

Emergency Preparedness Liability Work Group

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I. Introduction

Several major catastrophes in other jurisdictions, notably the September 11th terrorist attacks, Hurricane Katrina and the recent California forest fires, have renewed Oregon's focus on ensuring public sector preparedness for large-scale emergencies. Under state law and practice, both the state and local government prepare for and respond to emergencies. For instance, ORS 401.015 states that the government is responsible for reducing the vulnerability of the state to “loss of life, injury to persons or property and human suffering and financial loss resulting from emergencies” as well as to provide “recovery and relief assistance from for the victims of such occurrences.”

While it is the government’s duty to serve these functions, the infrequency of major emergencies means that a successful response must rely heavily on volunteers and other private providers who are not regular public sector employees. In order to assure that these individuals and entities are fairly treated and willing to assist the state with providing essential emergency responses in Governor-declared emergencies and search and rescue operations, the Oregon Law Commission charged the Work Group with the task of considering and recommending (as needed) law reform to address compensation issues surrounding such volunteers when they are injured, or when they injure others.

The current statutes addressing volunteer emergency service providers are largely set out in Chapter 401. This chapter also covers multi-lateral emergency assistance, and 911 and 211 telecommunication systems. The combination of all the various emergency provider laws in one chapter makes this whole area confusing. Much of the confusion should be alleviated by the Work Group’s recommended reorganization of Chapter 401.

There are two major overall policy objectives of the Work Group’s proposed bill. First, the proposal provides a clear mechanism for government compensation of qualified volunteer emergency providers injured in both Governor-declared emergencies and in search and rescue operations by providing them coverage under workers’ compensation. Second, the proposal clearly provides government compensation for people tortiously injured by such emergency providers by treating these providers as agents of the state for purposes of coverage under the Oregon Torts Claims Act. Enacting these provisions will alleviate concerns expressed by volunteer providers about who will bear the responsibility for compensating them or others injured while these volunteers are providing essential services for the benefit of Oregonians during emergency situations. The Work Group viewed the concerns of these volunteers as valid, even if the likelihood of injury or a tort suit occurring is not great. While the Work Group recognized the financial cost to government, it found that government responsibility for compensation under these circumstances is fair and just.

The final objective of the Work Group was to make the statutes covering emergency services and communications more user-friendly and clear through reorganization. As a result some definitions have been moved and others have been

omitted because they were unnecessary. The statutes will be broken-up into separate chapters divided by subject matter in order to provide more coherence and ease of access.

II. History of the Project

The genesis of this project was a letter to the Oregon Law Commission (OLC) from Bruce Goldberg, Director of the Department of Human Services (DHS) in November 2007. In this letter, Dr. Goldberg proposed that the Commission review the existing emergency response legislation and address the issues of liability and immunity for volunteer emergency providers during an emergency response. The letter identified the problems of volunteer hesitance to participate as well as a desire for the state to adequately prepare for emergencies. The proposal did not suggest solutions to the problems.

On December 4, the Oregon Law Commission Program Committee reviewed the proposal and requested both more information and that additional funding resources be identified to complete the project. On June 24, 2008 OLC staff, in consultation with DHS, issued a memorandum titled “Supplemental Scope Section for Proposal of Emergency Responder Liability Law Revision Project”¹ which provided more detailed information and listed seven issues for the Work Group to consider. On June 27, 2008, based upon the further research, the extended scope section document, and additional secured funding, the OLC Program Committee recommended the project and the creation of a Law Commission Emergency Preparedness Liability Work Group; the Law Commission approved the recommendations on July 28, 2008.

