

**VERMONT SECRETARY OF STATE
OFFICE OF PROFESSIONAL REGULATION**

**ADDENDUM TO THE 2015-2016 PRELIMINARY SUNRISE ASSESSMENT ON
MESSAGE THERAPY: THE IMPACT ON SEXUAL MISCONDUCT AND HUMAN
TRAFFICKING OF PROFESSIONAL REGULATION OF MESSAGE THERAPY**

In Act 30 (2019), the Vermont General Assembly charged the Office of Professional Regulation (“OPR” or the “Office”) with preparing an Addendum to the 2015-2016 Preliminary Sunrise Assessment on Massage Therapy that specifically assessed whether regulation of individuals or businesses offering massage services would address public safety concerns related to sexual misconduct and human trafficking. The General Assembly directed OPR to apply the criteria set forth in 26 V.S.A. Chapter 57 (“Chapter 57”) to conduct this assessment. Based on these statutory criteria, extensive public outreach, and thorough research, OPR concludes the following:

- *Sexual Misconduct: Requiring individuals or businesses to obtain registration prior to providing massage services may protect public safety by preventing repeated incidents of sexual misconduct. To be effective, the definition of “massage services” must be broad enough to encapsulate the different forms of bodywork being offered in the market, and OPR will need additional resources.*
- *Human Trafficking: Regulation of individuals or businesses providing massage services would not address the public harms presented by human trafficking. The individual who holds the required professional license is unlikely to control the human trafficking operation and is easily replaced by those in charge of the operation should the license holder be sanctioned for human trafficking violations. Municipal codes are more effective than professional regulation at deterring the establishment of human trafficking operations, but illicit operations often reappear elsewhere under different cover.*

Report’s Analytical Structure

Sexual misconduct and human trafficking are distinct crimes and, thus, different policy approaches are needed to address and prevent them. As a result, OPR is reviewing separately the questions of whether the regulation of massage services would

- 1) serve the public’s safety interests in preventing sexual misconduct; and

- 2) prevent or address the harms caused by human trafficking.

The stakeholders emphatically supported and urged this approach.

This report first applies the criteria set forth in Chapter 57 to assess whether and what forms of regulation would prevent sexual misconduct by individuals offering massage services. The report then turns to consider whether regulation could address the public harms posed by human trafficking.

History of Sunrise Review of Massage Therapy and the Impetus for this Addendum

This is the third report OPR has conducted to determine whether individuals and businesses offering massage services should be regulated by the State of Vermont. The 2010 and 2016 sunrise reports both concluded that professional regulation of massage services is unnecessary.¹ In both these reports, OPR considered whether regulation was needed to prevent general public harms potentially posed by unregulated individuals or businesses offering massage services (e.g., physical injuries or aggravation of existing medical conditions), as well as the more specific public harms of illicit sex work and sexual misconduct. During the 2016 sunrise review process, OPR received no comments or input from individuals who experienced sexual misconduct by a massage therapist. From this, OPR concluded that the criminal justice system was sufficient to address any crimes, including sexual misconduct or human trafficking, that occurred in the context of a massage parlor.

In April 2018, Roger Schmidt, a massage therapist in Middlebury, Vermont was arrested after a hidden camera was found in his massage business. A search of his home and business found 70 digital video and image files of nude female clients that were taken without the clients' knowledge or consent.² Police interviewed 24 different victims, many of whom stated that Mr. Schmidt was a "highly skilled" massage therapist.³ During the interviews it also became apparent that Mr. Schmidt engaged in other sexual misconduct, such as inappropriate touching and offering breast examinations to treat or prevent breast cancer.⁴ Mr. Schmidt pled guilty to 25 counts of voyeurism and two counts of illegally practicing medicine.⁵ After rejecting an initial plea deal agreement, an Addison County Superior Court Judge

¹ The 2010 and 2016 Sunrise Reports can be found online at <https://legislature.vermont.gov/assets/Legislative-Reports/MT-Sunrise-Report-OPR-2016-1-5.pdf> and <https://www.sec.state.vt.us/media/411936/massagetherapistsunriserpt-2010-1230.pdf>.

² *Police: Middlebury massage therapist had hidden cameras, faces voyeurism citations*, Burlington Free Press, <https://www.burlingtonfreepress.com/story/news/2018/04/16/owner-middlebury-massage-business-charged-voyeurism/521862002> (April 16, 2018).

³ *Middlebury Massage Therapist Sentenced for Taping Nude Clients*, VTDigger, <https://vtdigger.org/2019/07/24/middlebury-massage-therapist-sentenced-for-taping-nude-clients> (July 24, 2019).

