MINUTES

MONTANA HOUSE OF REPRESENTATIVES
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BOB CLARK**, on January 13, 1995, at 8;05 AM

ROLL CALL

Members Present:

Rep. Robert C. Clark, Chairman (R)
Rep. Shiell Anderson, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Bill Carey (D)
Rep. Aubyn A. Curtiss (R)
Rep. Duane Grimes (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Daniel W. McGee (R)
Rep. Brad Molnar (R)
Rep. Debbie Shea (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)
Rep. Cliff Trexler (R)

Members Excused: NONE

Members Absent: NONE

Staff Present: John MacMaster, Legislative Council
Joanne Gunderson, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: HB 37, HB 55
Executive Action: HB 74, TABLED

{Tape: 1; Side: A}

HEARING ON HB 37

Opening Statement by Sponsor:

REP. JON ELLINGSON, HD 65, brought HB 37 at the request of the Department of Administration for consideration by the committee. It is a civil statute of limitations bill which would restrict the rights of incarcerated criminals. The current law recognizes that if one is seriously mentally ill, or a minor, the statute of limitations should be extended. The law currently also extends to persons who are imprisoned on a criminal charge. Aside from speculation that the case of Gideon vs Wainwright made this exception a matter of law, the reason for the original inclusion of this exception was not known. The situation now is different in that everyone who is incarcerated at Deer Lodge has had the right to counsel prior to going there, the facility has an extensive law library, and there is an active legal advocacy program for the prisoners. Given these changes, the exception of prisoners from the statute of limitations no longer seems appropriate. The bill is designed to eliminate the disparity of rights that now exists between incarcerated criminals and other citizens by imposing the same statute of limitations on those criminals.

Other modest changes are made to the language of the current statute. It is the intention of the Department of Administration upon the passage of this bill into law, that it have retroactive application to existing claims.

Proponents' Testimony:

Bill Gianoulias, Chief Defense Counsel, Department of Administration, Risk Management and Tort Defense Division, presented written testimony in support of their request for this bill. **EXHIBIT 1**

Opponents' Testimony:

Russell Hill, Executive Director, Montana Trial Lawyers Association (MTLA), said MTLA opposes HB 37. He said the bigger issue is suits against non-state entities and other rights of action the prisoners may have. He disputed the argument that prisoners have the same ability as other citizens to file suit, though he agreed that their rights have greatly increased. He said the association also has problems with the retroactive portion of the bill.

Scott Crichton, American Civil Liberties Union (ACLU), explained that when the ACLU gets involved in cases representing inmates, the cases are civil and class actions and so they are not

regularly involved. It is his understanding that the defender project is also limited in their role. Law students are often used to provide legal assistance for inmates. Thus, he felt that it was not accurate to say that there is plenty of representation for inmates.

{Tape: 1; Side: A; Approx. Counter: 14.3}

Questions From Committee Members and Responses:

CHAIRMAN CLARK asked **Mr. Hill** if inmates are allowed to file suits against parties other than the state.

Mr. Hill answered, "Yes."

CHAIRMAN CLARK asked how many of those suits are pending at this time.

Mr. Hill replied that he did not know.

CHAIRMAN CLARK referred the same question to **Mr. Crichton.**

Mr. Crichton said he had no way of knowing.

CHAIRMAN CLARK asked **Mr. Gianoulias** the same question.

Mr. Gianoulias did not know.

REP. DANIEL MC GEE asked **Mr. Gianoulias** to address the concerns with the retroactive clause.

Mr. Gianoulias said that he would bring an amendment which would address that issue.

Closing by Sponsor:

REP. ELLINGSON waived closing.

HEARING ON HB 55

Opening Statement by Sponsor:

REP. JOHN BOHLINGER, HD 14, brought HB 55, at the request of the Department of Social and Rehabilitative Services (SRS), Child Support Enforcement Division. This bill revises the child support income deduction laws of Montana so that they will conform with federal law. He described the various requirements and reasons for enactment of this bill.

Proponents' Testimony:

Mary Ann Wellbank, SRS, Administrator, Child Support Enforcement Division, presented written testimony in support of HB 55. **EXHIBIT 2** She also distributed a booklet describing the program.