In August 2008, Commission Chair Lane Shetterly appointed two Oregon Law Commission Commissioners to chair the project: Representative Greg Macpherson, State Representative House District 38, and Gregory Mowe, Stoel Rives LLP. The Commission Chairs then appointed the following members of the Work Group: Rep. Jean Cowan, State Representative House District 10; Gwen Dayton, Oregon Hospital Association; Sheriff Tim Evinger, Klamath County Sheriff; Prof. Caroline Forell, University of Oregon School of Law; Dr. Grant Higginson, DHS Public Health Division; David Hytowitz, Safeco Insurance; Ken Murphy, Office of Emergency Management; Shannon O’Fallon, DOJ, General Counsel Human Services; Dr. Gary Oxman, Coalition of Local Health Officials; Doug Schaller, Johnson Clifton Larson & Schaller PC; and David Sugerman, Paul & Sugerman PC. Appointed advisors (non-voting members) were: Anna Braun, Oregon Judiciary Committee Counsel; Rob Cruickshank, Pacific Northwest Search & Rescue; Deborah Fifield, DAS Risk Management; Dr. Ross Fleischman, Portland Mountain Rescue; Susan Grabe, Oregon State Bar; Mark S. Rauch, City County Insurance Counsel; and Paul Snider, Association of Oregon Counties.

The Emergency Preparedness Liability Work Group first convened on September 15, 2008. Because of the short time-line for getting this project completed before the 2009 Oregon Legislature convened, the Work Group met six more times in late 2008 and early 2009, completing its work at its January 12, 2009 meeting. While the Work Group

¹ See supplemental scope memorandum in appendix.

considered the seven issues set out in the “Supplemental Scope” memo, the Work Group is not recommending substantive changes to current law in all seven areas.

III. Statement of the Problem Areas

In the “Supplemental Scope” memo, the Commission charged the Work Group with considering seven different issues: (1) Out-of-State Assistance; (2) Private Individual and Entity Immunity From the Scope of Liability for Negligence; (3) Private Individual Indemnification (Oregon Tort Claims Act application); (4) Triggering Events (Terms and Definitions); (5) Implications Regarding Insurance Coverage and Workers’ Compensation; (6) Defining the Minimum Standard of Care Required in an Emergency; and (7) Substitution of Remedies and Scheduled Compensation. The Work Group discussed all of these issues and concluded that many of them did not require legislative action and that those that did could largely be addressed by resolving the issues of compensation for volunteers who are injured while assisting in an emergency and compensation for persons injured by volunteers who are assisting in an emergency. These were the issues that the Work Group considered most important. Because existing statutes set out in Chapter 401 either failed to address or inadequately addressed these two issues, a majority of the Work Group was concerned that the current state of the law created a disincentive to volunteer and was unfair.

For volunteers responding to Governor-declared emergencies under ORS 401.661 and Governor-declared public health emergencies under ORS 401.441 the main concern is with the liability of volunteers for injuries to others during such emergencies. Unlike volunteers, government employees are already clearly covered under the Oregon Tort Claims Act (OTCA), ORS 30.260-30.300. The current statutes contained within ORS chapter 401, however, do not clearly address the liability of volunteers, leaving entirely uncertain the risk to volunteers associated with injuries to others during a Governor-declared emergency. For example, ORS 401.515(1) and (4) can be interpreted to provide absolute immunity for torts, protection under the OTCA, or perhaps even no protection for volunteers. Outside of ORS chapter 401, volunteers can rely on ORS 30.800, the “Good Samaritan” statute, but that statute is only applicable under very narrow circumstances. Additionally, the term “agent” within the OTCA (ORS 30.265) can be broadly interpreted and is not clearly defined in statute or in case law. While some argue that emergency volunteers would likely qualify as agents of the state under the statute, that issue is far from certain under current law. (See Section V. A. below for additional discussion).

There is also concern that although ORS 410.355 currently provides workers’ compensation for injuries suffered by volunteers in these situations, this statute is so broad that it unnecessarily covers other emergencies. Furthermore, ORS 401.395 provides for benefits in a system that is similar to workers’ compensation but is outside the traditional workers’ compensation system found in ORS chapter 656. This is especially problematic because the agency charged with administering this system (the Office of Emergency Management) has no expertise; existing workers’ compensation statutory provisions and case law do not apply to this parallel system; and this system has

never been funded by the Legislature. Additionally, the \$20,000 cap imposed on recoverable workers' compensation benefits under ORS 401.395 does not seem fair or appropriate.

