



Law and Justice Interim Committee
59th Montana Legislature

SENATE MEMBERS

DANIEL MCGEE--Vice Chair
BRENT CROMLEY
JESSE LASLOVICH
GARY PERRY
JIM SHOCKLEY
CAROL WILLIAMS

HOUSE MEMBERS

JOHN PARKER--Chair
GEORGE EVERETT
DIANE RICE
RON STOKER
BILL WILSON
JEANNE WINDHAM

COMMITTEE STAFF

SHERI HEFFELFINGER, Lead Staff
VALENCIA LANE, Staff Attorney
FONG HOM, Secretary

MINUTES

Date: June 30, 2006

Office of State Public Defender
Butte, Montana

Please note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division.

Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.

COMMITTEE MEMBERS PRESENT

REP. JOHN PARKER, Chair
SEN. DANIEL MCGEE, Vice Chair
SEN. BRENT CROMLEY
SEN. JIM SHOCKLEY
SEN. CAROL WILLIAMS
REP. GEORGE EVERETT
REP. DIANE RICE
REP. RON STOKER
REP. BILL WILSON
REP. JEANNE WINDHAM

COMMITTEE MEMBERS ABSENT

SEN. JESSE LASLOVICH
SEN. GARY PERRY

STAFF PRESENT

SHERI HEFFELFINGER, Lead Staff
VALENCIA LANE, Staff Attorney
PAT GERVAIS, Legislative Fiscal Analyst
CYNTHIA A. PETERSON, Secretary

Visitors

Visitors' list (Attachment 1)
Agenda (Attachment 2)

COMMITTEE ACTION

- The LJIC adopted LC 71rv as a committee bill with an amendment to change the language on page 5, subsection (3)(c)(iii) to refer to a part-time position as opposed to full time.
- The LJIC adopted the Legislative Fiscal Division numbers prepared for LC71rv, as presented in Exhibit 2.
- The LJIC approved the following minutes: Pro se Subcommittee meeting minutes from February 17, 2006 and March 22, 2006; LJIC meeting minutes from March 23, 2006, May 11, 2006, and May 12, 2006.

CALL TO ORDER AND ROLL CALL

Rep. John Parker, Chairman of the Law and Justice Interim Committee (LJIC) called the meeting to order at 8:22 a.m. The secretary noted the roll (Attachment 3).

AGENDA

LC 71: PROSECUTION SERVICES ACT

Summary of LC 71 (as revised), issues/options list--Sheri Heffelfinger

Ms. Heffelfinger reviewed LC71rv with the LJIC (EXHIBIT 1) .

Questions from the LJIC

Sen. McGee noted the use of the word "predictable" in Section 2(1)(f) and commented his experience has been that the appropriation process is not predictable. Ms. Heffelfinger explained that statutory appropriations are ongoing, and the appropriation has to be calculable and predictable. Sen. McGee expressed concern that in times of shortfall, the state has found it necessary to pare back. Ms. Heffelfinger explained that the statutory appropriation will be reviewed by the Fiscal Analyst's Office, and it will be assumed the funding will be maintained. Sen. McGee commented the Legislature has tried to get away from statutory appropriations over the years because the Legislature does not have control over statutory appropriations. Sen. McGee urged caution in encumbering future Legislatures.

Summary of LC 71 (as revised), issues/options list--Sheri Heffelfinger (continued)

Ms. Heffelfinger continued reviewing LC71rv with the LJIC.

Questions from the LJIC

Sen. McGee asked if the social security included in the definition of "salary" represented the full 15.3 percent or whether it is only the employer's 7.65 percent. Ms. Heffelfinger clarified it represents only the employer's share. Sen. McGee pointed out the issue of a pure 50/50 split could not necessarily be met with the 50 percent of 85 percent. Ms. Heffelfinger explained the state will pay 50 percent of the employer's share, and the county will pay the other 50 percent of

the employer's share. Sen. McGee emphasized the actions of the County Compensation Board could not be controlled, and those actions could conflict with the 50 percent of the 85 percent value of a district court judge. Sen. McGee suggested a county attorney could get paid more than a district court judge. Ms. Heffelfinger agreed and identified the question as whether the proposed legislation should say 50 percent of the 85 percent or should state 42.5 percent of a district judge's salary. Ms. Heffelfinger agreed the County Compensation Board could set the salary at a different level depending on various factors. The state's share, however, would be based on the formula contained in the proposed legislation.

