide (CNA) Registry that includes information on substantiated findings of abuse, willful neglect or exploitation against vulnerable adults in nursing homes. Federal requirements limit this particular registry to CNA's who work in Medicare- and Medicaid-certified nursing homes. As HCBS expand to assist an increasing population of elderly and vulnerable adults with activities of daily living in their homes, South Carolinians need a parallel registry of unlicensed caregivers with access to vulnerable adults in any setting. High turnover rates within the industry and the tendency of direct care workers to move from one employer to another without concern for accountability related to any abusive,

⁵ The latest update indicates the bill was referred to the House Judiciary Committee in October 2017. Accessed 5/10/18 at: <https://www.congress.gov/bill/115th-congress/house-bill/3885/all-info?r=1>

⁶ Omnibus Adult Protection Act, Section 43-35-10(11)

PROTECTING VULNERABLE ADULTS

neglectful or exploitative actions are additional reasons to offer vulnerable adults more protection.

The South Carolina Department of Social Services (DSS) maintains the Central Registry, a registry of individuals who have abused or neglected children. It is important to note that some people who are employed as public or private caregivers serve both adults and children (e.g., the Medicaid Children's Personal Care Program); as such, the South Carolina Vulnerable Adult Abuse Registry should include the names of individuals who serve both populations. Ideally, agency representatives who maintain the Vulnerable Adult Abuse Registry would be able to request a search of existing registries confidentially to provide comprehensive search capabilities for potential employers. To be effective and unbiased, the Vulnerable Adult Abuse Registry should also be independent of the long-term care service delivery system.

Additionally, individuals who are licensed by the South Carolina Department of Labor, Licensing, and Regulation would be subject to the appropriate licensure board for disciplinary action, but should also be referred to the Registry for actions that demonstrate abuse, neglect and exploitation of vulnerable adults. This group of licensed individuals includes such professionals as registered nurses, licensed practical nurses, social workers, therapists, physicians and psychologists. The majority of persons referred to the Vulnerable Adult Abuse Registry would come from two broad groups of unlicensed individuals: direct care workers and those others who may have access to vulnerable adults. These two groups are defined below:

The category of ***Direct Care Worker*** represents all unlicensed individuals who are contracted or employed in any setting with public funds or by an agency, hospital or facility that is licensed and/or certified by the SC Department of Health and Environmental Control (DHEC) or SC Department of Disabilities and Special Needs (DDSN) as defined in Section 43-35-10 and who provide hands-on care or services to vulnerable adults. These individuals include, but are not limited to:

- Personal Care Aides
- Adult Day Health Care Aides

PROTECTING VULNERABLE ADULTS

- Attendants
- Hospital Aides
- Paid Family Caregivers
- Home Health Aides
- Hospice Aides
- Recreation Aides
- Community Residential Care Facility Aides
- Certified Nursing Assistants in any setting
- Nursing Facility Feeding Assistants
- Direct Support Professionals
- Mental Health Specialists
- Behavioral Support Specialists
- Transportation Specialists or Aides
- Van Drivers

Individuals with Direct Access to vulnerable adults are persons contracted or employed by public or private agencies who have the opportunity for direct access to, or have personal contact with, the vulnerable adult, the vulnerable adult's residence, or financial, medical or personal records during the course of one's assigned duties. These individuals include, but are not limited to:

- Unlicensed Case Managers
- Fiscal intermediaries
- Long-Term Care or Skilled Nursing Facility Administrators
- Accounting staff
- Dietary staff
- Maintenance staff
- Housekeeping staff

PROTECTING VULNERABLE ADULTS

Names to be Placed on the Registry

Individuals may be placed on the Registry if:

1. They have been found guilty of abuse, neglect or exploitation of a vulnerable adult through conviction in a court of this state;
2. They have been found by clear and convincing evidence to have engaged in conduct that has been determined by professionals in an administrative proceeding to be abuse, neglect or exploitation of a vulnerable adult;
3. They have had a professional license revoked as a result of a criminal conviction or non-criminal misconduct; and/or
4. They have been ordered to be placed on the Registry by a court of this state.

The following state agencies who investigate allegations of abuse, neglect, and exploitation will refer findings that are substantiated or verified to the Registry:

Department of Social Services, Adult Protective Services (DSS APS)

Long Term Care Ombudsman Program (LTCOP)

State Attorney General's Office (AG)

State Law Enforcement Division (SLED)

Department of Health and Environmental Control (DHEC)

Department of Mental Health (sexual predators) (DMH)

Department of Consumer Affairs (DCA)

Local law enforcement agencies

Substantiation of an allegation reported to one of these agencies is based on a preponderance of evidence (i.e., the conclusion that the allegation is more likely than not to have occurred) regardless of criminal conviction. The investigative agencies will be responsible for reporting findings to the Registry. The investigative agencies will also be responsible for the outcomes of their respective investigations and will be required to participate as necessary in the case preparation and presentation of testimony during any appeals process. Prior to the development of legislation, further discussion is needed regarding standardization across

PROTECTING VULNERABLE ADULTS

investigative agencies for reporting individuals to the Registry and due process for individuals who appeal administrative decisions.

Length of Time for Placement on the Registry

The legislation to create a South Carolina Vulnerable Adult Abuse Registry should address how long individuals' names would be placed on the Registry and/or the circumstances under which names can be removed from the Registry. The CNA Abuse Registry hosted and maintained in an arrangement between DHHS and DHEC may serve as a model for determination of how long individuals' names who have been found to have abused, neglected or exploited vulnerable adults should remain on the proposed registry; for the CNA Abuse Registry, the names of individuals with violent felony convictions are never removed. Individuals whose names were placed on the registry for non-criminal violations remain on the registry for 10 years, after which they can petition for their name to be removed. Individuals whose names appear on the CNA abuse registry are barred from employment in Medicare-certified and Medicaid-certified nursing homes but not in other caregiver employment settings. This accountability gap is another matter that must be considered during the development of a Vulnerable Adult Abuse Registry.

DUE PROCESS

Due process protections must be afforded to individuals whose names are subject to being placed on the South Carolina Vulnerable Adult Abuse Registry. After a substantiated or verified finding of a preponderance of evidence that the individual abused, exploited or knowingly and willfully neglected a vulnerable adult, the individual would receive a written notice of the finding. The notice would further advise the individual that his/her name will be placed on the South Carolina Vulnerable Adult Abuse Registry for a minimum of ten years, pending a request for appeal within thirty (30) days from the date of the Notice.

The legislation to create this Registry needs to address multiple issues regarding an appeals process for individuals:

PROTECTING VULNERABLE ADULTS

- Whether the name is entered on the Registry while the finding or placement of the name (or both) is under appeal or not placed until the appeals process is completed;
- Whether consideration should be given to provisional placement on the Registry with a designation of “Proposed Concern” or similar indication (given the length of time appeals can take and for the protection of vulnerable adults in the interim);
- Whether a stand-alone, standardized administrative appeals process for all investigative agencies to use could be an option compared to each agency having its own internal appeals process;
- Which administrative agency or court would be responsible for judgments regarding an individual’s appeal;
- How many subsequent levels of judicial appeal would be necessary; and
- How variations to the appeals process would be addressed if the investigative agency has filed a petition in Family Court or if the appeal should be terminated if the individual is convicted of a criminal violation related to the substantiated finding.

Each investigative agency will be responsible for reporting findings to the Registry and for the outcomes of its respective investigations. Each agency will also be responsible for the administrative procedures for case preparation, participation and presentation of testimony during the appeals process. Prior to the development of legislation, further discussion is also needed regarding standardization of procedures for reporting individuals to the Registry.

