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## ABUSE OF VULNERABLE ADULTS

House Bill 4716 (Substitute H-4)  
House Bill 4717 (Substitute H-3)  
First Analysis (6-29-93)

Sponsor: Rep. Ilona Varga  
Committee: Judiciary

### ***THE APPARENT PROBLEM:***

Sadly, despite periodic legislative efforts to ensure that residents in supervised care settings are properly treated in well-regulated homes or institutions, accounts regularly surface that demonstrate the inadequacies of the system that is supposed to protect adults living in foster care or nursing homes. A recent example arose in early 1992, when media reports brought widespread attention to adult foster care homes owned by Nonya Knox in Inkster and Wayne. Allegations of abuse and neglect at the Knox homes apparently were frequent, but for one reason or another, the homes were not closed until after, as one reporter put it, "one retarded resident became comatose from choking on food and another had almost died from a drug overdose." According to Detroit News accounts, a third resident was left permanently scarred from third degree burns acquired through a scalding, and another developed a severe bowel problem due to an incorrect diet and inadequate medical supervision.

Reports are that the Wayne County Prosecutor's Office investigated the possibility of bringing criminal charges against Ms. Knox, but was unable to do so; apparently a case could not be made for criminal assault, and the law was inadequate to prosecute neglect of an adult. Reports of problems with the Knox homes and other facilities led to the development of an informal task force assembled by the governor and the Department of Social Services (DSS) to investigate the scope of the problem and come up with possible solutions. One outgrowth of that effort was a proposal to establish criminal penalties for abuse or neglect of "vulnerable adults," and to strengthen penalties in the adult foster care licensing act (which at present contains a misdemeanor with a \$1,000 fine as its most severe punishment).

Concerns heightened following deaths last summer in a fire in an unlicensed boarding home in Detroit

(the "Pingree Street fire"). Ten people, mostly elderly or mentally or physically handicapped, died in the fire. The home was a place that had continued to operate as boarding home after losing its license as an adult foster care home. Mental health advocates say that this is a relatively common problem: when regulators shut down an unacceptable adult foster care facility, the operator sometimes maintains it as a room and board. To help address problems with boarding homes, the governor's office ordered development of a model room and board ordinance for adoption by local units of government; the model ordinance gives special attention to fire safety, and is being distributed to local officials. Legislation to regulate room and board homes is being developed as well. However, if a "room and board" is providing care to adults who need supervision, it falls under adult foster care licensing requirements. Thus, in conjunction with efforts to properly regulate boarding homes, the law has been examined with an eye to resolving problems with unlicensed adult foster care homes.

Finally, fresh impetus to enact reforms arose following an exhaustive investigative series published by the Detroit News in May 1993. The many stories of abuse and neglect documented in the News series, coupled with accounts of how the system failed to punish or deal effectively with bad operators, brought renewed calls for stiff penalties to deter and punish violators and shut down unlicensed homes. Legislation to establish special penalties for abuse or neglect of vulnerable adults and to address problems with unlicensed homes has been proposed.

### ***THE CONTENT OF THE BILLS:***

The bills would establish special penalties for certain offenses in connection with abuse or neglect of adult foster care residents and other "vulnerable

House Bills 4716 and 4717 (6-29-93)

adults," and establish and increase sanctions for various licensure violations. Neither bill could take effect unless both were enacted. The bills would take effect October 1, 1993.

House Bill 4716 would amend the Michigan Penal Code (MCL 750.145m et al.) to create a new chapter dealing with crimes against "vulnerable adults" (that is, adults who because of age, developmental disability, mental illness, or physical handicap require supervision or personal care, or lack the personal and social skills necessary to live independently). The bill would establish the crime of vulnerable adult abuse and distinguish four degrees of it, and establish felony penalties for licensing or rule violations that led to the death of a vulnerable adult. It also would assign misdemeanor penalties to various offenses dealing with misuse of funds, interfering with state investigations, falsifying information, and retaliating against whistleblowers. Further details follow.

Vulnerable adult abuse. It would be vulnerable adult abuse in the first degree if a caregiver intentionally caused serious physical harm or serious mental harm to a vulnerable adult. The offense would be a felony punishable by imprisonment for up to 15 years, a fine of up to \$10,000, or both. (Community service also could be ordered for this and the other offenses established by the bill; see below.)

It would be vulnerable adult abuse in the second degree if a caregiver's omission or reckless act caused serious physical harm or serious mental harm to a vulnerable adult. The offense would be a felony punishable by up to four years in prison, a fine or up to \$5,000, or both.

It would be vulnerable adult abuse in the third degree if the caregiver intentionally caused physical harm to a vulnerable adult. The offense would be misdemeanor punishable by imprisonment for up to two years, a fine of up to \$2,500, or both.