Upon concerns voiced by Rep. Stoker, Ms. Heffelfinger explained the state's share would not be a percentage of the salary set by the county but would be 50 percent of a district judge's salary including employer benefit contributions on that salary.

Sen. Cromley asked if the cap on benefits is based upon 50 percent of 85 percent or whether it is based on actual expenses. Ms. Heffelfinger explained the cap is based on a district judge's salary and what they are actually getting paid.

Summary of LC 71 (as revised), issues/options list--Sheri Heffelfinger (continued)

Ms. Heffelfinger continued and reviewed Section 3 of LC71rv.

Questions from the LJIC

Upon question from Sen. McGee about using the entitlement share as the funding mechanism, Ms. Heffelfinger explained that at the last LJIC meeting, the LJIC determined that using the entitlement share was not going to be a fair way to pay the county attorneys.

Ms. Heffelfinger referred the LJIC to the Legislative Fiscal Division's per Department of Justice Estimates for LC 71 Prosecution Services costs (EXHIBIT 2), which was based on Department of Justice information.

Sen. McGee mentioned an error in subsection (3)(c)(iii) and pointed out that the definition of "part-time county attorney" contains the identical language as "full-time county attorney." Ms. Heffelfinger said she would make the correction.

Ms. Heffelfinger submitted a county-by-county table of county attorney salaries and projected salaries (EXHIBIT 3).

Ms. Heffelfinger clarified for Sen. Cromley that subsection 1(a) in Section 4 lists what officials are included in the county pay plan, and that the County Compensation Board sets the pay plan and provides the increase. Sen. Cromley asked if the County Clerk could be given a separate raise. Ms. Heffelfinger replied her understanding was if the county wants to give a three-percent raise to one official, they have to raise all the officials and cannot just raise one office.

Sen. Shockley believed county attorneys are not over paid, and that the LJIC is attempting to ensure that county attorneys are paid fairly. Sen. Shockley did not believe the County Attorney should receive an increase just because another county official receives an increase.

STAKEHOLDER COMMENTS ON LC 71 (as revised):

Department of Justice

Larry Fasbender, Deputy Director, Department of Justice (DOJ) suggested the proposed legislation provides a solid way to determine what is going to be paid as far as the state is concerned, but will allow the counties to decide how much they are going to pay county attorneys. Mr. Fasbender believed the proposed legislation would solve many of the administrative problems. Mr. Fasbender believed paying on a quarterly basis would be a smoother way to proceed. Mr. Fasbender also believed the proposed legislation addresses the problem with health insurance. Most of the increase would come from the increase in health benefits. Mr. Fasbender stated the numbers provided from Pat Gervaise are a little different than his numbers, but that he would work to resolve the differences. Mr. Fasbender noted in difficult times, the Legislature could always go back and change the numbers and percentages in the formula.

Montana Association of Counties

Harold Blattie, Executive director of the Montana Association of Counties, believed the current process absolutely does not work. Mr. Blattie urged the LJIC not to get hung up on the 50 percent of 85 percent since it is just a mathematical way to get to the right percentage. Mr. Blattie explained how some counties chose to backfill what the state was not providing, but some did not. Mr. Blattie emphasized that problems also occur when an incumbent leaves office. Mr. Blattie believed the proposed legislation recognizes that county attorney services are shared.

(Tape 1; Side B)

Mr. Blattie acknowledged the counties could now pay the county attorneys whatever they deemed appropriate. Mr. Blattie believed the legislation solved numerous problems by not directly tying the county attorney's salary to the district court judge's salary.

Questions from the LJIC

Sen. Shockley commented he did not have problem with paying county attorneys more money, but in looking at page 8 of the LC 71 (revised) bill draft, Sen. Shockley noted county attorneys will get the same raise as other county officials, which could result in a large pay increase for county attorneys since the raise would be calculated on a larger pay base. Mr. Blattie explained the provision was inserted at the request of the County Attorneys Association, and he did not view the provision as problematic. Mr. Blattie suggested that would be a local decision. Mr. Blattie explained they were trying not to compromise a county attorney's salary.