EXHIBIT 3 She reported that currently the division receives two-thirds of its funding from the federal government under Title IV-D of the federal Social Security Act and one-third comes from state special revenue. In order to continue to receive the federal funding, the division needs to strictly comply with the federal regulations.

Currently the division has about 42,000 cases and grows at a rate of 302 cases per month; approximately 42% of those being collected are in the income withholding category. She went on to explain in more detail the benefits of the passage of this bill. There is an effective date on this bill because the state is currently out of compliance.

Arlette Randash, Eagle Forum, rose in support of this bill because of its significance to single parents.

Kate Cholewa, Montana Women's Lobby, said they support all bills that facilitate the collection of child support and help keep families out of poverty.

Opponents' Testimony:

None

Informational Testimony:

EXHIBIT 4 was presented on behalf of **Mr. Peter Blouke, PhD, Director, SRS.**

EXHIBIT 5 was provided by **Ms. Wellbank** as supportive and informational testimony after the close of the hearing.

Questions From Committee Members and Responses:

REP. CLIFF TREXLER inquired about the affect on part-time wages.

Ms. Wellbank said that this bill does not have any impact on wages because the income withholding provisions are subject to the Consumer Credit Protection Act. Up to 50% of a person's net income may be withheld toward child support which is calculated according to guidelines based on both parents' income.

REP. TREXLER expressed his concern about line 2 on page 1 which says that "an employer may not discharge, discipline, or refuse to hire a person, because...." The term, "refuse to hire a person because" seems to be very difficult in that an employer may not know that the person has a child support problem, and may not hire that person for some other reason. He wanted to know if this would provide the person with a reason to sue.

Ms. Wellbank replied that this language is in current Montana law under 40-5-422, MCA, where the division issues income withholding orders. She said she is not aware of any lawsuits, but it does

protect the obligor from being refused employment for the sole reason of having a child support order.

REP. DEB KOTTEL expressed confusion on the new section 2 in that it duplicates what is already included in the Child Support Enforcement Act and also in the statutes on wrongful termination. She asked if this section is necessary.

John MacMaster viewed this section as creating a criminal offense because of subsection (2). He also said that because of this criminal offense being created, a person cannot be denied employment for these reasons. If a person is refused employment because of this act, the employer would be subject to a civil suit under the Wrongful Discharge Act.

REP. KOTTEL restated for purposes of clarification that refusal to hire an employee or termination of an employee based on receipt of a wage garnishment order only creates a civil liability for an employer. Under this bill, the liability would be expanded to a criminal liability.

Mr. MacMaster said he thought that would be so though that is not the law right now. Currently, if an employer refuses to hire, the court would find it is a violation of public policy and actionable under the Wrongful Discharge Act.

REP. KOTTEL asked if this new section is mandated under the federal law in order for Montana to receive funding.

{Tape: 1; Side: 2; Approx. Counter: 32.6}

Ms. Wellbank replied that it is, but reiterated that this section already applies to employers. There is a bifurcation in the law because the Child Support Enforcement Division issues orders and has its own section of the law under 40-5-422, MCA. The employer is already subject to these penalties. This carries it over to the orders that the court issues.

REP. KOTTEL asked if this subjects the employer to criminal action for failure to comply with the garnishment order, but not to such action for failure to hire.

Amy Pfeifer, SRS Legal Counsel, answered that she was confused about the discussion of criminal penalties. This bill poses the opportunity for a civil fine, but did not see how that translated into a criminal penalty.

Mr. MacMaster said that in his interpretation of the provisions in title 45, if there is a dollar amount described as a fine, that makes it a criminal offense. If the intent be a civil penalty, he recommends that the words, "civil penalty," be substituted for the word, "fine," to avoid this confusion when drafting a bill.

REP. KOTTEL said that after looking at 40-5-422, MCA, she found them to be similar, but not parallel and therefore, in conflict. She asked if they would have any problem with accepting an amendment which would use the words which **Mr. MacMaster** just referenced and additionally amending all other parts of the code to reflect that language.

Ms. Pfeifer said that they are not exactly parallel because court-ordered withholding orders apply to employers and not all payors. In the substantive provisions **REP. KOTTEL** was talking about, she said they are parallel and asked **REP. KOTTEL** to point out the specific areas where she sees a conflict.