For search and rescue volunteers the concerns are similar, including both their liability for harm to others, and compensation for injuries volunteers receive in the course of search and rescue operations. The search and rescue provisions in ORS 401.550 – 401.590 do not address either of these situations. As a result, under existing law, search and rescue volunteers can be personally liable for injuries to others resulting from a search and rescue. Furthermore, unless the county which requests their assistance voluntarily provides them with workers' compensation coverage or medical insurance (some counties currently do this) volunteers who are injured will receive no compensation from the government body for whom they volunteered unless they successfully sue under the Oregon Torts Claims Act. This is difficult to do because one must show fault on the government's part to succeed in such a claim. The frequency of multi-county searches and rescues, coupled with the practice of multi-unit response makes the varied coverage non-uniform, resulting in mistaken expectations.

The Emergency Health Care Services statutes (ORS 401.651 to 401.670) present additional problems. Under these statutes, DHS may designate certain health care facilities as emergency health care centers during Governor-declared emergencies or public health emergencies. If designated, these facilities can become agents of the state for tort claims act purposes. Also, these statutes create a special registry for health care providers, who, when the registry is activated, become agents of the state under the OTCA. One problem identified with these statutes is that, as currently enacted, their protections do not attach if the health care worker or facility receive compensation for their services. During an emergency, hospitals do not know in advance which patients will have insurance or other means to pay for services. Hospitals simply aren't checking insurance cards at the door. It does not make practical sense, policy wise, to only provide OTCA protections in those cases where hospitals do not ultimately receive compensation because a person happens to be uninsured. Another problem is that there are no guidelines in these statutes regarding 1) what types of activities are covered by these provisions (e.g. all activities conducted in the designated facilities? Only those activities specifically directed by the government?), or 2) what counts as impermissible "compensation" to particular individuals (e.g. per diem amounts? Housing for volunteers? Free meals?). Finally, there is no designation of which agency will be held responsible to indemnify and pay for any claims against qualified emergency health care providers and facilities when they arise.

Lastly, chapter 401 needs to be significantly reorganized. It currently contains all provisions relating to all types of emergencies – everything from the powers of the Governor during an emergency to the 9-1-1 emergency system and search and rescue. The Emergency Management Assistance Compact, a relatively self-contained act relating to the provision of emergency assistance across state lines, is also housed within chapter 401 and is currently located between the list of general definitions for the chapter and its

other substantive provisions. The organization of the chapter makes it extremely difficult to read and it also contains several definitions that need to be improved upon.

IV. The Objective of the Proposal

The objective of the proposal is to encourage and ensure fair compensation for qualified volunteers and health care facilities who participate in emergency response both by providing them with adequate compensation if they are injured and by protecting them from tort liability resulting from negligence committed while participating. Another objective of the proposal is to reorganize and clean up the existing statutes within ORS chapter 401 to make them clearer. Establishing certainty for volunteers and for government is an overarching goal as well, because current statutes do not speak with sufficient clarity to permit those potentially involved in emergency services to know what standards will or will not apply.

V. The Proposal

The proposal focuses primarily on amending the provisions contained within ORS chapter 401 and the proposal contains five basic elements: (1) extending Oregon Tort Claims Act protections to qualified volunteers; (2) providing workers' compensation benefits for qualified volunteers; (3) clarifying provisions relating to emergency health care services; (4) significant reorganization of ORS chapter 401; and (5) giving more control to public bodies to determine who is qualified to serve as a volunteer and thus receive benefits and liability protections.