Sen. Cromley asked whether an increase in the county attorney's salary would result in an increase for other county officials. Mr. Blattie responded that the whole concept is that the elected official salaries shall be set uniformly; however, there are special provisions in the law for county attorney salaries.

Montana County Attorney's Association

Fred Van Valkenberg, Missoula County Attorney and President of the Montana County Attorney's Association, supported LC 71. Mr. Van Valkenberg expressed concern about the definition of "part-time" county attorney. Mr. Van Valkenberg explained how the problem has taken up a substantial amount of legislative time and county attorney time in an unproductive fashion. Mr. Van Valkenberg believed the proposed legislation was close to being a product that the interested parties could live with and would solve an on-going issue about how county attorney salaries will be funded into the future. Mr. Van Valkenberg identified significant disparities in county attorney salaries that do not exist with other county officials. Mr. Van Valkenberg also spoke about the importance of being able to attract qualified attorneys. Mr. Van Valkenberg stated the bill potentially has money to add to the Attorney General's programs that provide assistance in the child abuse and neglect area and the forensic sciences area.

Questions from the LJIC

Sen. Williams did not agree with Sen. Shockley since the LJIC is trying to keep and attract county attorneys and that having a predictable system is very important.

Sen. Shockley responded he would rather see the county be able to pay whatever they want to pay. Sen. Shockley noted that when a county attorney's salary goes up, the clerk and recorder's salary does not. However, if the clerk and recorder receives a three-percent raise, the county attorney also gets a three-percent raise. Sen. Shockley did not support that provision and agreed with Sen. Cromley that it does not make sense to have the salary tied to other county official salaries. Sen. Cromley noted the provision is part of existing law.

Bill Kennedy, Yellowstone County Commissioner, submitted written testimony from the Yellowstone County Commissioners on LC 71 (EXHIBIT 4) and a letter from the Yellowstone County Commissioners supporting MACo's position (EXHIBIT 5). Mr. Kennedy explained how Yellowstone County split off the county attorney position from the other elected officials, and that the Yellowstone county attorney's salary is at 100 percent of the district court judge's salary.

Other public comment on LC 71

There was no further public comment offered.

COMMITTEE QUESTIONS, WORK SESSION, AND ACTION ON LC 71

Sen. McGee spoke to Commissioner Kennedy and explained the LJIC is trying to codify that portion of the county attorneys salaries that is the state's responsibility. Sen. McGee sought to know what is currently in code that assures the counties will have to pay a certain amount of money. Commissioner Kennedy could not identify any requirements currently in statute. Commissioner Kennedy stated as long as they know the formula, the counties can live with it because they know where the money will come from and how much money there will be. Commissioner Kennedy believed the proposed formula would work for Yellowstone County.

Sen. McGee addressed Mr. Van Valkenberg and asked what was in statute that would assure the county will pay its share. Mr. Van Valkenberg said there is nothing in statute, and that the state would be trusting the judgment of the county commissioners. Sen. McGee asked Mr. Van Valkenberg whether he was satisfied county attorneys would be compensated fairly at the county level. Mr. Van Valkenberg replied he was satisfied in the sense that you cannot get everything at once and that this is an important first step. Mr. Van Valkenberg was confident the state should be able to get good competent county attorneys. Sen. McGee asked for a reason why the bill should not address the county's level of responsibility to compensate at a certain level. Mr. Van Valkenberg stated County commissioners have a significant interest in seeing good representation of the county in civil matters. The issue is whether those two hats should be combined and whether the county attorneys should serve the state government and county government at the same time. Mr. Van Valkenberg recalled the LJIC decided earlier to adhere with the current system and encouraged the LJIC to trust that county commissioners will act in their own county's best interests.

Chairman Parker commented it is his sense that since the LJIC meeting in Billings, everyone has worked to reach a compromise. Chairman Parker asked Mr. Blattie whether he feels the counties' interests had been attended to. Mr. Blattie responded he was satisfied and thought the proposed legislation was acceptable. Mr. Blattie believed the counties would get what they pay for, and that would be a good motivator.