⁴ *Id.*

⁵ *Massage Therapist Sentenced for Secretly Videotaping Clients*, WCAX, <https://www.wcax.com/content/news/Middlebury-massage-therapist-to-change-plea-Monday-513027631.html> (July 22, 2019).

sentenced Mr. Schmidt to six months in jail, a \$3,087 fine and 2.5 years of probation, during which he is not permitted to bodywork on female clients.⁶

In April 2019, Sarah Robinson, the Deputy Director of the Vermont Network Against Domestic and Sexual Violence, testified before the Senate Government Operations Committee seeking oversight of massage therapists in Vermont to prevent sexual misconduct, not only by notorious individuals such as Mr. Schmidt but also by those massage therapists committing sexual misconduct whose victims never filed criminal charges.⁷ In that hearing, human trafficking was addressed by Commander Matthew Prouty of the Rutland Police Department and Lieutenant Lance Burnham of the Department of Public Safety. Both testified in favor of regulating individuals and businesses providing massage therapists sought regulation to facilitate the deterrence and investigation of human trafficking operations.⁸ The General Assembly, then, sought this Addendum to the two previous sunrise reports from OPR on the specific issues of sexual misconduct and human trafficking.

Legal Standards for Review

When regulation of any profession or occupation is being considered, Vermont law instructs that the policy and criteria set forth in 26 V.S.A. Chapter 57 (“Chapter 57”) should be applied. For this Addendum, the General Assembly also specifically instructed OPR to “apply the criteria set forth in 26 V.S.A. chapter 57 (review of regulatory laws) to assess whether new regulation of businesses or individuals offering massage services will serve the interests of public safety pertaining to sexual misconduct and human trafficking. Development of the Addendum shall not require the Office to repeat its 2010 and 2016 analyses of proposals by applicants for sunrise review.”⁹

Chapter 57 sets clear criteria for evaluating whether new professional regulations should be established. First, the State, through OPR, must evaluate whether a profession should be regulated at all, based on the following three criteria:

⁶ Middlebury Massage Therapist Sentenced for Taking Nude Clients, VTDigger, <https://vtdigger.org/2019/07/24/middlebury-massage-therapist-sentenced-for-taping-nude-clients> (July 24, 2019).

⁷ Vermont. Senate. Committee on Government Operations. *Testimony on House Bill 104: An Act Relating to Professions and Occupations Regulated by the Office of Professional Regulation. April 10, 2019.* 2019-2020 Legislative Session. (testimony of Sarah Robinson, Deputy Director of the Vermont Network Against Domestic and Sexual Violence) available at <https://legislature.vermont.gov/Documents/2020/WorkGroups/Senate%20Government%20Operations/Bills/H.104/Written%20Testimony/H.104~Sarah%20Robinson~Senate%20Government%20Operations-%20Licensing%20of%20Massage%20Therapists%20in%20VT%20~4-10-2019.pdf>.

⁸ Vermont. Senate. Committee on Government Operations. *Testimony on House Bill 104: An Act Relating to Professions and Occupations Regulated by the Office of Professional Regulation. April 10, 2019.* 2019-2020 Legislative Session. (meeting record of testimony by Cmdr. Matthew Prouty and Lt. Lance Burnham) available at <https://legislature.vermont.gov/committee/meeting-detail/2020/26/1826>.

⁹ Act 30, Section 30 (2019).

- (1) it can be demonstrated that the unregulated practice of the profession or occupation can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is recognizable and not remote or speculative;
- (2) the public can reasonably be expected to benefit from an assurance of initial and continuing professional ability; and
- (3) the public cannot be effectively protected by other means.

26 V.S.A. § 3105(a).

If it is determined, after reviewing of these criteria and considering governmental and societal costs and benefits, that it is necessary to regulate a profession or occupation, the law requires the least restrictive method of regulation be imposed consistent with the following factors:

- (1) if existing common law and statutory civil remedies and criminal sanctions are insufficient to reduce or eliminate existing harm, regulation should occur through enactment of stronger civil remedies and criminal sanctions;
- (2) if a professional or occupational service involves a threat to the public and the service is performed primarily through business entities or facilities that are not regulated, the business entity or the facility should be regulated rather than its employee practitioners;
- (3) if the threat to the public health, safety, or welfare, including economic welfare, is relatively small, regulation should be through a system of registration;
- (4) if the consumer may have a substantial interest in relying on the qualifications of the practitioner, regulation should be through a system of certification; or
- (5) if it is apparent that the public cannot be adequately protected by any other means, a system of licensure should be imposed.

26 V.S.A. § 3105(b).

Chapter 57, thus, requires a thorough and rigorous review and a showing of appropriately tailored, necessary regulation before permitting lawmakers or regulators to interfere with individuals' professional livelihoods and the general marketplace. Vermont has followed this public policy since 1977. In 2010 and 2016, OPR reviewed regulation of the massage therapy profession using the Chapter 57 criteria, and, in both instances, found that regulation was not required to protect the public. This report applies these Chapter 57 criteria once more, this time to the specific issue of whether regulation of the massage profession would prevent the harms of sexual misconduct and human trafficking.

Outreach, Hearings, and Research

OPR conducted extensive outreach and research to assess whether professional regulation of individuals and businesses offering massage services in Vermont would serve the public safety interest of preventing (a) sexual misconduct; and/or (b) human trafficking.

