

2012 Legislative Report ACLU of Oregon

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INTRODUCTION

Oregon voters approved a ballot measure in 2010 to send their legislators to Salem annually, rather than every other year, and this 2012 session marked the first annual session under this new law. The constitutional provision caps the session at 35 days in even-numbered years. Though members of the legislature proceeded through much of the session with the ambitious expectation of adjourning at the end of February, the final gavel fell just 1 day short of the constitutional limit in the evening hours of March 5th.

In contrast to a regular long session when thousands of bills are introduced, only about 300 bills were put forth this session. The break neck pace, however, was not sufficient for even this scaled down volume. More than in prior long sessions or even special short sessions in the past, bills were pushed through in the interest of time but at the expense of proper scrutiny. While we managed to emerge with a few successes and civil liberties fairly intact, we were disappointed to see one bill in particular move forward with significant implications for the privacy rights of Oregonians 65 years and older (see description of HB 4084 below for more detail). In a regular long session, a bill like this one would have been routed through the Judiciary Committee so that those members could properly amend the bill to protect criminal due process and privacy safeguards. Instead, because time was limited and the bill was a priority for legislative leadership, amendments were adopted quickly in the budget committee and crucial concerns were put off for later sessions. We share hope with many legislators and advocates that this process does not set the precedent for the future of short annual sessions.

This session we saw proposals in several civil liberties areas, including a great deal that touched on criminal justice or privacy issues. Short summaries of those bills are included below. To find full text of the bills, you can visit http://www.leg.state.or.us/bills_laws/. Or feel free to contact our office at any time with questions.

CRIMINAL JUSTICE

1. HB 4022: Civil Commitments for Heroin Users

At the request of Mike Schunk, the District Attorney for Multnomah County, Representative Jeff Barker (D-Aloha) introduced HB 4022, which set up a new system of civil commitment for heroin users. The bill sought to amend the definition of “mentally ill person” in the civil commitment law to include a person with substance dependence associated with opioids and said that, if such person had two or more convictions for heroin possession in the last five years or had been committed under this law in the last five years, was in possession of heroin within the last 30 days, had no pending criminal charges, and it would be “difficult, if not impossible, to avoid this commission of another” heroin possession offense, the person could be civilly committed. Special terms of commitment would be applied to these persons, including a longer period of time in which the state would have authority to hold them. Also, the bill shifts the authority to release the person from those with specific medical expertise to the court.

We testified in opposition to this bill, standing beside other groups such as Disability Rights Oregon, Partnership for Safety and Justice, and National Alliance on Mental Illness Oregon (NAMI Oregon), to express our concerns. HB 4022 appeared to implicitly recognize that heroin addiction, like all other drug abuse, is a health problem, and for that we praised the proponents. However, while the ACLU believes that we should look to decriminalizing drugs and focus our resources on treatment, we do not believe that the solution is to give the government the authority to hold a person in custody, absent criminal charges, and force that person to undergo medical treatment against his or her will.

Oregon has endeavored over the years to craft a very limited, detailed and protective civil commitment law that is only used as a last resort and under very narrow circumstances. The ACLU has collaborated with other groups to stay involved in this discussion to make sure that we maintain strong safeguards and protections before the government takes a person’s fundamental right to liberty. Though introduced with the good intention of better addressing drug addiction in Oregon, HB 4022 fell short of preserving these basic safeguards. Addiction to opiates is a serious health problem that should be addressed by increased access to treatment through the healthcare system.

WIN: Died in Committee

2. HB 4091: Retention of Fingerprints by the State Police

Representative Nancy Nathanson (D-Eugene) is a champion in the legislature of government efficiency. As Vice-Chair of the Joint Ways & Means Committee, which writes the state budget, the representative is constantly looking for ways to streamline government’s work to save the state money. To that end, she introduced HB 4091 to require the Department of Administrative Services (DAS) to convene a workgroup to examine and develop recommendations around how the state can improve its systems for performing criminal background checks. The redundancies and inconsistencies in our current system, she says, are costly to the state because employees must undergo multiple background checks within short periods of time. The ACLU does not dispute that the background check system we have now is overly complicated and, in some cases, unnecessary. Our advocacy in this area has always focused on

the need to balance security precautions, privacy rights, and due process concerns in a reasonable and practical manner.