A. *Limiting the Individual Liability of Volunteers by Bringing them within the Protections of the Oregon Tort Claims Act*

Among the suggested solutions to the exposure to liability for volunteers in Governor-declared state of emergencies and in search and rescue operations was to provide absolute immunity from liability. The Work Group concluded that this solution was inappropriate for two reasons. First, if immunity is created, in some cases injured parties will not receive compensation even for serious injury or death caused by a volunteer's unreasonable conduct. Second, under existing Oregon law, most notably the Oregon Supreme Court's 2007 decision in *Clarke v. OHSU*, 343 Or 581, creation of absolute immunity risks being declared unconstitutional under the Remedy Clause of Article I, section 10 of the Oregon Constitution. The Work Group's proposal therefore also makes clear that volunteers do not have absolute immunity by deleting ORS 401.515(1).² It should be noted that many other states facing this issue have simply expanded existing Good Samaritan acts to provide immunity for emergency volunteers.³ While many of these states have Remedies Clauses similar to that contained within the Oregon Constitution, their courts have interpreted their constitutions differently.

² Providing absolute immunity to certain individuals and thus completely depriving injured persons of a remedy would most likely be unconstitutional under the Supreme Court's analysis in *Clarke*.

³ For an example, see Georgia's Good Samaritan Act (Ga. Code Ann. §51-1-29).

The uncertainty surrounding the constitutionality of Oregon's current Good Samaritan statute (ORS 30.800) was a major reason that the Work Group decided not to recommend a revision to the statute. The current statute applies only to those who provide "emergency medical assistance." While this term might be interpreted broadly to cover most situations in which a Good Samaritan might provide services, a recent California decision suggests otherwise.⁴ The Work Group was concerned about whether the Good Samaritan statute would survive the Oregon Supreme Court's *Clarke* decision. While the concurrence in *Clarke* suggests that the Good Samaritan statute remains constitutional under the *Clarke* interpretation of the Remedies Clause,⁵ the Work Group concluded that the only way to ensure the constitutionality of any amendments to the Good Samaritan Act would be to amend the Oregon Constitution. The Work Group considered such a proposal to be beyond the scope of the current project, and therefore decided not to recommend amending the Good Samaritan statute.

Another suggestion was to alter the standard of care owed to a lower standard for persons serving as volunteers during an emergency. The Work Group also rejected this proposal since current Oregon tort law already requires that the facts and circumstances of the situation be taken into account when determining whether a person acted negligently or reasonably in a given case. The Work Group believed that mandating rigid protocols or altered standards of care for certain emergencies were unworkable.

The Work Group's proposal addresses the issue of exposure to liability for qualified volunteers in Governor-declared emergencies and in search and rescue operations by treating them as agents of a public body for purposes of the Oregon Tort Claims Act (OTCA), ORS 30.260 through 30.300. As a result, persons injured by these qualified volunteers while they were acting within the scope of the emergency would be indemnified by the public body and any recovery would be subject to the statutory caps on the amount that can be recovered. That is, persons injured by volunteers would have no cause of actions against the volunteer, only against the public body for which they serve. It should be noted that the 2009 Legislative Assembly is poised to increase the monetary caps on recovery within the terms of the OTCA to help ensure the constitutionality of substitution and indemnification by government for individuals in most cases.⁶ Even if the proposed changes are enacted, an "as applied" constitutional challenge similar to *Clarke* could still be made. If such a challenge were successful, the public body, when indemnifying the individual, would likely remain liable for an amount greater than the caps.

It should be noted that the proposal may not change the law in this area much, even if it clarifies it. In many cases, these volunteers would already be protected by the OTCA since the act covers officers, employees and *agents* of the state and public bodies if they are acting within the scope of their duties (see ORS 30.260-30.300). The term "agent" is not defined anywhere within the ORS, and there is little Oregon case law on

⁴ See *Van Horn v. Watson* (Cal. 2008) (finding that similarly-phrased statute regarding provision of "medical assistance" did not encompass pulling a person out of a car after an accident).

⁵ See *Clarke v. OHSU*, 343 Or. 581, 617 (Balmer, J concurring).

⁶ See SB 302, 305, and 311 (2009) (Oregon Tort Claims Act Task Force recommended bills).

this topic. The common law definition, derived from the Restatement of Agency and adopted by the Oregon Supreme Court in 1937,⁷ states: “Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” Under this definition, the Work Group believes that many qualified volunteers providing emergency services and conducting search and rescue activities would be covered by the OTCA under *current* law⁸. Nevertheless, the Work Group believed that the proposed changes provided greater clarity for volunteers ahead of time and would hopefully prevent additional litigation of the issue down the line. Thus, the Work Group recommends requiring substitution and indemnification for volunteers who are sued.

