

HOUSE RESEARCH ORGANIZATION

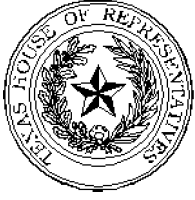
_____ session focus report _____

MAJOR ISSUES OF THE 75th LEGISLATURE REGULAR SESSION

July 11, 1997



Number 75-17



HOUSE RESEARCH ORGANIZATION

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MAJOR ISSUES OF THE 75th LEGISLATURE, REGULAR SESSION

The 75th Texas Legislature during its 1997 regular session enacted 1,487 bills and adopted 15 joint resolutions after considering over 5,700 measures filed. This Session Focus Report provides an overview of some of the session's highlights, summarizing both proposals that were enacted and some that were not. Also included is a brief review of the arguments offered for and against each measure as it was debated during the session.

The measures included in this report are a sampling and are not intended to be comprehensive. Other reports already published or being prepared by the House Research Organization examine in greater detail major legislation enacted by the 75th Legislature.

- Session Focus Report Number 75-15, Constitutional Amendment — Proposition 1 (HJR 4 by Craddick, Junell, et al./Armbrister, Bivins), Raising homestead exemption, portability of senior tax freeze, June 19, 1997, analyzes Proposition 1 on the August 9, 1997, ballot.
- Session Focus Report Number 75-16, Vetoes of Legislation — 75th Legislature, July 1, 1997, summarizes the governor's veto messages and includes responses from the authors and sponsors of vetoed bills.
- Session Focus Report Number 75-18, Constitutional Amendments — November 4, 1997, Election, September 5, 1997, analyzes the 14 proposed amendments on the November ballot.
- State Finance Report Number 75-3, The Fiscal 1998-99 Budget, September 30, 1997, reviews HB 1 by Junell (Ratliff), establishing the two-year state budget, plus other legislation affecting state spending and revenue.

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75TH LEGISLATURE, REGULAR SESSION

	Introduced	Enacted*	Percent Enacted
House bills	3,610	870	24.1 %
Senate bills	1,951	617	31.6 %
TOTAL bills	5,561	1,487	26.7 %
HJRs	123	8	6.5 %
SJRs	43	7	16.3 %
TOTAL joint resolutions	166	15	9.0 %

*Includes 36 vetoed bills — 19 House bills and 17 Senate bills

COMPARISON OF 1995 AND 1997 REGULAR SESSIONS

	1995	1997	Percent Change
Bills filed	4,957	5,561	+ 12.2 %
Bills enacted	1,088	1,487	+ 36.7 %
Bills vetoed	24	36	+ 50.0 %
JRs filed	188	166	- 11.7 %
JRs adopted	14	15	+ 7.1 %
Legislation sent or transferred to Calendars Committee	1,216	1,386	+ 14.0 %
Legislation sent to Local and Consent Calendars Committee	729	981	+ 34.6 %

Source: Legislative Information System (LIS)

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HB 1144 combines most pesticide and herbicide regulations into one chapter of the Agriculture Code, making a number of changes to the laws on pesticides and herbicides in the process and adding a new subchapter with some provisions specific to herbicides. The bill:

- eliminates licensing fee exemptions for pesticide applicators working for certain governmental agencies and prohibits licensed applicators from supervising applicators whose licenses are under suspension and revocation;
- exempts from state registration requirements pesticides not for use in Texas but being manufactured, transported, or distributed only for use outside of the state;
- deletes a mandate that the Texas Department of Agriculture (TDA) add a pesticide to the state limited-use list if directed by the Texas Natural Resource Conservation Commission (TNRCC);
- requires the Agricultural Resources Protection Agency to meet annually instead of quarterly and allows public opportunities to appear before the agency annually rather than every six months;
- makes pesticide dealer licensing biennial rather than annual and changes liability insurance requirements for certain licensed commercial applicators;
- requires TDA to cooperate on developing and implementing a state management plan for pesticides in groundwater; and
- allows county commissioners courts to implement certain restrictions on herbicide use.

Supporters said HB 1144 would consolidate and streamline the state's agricultural pesticide and herbicide laws, making them easier to understand and enforce. The bill also would strengthen enforcement of pesticide laws and enhance public safety by prohibiting applicators whose licenses were suspended or revoked from working under the supervision of another licensed applicator. The TDA is the lead agency for pesticide regulation with responsibility for registering products, monitoring the list, and enforcing pesticide laws and should have the ultimate authority over adding pesticides to the state limited-use list. Requiring registration of pesticides manufactured or transported for use outside the state is unnecessary; TDA regulates only pesticides used in state.

Opponents said allowing TDA to consider adding a pesticide to the state limited-use list if recommended by TNRCC would significantly reduce the role played by the state's environmental agency in protecting groundwater from pesticides. It also would be unwise to exempt from state registration pesticides that are only being manufactured, transported, or distributed for use outside the state since these pesticides could still represent a hazard to Texans.

The HRO analysis appeared in Part 1 of the May 6 Daily Floor Report.

HB 2542 extensively changes the Parks and Wildlife Code. The bill:

- increases maximum fines for Parks and Wildlife penalties to match those in the Penal Code and ups the penalty for hunting or fishing with a suspended or revoked license from a Class C to a Class A misdemeanor;
- creates an education/outreach program to increase participation in urban recreational activities;
- transfers certain Texas Parks and Wildlife Department authority to the executive director;
- specifies that landowners or occupants may build fences of any height on their land and establishes that they are not liable for restricting wild animals by the fence;
- authorizes TPWD to provide a special open season for youth hunting and fishing;
- requires boats on docks, moored or stored in water to have a current registration;
- makes changes to the scientific deer breeder statutes;
- allows TPWD to issue permits for managing white-tailed deer on private property; and
- establishes a limited entry crab license management program.

HB 2542 also changes sections governing hunting, fishing, shrimping, bait dealers, game birds, alligators, falconry, nongame animals, endangered species, funding, and fees, and requires TPWD to submit a report to the Legislature by October 1, 1997, on deficiencies in the maintenance, operational support, and support of historic structures, sites and parks under its jurisdiction.

Supporters said the bill would streamline the Parks and Wildlife Code, making it easier for game wardens and others to enforce the law and the general public to understand it. The bill also would codify some TPWD regulations and repeal unnecessary statutory provisions.

Opponents said that the bill should have required that commission members be appointed from specified geographic regions to ensure that members represented all areas of the state. Landowners should not be encouraged to build high fences enclosing state game.

Notes. SB 920 by Brown, creating a limited entry crab license management program, died in the House but was included in the conference report on HB 2542; it was analyzed in Part 2 of the May 26 Daily Floor Report. HB 2542 also includes HB 3061 by Hightower, allowing private landowners to manage deer, and HB 2541 by Kuempel, regulating scientific deer breeders. Both were analyzed in Part 1 of the April 30 Daily Floor Report and take effect September 1, 1997.

The HRO analysis appeared in Part 1 of the April 30 Daily Floor Report.

SB 1814 revises 1993 and 1995 laws setting up the Texas Boll Weevil Eradication Foundation to operate programs aimed at eliminating cotton boll weevils. It transfers numerous duties from the foundation board to the agriculture commissioner, establishes six statutory eradication zones, allows the commissioner to designate additional zones or to alter zones, and makes the foundation immune from certain lawsuits. It establishes the foundation as a quasi-governmental agency that operates the eradication program, under supervision of the Texas Department of Agriculture. The agriculture commissioner has general authority for ratifying, running and discontinuing the program. The foundation board is composed of representatives from each eradication zone and others involved with the program, such as lenders and entomologists. The foundation is immune from lawsuits and liability except as allowed by Chapter 101 of the Civil Practices and Remedies Code and for claims pending on or before April 30, 1997.

Supporters said SB 1814 would allow the state to continue efforts to eradicate the boll weevil while addressing the constitutional problem of the 1993 and 1995 laws. The Texas Supreme Court ruled that the laws too broadly delegated authority to a private entity. SB 1814 would give program authority to a statewide elected official while making the Texas Boll Weevil Eradication Foundation a quasi-governmental entity. Cotton growers would still have to agree to participate in the program and its assessments. The six statutory eradication zones would cover most of the state and incorporate those areas that were already involved in eradication efforts prior to the court decision. The climate, geography and conditions of other areas are so unique that they should not be included in a statutory zone. The commissioner could organize the other counties into eradication zones when they were ready to participate. The liability protections of the foundation would be similar to those of other state agencies. The foundation should be immune from pending lawsuits and liability except for those pending on or before April 30, 1997, the date the program was declared unconstitutional. Persons filing lawsuits after that date had solid notice that the program was unconstitutional and that their actions could be barred by legislation.

Opponents said there was no need for a statutory boll weevil eradication program; growers already can voluntarily organize, assess themselves a fee, and eradicate the pest. **Other opponents** said SB 1814 would not address problems about adequate program accountability, assessments, overly broad authority, and lack of grower controls. All areas of the state should be included in statutory zones; the boll weevil can move from field to field, and a coordinated program is necessary. Nonparticipating counties could become nurseries for boll weevils and undercut eradication efforts elsewhere. The liability of the program should not be limited; growers and the public harmed by foundation decisions should be able to seek judicial relief at any time.

The HRO analysis appeared in Part 1 of the May 26 Daily Floor Report.

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Prohibiting discrimination based upon genetic information

HB 39 by McCall, et al.
Effective September 1, 1997

HB 39 prohibits discrimination based upon genetic information for employment, health insurance eligibility, and issuance of occupational licenses. Genetic information is information derived from the results of a genetic test, which is a laboratory test of DNA, RNA, proteins, or chromosomes to identify genetic mutations or alterations associated with a predisposition for a disease. Genetic testing does not include a routine test performed as part of a physical exam, a test to determine drug use or the presence of HIV, or a chemical, blood or urine analysis. Pregnant women may not be required to submit to genetic testing of a child in utero for insurance purposes or coerced into having an induced abortion based on genetic information.

The bill makes genetic information confidential, private and privileged information. Entities covered by the bill cannot disclose genetic information, even by subpoena, without written authorization from the individual to whom the genetic information pertains. However, entities holding genetic information can disclose it without written authorization under certain explicit circumstances, including when authorized by state or federal criminal law or for research purposes, if the individual's name is not used in connection with the information.

Supporters said HB 39 would ensure that a promising new scientific technology was used to the benefit of Texans rather than to their detriment. Individuals with a history of disease in their families may resist undergoing genetic testing because they are afraid their health insurance company will use information from the tests to deny health coverage. An individual with an abnormal or mutated gene does not have a disease but merely the potential to develop the disease. Allowing discrimination based on this potential is egregious and unfair. HB 39 would add safeguards on two levels, preventing both unauthorized review of genetic information and illegal use of the information to deny health coverage or employment opportunities.

Opponents said the restrictions imposed by HB 39 would be premature because discrimination on the basis of genetic information is not a problem in the workplace. The federal ADA already protects individuals against discrimination based upon genetic information because of the protections afforded persons perceived to have disabilities. HB 39 would interfere with the free flow of information on which the health insurance industry is based. Prohibiting the use of genetic information would adversely affect business decisions on underwriting insurance policies because it would skew the use of risk as a factor in these decisions.

The HRO analysis appeared in the April 2 Daily Floor Report.

Employer protection for disclosing employee job performance

HB 40 by McCall, et al.
Died in Senate committee

HB 40 would have allowed employers to disclose information about a current or former employee's job performance to a prospective employer if requested by the employee or the prospective employer. An employer who disclosed information about a current or former employee would have been immune from liability for defamation based upon that disclosure, unless it was proved by a preponderance of the evidence that the employer knew the information was false or failed to disclose a grievance or a labor dispute with the employee.

Upon written request by applicants, prospective employers would have been required to furnish copies of all communications from current and former employers that could have affected their chances for employment with the prospective employer. An applicant would have had to make this request within 30 days after the date of application. A prospective employer would have been required to provide the applicant copies of the written correspondence within 10 days of the request.

Supporters said HB 40 would protect employers from defamation suits for giving information about a former or current employee. Many employers, fearful of being sued for libel, now just confirm prior employment, giving only "name, rank and serial number" when asked by a prospective employer for reference information about a former employee. HB 40 would encourage employers to be candid and honest about an employee's job performance. This is especially important for individuals applying for jobs that affect public safety, such as airline pilots, doctors, and truck drivers. HB 40 would be consistent with laws in 24 other states that protect employers from civil liability based upon disclosure of an employee's job performance.

Opponents said HB 40 would place too much control in the hands of employers and further undermine employee privacy by allowing employers to disclose information that had not been reviewed or challenged.

Employers who are fearful of providing reference information are reacting to a perceived rather than an actual problem. There are already adequate employer protections under current case law that have been upheld by many courts. Furthermore, the 10-day time limit to respond to an employee's request for written reference information would be a burden on employers.

The HRO analysis appeared in the April 17 Daily Floor Report.

HB 172, as passed by the House, would have waived sovereign immunity and allowed claimants to bring a suit against a unit of state government alleging breach of contract for goods or engineering or construction services, so long as the suit was brought to recover money damages or compel alternative dispute resolution. The total amount of damages claimants could have received in a contract case would have been limited to the amount they were to receive under the contract. HB 172 would have expressly prohibited awards of consequential or punitive damages in such cases. If a judgment were awarded or a settlement agreed to, the unit of state government would have been authorized to pay the claim from money appropriated for the contract. If such money were not available, the judgment could only have been paid by an appropriation by the Legislature.

Supporters said a majority of states and the federal government have abandoned the outdated notion of sovereign immunity for contract disputes, at least to some degree. In contract claims, there is a finite amount of money set in the terms of the contract that has often already been appropriated by the Legislature. Prohibiting contractors from recovering for legitimate claims from this finite amount is an abuse of state power. Even when the state is clearly wrong in its actions, it is not required to pay such claims unless it chooses to.

The state has the right to sue the contractor for any breach of the contractor's duties under the contract, but the contractor has no such right to sue the state. This often places the state in the unfair position of being able to demand additional goods or services not specified under the contract. If the risk of the state reneging on payment is limited, bids for many state projects may fall because contractors would no longer have to account for the risk of loss.

Opponents said the state, because of its size and its reliance on the tax dollars of its citizens, should be afforded additional protections by the doctrine of sovereign immunity. The state should not open itself up to being sued in even a limited number of cases. HB 172 would have given the attorney general unilateral authority to settle claims. Because the money used to settle such claims would come from money appropriated to the state agency, an agency should have some say in the settlement.

Notes. The Senate-passed version of HB 172 would not have waived sovereign immunity but would have established an administrative hearings procedure to settle contract claims. The House did not consider the Senate amendments.

The HRO analysis appeared in Part 1 of the May 9 Daily Floor Report.

HB 1202 would have made landowners immune from liability for property damage, personal injury, or death of a person caused by a criminal act unless they knew or should have known that a condition on the premises posed a “significant and unreasonable” risk of harm; they failed to use ordinary care to guard against the risk; and that failure was a proximate cause of the harm.

Landowner liability would not have been limited if the criminal act was committed by an employee or agent of the landowner; the landowner was criminally responsible for the act; the criminal act was at a location where the landowner was maintaining a nuisance; the criminal act resulted from the landowner’s violation of a statutory duty relating to security devices in rental housing; the cause of action was considered a toxic tort (related to hazardous chemicals, waste or other substances); or the claimant was a resident of a convalescent or nursing home.

Supporters said HB 1202 would have restored a sense of order and stability to the complicated area of premises liability law. Landowners are forced to defend themselves in suits brought by persons who have been injured by criminals when their only connection to the crime is that it was committed on their property. Crime victims are sympathetic plaintiffs, and innocent landowners can be unfairly forced to pay for society’s desire to punish criminal acts. Without clear standards defining landowner duties to such persons, juries can often be swayed by attorneys to find liability against the landowner. The exclusions in HB 1202 would have protected persons in certain high-risk situations or those unable to defend themselves.

Opponents said HB 1202 would have changed the standards for landowner liability and made it more difficult for persons injured on another’s land to receive compensation for the landowner’s failure to correct a dangerous condition or warn of the condition. HB 1202 would have increased the standard for recovery without providing a clear definition of what that standard entailed, an omission that would require additional litigation to clarify. Suits reflecting the changes made to tort law in 1995 on third-party responsibility are just now appearing in Texas courts. These new laws will likely change the outcome of many landowner liability cases; HB 1202 would have been an unnecessary and even confusing addition to the legal standards.

The HRO analysis appeared in Part 1 of the May 12 Daily Floor Report.

SB 220 allows Texas courts to exercise a more permissive application of the doctrine of forum non conveniens, under which civil courts may dismiss a lawsuit brought by a citizen of another state or country when both justice and the convenience of the parties would be better served if the action were brought and tried in another jurisdiction. Parties seeking to dismiss personal injury or death claims brought by out-of-state residents must show that an alternative forum exists for trying the claim; that maintaining the claim in Texas is a substantial injustice to them; and that the balance of interests to the parties and the state favors bringing the action in an alternate forum. A court may not dismiss or stay a claim on the grounds of forum non conveniens if a plaintiff makes a prima facie showing that an act or omission that was a proximate or producing cause of the claim occurred in Texas. Out-of-state residents must commence an action for personal injury or death in a Texas court within the time provided by the laws of the jurisdiction in which the wrongful act or omission took place.

SB 220 also establishes a procedure for dismissing asbestos-related claims if the exposure occurred outside of Texas. Claims filed on or after January 1, 1997, may be dismissed if a defendant made a stipulation that, for purposes of limitations, filing a claim in another state would relate back to the date the claim was filed in Texas. Claims filed between August 1, 1995, and January 1, 1997, may be dismissed unless the plaintiff filed a written statement electing to limit any punitive damages to the greater of two times the amount of economic damages, plus up to \$750,000 of the amount of noneconomic damages, or \$200,000. Any election made by a plaintiff is binding on all defendants in the plaintiff's claim. SB 220 applies to all asbestos-related claims pending in Texas courts on May 29, 1997, for which a trial, new trial, retrial or appeal was scheduled after that date.

Supporters said Texas courts are deluged with as many as 50,000 pending out-of-state cases. While these cases are brought by persons from another state, Texas taxpayers have to pay for the courts in which such cases are tried. The citizens in the areas burdened with such cases are also being denied access to their own courts because of the backlog of cases filed by those from other states. In order to remedy the problem, SB 220 would strengthen the ability of Texas judges to dismiss claims filed by out-of-state plaintiffs and establish tools to equitably dispose of a number of cases currently pending in Texas courts that should be tried elsewhere.

Texas courts have witnessed the revival of a number of cases that could not have been brought if the plaintiffs had to file them in their own states. Many have come from Alabama plaintiffs alleging harm from exposure to asbestos. Over 30,000 such cases have been filed in Texas courts, compared to only about 6,000 claims brought by Texas residents.

Asbestos-related claims filed from August 1, 1995, to January 1, 1997, would be allowed to remain in Texas courts if the plaintiffs agreed to have punitive damages available to them limited by SB 28 by Sibley, a Texas law that was enacted in 1995, before they filed their claims. While the limitation would encourage plaintiffs to seek out other forums, the plaintiffs could still use Texas courts to pursue their claims if such forums were not available.

The bulk of asbestos cases, those filed before August 1, 1995 would be allowed to remain in Texas. The only asbestos-related plaintiffs whose cases would likely be barred from being brought in Texas courts are the five percent of asbestos cases commenced this year, after plaintiffs' attorneys were placed on notice that the Legislature was considering limiting such suits. That notice encouraged a significant number of cases to be filed in the hopes of getting in under the wire and ensuring the out-of-state plaintiffs had a place in line in Texas courts.

Opponents said SB 220 was a special interest bill designed to benefit large interstate companies, particularly those who manufactured asbestos. Such companies may conduct a large portion of their business in Texas, but they would prefer to move cases to another state just to get away from the perceived plaintiffs' slant of Texas courts and juries. Owens-Corning and other asbestos manufacturers, which currently have more than 30,000 asbestos-related claims pending against them, could use SB 220 to ensure that claims were dismissed or delayed until the plaintiffs died from the diseases caused by exposure to asbestos.

SB 220 would affect the rights of Texas citizens to bring claims in Texas courts. The dismissal of asbestos-related claims could force Texas residents to have their case moved to another state if they were not Texas residents when they were exposed to asbestos. While generally unfair to out-of-state claimants, SB 220 would be particularly biased against claimants suing for asbestos-related injuries. SB 220 would allow the dismissal of pending cases and establish three classes of asbestos-related claimants based on when they commenced their actions in Texas courts. Those who commenced actions in 1997 would have their claims dismissed outright. Those who brought their cases between August 1, 1995, and January 1, 1997, would be forced to accept a limitation on damages in order to proceed in Texas courts. Only those plaintiffs who brought actions before August 1, 1995, would be allowed to continue their claims. Applying the bill retroactively to dismiss only asbestos-related lawsuits would be grossly unfair and an affront to justice.

The HRO analysis appeared in Part 1 of the May 23 Daily Floor Report.

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Concealed handgun license revisions

HB 2909 by Carter, Chisum, Allen, Hupp, Wilson, et al.
Effective September 1, 1997

HB 2909 makes numerous changes in the laws governing the carrying of concealed handguns. It requires the Department of Public Safety (DPS) to negotiate reciprocity agreements with other states that issue licenses to carry concealed handguns if their eligibility requirements include background checks that meet or exceed those under federal law. DPS also must establish a procedure for legal residents of other states that do not issue concealed handgun permits to obtain a Texas license if they meet all licensing requirements except for Texas residency.

HB 2909 replaces a prohibition against licensing persons of “unsound mind” with a prohibition against licensing persons “incapable of exercising sound judgment with respect to the proper use and storage of a handgun.” The bill defines this phrase to include persons diagnosed by a licensed physician as suffering from certain psychiatric disorders or conditions that cause or are likely to cause substantial impairment. Persons previously diagnosed with such conditions may receive a handgun license if a psychiatrist certifies that their condition is in remission and not reasonably likely to develop in the future.

Other changes made by the bill:

- require persons to demonstrate proficiency with a .32 caliber or above handgun, rather than either a 9 millimeter or .38 caliber;
- modify license revocation and suspension procedures;
- revise the format of warning signs related to handguns required in places that sell alcoholic beverages;
- create a new criminal offense for trespass by holders of license to carry concealed handguns;
- eliminate statutory defenses to prosecution concerning the unlawful carrying of certain weapons and add provisions to make the law nonapplicable to the same set of persons and situations; and
- exempt judges who receive concealed handgun licenses and parole and community supervision (probation) officers, subject to oversight by their employers, from some restrictions on carrying weapons.

Supporters said HB 2909 would fine-tune the concealed gun statute to address problems that have arisen since the law’s enactment in 1995. The bill would allow DPS to negotiate reciprocity agreements with other states to recognize concealed handgun licenses as long as those states had background checks at least as rigorous as those required under the federal rules for handgun purchases. The original law allowed reciprocal agreements only if the eligibility requirements were at least as rigorous as those of Texas, a requirement that has proven to be too restrictive. The bill also would mandate a system for licensing long-term Texas visitors, such as winter Texans.

By replacing disqualifying factors with more precise language and defining and giving examples of these criteria, the bill would help standardize the process of determining eligibility for a license. The bill also would reasonably extend licensing privileges to persons who have certifiably overcome former psychiatric conditions.

Opponents said HB 2909 would be an unwise lessening of the state's appropriately strict requirements on reciprocal licensing. HB 2290 would give DPS too much leeway to decide on reciprocal agreements and could allow persons who have not undergone the same rigorous scrutiny that Texans undergo to carry handguns here. This could result in unqualified or dangerous persons carrying handguns in Texas.

Persons diagnosed with psychiatric disorders should not be eligible to qualify for a concealed handgun permit if just one doctor says they are in remission. Psychiatrists often disagree with each other, and HB 2909 could lead to persons shopping around for a doctor to certify that their condition was in remission.

Notes. HB 311, which also eliminates statutory defenses to prosecution concerning the unlawful carrying of certain weapons and instead makes the law nonapplicable to the same set of persons and situations, took effect June 20, 1997. The HRO analysis of HB 311 appeared in the March 17 Daily Floor Report.

The HRO analysis of HB 2909 appeared in Part 1 of the May 13 Daily Floor Report.

