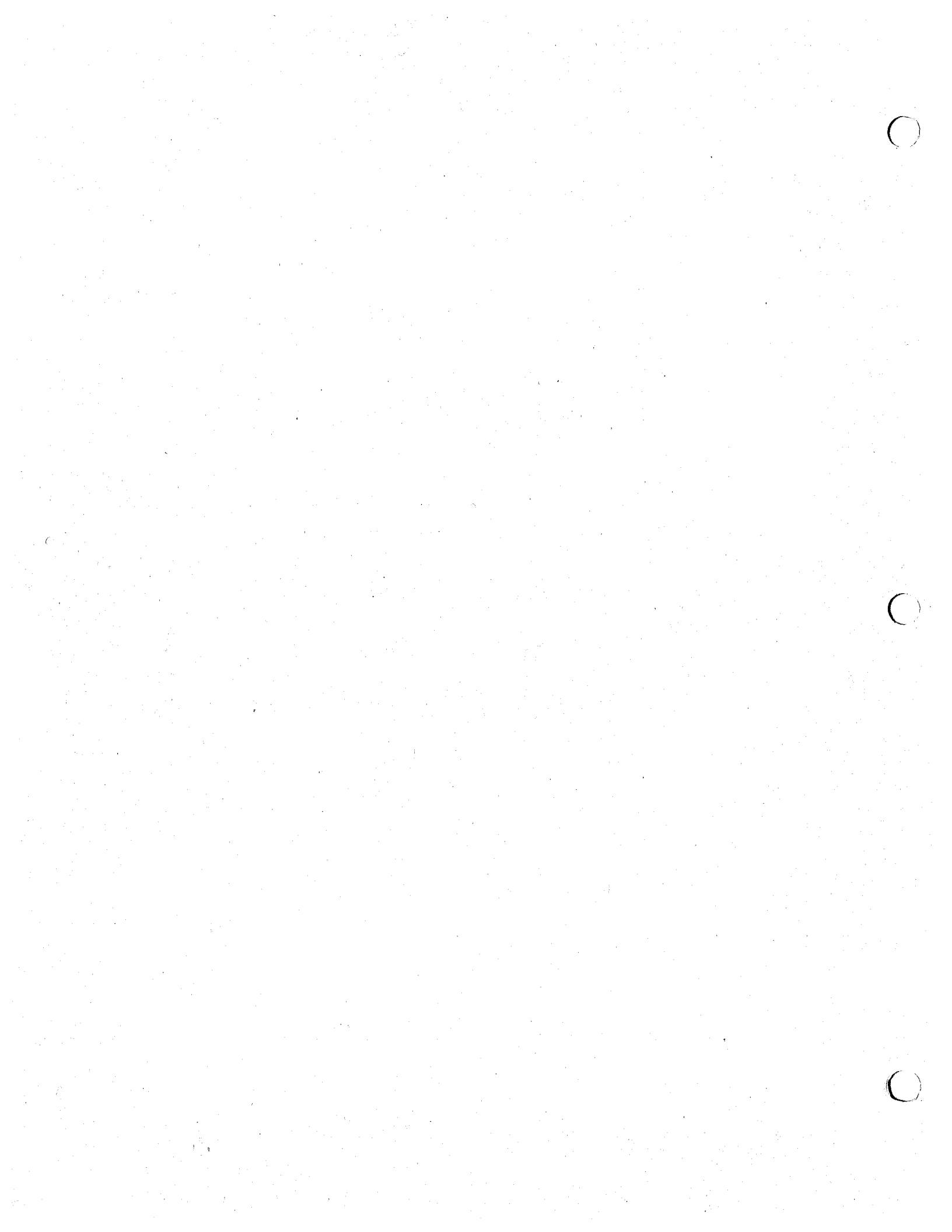




**CHAPTER 16**

**ELDER/ADULT  
PROTECTION LAW**





# PENOBSCOT INDIAN NATION

## ELDER/ADULT PROTECTION LAW

January 6, 2006

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## ELDER/ADULT PROTECTION LAW

### ARTICLE ONE

#### Title

This Act will be cited as the Elder/Adult Protection Law.