OPR organized two public meetings at its office in Montpelier, Vermont. The first meeting was held on October 30, 2019, and the second was held on November 7, 2019. The meetings were publicly noticed on the OPR website and representatives from the following organizations were invited by email to attend the meetings in person or remotely via GoToMeeting: Vermont Center for Crime Victim Services, Vermont Network Against Domestic and Sexual Violence, Vermont Department of Public Safety, Vermont Police Association, Vermont Association of Chiefs of Police, Vermont Human Trafficking Task Force, American Massage Therapy Association, the Department of State's Attorneys and Sheriffs, The Polaris Project (Human Trafficking Public Policy Advocates), and members of the massage therapy community. Information about the second public hearing was also disseminated by members of the massage therapy community who attended the first public meeting. OPR also invited the public to provide comments by email or telephone.

At the first public hearing on October 30, 2019, seven people attended in-person and one attended remotely via GoToMeeting. The majority of attendees were massage therapists, two of whom were representing the American Massage Therapy Association (VT Chapter). Opinion on regulation was equally divided among attendees, with approximately half supporting new regulation and half opposed. One individual identified herself as a consumer of massage therapy who experienced sexual misconduct by Roger Schmidt. She urged OPR to regulate massage.

At the second public hearing on November 7, 2019, thirteen people attended in-person, and eighteen attended remotely via GoToMeeting. Among the attendees was the Addison County State's Attorney who prosecuted the Roger Schmidt case, and representatives from the American Massage Therapy Association (VT Chapter), Green Mountain Massage School, and Associated Bodywork and Massage Professionals. Again, opinion on regulation was equally divided among attendees, though some attendees who opposed a more rigorous and stringent form of regulation, such as a qualifications-based license requirement, expressed support for a registration approach to regulation.

OPR staff, including the Office's state prosecutors and multiple of its investigators who are certified law enforcement, also attended both public meetings.

OPR received twelve written comments regarding the regulation of massage therapists. Five individuals wrote expressing support for some form of regulation of massage therapists (three of these commenters urged OPR to consider a less stringent form of regulation, such as a registration) and seven individuals wrote to express opposition to any regulation of massage therapists.

On whole, those who attended the public meetings and supplied commentary were massage therapists who had participated in the previous sunrise reviews. Additions to the conversation included the consumers harmed by Roger Schmidt, the Addison County State's Attorney, and law-enforcement officers from OPR, among whom is a former head of the Chittenden Unit for Special Investigations.

The attendees and commenters who supported the regulation of massage therapists argued that regulation would offer the following benefits:

- standardization of qualifications for entering the field;
- establishment of ethical codes, expectations, and guidelines for those providing massage therapy;
- potential for insurance reimbursement;
- information for the public about which massage therapist hold licenses and which have been the subject of disciplinary actions;
- deterring perpetrators from other states from coming to Vermont to practice massage therapy;
- recourse for individuals who have been victimized by massage therapists; and
- accountability for those massage therapists who engage in sexual misconduct.

Those opposed to regulation argued that regulation would be ineffective at preventing sexual misconduct by massage therapists and would result in the following harms:

- increased costs of doing business;
- increased costs for consumers;
- fewer massage therapists;
- professional protectionism resulting from increased barriers to licensure (e.g., educational requirements and associated costs);
- illusory or substantially ineffective protection of the public; and
- unnecessary state involvement in private businesses.

Many in favor of regulation contended that the existing criminal laws do not sufficiently deter or punish sexual misconduct by massage therapists. Those opposed to regulation did not disagree with this assertion but suggested that, rather than additional regulation, the appropriate solution is to bolster existing criminal laws and resources.

In addition to the public hearings, OPR staff attended a meeting with individuals who experienced sexual misconduct by massage therapists on December 11, 2019. The meeting was facilitated by the Network Against Domestic and Sexual Violence and WomenSafe, a nonprofit organization located in Addison County that works to serve people across the gender spectrum who experience sexual violence, domestic violence, dating violence, and stalking.¹⁰

¹⁰ *Who We Are*, WomenSafe, <https://www.womensafe.net/who-we-are> (last visited January 15, 2020).

At this meeting, six women who were victimized by Roger Schmidt shared their stories, and one woman provided a video statement relating her experience being sexually abused by an individual working as a massage therapist at a Williston business. The attendees who were victimized by Roger Schmidt shared that the criminal justice system had not provided them with an opportunity for their stories to be heard and had not resulted in a punishment that would prevent Mr. Schmidt from re-offending. One woman who initially reported Schmidt's hidden video cameras to police reported that she was asked if she was sure she wanted to pursue the case and warned that there may be negative consequences for her if she did. The woman who was abused in a Williston business shared that she did not wish to engage in the criminal justice system because she did not want to endure the scrutiny, exposure, and antagonism she anticipated encountering in criminal proceedings. All attendees strongly supported some form of professional regulation of individuals and businesses providing massage therapy.

Notably absent from the written comments and from the public meetings was support for the regulation of massage therapists to address human trafficking. Excepting OPR law-enforcement staff and the Addison County State's Attorney, and despite multiple outreach efforts, members of the law enforcement community did not attend either public meeting, and no written comments were received from law enforcement or trafficking-related advocacy organizations. Commenters who addressed human trafficking in the public meetings, including those in support of massage therapy regulation, stated they did not believe professional regulation of massage therapists would deter or address human trafficking. Practitioners licensed in states that regulate massage therapists spoke disdainfully of measures in these states, such as requiring the posting of "help is available" signs in bathrooms. The commenters found these requirements simultaneously wrongheaded, overbearing, and ineffective.