1. Qualified Volunteers Serving During a Governor-Declared State of Emergency or Public Health Emergency

The Work Group’s proposal provides in section 4 that qualified emergency service volunteers are agents of a public body under the Oregon Tort Claims Act (OTCA), ORS 30.260 through 30.300, for purposes of the acts and omissions of the volunteers if these occur during an ORS 401.661 state of emergency or an ORS 433.441 state of public health emergency, so long as the volunteer is performing emergency services under the direction of the public body. The proposal sets out the requirements for being a qualified emergency service volunteer in section 3(2). Section 3(1) limits coverage under the OTCA to volunteers who receive no compensation from the public body except for reimbursement for expenses.

The Work Group also recommends an amendment to the OTCA in Section 15 that makes clear that for purposes of the OTCA’s dollar limitation on recovery for a single accident or occurrence, events giving rise to a proclamation of a state of emergency or state of public health emergency do not constitute a single accident or occurrence. In other words, the flood, earthquake, or fire itself is not “one occurrence” for the purpose of the Act.

2. Qualified Search and Rescue Volunteers

The Work Group’s proposal provides in section 13 that qualified search and rescue volunteers are agents of a county under the OTCA for purposes of their acts or omissions that occur while these volunteers are performing search and rescue activities under the direction of the county’s sheriff or sheriff’s designee. Section 11 of the

⁷ See: *Kantola v. Lovell Auto Co.*, 157 Or. 534 (1937).

⁸ Another definition of agency can be found in an Oregon Attorney General Opinion from 1983. This definition reads: “A person (not an employee or officer) is an agent of a public body for purposes of the Tort Claims Act if that person meeting the usual ‘control’ tests with respect to the manner of performance of duties *or* if that person performs a function or responsibility of the public body *on behalf* of the public body. The person is not an agent, if a service (without supervision or control) is merely performed for the public body and not on its behalf.” (Emphasis in original). Op Atty Gen 145 (Opinion no. 8136, dated January 21, 1983). Most volunteers covered by this project would qualify as agents under either definition. For discussion of both definitions, see *Samuel v. Frohnmayer*, 82 Or. App. 375 (1986).

proposal defines “search and rescue activities” and sets out the requirements for a qualified search and rescue volunteer. Counties will be able to control who receives coverage because the only covered volunteers are those who are pre-registered with the county or acknowledged in writing by the county as being qualified; under the proposal people cannot simply show up at an emergency and be covered by the proposal. (For additional discussion of the government’s control see section E below). Furthermore, only those individuals who serve without compensation may be covered by the OTCA. The proposal makes clear that compensation does not include reimbursement for expenses.

B. *Providing Workers’ Compensation for Qualified Emergency Volunteers*

Qualified search and rescue and emergency service volunteers provide extraordinary and necessary services to Oregon and its citizens during times of crisis. They are to be commended for their willingness to serve. The Work Group’s proposal assures that if these volunteers are injured in the course of providing services, they will be compensated for their injuries through a public body providing them with workers’ compensation coverage. Such coverage makes workers’ compensation the exclusive remedy thereby precluding any tort claim by the injured volunteer against the public body.

1. Qualified Volunteers Under a Governor-Declared State of Emergency or Public Health Emergency

The Work Group’s proposal requires in Section 5 that the Office of Emergency Management provide workers’ compensation coverage for qualified emergency service volunteers who are injured in the course and scope of performing emergency service activities or emergency preparedness trainings under the direction of a public body. This proposal would replace ORS 401.355 with a new provision that narrows workers’ compensation coverage from “an emergency service worker” to only those qualified volunteers acting under an ORS 401.661 or ORS 433.441 governor-declared emergency.