It would be vulnerable adult abuse in the fourth degree if the caregiver's omission or reckless act caused physical harm to a vulnerable adult. The offense would be a misdemeanor punishable by imprisonment for not more than one year or a fine of up to \$1,000 or both.

These provisions would not prohibit a caregiver from taking reasonable action to prevent a

vulnerable adult from being harmed or from harming another, nor would they apply to an act or omission in connection with a durable power of attorney for health care.

Deaths due to licensing violations. If a licensee, employee, or individual acting on behalf of a licensee intentionally violated the Adult Foster Care Licensing Act or parts of the Public Health Code dealing with hospitals, nursing homes, and homes for the aged, and that violation was the proximate cause of the death of a vulnerable adult, the person would be guilty of a felony punishable by up to five years in prison, a fine of up to \$75,000, or both. Identical penalties would apply if the violation was committed by someone connected with a facility that was supposed to be licensed but was not.

Other proscribed actions. Certain offenses committed by caregivers or licensees would be misdemeanors punishable by imprisonment for up to two years, a fine of up to \$25,000, or both. A repeat offense would be a felony punishable by up to five years in prison, a fine of up to \$75,000, or both. (To be subject to the stiffer penalties, a person would not necessarily have to repeat the same offense he or she had committed earlier; the second offense could be any of the listed offenses.) The offenses would be:

\*\* commingling, borrowing, or pledging funds of a resident that are required to be held in a separate trust account;

\*\* interfering with an investigation under the Adult Foster Care Licensing Act, the parts of the Public Health Code dealing with hospitals, nursing homes, and homes for the aged, or the portion of the Social Welfare Act that deals with investigations of reports of abuse, neglect, or exploitation of adults.

\*\* filing false or misleading information required by the Adult Foster Care Facility Licensing Act or the parts of the Public Health Code dealing with hospitals, nursing homes, and homes for the aged.

\*\*intentionally retaliating or discriminating against a resident for giving information to an enforcement official, making a complaint against a facility, or aiding an administrative, civil, or criminal action against a facility.

Such retaliatory action against an employee, if a first offense, would be a misdemeanor punishable by

up to one year in jail, a fine of up to \$10,000, or both. Second or subsequent offenses would be subject to the same felony penalties that would apply to repeats of the above offenses. The bill would not preclude an employer from taking reasonable and appropriate action against an employee.

Other offenses. A conviction or sentence under the bill would not preclude a conviction or sentence under any other applicable law.

Community Service. In addition to or as an alternative to imprisonment under the bill, the court could impose community service of up to 160 days for a felony or up to 80 days for a misdemeanor. The community service could not involve interaction with vulnerable adults. Someone sentenced to community service could not receive compensation, and would have to reimburse the state or appropriate local unit of government for the cost of his or her supervision.

Definitions. A "caregiver" would be an individual who cared for, had custody of, or had authority over a vulnerable adult. A "facility" would be an adult foster care facility, a nursing home, or a home for the aged. An "omission" would be a willful failure, or a failure with deliberate disregard of the consequences, to provide food, clothing, personal care, supervision, or shelter necessary for a vulnerable adult's welfare, or the willful abandonment of a vulnerable adult. A "vulnerable adult" would be any of the following: an adult who because of age, developmental disability, mental illness, or physical handicap, required supervision or personal care, or lacked the personal and social skills required to live independently; an adult as defined in the Adult Foster Care Facility Licensing Act; or, an adult as defined by Section 11(b) of the Social Welfare Act.

House Bill 4717 would amend the Adult Foster Care Facility Licensing Act (MCL 400.713 et al.) to bar licenses for those convicted of felonies under the act or House Bill 4716; increase penalties for operating without a license, falsifying documents, and other violations of the act; provide for the issuance of emergency licenses; and prohibit certain offenders and those associated with them from being licensed for at least five years following conviction or disciplinary action. Further details follow.

Ban on involvement with facility. The act at present allows the Department of Social Services (DSS) to refuse a license for two years to someone who has had an adult foster care license denied or revoked; such refusals are governed by rules issued under the act. The bill would delete this language and replace it with several restrictions on issuing licenses.

The DSS would be prohibited from licensing someone who had been convicted of a felony under the act or House Bill 4716; that person also would be forbidden from being associated with the ownership or operation of a facility (including residing in a facility).

Someone who had been convicted of a misdemeanor offense under the act or House Bill 4716 would be barred from licensure or other involvement for five years after the conviction. The DSS could, but would not have to, refuse to license for five years someone who had a license revoked or suspended for falsification of documents or for violation of the act, its rules, or the terms of a license. Having a relationship with someone who had a license revoked or suspended also would be grounds for having a license revoked, suspended, or denied for five years after the licensure action. A person would be considered to have a relationship with a former licensee if the former licensee was involved with the facility in any of several specified ways.

