



Law and Justice Interim Committee

58th Montana Legislature

SENATE MEMBERS

DUANE GRIMES--Chair
BRENT CROMLEY
DANIEL MCGEE
GERALD PEASE
GARY PERRY
MICHAEL WHEAT

HOUSE MEMBERS

JOHN PARKER--Vice Chair
GAIL GUTSCHE
MICHAEL LANGE
DIANE RICE
JIM SHOCKLEY
FRANK SMITH

COMMITTEE STAFF

SHERI HEFFELFINGER, Research Analyst
VALENCIA LANE, Staff Attorney
SANDRA SHEPHERD, Secretary

MINUTES

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

SEN. DUANE GRIMES, Chair
REP. JOHN PARKER, Vice Chair

SEN. BRENT CROMLEY
SEN. DANIEL MCGEE
SEN. GERALD PEASE
SEN. GARY PERRY
SEN. MICHAEL WHEAT

REP. GAIL GUTSCHE
REP. MICHAEL LANGE
REP. DIANE RICE
REP. JIM SHOCKLEY
REP. FRANK SMITH

STAFF PRESENT

SHERI HEFFELFINGER, Research Analyst
VALENCIA LANE, Staff Attorney
KIP DAVIS, Secretary

Agenda & Visitors

Agenda, Attachment #1
Visitors' list, Attachment #2.

CALL TO ORDER AND ROLL CALL

CHAIRMAN GRIMES called the meeting to order at 8:30 a.m. REP. PARKER moved to accept the minutes from the May 20, 2004 meeting. REP. RICE seconded the motion, and the minutes were adopted unanimously.

I. Motion to Reconsider Previous Action on Investigation of Child and Family Services

CHAIRMAN GRIMES told the Committee that there had been a request to reconsider a motion made during the May meeting to investigate complaints against the Child Protective Services (CPS) division.

REP. PARKER explained that a motion was made in May to investigate three complaints against the actions of the CPS in Ravalli County and now REP. SHOCKLEY has asked him to make a motion to reconsider the action. He said that committee members, including REP. SHOCKLEY and himself have investigated the facts, to the extent possible, by making phone calls and reviewing court documents of record and have met with Shirley Brown, administrator of CPS for DPHHS and now feel that the actions of the department were justified and the court process was fair. It was learned that a single caseworker, working alone, cannot remove a child from a home and there is a review process by the local county attorney's office and, ultimately, due process through the court system. REP. PARKER said that for these reasons he believes the Committee should reconsider its action. SEN. MCGEE said that the public defender bill will help address some of these concerns, because trained attorneys acting as public defenders will be introduced into this process at the very beginning of the process. SEN. MCGEE also commented that, because of the privacy issues involved and the confidentiality required by law, there is a false aura of secretiveness and controversy surrounding CPS actions but there is no purposeful malfeasance and this is a good motion and there is no need for legislative investigation at this time. CHAIRMAN GRIMES said that even if there were purposeful malfeasance this Committee is not the proper venue for those issues because there could be no privacy or confidentiality. REP. RICE asked what recourse is available for the people who have traveled here and have serious grievances. SEN. MCGEE said it was his understanding that, in the case of a grievance, they can apply to the county attorney and the public defender and the court itself or file a grievance with Shirley Brown.

CHAIRMAN GRIMES then called for a voice vote on the reconsideration motion. The voice vote on the motion passed, with REP. RICE providing the only dissenting vote.

II. Briefing on the Current Structure, Status, and Funding of the Judicial Branch Court Information Technology Program

Jim Oppedahl, Court Administrator, Lewis & Clark County, presented a PowerPoint program (see *EXHIBIT #1*) explaining the structure, strategic planning objectives, current initiatives, and funding imperatives of the Judicial Branch Information Technology system.