### ARTICLE TWO

#### Declaration of Intent

The Penobscot Indian Nation (PIN) recognizes that many members of the tribe, because of incapacitation or dependency, are unable to manage their own affairs or to protect themselves from abuse, neglect or exploitation. Often these persons can not find others able or willing to render assistance. The PIN intends, through this law, to establish a program of protective services designed to fill this need and to ensure its availability to all incapacitated and dependent adults who are faced with abuse, neglect, exploitation or the substantial risk of abuse, neglect or exploitation. It is also the intent of the PIN 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. Any requirements for disclosure of information contained in this chapter do not supersede federal law if federal law prohibits the disclosure of such information in the manner as set forth in this law.

**The Penobscot Indian Nation, its Department of Human Services and its Tribal Court Clerk are unable to provide legal advice or interpretation of the PIN's Law, Maine Law, or Federal Law to the public. If you need legal advice, please consult a qualified attorney.**

## ARTICLE THREE

### Definitions

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

1. **Abuse.** "Abuse" means the infliction of injury, unreasonable confinement, intimidation or cruel punishment that causes or is likely to cause physical harm or pain or mental anguish; sexual abuse or sexual exploitation; or the intentional, knowing or reckless deprivation of essential needs. "Abuse" includes acts and omissions.
2. **Adult.** "Adult" means any person who has attained 18 years of age or who is a legally emancipated minor.
3. **Department.** "Department" means the Penobscot Indian Nation Department of Human Services.
4. **Caretaker.** "Caretaker" means any individual or institution who has or which assumes the responsibility for the care of an adult.
5. **Dependent Adult.** "Dependent adult" means an adult who has a physical or mental condition that substantially impairs the adult's ability to adequately provide for that adult's daily needs. "Dependent adult" includes, but is not limited to, any of the following:
  - A. a resident of a nursing home licensed or required to be licensed under MRSA Title 22, Section 1817;
  - B. a resident of a facility providing assisted living services licensed or required to be licensed under the State of Maine; or
  - C. a person considered a dependent person under MRSA Title 17-A, Section 555.
6. **Emergency.** "Emergency" refers to a situation in which:
  - 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 that will diminish or eliminate the risk;
  - C. there is no person legally authorized or available to consent to emergency services.

7. **Emergency Services.** "Emergency services" refers to those services necessary to avoid serious harm.
8. **Exploitation.** "Exploitation" means the illegal or improper use of an incapacitated or dependent adult or that adult's resources for another's profit or advantage.
9. **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 that individual lacks sufficient understanding or capacity to make or communicate responsible decisions concerning that individual's person, or to the extent the adult cannot effectively manage or apply that individual's estate to necessary ends.
10. **In Camera.** In chambers; in private. A cause is said to be heard *in camera* either when the hearing is had before the judge in his private chambers or when all spectators are excluded from the courtroom.
11. **Neglect.** "Neglect" means a threat to an adult's health or welfare by physical or mental injury or impairment, deprivation of essential needs or lack of protection from these.
12. **Protective Services.** "Protective services" means services that 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 or dependent adult's rights and resources and to maintain the incapacitated or dependent adult's physical and mental well-being.

Protective services may include seeking guardianship or a protective order under MRSA Title 18-A, Article 5.

13. **Serious Harm.** "Serious harm" means:
  - A. serious physical injury or impairment;
  - B. serious mental injury or impairment that now or in the future is likely to be evidenced by serious mental, behavioral or personality disorder, including, but not limited to, severe anxiety, depression or withdrawal, untoward aggressive behavior or similar serious dysfunctional behavior;
  - C. sexual abuse or sexual exploitation; or
  - D. serious waste or dissipation of resources.
14. **Sexual Abuse or Sexual Exploitation.** "Sexual abuse or sexual exploitation" means contact or interaction of a sexual nature involving an incapacitated or dependent adult without that adult's informed consent.