This proposal also eliminates the provision in ORS 401.395 that places a \$20,000 limit on the amount of workers’ compensation benefits payable to qualified emergency service workers. This section was particularly puzzling to the Work Group because it purported to give workers’ compensation benefits to emergency service workers, but it did not allow the workers to receive full compensation for their injuries, it did not provide any link to the regular workers’ compensation system in ORS chapter 656, and it stated that payment only had to be provided to injured workers if the Legislature appropriated money into the fund (which it never did). The Work Group believes that no legitimate reason exists for treating qualified volunteers differently than other people entitled to workers’ compensation benefits. The proposal also makes clear that if the qualified volunteer is already covered by another entity’s workers’ compensation program, that program will preclude workers’ compensation coverage by the public entity and thereby avoid double benefits.

By providing workers' compensation benefits, the public body is also limiting its own liability. Workers' compensation is a system based upon a tradeoff agreement between a subject worker and the employer. In exchange for receiving full benefits under the workers' compensation system, the employee is barred from filing civil suit against the employer. In this case, a qualified volunteer would be barred from filing suit against the public body directing them during an emergency. While this is a limitation on a plaintiff's ability to recover his or her losses and therefore may implicate the Remedies clause under a *Clarke* analysis, the workers' compensation system is permissible because the employee is not required to prove fault on the part of the employer in order to receive compensation. This tradeoff is the element which makes the workers' compensation system withstand scrutiny by the court, as the system does not deprive the worker of a "substantial" remedy.⁹ It should be noted that the \$20,000 cap currently in the statute may not be an adequate tradeoff between the volunteer and public body, as it may not provide the injured worker with a substantial remedy and therefore might be unconstitutional under *Clarke*.

Oregon law currently provides three options to the state and local governments regarding the provision of benefits to volunteers who are injured: (1) Government may elect to provide full workers' compensation benefits under ORS 656.039; (2) government may elect to provide Volunteer Injury Coverage (VIC); or (3) government may elect to provide no coverage whatsoever. The third option is the default. The first option is utilized by some state agencies – one notable agency that does not make such an election is the OEM, which utilizes a significant number of volunteers. Many local governments do choose to make an election for all of their volunteers including those who volunteer in an emergency. The second option allows government to choose to self-insure its volunteers for injuries suffered while volunteering. This self-insurance system is known as Volunteer Injury Coverage (VIC), and is administered by the Department of Administrative Services (DAS) and SAIF. This coverage is loosely authorized under ORS chapter 278, but is not specifically provided for in statute. DAS has issued a policy manual explaining the terms of VIC.¹⁰ The premiums for this service are taken from the funds paid by the agency into the workers' compensation fund, but there is no additional upfront cost for VIC coverage to the government, rather the cost is assessed at payout when the volunteer makes a claim. Under VIC, the maximum coverable amount is limited to a fixed amount of \$25,000, with individual caps placed on medical expenses (\$10,000 total) and loss of income (up to \$1,250 per month for up to 1 year). In order to receive these benefits, the volunteer must waive his or her right to sue the state for any and all harm or damage to the volunteer's health in any manner resulting from or arising out of his or her state volunteer activities. Because the volunteer is giving up his or her right to sue and the remedy is capped at a specified low dollar amount, the VIC program raises constitutionality concerns. That is, there may not be an adequate tradeoff between what the volunteer is giving up and what he or she is receiving from the government in return (see above discussion re *Clarke*).

⁹ See *Clarke*, 343 Or. at 435 (Balmer, J. concurring)

¹⁰ See DAS Policy Manual no. 125-7-204: <http://www.oregon.gov/DAS/SSD/Risk/VolInjTOC.shtml>

2. Qualified Search and Rescue Volunteers

The Work Group's proposal requires that counties provide workers' compensation benefits for their search and rescue volunteers in section 13 (1). In a split vote, the Work Group concluded that current law that allows counties to elect to provide workers' compensation coverage is not satisfactory and therefore recommend mandatory coverage. The Work Group's reason for its recommendation is that mandatory coverage creates needed consistency and clarity for these important volunteers who often cross county lines while risking their lives to rescue others. Workers' compensation coverage is already provided to search and rescue volunteers by most counties and making it mandatory will make it the exclusive remedy for all counties, eliminating the possibility of more open-ended tort liability. Additionally, the proposal makes it clear that search and rescue volunteers injured while performing search and rescue activities are not eligible for county workers' compensation benefits if they are already covered by workers' compensation under ORS 401.355.