ACCESS

The Vulnerable Adult Abuse Registry can serve as a resource for potential employers and consumers intending to privately employ a caregiver. It will be mandatory by law for public and/or licensed agencies and facilities to ask Registry staff to check the names of potential employees against names listed in the Vulnerable Adult Abuse Registry. This includes entities that employ or contract with any individuals who work as DCWs or who have direct access to the individual’s residence, financial, medical or personal information in his or her duties. The Registry personnel can track the number of requests for federal and state annual reports. The

PROTECTING VULNERABLE ADULTS

LTC ILC workgroup identified several issues regarding access to the Registry that will need to be addressed in the legislation and its subsequent implementation. These issues include access procedures and how a perpetrator's identification and violation(s) appear as entries on the Registry.

Expected Number of Referrals to the Registry

Pursuant to the Omnibus Adult Protection Act (OAPA), the primary investigative agencies listed above report data quarterly to the Adult Protection Coordinating Council regarding the number of allegations of abuse, neglect and exploitation received and the outcome of investigations, i.e., whether the allegation was substantiated (APS term) or verified (LTCOP term).⁷ DSS APS investigates referrals in the community, and the LTCOP investigates referrals in facilities. Recent APCC reports have estimated over 1,000 abuse investigations per year. As time passes, the number of individuals listed in the Registry will grow as their names will remain listed for ten years or more. To best maintain the Registry in the future, a procedure for expunging individuals' names after the penalty time has expired must be outlined and included in the operational mandates.

However, SLED and the AG's Office are law enforcement agencies and they do not make findings of substantiation or verification about whether there was evidence to refer a case for potential prosecution. Whether these agencies' reports will be pertinent to determining the volume of referrals to the Registry will depend upon legislative decisions regarding who can refer to the Registry and the threshold for referrals. Collaboration will be needed with the investigative agencies including the AG's Office and SLED to establish the point at which their cases are referred to the Registry.

⁷ Omnibus Adult Protection Act, Section 43-35-10

ENTITY TO HOST THE REGISTRY

Table 1 provides a summary of the workgroup’s discussions about which entity may be best to house the SC Vulnerable Adult Abuse Registry. It is important to note that the LTC ILC does not endorse a particular existing agency to house the Registry. The information in Table 1 is meant to provide a comprehensive range of issues to consider during the process of identifying a host agency. The selection of a host agency includes the following assumptions:

- That adequate funding and FTEs will be provided by the General Assembly;
- That an Investigative Agency making a referral to the Registry would “own” the referral and thus also be accountable for due process-related appeals; and
- That any necessary legislative or enabling authority would be obtained.

A distinction should be made between “housing” and “administering” the SC Vulnerable Adult Abuse Registry. A South Carolina agency that houses the Registry (i.e., maintains public responsibility for the Registry by state law) may be granted the authority to designate administrative responsibilities for the database development and management to a contractor or another agency. For example, it would be possible for two state agencies or an agency and a contractor to work together in the administration of a registry. An arrangement of this type currently exists between DHHS and DHEC in the administration of the current CNA Abuse Registry.

CONCLUSION

A recent case in U.S. District Court demonstrates the need to protect vulnerable adults from certain direct care workers by establishing an abuse registry. In this case, the offender was already on probation when hired in 2016 by an Alzheimer’s care facility and again in 2017 by a private elderly citizen’s family. He recently pleaded guilty to financial exploitation of two

PROTECTING VULNERABLE ADULTS

vulnerable elderly adults in his care.⁸ Such risks of maltreatment will be reduced when South Carolina establishes a Vulnerable Adult Abuse Registry.

It is essential to protect vulnerable adults from individuals who abuse, knowingly and willingly neglect, or exploit vulnerable adults in their care. The primary objective of a Vulnerable Adult Abuse Registry is to prevent certain direct care workers and other unlicensed individuals from gaining access to vulnerable adults in the future in **any** caregiving setting. When an investigative agency has found a preponderance of evidence that an individual should not be employed in HCBS or LTSS settings, the Registry can help prevent future cases of abuse, neglect or exploitation and help make perpetrators accountable for their actions. LTSS provider agencies, employers and regulators will be able to make better-informed hiring decisions when a Vulnerable Adult Abuse Registry is available. As noted above, multiple recent state-level analyses and reports recommend this type of registry to more fully protect the growing population of elderly and vulnerable adults in South Carolina. Legislation has also been introduced at the federal level to require all 50 states to maintain registries.

This issue paper has explored issues relevant to the creation of a Vulnerable Adult Abuse Registry in South Carolina. The workgroup and the LTC ILC have considered: 1) the necessary scope of a registry and categories of unlicensed caregivers to be included; 2) the individuals who would be added to the Registry upon a criminal or administrative finding of abuse, willful neglect, or exploitation; 3) due process protections for individuals who appeal placement on the Registry; 4) estimates of how many individuals' names would appear on the Registry; and 5) considerations of which state entity may host the Registry once it is established.

Additional necessary considerations are outlined in the 2018 Abuse Registry National Report produced by the National Adult Protective Services Association (NAPSA)⁹. First, the National Report counted 27 states in the United States that have already established their own abuse registries. Second, to reiterate and expand on the findings of the LTC ILC, the NAPSA report

⁸ Feit, N. 2018, May 24. "His Patients Were Elderly, Disabled. Their Credit Cards Funded His Shopping Sprees, S.C. Prosecutor Says." *The State*. Accessed at: <http://www.thestate.com/news/local/crime/article211871024.html>

⁹ National Adult Protective Services Abuse Registry National Report. 2018, March. Accessed at: <http://www.napsa-now.org/wp-content/uploads/2018/05/APS-Abuse-Registry-Report.pdf>

PROTECTING VULNERABLE ADULTS

recommended that legislators in the process of creating a Vulnerable Adult Abuse Registry consider the following questions:

- What funds are needed to operate the Registry?
- What staff are needed to maintain the Registry?
- What information will be included in the Registry that users can subsequently access when making decisions that will ensure the safe provision of care for a vulnerable adult?
- What due process procedures are necessary for individuals placed on the Registry?
- What employment restrictions regarding care for adults and children shall be placed on individuals whose names appear on the Registry?
- What penalties will there be for knowingly employing a perpetrator listed on the Registry in a direct care worker position?
- What type of education and training will be required of staff and investigators?
- Who must receive that education?

In conclusion, we submit this report to the SC Bar's Vulnerable Adults Taskforce and other interested parties to better inform future discussions and legislation concerning the protection of the vulnerable elderly and adults with disabilities in South Carolina.

PROTECTING VULNERABLE ADULTS

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PROTECTING VULNERABLE ADULTS

Table 1. Considerations of Possible Existing State Agencies to House the SC Vulnerable Adult Abuse Registry