## ARTICLE FOUR

### Authorizations

1. **General.** The Department shall act to:
  - A. protect incapacitated and dependent adults from abuse, neglect and exploitation and protect incapacitated and dependent adults in circumstances that present a substantial risk of abuse, neglect or exploitation;
  - B. prevent abuse, neglect or exploitation of incapacitated and dependent adults;
  - C. enhance the welfare of these incapacitated and dependent adults; and
  - D. promote self-care wherever possible.
  
2. **Reports.** The Department shall:
  - A. receive, promptly investigate and determine the validity of reports of alleged abuse, neglect or exploitation or the substantial risk of abuse, neglect or exploitation;
  - B. take appropriate action, including providing or arranging for the provision of appropriate services and making referrals to law enforcement; and
  - C. petition for guardianship or a protective order under MRSA Title 18-A, Article 5, when all less restrictive alternatives have been tried and have failed to protect the incapacitated adult.
  
3. **Appearance of designated employees in Tribal Court.** The PIN may designate employees of the Department to represent the Department in Tribal Court or State of Maine Probate Court in:
  - A. matters relating to the performance of duties in uncontested guardianship or conservatorship or termination of guardianship or conservatorship proceedings; and
  - B. requests for emergency guardianships arising from the need for emergency medical treatment or placement in assisted living programs, residential care facilities or nursing facilities or for orders necessary to apply for or preserve an estate in emergency situations.



## ARTICLE FIVE

### Records; confidentiality, disclosures

1. **Confidentiality of adult protective 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, with protection for the identity of reporters and other persons when appropriate:
  - A. an agency responsible for 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, United States Public Law 88-164, Title I, Part C or United States Public Law 99-319, except as provided in subsection 3, paragraph D;
  - C. a physician treating an incapacitated or dependent adult who the physician 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;
  - E. a person having the legal responsibility or authorization to care for, evaluate, treat or supervise an incapacitated or dependent adult;
  - F. any person engaged in bona fide research may only access information or records of the Department with prior authorization from the PIN Tribal Council;
  - G. a relative by blood, marriage or adoption of an incapacitated or dependent adult names in a record; and
  - H. a member of a panel appointed by the Department or the Maine State Office of the Attorney General to review the death or serious injury of an incapacitated or dependent adult.
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 must be limited to in camera inspection unless the court determines that 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 advocacy agency conducting an investigation under Chapter 961, United States Public Law 88-164, Title I, Part C or United States Public Law 99-319, regarding a developmentally disabled person or mentally ill person who is or who, within the last 90 days, was residing in a facility rendering care or treatment, when a complaint has been received by the agency or there is probable cause to believe that that individual has been subject to abuse or neglect, and that person does not have a legal guardian or the person is under public guardianship. The determination of which information and records are relevant to the investigation is made by agreement between the Department and the agency.

## ARTICLE SIX

### 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 \$5,000 may be adjudged. Any licensed, registered, accredited or certified professional who has been adjudged to have violated a provision of this chapter must, in addition to any financial penalty, be reported by the court or the Department to the appropriate professional licensing organization, registration board, accrediting unit or facility.

## ARTICLE SEVEN

### 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 a 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 a practitioner of a recognized religious organization may also be considered if requested by the incapacitated or disabled adult or his/her caretaker.
  
3. **Treatment by a Native Organization; Native Healer/Practitioner.** Nothing shall be construed to mean a person is abused, neglected, or in need of emergency or protective services for the sole reason that the person relies upon and is, therefore, being furnished treatment by a spiritual means through prayer alone in accordance with the tenets and practices of a well-recognized church or religious denomination or Native Organization healer/practitioner; nor shall anything in such sections be construed to authorize, permit, or require any medical care or treatment in contravention of the stated or implied objection of such person. Such construction does not:
  - A. eliminate the requirement that such a case be reported to the Department;
  - B. prevent the Department from investigating such a case; or
  - C. preclude a Court from ordering, when the health of the individual requires it, the provision of medical services by a licensed physician or treatment by a practitioner who relies on spiritual means for healing in accordance with the tenets and practices of a well-organized church or religious denomination or Native healer/practitioner.

