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Bill Analysis

Legislative Service Commission

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(As Passed by the Senate)

**Sens. Spada, Jacobson, Fedor, Dann, Herington, Austria, Amstutz, DiDonato,
Robert Gardner, Harris, Mumper, Miller**

BILL SUMMARY

- In a provision that sets forth a general testimonial privilege for members of the clergy, rabbis, priests, and ministers ("clerics" under the bill) and that provides an exception to the privilege that permits the cleric to testify by express consent of the person making the communication except when the disclosure of the information is in violation of a sacred trust, expands the "exception to the exception" so that the cleric may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of a sacred trust (existing law) and except that, if the person voluntarily testifies or is deemed under the provisions described in the next dotpoint to have waived the testimonial privilege, the cleric may be compelled to testify on the same subject except when disclosure of the information is in violation of a sacred trust (added by the bill).
- Expands the list of specified professions and persons that are subject to existing mandatory child abuse and neglect reporting provisions so that the provisions also apply to "clerics" and persons designated by any church, religious society, or faith acting as a leader, official, or delegate on behalf of the church, religious society, or faith who are acting in an official or professional capacity and know or suspect that a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired child under 21 years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child.
- Regarding the mandatory reporting provision the bill adds, as described in the preceding dotpoint: (1) provides that, except as described in clause

(2), "clerics" are not required to make a report under the mandatory reporting provision concerning any communications the cleric receives from a penitent in a cleric-penitent relationship, if, under the Privileged Communications Law provisions described in the second preceding dotpoint, the cleric could not testify with respect to that communication in a civil or criminal proceeding, and (2) if the penitent is deemed to have waived any testimonial privilege under that Law with respect to any communication the "cleric" receives from the penitent in a cleric-penitent relationship, except when the disclosure of any communication the cleric receives from the penitent is in violation of the "sacred trust," the cleric must make a report under the mandatory reporting provisions with respect to that communication, if: (a) the penitent, at the time of the communication, is either a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired person under 21 years of age, (b) the cleric knows or suspects, as a result of the communication or any observations made during it, that a child or person in either of those categories has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child or person, and (c) the abuse or neglect does not arise out of an attempt to have an abortion performed upon a child or person in either of those categories without the notification of her parents, guardian, or custodian in accordance with existing law's notification requirements.

- Modifies existing provisions that, in specified circumstances, require attorneys and physicians to make a report under mandatory child abuse or neglect provisions even when communications that are the basis of the report are privileged under the Privileged Communications Law so that the provisions are similar to the provisions described in clause (2) of the preceding dotpoint.
- Provides that the period of limitation for a violation of any provision of the Criminal Code that involves a physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of a child under 18 years of age or of a mentally retarded, developmentally disabled, or physically impaired child under 21 years of age does not run until either of the following occurs: (1) the victim of the offense reaches the age of majority, or (2) a public children services agency, or a municipal or county peace officer that is not the parent or guardian of the child, in the county in which the child resides or in which

the abuse or neglect is occurring or has occurred has knowledge of or suspects that the abuse or neglect occurred.

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CONTENT AND OPERATION

Privileged communications

For members of the clergy, rabbis, priests, and ministers

Existing law. Existing law lists certain categories of professions and relationships and establishes a testimonial privilege regarding those persons, in certain specified respects. Among the specified categories are *members of the clergy, rabbis, priests, and regularly ordained, accredited, or licensed ministers of an established and legally cognizable church, denomination, or sect*. Regarding those persons, existing law specifies that a member of the clergy, rabbi, priest, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect, when the member of the clergy, rabbi, priest, or minister remains accountable to the authority of that church, denomination, or sect, generally cannot testify concerning a confession made, or any information confidentially communicated, to the member of the clergy, rabbi, priest, or minister for a religious counseling purpose in the member of the clergy's, rabbi's, priest's, or minister's professional character. However, the member of the clergy, rabbi, priest, or minister may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of a sacred trust. (R.C. 2317.02(C).)