ENTITY	PROS	CONS
SC DEPARTMENT OF HEALTH AND HUMAN SERVICES	<ul style="list-style-type: none"> • DHHS has administrative authority for the CNA Registry and contractual experience with Pearson Vue, the CNA Registry vendor. • DHHS has experience with CLTC’s Phoenix/Care Call systems, which include a registration of Medicaid funded DCWs. • There is a possible link to Medicaid administrative funding. • DHHS has an appeals division. • CMS has urged SMA to adopt an abuse registry as part of HCBS waiver oversight. 	<ul style="list-style-type: none"> • The primary role of DHHS is as a funder. • The Registry will include non-Medicaid related entries. • There is potential for the Registry to be overshadowed in a large agency whose primary functions are directly related to Medicaid. • DHHS is in the midst of a massive replacement of its Medicaid Management Information System (MMIS).
SC DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL	<p><i>Bureau of Certification:</i></p> <ul style="list-style-type: none"> • The Bureau has experience with the CNA Abuse Registry. • The Bureau has a field staff of surveyors that investigate complaints. <p><i>Division of Health Licensing:</i></p> <ul style="list-style-type: none"> • The Division has regulatory experience with and licensure authority for NHs, CRCFs, personal care agencies, ADHCs, hospice, & home health—all of which employ DCWs. • The Division has staff that investigate complaints. 	<ul style="list-style-type: none"> • The Bureau’s experience is primarily with federal regulatory functions. • The Registry could be overshadowed in a large agency. • The Registry could be overshadowed in a large agency. • The focus is on unlicensed personnel
LIEUTENANT GOVERNOR’S OFFICE ON AGING	<ul style="list-style-type: none"> • There are possible marketing and education linkages with GetCareSC.com. • The new configuration of the LGOA as the SC Department of Aging may present opportunities for new programs. • The Aging Network could offer a system in which to embed possible staff resources for investigations. 	<ul style="list-style-type: none"> • According to the U.S. Administration on Community Living, there could be a conflict of interest with the Registry and the functions of the LTC Ombudsman Program.
SC DEPARTMENT OF LABOR, LICENSING AND REGULATION	<ul style="list-style-type: none"> • LLR has a staff of investigators. • LLR has experience with an appeals process. • LLR could provide a future linkage with operation of a registry, if it were deemed a good host for both. • LLR houses the Board of LTC Administrators 	<ul style="list-style-type: none"> • The workers listed on the Registry will be unlicensed, which may not be a good fit for LLR. • The LTCHA Board can only regulate licensed or previously-licensed individuals as provided for in the LTCHA Board’s statutes and regulations. • Capacity (personnel and resources)
SC LAW ENFORCEMENT DIVISION	<ul style="list-style-type: none"> • SLED has experience with investigations. • There are possible linkages with a proposed single point of entry/no wrong door for abuse, neglect & exploitation reporting, if SLED were identified as the single-entry point. 	<ul style="list-style-type: none"> • If the threshold for referrals includes non-criminal offenses, the Registry may not be a good fit for a law enforcement agency. • SLED does not conduct substantiation or verification

PROTECTING VULNERABLE ADULTS

SC DEPARTMENT OF SOCIAL SERVICES	<ul style="list-style-type: none"> • Currently, DSS maintains the Central Registry related to child abuse, and there is potential to build a registry related to adult abuse modeled on that experience. • DSS has a limited number of case managers in the field who could investigate perpetrators once given the legal authority and full training 	<ul style="list-style-type: none"> • Significantly limited resources keep DSS from maintaining abuse registries for Child Protective Services and Adult Protective Services simultaneously. • Timing is not ideal for DSS due to a number of policy and programmatic changes currently underway to improve APS.
REVENUE AND FISCAL AFFAIRS OFFICE	<ul style="list-style-type: none"> • Serves as the state data warehouse • Provides IT and data analytic services. 	<ul style="list-style-type: none"> • Limited scope / role • Limited capacity (personnel and resources)
OFFICE FOR THE STUDY OF AGING, ARNOLD SCHOOL OF PUBLIC HEALTH, UNIVERSITY OF SOUTH CAROLINA	<ul style="list-style-type: none"> • Developed and implemented the SC Vulnerable Adult Guardian Ad Litem Program before it was moved to the LGOA • Has 30 years of experience in operating the SC Alzheimer’s Registry. • Has experience in informing aging practice and policy • Has experience in working with Revenue and Fiscal Affairs • Is an active stakeholder in aging and public health initiatives in SC 	<ul style="list-style-type: none"> • Limited capacity (personnel and resources) prevent OSA from serving as anything other than a launching pad for the registry

Note:

Other agencies that were eliminated from consideration include:

- SC Department of Mental Health (due to potential conflicts with direct service provision);
- SC Department of Disabilities and Special Needs (due to potential conflicts with direct service provision); and
- SC Protection and Advocacy for Persons with Disabilities (due to not being a state agency).

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June 2015 LTC Taskforce Report | Recommendation 14

RECOMMENDATION 14

Develop an Adult Abuse Registry.

Rationale

The current system of LTSS does not include sufficient safeguards for protecting consumers from direct care workers (DCWs) and other caregivers who may have a proven history of adult abuse, neglect or exploitation. It is possible for unlicensed individuals, both paid and unpaid, with a history of abuse, neglect or exploitation to move from employer to employer without a record of these actions. An Adult Abuse Registry would provide needed information to consumers and families, providers, regulators and enforcement agencies. To be effective and unbiased, such a registry should be independent of the service delivery system.

At least twenty other states have some form of an abuse registry.²⁹ The APCC first researched the need for such a registry in South Carolina in a report released in 2000.³⁰ Model statutes from other states were reviewed. At that time, the most significant challenges identified to developing an Adult Abuse Registry in South Carolina were securing stable funding, establishing an appropriate host agency for the registry, defining the criteria for placement on the registry and outlining a mechanism for due process for people placed on the registry. The Legislative Audit Council also called for the establishment of an Adult Abuse Registry in both its 2008 and 2014 audits of the Department of Disabilities and Special Needs.^{29,31}

There are existing sources of information that could be linked to a registry. Two such sources are the current abuse registry required under federal law and maintained by DHEC for certified nursing assistants who work in nursing facilities and the SC Department of Labor, Licensing and Regulation (LLR)'s professional and occupational boards for social workers, nurses, physical therapists, long-term care health care administrators, etc. An important administrative consideration will be the technical interface between the Direct Care Worker Registry (Recommendation #12) and the Adult Abuse Registry.

Action steps

Lead entities—APCC, LLR, DSS, SCDHHS and Protection and Advocacy for People with Disabilities, Inc.(P&A)

APCC, LLR, DSS, SCDHHS and P&A should:

- Review existing reports and recommendations and propose legislation, including identifying a host agency and addressing due process and employment prohibitions, to establish the registry;
- Prepare an accompanying budget request to secure the necessary funding.

APPENDICES

The Appendices are official responses to the Issue Paper from

- A) SC Department of Social Services, Office of Adult Protective Services
- B) SC Lieutenant Governor's Office on Aging
- C) SC Department of Health and Human Services

**South Carolina Department of Social Services
Adult Protective Services**

**Comments on the Proposed
Vulnerable Adult Abuse Registry**

The South Carolina Department of Social Services Adult Protective Services Program (DSS APS) agrees that South Carolina would benefit from a “system to protect consumers and families, providers, regulators and enforcement agencies to protect recipients of long term services and supports.” Most importantly, DSS APS agrees that perpetrators who willfully abuse, neglect and/or exploit the elderly & disabled should be held accountable.

However, in order to participate in an abuse registry, DSS APS will need to change its current policy and practice, make a philosophical shift in its underlying theory of case practice, and hire additional staff. In addition to these changes, the legislature, in consultation with DSS and other interested parties, will need to enact legislative amendments to the Omnibus Adult Protection Act (OAPA) that governs the program.

The information below reflects the agency’s comments on the creation of the abuse registry as well as the June 2018 Issue Paper entitled, “Protecting Vulnerable Adults from Potentially Abusive Workers.” These comments are divided into three sections. Section I pertains to the need for amendments to, or expansion of, OAPA with respect to the provision of adult protective services by SCDSS. Section II references current agency policy and practice as well as the requisite shift in philosophy, policy and practice which would be needed in order to fit within the framework of an abuse registry. Finally, Section III incorporates additional comments on the sections presented in the June 2018 issue paper.

Section I

Amend/Expand the Omnibus Adult Protection Act

If the recommendations made in the Issue Paper are to be realized, OAPA must be amended to enable DSS to determine the perpetrators of maltreatment of a vulnerable adult, create an administrative review/appeal process for the perpetrators, and where the “perpetrator” determination is affirmed, refer perpetrator names to the statewide adult abuse registry.