Extended probation for certain sex offenders; super-intensive supervision

HB 2918 by Place, Allen, Hamric, et al.
Effective September 1, 1997

HB 2918 creates a new category of supervision for persons released on parole or mandatory supervision — super-intensive supervision. The bill also defines electronic monitoring, which can be imposed on probationers or parolees, as including satellite position tracking and location systems. HB 2918 allows judges to extend periods of community supervision (probation) for persons convicted of or given deferred adjudication for indecency with a child, sexual assault, or aggravated sexual assault for an additional 10 years beyond the current limit of 10 years. This extension authority is in addition to current authority to extend community supervision for up to a total of 10 years of probation for first-, second- and third-degree felonies. HB 2918 also authorizes the Texas Department of Criminal Justice (TDCJ) to establish a good conduct time classification that requires diligent participation in treatment by inmates determined to need treatment and that awards good conduct time based on that participation. The bill also requires that public newspaper announcements about the whereabouts of certain sex offenders who have been released into the community be placed in the newspaper of greatest circulation, rather than a paper of general circulation, in the county where the offender lives.

Supporters said creating a new level of supervision for persons released on parole and mandatory supervision would allow for full-time monitoring to ensure that the most dangerous offenders are adequately supervised and the public adequately protected. Super-intensive supervision could include requiring offenders — especially those whom the state must by law release from prison on mandatory supervision — to stay in secure lockups, to be electronically monitored by satellites, or to be supervised by a parole officer with a reduced caseload. HB 2918 would give judges more flexibility to keep watch for an extended time over offenders who have committed indecency with a child, sexual assault, or aggravated sexual assault. Combined with current law, these measures could continue probation for a maximum of 20 years, which is not unreasonable for persons who have committed these serious sex offenses.

Opponents said there was no need to create a new category of super-intensive supervision for parolees because current law authorizes the parole board to impose a wide range of sanctions. By allowing an extension of probation terms for certain sex offenses, HB 2918 would unwisely continue to craft a separate punishment system for sex offenders. Authorizing this extra extension of community supervision time would unfairly allow judges to keep these persons on a hook, with a possible prison sentence hanging over their head, for as long as 20 years. In addition, the bill could open the door for even longer extensions of supervision and for the use of extended supervision for other crimes. HB 2918 could be the first step in unwisely enacting lifetime probation.

The HRO analysis appeared in the April 10 Daily Floor Report.

Defining illegal gambling machines, amusement machines

HB 3350 by Place, Keel, Oakley
Died in the Senate

HB 3350 would have altered the Penal Code definition of gambling device, added a new definition for amusement machines, increased the penalty for repeat offenses of possession of a gambling device, and included operating a gambling device in the offense of gambling promotion. Illegal gambling devices would have been any device, other than an amusement machine, on which a game of skill or chance could be played for “consideration,” giving players the chance to win anything of value based solely or partially on chance. Legal amusement machines would have been defined as devices designed, constructed and maintained solely for bona fide amusement purposes that awarded players exclusively with prizes, noncash merchandise, or tickets or tokens redeemable only for noncash merchandise on the premises where they were located. The prize from a single play could have had a maximum wholesale value of not more than 10 times the cost to play the machine or \$5, whichever was less. Amusement machines would not have included video or mechanical slot machines, eight-liners, or any device with certain internal specifications.

Supporters said HB 3350 would close loopholes that have allowed electronic gambling to proliferate under the cover of a law intended only to legalize amusement games with no significant payoff. HB 3350 would draw a bright line between legal and illegal machines so that law enforcement authorities and prosecutors could combat illegal gambling machines and the public could continue to enjoy legal amusement games. Problems have arisen for law enforcement officers because current law is vague and it can be difficult to determine if a machine is sometimes used to award prizes in excess of the legal limit. There could be no big payoff from a legal amusement machine; true gambling machines, such as video and mechanical slot machines and eight-liners, would be explicitly prohibited. HB 3350 would clearly define these machines based on their capabilities and features, not just their name. Gift certificates for merchandise would be restricted to ensure that they were not used to skirt the law violating the limit on prizes.

Opponents said current law outlawing gambling devices and defining legal amusement machines is adequate to control gambling. If illegal games are proliferating, enforcement and prosecution should be stepped up. HB 3350 would outlaw many harmless, purely amusement machines, unfairly helping large, well-established businesses such as amusement parks and national-chain restaurants at the expense of small venues such as VFW halls, bowling alleys or stores. The criteria used to decide whether a machine is legal or not should focus on the prize and not on the inner workings or technical aspects of the machines. HB 3350 also would unfairly discriminate against certain types of machines, such as eight-liners, by declaring them illegal based solely on their names. By focusing on where a gift certificate was redeemed, the bill would discriminate against small establishments that may not carry a full range of merchandise.

The HRO analysis appeared in Part 1 of the May 9 Daily Floor Report.

SB 46 requires life imprisonment for persons convicted of certain sex crimes who have one previous conviction for a felony sex offense. Prior law required life imprisonment if the offender has been convicted of two previous felonies, one of them a specified sex crime. SB 46 applies to persons who have previously been convicted of a specified sex offense and are convicted of aggravated sexual assault, sexual assault, aggravated kidnapping with intent to violate or abuse the victim sexually, or first-degree burglary committed with intent to commit aggravated sexual assault, sexual assault, aggravated kidnapping with sexual intent, or indecency with a child. Persons serving life in prison under these circumstances will not be eligible for parole until they have served, without good conduct time, at least 35 years.

Supporters said SB 46 would strengthen sex offender laws in Texas by creating a “two-strikes and you’re out” provision for repeat sex offenders. These offenders prey on the most vulnerable members of society and should be kept off the streets as long as possible. Two serious sex offenses demonstrate an individual's ongoing threat to society; life in prison, not treatment, is the proper way to deal with such offenders. Locking up repeat sex offenders for at least 35 years is not too harsh of a penalty when weighed against their continuing threat to society. While current law requires life in prison for some sex offenders who have committed three felonies, one of which does not have to be a sex offense, SB 46 would more narrowly target repeat serious sex offenders. Although these offenders may face serious penalties now, these penalties are not harsh enough given the seriousness of their crimes. Life in prison under SB 46 would mean that offenders serve a minimum of 35 years, longer than the minimum term that can be required under current law. The state has the prison capacity to deal with any increase in the need for prison beds, and using the state's resources to keep repeat, serious sex offenders away from society should be a top priority.

Opponents said the Legislature should not continue to craft a separate punishment system for sex offenders nor erode the sentencing discretion of courts, even for repeat sex offenders. SB 46 would be a move away from the 1993 Penal Code revisions that established standard punishments for repeat and habitual offenders and that used punishment ranges rather than inflexible sentencing mandates. Persons convicted of two serious sex offenses are already being dealt with harshly and most likely are receiving life in prison or another long prison sentence under either standard punishment ranges for their offense or under penalties for repeat offenders. SB 46 could be costly to the state. Although Texas now may have prison capacity for longer prison sentences, projections show that prison beds will fill up again in a few years. Treatment, not just punishment, should be a priority for sex offenders.

The HRO analysis appeared in Part 1 of the May 22 Daily Floor Report.

Penalty for arson involving a place of worship

SB 78 by Ellis, West, Patterson, Whitmire
Effective September 1, 1997

SB 78 makes arson a first-degree felony if the offender knew the property intended to be damaged or destroyed was a place of worship.

Supporters said SB 78 is necessary to help combat arson against places of worship in Texas, to appropriately punish persons who commit this terrible act, and to send a message that the state will not tolerate such attacks. Burning a church, synagogue, mosque, temple or other place of worship is a serious offense against all people of faith as well as an attack on religious freedom that should carry a more serious penalty than that given for regular arson. The punishment established by SB 78 for burning a place of worship would be in line with the seriousness of the offense. The U.S. Congress recently increased the federal penalty for damaging religious property that causes injury.

Arson committed against churches and other places of worship has been on the rise. From January 1995 through 1996, 318 churches in the United States were burned. Texas alone had 63 suspicious fires at places of worship. In April 1997, two more Texas churches were struck by fires. Although SB 78 would cover all places of worship, it is especially important to African-Americans who have seen a great number of their churches destroyed by fires. In this situation, the general framework of the Penal Code is inadequate since arsonists are targeting churches and other buildings specifically because they are places of worship and to harass and intimidate persons who belong to the groups that meet there. SB 78 would be in line with other sections of the Penal Code that deal with unique circumstances. For example, the crime of criminal mischief is punished more harshly if it is inflicted on a place of worship or human burial.

Opponents said the new Penal Code created in 1993 was carefully crafted to encompass broad language and eliminate special provisions, and the careful balance of offenses and penalties should not be distorted with exceptions for special circumstances. Arson committed against a place of worship should carry the same penalties as arson against other types of property. Singling out places of worship for special penalties could lead to other entities, such as schools or day care centers, asking for the same protections. The penalty for arson, a second-degree felony, is already enhanced to a first-degree felony if bodily injury or death is suffered. SB 78 would distort the rank of penalties to punish arson causing property damage as harshly as arson causing bodily injury.

Notes. SB 79 by Ellis et al., which prohibits an insurer from cancelling or declining to renew fire insurance coverage of a church solely due to arson or a reported threat of arson, takes effect September 1, 1997, for policies as of January 1, 1998. The HRO analysis of SB 79 appeared in Part 3 of the May 23 Daily Floor Report.

The HRO analysis of SB 78 appeared in Part 3 of the May 22 Daily Floor Report.

SB 97 repeals a previous anti-stalking statute and replaces it with new provisions making it illegal for a person to engage in certain kinds of conduct generally associated with stalking. The conduct must occur on more than one occasion and be pursuant to the same scheme or course of conduct directed specifically at another person.

The conduct also must meet certain tests: (1) the accused has to know or reasonably believe the other person will find the conduct threatens bodily injury or death to the person or a member of the person's family or household or that an offense would be committed against the person's property; (2) the conduct has to cause the other person or a family or household member to fear bodily injury or death or that a crime would be committed against the person's property; and (3) the conduct must cause reasonable persons to fear bodily injury or death for themselves or family or household members or that an offense would be committed against their property.

A first offense is a Class A misdemeanor (up to one year in jail and a \$4,000 fine); repeat offenses are third-degree felonies (two to 10 years in prison and an optional fine of up to \$10,000).

Supporters said SB 97 would help protect stalking victims and punish offenders while meeting the objections of the Court of Criminal Appeal, which ruled the state's previous stalking law unconstitutionally vague in September 1996. Stalking is a serious problem; a specific statute is necessary to intervene in situations before violence escalates and to prohibit behavior not covered by other laws, such as a stalker's repeatedly sending a victim a seemingly harmless gift that is calculated to terrorize. SB 97 would prohibit only criminal behavior. Its objective standards for determining if stalking has occurred are specific enough that the law could not be used against constitutionally protected activities. The revised stalking statute should not include an affirmative defense to prosecution for constitutionally or statutorily protected rights, as in the 1993 and 1995 stalking laws, because these rights are always protected without specific mention.

Opponents said it is unnecessary to replace the stalking statute thrown out by the Court of Criminal Appeals with another specific offense for stalking. The situations described in these proposals are already covered by Penal Code provisions on harassment, terroristic threat, disorderly conduct, and others. Establishing a specific offense for stalking would be a step backward from recent Penal Code revisions that established broad categories of offenses and eliminated many special offenses and separate provisions. SB 97 should either contain an affirmative defense to prosecution for constitutionally protected activities or clearly state that the law was not intended to be used against such activities.

The HRO analysis appeared in the January 23 Daily Floor Report.

SB 123 allows Texas Department of Criminal Justice (TDCJ) inmates convicted of certain sex crimes against children to volunteer for an orchiectomy, the surgical removal of one or both testicles. TDCJ physicians may perform orchiectomies on inmates convicted of indecency with a child, sexual assault of a child, or aggravated sexual assault of someone younger than 14 years old who have a previous conviction for one of these same offenses. Inmates must undergo evaluation and counseling before the procedure.

Neither defendants nor prosecutors may offer evidence before sentencing that the defendant plans to undergo an orchiectomy. The bill prohibits judges from requiring a defendant to undergo an orchiectomy as a condition of community supervision (probation) and parole panels from requiring inmates to undergo an orchiectomy as a condition of parole or mandatory supervision.

Supporters said allowing some child sex offenders to volunteer for castration would give these offenders a viable treatment option to help them control their sexual compulsions. The state should do all it can to protect children from these repeat offenders. Castration of sex offenders is not new or barbaric. Several European countries have used castration to treat sex offenders, and some have seen recidivism rates drop from over 50 percent to between 2 percent and 10 percent among offenders who undergo the procedure. California recently began allowing chemical castration for some sex offenders. It would not necessarily be easy for castrated inmates to undo the procedure by obtaining testosterone or implants. SB 123 has safeguards to ensure that inmates understand their decision and that the procedure would not be used to reduce punishment or as a condition of probation or parole. TDCJ doctors would not be forced to perform the procedure, and current procedures to handle cases outside of a doctor's area of expertise would apply.

Opponents said castration is a primitive, inhumane method of treating sex offenders that has no place in modern American society and is more a punishment than a treatment. The procedure could face a constitutional challenge as cruel and unusual punishment. It is always questionable whether prison inmates can give free consent to any surgical procedure. The effects of castration are not clear from studies of castration in European countries. Many sex crimes are crimes of violence that would not necessarily be reduced by an orchiectomy. The effects of castration are not necessarily permanent and can be at least partially undone by testosterone supplements and implants. Allowing voluntary castrations could lead to its use as a punishment or to inmates believing that punishment would be reduced if they volunteered for the procedure. It is unclear what would happen if TDCJ doctors did not want to perform the procedure.

The HRO analysis of HB 769, the companion to SB 123, appeared in Part 1 of the May 2 Daily Floor Report.

Eliminating required release of inmates on mandatory supervision

SB 250 by Whitmire, et al.
Died in House committee

SB 250 would have eliminated release on mandatory supervision for prison inmates whose calendar time plus good conduct time equaled their sentences. Instead, these inmates would have had to undergo a mandatory review process. The parole board would have been prohibited from releasing an inmate if it determined that the release would pose a significant threat to public safety. The bill would have outlined factors to be considered in the pre-release review, including whether an inmate had a history of violent acts or sex offenses.

Supporters said inmates should not be released from prison automatically simply on the basis of a calculation involving their sentence and their good conduct time. Inmates should not be denied parole and then released before their sentences are served without first being reviewed by a parole board to ascertain whether they pose a threat to public safety. A number of court cases indicates that there is no constitutional bar to retroactively requiring review before granting early release and that SB 250 would not violate prohibitions against ex post facto laws. Requiring a review of all inmates before release would not be unconstitutional because it would not change or increase the punishment or length of a sentence, only the conditions and location under which an inmate served the sentence. SB 250 would be a procedural, administrative change of the type that has passed constitutional muster and also would not violate prohibitions against denying persons of their liberty without due process. Any higher costs required to implement SB 250 would be money well spent, especially considering the price that crime exacts on victims and society.

Opponents said retroactively eliminating automatic release on mandatory supervision would be unconstitutional and unfair. Inmates have a right to be dealt with under the laws in effect when their crimes were committed. As illustrated in recent court cases, including the U.S. Supreme Court decision in *Lynce v. Mathis*, 117 S.Ct. 891 (1997), retroactively restricting automatic release would increase punishment by increasing incarceration time for inmates who committed their crimes before the change took effect, violating U.S. and state constitutional prohibitions against ex post facto laws. SB 250 would be significantly more than a procedural change and could raise other issues dealing with inmates' due process rights and liberty interests. In addition, since many inmates are incarcerated as the result of plea bargains, they could challenge SB 250 for violating those agreements. Because of this, inmates could be granted new trials that could result in some going free either because prosecutors would choose not to retry the case or because the inmates would be found innocent. SB 250 would result in inmates being incarcerated longer, increasing the demand for prison beds and costing the state hundreds of millions of additional dollars in prison operating costs.

SB 875 changes current law requiring certain sex offenders convicted or given deferred adjudication to register with local law enforcement authorities. The registration requirement applies to those who committed offenses on or after September 1, 1970, rather than September 1, 1991, as previously required. Provisions for publishing notice of an offender's whereabouts in newspapers apply only to offenses committed after September 1, 1995, or after September 1, 1997, for the offense of compelling prostitution. SB 875 includes private primary or secondary schools in the public notification requirements.

The bill also requires lifetime registration for persons convicted or given deferred adjudication for certain sexually violent offenses and for prohibited sexual conduct, compelling prostitution of someone younger than 17 years old, and possession or promotion of child pornography. Other offenders generally are required to register for 10 years from the end of their supervision by the criminal justice system. Persons subject to lifetime registration can petition the district court for an exemption. Persons subject to the registration law who have been convicted or given deferred adjudication for two or more sexually violent offenses are required to report at least every 90 days to local law enforcement authorities to verify their registration information; others must report once a year. Law enforcement authorities at any time can mail a verification form to an offender, who must return it within 21 days. SB 875 eliminates the ability of offenders to petition a judge for exemption from the registration and notification law but continues to allow offenders to petition for exemption from the newspaper publication of their whereabouts.

Supporters said SB 875 would fine-tune the state's sex offender registration and notification law. Sex offenders tend to be repeat offenders, and the public has a right to information about their presence in the community. Provisions requiring retroactive registration and lifetime registration for some offenders, periodic check-ins with law enforcement authorities, and verification of registration information upon request would ensure that law enforcement authorities and the public were able to keep up with these offenders and help Texas meet federal requirements concerning sex offender registration. SB 875 would retroactively apply registration only to persons who committed offenses since 1970 and were still under state supervision, not those who had completely discharged their sentences. The courts have upheld the right of a state to require retroactive registration as a method of monitoring these offenders. SB 875 would require retroactive registration beginning with offenses committed in 1970 because this is when the state began to keep more accurate criminal records. SB 875 would help protect all children by including private schools in the notification process. As a practical matter, law enforcement authorities would be able to ask private schools to register with them so that they would know whom to notify about sex offenders who moved into the area.

Opponents said SB 875 would unfairly expand the duty to register with local law enforcement authorities to persons who committed their offenses before the sex offender registration law was enacted. This would amount to additional punishment after an offender had been sentenced. In addition, it may be impossible to monitor compliance because reliable crime records dating back to 1970 often do not exist. Extending registration for life for some offenders also would be unfair. At some point, offenders should be able to prove that they have rehabilitated themselves. Current law requiring 10 years of registration provides that opportunity. Lifetime registration would make it virtually impossible for offenders ever to reintegrate into society. In addition, if their registration information has not changed, offenders should not have to periodically report to law enforcement authorities. The bill is unclear about what would be considered a private school that must receive sex offender information and whether entities such as home schools and day care centers would have to be included in the notification. In addition, law enforcement authorities would have no way of knowing of the existence of a private school to notify.

Notes. Other bills, all effective September 1, 1997, also amended notification requirements for sex offenders:

- **SB 381** by Shapiro et al. restricts the use of deferred adjudication for some sex offenders and the option for defendants to have some multiple sex offenses tried separately and allows sentences for some sex offenses to run concurrently or consecutively. The bill eliminates a current exemption from the newspaper notification requirements for all offenders given deferred adjudication, exempting only offenders given deferred adjudication for prohibited sexual conduct. The HRO analysis of SB 381 appeared in the May 20 Daily Floor Report.
- **HB 2918** by Place, Allen, Hamric, et al., also analyzed in this Major Issues report, requires that public newspaper announcements of the whereabouts of certain sex offenders who have been released into the community be placed in the newspaper of greatest circulation, rather than a paper of general circulation, in the county where the offender lives. HB 2918 also requires extended probation for certain sex offenders and super-intensive monitoring for persons released on parole or mandatory supervision.
- **HB 1176** allows public access to information that is kept by the Department of Public Safety as part of the sex offender registration system and to certain criminal history record information maintained by DPS. The HRO analysis of HB 1176 appeared in Part 2 of the May 5 Daily Floor Report.

The HRO analysis of SB 875 appeared in the May 19 Daily Floor Report.

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Allowing home equity loans, reverse mortgages

HJR 31 by Patterson, Marchant, Danburg, et al.
Effective January 1, 1998, pending voter approval

HJR 31 would allow equity in a homestead to be used to secure payment of loans (called extensions of credit) and reverse mortgages. If the loan was not repaid or a borrower failed to meet the terms of the loan, the lender could foreclose on the home. HJR 31 also would establish rules and guidelines for the loans. Agricultural land used as homestead property — except for land used for milk production — could not be used to secure an extension of credit.

Extensions of credit, reverse mortgages. The principal amount plus the total outstanding debt secured by the homestead could not exceed 80 percent of the property's market value. Foreclosure could only be by court order, and lenders would have no recourse against the personal property of the borrower. Loans could not be closed before the 12th day after an application was submitted or the lender gave the borrower a copy of a written notice that outlined the law, whichever was later. Borrowers could rescind a loan without penalty within three days after the loan was made. Loans could be for any fixed or variable interest rate allowed under the statutes. Open-ended accounts would be prohibited. Fees, other than interest, could not exceed 3 percent of the principal. Lenders could not make borrowers put up other security for a loan and could not accelerate payments because of a drop in the home's market value or default on another debt.

For a reverse mortgage, under which lenders make payments to homeowners then receive repayment or assume the ownership when the homeowner moves or dies, lenders would have to provide advances to a borrower based on the equity in the borrower's homestead. Reverse mortgages could only be made to a person who was, or whose spouse was, at least 55 years old. Reverse mortgages could not require payment of principal or interest until the property was sold or otherwise transferred or all borrowers quit occupying the property for more than 180 consecutive days and the owner's location was unknown to the lender. Lenders could not reduce the amount or number of advances because of a change in interest rates, and the loans would be nonrecourse. Interest rates could be fixed or adjustable. Borrowers would have to attest in writing that they received counseling about reverse mortgages and other financial alternatives.

Home improvement loans. HJR 31 also would restrict encumbrances placed on homesteads for home improvement loans, including requiring all work and materials to be contracted for in writing, requiring a 12-day cooling off period before a contract for work and materials could be executed, allowing the contract to be rescinded within three days of being executed, and executing the contract only at the office of a lender, attorney or title company. Exceptions to the cooling off and three-day rescission periods could be made if the work and materials were necessary to complete immediate repairs that materially affected the health or safety of the residents.

Supporters said allowing home equity lending would give homeowners the right to use their home as they see fit, including as collateral for an equity loan. Texas should not continue, alone

among the states, to limit a legitimate use of property. The Constitution's homestead provisions are paternalistic and outdated. The inability to get home equity loans is costing Texans substantial sums because they must turn to higher interest loans that, unlike equity loans, are not tax deductible or must sell their home to use the equity. Fears of borrowers losing their homes as a result of a default on home equity loans are overblown and unfounded. Unsecured credit would not dry up with the advent of home equity loans. Home equity loans would greatly expand the number of people able to borrow money to start a new business and thereby expand the Texas economy and create new jobs. One estimate puts untapped home equity at about \$124 billion. Agricultural property should be exempt from being used as security for an equity loans because it represents both a person's home and livelihood. However, homesteads involved in milk production should be treated differently because of the large amount of capital invested in a small amount of land that usually includes the farmer's homestead.

HJR 31 would contain protections for consumers and lenders and would place these protections in the Constitution where they cannot be easily altered. For example, HJR 31 would cap fees and the amount that can be borrowed, impose a cooling-off period, give borrowers a three-day right to rescind a loan, and allow only court-ordered foreclosures. Also, the home would have to stand alone as collateral for the loan, with lenders having no recourse against a borrower's other assets. HJR 31 also would allow reverse mortgages and subject these loans to many of the same restrictions placed on equity loans. HJR 31 also would allow persons who have paid off their mortgages, paid cash for a home, or inherited a house to refinance their home and receive cash.

Opponents said Texans should not be able to risk losing their homes because of default on a loan for purposes unrelated to the homestead, and the state should not dilute its long-standing protection for homeowners. Dropping the Constitution's homestead exemption could lead to Texans taking on debt backed by their home to finance routine spending and risk losing their homes to foreclosure should they default. If lenders are allowed to secure loans with a homestead, they would stop making unsecured personal loans and would force homeowners to risk their homes to obtain credit. Other avenues exist for consumers to finance real needs such as college costs and medical expenses without putting their homes at risk. Increasing borrowing from home equity loans might create a short-term burst of economic activity, but a decline would follow along with a substantial increase in home foreclosures. **Other opponents** said all farmers and ranchers, not just those involved in milk production, should have the same rights as other Texans to borrow against their equity. Also, requiring the extra time and expense of court-ordered foreclosure and prohibiting recourse against other assets in case of default would make home equity loans much less attractive for many lenders, especially smaller institutions.

