

LEGISLATIVE OVERSIGHT REVIEW SPECIAL COMMITTEE

NEBRASKA LEGISLATURE

LR 298: Provide for the Executive Board of the Legislative Council to appoint a committee of the Legislature to be known as the Legislative Oversight Review Special Committee of the Legislature

One Hundred Eighth Legislature
Second Session

Committee Members

Speaker John Arch, Chairperson, District 14
Senator Justin Wayne, Vice Chairperson, District 13
Senator Raymond Aguilar, District 35
Senator Beau Ballard, District 21
Senator Eliot Bostar, District 29
Senator Machaela Cavanaugh, District 6
Senator Robert Clements, District 2
Senator Ben Hansen, District 16
Senator Rick Holdcroft, District 36
Senator Mike Jacobsen, District 42
Senator John Lowe, District 37
Senator Mike McDonnell, District 5
Senator Merv Riepe, District 12
Senator Julie Slama, District 1
Senator Tony Vargas, District 7

Committee Staff

Trevor Fitzgerald, Counsel to the Executive Board
Lisa Johns, Policy Analyst to the Speaker

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Introduction

On August 16, 2023, Attorney General Mike Hilgers issued an Attorney General's Opinion concluding that the statutes governing the Office of Inspector General of Nebraska Child Welfare (OIG for Child Welfare) and the Office of Inspector General of the Nebraska Correctional System (OIG for Corrections) were in violation of the separation of powers provisions in Article II, Section 1 of the Nebraska State Constitution. Immediately following the issuance of the Attorney General's Opinion, both the Department of Health & Human Services and the Department of Correctional Services took the unprecedented step of cutting off access to information for not just the OIG for Child Welfare and the OIG for Corrections, but also the Office of Public Counsel (Ombudsman's Office).

In response to the Attorney General's Opinion, multiple pieces of legislation were introduced during the 2024 legislative session to address issues raised by the opinion, including LB 1321 (introduced by Speaker John Arch), LB 1293 (introduced by Senator Danielle Conrad), LB 1343 (introduced by Senator Justin Wayne), and LR 284CA (introduced by Senator Wendy DeBoer).

Ultimately, the Legislature adopted LR 298, a resolution introduced by Speaker Arch providing for the creation of a special committee known as the Legislative Oversight Review Special Committee (LR 298 Special Committee). The LR 298 Special Committee was tasked with studying the structure and organization of legislative oversight functions amongst the various divisions and offices of the Legislature, as well as the structure and organization of legislative oversight functions in other state legislatures.

On February 14, 2024, Senator Ray Aguilar, Chairperson of the Executive Board, and Speaker Arch signed a memorandum of understanding (MOU) with the Executive Branch to allow the work of the OIGs and the Ombudsman's Office to proceed while the LR 298 Special Committee conducted its work and developed further legislation to address the issues raised by the Attorney General's Opinion as well as the Legislature's broader oversight functions. Provisions of the MOU will remain in effect until the closing of the 109th Legislature, 1st Session, unless extended by mutual agreement.

While the primary work product of the LR 298 Special Committee will ultimately be the introduction of legislation during the 109th Legislature, 1st Session, this report serves as

a summary of the committee's work towards resolution of the issues presented by the Attorney General's Opinion and hopefully the strengthening of the Legislature's critical oversight functions.

Timeline of Study Activities

February 5, 2024	Introduction of resolution
February 14, 2024	Public hearing on resolution before Executive Board; Senator Aguilar & Speaker Arch sign MOU with Executive Branch
February 23, 2024	Adoption of resolution
March 6, 2024	At-large committee members appointed by Executive Board
April 18, 2024	Speaker Arch elected as Chairperson; Senator Wayne elected as Vice Chairperson
May 22, 2024	Committee members receive briefings from division directors, OIGs, and Counsel to the Executive Board on the role each office plays in legislative oversight
June 25, 2024	Committee members receive briefing from outside legal counsel on constitutional and statutory authority for legislative oversight; Carl Levin Center for Oversight and Democracy presents comparative analysis of oversight models in other states to committee members
Late Summer/ Early Fall 2024	Speaker Arch and staff meet with division directors and OIGs to discuss possible restructuring concepts
September 25, 2024	Committee members begin initial discussions for Restructuring and direct Counsel to Executive Board to begin drafting legislation
December 9, 2024	Committee provides general support of proposed Restructuring summary, with specific feedback and Suggestions for additional changes

