To: Public Health and Welfare; Judiciary B

By: Representative Franks

MISSISSIPPI LEGISLATURE
REGULAR SESSION 2001

HOUSE BILL NO. 1319

AN ACT TO AMEND SECTION 43-47-5, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT THE DEPARTMENT OF HUMAN SERVICES SHALL BE AUTHORIZED AND DIRECTED TO INVESTIGATE ANY ALLEGATION OF ABUSE, NEGLECT OR EXPLOITATION OF A PATIENT IN A CARE FACILITY IF THE ALLEGED ACTION OCCURRED AT A PRIVATE RESIDENCE; TO AMEND SECTION 43-47-7, MISSISSIPPI CODE OF 1972, TO ADD LICENSED MEDICAL PERSONNEL AND OTHER ENTITIES TO THE ENUMERATION OF MANDATED REPORTERS OF ABUSE, NEGLECT AND EXPLOITATION UNDER THE VULNERABLE ADULTS ACT AND TO PRESCRIBE CRIMINAL PENALTIES FOR FAILING TO MAKE SUCH REQUIRED REPORTS, TO PROVIDE THAT ADULT CENTRAL REGISTRY CRIMINAL BACKGROUND CHECKS SHALL BE MANDATORY ON EMPLOYEES, PROSPECTIVE EMPLOYEES, VOLUNTEERS AND PROSPECTIVE VOLUNTEERS OF ADULT CARE FACILITIES UNDER THE VULNERABLE ADULTS ACT AND TO PROVIDE FOR THE CONFIDENTIALITY OF SUCH REPORTS BY THE DEPARTMENT OF HUMAN SERVICES; TO AMEND SECTION 43-47-9, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT A COURT MAY AUTHORIZE THE EVALUATION OF AN ABUSED ADULT UPON SHOWING OF PROBABLE CAUSE, INCLUDING AN EVALUATION OF THE FINANCIAL RECORDS OF THE VULNERABLE ADULT; TO AMEND SECTION 43-11-13, MISSISSIPPI CODE OF 1972, TO DIRECT THE STATE DEPARTMENT OF HEALTH TO REQUIRE ALL LICENSED NURSING FACILITIES TO CONDUCT CRIMINAL RECORD BACKGROUND CHECKS AND ADULT CENTRAL REGISTRY CHECKS ON EMPLOYEES, PROSPECTIVE EMPLOYEES AND VOLUNTEERS, TO PROVIDE IMMUNITY AND TO AUTHORIZE THE DEPARTMENT TO CHARGE THE LICENSEE A FEE FOR SUCH CRIMINAL RECORD CHECKS; TO PROVIDE ENHANCED PENALTIES FOR CRIMES COMMITTED AGAINST PERSONS AGED 65 OR OLDER; TO REQUIRE NOTICE OF PENALTY ENHANCEMENT; TO PROVIDE FOR A SEPARATE SENTENCING PROCEEDING; TO PROVIDE THAT PENALTIES MAY BE DOUBLED; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. Section 43-47-5, Mississippi Code of 1972, is amended as follows:

43-47-5. For the purposes of this chapter, the following words shall have the meanings ascribed herein unless the context otherwise requires:

(a) "Abuse" shall mean the willful infliction of physical pain, injury or mental anguish on a vulnerable adult, the unreasonable confinement of a vulnerable adult, or the willful deprivation by a caretaker of services which are necessary to

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maintain the mental and physical health of a vulnerable adult.

"Abuse" shall not mean conduct which is a part of the treatment and care of, and in furtherance of the health and safety of a patient or resident of a care facility.

(b) "Care facility" shall mean:

(i) Any institution or place for the aged or infirm as defined in, and required to be licensed under, the provisions of Section 43-11-1 et seq.; and

(ii) Any long-term care facility as defined in Section 43-7-55; and

(iii) Any hospital as defined in, and required to be licensed under, the provisions of Section 41-9-1 et seq.; and

(iv) Any home health agency as defined in, and required to be licensed under, the provisions of Section 41-71-1 et seq.; and

(v) Any hospice as defined in, and required to be licensed under, the provisions of Chapter 85 of Title 41.

(c) "Caretaker" shall mean an individual, corporation, partnership or other organization which has assumed the responsibility for the care of a vulnerable adult, but shall not include the Division of Medicaid, a licensed hospital, or a licensed nursing home within the state.