III. Report from the Public Defender Subcommittee

SEN. MCGEE told the Committee that LC0214, the proposed bill draft of the public defender act (see *EXHIBIT #2*), is a takeoff from SB 218 in 2003 and explained the policy decisions behind the current version. The first policy decision faced by the subcommittee was which courts should be included under the new state public defender's office and the unanimous

decision of the Subcommittee was that all courts would be served by the state office--city courts, justice's courts, and district courts. Although the Subcommittee realized that funding a system this broad would be a challenge, the lawsuit requires effective assistance of counsel at any level and so the decision was made to set up the structure of the state office and figure out ways to fund the office later. He said that the second significant policy decision was how rigid or how flexible the system would be, and the Subcommittee chose the most flexible possible, while standardizing the effective assistance of counsel throughout the state by establishing standards for qualifications and procedures for training. A 7-member public defender commission, appointed by the governor, will be established which will hire, and have authority over, a chief public defender. The chief public defender may hire deputies for each of 11 regions, which would be staffed by state employees. The decision about the income levels for the threshold of indigency was deferred to the full Committee for the Sept. 8 meeting. He said that efforts were made to define eligibility based on a more flexible formula than simply income and the concept of partial indigence was discussed. The Subcommittee decided that every cost related to the defense would be paid by the public defender's office, while prosecution costs would remain the responsibility of the court administrator. SEN. MCGEE said the Committee members should keep in mind that funding sources will be needed to finance the statewide public defender system. Currently, city courts keep 100% of the fines levied in those courts and Justice's Courts keep 50% of their fines and if public defense is going to be a statewide function then some of those fines should be coming to the state. He said Harry Freebourn, Legislative Fiscal Analyst, will revise the numbers he has to include additional information and estimates received yesterday, but the truth is that it is not possible to say, at this moment, how much is currently being spent on public defense in this state, so the Committee doesn't know what the cost of this bill should be, and the numbers may not be available until the system is up and running.

SHERI HEFFELFINGER, legislative research analyst, went through the proposed bill draft, section by section, and highlighted the major amendments decided on by the Subcommittee. She said that some policy decisions made by the Subcommittee, such as to include justice's, city, and municipal courts under the state public defender system, will result in technical changes being made throughout the proposed bill draft.

IV. Public Comment on the Proposed Public Defender Bill Draft

Penelope Strong, Chief Public Defender, Yellowstone County, told the Subcommittee that there were two areas of the proposed bill draft that she would like to comment on, with the first being that the commission membership should include representation of the indigent client base that the public defenders will be defending. The second area is the amendment regarding pro se litigants. There is a problem of constitutionality because, before a litigant can go pro se, the court must give its approval and, typically, the judge will assign an attorney as standby counsel.

CHAIRMAN GRIMES asked **Ms. Strong** if she could give the Committee any general statistics on the makeup of her client base, and **Ms. Strong** replied that she estimated that 25% of her office's case load comes from the Native American population.

Anita Roessman, Attorney, Montana Advocacy Program, commented that this proposed bill draft offers an important moral direction for the future public defender system and said that half of the calls her office receives are from people who can't get their public defender to return their phone calls. In regard to who should pay for fitness to proceed evaluations, **Ms. Roessman** said the Committee should be careful about making that a public defender responsibility because the clients often don't want the evaluations to be performed, so the evaluations should

remain a court issue and any party should be able to request the issue be addressed.

Kandi Matthews-Jenkins, Missoula, said that she would like to see some guarantees in the proposed Public Defender Act that vigorous and aggressive public defenders are not treated prejudicially by the courts.

V. Committee Discussion and Actions On Proposed Public Defender Bill Draft

CHAIRMAN GRIMES, noting that Chief Justice Gray was concerned about travel expenses for public defenders, said he wanted to address the costs and asked if travel had come up in the discussions. SEN. MCGEE said the Subcommittee did not address travel specifically, but looked at estimated overall costs for the system. He said that the numbers were only estimates based on actual court expenditures for 80% of criminal cases and 50% of civil cases, which is a national estimation of public defender participation. However, he said that the Subcommittee has no idea of the revenue of the courts or even the revenue sources. There is no way to come up with a statewide public defender system that won't require significant state assumption and, although there are other revenue sources that can go into this system, they cannot be identified at this time.

Harry Freebourn, Legislative Fiscal Analyst, said he showed the Subcommittee a PowerPoint presentation (see *EXHIBIT #3*) and the initial estimates for the statewide public defender system were \$20 million. He said that testimony was offered that the \$8 million estimate for statewide justice's courts is too high, but the addition of municipal and city courts to the system, as well as a much-expanded appellate system, training costs, psychiatric evaluations, and more public defender hours because of earlier appointment, will bring the estimate back up. Finding sources of revenue to finance the statewide system will require substantial work.

REP. PARKER explained that the budget will not represent entirely new money, because most of these functions are already being paid for, either from state funds or by the cities and counties. It is mostly a matter of moving money around and the state can use the funding streams the cities and counties have been using. SEN. MCGEE pointed out that, ultimately, there will be a net cost savings because better training and better efficiencies will result in fewer problems.

