MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON HUMAN SERVICES AND AGING

Call to Order: By Stella Jean Hansen, on January 16, 1989, at 3:10 p.m.

ROLL CALL

Members Present: All, except

Members Excused: Rep. Hansen

Members Absent: None

Staff Present: Mary McCue, Legislative Council

Announcements/Discussion: None

HEARING ON HB 113

Presentation and Opening Statement By Sponsor: Rep. Rehberg stated that this bill was an act to clarify the placement options available to a youth placement committee. The bill is being carried by the Department of Family Services.

List of Testifying Proponents and What Group They Represent:

Lesley Taylor, Department of Family Services

List of Testifying Opponents and What Group They Represent:

Mona Jamison, Montana Juvenile Probation Association

Testimony:

Lesley Taylor, a proponent to this legislation, also acted as an attorney for the Department of Family Services said that this bill would clarify the placement options of the Youth Placement Committee. Exhibit 1.

Mona Jamison is in opposition of this legislation, said that the Department was not against the purpose of this bill and what they were trying to accomplish but in the way that it is being accomplished. On page 1, line 21, what is deleted is the language in a licensed facility,

that deletion is over broad and accomplishes not only the purpose underlying the bill which they support but could raise other questions as to the general placement of the youth in need of supervision. In section 1 of page 4 of the bill, keep in the language "in a licensed facility" and add "except for placement in." This goal could be accomplished more efficiently and with less confusion if we actually enumerated those facilities where the licensing would not be required in this section rather than just have the blatant elimination of the licensing requirement.

Questions From Committee Members: Rep. Good asked Rep. Rehberg if he objected to an amendment to this legislation and Rep. Rehberg said that this bill is just a recommendation on the part of the committee. Rep. Rehberg also stated that he liked the way the bill was written but if it satisfies the needs of the opponents, the amendment is agreed upon. Rep. Good then asked Ms. Jamison if she could reiterate those exceptions that she thought might want to be included. Ms. Jamison stated that Ms. Taylor's memo in the second paragraph sites Pine Hills and Mountain View Schools in addition to placement with the family members.

Rep. Boharski asked Rep. Rehberg if he knew if there was a reason why Mountain View and Pine Hills Schools are not licenses and Rep. Rehberg said that the law does not require them to be licensed. Rep. Boharski then asked if these facilities could be licensed and Rep. Rehberg said that they would not want to be licensed because of what they would have to go through to become licensed.

Closing By Sponsor: Rep. Rehberg closed on the bill and also stated that if an amendment were appropriate, one should be done.

HEARING ON HB 115

Presentation and Opening Statement by Sponsor: Rep. McDonough said this bill was an act to permit the charge of reasonable adoption process fees; to provide for the imposition of a fine on a person convicted of charging or accepting unreasonable adoption process fees; and to require a detailed report concerning the adoption process. This bill clarifies the fees that can be charged in parental adoptions, makes it a crime for people who knowingly offer or accept anything of value greater than that allowed under the fee section for furnishing a child for adoption that they be guilty of a misdemeanor and subject to a fine not to exceed

$1,000.00, it requires that all charges and expenses paid by the parties must be reported to the court in adoption proceedings. Rep. McDonough then supplied an amendment to this bill. Exhibit 2.

List of Testifying Proponents and What Group They Represent:

Betty Bay, Montana Department of Family Services

List of Testifying Opponents and What Group They Represent:

Bill Driscoll, Attorney at Law

Testimony:

Betty Bay said that she supports this bill and that it will provide guidance to birth parents and prospective adoptive parents. Knowing that expenses will be reported to the court may prevent the potential for either party being taken advantage of. Exhibit 3.

Bill Driscoll does not actually oppose the purpose of this bill and the amendment which is proposed. The definition of adoption fees as reasonable without specifying further is difficult to understand what would be reasonable and when this goes on to pose the possibility of a criminal sanction should be looked into closely. Not all adoption agencies charge fees based strictly on cost of each adoptive placement. Fees based on the ability to pay is most common.

Questions From Committee Members: Rep. Simon asked Ms. Bay what the definition of reasonable might be and Ms. Bay said that the presiding judge would determine what a reasonable fee might be. Rep. Simon then asked Ms. Bay if a party would be subject to a criminal penalty if a person felt that a fee was reasonable and the judge decided it was not reasonable, wold criminal actin be brought against him. The court fees would determine the amount allowable.

Closing By Sponsor: Rep. McDonough then closed the hearing on this bill and mentioned the reasonable cost of medical expenses and the court determination. It is not uncommon for a judge to use a subjective opinion. The concern about it being a crime can be clarified because the petition goes to a judge before the adoption is finalized. A judge cannot therefore say that the fees are not reasonable and the party is guilty of a misdemeanor. There would be no retroaction crime taking place.

EXECUTIVE ACTION

DISPOSITION OF HB 86

Rep. Simon stated that there was not a great deal of redeeming value in the bill to begin with. The Committee has previously stricken Section 2, 3 and 4 from the bill. The recommendation of Sections 5, 6 and 7 be stricken from the bill which leaves Section 1 which has already been amended by the Committee. Section 5 is the liability section and there is, currently in law, the responsibility and protection for state employees. Rep. Simon then made a Motion that Sections 5, 6 and 7 be stricken.

Rep. Strizich then asked Rep. Simon if the meeting of the minimum requirements for receiving funds were met and Rep. Simon deferred the question to the researcher.

Mary McCue said that if the purpose of including that liability provision is to say that the state employees involved are not liable, there is a statute already in place to accommodate this question. But if a non-state employee is involved another question arises. The language of the federal legislation says that this kind of provision is necessary. A provision already appears in the law to deal with the liability of employees of the state.

Rep. Strizich then asked Lesley Taylor to answer the same question and she stated that the local ombudsmen were not state employees and were employed by the area agencies on aging which are both non-profit, private or arms of local government. Rep. Strizich then asked if dropping this provision out of the bill was feasible and Ms. Taylor said that she wold feel that this would jeopardize the funding.

Rep. Squires asked to defer again the executive action on this bill insofar as to the status of the federal funding. j Also, the access of testimony from the department who are requesting the legislation is necessary.

Rep. Boharski addressed the liability aspect and stated that during the 1987 session, there was a law passed which would release private, non-profit corporations from liability. This would relinquish the liability of the long term ombudsman. Rep. Boharski made a Motion to amend the liability clause.

Rep. Blotkamp then made a Substitute Motion to Defer Action

and a vote was taken and passed.

DISPOSITION OF HB 113

Motion: A Motion was made by Rep. McCormick to DO PASS AS AMENDED.

Discussion: Rep. Simon stated that there were only suggested amendments and they had not been adopted.

Rep. Whalen then made an amendment for page 1, line 21 which would retain the language "in a licensed facility" rather than striking it. Add the following language "except for placement in Pine Hills School, Mountain View School and placement with family members."

Rep. Stickney opposed the suggestion to the above amendment.

Rep. Whalen made a substitute amendment which superceded the previous amendment which would state that on line 21 retain the term "in a licensed facility, Mountain View School, Pine Hills School or a family member or relative."

Rep. Simon asked Rep. Whalen about guardianship and Rep. Whalen said he did not have the answer to this and directed the question to Lesley Taylor. Ms. Taylor said that the licensing statute states that a guardian should be included.

Rep. Whalen then stated that the inclusion of "guardian" should be inserted.

Rep. Good stated that state juvenile correction centers should be used instead of the individual names of the institutions. Lesley Taylor also suggested the use of the generic term would be feasible.

Mary McCue then stated the amendment should be "in a licensed facility, Mountain View School, Pine Hills School, or parent, or family member."

Rep. Simon said in the definition section of Montana Youth Court Act, a person called the custodian should be considered in the language.

Amendments and Votes: All in favor of the amendment was voted upon. Motion failed.