(d) "Court" shall mean the chancery court of the county in which the vulnerable adult resides or is located.

(e) "Department" shall mean the Department of Human Services.

(f) "Emergency" shall mean a situation in which:

(i) A vulnerable adult is in substantial danger of death or irreparable harm if protective services are not provided immediately;

(ii) The vulnerable adult is unable to consent to services;
(iii) No responsible, able or willing caretaker, if any, is available to consent to emergency services; and
(iv) There is insufficient time to utilize the procedure provided in Section 43-47-13.

(g) "Emergency services" shall mean those services necessary to maintain a vulnerable adult's vital functions and without which there is reasonable belief that the vulnerable adult would suffer irreparable harm or death, and may include taking physical custody of the adult.

(h) "Essential services" shall mean those social work, medical, psychiatric or legal services necessary to safeguard a vulnerable adult's rights and resources and to maintain the physical or mental well-being of the person. These services shall include, but not be limited to, the provision of medical care for physical and mental health needs, assistance in personal hygiene, food, clothing, adequately heated and ventilated shelter, protection from health and safety hazards, protection from physical mistreatment and protection from exploitation. The words "essential services" shall not include taking a vulnerable adult into physical custody without his consent except as provided for in Section 43-47-15 and as otherwise provided by the general laws of the state.

(i) "Exploitation" shall mean the illegal or improper use of a vulnerable adult or his resources for another's profit or advantage.

(j) "Lacks the capacity to consent" shall mean that a vulnerable adult, because of physical or mental incapacity, lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including, but not limited to, provisions for health care, food, clothing or shelter. This may be reasonably determined by the department in emergency situations; in all other instances, the court shall make the determination following the procedures in Sections 43-47-13 and
43-47-15 or as otherwise provided by the general laws of the state.

(k) "Neglect" shall mean either the inability of a vulnerable adult who is living alone to provide for himself the food, clothing, shelter, health care or other services which are necessary to maintain his mental and physical health, or failure of a caretaker to supply the vulnerable adult with the food, clothing, shelter, health care, supervision or other services which are necessary to maintain his mental and physical health.

(l) "Protective services" shall mean services provided by the state or other government or private organizations, agencies or individuals which are necessary to protect a vulnerable adult from abuse, neglect or exploitation. They shall include, but not be limited to, investigation, evaluation of the need for services and provision of essential services on behalf of a vulnerable adult.

(m) "Vulnerable adult" shall mean a person eighteen (18) years of age or older or any minor not covered by the Youth Court Act who is present in the state and who, regardless of residence, is unable to protect his or her own rights, interests, and/or vital concerns and who cannot seek help without assistance because of physical, mental or emotional impairment. The term "vulnerable adult" shall also include all residents or patients, regardless of age, in a care facility for the purposes of Sections 43-47-19 and 43-47-37 only. Nothing in this chapter shall be construed as authorizing the Department of Human Services to perform any investigation, evaluation or examination or provide protective services, essential services or emergency services regarding any resident or patient in a care facility. Notwithstanding the provisions of this subsection, the department shall not be prohibited from investigating, and shall have the authority and responsibility to fully investigate, in accordance with the provisions of this chapter, any allegation of abuse,
SECTION 2. Section 43-47-7, Mississippi Code of 1972, is amended as follows:

43-47-7. (1) (a) Except as otherwise provided by Section 43-47-37 for vulnerable adults in care facilities, any person including, but not limited to, the following, who knows or suspects that a vulnerable adult has been or is being abused, neglected or exploited shall immediately report such knowledge or suspicion to the Mississippi Department of Human Services * * *:

(i) Physician, osteopathic physician, medical examiner, chiropractic physician, nurse or hospital personnel engaged in the admission, examination, care or treatment of disabled adults or elderly persons;

(ii) Health professional or mental health professional other than one listed in subsection (1);

(iii) Practitioner who relies solely on spiritual means for healing;

(iv) Nursing home staff, assisted living facility staff, adult day care center staff, adult family-care home staff, social worker or other professional adult care, residential or institutional staff;

(v) State, county or municipal criminal justice employee or law enforcement officer;

(vi) Human rights advocacy committee or long-term care ombudsman council member; or

(vii) Bank, savings and loan or credit union officer, trustee or employee.