REP. LANGE questioned whether the state is automatically compelled to be on the hook for all of the defense costs related to a strictly municipal crime and said that there is a clear difference, in his mind, between the levels of government and the laws or codes they adopt, and that the state should not have to pay the full costs for the defense in a matter involving a strictly city, or county law. He asked if the Subcommittee discussed a mechanism for determining the city or county portion of such cases. SEN. MCGEE replied that the law does require that a public defender be provided in all cases for crimes for which loss of liberty is a possible outcome, even jail time for a city offense, and the public defense will be paid for by the state, although the actual cost of holding court and the prosecution's expenses would remain with the city. The formula for the city's or county's share of funding was left so that issue could be dealt with by the full Committee and the funding issues will be dealt with during the September 8th Committee meeting.

SEN. CROMLEY asked if the term "partial indigence" would refer to an area that is above the threshold poverty income. SEN. MCGEE said the Subcommittee envisioned a gradation system, with a range of values.

CHAIRMAN GRIMES said he was concerned about divestiture and the timing of when someone is declared indigent is important. SEN. PERRY said divestiture could be dealt with by a rule of anticipation, such as the IRS uses.

REP. RICE asked **Mr. Freebourn** if the auxiliary costs associated with the state assumption of the county offices--benefits, retirement, etc.--were factored into his analysis. **Mr. Freebourn** said that his estimates did capture most of those costs.

REP. RICE then asked if the question of immunity was discussed and whether the existing checks and balances would remain in place when these public defenders become state employees. REP. PARKER answered that it was not discussed in that specific context, but he believes that any judge in Montana can find any attorney in Montana in contempt of court for not performing their duties properly. Rep. Parker said that this proposed bill draft does provide for a grievance procedure and when complaints have merit there will be opportunities for remedial training and sanctions and even termination. The commission will have ultimate accountability to see that the public defenders under the system are providing effective assistance of counsel.

REP. RICE said that, with all the worries about the school funding issue and other demands on the general fund, she was very concerned about creating a new department that the Committee had no idea about how much it would cost, or even about what is being spent now. She said that there will be many unintended costs associated with this and the Committee needs concrete financial information before going ahead. Another area of concern is local control and telling local governments how they have to do things--there are many concerns throughout the state that the Legislature is taking control over local governments and that now the state will be going after their funding sources too.

SEN. MCGEE said this will be as proscriptive as it needs to be, given the needs of the community. Every venue has its own perspective of what it wants, so the Subcommittee left it flexible. SEN. MCGEE said he believes the statewide system isn't going to increase costs more than 15% above what the state is spending now.

CHAIRMAN GRIMES wondered if it would be possible to gradually implement this system over time, for example, phasing in the courts of limited jurisdiction. SEN. MCGEE said this was discussed, but within the philosophy that everyone is entitled to counsel, even if they can't afford it, the decision was made to provide that counsel at every level right from the start.

REP. LANGE pointed out that state agencies and boards are quasi-judicial and asked if public defenders will be provided in this enforcement area. SEN. MCGEE said the yardstick for consideration for eligibility for a public defender is whether there could be a loss of liberty. The loss of property doesn't correlate with the loss of liberty. This issue can be looked at, however.

Mr. Freebourn reviewed the basis for the numbers contained in *EXHIBIT #3*. He said that "current program" refers to the current public defender system in district courts, which is paid for by the court administrator, and the \$9.3 million estimate is a reliable number that came from the state accounting system. The county public defender office costs, which relate to district court, were the results of requests for the information from six of the seven county public defender offices. The estimates for the chief public defender office and public defender commission, which include \$500,000 one-time startup costs, came from SB218. He said that the \$8 million figure arrived at for Justice's Courts is questionable and needs a great deal of work. Only about one-third of the surveys sent to the Justice's Courts around the state were

returned and this number was cobbled from the information that was received.

CHAIRMAN GRIMES said that the Committee will have to go down the funding road sometime, and that he agrees with the Subcommittee decision to decide what the state public defender system had to look like, regardless of what it will cost, because of not having a handle on the current costs.