The Work Group recognizes that mandating workers' compensation coverage for search and rescue volunteers creates a new unfunded mandate for the few counties that currently do not provide workers' compensation benefits for their search and rescue volunteers. While employees of counties automatically receive workers' compensation coverage, counties may elect to cover volunteers under ORS 656.031 and 656.039. Under Article 11, section 15 of the Oregon Constitution, even if this requirement is enacted, thus imposing an unfunded mandate, counties may not be required to comply. Staff has been actively working with the Association of Oregon Counties to gain support for this provision and address the counties' concerns.

It should be noted that the decision to mandate workers' compensation benefits for search and rescue volunteers was not unanimous among Work Group members. Some proposed allowing counties to provide insurance and disability coverage to search and rescue volunteers. While this option is less advantageous for counties because these insurance benefits are not an exclusive remedy for the injured worker, this would be better than providing no coverage whatsoever. This option may be less expensive, but it also may not adequately compensate injured volunteers for their injuries.

C. Emergency Health Care Services

Sections 7 through 9 of the proposal state that during a Governor-declared emergency or Public Health Emergency, emergency health care providers registered under ORS 401.654 and other health care providers who volunteer to perform health care services under ORS 401.651 to 401.670 are covered by the OTCA regardless of whether they receive compensation. This allows hospitals to seek reimbursement through insurance or from federal sources if they so choose. As a tradeoff for eliminating the requirement that these health care providers volunteer without compensation, they are only covered by the OTCA if they are acting pursuant to directions from a public body. The Work Group believed it was important that there be some sort of nexus tying the tortious activity to the actions of the public body. In short, not all torts committed within

a hospital or by volunteer health care providers would be indemnified by the state during a declared emergency; a nexus would be necessary.

D. *Reorganization*

The Work Group also recommends that chapter 401 be broken up into several chapters and that various sections be amended or deleted. Early on, the Work Group identified organization of ORS chapter 401 as a major problem. Legislative Counsel (LC) reported that the organization could be easily improved by breaking the chapter into smaller sections based upon subject matter (e.g. separate 9-1-1 and 2-1-1 sections from search and rescue, etc.). Many of these organizational improvements can be accomplished by LC without legislative action, and the Work Group decided to leave it up to LC how best to reorganize and clean up chapter 401.

E. *Government Control over Who Receives Benefits*

Although emergency service workers and search and rescue volunteers receive increased protections under this proposal, the government also will have greater control over who will receive workers' compensation benefits and indemnification under the OTCA. Current law covers all "emergency service workers," defined as individuals who perform "emergency services" and who are either registered or who independently volunteer and are eventually "accepted" by the Office of Emergency Management or the county or city emergency management agency they serve under. The Work Group believed that "accepted" was not strong enough language because simply not rejecting a volunteer who comes to the scene could be interpreted as acceptance. This left the public body subject to possibly open-ended liability. The proposal makes some minor, yet significant changes to this definition by requiring that the volunteers be "acknowledged in writing" by the public body they serve. By setting up specific protocols as to how someone will receive coverage, the public body can limit its liability exposure by only registering a limited number of volunteers. Additionally, this helps prevent a flood of volunteers from showing up at the scene which can actually harm emergency relief efforts. This also informs prospective volunteers of the guidelines beforehand and lets them know that failure to follow these protocols will leave them without the benefits and liability protections. The same requirements apply to search and rescue volunteers.

VI. Section by Section Analysis of the Proposal

Sections 1-6: Qualified Emergency Service Volunteers

These sections amend the definitions of emergency service activities and emergency service volunteers. The definitions make clear that approved training exercises are covered under "emergency service activities" and that volunteers must be pre-registered, acknowledged in writing at the scene by the public body in charge, or a member of the Oregon State Defense Force. To be a qualified volunteer, one must be serving without compensation; section 3 clarifies that compensation does not include reimbursement for expenses.

