

Oregon Law Commission Enabling Rules Work Group

LC 250

Prepared by Wendy J. Johnson
Deputy Director and General Counsel
Oregon Law Commission

From the Offices of the Executive Director
Jeffrey Dobbins

Draft Report Submitted to
Oregon Law Commission Meeting on
January 23, 2008

I. Introductory Summary

This proposed bill revises and clarifies the Oregon Law Commission's own enabling statutes. The bill would add two commissioners to the composition, modify the requirements of the legislative appointments and make other modest changes to clarify and reorganize these statutes. The statutes have not been amended since the Law Commission was first established by statute by the Legislative Assembly in 1997.

II. History of the Project/Statement of the Problem Area

The Oregon Law Commission's Enabling Rules Work Group recommends retooling the Commission's statutory provisions passed into law during the 1997 Legislative Session. See ORS 173.315 et seq. The Oregon Law Commission recently celebrated its ten year anniversary and recognizes that its own statutes as well as internal procedures should be reviewed and improved periodically. The present statutes do not entirely reflect current practice; in addition, experience has shown that some of the policies in the statute could also be improved.

Commissioner and Attorney General Hardy Myers served as the chair of the Work Group. The Work Group met six times from February 2008 to August 2008. LC 250, the legislative proposal addressed here, incorporates the Work Group's recommendations. The Work Group included the following members: Sen. Suzanne Bonamici, Mark Comstock, Chief Justice Paul DeMuniz, Sandra Hansberger, Associate Dean Peter Letsou, Prof. Hans Linde, Sen. Floyd Prozanski, Lane Shetterly, and Prof. Dom Vetri.

III. Objective of the Proposals/Section Analysis

This proposal addresses a series of issues or perceived problems. Each of those matters is specifically discussed below. The matters are listed in the order covered by the statutory proposal, with sections of the bill proposal indicated as appropriate.

Section 1(2): Commission Membership

The Commission has been composed of thirteen voting Commissioners since its creation in 1997. All three branches of government as well as the legal community (both academic and practicing legal community) comprise the Commission. The Commission has included two persons appointed by the Senate President (at least one of whom is a Senator at the time of appointment), two persons appointed by the Speaker of the House (at least one of whom is a Representative at the time of appointment), the Chief Justice of the Oregon Supreme Court (or designee), the Attorney General (or designee), a governor's appointee, the dean (or designee) from each of the three law schools in Oregon, and three persons selected by the Oregon State Bar's Board of Governors. The Work Group believes this balance in membership has worked well and has led to the success of the Commission. The Work Group recommends generally keeping the structure, and only modifying the existing Commission membership slightly.

Legislative Members

The Legislative Assembly has had the potential to occupy at least four slots on the Commission; however the statute requires that only two of the slots be legislators at the time of appointment. In the past, the Speaker and the Senate President have chosen to appoint non-legislators to one of the slots. The Work Group believes that the participation and experience of legislators is invaluable to the success of the Law Commission's work,¹ and thus the recommended bill continues to require one sitting member of the Senate and one sitting member of the House at the time of appointment. The bill adds that the persons appointed to these slots will serve *ex officio*, which means that they will lose their slots if they cease to be a member of the respective legislative chamber. This will result in the commission having at least one senator and one member of the house as members. In addition, the bill provides that the second slots appointed by the House and Senate must also either be sitting members or former members of the respective chamber.

The Work Group also clarified credential requirements for the *ex officio* members of the Commission who are authorized to designate someone else to serve as a Commissioner in their stead. The deans of each of Oregon's law schools, the Attorney General, and the Chief Justice have the authority in the existing statute to choose a designee to the Commission. In practice, the Lewis and Clark Law School and the University of Oregon Law School deans have each designated faculty of their respective law schools to serve on the Commission. The Chief Justice has on occasion designated another Justice of the Supreme Court. And the Attorney General also has occasionally designated an assistant attorney general from the Department of Justice. The recommended statute would simply codify present practice and ensure such continued practice.

¹ See Hans Linde, *Notes for New Generation*, 44 WILLAMETTE LAW REVIEW 463, 465.

Two Additional Judicial Members

Finally, the Work Group recommends expanding the Commission size from thirteen to fifteen Commissioners. The two new slots would expand the number of judges on the Commission. The statute presently requires only one member of the judicial branch—the Chief Justice of the Oregon Supreme Court. “A major reason for including the Chief Justice was the hope of stimulating some system with the judiciary to collect and report instances, whether in statutes, regulations, or common law, where judges find sources of legal guidance more than ordinarily confused, contradictory, or simply lacking.”² The Work Group recommends extending the Commission composition to cover the lower courts of the judicial branch.