## ARTICLE EIGHT

### Persons Mandated to Report Suspected Abuse, Neglect or Exploitation

1. **Report required.** The following persons immediately shall report to the Department when the person has reasonable cause to suspect that an incapacitated or dependent adult has been or is at substantial risk of abuse, neglect or exploitation.
  - A. While acting in a professional capacity:
    - (1) a physician;
    - (2) a physician's assistant;
    - (3) a dentist;
    - (4) a podiatrist;
    - (5) a registered or licensed practical nurse;
    - (6) a certified nursing assistant;
    - (7) a social worker;
    - (8) a psychologist;
    - (9) a pharmacist;

- (10) a speech therapist;
  - (11) a mental health professional;
  - (12) a law enforcement official;
  - (13) unlicensed assistive personnel
  - (14) a Senior Meals Driver; or
  - (15) a clergy member acquiring the information as a result of clerical professional work except for information received during confidential communications.
- B. Any person who has assumed full, intermittent or occasional responsibility for the care or custody of the incapacitated or dependent adult, regardless of whether the person receives compensation;
  - C. Any person affiliated with a church or religious institution who serves in an administrative capacity or has otherwise assumed a position of trust or responsibility to the members of that church or religious institution, while acting in that capacity, regardless of whether the person receives compensation.

The duty to report under this subsection applies to individuals who must report directly to the Department. A supervisor or administrator of a person making a report under this section may not impede or inhibit the reporting, and a person making a report may not be subject to any sanction for making a report. Internal procedures to facilitate, ensure confidentiality, and apprise supervisors and administrators of reports may be established as long as those procedures are not inconsistent with this law.

- 2. **Reports.** Reports regarding abuse, neglect or exploitation must be made immediately by telephone to the Department and must be followed by a written report within 48 hours if requested by the Department. The reports must contain the name and address of the involved adult; information regarding the nature and extent of the abuse, neglect or exploitation; the source of the report; the person making the report; that person's occupation; and where that person can be contacted. The report may contain any other information that the reporter believes may be helpful.
- 3. **Confidentiality in case of treatment of individual suspected of causing abuse, neglect or exploitation.** This section does not require any person acting in that person's professional capacity to report when all of the following requirements are met:
  - A. the factual basis for knowing or suspecting abuse, neglect or exploitation of an adult covered under this subchapter derives from the professional's treatment of the individual suspected of causing the abuse, neglect or exploitation;
  - B. the treatment was sought by the individual for a problem relating to the abuse, neglect or exploitation; and

- C. in the opinion of the person required to report, the abused, neglected or exploited adult's life or health is not immediately threatened.
4. **Confidentiality in case of treatment of individual suspected of being abused, neglected or exploited.** This section does not require any person acting in that person's professional capacity to report when all of the following requirements are met:
- A. The factual basis for knowing or suspecting abuse, neglect, or exploitation of an adult covered in this subchapter derives from the professional's treatment of the individual suspected of being abused, neglected or exploited;
  - B. The treatment was sought by the individual for a problem relating to the abuse, neglect or exploitation; and
  - C. In the opinion of the person required to report, the individual is not incapacitated and the individual's life or health is not immediately threatened.

## ARTICLE NINE

### Mandatory Reporting to Medical Examiner for Postmortem Investigation

A person required to report cases of known or suspected abuse or neglect, who knows or has reasonable cause to suspect that an adult has died as a result of abuse or neglect, shall report that fact to the appropriate authority. An adult shall not be considered to be abused or neglected solely because he/she was provided with treatment by spiritual means by a practitioner of a recognized religious organization or a Native American healer/practitioner.

## ARTICLE TEN

### Optional Reporting

Any person may make a report to the Department when that person has reasonable cause to suspect an incapacitated or dependent adult has been or is at substantial risk of abuse, neglect or exploitation.