REP. KOTTEL referred to subsection (c) as not being in the other portion of 40-5-422, MCA. She questioned why there would be a need for two sections and then these two sections would be different.

Ms, Pfeifer said that subsection (c) is actually in the new bill in section 2. It is simply a drafting difference. In "422" there is subsection (a), (b) and (b) becomes the institution of income withholding on the obligor's income or the initiation of proceedings under this part. The same language is contained there except that in this bill it is divided up between subsections (b) and (c).

REP. KOTTEL asked if this were true, why the need for a new section.

Ms. Pfeifer replied that these are separate and distinct ways in which an income withholding order is issued. The 300's are when the court issues an income withholding order and the 400's are when the Child Support Enforcement Division issues an income withholding order. The intention is that the same kinds of rules apply to issuing those orders and that employers are subject to the same kinds of provisions in honoring them.

REP. KOTTEL asked if due process is exercised in issuing income withholding orders and if administrative powers are being expanded.

Ms. Pfeifer said that administrative powers have been there since 1985 and nothing in that section of the code is being changed. In compliance with federal mandates, the same provisions that apply to all income withholding orders issued in the state are the same; this bill will apply to the courts as it currently does to the department. Employees have the same due process rights whether the order is issued through the court or through the department. Nothing has changed in enforcement of income withholding orders since 1990.

REP. KOTTEL asked if there would be an objection by SRS to change "fine" to "civil penalty."

Ms. Pfeifer said she would like to take a further look to be sure it would be in compliance with federal regulations. She said that in the Federal Consumer Credit Protection Act, there is a similar provision and she would look at that language.

{Tape: 1; Side: A; Approx. Counter: 41.5}

REP. TREXLER pointed out the language used on line 7, page 2, relating to penalties for employers seemed to be an open generality. He wanted to know what kind of restitution an employer would have to make if the employer did not hire someone with an income withholding order.

Ms. Wellbank said that the employer would have the right to defend himself in court.

Ms. Pfeifer expanded on the definition of "full restitution" as including reinstatement of back pay, loss of health insurance and extending to other damages that would be imposed from a wrongful termination suit.

REP. MC GEE asked **Ms. Wellbank** if she had ever been an employer.

Ms. Wellbank said that she had never been self-employed.

REP. MC GEE asked **Ms. Wellbank** to put herself in the place of an employer who, based on what she had just said to the committee, would become subject to both civil and criminal penalties under the law by not hiring someone who may have income withholding. He wondered if it did not seem onerous that the employer would have the opportunity to defend himself in court, in that the employer winds up being a criminal though the person who was not hired had failed to comply with the law.

Ms. Wellbank said that the department disagrees that it is a criminal penalty, but the question is valid. The problem lies in the fact that many are behind in child support and the employers are a very essential part of the enforcement system. It is true, the department places some burden on employers in their reliance on them to help collect money. The fact is, that if the employers didn't comply, the whole system would disadvantage children because the most effective way to collect the money is through income withholding. With over 30% of families going on to divorce and children born out of wedlock in 25% of the Montana population, a significant number of children are affected.

REP. MC GEE reiterated that what he heard being said to the committee was that in order to provide for alleged certain rights of children to receive money, this law would trample on the rights of the employer. The law would use the employer as an administrative arm. He wanted to know if there has been any discussion regarding compensation to employers to handle the administrative ends.

Ms. Wellbank replied that there is a provision in the law, in 40-5-309, MCA, stating that the district court may allow a fee not to exceed $5 per deduction.

{Tape: 1; Side: A; Approx. Counter: 49.3}

REP. DUANE GRIMES wanted clarification that this is federal law.

Ms. Pfeifer replied that it has been federal law for a number of years. The Consumer Credit Protection Act had some provisions against discharge or disciplinary action against an employee generally. Title IV-D in the Social Security Act since 1985, created the provisions that are in the administrative codes. The only thing that is new is that every child support order issued in the state now needs to comply with these requirements.

REP. GRIMES inquired about who has been charged with the responsibility of enforcing the laws on Montana employers. Also, he asked if this bill would change that process.

Ms. Pfeifer said that she was not sure who would enforce a violation of the federal Consumer Credit Protection Act. But if it were not enforced by that act, the agency would enforce it through the civil court system. She said that this bill would not change that process.