Anticipating that significant public contributions on the topic of human trafficking would be few, OPR undertook the task of researching how human trafficking operates in Vermont, nationally, and internationally. OPR reviewed research from anti-trafficking advocacy organizations. OPR also reviewed how other states and municipalities have used professional regulation policy to address human trafficking. The findings of this research are related, below.

Part I: Sexual Misconduct

Necessary Regulation: Regulation of massage therapists could protect the public from the real and immediate threat of repeated sexual misconduct by massage therapists.

Chapter 57 criteria direct the Office to first determine whether regulation of a profession is needed based on the assessment of three criteria. In the following section, these criteria are applied to the question of whether professional regulation is necessary to protect the public from sexual misconduct.

- I. It can be demonstrated that the unregulated practice of the profession or occupation can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is recognizable and not remote or speculative;*

The first criterion asks whether it can be demonstrated that the unregulated practice of a profession can clearly harm or endanger the health, safety, or welfare of the public and whether that potential for harm is recognizable and not remote or speculative. Here, the General Assembly has identified the public harm as sexual misconduct by massage therapists. The question then becomes whether the unregulated practice of massage therapy can “clearly” result in sexual misconduct or “endanger” the public by posing a risk of sexual misconduct. OPR must also assess whether that risk of sexual misconduct is “recognizable” and not “remote or speculative.”

After discussions with women who experienced sexual misconduct by massage therapists, OPR finds that the risk of sexual assault by a massage therapist is not “remote or speculative.” The relationship of a client and a massage therapist is a vulnerable one, in that the client commonly is disrobed and in a private space alone with the massage therapist. Roger Schmidt, the massage therapist from Middlebury, took advantage of this vulnerability by placing hidden cameras around the massage parlor. In a separate case, a massage therapist exploited this vulnerability and sexually assaulted a client. There are nationwide reports of sexual misconduct perpetrated by massage therapists, and even law firms advertising services for victims of massage therapist sexual assaults. Thus, OPR concludes that the risk of sexual assault, voyeurism, and other inappropriate or criminal sexual conduct by massage therapists is not remote or speculative.

The question is then whether it is the *unregulated* practice of massage therapy that poses this risk of sexual misconduct – if regulation were in place, would the sexual misconduct be prevented, initially or on repeat occasions? OPR does not believe that *initial* sexual misconduct offenses by massage therapists can be prevented by regulation. Unless a massage therapist has previously engaged in sexual misconduct and has a record of such misconduct (e.g., a criminal or disciplinary record from another state), there is no way for licensing authorities to identify an applicant for licensure as a particular risk to engage in sexual misconduct. This analysis is true for all the professions that are regulated within the State and elsewhere.

However, OPR does find that regulation could prevent repeat offenses by massage therapists, primarily by offering the ongoing monitoring of licensees, sanctions that potentially prohibit individuals from providing massage therapy, and public notice of sanctions. These are attributes that the criminal-justice system lacks. This is illustrated by the outcome of the recent Schmidt case in Addison County. In that case, the defendant, though convicted of multiple criminal counts directly related to the exploitation of his position as a massage therapist, is permitted, even while on probation, to continue to offer massage therapy to male clients without condition; after 2.5 years, he is again allowed to offer massage to all clients, unaccompanied by a public warning about his history. If a professional license or registration were required to provide massage, it is likely that Mr. Schmidt would be the subject of disciplinary action *permanently* revoking his license to perform massage services as defined under law, and that there would be a publicly-available record of this disciplinary action.

Similarly, professional regulation could protect against repeat offenses by a massage therapist who sexually assaulted a woman at a Williston business. In this instance, the woman who experienced the sexual assault reported the massage therapist to the business. The business investigated and subsequently fired the massage therapist. However, because there was no record of the assault, and because the business did not share the reasons for terminating him, the massage therapist was hired by another local massage business within weeks. Months later, he was terminated by the second massage business for the same offense – a sexual assault against a client. The discovery of this repeated offense was the coincidental result of living in a small state: the woman who was initially assaulted at the Williston business shared her experience with the owner of the second local massage business. The two connected the stories and realized it was the same offending massage therapist. The woman also learned that the massage therapist is currently working at three other local establishments and there is no way to alert those businesses or the public about his previous sexual misconduct.

Were a professional regulation system in place, the victim and either of the perpetrator's first two employers could have made complaints to OPR. After investigation and due process, it is possible that the massage therapist's license may have been revoked, resulting in a publicly accessible record that he is no longer permitted to perform massage services in Vermont, and making it a crime under 3 V.S.A. § 127 for him to offer regulated services in the future. Thus, because it can result in the revocation of a license to provide massage therapy and because it offers the public notice of disciplinary actions, OPR finds that regulation could prevent the recognizable public harm of *repeated* sexual misconduct by massage therapists.

