WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

Memo No. 1

TO: MEMBERS OF THE SPECIAL COMMITTEE ON STATE-TRIBAL RELATIONS

FROM: David L. Lovell, Senior Analyst, and Joyce L. Kiel, Senior Staff Attorney

RE: Legislation Recommended by the Special Committee on State-Tribal Relations to the 2003-04 Legislature

DATE: October 4, 2004

This memorandum describes legislation introduced in the 2003-04 Legislative Session at the recommendation of the 2002-04 Special Committee on State-Tribal Relations. It also provides a summary of the legislative history of each piece of legislation. The text of the legislation is available at the Legislature's Internet site at www.legis.state.wi.us.

A. TRIBAL ADMINISTRATION OF REHABILITATION REVIEWS UNDER THE CAREGIVER BACKGROUND CHECK LAW

1. Current Law on Caregiver Background Checks

a. General Background

Under current law, except as discussed below, if a person has been convicted of certain serious crimes, has abused or neglected a client, has misappropriated the property of a client, has abused or neglected a child, or must be credentialed and has credentials that are not current or that are limited so as to restrict the person from providing adequate care to a client, then the following apply:

1. The Department of Health and Family Services (DHFS) may not license, certify, issue a certificate of approval to, or register the person to operate an adult treatment facility, organization, or service or continue the license, certification, certificate of approval, or registration. Adult treatment facilities, services, and organizations include, for example, nursing homes, community-based residential facilities, home health agencies, and community mental health and alcoholism and other drug abuse programs. Also, DHFS may not license or continue or renew the license of the person to operate a foster home, treatment foster home, group home, shelter care facility, child welfare agency, or day care center.

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
(608) 266-1304 • Fax: (608) 266-3830 • Email: leg.council@legis.state.wi.us
http://www.legis.state.wi.us/lc

A facility, organization, or service that provides care for adults or children and that is subject to this law is defined as an "entity."

2. A county department of human services or county department of social services (county department) or a child welfare agency may not license or renew the license of the person to operate a foster home or treatment foster home.

3. A county department may not certify the person as a day care provider for purposes of reimbursement under the Wisconsin Works program.

4. A school board may not contract with the person to operate a day care program.

5. An entity may not employ as a caregiver, contract with as a caregiver, or permit to reside as a nonclient resident the person if the person has or is expected to have regular direct contact with clients of the entity.

These provisions apply if the appropriate regulatory agency or entity knew or should have known about the person's record.

b. Rehabilitation Exception

Under current law, the prohibitions discussed above do not apply to a person who has such a record if the person demonstrates to the appropriate regulatory agency by clear and convincing evidence and in accordance with procedures established by DHFS by administrative rule that he or she has been rehabilitated. For purposes of licensing a foster home or treatment foster home, however, a person convicted of certain crimes specified in s. 48.685 (5) (bm), Stats., is not permitted to demonstrate rehabilitation.

c. Tribal Administration of Rehabilitation Exception

Under current law, a tribe may choose to conduct rehabilitation reviews with respect to entities located ***within*** the boundaries of the tribe's reservation. "Reservation" is defined for this purpose as land in the state within the boundaries of a reservation of a tribe or within the Bureau of Indian Affairs (BIA) Service Area for the Ho-Chunk Nation.

A tribe that chooses to do so must submit to DHFS a rehabilitation review plan that includes all of the following:

1. The criteria to be used to determine if a person has been rehabilitated.

2. The title of the person or body designated by the tribe to whom a request for review must be made.

3. The title of the person or body designated by the tribe to determine whether a person has been rehabilitated.

4. The title of the person or body designated by the tribe to whom a person may appeal an adverse decision and whether the tribe provides any further rights of appeal.

5. The manner in which the tribe will submit information relating to a rehabilitation review to DHFS so that DHFS may include that information in its annual rehabilitation report to the Legislature.

6. A copy of the form to be used to request a rehabilitation review and a copy of the form on which a written decision is to be made regarding whether a person has demonstrated rehabilitation.