Recommendation and Vote: A vote was then taken to DO PASS. All members voted in favor with the exception of Rep. Good.

DISPOSITION OF HB 115

Rep. Boharski made a Motion to DO PASS.

Discussion: Rep. Boharski questioned line 25 regarding reasonable costs.

Rep. Simon made a Motion to Move the Amendment.

Amendments and Votes: A vote was taken to remove the effective date of the legislation. The Motion passes.

Recommendation and Vote: A Motion of DO PASS AS AMENDED was voted upon and passed unanimously.

ADJOURNMENT

Adjournment At: 4:35 p.m.

REP. STELLA JEAN HANSEN, Chairman

SJH/ajs

1607.min

DAILY ROLL CALL

HUMAN SERVICES AND AGING COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date 1-16-89

NAME	PRESENT	ABSENT	EXCUSED
Stella Jean Hansen	✓		
Bill Strizich	✓		
Robert Blotkamp	✓		
Jan Brown	✓		
Lloyd McCormick	✓		
Angela Russell	✓		
Carolyn Squires	✓		
Jessica Stickney	✓		
Timothy Whalen	✓		
William Boharski	✓		
Susan Good	✓		
Budd Gould			✓
Roger Knapp	✓		
Thomas Lee	✓		
Thomas Nelson	✓		
Bruce Simon	✓		

STANDING COMMITTEE REPORT

January 17, 198?

Mr. Speaker: We, the committee on Human Services and Aging report that HOUSE BILL 113 (first reading copy -- white) do pass.

Signed: _____
Stella Jean Hansen, Chairman

1409568C.hbv

STANDING COMMITTEE REPORT

January 17, 1989

Mr. Speaker: We, the committee on Human Services and Aging report that HOUSE BILL 115 (first reading copy -- white) do pass as amended .

Signed: _____
Stella Jean Hansen, Chairman

And, that such amendments read:

1. Title, lines 10 and 11.
Strike: "; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE"

2. Page 1, lines 15 and 16.
Strike: "a licensed child-placing agency or"

3. Page 6, lines 12 and 13.
Strike: section 5 in its entirety

January 16, 1989

TESTIMONY IN SUPPORT OF HB 113
Submitted by Leslie Taylor
Legal Counsel for the Department of Family Services

The Department of Family Services requested this bill to clarify the placement options of the Youth Placement Committees. The Youth Placement Committees are interdisciplinary committees which review youths committed to the Department of Family Services for the purpose of recommending an appropriate placement of the youth. Youths which are reviewed by the Committees are youths who have been adjudicated as a youth in need of supervision or a delinquent youth by the Youth Court.

Currently, Section 41-5-526, MCA, states that the committees may recommend placement only in a "licensed facility". However, under Section 41-5-523, MCA, the Youth Court may specify that a delinquent youth who is a "serious juvenile offender" be placed in physical confinement if the court finds such confinement necessary for the protection of the public. In Montana, the only facilities which can provide long-term "physical confinement" are the two youth correctional facilities - Pine Hills and Mountain View Schools. These facilities are not required to be licensed by statute and are not licensed facilities. When the Youth Court specifies physical confinement, the committee routinely recommends placement in the youth correctional facilities. To clarify this apparent inconsistency in the statutes, the Department is proposing the words "licensed facility" be removed from Section 41-5-526 to authorize the Youth Placement Committees to recommend placement in the youth correctional facilities.

This bill would also allow the Youth Placement Committees to recommend placement of the youth with his parent or with relatives if appropriate. Under Montana law, these people are not required to be licensed.

Any person providing foster care for children not related by blood must obtain a license as a youth care facility. See, Section 41-3-1141, MCA. Therefore, when placement in foster care is recommended by the Youth Placement Committees, placement can only be made in licensed youth care facilities. The existing licensing statutes provide adequate assurances that youths placed in foster care will be placed in facilities which meet state licensing standards.

To allow the greatest flexibility to the Youth Placement COmmittees when recommending a placement for youths committed to the Department of Family Services, the Department urges this Committee to give this bill your favorable consideration.

EXHIBIT 1
DATE 1-16-89
HB 113

AMENDMENTS TO HB 115
PROPOSED BY THE DEPARTMENT OF FAMILY SERVICES

1. Page 1, lines 15 and 16.
   Following: "a"
   Strike: "licensed child-placing agencies"

EXHIBIT 2
DATE 1-16-89
HB 115

DEPARTMENT OF FAMILY SERVICES

STAN STEPHENS, GOVERNOR

(406) 444-5900

STATE OF MONTANA

P.O. BOX 8005
HELENA, MONTANA 59604

January 16, 1989

Testimony in support of HB 115
ESTABLISHING A PENALTY FOR CHILD PROCUREMENT

Betty Bay, Department of Family Services

Montana Law does not currently address the issue of selling children for profit. To protect children and their birth and adoptive parents, we believe there must be a penalty for charging unreasonable fees.

As an example, I know of a birth mother who contacted prospective adoptive parents regarding relinquishing her unborn child. As the baby's birth date got closer, the birth mother kept "raising the ante." The prospective adoptive parents requested guidelines regarding what they could provide financially. Conversely, the birth mother believed she was entitled to certain compensation and would find adoptive parents to provide what she was requesting.

There are expenses which should be allowed when a birth parent decides he/she is unable to parent and selects parents for the child. House Bill 115 defines the costs for adoption services and requires that an accounting of expenses be filed with the court. Defining and reporting expenses is necessary for birthparents and adoptive parents.

House Bill 115 will provide guidance to birth parents and prospective adoptive parents. Knowing that expenses will be reported to the court may prevent the potential for either party being taken advantage of. If it appears a child is being sold, appropriate action can be taken.

EXHIBIT 3
DATE 1-16-89
HB 115

Sample of Model For Discussion ONLY

SLIDING SCALE DAY CARE

Monthly Income
Steps

Household Size	150 AFDC Level $$$$	1	2	3	4	5	6	7	8	9	10	11	12	75% Median Income $$$$
2	289	290 328	329 367	368 407	405 446	447 485	486 524	525 564	565 603	604 642	643 681	682 720	721 759	760
3	388	389 434	455 480	481 526	527 572	573 618	619 663	664 709	710 755	756 801	802 847	848 893	804 938	939
4	496	497 547	548 598	599 650	651 702	703 754	755 805	806 857	858 909	810 961	962 1012	1013 1064	1065 1116	1117
SUPPORT LEVELS														
Percent SRS Pays	100% (XX)	92.3	84.5	76.9	69.2	61.5	53.8	46.2	38.5	30.8	23.9	15.4	7.7	0%

DEPARTMENT OF FAMILY SERVICES

STAN STEPHENS, GOVERNOR

(406) 444-5900

STATE OF MONTANA

P.O. BOX 8005
HELENA, MONTANA 59604

SECTION BY SECTION ANALYSIS OF HB 86
presented to House Human Services Committee
by Leslie Taylor, Department Attorney

Section 1: This section amends existing statutes to specify that the Long Term Care Ombudsman (LTCO) or local ombudsman shall have access to medical and social records with the permission of the resident, the resident's guardian or, if the resident is unable to consent, upon court order.

This section was copied directly from federal law. [See, Attachment A, Older Americans Act Amendments of 1987, P.L. 100-175, Sec. 129, paragraph (J)(iv), page 41.] It should be noted that Congressman Bonker and Senator Glenn, the authors of P.L. 100-175 have suggested that the "access to records" provision would require state legislation. See, Attachment B, page 3.

The question has been raised by the nursing homes' lobbyist as to whether this section is necessary in light of the Health Care Information Act. The Health Care Information Act does provide that any person may have access to medical records with the patient's permission and the Act specifies that a person authorized to consent to health care for another may also consent to release of records. (See, Attachment C, Sec. 50-16-521, MCA.) The Act does not specifically provide a mechanism for release of medical records if the patient is unable to consent and has no guardian. Perhaps Sec. 50-16-535(7), MCA, may apply in such situations, but it is not clear whether investigations by the LTCO would be covered under this section.

