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POSITION ON PROPOSED LEGISLATION

BILL: HB 1177 -Courts-Expert Witnesses-Licensed Certified Social Workers-Clinical

FROM: Maryland Office of the Public Defender

POSITION: Informational

DATE: 02/28/2022

The Maryland Office of the Public Defender takes no position at this time, but respectfully offers this information for the Committee's consideration regarding HB 1177.

House Bill 1177 authorizes a licensed certified social worker-clinical who is licensed under the Maryland Social Workers Practice Act and qualified as an expert witness to testify on ultimate issues, including insanity, competency to stand trial, and matters within the scope of the social worker's special knowledge, in any court or administrative hearing.

1. Background on Social Work Practice

In the early twentieth century, Mary Richmond formulated the first comprehensive statement of principles of direct social work practice. Social work practice in the area of child welfare practice is one of the earliest practice areas beginning in the nineteenth century. Forensic social work practice is one of the newer areas of social work practice. In the broadest perspective of understanding forensic social work, forensic social work is defined as:

Forensic social work is based on specialized knowledge drawn from established principles and their application, familiarity with the law, painstaking evaluation, and objective criteria associated with treatment outcomes.¹

Dr. Carlton Munson, PhD, LCSW-C, professor from University of Maryland, School of Social Work in his 2011 article entitled Forensic Social Work Practice Standards: Definition and Specification supports that the importance of the specialization of forensic social work and explains the complications:

Even though the number of forensic social workers has increased in court settings, they remain little understood with respect to credentials and precise areas of expertise. This was not a problem as long as there was not widespread regulation

¹ Roesch, R. (2015). Social Worker Assessments of Competency to Stand Trial. *Journal of Forensic Social Work* 5: 186-200.

of social work practice. With the advent of licensing boards, regulation expanded but was and continues to be applied to social work practice generically. The main distinction of social workers for licensing purposes is clinical practitioners and non-clinical practitioners. After 40 years of regulation, licensing boards in social work have yet to develop specialty practice regulations even though specializations have expanded significantly over the last 40 years.²

The social work profession continues to evolve in numerous ways. For example, in 2003 the American Bar Association recognized the significance of “mitigation” specialists in cases of capital punishment. Thus, evolving constitutional law and the 2003 revision of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" have formally recognized the established standard practice that the defense team must include a qualified mitigation specialist at the onset of representation. The fundamental duty of a mitigation specialist is to conduct a comprehensive life history investigation of the client and identify all relevant mitigation issues, including facts and circumstances to rebut the prosecution's case in aggravation. The process of gathering, organizing, and analyzing life history data often leads to the identification of mental health issues requiring assessments by mental health experts who potentially will testify regarding their findings.³

The National Association of Social Workers, Code of Ethics, Value and Principle of Competence in social work practice states: *Social workers practice within their areas of competence and develop and enhance their professional expertise.* Social workers continually strive to increase their professional knowledge and skills and to apply them in practice. Social workers should aspire to contribute to the knowledge base of the profession. Therefore, it is important that social workers working in the area of practice are duly trained and skilled. The National Association of Social Workers has NASW Practice Standards & Guidelines that provide benchmarks that describe the services that social workers should provide; that employers should support and that consumers should expect. The NASW does not currently have Practice Standards and Guidelines for forensic social work practice.

Maryland Office of the Public Defender recognizes the expansion of forensic social work practice in recent years. Further OPD understands that it is likely that this role will increase as states review legislation governing the evaluation of competency for juveniles and adults. As social workers become more involved.⁴ In such instances, a social worker’s qualification as an expert may be critical to criminal proceedings. There are, however, additional potential impacts that this Committee should consider in its evaluation of HB 1177.

2. HB 1177’s Impact on Mental Health Clients

The Mental Health Division of the Office of the Public Defender represents clients in involuntary civil commitment hearings and clients who have been committed to State psychiatric hospitals after not criminally responsible verdicts in criminal cases. We also represent clients who have

² Munson, C. (2011). Forensic social work practice standards: Definition and specification. *Journal of Forensic Social Work, 1*(1), 37-60.