SEN. PERRY commented that **Mr. Freebourn** is going to try to get the total number of court cases in the state that result in fines and court costs being assessed, not just those requiring a public defender. If we use the numbers we have today, it may result in a additional cost of \$3 million on top of what is already being spent on public defense. To raise that \$3 million, perhaps a surcharge on court costs that would go directly to the state public defender's office could be assessed.

SEN. MCGEE commented that we are using an estimate of 80% of the criminal cases in district court involve indigent defendants, leaving 20% of the criminal cases in district court involving non-indigent defendants, and suggested a surcharge of some designated amount being levied on those cases, with the revenue going directly to the public defender system. He said that fifty percent of the civil cases in district court involve non-indigent defendants and the surcharge could be assessed there, too.

REP. PARKER pointed out that the court system already incorporates a large number of surcharges, and once the practice of adding fees onto fines for the non-indigent begins the area of partial indigence opens up. Assessing fees of people who don't have any money doesn't generate much revenue.

REP. PARKER said that he thought it would be helpful to make a list of the tasks that need to be done for the next meeting. More staff research needs to be done on the four open questions that remain: the cost-sharing issue; identifying parts of the new public defender budget that are already being funding by some other area of state government; the appellate issue; and what percentage of the federal poverty level will qualify as indigent, as well as the issue of partial indigence.

SEN. MCGEE said that he would also like the Committee members to give some consideration to the size and makeup of the commission. He said that the Committee has heard testimony that seven members is too small. However, the national standard of 11-13 members may not be necessary in Montana.

CHAIRMAN GRIMES asked the audience if there was anything the Committee had overlooked, with regard to policy decisions to be made, in its discussion of the proposed bill draft.

Pam Bucy, Assistant Attorney General, commented that the lawsuit hadn't been discussed today and noted that litigation had been postponed to allow this Committee to deal with this issue. She said that it was necessary to craft a thorough and complete public defender system because if the ACLU is able to win even a few elements of their case there will be a court fight over millions of dollars of attorney's fees.

Scott Crichton, ACLU, told the Committee that there are federal grants available for the development of information technology systems for public defenders and expenses could be further reduced by allowing exceptions to the procurement process. He encouraged the committee to keep up the good work and said that he hopes people see the ACLU as a

constructive player in the process.

CHAIRMAN GRIMES said MS. HEFFELFINGER wanted the Committee to put some consideration into the issue of who pays for which elements of a psychological evaluation and to add that to the list of issues to be dealt with at the September meeting, and she requested some clarification and direction on the issue of court reporters and whether the public defender's office should pay "real" costs or "actual" costs. SEN. MCGEE suggested leaving the language as it is, and the issue of "actual" versus "real" costs would be dealt with in a separate bill.

CHAIRMAN GRIMES said another issue which should be reviewed by the Committee was which positions should be exempt positions and which should not.

REP. LANGE suggested looking at how other states establish eligibility and how they quantify indigence and the poverty level.

SEN. PEASE wondered if other states take the region or locale in mind when the poverty level percentages come up, noting that this could be an important, critical issue in this state because incomes vary so widely across Montana.

VI. Public Comment on Issues Other Than the Public Defender Bill

Ms. Matthews-Jenkins read her remarks regarding the motion to reconsider a legislative investigation into the allegations of malfeasance against the Child Protective Services agency (see *EXHIBIT #4*).

Audrey Berg, Ravalli County, said that the public defender system in the state needs work and cited rude, insensitive behavior on the part of a public defender she was involved with who told her "you get what you pay for". She said that the actions taken by the CPS are often not in the best interests of the child, as has been proven by the course her daughter's life has taken since the CPS became involved.

Viola Johnson said she was here because of her pact with God to stand for the families whose children are being abducted by government through false allegations and misuse of police power. She said the CPS was creating horror stories for the children and families involved with them.

Steve Crawford, Helena, said he was concerned about the corruption in the system and that it needed to be taken care of. He said that one issue was that prisoners aren't receiving the medical treatment the state is being charged for.

Jennifer Young, Great Falls, told the Subcommittee that the CPS system needs work. She said she followed every order she was given and attended every program she was told to attend but still will be going to court for the termination of her parental rights and doesn't know why,

Krystina Nerling explained that she was in foster care and has been treated very badly by the system. She said she received more abuse in the foster homes than she ever received at home. She said she was put on medication she didn't need, which made her behave abnormally, and was handcuffed at age 13 and taken to a mental hospital. She said the

movement between foster homes put her so far behind in school that she ended up in adult education.