Current law provides that if DHFS does not disapprove the plan within 90 days after receiving the plan from the tribe, the plan is considered approved. If, during that 90-day period, DHFS disapproves the plan, DHFS must provide written notice of that disapproval to the tribe, together with the reasons for disapproval. DHFS may not disapprove a plan unless it finds that the plan is not rationally related to the protection of clients. If DHFS disapproves the plan, the tribe may, within 30 days after receiving the notice of disapproval, request that the Secretary of Health and Family Services review DHFS's decision. A final decision by the secretary is not subject to further review.

2. 2003 Senate Bill 192 and Assembly Bill 401

2003 Senate Bill 192 and Assembly Bill 401 would have done the following:

a. Amend the definition of "reservation" by deleting the reference to the BIA Service Area for the Ho-Chunk Nation. The BIA Service Area includes all land in 14 counties, including land that is neither part of a reservation nor held in trust for the Ho-Chunk Nation or a tribal member. The bills defined "trust land" as land in Wisconsin held in trust by the federal government for the benefit of a tribe or a member of a tribe. The bills then replaced references to "reservation" with references to "reservation or trust land."

Unlike other tribes in the state, the Ho-Chunk Nation does not have a consolidated reservation but has trust land in at least 14 counties. These changes would result in treating the Ho-Chunk Nation on the same basis as other tribes, that is, permitting a tribe, under certain circumstances, to conduct rehabilitation reviews for entities on the tribe's reservation or off-reservation trust land.

b. Specify that if a tribe's rehabilitation review plan has been approved by DHFS, the tribe may conduct rehabilitation reviews with respect to all entities on the tribe's reservation or trust land. This is implied in current law, but not explicitly stated.

c. Permit a tribe to request that DHFS grant the tribe authority to conduct rehabilitation reviews with respect to some, but not all, entities on the tribe's reservation or trust land. Under current law, it is arguable that a tribe may only request authority to conduct rehabilitation reviews for all, but not some, entities on its reservation. This change would clarify that a tribe may request review authority for a limited number of entities, for example, for only certain types of entities (such as community-based residential facilities or day care centers), for specifically named entities, or for entities based on ownership (such as entities owned or operated by the tribe).

Require DHFS to establish by administrative rule the criteria to be used to determine whether a tribe may be authorized to conduct rehabilitation reviews for some, but not all, entities on the tribe's reservation or trust land. The bills also required DHFS to grant the tribe's request if those criteria are met.

d. Permit a tribe to request that DHFS grant the tribe authority to conduct rehabilitation reviews with respect to an entity that is located outside the boundaries of the tribe's reservation or trust land and

that is owned or operated by the tribe or a tribal enterprise ("tribal entity"). The bills defined "tribal enterprise" as a business that is at least 51% owned and controlled by the governing body of one or more tribes, is actively managed by the governing body, or by the designee of the governing body of one or more Indian tribes, and is currently performing a useful business function.

In evaluating the tribe's request, the bills required that DHFS consider factors such as the proximity of the tribal entity to the tribe's reservation or trust land and the population to be served by the tribal entity. The bills permitted DHFS to grant rehabilitation review authority to the tribe with respect to that tribal entity if DHFS determines that the conduct of rehabilitation reviews by the tribe with respect to that tribal entity is rationally related to the protection of clients.

3. Legislative History

The caregiver background check law was created by 1997 Wisconsin Act 27, the 1997-99 Biennial Budget Act. Based on recommendations of the American Indian Study Committee (AISC, the predecessor to this committee), 1999 Wisconsin Act 9, the 1999-2001 Biennial Budget Act, amended the law to authorize tribes to conduct rehabilitation reviews, as described above. However, not all recommendations of the committee were included in that act, and technical refinements were needed.

In response to this, Representative Terry Musser, Chair of the AISC, coauthored legislation relating to tribal administration of rehabilitation reviews. This legislation, 1999 Assembly Bill 823, was passed by the Assembly. At the close of the 1999-2000 Legislative Session, the bill had been recommended for concurrence by the Senate Committee on Health, Utilities, Veterans and Military Affairs on a vote of Ayes, 6; Noes, 1, and scheduled for final consideration by the Senate. However, the session ended before the Senate took its final action on the bill.