DSS’ Current Powers under OAPA

OAPA currently directs DSS to investigate allegations of abuse, neglect or exploitation of vulnerable adults for the purpose of protecting the vulnerable adult, not for the purpose of punishing or holding the perpetrator accountable. It does not specifically authorize DSS to make the determination that a particular individual is responsible for the maltreatment. Therefore, from a DSS practice standpoint, the objectives of the APS investigation have been to ascertain whether a vulnerable adult has been harmed or placed at risk of harm and to protect the vulnerable adult from the harm or the risk. Determining whether any individual is responsible for the maltreatment of a vulnerable adult has not been one of the agency's objectives.

In most instances, when DSS seeks judicial involvement in an APS case, DSS does not ask the family court to make a finding that a specific individual perpetrated abuse or neglect upon the vulnerable adult. Rather, DSS asks the court to determine if the adult is "vulnerable," has suffered maltreatment, or is at risk of maltreatment and in need of protective services.

A Comparison of OAPA to The Children's Code

The child protective services (CPS) provisions of the South Carolina Children's Code (S.C. Code of Laws § 63-7-10, et seq.) authorize DSS to investigate claims of child abuse and neglect, to identify perpetrators and to substantiate cases against perpetrators. It also allows perpetrators to be entered in the Central Registry of Abuse and Neglect. In contrast with OAPA, the Children's Code provides detailed authorization, structure and processes for DSS investigations and determinations. The Children's Code directs DSS to investigate in order to determine whether a report of abuse or neglect is indicated or unfounded. The Children's Code directs DSS to categorize reports as suspected, unfounded or indicated, and gives a standard of proof by which DSS must weigh factual evidence and make its determination. OAPA does not provide a standard of proof for reports involving vulnerable adults, although the State Supreme Court has ruled that DSS must present clear and convincing evidence that an individual is a vulnerable adult.

The Children's Code provides for an administrative appeals process for indicated reports and gives direction on how DSS must maintain records of indicated reports in its database. The Children's Code also provides for the retention and destruction of information maintained by DSS related to indicated reports. And the Children's Code allows DSS to petition the family court to enter a perpetrator in the Central Registry. OAPA does not provide authority similar framework for DSS to make that petition in family court cases and the family court (a court of limited jurisdiction that may take action only when allowed to do so by statute) is not expressly given the authority to order that the name of an APS perpetrator is entered in a registry.

Due Process and Required Changes to the Law

As mentioned above, the Children's Code governs the determination by SCDSS that a child has been abused or neglected by an identified person who is responsible for the child's welfare, and provides a framework for the agency to indicate a report against the perpetrator. It also provides a framework for the perpetrator to appeal the agency's determination.

Similarly, under the proposed system of entering perpetrators of vulnerable adult abuse/neglect/exploitation in a Central Registry, a framework for appealing the agency's determination would be an important component. The opportunity to administratively appeal the agency's determination provides constitutional due process and fulfills requirements of the Administrative Procedures Act.

With the statutory creation of a vulnerable adult abuse registry, DSS would be required to change current practice and begin indicating reports against perpetrators in certain APS cases (this should exclude cases involving self-neglect). The law must provide criteria by which reports are indicated against perpetrators and provide for an appeal process. DSS will have to direct resources toward the promulgation of regulations in conjunction with the amended laws.

The new or amended laws, regulations and policies must set forth:

- 1) The authority of DSS to substantiate/indicate a report or case against an individual;
- 2) The types of reports/cases (abuse, neglect, exploitation) in which DSS indicates or names a perpetrator;
- 3) The standard of evidence required for the agency's finding against an individual. The most appropriate standard is preponderance of the evidence, i.e., a finding that the individual "more likely than not" perpetrated the specified maltreatment upon the vulnerable adult;
- 4) The authority of the family court to exercise jurisdiction over the caregiver and to make a finding or affirm a finding against the caregiver.
- 5) For cases in which DSS makes a finding that an individual in a community setting (non-family member) is responsible for the maltreatment of the vulnerable adult, the internal administrative appeals framework again becomes important. The administrative appeals process for non-family members would also require a mechanism for the perpetrator to appeal the agency's final decision to the Administrative Law Court under §1-23-380 of the Administrative Procedures Act. For instance, DDSN day programs are regarded as "community settings" for purposes of APS investigations. Under the proposed changes, if APS were to indicate a case against a DDSN staff member for maltreatment of a vulnerable adult, an appeal would go through the internal administrative appeal channel and not to the family court.
- 6) Directions for DSS recordkeeping in substantiated cases;

- 7) The circumstances under which a named perpetrator will be entered in the Adult Abuse Registry; and
- 8) The authorization for DSS and the Family Court to refer a perpetrator to the Registry.

Section II

Policy, Practice and Philosophical Shift

Current Policy

The DSS APS program protects vulnerable adults who have been abused or neglected or who are at substantial risk of abuse or neglect. The focus is on the implementation of protective services for those at risk, rather than accountability for those who commit the maltreatment. As mandated by law, DSS APS substantiates the vulnerability of the adult and the need for protective services rather than substantiate the responsibility of a perpetrator.

Current policy states that the purpose of the investigation is to determine if: 1) the alleged victim is a vulnerable adult; 2) the vulnerable adult is a substantial risk of being or has been abused, neglected or exploited, 3) whether the vulnerable adult is unable to protect herself or himself and if so 4) whether protective services are necessary to protect the vulnerable adult from substantial risk of or from abuse, neglect or exploitation.

Programmatic changes

DSS APS investigators currently gather information for a thorough assessment of a vulnerable adult's protective service needs rather than gathering evidence that will stand if a perpetrator appeals. The changes suggested in this proposal will require the agency to shift their method to one of investigating with the intent of identifying a perpetrator and substantiating a finding against the perpetrator while the agency also continues to provide protective services to the vulnerable adult. For this shift to take place DSS APS will need to research other states' investigative procedures and change its own policies to reflect best practices. After the tools are researched and adapted to fit our State's practice, policy will have to be revised/written and training implemented. The training will need to include an extensive range of staff including APS intake practitioners, investigators, supervisors and attorneys as well as county and regional directors.

Train staff

The University of South Carolina, College of Social Work, Center for Child & Family Studies (USC) currently designs and provides training to the APS staff. USC will be required to re-write the APS Basic Training curriculum based on the changes in the law and policy. Current employees who work in the DSS APS program will need to be trained on the changes to law and policies. They will also have to be trained to shift the way they think about the role of APS.

Hire Staff

The DSS APS is already an under-resourced program that struggles with fulfilling its legal mandate of providing protective services to vulnerable adults. Due to lack of staff in the DSS APS program the agency is often forced to utilize staff who already carry a child services caseload in addition to serving the continuously increasing vulnerable adult population. The number of clients served by the agency increased by 22% between July 31, 2017 and July 30, 2018, and that number is expected to continue to rise. So that the agency does not remove critical resources from vulnerable adults and place the adults at further risk of harm, the DSS APS program will need to hire additional staff. Taking into consideration that the agency currently needs additional case managers to provide protective services to vulnerable adults, there will also be a need to hire additional investigative staff, attorneys, hearing officers and information technology (IT) staff.

The NAPSA Adult Protective Services Abuse Registry National Report, March 2018 reported that, "Some state respondents noted that APS investigators and supervisors have found their workloads impacted by APS abuse registries due to additional work time required to:

- prepare and submit perpetrator information to the registry:
- prepare and justify case substantiations:
- notify perpetrators of registry placement; and
- participate in administrative and judicial hearings, and/or assist legal representatives in preparing for hearings."

