

**REPORT OF THE INVESTIGATIONS SUBCOMMITTEE**  
**Vulnerable Adult Act Stakeholders Work Group**  
**July 25, 2008**

**Task:** *The final work of the Investigations Subcommittee was to narrow the scope of the remaining issues raised by members of the large Stakeholders group at its meeting on June 20, 2008, and to review the Survey results for additional items for analysis for possible legislative action.*

**Subcommittee Members:** Carmen Castaneda (Co-Chair), Hennepin County Adult Protection Services; Maura McNellis-Kubat (Co-Chair), Department of Human Services Licensing Division; Janet Reigstad, Stearns County Human Services; Randy Snyder, Board of Examiners for Nursing Home Administrators; Tara Widner, United Steelworkers Union; Kris Lohrke, Office of Health Facility Complaints; Arlene Wegener, Office of the Ombudsman for Mental Health and Developmental Disabilities; Mary Brown, ElderCare Rights Alliance

**Members Present:** Carmen Castaneda, Maura McNellis-Kubat, Janet Reigstad, Randy Snyder, Kris Lohrke, Arlene Wegener, and Harbir Kaur on behalf of Mary Brown. Note: Three new members were added to the Subcommittee, which diversified member representation.

**Issues for Analysis:**

1. Review new work from the Survey Results and Final Comments
2. *“Have a system to “flag” alleged perpetrators who may not yet have been substantiated for vulnerable adult maltreatment in order to alert prospective employers.”*
3. *“The lead agency investigation of an incident of maltreatment should receive the same priority, despite an internal investigation required by CMS or when an alleged perpetrator (employee) has been terminated.”*
4. *“Clarify how an investigation is conducted, clarify what will or will not be investigated, and communicate the results of the investigation when completed.”*

**Results**

1. *Review Survey Results and Final Comments to determine new items for the workgroup.* Survey Questions #37 and #38

Two existing issues were presented in Survey Questions #35 and #36 and will be reviewed below. Two new items were raised in Survey Questions #37 and #38 and will be discussed in this section.

- a) **New (#37):** *“Government agencies (Ombudsman, County APS, DHS, OHFC, etc.) should be allowed access to information necessary to protect a vulnerable adult when the vulnerable adult is unable to access the information himself/herself (for example, due to cognitive incapacity).”*
- The Survey results indicate overwhelming agreement with this question (167 responses out of 186 Agree/Strongly Agree)
  - Authority already exists in present law to obtain such information.
    1. The Ombudsman for Mental Health and Developmental Disabilities can access such data under Minn. Stat. 245.94: Powers of the Ombudsman. These powers include the right to examine records, enter facilities, subpoena records, and attend hearings.
    2. The Lead Agencies of OHFC, DHS Licensing and County Adult Protection Units have authority under Minn. Stat. 626.557, Subd. 9b to access not public records. Subd. 10(b) of the Vulnerable Adult Law allows Adult Protection Services to “enter facilities and inspect and copy records as part of an investigation.”
- **Recommendation:** No new language is needed for the specified parties to obtain information necessary for a vulnerable adult investigation. For criminal investigations, subpoena power exists through law enforcement to obtain information not otherwise available in a civil investigation by the lead agencies. The Subcommittee believes that this a proper balance to protect the privacy of the vulnerable adult.
- b) **New (#38):** *“Coordination with courts and law enforcement are sometimes difficult”*
- The Committee interpreted this comment to be an educational matter in which additional training is required.
    1. DHS Licensing encourages law enforcement to charge perpetrators with crimes appropriate to the offense which result in a disqualification.
    2. The National Adult Protective Services Association is getting ready to conduct an extensive nationwide survey on what topics the criminal justice system most needs training in and the best methods to deliver such learning.
- **Recommendation:** Further legislative action is not necessary to meet investigative training needs. These duties already are outlined in Minn. Stat. 626,557, Subd. 9e.
- c) **New comments (4):** Two comments related to determining mental capacity of the vulnerable adult; one spoke to the adequacy of an investigation; and one addressed funding for APS to give these services high priority.
- The adequacy of the investigation will be addressed in Item #4 of this report.
  - A definition of capacity is being addressed by the Definitions Subcommittee.

- A functional description of capacity is contained in Minn. Stat. 626.5572, Subd. 21 (4)
  - Funding for APS relates to the prioritization of case assignments which also will be addressed in Item #4 of this report.
  - Funding for Adult Protection Services would be addressed for the first time in the history of elder abuse through passage of the Elder Justice Act by the Federal Congress.
- **Recommendation:** Refer to the Definitions and Investigations Subcommittees. Lobby Congress for passage of the Elder Justice Act.