In the 2001-02 Legislative Session, the Special Committee on State-Tribal Relations recommended the introduction of legislation based on 1999 Assembly Bill 823. The Joint Legislative Council introduced this legislation as 2001 Assembly Bill 223. Again, this legislation was passed by the Assembly but was not acted on by the Senate.

In the 2003-04 Legislative Session, the Special Committee again recommended introduction of this legislation, which the Joint Legislative Council introduced as companion bills, 2003 Senate Bill 192 and Assembly Bill 401. The Senate Committee on Health recommended passage of Senate Bill 192, but the full Senate took no action on the bill. The Assembly took no action on Assembly Bill 401.

B. COMMUNICATIONS BETWEEN THE STATE GOVERNMENT AND TRIBAL GOVERNMENTS

1. Background; Committee Study

The resolutions and bills described in this section are the culmination of nearly three years of study and discussion by the Special Committee on State-Tribal Relations and by its predecessor, the AISC. From May 1999 through March 2000, the AISC discussed the idea of tribal delegates to the Legislature, although it did not make any recommendation on this topic.

When the Special Committee on State-Tribal Relations commenced its work in October, 2000, it engaged in a broader discussion of improving communications between the state government and tribal governments. Under the sponsorship of the four legislative caucus leaders and the 11 tribal chairs, and

with technical and financial assistance from the National Conference of State Legislatures and the National Congress of American Indians, Chair Musser and committee staff organized the Leadership Conference on State-Tribal Relations, which was held in Madison in February 2001. The conference identified many mechanisms that the state could pursue to improve communications between the state government and tribal governments. It also provided state and tribal leaders an opportunity to discuss issues and concerns regarding communications between their respective governments. Written materials from this conference can be found at www.legis.state.wi.us/lc/studies/STR/str00_materials.htm.

Following the Leadership Conference, the Special Committee studied the ideas identified or generated by the conference and developed four legislative recommendations based on those ideas.

2. Consultation Policy

a. Background

The committee received background information describing consultation policies of the federal government and other states. The BIA has established a government-to-government consultation policy to promote dialogue between the BIA and tribes regarding proposed federal actions affecting tribes so that meaningful and timely input is received from tribal officials about proposed federal actions. Several states have developed similar policies. For example, Oregon enacted legislation, effective January 1, 2002, providing that a state agency must develop and implement a policy to promote communication between the state agency and tribes and must make a reasonable effort to cooperate with tribes in developing and implementing programs of the state agency that affect tribes. Washington has developed government-to-government implementation guidelines which, among other things, formalize the requirement for the State of Washington to seek consultation and participation by representatives of tribal governments in developing policy and program activities.

After reviewing information regarding consultation policies in place as of 2002, the Special Committee recommended a joint resolution endorsing a consultation process.

b. 2003 Assembly Joint Resolution 40

2003 Assembly Joint Resolution 40 was recommended by the Special Committee but introduced by Chair Musser. It stated that the Legislature encourages the Governor to develop and implement a consultation policy under which state executive branch agencies do all of the following:

1. Ensure meaningful and timely input by representatives of tribal government in developing state policies and programs that have a substantial and direct effect on: (a) one or more tribes in the state; (b) American Indians in the state; or (c) the relationship between state government and the tribes in the state.

2. Identify key personnel in the agency who are responsible for coordination with tribal governments and have them meet on a regular basis with tribal officials regarding issues of mutual interest.

The joint resolution also stated that the Legislature encourages the Governor to promote positive government-to-government relations between the state and the tribes in Wisconsin.

3. Recognition of the Sovereign Status of Tribes

a. Background

The sovereign status of tribes is established as a matter of federal and tribal law. The sovereignty that a tribe possesses is inherent, which means that it comes from within the tribe itself, and existed before the founding of the United States. However, the U.S. Supreme Court has held that tribal sovereignty is not absolute but, rather, is subject to certain limits resulting from the unique relationship of the tribes to the United States. In general, under federal law, tribes retain those attributes of their original sovereignty that have not been given up in a treaty, divested by an act of Congress, or divested by implication as a result of their status as, to use the term adopted by the U.S. Supreme Court, "domestic dependent nations."