In discussing this matter with Elizabeth Clinton of the Administration on Aging, Department of Health and Human Services, Ms. Clinton stated that the Older Americans Act requires access to patient's medical and social records. If there is no guardian and the resident is unable to consent to the release of records, the state must assure that the LTCO can obtain access. She stated that the State of Montana would be out of compliance with the Older Americans Act if Montana law did not give the LTCO and local ombudsmen specific authority for access to medical and social records. The Department has requested written confirmation from the Administration on Aging regarding this matter and the other concerns outlined below.

Section 2: This section prohibits retaliation against those persons filing a complaint with or providing information to the LTCO. This section was proposed to implement a provision of the federal law. (See, Attachment A, Sec. 129, paragraph (J), page 41.) A number of states already have these provisions in their State Ombudsman Acts and the Department modeled the wording of this section after the laws of other states.

Again, the drafters of the federal bill point out that this section should be implemented by state statute. See, Attachment B, page 3.

It has been suggested that this section is not needed because Section 50-5-1104, MCA, covers this situation. Section 50-5-1104 does provide that residents have a right to present a grievance to the long-term care facility and to ask a "state agency" for assistance "free from restraint, interference or reprisal." (Sec. 50-5-1104 (2) (d) and (e) attached hereto as Attachment D.) I do not believe that the plain meaning of the existing law fulfills the federal requirement "to prohibit retaliation and reprisals by a long-term care facility or other entity with respect to any resident or employee for having filed a complaint with, or providing information to [the LTCO]." [See, Attachment A, Sec. 129, paragraph (J) (ii), page 41.] Section 50-5-1104 pertains only to grievances filed with the long-term care facility. It does not include complaints filed or "information provided to" the LTCO. Nor does it mention employees.

The Department's discussion with the federal officials revealed that the Administration on Aging interprets the federal law to require that language related to "interference, retaliation and reprisals," as well as appropriate sanctions be contained in state law to comply with the Older Americans Act.

Section 3: This section makes it a misdemeanor for a person to willfully interfere with the actions of the LTCO or local ombudsman. This section is intended to implement the federal law. (See, Attachment A, Sec. 129 (J) (i), (ii) and (iii), page 41.) To be eligible for federal funds, the federal law specifically requires that the state insure that willful interference is "unlawful." The Department interprets that to mean that such action is a crime. Currently there is no state law or any other law or regulation which makes such interference unlawful. This is also a provision the federal drafters believed would require state legislation. See, Attachment B.

The position of the Administration on Aging is outlined in the discussion under Section 2 above.

Section 4: This section coordinates with the previous sections which impose sanctions for unlawful activity. It merely clarifies that the county attorney is responsible for prosecuting any allegations of violations of the LTCO bill. As originally

proposed by the Department in its bill drafting request, this section was placed under Sections 2 and 3, but the Legislative Council changed the wording of the original bill draft after notifying the department. See, Attachment E. The Department has no objection to returning to the original wording of the bill draft request.

Section 5: This section states that the LTCO or local ombudsman cannot be held liable for the good faith performance of their duties. This section is intended to implement federal law. (See, Attachment A, Sec. 129 (I), p. 41.) The language is identical to the language of the federal statutes.

It has been suggested that this section is not necessary because the State Tort Claims Act would cover these situations. It should be noted that only the state LTCO is a state employee. The local ombudsmen are employees of the Area Agencies on Aging (AAA) or subcontractors of the AAA. Of the eleven AAA's, four are affiliated with local government and seven are non-profit private corporations. There is a question as to whether the local ombudsmen affiliated with non-profit private corporations would have coverage in any form under the State Tort Claims Act.

The State Tort Claims Act provides for "indemnification" of employees, not freedom from liability. Therefore, the LTCO would be provided with a defense by the state and the state would pay any damages awarded. That is not the same as being provided immunity for liability. Indemnification means that if the LTCO is found liable, the state will pay any damages awarded.

The immunity from liability section proposed in HB 86 would provide the basis for the State's defense of the LTCO. A similar provision is found under the child abuse and neglect statutes (41-3-203, MCA). This section of the child abuse statutes has been relied upon in two recent cases to dismiss claims against the individual social workers and the state.

It should also be noted that the State Tort Claims Act provides for indemnification only for "tort" cases (i.e., cases involving personal injuries). Any other possible claims which might be brought against the LTCO would not be covered.

The Administration on Aging advised that the State Tort Claims Act would not make the LTCO and local ombudsmen free from liability. It is the opinion of the Administration on Aging that there must be something in the law exempting the LTCO and local ombudsmen from liability to comply with the Older Americans Act.

Many other states have a Long Term Care Ombudsman Act which contain some or all of the provisions proposed by HB 87. Many of the these same states have other provisions similar to the Health Care information Act, the state Tort Claims Act, etc. Passage of HB 86 as proposed will assure federal compliance and provide a clear and concise statement of all LTCO-related provisions. For

the reasons set forth above and to assure continued compliance with the requirements of the Older Americans Act, the Department of Family Services urges passage of HB 86.

ATTACHMENT A

Charlie Rehberg

100th Congress
1st Session

COMMITTEE PRINT

S. PRT.
100-68

OLDER AMERICANS ACT AMENDMENTS OF 1987: A SUMMARY OF PROVISIONS

Public Law 100-175

AN INFORMATION PAPER

PREPARED FOR USE BY THE

SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE

DECEMBER 1987

Serial No. 100-C

This document has been printed for information purposes. It does not offer findings or recommendations by this committee.

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(3) by adding at the end the following:

"(L) coordinate the categories of services specified in paragraph (2) for which the area agency on aging is required to expend funds under part B, with activities of community-based organizations established for the benefit of victims of Alzheimer's disease and the families of such victims.".

SEC. 128. PUBLIC HEARINGS.

Section 307(a)(8) of the Older Americans Act of 1965 (42 U.S.C. 3027(a)(8)) is amended by inserting ", and public hearings on," after "evaluations of".

SEC. 129. OMBUDSMAN OFFICE AND PROGRAM.

(a) TECHNICAL ASSISTANCE.—Section 301 of the Older Americans Act of 1965 (42 U.S.C. 3021) is amended by adding at the end the following:

"(c) The Commissioner shall provide technical assistance and training (by contract, grant, or otherwise) to State long-term care ombudsman programs established under section 307(a)(12), and to individuals designated under such section to be representatives of a long-term care ombudsman, in order to enable such ombudsmen and such representatives to carry out the ombudsman program effectively.".

(b) STUDY OF OMBUDSMAN PROGRAM.—(1) The Commissioner on Aging shall conduct a study concerning involvement in the ombudsman program established under section 307(a)(12) of the Older Americans Act of 1965 (42 U.S.C. 3027(a)(12)) and its impact upon issues and problems affecting—

(A) residents of board and care facilities and other similar adult care homes who are older individuals (as defined in section 302(10) of such Act), including recommendations for expanding and improving ombudsman services in such facilities, and

(B) the effectiveness of recruiting, supervising, and retaining volunteer ombudsmen.

(2) The Commissioner shall prepare and submit a report to the Congress on the findings and recommendations of the study described in paragraph (1) not later than December 31, 1989.

(c) AUTHORIZATION OF APPROPRIATIONS.—(1) Section 303(a) of the Older Americans Act of 1965 (42 U.S.C. 3023(a)), as amended by section 122(a), is amended—

(A) by inserting "(1)" after "(a)", and

(B) by adding at the end the following:

"(2) Subject to subsection (h), there are authorized to be appropriated $20,000,000 for fiscal year 1988 and such sums as may be necessary for each of the fiscal years 1989, 1990, and 1991 to carry out section 307(a)(12).".