First, the Work Group recommends adding the Chief Judge of the Court of Appeals (or designee). Section 1(2)(i). If the Chief Judge appoints a designee, the designee must be another judge of the Court of Appeals. See Section 1(6)(c). Second, the Work Group recommends adding a circuit court judge. The Chief Justice would appoint a circuit court judge or a retired circuit court judge who continues to serve as a senior judge. See Section 1(2)(j). The Work Group recognized the time demands, particularly on circuit court judges, but felt that their experience would be invaluable to the Commission. Allowing those with circuit court experience but who are now serving as senior judges (semi-retirement) was a compromise to give flexibility to the selection. The Work Group made these recommendations since lower courts see problems that the Oregon Supreme Court often does not encounter. It should also be noted that the Work Group wanted to keep the Commission total membership at an odd number for voting purposes.

The Work Group did discuss also adding a representative of the public to the Commission composition, but ultimately found that unnecessary. The Group reasoned that the staff works with the Oregon State Bar and other groups to assist with Work Group member selection, often selecting a public advocate for the respective project. In addition, the public has adequate access to the Commission’s processes as meetings are open to the public.

Section 1(3): Ex Officio Membership

This section simply states what is perhaps the obvious to some, namely that certain members of the Commission sit as Commissioners by virtue of their office or position, i.e. ex officio. They continue to hold their membership as a Commissioner until they no longer hold the office or position. These Commissioners include the Attorney General, Chief Justice, and the deans of the law schools. In addition, the Chief Judge of the Court of Appeals (recommended new addition) would also be an ex officio member as would the legislative slots described above.

Section 1(4): Length of Terms for Commissioners (Non-Ex Officio Members)

The statutes have provided that Commissioners who are not ex officio members serve terms of two years. The Work Group and staff determined that two year terms are simply too short. Such service provides only one interim and regular session year.

² See Linde, *Notes for New Generation*, 44 WILLAMETTE LAW REVIEW at 466.

Many law reform projects take several years to fully complete and one also needs time to become familiar with the Commission process and projects. Continuity of the Commission is also important. The Work Group recommends extending the terms to four years and this section of the bill makes that change. However, to address potential changes in Oregon legislature membership and leadership (after elections), the Work Group recommends providing that the legislative appointments that require current membership in the House or Senate will cease earlier than four years if the person is no longer serving in their respective chamber of the Legislative Assembly. See Section 1(4)(b). Reappointments continue to be permitted for all members, assuming that they meet the requirements. See 1(4)(a).

Section 1(5): Filling Vacancies

This section simply explains how vacancies are to be handled when appointed Commissioners resign or otherwise end their term early. The new Commissioner finishes out the unexpired term of the predecessor to keep the appointments staggered. Often there is very little time left in the unexpired term; this section provides the appointing authority with the power to make the new appointment for the unexpired term and the next term at the same time. This promotes efficiency and provides flexibility to the appointing authority.

Section 1(6): Designee Requirements

This section simply codifies present practice of the ex officio members to date who have designated others to serve in their stead. Looking to the future, the Work Group wanted to make sure that the Commission membership remains consistent. The Work Group hopes that the ex officio members will actually serve on the Commission themselves. However, if the ex officio member does choose to designate someone else, the person should hold a similar position within the same institution as the designating Commissioner; the bill makes this an explicit requirement.

The Work Group decided not to permit other Commissioners to use proxy voting (which reflects current practice). Only ex officio members with designation authority in statute may designate another person to vote for them. In practice, some ex officio members have made the designation long term while some have made their designation limited, e.g., for a single meeting. This practice will remain permissible.

Section 1(7): Unexcused Absences

This provision is in existing law and simply provides that the term of a Commissioner who misses three consecutive meetings without prior approval of the Commission chair shall cease. See ORS 173.315(3). Unexcused absences have never been a problem for Commissioners. The recommended revised statute simply moves this provision to a separate subsection and also provides for the procedure for a new appointment should removal of a Commissioner be made for unexcused absences.

Section 1(8):

No change is made, except for renumbering.

Section 1(9): Quorum Requirements

The Law Commission's quorum requirement is like many other boards and commission statutes in that it fixes the quorum requirement at a majority of the members of the Commission. The statute did not, however, clearly state the number of votes necessary for a decision. The additional recommended sentence clarifies this issue. It provides that if there is a quorum, the commission may take action if there is an affirmative vote by a majority of the commissioners present. This rule is consistent with practice and is consistent with the Attorney General's interpretation of common law quorum requirements and the application of Oregon quorum statutes.³

Section 2: Transitioning of Terms/Effective Date Provisions

(1), (2), (3) Legislative Members: Subsections (1) and (2) transition the Commission appointments made by the Senate President and House Speaker. Present law requires only that two of these slots be actual members of the legislature at the time of appointment. At the time of this report, those positions are held by Sen. Floyd Prozanski and Rep. Greg Macpherson. The House Speaker also has also appointed a former legislator (Lane Shetterly) for the second House position. Thus, the only legislative appointment not in compliance with the proposed new requirements is the Senate appointment of John DiLorenzo, who is neither a current or former legislator. Subsection (3) would grandfather Mr. DiLorenzo, permitting him to remain as a commissioner and to be reappointed as well.