II. *The public can reasonably be expected to benefit from an assurance of initial and continuing professional ability;*

As discussed above, OPR does not believe that regulation can provide assurances about initial professional safety. One can test skills or training, but not internal motivations or intentions. In most cases, it is unlikely any aspect of the licensing process will credibly assure that an applicant for *initial* licensure will not engage in sexual misconduct. The only mechanism that OPR has to prevent licensees from engaging in sexual misconduct is to deny licenses to those applicants who have been publicly sanctioned for sexual misconduct, through the criminal or civil justice systems or through administrative process in jurisdictions where they previously practiced. In turn, unless the massage therapist applying for a license has previously engaged in sexual misconduct and there is a record of this misconduct, professional regulation will not be able to prevent licensure or to assure that the licensees will not engage in sexual misconduct.

Regulation could, however, offer the public some assurance of past good conduct by licensees and confidence that, should a licensee be sanctioned for sexual misconduct, the public will have access to information about what happened. Additionally, in cases where a license is revoked or suspended, the public can be assured that the licensee is prohibited from practicing massage therapy. The sanction for engaging in the unauthorized practice of massage therapy will be limited to the remedies set forth in 3 V.S.A. § 127 – a maximum civil penalty of \$5,000, a maximum administrative penalty of \$2,500 and a

maximum criminal penalty of \$5,000 and no more than one-year imprisonment. Even these seemingly minimal consequences, however, would provide some assurance of continued public safety.

That said, the ability to provide this assurance is limited to the information made available to OPR and the evidence to support accusations of sexual misconduct. For any sanction to be implemented by OPR against a licensee, a complaint must be made, investigations must occur, the accused licensee must be afforded due process, and the State must produce admissible evidence sufficient to persuade a trier-of-fact to find a regulatory violation.

This disciplinary process is essential and constitutionally required – it protects the rights of the accused and provides an opportunity for victims to be heard. Yet, it brings with it many of the detriments of the criminal adjudicative process. Further, it is possible that, at any point in the course of this process, there will be a breakdown or a barrier that results in a licensee who committed sexual misconduct evading sanction and continuing in licensed practice. That said, OPR has a well-developed and thorough disciplinary process in place, and OPR's enforcement unit investigates and prosecutes multiple cases related to sexual misconduct by regulated professionals every year. If OPR undertakes to regulate massage therapy, the public can be assured by the Office's ability to address unprofessional conduct by professional licensees, including a massage therapist if so charged.

III. The public cannot be effectively protected by other means.

Sexual assault and voyeurism are crimes first and foremost, and where susceptible to prosecution, should be prosecuted as such. But while it may be legally and theoretically possible for the criminal-justice system to protect the public from repeated sexual misconduct perpetrated by massage therapists, the criminal-justice system is not equipped to exclude bad actors from the marketplace for extended periods. Probation eventually ends and perpetrators can reoffend without public notice. License revocation, however, is forever.

There are Vermont criminal laws that prohibit sexual misconduct, whether committed by a massage therapist or any other individual. Title 13, Section 2605 of the Vermont Statutes Annotated, for example, prohibits voyeurism, which includes intentionally viewing, photographing, filming or recording in any format "the intimate areas of another person without that person's knowledge and consent" while that person is in a place or under circumstances in which the person has a reasonable expectation of privacy. 13 V.S.A. § 2605(b). Under this law, a person has a "reasonable expectation of privacy" in "a place in which a reasonable person would expect to be safe from unwanted intrusion or surveillance." 13 V.S.A. § 2605(a)(5)(B). Sexual assault, defined in part as "engag[ing] in a sexual act with another person and compel[ling] the other person to participate in a sexual act...without the consent of the other person," is also prohibited under Vermont law. 13 V.S.A. § 3252(a)(1). Thus, massage therapists who engage in voyeurism or who commit sexual assault are already violating Vermont law.

Proponents of professional regulation of massage therapists allege, however, that these laws are ineffective at protecting the public. They base this conclusion on experiences, such as the minimal punishment and probationary sentence given to Roger Schmidt and the alleged recidivism of the massage therapist from the Williston business. Individuals who have experienced sexual misconduct by a massage therapist also cite the inadequacy of the criminal-justice system in providing a forum for victims of these crimes to share their stories and seek justice for the harms committed. Not only did the women feel that they were not listened to or encouraged to pursue the case against Mr. Schmidt, but they also felt that the criminal-justice system is ineffective, as the sentence leaves Mr. Schmidt with the opportunity to offend again.

Legal reforms other than implementing professional regulation may address some of these issues. For example, strengthening sentencing or probationary standards to permit lifelong prohibitions on professional practice could prevent repeated sexual misconduct.¹¹ However, more significant than the legal reforms, are cultural changes necessary to make the criminal-justice system more accessible to victims of sexual misconduct. The system is perceived as cold, daunting, and public, and that perception makes many victims of sexual misconduct reluctant to involve authorities. Authorities, in turn, cannot act against these violations.