Section III

Names to be placed on the Registry

A) This section of the Issue Paper states, "Individuals may be placed on the registry if...(2) They have been found by clear and convincing evidence to have engaged in conduct that has been determined to be abuse... in an administrative proceeding." DSS recommends that this standard is changed to "by a preponderance of the evidence." The preponderance standard is the applicable standard of proof in DSS investigations related

to institutional maltreatment of children, such as with foster care providers and child care staff. B) Number (3) of this section of the Issue Paper states, "They have had a professional license revoked as a result of a criminal conviction..." DSS is concerned that this category is somewhat vague and might open the door to challenges that it is overly broad. Therefore, DSS recommends that the category enumerated by #3 says:

"They have had a professional license revoked relevant to the provision of care or services to another individual or has pled guilty or nolo contendere to or has been convicted of:

- (a) an "Offense Against the Person" as provided for in Chapter 3, Title 16;
- (b) an "Offense Against Morality or Decency" as provided for in Chapter 15, Title 16;
- (c) contributing to the delinquency of a minor as provided for in Section 16-17-490;
- (d) the common law offense of assault and battery of a high and aggravated nature when the victim was a person seventeen years of age or younger;
- (e) criminal domestic violence as defined in Section 16-25-20;
- (f) criminal domestic violence of a high and aggravated nature as defined in Section 16-25-65;
- (g) a felony drug-related offense under the laws of this State within the last 5 years;
- (h) unlawful conduct toward a child as provided for in Section 63-5-70;
- (i) cruelty to children as provided for in Section 63-5-80;
- (j) child endangerment as provided for in Section 56-5-2947; or
- (k) criminal sexual conduct with a minor in the first degree as provided for in Section 16-3-655(A);¹ or
- (l) a crime of moral turpitude, including but not limited to larceny, fraud, forgery, embezzlement, breach of trust with fraudulent intent.

Access to Central Registry

The "Background" section of the Issue Paper notes that SCDSS maintains the State's Central Registry. The Issue Paper proposes that the Vulnerable Adult Abuse Registry shall link to the Central Registry so that the names listed on the Central Registry are accessible to those who maintain and access the Vulnerable Adult Registry. That proposition is impracticable given current laws and agency practices.

¹ These offenses are found in §63-7-2350 of the Children's Code and prohibits the placement of a child in the home of a person having one of these convictions.

It is important to note that the Central Registry is not contained within its own independent database at DSS. As required by S.C. Code Ann. §63-7-1920, the Central Registry is contained within DSS's Child Protective Services records and is a component of the automated Child and Adult Protective Services System. DSS would require additional funding to explore the possibility of programming that would allow outside parties access to the Central Registry without also providing access to all the other highly confidential information in DSS' database.

S.C. Code Ann. §63-7-1980 specifies the limited circumstances under which a person's name is screened against the Central Registry. S.C. Code Ann. §63-7-1990(A) states that all "information collected pursuant to this article maintained by the Department of Social Services and the Central Registry of Child Abuse and Neglect are confidential." The Children's Code provides very specific circumstances in which that information may be shared. If users of the proposed Vulnerable Adult Abuse and Neglect Registry are to be permitted access to information contained within the Central Registry, the Children's Code must first be amended.

Assuming the Children's Code is amended to address these restrictions on access to the Central Registry, DSS staff could check the Central Registry upon request of those seeking to screen employees against both the Vulnerable Adult Abuse Registry and the Central Registry. It bears mentioning, however, that DSS would need additional staff to handle anticipated increased requests for background checks and would also need to recover administrative costs for processing the requests.

Other Observations Pertaining to the "Issue Paper"

"Recommended Scope of the Vulnerable Adult Abuse Registry"

The definition of "Direct Care Worker" refers to unlicensed individuals who are "employed in any setting with public funds." If this definition is adopted, DSS and other agencies would have to conduct additional investigation in APS cases to determine how the caregiver is paid and the source of those funds.

The definition of "Individuals with Direct Access" is broad in that it applies to persons who are not actually caregivers and may have only minimal contact with a vulnerable adult. DSS respectfully suggests narrowing the proposed definition.

Generally, DSS recommends that the standards under the headings "Names to be Placed on the Registry" and "Length of Time for Placement on the Registry" are consistent with those standards applicable to the Central Registry.

DSS' Participation in Vulnerable Adult Abuse Registry

Proponents of the creation of such a registry should be mindful that the category of “self-neglect” constitutes the majority of cases in which vulnerable adult maltreatment is substantiated. By the OAPA definition of self-neglect, the vulnerable adult had no caregiver and was unable to protect himself/herself from harm or risk of harm. Cases in which there is a finding of self-neglect should not be referred to the Vulnerable Adult Abuse Registry. In other cases DSS does not substantiate that the abuse, neglect or exploitation occurred but rather determines after investigation that there is a substantial risk of maltreatment to the vulnerable adult. In those cases, it is unlikely DSS would name a perpetrator or refer a name to the Registry.

Housing/Hosting the Registry

DSS APS is capable of housing the Abuse Registry, but would need to hire additional staff which would include but not be limited to additional case managers, attorneys, hearing officers, and IT staff. Furthermore, the agency would also need to design/purchase a computer program or IT system and hire staff to support the database/website maintenance, support, and troubleshooting for the proposed Registry.

One of the attachments to the Issue Paper included a table entitled, “Considerations of Possible Existing State Agencies to House the SC Vulnerable Adult Registry.” DSS offers the following “pros and cons” for additional consideration:

Table 1. Consideration of Possible Existing State Agencies to House the SC Vulnerable Adult Abuse Registry

Pros	Cons
<p>DSS APS does have the experience operating the Child Welfare Central Registry.</p> <p>DSS APS will most likely contribute the majority of the names to the registry.</p>	<p>Conflicting priorities (Protective Services should be funded before the Abuse Registry)</p> <p>Capacity (The DSS APS Program is currently underfunded & understaffed)</p> <p>Bad Timing (DSS APS is currently attempting to build a solid program & taking on this additional responsibility would be problematic)</p> <p>Inability to connect to/interface with the Central Registry (The Central Registry is a component of the automated child and adult services case management database.)</p>

Under the Issue Paper’s heading “Expected Number of Referrals to the Registry,” is a statement, “[f]or the calendar year 2017, a total of 1,275 substantiated ... cases were reported by LTCOP for the category of Community Residential Care Facilities, and by the DSS APS Program.” DSS wishes to emphasize that the statistics it furnished pertained to cases in which an adult was found to be vulnerable and was harmed or at substantial risk of harm. Those figures do not reflect cases in which a perpetrator was named.

Therefore, they are not a reliable indicator of the number of possible referrals to an adult abuse registry.

CONCLUSION

The South Carolina Department of Social Services concurs that the creation of a Vulnerable Adult Abuse Registry would benefit the most vulnerable of the state's population by having a statewide listing of persons who have been determined to have perpetrated maltreatment against a vulnerable adult. SCDSS is also cognizant of the crucial role the agency will have in terms of the submission of names to the Registry. In order to achieve its objectives, the agency believes special consideration should be given to:

1. Enacting administrative appeals procedures for suspected/named perpetrators at local entity/agency and state level. This would include amendments to the Omnibus Adult Protection Act, especially as they pertain to DSS APS. This would also include authorizing the agency to promulgate regulations to carry out the objectives of OAPA amendments:
2. Provision of adequate funding to hire additional staff (casework, legal and administrative) to accomplish the objectives of the proposed registry in terms of naming perpetrators in substantiated cases and handling appeals; and
3. If the Registry is to be housed at SCDSS, development of a funding source to:
 - a. Fund the design/creation of an abuse registry software program separate and apart from the SCDSS Child and Adult Protective Services System as well as adequate IT- support staffing; and
 - b. Hiring additional staff to administer the Registry, i.e., enter names on the Registry and conduct the background screenings

October 17, 2018

VIA ELECTRONIC TRANSMISSION

Corey Remle, Ph.D.
Long-Term Care Implementation Leadership Council
c/o South Carolina Institute of Medicine and Public Health
1301 Gervais Street
Columbia, SC 29201

Re: “Protecting Vulnerable Adults from Potentially Abusive Workers,” An Issue Paper from the Long-Term Care Implementation Leadership Council convened by the South Carolina Institute of Medicine and Public Health, June 15, 2018.