(b) To the extent possible, a report made pursuant to paragraph (a) must contain, but need not be limited to, the following information:
(i) Name, age, race, sex, physical description and location of each vulnerable adult alleged to have been abused, neglected or exploited.

(ii) Names, addresses and telephone numbers of the vulnerable adult’s family members.

(iii) Name, address and telephone number of each alleged perpetrator.

(iv) Name, address and telephone number of the caregiver of the vulnerable adult, if different from the alleged perpetrator.

(v) Description of the physical or psychological injuries sustained.

(vi) Actions taken by the reporter; if any, such as notification of the criminal justice agency.

(vii) Any other information available to the reporting person which may establish the cause of abuse, neglect or exploitation that occurred or is occurring.

In addition to above, any person or entity holding or required to hold a license as specified in Title 73, Professions and Vocations, of the Mississippi Code of 1972, shall be required to give his, her or its name, address and telephone number in the report of the alleged abuse, neglect or exploitation.

(c) The department or its designees shall report to an appropriate criminal investigative or prosecutive authority any person required by this section to report or who fails to comply with this section. A person who fails to make a report as required under this subsection or who, because of the circumstances, should have known or suspected that a vulnerable adult suffers from abandonment, exploitation, abuse, neglect or self-neglect but who knowingly fails to comply with this section shall, upon conviction, be guilty of a misdemeanor and shall be punished by a fine of not exceeding Five Thousand Dollars ($5,000.00), or by imprisonment in the county jail for not more
than six (6) months, or both such fine and imprisonment. If a
person convicted under this section is a member of a profession or
occupation that is licensed, certified or regulated by the state,
the court shall notify the appropriate licensing, certifying or
regulating entity of the conviction.

(2) Reports received by law enforcement authorities or other
agencies shall be forwarded immediately to the Department of Human
Services or the county welfare department.

(3) The report may be made orally or in writing, but where
made orally, it shall be followed up by a written report.

(4) Anyone who makes a report pursuant to this section, who
testifies or participates in any judicial proceedings arising from
the report or who participates in a required investigation or
evaluation shall be presumed to be acting in good faith and in so
doing shall be immune from liability, civil or criminal, that
might otherwise be incurred or imposed.

(5) A person who intentionally makes a false report under
the provisions of this section may be found liable in a civil suit
for any actual damages suffered by the person or persons so
reported and for any punitive damages set by the court or jury.

(6) The Executive Director of the Department of Human
Services shall establish a statewide central register of reports
made pursuant to this section. The central register shall be
capable of receiving reports of vulnerable adults in need of
protective services seven (7) days a week, twenty-four (24) hours
a day. To effectuate this purpose the executive director shall
establish a single toll-free statewide phone number that all
persons may use to report vulnerable adults in need of protective
services, and that all persons authorized by subsection (7) of
this section may use for determining the existence of prior
reports in order to evaluate the condition or circumstances of the
vulnerable adult before them. Such oral reports and evidence of
previous reports shall be transmitted to the appropriate county
welfare department. The central register shall include, but not be limited to, the following information: the name and identifying information of the individual reported, the county welfare department responsible for the investigation of each such report, the names, affiliations and purposes of any person requesting or receiving information which the executive director believes might be helpful in the furtherance of the purposes of this chapter.

Upon request, a vulnerable adult who is the subject of a report or, if the vulnerable adult is legally incapacitated, the guardian or guardian ad litem of the vulnerable adult shall be entitled to receive a copy of all information contained in the registry pertaining to his or her case.

Each person, business, organization or other entity, whether public or private, operated for profit, operated for nonprofit or a voluntary unit of government not responsible for law enforcement providing care, supervision or treatment of adults or vulnerable persons shall conduct criminal records and adult central registry checks on each employee, prospective employee, volunteer or prospective volunteer of the entity who provides, and/or would provide services to adults or vulnerable persons.

The department shall not release data that would be harmful or detrimental to the vulnerable adult or that would identify or locate a person who, in good faith, made a report or cooperated in a subsequent investigation unless ordered to do so by a court of competent jurisdiction.