Tribal sovereignty is not dependent on state action. Nonetheless, the Special Committee recommended that, in order to promote a better understanding of tribal sovereignty and better relations with the tribes, the state formally recognize the sovereign status of the tribes in the state. The Special Committee recommended using as a pattern the resolution adopted by the California Legislature in 2000 to recognize the sovereignty of tribes in California.

b. 2003 Senate Joint Resolution 36 and Assembly Joint Resolution 37

2003 Senate Joint Resolution 36 and Assembly Joint Resolution 37 stated that the Legislature does the following:

1. Affirms state recognition of the sovereign status of tribes as separate and independent political communities within the territorial boundaries of the United States.

2. Encourages all state departments and agencies, when engaging in activities or developing policies affecting American Indian tribal rights or trust resources, to do so in a knowledgeable manner that is respectful of tribal sovereignty.

3. Encourages all state departments and agencies to continue to reevaluate and improve the implementation of laws that affect tribal rights.

4. Wisconsin Tribal-State Council

a. Background

More than 30 states have created some structure in their executive branch to address state-tribal relations. These include most of the states that contain substantial American Indian populations and many states with smaller American Indian populations, including some states in which no state recognized or federally recognized tribal governments are located. Some states have created these structures through legislation, while others have done so through executive orders or less formal executive actions. The organization and functioning of these entities vary greatly. A common feature, however, is that councils, commissions, and offices of Indian affairs typically either bring state and tribal representatives together or establish liaison between the governments. As a result, these entities facilitate communications and help inform the functioning of state government on matters involving American Indians and tribal governments.

At the Leadership Conference, it was observed that Wisconsin is perhaps the only state with a substantial American Indian presence--11 federally recognized American Indian tribes and bands and over 69,000 American Indian state residents--that does not have an executive branch institution designed to address state-tribal relations or to facilitate communications between state government and tribal governments.

b. 2003 Senate Bill 189 and Assembly Bill 398

2003 Senate Bill 189 and Assembly Bill 398 would have created a new council composed of 11 representatives of the American Indian tribes and bands in this state and 11 representatives of state and local governments. They directed the council to elect two co-chairs, one from among the tribal representatives and one from among the state and local representatives. The bills provided that the council be attached to the Department of Administration (DOA) for administrative purposes, but function autonomously. In particular, the bills provided that the council would determine its own times and locations of meetings and submit its reports to the Governor and the Legislature, rather than to the Secretary of Administration. The bills required all state agencies to provide assistance to the council, upon request.

The bills would have assigned a number of functions to the council that relate to facilitating communications and sharing information between the state and tribal governments. In addition, they directed the council to monitor those actions of the executive and legislative branches of state government that may affect tribal governments and American Indians and to make policy recommendations regarding those matters. Specifically, the bills directed the council to do all of the following:

1. Facilitate the resolution of disputes, disagreements, and misunderstandings between state government and tribal governments by coordinating communication between the appropriate representatives of the state and tribal governments.

2. Serve as an information clearinghouse regarding state-tribal relations and state programs that affect tribal governments and American Indians.

3. Serve as a resource to state agencies, authorities, and the Legislature on matters involving state-tribal relations, including providing staff support to task forces or committees.

4. Monitor state executive branch policies and practices that affect tribal governments and American Indians.

5. Develop recommendations for state executive branch policies.

6. Monitor agreements between state government and tribal governments.

7. Support and coordinate communication between state agency and authority liaisons who work with tribes, to promote the smooth delivery of state services to tribal governments and American Indians and to avoid the duplication of effort. The bills directed the council to review the adequacy of existing state liaison positions and to recommend any changes in the number of liaison positions as it deems necessary.

8. Monitor state legislation that potentially may affect tribal governments or American Indians.

9. Develop recommendations for state legislation.

10. Provide training to state officials and employees concerning the legal status of American Indian tribes and bands, legal and practical aspects of relations between tribal governments and the state and federal governments, and issues affecting state-tribal relations. The bills directed the council to provide training to state executive branch officials and employees at least once per year and to provide training to state legislators and legislative employees at least once at the start of each legislative session.