The HRO analysis appeared in Part 1 of the May 9 Daily Floor Report.

HB 92 provides a mechanism for cities and counties to build sports and community venue projects and related infrastructure. Venue projects are defined as arenas, coliseums, stadiums or other facilities used for professional or amateur sports or community events and requiring admission fees, including convention and civic centers, civic center hotels, auditoriums, theaters, opera houses, music and exhibition halls, museums, aquariums, plazas, and other economic development projects. Venue districts may be created to build a sports or community venue project by municipalities with populations of more than 1.2 million and counties with populations of more than 2.2 million or two cities, two counties, or a city and a county. Districts can issue bonds to finance projects once the voters approve the projects and the financing mechanisms. Allowable funding mechanisms include up to a half-cent sales tax, 10 percent admissions tax, \$3 parking tax, 5 percent rental car tax, 2 percent hotel occupancy tax, and a \$5,000 facility use tax. Sales taxes imposed may not exceed the total 2-percent maximum for local sales and use taxes. Entities seeking to build community and sports venues must send their plans to the comptroller for a determination of whether the project would have a significant negative fiscal impact on state revenue. Harris County need not hold another election on construction of a sports venue project voters have already approved, but must hold an election to approve any sales and use tax to finance the venue.

Supporters said HB 92 would let the voters in each community decide whether and how they want to financially support local civic projects. All local residents benefit from a new community venue because of the increased property values, economic activity, and tourist activity. Civic facilities contribute to the economic health of a city and can be an integral part of downtown revitalization efforts. HB 92 would ensure that professional sports teams remain in Texas and continue to provide the economic benefits to the community and the state. The funding options would target users and beneficiaries of these new facilities. No state tax dollars would be available, and the financial options could only be employed if the comptroller determined they would not have a significant negative impact on the state's economy.

Opponents said local taxpayers should not be forced to pay the cost of facilities that would otherwise be built by the private sector. Limited public resources should not be wasted on specialized and non-essential facilities. The funding mechanisms would unfairly impact all residents and visitors, whether or not they used the facilities, and the taxes paid by lower and middle income residents would be used to build facilities for the rich. The economic benefits touted by supporters of public subsidies are overstated; sporting events generally are attended by local residents who otherwise would spend money on other local entertainment options.

The HRO analysis appeared in Part 1 of the May 7 Daily Floor Report.

Establishing the Texas Department of Economic Development

SB 932 by Sibley
Effective September 1, 1997

SB 932 abolishes the Texas Department of Commerce and establishes the Texas Department of Economic Development (TED) to develop a strategic plan for state economic development and coordinate the state's international trade, business assistance, and tourism efforts. The bill creates new divisions, including offices of defense affairs, rural affairs, small business assistance, the Texas strategic military planning commission, and the Texas business and community economic development clearinghouse. It replaces the commerce department policy board with a governing board composed of nine public members appointed by the governor. The board is charged with employing the TED executive director.

SB 932 also amends various provisions of the Smart Jobs program. It authorizes full grant amounts to be paid if participants in a job training project have an attrition rate of 15 percent or less in their new jobs 90 days after completing their training. It also requires as a condition of a grant that wages for new jobs created through the project be equal to or greater than the prevailing wage for that occupation in the local labor market, rather than two-thirds of the state average weekly wage. Grants in excess of \$1.5 million per year may be awarded to a single business only if the business locates or expands in an enterprise zone, an adversely affected defense-dependent community, a high unemployment area, or a sparsely populated county; employs economically disadvantaged individuals; or is a small or micro-business.

Supporters said SB 932 would increase the quality and efficiency of the state's economic development efforts by establishing a one-stop information center to increase program accessibility and ensure Texas remained competitive with the economic development efforts of other states. Changes to the Smart Jobs program also would better distribute training monies throughout the state to respond to need.

Opponents said the Texas Department of Commerce and its predecessor agencies have been the subject of repeated and extensive reorganization efforts over the past nine years. Abolishing TDOC would only serve to delay administrative efficiencies gained since its last reorganization and disrupt the state's economic development efforts. Capping the amount of job training grants that could be awarded under the Smart Jobs program would hinder Texas business recruitment efforts and impede its ability to compete with other states for large business relocation.

Notes. SB 932 includes portions of HB 1528 by Oliveira, amending the Smart Jobs program, The HRO analysis of HB 1528 appeared in Part 1 of the May 5 Daily Floor Report.

The HRO analysis of HB 2500, companion to SB 932, appeared in Part 1 of the May 1 Daily Floor Report.

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Changing primary election dates

HB 32 by Greenberg, West, Denny, Gallego, J. Jones
Died in the Senate

HB 32, as reported by the Senate State Affairs Committee, would have moved the presidential primary and general primary election from the second Tuesday in March to the first Saturday in May and the primary runoff from the second Tuesday in April to the first Saturday in June, starting with the 1998 election. Applications for ballot places would have to have been received by January 2. HB 32 also would have established the fourth Saturday in March rather than the first Saturday in May as one of the four uniform election dates and allowed political subdivisions until December 31, 1997, to change their general election date.

The bill also would have prohibited rental charges for the use of a public building as a polling place, but a reasonable reimbursement fee could have been collected for actual expenses incurred. Candidates could not have withdrawn from the general primary election after the 64th day before the election day. The filing deadline for an application for a place on the ballot would have been extended as provided by current law in the event that a candidate died or was declared ineligible on or before the 64th day before the general or primary election date. The dates for county and senatorial district conventions, local and state canvasses, and other deadlines would have been changed to conform to the new primary date.

Supporters said primaries should be restored to the schedules that existed before 1988, when Super Tuesday was created in hopes of giving the region more clout in picking presidential nominees. Super Tuesday never exerted the expected influence on the presidential nominating process, and its legacy for Texas has only been local dissatisfaction. Early primary dates have made voters disenchanted with seemingly endless campaigning and weary of trying to keep focused on the issues. The long campaign period also has made it difficult for new candidates trying to muster sufficient finance resources to endure the process. Having primaries on Saturday would increase election worker availability and voter convenience.

Opponents said moving the primary from March to May would eliminate any Texas influence on the presidential nominating process. HB 32 could increase election costs by requiring that primary and runoff elections be held on a Saturday instead of Tuesday, a day when most public buildings are already open. Having the primaries on the first Saturday in May could conflict with Cinco de Mayo celebrations. Further, conducting runoff elections in June when many families are out of town would only decrease voter turnout. **Other opponents** said filing deadlines also should be advanced in order to realize any benefits from moving the primary election date to May. Retaining the January 2 filing deadline would continue an unfair advantage for incumbents, and year-long campaigns would continue.

The HRO analysis appeared in Part 2 of the April 21 Daily Floor Report.

HB 331 defines criteria for determining whether military personnel are eligible to receive full mail-in ballots or ballots listing only federal offices and requires the secretary of state to establish procedures allowing certain members of the military, their spouses, or dependents to vote early using electronic transmission of ballots and to cast state write-in ballots. Federal ballots arriving after an election date can be counted if they are mailed before the deadline from a location outside the United State and arrive no later than the fifth day after a general election or the second day after a primary or special election for state and county officials.

The bill also deletes the existing prohibition against more than one party holding a primary election in the same building on the same day and sets procedures for holding and financing joint primaries. The presiding judge and alternate presiding judge must be affiliated with different political parties.

Except for regular annual election dates and cases of emergency approved by the governor, no election can be held 30 days before or after the date of a general state or county, primary, or runoff primary election. Movable polling places may not be used for early voting in nonpartisan elections. Voters who are unable to comply with identification requirements and refuse to execute an affidavit may be rejected from voting.

Supporters said that HB 331 would remedy confusing and outdated election procedures that have led to a variety of problems in Texas elections and institute adequate checks to prevent fraud and abuse. The bill also would remove overly restrictive voting deadlines that prevent many military service members from exercising their voting rights.

Opponents said the new procedures for appointing precinct judges would favor the two major parties to the exclusion of minor parties or independents. An outside party should monitor the appointments, especially in counties lacking a strong two-party system. Furthermore, allowing the counting of late ballots and those received by facsimile would make voting regulations overly lax, leaving the system wide open to fraud and abuse and jeopardizing the integrity of election results in Texas.

The HRO analysis appeared in Part 1 of the April 30 Daily Floor Report.

HB 772 would have enacted the congressional district lines that were ordered by a three-judge federal panel for the 1996 election, with adjustments to eliminate population deviations in the 13 districts redrawn by the court, for the 1998 and 2000 election cycles.

Notes. The *Vera v. Richards* (CA No. H-94-0277) challenge to the Texas congressional districts drawn in 1991 was filed in U.S. district court in January 1994 by seven registered voters from Houston and Dallas who claimed that the plan was an “effort to segregate the races for purposes of voting” and thus racially gerrymandered. The suit was filed following a key U.S. Supreme Court decision on racial gerrymandering, *Shaw v. Reno*, 113 S. Ct. 2816 (1993), which held that redistricting plans could be challenged under the equal protection clause of the U.S. Constitution's 14th Amendment when a district's geographic irregularities and “bizarre” shape appear racially based and when such segregation disregards traditional redistricting principles and is not justified by compelling state interests.

The plaintiffs in *Vera v. Richards* won a preliminary victory on August 17, 1994, when a three-judge Houston panel ruled that congressional Districts 18, 29 and 30 were “conceived for the purpose of providing ‘safe’ seats in Congress” for two African-American and one Hispanic representative and were therefore unconstitutional racial gerrymanders. On June 13, 1996, the U.S. Supreme Court upheld the Houston panel's decision, now titled *Bush v. Vera* (116 S. Ct. 1941), and remanded the case to the Houston panel.

In August 1996, the Houston court panel — Fifth U.S. Circuit Judge Edith H. Jones and U.S. District Judges Melinda Harmon and David Hittner — redrew 13 districts in Harris, Dallas and Tarrant counties. It voided the March primary elections and ordered an open election in the 13 affected districts for the November 5, 1996, general election, with runoff elections on December 10. The panel gave the Legislature until June 30, 1997, to redraw districts for the 1998 and 2000 election cycles or else it would decide the congressional district plan.

The HRO analysis appeared in Part 1 of the May 14 Daily Floor Report.

HB 1175 would have required all appellate judges and justices to be elected in nonpartisan elections. The candidates for justices of the Supreme Court and judges of the Court of Criminal Appeals and the 14 courts of appeals would have been placed on the bottom of the election ballot under all partisan office candidates. The victorious candidate would have had to obtain a majority of votes cast for the office. If any candidate failed to gain a majority, the top two candidates would have faced each other in a runoff election.

Supporters said many judicial races are too often decided more by party affiliation than by individual merit. Shifting tides of party fortune, not judicial performance, have caused the defeat of almost 10 percent of the state judiciary in the last two years. Because judges are barred from stating positions on specific issues, factors like party affiliation or campaign advertising have gained undeserved importance in judicial elections. Past party sweeps of statewide judicial races suggest that many voters look more at party affiliation than at the particular qualifications of each candidate.

Nonpartisan elections would allow voters to make a decision based on the qualifications of judicial candidates rather than according to a straight-party ticket. Nonpartisan elections would help prevent party sweeps, where many qualified judges have been voted out of office solely on the basis of party affiliation. Nonpartisan elections for appellate judges are used in 13 states and work well at eliminating partisanship from a nonpartisan office.

Opponents said nonpartisan elections would create a greater reliance on campaign contributions, making it more difficult for voters to make an informed choice of a judicial candidate. Lacking any party affiliation, candidates would have to increase advertising to get the name recognition to win an election. Such a campaign could be much more costly than one in which the candidate could partially rely on party affiliation to carry a certain number of votes. Nonpartisan elections would force judicial candidates to accept even more campaign contributions from the lawyers and litigants who may appear before them. Nonpartisan campaigns also could increase voter apathy; forced to choose among low-profile candidates without a party affiliation, voters would either abstain or vote for candidates with familiar names.

Notes. HB 1175 passed the House by 67-66, two present, not voting. The Senate Jurisprudence Committee substituted a plan similar to SB 621 by Duncan providing for partisan elections of appellate judges with retention elections thereafter. That proposal was never placed on the Senate Intent Calendar. An accompanying proposed constitutional amendment, HJR 69 by Thompson, was laid on the table subject to call in the House.

SJR 25 and SB 621 by Duncan, both reported favorably the Senate Jurisprudence Committee but withdrawn from the Senate intent calendar, would have provided for partisan election of appellate judges for their first terms, then retention elections thereafter.

SJR 26 and SB 628 by Gallegos, also reported favorably by the Senate Jurisprudence Committee but withdrawn from the Senate Intent Calendar, would have provided for nonpartisan retention elections of appellate judges; initial nonpartisan elections of district judges alternating thereafter with retention elections; and in Harris County, district judge elections from state representative districts.

The 74th Legislature in 1995 established the Texas Commission on Judicial Efficiency to study the issue of judicial selection. The commission was unable to recommend one plan for selecting judges but recommended two alternative plans: one based on judicial selection legislation proposed by Sen. Rodney Ellis and then-Rep. Robert Duncan and the other an appoint-elect-retain plan (AER) developed by the Judicial Selection Task Force of the commission.

The modified Ellis-Duncan plan proposed nonpartisan retention elections for appellate judges; initial nonpartisan elections alternating thereafter with retention elections of district, statutory county, and probate judges; in Dallas, Tarrant and Bexar counties, district judge elections in county commissioner precincts; and in Harris County, district judge elections in smaller geographic regions. The commission's AER plan proposed open, contested, but nonpartisan initial election of gubernatorially appointed judges approximately one year after their assuming office, with retention elections thereafter. For additional information, see House Research Organization Session Focus Report Number 75-9, Judicial Selection: Options for Choosing Judges in Texas, March 10, 1997.

The HRO analyses of HB 1175 and HJR 69 appeared in Part 1 of the May 14 Daily Floor Report.

HB 3207 prohibits members of the Legislature from representing other persons before state agencies for compensation unless they disclose that they are being compensated. The bill also requires candidates for public office who are not the actual office holders to stipulate in their advertising that they are running “for” the office, with violations a Class A misdemeanor.

The bill prohibits a person from making a contribution in the name of another unless the contributor discloses, in writing, information to the recipient and to the person on whose behalf the contribution is made. Lobbyists registering with the Ethics Commission must include the subject matter of the legislation or action for their direct communication with a member of the legislative or executive branch. The commission must keep a record of each request for access to campaign finance reports, excluding those made by commission employees and individuals acting on their own behalf. In counties of 100,000 or more, county officers — including county judges, commissioners, or county attorneys — must file a financial statement with the county clerk in the same manner as required of state officials. The civil penalty for failure to file a financial statement was increased from \$100 to \$1,000. The fund-raising and reporting requirements applicable to legislative caucuses also apply to entities established by a caucus for research, education or other activities.

Supporters said HB 3207 was intended to implement corrective changes requested by the Ethics Commission. Requiring legislators to inform agencies they are being paid for their representation would reduce the perception of unfairness that arises when legislators come before agencies. Requiring candidates for office to use the word “for” in their political advertising would alleviate confusion about incumbency, and requiring the commission to maintain a record of requests would allow persons reporting to determine who is examining their records. Certain county officials would be required to make financial disclosures in the same manner as state officials, again reducing confusion and creating greater uniformity.

Opponents said that the only way to eliminate the perceived unfair advantage of legislators appearing before state agencies is to ban representation for compensation. Requiring non-incumbents to use the word “for” would be too restrictive of their speech rights. Maintaining records of requests for public information would go against the spirit of the open records law and discourage some from making such information requests. Enforcing contribution requirements on entities established by legislative caucuses could negatively impact scholarship programs established by those caucuses.

The HRO analysis appeared in Part 2 of the April 30 Daily Floor Report.

HB 3332 would have changed reporting requirements for candidates, officeholders, political committees, and parties and extended registration and reporting requirements to previously unregulated individuals and activities. Persons receiving more than \$200 in a calendar quarter from a candidate, officeholder, political committee, or political party to provide political services in connection with a campaign would have had to register as political consultants and pay a registration fee. In legislative and State Board of Education elections and campaigns for all statewide offices except the judiciary, each candidate or officeholder would have been required to designate in writing a specific-purpose principal campaign committee, whose name would have had to include their own names. Committees would have had to notify candidates' principal campaign committees and the Texas Ethics Commission at least 72 hours before making a direct expenditure supporting or opposing one or more candidates. Individuals could not have made contributions or expenditures in another's name or on their behalf unless the name and address of the person actually making the contribution was disclosed in writing to the recipient. Individuals would have been civilly liable for acts or omissions by their principal campaign committees.

For state and local races, campaign finance reports would have had to provide identifying data on each person from whom a candidate or political committee received aggregate contributions of over \$100 during the reporting period. The bill would have set up the Fair Campaign Spending Fund with penalties recovered from ethics violations and other funds for voter education projects.

Supporters said that the integrity of campaigns is maintained not by regulating freedom of political speech or expression through campaign finance limitations but through a thorough reporting system that allows citizens to be fully informed about who is funding political campaigns and how candidates are spending their money. HB 3332 would centralize campaign fundraising under principal political committees so that contributions and expenditures could be more easily identified and tracked. Also, as political consultants gain greater influence over the content and form of political campaigns, their participation should be acknowledged and documented.

Opponents said HB 3332 would impose a number of constitutionally questionable restrictions on individual freedoms of speech and expression and institute burdensome reporting requirements amounting to more red tape without improving the campaign finance system. The regulation of political consultants provided by HB 3332 would be unworkable, ineffective, and duplicative. Candidates already report expenditures paid to consultants, and there is no need for the mountains of paperwork that duplicating such reports would create.

The HRO analysis appeared in the May 15 Daily Floor Report.

Environment

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HB 1131 would have required the attorney general, in coordination with the Texas Natural Resource Conservation Commission (TNRCC), to establish and maintain a toll-free environmental hotline to receive information on violations and suspected violations of environmental laws. The attorney general, by joint rulemaking with TNRCC, would have compensated those who reported information that substantially contributed to the assessment of a criminal, civil or administrative penalty for the violation of an environmental law.

The award would have been 10 percent of a fine or civil and administrative penalty ordered or agreed to by the violator and collected by the state, up to \$1,000. An award would have been offered only if the fine or penalty was attributable to information reported by the person. The prosecuting attorney would have determined if the information substantially contributed to obtaining the assessment. Not more than 10 percent of the total fines and penalties collected by the state in a fiscal year would have been deposited to a special account in the general revenue fund to be used to maintain the toll-free line, investigate alleged violations, and reward payments.

Supporters said HB 1131 would create an environmental crime stoppers program, modeled after the successful Crime Stoppers program, to give Texans an added incentive to report environmental violations to the state. The Attorney General's Office has the expertise to advise hotline staff concerning environmental violations and prior experience handling high-volume hotlines. Having a single environmental hotline that could be publicized statewide would be a help to citizens in every area of the state who do not now know where to turn to report an environmental violation. Citizens could alert TNRCC to serious problems the agency might never have discovered otherwise.

Opponents said the bill would use taxpayer dollars to set up an unnecessary environmental hotline. The Attorney General's Office would likely refer almost every call to TNRCC, creating an unnecessary bureaucracy merely to transfer calls. TNRCC, which already has several toll-free hotlines, is the agency to whom such calls should be directed in the first place. The \$1,000 reward offered by the bill would just encourage citizens to report bogus violations in the hopes of winning an award. The bill also would encourage those who oppose industrial facilities to comb through the statutes to find minor technical violations of the law with which the regulated community could be charged.

The HRO analysis appeared in Part 3 of the May 2 Daily Floor Report.

HB 1190 continues funding for the Texas Clean Rivers Act, deleting a statutory provision that would have ended Texas Natural Resource Conservation Commission (TNRCC) authority to assess fees for the Clean Rivers Program after August 31, 1998. TNRCC is directed to “equitably apportion” funds collected from water user and wastewater permit holders among river basins and required to establish rules for river authorities participating in the program, including the development of a process to encourage public participation. Only river authorities with state contracts to do an assessment are required to monitor water quality in their watersheds, and Clean River funds can only be used for watershed monitoring and assessment of water quality.

HB 1190 deletes a statutory requirement that cities with populations of 5,000 or more establish a water pollution control and abatement program; instead, cities may establish such programs. TNRCC can require cities with populations of 10,000 or more to establish a water control and abatement program if assessments identify water pollution from non-permitted sources. A city can contract with a river authority or other political subdivision to perform any services that are part of a water pollution control and abatement program, and TNRCC can help cities to obtain funds for water pollution control and abatement programs. TNRCC must consider available monitoring data and assessment results in developing or reviewing wastewater permits and stream standards and in conducting other water quality management activities.

Supporters said continuing funding for the Clean Rivers Program was necessary in order to ensure ongoing collection of accurate water data. Policy decisions concerning water resources are of questionable value without the kind of basic water data collected under this program. Under HB 1190, water rights and discharge permit holders would finally see a concrete benefit from the fees they have paid since 1991 because the information they pay to have collected would actually be used to set stream standards and effluent limits. The bill also would remove an unfunded mandate on cities to develop pollution abatement plans absent any evidence of need. This provision is so broad, costly and unenforceable that TNRCC has never even promulgated rules concerning these pollution abatement plans.

Opponents said that while continued funding for the Clean Rivers program was vital, the benefits of the bill would be overshadowed by the other provisions removing the only specific requirement in the Water Code that certain cities control or prevent nonpoint source pollution problems. The state must begin to tackle nonpoint source water pollution since point source pollution from industries, agriculture and cities is already highly regulated. Preventing nonpoint source pollution in the first place is much more cost effective than cleaning it up afterwards.

The HRO analysis appeared in the March 18 Daily Floor Report.

HB 2103 would have established state policy to ensure that new solid waste facilities were not located disproportionately in pre-existing low-income, minority, or other communities in order to minimize adverse effects of solid waste on those communities. The state strategic solid waste plan would have had to consider the effect of multiple sources of pollution and other nuisances on communities surrounding solid waste facilities and assess historical trends regarding the siting of solid waste facilities in low-income, minority or other communities. The bill also would have required the Texas Natural Resource Conservation Commission to: consider evidence relating to cumulative risks in administrative proceedings concerning the siting, expansion, or operation of a facility in an area where other facilities were located; adopt rules to protect the public from cumulative risks of pollution; and determine if a proposed facility was compatible with local land uses, taking into consideration such factors as the proximity of the facility to residences, schools, or surface or groundwater sources.

Applicants for a solid waste facility would have been required to hold a public meeting in the county where a proposed facility would be located within 45 days of filing the application. Issues discussed at the meeting would have included other sites considered for the proposed facility, potential benefits to the local community of constructing the facility, and employment opportunities at the facility. HB 2103 also would have specified certain notice requirements concerning the meeting, including publication of notice in the primary language of non-English speakers if they constituted five percent or more of the population residing within one mile of the proposed facility.

Supporters said HB 2103 would encourage justice and equity in solid waste facility siting. The bill would protect any community from the cumulative effects of pollution, but especially lower income and minority communities where a disproportionate number of polluting facilities are located. These communities overwhelmingly bear the cost of environmental contamination in Texas through decreased property value and health hazards.

Opponents said it is bad public policy to carve out environmental law for one class of citizens, as this bill would do. Siting problems in urban areas should be handled by zoning rather than environmental regulation. There is no proof that “environmental racism” in siting facilities exists since in most cases low-income and minority communities grow up around facilities rather than the other way around.

The HRO analysis appeared in the May 15 Daily Floor Report.

HB 2776 amends the state superfund and voluntary cleanup program to:

- limit liability of certain fiduciaries, lenders and landowners for clean up of contaminated sites;
- expand funding options for state clean up of contaminated sites;
- allow voluntary cleanup program participation as an alternative to state superfund listing;
- authorize the executive director of the Texas Natural Resource Conservation Commission (TNRCC) to remove a facility from the state superfund registry;
- require the TNRCC executive director to hold public meetings rather than contested case hearings if sites subject to remedial investigations are proposed for non-residential use; and
- release TNRCC from certain Government Code provisions relating to purchasing, construction and public work contract requirements undertaken in connection with superfund sites.

