

NOTE TO FILE: REPORT IS FINAL, NOT DRAFT

ADULT PROTECTION COORDINATING COUNCIL ADULT ABUSE REGISTRY COMMITTEE DRAFT REPORT

July 30, 2008

The purpose of an adult abuse registry is to enhance the protection of vulnerable adults from abuse, neglect, and exploitation. An adult abuse registry can reduce the opportunity for individuals previously found to have abused, exploited or willfully neglected a vulnerable adult to be entrusted with the care of vulnerable persons.

There are a variety of approaches which the States with adult abuse registries have used to accomplish that general purpose, and a variety of issues which must be addressed in drafting and implementing a registry law. The major issues are listed below, with the recommendation of the Committee following each issue.

ISSUE #1: The primary effect of an individual's listing on the registry.

Background/Discussion: Currently, the placement of a Certified Nursing Assistant's name on the nurse aide abuse registry permanently prohibits the aide from employment in long term care facilities. As discussed below, an adult abuse registry law would likely be an extension of the Omnibus Adult Protection Act (OAPA), and so would likely relate to employees or prospective employees of a "facility," as that term is defined by OAPA. ["Facility" means a nursing care facility, community residential care facility, a psychiatric hospital, or a facility operated or contracted for operation by the State Department of Mental Health or South Carolina Department of Disabilities and Special Needs.]

If listing in an adult abuse registry results in a general ban on employment of the individual in any "facility," the settings in which the listed individuals would be banned from working would be much more extensive than the nurse aide registry's ban on employment in nursing care facilities. The due process protections and procedures which would have to be incorporated in the adult abuse registry law and regulations would likewise have to be more extensive than if the registry were instead in the nature of a required source of background information concerning prospective employees.

Decision Point: Determine the primary effect of listing on the registry.

- Options:**
- (1) The registry could trigger an automatic ban on employment in covered facilities for individuals who have committed abuse, neglect, or exploitation.
 - (2) The registry could be a source of information for all potential employers of care givers (including individuals privately employing a care giver).
 - (3) Short of a permanent ban to employment, other intermediate steps or a range of consequences could be developed.

Workgroup Recommendation: Option number two is recommended. This option would create a registry which could be accessed by potential employers and serve as a

resource for information about the potential employee. The consensus of the Workgroup was that the registry should not supplant existing enforcement mechanisms. Concern was expressed that if option number one (listing on the registry triggers a permanent ban on employment) was chosen, the registry would become primarily a regulatory/enforcement tool, and would also require a significant amount of accompanying due process measures, which would increase the costs and difficulty of administration. The Workgroup's decision on this issue also took into account several fairness issues associated with a ban on employment, including the harshness of creating a system that imposes the same severe sanction regardless of the nature/severity of the offense. Another concern expressed was that such a drastic consequence may inadvertently discourage reporting of relatively minor infractions, which could hamper identification of "habitual" violators who commit less serious offenses. Option #3 (a range of sanctions) was viewed as requiring the creation of an unduly complex law.

ISSUE #2: Determine whether an adult abuse registry will be an extension of the Omnibus Adult Protection Act (OAPA).

Background/Discussion: The proposal is to create an adult abuse registry that would list individuals who are found to have abused, exploited or willfully neglected a vulnerable adult in any care giver setting. This broad scope would eliminate a shortcoming of the nurse aide registry and would provide a mechanism for any potential employer (including private citizens) seeking the services of a care giver to determine whether a prospective employee has a prior history of abuse, willful neglect or exploitation. The proposed adult abuse registry would contain substantiated findings for any type of hands-on care giver in any setting — e.g., nurse aides, nurses, personal care aides, and employees of nursing homes, facilities for the mentally ill or those with special needs, assisted living facilities, community residential care facilities and those providing private home care to vulnerable adults.

The Omnibus Adult Protection Act (OAPA), S. C. Code of Laws, Title 43, Chapter 35, provides for the protection of vulnerable adults in our State. OAPA includes the following definitions that would be relevant to the establishment of an adult abuse registry:

A care giver is defined as "a person who provides care to a vulnerable adult, with or without compensation, on a temporary or permanent or full or part-time basis and includes, but is not limited to, a relative, household member, day care personnel, adult foster home sponsor, and personnel of a public or private institution or facility".