11. Submit a biennial report on the council's activities to the Governor, to the Special Committee on State-Tribal Relations, and to the Chief Clerk of each house of the Legislature for distribution to the appropriate standing committees.

The bills would have appropriated $214,300 in fiscal year 2004-05 and $200,000 in fiscal year 2005-06 for the operation of the council and authorized three full-time equivalent positions: an executive director, a policy analyst, and a support position. The appropriation was from gaming revenues paid by the tribes to the state.

5. Tribal Impact Statements

a. Background

It is not uncommon for legislation to have impacts on American Indians or tribal governments that are different from the impacts on other individuals or on other units of government. Differential impacts can arise from a variety of sources but primarily from the unique legal status of reservations and land held in trust by the federal government for tribes or tribal members and from federal law relating to activities on those lands. In addition, these impacts may not be intended or anticipated by the authors of the legislation. In the past, this has led to legislation of general applicability that has had unanticipated adverse impacts on American Indians or tribal governments, for example, in the design of the state's economic development programs.

The preparation of a report describing any impact of legislation on American Indians or tribal governments that is different from the impact on other individuals or governmental units is one mechanism to help inform the legislative process and prevent the enactment of legislation with unintended impacts on American Indians or tribal governments.

b. 2003 Senate Bill 190 and Assembly Bill 399

2003 Senate Bill 190 and Assembly Bill 399 would have required the preparation of statements describing the impact of legislation on tribal governments and American Indians. The requirements of the bills were designed to parallel the current requirements contained in the statutes and the joint rules of the Legislature for the preparation of statements describing the fiscal impact of legislation.

The bills would have directed the Legislative Reference Bureau to identify bills for which tribal impact statements are required and authorized either house of the Legislature to request one. In addition, the chair or either co-chair of the Special Committee on State-Tribal Relations could request a tribal impact statement. If the Wisconsin tribal-state council were created (2003 Senate Bill 189 and Assembly Bill 398), the bills permitted either co-chair or the executive director of the council to request a tribal impact statement. They directed the DOA to assign the task of preparing a statement to the

appropriate agency or agencies. They established a deadline for the preparation of a statement and requirements for its distribution. The bills prohibited a standing committee from holding a public hearing on, or reporting a bill for which a tribal impact statement is required, prior to receipt of the statement.

6. Legislative History of Legislation Relating to Communications Between State Government and Tribal Governments

The four proposals relating to communications between state government and tribal governments were introduced very late in the 2001-02 Legislative Session. They were introduced on February 5, 2002; the regular session was adjourned on March 26, 2002. As a result, it is not surprising that the Legislature did not consider or pass these proposals. However, the Assembly Committee on Government Operations held a public hearing on all four proposals on February 27, 2002.

Senator Gary George, Vice Chair of the committee, introduced companions to these proposals, that is, Senate joint resolutions and bills that were identical to the Assembly joint resolutions and bills that the Joint Legislative Council introduced at the committee's recommendation. Like the Assembly proposals, these proposals were introduced very late in the legislative session and did not receive consideration.

During a special session called to review the state budget, the Senate incorporated the language creating a Wisconsin tribal-state council into its version of January 2002 Special Session Assembly Bill 1, the 2001-03 Budget Reform Bill. The Assembly did not concur in this action. The Conference Committee later removed the provision from the bill.

In the 2003-04 Legislative Session, the Special Committee again recommended introduction of these proposals. The Joint Legislative Council introduced three of them, as companion Senate and Assembly proposals, but did not reintroduce the joint resolution regarding consultation. Chair Musser subsequently introduced the joint resolution regarding consultation under his own name. Several of the proposals received hearings, but none were passed or adopted by the Legislature.

7. Recent Developments; Actions by Governor

On March 1, 2004, Governor Jim Doyle issued an executive order recognizing tribal sovereignty and directing state agencies to recognize the government-to-government relationship between the State of Wisconsin and the American Indian tribes and bands in Wisconsin. The Governor subsequently directed staff at DOA to work to improve communications between state agencies and tribal governments, with the ultimate goal of establishing consultative, government-to-government relationships.