In an effort to jumpstart some of the anticipated savings, Representative Paul Holvey (D-Eugene), who co-chairs the House General Government and Consumer Protection Committee where the bill was first introduced, drafted an amendment to Rep. Nathanson's workgroup bill that would have permitted the Oregon State Police to retain fingerprint cards for five years of persons who have undergone a criminal background check. Under current law, one that the ACLU fought very hard to include when a similar overhaul of this process occurred in 2005, fingerprints must be destroyed immediately after use in a criminal background check. Oregon is not and should not be a place that allows for our law enforcement agencies to maintain a central database of individuals who have never been convicted of a crime. Such a database would undoubtedly be tempting for use and potential misuse. Chipping away at this protection is a dangerous precedent to set. While we testified before the committee to our support of the workgroup, we strongly opposed this particular amendment. Co-Chair Holvey considered our concerns and decided not to adopt the amendment.

At our request, the committee did add adopt an amendment to HB 4091 that stated that a privacy advocate should be included in the work group. The ACLU will serve that function so as to ensure that these important privacy safeguards are protected going forward.

WIN: HB 4091 passed without the amendment that would allow for retention of fingerprints.

Vote: 60-0 (House); 29-0, 1 excused (Senate)

3. HB 4100: Statute of Limitations for Certain Crimes against Minors

The statute of limitations serves an important function in the criminal justice system. Its purpose and design is to permit both the prosecution and the defense to present a case before the evidence gets stale. Prosecution within a few years of the crime allows a victim to confront the accused and it also allows the accused to call witnesses and prepare a defense. As more and more time lapses between the crime and the trial, it becomes increasingly difficult, if not impossible, for the accused to prepare a meaningful defense – memories are lost, witnesses have died, exculpatory evidence is no longer available.

HB 4100 brought back a concept that was floated and failed in the 2011 session to extend the statute of limitations for sex-related crimes if, at the time of the crime, the victim was under the age of 18. For many sex-related crimes under current law, prosecution of the defendant must be commenced within six years after the commission of the crime and, in cases where victims were under 18 at the time of the crime, prosecution must be commenced any time before the victim turns 30 or within 12 years after the offense is reported, whichever occurs first. HB 4100 sought to eliminate the statute of limitations completely for these certain sex-related crimes committed against minors.

The ACLU recognizes the very difficult issues raised by HB 4100, such as the great time and pain that is sometimes takes for a victim to truly grasp what has happened. The courage of crime victims to come forward in support of similar proposals in the past is profound. We opposed the bill, as we did others in prior sessions, because of the important protections that a statute of limitations provides to the accused, particularly those who are innocent of the crime.

The fundamental underpinning of our criminal justice system is the presumption that a person accused of a crime is innocent unless and until the state proves beyond a reasonable doubt that the defendant is

guilty of the charge. Particularly in the realm of highly emotional cases, such as sexual assault of a minor, a jury is more likely to start with the opposite presumption: that the defendant is guilty or he would not have been charged. The more we take steps to extend the statute of limitations or eliminate it altogether, the greater the barrier to justice that the accused must face.

The similar concept for this bill in 2011 did receive a hearing in the House Judiciary Committee, but HB 4100 did not receive a hearing this session. We expect this issue to resurface in future sessions.

