

MAINE STATE LEGISLATURE

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FIRST REGULAR SESSION

ONE HUNDRED AND TENTH LEGISLATURE

Legislative Document

No. 750

S. P. 268

In Senate, February 10, 1981

Referred to the Committee on Judiciary. Sent down for concurrence and ordered printed.

MAY M. ROSS, Secretary of the Senate

Presented by Senator Najarian of Cumberland.

Cosponsors: Representative Thompson of South Portland, Representative Aloupis

of Bangor and Senator Gill of Cumberland.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED AND EIGHTY-ONE

AN ACT Concerning the Protection of Incapacitated and Dependent Adults.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. 22 MRSA c. 958, as enacted by PL 1973, c. 631, § 2, and as amended, is repealed.

Sec. 2. 22 MRSA c. 958-A is enacted to read:

CHAPTER 958-A

ADULT PROTECTIVE SERVICES ACT

SUBCHAPTER I

GENERAL PROVISIONS

§ 3470. Title

This Act may be cited as the Adult Protective Services Act.

§ 3471. Declaration of policy and legislative intent

The Legislature recognizes that many adult citizens of the State, because of incapacitation, are unable to manage their own affairs or to protect themselves

from abuse, neglect, exploitation or physical danger. Often these persons cannot find others able or willing to render assistance. The Legislature intends, through this Act, to establish a program of protective services designed to fill this need and to assure its availability to all incapacitated and dependent adults who are faced with abuse, neglect, exploitation or physical danger. It is also the intent of the Legislature to authorize only the least possible restriction on the exercise of personal and civil rights consistent with the person's need for services and to require that due process be followed in imposing those restrictions.

§ 3472. Definitions

As used in this chapter, unless the context indicates otherwise, the following terms have the following meanings.

1. Abuse. "Abuse" means the willful infliction of injury, unreasonable confinement, intimidation or cruel punishment with resulting physical harm or pain or mental anguish; or the willful deprivation of essential needs.

2. Adult. "Adult" means any person who has attained the age of 18 years and who does not have a condition of mental retardation as defined in Title 34, section 2602, subsection 4.

3. Caretaker. "Caretaker" means any individual or institution who has or assumes the responsibility for the care of an adult.

4. Commissioner. "Commissioner" means the Commissioner of Human Services or his representative in the geographical area in which the person resides or is present.

5. Department. "Department" means the Department of Human Services.

6. Dependent adult. "Dependent adult" means any adult who is wholly or partially dependent upon one or more other persons for care or support, either emotional or physical, and who would be in danger if that care or support were withdrawn.

7. Emergency. "Emergency" refers to a situation where:

- A. The incapacitated or dependent adult is in immediate risk of serious harm;
- B. The incapacitated or dependent adult is unable to consent to services which will diminish or eliminate the risk; and
- C. There is no guardian to consent to emergency services.

8. Emergency services. "Emergency services" refer to those services necessary to avoid serious harm.

9. Exploitation. "Exploitation" means the illegal or improper use of an incapacitated or dependent adult or his resources for another's profit or advantage.

10. **Incapacitated adult.** "Incapacitated adult" means any adult who is impaired by reason of mental illness, mental deficiency, physical illness or disability to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, or to the extent the adult cannot effectively manage or apply his estate to necessary ends.

11. **Neglect.** "Neglect" means a threat to an adult's health or welfare by physical or mental injury or impairment, sexual abuse or exploitation, deprivation of essential needs or lack of protection from these.

12. **Protective services.** "Protective services" means services which will separate incapacitated or dependent adults from danger. Protective services include, but are not limited to, social, medical and psychiatric services necessary to preserve the incapacitated adult's rights and resources and to maintain the incapacitated adult's physical and mental well-being.

These services include, but are not limited to, providing for medical care for physical and mental health care needs, assistance in personal hygiene, in food and clothing needs, in obtaining or preserving adequately heated and ventilated shelter, protection from health and safety hazards and protection from abuse, neglect and exploitation. Protective services may include seeking guardianship or a protective order under Title 18-A, Article 5. The department shall classify as protective clients the incapacitated adults who receive protective services.

13. **Serious harm.** "Serious harm" means:

A. **Serious injury;**

B. **Serious mental injury or impairment, evidenced by severe anxiety, depression or withdrawal, untoward aggressive behavior or similar serious dysfunctional behavior; or**

C. **Sexual abuse or exploitation.**

14. **Serious injury.** "Serious injury" means serious physical injury or impairment.