December 13, 2024

Counsel to Executive Board and Speaker Arch present
Update on the committee's work at the Legislative Council
Meeting in preparation for the 109th Nebraska Legislature

December 15, 2024

Report issued

Appendices

Appendix 1

ONE HUNDRED EIGHTH LEGISLATURE

SECOND SESSION

LEGISLATIVE RESOLUTION 298

Introduced by Arch, 14; Aguilar, 35; Ballard, 21; Clements, 2; Jacobson, 42; Lowe, 37; Riepe, 12; Slama, 1; Vargas, 7.

WHEREAS, the Legislature has the inherent power to secure information in order to legislate, hold hearings, and conduct investigations related to the operation of state government; and

WHEREAS, legislative oversight functions related to the Legislature's inherent power are currently distributed among the various legislative divisions within the Legislative Council, including the office of Public Counsel, the office of Legislative Audit, the office of Legislative Research, and the office of Legislative Fiscal Analyst; and

WHEREAS, the office of the Attorney General issued an opinion on August 16, 2023, stating that the current statutory regime governing two offices related to legislative oversight, the office of Inspector General of Nebraska Child Welfare and the office of Inspector General of the Nebraska Correctional System, violated the separation of powers provisions in Article II, section 1, of the Constitution of Nebraska; and

WHEREAS, the Legislature believes that the legislative divisions and offices, including the office of Inspector General of Nebraska Child Welfare and the office of Inspector General of the Nebraska Correctional System, serve important legislative oversight functions and that these divisions and offices will benefit from a full review to strengthen the performance of their legislative oversight functions, to address any restructuring or reorganization necessary for continued legislative oversight, to examine how any such restructuring or reorganization may impact the interface between the Legislature and the Executive and Judicial branches, and to address any remaining issues related to the opinion of the Attorney General issued on August 16, 2023.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDRED EIGHTH LEGISLATURE OF NEBRASKA, SECOND SESSION:

1. That the Legislature hereby calls for the Executive Board of the Legislative Council to appoint a committee of the Legislature to be known as the Legislative Oversight Review Special Committee of the Legislature. Members shall include all members of the Executive Board of the Legislative Council, the chairperson of the Health and Human Services Committee of the Legislature, the chairperson of the Judiciary Committee of the Legislature, and three at-large members of the Legislature. The Legislative Oversight Review Special Committee shall elect a chairperson and vice-chairperson from the membership of the committee. The executive board may provide the committee with a legal counsel, committee clerk, and other staff as required by the committee from existing legislative staff. The executive board may authorize the committee to hire outside legal counsel as deemed necessary by the committee. The committee may hold hearings. After authorization by the executive board, the committee may issue subpoenas to compel the attendance of witnesses and the production of any papers, books, accounts, documents, and testimony under oath.

2. The Legislative Oversight Review Special Committee may study the current structure and organization of legislative oversight functions among the various legislative divisions and offices and the structure and organization of legislative oversight functions in other state legislatures. The committee may also study whether current oversight conducted by any statutorily created board or commission would be more appropriately conducted within the legislative branch.

3. The Legislative Oversight Review Special Committee shall issue a report with its findings and recommendations to the Legislature no later than December 15, 2024. The report shall include recommendations for draft legislation, if necessary. The committee terminates on December 31, 2024.