*2. "Have a system to "flag" alleged perpetrators who may not yet have been substantiated for vulnerable adult maltreatment in order to alert prospective employers". Survey Question #35*

- The Survey results demonstrate strong support for this recommendation. (125 responses out of 183 Agree/Strongly Agree)
- This is the third Subcommittee Meeting in which this issue has been addressed.
- The purpose of retaining data on perpetrators is to prevent their employment or services in programs serving vulnerable adults in order to protect consumers from abuse, neglect or financial exploitation.
- A "flagging system" already is being utilized by the two Regulatory Lead Agencies of DHS and OHFC.
  - The present practice by DHS Licensing already "flags" the name of a person under investigation for alleged maltreatment. This information, however, remains with DHS Licensing and is not available to a potential employer until the investigation is completed. If the proposed employer inquires about a person on whom an investigation is being conducted, they will not receive a clearance letter to hire that individual.
  - The present practice of OHFC likewise is to maintain the names of alleged perpetrators to check for subsequent reports and patterns of maltreatment.
- The Subcommittee could find no evidence of other states which "flag" alleged perpetrators and make such information available to the public or to employers.
- The federal Nurse Aide Registry will not permit this practice on its list.
- Chapter 13.46 of the Minnesota Government Data Practices Act does not allow such disclosure during the course of an investigation because investigative data is classified as confidential.

- **Recommendation.** The Subcommittee maintains its original position that it does not endorse this proposal to share this information with prospective employers based on due process rights of individuals who may have allegations made against them. Until maltreatment allegations have been investigated and substantiated using preponderance of evidence standards, the protective services system should not treat the accused as “guilty”. Licensing regulations already can require that a person under investigation be supervised during a pending investigation in order to protect facility residents. This item is not recommended for legislative action.

3. *“The lead agency investigation of an incident of maltreatment should receive the same priority, despite an internal investigation required by CMS or when an alleged perpetrator (employee) has been terminated”.* Survey Question #36

- The Survey results demonstrate strong support for this recommendation. (125 responses out of 183 Agree/Strongly Agree)
- The Subcommittee believes that adequate protective measures already are in place through the practices of the two Regulatory Agencies of OHFC and DHS. Both the Lead Agencies of OHFC and DHS Licensing do investigate persons after they have been fired. County APS Units typically do not.
- **Recommendation.** The Investigations Subcommittee maintains its position that the Vulnerable Adult Law is for the primary purpose of protecting vulnerable adults. While due process rights are important for both employers and employees involved in maltreatment reporting and internal investigations, the duty of the lead agencies must give primacy to stopping, reducing, eliminating and preventing maltreatment to the vulnerable adult. The Investigations Subcommittee recommends that we separate out employment law issues from the matter of prioritization of case investigations. The primary focus here must remain on the type of maltreatment that has occurred and the level of risk to the client and to other persons in the facility.

4. *“Clarify how an investigation is conducted, clarify what will or will not be investigated, and communicate the results of the investigation when completed.”*

- Based on feedback from members of the large Stakeholders Group as enunciated at the June 20th meeting, three primary issues reside within this Question:

**1. How do cases get assigned for investigation (prioritization of reports)?**

- Members are referred to the Subcommittee report dated June 13, 2008 regarding the statutory authority of the Lead Agencies under in Minn. Stat. 626.557, Subd. 9(b) that allows each lead agency to develop guidelines for prioritizing reports for investigation.
- The Investigations Subcommittee appreciates the need for more transparency into the guidelines of the Lead Agencies for the assignment of reports. Written guidelines are provided with this report from, DHS Licensing, Stearns County Adult Protection, and Hennepin County Adult Protection Services.

**2. How are investigations conducted and the results communicated (what activities are spelled out in the Statute)?**

- Because the Vulnerable Adult Law incorporates investigations by three separate lead agencies, identical investigative procedures are not uniformly appropriate.
- The Investigations Subcommittee is concerned that the law not be written in too prescriptive a manner so as to challenge the validity of investigative findings on the basis of form rather than content. Discretion is inherent in investigations based on the nature of the complaint, the severity of the incident, the duties of the alleged perpetrators involved, and the decision-making capability of the alleged victim. While a fact-based investigation is scientific and objective, it also is governed by too many variables to individually quantify in statute.

**3. What are the skills of the persons completing these investigations?**

- Minn Stat. 626.557, Subd. 9e (a) spells out the education requirements for Lead Agency Investigators.

*Subd. 9e. **Education requirements.** (a) The commissioners of health, human services, and public safety shall cooperate in the development of a joint program for education of lead agency investigators in the appropriate techniques for investigation of complaints of maltreatment. This program must be developed by July 1, 1996. The program must include but need not be limited to the following areas: (1) information collection and preservation; (2) analysis of facts; (3) levels of evidence; (4) conclusions based on evidence; (5) interviewing skills, including specialized training to interview people with unique needs; (6) report writing; (7) coordination and referral to other necessary agencies such as law enforcement and judicial agencies; (8) human relations and cultural diversity; (9) the dynamics of adult abuse and neglect within family systems and the appropriate methods for interviewing relatives in the course of the assessment or investigation; (10) the protective social services that are available to protect alleged victims from further abuse, neglect, or financial exploitation; (11) the methods by which lead agency investigators and law enforcement workers cooperate in conducting assessments and investigations in order to avoid duplication of efforts; and (12) data practices laws and procedures, including provisions for sharing data.*

- Subd. 9e (d) further enunciates the education necessary for an employee before that individual begins employment as well as the continuing education required each year specific to their duties.

**Recommendation.** No additional statutory changes are necessary. The Subcommittee recommends that the statute remain broad in its requirements and that written policies, procedures and protocols of each Lead Agency specify the details of how investigations should be conducted, training provided and case assignments be made.

