

January 26, 2012

Senator Kathy Campbell, Chair
Health and Human Services Committee
State Capitol
Lincoln, NE 68509

RE: LB 957

Dear Senator Campbell and members of the HHS Committee:

I am writing to oppose LB 957 which would create the Office of Inspector General for child welfare.

The existing authority for oversight and investigation of administrative acts of executive branch agencies rests with the Office of Public Counsel. LB 957 would expand that role by extending the Office's authority to private citizens and entities through the creation of a new Office of Inspector General within the Office of Public Counsel.

The bill would give the Inspector General jurisdiction to investigate the following private individuals and entities:

- Private agencies and their subcontractors
- Licensed child care facilities
- Foster parents
- Any provider of child welfare services
- Any program or facility licensed by DHHS; and
- Individuals credentialed under the Uniform Credentialing Act

Oversight and investigation of all these individuals and entities is a function of the executive branch and expanding the role of the legislative branch in this way raises Constitutional questions regarding separation of powers. The Nebraska Constitution provides for the three branches of government and states that "no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted in this Constitution."¹ This separation of powers clause prohibits one branch of government from exercising the duties of another branch.² The Nebraska Supreme Court has stated that the function of the Nebraska Legislature is, "through the enactment of statutes to declare the law and public policy and to define crimes and punishments."³

¹ Neb. Const, art. II § 1.

² *State ex rel. Spire v. Conway*, 238 Neb. 766 (1991).

³ *Id.*, at 230.

Under LB 957, the role of the Inspector General, acting as an arm of the legislative branch, would go beyond the lawmaking function. Section 24 of the bill suggests that the Inspector General would conduct or be involved in criminal investigations by its requirement for the Inspector General to “ensure the preservation of evidence for possible use in a criminal prosecution.” This type of criminal investigation is typically a function of the executive branch.

In addition to the separation of powers issue, several individual Constitutional rights are affected by several provisions of LB 957. Section 23 of the bill provides for criminal liability when a person fails to comply with a subpoena or even fails to answer a question in contrast to current statute requiring the Public Counsel to enforce subpoenas through the courts.⁴ By making failure to comply a criminal offense, the individual served with a subpoena is not afforded the due process protection⁵ of being able to quash a subpoena for various reasons or to invoke attorney-client or doctor-patient privilege.

Another constitutional right affected by this bill is the right against self-incrimination.⁶ Because of the bill’s criminal penalty for refusal to comply with a subpoena or answer questions, a person being investigated by the Inspector General may in some circumstances be presented with the dilemma of either providing information that may result in his/her own criminal prosecution or facing criminal prosecution for refusing to provide such information. Additionally, since it appears from the bill that Inspector General investigations could lead to criminal prosecution, the question remains whether the Inspector General would be required to administer a *Miranda* warning before questioning individuals or obtain a warrant before seizing records.⁷

Yet another due process issue raised by LB 957 relates to the bill’s provisions on access to reports of the Inspector General. The bill is restrictive in dictating who may receive such a report. None of the individuals or entities receiving a report is allowed to distribute it further or to disclose any information contained in the report without approval of the Inspector General. The Inspector General, however, may distribute a report to a juvenile court judge and a child’s guardian ad litem. The consideration of information in this report by a juvenile court may amount to an *ex parte* communication⁸ and therefore violate due process rights of the parties. In addition, the parties would almost certainly not have the ability to cross-examine the

⁴ See Neb. Rev. Stat. § 81-8,245 (5).

⁵ Due process rights are addressed in the Nebraska Constitution at Neb. Const. art I, sec. 3.

⁶ The right against self-incrimination is addressed in the Nebraska Constitution at Neb. Const. art I, sec. 12.

⁷ Protection against unreasonable search and seizure is addressed in the Nebraska Constitution at Neb. Const. art I, sec. 7.

⁸ Judges are prohibited from permitting or considering *ex parte* communications by the Neb. Rev. Code of Judicial Conduct § 5-302.9. “An ‘*ex parte* communication’ occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party.” *In re Interest of Chad S.*, 263 Neb. 184 (2002).

Inspector General as the author of the report or other witnesses cited in the report, even if they somehow learned of the content of the report.

In addition to these Constitutional issues, there are several administrative concerns that are presented by the bill. First, the bill may result in the Inspector General's interference with criminal or civil investigations being carried out by DHHS, law enforcement or other agencies. Additionally, authorizing the Inspector General to investigate private citizens would place an undue burden on Nebraska's private child welfare agencies, child care providers, foster parents, and licensed health professionals. In particular, this bill would require those individuals and entities to submit to additional investigations that are conducted separate from and in addition to investigations by DHHS, law enforcement, or other governmental agencies. Consider the number of bodies overseeing just one type of these of providers, foster parents: They are frequently visited by the foster child's caseworker, guardian ad litem, and CASA worker; they are subject to inspections by the Foster Care Review Board, an independent body that is likely better suited to oversee foster homes; they are subject to licensing inspections by DHHS; and if a foster child goes on run or has an unexplained injury, they may be questioned by law enforcement and child protective services. It is unnecessary and unfair to ask these individuals, who open their homes and lives in service of our children, to bear yet another intrusion into their lives, particularly at a time when it is so critical to retain and recruit good foster parents.

Related to this is the issue of evidentiary and chain of custody concerns. Because LB 957 allows the Inspector General to seize original records, it is unclear how a law enforcement agency would be able to gather necessary evidence for criminal prosecution or prove chain of custody when the Inspector General has seized such originals.

Finally, LB 957 requires the Inspector General to maintain a toll-free telephone line for complaints. This means that in some circumstances, such as with child abuse and neglect allegations and complaints against UCA-credentialed professionals, an individual potentially has three agencies to which a report is required or allowed: DHHS, law enforcement, and the Inspector General. There is no requirement for the Inspector General to refer or disclose certain complaints to DHHS or law enforcement. This may result in undue confusion to the public and may potentially result in some reports "falling through the cracks" when they are reported to only the Inspector General.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kerry T. Winterer", is written over the word "Sincerely,".

Kerry T. Winterer, CEO
Nebraska Department of Health and Human Services