C. LABELING OF WILD RICE OFFERED FOR SALE

1. Background

Wild rice is a very important resource for several American Indian tribes in Wisconsin for cultural, historical, and economic reasons. Many members of these tribes harvest wild rice by traditional methods, for their own use and to sell. Some non-Indian individuals also use traditional harvest methods.

Wild rice that is offered for sale comes to market through three different channels: some is harvested by hand from wild stands; some is cultivated on farms and harvested by combine (largely in California and Minnesota); and some is harvested mechanically from wild stands (a practice in Canada). Because the traditional process of harvesting wild rice by hand is much more labor intensive than mechanized cultivation and harvesting, the cost of production, and so the retail price, of hand-harvested, wild-grown wild rice is several times greater than that of cultivated wild rice or of wild rice that is mechanically harvested from the wild. The price difference puts sellers of wild rice that is hand-harvested from the wild at a competitive disadvantage to the sellers of cultivated and mechanically-harvested wild rice, especially where the buyer does not have information regarding the source of the wild rice.

Current law contains some requirements for the labeling of wild rice that is offered for sale. Specifically, a wholesaler or supplier is required to label cultivated wild rice as being "paddy-grown" unless the wild rice is blended with wild-grown wild rice. In addition, a wholesaler or supplier is prohibited from labeling wild rice as "100% natural wild rice" unless it is 100% wild-grown wild rice. However, current law does not indicate how blends of wild-grown and cultivated wild rice may be labeled or address the method of harvesting or the place of origin of the wild rice. In addition, current law does not apply to retail sales.

2. 2003 Senate Bill 191 and Assembly Bill 400

2003 Senate Bill 191 and Assembly Bill 400 would have repealed and recreated the existing statute relating to the labeling of wild rice offered for sale in this state.

The bills required that the label of any wild rice that is sold or offered for sale in this state, at retail or wholesale, and any sign, advertisement, or other representation regarding such wild rice must inform consumers if the wild rice is cultivated, if it is a blend of wild-grown and cultivated wild rice, and if it is machine harvested. If the wild rice is a blend, the label must indicate the proportions making up the blend. If the wild rice is in a packaged food product that contains at least 40% other food products and that is labeled or marketed as a wild rice product, the label must indicate the proportion of the product that is wild rice. The bills also required that labels and representations regarding wild rice indicate the state or province in which the wild rice was grown.

The labeling requirements did not apply to wild rice that is cooked and ready to eat. Wild rice that is identified as cultivated or blended, and packaged wild rice products were not required to be identified as machine harvested.

The bills did not make any requirements regarding the labeling of or representations regarding wild rice that is 100% wild-grown or that is harvested by traditional methods, except to require that the state or province of origin be identified.

The bills required the Department of Agriculture, Trade, and Consumer Protection to promulgate rules for implementation of the requirements created by the bills.

The bills provided that a person who violates the labeling and advertising requirements must forfeit not less than $50 nor more than $500 for the first violation and not less than $200 nor more than $1,000 for subsequent violations.

3. Legislative History

At the recommendation of the Special Committee, the Joint Legislative Council introduced this proposal as 2001 Assembly Bill 773 on February 5, 2002, less than two months before the end of the regular legislative session. It was passed by the Assembly on a voice vote but failed to receive a public hearing in the Senate committee, and so was not concurred in by the Senate and ultimately failed to pass.

In the 2003-04 Legislative Session, the Special Committee again recommended introduction of this proposal. The Joint Legislative Council introduced it as 2003 Senate Bill 191 and Assembly Bill 400. The agriculture committees of the two chambers recommended passage of the bills, but neither bill was taken up by the full chamber.

D. LEGISLATION REGARDING AMERICAN INDIAN JUVENILES ALLEGED TO HAVE COMMITTED A DELINQUENT ACT UNDER CERTAIN CIRCUMSTANCES

1. Background

2003 Assembly Bill 402 and 2003 Senate Bill 193 relate to proceedings involving an American Indian juvenile (age 16 or under for violations of criminal laws) who is physically outside the boundaries of the reservation of a tribe and any off-reservation trust land of either a tribe or tribal member as a direct consequence of an order issued by a court of that tribe (other than a tribal court order relating to adoption, physical placement or visitation with the juvenile's parent, or permanent guardianship) and allegedly commits a delinquent act.