Operation of the bill. The bill modifies the testimonial privilege provision applicable to members of the clergy, rabbis, priests, and ministers as follows (R.C. 2317.02(C)):

(1) It retains the existing provision that sets forth the general testimonial privilege, but replaces the multiple references contained in the provision to a "member of the clergy, rabbi, priest, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect" with references to a "cleric," which the bill defines as a member of the clergy, rabbi, priest, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect.

(2) It modifies the existing exception to the general testimonial privilege that permits the member of the clergy, rabbi, priest, or minister (the "cleric" under the bill) to testify by express consent of the person making the communication, except when the disclosure of the information is in violation of a sacred trust by adding a new "exception to the exception" for circumstances in which the person voluntarily testifies or is deemed by R.C. 2151.421(A)(2), as described below in "**Reports of child abuse or neglect**," to have waived the privilege. Under the existing exception, as modified by the bill, a cleric who otherwise would be subject to the general testimonial privilege may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of a "sacred trust" (see (3), below) *and except that, if the person voluntarily testifies or is deemed by R.C. 2151.421(A)(2) to have waived any testimonial privilege under this provision, the cleric may be compelled to testify on the same subject except when disclosure of the information is in violation of a "sacred trust" (see (3), below).*

(3) Related to the provisions described above in (2), the bill defines "sacred trust" as a confession or confidential communication made to a cleric in the cleric's ecclesiastical capacity in the course of discipline enjoined by the church to which the cleric belongs if both of the following apply: (a) the confession or confidential communication was made directly to the cleric, and (b) the confession or confidential communication was made in the manner and context that places the cleric specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine.

For persons in other specified categories or professions and relationships

Under the existing law regarding testimonial privilege, the other categories of professions and relationships who cannot testify in specified respects, which are unchanged by the bill, are (R.C. 2317.02(A), (B), and (D) to (J)):

(1) Attorneys, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that, if the client voluntarily testifies or is deemed by R.C. 2151.421 (see "**Reports of child abuse or neglect**," below) to have waived any testimonial privilege under this provision, the attorney may be compelled to testify on the same subject, and subject to

exceptions provided in the provision regarding express consent of the client or, if the client is deceased, the client's surviving spouse, executor, or administrator.

(2) Physicians (i.e., doctors of medicine, doctors of osteopathic medicine, doctors of podiatry) and dentists concerning a communication made to the physician or dentist by a patient in that relation or the physician's or dentist's advice to a patient, except that, if the patient is deemed by R.C. 2151.421 (see "Reports of child abuse or neglect," below) to have waived any testimonial privilege under this provision, the physician may be compelled to testify on the same subject, and subject to other exceptions provided in the provision regarding testimony in a civil action under the discovery provisions of Civil Rules in specified circumstances, in a civil action concerning court-ordered treatment or services received by a patient in specified circumstances, in a criminal action concerning a test or the results of a test that determines the presence or concentration of alcohol, a drug of abuse, or both in the patient's blood, breath, urine, or other bodily substance at any time relevant to the offense in question, in a criminal action against a physician or dentist in specified circumstances, in a will contest action in specified circumstances.

(3) Husbands and wives, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and such rule is the same if the marital relation has ceased to exist;

(4) Persons who assign a claim or interest, concerning any matter in respect to which the person would not, if a party, be permitted to testify;

(5) Persons who, if a party, would be restricted under R.C. 2317.03, when the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee, or legatee, shall be restricted in the same manner in any action or proceeding concerning the property or thing.

(6) School guidance counselors who hold a valid educator license from the State Board of Education as a professional clinical counselor, professional counselor, social worker, independent social worker, marriage and family therapist or independent marriage and family therapist, or registered under R.C. Chapter 4757. as a social work assistant concerning a confidential communication received from a client in that relation or the person's advice to a client, subject to specified exceptions.