(2) Section 308(b)(5) of the Older Americans Act of 1965 (42 U.S.C. 3028(b)(5)) is amended—

(A) in subparagraph (A) by striking "subsection (a)" and inserting "subsection (a)(1)", and

(B) in subparagraph (B) by inserting "subsections (a)(1) and (b) of" after "under" the first place it appears.

(d) STATE PLANS.—Section 307(a)(12) of the Older Americans Act of 1965 (42 U.S.C. 3027(a)(12)) is amended to read as follows:

"(12) The plan shall provide the following assurances, with respect to a long-term care ombudsman program:

"(A) The State agency will establish and operate, either directly or by contract or other arrangement with any public agency or other appropriate private nonprofit organization, other than an agency or organization which is responsible for licensing or certifying long-term care services in the State or which is an association (or an affiliate of such an association) of long-term care facilities (including any other residential facility for older individuals), an Office of the State Long-Term Care Ombudsman (in this paragraph referred to as the 'Office') and shall carry out through the Office a long-term care ombudsman program which provides an individual who will, on a full-time basis—

"(i) investigate and resolve complaints made by or on behalf of older individuals who are residents of long-term care facilities relating to action, inaction, or decisions of providers, or their representatives, of long-term care services, of public agencies, or of social service agencies, which may adversely affect the health, safety, welfare, or rights of such residents;

"(ii) provide for training staff and volunteers and promote the development of citizen organizations to participate in the ombudsman program; and

"(iii) carry out such other activities as the Commissioner deems appropriate.

"(B) The State agency will establish procedures for appropriate access by the ombudsman to long-term care facilities and patients' records, including procedures to protect the confidentiality of such records and ensure that the identity of any complainant or resident will not be disclosed without the written consent of such complainant or resident, or upon court order.

"(C) The State agency will establish a statewide uniform reporting system to collect and analyze data relating to complaints and conditions in long-term care facilities for the purpose of identifying and resolving significant problems, with provision for submission of such data to the agency of the State responsible for licensing or certifying long-term care facilities in the State and to the Commissioner on a regular basis.

"(D) The State agency will establish procedures to assure that any files maintained by the ombudsman program shall be disclosed only at the discretion of the ombudsman having authority over the disposition of such files, except that the identity of any complainant or resident of a long-term care facility shall not be disclosed by such ombudsman unless—

"(i) such complainant or resident, or the individual's legal representative, consents in writing to such disclosure; or

"(ii) such disclosure is required by court order.

"(E) In planning and operating the ombudsman program, the State agency will consider the views of area agencies on aging, older individuals, and provider agencies.

"(F) The State agency will—

"(i) ensure that no individual involved in the designation of the long-term care ombudsman (whether by appointment or otherwise) or the designation of the head of any subdivision of the Office is subject to a conflict of interest;

"(ii) ensure that no officer, employee, or other representative of the Office is subject to a conflict of interest; and

"(iii) ensure that mechanisms are in place to identify and remedy any such or other similar conflicts.

"(G) The State agency will—

"(i) ensure that adequate legal counsel is available to the Office for advice and consultation and that legal representation is provided to any representative of the Office against whom suit or other legal action is brought in connection with the performance of such representative's official duties; and

"(ii) ensure that the Office has the ability to pursue administrative, legal, and other appropriate remedies on behalf of residents of long-term care facilities.

"(H) The State agency will require the Office to—

"(i) prepare an annual report containing data and findings regarding the types of problems experienced and complaints received by or on behalf of individuals residing in long-term care facilities, and to provide policy, regulatory, and legislative recommendations to solve such problems, resolve such complaints, and improve the quality of care and life in long-term care facilities;

"(ii) analyze and monitor the development and implementation of Federal, State, and local laws, regulations, and policies with respect to long-term care facilities and services in that State, and recommend any changes in such laws, regulations, and policies deemed by the Office to be appropriate;

"(iii) provide information to public agencies, legislators, and others, as deemed necessary by the Office, regarding the problems and concerns, including recommendations related to such problems and concerns, of older individuals residing in long-term care facilities;

"(iv) provide for the training of the Office staff, including volunteers and other representatives of the Office, in—

"(I) Federal, State, and local laws, regulations, and policies with respect to long-term care facilities in the State;

"(II) investigative techniques; and

"(III) such other matters as the State deems appropriate;

"(v) coordinate ombudsman services with the protection and advocacy systems for individuals with developmental disabilities and mental illness established under part A of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001 et seq.) and under the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (Public Law 99-319); and

"(vi) include any area or local ombudsman entity designated by the State Long-Term Care Ombudsman as a subdivision of the Office. Any representative of an entity designated in accordance with the preceding sentence (whether an employee or an unpaid volunteer) shall be treated as a representative of the Office for purposes of this paragraph.

"(I) The State will ensure that no representative of the Office will be liable under State law for the good faith performance of official duties.

"(J) The State will—

"(i) ensure that willful interference with representatives of the Office in the performance of their official duties (as defined by the Commissioner) shall be unlawful;

"(ii) prohibit retaliation and reprisals by a long-term care facility or other entity with respect to any resident or employee for having filed a complaint with, or providing information to, the Office; and

"(iii) provide for appropriate sanctions with respect to such interference, retaliation, and reprisals; and

"(iv) ensure that representatives of the Office shall have—

"(I) access to long-term care facilities and their residents; and

"(II) with the permission of a resident or resident's legal guardian, have access to review the resident's medical and social records or, if a resident is unable to consent to such review and has no legal guardian, appropriate access to the resident's medical and social records.

"(K) The State agency will prohibit any officer, employee, or other representative of the Office to investigate any complaint filed with the Office unless the individual has received such training as may be required under subparagraph (G)(iv) and has been approved by the long-term care ombudsman as qualified to investigate such complaints.".

(e) MINIMUM EXPENDITURE FOR OMBUDSMAN SERVICES.—Section 307(a)(21) of the Older Americans Act of 1965 (42 U.S.C. 3027 (a)(21)) is amended to read as follows:

"(21) The State plan shall provide that the State agency, from funds allotted under section 304(a) for part B and for paragraph (12) (relating to the State long-term care ombudsman) shall expend to carry out paragraph (12), for each fiscal year in which the allotment for part B for the State is not less than the allotment for fiscal year 1987 for part B for such State, an amount which is not less than the amount expended from

ATTACHMENT B

Best Practice NOTES
On Delivery of Legal Assistance to Older Persons

VOL. 2, NO. 4 NOVEMBER 1988

CONTENTS

INTRODUCTION

Following enactment of the 1987 Amendments to the Older Americans Act (OAA), TCSG began to receive numerous questions regarding the new provisions relating to the Office of the Long-Term Care Ombudsman. (Please see **Best Practice Notes**, Vol. 1, Nos. 11 & 12, November, 1987 for a discussion of the new ombudsman provisions.) The questions came primarily from state directors, legal services developers, and ombudsmen who were concerned about the meaning and implications of the provisions for state units on aging and legal assistance programs, as well as for the operation of the ombudsman program.

In response, TCSG sent a letter to all state directors, developers and ombudsmen asking that questions be submitted so we might address them for the entire network in **Best Practice Notes**. That letter indicated we would be working with Bill Benson, Staff Director of the Subcommittee on Housing & Consumer Interests, House Select Committee on Aging, in an effort to get clarification on some of the issues raised. We are extremely fortunate in that the Chairman of the Subcommittee, Congressman Don Bonker, along with Senator John Glenn, who is Chairman of the Senate Government Affairs Committee -- the two authors of the 1987 ombudsman provisions of the Act -- agreed to respond directly to several questions.

A large number of questions were received by TCSG, and unfortunately it is not possible to address all of them. But given the importance of this topic to the network, this entire issue of **Best Practice Notes** is devoted to the responses of Congressman Bonker and Senator Glenn.