Rep. Stoker asked if a County Compensation Board decided to have a three-percent increase for another elected official whether it could then give that exact same dollar amount to the county attorney. Mr. Van Valkenberg suggested it would depend on the formula that the particular County Compensation Board had adopted for pay raises. Rep. Stoker asked whether the 85 percent factor was the one that caused the least amount of distress in the whole system. Mr. Van Valkenberg understood the 85 percent was relatively close to what the legislature was currently appropriating as a whole, and adding in the percentage of contribution for healthcare benefits bumped it up and resulted in a political compromise.

Sen. Williams MOVED that the LJIC adopt LC71rv as a committee bill.

Sen. McGee noted on page 5, subsection (3)(c)(iii), should refer to a part-time position as opposed to full time. Chairman Parker accepted Sen. McGee's suggestion as a friendly amendment. Sen. McGee addressed page 6, subsection 1(b), and asked what "uniform" means and whether it needed clarification. Mr. Blattie responded "uniform" means the salary is set at \$40,000 a year for the enumerated elected officials. Mr. Blattie did not see the reference to "uniform" as being a problem.

Sen. Williams' motion CARRIED unanimously by voice vote with Sen. Perry and Rep. Laslovich voting aye by proxy.

Sen. McGee MOVED to adopt the Legislative Fiscal Division numbers prepared for LC71rv, as presented in Exhibit 2. Sen. McGee stated he was not certain about numbers, but was comfortable with the numbers since the legislation would go through the normal appropriations process. Sen. Williams agreed and recalled Mr. Fasbender had commented his numbers were a little different.

(Tape 2; Side A)

Sen. McGee's motion CARRIED unanimously by voice vote with Sen. Laslovich and Sen. Perry voting aye by proxy.

BREAK

HJR 15: SENTENCING EQUITY STUDY

Issue Briefings on HJR 15 Study, Equity in the Justice System for American Indians

The LJIC addressed HJR 15 (EXHIBIT 6), and Chairman Parker referred the LJIC to Rep. Juneau's e-mail comments (EXHIBIT 7).

- **Bill sponsors, members of State Tribal Relations Interim Committee**

Cil Robinson, Board of Crime Control, said that in the juvenile justice system it is difficult to find state-wide data. Ms. Robinson's focus has been getting a system in place to make data available for study, monitoring, and followup. The federal requirements include looking at arrest data, court referral data, diversion data, detention data, petitioning data, or charges filed, cases resulting in delinquent findings, cases resulting in probational placement, and cases resulting in confinement in secured juvenile correctional facilities, and cases transferred to adult court. Ms. Robinson believed good data would be available in most of those areas by the end of 2006. An assessment has been conducted based on available data, but the data is not complete. Ms. Robinson provided available data using the federal test for American Indian Alaska native youth. Ms. Robinson explained data is available on youth transferred into adult court, but that only sporadic data is available for youth where an action is initiated in adult court. Ms. Robinson pointed out that a low diversion rate is undesirable because you would want youth to be diverted from the system at a higher rate. Ms. Robinson cited the need to address disproportionate minority contact with the juvenile justice system in Cascade, Yellowstone, Choteau, Hill, Liberty, Missoula and Mineral Counties. Chairman Parker requested a written summary of Ms. Robinson's testimony.

Jim Mason, American Indian Liaison, Department of Corrections, said that he looks after the cultural issues of American Indians, and does not deal much with juveniles. Mr. Mason identified a new position entitled "Native Cultural Officer," to assist American Indian offenders in understanding the justice system. Mr. Mason believed the program has been successful and well received by the courts. Mr. Mason explained the goal is to divert a higher percentage of American Indian offenders from prison.

- **Indian Affairs Coordinator, Governor's Office**

There was not a representative from the Governor's Office present.

- **Department of Justice**

John Conner, Chief Criminal Counsel, Attorney General's Office, travels throughout the state prosecuting criminal cases and is becoming more aware of issues in dealings with Native American defendants. Mr. Conner spoke about his experience in prosecuting the Montana State Prison riot cases in the 1990s and his dealings with a Native American witness for the state. Mr. Conner believed that particular witness should never have been in prison. Mr. Conner believed there needs to be a better understanding of the cultural and economic differences of American Indians. Mr. Conner believed the new public defender system will help in these instances since it will be very conscious of Native American issues. Mr. Conner was clear that he has not seen any signs of overt discrimination with respect to prosecution decisions made by the county attorneys. Mr. Conner thought decisions should, however, be made with some basis of cultural understanding. Mr. Conner will begin presenting training sessions with county attorneys that deal with cultural awareness of Native Americans.

