



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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MEMORANDUM

DATE: March 2, 2010

TO: All Members of the Delaware State Senate
and House of Representatives

FROM: Ms. Daniese McMullin-Powell *DMP/KH*
Chairperson
State Council for Persons with Disabilities

RE: H.B. 302 [Financial Exploitation Reporting]

The State Council for Persons with Disabilities (SCPD) has reviewed H.B. 302 which is intended to establish civil and criminal immunity for persons reporting financial exploitation of the elderly and “infirm”. SCPD has the following observations.

First, the bill only covers financial exploitation of adults and not children. Children are also subject to financial exploitation. However, it appears that immunity for reporting exploitation of children is already available under Title 16 Del.C. §§903 and 908 and Title 10 Del.C. §901(1) and 901(11). Therefore, with the possible exception of pediatric nursing home residents [Title 16 Del.C. §1119B], the bill should not result in any major gap in reporting immunity.

Second, in lines 17-18, the sponsors should consider deleting the following words: “with respect to any act, omission, failure to act or failure to report pursuant to such reporting program”. Otherwise, the bill literally provides immunity to persons who fail to comply with a reporting duty or fail to take steps to protect a victim!

Third, the definition of “person” in lines 10-11 only explicitly refers to private entities and omits any reference to public bodies. As a result, government-required reporting policies would not be covered by the bill since the definition of a “reporting program” is limited to one adopted by a “person” (line 6). Thus, reporting pursuant to the DHSS PM 46 policy would not be covered by the bill. Parenthetically, it appears that there are gaps in immunity protections for persons reporting pursuant to statute. For example, persons reporting long-term care financial exploitation pursuant to Title 16 Del.C. §1132 are civilly and criminally immune pursuant Title 16 Del.C. §1135. Likewise, persons generally reporting to Adult Protective Services (APS) enjoy both civil and criminal

immunity pursuant to Title 31 Del.C. §3910. However, persons reporting to the DHSS long-term care Ombudsman pursuant to Title 16 Del.C. §1152(5) are only given civil but not criminal immunity pursuant to Title 16 Del.C. §1154. Moreover, persons reporting financial exploitation to DHSS pursuant to Title 16 Del.C. §2224 are given no immunity at all. The sponsors may wish to amend the bill to resolve these gaps.

Fourth, the sponsors may wish to consider adding a second sentence to the definition of “financial exploitation” at lines 12-14 to read as follows: Without limitation, the term “financial exploitation” includes acts encompassed by Title 16 Del.C. §§1131(5) and Title 31 Del.C. §3902(5).” This would obviate any argument that the definition of “financial exploitation” created by the new Section 8146 is narrower than these other statutes and therefore immunity only applies to a subset of reporters of “financial exploitation” under these statutes.

Fifth, the term “infirm adult” in line 9 is an outdated reference which could be construed as pejorative. It is also unduly limiting. Consider that the bill covers all “elderly” persons irrespective of capacity. Thus, reporting financial exploitation of an astute 62 year old stockbroker would be covered by the bill while reporting financial exploitation of persons with disabilities would only be covered if the person were “substantially impaired in the ability to provide adequately for the person’s own care and custody.” The sponsors may wish to consider adopting a more inclusive term.

Sixth, lines 24-25 could be problematic. Literally, any “person” could adopt an “internal policy” for reporting financial exploitation which would eviscerate even the attorney-client privilege for consultation on actions occurring in the past. See e.g., Delaware Lawyers’ Rules of Professional Conduct, Rule 1.6, Comments 8 and 12.

Seventh, line 27 should be deleted or amended. There are existing statutes and regulations which require agencies to have policies on reporting financial exploitation. To avoid a conflict with such statutes and regulations, line 27 could be amended to read as follows: “Nothing in this section shall be construed to require any person to adopt a reporting program.”

Thank you for your consideration and please contact SCPD if you have any questions regarding our observations on the proposed legislation.

cc: The Honorable Jack A. Markell
The Honorable Rita Landgraf
The Honorable Susan Del Pesco
Ms. Deborah Gottschalk
Mr. Brian Hartman, Esq.
Governor’s Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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