THE CENTER FOR SOCIAL GERONTOLOGY, INC.
A National Support Center In Law And Aging

117 N. First Street • Suite 204 • Ann Arbor, MI 48104 • (313) 665-1126

WILLIAM F. BENSON
STAFF DIRECTOR

PATRICIA LAWRENCE
MINORITY STAFF DIRECTOR

U.S. House of Representatives

SELECT COMMITTEE ON AGING

SUBCOMMITTEE ON HOUSING AND CONSUMER INTERESTS

717 HOUSE OFFICE BUILDING ANNEX 1

Washington, DC 20515

(202) 226-3344

October 31, 1988

Ms. Penelope Hommel, Director
The Center For Social Gerontology, Inc.
117 North First Street, Suite 204
Ann Arbor, Michigan 48104

Dear Ms. Hommel:

We greatly appreciate your interest in the recent amendments to the Older Americans Act (OAA) concerning the Long-Term Care Ombudsman Program. As the House and Senate authors of the "Ombudsman Advocacy Improvement" legislation (H.R. 2042 and S. 959), that the OAA ombudsman amendments are based upon, we are pleased to have this opportunity to provide further clarification regarding our intent in crafting several of the provisions that are now part of the OAA.

We have received a number of inquiries concerning implementation of the new provisions and have responded to them on an individual basis. Many of these inquiries have addressed the very issues that your readership have raised. We understand that you have a wide readership for Best Practice Notes among the OAA aging network membership, including state units on aging, area agencies on aging, legal services providers, and ombudsmen. Printing our responses to your readers' questions in your publication should prove to be a very effective way to address the implications of the new law.

The questions that you have submitted concern several issues, including the importance of legal counsel for state and local ombudsmen, that we believe to be among the most significant new ombudsman-related provisions in the 1987 amemendments. We are confident that the 1987 amendments will clearly strengthen state and local ombudsman programs and improve this important nationwide network of advocates for the institutionalized elderly. We would welcome the opportunity to respond to any additional questions or comments that you believe we should consider regarding the new law.

Sincerely,

Don Bonker, M.C.

John Glenn, Senator

QUESTIONS ON THE 1987 AMENDMENTS TO THE OAA AND THE OFFICE OF THE LONG-TERM CARE OMBUDSMAN

EDITOR'S NOTE: If readers have questions about the ombudsman program and interpretation of the final regulations, please channel those questions to your AoA Regional Office through your State agency on aging.

Question One: *Do the 1987 Amendments require enabling legislation by a state legislature vis-a-vis that state's Ombudsman program? If so, what must that legislation address?*

Bonker/Glenn Response:

Some states will have to enact enabling legislation to meet some of the new requirements in the 1987 Amendments. Others may have to amend existing legislation. It is possible that certain provisions could be implemented by regulation; and others could be implemented through administrative decisions. For example, the requirement that the state must prohibit retaliation or reprisal by a long-term care facility or other entity with respect to any resident or employee for having filed a complaint with or for providing information to an ombudsman, will likely require state law to implement. The requirement that the state must ensure that representatives of the Office shall have access to long-term care facilities, their residents, and, with permission of a resident or resident's legal guardian, to records, is also likely to require legislation. This might be done through a free-standing ombudsman bill, or by amendments to existing state legislation or regulation governing nursing homes. Similarly, the state's duty to ensure that willful interference with representatives of the Office in the performance of their official duties is unlawful will likely necessitate state legislation or regulation. [§307(a)(12)(J)(i), (ii), and (iv)]

On the other hand, the requirement that the State agency on aging must provide adequate legal counsel to the Office [§307(a)(12)(G)(i)] could be addressed by hiring an attorney to work within the Office of the State Long-Term Care Ombudsman. This most likely could be an administrative decision of the agency responsible for a state's ombudsman program.

We would hope that individual states have analyzed their existing laws with respect to the ombudsman program, nursing homes, and related requirements, to determine whether or not a specific ombudsman enabling bill is necessary, or if the provisions in the 1987 Amendments could be accomplished by amending existing statutes or regulations.

The following four questions concern the two new requirements in the 1987 Amendments that legal advice and representation be available to ombudsmen. [§307(a)(12)(G)(i) and (ii)]

Question Two(a): *What are the implications for State agencies on aging, State attorneys general, Title III legal providers, etc. of the provision in the 1987 Amendments which requires State agencies to "ensure that adequate legal counsel is available to the Office for advice and consultation and that legal representation is provided to any representative of the Office against whom suit or other legal action is brought in connection with . . . official duties"? [§307(a)(12)(G)(i)]*

Bonker/Glenn Response: The intent of this new requirement that the State agency must "ensure that adequate legal counsel is available to the Office" is to provide ombudsmen at the state and local levels with access to legal support when needed. The purpose of this provision is to make certain that counsel is available for purposes of advice and consultation on matters affecting the work of an ombudsman, and to ensure that representation is available to ombudsmen who face some form of a legal situation in which an attorney's assistance would be important. Examples include a lawsuit filed or threatened against an ombudsman, or situations in which an ombudsman has been issued a subpoena or court order. In these situations, an ombudsman obviously should have access to an attorney for advice and, if needed, representation.

This requirement was based upon Congress' recognition that the performance of ombudsman responsibilities clearly involves dealing with a wide variety of issues and matters having legal implications. And, in the course of an ombudsman's work, there is always the potential for being party to a legal action of one kind or another. In drafting this provision, it was our intent that ombudsmen would have available to them attorneys who are knowledgeable about nursing home-related law and who have the resources to properly assist and represent ombudsmen when the occasion requires it. Hence the requirement that such legal counsel and representation be "adequate." This requirement is also pertinent to the new provision [§307(a)(12)(G)(ii)] which requires that the State agency will "ensure that the Office has the ability to pursue administrative, legal, and other appropriate remedies on behalf of residents of long-term care facilities."

The Act does not dictate how legal counsel and representation is to be provided. Rather, that decision is left to the states to implement in a way that is most appropriate for the state and will provide the best form of legal counsel and representation. For example, some states

ATTACHMENT C

(2) The health care provider shall post a copy of the notice of information practices in a conspicuous place in the health care facility and upon request provide patients or prospective patients with a copy of the notice.

History: En. Sec. 18, Ch. 632, L. 1987.

50-16-513. Retention of record. A health care provider shall maintain a record of existing health care information for at least 1 year following receipt of an authorization to disclose that health care information under 50-16-526 and during the pendency of a request for examination and copying under 50-16-541 or a request for correction or amendment under 50-16-543.

History: En. Sec. 22, Ch. 632, L. 1987.

50-16-514 through 50-16-520 reserved.

50-16-521. Health care representatives. (1) A person authorized to consent to health care for another may exercise the rights of that person under this part to the extent necessary to effectuate the terms or purposes of the grant of authority. If the patient is a minor and is authorized under 41-1-402 to consent to health care without parental consent, only the minor may exclusively exercise the rights of a patient under this part as to information pertaining to health care to which the minor lawfully consented.

(2) A person authorized to act for a patient shall act in good faith to represent the best interests of the patient.

History: En. Sec. 19, Ch. 632, L. 1987.

50-16-522. Representative of deceased patient. A personal representative of a deceased patient may exercise all of the deceased patient's rights under this part. If there is no personal representative or upon discharge of the personal representative, a deceased patient's rights under this part may be exercised by persons who are authorized by law to act for him.

History: En. Sec. 20, Ch. 632, L. 1987.

50-16-523 and 50-16-524 reserved.

50-16-525. Disclosure by health care provider. (1) Except as authorized in 50-16-529 and 50-16-530 or as otherwise specifically provided by law or the Montana Rules of Civil Procedure, a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent or employee of a health care provider may not disclose health care information about a patient to any other person without the patient's written authorization. A disclosure made under a patient's written authorization must conform to the authorization.