(7) Mediators acting under a mediation order issued under R.C. 3109.052(A) or otherwise issued in any proceeding for divorce, dissolution, legal separation, annulment, or the allocation of parental rights and responsibilities for

the care of children, in any action or proceeding, other than a criminal, delinquency, child abuse, child neglect, or dependent child action or proceeding, that is brought by or against either parent who takes part in mediation in accordance with the order and that pertains to the mediation process, to any information discussed or presented in the mediation process, to the allocation of parental rights and responsibilities for the care of the parents' children, or to the awarding of parenting time rights in relation to their children;

(8) Communications assistants, acting within the scope of the communication assistant's authority, when providing telecommunications relay service, concerning a communication made through a telecommunications relay service.

(9) Chiropractors in a civil proceeding concerning a communication made to the chiropractor by a patient in that relation or the chiropractor's advice to a patient, subject to specified exceptions regarding consent or claims filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

Reports of child abuse or neglect

Existing law

Mandatory reporting. Existing law lists certain categories of professions, and prohibits a person in any of the specified professions who is acting in an official or professional capacity and knows or suspects that a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired child under 21 years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, from failing to immediately report that knowledge or suspicion to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred, or, if the child is in an inmate in the custody of a state correctional institution, to the State Highway Patrol. A violation of the prohibition against failing to make the mandatory report is a misdemeanor of the fourth degree.

The specified professions to which the mandatory reporting provision applies are attorneys; physicians, including hospital interns and residents; dentists; podiatrists; practitioners of a limited branch of medicine as specified in R.C. 4731.15; registered, licensed practical, and visiting nurses; other health care professionals; licensed psychologists; licensed school psychologists; independent marriage and family therapists and marriage and family therapists; speech pathologists and audiologists; coroners; administrators and employees of a child

day-care center, residential camp, child day camp, certified child care agency, or other public or private children services agency; school teachers, employees, and authorities; persons engaged in social work or the practice of professional counseling; agents of a county humane society; and persons rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion.

Attorneys and physicians are provided an exception from the mandatory reporting provision, concerning communications received from a client or patient in an attorney-client or physician-patient relationship, if, under specified provisions of the Privileged Communications Law (see "**Privileged communications**," above), the attorney or physician could not testify with respect to that communication in a civil or criminal proceeding. If the client or patient is deemed to have waived any testimonial privilege under the specified provisions of that Law with respect to any communication, the attorney or physician must make a report under the mandatory reporting provisions described above with respect to that communication, if: (1) the client or patient, at the time of the communication, is either a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired person under 21 years of age, (2) the attorney or physician knows or suspects, as a result of the communication or any observations made during it, that the client or patient has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the client or patient, and (3) the attorney-client or physician-patient relationship does not arise out of the client's or patient's attempt to have an abortion without the notification of her parents, guardian, or custodian in accordance with the notification requirements of R.C. 2151.85. (R.C. 2151.421(A), and R.C. 2151.99(A)--not in the bill.)

Discretionary reporting. Independent of the mandatory reporting provision described above, existing law permits anyone who knows or suspects that a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired person under 21 years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect of the child, to report or cause reports to be made of that knowledge or suspicion to the public children services agency or to a municipal or county peace officer (R.C. 2151.421(B)).

Procedures, rules, immunities regarding reporting. Existing law provides that any report made under the mandatory or discretionary reporting provisions must be made forthwith either by telephone or in person and must be followed by a written report, if requested by the receiving agency or officer. The report must contain specified information, and a person making a mandatory report may take or cause to be taken color photographs of areas of trauma visible on the child and,

if medically indicated, x-rays. Existing law provides rules and procedures for peace officers and public children service agencies in making follow-ups and investigations of a report and regarding removal of a child who is the subject of a report from the child's parents, stepparents, guardian, or custodian.

Under existing law, except as described below, any person, hospital, institution, school, health department, or agency that participates in the making of a report under the mandatory or discretionary reporting provisions, and any person that participates in a judicial proceeding resulting from such a report is immune from any civil or criminal liability for injury, death, or loss to person or property that might be incurred or imposed as a result of the making of the reports of the participation in the judicial proceeding. However, if it is proved in a civil or criminal proceeding that participation in the making of a report under either reporting provision, or in a resulting judicial proceeding, was not in good faith, the court must award the prevailing party attorney's fees and costs. Also, a person who knowingly makes or causes another person to make a false report under the discretionary reporting provisions that alleges that a person has committed an act or omission that resulted in a child being an abused or neglected child is guilty of the offense of "making or causing a false report of child abuse or neglect," under R.C. 2921.14.