A vulnerable adult is defined as "a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult."

Decision Point: Based on the OAPA “care giver” definition, a family member who provided care and for whom there is a substantiated finding of abuse, willful neglect or exploitation, would be reported to the registry. Using the care giver definition in the OAPA (above), the registry would also include licensed health care professionals.

- Options:**
- (1) Use the OAPA definitions as the basis for the adult abuse registry.
 - (2) Create exceptions for reporting to the registry that would exempt designated individuals from being listed even when substantiated findings are made (e.g., no reporting of family member care givers; exemption of licensed health care professionals).

Workgroup Recommendation: The recommendation is to adopt the definitions in the OAPA in order to maintain consistency with the statute for the protection of vulnerable adults and to create a more comprehensive resource for potential employers. The registry should be constructed within the framework of the OAPA in an effort to provide a consistent complement to the safeguards contained in the Act.

ISSUE #3: Determine what, if anything could be done in the legislation to help ensure consistency in the standard or proof needed for a substantiated finding among investigative bodies.

The OAPA provides for the protection of vulnerable adults in all settings and sets forth the investigative entities and the system for adult protection in South Carolina. The Adult Protective Services Division of the Department of Social Services [DSS-APS] is charged with investigating reports in the community, while the State Long Term Care Ombudsman [Ombudsman] is responsible for investigating reports in facilities. SLED is required to investigate allegations of abuse, neglect or exploitation (ANE) occurring in facilities operated or contracted for operation by the Department of Mental Health and the Department of Disabilities and Special Needs. Law enforcement agencies, local prosecutors, and the Office of the Attorney General also may investigate OAPA cases within their respective jurisdictions. Other entities have investigative responsibilities in accordance with federal mandates — e.g., OBRA authorizes DHEC as the State certification agency to investigate complaints in Medicare/Medicaid certified long term care facilities in order to determine whether the facilities are in compliance with the Medicare/Medicaid requirements for participation.

For the non-law enforcement agencies, substantiation of an allegation of ANE is generally based on a preponderance of the evidence — e.g., the conclusion that the allegation is more likely than not to have occurred. However, in the case of investigations conducted by law enforcement agencies (SLED, Attorney General and local law enforcement agencies) the agency conducting the investigation generally does not draw a conclusion one way or the other, in recognition that a decision on whether investigation determined ANE will be made either by a Solicitor, and the Solicitor’s perspective may also take into account whether the case has “prosecutorial merit,” which involves several factors including whether the Solicitor believes there appears to be sufficient evidence of the prospective defendant’s guilt beyond a reasonable doubt.

Workgroup Recommendation: Given the number of potential investigative entities from which “findings” could be available for inclusion on the registry, the Committee believes that, consistent with OAPA, the proposed registry will have to list individuals who were found to have committed ANE using different methodologies and standards of proof. That may not be ideal, but is the end result of having multiple investigative agencies, some with a criminal focus and some without, conducting investigations.

ISSUE #4: Determine when a perpetrator’s, or alleged perpetrator’s, name would be included on an adult abuse registry.

The investigative entities and operators of OAPA covered facilities will be responsible for reporting findings to the registry. The investigative entities will also be responsible for the outcomes of their respective investigations and will be required to participate as necessary in the case preparation and presentation of testimony during any appeals process.

Decision Point: The point at which a subject individual's name and a brief description of the offense is placed on the registry needs to be determined.

- Options:**
- (1) The subject individual could be reported to the registry after the *allegation* is received and the registry could contain information regarding the allegation which would be accessible to entities/individuals who query the registry.
 - (2) The subject individual's name could be placed on the registry after a *substantiated* finding of ANE by the investigative entity or termination for ANE by a covered. (*Note: As discussed above, law enforcement agencies conducting OAPA investigations generally do not draw any conclusions.*)
 - (3) The subject individual’s name could be placed on the registry after a substantiated finding has been made and the individual's due process protections have been exhausted. (As discussed below [Issue #6], a conviction or other judicial adjudication would preclude administrative avenues of appeal. The workgroup favors listing an individual in the registry following conviction or adjudication regardless of whether the individual appealed his/her conviction or adjudication.)
 - (4) The subject individual's name could be placed on the registry following a *conviction* in criminal court. [Note: Historically, there have been few criminal prosecutions of adult protection cases.]