§ 3473. Authorizations

1. **General.** The department shall take appropriate action, consistent with available funding, which will achieve the following goals:

A. **Coordinating, developing and providing services which:**

(1) **Support and reinforce self-care for incapacitated and dependent adults;**

(2) **Supplement that care; and**

(3) **When necessary, substitute for self-care of incapacitated and dependent adults;**

B. **Encouraging the voluntary use of these and other services by incapacitated and dependent adults;**

C. Cooperating and coordinating with other agencies, facilities or persons providing related services to incapacitated and dependent adults;

D. Establishing and maintaining an Adult Protective Services Contingency Fund to provide temporary assistance to incapacitated and dependent adults to help them provide proper self-care; and

E. Petitioning for guardianship or a protective order under Title 18-A, Part 5 when all less restrictive alternatives have been tried and have failed to protect the incapacitated adult.

2. Duties. The department shall act to protect abused, neglected or exploited incapacitated and dependent adults in circumstances which present a substantial risk of abuse, neglect or exploitation, to prevent further abuse, neglect or exploitation, to enhance the welfare of these incapacitated and dependent adults and to promote self-care wherever possible. The department shall:

A. Receive reports of alleged abuse, neglect or exploitation;

B. Promptly investigate all alleged cases of abuse, neglect or exploitation coming to its attention;

C. Determine the validity of the alleged abuse, neglect or exploitation in each case; and

D. Take appropriate action to further the purposes of this chapter.

§ 3474. Records; confidentiality, disclosure

1. Confidentiality of records. All department records which contain personally identifying information and are created or obtained in connection with the department's adult protective activities and activities related to an adult while under the jurisdiction of the department are confidential and subject to release only under the conditions of subsections 2 and 3. Within the department, the records shall be available only to and used by authorized departmental personnel and legal counsel for the department in carrying out their functions.

2. Optional disclosure of records. The department may disclose relevant information in the records to the following persons:

A. An agency investigating a report of adult abuse, neglect or exploitation when the investigation is authorized by statute or by an agreement with the department;

B. An advocacy agency conducting an investigation under chapter 961;

C. A physician treating an incapacitated or dependent adult whom he reasonably suspects may be abused, neglected or exploited;

D. An incapacitated or dependent adult named in a record who is reported to be abused, neglected or exploited, or the caretaker of the incapacitated or dependent adult, with protection for identity of reporters and other persons when appropriate;

E. A person having the legal responsibility or authorization to care for, evaluate, treat or supervise an incapacitated or dependent adult; and

F. Any person engaged in bona fide research, provided that no personally identifying information is made available, unless it is essential to the research and the commissioner or his designee gives prior approval. If the researcher desires to contact a subject of a record, the subject's consent shall be obtained by the department prior to the contact.

3. **Mandatory disclosure of records.** The department shall disclose relevant information in the records to the following persons:

A. The guardian ad litem of an incapacitated or dependent adult named in a record who is reported to be abused, neglected or exploited;

B. A court on its finding that access to those records may be necessary for the determination of any issue before the court. Access shall be limited to in-camera inspection, unless the court determines that public disclosure of the information is necessary for the resolution of an issue pending before it;

C. A grand jury on its determination that access to those records is necessary in the conduct of its official business; and

D. An appropriate state executive or legislative official with responsibility for adult protection services in carrying out official functions, provided that no personally identifying information may be made available unless necessary to the functions.

§ 3475. **Penalty for violations**

A person who knowingly violates a provision of this chapter commits a civil violation for which a forfeiture of not more than \$500 may be adjudged.

§ 3476. **Spiritual treatment**

1. Treatment not considered abuse, neglect or exploitation. An incapacitated or dependent adult shall not be considered to be abused, neglected or exploited solely because treatment is by spiritual means by an accredited practitioner of a recognized religious organization.

2. Treatment to be considered if requested. When medical treatment is authorized, under this chapter, treatment by spiritual means by an accredited practitioner of a recognized religious organization may also be considered if requested by the incapacitated or disabled adult or his caretaker.

SUBCHAPTER II

INVESTIGATIONS AND PROTECTIVE SERVICES

§ 3480. **Investigations**

1. **Subpoenas and obtaining criminal history.** The commissioner, his delegate or the legal counsel for the department may:

A. issue subpoenas requiring persons to disclose or provide to the department information or records in their possession which are necessary and relevant to an investigation of a report of suspected abuse, neglect or exploitation or to a subsequent adult protective proceeding;

(1) The department may appeal to the District Court and Probate Court to enforce a subpoena; and

(2) A person who complies with a subpoena is immune from civil or criminal liability that might otherwise result from the act of turning over or providing information or records to the department; and

B. Obtain nonconviction data and other criminal history record information under Title 16, section 611, which he deems relevant to a case of alleged abuse, neglect or exploitation.

