



# PROPOSED RULE MAKING

## CR-102 (October 2017) (Implements RCW 34.05.320)

Do NOT use for expedited rule making

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STATE OF WASHINGTON  
FILED

DATE: October 17, 2017

TIME: 3:25 PM

WSR 17-21-088

**Agency:** Department of Social and Health Services, Aging and Long-Term Support Administration

- Original Notice**
- Supplemental Notice to WSR** \_\_\_\_\_
- Continuance of WSR** \_\_\_\_\_

- Preproposal Statement of Inquiry was filed as WSR 17-17-136** ; or
- Expedited Rule Making--Proposed notice was filed as WSR** \_\_\_\_\_ ; or
- Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1); or**
- Proposal is exempt under RCW** \_\_\_\_\_.

**Title of rule and other identifying information:** (describe subject) The department is proposing to amend WAC 388-71-0105 "What definitions apply to adult protective services?" as a result of a court order.

**Hearing location(s):**

Date:	Time:	Location: (be specific)	Comment:
November 21, 2017	10:00 a.m.	Office Building 2 DSHS Headquarters 1115 Washington Olympia, WA 98504	Public parking at 11 <sup>th</sup> and Jefferson. A map is available at: <a href="https://www.dshs.wa.gov/sesa/rules-and-policies-assistance-unit/driving-directions-office-bldg-2">https://www.dshs.wa.gov/sesa/rules-and-policies-assistance-unit/driving-directions-office-bldg-2</a>

**Date of intended adoption:** Not earlier than November 22, 2017 (Note: This is **NOT** the **effective** date)

**Submit written comments to:**

Name: DSHS Rules Coordinator  
 Address: PO Box 45850, Olympia, WA 98504  
 Email: [DSHSRPAURulesCoordinator@dshs.wa.gov](mailto:DSHSRPAURulesCoordinator@dshs.wa.gov)  
 Fax: 360-664-6185  
 Other:  
 By (date) 5:00 pm November 21, 2017

**Assistance for persons with disabilities:**

Contact Jeff Kildahl, DSHS Rules Consultant  
 Phone: 360-664-6092  
 Fax: 360-664-6185  
 TTY: 711 Relay Service  
 Email: [Kildaja@dshs.wa.gov](mailto:Kildaja@dshs.wa.gov)  
 Other:  
 By (date) November 7, 2017

**Purpose of the proposal and its anticipated effects, including any changes in existing rules:** The department is proposing to amend WAC 388-71-0105 to strike the term "willful" from the definitions list in order to comply with an order issued by the Division III Court of Appeals in *Crosswhite v. DSHS* that invalidated the current definition of "willful".

**Reasons supporting proposal:** See purpose statement above.

**Statutory authority for adoption:** RCW 74.08.090

**Statute being implemented:** .

**Is rule necessary because of a:**

Federal Law?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Federal Court Decision?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
State Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

If yes, CITATION: Division III Court of Appeals in *Crosswhite v. DSHS*

**Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:** None

**Name of proponent:** (person or organization) Department of Social and Health Services

<input type="checkbox"/> Private
<input type="checkbox"/> Public
<input checked="" type="checkbox"/> Governmental

**Name of agency personnel responsible for:**

	Name	Office Location	Phone
Drafting:	Carol Sloan	P.O. Box 45600, Olympia, WA 98504-5600	360-725-2345
Implementation:	Carol Sloan	P.O. Box 45600, Olympia, WA 98504-5600	360-725-2345
Enforcement:	Carol Sloan	P.O. Box 45600, Olympia, WA 98504-5600	360-725-2345

**Is a school district fiscal impact statement required under RCW 28A.305.135?**  Yes  No

If yes, insert statement here:

The public may obtain a copy of the school district fiscal impact statement by contacting:

Name:  
Address:  
Phone:  
Fax:  
TTY:  
Email:  
Other:

**Is a cost-benefit analysis required under RCW 34.05.328?**

Yes: A preliminary cost-benefit analysis may be obtained by contacting:

Name:  
Address:  
Phone:  
Fax:  
TTY:  
Email:  
Other:

No: Please explain: Not a significant legislative rule as defined in RCW 34.05.328 (5) (c).

**Regulatory Fairness Act Cost Considerations for a Small Business Economic Impact Statement:**

This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see chapter 19.85 RCW). Please check the box for any applicable exemption(s):

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Please cite the specific federal statute or regulation this rule is being adopted to conform or comply with, and describe the consequences to the state if the rule is not adopted.

Citation and description:

This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by RCW 34.05.313 before filing the notice of this proposed rule.

This rule proposal, or portions of the proposal, is exempt under the provisions of RCW 15.65.570(2) because it was adopted by a referendum.

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.025(3). Check all that apply:

- RCW 34.05.310 (4)(b) (Internal government operations)
- RCW 34.05.310 (4)(e) (Dictated by statute)
- RCW 34.05.310 (4)(c) (Incorporation by reference)
- RCW 34.05.310 (4)(f) (Set or adjust fees)
- RCW 34.05.310 (4)(d) (Correct or clarify language)
- RCW 34.05.310 (4)(g) ((i) Relating to agency hearings; or (ii) process requirements for applying to an agency for a license or permit)

This rule proposal, or portions of the proposal, is exempt under RCW \_\_\_\_.