WIN: Died in Committee

4. HB 4146: Expunction of Juvenile Records Involving Prostitution

This bill was a small but important change to the statutes that recognized that minors who are charged with prostitution are not criminals but rather victims themselves. Under Oregon law, minors cannot consent to sex and therefore it is inconsistent to prosecute minors with the crime of consenting to sex with money. Representative Jefferson Smith (D-Portland) worked with groups such as Youth, Rights & Justice, Oregon Center for Christian Voices, National Crime Law Institute, and Multnomah County Commissioner Diane McKeel to bring forth HB 4146. The bill requires the expunction of juvenile records involving prostitution when the subject was under 18 years of age at the time of the offense. Expunction is required to occur without a waiting period and, if no objection is filed, without a hearing. In practice, juveniles are typically not charged under the prostitution statute, so HB 4146 made a fair change to the law to provide a clean slate to youth prosecuted under the old practices.

HB 4146 passed without opposition. While this bill implements just a small change to expunction statutes, we anticipate a proposal for a more thorough overhaul of these laws in 2013. We will be working with representatives from the district attorneys, the criminal defense attorneys, and other stakeholders in the interim to develop these proposals.

WIN: Passed

Vote: 57-0, 3 excused (House); 30-0 (Senate)

5. SB 1527: Caps the Fine for Violations When Initially Charged as a Misdemeanor

On February 6, 2012, Multnomah County Circuit Court Judge Cheryl Albrecht issued an opinion in the case of several persons arrested at an Occupy Portland protest. Each of the defendants had been initially charged with at least one misdemeanor crime and the District Attorney elected to “charge down” to violations. The defendants argued in court that, because the charges started out as and could still be sentenced as criminally punishable crimes, they were therefore entitled to the Constitutional and statutory procedural protections of right to jury trial, right to appointed counsel, right to confront witnesses, privilege against self-incrimination, and the “beyond a reasonable doubt” burden of proof. These protections are not typically available to persons who were initially charged with a violation. Judge Albrecht agreed with the defendants. Her analysis explained that the Oregon statutes that lay out the trial process for charged down violations entitle the defendants to proof beyond a reasonable doubt standard, confrontation of adverse witnesses, and the right not to be required to appear as a witness in one’s own case. The protections not afforded by statute are provided by Article I, section 11 of the Oregon Constitution and the 6th Amendment of the U.S. Constitution, she reasoned, including the right to a jury trial and the right to appointed counsel.

The implications of this opinion were limited because it was issued by only one judge in one county. In agreement with Judge Albrecht’s legal analysis in the opinion, however, the Multnomah County District

Attorney's office anticipated that other judges might rule the same way in similar cases, a result that would significantly strain the already stretched resources of their office. As a response to this concern, the DA's asked the House Judiciary Committee to adopt an amendment to SB 1527 (a bill already moving through the process with a small technical fix to a bill from the 2011 session) to cap the fine for a violation in cases where the defendant was initially charged with a misdemeanor and the DA elected to charge down. The amendment did not directly reverse Judge Albrecht's decision, but it changed a significant piece of the analysis. With fines capped at the violation level, it is more difficult to make the argument that a defendant is still subject to misdemeanor-level penalty and thus greater procedural protection.

We joined the criminal defense lawyers in supporting this amendment to SB 1527 because, while it remains unclear whether a judge in a future case would come to the same conclusion as Judge Albrecht with the capped fine for charged down violations, it is clear that a violation charge, whether or not it began as a misdemeanor charge, should be treated as a violation. By capping the fine for violations, we reasoned, the legislature is acknowledging that it does not make sense for someone charged with a violation to be subject to a misdemeanor level fine. The amendment was adopted and the bill passed, but the change does not apply retroactively, so these Occupy Portland defendants as well as any other defendant who has received a charged down violation before the enactment of this law will not be affected by the change.

WIN: Passed

Vote: 30-0 (Senate); 59-0, 1 absent (House); 27-0, 3 excused (Senate concurring vote)

6. SB 1534: Heightened Penalty for Solicitation of Crime Using Electronic Communication

Citing the intent to target flash mob theft, an occurrence seen in other states whereby a group of people engage in a crime simultaneously, making it more difficult for any one individual to be detected, stopped, or caught, Senator Doug Whitsett (R-Klamath Falls) introduced SB 1534. The bill created the felony crime of aggravated solicitation for persons who use electronic communication to solicit two or more persons to commit a crime. The level of heightened penalty for electronic solicitation would be based on the severity of the crime solicited: Class A felony if the target crime is a Class A felony or murder or treason, Class B felony if the target crime is a Class B felony, and Class C felony if the offense solicited is a misdemeanor or a Class C felony.

