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May 13, 2021

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 548/Senate Bill 299, Human Services – Trauma-Informed Care – Commission and Training (Healing Maryland's Trauma Act);
House Bill 831/Senate Bill 723, Maryland Food System Resiliency Council; and
House Bill 1364/Senate Bill 946, Historic St. Mary's City Fort to 400 Commission

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency the following bills: House Bill 548/Senate Bill 299; House Bill 831/Senate Bill 723; and House Bill 1364/Senate Bill 946. We write to discuss potential constitutional issues common with these bills and to provide advice for implementation to avoid those issues. Specifically, having members of the General Assembly serve as members on the entities created by the bills raises a separation of powers issue under Article 8 of the Maryland Declaration of Rights, and a dual office issue under Article III, §11 of the State Constitution. It is our view, however, that by limiting the legislator members' roles to purely advisory, the problems are avoided.

Below is a description of the entities created by the bills:

- House Bill 548/Senate Bill 299[1] create the Commission on Trauma-Informed Care in the Department of Human Resources. The Commission has 29 members, including two members of the House of Delegates and two members of the Senate. Members serve a 4-year term. Most of the duties of the Commission are advisory, except the Commission is also directed to "study developing a process and framework for implementing an Adverse Childhood Experiences (ACEs) Aware Program; and [i]mplement the Program."

- House Bill 831/Senate Bill 723[1] create the Maryland Food System Resiliency Council, which has at least 25 members, including a member of the House of Delegates and a member of the Senate. Many of duties of the Council are advisory such as making recommendations and plans. A few specified duties, however, arguably go beyond the advisory realm. For example, the Council is directed to "coordinat[e] State and local level food insecurity services to support residents of the State"; "leverage[e] federal and private sector grants and other resources in order to address food insecurity needs"; and "expand the impact of existing food council organizations by… supporting identification and application of grants to operating funds to support existing and new food council organizations as needed."

- House Bill 1364/Senate Bill 946[1] create the Historic St. Mary's City Fort to 400 Commission. The Commission has 18 members, including two members of the Senate and two members of the House of Delegates. The majority of the duties of the Commission are advisory in nature, but the Commission is also directed and empowered to "secure support and financial resources to implement events and activities planned and assisted by the Commission, including the formation of an appropriate legal entity."

[1] The bills are identical crossfiled bills.

The members of each foregoing entity do not receive compensation for service on the entity, except for expense reimbursement. Moreover, in each case, the number of non-legislator members greatly outnumber the legislators. In addition, each entity is staffed by one or more executive branch agency.

Having legislator members on a non-legislative body that is empowered to manage State funds, create legal entities, enter into contracts, solicit and accepting a gift, grant, legacy, or endowment of money, among other actions, could implicate the separation of powers of Article 8 of the Maryland Declaration of Rights or cause a violation of the prohibition against dual office holding found in Article III, §11 of the State Constitution. Article 8 of the Declaration of Rights provides: "That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." Article III, Section 11 of the Constitution states: "No person holding any civil office of profit, or trust, under this State shall be eligible as Senator or Delegate."

Because the members of the entities created by the specified bills will not be paid for their services, merely reimbursed for their expenses, service on any of the entities is not an "office of profit." To determine if service on an entity constitutes an "office of … trust," which will conflict with simultaneously being a legislator, courts employ a five factor test:

1. the position was created by law and casts upon the incumbent duties which are continuing in nature and not occasional;
2. the incumbent performs an important public duty;
3. the position calls for the exercise of some portion of the sovereign power of the State;
4. the position has a definite term, for which a commission is issued, a bond required[,] and an oath required; [and]
5. the position is one of dignity and importance.

Board of Supervisors of Elections v. Attorney General, 246 Md. 417, 439 (1967). Subsequent cases have minimized the importance of the fifth factor and emphasized that the third factor is the most important. *See* 64 *Opinions of the Attorney General* 255, 256 (1979) (discussing *Duncan v. Koustenis*, 260 Md. 98 (1970)).

The Office of the Attorney General has on several occasions considered whether a legislator may serve on a non-legislative, State created body without violating Article 8 of

the Maryland Declaration of Rights or cause a violation of the prohibition against dual office holding found in Article III, §11. For example, in 1976, the Attorney General opined that these two constitutional provisions would be infringed by the service of members of the General Assembly on the Washington Suburban Transit Commission. 61 *Opinions of the Attorney General* 152, 159-62 (1976). In 2009, we advised the Governor about legislation reestablishing the Commission on the Establishment of a Maryland Women in Military Service Monument. *See* Bill Review Letter on House Bill 944 and Senate Bill 367 (May 15, 2009). Because the legislation empowered the Commission, the membership of which included members of the General Assembly, to enter contracts regarding "the funding, design, construction, or placement of an appropriate monument," and not merely to give advice regarding a monument, we advised that the exercise by the Commission of those executive powers could infringe these two provisions. In 2012, we advised the Governor about the Health Care Reform Coordinating Council, a body the membership of which includes both members of the General Assembly and officials in the Executive Branch. *See* Bill Review Letter on House Bill 443 (April 30, 2012). The concern was that in selecting the State benchmark plan for purposes of the Affordable Care Act, the Council would be functioning as a regulatory body and not in a merely advisory capacity. As a result, we advised that constitutional concerns would be significantly reduced either if the legislators who are members of the Health Care Reform Coordinating Council abstained from voting on the selection of the State benchmark plan, or if the votes of those members were not determinative of the outcome of the selection.

Along the same line of concerns raised about the entities in the foregoing paragraph, if the entities created by the specified bills exercise some of the powers granted, the entities would be performing an executive branch function. For legislators to be members of a State entity exercising such powers could risk a court finding a separation of powers violation. Nevertheless, concerns under both Article 8 of the Declaration of Rights and Article III, § 11 of the Constitution are substantially lessened by the fact that nearly all of the responsibilities are advisory in nature. Moreover, many of the duties arguably have a nexus to legislative activities. Thus, the courts likely would not conclude that membership on any of the entities is an "office of trust." At the same time, a colorable separation-of-powers concern could be raised by exercise of these duties through the votes of members of the legislature cast in those legislators' other capacity as members of an entity functioning as an executive branch entity.

In light of the foregoing, it is our view that the foregoing constitutional concerns would be addressed if the legislators who are selected to be members of the specified bodies abstained from managing State funds, creating legal entities, entering into contracts, soliciting or accepting a gift, grant, legacy, or endowment of money, and the like.

Accordingly, if the legislators on these entities limited their role to the advisory roles, there are no constitutional problems with having two members of the General Assembly serving in that capacity.

Sincerely,

Brian E. Frosh
Attorney General

BEF/SBB/kd

cc: The Honorable John C. Wobensmith
Keiffer J. Mitchell, Jr.
Victoria L. Gruber