REP. KOTTEL expressed concern about the penalties for an employer discharging an employee, or for failure to comply with a wage deduction order, or who refuses to hire. These now appear in three places in the statute and are not quite parallel though they may be substantively the same. She referenced one place that is quite different in 39-2-302, MCA, which gives an employee a civil right to sue, grants damages up to four years of back wages, etc. Under 40-5-402, MCA, the court has the right to issue a fine and with this amendment, the division would be given the ability to impose a fine. She wanted to know if it is necessary to have it covered three places in the statute, or if 39-2-302, MCA, takes care of the issue. She asked if the legislature were to refuse to enact this bill's new employer penalty provisions, would federal funds be threatened.

Ms. Pfeifer said that she would have to look at what is in title 39 to see if it complies with the federal mandates for the state's program. If it does not, then funding would be in jeopardy. If it does, then there could be a reference in both the 300's and 400's of title 39.

REP. KOTTEL asked for the amount of the funding.

Ms. Wellbank said that the Child Support Enforcement Division has a budget of approximately $7 million, about two-thirds of that is federal funding. The AFDC budget is much greater than that and both would be jeopardized.

CHAIRMAN CLARK referred to section 4 which states that the court decides and that it must state in subsection (2) how much the employer is allowed and asked if that does not take away more from the employer.

Ms. Wellbank answered that it does and in this case the court is allowed in the parallel law and in the administrative section where the employer may deduct up to $5.

Closing by Sponsor:

REP. BOHLINGER commented that he had not found it a burdensome thing to comply with the law in income withholding. He reasserted the need of this bill for the protection of children through child support enforcement. He reiterated that the necessity of this bill is in bringing Montana laws into compliance with federal laws. As a result of the concern about the language on page 2, line 6, the possibility of changing the language from "fine" to "subject to civil penalty" will be treated as a friendly amendment if it is found that it is in compliance with federal requirements.

CHAIRMAN CLARK closed the hearing on HB 55.

{Tape: 1; Side: A; Approx. Counter: 62.5}

EXECUTIVE ACTION ON HB 74

Motion: **REP. WILLIAM BOHARSKI MOVED HB 74 DO PASS.**

Discussion: **REP. BOHARSKI** recalled testimony regarding a judge ruling that a case was superfluous prior to action and did not hear the case. He wanted to know how that works.

Mr. MacMaster replied that he believed the judge would consider the claim or defense and decide himself whether or not it is frivolous. If he decided it was frivolous, and if the bill is amended to say that, then the court may order that the jury's fees be paid by the demanding party or the losing party.

REP. BOHARSKI wondered if that could ever be the case, that the judge would have made up his mind ahead of time. Rather, he wondered, if it is the case that after the jury listened to the case, the judge would ask the jury to decide if it was frivolous in nature, then the jury could make that determination, and under those conditions, the losing party could be required to pay the fees. If the judge, however, were to decide in advance, there would be no need for this bill the way it is because the costs would never arise. He inquired if it would be possible for someone to bring a cause of action in a civil court and after hearing the case, the jury could decide this was obviously frivolous, and basically because of that, they were going to go ahead and charge the fees against the losing party.

Mr. MacMaster said that it could be provided in the bill that the jury would decide whether it was frivolous and then award the costs if it is. There is currently a rule of criminal procedure that applies this principle with respect to non-jury costs. If a judge thinks, in a civil action, either a claim or a defense is frivolous, the court can order that person or that person's attorney to pay the costs of the other party.

REP. BOHARSKI asked if the judge makes the decision as to whether or not that was frivolous and charges the fees to the losing party.

Mr. MacMaster said, "Yes, he does."

REP. MC GEE requested consideration of a second sentence which would incorporate two philosophies that the court must assess the ability to pay by any party (including the state or political subdivisions), and that the court or jurors (whichever is appropriate) would address whether or not the case is frivolous.

REP. LOREN SOFT commented that he recalled that **REP. HOLLAND** agreed to some amendments proposed by **Mr. Thueson** which cover these concerns.

REP. MC GEE asked that the amendments be read into the record.

Mr. MacMaster directed the attention to page 1, line 18, after the word, "actions," insert "if the court finds that the party's claim or defense was frivolous and that the party is able to pay within a reasonable period of time."

