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IN OPPOSITION TO
SB 77
(OREGON DOC EXHAUSTION REQUIREMENTS)

BEFORE THE SENATE JUDICIARY COMMITTEE

FEBRUARY 2, 2011

I cannot appear in person today but respectfully submit this testimony and additional documents in opposition to SB 77. This proposal intends to replicate the exhaustion requirements that have been set forth in the federal Prison Litigation Reform Act (PLRA). One of the main purposes of the PLRA was to get federal courts out of running state prisons and local jails. The legislative history is clear: 42 USC §1997e(a) applies only to claims brought under *federal law*. It was never intended to limit prisoner access to remedies in state courts. Just as the ACLU opposes the PLRA, we strongly oppose this attempt to replicate a part of it into state law.

Oregon DOC has stated that this law is intended to address alleged issues around inmates filing small claims actions against other inmates. The majority of SB 77 has nothing to do with this issue but instead a wholesale restriction on inmate access to the judicial system. The other suggestion has been that this is a cost-saving measure. The results of the federal PLRA exhaustion requirements which SB 77 replicates, have produced more litigation, unfortunately expending tremendous resources to litigate whether or not exhaustion requirements have been met, as opposed to resolving the merits of the claims. We believe that will be the case here.

SB 77 Eliminates Inmate Access to Courts

Section 2 of SB 77 bars an inmate from bringing *any* action against a public body unless the inmate has exhausted *all* administrative remedies that the DOC provides. This is a fundamental policy change, completely independent of the purported inmate-to-inmate issue. This bars inmates ability to seek relief in courts for any fundamental violation of their rights during their incarceration unless they fully exhaust the Oregon DOC grievance process. As set forth below, the grievance procedures are set up to manage an inmate's ability to grieve. And while that may be completely appropriate process for grievance, when it is linked to the fundamental right to access courts for relief, it creates unjustifiable barriers that will have the real result of limiting an inmate's ability to seek necessary and appropriate relief.

In a January 2008 letter to Congress, the Chair of the National Prison Rape Elimination Commission (created by Congress) wrote to Congress about the effect of the same type of exhaustion requirement in the federal PLRA on eliminating sexual abuse in U.S. prisons and jails:

> "Medical professionals, corrections experts, and advocates have provided us with extensive information indicating that the PLRA's requirement that a prisoner successfully exhaust all available administrative remedies before filing suit has undermined the ability of sexual assault victims to gain access to the crucial external oversight of the judicial branch – and as a result, has obstructed their ability to obtain the relief and redress to which they may be legally entitled. Because of the emotional trauma and fear of retaliation or repeated abuse that many incarcerated rape victims experience, as well as the lack of confidentiality in many administrative grievance procedures, many victims find it extremely difficult – if not impossible – to meet the short timetables of adminstrative procedures."

DOC grievance procedures are set forth in OAR 291-109-0140 through 291-109-0190. In short, those provisions establish very limited time-lines and procedural barriers for inmates to comply with grievance procedures. Specifically, an inmate must grieve an issue within 30 days of the event and may only raise one event per complaint. Not all inmates can or will be able to comply for many reasons, including mental capabilities, fear of retaliation, emotional trauma, disabilities, medical crisis, language skills, location where access is limited, and comprehension of the process, to name a few. The only exception to address this is to allow another inmate to file on behalf of the grieving inmate, who must still sign the grievance. It does not extend deadlines or give any other meaningful resources to inmates. If an inmate does not use the right form, the grievance will be rejected. Unable to file or properly file in a timely manner the grievance, an inmate will be barred from further action within the grievance process and will never be able to exhaust all administrative remedies as required in Section 2.