2. Confidentiality. Information or records obtained by subpoena shall be treated in accordance with section 3474.

§ 3481. Responsibility of the department upon receiving abuse, neglect or exploitation reports; contracts

When the department receives a report that an incapacitated or dependent adult is in need of protective services it shall arrange for a prompt and thorough investigation to determine whether the adult is incapacitated or dependent and if so, whether the adult is in need of protective services and what services are needed. The investigation shall include a visit to the adult and consultation with others having knowledge of the facts of the particular case. After completing the investigation, the department shall have made a written assessment of the case indicating whether the adult is incapacitated or dependent and whether protective services are needed.

The department may contract with an agency or private physician for the purpose of providing immediately accessible medical evaluations in the location that the department considers most appropriate.

§ 3482. Providing for protective services with the consent of the person; withdrawal of consent; caretaker refusal

When it has been determined that an incapacitated or dependent adult is in need of protective services, the department shall immediately provide or arrange for protective services, provided that the adult consents.

1. Consent. If an incapacitated or dependent adult does not consent to the receipt of protective services, or if he withdraws consent, the service shall not be provided.

2. Consent refused. When a private guardian or conservator of an incapacitated adult who consents to the receipt of protective services refuses to allow those services to be provided to the incapacitated adult, the department may petition the Probate Court for removal of the guardian pursuant to Title 18-A,

section 5-307, or for removal of the conservator pursuant to Title 18-A, section 5-415. When a caretaker or guardian of an incapacitated adult who consents to the receipt of protective services refuses to allow those services to be provided to the incapacitated adult, the department may petition the Probate Court for temporary guardianship pursuant to Title 18-A, section 5-310 or for a protective arrangement pursuant to Title 18-A, section 5-409.

§ 3483. Providing for protective services to incapacitated adults who lack the capacity to consent

If the department reasonably determines that an incapacitated adult is being abused, neglected or exploited and lacks capacity to consent to protective services, the department may petition the Probate Court for guardianship or conservatorship, in accordance with Title 18-A, section 5-601. The petition must allege specific facts sufficient to show that the incapacitated adult is in need of protective services and lacks capacity to consent to them.

§ 3484. Emergency intervention; authorized entry of premises; immunity of petitioner

1. **Temporary guardianship.** In accordance with Title 18-A, section 5-310, the department may petition for temporary guardianship of an incapacitated adult when there is reasonable cause to believe that:

- A. The incapacitated adult lacks capacity to consent and that he is in need of protective services;
- B. An emergency exists;
- C. All alternatives have been exhausted; and
- D. No other person authorized by law or order to give consent for the person is available and willing to arrange for emergency services.

2. **Action.** When the court has exercised the power of a guardian or has appointed the department temporary guardian pursuant to Title 18-A, section 5-310, and the ward or a caretaker refuses to relinquish care and custody to the court or to the department, then at the request of the department, a law enforcement officer may take any necessary and reasonable action to obtain physical custody of the ward for the department. Necessary and reasonable action may include entering public or private property with a warrant based on probable cause to believe that the ward is there.

3. **Liability.** No petitioner shall be held liable in any action brought by the incapacitated adult if the petitioner acted in good faith.

§ 3485. Payment for protective services

At the time the department, in accordance with section 3481, makes an evaluation of the case reported, it shall be determined, according to regulations set by the commissioner, whether the incapacitated or dependent adult is

financially capable of paying for the essential services. To the extent that assets are available to incapacitated or dependent adults, or wards, the cost of services shall be borne by the estate of persons receiving those services.

§ 3486. Reporting abuse

Upon finding evidence indicating that a person has abused, neglected or exploited an incapacitated or dependent adult, the department shall notify the district attorney.

§ 3487. Cooperation

All other state and local agencies as well as private agencies receiving public funds shall cooperate with the department in rendering protective services on behalf of incapacitated and dependent adults.

§ 3488. Adoption of standards

The department shall adopt standards and other procedures and guidelines with forms to insure the effective implementation of this chapter.

STATEMENT OF FACT

The purpose of this bill is to establish clear, consistent standards for the provision of services to remedy neglect, abuse and exploitation of incapacitated or dependent adults.

The current statute providing for protective services to incapacitated adults requires staff in the Department of Human Services's regional offices. This bill is intended, primarily, to clarify the existing statute. To implement either the existing statute or the proposed amendments will require additional personnel. These additional personnel lines are proposed in the department's Part II budget because an increased demand for services to incapacitated adults will require additional staff even if these proposed amendments fail passage. The Part II budget request is for \$179,473 for fiscal year 1982 and \$218,753 for fiscal year 1983.