The Menominee Indian Tribe of Wisconsin originally proposed that the 2000-02 Special Committee on State-Tribal Relations address the issue following the Wisconsin Court of Appeals decision in *In the Interest of Elmer J.K. III*, 224 Wis. 2d 372, 591 N.W.2d 176 (Wis. Ct. App. 1999). That case involved a Menominee juvenile who had been adjudicated delinquent by the Menominee Tribal Court and placed by the tribal court in a residential facility outside the boundaries of the Menominee Reservation and who then engaged in disorderly conduct and battery to staff members at the residential facility in violation of several Wisconsin criminal statutes. The *Elmer J.K.* court held that the state court had jurisdiction and stated that the Menominee Tribal Court did not have jurisdiction. Chair Musser directed that a group of interested persons be convened to consider the matter. The group developed a proposal that was presented to the Special Committee. The bills contain the modifications to that proposal agreed to by committee members.

2. 2003 Assembly Bill 402 and 2003 Senate Bill 193

The bills relate to an American Indian juvenile who allegedly commits a delinquent act while physically outside the boundaries of a tribe's reservation and any off-reservation trust land of that tribe or a tribal member as a direct consequence of a tribal court order as noted above (the specified circumstances). The bills provide a process for consultation to determine which government (tribal or state) should exercise its existing jurisdiction based on the best interests of the juvenile and of the public. The bills do not alter, diminish, or expand the jurisdiction of either the state courts or tribal courts. The jurisdiction of a tribal court is determined by federal law and tribal law, rather than state law. The provisions of the bills are as follows:

a. Duties of Juvenile Court Intake Worker

If the juvenile court intake worker determines in the intake inquiry that the specified circumstances exist, the intake worker must promptly notify the clerk of the tribal court, a person who serves as the tribal juvenile intake worker, or a tribal prosecuting attorney that the juvenile has allegedly committed a delinquent act under the specified circumstances. If the intake worker is notified by a tribal official that a petition related to the delinquent act has been or may be filed in tribal court, the intake worker must consult with tribal officials.

After the consultation, the intake worker must determine whether the best interests of the juvenile and of the public would be served by having the matter proceed solely in tribal court. If the intake worker determines that the best interests of the juvenile and of the public would be served by having the matter proceed solely in tribal court, the intake worker must close the case. If the intake worker determines that the best interests of the juvenile and of the public would not be served by having the matter proceed solely in tribal court, the intake worker must, as under current law, do one of the following: (1) enter into a deferred prosecution agreement; (2) request that the district attorney file a delinquency petition or, if the juvenile is under 10 years of age, request that the district attorney or corporation counsel file a juvenile in need of protection or services (JIPS) delinquency petition; or (3) close the case.

b. Duties of District Attorney or Corporation Counsel

Under current law, a district attorney may file a delinquency petition in the juvenile court, and either the district attorney or corporation counsel (as determined by the county board) may file a JIPS delinquency petition in the juvenile court, based on the request of the intake worker or after the intake worker has closed the case. The bills provide that, if the specified circumstances apply, before filing such a petition the district attorney or corporation counsel must determine whether the intake worker has received notification from a tribal official that a petition relating to the alleged delinquent act has been or may be filed in tribal court. If the intake worker has received that notification or if a tribal official has provided that notification directly to the district attorney or corporation counsel, the district attorney or corporation counsel must attempt to consult with appropriate tribal officials before filing the delinquency or JIPS delinquency petition in juvenile court.

c. Delinquency or JIPS Delinquency Petition

If a decision is made to file a delinquency petition or JIPS delinquency petition in juvenile court, the petition must include a statement that the specified circumstances exist. In addition, the petition also must include a statement that a petition has been or may be filed in tribal court relating to the same delinquent act if a tribal official has informed the intake worker, district attorney, or corporation counsel that that is the case.

d. Juvenile Court Procedure

If the juvenile court is informed during a delinquency proceeding or JIPS delinquency proceeding that a petition relating to the same delinquent act has been or may be filed in tribal court, the juvenile court must stay (suspend) the proceeding and communicate with the tribal court to discuss whether the tribal court or juvenile court may be the more appropriate forum. If the juvenile court and tribal court either mutually agree or agree under the terms of an established judicial protocol applicable

to the juvenile court that the tribal court would be the more appropriate forum, the juvenile court must either dismiss the delinquency petition or JIPS delinquency petition without prejudice or stay the proceeding. The juvenile court's decision must be based on the best interests of the juvenile and of the public.

