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June 17, 2016

Economic Affairs Interim Committee
PO BOX 201706
Helena, MT 59620-1706

RE: LC3901, LC3902, & LC3903 – options for supervision.

Chairman Lynch, Committee Members, and Ms. Murdo:

In the past, I have written to and testified before the committee regarding unlicensed practice issues, which from the perspective I have taken, is based on the restraint of trade and anticompetitiveness that may arise between unlicensed professions and licensed ones.

I think I come from a unique perspective. I have been very active in issues regarding low-risk, low-harm professions that do not require licensure, which are typically found in the field of complementary, alternative, and integrative health care. I have also served on and was chair of the Montana Board of Massage Therapy. I think this allows me to understand the issues from both perspectives and possibly provide a viewpoint to the committee that may not have been considered at this point.

If the three bill drafts are all truly options and one is to be chosen, I have no issues with LC3903. It is only informative and does not negatively impact persons practicing unlicensed professions, nor does it negatively impact boards.

If all of them are to be considered as a package, I do like the idea of a panel, but there are issues. Of the three, LC3901 is the most problematic.

I've outlined my issues in the following pages.

I deeply apologize for not appearing before the committee as, between work commitments and my graduate school commitments, I am not able to travel to Helena. I am however available by phone from 2:30-3:30, which coincides with the scheduled agenda time.

Thank you in advance for your consideration.

Sincerely,



Deborah A. Kimmet
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Issues with LC3901:

This draft is also aimed at protecting the licensing boards from unlicensed practice complaints that could lead to an antitrust suit. As such, some of the phrasing is problematic. Recommendations will follow.

1. Phrasing: "Protect public health or public safety" Section 1 on p. 1

Phrasing: "public health and safety" Section 2 (13)(b) on p. 6

a. **From the perspective of unlicensed professions:**

This language is overly broad and vague. Public health and public safety are not clearly defined anywhere in statute or rule. Of the unlicensed practice complaints I have researched, the protection of the "public health, safety, and welfare" often was determined without clear criteria and usually as a result of simply "because we said so." This then leads boards and the department to pick an arbitrary and sometimes anti-competitive path. MCA 37-1-317 discusses unlicensed practice as the practice of a profession for which a license is required. This is a problem if the person is practicing a profession that does not require licensure, but overlaps with a licensed profession. Case in point: homeopathy and the practice of medicine. Since I attempted to introduce legislation to address this issue back in 2009, the Department has reclassified unlicensed practice complaints to executive session and I have no longer been able to track them as easily. But prior to that, I tracked cases that showed a clear bias of pursuing the case when risk of harm was low or non-existent. But...

b. **As a former board member:**

Boards are put in a bind. If they do not act against unlicensed practice cases even when there is little to no risk of harm, that board could be held liable. The boards really cannot refuse to act even when a person is performing an unlicensed profession, is well-trained in that unlicensed profession, and thus presents little or no risk; they must act if the person is doing something that overlaps with that licensing board's scope. The lack of guidelines as to what really constitutes health, safety and welfare does not give the board much discretion in the matter... and it would be my contention that it would also not give the department discretion in the matter either.

Recommendation 3901-1: until such time as clear guidelines and definitions can be implemented that protect individuals practicing a profession that does not require a license, I have to oppose the bill. At the very least:

- a. **Delete this portion of Section 1 (p. 1):** "Federal or state antitrust laws that prohibit anticompetitive actions do not apply if the department determines that a board action implements legislative policy to protect public health or public safety."
1. Because the board and department would not have discretion to determine health and safety issues due to the liability issues mentioned above, it is not right for the department to confer blanket immunity and remove redress from the individual's right to pursue an anticompetitive complaint.
 2. It also deprives an individual of constitutional and federal protections. I'm not sure how well the statement will withstand constitutional scrutiny of the state telling a federal entity its laws don't apply.

- b. **Delete this portion of Section 3(13)(b) (p. 6):** “If legislative policy provides within law a clear indication that the board’s prospective action protects public health and safety, the department may approve the prospective board action.”
 - 1. Due to the aforementioned public health and safety language.

Issues with LC3902: the draft that establishes a review panel.

1. **From the perspective of unlicensed professions:** It is not clear for whom the law is intended. The purpose (Section 2) allows for the commissioner to convene a panel when a licensing board is likely to trigger an antitrust complaint which can happen in unlicensed practice complaints, but in Section 4 limits the panel to situations when a board is seeking to change their scope or when rulemaking.
 - a. **If this bill is intended to also address unlicensed practice complaints in addition to the spats between licensed professions,** there are several things wrong with the bill that discriminate against persons who are practicing a profession that is not licensed in the state of Montana and **I cannot support this bill without a major rewrite.**
 - b. If this bill is not intended to address unlicensed practice complaints, there is too much ambiguity in the language. Case in point: “trigger an antitrust complaint; or” – it is the “or” that raises the ambiguity as to whom the bill applies, as does the statement in Section 4 (1) “a proponent group... may request the commissioner to appoint a panel to *review the scope of practice* or proposed scope of practice.” These both seem to imply that unlicensed practice complaints could fit under the purview of this bill.

Recommendation 3902-1: If this bill is ***not*** intended to address unlicensed practice complaints, then clearly state in Section 2 “the purpose [sections 1 through ??] is to provide authority for a supervisory panel to be called at the discretion of the commissioner of labor and industry to determine if actions by a licensing board appear likely to result in an antitrust complaint or scope of practice dispute with another licensed profession.

Very simple, to the point, and only applies to another licensed profession.

2. **As a former board member,** there are 2 main issues
 - a. The language in section 2(2) regarding scope overlap. Of course professions’ scopes overlap. The myth that they shouldn’t is just that and does a disservice to the public to try to limit boards to non-overlapped practice. It is when the boards have issues over that overlap that’s in question. The draft as written plays into this myth of no overlap and sets into statute a stated implication that there should be no overlap. This type of language should be eliminated from the bill.

Recommendation 3902-2-1: Rewrite Section 2 as suggested above in Recommendation 3902-1
 - b. Opponents and proponents are treated differently. Proponents can request a panel for any situation; an opponent may only do so during the rule-making process. This is inherently not fair and severely limits the opponents of such a scope of practice change. In addition to rulemaking, boards also propose statutes, and write position papers and white papers. All of these can clarify

the scope, and in the cases of broad scopes, expand the actions of the profession to claim territory within that broad scope that was not standard practice in the past.

Recommendation 3902-2-2: Standardize language between opponents and proponents so that both may request a panel under the same circumstances. Those circumstances should be broad to include proposals of all kinds including rules, statutes, white papers, etc. to include the myriad of ways that a profession may broaden a scope without actually doing so legislatively (via statute change). And include legislative remedies if you desire, so that these disputes will be somewhat resolved before they land in the legislature.

LC3903 clearly outlines the role of the Department, and have no comment.