Explanation of exemptions, if necessary:

**COMPLETE THIS SECTION ONLY IF NO EXEMPTION APPLIES**

If the proposed rule is **not exempt**, does it impose more-than-minor costs (as defined by RCW 19.85.020(2)) on businesses?

No Briefly summarize the agency's analysis showing how costs were calculated. \_\_\_\_\_

Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses, and a small business economic impact statement is required. Insert statement here:

The public may obtain a copy of the small business economic impact statement or the detailed cost calculations by contacting:

- Name:
- Address:
- Phone:
- Fax:
- TTY:
- Email:
- Other:

**Date:** October 12, 2017

**Name:** Katherine I. Vasquez

**Title:** DSHS Rules Coordinator

**Signature:**

**WAC 388-71-0105 What definitions apply to adult protective services?** In addition to the definitions found in chapter 74.34 RCW, the following definitions apply to adult protective services:

**"AL TSA"** means DSHS aging and long-term support administration.

**"Adult family home"** means a home or building licensed under chapter 70.128 RCW.

**"ALJ"** means an administrative law judge, an impartial decision-maker who is an attorney and presides at an administrative hearing. The office of administrative hearings (OAH), which is a state agency, employs the ALJs. ALJs are not DSHS employees or DSHS representatives.

**"APS"** means adult protective services.

**"Basic necessities of life"** means food, water, shelter, clothing, and medically necessary health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication.

**"BOA"** means the DSHS board of appeals. The board of appeals consists of lawyers who are members of the Washington State Bar Association. An ALJ's decision can be appealed to the board of appeals, allowing a level of review before an appeal to the court system may be considered.

**"DSHS"** means the department of social and health services.

**"Enhanced service facility"** means a home or building licensed under chapter 70.97 RCW.

**"Facility"** means a residence licensed as an assisted living facility under chapter 18.20 RCW, an adult family home under chapter 70.128 RCW, a nursing home under chapter 18.51 RCW, a soldier's home under chapter 72.36 RCW, a residential habilitation center under chapter 71A.20 RCW, an enhanced services facility under chapter 71.05 RCW, or any other facility or residential program licensed or certified by DSHS's aging and long-term support administration.

**"Final finding"** means a substantiated initial finding of abandonment, abuse, financial exploitation, or neglect that:

(1) Has been upheld through the administrative appeal described in WAC 388-71-01205 through 388-71-01280(~~(7)~~); or

(2) Is not timely appealed to the office of administrative hearings. A final finding may be appealed to superior court and the court of appeals under the Administrative Procedure Act, chapter 34.05 RCW.

**"Intermediate care facility for individuals with intellectual disabilities (ICF/IID)"** means a facility certified under 42 C.F.R. Part 483, Subpart I.

**"Legal representative"** means a guardian appointed under chapter 11.88 RCW or an attorney-in-fact under chapter 11.94 RCW.

**"Nursing assistant"** means a nursing assistant as defined under RCW 18.88A.020 or successor laws.

**"Nursing facility (~~(NF)~~)"** **"NF,"** or **"medicaid-certified nursing facility"** means a nursing home licensed under chapter 18.51 RCW, or any portion of a hospital, veterans' home, or residential habilitation center, that is certified to provide nursing services to medicaid recipients under section 1919(a) of the federal Social Security Act (~~((42 U.S.C. § 1396r))~~) (42 U.S.C. Sec. 1396r). All beds in a nursing facility are certified to provide medicaid services, even though one or more of the beds may also be certified to provide medicare skilled nursing facility services.

**"Nursing home"** means any facility licensed to operate under chapter 18.51 RCW.

**"Person with a duty of care"** includes, but is not limited to, the following:

(1) A guardian appointed under chapter 11.88 RCW; ~~((e))~~

(2) A person named in a durable power of attorney as the attorney-in-fact as defined under chapter 11.94 RCW~~((-))~~; or

(3) A person providing the basic necessities of life to a vulnerable adult where:

(a) The person is employed by or on behalf of the vulnerable adult; or

(b) The person voluntarily agrees to provide, or has been providing, the basic necessities of life to the vulnerable adult on a continuing basis.

**"Personal aide"** means the same as found in RCW 74.39.007.

**"Self-directed care"** means the same as found in RCW 74.39.007.

**"Skilled nursing facility ~~((SNF))~~, "SNF," or "medicare-certified skilled nursing facility"** means a nursing home, a portion of a nursing home, or a long-term care wing or unit of a hospital that has been certified to provide nursing services to medicare recipients under section 1819(a) of the federal Social Security Act (42 U.S.C. § 1395i-3).

**"Substantiated initial finding"** means a determination made by the department upon investigation of an allegation of abandonment, abuse, financial exploitation, neglect, or self-neglect that more likely than not occurred.

~~((**"Willful"** means the nonaccidental action or inaction by an alleged perpetrator that he/she knew or reasonably should have known could cause harm, injury or a negative outcome.))~~