- **Department of Corrections**

Mike Ferriter, Director, Department of Corrections, appreciated the opportunity to discuss HJR 15. Director Ferriter noted the use of certain terms in HJR 15 such as "treatment opportunities," "rates of incarceration," "probation and parole revocations." Director Ferriter suggested more attention should be focused on disparity issues. Mr. Ferriter provided oral statistics to the LJIC and stated he would provide verified written statistics to Ms. Heffelfinger. Director Ferriter suggested ongoing training in cultural diversity would help reduce probation and parole revocation numbers for Native Americans.

Ms. Robinson added that under the Montana Youth Court Act, youth age 16 who are in the informal part of the system can waive their rights without consulting their parents or counsel. Ms. Robinson believed the statute needed to be looked at.

- **State Public Defender's Office**

No presentation was available from Office of State Public Defender.

- **County Attorney Representatives**

Fred Van Valkenberg was only recently asked to participate and did not have an opportunity to discuss the issue with members of the County Attorneys' Association and expressed his personal opinion. Mr. Van Valkenberg identified the issue as a complex issue that does not lend itself to a simple analysis of statistics. Mr. Van Valkenberg believed the problem is not unique to Montana. While Mr. Van Valkenberg agreed it may be very difficult to find instances of overt discrimination, he suggested there are such significant cultural differences that judges, prosecutors, and police officers need to use an entirely different type of approach when dealing with Native Americans. In addressing the issue of disproportionate numbers in the commission of crimes, Mr. Van Valkenberg believed the disproportionate numbers have a lot to do with alcohol abuse. Mr. Van Valkenberg identified a need to address alcoholism in the Native American communities. Mr. Van Valkenberg identified hope as being the essential ingredient.

- **American Civil Liberties Union**

Scott Crichton, American Civil Liberties Union (ACLU), provided a larger perspective and agreed recitation of statistics would not capture the problem. Mr. Crichton noted the differences between the past racial discrimination against African Americans, who were treated as property, and Native Americans, who faced eradication. Mr. Crichton believed most people who are incarcerated have substance abuse issues.

(Tape 2; Side B)

Mr. Crichton suggested it is much better to treat individuals rather than incarcerate them; however, no treatment is available in Montana's county jails. Mr. Crichton identified cultural awareness, education, and training as key. Mr. Crichton suggested implementing comprehensive jail standards and requiring a timely reporting from jails providing information regarding each inmate. Mr. Crichton requested that the issue of racial profiling be further addressed. Mr. Crichton cautioned against criminalizing poverty.

Other Public Comment on HJR 15 Study

Jim Smith, Montana Sheriffs' and Peace Officers' Association, recalled that local law enforcement supported racial profiling legislation in the past and has made a good-faith effort to address the issue. Mr. Smith explained the Montana Law Enforcement Academy is providing training on racial profiling, and the training was attended by over 1,700 law enforcement officers during the past year.

Round Table Discussion: Committee and Invited Guests on HJR 15

Roxanne Gourneau, Vice Chairman for the Fort Peck Assiniboine and Sioux Tribes, offered tribal assistance to the HJR 15 study. Ms. Gourneau believed it would be necessary to get a full picture of all Montana citizens. Ms. Gourneau identified a need to recognize some situations are not going to go away and that social ills need to be addressed. Ms. Gourneau did not want to see neon lights across reservations that would invite increased crime. Ms. Gourneau spoke about the need to increase treatment facilities and the need to provide economic dollars to encourage economic advancement. Ms. Gourneau suggested Native Americans many times will not aid in their own defense because they do not know how. Ms. Gourneau believed it was important to be able to distinguish between cultural behavior and rude behavior. Ms. Gourneau believed there is a disparity in sentencing between the state system and the federal system. Ms. Gourneau thought the reservations should share in the responsibility of addressing Native American problems. Ms. Gourneau also thought it was important to understand the dominant culture.