Solicitation of a crime falls under an historic exception to free expression under Article I, section 8 of the Oregon Constitution, meaning that speech can be regulated when the speech is the solicitation of a crime. As a policy matter, however, SB 1534 took the wrong approach to regulating solicitation based on the *manner* of expression. One person might gather two friends at a coffee shop to plan a robbery and another person might email two friends to plan a robbery. Under the bill, the second person would be subject to a more severe penalty than the first person simply because he used email to commit the crime. Of further concern with the bill were the potential proportionality issues. It is troublesome enough that, no matter the level of the target crime, the bill punishes the solicitation communication as if it is the act itself. But the provision that created a Class C felony for soliciting a misdemeanor target crime is especially problematic – raising issues under Article I, section 16 of the Oregon Constitution, which states that “all penalties shall be proportioned to the offense” – because it would make the penalty for solicitation more severe than for the act of committing the crime itself.

SB 1534 received a hearing in the Senate Judiciary Committee, but did not advance to a work session.

WIN: Died in Committee

7. SB 1557: Consumption of Controlled Substances by Minors

SB 1557 was brought forward by Senator Chris Telfer (R-Bend) at the request of a few police officers in Bend. The officers wanted to address incidents of high school students coming to school under the influence of drugs – most often, marijuana. They claim that their officers in schools do not have the tools they need to penalize these students – punishment that they see as necessary to early intervention and treatment for substance abuse.

SB 1557 created the crime of consumption of a controlled substance by persons 21 years or younger with the penalty of a Class B violation. The bill was fraught with both procedural issues and raised significant policy concerns. The ability of an officer to determine what specific substance has been consumed would be very difficult, particularly because he could not get a warrant for a violation and thus could not get a urine sample. In addition, an officer would not be able distinguish from lawfully consumed substances. If the bill passed, it would seem that everyone age 21 and younger would effectively be required to carry with them at all times a copy of their prescription.

While the proponents of the bill have a well-intentioned concern for the well-being of young people, the approach of the bill was off base and dangerous to civil liberties. The problem of substance abuse is one that should be addressed with robust treatment resources rather than additional criminal penalties. We should not be enhancing the ability of law enforcement to stop someone in a public place for a search without probable cause under the pretext of suspicion of consumption of a controlled substance. And we certainly should not be sweeping school age kids from school into the court system.

SB 1557, like other similar proposals in prior legislative sessions, received a hearing but did not advance to a work session.

WIN: Died in Committee

FREE SPEECH

8. SB 1575: Disorderly Conduct at a Funeral

For years, the Westboro Baptist Church (WBC) and founders the Phelps family have picketed outside funerals, holding signs displaying often hateful homophobic messages. HB 3241 was introduced in the 2011 session to target these activities but, at the ACLU's urging to reject the measure so clearly in violation of both the free expression provision of the Oregon Constitution (Article I, section 8) and the First Amendment of the United States Constitution, the bill failed. The concept came back in this short session and, though more limited than it had been before, was still motivated by the desire to respond to the offensive and abhorrent speech activities, albeit religiously motivated speech, of the WBC.

SB 1575 incorporated the new laws into the existing disorderly conduct statute and said that a person is subject to a heightened criminal penalty for committing the crime of disorderly conduct if that conduct takes place within 200 feet of a funeral service. In testimony to each Judiciary Committee – House and Senate – we cautioned there was a high risk of misapplication of this new law to persons based on the content of their speech. The disorderly conduct statute prohibits a person from, among other things, making “unreasonable noise; disturb[ing] any lawful assembly of persons without lawful authority; obstruct[ing] vehicular or pedestrian traffic on a public way...” To be charged with the crime, the person must have the “intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk

thereof.” In our view, SB 1575 should not be interpreted so broadly that it would implicate unpopular speech but, if a government agency enforces the law in such a way it could be subject to a lawsuit for damages and injunctive relief.

