

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-0638/1dn  
JTK:kmg:pg

December 6, 2002

Senator Ellis:

1. The appropriation treatment in this draft assumes enactment by July 1, 2003. If enactment does not occur by that date, please contact me and I will prepare a technical amendment to update this treatment.
2. This draft grants independent authority to the ethics and elections accountability and control board's special prosecutor to prosecute violations of the ethics, elections, and lobbying regulation laws and the criminal code provision relating to misconduct in public office, and directs the board to allow the prosecutor to exercise the board's power to issue subpoenas and to obtain search warrants. See proposed s. 758.21 (7) and the treatment of s. 5.05 (1) (b), stats. The draft does not affect the current authority of the board to enforce the law. Please let me know if this is not in accord with your intent.
3. The draft does not specify whether the special prosecutor must bring an enforcement action upon direction of the board if the special prosecutor does not want to bring that action. You may wish to clarify that point.
4. If you would like to authorize the division administrators of the newly created divisions of the Ethics and Elections Accountability and Control Board to be appointed outside the classified service, we will need to include a provision in the draft. Also, the current executive directors of the Ethics Board and the Elections Board serve outside the classified service. If you wish to require conversion of their positions into division administrator positions inside or outside the classified service, we will need to include a provision in the draft. In addition, if you would like to designate the incumbent executive directors as the initial appointees to the administrator positions until removed by the board, we will need to include a provision in the draft. Under the draft, all incumbent employees of the existing boards become employees of the new board, with civil service protection retained. However, the executive directors have no protection currently. Their salaries are set by their respective boards within statutory ranges. Therefore, if no provision is included in the draft, the current executive directors will become classified employees of the new board without specific position titles. Their salaries will be set under the classified pay structure. If you wish, the draft could include a provision guaranteeing the incumbent executive directors initial employment with the new board without a decrease in salary.
5. The instructions provide for the new board to have at least one full-time prosecutor position to investigate and prosecute violations of the law. See proposed s. 758.21 (7)

of the draft. Under the draft, the special prosecutor is a full-time classified employee who must be hired under merit-based recruitment procedures and is removable only for cause. Currently, the Elections Board is specifically authorized to employ legal counsel under s. 5.05 (1) (a), stats., and the board does so. The Ethics Board is not specifically so authorized, but the board in fact employs legal counsel. Neither board has a full-time investigator position, although 2001 Wisconsin Act 109, section 9215 (3v) authorized one investigator position for the Elections Board. This provision is potentially affected by the nonseverability clause in that act [SECTION 9115 (2y) (b)]. Each board currently has an executive director. The draft provides for the new board to have one executive director. However, the draft does not authorize any additional FTE positions for the new board. If any are contemplated, provision for them will need to be included in the draft. Otherwise, the new board will need to reallocate existing staff as necessary to meet the staffing requirements of the draft. If you want to include additional position authorizations in the draft, I will need to know the proposed funding source for the positions.

6. Proposed s. 758.21, which places the administrative and enforcement functions of the current elections and ethics boards in the judicial branch and augments these functions with an independent prosecutorial function, may raise an issue under the separation-of-powers provisions of the Wisconsin Constitution [art. VI and art. VII, sec. 2] because the draft places administrative and enforcement functions within the judicial branch. While a provision of this type would not be permitted under the constitutions of some states, the Wisconsin Supreme Court has indicated that in this state the separation-of-powers principle will not be applied inflexibly. The test is whether there is an actual and substantial encroachment, rather than a theoretical bridging of the division of power. *J.F. Ahern v. Bldg. Comm.*, 114 Wis.2d 69, 104 (Ct. App., 1983), as quoted in *Martinez v. DILHR*, 165 Wis.2d. 687, 697 (1992). Additionally, in this case, the proposed Ethics and Elections Accountability and Control Board will exercise some authority over all three branches. Under the separation of powers doctrine, a statute may not materially impair or practically defeat the proper function of a particular branch of government and the exercise of powers delegated it. *In Matter of E.B.*, 111 Wis. 2d 175, 184 (1983). With respect to a power that is shared between branches, a statute may not unduly burden or substantially interfere with another branch's essential role and powers. *State v. Unnamed Defendant*, 150 Wis. 2d 352, 360 (1989). Whether proposed s. 758.21 will be viewed as a substantial encroachment by one branch of government upon the proper function of another branch cannot be determined with certainty.

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