(7) Reports made pursuant to this section, reports written or photographs taken concerning such reports in the possession of the Department of Human Services or the county welfare department shall be confidential and shall only be made available to:

(a) A physician who has before him a vulnerable adult whom he reasonably suspects may be abused, neglected or exploited, as defined in Section 43-47-5;
(b) A duly authorized agency having the responsibility for the care or supervision of a subject of the report;
(c) Any person who is the subject of the report;
(d) A grand jury or a court of competent jurisdiction, upon finding that the information in the record is necessary for the determination of charges before the grand jury;
(e) A district attorney or other law enforcement official.

Notwithstanding subsection 7(b) hereof, the department may not disclose a report of the abandonment, exploitation, abuse, neglect or self-neglect of a vulnerable adult to the vulnerable adult's guardian, attorney-in-fact, surrogate decision maker, or care giver who is a perpetrator or alleged perpetrator of the abandonment, exploitation, abuse or neglect of the vulnerable adult.

Any person given access to the names or other information identifying the subject of the report, except the subject of the report, shall not divulge or make public such identifying information unless he is a district attorney or other law enforcement official and the purpose is to initiate court action. Any person who willfully permits the release of any data or information obtained pursuant to this section to persons or agencies not permitted to such access by this section shall be guilty of a misdemeanor.

(8) Upon reasonable cause to believe that a caretaker or other person has abused, neglected or exploited a vulnerable adult, the department shall promptly notify the district attorney of the county in which the vulnerable adult is located, except as provided in Section 43-47-37(2).

SECTION 3. Section 43-47-9, Mississippi Code of 1972, is amended as follows:

43-47-9. (1) Upon receipt of a report pursuant to Section 43-47-7 that a vulnerable adult is in need of protective services,
the department shall initiate an investigation and/or evaluation within forty-eight (48) hours to determine whether the vulnerable adult is in need of protective services and what services are needed. The evaluation shall include any necessary visits and interviews with the adult, and if appropriate, with the alleged perpetrator of the dependent adult abuse and with any person believed to have knowledge of the circumstances of the case. When a caretaker of a vulnerable adult refuses to allow the department reasonable access to conduct an investigation to determine if the vulnerable adult is in need of protective services, the department may petition the court for an order for injunctive relief enjoining the caretaker from interfering with the investigation.

The department may provide necessary protective services and may establish a sliding fee schedule for those persons able to pay a portion of the protective services.

(2) The staff and physicians of local health departments, mental health clinics and other public or private agencies, including law enforcement agencies, shall cooperate fully with the department in the performance of its duties. These duties include immediate, in-residence evaluations and medical examinations and treatment where the department deems it necessary. Provided, however, that upon receipt of a report of abuse, neglect or exploitation of a vulnerable adult confined in a licensed hospital or licensed nursing home facility in the state, the department shall immediately refer this report to the proper authority at the State Department of Health for investigation under Section 43-47-37.

Upon a showing of probable cause that an adult has been abused, a court may authorize a person, also authorized by the department, to make an evaluation, to enter the residence of, and to examine the dependent adult. Upon a showing of probable cause that a dependent adult has been financially exploited, a court may authorize a person, also authorized by the department, to make an
evaluation, and to gain access to the financial records of the
dependent adult.

(3) The department may contract with an agency or private
physician for the purpose of providing immediate, accessible
evaluations in the location that the department deems most
appropriate.

SECTION 4. Section 43-11-13, Mississippi Code of 1972, is
amended as follows:

43-11-13. (1) The licensing agency shall adopt, amend,
promulgate and enforce such rules, regulations and standards,
including classifications, with respect to all institutions for
the aged or infirm to be licensed hereunder as may be designed to
further the accomplishment of the purpose of this chapter in
promoting adequate care of individuals in such institutions in the
interest of public health, safety and welfare. Such rules,
regulations and standards shall be adopted and promulgated by the
licensing agency and shall be recorded and indexed in a book to be
maintained by the licensing agency in its main office in the State
of Mississippi, entitled "Rules, Regulations and Minimum Standards
for Institutions for the Aged or Infirm" and said book shall be
open and available to all institutions for the aged or infirm and
the public generally at all reasonable times. Upon the adoption
of such rules, regulations and standards, the licensing agency
shall mail copies thereof to all such institutions in the state
which have filed with said agency their names and addresses for
this purpose, but the failure to mail the same or the failure of
the institutions to receive the same shall in no wise affect the
validity thereof. Said rules, regulations and standards may be
amended by the licensing agency from time to time as necessary to
promote the health, safety and welfare of persons living in said
institutions.

