



DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL

**MEMORANDUM**

DATE: February 9th, 2016  
TO: Honorable Shamia Fagan, Chair  
FROM: Aaron Knott, Legislative Director  
SUBJECT: HB 4138 – Authorizing Legislative Assembly to appoint independent counsel

This testimony is presented in opposition to HB 4138.

**BACKGROUND**

Heightened accountability for Executive Branch officials is a laudable policy goal. HB 4138, as written, creates procedural, substantive and constitutional issues which run the risk of judicial unenforceability.

**HB 4138 may create a constitutionally impermissible delegation of authority.** The United States Constitution contains no provision that explicitly separates the powers of government. It simply creates three separate branches of government, provides what powers shall be vested in each, and leaves unsaid the notion that the powers assigned to each branch must be kept strictly separate. Unlike the federal constitution, Oregon makes an explicit provision for the separation of powers which mandates strict compartmentalization between the branches. HB 4138 instructs the legislature to order the executive as to how to carry out a function traditionally left to its sole discretion – who to investigate, and why. The curative language at Sec. 1 (4)(a) of the bill, leaving the ultimate discretion with the Attorney General as to whether to proceed following an investigation, does not change the nature of the delegation of power to the legislative branch. Additionally, despite the relating clause pertaining to “Executive Branch misconduct,” HB 4138 allows the Legislative Assembly to compel investigation of any “violations... of ethics or criminal laws.” This power is not confined to Executive Branch misconduct, and may be applied as written to an allegation that a person has committed any crime in Oregon law. This has the potential to transform the Attorney General into an office of the Legislative Prosecutor, and intrudes significantly into the territory of the elected district attorneys as the chief law enforcement officers of their respective counties.

**The investigatory procedure required by HB 4138 will impede prosecution.** The Attorney General is subject to several procedural constraints in determining the form and extent of an investigation as required by HB 4138. This includes a requirement that the Attorney General make a determination and report the results to the Legislative Assembly not later than the 90<sup>th</sup> day following the joint resolution commanding the investigation. This creates at least two

problems: First, it is not always possible to determine whether a prosecution will be viable within 90 days. Witnesses need to be located, served with process and interviewed, potentially voluminous evidence must be gathered and assessed. While an investigation *may* be completed within 90 days, HB 4138 hazards requiring disclosure of an incomplete investigation. Secondly, the disclosure itself has the potential to be damaging to the viability of any subsequent prosecution. Sec. 3 requires that any disclosure to the legislature be made public by the Attorney General. This disclosure is required independently of whether it is being made in the best interest of the prosecution, and regardless of how close the case is to indictment. Generally speaking, materials prepared in anticipation of litigation or prosecution are not subject to public records requests (ORS 192.501). This prevents the state from being compelled to disclose the existence of witnesses, evidence and legal strategies to the party being investigated. HB 4138 compels this result prior to an indictment, essentially providing the prosecutor's playbook to the person to be prosecuted and providing easy opportunity for witness tampering and the destruction of evidence. This will be even more damaging in the plausible instance that a law enforcement agency, including Federal agencies like the FBI, has already opened a criminal investigation into the subject of this proposed legislative action.

**The required appointment of independent counsel makes neither strategic nor financial sense.** HB 4138 requires the circuit court to appoint independent counsel after a preliminary investigation by the Attorney General. Under current law, the Attorney General appoints independent counsel only in the instance of a conflict or when otherwise efficient to do so. The Attorney General retains sole discretion over this appointment. HB 4138 requires the appointment of independent counsel after the completion of a preliminary investigation. This requirement is confusing, and expensive. The most logical read of HB 4138 is that it contemplates the appointment of a person who is neither an Assistant Attorney General nor a Deputy District Attorney by a circuit court. It is not clear by what standard a circuit court would seek to employ a special prosecutor, but such an appointment will undoubtedly be expensive, and will operate outside of the normal machinery of the state. Because the Department of Justice is the investigating agency responding to the legislative request under this bill, an independent prosecutor appointed in this matter will still be completely reliant on the case built by the Department. This makes their required appointment all the more puzzling.

The procedure outlined in HB 4138 is likely to damage any investigation initiated on its terms, and at great financial cost. The Department of Justice opposes HB 4138 as written.

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