Cultural reforms of the criminal-justice system, however, are too distant on the horizon to protect women today. Proponents of professional regulation, including the Addison County State's Attorney, express a more practical hope: that regulation may offer an administrative path through which victims of sexual misconduct may report and have documented their experiences at the hands of licensees. For some, a regulatory complaint, which may be initiated online, is inherently less intimidating an undertaking than the initiation of a criminal complaint to police. Additionally, a person victimized by a massage therapist may feel more comfortable sharing their story in an effort to have the perpetrator prohibited from continuing to practice, and potentially to reoffend. Such an outcome is less daunting than seeking to have someone jailed.

However, the process of complaining about and seeking the sanctioning of a professional license is not simple or "easy." A professional licensee has a constitutional property right in the license, and the State may not revoke a license without substantially the same due process considerations and evidentiary obligations as attend a criminal proceeding. Individuals who file complaints against a massage therapist for sexual misconduct will be interviewed by an investigator and may be required to testify against that massage therapist. The licensed massage therapist will have the opportunity to question the individual accusing them of sexual misconduct. The burden of proof for disciplining a licensee is lower than in the criminal system – a preponderance-of-the-evidence standard is used in the administrative proceedings as compared to the beyond-a-reasonable-doubt standard used in criminal matters. This reduction in the burden of proof is rationalized, however, because the resulting sanctions are similarly lower – a loss of a license to practice as compared to a jail sentence. Thus, while OPR can offer an effective legal remedy for

¹¹ Certain sexual offenses are subject to maximum sentences of life imprisonment and additional sex offender conditions and treatment. 13 V.S.A. § 3271. Voyeurism is not included in the list of sexual offenses, however.

individuals who have experienced sexual assault by a massage therapist and can perhaps offer an alternative or less intimidating forum for initiating a complaint against a professional, the Office cannot assure victims that professional regulation will be an easier route to sanctioning massage therapists who engage in sexual misconduct.

If professional regulation is implemented, however, OPR can more nimbly and effectively provide the public with notice of sexual misconduct by a massage therapist and prohibit an individual from offering massage services than can the criminal justice system. OPR's disciplinary process is faster than the criminal process, particularly in instances when a "summary suspension" is required to protect the public. When an OPR state prosecutor establishes, to the satisfaction of a professional board or Administrative Law Officer's ("ALO"), that a licensee poses a threat to the "public health, safety, or welfare" that "imperatively requires emergency action," the board or ALO can summarily suspend the license, which then prohibits the licensee from practicing while the underlying case is pending. 3 V.S.A. § 814(c).

OPR's system for notifying the public of sanctions against licenses is also more accessible to the public than are criminal histories. Public awareness of a criminal conviction typically comes about in rare instances of media attention, and government does not allow citizens to run criminal background checks one each other online. Unlike criminal convictions, disciplinary actions taken against licensees are listed on the OPR website, and the conduct histories of licensees are searchable online. In this way, employers and the public can see whether an individual holds the necessary license to perform a service and if a licensee has been disciplined.

Least Restrictive Method

If professional regulation is found to be necessary, Chapter 57 directs the General Assembly to use the least restrictive method of regulation consistent with the public interest and five statutory factors. In the following section, these factors are applied to determine the least restrictive method of regulating massage therapy.

- I. *If existing common law and statutory civil remedies and criminal sanctions are insufficient to reduce or eliminate existing harm, regulation should occur through enactment of stronger civil remedies and criminal sanctions*

As noted above, sexual misconduct by massage therapists could be addressed in part by stronger criminal sanctions. However, OPR believes that professional regulation could more effectively offer the public notice of sexual misconduct by massage therapists and access to a list of licensed massage therapists, and more nimbly remove bad actors from the marketplace.

- II. *If a professional or occupational service involves a threat to the public and the service is performed primarily through business entities or facilities that are not regulated, the business entity or the facility should be regulated rather than its employee practitioners*

OPR finds that professional regulation of businesses alone would not address the public harm of sexual misconduct committed by unregulated massage therapists. Effective regulatory enforcement in this context would require the regulation of individuals.

III. Levels of Licensure

The next three factors address three different models of licensure that are tailored to address the level of harm posed to the public by the unregulated practice of the profession: registration, certification and licensure. Before addressing the next factors, it is helpful to review the different forms of professional license regulation.

- Registration is the “lowest” form of licensure in that it requires few, if any, qualifications to obtain. Registration typically requires an individual who wishes to offer a service to the public for consideration to register with the Office and to provide minimal information (e.g., attestations about convictions in other states). Individuals who are not registered or who have had their registrations revoked are prohibited from offering the defined professional service. This model of licensure is best used in circumstances where the inept or untrained practice of the profession does not threaten harm to the public.
- Certification requires only qualifications to obtain. This is a voluntary form of credentialing that a professional can use to signify to the public that they have met certain professional standards that are set forth in law. Certification is most useful in instances where the state and professionals have an interest in notifying the public about those professionals who have greater qualifications, but where there is no compelling protection to be had from prohibiting uncertified people engaging in the underlying activity.
- Licensure is the “highest” level of professional regulation. This form of regulation is mandatory (individuals without a license are prohibited from offering the service without a license) and applicants must fulfill certain qualifications to obtain a license. Licensure is appropriate when public safety is threatened by the unqualified practice of a profession.

