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DEPARTMENT OF JUSTICE

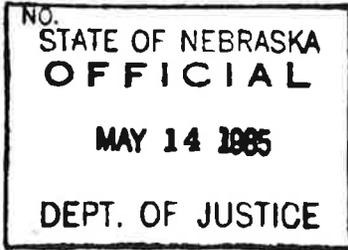
STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

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May 13, 1985

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General



Senator Don Wesely
Nebraska State Legislature
1402 State Capitol
Lincoln, Nebraska 68509

Dear Senator Wesely:

This is to acknowledge receipt of your letter of April 10, 1985, in which you request an opinion as to the constitutionality of LB 320 and LB 490. You ask specifically whether either LB 320 or LB 490 contain language that would withstand a court test on the question of overbreadth or vagueness, and whether they adequately address the question of duty on the part of the accused if it is necessary to establish criminal liability.

Initially we note that the present statutes which describe the crimes of child abuse and abuse of an incompetent or disabled person (Neb.Rev.Stat. §§28-707 and 28-708 (Cum.Supp. 1984)) do not have any applicable definitional provisions. The definitions provided by Neb.Rev.Stat. §28-710 (Cum.Supp. 1984) are specifically applicable only to §§28-710 to 28-727. Furthermore, in a series of recent cases/*/ various aspects of §§28-707 and 28-708 have been struck down by district courts specifically due to inadequate definition of the terms and phrases employed to describe the crimes in question.

/*/ State v. Frey, District Court of Lancaster County, Docket 65, Page 218 (aff'd in part and rev'd in part), 218 Neb. 558, N.W.2d (1984); State v. Sinica, District Court of Lancaster County, Docket 66, Page 169; State v. Collins and State v. Becke, District Court of Douglas County, Docket 115, Page 742.

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In reviewing the recent cases concerning §§28-707 and 28-708 the specific areas of concern have been (1) the definition of "an incompetent or disabled person," (2) the legal duty of a responsible person to protect the minor child, incompetent or disabled person, (3) the definition of "a situation that endangers his or her life or health," (4) the definition of "cruelly confined or cruelly punished," and (5) the definition of "necessary" in the context of food, clothing, shelter or care. We review the present language of LB 320 from the standpoint of the concerns noted by the various district courts.

LB 320

LB 320 would create the Adult Protective Services Act which among other items makes it a crime to abuse a "vulnerable adult" (Section 18) and repeals the present criminal statute, §28-708, concerning "incompetent or disabled" persons (Section 29). The district court in State v. Frey, supra, found several shortcomings in the present language of §28-708. On appeal the Nebraska Supreme Court upheld §28-708 against a challenge based upon overbreadth but reversed for further proceedings on the question of vagueness. The definitional sections of LB 320 which would be applicable to the crime of abusing a "vulnerable adult" are comprehensive while no definitional provisions are presently applicable to §28-708. In our opinion, the new crime of abusing a "vulnerable adult" which would be created by LB 320, in light of the extensive definitional provisions of the bill, is not constitutionally suspect for vagueness or overbreadth. We further believe the legal duty created and defined by LB 320 resolves a further potential defect in the present language of §28-708.

LB 490

LB 490 would create definitional language applicable to the present provisions of §28-707 (abusing a minor child) and §28-708 (abusing an incompetent or disabled person) (Section 2). In addition it specifically requires the existence of a legal duty for a person "entrusted with the custody or care" of either a minor child (§28-707(1)) or an incompetent or dependent person (§28-708(1)). In so doing, it is our opinion that LB 490 remedies the problems found by the district courts to exist in the present language of §28-707 and §28-708 and as such is not constitutionally suspect for vagueness or overbreadth. A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding. State v. Sprague, 213 Neb. 581, 330 N.W.2d 739 (1983). Again, although couched in somewhat different language than that contained in LB 320, the creation and definition of a legal duty by LB 490 appears to resolve a

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potential defect in the present language of §§28-707 and 28-708.

We note in closing that LB 320 repeals §28-708 and substitutes an entirely new crime while LB 490 merely amends and defines the present §28-708. Care should be taken to clarify the final intent of the Legislature regarding §28-708 should both LB 320 and LB 490 appear likely to become law, lest the definitional provisions of LB 490 be applicable in part to a statute repealed by LB 320.

Sincerely,

ROBERT M. SPIRE
Attorney General



Royce N. Harper
Assistant Attorney General

RNH:cw

cc: Patrick J. O'Donnell
Clerk of the Legislature
2018 State Capitol
Lincoln, Nebraska 68509