The bill limits the liability of fiduciaries and others acting for the benefit of another person for contamination of superfund sites unless their negligence, gross negligence, or wilful misconduct caused the release. Certain lenders acquiring contaminated solid waste superfund sites through foreclosure without participating in their management or operation are not liable for cleanup costs or environmental penalties as long as they seek to divest themselves of the property within 12 months of foreclosure. “Innocent” owners and operators are not liable for clean up in response to the release or migration of a contaminant from a source not located on or at their property, and can apply to TNRCC for a certificate evidencing their immunity from liability if they provide reasonable access to their site for remediation efforts. Purchasers of contaminated property who obtain property without knowing it is contaminated despite due diligence property assessments prior to purchase are also eligible for immunity from cleanup costs.

Supporters said HB 2776 would streamline the state superfund process and allow public input on land use before remedies are selected for sites. Innocent owners and operators should not be liable if their properties were contaminated by off-site sources. Limiting liability of certain lenders and fiduciaries who did not cause the pollution would help restore many sites to productive use.

Opponents said contested case hearings are the proper forum for discussing potential land-use changes at contaminated sites because standards for cleanup of non-residential sites would be less stringent. Certifying certain owners and operators and land purchasers as immune from liability would be an unnecessary expense for the state and could delay the clean up of some sites.

The HRO analysis appeared in Part 2 of the May 5 Daily Floor Report.

Continuing air permit exemptions for certain facilities

HB 3019 by Allen
Effective September 1, 1997

HB 3019 authorizes the Texas Natural Resource Conservation Commission (TNRCC) to continue to grant standard exemptions from air permitting requirements to any facility, not just permitted facilities, if it is found that such changes will not result in significant increases in air pollution. TNRCC must develop a voluntary emissions reduction plan for permitting existing significant sources by December 1, 1998.

Supporters said that the voluntary emissions reduction plan to be developed under HB 3019 would eventually bring grandfathered facilities, which include utilities and other significant sources of air emissions, into compliance with air quality regulations. The timetable established by the bill would give these facilities time to start preparing to come under TNRCC permitting authority. If immediate compliance were required, economic disruption and chaos would result for the affected facilities and the many people they serve, since the changes required for compliance could cost hundreds of millions of dollars. TNRCC already grants standard exemptions from air permitting requirements to these grandfathered, nonpermitted facilities when new changes do not result in significant increases in air pollution, and HB 3019 would allow the agency to continue this practice. Due to a statutory change in 1991, confusion has arisen about whether or not TNRCC still has the legal authority to grant standard exemptions to nonpermitted facilities; HB 3019 would settle the matter and avoid lengthy court battles about it.

Opponents said that grandfathered facilities should not be allowed to continue to make changes to their facilities without air permits. These facilities, mostly refineries and utilities, should be required to come into compliance with the Texas Clean Air Act and obtain TNRCC permits like most other large industrial facilities in the state. These facilities do not have the incentive to comply with the voluntary emissions reduction program proposed by the bill because compliance would cost hundreds of millions of dollars. These facilities have been exempted from complying with permit requirements since the 1970s, and they should no longer be able to use standard exemptions to upgrade their aging facilities without applying for permits or complying with state air pollution standards. Standard exemptions should only be granted to permitted facilities.

The HRO analysis appeared in the May 15 Daily Floor Report.

SB 1 requires the Texas Water Development Board (TWDB) to adopt a comprehensive state water plan every five years incorporating local and regional plans. Regional water planning groups will develop plans with technical and financial assistance provided by the TWDB. The bill creates a drought response and monitoring committee and requires various water rights holders and other entities to implement water conservation and drought contingency plans in certain circumstances. It also establishes the Texas Geographic Information Council to direct statewide data collection and an interim committee to study the state's water supply and wastewater infrastructure needs and report on those needs by January 5, 1999.

SB 1 consolidates existing TWDB bond authorizations into a single financial assistance fund called the Texas Water Development Fund II, pursuant to approval of a constitutional amendment proposed in SJR 17 (see "Notes" following). It also:

- authorizes the TWDB to administer loans for certain investor-owned utilities and disadvantaged communities for water and wastewater systems from the Safe Drinking Water Act State Revolving Fund;
- requires the Texas Water Bank to act as a clearinghouse for water marketing transactions;
- grants sales tax exemptions for the purchase of water conservation and reuse equipment;
- allows local authorities to grant property tax exemptions for water conservation initiatives, pursuant to approval of a constitutional amendment proposed in SJR 45;
- authorizes the TWDB to use the Agricultural Trust Fund to provide financial incentives or loans for the installation of water-conserving devices; and
- creates a Water Utility Improvement Account to pay for the expenses of a utility placed in receivership, funded by penalties and fines collected from utilities.

The bill establishes procedures and notice and hearing requirements for interbasin transfers, provides criteria to be used in determining whether an application for an interbasin transfer should be granted, and makes interbasin transfers junior in priority to water rights granted prior to the transfer. It also repeals the Wagstaff Act, which gave cities superior water rights in certain circumstances.

SB 1 establishes procedures for indirect reuse projects and specifies that surface water diverted under a water right and then returned to a watercourse or stream is still considered surplus water and subject to appropriation. The bill also provides for emergency authorizations for water use and water rights cancellations and increases civil and administrative penalties for violations of surface water rights and dam and levee safety requirements. The Texas Natural Resource Conservation

Commission (TNRCC) must consider the hydrologic connection between ground and surface water in granting surface water rights.

SB 1 makes groundwater districts the preferred governmental entity for managing groundwater resources and establishes new procedures for creating priority groundwater management areas. The bill requires state educational programs for residents in priority groundwater management areas and state assistance to groundwater districts in developing management plans and collecting data. The bill also makes a number of regulatory changes concerning utility service to small communities, requiring TNRCC to take certain actions to ensure the adequacy of small systems.

Supporters said that SB 1 would lay a foundation on which Texas could build a statewide water management strategy, a move critical for the state's economic future. Without comprehensive conservation and drought management programs, the growing demands for water will outstrip supply in some areas of the state within the next four decades. The bill would encourage the equitable reallocation of water through a number of different strategies while at the same time protecting the rights of other water users. It also would give the state more flexibility to finance a wide variety of critically needed water projects and finance aging water and sewer systems in many areas of the state. The state water plan would be built from the local level up, incorporating local ideas and recommendations into overall regional and statewide policies.

Opponents said SB 1 would give TNRCC and the TWDB too much power over local entities. Water planning in the bill is structured in such a way so as to come from the top down rather than the bottom up. Only plans that truly percolate up from the local level will work; otherwise they will be bitterly opposed by those who are forced to comply with them. SB 1 also would severely limit future interbasin transfers, clouding the future of water marketing in the state. If Texas is serious about managing water resources, it eventually will have to eliminate the rule of capture, as some other western states have done, and adopt a more appropriate strategy for regulating groundwater, such as the "reasonable use" doctrine that allows landowners to pump as much as they wish so long as their pumping does not adversely affect their neighbors' wells.

Notes. SB 1 is the implementing legislation for two constitutional amendments, **SJR 17** and **SJR 45** by Brown, on the November 4, 1997, ballot. SJR 17 would consolidate existing categories of voter-approved bond authorizations into a new Texas Water Development Fund II, adjust cash flow and reserve requirements, provide that fund money could not be used for certain interbasin transfers, and eliminate a constitutional requirement limiting TWDB use of loan repayments to the Agricultural Water Conservation Fund. SJR 45 would allow the Legislature to authorize local taxing units to grant exemptions or other relief from property taxes on property for which a water conservation initiative was implemented. The **HRO analyses** for both proposals appeared in Part 1 of the May 23 Daily Floor Report.

The **HRO analysis** of SB 1 appeared in Part 2 of the May 21 Daily Floor Report.

Requiring cost-benefit analyses of environmental rules

SB 633 by Brown
Effective September 1, 1997

SB 633 requires state agencies to conduct a regulatory analysis before adopting a major environmental rule. Individuals can challenge the validity of a major environmental rule adopted without a regulatory analysis by submitting a public comment about the rule to the agency and filing a court action for a declaratory judgment within 30 days after the rule's effective date. The rule is invalid if the court determines it was not properly proposed or adopted.

A major environmental rule is defined as one intended to protect the environment or reduce risks to human health from environmental exposure and that can adversely affect, in a material way, the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. A regulatory analysis must determine if a new rule is necessary and consider its costs and benefits. Regulatory analyses are required only for proposed rules that exceed standards set by federal or state laws, are adopted solely under the general powers of the agency instead of under specific state laws, or exceed a requirement of a federal delegation agreement or contract between the state and the federal government.

When giving notice about a proposed environmental rule, an agency must prepare a draft impact analysis describing the effects of the proposed rule, written so a reasonable reader can understand it. The analysis must include a description of alternative methods for achieving the purpose of the rule and explain why those alternatives were rejected. After considering public comments on the rule, the agency must prepare a final regulatory analysis addressing all comments and finding that the rule is the most effective at obtaining desired results with costs no greater than those of alternative regulatory methods.

Supporters said that SB 633 would allow for scrutiny of certain environmental rules that could adversely affect the economy without providing additional protection to the public. The regulatory analyses would be applied in limited circumstances and only to rules the state has the discretion to adopt that are not specifically required by federal or state law. The bill would stop the needless promulgation of rules that provide almost no benefit to the public but cost the regulated community and the public it serves large amounts of money.

Opponents said that under the bill, state agencies would have to conduct expensive, time-consuming, multi-step regulatory analyses of environmental rules. Regulated industries have pushed for this bill to paralyze possible environmental rules with unnecessary bureaucratic procedures. Agencies, fearful of being sued, would be hesitant to promulgate such rules, and the time the agency spent analyzing rules could slow permitting decisions and enforcement actions.

The HRO analysis appeared in Part 3 of the May 23 Daily Floor Report.

SB 1586 would have reauthorized the Waste Tire Recycling Program, which will expire December 31, 1997, as the Scrap Tire Recycling Program. The bill would have stopped reimbursements paid to all tire processors by the end of 1997 and established the amount of reimbursement payments per ton that could have been paid quarterly to scrap tire end users meeting certain criteria. The Texas Natural Resource Conservation Commission (TNRCC) could have hired a consultant to assist in developing and evaluating end uses.

The bill also would have reduced the fee on each new tire sold in the state from the current \$2 to \$1.50 on September 1, 1997, and to \$1 in 1999 through 2001. Good used tires would have been exempted from fees. TNRCC would have been required to inventory the location of shredded tire piles in the state and whole tires in priority enforcement list sites.

SB 1586 also would have prohibited disposing of tires in landfills except in areas determined by the commission to have an inadequate end-use market for scrap tires and required TNRCC to make payments to out-of-state recyclers under certain conditions. Remediation costs incurred by TNRCC for cleaning up sites for which insufficient financial assurance was provided would have constituted a state lien on the property where the site was located. The bill also would have enhanced enforcement provisions concerning scrap tires, making it a state jail felony to intentionally burn or dispose of tires at a location other than a recovery facility or site authorized to accept those tires and increasing civil penalties for various violations of scrap tire rules.

Supporters said continuing the waste tire program was essential to ensure that tires and tire shred piles remained in controlled and monitored environments. Without a tire program, illegal tire dumps and tire fires would once again become a problem in the state. Under SB 1586, only those entities with legitimate end uses for scrap tires would have been reimbursed.

Opponents said it would be unfair to suddenly cut off all reimbursements to tire processors who had made a substantial financial commitment to developing scrap tire markets. SB 1586 would put in control of the waste tire market the companies that burn whole tires when burning tires clearly creates toxic pollution for surrounding communities and should be avoided if possible.

Regulatory flexibility for alternative pollution control measures

SB 1591 by Haywood
Effective September 1, 1997

SB 1591 allows the Texas Natural Resource Conservation Commission (TNRCC) to exempt an applicant for a permit or license from a statute or commission rule concerning pollution control and abatement if the applicant proposes to control or abate pollution by an alternative method or apply an alternate standard. The alternate method cannot be inconsistent with federal law and must be at least as protective of the environment and the public health as the method that would otherwise be prescribed by statute or TNRCC rule.

TNRCC is required to issue rules setting a procedure for obtaining an exemption by rule, including provisions for public notice and participation. TNRCC may establish a reasonable fee for applying for the exemption. A TNRCC order exempting the applicant must provide a description of the alternative method used and condition the exemption on compliance with the prescribed method or standard. SB 1591 specifies that it does not authorize exemptions to statutes or regulations for storing, processing or disposing of low-level radioactive materials.

Supporters said SB 1591 would give the state additional regulatory flexibility when granting permits or licenses for pollution control or abatement but leave existing statutory environmental quality standards in place. In some cases, alternate methods would result in a higher standard of environmental performance because facilities could use innovative and efficient new techniques. Alternative techniques may also be more cost effective for the regulated industry while at the same time providing the same or a better protection against pollutants than is currently required. Exemptions would only be granted in the rare cases where state laws are more stringent than federal laws and would allow TNRCC to quickly implement changes made on the federal level.

Opponents said the bill would give free rein to TNRCC to exempt a permit applicant from almost any requirement of pollution control statutes and rules. There would be no way for affected parties to know in advance what requirements the agency would exempt an industrial polluter from having to meet. Exempting an applicant from a statute would allow the executive branch to make new law without the approval of the Legislature because if Congress weakened environmental laws, TNRCC could exempt polluters from pollution controls previously required, and the Texas Legislature would have no say in the matter.

The HRO analysis appeared in Part 3 of the May 21 Daily Floor Report.

Families and Children

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HB 323 would have prohibited divorce on the grounds of insupportability (“no-fault divorce”) in cases where only one spouse petitioned for divorce or where there were children under 18 years of age who were born or adopted during the marriage. In other cases, the bill would have required a one-year waiting period between the date a no-fault divorce petition was filed and the date the divorce was granted.

Supporters said no-fault divorce has been responsible for increased divorce rates, societal devaluation of marriage and the family, increased poverty among women and children, and increased juvenile delinquency. No-fault divorce has not lived up to its goal of decreasing the bitterness and acrimony of divorce; the conflict has merely shifted from the prior fault-finding phase of the divorce to the child custody and property settlement phases. In contested divorce cases, unilateral no-fault divorce has shifted power from the “innocent” spouse who is being abandoned to the spouse who wants out of the marriage. The spouse who wants to maintain the marriage has no legal recourse and may have to pay substantial legal fees for representation for an unwanted divorce. No-fault divorce focuses on the desires of parents and ignores the needs of children, who suffer from higher rates of poverty, drug use, teen pregnancy, juvenile delinquency, problems in school, and teen suicide. Laws can change individual and societal attitudes, and no-fault divorce laws need to be revised to increase commitment to the institution of marriage, protect children and innocent spouses, and deter divorce.

Opponents said the lamentably high divorce rate is not a problem that can be fixed legislatively. There is no significant causal connection between no-fault divorce laws and the elevated divorce rate — both resulted from the same changes in societal attitudes toward divorce. If HB 323 were enacted, spouses would likely return to the methods of perjury and fabrication to obtain a divorce or be forced to extreme measures to persuade the other spouse to agree to the divorce. Mediation would become unusable because neither party would want to admit fault. No-fault divorce provides a necessary means of escape for women in abusive marriages. Eliminating no-fault would more likely help wealthy women rather than the average housewife because establishing fault in a contested divorce would be an expensive process. The detrimental financial effects of divorce on many women do not result from no-fault divorce, but rather from courts that do not enforce property settlement and child support orders. Furthermore, those who want to repeal no-fault divorce fail to recognize the lasting scars children suffer from living with intact but dysfunctional families where parents have delayed ending bad marriages. Without no-fault divorce, children would be caught in the crossfire of parents trying to prove each other’s guilt in the breakup. Tougher divorce laws would likely encourage the already significant social trend of unmarried couples living together, and this would result in even more financial and social insecurity for women and children.

HB 1091 requires the Bureau of Vital Statistics in the Department of Health to establish and administer a paternity registry through which fathers who are not the presumed, adjudicated, or otherwise acknowledged father of a child must register to preserve their parental rights. A man who fails to file a notice of intent to claim paternity within 30 days after the child's birth may not assert an interest in the child except by filing a suit to establish paternity before termination of his parental rights. Ignorance of a pregnancy is not a sufficient reason for failing to register a paternity claim because men are deemed to already know that sexual intercourse with a woman can result in pregnancy.

Under the bill, the parent-child relationship may be terminated if a court finds that the biological father was convicted of a sexual crime that directly resulted in the victim's pregnancy with the child. The bill also limits revocability of certain affidavits involving relinquishment or waiver of parental rights; allows adoption of certain children whose relationship with one parent has already been terminated; requires courts to give precedence to final adoption hearings; transfers operation of the central adoption registry to the Bureau of Vital Statistics; requires public information about the registry; and prohibits adoption advertising except by licensed child-placement agencies.

Supporters said the paternity registry would protect the parental rights of biological fathers who register by entitling them to service of process in original suits affecting the parent-child relationship. This would provide more effective notice than current methods requiring notice by publication, birth mother identification of the father, or adoptive parents locating the father. The registry also would provide assurance to the adoptive parents and the birth mother that an adoption would not be disrupted because the biological father would have to file a notice of intent to claim paternity within 30 days after the child was born or file a suit to establish paternity before his parental rights were terminated. The bill also would facilitate appropriate termination of parental rights in cases where the biological father caused the pregnancy during commission of certain sexual offenses and help biological family members find each other when mutually agreeable.

Opponents said the benefit of the registry for fathers who do register would be far outweighed by the harm it would cause to other fathers whose parental rights would be prematurely terminated. In many cases, pregnancies result from short-term relationships where a man would not have a reasonable opportunity to get the information required by the paternity registry, such as the mother's social security or driver's license numbers. Requiring the registry to send a copy of the notice of intent to claim paternity to the mother could threaten the mother's right to confidentiality and privacy since a mailed notice could easily be intercepted or misdirected.

The HRO analysis appeared in Part 2 of the April 23 Daily Floor Report.

Prohibiting recognition of same-sex marriages from other states

HB 3464 by Chisum
Died in the House

HB 3464 would have prohibited Texas from officially acknowledging a public act, record or judicial proceeding that recognized or validated a marriage between persons of the same sex or a right or claim asserted as a result of the marriage.

Supporters said state law should be as specific as possible to ensure the courts understand that the people of Texas hold as an established public policy that marriage is an institution existing solely between one man and one woman. Pending cases in Hawaii raise the possibility that persons of the same sex may be able to marry there and then move to Texas. Texas would have to show a strong public policy against same-sex marriages in order to avoid having to recognize those marriages under the full faith and credit clause of the U.S. Constitution that requires states to honor the acts, records and proceedings of other states. Making a preemptive move is necessary because advocates of recognizing same-sex marriage plan to challenge state laws by marrying in Hawaii and then filing for benefits in other states. Those activists also are shopping for a sympathetic judge to declare unconstitutional the federal Defense of Marriage Act, which provides that no state can be required to give effect to any same-sex marriage from another state. The U.S. Supreme Court has defined marriage as the union between one man and one woman, a definition consistently upheld by state and federal courts. Same-sex marriage falls outside the fundamental understanding of marriage, so denying recognition of marriage licenses to same-sex couples is not a regulation of marriage itself. In addition, the legal concept of equal protection applies only to immutable characteristics, and homosexuality can only be identified by behavior. Laws banning or regulating a wide variety of sexual conduct have been upheld at every court level.

Opponents said HB 3464 not only would violate the full faith and credit clause but also was unnecessary because no state or locality currently sanctions same-sex marriages nor is there an urgent “threat” of gay marriage. In addition, the Defense of Marriage Act already authorizes states to refuse to give effect to a same-sex marriage from another state. The United States is a nation governed by one Constitution, not a collection of small nations with contiguous borders. Americans have a right to go from one state to another, including Texas, without having to surrender their marriage as a price of traveling or relocating. HB 3464 would create a complex set of legal and logistical problems that have not been fully examined. For example, what would happen to marital property of a marriage that was not recognized in Texas? The current ban on same-sex marriages in Texas violates the equal protection rights of lesbians and gay men; extending the ban to same-sex marriages from other states would only exacerbate constitutional problems. Allowing states to refuse to recognize same-sex marriages from other states would infringe on the rights of religious institutions that recognize same-sex marriages.

The HRO analysis appeared in Part 2 in the May 14 Daily Floor Report.

SB 34 implements several recommendations of the Governor's Committee to Promote Adoption, the Texas Court Improvement Project, and the Sunset Advisory Commission to reduce the amount of time required for the adoption process. The Department of Protective and Regulatory Services (DPRS) must immediately file suit to terminate the parent-child relationship of an abandoned child, begin efforts to locate adoptive parents at the same time it begins procedures to terminate a parent-child relationship, and report to courts on a child's adoptability and its search for prospective adoptive parents.

The DPRS also must adopt policies to improve services to children and families, increase its accountability, and ensure consistency of services throughout different regions of the state. To meet these goals, the DPRS must: establish time frames for initial screening of potential adoptive families; evaluate the effectiveness of management-level employees in expeditiously making permanent placements for children; establish goals and performance measures for the permanent placement of children; seek and provide incentives for private licensed child-placing agencies to place children remaining available for more than 90 days; encourage approval of foster parents as adoptive parents; and address failures by its service regions in making permanent placements for children in a reasonable time.

Also, the DPRS must maintain in its central database specific information concerning the services it has provided to children placed in its custody, including the amount of time involved in each adoption and placement in substitute care. The DPRS must make the information available to the public, except for information required by law to be confidential.

SB 34 institutes shorter deadlines for hearings involving placement of children, requires hearings and status reviews to include planning for permanent placement, mandates that courts conduct regular placement review hearings, and establishes requirements for placement review hearing notice, process and reports. The bill also reduces the period during which the validity of adoption orders and certain orders terminating parental rights can be attacked, and establishes a one-year time frame for extending or dismissing a suit to terminate the parental relationship.

The Office of Court Administration must develop an information system to track compliance with requirements for the timely disposition of those cases. The presiding judge of an administrative judicial region can appoint a master for handling child protection cases, if the court needs assistance in processing cases within a reasonable time period.

Supporters said SB 34 would make the Texas adoption system more decisive, efficient and accountable. Many children spend years in the state system before being adopted, and such delays can be extremely detrimental to healthy emotional development. All Texas children deserve a

loving stable environment, and SB 34 would help provide that environment more quickly to children in foster care by expediting the adoption process. The bill would do this by establishing a 12-month deadline for resolving each child's case and requiring the DPRS to begin searching earlier for prospective adoptive parents. DPRS accountability would be increased by requiring it to maintain information on the status of children in its custody and make that information available to the public. SB 34 also would promote judicial efficiency by ensuring timely productive hearings and requiring the Office of Court Administration to develop a system to track compliance with case disposition deadlines. Finally, SB 34 would improve the stability and security of children and adoptive families by shortening the time during which adoption orders and orders terminating parental rights could be attacked.

Opponents said SB 34 would make a drastic, and perhaps tragic, move in reducing to six months the time during which adoption orders and orders terminating parental rights can be attacked. This would not be enough time for many biological parents acting in good faith to come forward. For example, the bill could unfairly and prematurely cut off the rights of a biological father who did not know he had a child or whose child had been taken away by the mother. Requiring the DPRS to immediately file suit to terminate the parent-child relationship of an abandoned child also could unfairly threaten the rights of a parent who did not have possession of the child. One parent could have a child and abandon it without the other's knowledge, but both parents' rights could be terminated as a result. The bill should explicitly require that in cases in which the DPRS is appointed as managing conservator without terminating parental rights, the parent should maintain the visitation rights of a possessory conservator.

Notes. Provisions of SB 34 addressing adoption and substitute care information, the search for adoptive parents, and DPRS planning and accountability take effect September 1, 1997. Most other provisions take effect January 1, 1998.

The HRO analysis appeared in Part 3 of the May 22 Daily Floor Report.

SB 86, as reported by the House State Affairs Committee, would have required physicians to notify parents or guardians 48 hours before performing non-emergency abortions on minors. Alternatively, the minor could have received a professional evaluation from another physician or sought approval from a court to undergo an abortion. The bill would have allowed physicians to perform abortions without notice if they determined that the procedure was needed immediately due to a medical emergency. Failure to give notice or comply with one of the alternatives to notice would have subjected the physician to disciplinary action by the Board of Medical Examiners.