## ARTICLE ELEVEN

### Immunity from Liability

1. **Reporting and proceedings.** A person participating in good faith in reporting under this subchapter, or in a related adult protection investigation or proceeding, is immune from any civil liability that might otherwise result from these actions, including, but not limited to, any civil liability that might otherwise arise under tribal laws or rules regarding confidentiality of information.
2. **Presumption of good faith.** In a proceeding regarding immunity from liability, there shall be a rebuttable presumption of good faith.

## ARTICLE TWELVE

### Investigations

1. **Subpoenas and obtaining criminal history.** The Department will petition the Tribal Court to:
  - A. Issue subpoenas requiring persons to disclose or provide to the Department information or records in their possession that are necessary and relevant to an investigation of a report of suspected abuse, neglect or exploitation or to a subsequent adult protective proceeding, including, but not limited to, health care information.
    - (1) 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
    - (2) the Department or appropriate Law Enforcement Agency may obtain non-conviction data and other criminal history records which they deem relevant to a case of alleged abuse, neglect or exploitation.
2. **Confidentiality.** Information or records obtained by subpoena shall be kept confidential as is applicable by law.
3. **Right of entry and access to records of licensed facilities.** The Department's duly designated officer or employee has the right to enter upon and into the premises of any facility within Penobscot Indian Territory and licensed under Title 22 MRSA Sections 1817 and 7801 in order to obtain information necessary and relevant to an investigation of a report of suspected abuse, neglect or exploitation or to a subsequent adult protective proceeding. The Department has access to all records in the facility's possession that are relevant to the investigation of a report of suspected abuse, neglect or exploitation and any subsequent adult protective

proceeding and the Department is not required to obtain a subpoena to the facility before obtaining access to the records.

### ARTICLE THIRTEEN

#### Confidential Communications

The confidential quality of communications is abrogated to the extent allowable under federal law in relation to required reporting or cooperating with the Department in an investigation or other protective activity under this law. Information released to the Department pursuant to this law must be confidential and may not be disclosed by the Department except as provided in Article Five.

### ARTICLE FOURTEEN

#### 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/she 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 to the Tribal Court, or Maine State Probate Court as appropriate, for removal of the guardian pursuant to MRSA Title 18-A, section 5-307, or for removal of the conservator pursuant to MRSA 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 Tribal Court, or Maine State Probate Court as appropriate, for temporary guardianship pursuant to MRSA Title 18-A, section 5-310-A or for a protective arrangement pursuant to MRSA Title 18-A, section 5-409.

## ARTICLE FIFTEEN

### 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 Tribal Court, or Maine State Probate Court as appropriate, for guardianship or conservatorship, in accordance with MRSA 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.

## ARTICLE SIXTEEN

### Emergency Intervention; Authorized Entry of Premises; Immunity of Petitioner

1. **Action.** When the Tribal Court has exercised the power of guardian or has appointed the Department temporary guardian pursuant to MRSA Title 18-A, section 5-310-A, 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.
2. **Liability.** No petitioner shall be held liable in any action brought by the incapacitated adult if the petitioner acted in good faith.

## ARTICLE SEVENTEEN

### Payment for Protective Services

At the time the Department makes an evaluation of the case reported, it must be determined whether the incapacitated or dependent adult is financially capable of paying for essential services. To the extent that assets are available to the incapacitated or dependent adult, ward, or protected person, the cost of services must be borne by the estate of the person receiving those services, provided, however, the Department shall seek all sources of funding available to tribal members to pay for such services.



## ARTICLE EIGHTEEN

### Reporting Abuse

Upon finding evidence indicating that a person has abused, neglected or exploited an incapacitated or dependent adult, resulting in serious harm, the Department shall notify the Maine State District Attorney, Tribal Prosecutor, or Law Enforcement Agency, whichever is appropriate to the situation.

## ARTICLE NINETEEN

### Cooperation

All Tribal departments shall cooperate with the Department in rendering protective services on behalf of incapacitated and dependent adults. The Department shall contact the State of Maine and other agencies as well as private agencies receiving public funds through the Maine State Legislature and federal allocations for designated funds available to render services to incapacitated and dependent adults.

## ARTICLE TWENTY

### Adoption of Standards

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