(2) The licensee shall keep posted in a conspicuous place on
the licensed premises all current rules, regulations and minimum
standards applicable to fire protection measures as adopted by the licensing agency. The licensee shall furnish to the licensing agency at least once each six (6) months a certificate of approval and inspection by state or local fire authorities. Failure to comply with state laws and/or municipal ordinances and current rules, regulations and minimum standards as adopted by the licensing agency, relative to fire prevention measures, shall be prima facie evidence for revocation of license.

(3) The State Board of Health shall promulgate rules and regulations restricting the storage, quantity and classes of drugs allowed in personal care homes. Residents requiring administration of Schedule II Narcotics as defined in the Uniform Controlled Substances Law may be admitted to a personal care home. Schedule drugs may only be allowed in a personal care home if they are administered or stored utilizing proper procedures under the direct supervision of a licensed physician or nurse.

(4) The licensing agency shall require that all licensees conduct criminal records background checks and adult central registry checks on each employee, prospective employee, volunteer or prospective volunteer who provides or would provide personal care or have personal contact with any resident of an institution for the aged or infirm. In order to conduct the criminal records background check, each employee, prospective employee, volunteer or prospective volunteer shall be fingerprinted. If no disqualifying record is identified at the state level, the fingerprints shall be forwarded by the Department of Public Safety to the Federal Bureau of Investigation for a national criminal history record check.

(5) The licensing agency and its agents, officers, employees, attorneys and representatives shall not be held civilly liable for any findings, recommendation or actions taken pursuant to this section.
(6) All fees incurred in compliance with this section shall be borne by the institution for the aged or infirm. The licensing agency is hereby authorized to charge a fee which shall include the amount required by the Federal Bureau of Investigation for the national criminal history record check and any necessary costs incurred by the licensing agency for the handling and administration of the criminal history background checks.

SECTION 5. The penalty for any felony or misdemeanor shall be subject to enhancement as provided in this act if the felony or misdemeanor was committed if the defendant knew or should have known that the victim is sixty-five (65) years of age or older.

SECTION 6. (1) For enhancement of the penalty for a felony offense to apply, the prosecuting attorney if the defendant is charged by information, or grand jury if an indictment is returned, shall provide notice upon the information or indictment that the prosecutor will seek the enhanced penalty provided in this act. The notice shall be in a clause separate from and in addition to the substantive offense charged and shall not be considered as an element of the offense charged.

(2) For enhancement of the penalty for a misdemeanor to apply, the affiant, the prosecuting attorney if the defendant is charged by information, or grand jury if an indictment is returned, shall provide written notice that the enhanced penalty will be sought as provided in this act. The notice shall be in a clause separate from and in addition to the substantive offense charge and shall not be considered as an element of the offense charged.

(3) There shall be no mention in the guilt or innocence phase of the trial or in any documents or evidence seen by the jury that an enhanced penalty may be sought.

SECTION 7. (1) Upon conviction or adjudication of guilt of a defendant where notice has been duly given that an enhanced penalty will be sought as provided in this act, the court shall
conduct a separate sentencing proceeding to determine the sentence. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge shall summon a jury to determine whether an enhanced penalty should be imposed. If trial by jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. Provided, however, that if the defendant enters a plea of guilty and waives trial by jury for the sentencing proceeding, the sentencing proceeding shall be conducted before the trial judge sitting without a jury. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Mississippi. The state and the defendant or his counsel or both defendant and counsel shall be permitted to present arguments for or against any sentence sought.

(2) In order to impose an enhanced penalty under the provisions of this act, the jury must find beyond a reasonable doubt:

   (a) That the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated; and

   (b) That the defendant maliciously and with specific intent committed the offense because the victim was within the class delineated.

(3) That the victim was within the class delineated means that the reason the underlying crime was committed was because the defendant knew or should have known that the victim is sixty-five years of age or older.
SECTION 8. In the event it is found beyond a reasonable doubt that the offense was committed and the defendant knew or should have known that the victim is sixty-five (65) years of age or older, then the penalty for the offense may be enhanced by punishment for a term of imprisonment of up to twice that authorized by law for the offense committed, or a fine of up to twice that authorized by law for the offense committed, or both.

SECTION 9. This act shall take effect and be in force from and after July 1, 2001.