Supporters said parental notification statutes are a constitutional method of ensuring parental involvement in a significant medical procedure. Statutes like the one proposed by SB 86 have been upheld by the U.S. Supreme Court because they ensure the privacy of the minor and offer a reasonable alternative to parental notification. Parents are notified of, and in many cases must often give consent for, every other non-emergency or elective medical procedure performed on a minor, even certain non-invasive procedures such as tattoos. Parents also should have the right to know about a dangerous and invasive medical procedure that could place their daughter's life at risk.

The state has a legitimate interest in protecting minor children from their own immaturity, inexperience, and lack of judgment. The choice of whether or not to have an abortion is one often highly charged with conflicting emotions. The repercussions of such a choice can have emotional and psychological consequences on the woman for many years. Many minors may not have the ability to make a mature, rational choice. Even when the relations between parents and teens are strained, this issue can often bring them together and allow the parent to give the minor much needed advice and support.

Opponents said the real purpose of SB 86 was to discourage legal abortions by minors by setting up hurdles to prevent them from exercising their constitutional right. Parental notification statutes increase the risk of harm to pregnant minors, from both repercussions at home due to notice and additional complications caused by delays, but serve no legitimate state interest in protecting the health of the minor. Minors faced with the choice of informing their parents or going before a judge or other doctor could decide to find another way to terminate an unwanted pregnancy than a legal abortion, such as self-abortions or illegal abortions, which would pose serious health risks.

The HRO analysis appeared in Part 1 of the May 26 Daily Floor Report.

Government Affairs

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HB 1185 establishes numerous criminal offenses related to fraudulent legal documents. These include using a fraudulent court record with intent that it be treated as a legal document and holding, with intent to defraud, a fraudulent lien or claim against real or personal property and refusing to release the claim. The bill also includes in the offense of impersonating a public servant knowingly purporting to exercise any function of a public servant or public office, including a judge and court, if the position or office does not lawfully exist. Persons who believe that a judgment filed against them or that a claim or lien filed against their property is fraudulent can file a motion for judicial review of the document. Judges can rule immediately on the motion, based solely on review of the documentation. All pleadings, motions and other papers in all criminal cases must be signed by an attorney or by the defendant certifying that the paper is not groundless and brought in bad faith or groundless and brought for harassment, unnecessary delay or other improper purpose. Courts are to presume that papers are filed in good faith; pleas of not guilty, no contest or nolo contendere or allegations that an event took place on or about a particular date do not constitute violations. HB 1185 also creates a cause of civil action against anyone who makes, presents or uses a fraudulent court record, document, or claim against property.

Supporters said HB 1185 would help deter persons and groups who have clogged the state's legal system with bogus judgments from nonexistent courts and with fraudulent documents, causing innocent victims to spend time and money to clear their names and property. The bill also would set up a quick, free process for judicial review of liens and judgments that might be fraudulent. The requirement that defense attorneys and defendants certify their pleadings would track the Rules of Civil Procedure, preventing the filing of groundless pleadings being brought for improper purposes. Allowing use of civil courts to obtain damages from those filing fraudulent documents would serve as both a deterrent and a means of providing relief.

Opponents said HB 1185 would unnecessarily create new criminal offenses and penalties and a new civil cause of action. Fraudulent lien filings could be handled under current law or through other avenues, such as changing filing procedures, so that bogus documents are quickly spotted and removed. Establishing punitive laws aimed at prosecuting particular political organizations, such as the so-called Republic of Texas, however extreme their beliefs and methods, is highly questionable. Many of the situations covered by the bill are civil in nature and would be better dealt with by the civil courts. The judicial review of documents would require judges to make decisions that were more than simply ministerial, and affected persons should be afforded normal due process. The codes of conduct that already govern attorneys could easily be used against someone filing groundless documents.

The HRO analysis appeared in the March 12 Daily Floor Report.

Teacher Retirement System benefit increases

HB 2644 by Telford
Effective September 1, 1997

HB 2644 increases benefits for Teacher Retirement System (TRS) retirees from between 2 percent and 14 percent and the lifetime monthly benefit for surviving beneficiaries by \$50 per month and sets a base per month minimum retirement annuity of \$150. Members can retire when their age plus years of service equal 80. Salary supplements of up to \$5,000 for driver's education courses taught outside the regular classroom hours can be part of the compensation base for retirement benefits. The bill permits TRS members with at least 25 years service to participate in a deferred retirement option (DROP) plan for up to five years: members continue to work and contribute to the retirement system but receive no service credit, while TRS deposits an amount equal to 79 percent of their annuities into a DROP account that is paid upon retirement. The bill also sets up an excess benefit arrangement and makes a number of changes to TRS-Care. It allows the program to be self-insured, to contract with any entity to provide health insurance, and to offer long-term care. School districts must pay 75 percent, instead of 100 percent, of the costs of participating in TRS-Care and can offer alternative health care plans in addition to TRS-Care. Beginning with the 1998-1999 school year, health care coverage of school district employees must be comparable to that provided state employees. School districts must report to TRS each year on their health care plan.

Supporters said the bill would provide current and future retirees much needed benefit increases and give members an opportunity to retire with a nest egg by participating in a DROP plan. The bill would implement many of the recommendations on TRS-Care made by Value Health Management in an interim study commissioned by the Legislative Audit Committee. The bill would put teeth into the law requiring school district health care coverage to be comparable to that of state employees.

Opponents said TRS trustees should be given the authority to raise the retirement benefit multiplier from 2 percent to 2.25 percent if the money is available and the state should increase its contribution rate, now at the constitutional floor of 6 percent, to provide increased retirement benefits. A DROP plan reduces retirees' annuities because they do not receive credit for the years they worked under the deferred plan. School districts do the best they can with the money available to pay health insurance premiums for their employees — 35 percent pay 100 percent of employee-only premium costs, and the costs of this unfunded mandate would be enormous.

Notes. HB 1700 by Rangel et al., requiring health care coverage for school district employees to be comparable to that of state employees, was incorporated into HB 2644 in conference committee. The HRO analysis of HB 1700 appeared in Part 1 of the May 5 Daily Floor Report.

The HRO analysis appeared in Part 1 of the April 16 Daily Floor Report.

SB 308 would have eliminated the open meetings exemption for staff briefings by repealing a section of the Government Code specifically allowing “closed” briefings and redefining “meeting” to include such briefings. A “meeting” would have included any gathering where a quorum of a governmental body exchanged information or questions with any third person, including an employee, about public business or policy over which the governmental body had supervision or control. School boards would have been allowed to conduct closed meetings to deliberate matters made confidential by law.

Supporters said SB 308 would have eliminated a loophole in the open meetings law. The staff briefings exception allowed under current law is in direct conflict with general standards of open government. The notion that the members of a governmental body can meet with an employee behind closed doors, ask questions and receive answers, and still not be considered conducting public business makes little sense. Under current law, a staff briefing is not a deliberation because the members do not engage in direct conversation with each other. However, because members may hear the questions and answers posed to staff by other members and can ask questions based on those questions, such proceedings should fall within the realm of deliberations.

In practice, the staff briefings exemption allows significant negotiation and deliberation to occur, but because the staff briefings are not open to the public or the media and do not require an agenda, minutes or recording, no one other than the participants is aware of how much public business is actually being discussed behind closed doors. Exceptions to the open meetings law exist for sensitive matters such as personnel decisions, property acquisition, and discussion of future or pending litigation. There is no need to have additional exceptions for what is clearly public business.

Opponents said many governmental entities use staff briefings for the legitimate purpose of educating officials about an issue that is not yet ready to be discussed in public. For example, if an incident occurred on the property of a school, the members of the district’s board could meet with staff immediately to find out what the incident was and what the possible repercussions for the district may be. Some of this information may be confidential; some may not. Additionally, some information may not have been checked by staff before being passed on to members. SB 308 would force members to be kept in the dark about important events or incidents until a public meeting could be called and the information prepared for public use.

The HRO analysis appeared in Part 1 of the May 27 Daily Floor Report.

SB 310 raises the minimum salaries of Supreme Court justices and judges of the Court of Criminal Appeals to \$102,463, a \$7,777 increase. Because the salaries of all other members of the judicial branch are tied to the salary of Supreme Court justices, the minimum salaries of the chief justice of the Supreme Court and the presiding judge of the Court of Criminal Appeals will increase by \$7,777 per year to \$105,240. Minimum salaries of the justices of the courts of appeals, including the 14 chief justices, will increase by \$7,388 per year, to \$97,850 for chief justices and \$97,340 for justices. The minimum salaries of district court judges and district attorneys under the Professional Prosecutors Act will increase by \$7,000 per year, to \$92,217.

Supporters said current and prospective members of the Texas judiciary must be provided adequate compensation relative to similarly situated members of the federal bench, the judiciary of other states, and lawyers with comparable experience in private practice and public service in Texas. Otherwise, the Texas judiciary will not attract the most able attorneys to the bench and will not retain experienced judges. The Texas Commission on Judicial Efficiency recently completed a study of this issue and found that Texas judges were paid well below the average of those serving in comparable positions. Compared to other states, Texas consistently falls in the bottom half in judicial salaries; compared to the other 12 states with populations over six million, Texas ranks dead last.

Opponents said the pay raises and the accompanying increases in retirement plan benefits would cost more than \$13 million in the next biennium, and even more in each biennium after that. There is no guarantee that earmarking these sums for judicial pay hikes would actually accomplish the goal of attracting the best judges.

Legislator pensions are linked to the salary of district court judges. Any raise given to district court judges would result in increased retirement benefits for legislators. In order to remove the perception that legislators would be voting themselves an increase in benefits, an independent judicial compensation panel should examine the issue and make objective recommendations to the Legislature.

Notes. HB 1 by Junell, the General Appropriations Act, provided additional salary increases for judges over the next two years. Salaries of the chief justice of the Supreme Court and presiding judge of the Court of Criminal Appeals will increase by \$12,530, to \$110,000 for fiscal 1998, plus an additional \$5,000, to \$115,000, for fiscal 1999. Salaries of the justices and judges of the Supreme Court and Court of Criminal Appeals will increase by \$14,314, to \$109,000, for fiscal 1998 and an additional \$4,000, to \$113,000, for fiscal 1999. Salaries for justices and chief justices of the courts of appeals will increase by \$13,598, to \$104,050, for chief justices and \$103,550 for justices for fiscal 1998, with an additional \$3,800, to \$107,850 and \$107,350, for fiscal 1999. For

the 396 district judges and the 124 applicable district attorneys, salaries will increase by \$12,883, to \$98,100, for fiscal 1998, with an additional \$3,600, to \$101,700, for fiscal 1999. The total cost to the state, including retirement benefits, for the fiscal 1998-1999 biennium will be \$28 million.

SJR 20/SB 328 by Brown, which would have established a Judicial Compensation Commission to set judicial salaries, passed the Senate and was reported favorably by the House Judicial Affairs Committee but died in the Calendars Committee.

The HRO analysis of SB 310 appeared in Part 3 of the May 21 Daily Floor Report.

SB 313 would have allowed residents of the Kingwood subdivision in northeast Harris County to vote on a petition to disannex the area from the City of Houston.

A petition signed by 10 percent of area registered voters would have to have been submitted within two years of the annexation, which occurred on December 11, 1996. Houston would have had to pay election costs and would have been prohibited from re-annexing any part of the tract of land that was de-annexed unless approved by the voters.

Supporters said SB 313 would have empowered the residents of Kingwood to decide whether to be included within the City of Houston. It would have given annexed residents a larger chair at the annexation bargaining table and the city an incentive to provide sufficient services to a newly annexed area.

Requiring a city to hold an election to win area voter approval for annexation would not be overly burdensome. If there was a legitimate reason for the annexation and if the quality of service to that area would be improved as a result of the annexation, voters would approve such a measure. If, however, the annexation was done simply to engulf a revenue-rich area and would actually result in a decrease in the quality of services, the residents would rightly reject the annexation proposal.

Opponents said SB 313 would set a bad precedent. There would be nothing to stop other areas from pursuing disannexation legislation in the future. This bill would unwisely limit Houston's annexation powers and prevent it from planning for future growth. Any legislation that would curtail one city's right to annex could apply to all cities. Local control is meaningless if special interests on the losing end of local land use policies can exert political influence at the state level to have them overridden.

The Kingwood annexation made fiscal sense for Houston because it boosted the tax base without incurring substantial expenditures for capital improvements typically needed when undeveloped areas are annexed. A vast majority of Kingwood residents work in Houston, and nearly all benefit in some way from the city.

Employee Retirement System benefit increases

SB 1102 by Armbrister
Effective September 1, 1997

SB 1102 increases Employee Retirement System (ERS) benefits, raising the benefit multiplier from 2 percent to 2.25 percent and retirement, disability, and death benefits for members and their survivors in the employee class by 12.5 percent for those retiring between September 1, 1996, and August 31, 1997. The ERS board of trustees may, with actuary approval, issue a "13th check" in fiscal 1998.

Employees of the Texas Workforce Commission, Texas Department of Human Services, and Texas Department of Mental Health and Mental Retardation who lose their jobs prior to September 1, 1999, as a result of privatization or downsizing will receive three years of service and age to enable them to retire immediately. Employees unable to retire immediately will receive five years age and service for retirement eligibility purposes only.

The bill allows members to retire if their age and years of service total 80 and creates a separate nonqualified, unfunded excess benefit plan to pay benefits above federal limits. The ERS board can make rules allowing members to pay for establishing or reestablishing service credit other than through lump-sum payments. Judges may retire with unreduced benefits at age 65 with 10 years of service or at any age with 20 years of service, and judges in JRS II can use military service credit for retirement eligibility. The law deletes a requirement that the Uniform Group Insurance Benefits Program basic coverage include benefits and health care service required by state and federal law.

Supporters said ERS retirees, who do not receive automatic cost-of-living benefit hikes, deserve a much-needed 12.5 percent increase in their retirement benefits. The system is flush with money and should return these funds to members in form of increased benefits. The bill would provide generous benefits for certain members working for agencies that may lose positions as a result of privatization or reductions in workforce in fiscal 1998 and fiscal 1999. The bill also would make it easier for ERS members to purchase service credit, implementing a recommendation in the latest Texas Performance Review, *Disturbing the Peace*. ERS would continue to adhere to state and federal laws regarding qualified health care plans.

Opponents said repealing Insurance Code provisions pertaining to the Texas Employees Uniform Group Insurance Plan would lead some to believe that the system was attempting to exempt itself from state regulation regarding qualified health care plans.

The HRO analysis appeared in Part 2 of the May 23 Daily Floor Report.

SB 1534 establishes a basic civil legal services account to provide funding for indigent legal services. The account will be funded with filing fees on civil cases: \$25 for Supreme Court and courts of appeals; \$10 for district courts other than family law or divorce matters; \$5 for district court family law and divorce matters; \$5 for county courts; and \$2 for justice of the peace courts.

The basic civil legal services account may not be used to support: class action lawsuits; abortion-related litigation; lawsuits against a governmental entity, political party, candidate or officeholder for an action taken in the individual's official capacity; lobbying for or against any candidate or issue; or services to an individual not legally in the United States unless necessary to protect the person's physical safety. Funds also may not be used to provide legal services for any legal matter that would normally result in a fee provided from the recovery, such as a contingency fee. The legal services funds may be used to sue a governmental entity to secure benefits due by law to individuals or their dependents. Individuals may use legal services funds if they are able to show that they attempted to obtain legal services from an attorney who normally took such cases in their home county and were refused.

Supporters said SB 1534 would help those who cannot afford an attorney gain access to the civil justice system. Legal services programs for indigents have recently suffered significant funding losses from federal funding cuts. Funds raised through the Interest on Lawyers Trust Accounts (IOLTA) program by the State Bar of Texas are also facing constitutional challenges, and a recent U.S. Fifth Circuit Court of Appeals opinion held the program unconstitutional.

The use of court fees to provide legal services is the most efficient way to raise the needed funding. Nearly 20 other states impose similar fees in order to provide legal services to indigents. The imposition of these nominal fees would raise an estimated \$3 million each year. The bill includes protections against supporting cases that would be seen as violating the free speech rights of fee payers by forcing them to subsidize promotion of viewpoints with which they may disagree.

Opponents said court fees used to fund various programs have proliferated in recent years. While the goal of providing legal services to the indigent may be laudable, it should be done through the appropriations process. Court fees are a tax on filing suits and are applied to all plaintiffs regardless of their economic situation. Increased fees would actually be a greater burden on those of limited means who must file suits to protect their rights and would create one more barrier to accessing the courts.

The HRO analysis of HB 2917, the companion to SB 1534, appeared in Part 1 of the May 1 Daily Floor Report.

Higher Education

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HB 588 establishes uniform admission and reporting procedures for the state's general academic colleges and universities considering admission applications of first-time freshman students. Institutions must admit applicants who graduated in one of the two preceding school years from accredited public or private high schools and whose grade point average placed them in the top 10 percent of their graduating class. An institution's governing board may extend the scope of admission to encompass applicants who graduated in the top 25 percent of their class. HB 588 states the Legislature's intent that all institutions of higher education pursue academic excellence by considering academic achievement as well as such other factors as socioeconomic status, community involvement and responsibility, and personal interviews in making admission decisions.

Supporters said HB 588 would be a bold step to adapt admissions policies at Texas institutions of higher education to the needs of a changing population, allowing all students the opportunity to continue their education. Studies have shown that innate intellectual ability is distributed evenly throughout the population, occurring with equal regularity among all racial, ethnic, and socioeconomic groups. The under-representation, therefore, of certain groups in Texas colleges and universities does not indicate these students are unable to succeed in a university setting. Rather, it shows that they have not been given an opportunity to demonstrate what they can do. There is no better predictor of future success than past performance, and all students in the top 10 percent of their classes have shown themselves able to meet the highest standards of scholarship. The group admitted under HB 588 would be not only talented but also diverse: about two-thirds of graduating seniors in 1996 represented minority groups.

Opponents said HB 588 would decree statewide admissions policies that could actually harm institutions already facing important decisions regarding admissions policies. In the past, the Legislature has wisely left decisions on admissions policies up to the individual schools. Universities should retain the authority to make such decisions and implement policies that best suit their individual needs and that will best help them meet their goals and educate their student bodies. **Other opponents** said HB 588 would not solve the problems created when the Fifth U.S. Circuit Court of Appeals rejected affirmative action programs in Texas higher education. The employment of race-neutral criteria would not address the reason that affirmative action was originally initiated: to overcome prejudice and discrimination and their effects on the educational, professional, and socioeconomic achievements of minorities.

The HRO analysis appeared in Part 1 of the April 15 Daily Floor Report.

SB 149 requires that the governing board of each public institution of higher education adopt rules and procedures for the periodic performance evaluation for all tenured faculty. The governing board may not waive the evaluation process for any faculty member granted tenure nor award tenure to an administrator that in any way varies from the institution's general policy on tenure. Evaluations must be based on the professional responsibilities of the faculty member, be directed toward professional development, incorporate due process rights, and be conducted at least once every six years but not more often than once a year. A faculty member may be subject to revocation of tenure or other discipline only if there is a determination of professional incompetency, neglect of duty, or other good cause. SB 149 stipulates that faculty facing termination on the basis of a review may have the matter referred to nonbinding alternative dispute resolution.

Supporters said SB 149 would inject needed accountability to the system of higher education in Texas. Although means now exist to remove individuals guilty of grievous offenses, they are rarely used. In the last 25 years, the University of Texas, Texas A&M, and the University of Houston have fired only eight tenured individuals for incompetence. Clearly, a more effective manner of identifying and removing incompetent individuals is needed. A reasonable level of post-tenure accountability for faculty would ensure students that they would continue to receive the high level of service for which the professor was awarded tenure in the first place. It would raise the quality of participation by both students and faculty and improve the overall academic environment at the state's public institutions. Furthermore, instituting post-tenure review would assure the public that their tax dollars were used to support only the highest caliber of academic work and that state institutions did not support professors who had long since ceased to adequately perform their duties.

Opponents said instituting a post-tenure review process would threaten academic freedom and the quality of higher education in Texas. Eroding the security provided by the tenure system could result in faculty being fired for political or personal reasons. The academic freedom afforded by tenure has helped the United States develop the best university system in the world. Jeopardizing the state's tenure system would inhibit the ability of state institutions to recruit top-notch professors and increase the incentive for those already in Texas to look elsewhere. In examining issues of accountability and efficiency, academia cannot be compared to private industry. Without tenure, there is little reason to believe that universities could play their essential role as sanctuaries of study and debate.

The HRO analysis appeared in Part 1 of the May 26 Daily Floor Report.

SB 1419 establishes statewide standards for institutions of higher education to use in admitting student athletes promised or granted athletic scholarships, grants, or other financial assistance funded by state revenues. Entering freshman student athletes must meet any minimum high school grade point average required by the institution for all other entering freshmen. For other incoming student athletes, their cumulative college GPA must be equal to or greater than the minimum cumulative college-level grade point average that the institution required of other undergraduate students to remain enrolled in the preceding academic year.

Supporters said SB 1419 would reinforce the essential principle that student athletes are students first and athletes second. Awarding athletic scholarships should not entail lowering academic standards. Furthermore, luring unqualified students to universities with large financial incentives is harmful to the students themselves, many of whom wind up dropping out of college without ever receiving a degree. This bill would ensure that only students with appropriate academic qualifications were awarded athletic scholarships.

Opponents said the Legislature in the past has wisely left decisions on awarding athletic scholarships up to the individual schools. Universities should retain the authority to make such decisions and implement policies that will best suit their individual needs and help them meet their goals and educate their student bodies. SB 1419 could hinder the ability of Texas schools to recruit the most outstanding athletes. If schools from other states are able to offer scholarships to students with GPAs below Texas standards, the state could lose its best athletes to competitors. Such losses could be extremely harmful to state universities, ultimately diminishing the success of athletic programs and jeopardizing the fame and fundraising potential they bring. Successful athletic programs help pull in money to a school, thereby enhancing the facilities and the programs for all students, not just the athletes.

Other opponents said that the bill would do little to improve the quality of education provided student athletes. Most state schools do not require a minimum grade point average for entering freshmen; therefore, the bill would not apply to the vast majority of Texas athletes.

The HRO analysis appeared in Part 1 of the May 23 Daily Floor Report.

Human Services

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Faith-based chemical dependency treatment programs

HB 2481 by Swinford, et al.
Effective September 1, 1997

HB 2481 exempts from Texas Commission on Alcohol and Drug Abuse (TCADA) licensing and regulations chemical dependency treatment programs conducted by a religious organization that are exclusively religious, spiritual or ecclesiastical in nature. Chemical dependency treatment providers or counselors in faith-based programs also are exempt from licensing requirements. The faith-based programs may not treat minors nor provide medical care, medical detoxification, or medical withdrawal services. Exempted faith-based programs must conspicuously include in any promotional literature a specified statement saying their services are exclusively religious in nature and not subject to TCADA licensure or regulation. No one may be admitted to the program without first signing a declaration acknowledging that the treatment is exclusively religious and not subject to TCADA oversight. Programs must register with TCADA, and their exemption may be revoked under certain conditions. Faith-based programs may not compete against licensed programs for federal or state treatment funding.

Supporters said HB 2481 would allow faith-based organizations to legally provide care and counseling to chemically dependent individuals in need of help. Some of these faith-based programs have been operating successfully for years, with national recognition for their efforts. Texas regulations require chemical dependency treatment centers to conform to a “medical model” of treatment, which rejects the unique nature and philosophy of faith-based programs and the potential healing properties of prayer, spiritual counseling, and moral teaching, even though it is a well accepted fact that no one form of treatment works for everyone. The likelihood of these programs harming or misleading clients is very small. Faith-based programs could not hold themselves out as medical treatment facilities, and clients could voluntarily leave any time they felt the program was no longer useful. The counselors, often former drug abusers themselves, are well experienced in alcohol and substance abuse conditions and know that they need to call for emergency and other medical assistance when such problems arise.

Opponents said HB 2481 would endanger the public by exempting faith-based programs from important minimum standards. Individuals often choose treatment when they are in a very vulnerable state and not fully competent. Declarations signed at admission would not guarantee that clients understood the limitations of the program and that no medical safety net would be provided. The fact that an organization is a recognized religion does not mean that its treatment approaches are valid and appropriate or that all the individuals involved are competent, mentally healthy and mature or have a client’s interest at heart. Poorly educated counselors may not be able to recognize the medical problems, complications, and risk of death that can arise or be able to refer clients with mental illnesses to an appropriate health care professional.

The HRO analysis appeared in Part 1 of the May 13 Daily Floor Report.