(4), (5), (6) Staggering/ Ending Date of Terms:

The Work Group recommends changing the end date of terms from August 31 to June 30 (the half year mark). This date will better correspond with session dates and the general ebb and flow of Commission work. Subsections (4), (5), and (6) give the Commission discretion in determining whether to lengthen or shorten existing Commission member terms to create a staggering effect so that all Commissioners are not ending their terms at the same time. That is, the existing Commissioners will be on a two year term and the bill would permit extension of the terms to four years. The bill allows the Commission to work with the appointing authorities to create a staggered schedule of appointments. Legislative Counsel suggested this option rather than trying to specify how to treat particular Commissioners and terms.

Section 3: Compensation for Commission and Work Group Members

The work group recommends adding language to permit legislators who are serving on Commission Work Groups or serving as Commissioners to seek reimbursement for actual expenses associated with their participation. The existing statute only permits legislators who are serving as Commissioners to receive the per diem/travel expenses from the Legislative Assembly. This has resulted in the odd case of two legislators working on the same law reform project (having been appointed to serve) and attending the same meetings, but one is reimbursed and the other is not. The Commission's work is closely associated with the duties and responsibilities of

³ See Hardy Myers, Attorney General's Public Records and Meetings Manual, Public Meetings Law Appendix C, at C-4 (January 2008).

legislators, and the Work Group makes the recommendation to ensure legislator participation in Commission projects. The fiscal impact of this change is modest.

Section 4: Meetings

This section has been modified by the work group to allow for more flexibility of the Commission in setting its meetings. While the statutory requirement for quarterly meetings is deleted altogether, it should be noted that in the concurrent review of the Commission's internal Policies and Procedures, the goal of quarterly meetings has been retained. The group did this as it thought the Policies and Procedures were a better location for such a specific provision. The problem with a quarterly meeting requirement is that there are busy times of the year and slow times of the year for the Commission. For example, in the fall and winter before a regular session, the Commission needs to meet often, generally monthly. However, during session the Commission generally does not need to meet. Also, during the early part of the interim, Commission Work Groups are busy meeting, but there is not a need for the full Commission to meet. The current requirement has led to the "tap-tap" meeting on occasion and such meetings serve little purpose.

Section 5: Legislative Counsel

The Commission continues to enjoy a close relationship with Legislative Counsel's office. At one time, Legislative Counsel's office and the Judiciary Committee's Counsel staffed the Commission's predecessor, the Law Improvement Committee. The Commission's enabling statutes were enacted in 1997 by the Legislative Assembly. Then, in 2000, the Commission began to be staffed by Willamette University College of Law when a contract was negotiated between Willamette University and Legislative Counsel. The statute, however, was never modified to reflect the changes in staff functions. Thus, the present statutes inaccurately seem to require staffing by the Legislative Counsel office itself, but those duties have been transferred to Willamette's staff for the Commission.

The Work Group determined that the provisions of current ORS 173.335(2) should be deleted altogether as they are duplicative to those tasks currently performed by Commission staff and dealt with in Section 6 (2) of this proposed bill. Lastly, the bold language in Section 5(1) is from current ORS 173.338 (2); it simply has been moved to Section 5(2). It is a statutory directive requiring action on the part of Legislative Counsel to assist with drafting services for the Commission. It is more appropriately located in Section 5, the Legislative Counsel section of the proposed bill. The Legislative Counsel's office does indeed assist with selecting Commission projects and provides invaluable drafting services to the Commission's Work Groups.

Section 6: Law Revision Program

This section, currently codified as ORS 173.338, describes the appropriate scope of Commission projects and very purpose as a law revision and recommending body. Subsection (1) has been stylistically revised to more aptly reflect the purpose and authority of the Commission. Further, subsection (2) of what is currently ORS

173.338 has been moved to the previous section, as it relates to obligations of Legislative Counsel and more appropriately fits there. Lastly the subsection (2) of this bill was formerly located in ORS 173.342 (2), and fits more appropriately within this section as it relates to a legislative directive to undertake a specific review/revision program.

Section 7: Reports

This section is currently codified as ORS 173.342. The only change from the current statute was to move subsection (2) regarding a legislative directive to study a topic and places this in the Law Revision Program section above as the group decided that would be a more appropriate location for the provision.

Section 8: Work Groups

This section provides clear statutory authority for the creation of “work groups” as per current Commission practice, and reflects the current use of the term “work group” as opposed to “committees”.

Section 9: Enacting and Effective Date

This section provides that the revisions to the Oregon Law Commission Enabling Rules statutes shall become effective upon passage. The reason for the Emergency Clause is to allow the terms and new provisions to take effect sooner, particularly the membership requirements.

III. Conclusion

The proposed bill amends ORS 173.315 et seq. It improves the Commission’s own enabling statutes based on recommendations of a Work Group charged with evaluating the statutes and practices of the Commission upon its ten year anniversary.