While DOC has some deadlines for response, those deadlines can be changed and there is no set time-line upon which an inmate is entitled to final resolution in the three leval grievance process. There is no provision allowing an inmate to proceed to the two required appeal levels on the basis that there was no final resolution at the prior grievance level. Again, this may be quite appropriate flexibility to give the Department in handling grievances but it should not then be a restriction on an inmate from ever seeking resolution through the courts. This gives the agency the ability to delay or never resolve a grievance in a manner that allows the inmate to show a court that there has been complete exhaustion of adminsitrative grievance procedures.

Further, if there is an procedural error to a inmate's grievance, that grievance cannot be appealed or fixed; instead the inmate must begin again. The rules are silent as to whether this tolls the thirty day deadline on an inmate bringing a grievance. In addition, an inmate cannot expand on the grievance with new evidence or information unless that evidence was unavailable to the inmate at the time of filing. This will have the result of

creating insurmountable barriers to the most vulnerable of inmates who, already facing a 30 day deadline might not have the requisite skill set to articulate the problems and bring forward the necessary evidence. And the state will argue in any court proceeding that the particular issues raised by the inmate in a legal action were not brought before the agency in the grievance process and move to dismiss the claim. The result will be a permanent bar on relief since the 30 day deadline has obviously passed.

Again, while that may be appropriate within the context of grievance procedures, when they became the only basis from which an inmate can subsequently seek relief in courts, they will only act as procedural barriers to inmates in bringing meritious issues before a court for appropriate relief.

The very structure of the exhaustion requirement allows inmates' access to courts to be controlled by the very people the inmate is trying to sue. Thus, for example, a prison or jail can have as many steps in its grievance procedure as its wants. It can also make the filing deadlines as short as it wants. In one ACLU prison project case, after the inmate successfully went through the three-stage grievance process, the prison simply changed it to seven steps.

To leave the ability to seek redress in courts to the discretion of rules established by state as well as local correction facilities removes a fundamental right of inmates to access courts to seek relief. Like the federal requrements, SB 77 puts insurmountable barriers in place to inmate who have plainly meritorious claims.

The results under the federal PLRA have been that prisoners, both adults and juveniles, pre- and post-conviction fail to exhaust due to ignorance, mental illness, disability, misinformation, to name a few. Failures to exhaust means inmates are then forever barred from filing meritorious claims. The very same thing can and will happen here if this law is passed. Along with our written testimony, I have attached testimony from two former heads of departments of corrections. Jeanne Woodford is the former warden of San Quentin State Prison and former director of the California Department of Corrections. Chase Riveland is the former Secretary of the Washington State Department of Corrections and the former Executive Director of the Colorado Department of Corrections. They have reviewed SB 77 and based on their experience of running corrections facilities, they urge Oregon not to enact a law that requires prisoners to exhaust all administrative remedies prior to filing suit against a public body in court. I urge the Committee to review their testimony.

In addition, I will provide to the Commiee material documenting harmful effects of the federal PLRA law on real meritorious claims, the harmful effects of the law on religious freedom claims and a June 2009 Human Rights Watch Report "No Equal Justice: The Prison Litigation Reform Act in the United States." The HRW Report documents the complete failure of the federal PLRA and the very fundamental human rights violations that continue to occur under this law. The report also references the 2007 American Bar Association's resolution urging governments at all levels to ensure that prisoners

have meaningful access the courts and calling for reforms to the federal PLRA, particularly as it relates to exhaustion requirements.

We now have extensive documentation that the result of the federal PLRA is not to reduce frivolous litigation but, instead, remove any access to the courts by those with meritorious claims. We should not replicate that model here in Oregon.

Small Claims

Despite the claim that this law is necessary to address inmate-to-inmate small claims, the majority of the new provisions set forth in Section 3 and beyond are requirements for an inmate to sue any public body (when it comes to inmate actions against other inmates, SB 77 sets up a complete bar). SB 77 restricts inmate's access to small claims court and the scope of remedy available. Claims by inmates can only be for the loss or destruction of property owned by the inmate. No other person seeking remedy to vindicate their legal rights in small claims court is subject to this limitation.