(2) A health care provider shall maintain, in conjunction with a patient's recorded health care information, a record of each person who has received or examined, in whole or in part, the recorded health care information during the preceding 3 years, except for an agent or employee of the health care provider or a person who has examined the recorded health care information under 50-16-529(2). The record of disclosure must include the name, address, and institutional affiliation, if any, of each person receiving or examining the recorded health care information, the date of the receipt or examination, and to the extent practicable a description of the information disclosed.

History: En. Sec. 5, Ch. 632, L. 1987.

50-16-530. Disclosure without patient's authorization — other bases. A health care provider may disclose health care information about a patient without the patient's authorization if the disclosure is:

(1) directory information, unless the patient has instructed the health care provider not to make the disclosure;

(2) to federal, state, or local public health authorities, to the extent the health care provider is required by law to report health care information or when needed to protect the public health;

(3) to federal, state, or local law enforcement authorities to the extent required by law;

(4) to a law enforcement officer about the general physical condition of a patient being treated in a health care facility if the patient was injured on a public roadway or was injured by the possible criminal act of another; or

(5) pursuant to compulsory process in accordance with 50-16-535 and 50-16-536.

History: En. Sec. 10, Ch. 632, L. 1987.

50-16-531 through 50-16-534 reserved.

50-16-535. When health care information available by compulsory process. Health care information may not be disclosed by a health care provider pursuant to compulsory legal process or discovery in any judicial, legislative, or administrative proceeding unless:

(1) the patient has consented in writing to the release of the health care information in response to compulsory process or a discovery request;

(2) the patient has waived the right to claim confidentiality for the health care information sought;

(3) the patient is a party to the proceeding and has placed his physical or mental condition in issue;

(4) the patient's physical or mental condition is relevant to the execution or witnessing of a will or other document;

(5) the physical or mental condition of a deceased patient is placed in issue by any person claiming or defending through or as a beneficiary of the patient;

(6) a patient's health care information is to be used in the patient's commitment proceeding;

(7) the health care information is for use in any law enforcement proceeding or investigation in which a health care provider is the subject or a party, except that health care information so obtained may not be used in any proceeding against the patient unless the matter relates to payment for his health care or unless authorized under subsection (9);

(8) the health care information is relevant to a proceeding brought under 50-16-551 through 50-16-553; or

(9) a court has determined that particular health care information is subject to compulsory legal process or discovery because the party seeking the information has demonstrated that there is a compelling state interest that outweighs the patient's privacy interest.

History: En. Sec. 11, Ch. 632, L. 1987.

50-16-536. Method of compulsory process. (1) Unless the court for good cause shown determines that the notification should be waived or modified, if health care information is sought under 50-16-535(2), (4), or (5) or in

ATTACHMENT D

50-5-1102. Findings and purpose. (1) The legislature finds and declares that many residents of long-term care facilities are isolated from the community and lack the means to assert their rights.

(2) The purpose of this part is to:

(a) establish and recognize the fundamental civil and human rights to which residents of long-term care facilities are entitled; and

(b) provide for the education of residents and staff regarding these rights.

History: En. Sec. 2, Ch. 582, L. 1987.

50-5-1103. Definitions. In this part the following definitions apply:

(1) "Administrator" means a person who is licensed as a nursing home administrator under Title 37, chapter 9, and who administers, manages, or supervises a long-term care facility.

(2) "Authorized representative" means:

(a) a person holding a general power of attorney for a resident;

(b) a person appointed by a court to manage the personal or financial affairs of a resident;

(c) a representative payee;

(d) a resident's next of kin; or

(e) a sponsoring agency.

(3) "Department" means the department of health and environmental sciences.

(4) "Facility" or "long-term care facility" means a facility or part thereof licensed under Title 50, chapter 5, to provide skilled nursing care, intermediate nursing care, or personal care.

(5) "Long-term care ombudsman" means the individual appointed to fulfill the requirement of 42 U.S.C. 3027(a)(12) that the state provide an advocate for residents of long-term care facilities.

(6) "Resident" means a person who lives in a long-term care facility.

History: En. Sec. 3, Ch. 582, L. 1987.

50-5-1104. Rights of long-term care facility residents. (1) The state adopts by reference for all long-term care facilities the rights for long-term care facility residents applied by the federal government to facilities that provide skilled nursing care or intermediate nursing care and participate in a medicaid or medicare program (42 U.S.C. 1395x(j) and 1396d(c), as implemented by regulation).

(2) In addition to the rights adopted under subsection (1), the state adopts for all residents of long-term care facilities the following rights:

(a) A resident or his authorized representative must be informed by the facility at least 30 days in advance of any changes in the cost or availability of services, unless to do so is beyond the facility's control.

(b) Regardless of the source of payment, each resident or his authorized representative is entitled, upon request, to receive and examine an explanation of his monthly bill.

(c) Residents have the right to organize, maintain, and participate in resident advisory councils. The facility shall afford reasonable privacy and facility space for the meetings of such councils.

(d) A resident has the right to present a grievance on his own behalf or that of others to the facility or the resident advisory council. The facility shall

establish written procedures for receiving, handling, and informing residents or the resident advisory council of the outcome of any grievance presented.

(e) A resident has the right to ask a state agency or a resident advocate for assistance in resolving grievances, free from restraint, interference, or reprisal.

(f) During his stay in a long-term care facility, a resident retains the prerogative to exercise decisionmaking rights in all aspects of his health care, including placement and treatment issues such as medication, special diets, or other medical regimens.

(g) The resident's authorized representative must be notified in a prompt manner of any significant accident, unexplained absence, or significant change in the resident's health status.

(h) A resident has the right to be free from verbal, mental, and physical abuse, neglect, or financial exploitation. Facility staff shall report to the department and the long-term care ombudsman any suspected incidents of abuse under the Montana Elder Abuse Prevention Act, Title 53, chapter 5, part 5.

(i) Each resident has the right to privacy in his room or portion of the room. If a resident is seeking privacy in his room, staff members should make reasonable efforts to make their presence known when entering the room.

(j) In case of involuntary transfer or discharge, a resident has the right to reasonable advance notice to ensure an orderly transfer or discharge. Reasonable advance notice requires at least 21 days' written notification of any interfacility transfer or discharge except in cases of emergency or for medical reasons documented in the resident's medical record by the attending physician.

(k) If clothing is provided to the resident by the facility, it must be of reasonable fit.

(l) A resident has the right to reasonable safeguards for his personal possessions brought to the facility. The facility shall provide a means for safeguarding the resident's small items of value in his room or in another part of the facility where he must have reasonable access to the items.

(m) The resident has the right to have all losses or thefts of personal possessions promptly investigated by the facility. The results of the investigation must be reported to the affected resident.

(3) The administrator of the facility shall adopt whatever additional measures are necessary to implement the residents' rights listed in subsections (1) and (2) and meet any other requirements relating to residents' health and safety that are conditions of participation in a state or federal program of medical assistance.

History: En. Sec. 4, Ch. 582, L. 1987.

50-5-1105. Long-term care facility to adopt and post residents' rights. (1) The administrator of each long-term care facility shall:

(a) adopt a written statement of rights applicable to all residents of its facility, including as a minimum the rights listed in 50-5-1104;

(b) provide each resident, at the time of his admission to the facility, a copy of the facility's statement of residents' rights, receipt of which the resident or his authorized representative shall acknowledge in writing;

ATTACHMENT E

L.C. 108

_____BILL NO._____

INTRODUCED BY _____

BY REQUEST OF THE DEPARTMENT OF FAMILY SERVICES

A BILL FOR AN ACT ENTITLED: "AN ACT TO ALLOW THE LONG-TERM CARE OMBUDSMAN ACCESS TO MEDICAL AND SOCIAL RECORDS; TO PROHIBIT DISCRIMINATORY, DISCIPLINARY OR RETALIATORY ACTIONS BY THE LONG-TERM CARE FACILITIES; TO PROHIBIT WILLFUL INTERFERENCE WITH THE LAWFUL ACTIONS OF THE LONG-TERM CARE OMBUDSMAN AND PROVIDING PENALTIES; AMENDING SECTION 53-5-804, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 53-5-804, MCA is amended to read:

"53-5-804. Access to long-term care facilities and records.