Accreditation for religious organizations providing child care

HB 2482 by Smithee
Effective September 1, 1997

HB 2482 requires the Department of Protective and Regulatory Services (DPRS) to authorize child care facilities to operate without a license if they have been accredited by an alternative accreditation organization approved by DPRS as meeting or exceeding its minimum standards. The accreditation agency must file a copy of its minimum standards and inspection procedures with DPRS and obtain information from the central registry of child abuse and neglect cases before registering facility operators, employees and administrators. Approved accreditation organizations also will have to undergo an annual renewal procedure to ensure continued compliance. DPRS may conduct limited inspections of accredited facilities if it receives complaints about child abuse or neglect or violations of standards that create an immediate threat to the health and safety of the children. DPRS may suspend a facility's certificate for 10 days if necessary, require the facility to take corrective action, and remove children in cases of immediate threats to health and safety. The bill specifies that it does not affect the authority of local, regional and state fire inspection officials and that no governmental agency is authorized to exercise control over the ministry, teaching, and religious environment of such facilities or their ability to select personnel. The act will be repealed in four years unless continued.

Supporters said HB 2482 would help remedy the lack of quality, affordable child care in Texas by allowing faith-based organizations to operate facilities without having to undergo state regulatory procedures that may conflict with their missions and goals and burden their limited budgets. An alternative accreditation process using private agencies would ensure vigorous and qualified oversight. Many nationally recognized alternative accreditation agencies have standards that are superior to those in Texas, and they likely will steer clear from fringe groups for fear of losing their status. Similar legislation has proven successful in other states. The state would retain all police powers to conduct inspections in abuse and neglect cases and be able to suspend certificates and even remove children if needed. Issues of separation of church and state or equal protection would not be raised because the bill would not be limited to faith-based organizations.

Opponents said HB 2482, by granting an exemption for religious reasons, would create the potential for litigation over issues relating to separation of church and state. Existing child care standards do not make reference to or restrict curriculum issues, philosophy or religious orientation but, rather, are about numbers, such as staff-to-child ratio and maximum group size, to promote the safety and welfare of children. Texas could place many children at risk by allowing for the accreditation of fringe groups with outdated notions of proper disciplinary measures for children. Parents seeking child care may be lulled by this "accredited status" and leave their children vulnerable under a false sense of security.

The HRO analysis appeared in Part 1 of the May 2 Daily Floor Report.

HB 2577 renames the Texas Housing Corporation the Texas State Affordable Housing Corporation and directs it to provide adequate, safe and sanitary housing for individuals and families of low and very low income and families of moderate income. The corporation can engage in mortgage banking activities and lending transactions and acquire, hold, sell or lease real or personal property but cannot compete with private lenders or make any loan that could be made by a private lender on the same or better terms.

HB 2577 also codifies many current policies of the Texas Department of Housing and Community Affairs (TDHCA) regarding the implementation of the low income housing tax credit plan. The agency must prepare the “qualified allocation plan” required by federal law for use in setting criteria and priorities for the allocation of tax credits, and the governor may approve, reject or modify the plan. In allocating low income housing tax credits, the TDHCA must score each application using a point system based on criteria consistent with its housing goals.

HB 2577 expands the statutory provisions addressing issuance of bonds to fund the housing projects of 501(c)(3) nonprofit organizations. At least 50 percent of the total amount of bonds issued must be reserved for the purposes of new construction of housing or acquisition of housing with substantial rehabilitation. Not more than 25 percent of the amount issued can be used for projects in any one metropolitan area, and at least 15 percent must be reserved for projects in rural areas. Nonprofit organizations seeking to undertake a project must demonstrate that the project is carefully and conservatively underwritten and agree to reserve 60 percent of the housing to be provided by the project for low income individuals and families at restricted rents.

In addition to its preexisting uses, the Housing Trust Fund now can be used to acquire property to endow the fund and to provide security for repayment of revenue bonds issued to finance affordable housing.

In cooperation with certain other agencies, organizations and individuals, the TDHCA must develop and implement a statewide homebuyer education program designed to provide information and counseling to prospective homebuyers about the home buying process. The TDHCA must also coordinate its provision of tenant services, including child care, transportation, and adult education, with similar services offered through state workforce development and welfare programs.

Political subdivisions may reduce or waive an impact fee for housing units that would qualify as affordable housing once constructed. If affordable housing is not constructed, the political subdivision may reverse its decision to waive or reduce the impact fee. In appraising real property rented to a low-income individual or family under a program limiting rent to a percentage of the

individual's or family's income, the tax appraiser must take into account the extent to which that use and limitation reduce the market value of the property.

Supporters said HB 2577 would provide some creative new methods to address the need for affordable housing in Texas at a time when federal funding is starting to shrink. The 501(c)(3) bond program would generate some funds for the TDHCA while providing nonprofit organizations with money for projects designed to create affordable housing. Any money made in administering the bond program would go the Housing Trust Fund to be used for more affordable housing. The corporation would be authorized to service the bonds so the state would experience substantial savings by avoiding the cost of having a private entity service the bonds. HB 2577 would resolve concerns regarding the low income housing tax credit process and project fees with new disclosure requirements. The bill would make the TDHCA's programs more user-friendly for the public by instituting increased requirements for public meetings, comments and information. The bill would not allow the TDHCA to hold property in perpetuity, but would authorize the TDHCA to buy multi-family housing, rehabilitate it, and sell it. This is designed to generate more multi-family housing, not to speculate in real estate or have the TDHCA act as a landlord. The operations of the State Affordable Housing Corporation would be thoroughly examined during sunset review of TDHCA. In addition, the bill would impose substantial reporting and auditing requirements on the corporation.

Opponents said HB 2577 should not authorize the TDHCA to use the Housing Trust Fund to acquire property with which to endow the fund. It would not be prudent for the agency to speculate in real estate in an attempt to generate revenue. The TDHCA also should not be allowed to function as a landlord for low-income properties. Local nonprofits and local housing authorities would be able to manage these properties better than a central state bureaucracy. In addition, this arrangement would increase the state's liability to an unacceptable level. The bill also should provide explicitly for sunset review of the State Affordable Housing Corporation.

The HRO analysis appeared in Part 1 of the May 8 Daily Floor Report.

Oversight of welfare eligibility and delivery system privatization

HB 2777 by Junell
Effective June 19, 1997

HB 2777 establishes the Texas Legislative Oversight Committee to advise and monitor the Health and Human Services Commission (HHSC) in developing and implementing a plan for integrating services and functions relating to eligibility determination and service delivery by health and human services agencies and the Texas Workforce Commission. The plan must streamline service delivery, integrate processes for the transition from welfare to work, and improve access to benefits and services for clients, subject to approval by the governor, the Legislative Budget Board, and the federal government. The plan must give priority to the design and implementation of computer hardware and software and to providing technical support for the eligibility system. The bill authorizes HHSC to contract for appropriate professional and technical assistance. HHSC must consult with the affected agencies, provide a detailed cost-benefit analysis, and hold public hearings in at least four geographically diverse locations of the state within 10 days after releasing a request for bids, proposals or offers.

Supporters said HB 2777 would prevent any rush toward wholesale privatization of the state's welfare system by restoring the original intent of the welfare reform bill enacted last session. In 1995, the Legislature clearly intended to carefully study the benefits of integrated eligibility and move slowly to automate services one step at a time. Privatization efforts should proceed slowly and cautiously. If done properly, a system that enables Texans to apply at a single office for welfare, food stamps, and Medicaid at one time would save the state \$120 million a year. HB 2777 would eliminate the role of the Council on Competitive Government in privatization efforts, replacing it with a new committee of legislators better attuned to the needs and desires of taxpayers. The bill provides for public input into the process by requiring timely public hearings all across Texas.

Opponents said efforts to privatize and automate public assistance programs are proceeding too rapidly without thought to the quality of services. Emergency, discretionary assistance to needy Texans might not be available if an automated or computerized system is substituted for human interaction. Private corporations would have an incentive to place profit ahead of client interests and would likely reduce services to cut costs. Other automation projects in Texas and elsewhere have proven costly and behind schedule. The privatization plan would not create a one-stop system because Texans have been going to one office and filling out a single application for welfare, food stamps, and Medicaid since the early 1980s. The \$120 million-a-year savings estimate comes directly from the corporations hoping to bid on the \$2.8 million five-year contract rather than from any independent analysis.

The HRO analysis appeared in Part 1 of the April 30 Daily Floor Report.

SB 84 abolishes the Texas Board of Nursing Facility Administrators (BNFA), transferring its functions to the board governing the Texas Department of Human Services (DHS) and creating an advisory committee to the DHS board. If this arrangement does not meet federal requirements, the bill would establish a new Board of Nursing Facility Administrators within DHS.

Either board will have similar responsibilities regarding administrator regulation, including licensing and applicant qualification standards, complaint processing procedures, and sanction, penalty and fee-setting authority. The bill requires that rules be established for determining whether deficiencies noted in a survey of a facility warrant action against an administrator and sets up a system for monitoring license holders. The bill also specifically prohibits a person from acting as a nursing facility administrator without a license and provides protections for administrators who refuse to engage in activities that would violate their licensure standards.

Supporters said SB 84 would help rectify problems with the current BNFA and improve regulation of nursing home administrators. Ensuring the quality of nursing home administrators through better licensing would go far in preventing or quickly correcting occurrences of resident neglect and poor nursing home care. A recent state auditor's report found the BNFA to have the worst record of any state board in disciplining its licensed professionals, having failed to discipline any of its 2,300 licensees since 1993. There is also concern that the current board, composed of six nursing home administrators and three public members, violates federal prohibitions against nursing home administrator domination of a licensing board.

Transferring the duties of the BNFA to the board of DHS would be a logical first step in creating a more representative board. The DHS board could quickly assume the new responsibilities because DHS already regulates nursing homes and is very familiar with nursing home problems and issues, including those involving nursing home administrators.

Opponents said abolishing BNFA entirely would be unnecessary and would just delay the implementation of much needed changes. What is needed is clearer definition of board authority and stricter, more enforceable rules, which would be granted by provisions included in this bill. Transferring duties to the DHS would require familiarizing the board members with nursing home administrator issues and licensing processes and take time away from developing and implementing strong rules and enacting swift penalties.

The HRO analysis appeared in Part 3 of the May 23 Daily Floor Report.

SB 190 amends nursing home regulations to:

- authorize state regulators to set standards that may be more stringent than federal mandates;
- increase penalties for infractions of nursing home laws and regulations;
- require nursing home owners and management entities to have a good record of complying with state nursing home rules and laws in order to receive or renew a facility's license;
- establish procedures to control, decertify or reallocate Medicaid-certified nursing home beds;
- require nursing homes to make available to the public information on state inspections;
- delineate nursing home investigation procedures and complaint resolution deadlines;
- specify quality of care standards and resident rights; and
- create a long-term care legislative oversight committee.

Supporters said SB 190 would substantially improve nursing home oversight and enforcement of state and federal standards, establish enforceable resident rights protections, and improve the quality of life and care for Texas nursing home residents. SB 190 would allow federal regulations to serve as broad guidelines under which Texas could impose more stringent standards as needed and reverse provisions that had removed the state's ability to impose tougher regulations. It would codify many regulations regarding services, quality of care, and resident rights and thereby establish clear standards about nursing home responsibilities and make violations of those standards subject to legal actions. At the same time, it also would allow nursing homes sufficient flexibility to meet standards in a manner relevant to their particular resident mix. SB 190 would provide the Department of Human Services with management and background history needed to prohibit chronic violators from operating nursing homes and update penalty amounts so they would provide a sufficient deterrent and not simply be viewed as a "cost of doing business."

Opponents said SB 190 would provide the state with unnecessary, overly punitive enforcement authority. Many enforcement problems are due to bureaucracy and improper use of current authority, not to a shortage of laws, rules or penalties. Enacting punitive measures alone will not guarantee quality care; the state instead should require objective quality measurements in order to prevent future deficiencies. The staffing and standard of care requirements in SB 190 are too broadly written to enforce and therefore would fail to provide a sufficient minimum standard. The occurrence of resident neglect or abuse still would be the first means of identifying problems.

The HRO analysis for HB 413, companion to SB 190, appeared in Part 1 of the April 16 Daily Floor Report.

Criminal history checks for child care facilities and caregivers

SB 1539 by West
Effective September 1, 1997

SB 1539 requires the Department of Protective and Regulatory Services (DPRS) to conduct criminal history checks of directors, owners, and operators of child care facilities or listed family homes and of each person 14 years of age and older who regularly stays or works at the facility or home. Family home operators providing care for compensation for three or fewer unrelated children must be listed with DPRS and provide notice to customers that being listed is not the same as being regulated or inspected. DPRS may charge fees to cover administrative costs for background checks and may deny licenses based on the results. Persons whose licenses have been denied, revoked or suspended are entitled to a hearing by the State Office of Administrative Hearings governed by the Administrative Procedure Act.

Supporters said giving DPRS explicit authority to conduct criminal history checks would position the agency to better protect children from abuse, neglect and exploitation. Although criminal history checks will never be a complete or thorough solution to the problems of child abuse, they are important first steps that should be required for personnel who provide child care services to children. Family home operators also should be required to list with DPRS and undergo criminal history checks so that all parents can access information about any serious criminal convictions or substantiated child abuse complaints regarding child care providers. Many parents see the small family home setting as a better alternative to a more institutional setting, but in turning to family homes as a child care option, they find an unregulated nightmare. No burdensome requirements would be imposed; only periodic criminal history checks and minimal fees to cover administrative costs would be required for listed family homes. Listed providers would be able to better market their services because they could advertise that they were listed with DPRS and had a clean record. Parents would then be able to make better informed decisions about child care options. Allowing parents to have access to background information would help weed out dangerous child care operators instead of just relying on free market forces to shut down child abusers only after their offenses finally catch up with them.

Opponents said the costs and delays of criminal history checks would not be justified because it is unlikely that many convicted child abusers would be found through this screening process. Requiring family homes to be listed would disadvantage homemakers trying to make a few extra dollars to help out a neighbor by watching their children. Such requirements use children as an excuse for government overregulation and intrusiveness. Parents are in a better position than the state to oversee child care in the family home setting and to select appropriate child care providers. The government should avoid the temptation to begin over-regulating in this area; the free market can take care of bad child care providers.

The HRO analysis appeared in Part 2 of the May 27 Daily Floor Report.

Public Education

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HB 318 expands eligibility for the public education grant program and creates additional incentives for public school districts to accept students from low-performing public schools in other districts. Students using public education grants to attend school in other districts will be included in the average daily attendance of the receiving district. The receiving district also will be entitled to additional facilities assistance if the number of children it accepts exceeds the number of children who have left. The education commissioner must notify school districts of campuses where students are eligible for public education grants, and school districts must inform parents of eligible students about the public education grant program.

HB 318 also allows the State Board of Education to authorize up to 100 new charter schools that have an express policy of accepting students under the public education grant program. The board may grant additional charters to schools that serve students who have dropped out or are in danger of dropping out.

Supporters said HB 318 would help parents of children in low-performing schools find alternatives to meet their children's educational needs and give low-performing schools an incentive to improve rather than lose students and the funding that goes with them. The bill would expand on the state's initial success with charter schools and allow more children to benefit from the unique educational opportunities charter schools offer. These represent a wealth of new ideas and approaches to education that could invigorate the public school system by offering models for alternative approaches to education.

Opponents said HB 318 would set up multiple financial incentives for high-performing schools to receive more funding and students at the expense of schools that may need additional help from the state to meet student needs. Rather than encouraging these students to bail out, the state should marshal its resources to improve low-performing schools, where a majority of at-risk students are likely to remain. Rather than expand the number of charter schools, the state should wait to assess the performance of the original 20 schools and give public schools the flexibility they need to try new educational ideas. **Other opponents** said the public education grant program should be expanded to allow students at low-performing schools the chance to attend private schools as well.

Notes. The conference committee on HB 318 incorporated provisions of SB 519, expanding the number of open enrollment charter schools. The HRO analysis of SB 519 appeared in Part 2 of the May 26 Daily Floor Report.

The HRO analysis of HB 318 appeared in Part 2 of the May 5 Daily Floor Report.

SB 133 requires that alternative education be provided for students removed from the classroom because of violent or disruptive behavior or for engaging in illegal activities. School districts must provide a separate alternative education setting for students who are removed from the classroom but not expelled. Students who commit certain drug-related or felony offenses must be expelled from school. Counties with populations over 125,000 must work with school districts to operate juvenile justice alternative education settings for students expelled from regular schools. All alternative education settings must offer an academic program that enables students to perform at their grade level.

Supporters said SB 133 would strengthen and fine-tune a process established in 1995 by providing clear guidelines for removing certain students from regular classrooms and placing them in an appropriate alternative education setting. This would ensure that these students are not just cast into the streets and denied the opportunity to continue their education. The bill also would give schools clear authority to adopt a true “zero tolerance” policy towards the use of drugs and alcohol or the possession of weapons on campus.

Opponents said SB 133 would go too far in allowing school districts to adopt zero tolerance policies prohibiting drugs or alcohol at school or school-sponsored events and activities. Students guilty of relatively minor infractions could be placed with hardened gang members. Furthermore, the cost of educating students in alternative education settings can be significantly higher than the cost of educating them in a regular classroom, yet schools and counties would receive the same per student allotment regardless of where the student was educated.

The HRO analysis appeared in Part 1 of the May 26 Daily Floor Report. For additional background, see HRO Session Focus Report Number 75-12, Making the Grade: Alternative Education and Safe Schools, April 4, 1997.

SB 1873 abolishes the Foundation School Budget Committee (FSBC), composed of the governor, the lieutenant governor, and the comptroller, and makes the Legislative Budget Board (LBB) responsible for estimating costs and recommending changes to school funding elements to be made through the appropriations process. The bill also extends for an additional two school years the existing hold harmless provision for school districts whose revenue is subject to recapture and includes a temporary, two-year hold harmless provision for the Texas School for the Blind and Visually Impaired and the Texas School for the Deaf. SB 1873 removes funds paid into a tax increment fund from the amount of local revenue or school facilities taxes calculated in school finance formulas and allows the purchase of attendance credits by wealthy districts to be based on the district's maintenance and operations tax revenues rather than total tax revenues. The education commissioner may adjust a district's taxable values to accommodate for losses in taxable value of more than 4 percent, contingent on available appropriations. Districts may not set bond payment tax rates higher than those stated in filed documents unless necessary to compensate for declining property values. Compensatory education funds — funds given to a district based on the number of students on the federal free or reduced-lunch program and used for at-risk students — may only be used to improve and enhance programs under the regular education program. The State Board of Education must develop reporting and auditing procedures to ensure proper use of funds.

Supporters said the FSBC has not adequately served its purpose, the LBB is already doing nearly all of the tasks that would be assigned it by SB 1873, and the Legislature through the appropriations process is already primarily in charge of determining how much more money can be given to schools each biennium. Extending the hold harmless provisions in the current school finance system would ensure that wealthy districts operating under recapture would still be able to spend the same amount of money per student they were spending when SB 7 by Ratliff, the bill creating the “Robin Hood” system, was imposed in 1993. SB 1873 conforms to HB 4, which removes debt taxes from recapture amounts.

Opponents said moving the decisions affecting schools funding from the statewide elected officials on the FSBC to the LBB and enveloping those decisions within the appropriations process could reduce accountability. Continuing the hold harmless provision would ensure that wealthy districts could keep spending far more per student than most other districts. Equalizing the education finance system requires bringing those districts down to a level where their spending per student is included in the funding formulas applied to all school districts. Allowing districts to continue avoiding recapture of debt service taxes would cost the state \$28 million each year.

The HRO analysis appeared in Part 1 of the May 26 Daily Floor Report.

Public Health

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HB 3 creates the non-profit Texas Healthy Kids Corporation to provide health benefits for primary and preventive care for children under the age of 18 who are not covered or not adequately covered by health insurance or a health benefit plan. The corporation will not be an insurer nor can it self-insure, but will contract for the provision of health benefit program coverage. The corporation must develop the benefits structure and other features of the program and must notify parents of the availability of coverage through the Texas high risk pool.

Parents of enrolled children will be responsible for premium payments, copayments, coinsurance and deductibles, at risk of termination from the plan. These premiums may be paid from a special corporation account for a limited time period under certain conditions. The corporation can accept grants and gifts of money, property or services, and state appropriations, and may use community benefit donations made by non-profit hospitals or hospital systems only to meet state tax-exemption requirements to purchase health benefits for children with family incomes below 200 percent of the federal poverty index. Plan providers will be exempt from state premium taxes and health benefit mandates.

Supporters said HB 3 would help provide affordable health benefit coverage for 1.3 million uninsured Texas children of low and moderate income families, with savings to the state and to local taxpayers. Texas has a disproportionate number of uninsured children in working families with incomes too high to qualify for Medicaid but too low to pay for insurance for the whole family or who work for employers who do not offer insurance or insurance for dependents. HB 3 would help improve the lives, education and potential of uninsured children while providing savings to local taxpayers who pay for publicly supported hospitals. Uninsured children are more likely to use costly hospital emergency rooms as their chief source of medical care and to require hospitalization because of delayed treatment. State appropriations to start the program would be offset by Medicaid savings.

HB 3 would not create a new bureaucracy or entitlement program. It would establish an innovative partnership that would stimulate free enterprise and spur private sector involvement in a statewide problem by creating a vehicle to receive private, charitable funds. Eligibility and benefits would be structured to ensure cost-effectiveness and plan availability and to channel high-risk children to the state's high risk pool. Tax breaks would be used as incentives to encourage participation by insurers and health maintenance organizations.

Opponents said HB 3 would create a new state bureaucracy and public benefit program that could continue to grow in an already bloated state government. There would be no guarantee that parents would purchase coverage or that the pool would be sufficiently large and composed of mostly healthy children to counterbalance the costs of covering care for high risk and unhealthy

uninsured children. Health benefit availability through the Texas Healthy Kids Corporation would reduce employers' incentive to provide employee and dependent health benefits. Tax exemptions would be an unnecessary incentive for insurers and HMOs because their revenues and profits would greatly increase through access to a large, mostly healthy pool of children.

The HRO analysis appeared in the April 1 Daily Floor Report.

Hospital benefits for mothers and newborns

HB 102 by Gray, Greenberg, Van de Putte, McCall, et al.
Effective September 1, 1997

HB 102 requires most health benefit plans that provide maternity benefits to include coverage for inpatient care for a mother and her newborn in a health care facility for a minimum of 48 hours following uncomplicated vaginal delivery and 96 hours following an uncomplicated delivery by caesarean section. Women are not required to remain under inpatient care in a health care facility for any fixed term following birth, and a health benefit plan providing in-home postdelivery care is not required to provide the minimum hours of inpatient coverage unless considered medically necessary by the attending physician. Health benefit plans are prohibited from employing measures that would reduce required coverage or use of benefits and must provide timely postdelivery care to mothers or newborn children discharged before the expiration of specified minimum inpatient hours of coverage. "Postdelivery care" includes postpartum health care services and necessary testing as well as parent education, assistance and training in breast-feeding and bottle-feeding.

Supporters said HB 102 would ensure that mothers and the 300,000 infants born in Texas each year receive necessary medical care and attention and help prevent illness and mortality arising from complications that go unmonitored or untreated after too hasty release from a hospital. HB 102 would implement provisions that would conform to new federal requirements but would not require a minimum hospital stay in all cases, thereby containing any additional costs. It also would improve on federal mandates by requiring health benefit plans to ensure that appropriate and necessary postdelivery care was rendered to mothers who chose to leave the hospital setting.

Health care cost cutting has steadily reduced health benefit coverage for inpatient stays for maternity care, and so-called "drive-by deliveries" can harm both mothers and infants. About 14 percent of women and 11 percent of newborns experience complications after their release from the hospital, and many infant problems do not become apparent within the first 24 hours after delivery. HB 102 would not increase costs, dictate medical practice, nor place into law provisions that could not be modified to meet changing medical standards.

Opponents said legislators should avoid setting standards for the care and treatment of specific medical conditions or parts of the body. Minimum stay requirements could infringe on medical decisionmaking and practice trends by setting arbitrary standards for a specific medical condition. Also, longer hospital stays increase the risk of exposing the mother and child to non-maternity-related diseases and complications. Mandatory minimum inpatient stay and postdelivery benefits would increase the cost of health insurance, just as any mandated benefit would, and could thereby limit the availability of employer-sponsored health insurance or the access to insurance by individuals and families.