If the juvenile court stays the proceeding, rather than dismissing the petition, the juvenile court's jurisdiction over the juvenile continues for one year after the last order affecting the stay is entered. During that time, a motion may be made by any of the parties to lift the stay order and have the juvenile court take further action. If, however, the stay order remains in place, the petition will automatically be dismissed one year following the last court order.

e. Venue

If a petition relating to the same delinquent act has been filed in tribal court, the bill prohibits venue for a delinquency proceeding or JIPS delinquency proceeding from being in the county where an American Indian juvenile resides (unless it is also either the county where the juvenile is present or the county where the violation occurred). In contrast, under current law, venue for a delinquency proceeding or JIPS delinquency proceeding may be in any of the following three county circuit courts: (1) the county where the juvenile resides; (2) the county where the juvenile is present; or (3) the county where the violation occurred.

3. Legislative History

On the recommendation of the Special Committee, the Joint Legislative Council introduced this proposal as companion bills. The Assembly version, 2003 Assembly Bill 402, was passed by both houses and signed into law as 2003 Wisconsin Act 284. The text of the Act is available at the Legislature's Internet site, referenced in the introduction to this memorandum, and the Legislative Council Act Memo describing the Act is available at the Legislative Council's publications page at http://www.legis.state.wi.us/lc/publications.htm.

E. INDIAN STUDENT ASSISTANCE GRANTS

1. Background

The Indian Student Assistance Program is a needs-based grant program administered by the Higher Educational Aids Board (HEAB) to assist Indian students to receive a higher education. Grants are available for undergraduate and graduate study at any accredited public or private institution of higher education in this state. Full- and part-time students in good academic standing are eligible for grants for a period of up to five years. To be eligible for a grant, a student must be a resident of this state and must have at least 1/4 Indian ancestry, as certified by a federally recognized Indian tribe, or be recognized as a member of a tribe for purposes of the program.

When this program was created in 1971, a cap on the maximum size of Indian Student Assistance grants was set at $1,500 per year. The cap was increased to $1,800 in 1979 and to $2,200 in 1991, to reflect increases in the cost of higher education. 1995 Wisconsin Act 27, the 1995-97 Biennial Budget Act, did not change the cap itself, but reduced the amount of a grant that may be paid from state revenues to $1,100. That Act created a separate appropriation from which the grant amounts may be matched with funds contributed by tribes. Although the tribes typically provide some financial

assistance to their tribal members for higher education, they do not do so by contributing funds to HEAB to specifically match the part of the Indian Student Assistance grant that is funded by the state program.

1999 Wisconsin Act 9, the 1999-2001 Biennial Budget Act, changed the funding source for the grant from general purpose revenue to program revenue derived from gaming revenues paid to the state by the tribes under the gaming compacts and related agreements.

2. 2003 Assembly Bill 422

2003 Assembly Bill 422 does the following:

- Increases the maximum amount of individual grants allowed from $1,100 to $3,200. This amount is intended to fund the same share of average financial need as the grants funded in 1994-95, the last time that the grant amount was modified.

- Increases the appropriation for grants to an amount estimated to allow full funding of grant applications at the higher grant amount. The draft assumes a base funding level of $787,600 annually and increases this appropriation by $1,481,600 for a total appropriation of $2,269,200 annually.

- Repeals the appropriation and language regarding tribal contributions for matching grants.

3. Legislative History

The Special Committee recommended that the Joint Legislative Council introduce this proposal in the 2003-04 Legislative Session, but the Joint Legislative Council declined to do so. Instead, Chair Musser introduced the proposal under his own name as 2003 Assembly Bill 422. The bill received a hearing in the Assembly Committee on Colleges and Universities, but no further action was taken on the bill.

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