Motion: REP. MC GEE MOVED TO AMEND HB 74 ACCORDING TO THE PREVIOUS WORDING.

Discussion: **REP. BRAD MOLNAR** asked if "court finds" means the judge or the jury.

Mr. MacMaster answered that it means the judge.

REP. MOLNAR said that in his experience, judges are extremely reluctant to dismiss because the case was frivolous. Therefore, he thinks the amendment is correct on a theoretical basis, but not on a practical one.

REP. LINDA MC CULLOCH asked about how the judge determines whether a person is able to pay.

Mr. MacMaster said that the judge would look at the party's complete financial situation and all income factors and compare that with the jury's costs and decide how much of it should be imposed along with a possible payment schedule.

REP. JOAN HURDLE asked if she understood that the judge can already decide whether or not a case is frivolous and the merits of awarding of payment.

Mr. MacMaster answered that a judge can, under Montana rules of civil procedure that regulate procedure in district courts, order the party or the party's lawyer or both to pay the court costs including attorney fees; but it does not include the cost of impaneling or having a jury.

REP. DEB KOTTEL asked if, in **Mr. MacMaster's** opinion, the language in the amendment would cure any constitutional deficiencies.

Mr. MacMaster said he thought it would go a long way toward doing that. He referred to another section in the code which was cited in testimony, 3-15-203, MCA, which says almost the same thing. He read that part of the code and said that the bill is probably unconstitutional as it stands without the amendment.

{Tape: 1; Side: A; Approx. Counter: 75.5}

REP. KOTTEL said that though this amendment goes far in making the bill palatable to her, she still believes it will have a chilling effect on people entering the court system.

CHAIRMAN CLARK made the following points: (1) this bill is dealing with civil cases, not criminal cases; and (2) this bill is not raising money for the court, but rather stopping the counties and taxpayers from picking up the tab for people who file civil suits in court and as such the intent is to save money not to raise money.

REP. KOTTEL felt that was just a matter of semantics. She referred to the county attorney who testified that he did not know that the county paid for jury trials. She explained how this testimony offended her.

REP. MOLNAR gave his reasons for disagreeing with the amendment. He called for the question on the amendment.

Vote: The motion to amend failed by a show of hands, 7 - 12.

Discussion: **REP. MC GEE** felt that it would be appropriate to table the bill until some of the language could be cleared.

REP. SHIELL ANDERSON said that he liked the amendment, and without it, a law would be enacted that would be found to be unconstitutional. He would like to give the judge the opportunity to award jury costs in certain of these cases, but he did not believe it would pass constitutional muster. He stated an example of how this could put a damper on people going to court with their cases, but with the amendment limiting it to frivolous claims, the judge has some leverage in certain cases.

{Tape: 1; Side: B}

REP. BOHARSKI asked for a reading of the other section of statute that refers to judges ordering parties in a frivolous case to pay costs.

Mr. MacMaster replied that in Rule 11 of the Montana Rules of Civil Procedure basically says that each party, plaintiff and defendant, (either the party or his attorney) has to sign every pleading, every motion, every paper filed in support and signing it is an affirmation that you think you have a good reason to bring the cause of action. Then it says, "If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." Cases decided under that rule, many talk about the frivolousness of the order.

REP. BOHARSKI said that the average person in the state is not only allowed a jury trial, they are allowed access to the courts and therefore he wonders why in that section of the procedure rules we can allow the judge to assess costs to an individual, but then we become unconstitutional when part of those court costs are for a jury.

REP. ANDERSON answered that because under the Constitution a person has a right to trial by jury, but it doesn't mention a Constitutional right to trial with all costs included.

REP. MOLNAR reminded the committee about the testimony from the ACLU that this language is already in the law under "203" in courts not of record and that they have never found anything unconstitutional with it. He said it is probably found under the wrong section. It probably should strike the words, "not of record."

Motion: REP. MOLNAR MOVED TO AMEND LINE 18 CHANGE IT TO READ, "IN CIVIL ACTIONS THE JURY MAY ORDER."