The HRO analysis appeared in Part 1 of the May 13 Daily Floor Report.

HB 119 requires tobacco product manufacturers to file with the Texas Department of Health an annual report identifying ingredients other than tobacco and water in the cigarettes or tobacco products they distribute in Texas, beginning January 1, 1998. The report for each product also must contain a nicotine yield rating to reflect the nicotine intake for the average consumer of the product.

Information included in an annual report is considered public information, unless the attorney general advises that the disclosure would constitute an unconstitutional taking of property or if the department determines the information would not reduce public health risks. Trade secrets under state or federal law also will be considered confidential. The department may petition a district court in Travis County to prohibit the sale or distribution of a tobacco product if the manufacturer fails to file the required annual report or grant other injunctive relief.

Supporters said HB 119 would require from tobacco product manufacturers the same duty to report ingredients as imposed on other manufacturers of food products and would protect trade secrets similar to the reporting program operated by the federal government. There is ample reason to believe that additives used in the manufacture of cigarettes and tobacco products may be harmful when burned and inhaled into the lungs. Cigarette smoking has been linked to cancer and bronchitis since 1964, and in December 1992 the Environmental Protection Agency also found “secondhand smoke” to be carcinogenic. Tobacco products should be held to more stringent reporting standards than food and drink products because their ingredients change chemical properties while burning and are inhaled into the lungs. In addition, such toxic chemicals as formaldehyde, arsenic and ammonia may be used to improve tobacco product flavor.

Opponents said HB 119 would conflict with federal law and result in the public disclosure of manufacturer trade secrets. The bill would not add any new public health protections; ingredient lists and nicotine ratings are already developed and required by the federal government. Federal law only requires manufacturers to submit one ingredient list that covers all of their tobacco products, not a list for each tobacco product, which would reveal trade secrets. The bill would subject tobacco products to ingredient disclosure requirements that are far more extensive than those that apply to foods. Food manufacturers do not have to divulge fragrances, colors and other additives, as this bill would require from tobacco manufacturers. Tobacco companies have spent millions of dollars to create markets for unique brands, investments that would be compromised by HB 119.

The HRO analysis appeared in Part 1 of the May 12 Daily Floor Report.

Releasing contact lens prescriptions to patients

HB 196 by Maxey, Howard
Generally effective January 1, 1998

HB 196, the Texas Contact Lens Prescription Act, requires optometrists and physicians to release contact lens prescriptions for most patients on request. The bill also specifies which professionals may fill contact lens prescriptions, establishes lens dispensing permits for opticians and optical corporations, and includes civil and administrative enforcement provisions.

A physician or optometrist may exclude categories of contact lenses from prescription release if the exclusion is clinically indicated and may refuse to give a contact lens prescription to a patient due to the patient's health or nonpayment of rendered services. Patients may request contact lens prescriptions at any time during the period when the prescription is valid, and in most cases prescriptions cannot be issued that expire before the first anniversary of the date the patient's prescription parameters were determined.

HB 196 also specifies that a contact lens prescription cannot contain a notice waiving the liability of the physician, optometrist, or therapeutic optometrist and that such providers are not liable for any subsequent use of a prescription if they have not reexamined the patient.

Supporters said HB 196 would help consumers obtain needed prescriptions for contact lenses in a timely and convenient manner, allow them to competitively shop for contact lenses, and prevent unnecessary and duplicative eye examination expenses or over-priced contact lens charges. The bill would clarify an ambiguity in the law that prevents many patients from getting their contact lens prescription in emergencies, when moving or traveling, or when shopping around for the best contact lens prices. Texas law does not explicitly require optometrists or physicians to release prescriptions to patients, so some refuse to do so even though the patient has paid for the service that created the prescription. Physicians and optometrists could refuse to release a prescription for health-related reasons, including any potential harm to the patient's ocular health, or because the prescription was more than one year old. They also could exclude a category of contact lenses if clinically indicated.

Opponents said exceptions from the mandatory release of contact lens prescriptions should be made for hard contact lenses, which represent about 15 percent of the market, because they pose greater risk to the eye than soft lenses. Due to the way they are made, hard lenses warrant closer scrutiny by a patient's eye doctor in fitting and wearing.

The HRO analysis appeared in Part 2 of the April 29 Daily Floor Report.

HB 2913 makes the Health and Human Services Commission responsible for adopting reasonable standards governing the determination of Medicaid rates and implementing Medicaid managed care plan contracts. The commission must use specified considerations when awarding contracts, and contracts have to contain specified conditions, including procedures to ensure accountability, cost-effective rates, and patient access to care and complaint processes.

In each health care service region, the commission must contract with at least one licensed HMO that is wholly owned and operated by a hospital district or is a nonprofit corporation that contracts with a hospital district. For at least three years, managed care organizations must include within their networks health care providers who have previously provided significant levels of Medicaid and charity care, accredited primary care residency programs, and designated disproportionate share hospitals. The commission must appoint a regional advisory committee 180 days prior to the date it plans to begin Medicaid managed care in the region.

HB 2913 also includes provisions specifying implementation plan development, recipient enrollment procedures, marketing guidelines, and other plan features.

Supporters said HB 2913 would improve the implementation and oversight of a significant and evolving change in the Medicaid program — the shift from fee-for-service reimbursement of providers to managed care systems — by making one agency accountable for managed care contracting. The bill would require the inclusion of traditional charity care providers in managed care plans because of the investment local communities have made in indigent care and in order to maintain established Medicaid provider-patient relationships.

The bill would appropriately shift only managed care contracting responsibilities to the commission, not the administration of all Medicaid programs, which should await a comprehensive review of the delivery of health and human services, such as the sunset review scheduled during this interim.

Opponents said HB 2913 would only address Medicaid managed care — it would still leave other components of the Medicaid program, such as nursing home payments, fee-for-service contracts, and investigations, fragmented between several state agencies.

The HRO analysis appeared in Part 1 of the May 7 Daily Floor Report.

SB 54 requires most health benefit plans to permit women to have direct access to the health care services of a designated obstetrician or gynecologist without a referral by their primary care physician or prior authorization or precertification. Plans must include a sufficient number of properly credentialed obstetricians and gynecologists to ensure access to diagnostic, treatment and referral services for any disease or condition within the scope of the obstetrician or gynecologist. A plan may not impose a copayment or deductible for direct access unless such a cost is imposed for access to other services provided.

Supporters said SB 54 would allow women to obtain the obstetric and gynecologic (ob/gyn) health care services they need without the cost, inconvenience and delay of first obtaining a referral from another primary care physician. Most managed care plans require women to visit their primary care physician in order to receive a referral to an ob/gyn specialist, even though the health care problem may be chronic or potentially serious and require immediate and appropriate medical response.

SB 54 would maintain HMO cost containment practices while improving patient access to care by allowing direct access to ob/gyn care only for obstetrical or gynecological problems. The patient would not be allowed to designate the ob/gyn specialist as her primary care doctor; SB 54 would properly restrict case oversight and management to true primary care physicians. The bill also would allow ob/gyn specialists to refer patients to other specialists for necessary treatment only if they kept the primary care physician informed of the patient's condition and any medical services provided in order to maintain necessary oversight of the patient's total health care condition and ensure the patient receives all necessary medical care.

Opponents said patient referrals by ob/gyn specialists to other specialists should be subject to a concomitant authorization by the patient's primary care physician. Without such authorization, the primary care physician would lose oversight and control over the patient's utilization of medical services. This could lead to unnecessary or duplicative services and testing, increasing the costs of patient care. Alternatively, women should be allowed to declare an obstetrician or gynecologist as their primary care physician. For most women, ob/gyn health care services constitute their primary medical need, and a obstetrician or gynecologist may be the only doctor they require for most of their lives.

The HRO analysis appeared in Part 1 of the May 22 Daily Floor Report.

SB 55 imposes penalties on retailers who sell cigarettes or tobacco products to people under the age of 18, prohibits distribution of tobacco samples or coupons to minors, and limits the placement of cigarette vending machines and signs. Tobacco products may not be sold to anyone under age 27 without proper identification. The bill authorizes the comptroller to make unannounced inspections with local law enforcement officers to ensure compliance with regulations and use of underage “decoys” to test compliance. Local entities may enact more stringent regulations regarding the sale, distribution, or use of cigarettes or tobacco products. Minors convicted of unlawfully possessing or using tobacco may be subject to a \$250 fine or required to attend an approved tobacco awareness program. Driver's licenses or permits may be suspended or denied to minors who fail to attend a program.

The bill also imposes new permit fees on retailers and a fee on cigarette advertising to fund a tobacco education program and a grant program for youth groups dedicated to reducing tobacco use by minors. The Texas Department of Health must report every two years on the status of smoking and the use of tobacco products in the state.

Supporters said SB 55 would offer a reasonable and uniform approach to preventing children's access to cigarettes and other tobacco products. It would place responsibility for restricting cigarette sales on cigarette distributors, retailers, and the young people themselves. It would impose penalties but offer alternatives to fines that would help stop the flow of tobacco sales to minors and educate young people about the hazards of smoking. While its provisions are reasonable and fair, it would set an example by instituting one of the toughest and most comprehensive efforts against smoking by minors in the nation.

Opponents said the punishments imposed by SB 55 would be excessively harsh on young people who buy cigarettes and on retailers and employees who sell them. Young people who want to buy cigarettes will often go to great lengths to do so. Retailers should not be held responsible for minors who succeed in purchasing cigarettes nor forced to regulate social behavior. The bill is unnecessary and would be too costly. Devoting scarce law enforcement to offenses like tobacco sales and purchases of tobacco by minors would be a poor use of enforcement resources that could be better applied to other crimes. The bill would do little to deter smoking among the young.

The HRO analysis appeared in Part 1 of the May 21 Daily Floor Report.

SB 386 amends the Civil Practices and Remedies Code to hold health insurance carriers, HMOs, and other managed care entities liable for damages for harm to an insured or an enrollee for failure to exercise ordinary care when making health treatment decisions. The bill also amends the Insurance Code to create standards for actions by utilization review (UR) and independent review organizations (IRO).

In order to maintain a cause of action, a person first has to have exhausted the entity's UR and appeals processes or give written notice of the claim of harm to the insurer, HMO, or managed care entity and agree to submit the claim to a review by an IRO. The commissioner of insurance is responsible for promulgating rules and standards governing the certification, selection and operation of IROs, designating IROs that meet state standards, and overseeing IROs for compliance. An enrollee with a life-threatening condition is entitled to an immediate appeal of an adverse determination to an IRO without complying with further UR or HMO internal review processes.

Supporters said SB 386 would ensure that managed care organizations are held accountable for health care treatment decisions that affect the quality of diagnosis and care of enrollees. It would provide two recourses that would allow an impartial review of claims and impose penalties for harm caused by an entity's failure to exercise care. The bill would not create a new cause of action, but remove a commonly used defense that prevents managed care entities from being held accountable for their actions. Many HMOs hide behind statutory prohibitions against the corporate practice of medicine, which, by limiting the practice of medicine to doctors, removes from liability organizations that may also be in the business of making medical decisions.

The bill would not increase costs because it would not force managed care entities to practice "defensive medicine" and would not increase the liability of responsible providers. It would simply ensure that patient care and treatment are given the same weight as cost containment when decisions to pay for care are being made.

Opponents said SB 386 would cause an avalanche of lawsuits by enacting a new cause of action that would negate many of the tort reform measures enacted last session and inappropriately hold managed care entities to a medical malpractice standard. The court system is not the appropriate or best place to protect patient health care; increased liability has not been found to increase quality. Texas should at the very least enact this bill in stages, establishing IROs this session and new tort actions, if needed, next session. SB 386 also would undermine UR and pre-authorization controls that are essential to containing runaway health care costs.

Notes. The 75th Legislature enacted four other bills that substantially affect HMO regulation:

- SB 382 increases solvency standards and establishes a new “limited health care services” HMO plan type;
- SB 383 codifies regulations developed in 1996 and other requirements related to preferred provider organizations (PPOs);
- SB 384 amends utilization review requirements pertaining to HMOs and PPOs; and
- SB 385 places into statute regulations developed in 1996 and other requirements related to HMOs.

The HRO analyses of these bills appeared in Part 2 of the May 23 Daily Floor Report. The bills take effect September 1, 1997, except SB 393, which took effect June 19, 1997.

The HRO analysis of SB 386 appeared in Part 1 of the May 7 Daily Floor Report.

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School finance, increasing homestead exemptions

HB 4 by Craddick, Junell

Effective September 1, 1997, and upon approval of HJR 4

HB 4 would appropriate \$1.04 billion to cover the cost of an additional \$10,000 exemption from taxable value of residential homestead property for calculating school ad valorem taxes, if voters approve HJR 4 on August 9, 1997. Since the additional state money would result in a 6 percent raise over the next two years for teachers on the minimum salary schedule, HB 4 also would appropriate money to school districts to cover this cost. Increased salaries would extend the length of teacher contracts by one day in the 1997-1998 school year and a second day in the 1998-1999 school year. HB 4 also would appropriate an additional \$65 million to an enrollment contingency fund to cover unexpected increases in enrollment growth.

Regardless of the outcome of the election on HJR 4, HB 4 will:

- statutorily dedicate lottery revenues to the foundation school program;
- increase the state share of lottery revenues by 5 percent, generating an additional \$300 million in the next biennium;
- eliminate the recapture of debt services taxes from districts above the maximum wealth limit, at a cost of \$56 million to the foundation school program;
- require rollback rate calculations to factor in state as well as local revenues, to conform to a recent district court decision; and
- create a facilities tier for new debt, establishing a guaranteed yield of \$28 per penny of tax effort per student in average daily attendance to assist school districts in financing construction and renovation of school facilities.

Supporters said when the constitutional amendment allowing a state lottery was presented to the voters, many believed that 100 percent of the proceeds would go to support public education. Although that was not the case, there is no reason why it should not be. Dedicating lottery revenues to public education would allow those who play the lottery to feel that, even if they did not win, they were doing something positive for the children of Texas. Popular support for the lottery could increase if its revenues were clearly dedicated for education.

One of the most significant costs for schools is facilities. The need for facilities is constant, as old facilities must be replaced and new facilities built for a growing student population. The new facilities funding system proposed by HB 4 is designed to help districts that otherwise would not be able to raise enough money because of their low property wealth. Thus, those districts with the lowest property wealth would receive first draw on the money appropriated for new facilities.

Opponents said dedicating lottery revenues would do nothing to increase state spending on education and could actually hurt education funding. If lottery revenue fell short of projected

revenue, the school system might be underfunded. The experience in other states that have dedicated lottery funds is that less money is budgeted for education in hopes that increased lottery revenues will make up for the difference.

Funding new facilities through a guaranteed yield system would significantly increase state appropriations. While the first biennial appropriation would be only \$200 million, appropriations would have to continue for the life of the bonds, anywhere from 10 to 20 years. Any new facilities money would have to be added to that \$200 million amount. By the tenth year of the program, if \$200 million were added every biennium, the total state cost of the program would be \$1 billion.

Notes. For a discussion of the homestead exemption and the portability of the 65-and-over school tax freeze, see HJR 4 in this report.

The HRO analysis of HB 4 appeared in the April 22 Daily Floor Report. The HRO digest of the conference committee report on HB 4 appeared in the May 31 Daily Floor Report.

Increasing the homestead exemption, portability of 65-and-over tax freeze

HJR 4 by Craddick, Junell
On August 9, 1997, ballot

HJR 4 would amend the Texas Constitution to increase from \$5,000 to \$15,000 the exemption from taxable value of residential homestead property for calculating school ad valorem taxes. The Legislature could provide that all or part of the exemption not apply to a district or political subdivision that imposes property taxes for public education purposes but was not the principal school district providing public education throughout its territory. The exemption would take effect in the current tax year. HJR 4 also would allow a proportional amount of the school tax freeze for persons 65 and over to be transferred to another homestead. The \$10,000 additional homestead exemption would be multiplied by the 1997 school tax rate to lower the tax of individuals now receiving the tax freeze.

If HJR 4 is approved by the voters on August 9, 1997, HB 4, its enabling legislation, would appropriate \$1.04 billion to cover the cost of the homestead exemption increase. Since under state law the additional state money for public education would result in a 6 percent raise over the next two years for teachers on the minimum salary schedule, HB 4 would appropriate money to school districts to cover the increased cost of teacher salaries. It also would appropriate an additional \$65 million to an enrollment contingency fund to cover unexpected increases in enrollment growth.

Supporters said the \$5,000 homestead exemption should be increased to \$15,000 to give equitable and meaningful property tax relief to homeowners in Texas. HJR 4 would not reduce the amount of money used by schools; the state would send school districts enough to cover local property tax revenues lost due to the additional exemption. The net result would be one of the largest tax reductions in state history. The infusion of over \$1 billion of state money to the school finance system would increase the state's share of total education costs from the current 46 percent to 49 percent, which would reduce the disequalizing effect of the wealth disparities among the 1,044 school districts produced by property tax bases that vary widely in value per student. The increased homestead exemption also would reduce the effects of recapture, the "Robin Hood" system put into place under SB 7 by Ratliff in 1993 to mitigate the effects of wide disparities in wealth among school districts in Texas.

In 1995, the Legislature enacted SB 1 by Ratliff, tying the teacher minimum salary schedule to increases in the state share of the cost of education through the foundation school program. The state funding increase of \$1.04 billion would result in a 6 percent raise over the next biennium for teachers on the minimum salary schedule. HB 4, the enabling legislation for HJR 4, would appropriate enough state money to cover the extra costs to school districts from the increase in teacher salaries. If HJR 4 were not approved, the statewide teacher minimum salary schedule for the 1997-1998 and 1998-1999 school years would not be increased.

Portability of the 65-and-over tax freeze would be an important addition to the range of homestead exemptions. Current law penalizes persons 65 and over who move to a different residence, even though many people in this age category move to smaller homes because they need less space. Some are also forced to move because they cannot afford the taxes, mortgage payments, or insurance premiums on their current home. However, by moving, they lose the school tax freeze that they enjoyed. Senior citizens should not be forced to stay in the same home after they turn 65 just to retain their property tax freeze. The tax freeze for seniors is a benefit that should follow individuals, not the property they happened to be living in at the time they turned 65.

Opponents said HJR 4 would take \$1 billion in state taxes already raised from all taxpayers and give it to the 60 percent of individuals who own their homes. The other 40 percent of individuals, those who rent, would not see any decrease in their rents. Moreover, businesses would not see any relief in the amount of property taxes that they pay, even though businesses pay roughly 60 percent of all school property taxes. If the state has saved money during the last budget cycle, it should be used for the benefit of all Texans, not just a select few. Even the select few would get only an average \$140 a year in property tax relief, not even \$12 a month. While HJR 4 would shift more than \$1 billion of state money to local school districts, there would be no net increase in spending on schools. If the \$1 billion surplus was not used for modest property tax relief, it could be used to fund many other worthwhile programs for the benefit of all Texans.

There is no guarantee that the state money used to replace local tax revenue lost by the enhanced homestead exemption would be available in the next biennium. The \$1 billion used for this budget cycle is available only because of cost savings and overestimates in program growth and underestimates in revenue growth. Such savings may not be realized again. If these revenues are not available again, the Legislature would be forced to increase state spending, raise taxes, or cut spending for basic services, or school districts would have to raise local taxes dramatically.

The portability of the 65-and-over tax freeze should be carefully structured to provide relief only to those seniors who actually need the exemption. A senior who can afford to move to a larger, more expensive house should be required to pay the property taxes associated with such a move. There would be substantial costs in making the 65-and-over tax freeze portable. Districts would lose approximately \$12 million per year due to the portability of the tax freeze. The state would pay districts for that loss in property tax revenues, but state funding calculations include a one-year lag. The cost to the state would be cumulative: for example, the cost in 2000 is estimated to be \$12.4 million; in 2001, it would rise to \$24.2 million, according to LBB estimates.

The HRO analysis of HJR 4 appeared in the April 22 Daily Floor Report. The HRO digest of the conference committee report on HJR 4 appeared in the May 31 Daily Floor Report. For a more detailed analysis of HJR 4, see House Research Organization Constitutional Amendment Report — August 9, 1997, Election, Number 75-15, June 19, 1997.

Sales tax exemptions for property used in manufacturing processes

HB 1855 by Eiland
Effective October 1, 1997

HB 1855 amends sec. 151.318 of the Tax Code to limit sales tax exemptions for tangible personal property to property that is directly used or consumed in or during the manufacturing process and that directly makes or causes a physical change to the product or any intermediate or preliminary product that becomes an ingredient or component part of the final product. Intraplant transportation equipment used to move a product or raw material in connection with the manufacturing process, including all piping, conveyor systems and machinery and equipment or supplies used to maintain or store tangible personal property, are ineligible for the sales tax exemption.

These limitations do not apply to semiconductor fabrication cleanrooms and equipment.

The bill also specifically allows sales tax exemptions for actuators, steam production equipment and its fuel, in-process flow through tanks, cooling towers, generators, heat exchangers, electronic control room equipment, and computerized control units that are used to power, supply, support, or control equipment used to generate electricity, chilled water or steam for final sale. Taxpayers claiming an exemption under sec. 151.318 have the burden of proving that the exemption is applicable.

Supporters said the bill would close a loophole in the Tax Code that some manufacturers currently are exploiting at a cost of millions of dollars to state tax revenues and increase state revenues by an estimated \$400 million between 1998 and 2002. The exemption for items used in the manufacturing process was never intended to cover all items associated with that process, and the comptroller had interpreted this provision to deny sales tax exemptions for equipment and material not directly used in the manufacturing process. That interpretation was overturned by the Austin Court of Appeals in *Sharp v. Tyler Pipe* (919 S.W.2d 157) and *Sharp v. Chevron Chemical Co.* (924 S.W.2d 429) as too narrow a reading of the statute. The Texas Supreme Court declined to review the decisions. The effect of the appeals court's siding with manufacturers opened up the door for further appeals for exemptions for items purchased to facilitate the normal course of manufacturing operations.

Opponents said HB 1855 would too strictly define the materials exempt under sec. 151.318 of the Tax Code and would effectively impose new taxes on certain materials and equipment essential to processing oil or gas that cause a chemical or physical change without actually coming into physical contact with the oil or gas.

The HRO analysis appeared in Part 1 of the May 2 Daily Floor Report.

Property tax appraisal limits; portability of senior tax freeze

SJR 43/SB 841 by Cain, et al.

On November 4, 1997, ballot; generally effective January 1, 1998

SJR 43 proposes different constitutional amendments, depending on the outcome of the August 9, 1997, constitutional election on HJR 4, which includes a proposal to allow persons age 65 and over to transfer their school tax freeze to another homestead. If HJR 4 is approved, SJR 43 will present a proposed amendment to allow the Legislature to limit the maximum average annual increase in homestead appraisal valuations to 10 percent or more for each year since the most recent tax appraisal. Any limitation on appraisal increases would take effect on January 1, 1998, or on January 1 of the tax year following the first tax year that a property owner qualified for a homestead exemption and would expire on January 1 of the first tax year that the owner or surviving spouse no longer qualified for the homestead exemption. If HJR 4 is not approved, the proposed amendment presented by SJR 43 also would authorize the Legislature to make laws to transfer all or a proportionate amount of the 65-and-over school tax freeze to a different homestead. Regardless of whether HJR 4 is approved, SJR 43 provides that if all or a portion of the 65-and-over tax freeze was portable to a new homestead, the Legislature could permit school districts to apply the tax freeze transfer retroactively.

SB 841 would limit the appraised value of a homestead for any tax year to no more than the property's market value or the last appraised value plus 10 percent per year since the last appraisal, plus the market value of any new improvements increasing the market value, whichever is less. Implementation of this provision of SB 841 is contingent on approval of SJR 43.

If HJR 4 is not approved in August 1997 and SJR 43 is approved in November 1997, SB 841 would allow a proportional amount of the 65-and-over tax freeze to be transferred to another homestead. In addition, the tax freeze would be prorated from the individual's 65th birthday, rather than taking effect the next tax year. Surviving spouses age 55 or older would receive the freeze if their spouses died at age 64 but in the year they would have turned 65. School districts in counties with a population of less than 75,000 could apply retroactively the 65-and-over tax freeze transfer to a new homestead acquired on or after January 1, 1993. The school board would have until January 1, 1999, to agree to make the 65-and-over tax freeze retroactive, and the transferred freeze would apply only to future school taxes.