OPR has concluded on two previous occasions that licensure is not an appropriate means to regulate massage therapy as it is not necessary for the public safety to standardize or guarantee the qualifications of massage therapists. The two important issues that brought forth this addendum are unrelated to the qualifications of a massage therapist. It was, in 2010 and again in 2016, and continues to be the Office’s finding that the unqualified practice of massage therapy does not pose a threat to the public that warrants imposing educational or training requirements as a prerequisite for offering the service. Nor would requiring individuals to fulfill certain qualifications address the public harm of sexual misconduct by massage therapists.¹² Thus, licensure imposes an unnecessarily high burden without addressing the public

¹² Roger Schmidt was certified by the Associated Bodywork and Massage Professional association.

harm posed by sexual misconduct by massage therapists. Similarly, certification, particularly because it is voluntary, would not address the public harm posed by sexual misconduct committed by massage therapists and is, thus, not an appropriate form of regulation.

OPR finds that registration would be the least restrictive method of regulation, as well as the most effective method of regulation by which to address the specific harm of sexual misconduct perpetrated by massage therapists.¹³ Registration would allow OPR to develop and publish a list of individuals practicing massage therapy in the State, to gather criminal history and other relevant information about these individuals before permitting them to register, and to impose discipline on registrants found to have engaged in unprofessional conduct, including sexual misconduct. That said, registration imposes few barriers to entering a professional field. There are no educational or training requirements to obtain a registration. Thus, registration facilitates state oversight and discipline without requiring individuals to invest a lot of resources to begin practicing or to hew to a particular style or method of practice. In turn, OPR recommends the implementation of a registration requirement for all massage therapists seeking to offer massage services to the public for consideration.

Additional Considerations

Definition of Massage Therapy Services

If the General Assembly decides to create a registration requirement for massage therapists, OPR encourages the General Assembly to define massage therapy broadly so as to encompass varying forms of massage, body-, and energy work in which a client may be placed in a vulnerable position relative to a practitioner. There are many different types of massage, body-, and energy-work professionals working in Vermont. These professionals offer services from Swedish massage to cupping to Reiki. Some of these services require touching; others do not. Many require clients to disrobe to varying degrees and most occur in private locations with just the client and the professional. If massage therapy is defined too narrowly, professions that may pose a public risk of sexual misconduct may be excluded from regulation. Additionally, a too-narrow definition will allow perpetrators of sexual misconduct to simply re-title themselves as another type of massage, body or energy work professional if they are unable to register as a massage therapist or if their registration is revoked, thus evading oversight and negating the protective effects of regulation. Therefore, OPR supports defining massage therapy broadly so as to include all types of massage, body-, and energy work.¹⁴ Because a registration system is much more

¹³ OPR wishes to note that, though the statutory language states that registration is appropriate when “the threat to the public health, safety, or welfare...is relatively small,” OPR does not believe that the threat of sexual misconduct by massage therapists is “small.” Rather, OPR believes, as detailed above, that registration is the most effective way of protecting the public (e.g., by notifying the public about offending massage therapists) without imposing unnecessary burdens on individuals seeking to provide massage therapy.

¹⁴ OPR notes that it is a challenging task to create a broad and encompassing definition of massage, body and energy work that does not require licensure before one is allowed to disrobe in a private space with another individual. However, the Office is emboldened by the ability of other states to draft encompassing and effective definitions.

compatible with the regulation of heterogeneous and broadly-defined activities than a licensure system, the least intrusive means of marketplace intrusion happens also to be the most effective of the available means of regulation to attack the problem at hand.

Required Resources

There are a significant number of massage therapists and bodywork professionals currently operating in Vermont. Effectively registering, assisting, and disciplining this field would require staff time and resources that OPR currently lacks. OPR strives to provide excellent customer service to each Vermonter seeking a professional license and to thoroughly investigate and adjudicate complaints against professionals. Staff time and resources are already consumed by this effort in service to the 75,000 current Vermont licensees. Adding a new professional license with a significant number of registrants will strain the existing structures at OPR in a manner that may threaten not only the adequate implementation and oversight of the regulation of massage therapists but other regulatory programs, as well. Further, initiating the licensure of this profession will require significant outreach and education. For these reasons, OPR asks that any new laws requiring the registration of massage therapists be accompanied by one additional FTE position in licensing administration and one additional FTE position in criminal investigations.

Conclusion Regarding Sexual Misconduct

For the above reasons, OPR finds that the regulation of massage therapists with a mandatory registration will serve the public's safety interest in addressing sexual misconduct by massage therapists. OPR encourages the General Assembly to define massage therapy broadly so as to encompass all forms of massage, body-, and energy work. OPR further notes that it will need additional resources to implement, administer, and enforce an effective regulatory program.

Part II: Human Trafficking

Analysis of the potential of regulation to mitigate human trafficking begins and ends with the first section of chapter 57 analysis:

It can be demonstrated that the unregulated practice of the profession or occupation can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is recognizable and not remote or speculative;¹⁵

The United Nations defines human trafficking as:

The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of

¹⁵ 26 V.S.A. § 3105(a).