REP. MC GEE referred to a Montana Supreme Court Opinion which said, "We hold that the plain meaning of the Constitution controls and that the legislative enactment of section 3-15-203, MCA, restricts the inviolate right to jury trials in justice court. We so hold for two reasons, (1) the plain language of the Constitution mandates it, any other construction renders the language of the Constitution meaningless; (2) the jury fees paid by the party demanding a jury trial are taxed as costs against the losing party. This suggests that the statute which requires prepayment of jury fees is not a true mechanism for recovery of costs, but rather a device to discourage the exercise of the right to jury trial. As Justice Black stated in the case which

declared the right to trial by jury a fundamental right ..... the right to jury trial is not inviolate if it is accorded only to those who can afford to pay for it. Jury trials should not be available in Montana on pay-as-you-go basis. The idea that justice can be bought is analogous to the sin of simony which was the practice of buying the souls of friends and relatives out of purgatory and into heaven which inspired the verse, ... We accept this petition for original jurisdiction and declare 3-15-203, MCA, and rule 14.f, MJR civ P, unconstitutional."

REP. ANDERSON gave reason for voting against the amendment. He felt that it would set up a severe conflict of interest.

Vote: Motion to amend failed by a voice vote.

Motion/Vote: **REP. MC GEE MOVED TO TABLE.** The motion carried by a show-of-hands vote of 16 - 3.

Motion: **REP. MC CULLOCH MOVED TO ADJOURN.**

{Comments: This set of minutes is complete on one 90-minute tape.}

ADJOURNMENT

Adjournment: The meeting was adjourned at 9:50 AM.

Bob Clark
BOB CLARK, Chairman

Joanne Gunderson
JOANNE GUNDERSON, Secretary

BC/jg

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL DATE 1/13/95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Clark, Chairman	✓		
Rep. Shiell Anderson, Vice Chair, Majority	✓		
Rep. Diana Wyatt, Vice Chairman, Minority	✓		
Rep. Chris Ahner	✓		
Rep. Ellen Bergman	✓		
Rep. Bill Boharski	✓		
Rep. Bill Carey	✓		
Rep. Aubyn Curtiss	✓		
Rep. Duane Grimes	✓		
Rep. Joan Hurdle	✓		
Rep. Deb Kottel	✓		
Rep. Linda McCulloch	✓ late		✓
Rep. Daniel McGee	✓		
Rep. Brad Molnar	✓		
Rep. Debbie Shea	✓		
Rep. Liz Smith	✓		
Rep. Loren Soft	✓		
Rep. Bill Tash	✓		
Rep. Cliff Trexler	✓		

EXHIBIT 1
DATE 1/13/95
HB 37

DEPARTMENT OF ADMINISTRATION
RISK MANAGEMENT AND TORT DEFENSE DIVISION

MARC RACICOT, GOVERNOR

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STATE OF MONTANA

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HELENA, MONTANA 59620-0124

January 13, 1995

TESTIMONY IN SUPPORT OF HB 37, by Bill Gianoulias, Chief Defense Counsel, Risk Management and Tort Defense Division, Department of Administration.

The Risk Management and Tort Defense Division requested and supports HB 37. This bill simply provides that people in prison have the same statute of limitations that applies to everyone else.

Section 27-2-401 MCA now provides a person imprisoned on a criminal charge, or under a sentence for a term less than life, with up to a five year extension for bringing a lawsuit. If a person in prison has a tort claim to file, instead of a three year statute of limitations, the time period to file a lawsuit is eight years. This amendment will eliminate the five year extension and allow a person in prison three years to file suit, the same amount of time as for everyone else.

While inmates may have had difficulty gaining access to courts in the past, it is not so now. Of 203 open lawsuits we are presently defending, 97 of them have been brought by inmates. Inmates also have access to courts through the Montana Defender Project which is funded by the state and run by the University of Montana Law School. Many inmates have access to computers and access to a law library maintained by the state for the inmates at the prison.

We request that you pass HB 37.

EXHIBIT 2
DATE 1/13/95
HB 55

DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES
CHILD SUPPORT ENFORCEMENT DIVISION

MARC RACICOT
GOVERNOR

PETER S. BLOUKE, PhD
DIRECTOR

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House Bill 55
"Federal Conformity"
Sponsored by Representative John Bohlinger
Testimony of Mary Ann Wellbank
SRS Child Support Enforcement Division Administrator

This legislation is beneficial to individuals who are entitled to receive support. The state Child Support Enforcement program is authorized under Title IV-D of the federal Social Security Act and state administered. State programs must conform to very specific federal regulations. The purpose of the draft legislation is to bring the program into compliance with federal regulations.