Existing law provides that: (1) in general, a report made under the mandatory or discretionary reporting provisions is confidential, (2) the information provided in a report and the name of the person who made it cannot be released for use, and cannot be used, as evidence in any civil action or proceeding against the person who made it, and (3) in a criminal proceeding the report is admissible in accordance with the Rules of Evidence and is subject to discovery in accordance with the Criminal Rules. Limited exceptions are provided if the subject child dies, or if the alleged conduct allegedly occurred in or involved an out-of-home care entity. Existing law provides rules and procedures regarding protective services based on a report. (R.C. 2151.421(C) to (I) and (K) to (N).)

Operation of the bill

Inclusion of clerics and designated religious leaders, officials, and delegates within list of professions and person subject to mandatory reporting.

The bill expands the list of specified professions and persons that are subject to the mandatory child abuse and neglect reporting provision. Under the bill, in addition to the professions and persons to which the provision currently applies, the provision applies to "clerics" (see **Privileged communications**," above, for the bill's definition of this term) and to persons designated by any church, religious society, or faith acting as a leader, official, or delegate on behalf of the church, religious society, or faith. (R.C. 2151.421(A)(1)(b).)

Thus, under the bill, subject to the exception described in the next paragraph, a person in any of the professions or categories identified in the preceding paragraph (as added by the bill), or in any of the professions specified under existing law, who is acting in an official or professional capacity and knows or suspects that a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired child under 21 years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, is prohibited from failing to immediately report that knowledge or suspicion to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred, or, if the child is in an inmate in the custody of a state correctional institution, to the State Highway Patrol. The existing penalty for a violation of the prohibition against failing to make the mandatory report, and the existing procedures for making the mandatory report, rules and procedures regarding follow-ups and investigations regarding the report, qualified civil immunity regarding the making of the report, rules regarding the use or confidentiality of the report, and rules and procedures regarding protective services based on the report, all apply regarding persons in any of the professions or categories identified in the preceding paragraph (as added by the bill) and the reports they make. (R.C. 2151.421(A)(1), (C) to (I), and (K) to (N); and R.C. 2151.99(A), not in the bill.)

Exception from mandatory reporting for clerics, and for attorneys and physicians. The bill extends the existing limited exception from the mandatory reporting provision that is provided for attorneys and physicians so that the exception also applies regarding *clerics* added to the mandatory reporter list as described in the preceding paragraph, and revises some of the language of the exception. Under the bill, except as described in the next paragraph, attorneys, physicians, *and clerics* are not required to make a report under the mandatory reporting provision concerning any communications the attorney, physician, *or cleric* receives from a client, patient, *or penitent* in an attorney-client, physician-patient, *or cleric-penitent* relationship, if, under specified provisions of the Privileged Communications Law (see **Privileged communications,**" above), the attorney, physician, *or cleric* could not testify with respect to that communication in a civil or criminal proceeding.

However, *if the client, patient, or penitent is deemed to have waived any testimonial privilege under the specified provisions of that Law with respect to any communication the attorney, physician, or cleric receives from the client, patient, or penitent in an attorney-client, physician-patient, or cleric-penitent relationship,* the attorney, physician, *or cleric* must make a report under the mandatory reporting provisions with respect to that communication, if: (1) the client, patient, *or penitent*, at the time of the communication, is either a child under 18 years of

age or a mentally retarded, developmentally disabled, or physically impaired person under 21 years of age, (2) the attorney, physician, or cleric knows or suspects, as a result of the communication or any observations made during it, that a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired person under 21 years of age (currently, this clause refers only to the client or patient) has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child or person (currently, this clause refers only to the client or patient), and (3) the abuse or neglect (currently, this clause refers to the attorney-client or physician-patient relationship) does not arise out of an attempt to have an abortion performed upon a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired person under 21 years of age (currently, this clause refers only to an attempt by the client or patient) without the notification of her parents, guardian, or custodian in accordance with the notification requirements of R.C. 2151.85. The bill specifies that the provisions described in this paragraph do not apply in a cleric-penitent relationship when the disclosure of any communication the cleric receives from the penitent is in violation of the "sacred trust" (see "Definitions," below). (R.C. 2151.421(A)(2) to (4).)