Section 4 states that qualified emergency service volunteers are agents of a public body under the Oregon Tort Claims Act only if (1) their negligent acts or omissions are committed during a declared state of emergency or public health emergency; and (2) if they are performing emergency service activities under the direction of the public body. This section requires the public body to indemnify the negligent acts or omissions of the emergency service worker in accordance with the terms of the OTCA. Section 5 provides that the public body must also provide workers' compensation benefits to qualified emergency service workers. This section makes clear that benefits are to be given in accordance with the existing workers' compensation laws in ORS chapter 656.

Sections 7-9: Emergency Health Care Services

These sections amend ORS 401.657 to 401.670, relating to emergency health care services. The changes in sections 7 and 8 clean up the language and do not reflect substantive changes. Section 9 states that emergency health care providers are agents of the state regardless of whether they are compensated; however, they only receive these protections if they are acting pursuant to directions from a public body. This means there must be a nexus between the direction of the public body and the tortious act or omission being committed by the health care provider or facility.

Sections 10-14: Search and Rescue

Section 11 clarifies the definitions of search and rescue volunteers and search and rescue activities. Search and rescue volunteers are only qualified if they are registered with OEM or a county sheriff, a member of a designated organization that is registered with OEM or a county sheriff, or acknowledged in writing at the scene. Again, this allows the county or OEM to control who will be entitled to liability protections under the OTCA and workers' compensation benefits. Section 12 clarifies that, while search and rescue volunteers must be uncompensated to be qualified under these provisions, compensation does not include reimbursement for expenses.

Section 13 states that qualified search and rescue volunteers are agents of the county for whom they are working for purposes of the OTCA. Section 14 provides that these volunteers also receive workers' compensation benefits under chapter 656. Section 14 (2) is included because sometimes a qualified search and rescue volunteer could also be considered an emergency service worker based on the circumstances. This subsection provides that such a person may not receive double benefits.

Section 15: Oregon Tort Claims Act

This section amends the OTCA to clarify that a declaration of emergency or public health emergency by the Governor does not constitute a single act or occurrence for purposes of the OTCA. In effect, this means that the recovery for the *entire* disaster (e.g. the governor's emergency declaration following a major earthquake) will not be limited to the caps set under the OTCA.

Section 16: Series Adjustment

This section provides for some of the reorganization of chapter 401.

Sections 17-52: Miscellaneous Provisions

The changes contained within these sections are primarily included to clean up the chapter. Unnecessary definitions are eliminated, references to specific ORS numbers are amended where appropriate, and some Legislative Counsel amendments relating to style and form are made. These sections contain no substantive policy changes.

VII. Conclusion

The proposal set forth by the Work Group should be adopted for several reasons. The proposal encourages volunteerism in Oregon by providing liability protections (indemnification plus tort caps) to qualified volunteers accepted by public bodies and acting subject to their direction and control during Governor-declared emergencies and in covered search and rescue operations. Furthermore, this proposal provides workers' compensation to those who volunteer to provide essential services during a declared emergency or search and rescue efforts at the direction of public bodies. This proposal also gives the public bodies more control over who qualifies as an emergency service worker or search and rescue volunteer and thus prevents the public bodies from being subject to unlimited liability. The proposal also clarifies the emergency health care sections of chapter 401. Finally, this proposal clarifies and reorganizes an extremely complicated and poorly organized chapter in the Oregon Revised Statutes.

While there may be a fiscal impact associated with the part of the proposal requiring workers' compensation benefits to emergency service workers and search and rescue volunteers, the policy choices contained within this proposal are the right ones considering the essential service these volunteers provide to Oregon. Furthermore, the alternative—to use paid government employees rather than volunteers—would have a crippling fiscal impact to the state's already limited resources and likely would provide inadequate emergency and search and rescue services to the citizens of Oregon.

VII. Appendices