The South Carolina Lieutenant Governor’s Office on Aging (“LGOA”) hereby submits comments in response to the *Protecting Vulnerable Adults from Potentially Abusive Workers* (“Issue Paper”) policy paper published by the South Carolina Institute of Medicine and Public Health (“IMPH”) on behalf of the Long-Term Care Implementation Leadership Council (“LTC ILC”). The LGOA supports creating a Vulnerable Adult Abuse Registry (“the Registry”) as a tool to aid home care providers determine whether job applicants have been abusive in previous positions, and prevent such individuals from moving from one employment situation to another without any record of the abuse. The LGOA believes that the Registry will hand seniors, the care network, and elder justice advocates a decisive victory in fighting the growing problem of elder abuse. The LGOA’s comments center on the Issue Paper’s proposal that the State Long-Term Care Ombudsman Program (“SLTCOP” or “Ombudsman”) would substantiate claims of abuse, neglect, or exploitation committed against a vulnerable adult to add the perpetrator’s name to the Registry.

The Ombudsman program has a very specific mandate in the Older Americans Act, and the scope of its investigative powers does not include substantiating allegations against a malfeasor for the purpose of enforcing a penalty. The comments in Section I provide background on the powers vested in the SLTCOP by the Older Americans Act, and how the Ombudsman could contribute to the Registry without exceeding the scope of its authority. Section II addresses the issue of due process, and emphasizes that, consistent with recent case law from other jurisdictions, the legislation creating the registry must sufficiently address due process procedures to ensure that citizens are not erroneously deprived of a protected liberty interest. Sections III and IV address components of the Registry such as the standard of review, a discretionary component to aid in determining the length of time names should appear on the Registry, and a process by which an individual may petition to have their name expunged from the Registry before expiration of the prescribed period. Sections V and VI explore responses to the recently published report from the National Adult Protective Services Association focusing on adult abuse registries in twenty-six states, and make recommendations based on lessons learned from respondents to that report. The LGOA thanks IMPH and the LTC ILC for the opportunity to submit comments.

I. The Proposed Scope of the State Long-Term Care Ombudsman Program’s Involvement with the Registry Conflicts with its Mandate in the Older Americans Act; Disclosure Requirements

The Issue Paper enumerates several state agencies charged with investigating allegations of abuse, neglect, and exploitation, and proposes that those entities will substantiate claims and refer names to the Registry. Including the SLTCOP among those agencies demonstrates a lack of knowledge of the Ombudsman’s statutory purpose. Substantiating and/or verifying allegations against a perpetrator is outside the scope of the SLTCOP mandate; Section 712(a)(3)(A) of the Older Americans Act defines the responsibilities within the purview of the SLTCOP. The Ombudsman is charged with identifying, investigating and resolving complaints made by or on behalf of residents that relate to action, inaction or decisions that may adversely affect the residents’ health, welfare or rights.¹ Though the statute utilizes the word “resolve,” the SLTCOP is not granted fact-finding capabilities, as compared to other entities such as Adult Protective Services and state licensing agencies. The Ombudsman attempts to resolve complaints to the residents’ satisfaction and does not gather evidence to substantiate whether abuse occurred, or to determine if a law or regulation has been violated to enforce a penalty.² Therefore, the SLTCOP could not be responsible for verifying findings for the Registry and remain within the bounds of its legal authority under the statute. Exceeding that authority could potentially jeopardize funding and risk the LGOA losing its designation as the State Unit on Aging in South Carolina.

The regulations promulgated by the U.S. Department of Health and Human Services (DHHS) to administer the Older Americans Act provide textual support for the lack of the SLTCOP’s power to substantiate allegations. The Ombudsman is permitted to, “provide information regarding the complaint to another agency for such agency to *substantiate the facts for regulatory, protective services, law enforcement, or other purposes* [emphasis added],” so long as the Ombudsman adheres to the disclosure requirements set forth in the Older Americans Act and DHHS regulations.³ Therefore, the office would be permitted to provide information related to the complaint to another agency for purposes of substantiating the allegation, as the phrase “or other purposes” in the regulatory text would encompass the Registry.

Notably, the Older Americans Act and DHHS regulations impose upon the SLTCOP stringent disclosure requirements, which prohibit revealing the identity of any resident or complainant except under very specific circumstances, including where required by court order.⁴ In providing information to other state agencies, the Ombudsman would be precluded from identifying the resident or complainant unless one of the limited exceptions applies.

Thus, while the SLTCOP could not directly contribute names to be placed on the Registry given its specific directives in the Older Americans Act, the agency is supportive of providing information concerning complaints to another agency to serve the public interest. As stated above,

¹ Older Americans Act. Section 712(a)(3)(A) (2016).

² National Consumer Voice for Quality Long-Term Care for the National Center on Elder Abuse, *Long Term Care Ombudsman Program: What You Must Know*, <http://ltombudsman.org/uploads/files/library/long-term-care-ombudsman-program-what-you-must-know.pdf> (last visited Oct. 15, 2018).

³ 45 C.F.R. 1324.19(b)(3).

⁴ Older Americans Act. Section 712(d).

any such assistance must be navigated carefully to ensure the Ombudsman does not run afoul of its disclosure obligations in the federal statute.

II. Sufficient Procedural Safeguards Must Be Established to Ensure Due Process Requirements Are Met

The Fourteenth Amendment provides that no state can deprive an individual of life, liberty, or property without due process of law.⁵ Parallel provisions in the South Carolina Constitution state that “no person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard ... nor shall he be deprived of liberty or property unless by a mode of procedure described by the General Assembly, and he shall have in all such instances the right to judicial review.”⁶ While it is not per se unconstitutional for the government to deprive an individual of a protected interest,⁷ the government must follow adequate procedural safeguards before an individual is divested of a fundamental right.⁸ If procedural safeguards are insufficient, an individual will have a procedural due process claim if: 1) the government has violated a recognized liberty interest of the individual, and 2) the government did not employ proper predeprivation procedures. The Supreme Court has construed the definition of “liberty” broadly, to include generally identifying a liberty interest in pursuing one’s profession.⁹ Previous decisions recognized that reputational harm may cause a constitutional violation if the harm accompanies an official action that alters a right the state previously recognized, often referred to as the stigma-plus test.¹⁰ For example, the Court has accepted a plaintiff who loses employment because of government’s stigmatizing conduct as the “plus” required by the stigma-plus test.¹¹ Stated another way, a government action resulting in reputational harm without also depriving an individual of any right or status recognized under law does not rise to the level of a constitutional deprivation and a procedural due process claim would fail.

⁵ U.S. Const. amend. XIV, § 1; *see, e.g., Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) (explaining that due process requires government to give individual adequate notice of proceedings, to give hearing, and to provide impartial decision maker); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (holding that government violates due process if it offends rights so deeply rooted in tradition as to be fundamental).

⁶ S.C. Const. art. 1, § 22.

⁷ *See Zinermon v. Burch*, 494 U.S. 113, 125 (clarifying that state deprivation of protected right is only unconstitutional without due process of law).