Penalties. Operating an adult foster care facility without a license would continue to be a misdemeanor, but the attached penalties would be increased to imprisonment for up to two years, a fine of up to \$50,000, or both. A second or subsequent violation would be a felony punishable by up to five years in prison, a fine of up to \$75,000, or both.

At present, it is a misdemeanor to continue to operate an adult foster care facility after the DSS revokes, suspends, or denies a license. The bill would instead make the offense a felony punishable by up to five years in prison, a fine of up to \$75,000, or both.

Other violations of the act would continue to be misdemeanors, but the maximum jail term would be increased to one year, and the maximum fine to \$1,000.

Operating without a license. If the DSS determined that unlicensed facility was an adult foster care facility, it would notify the owner or operator of the need to be licensed. If the person did not apply for a license within 30 days, he or she would be subject to the penalties that apply to operating a facility without a license (see above).

Emergency licenses. In the case of facilities operated under lease with the Department of Mental Health or a county community mental health board, the DSS could issue an emergency license for a 90-day period to avoid relocation of residents following the revocation, suspension, or nonrenewal of a license, if all of the following requirements were met: the leased facility was in substantial compliance with all licensing requirements; the applicant for the emergency license was a licensee who was in compliance with all applicable regulations under the act and had a contract with the appropriate mental health agency to operate the facility temporarily; and, the former licensee's access to the facility had been lawfully terminated by the owner or lessee of the facility.

Community service. As an alternative to imprisonment under the act, the court could impose community service of up to 160 days for a felony or up to 80 days for a misdemeanor. The community service could not involve interaction with vulnerable adults. Someone sentenced to community service could not receive compensation, and would have to reimburse the state or appropriate local unit of government for the cost of his or her supervision.

**FISCAL IMPLICATIONS:**

There is no fiscal information at present. (6-22-93)

**ARGUMENTS:**

**For:**

With deinstitutionalization and the rise in community placement, adults who need care and supervision are supposed to receive that care in well-maintained group or foster homes. However, egregious cases of abuse and neglect of vulnerable adults arise with dismaying frequency. While penalties for neglect or abuse of vulnerable adults are widely perceived to be inadequate, merely hiking penalties in the regulatory acts would be insufficient: licensed settings include a variety of types of facilities regulated by varying agencies, and even licensed settings do not encompass the full

range of situations in which vulnerable adults may be living.

To address this situation, House Bill 4716 would do a number of things. It would create the crime of vulnerable adult abuse, which would apply everywhere, regardless of setting; all adults in need of care and supervision would receive equal protection. Thus, the crime would apply not only to the licensed home operator whose careless administration of medication left a resident comatose; it also would apply to an unlicensed operator who left a resident in a scalding bath, to a family member who abused an elderly relative living at home, and to someone who abandoned a mentally impaired family member in a bus station.

House Bill 4716 also would create special felony penalties for violations of regulatory laws where those violations led to the death of a vulnerable adult. Both licensed facilities and those that ought to be licensed would be covered, regardless of the licensing scheme under which the facility fell. Stiff criminal fines would provide a financial incentive not to "cut corners" at the expense of residents; such fines, moreover, are warranted, as some of the worst problems appear to have been with owner/operators who have amassed great wealth at the expense of foster care recipients.

Other provisions would address problems experienced with operators who refuse to allow investigators into homes or who bar contact between investigators and residents: obstruction of an investigation and retaliation against whistleblowers (whether resident or employee) would be misdemeanors subject to stiff fines.

In sum, the bill would establish a comprehensive criminal law that would apply across the state, regardless of setting. Stiff, uniform criminal penalties should serve to deter and punish wrongdoers; all vulnerable adults in Michigan would benefit as a result.

**Response:**

A clear problem with the law has been not so much inadequate penalties, which in any event can be addressed through the regulatory acts, but inadequate enforcement. Lack of personnel and funding for inspections, coupled with cozy relationships between some home operators and local agencies, have played a major role in the system's failure to prevent and halt abuse and

neglect in adult foster care homes. The bills would do nothing to resolve this root problem.

**Rebuttal:**

Reports are that extra funding for regulation and inspection of adult foster care homes will be in the budgets for the DSS and the Department of Mental Health for the coming fiscal year. According to newspaper accounts, the number of state inspectors for adult foster care homes will increase from 59 to about 79, and the number of social workers investigating complaints of abuse will rise from 65 to 106. In addition, the Department of Mental Health is expected to add eight inspectors to visit homes with special contracts. However, reports also suggest that the hiring of additional workers may be contingent on enacting tougher laws on abuse.