Workgroup Recommendation: In keeping with the concept of the registry as an informational resource, the Workgroup recommends option number two. A mere allegation of misconduct was viewed as premature for listing the name of a subject on the registry. However, once a finding has been substantiated, sentiment swings strongly in favor of making that information available as soon as possible. If the substantiated finding is entered on the registry prior to completion of the due process measures, the registry should include the status of that process for inquirers (e.g., appeal filed and

currently pending; administrative appeal concluded, now pending judicial review). Consideration could also be given to allowing the subject individual to provide a brief explanation/refutation that could be included with the listing. (See discussion at “Due Process Protections,” below.)

ISSUE #5: Determine which agency will host the registry

It has been recommended that the registry be centralized and that DHEC operate the registry in conjunction with the operation of the current nurse aide registry. Should the registry be maintained by another entity, federal regulations would prohibit the registry from including the Survey and Certification findings against a certified nurse aide. The result would be the maintenance of two registries, one for certified nurse aides and one for all other care giver perpetrators; unless a waiver of federal regulations can be obtained.

ISSUE #6: Determine what types of due process will be afforded individuals who would be listed or proposed for listing in the registry

Some level of due process protection must be afforded to individuals whose names are subject to being placed on the adult abuse registry. The extent of protection that is necessary will be related to the consequences of being listed on the registry. For example, if the registry is used to administer an automatic ban upon employment, more extensive due process protections will be necessary than would be required if the registry is simply a source of information for potential employers.

- Options:**
- (1) Develop a process modeled after the National Practitioners Data Bank whereby a brief report is prepared and submitted to the subject of the report, who is then given an opportunity to add his/her comments and explanation. The full report — including the offender’s comments — is then submitted to the national data bank and there are no further avenues of appeal.
 - (2) Establish an internal agency team to review the investigative entities’ records and findings. (This sort of review is utilized by Delaware prior to placement of a perpetrator’s name on the registry.)
 - (3) Offer full appeal rights that would include the opportunity for an administrative hearing, followed by further review under the South Carolina Administrative Procedures Act.

Workgroup Recommendations:

The workgroup devoted significant time and attention to this issue after reconvening. The workgroup studied the process involved in listing an individual's name on South Carolina' Child Abuse Registry, as well as the Adult Abuse Registry in Delaware. The consensus of the workgroup was that the following procedure should be utilized in determining whether to, and how to, place an individual's name on the registry:

- (1) After the Investigative entity, makes a substantiated finding that there is a

preponderance of evidence that the subject individual abused, exploited or knowingly and willfully neglected a vulnerable adult, the subject individual would be advised in a written Notice of such finding. The Notice would further advise the individual that, pursuant to the Adult Abuse Registry law, the individual's name will be listed on the Adult Abuse Registry with a finding of "Proposed Concern."

*It will be up to each IE to determine how it will arrive at a substantiated finding of abuse, exploitation or knowing and willful neglect. Investigations of OAPA cases are carried out by staff with varying degrees of knowledge and experience. To ensure some consistency among various investigative staff, IE s may determine it prudent to consider all investigation findings preliminary until reviewed by senior staff or an internal review committee.

(2) The individual will be further advised in the Notice of the requirement that certain licensed health care entities and licensed facilities which serve vulnerable adults are required to query the Registry prior to employment, and others may query the registry with the written consent of the individual listed. The individual will also be advised that they have the right to file an appeal of this action within 30 days from the date of the Notice. Such appeals will be subject to the APA, and will follow the contested case procedure of the APA. If the registry law provides some mechanism beyond an appeal process or following an unsuccessful appeal for an individual listed on the registry to petition for removal from the registry at a later date, those provisions will also be summarized in the Notice.

(3) Appeal hearings will be conducted by a hearing officer, with a right of appeal to Circuit Court. In the event there is no appeal or the appeal results in a decision upholding the finding of abuse, willful neglect or exploitation, the listing in the registry will be changed from "Proposed Concern" to "Substantiated Finding." In the event an appeal by an individual result in a decision finding that there is insufficient evidence to substantiate the finding of abuse, willful neglect or exploitation, the listing shall be removed.