The bill also amends provisions of the Tax Code that will take effect January 1, 1998, regardless of the outcome of the constitutional amendment elections. The bill allows homeowners to defer payment of taxes or abate a lawsuit to collect delinquent property taxes on the portion of their homestead's appraised value that exceeds the market value of any new improvements and 105 percent of the appraised value for the preceding year. The homeowner must file the application for deferral before the taxes become delinquent. The deferred taxes, plus 8 percent annual interest, are due when the property ceases to be a homestead.

Chief appraisers must follow mass appraisal standards that comply with the Uniform Standards of Professional Practice and specific standards outlined in law when using market, cost and income approaches to determining market value. They also must consider the effect of involuntary government restrictions when appraising private property and must account for rent limitations in appraising low-income rental property. Chief appraisers must send detailed explanations of the time and procedures for protesting a valuation or a copy of the state pamphlet on Taxpayers' Rights, Remedies and Responsibilities with the appraisal notice. Notices denying a special appraisal application must be sent to property owners by certified mail. Taxing units must hold a public hearing and publish notice in newspapers before adopting a tax rate that will result in any increase in total revenue from the preceding year. Appraisal review boards must provide hearing times in the evening and on weekends.

SB 841 also increases the number of appraisal district directors from five to six, adding the tax assessor-collector as ex-officio member, and the number of auxiliary appraisal review board members. It prohibits homeowners from receiving the same exemption for more than one homestead in the same year and assesses an additional penalty equal to 50 percent of the amount of tax on the home to persons receiving fraudulent exemptions. Property owners of only part of a property will have their exemption calculated according to their ownership interest. Religious and charitable organizations will receive property tax exemptions immediately upon qualifying, rather than having to wait until January 1 of the next year.

Supporters said these provisions would revise the property tax system and make it more responsive to property owners in several ways: limiting property tax appraisals to 10 percent a year; allowing persons reaching the age of 65 to take immediate advantage of the senior tax freeze, rather than having to wait until the next tax year; permitting property owners to defer taxes in certain circumstances; and requiring that appraisal hearings be held in the evenings and on weekends to accommodate taxpayers' schedules. At the same time, strong penalties would be established to prevent fraudulent use of homestead exemptions,

Opponents said these provisions would be bought at a great price. To compensate for revenue lost to school districts, over the three-year period 2000 to 2002, portability of the 65-and-over tax freeze would cost the state more than \$70 million, while the 10 percent annual appraisal value limitation would cost nearly \$60 million. If a fair and accurate appraisal shows the value of property has increased, then property owners should have to pay their fair share of taxes rather than be subsidized by other taxpayers. Furthermore, cities and counties also would lose between \$5 and \$6 million in lost taxes each year as a result of the appraisal limitation, meaning either a reduction in services or an increase in tax rates.

The HRO analysis for SJR 43 appeared in Part 1 of the May 22 Daily Floor Report; the analysis for SB 841 appeared in Part 1 of the May 23 Daily Floor Report.

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Lowering blood alcohol content for definition of intoxication

HB 133 by Hochberg
Died in Senate committee

HB 133 would have lowered the blood alcohol concentration for defining intoxication in the Penal Code from .10 to .08.

Supporters said lowering the blood alcohol content level that is considered intoxicated would make driving illegal for persons who had consumed enough alcohol to impair their driving performance. This would raise the perceived risk of being arrested for driving while intoxicated, make drivers more cautious about driving after drinking, and thus save lives and money and prevent injuries from alcohol-related accidents. Defining intoxication at .08 would be a reasonable policy that would not interfere with Texans' ability to enjoy alcohol responsibly. Research shows that at .05 blood alcohol content most people show measurable impairment. At a blood alcohol content of .10, drivers are at least six times more likely to be involved in a crash than when sober, and there is considerable evidence that persons are also dangerously impaired at .08.

Prosecutors should be able to handle any increase in additional DWI cases or actions that would result from this bill. In fact, the stronger message sent against DWI would help deter violations and ultimately reduce prosecutions.

Opponents said lowering the legal blood alcohol level from .10 to .08 could cause persons who might have been drinking alcohol but who were not necessarily intoxicated to be unfairly convicted of intoxication crimes. Current law provides for a reasonable legal blood alcohol content level. At the .08 level, many persons could retain normal use of their mental or physical faculties and not be intoxicated. HB 133 would come dangerously close to criminalizing drinking alcohol rather than criminalizing a specific act committed while intoxicated.

HB 133 is unnecessary because current law also defines "intoxicated" as not having the normal use of mental or physical faculties. Persons who meet this definition at .08 blood alcohol content, or another level, could be convicted of an intoxication offense without a change in the law.

HB 133 could overburden prosecutors with an increase in DWI cases. HB 133 could actually make it more difficult to get DWI convictions because many persons with a .08 alcohol level might not appear in videotapes to be impaired and might perform well on standard tests of physical abilities.

The HRO analysis appeared in the April 30 Daily Floor Report.

Expiration of driver's licenses

HB 1200 by Cuellar
Effective September 1, 1997

HB 1200 extends the expiration date for driver's licenses from the current four years to six years. The bill increases fees for renewing most driver's licenses from \$16 to \$24; licenses to operate motorcycles or mopeds from \$21 to \$32; and commercial drivers licenses from \$40 to \$60. Licenses allowing the holder to operate both automobiles and motorcycles and mopeds incur an additional \$8 fee. HB 1200 also increases the fee for personal identification certificates from \$10 to \$15 for persons under 60; persons 60 and older pay a \$5 fee. Personal ID certificates for individuals 60 years and older do not expire.

Supporters said extending the expiration date of driver's licenses would cut down on long lines at Department of Public Safety (DPS) offices and allow DPS to provide better customer service. DPS now processes 4.2 million new applications and renewal forms each year at a cost of \$1.2 million. There is no reason to update this information every four years at such an expense. Texas licenses now use such modern technology as magnetic strips and bar codes, enabling police officers to verify a driver's eligibility and legal standing almost instantly. Renewals at six-year intervals would still preserve the integrity of documents, jury selection, and several public safety programs such as municipal "Failure to Appear" programs. Driver safety would also be maintained because DPS employees would still be able to screen motorists at regular intervals for physical limitations and test them for visual and hearing impairments. All of these programs and features would be threatened with lifetime licenses.

Opponents said extending the driver's license expiration period was merely an excuse to increase license fees. **Other opponents** said implementing the comptroller's recommendations for lifetime licensing would have provided for even more customer convenience, eliminated walk-in traffic and long lines in DPS offices, and reduced the costs of postage and processing applications.

The HRO analysis appeared in Part 2 of the April 21 Daily Floor Report.

Zero tolerance for minors driving under the influence

SB 35 by West
Effective September 1, 1997

SB 35 makes it illegal for minors under the age of 21 to operate a motor vehicle while having any detectable amount of alcohol in their blood. This Class C misdemeanor is punishable by a fine and temporary suspension of the minor's driver's license. Repeat offenders face harsher penalties, including possible jail time. The bill also requires offenders to participate in community service and alcohol awareness courses. Law officers can issue written citations to certain offenders violating the zero tolerance standard but not judged to be suffering actual or apparent impairment of their driving faculties and reactions. Law officers also may take minors into custody on reasonable grounds to obtain a blood or breath sample for analysis.

SB 99 allows automatic suspension of driver's licenses for those minors with any detectable amount of alcohol in their systems, permits occupational licenses to be suspended under certain circumstances following drinking-and-driving arrests and convictions involving juveniles, and sets new record-keeping and reporting requirements for local and state jurisdictions that maintain certain court records of such arrests and convictions. The bill also amends other laws concerning juveniles and the sale, use and purchase of alcohol.

Supporters said accident rates of juvenile drivers and the large number of alcohol-related traffic fatalities in Texas among this group require strong and decisive measures. If Texas fails to take action with a zero tolerance initiative, under federal mandates requiring states to combat teen drinking and driving the state would lose almost \$40 million in federal highway funds. Since minors cannot legally purchase alcohol in the state, there is no justification for tolerating youthful drivers operating motor vehicles while under the influence of any measurable level of alcohol. Studies have demonstrated that incremental increases in the percentage level of blood alcohol lead to larger decreases in the level of motor skills and driving ability. The sanctions included in SB 35 should provide the necessary deterrent to cause juvenile drivers to curtail their overall use of alcohol and to terminate any alcohol abuse while driving motor vehicles.

Opponents said that the zero tolerance standard would lead to arbitrary and selective enforcement of the law. The absolute ban on any detectable level of alcohol is tougher than the federally mandated standard. Many over-the-counter medicines contain some measurable level of alcohol and could cause false positives. The law would single out juveniles for harsh punishment when the societal problem with alcohol is present among all age and income levels in Texas. Provisions for maintaining detailed records on juvenile arrests and convictions and sharing that information with other law enforcement entities could violate the confidentiality rules intended to provide special protection to criminal records of juveniles.

The HRO analysis appeared in the May 20 Daily Floor Report.

Repeal of mandatory helmet law for adult motorcyclists

SB 99 by Patterson
Effective September 1, 1997

SB 99 changes state law to permit adult motorcycle operators and passengers to ride their vehicles without using a motorcycle helmet or other protective headgear. In order to operate or ride a motorcycle without wearing a helmet, a person must be at least 21 years of age and have successfully completed a motorcycle training and safety course or be covered by a health insurance plan providing at least \$10,000 in medical benefits for injuries incurred as a result of a motorcycle accident. The Department of Public Safety must issue a sticker to all registered motorcycle owners providing satisfactory evidence of successfully completing the training and safety course or having obtained the appropriate level of insurance coverage. Each sticker costs \$5 and is good for three years. The bill also requires that the \$5 sticker fee plus \$5 from motorcycle license fees be deposited into a new Motorcycle Education Fund Account created to defray the cost of administering the motorcycle operator training and safety program.

Supporters said safety and health data on the efficacy of using helmets are inconsistent and inaccurate. Wearing helmets may actually increase neck and spinal injuries. And while helmets can make head injuries survivable, it is often at an enormous medical cost and reduced quality of life. Even helmet manufacturers acknowledge that their products can offer only limited protection for the wearer at speeds higher than 15 miles per hour. Helmets can do nothing to lessen injuries resulting from the rebound effect upon the brain and cut down the rider's peripheral vision and hearing. Their weight can increase fatigue and lower the rider's concentration level. In Texas summer weather, the heat and discomfort caused by helmets can be debilitating. Only motorcycle training and thorough safety instruction has been shown to really lower the accident rate and provide added protection to riders.

Opponents said SB 99 would increase the severity of motorcycle accidents in Texas. Riders without helmets are far more likely to suffer a head injury, and total hospitalization costs for such riders are higher than for protected riders. Measurable and verified data from the National Highway Traffic Safety Administration have consistently shown that helmet use is effective in preventing motorcycle deaths and head injuries and in lessening their severity. Repealing the helmet law would cause more severe motorcycle driver and passenger accidents, resulting in increased injuries and fatalities, higher insurance costs and premiums for all motorists, and declining availability of insurance for cyclists. A mere \$10,000 in health and medical coverage would not provide an adequate level of coverage, given the severity of injuries normally associated with motorcycle accidents and health care costs, and taxpayers would have to cover the shortfall.

The HRO analysis of HB 350, companion to SB 99, appeared in the April 14 Daily Floor Report.

SB 370 continues the Department of Transportation (TxDOT) for 12 years and implements changes recommended by the sunset review process. The bill abolishes the Texas Turnpike Authority (TTA) as a separate agency, moving its functions to TxDOT, and creates the North Texas Turnpike Authority (NTTA) to take over operations of TTA in the Dallas-Fort Worth area. It also allows TxDOT to approve the creation of other regional turnpike authorities (RTAs) by two or more counties as long as one has a population over 300,000.

TTA becomes a division of TxDOT but retains all power to finance and construct toll roads. TxDOT may charge a toll on current non-toll roads for maintenance costs if public hearings are held. The NTTA and other RTAs have the same authority as TTA concerning toll road projects. The NTTA, which includes Dallas, Tarrant, Collin and Denton counties, takes over the four projects currently operated or under construction in that area and must pay fair compensation for the assets.

Other changes made by SB 370 include: establishing a state infrastructure bank to encourage investment and develop new financing techniques; reviewing contractor bidding to ensure ability to meet quality, safety and timeliness standards; establishing electronic bidding procedures; increasing privatization; allowing additional means to reduce congestion; allowing more flexibility in distributing funds; creating several pilot projects and studies; allowing the installation of an emergency call box system funded by public or private entities; codifying existing contract claims procedures; and prohibiting TxDOT from selling information to be published on the Internet.

Supporters said the changes to transportation-related agencies made by SB 370 would lead to greater funding flexibility, increased revenues, cooperation between state and local governments, reduced traffic congestion, and better governance and accountability. TxDOT has done its assigned tasks well and has continually sought to improve its functions and operations. Moving TTA to TxDOT would concentrate highway building and planning functions and give TxDOT the authority to incorporate toll roads in the state highway system. Creating RTAs, including NTTA, would promote local control and cooperation between local officials and transportation agencies.

Opponents said SB 370 would fail to remedy significant administrative inefficiencies within TxDOT. Authorizing the department to build toll roads would increase the reliance of such roads, which already burden lower income Texans more than others. State highways should be open to all Texans, not reserved for the few who can afford the entry fee. Allowing the creation of the NTTA and other RTAs would further diffuse statewide transportation planning.

The HRO analysis appeared in the May 20 Daily Floor Report.

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Statewide one-call notification system for excavations

HB 2295 by Oakley, et al.
Effective September 1, 1997

HB 2295 creates the Texas Underground Facility Notification Corporation as a public nonprofit organization for coordinating statewide notification services to monitor underground excavation activities. The corporation will maintain a registry of notification centers and establish a statewide toll-free phone number to be used by excavators. Underground facilities that produce, store or convey electricity, gas, petroleum, steam, or telecommunication services must pay a \$50 annual fee, provide the name and number of contacts, and furnish maps showing underground lines. Excavators must notify centers of planned excavations and of any damage to underground facilities. Violators are subject to civil penalties of \$50 to \$100, increasing with subsequent violations. The bill does not affect any civil remedies for personal injury or property damage. Notification requirements do not apply to emergency excavations in life-threatening situations nor to cemetery internment operations, routine railroad maintenance, agricultural operations on private property, general oil and gas exploration activities, certain routine maintenance by county employees on county road rights-of-way, and contractors working in a public right-of-way under a Department of Transportation contract. Persons who intentionally remove, damage, or conceal signs regarding the location of an underground facility commit a Class B misdemeanor.

Supporters said a dial-before-you-dig system would enable citizens and businesses to verify the location of underground facilities with a single call prior to excavating. Excavation work in Texas is responsible for 45 percent of pipeline failures, and more than 250,000 Texans lose total phone service each year because of excavation damage. The current system of notification is inadequate because existing centers provide only regional information. HB 2295 would make Texas eligible for \$200,000 in federal funding for public service announcements on the one-call system. The bill would not burden residential builders, who routinely call notification centers to protect themselves from liability. It also would protect potential land purchasers unaware of hazardous underground lines by deterring unscrupulous developers from intentionally removing signs.

Opponents said the residential construction industry should be exempted from participating in the new system; current coordinated efforts between utilities and phone companies already are working. The notice requirements and liability provisions may increase new home costs. Creating a new offense for intentional removal or damage of signs also is unnecessary; criminal mischief laws cover this conduct and allow greater penalties depending on the pecuniary loss suffered.

Notes. Senate amendments to HB 2295 incorporated HB 1664 by Oliveira and Keel, penalizing intentional removal of signs marking underground facilities. The HRO analysis of HB 1664, which died in Senate committee, appeared in Part 1 of the May 5 Daily Floor Report.

The HRO analysis of HB 2295 appeared in Part 1 of the April 30 Daily Floor Report.

SB 249 assesses sales receipts of all telecommunications utilities and commercial mobile service providers at a rate of 1.25 percent to fund the Telecommunications Infrastructure Fund (TIF) and caps the fund at \$1.5 billion. Once the fund reaches \$1.2 billion, excluding interest and loan repayments, the comptroller must adjust the assessment for the following fiscal year at a rate necessary to reach \$1.5 billion. The comptroller cannot collect the assessment in a fiscal year once the fund reaches \$1.49 billion if any assessment imposed would cause the total collected to exceed \$1.5 billion. Half the funds collected go into the public schools account, formerly known as the telecommunications utilities account, and the other half goes into the qualifying entities account, previously called the commercial mobile service providers account.

The TIF board must adopt a five-year master plan for infrastructure development, including time lines and resource allocation targets, update the plan annually, and publish any amendments to it in the Texas Register.

Supporters said SB 249 would resolve the legal and financial issues surrounding the state program to wire and equip schools, libraries and hospitals in Texas with state-of-the-art telecommunications links. It would equalize the assessment rate on regular telephone companies and cellular phone companies and ensure that the TIF reached \$1.5 billion. The bill also would address the constitutional issue of unequal taxation resulting from differing assessments on the wired telephone industry and cellular service providers authorized by the 74th Legislature. Requiring the TIF board to adopt a five-year master plan would ensure that an overall comprehensive program was in place to meet the telecommunication infrastructure needs of schools, hospitals and libraries, complete with project descriptions, time lines, and resource allocation targets for each year, updated on an annual basis. Because telephone service costs are diminishing, the TIF assessment should not present a financial burden on large local telephone companies, which have large customer bases and can afford to more easily absorb the assessment costs than smaller cellular and paging companies.

Opponents said cellular, paging, and long-distance companies were originally assessed a higher rate precisely because they can pass the TIF costs on to their customers. By opting for incentive regulation in 1995, however, telephone companies agreed to a cap on their rates for four years and now are unable to pass on the TIF assessment, which places them at an unfair competitive disadvantage. Also, continuing this fee would place a financial burden on mobile service users when local exchange companies could absorb those costs much more easily.

The HRO analysis appeared in the March 24 Daily Floor Report.

Unauthorized switching of long-distance carriers

SB 253 by Barrientos, et al.
Effective September 1, 1997

SB 253 allows the Public Utility Commission (PUC) to adopt rules regarding unauthorized switching of telecommunications utilities, also called “slamming.” The rules must be adopted by the PUC by November 1, 1997.

If an unauthorized change occurs, the service provider initiating the change will have to: pay all costs to return the customer to the original utility; pay the original utility any amount that should have been paid to it for service had the customer not been changed; return to the customer any amount paid over what would have been paid if the change had not occurred; and provide billing records to the original utility. All customers changed without authorization are entitled to any benefits through the original utility.

For repeated violations, utilities may be ordered to take corrective action and may be subject to administrative penalties. In cases of repeated and reckless violations of the rules, the PUC may suspend, restrict or revoke the telecommunications company’s certificate allowing it to provide service in Texas.

Supporters said unauthorized changes in long distance carriers, popularly called slamming, is an unwelcome by-product of the proliferation of long distance companies. Customers are often tricked into changing their long distance service when they sign up for certain contests or prizes. Other customers have been switched based on targeted marketing without any authorization whatsoever. While federal rules are supposed to prevent the unauthorized change of long distance service, state rules are needed to allow the PUC to require repayment of funds collected by an unauthorized carrier and to provide penalties for repeated violations.

One goal of the rules outlined in SB 253 is to ensure that the company initiating an unauthorized change of service (the slammer) does not gain any financial benefit from such actions. Any payment the slammer received would have to be paid back to the customer’s original telecommunications company, and any overage would be returned to the customer.

Opponents said the prevention and punishment of slamming is important to telecommunications customers in Texas, but it should be addressed by the Legislature and not left up to an appointed commission. SB 253 would allow the PUC to determine what constitutes reckless conduct justifying revocation of a certificate and how long a customer has to complain about a suspected unauthorized change. These are policy questions that the Legislature should address.

The HRO analysis appeared in Part 1 of the May 22 Daily Floor Report.

SB 965, as proposed by a House State Affairs Committee substitute, would have opened the Texas electric market to retail competition as of December 31, 2001. Municipally-owned or electric cooperatives could have opted for competition at any time. The bill also would have provided mechanisms for a transition from a regulated to a deregulated market, including provisions for regulated utilities to recover 100 percent of “stranded costs” from prior investments, established standards for electricity reliability and consumer protection, and authorized the PUC to monitor and regulate market power in a deregulated market.

Electric utilities would have to have made an irrevocable decision to elect customer choice/retail competition and the opportunity to reduce potential stranded costs by December 31, 1997. Electric utilities choosing to remain under cost-of-service regulation would have had to offer customer choice by December 31, 2001, but would have had no claim to stranded cost recovery. In the freeze period between January 1, 1997, and December 31, 2001, the PUC would have been prohibited from reducing a utility's base rates, and any final PUC order affecting retail base rates issued between January 1, 1997, and September 1, 1997, would have been nullified. During the freeze period, electing utilities would have been required to reduce rates for residential customers by 12 percent, and certain commercial customers would have received a 4 percent reduction. Utilities would have been required to unbundle costs and rates by September 1, 1998, and by December 31, 2001, they would have had to separate their business activities into generation, transmission and distribution functions. A transmission and distribution unit of a company would have been prohibited from selling electricity or participating in the electric retail market after December 31, 2001, unless it was a “provider of last resort.”

Utilities electing deregulation would have been allowed to recover all net, verifiable, nonmitigable retail stranded costs from retail customers within the utility's certificated area as it existed on May 1, 1997. Electing utilities would have been given various tools to recover their potential stranded costs, including securitizing “regulatory assets” up to \$3.372 billion during the freeze period with 15-year bonds, shifting depreciation from transmission and distribution to generating assets, and securitizing uneconomic generating assets specified in a PUC “true-up” proceeding in 2002. Securitization would have allowed utilities to refinance stranded costs at a lower cost over the life of an uneconomic asset than would have been permitted under traditional utility financing. To allow stranded costs to be paid off, the PUC would have issued irrevocable “qualified rate orders” authorizing the utility or its assignee to collect “qualified intangible charges” from ratepayers sufficient to retire “qualified property bonds” used to refinance the amount of the stranded costs. The nonbypassable charges would have been sufficient to pay off 100 percent of stranded costs. The stranded-cost bonds would not have been backed by the full credit of the state, but the state would have had to agree not to limit, alter, or in any way impair the right of a utility or its assignee to repay the bonds in full.

All electric generating utilities would have been required to report their electric capacity to the PUC, which, beginning January 1, 2001, would have been responsible for monitoring market power in Texas using a specific index based on the capacity of all electric power suppliers to make sales to others. Consumer protections would have been put in place prior to retail competition, including a guarantee of safe, reliable and affordable electricity, protection against disconnections in extreme weather and medical emergencies, and confidentiality of consumer information including utility bills and payment records.

Supporters said SB 965 would provide a five-year transition to retail competition and allow electric utilities to recover 100 percent of their stranded costs while lowering electric bills for residential and commercial customers. It would provide needed consumer safeguards in a competitive environment and give the PUC the necessary tools to monitor and control market power. Utilities would have to unbundle their rates and costs, separate their different functions, and provide a true market for retail competition. Securitizing stranded costs would lower the cost of paying off those assets that proved to be uneconomic for deregulated utilities in a competitive market.

Opponents said using a nonbypassable charge predominantly paid by residential and commercial customers to pay 100 percent of the stranded costs of utilities would be unfair. Electric utilities and industrial users should pay part of the costs. The consumer safeguards in the deregulation proposal were merely a vague promise that would not be dealt with concretely until a later time. The deregulation proposal would promote additional air and water pollution because utilities would be permitted to operate older coal-fired plants in a competitive market. Further, unless metering and billing were competitive, consumers would fail to get the full benefits of retail competition. This proposal would affect everyone in the state and involve billions of dollars, yet it was offered at the last minute without adequate opportunity for review by those most affected by it.

Notes. As reported by the House State Affairs Committee, SB 965 did not include an electric utility deregulation proposal and would have made several changes to the Public Utility Regulatory Act of 1995, including changing the conflict-of-interest provisions for PUC commissioners and OPUC counsel and staff, authorizing the PUC to use dispute resolution proceedings and partial contested case proceedings, and establishing electric service reliability standards. For additional background, see HRO Focus Report Number 74-30, Power Struggle: Deregulating the Electricity Industry, December 5, 1996.

The HRO analysis appeared in Part 4 of the May 26 Daily Floor Report.

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