Period of limitations for criminal prosecutions

Existing law

Existing law specifies that, except as described in this paragraph or other provisions in this part of this analysis, a criminal prosecution is barred unless it is commenced within the following periods after an offense is committed: for a felony, six years; for a misdemeanor other than a minor misdemeanor, two years; and for a minor misdemeanor, six months. Existing law specifies that there is no period of limitation for the prosecution of a violation of R.C. 2903.01 (aggravated murder) or 2903.02 (murder). Existing law also provides a special 20-year limitations period for certain offenses--under this provision, except as otherwise described below, a prosecution of any of the following offenses is barred unless it is commenced within 20 years after the offense is committed: (1) a violation of R.C. 2903.03, 2903.04, 2905.01, 2907.02, 2907.03, 2907.04, 2907.05, 2907.21, 2909.02, 2911.01, 2911.02, 2911.11, 2911.12, or 2917.02, a violation of R.C. 2903.11 or 2903.12 if the victim is a peace officer, a felony violation of R.C. 2903.13, or a violation of former R.C. 2907.12, or (2) a conspiracy to commit, attempt to commit, or complicity in committing a violation set forth in clause (1) of this sentence.

If the period of limitation described in the preceding paragraph has expired, prosecution must be commenced for an offense of which an element is fraud or breach of a fiduciary duty within one year after discovery of the offense either by

an aggrieved person, or by the aggrieved person's legal representative who is not a party to the offense, and prosecution must be commenced for an offense involving misconduct in office by a public servant at any time while the accused remains a public servant, or within two years thereafter.

For purposes of these provisions, an offense is committed when every element of the offense occurs. In the case of an offense of which an element is a continuing course of conduct, the period of limitation does not begin to run until such course of conduct or the accused's accountability for it terminates, whichever occurs first. A prosecution is commenced on the date an indictment is returned or an information filed, on the date a lawful arrest without a warrant is made, or on the date a warrant, summons, citation, or other process is issued, whichever occurs first. A prosecution is not commenced by the return of an indictment or the filing of an information unless reasonable diligence is exercised to issue and execute process on the same, and is not commenced upon issuance of a warrant, summons, citation, or other process unless reasonable diligence is exercised to execute the same.

Existing law specifies that the period of limitation does not run during any of the following times: (1) during any time when the *corpus delicti* remains undiscovered, (2) during any time when the accused purposely avoids prosecution (proof that the accused departed Ohio or concealed his or her identity or whereabouts is *prima-facie* evidence of his or her purpose to avoid prosecution), or (3) during any time a prosecution against the accused based on the same conduct is pending in Ohio, even though the indictment, information, or process which commenced the prosecution is quashed or the proceedings thereon are set aside or reversed on appeal. (R.C. 2901.13.)

Operation of the bill

The bill enacts a provision that specifies an additional circumstance in which the period of limitations for a criminal prosecution of a specified nature does not run. Under the new provision, in addition to the situations specified under existing law, the period of limitation for a violation of any provision of R.C. Title XXIX (the Criminal Code) that involves a physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of a child under 18 years of age or of a mentally retarded, developmentally disabled, or physically impaired child under 21 years of age does not run until either of the following occurs: (1) the victim of the offense reaches the age of majority, or (2) a public children services agency, or a municipal or county peace officer that is not the parent or guardian of the child, in the county in which the child resides or in which the abuse or neglect is occurring or has occurred has knowledge of or suspects that the abuse or neglect occurred. (R.C. 2901.13(I).)

HISTORY

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