Under present Montana law, income withholding orders may be issued by two entities; by the courts pursuant to MCA 40-5-301 et seq. and by the CSED pursuant to MCA 40-5-401 et seq. Federal law at 42 USC 666(a)(8)(B), part of federal Title IV-D governing the state/federal child support enforcement program, sets out certain requirements of state income withholding laws. A state's failure to conform its statutes to these requirements may result in failure of the state's IV-D plan, which in turn results in loss of funding for the state welfare program.

This bill conforms MCA 40-5-301 et seq., the provisions allowing individuals to obtain income withholding orders for the payment of child support **without** the assistance of the CSED, to the requirements of federal law.

Each of these requirements are already part of the income withholding scheme of MCA 40-5-401 et seq., when income withholding is initiated by the CSED. The bill sets out the duties of an employer upon receipt of an income withholding order, provides that an employer may not discharge, discipline, or refuse to hire an obligor because the obligor has a child support obligation or is the subject of an income withholding order, sets a civil penalty for the employer's refusal to honor the income withholding order, and sets out the requirements of the order.

Submitted by: Mary Ann Wellbank

EXHIBIT 3
DATE 1/13/95
HB 55

Department of Social and Rehabilitation Services

Program Descriptions

January 1995

(pamphlet)

Peter S. Blouke, PhD
Director

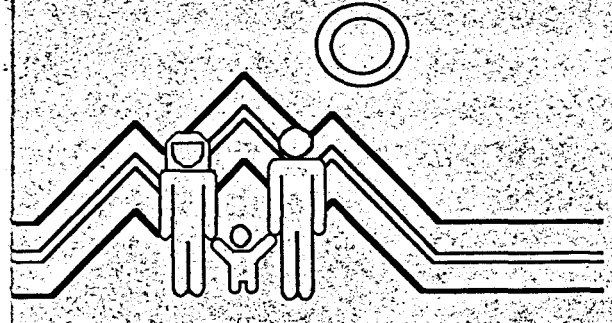

EXHIBIT 4
DATE 1/13/95
HB 55

DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

MARC RACICOT
GOVERNOR

PETER S. BLOUKE, PhD
DIRECTOR

STATE OF MONTANA

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House Bill 55
Sponsored by Representative John Bohlinger
Written Testimony of Peter S. Blouke, PhD, Director
Department of Social and Rehabilitation Services

The Department of Social and Rehabilitation Services, Child Support Enforcement Division is authorized under Title IV-D of the federal Social Security Act which provides specific criteria under which the Child Support Program must operate. Failure to conform to the federal requirements ultimately risks loss of funding for the state welfare program.

Current Montana law allows income withholding orders to be issued by both the courts under MCA § 40-5-301 et seq. and the CSED under 40-5-401 et seq. The purpose of HB55 is to bring the court's withholding provisions found at MCA § 40-5-301 et seq. in to compliance with the federal regulations found in Title IV-D of the Social Security Act at 42 USC 666(a)(8)(B). HB55 will provide more consistency between the withholding provisions found in MCA § 40-5-301 et seq. and MCA § 40-5-401 et seq. and will ultimately benefit both employers and obligors by providing a more uniform method of issuing income withholding orders.

Thank you for your consideration of this legislation.

Submitted by: Pete S. Blouke

Peter S. Blouke, PhD, Director
Department of Social and
Rehabilitation Services

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DATE 1/13/95
HB 55

DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES
CHILD SUPPORT ENFORCEMENT DIVISION

MARC RACICOT
GOVERNOR

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STATE OF MONTANA

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January 13, 1995

To: Rep. Bob Clark, Chair, House Judiciary Committee
House Judiciary Committee

From: Mary Ann Wellbank, Administrator
Child Support Enforcement Division
Department of Social and Rehabilitation Services

Re: HB 55

Thank you for the excellent hearing of HB 55 today.

Several members of the Committee had questions concerning Section 2 of the bill which set out protections for an obligor. Rep. Kottel was specifically concerned with the apparent duplication of these provisions with MCA 40-5-422, and MCA 39-2-303. We would like to take this opportunity to address these concerns.