We did not actively oppose this scaled back version of the concept that was floated in the 2011 session, but we are disappointed that the legislature chose to make laws based on the content of a group’s speech and we will be watching closely as this new law is implemented.

NEUTRAL: Passed

Vote: 29-0, 1 excused (Senate); 59-1 (House; Nolan voting no)

PRIVACY

9. HB 4084: Law Enforcement Access to Medical and Financial Records of Elders

HB 4084 came to the 2012 legislature as the product of the Elder Abuse Work Group that had met during the interim to discuss issues of crimes against elderly Oregonians and how we might amend the law to better protect this population. While many interests were well represented in the Work Group, including long-term care providers, law enforcement, community banks, and the state agency for human services, the group developed its recommendations without consideration of either a criminal defense or a privacy rights perspective. The result was a bill that significantly compromised the rights of Oregonians in both areas.

Most concerning from the ACLU’s perspective are the changes the bill made to the authority of law enforcement officers to access the most personal documents of persons 65 and older. Where the existing law allowed for law enforcement to access private financial records or protected health information of a person without his or her consent, the law still required judicial oversight and a means of notice to that person. HB 4084 eliminates these critical safeguards. The bill says that, upon notice to a health care provider of an elder abuse investigation, the provider must hand over protected health information of an alleged victim of abuse and also consult with the law enforcement officer about these records. No notice to the patient is required, no showing of probable cause, no articulation of urgency. Last minute amendments to the bill inserted the requirement that, when accessing private financial information, a law enforcement officer must first obtain a subpoena from a grand jury or a judge, but the bill removes the provision in current law that requires notice to the account holder before the access.

HB 4084 implicates core protections against government intrusion and the role of the judiciary to provide meaningful oversight and safeguards. Several legislators expressed severe reservations about the new and unchecked access to records awarded to law enforcement officers in this bill. In the rush of the one-month session, however, these concerns were set aside so as to enable legislators to claim a win on elder abuse in this election year. We received assurances from a handful of legislators that work will be done in the interim to prepare fixes to this legislation for the next session and we will be working hard in the coming months to hold them accountable to this promise.

LOSS: Passed

Vote: 59-1 (House; Barnhart voting no); 27-2, 1 excused (Senate; Shields and George voting no)

10. SB 1507: Removes Informed Consent Requirement for HIV Testing

Citing data about the importance of early detection of HIV and the burden of the required informed consent process before testing, a couple of resident physicians from Portland brought forth this bill with the intent to remove barriers to testing. The informed consent requirement in existing law mandated that, before a physician performed an HIV test, he or she must first explain to the patient in general terms the procedure for testing, any alternatives, any risks, and also allow the opportunity to the patient to ask more detailed questions. The proponents of the bill argued that this process is too time intensive for many providers and, therefore, HIV testing is more often not performed. The bill replaced the informed consent requirement with a more limited requirement that the patient must be notified – either verbally or in writing – of the test and be provided an opportunity to decline testing. The bill explicitly allows for such notification to be embedded in a general medical consent form along with notice of other procedures.

The ACLU agrees that increasing access to HIV testing and care is a critically important goal. Far too many people do not know their HIV status and we support efforts to help people living with undiagnosed HIV learn their status and gain access to necessary care and support services. We opposed SB 1507 because we strongly believe that HIV testing should be truly voluntary and informed, and the combination of decreased notification requirements and allowance for notification in a general medical consent form posed too great a risk that patients might never know when they are being tested.