*power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.*¹⁶

Though human trafficking is among the gravest criminal offenses, it appears highly improbable that administrative licensing of massage providers or businesses can effectively bolster criminal law enforcement against traffickers, and no arguments to that effect were heard in the public process related to this analysis. Unlike sexual misconduct, which typically involves individual bad actors who would stay in the same marketplace if the subject of regulatory enforcement, human trafficking typically is committed by organized and mobile criminal actors. This makes addressing human trafficking using professional regulation very challenging, as professional regulation considers and addresses the qualifications and behaviors of individual licensees and fixed points of service.

Further, the conduct of trafficking victims is unrelated to notions of professional misconduct. Victims of human trafficking are not engaged in simple prostitution. The typically female victims of human trafficking are not exercising professional authority and voluntarily offering marketplace services. Victims of human trafficking are, by definition, coerced into participation in activities not of their choosing.

Illicit massage businesses (IMBs)—those offering illegal sexual services under cover of professional massage—are often the site of human trafficking operations. Currently, the number of active IMBs in the USA is estimated at around 9,000 and growing.¹⁷ Nationally, IMBs collect an estimated \$2.5 billion in annual revenue.¹⁸ The trafficked individuals working in IMBs are coerced and controlled via psychological abuse, fraud, and violence.¹⁹ Likewise, IMB victims are moved regularly to enhance control and prevent escape. Despite the nexus between IMBs and trafficking, massage is far from the only cover for trafficking, which occurs as well in agriculture, hospitality, food service, and myriad other contexts. Neither individual participants in OPR's review process nor advocacy organizations contacted by the Office recommended practitioner licensure as an effective means of preventing, deterring, or detecting human trafficking at IMBs.

¹⁶ United Nations Convention Against Transnational Organized Crime And The Protocols Thereto: 41. Retrieved 10/29/2019, <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

¹⁷ Dank, Meredith, Bilal Khan, P. Mitchell Downey, Cybele Kotonias, Debbie Mayer, Colleen Owens, Laura Pacifici, and Lilly Yu. 2014. Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major U.S. Cities. Urban Institute.

¹⁸ Bouche, V., & Crotty, S. (2017, September 27). Estimating Demand for Illicit Massage Businesses in Houston, TX. *Journal of Human Trafficking*. Retrieved from <http://www.tandfonline.com/doi/abs/10.1080/23322705.2017.1374080?journalCode=uhmt20>

¹⁹ Primary resource: Human Trafficking in Illicit Massage Businesses. Polaris Project. 2018.

Approximately forty-three states regulate massage therapy on the state-wide level. Despite that level of oversight, human trafficking persists and continues to evade efforts at punishment and deterrence. OPR has been unable to establish that the prevalence of trafficking through IMBs varies in any way between states that do and do not regulate massage therapists.

Occupational and professional licensing is oriented toward protecting consumers and clients from abuse or incompetence by licensees, and it may deter willful misconduct by a regulated practitioner. The hope is to protect the client from the practitioner. At IMBs engaged in trafficking, however, the illicit activity is one in which both business owner and consumer are abusing the practitioner. Licensing occupations we believe to be potential points of trafficking victimization, and thereby making uninvolved practitioners and victims alike the subject of regulatory obligations, is broadly understood to be an inadvisable means of preventing victimization. Trafficking victims often lack identifying documents or lawful employment status, so few can or will approach government authorities for licensure or for assistance escaping exploitative conditions. IMBs, unlike legitimate marketplace providers of professional services, are unattached to reputation or particular location and commonly close and move under pressure, well before regulators catch up.

Conclusion Regarding Human Trafficking

Because we are unable to identify any relationship between the regulation of legitimate massage therapy services and the effective deterrence or detection of human trafficking—which can occur in countless other contexts—we cannot conclude that clear and identifiable harm accrues to trafficking victims as a result of non-regulation of massage therapy. To the extent regulation may protect the public, its protective effects radiate to clients not providers of professional services. For these reasons, OPR does not recommend regulation of massage therapy as a means of addressing human trafficking.

Conclusion

Understanding the sensitive and personal nature of these issues, OPR has carefully considered the task assigned in this Addendum Report to the original 2016 Sunrise Report regarding Massage Therapy. The Office is grateful to the stakeholders who engaged on this issue, particularly the individuals who have been victimized. The Office finds that requiring individuals and businesses to obtain registration prior to providing massage services will likely protect public safety by preventing repeated incidents of sexual misconduct if the initial instance of misconduct is reported. The Office finds that regulation of individuals or businesses providing massage services would not address the public harms presented by human trafficking. We strongly encourage policymakers to define “massage services” broadly so bad actors cannot “walk around” state oversight, and those whose licenses have been revoked are effectively removed from the marketplace. OPR looks forward to working with the legislature and stakeholders on developing these policies.

Respectfully submitted to the House and Senate Committees on Government Relations.

STATE OF VERMONT
SECRETARY OF STATE
OFFICE OF PROFESSIONAL REGULATION

BY:



January 15, 2020

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Date

APPROVED:



January 15, 2020 S.

Lauren Hibbert
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Date