Questions from the Committee

Sen. McGee thanked Mr. Van Valkenberg for his comments. Sen. McGee believed hope is spiritual, and that the statistics are not the problem; rather, the statistics are the result. Sen. McGee said hopelessness could make a person not want to get out of bed in the morning and experience a need to dull the pain. Sen. McGee said we have created a reservation system that allows people to exist through subsidies rather than participate in the dominant society. Sen. McGee outlined various cultural differences and stated he believes the problem is spiritual,

not cultural, and that the laws need to respect and understand the spirit.

Rep. Everett noted two percent of the total Indian population lives off the reservation, and asked if there is a statistic available that would indicate more Native Americans come into the prison system who live off the reservation. Mr. Ferriter noted the lack of a traditional reservation in the Great Falls area, and that there is a large number of Native Americans from that area in the prison system. Mr. Ferriter suggested there is a need to look at the federal side of the equation.

Sen. Williams believed the LJIC made a good start in obtaining data and information and is making progress but also believed the scope of what the LJIC could do during the interim is limited. Sen. Williams identified the issue as access to justice and how Native Americans can obtain better access to justice. Sen. Williams suggested inviting tribal leaders and members to the next meeting.

(Tape 3; Side A)

Sen. Shockley said he recently visited the Salish and Kootenai Reservation. Sen. Shockley believed there are more Indians in the system because Indians commit crimes at a higher rate and do not get sentencing breaks. Sen. Shockley said racial profiling exists and stated driving under the influence is the number one felony for Indians and is a result of racial profiling. Sen. Shockley spoke about his personal experience with a Native American who confessed to a crime he did not commit because he simply collapsed once he got into the system. Sen. Shockley thought a cultural officer could have helped in that particular situation.

Rep. Windham commented on the statistics and suggested that on the Flathead Reservation, cases, including juvenile cases, are prosecuted in state court and not federal court, so the data might be better in Lake County. Rep. Windham said poverty was the problem and stated that there is data and that behavior can change a person's mental or spiritual outlook. Rep. Windham believed internal biases drive people, and that it is difficult for people to face their short comings.

Chairman Parker concluded that he hoped the LJIC and Legislature would continue working in the right direction. Chairman Parker suggested that thought should be given to the impact on victims. Chairman Parker warned against trying to sweep tough issues under the table.

Committee instructions to staff on HJR 15

Ms. Heffelfinger solicited information from the LJIC on what information they would like included in the staff report on HJR 15. The resolution focuses on obtaining state-wide data, and Ms. Heffelfinger asked whether the LJIC wanted a contracted statistical study and how much money the LJIC wanted to spend. Chairman Parker asked if money was available for contract research. Ms. Heffelfinger explained there was no money available in the LJIC budget and that it would be an appropriation request for the next biennium. Chairman Parker suggested Ms. Heffelfinger summarize information from the stakeholders and document what the state is already doing to address the problem. Chairman Parker requested a presentation on the issues and the options for a contract study. Chairman Parker also requested Ms. Heffelfinger solicit a letter from the President of the District Judges Association and request them to make a presentation in August and also invite more tribal representatives to speak.

Rep. Stoker stated he would like to hear a concise report from the seven reservations. Rep. Stoker thought it was important for the LJIC to understand the criminal justice system within each reservation. Chairman Parker cautioned the LJIC's agenda is full for August, but suggested written reports could be requested. Ms. Heffelfinger explained she had already invited tribal representatives, but would make another attempt. Sen. Williams suggested Rep. Juneau and Rep. Windy Boy could help facilitate Ms. Heffelfinger's request.

PUBLIC COMMENT ON ANY ISSUES RELEVANT TO LJIC DUTIES

There was no further public comment offered.

APPROVAL OF MINUTES

Sen. Williams moved to approve the minutes from previous meetings. The motion carried unanimously by voice vote with Sen. Laslovich and Sen. Perry voting aye by proxy.

Chairman Parker appointed a subcommittee to address the public defender entitlement share funding issues and what the counties will pay versus what the state will pay: The subcommittee will consist of Sen. Williams, Rep. Rice, Rep. Windham and Sen. McGee (Chairman).

ADJOURNMENT

Members of the LJIC were invited to attend the Public Defender Commission meeting that was underway at the Butte Plaza Inn. Attendance was optional.

There being no further business to come before the LJIC, the meeting adjourned at 11:50 a.m.

CI0425 6235fhxc.