(1) The long-term care ombudsman or local ombudsman shall have access without advance notice to any long-term care facility, including private access to any resident, for the purpose of meeting with residents, investigating and resolving complaints, and advising residents on their rights.

(2) Access must be granted to the long-term care ombudsman or local ombudsman during normal visiting hours (9 a.m. to 6 p.m.) and to the long-term care ombudsman at any time he considers necessary to perform the duties described in 53-5-803.

(3) The long-term care ombudsman or local ombudsman shall have access to all medical and social records of any resident of a long-term care facility with the permission of the resident or

the resident's guardian or, if the resident is unable to consent and has no guardian, upon order of the court authorizing disclosure.

~~(iii)~~(c) The ombudsman shall carry out the duties described in 53-5-803 in a manner that is least disruptive to resident care and activities.

Section 2. Discriminatory, disciplinary and retaliatory action prohibited. (1) No discriminatory, disciplinary or retaliatory action shall be taken against any employee of a facility nor against any patient, resident or client of a facility for having filed a complaint with or providing information to the long-term care ombudsman or local ombudsman. Nothing in this section is intended to infringe upon the rights of the employer to supervise, discipline or terminate an employee for other reasons.

(2) Any person who knowingly or willfully violates the provisions of this subsection is guilty of a misdemeanor.

(3) The county attorney of the county in which the long-term care facility is located shall investigate and prosecute, if appropriate, any allegations concerning violations of this part at the request of the long-term care ombudsman.

Section 3. Willful interference prohibited. (1) Any person who willfully hinders or interferes with the lawful actions of the long-term care ombudsman or local ombudsman in the performance of his official duties is guilty of a misdemeanor.

(2) The county attorney of the county in which the long-term care facility is located shall investigate and prosecute, if appropriate, any allegations concerning violations of this part at the request of the long-term care ombudsman.

Section 4. The long-term care ombudsman and local ombudsman shall not be held liable for the good faith performance of their duties under this chapter.

Section 5. Effective date. [This act] is effective on passage and approval.

-end-

The following changes in the 1987 Reauthorization of the Older Americans Act (OAA) are ones that I feel will have a major impact on ombudsman services in Montana:

1. requiring all sub-state programs to be a subdivision of the state program and all local personnel as representatives;
2. requiring immunity from liability for good faith performance of official duties by all representatives of the program;
3. ensuring that all representatives are provided legal counsel if a suit is brought against them for performing their duties;
4. mandated training before local personnel designated as ombudsmen can investigate complaints;

1. Programmatic Changes

Section 307(a)(12)(H)(vi) represents the most significant change, since it is a major departure from the current requirements for programmatic structure. It stipulates that the State Agency will:

> "include any area or local ombudsman entity as a subdivision of the (State Ombudsman) Office. Any representative of an entity designated in accordance with the preceding sentence (whether as employee or an unpaid volunteer) shall be treated as a representative of the Office for purposes of this paragraph."

Current state law (MCA 53-5-302(1)) states that a "Local Ombudsman means a person officially designated by the long-term care ombudsman to act as his local representative." The "subdivision" requirement would appear to go beyond the current intent of the state law.

2. Immunity from Liability

Sections 307(a)(12)(I) and 307(a)(12)(G)(i) address two related issues: liability and legal representation. Paragraph (I) states:

> "the State will ensure that no representative of the Office will be liable under State law for the good faith performance of official duties."

The issue of liability is one that historically has been a concern to AAA's as well as a factor that has limited the scope of involvement of local LTCO's. The OAA does not require this protection for other entities within the Act, thus acknowledging the special circumstances that local ombudsman duties represent. With the Supreme Court ruling on CI-27, the immunity from liability for volunteers passed by the 1987 Legislature (SB49) would seem not to provide this protection.

3. Legal Representation

Paragraph (G) stipulates that the State Agency will ensure that

> "... legal representation is provided to any representative of the Office against whom suit or legal action is brought in connection with the performance of such representative's official duties."

Since legal representation for a local ombudsman has not been an issue to date, it is unclear to what extent the "representative" status under the current law establishes a responsibility for the state to provide such a supportive service.

Taken together, the subdivision requirement, the protection for liability and the provision of legal representation raise the issue of whether an employer-employee relationship is being created between the state and the local Ombudsmen. If one is not created, legislation might well be needed to meet some of these requirements.

4. Training Requirements

The other change that could have a major impact on the current programmatic structure is the requirement for training and the prohibition on having local LTCO's involved in resolving complaints without adequate training. Two factors have limited the development of local LTCO programs to date: lack of funding to do recruitment and training of local LTCO's; and lack of funding to pay local LTCO's for their work. The new training requirement presents a major challenge to the current system. Whether AAA's will want to continue with the current system depends not only on the training issue but on how the other employment and liability issues discussed above are resolved. In any event, with all the changes facing the program, a serious evaluation of all alternatives for program delivery should take place at this point.

Other changes that will require legislation by the state to be in compliance with the OAA:

Section 307(a)(12)(J) contains several requirements pertaining to complaint investigations not currently covered by the ombudsman bill or DHES law or regulations. They include:

1. ensuring that willful interference with an investigation by the Office is unlawful;
2. a prohibition against retaliation or reprisals by a facility against anyone making a complaint or providing information;
3. sanctions for interference, retaliation or reprisals.

Paragraph (J) also requires access to facilities and records. As discussed above, facility access exists while access to records was deemed inappropriate under the current structure. Without a change in the current method of delivering services, including access to records in any future legislation would be an issue that providers would oppose and AAA's would not support for training and liability reasons.

Changes that will probably not require legislation:

1. providing assurances against conflicts of interest in designating all personnel involved in the program;
2. ensuring the Office can pursue legal or administrative remedies to correct problems;
3. requiring an annual report on problems facing residents and possible solutions to correct them;
4. coordination of activities with the protection and advocacy agency for the developmentally disabled and mentally ill;

In my opinion, the additional changes listed above could probably be covered through the establishment of policies and procedures. Some states have put some of these requirements in statute

they were not required under federal law. Based on past experience, I would recommend including only those items that absolutely need legislation. I would also recommend that the policies and procedures also include a description of what the previous requirements under the OAA (ie., those pertaining to the State Ombudsman duties) are for our program here in Montana.

courses of action they would take if CA-18 passed.

An interim committee of the Legislature has been studying welfare reform and last week adopted a comprehensive package of welfare reform proposals that will be considered by the next Legislature.

Recent welfare reform on the federal level, coupled with state welfare reform, will bring balance to the system and eventually reduce welfare costs without denying the people of Montana the constitutional guarantee of help in time of need.

State can do without CA-18

AN IR VIEW

Constitutional Amendment 18, stated very simply, would eliminate the requirement in the Montana Constitution that mandates the state to provide welfare services to the needy.

The official ballot title says the amendment would allow the Legislature greater discretion in providing economic assistance and social and rehabilitation services to those in need.

The attorney general's explanatory statement provides a better explanation of CA-18. It states: "The proposal would allow the Legislature to decide whether to give assistance to those who the Legislature determines are in need and to establish eligibility criteria for welfare services, as well as the duration and level of such services."

The Legislature, frustrated in its attempts to withhold general assistance from young, childless able-bodied people and limit some Medicaid benefits to certain elderly people, voted in 1987 to place CA-18 on the ballot.

Legislators blame the courts for taking away their ability to regulate welfare.

Ironically, the courts did not invoke the welfare clause in the constitution when it struck down the Legislature's attempts to limit benefits. They relied on the constitution's guarantee of "equal protection" and said the Legislature cannot arbitrarily treat one class of needy people differently than others.

It's true that the state's welfare budget has grown like topsy in recent years, but that bears close scrutiny.