³ Dudley, R. G., & Leonard, P. B. (2008). Getting it right: Life history investigation as the foundation for a reliable mental health assessment. *Hofstra Law Review, 36*(3).

⁴ *Id.*

been civilly committed to State psychiatric hospitals after their criminal cases were dismissed due to their incompetence to stand trial. In 2020, Mental Health Division attorneys represented clients in approximately 9,600 involuntary civil commitment cases and hundreds of clients committed to State psychiatric hospitals.

HB 1177 will expand involuntary commitment evaluation authority to social workers, and would permit social workers to provide expert testimony at involuntary civil commitment hearings. This bill would potentially allow social workers to replace psychiatrists in the involuntary admission process. Removing psychiatrists from the process could have adverse impacts on our clients' medical safety and their legal rights.

MD Code, Health General Article § 10-632, provides that an administrative law judge can commit an individual to an inpatient psychiatric facility if there is clear and convincing evidence that an individual has a mental disorder, needs inpatient care or treatment, is a danger to self or others, is unable or unwilling to be voluntarily admitted to a facility, and that there is no available less restrictive form of intervention that is consistent with the welfare and safety of the individual. The commitment is for 6 months, or until the individual no longer meets the criteria for involuntary commitment. Involuntary inpatient confinement is a significant deprivation of individual liberty with serious collateral consequences. These consequences were outlined by the Maryland Court of Appeals in *D.L. v. Sheppard Pratt*, 465 Md. 339 (2019) and include, but are not limited to, loss of second amendment rights, loss of right to vote, inability to serve on federal juries, limitations on employment, impacts on immigration and custody cases, and limitations on professional licensure. These consequences are in addition to other personal consequences that can occur during an inpatient hospitalization such as eviction, loss of jobs, and loss of custody of children.

When an individual is certified for involuntary admission Maryland law requires that a psychiatrist conduct an examination of the individual within 24 hours of admission to an inpatient psychiatric unit. This is the beginning of the individual's "observation period." During that time, a psychiatrist physically examines the patient, orders and interprets medical tests, reviews medical records, and interviews collateral sources. A second examination is conducted within 48 hours of the involuntary civil commitment hearing and the psychiatrist who conducts the 48 hour exam is required to testify as an expert witness at the hearing.

Social workers are not licensed to rule out medical conditions that mimic mental illnesses, they cannot order or interpret medical tests, nor make differential diagnoses – ruling out a somatic medical illness as the cause of an individual's symptoms. Social workers cannot prescribe medications. Thus, permitting social workers to testify as expert witnesses at involuntary civil commitment hearings could permit them to testify to the results of exams and tests they did not conduct and medications they cannot legally prescribe.

In Ronald Roesch's 2015 article, *Social Worker Assessments of Competency to Stand Trial*, he found: At present, most competency evaluations are conducted by psychiatrists or psychologists, but social workers are also involved in a few jurisdictions in the United States, whether as

independent evaluators or as part of an interdisciplinary team.⁵ Additional research, standards, and qualifications, however to permit a social worker's qualification as an expert in this area, may be necessary. This is because, diagnostic and prescription writing fall outside the scope of many social worker's expertise. Thus, permitting their testimony in lieu of a psychiatrist could lead to the illegal involuntary hospitalization of someone with a somatic medical illness or the involuntary hospitalization of someone with a mental illness who does not meet the legal criteria for involuntary commitment. Existing law guarantees expert testimony at a level that can reach the clear and convincing burden of proof required in these cases.