CHAIRMAN GRIMES told the Committee that letters from Mr. Sam Johnson to the Committee concerning the charges brought against the state regarding the treatment of prisoners are included in the meeting packet (see *EXHIBIT #5*).

Casey Rudd, Connections, Bozeman, told the Committee that Connections is a prisoner advocacy group and she asked the Committee to consider the issues raised in Mr. Johnson's letters. Mr. Johnson and the inmates at MSP have six bills they would like see become law, relating to the areas of medical treatment, good time, phone calls, and parole board issues. CHAIRMAN GRIMES asked **Ms. Rudd** to put those suggestions into letter form for the Committee.

Written comments from Lillian Gunder were submitted (see *EXHIBIT #6*) to the Committee.

VII. Discussion and Action on Other Committee Bills

- **Driver's License Renewal for Overseas Military and Dependents**

MS. LANE told the Committee that a proposed bill draft was included in the Committee's meeting packets and that the bill allows multiple mail-in renewals of a driver's license by military personnel or their dependents (see *EXHIBIT #7*). She said the proposed bill draft also extends the term of mail-in renewals to 8 years, to match the regular term of a driver's license that was renewed in person.

CHAIRMAN GRIMES said the Committee will readdress this issue during the September meeting.

VIII. Agency Legislation Review

- **Department of Justice**

Ms. Bucy said that she didn't have much more information on the gambling control statutes yet but said the agency bills have been drafted by the department but that she hasn't seen them, yet.

REP. PARKER moved that the Committee request that the staff draft the agency bills from the Department of Justice. No second was needed for this motion. The motion passed with 2 dissenting votes.

- **Department of Corrections**

Bill Slaughter, Director, Department of Corrections, said that his department is proposing one bill, to change the bonding for prerelease centers from 10 years to 20 years.

SEN. MCGEE moved that the Committee request that the staff draft the agency bill from the Department of Corrections. No second was needed for this motion. The motion passed unanimously.

- **Judicial Branch**

Mr. Oppedahl told the Committee that the Supreme Court was proposing two bills, both of which were essentially housekeeping bills and did not propose any new laws. The first bill (see *EXHIBIT #8*) came from the district court counsel and tries to clarify the payment of transcript costs in civil cases. The second bill (see *EXHIBIT #9*) is a cleanup of current law to comport with the practices that the Supreme Court has employed for many years regarding the Supreme Court's "term" of operation. Another bill may be presented to the Committee in September because the surcharge that funds the court's information technology system is due to terminate on June 30, 2005.

SEN. CROMLEY moved that the Committee request that the staff draft the agency bills from the Judicial Branch. No second was needed for this motion. The motion passed unanimously.

IX. Report on the Disposition of Parole Applications Made by Native Americans

Craig Thomas, Executive Director, State Parole Board, explained that he was making his presentation in response to HB211, which required a report to the Committee. He reviewed statistics concerning the Native American prison population in relation to parole applications (see *EXHIBIT #10*).

CHAIRMAN GRIMES asked if Committee members had any other issues they wished to discuss.

REP. SMITH said he would like to discuss the problem mentioned in the letters from inmates about the high price tag on phone calls from prison. He noted that he had received complaints from his constituents saying that the phone calls are too expensive at \$1 per minute and pose an unfair burden on the families of inmates. **Mr. Slaughter** said that prison phone service is provided by contractors and, because the calls are monitored, there is an elaborate infrastructure involved in the prison phone service. Rebates are received from the contractor, and those dollars go directly into the inmate welfare fund, and these phone rebates are the largest contributor to the inmate welfare fund. Calls to attorneys are not charged.

REP. LANGE, noting complaints received from inmates about the parole planning process, asked Mr. Slaughter to explain how that works and what the requirements were. **Mr. Slaughter** said that it is in the state's best interest to have a good plan ready for an inmate before they are paroled, such as a job, a place to live, and family support, and that there is a parole officer in each facility whose sole job is to put together such a plan. He said that without such a plan, most of the parolees fail. In Montana, the problem is that there is no availability of employment in small communities and, in larger communities, there is no affordable housing. The prison does have a program that links inmates with vocational and education people to develop job and computer skills, as well as the social aspects, necessary to get a job. He said that the program has a consistent enrollment of 35 inmates.

The meeting was adjourned at 3:47 p.m. The next meeting was scheduled for Wednesday, September 8, 2004, at 8:30 a.m.

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