⁸ *See, e.g., Bell v. Burson*, 402 U.S. 535, 542 (1971) (stating that Due Process Clause requires state to provide notice and opportunity for hearing before depriving individual of constitutionally protected right); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (stating that government must provide some type of hearing before government deprives individual of constitutionally protected interest).

⁹ *See Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999) (holding that liberty component of Fourteenth Amendment Due Process Clause includes generalized right to choose one’s field of private employment); *see, e.g., Traux v. Raich*, 239 U.S. 33, 38 (1915) (explaining that right to earn livelihood and to pursue employment warrants protection); *Dent v. West Virginia*, 129 U.S. 114, 121 (1889) (pointing out that government prohibiting individual to practice chosen profession deprives individual of liberty interest found in pursuing one’s profession).

¹⁰ *Valmonte v. Bane*, 18 F.3d 992, 1002 (2d Cir. 1994) (holding government’s placement of Valmonte on New York Central Register created statutory impediment to employment, altering her rights); *See Cooper v. Dupnik*, 924 F.2d 1520, 1532 (9th Cir. 1991) (defining stigma-plus test and defining plus element).

¹¹ *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 573 (1972)

In deciding what procedures are required when there has been a deprivation of life, liberty, or property, the Supreme Court articulated a three-part test in *Mathews v. Eldridge* that must be employed. A court must consider: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and 3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹²

Again, while it is outside of the mandate of the SLTCOP to substantiate cases against alleged perpetrators, the Issue Paper contains several proposals that merit comment with regard to due process. The Issue Paper states the legislation creating the Registry must address:

“Whether the name is entered on the Registry while the finding or placement of the name (or both) is under appeal or not placed until the appeals process is completed; Whether consideration should be given to provisional placement on the Registry with a designation of “Proposed Concern” or similar indication (given the length of time appeals can take and for the protection of vulnerable adults in the interim);”

It is not inconceivable that, in either of the above scenarios, an individual would see diminished or abrogated employment prospects by having their name placed on the Registry while the matter remained under appeal, thereby satisfying the “plus” element of the stigma-plus test. Recent cases emanating from the Eleventh Circuit grappling with the issue of abuse registries have confirmed that while general allegations of harm to future job prospects are insufficient¹³, more specific claims that an individual has worked or applied for a position in the field previously, or had been discharged, demoted, rejected from a job, or passed over for promotion could show that a non-reputational obstacle was placed in their path to employment, thus demonstrating an injury that rises to the level of a constitutional deprivation.¹⁴ Ensuring adequate due process protections must be given adequate consideration in light of these decisions to serve the goals of the Registry.

III. The Legislation Must Adopt a Tenable Standard of Review

The Issue Paper proposes to place individuals' names on the Registry if, among other things, the person has been found by “clear and convincing evidence to have engaged in conduct that has been determined by professionals in an administrative proceeding to be abuse, neglect or exploitation of a vulnerable adult.” While the SLTCOP would be unable to substantiate or verify allegations, our understanding is that those entities with proper authority, such as the Adult Protective Services Division of the Department of Social Services, utilizes a “preponderance of

¹² *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹³ See *Smith v. Siegelman*, 322 F3d 1290, 1296-98 (11th Cir. 2003) (although inclusion in Alabama's child abuse registry could adversely affect future employment rights, registrant could not show a protected liberty interest where he had not been “discharged, demoted, or rejected from a job” or even “passed over for promotion); *Duran v. Buckner*, 157 S3d 956, 970-71 (Ala. Civ. App. 2014) (citing *Smith* and holding that general allegations of harm to future job prospects were insufficient); *Watso v. Colorado Dep't of Social Servs.*, 841 P2d 299, 304-05 (Colo. 1992) (possibility that appellants might be screen by future employers should they seek childcare-related employment insufficient to form protect property interest).

¹⁴ *Georgia DHS v. Steiner*, No. S18A0281 (Ga. June 18, 2018).

the evidence” standard in their investigations. The LGOA recommends that the enabling legislation apply the preponderance standard to align abuse investigations with those already conducted by state agencies, which would increase efficiency and not detract from the objectives of the Registry.

IV. The Duration of Registry Listings Should Contain a Discretionary Component to Recognize Particularly Egregious Actions; Registry Removal

The Issue Paper recognizes that the legislation creating the Registry must address the length of time an alleged perpetrator’s name would remain on the Registry. The LGOA is in favor of placing names on the Registry for sufficient length of time to protect vulnerable adults in the present, deter future instances of abuse, neglect, and exploitation, and ensure the offender is penalized. While the LGOA agrees generally that the CNA Abuse Registry in South Carolina may serve a model, our recommendation is to incorporate a discretionary component in the legislation that takes various factors into account when determining for what length of time a name should be placed on the Registry.

Discretionary factors would provide more recognition that while all instances of abuse, neglect, and exploitation of vulnerable adults are abhorrent, there are certain actions that, by their very nature, warrant an individual having their name on the Registry for a longer period of time, or indefinitely. The State of Missouri takes this approach in maintaining its Employee Disqualification List. Specifically, the length of time a person’s name appears on the list is based on the following factors: 1) whether the person acted recklessly or knowingly; 2) the degree of physical, sexual, or emotional injury or harm, or, the degree of imminent danger to the health, safety, or welfare of a resident or in-home services client; 3) the degree of misappropriation of the property or funds, or falsification of any documents for service delivery of an in-home services client; 4) whether the person has previously been listed; 5) any mitigating circumstances; 6) any aggravating circumstances; and 7) whether alternative sanctions resulting in conditions of continued employment are appropriate in lieu of placing a name on the employee disqualification list, such as additional training or counseling.¹⁵ It is our position that this approach considers relevant factors in determining the length of placement, and better serves the objectives of the Registry generally, as well as those aging and vulnerable adults that comprise our constituency.

Legislation creating the Registry should also articulate a process by which an individual may petition to have their name expunged. A number of states have statutorily defined procedures by which a person may request their name be removed from a registry. For example, in Delaware, the Department of Health and Social Services is permitted to remove an individual’s name prior to their registration period when the agency deems the individual no longer poses a threat to any person receiving care or where equity requires.¹⁶ Moreover, Delaware provides the alleged perpetrator with the right to petition the agency in writing for removal where: at least one year has passed since their name was placed on the Registry, affirmative steps have been taken to correct behaviors that led to placement on the Registry, and improved behavior is also demonstrated

¹⁵ Mo. Rev. Stat. §192.2490(9).

¹⁶ 16 Del. Admin. C. § 3101-6.1.

through work references.¹⁷ If the agency were to deny the removal based on the information presented, the petitioner may appeal the denial or reapply for removal after six months or when evidence of the affirmative steps to correct the behavior can be produced.¹⁸ Upon review, the LGOA believes such procedures strike the appropriate balance between personal accountability and ensuring sufficient due process protections.

V. State Agencies' Participation in a Vulnerable Adult Abuse Registry Should Not Divert Other Critical Resources from the Population Needing Protection

The Issue Paper's suggestion that investigative agencies will be responsible for the outcomes and require their participation in case preparation and presentation on appeal must not divert critical resources from vulnerable adults and the aging in South Carolina. The LGOA maintains its position that the SLTCOP is unable to substantiate abuse, neglect, and exploitation cases due to its restrictions in the federal statute. The SLTCOP is, however, amenable to providing information regarding the complaint to another agency to substantiate the claim (provided the Ombudsman does not violate the disclosure requirements in Section 712(d) of the Older Americans Act). The LGOA believes that, in contributing to this effort, workloads may be unduly burdened with additional work time required for participating in preparing and potentially testifying during the appeals process. The Issue Paper does not make clear whether an agency that merely refers matters for the purposes of substantiating claims to another agency would be subject to mandatory participation in the appeals process; the comments below reflect the assumption that agency staff participation would be required.