Involuntary inpatient confinement is a significant deprivation of liberty and decisions about whether to confine or release a person alleged to be dangerous due to a mental illness should be made by the highest credentialed medical professionals. MOPD is concerned that HB 1177 may limit courts' discretion to deny social workers expert status for the purpose of testifying. See, *In re ADOPTION/GUARDIANSHIP NO.CCJ14746 in the Circuit Court for Wicomico Count*, 360 Md. 634 (1999), "A legislative act specifically decreeing that a class of persons is qualified to give expert testimony on a given subject merely limits the court's discretion to deny a person in that class expert status for the purpose of testifying."

Maryland's current involuntary admission laws provide vigorous protection of individual liberty and community interests. There must be careful consideration given to the impact of expanding the role of a social worker in such cases.

3. HB 1177's Impact on Forensic Mental Health Clients

The Forensic Mental Health Division of the Office of the Public Defender is responsible for assisting attorneys in cases involving clients with complex mental health issues. In furtherance of this, we are responsible for retaining experts to assist in developing defense strategies relevant to the clients' mental health needs. A person's competency to stand trial and criminal responsibility are frequent subjects of concern and inquiry. As such, we seek out experts with the most expertise in these areas. Typically, competency and criminal responsibility evaluations are conducted by forensic psychiatrists or forensic psychologists specifically trained in mental health and the law. The training emphasizes the intersection of mental health issues and the law. We regularly call on forensic psychologists and psychiatrists to assist us in these matters.

Psychiatrists are medical doctors with specific training and experience in the medical diagnosis, biology and pharmacology of mental illness, and medication treatment and effects. Psychologists have doctoral degrees in psychology, with a focus on human development, cognitive and intellectual abilities, personality, and social-emotional functioning relative to mental illness. They often utilize specialized psychometric testing as evaluative tools.⁶

⁵ Roesch, R. (2015). Social Worker Assessments of Competency to Stand Trial. *Journal of Forensic Social Work* 5: 186-200.

⁶ Thomas Grisso, *The Differences Between Forensic Psychiatry And Forensic Psychology*, 21 BULL AM ACADEMY PSYCHIATRY LAW 138-139.

It is important to emphasize that competence to stand trial and criminal responsibility are legal constructs. They are not diagnoses; nor are they indicators of a client's ability to function in arenas other than legal contexts. Simply because an individual has been diagnosed with a mental illness does not necessarily mean that person is incompetent to stand trial or that they are not criminally responsible due to a mental disorder.

Opining on the ultimate issue of competency requires a clinician to be trained not only in diagnosis, but in concepts relevant to identifying psycho-legal capabilities consistent with participating in a constitutionally sound defense. The legal expertise required to opine on the ultimate issue of criminal responsibility involves understanding the legal nuance of behavior at a discreet period in legal time which may or may not be the same as the defendant's mental health status at the time of trial. *Jolley v. State*, 282 Md. 353,373 (1978). Forensic Psychiatrists retained by the OPD are all board certified in psychiatry and neurology, as well as additionally board certified in Forensic Psychiatry. Forensic psychologists retained by the OPD all hold doctorate degrees in clinical psychology, as well as post-doctorate forensic training.

Social workers play a critical role in providing a comprehensive defense to indigent clients. The Social Work Division of the Office of the Public Defender is a robust one, offering a wide range of services to assist attorneys in identifying and addressing psychosocial concerns that impact the case, and as per the Social Work Practice act, in restoring and enhancing social functioning. MD Code, Health Occ. § 19-101.

Additionally, OPD social workers conduct diagnostic assessments to assist attorneys in identifying whether further assessment for competency and criminal responsibility may be in order. However, because they have not been specifically trained in conducting the actual evaluations or opining on the ultimate issues, they do not provide this service to us. It might be, we may consider this at some time in the future when it is clear that training an expertise in this area become commensurate with that of forensically trained psychiatrists and psychologists.

In consideration of this legislation, it is important to weigh and balance these unresolved issues and concerns. As such, we hope this information is helpful and instructive in the Committee's consideration in reviewing this bill.

Submitted by: Government Relations Division of the Maryland Office of the Public Defender.

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