First the requirements for inmate actions against any public body. SB 77 requires unique and burdensome procedural requirements for inmate litigants but no one else, indeed more difficult than those required by lawyers, who are trained to navigate procedural requirements (and as we know, are not always successful).

Under SB 77 the inmate *must* attach an affidavit signed by the inmate to proceed with a claim; failure to do so requires to the court to dismiss the action, allowing the inmate to refile (Section 2). This requirement may actually require more time and resources by the courts just to allow the inmate to perfect the complaint. This new burden does not have anything to do with the merits of the claim and certainly won't stop an inmate from trying to file. It will however, create burdens for the most vulnerable inmates who won't be able to fulfill that requirement or understand what is required of them.

If the inmate is suing any state agency, including the Department of Corrections, SB 77 requires the inmate to "serve the notice and claim and all subsequent filings" not just on the named public body but the Attorney General and the Superintendent or other officer of the correctional facility in which the inmate is incarcerated." Section 3(1) and (2)(a). Again, this does not have any connection to the merits of the claim but simply provides more burdens on the non-lawyer inmate than a lawyer or any other person must comply with when it comes to service.

Further, rather than requiring that an inmate follow the same notice obligations under ORS 46.445, SB 77 provides that the inmate must follow that provision *except* that instead of a statement required under that provision must read "30 days" instead of "14 days." Section 3(2)(b). Trained lawyers sometimes have problems complying with all the procedural obligations related to ligitation. Here, DOC is proposing that an inmate, intending to follow the expected process must now know that there is a special provision related uniquely to inmates. Ironically, public bodies being sued are more able than private parties to react to the filing of claims in a timely manner and yet the state, not individuals who are being sued in small claims courts, is being given a 30 day period to

respond rather than a 14 day. And the law currently allows for the parties to seek an extension, so the state already has all the tools it needs. If the issue is that parties need 30 not 14 days to respond in small claims courts, change the law as it applies to everyone.

SB 77 also limits an inmate's damages to the actual value of the property lost or destroyed whether the claim is against the Department of Corrections or any other state agency (Section 3(5)). Why, if an inmate proves a meritorious claim against a public body should that inmate be limited in the recovery different from the rest of the society, indeed different from anyone else suing a public body? There is no justification for creating a law where one class of people are entitled to less recovery than another class of people for the same type of injury once it has been proven. If there needs to be a debate about limiting recovery under small claims, it should be limited for everyone. Inmates do not shed *all* of their rights but SB 77 proposes to remove access from those who are under complete control of the state and who may need the courts most to ensure necessary protections. If the state needs to save money, have the debate about limiting recovery by *everyone* against a public body, not just inmates.

Finally, Section 5(4)(b) eliminates an an inmates ability to commence an action against another inmate in small claims court. The argument is the concern that vulnerable inmates may be subject to actions under small claims court. Having not seen evidence of that, even assuming that this argument is true, it is the same problem that exists for Oregonians who are not incarcerated and yet may not have all the skills necessary to respond. Indeed, that is far more likely to happen in the general public and as such, that issue should be addressed in a manner that does not restrict all inmates from accessing the courts. In addition, it also would mean that an inmate who is the victim of another inmate's actions would also be barred from seeking any relief. Based on some suggestion that there is a risk to some inmates, those inmates who are truly victims will have no remedy.

Constitutional Issues

In addition to the policy issues, SB 77 raises constitutional concerns under the Oregon Bill of Rights. Article I, section 10 states in part that "every man shall have remedy by due course of law for injury done him in her person, property, or reputation" and Article I, section 20 states that "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." SB 77 would set up a separate system of redress for one class different than another class and limit the right of remedy in small claims court and as a result, we believe that this proposal implicates those constitutional protections.

Conclusion

We believe that Oregon is different from a lot of other jurisdictions across the country, but the way that we ensure that we are better than most is to keep the necessary checks and balances between the various branches of government that the current law provides. For all the reasons, set forth above, we urge you not to go forward with SB 77.