The *Adult Protective Services Abuse Registry National Report* (NAPSA Report), published in 2018 by the National Adult Protective Services Association, comprehensively reviewed those states that have adult abuse registries to examine the "who, what, where, when, how and why of APS abuse registries."¹⁹ Notably, a number of state respondents voluntarily reported that adult protective services investigators and supervisors have found their workloads impacted by the additional work time required to participate at administrative and judicial hearings, or assist legal representatives in preparing for hearings. The potential implications for SLTCOP staff based on current caseload is staggering. From July 1, 2016 through June 30, 2017, the Ombudsman staff investigated 8,969 complaints, and had approximately 3,724 cases.²⁰ Of that total, 1,332 were categorized as abuse, neglect, and/or exploitation cases.²¹ One inference clearly drawn from that data is the number of potential cases requiring involvement from SLTCOP staff deviates resources that would otherwise provide direct-services to the aging. Moreover, our constituent population would be hindered in their ability to access resources necessary to resolve complaints on their behalf. One respondent in the NAPSA Report substantiates this inference, calling Registry

¹⁷ 16 Del. Admin. C. § 3101-6.1-6.3.

¹⁸ *Id.*

¹⁹ Natl. Adult Protective Svcs. Assoc., NAPSA Adult Protective Services Abuse Registry National Report, at 2, <http://www.napsa-now.org/wp-content/uploads/2018/05/APS-Abuse-Registry-Report.pdf> (last visited Oct. 15, 2018).

²⁰ LGOA Accountability Report.

²¹ In the period from July 1, 2017 – June 30, 2018, the South Carolina Ombudsman staff investigated a total of 1,947 cases of abuse, neglect, and/or exploitation.

administration in their state, “incredibly time-consuming and complicated,” and more importantly, “meeting the obligations of running the registry diverted funds from direct services to the registry . . .”²² Any legislation and accompanying regulations must address the extent to which state agency staff will be expected to participate in the appeals process, and balance the government’s interest in conducting normal operations to serve South Carolinians with the interest in creating a robust registry to protect vulnerable adults.

VI. Serving as the Host of the Vulnerable Adult Abuse Registry Would Necessitate Additional Full-Time Employees to Provide Database Support and Data Entry

The LGOA is capable of housing the Registry, provided additional funding is provided to secure staff to support its administration. We concur with the comments submitted by the Adult Protective Services division of the South Carolina Department of Social Services that, while we are in a position to house the Registry, the LGOA is not currently staffed appropriately. The LGOA would need to internally design or purchase a computer program or database system that would physically house the registry. Additionally, the agency would need to hire more full-time employees in the fields of information technology and administrative support to provide data entry, maintenance, and troubleshooting.

Respondents to the NAPSA Report lend credence to this assessment; the states of Ohio, Nebraska, Missouri and Kentucky each have four or more full-time employees dedicated solely to their abuse registry operations.²³ In addition to those full-time employees, respondents noted that various staff across other state agencies provided additional labor and support to registry operations.

VII. Conclusion

The Lieutenant Governor’s Office on Aging is supportive of creating a Vulnerable Adult Abuse Registry to protect those most susceptible to abuse in South Carolina. While we support the creation of the Registry, the Ombudsman is unable to directly substantiate findings against alleged perpetrators, as it contravenes the mandate of the program as articulated in the Older Americans Act and DHHS regulations administering the act. The agency may provide referrals to another state agency for further investigation and to substantiate the claims, as long as that referral comports with the disclosure requirements the Older Americans Act imposes on the Ombudsman. The legislation creating the Registry must ensure sufficient due process protections are afforded, including adequate appeals and expungement procedures that are discretionary to allow for more serious offenders to be placed on the Registry for extended periods of time. Moreover, the Registry should not detract from those resources that provide direct services to vulnerable adults. If this agency is deemed the most appropriate place to house the Registry, a source of funding must be identified and secured to fund the design or purchase of the Registry program, as well as hiring full-time employees to provide IT support and administer the Registry.

²² Natl. Adult Protective Svcs. Assoc., NAPSA Adult Protective Services Abuse Registry National Report, at 40, <http://www.napsa-now.org/wp-content/uploads/2018/05/APS-Abuse-Registry-Report.pdf> (last visited Oct. 15, 2018).

²³ Id. at 35.

November 5, 2018

Dr. Megan A. Weis
Co-Director, South Carolina Institute for Medicine and Public Health
1301 Gervais Street, Suite 300
Columbia, South Carolina 29201

Dear Dr. Weis,

Thank you for the opportunity to comment on the Institute for Medicine and Public Health's (IMPH) draft proposal for the creation and maintenance of a statewide Adult Abuse Registry. We have had the opportunity to review the proposal and comments made by some stakeholders and find the overarching goal of an Adult Abuse Registry to be both timely and one the department supports.

The South Carolina Department of Health and Human Services (SCDHHS) is the single state agency for South Carolina's Title XIX Medicaid program, the Children's Health Insurance Program (CHIP), lead agency for the Individuals with Disabilities Education Act (IDEA) Part C program and others. As such, SCDHHS plays a central role in the development of health policies and financing for services targeted to the state's most vulnerable populations including young children, pregnant mothers, elderly citizens and the disabled. Accordingly, the safety and integrity of our provider community forms the basis of public trust necessary to allow medical and long-term care institutions to serve this vulnerable population.

Although many of our policies and processes are developed by the agency's capable staff and stakeholders, we rely on myriad external partners and institutions to effectively serve South Carolinians. Independent licensure and verification through state agencies and national certifying institutions, criminal history verification through state and national databases and sanctions and exclusion lists of individuals and businesses maintained by numerous state agencies all allow SCDHHS to protect the programmatic integrity of our provider community. An Adult Abuse Registry would add important consumer protections by creating oversight over what is now a largely unlicensed adult direct care workforce. We also believe such an independent registry would secure our workforce by additionally excluding transient workers who commit actions of abuse or neglect that are tantamount to professional negligence or malfeasance but fall short of criminal sanction.

Our support for a registry does include concern about portions of the proposal that suggest housing the registry within SCDHHS. Currently, South Carolina's medical and human service licensure is spread across several agencies, including the South Carolina Department of Labor, Licensing and Regulation, the South Carolina Department of Health and Environmental Control, the South Carolina Department of Social Services and others. Even service-focused agencies

November 5, 2018

Dr. Weis

Page 2

such as the South Carolina Department of Disabilities and Special Needs have roles in maintaining and regulating the specific provider networks. Although SCDHHS does administer one professional certification program – the South Carolina Nurse Aide Registry – through contract with a third-party entity, it does not operate other broad regulatory or investigative functions.

Establishing an Adult Abuse Registry would require the department to do so largely outside of the Title XIX Medicaid program, because such a registry would be a creation of state regulation for broad use and not necessarily designed specifically to support the Medicaid program. This specific statewide regulatory mission would represent a substantial departure from the agency's traditional role as a health policy and financing organization. It would also further fracture the state's human service workforce regulation; a step backward with respect to the logical organization and assignment of public functions to public entities.

SCDHHS will be an eager contributor and should be a required participant in and user of the registry. The registry may also benefit from SCDHHS acting as a mandatory reporter and stakeholder in the development and maintenance of the registry and related programs. Further, SCDHHS' financial influence in the adult direct care market can be used to augment the force of registry's effect on direct care provider behavior to benefit the citizens we serve.

Thank you for the opportunity to comment on IMPH's Adult Abuse Registry proposal. Please contact if I may be of assistance on this issue.

Best,


Joshua D. Baker