The statutory provisions amended in HB 55 and the related provisions in MCA 40-5-301 et seq. apply to income withholding orders issued by a district court to an employer for the payment of child support. MCA 40-5-401 et seq., not amended by this bill, contains the provisions applying to income withholding orders issued by the Child Support Enforcement Division to employer or other payors of income for the payment of child support.

Each of the new provisions of HB 55 are already part of the statutory scheme applying to income withholding orders issued by the CSED pursuant to MCA 40-5-401 et seq. For example, Section 1 of HB 55, Duties of Employers is substantially similar to MCA 40-5-421; Section 2 is substantially similar to MCA 40-5-422; Section 3 is substantially similar to MCA 40-5-424. These provisions are repeated because the orders are issued by separate entities - either the court or the CSED.

Rep. Kottel was concerned with having three separate provisions of the code dealing with protections of obligors against discharge etc. due to the employer's receipt of a garnishment order.

Section 1674 of the federal Consumer Credit Protection Act was

adopted in May 1968 with an effective date of July 1, 1970. This statute provides:

> (a) No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness.
>
> (b) Whoever willfully violates subsection (a) of this section shall be fined not more than $1,000, or imprisoned not more than one year, or both.

As you can see from this language, this provision applies to all employers and prevents discharge of an employee subject to any garnishment order. This could include a child support order but could also include a garnishment from any other creditor. This provision subjects the employer to federal criminal penalties.

In response to the federal act, Montana adopted MCA 39-2-302 as part of its labor code. This statute provides,

> No employer shall discharge or lay off an employee because of attachment or garnishment served on the employer against the wages of the employee.

No penalty provisions are contained in this section.

The federal law governing child support enforcement is 42 U.S.C. §651 et seq., Title IV-D of the Social Security Act. Since enacted in 1984, Section §666 of the Act, has required certain provisions regarding income withholding be codified into state law. Section 666 initially applied only to income withholding orders issued by the state's child support agency, but was later amended to require that many of the provisions also apply to all income withholding orders issued in the state, including those issued by a court for a non child support agency case. Section 666(b)(6)(D) and the regulations promulgated thereunder state:

> Provision must be made for the imposition of a fine against any employer who discharges from employment, refuses to employ, or takes disciplinary action against any absent parent subject to wage withholding required by this subsection because of the existence of such withholding and the obligations or additional obligations which it imposes upon the employer.

This requirement has applied to state agency-initiated income withholding orders since 1985 and became applicable to court issued income withholding orders on January 1, 1994. Montana is currently out of compliance with respect to this provision and the others contained in HB 55. The federal government has withheld sanction action pending HB 55.

The language of MCA 39-2-302 is not sufficiently broad to meet the requirements of 42 U.S.C. 666(b)(6)(D). Specifically, under

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§666(b)(6)(D), the employer may not discharge, refuse to employ, or take disciplinary action against the employee. MCA 39-2-302 prohibits only discharge and lay-off. Section 666(b)(6)(D) requires that the employer must be subject to a fine for engaging in the prohibited behavior. MCA 39-2-302 provides no penalty.

Although the Division does not believe use of the word "fined" in Section 2 of HB 55 renders this provision a criminal violation, the Division has no objection to substitution of the phrase "subject to a civil penalty" for "fined" at line 6, page 2 of the Introduced HB 55.

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 1/13/95

BILL NO. HB 37 SPONSOR(S) Rep. Eddington

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NAME AND ADDRESS	REPRESENTING	Support	Oppose
Bill Gianeulias Tenders Rtnr. Bldg.	RMTD - Dept. of Administration	✓	
Scott Crichton	ACLU		✓

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HOUSE OF REPRESENTATIVES
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JUDICIARY COMMITTEE DATE 1/13/95

BILL NO HB 55 SPONSOR(S) Rep. Bohlinger

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NAME AND ADDRESS	REPRESENTING	Support	Oppose
M.A. Wellhart	SRS-CSED	✓	
Kate Cholewa (EWA)	MT Womens Lobby	✓	
Arlette Randash	Eagle Forum	✓	
Laurie Koutnik	Christian Coalition	✓	

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