

PROTECT MINNESOTA ELDERS

May 19, 2018

The Honorable Kurt Daudt
Speaker of the House
Minnesota House of Representatives

The Honorable Paul Gazelka
Majority Leader
Minnesota Senate

Dear Speaker Daudt, Majority Leader Gazelka, and Members of the Minnesota Legislature:

The Elder Abuse Consumer Coalition (the Coalition), consisting of the undersigned organizations, writes to express its opposition to the inadequate Article 27 (Eldercare Article) contained in SF 3656, the Supplemental Budget Bill. Article 27 fails to provide any of the necessary and critical protections to address the horrific and widespread elder abuse chronicled in the 2017 Star Tribune exposé, “Left to Suffer.”

As it stands, Article 27 is inadequate. Vulnerable adults and their families -- indeed all Minnesotans -- expect meaningful, not merely cosmetic changes when this vitally important issue cries out for strong and significant reform. We urge the legislature to consider a stand-alone bill to address this critical issue and we remain ready to build consensus in the next day.

In several instances, Article 27 actually moves older and vulnerable adults farther away from the reforms needed, and in some cases, inexplicably takes away existing rights.

Article 27 is fatally flawed because of what it does NOT contain. Under current law, older and vulnerable adults have no protection against arbitrary evictions or service terminations. Protections against arbitrary evictions and terminations has been a central Coalition platform. Persons living in group homes may only be discharged for limited reasons, have a right to appeal a discharge, and, if they must leave, there must be a discharge plan to ensure a safe landing. No such protections exist for vulnerable adults residing in assisted living facilities. Further, persons living in manufactured homes may only be discharged for certain reasons. Like vulnerable adults, they are anything but “mobile.” But, vulnerable adults can, and as documented by our organizations, have been discharged to homeless shelters and the street. This is unconscionable and unacceptable. Yet, Article 27 provides no protection against arbitrary eviction and a limited, delayed, and ineffective provision regarding termination of services.

Further, Article 27 contains no provisions giving older and vulnerable adults and their families the authority to civilly enforce their rights under the Health Care and Home Care Bills of Rights. Rights without remedies are no rights at all. The Vulnerable Adult Act provides for private civil enforcement when a vulnerable adult is a victim of financial exploitation. See Minn. Stat. § 626.557, subd. 20. Under the Vulnerable Adult Act, an aggrieved victim is entitled to the greater of treble damages or \$10,000, as well as legal fees. There is no corollary in Article 27. There is no reason why older and vulnerable adults should not have the same rights to enforce violation of their rights under the Bills of Rights as they do for violation of the prohibition against financial exploitation.

While the Article 27 does contain some prohibition against deceptive marketing that the Coalition has demanded, without a private civil enforcement right, facilities can continue to mislead with impunity as well as violate all other resident rights granted under Chapters 144 and 144A. The facilities cannot be counted on to police themselves, and even at its most efficient, government regulators cannot substitute for private enforcement.

Article 27 fails to provide a legal representative, let alone a family member, with the necessary authority to advocate for and enforce the rights of the vulnerable adult, and to be free from retaliation for doing so. Finally, it fails to give families access to necessary information so that there can be more assurance their loved ones are free from abuse, maltreatment, and neglect.

As to what is in Article 27, the following highlights its most egregious deficiencies.

Section 4 (Electronic Monitoring)

First the very families that rely on these devices to monitor the well-being and prevent abusive treatment of their loved ones are ignored. Second, Article 27 places an intimidating and obstructionist barrier to the existing right of a vulnerable adult to place a camera in the room by codifying the indignity of requiring a legal guardian to verify the vulnerable adult's consent in the presence of a facility employee. Third, in dictating production and admissibility of electronic monitoring evidence in a court dispute, Article 27 inappropriately and arguably unconstitutionally encroaches on the Judicial Branch's authority and creates at best ambiguity and at worst a direct conflict with the Rules of Evidence and Rules of Civil Procedure. Finally, it fails to provide any protection for staff and caretakers in the event of a labor dispute.

Section 6 (Health Care Bill of Rights)

Article 27 inexplicably takes away the existing rights of those living in board and lodging facilities to be free from arbitrary transfer or discharge. Under the existing Health Care Bill of Rights, these residents "shall not be arbitrarily transferred or discharged." See Minn. Stat. § 144.651, subd. 29. This provision has never been seen in any previous iteration of HF 3088, HF 3138, or SF 3437, and obviously has never been heard, vetted, or debated in any committee.

Section 14 (Health Care Bill of Rights)

Retaliation against vulnerable adults and family members for filing a complaint, submitting a maltreatment report, or otherwise advocating for better care or treatment has been one of the central tenets of the Coalition proposal for reform. Article 27 ostensibly contains language regarding retaliation, but then renders any protection worthless by providing that the retaliation must be conducted "in bad faith" for it to be a violation. Retaliation by definition is bad faith conduct. What would be an example of a "good faith" retaliation? "Good faith" retaliation is an oxymoron. This section, like the rest of the article, presents the illusion of protection; in fact it is just meaningless words on paper.

Section 55 (Licensing and Dementia Care Certification)

Minnesota is the only state that does not license assisted living facilities. Further, the ever growing percentage of persons in assisted living with Alzheimer's or dementias necessitates creating certification for those facilities holding themselves out as "dementia" or "memory care" facilities.

The Coalition has advocated from the outset that the Legislature – this session – must commit to establishing a clear path toward licensure and certification. With respect to licensure, the Coalition has always acknowledged the need for stakeholder input. At the same time, the Coalition has insisted that this is not a question of if there should be licensure, but rather how and under what standards licensure should be implemented.

Article 27 takes a giant step backward. It violates the principle of how not if, fails to commit to licensing and certification, and pushes any possible implementation out to 2021. In short, this provision is unacceptable. Minnesota cannot remain an outlier when it comes to licensing and regulating assisted living facilities.

In sum, Article 27: fails to ensure that the assisted living facilities on which older and vulnerable adults rely will be licensed; fails to protect older and vulnerable adults from arbitrary evictions and service terminations; and fails to meaningfully expand and enable individual enforcement of rights granted to older and vulnerable adults under the Health Care and Home Care Bills of Rights. Article 27 offers an illusion of progress but is disappointingly hollow.

For all these reasons, the Elder Abuse Consumer Coalition opposes Article 27. It is unacceptable for the Minnesota Legislature to fail to enact meaningful elder abuse reforms.

Sincerely,

AARP
Alzheimer's Association
Elder Justice Center
Elder Voice Family Advocates
Mid-Minnesota Legal Aid

c.c.: The Honorable Thomas M. Baak, Minority Leader, Minnesota Senate
The Honorable Melissa Hortman, Minority Leader, Minnesota House of Representative