**Against:**

House Bill 4716 would apply to "caregivers," who would include those who had authority over a vulnerable adult. In addition, it would criminalize "omissions," which would include a wilful failure to provide the supervision necessary for a vulnerable adult's welfare. Thus criminal penalties could be applied not only to actual wrongdoers, but also to a facility owner or operator who may have had no knowledge of the behavior of an employee. While arguably an owner or operator should have to share civil liability for any harm that befalls a resident, criminal liability should be reserved for the actual wrongdoer. The bill could unfairly leave a facility owner open to criminal charges of abuse of a vulnerable adult.

**Response:**

Facility owners and operators should bear responsibility for failure to adequately select, train, and supervise employees. Whether owners and operators should be insulated from criminal liability is questionable. Under the bill, for an owner's omission to constitute vulnerable adult abuse, there would have to be a "wilful failure, or a failure with deliberate disregard of the consequences" to provide certain things necessary for a vulnerable adult's welfare, and the vulnerable adult would have to have suffered harm as a result. Someone whose behavior fit this description should be held accountable under criminal law; a civil lawsuit should not be the only legal recourse.

**Against:**

The bills could cause some problems to be hidden. Rather than report problems to authorities, owners and operators fearful of serious criminal liability

might instead try to deal with matters privately. The bills could "chill" self-reporting.

**Response:**

Many dispute whether the bills would affect the behavior of reputable owners and operators.

**Against:**

It would be unnecessary and improper to amend the penal code with respect to facilities that operate under regulatory acts. For one thing, "abuse" is assault and is already against the law. With regard to nonassaultive offenses and problems with facilities, if the acts regulating various types of facilities are inadequate, then it is those acts that should be amended. To do otherwise risks an unconstitutional attempt to "amend by reference," and risks creating inconsistencies between the penal code and applicable regulatory acts. For example, the portion of the Public Health Code that regulates nursing homes makes it a misdemeanor with a \$1,000 minimum fine and a \$10,000 maximum fine for a nursing home licensee, administrator, or employee to abuse or harmfully neglect a patient. This would be inconsistent with the more general criminal penalties proposed by House Bill 4716.

**Response:**

House Bill 4716 explicitly states that it would not preclude a conviction or sentence for a violation of any other applicable law. Moreover, because of the variety of licensing schemes and problems with unlicensed facilities, there is a need to have a general criminal law on abuse and neglect of vulnerable adults.

**Against:**

Similar criminal sanctions should be extended to institutional settings, such as mental hospitals staffed by employees of the Department of Mental Health.

**Response:**

Criminal penalties for abuse or neglect of a vulnerable adult would apply in institutions, as well as in licensed and unlicensed adult foster care homes and in private residences.

**Against:**

Although penalties for retaliating against "whistleblowing" employees or residents would apply to both caregivers and licensees, certain protections would apply to complaints against "facilities," rather than complaints against either caregivers or facilities. It would be better to clarify House Bill

4716 in this regard and ensure the broader protection.

***Against:***

Licenses would be punished more harshly than non-licenses under the bills. Both would be subject to the same criminal penalties and heavy fines under House Bill 4716, but licenses would additionally be subject to loss of licensure and their income, which could amount to much more than any fines meted out under House Bill 4716.

***Response:***

A licensee's abuse or neglect of a vulnerable adult would be subject to the same criminal penalties that apply to anyone else who abuses or neglects a vulnerable adult under his or her care.

***For:***

Like House Bill 4716, House Bill 4717 would strengthen criminal penalties applicable to those who abuse or neglect adults who receive foster care, and those who violate licensing laws. However, the bill would further address problems with unlicensed homes by prohibiting certain connections with former licensees; it thus would close the door on those who lose a license, then try to stay in business through other personal or business relationships. House Bill 4717 also would prevent people in residential care settings under the auspices of community mental health services from being uprooted unnecessarily; the bill offers a mechanism to allow residents to remain while a home changes hands.

***POSITIONS:***

The Office of the Auditor General strongly supports the bills. (6-25-93)

The Michigan Protection and Advocacy Service strongly supports the bills. (6-27-93)

The Association for Retarded Citizens-Michigan (ARC Michigan) supports the bills. (6-28-93)

Citizens for Better Care supports the bills. (6-28-93)

The Department of Mental Health supports the bills. (6-22-93)

The Prosecuting Attorneys Association of Michigan supports the bills. (6-22-93)

The Department of Social Services supported the original bills and the H-2 substitutes, but is reviewing the committee substitutes and has no formal position at this time. (6-22-93)

The Michigan Residential Care Association (which represents 3500 licensed adult foster care facilities) supports the concept of the bills, but believes that there may need to be amendments to clarify that criminal penalties should apply only to the actual wrongdoer whether licensee or employee; employers generally should not be held criminally liable for the wrongful acts of their employees. (6-23-93)

A representative of the Health Care Association of Michigan testified against House Bill 4716. (6-22-93)