Meaningful informed consent is important because HIV testing has specific legal and social consequences. Test results may be reported to the government. And, despite state and federal laws prohibiting it and significant improvements in public awareness, discrimination against people living with HIV is a real and ongoing problem. In other states, women in correctional facilities who are HIV positive are placed in special segregation units. In July of 2010, even the White House Office of National AIDS Policy voiced concern that “the stigma associated with HIV remains extremely high and fear of discrimination causes some Americans to avoid learning their HIV status, disclosing their status, or accessing medical care.” We testified about our serious reservations about a policy that does not recognize the real challenges of social stigma and the risk of discrimination that persons with HIV still face today.

We offered a small amendment to the bill to clarify that, if a provider opted to give notice of testing in a general medical consent form, the provider must make that notice separate and conspicuous on the form. Rather than adopt the amendment to be sure that patients were truly receiving the required notice, the Senate Committee on Health Care, Human Services and Rural Health Policy chose to rush the bill through in order to stay on schedule in the fast-paced short session.

LOSS: Passed

Vote: 30-0 (Senate); 60-0 (House)

EQUAL PROTECTION

11. HB 4052: Use of E-Verify System by Public Employers

Introduced by Representative Kim Thatcher (R-Keizer), HB 4052 proposed a mandate on all state agencies to use the federal E-Verify system. E-Verify is an internet-based computer database run by the U.S. Department of Homeland Security that is used by some businesses to verify the work eligibility of employees. The system is widely understood to be flawed and often inaccurate, each error increasing the risk that a U.S. citizen or legal U.S. worker could be denied employment and a paycheck because of

the mistake. The state of Oregon, like the federal government, already verifies the eligibility of job applicants and prohibits those of undocumented status from receiving employment. Mandating the use of E-Verify will only serve to erect further bureaucratic barriers to employment for *eligible* workers who are already struggling in this recessed economy. The system could be set off by any number of errors, including mis-spellings, typos, or transposed numbers, and it could be very difficult or confusing for a worker to navigate the process simply to clear them up.

In our view, HB 4052 is an attempt by its proponents to play into discriminatory anti-immigrant sentiment in our state, but present it as a measure to help the unemployed. For several sessions now this messaging has not fooled the legislature. Just like similar bills introduced in prior sessions, HB 4052 failed to receive even a hearing in committee.

WIN: Died in committee

PUBLIC RECORDS

12. SB 1526: Seeks Clarity around Definitions in Public Meetings Laws

In the wake of a judicial opinion issued by the Lane County Circuit Court, Senator Floyd Prozanski (D-South Lane and North Douglas Counties) introduced SB 1526 to better define the meaning of “deliberations” in public meetings laws. The stated purpose of Oregon’s public meetings laws is to ensure that the public is aware of the deliberations and decisions of their governing bodies and that these decisions be arrived at in a transparent and open way. To that end, all meetings of a public body must be available and open to the public to attend – a meeting defined as “the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision...”

The Lane County decision, *Dumdi v. Handy* (2011), muddled an already fuzzy line between what does and does not constitute a public meeting. In particular, *Dumdi* made two assertions that, arguably, were counter to common understanding and practice for many public bodies. The first was that communication over email is subject to public meetings law restrictions. The second was that a quorum of members of the public body need not be assembled at the same time and in the same place. These serial interactions amongst pairs of officials may amount to a quorum and, if the officials are also engaging in decision making or deliberation, would constitute a public meeting.

Senator Prozanski and a collection of stakeholders, including the ACLU and also the League of Oregon Cities, the Association of Oregon Counties, and the Oregon Newspaper Publishers Association, convened to review the initial proposal and very quickly concluded that, while we can all agree that the current law is unclear and needs improvement, the details are too complex for a short session. The Senate Judiciary Committee, of which Senator Prozanski is the Chair, held a brief public hearing on the bill in order to explain on the record the issues and the intent of SB 1526, but carried over the issue to an interim workgroup. Our interest is in maintaining the philosophy behind the public meetings law, which is to make sure that decisions and deliberations of public bodies happen in public, and we will participate in the workgroup to make sure that interest is preserved.

NEUTRAL: Bill did not move forward. Further work expected in the interim.