The Medicaid budget accounted for the state Department of Social and Rehabilitation Services largest spending increase last fiscal year, growing $12 million to $141.4 million. The benefits alone represent almost 59 percent of the entire SRS annual budget and the program cost has grown 66 percent since 1983.

Advances in medicine mean that doctors can do more for their patients and that results in a longer-living population of older citizens who need more health care than younger people. There was an average of 26,207 Medicaid cases per month last year, 5 percent more than the year before and nearly 50 percent more than in 1983.

This year's Medicaid budget is $165 million; the state provides 30 percent and the remainder comes from the federal government.

Aid to Families with Dependent Children saw a 52 percent increase in cases since 1983, but only a 3 percent increase between 1987 and 1988. The number of general assistance recipients increased 64 percent in five years, but less than 1 percent last year. Actual general assistance spending decreased 2 percent last year.

Rep. Cal Winslow, R-Billings, was the principal sponosr of CA-18. Winslow, a Republican gubernatorial candidate who was defeated by Stan Stephens in the primary, distributed a position paper on welfare reform. His position paper cited the need to pass CA-18 and then listed a number of proposals for welfare reform, all of which could be accomplished without passage of CA-18.

The *IR* editorial board is bothered by the fact that legislators have failed to say what specific courses of action they would take if CA-18 passed.

Opinion, comment

The Mont
Official newspaper of Bu

Vote against 18

Welfare measure changes are far too sweeping

Constitutional Amendment No. 18, placed on the Nov. 8 ballot by the Legislature, would eliminate the constitutional requirement for the state to provide welfare services to the needy.

Some of the language you'll read on the ballot does not make that clear, stating only that Amendment 18 would give the Legislature "greater discretion" in providing such services. But the attorney general's explanatory statement makes it clear that the measure would make welfare services optional for future Legislatures.

The state constitution now says the Legislature "shall" provide economic assistance and social and rehabilitative services for those, "who by reason of age, infirmities, or misfortune may have need for the aid of society."

The proposed amendent would change the phrase "shall provide" to "may provide." It also would add language that would give the Legislature the power to determine who is in need, and to set the duration and level of public assistance benefits.

Some of the opponents of Constitutional Amendment 18 describe it as a "heartless attempt to balance future budgets on the backs of" the poor. We wouldn't go that far, but the amendment certainly would make it easier for the Legislature to reduce welfare benefits or to prohibit certain classes of people from receiving public assistance. And, it could make those decisions arbitrarily.

Supporters say the amendment would take decisions on welfare spending away from lawyers and judges and return those decisions to to the Legislature. The Legislature has attempted to eliminate benefits to young, childless, able-bodied people, but those attempts were thwarted by the courts.

However, the courts did not rely on the constitution's welfare guarantee in those cases. They relied on the constitution's equal protection language, ruling that the Legislature cannot arbitrarily treat one class of needy people differently than others. Some lawyers say that even if Constitutional Amendment 18 had been in effect at the time of previous welfare challenges, it would not have affected the outcome.

Public assistance costs are rising in Montana. It's possible that the Legislature *should* have "greater discretion" in granting such assistance. But Constitutional Amendment 18 is too sweeping. We don't think today's legislators would would use the amendment to throw the poor into the streets, but the amendment would make it possible for future lawmakers to just that, if they wished.

If constitutional changes affecting public assistance are needed, they should be more specific. Constitutional Amendment 18 is too broad. We recommend a vote AGAINST.

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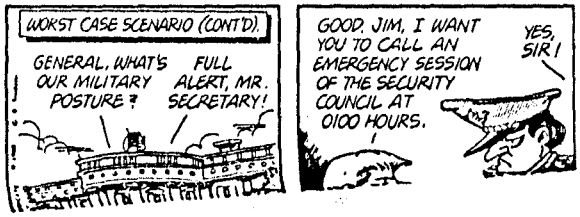
BY GARRY TRUDEAU



Limits on welfare: a bad referendum

Montana's 1972 Constitution contains the following provision: "The Legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have need for the aid of society."

It is a broad, big-hearted provision that is true to a commitment made 83 years earlier in the state's first constitution, and one that should be left alone.

Faced with burgeoning welfare costs and frustrated by court decisions reversing legislative attempts to restrict welfare,

ELECTION '88

Montana legislators in 1987 proposed a constitutional referendum that would change "shall provide" to "may provide."

The legislators' ballot statement for Constitutional Referendum No. 18 makes the change sound reasonable enough, asking people to simply allow the Legislature "greater discretion to determine the eligibility, duration, and level of economic assistance and social services to those in need."

But opponents argue that CR-18 would eliminate important constitutional protections for the most vulnerable people in our society, and we agree.

Helena District Judge Gordon Bennett and later the Montana Supreme Court were asked to take CR-18 off the ballot because of the ballot statement. Both courts declined, saying they did not have the authority. But Bennett blasted the wording as "patent and unarguable deception." In their ruling, the five-member high court majority did not share Bennett's caustic views, although two justices again chastized the Legislature for "this shabby referendum."

We can appreciate the sentiments of legislators who, in the 1985 session and 1986 special session, attempted to limit general assistance payments to able-bodied young men. General assistance caseloads were expanding rapidly, with more than 500 recipients in Cascade County alone in February 1985 and more than 600 in early 1986, compared to fewer than 400 this year.

But the legislative measures were thrown out by the courts because of "equal protection" problems — not because of the welfare clause in the constitution..

It's tempting, as proponents of CR-18 have done, to blame the courts and lawyers for the failure of the bills. But to use a perceived problem with general assistance — which accounts for less than 2 percent of the state's public assistance budget — as a rallying call for a rewriting of the Montana Constitution is an extreme and unnecessary reaction.

Rising Medicaid expenses — which totaled $141 million, or more than 50 percent of the public assistance budget last fiscal year — are a much bigger problem. But few Montanans would favor eroding the state's firm commitment to the aged, blind and disabled, who account for two-thirds of Medicaid recipients, which is what CR-18 would do.

The state high court has indicated clearly that it does not view public assistance as a right — but as a benefit that can and should be regulated by the Legislature, if done reasonably.

Proposals for state welfare reform, such as those made recently by an interim legislative study committee, should be meshed with federal welfare reform legislation passed this month and given a chance to work.

We do not support Constitutional Referendum 18.

opinion

GAZETTE OPINION

CA-18

Against..... ☒
For..... ☐

Constitutional Amendment 18 is one of the most controversial issues on the ballot, and it should be.

At its root is one of the most basic questions of humanity and government: Are we to be our brother's keeper.

If the amendment is adopted, the Legislature may continue to fund programs for the truly needy in the state. When the Constitution was passed in 1972, the people voted that the state shall provide programs.

The amendment isn't intended to deprive any but the childless, "able-bodied" segments of society, but in reality it goes much further than that.

Would the Legislature — given the provisions of CA 18 — really cut back services for the needy? Remember last session when faced with balancing a difficult budget, the Legislature raided state funding for education, and education is essential to the future of this state.

Yes, it is possible that truly needy Montanans could be sacrificed on the budgetary altar. Vote No! on CA-18.

VISITORS' REGISTER

HUMAN SERVICES AND AGING COMMITTEE

BILL NO. 113 DATE January 16, 1989

SPONSOR Rep. Rehberg

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
~~Leslie Taylor~~ Olcs written	Dept of Fam. Services	~~X~~	
~~Ed~~ BILL DRISCOLL	HELENA		X Concerned
GARY Forsyth	LDS Social Services	X	
JOHN THORSON	MONTANA MENTAL HEALTH ASSOC		
Mona Jamison			X

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

HUMAN SERVICES AND AGING COMMITTEE

BILL NO. 115 DATE January 16, 1989

SPONSOR Rep. McDonough

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
BETTY BAY	DEPT. OF FAMILY SERVICES	✓	
Betsy Stimatz	Helena	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.