Variations to the Appeal Process

(A) An exception to the appeal process under the APA will occur for those cases in which DSS APS staff have filed a petition in Family Court and, in the course of such proceedings, sought a finding that the subject individual abused, willfully neglected or exploited a vulnerable adult. Should the Family Court enter such a judicial finding, any appeal by the individual must take place from the Family Court Order. Similarly, if the Family Court makes a finding that the subject individual did not abuse, willfully neglect or exploit a vulnerable adult, including a finding that a vulnerable adult was neglected, but that such neglect was not willful, no entry of the subject individual shall be made into the registry, and any prior entry shall be removed.

(B) Another exception to the above procedure will be that individuals who are convicted of a criminal violation arising from the same conduct which led to the IE's substantiated finding of abuse, exploitation or willful and knowing neglect

will be listed on the adult abuse registry as proposed by the IE. If the conviction occurs during the review or appeals process, upon confirmation of the conviction, the review or appeals process shall terminate. (If the individual successfully appeals their criminal conviction, and such conviction is overturned, the individual may then, at that future date, re-institute the appeal of their listing on the Adult Abuse Registry, and such appeal shall not be dismissed on timeliness grounds unless the individual had already failed to timely file an appeal of the listing as of the date of their initial conviction.

(C) Another exception to the above procedure will be for Certified Nurse Aides (CNAs) who are listed on the CNA Abuse and Neglect Registry in accordance with federal regulations and procedure. The statute will provide that registration in the CNA Abuse and Neglect Registry will automatically result in a reciprocal listing of the same individual on the Adult Abuse Registry, presumably permanently.

(4) The public portion of the registry will only indicate that the person is listed on the registry. Only individuals and entities with an authorization signed by the individual listed on the Registry shall be allowed access to the information concerning the individual in the Adult Abuse Registry. However, certain employers, such as "facilities" as defined in OAPA, will be (a) required to query the Registry, (b) required to obtain a signed release from prospective employees authorizing the release of information about such person from the Registry and (c) must make any offer of employment contingent on receipt of an "acceptable" report from the Registry (although what is acceptable will be left to the discretion of the employer.) Time limits may be desirable, e.g., query must be received by the Registry prior to or within 30 days of employment. As noted, prospective employers or others who are not required to query the Registry, but nevertheless wish to find out whether a prospective employee or particular person is listed on the Registry, may, but must also present an authorization signed by the individual who is the subject of the query.

ISSUE #7: Create a complementary obligation on prospective health care employers, job applicants and former employers to obtain/provide information about past job performance and/or misconduct in the applicant's previous jobs, in addition to checking the Adult Abuse Registry.

Delaware has not only an Adult Abuse Registry, but laws and regulations requiring all health care providers to conduct a background check which includes the following:

- the Adult Abuse Registry;
- the Child Abuse Registry;
- a "Service Letter" from each of the applicant's employers from the previous 5 years;
- criminal background check; and
- drug screen.

Delaware State law requires applicants, to accurately disclose to prospective employers their current or most recent employer, and, if previously employed in a health care facility or child care facility within the previous 5 years, to disclose such previous

employers. It further requires applicants to consent to a release of specified information from their current or prior employers. The prospective health care facility or child care facility employer must then query on a State form such previous employers. Delaware law requires current and former employers who receive such a query to respond by completing the form and returning it within 10 working days. The law immunizes current and former employers from civil liability if they complete the form in good faith, and the law presumes good faith.

As noted, prospective health care facility or child care facility employers must also query the Adult Abuse and Child Abuse registries, with a required authorization by the applicant, as well as obtain a criminal background check and drug test.

Decision Point: Determine whether to include a complementary obligation on prospective health care employers, job applicants and former employers to obtain/provide information about past job performance and/or misconduct in the applicant’s previous jobs, in addition to checking the Adult Abuse Registry.

Workgroup Recommendation: The consensus of the Workgroup is that requiring prospective employers to obtain information from current and former employers (and requiring the applicant and former employers to facilitate the reference check, as outlined in the Delaware law) helps to further ensure that a facility screening applicants for prospective employment will learn of past instances of misconduct either involving abuse, neglect or exploitation, or lesser conduct which could indicate a reason for concern. The “Service Letter” method can disclose conduct which may not have been substantiated by an investigative entity, or have resulted in any criminal proceedings, but which nevertheless would alert the prospective employer that the applicant may not be suited to working with vulnerable adults.