Appendix 2

LR 298 Legislative Oversight Committee Update

How we got here and next steps in the 109th Legislature

Office of Public Counsel

- ▶ One of six divisions of the Nebraska Legislature
 - ▶ Commonly referred to as the Ombudsman's Office
- ▶ Duties
 - ▶ Promotes accountability in government by independently and impartially investigating issues related to state agencies and employees
 - ▶ Investigates citizen complaints and works towards informal resolution of grievances
 - ▶ Conducts investigations under the State Government Effectiveness Act (whistleblower statutes)
- ▶ The Office of Inspector General of Nebraska Child Welfare (OIG for Child Welfare) and the Office of Inspector General of the Nebraska Correctional System (OIG for Corrections) are currently housed within the Ombudsman's Office

History of the Ombudsman's Office

- ▶ The Ombudsman's Office was created in 1969 to receive complaints from the public about administrative agencies of state government
 - ▶ No jurisdiction to take complaints related to the courts, the Legislature, the Governor and his/her personal staff, or political subdivisions
- ▶ In 1976, the Legislature added the role of Deputy Public Counsel for Corrections in response to reform of the corrections system in the wake of the Attica riots
- ▶ In 1993, the Legislature passed the State Government Effectiveness Act (whistleblower statutes) and designated the Ombudsman's Office to receive complaints under the Act
- ▶ In 1994, the Legislature added the role of Deputy Public Counsel for Welfare Services in response to the restructuring of the state's welfare services
- ▶ In 2008, the Legislature extended the Ombudsman's jurisdiction to county and city jails and added the role of Deputy Public Counsel for Institutions in response to concerns about state-run non-correctional facilities (YRTCs, BSDC, Regional Centers, and Veteran's Homes)

“ We hire the Public Counsel to be the public's lawyer on our behalf ... This is the person you and I have hired and said, here is your gate into state government. You've got a problem, our bureaucracy isn't working; you have some rights, state government isn't giving them to you, here is your portal to the State of Nebraska. ... This is our employee that we have held out and said, as best as we can do as a legislative branch, here is the Public Counsel to give you a way to deal with difficult, intricate questions that involve your rights with respect to a bureaucracy. ”

Senator David Landis

Floor debate on legislation designating the Office of Public Counsel to arbitrate disputes under the Nebraska Unmarked Human Burial Sites and Skeletal Remains Protections Act

March 23, 1989

History of the OIGs

- ▶ The OIG for Child Welfare was created in 2012, while the OIG for Corrections was created in 2015
- ▶ The OIG for Child Welfare originated as part of several recommendations from the Health and Human Services Committee's LR 37 investigation in 2011, which was an extensive and thorough review of Nebraska's attempt to privatize the child welfare system
 - ▶ LB 821 (2012) passed 49-0
- ▶ The OIG for Corrections was created following the recommendation of the Department of Correctional Services Special Investigative Committee (LR 424 - 2014) in response to the 2013 murders committed by former inmate Nikko Jenkins
 - ▶ LB 598 (2015) passed 47-0

Additional History

- ▶ Since the creation of the OIG for Child Welfare, the Legislature has expanded the OIG's duties and jurisdiction in order to enhance the ability of the OIG to monitor and review the child welfare system
 - ▶ In 2014, the Legislature mandated that the OIG review complaints and incidents related to cases referred to Alternative Response
 - ▶ In 2016, the OIG was charged with reviewing and analyzing data related to juvenile room confinement and issuing an annual report on its findings to the Legislature
 - ▶ In 2018, the Legislature required that allegations of sexual abuse of a state ward, juvenile on probation, juvenile in a detention facility, or juvenile in a residential child-caring agency be reported to the OIG
 - ▶ In 2020, following the crisis at the Youth Rehabilitation & Treatment Center (YRTC) in Geneva, the Legislature established a reporting system through the OIG with the intent of providing increased accountability and oversight regarding the treatment of juveniles in YRTCs

What the OIGs Are Not...

- ▶ The OIGs are not an “oversight committee” like in Congress or special or investigatory committees created by the Legislature
- ▶ The OIGs have no authority to direct executive branch or judicial branch agencies
 - ▶ OIGs make recommendations, but have no way to require agencies to accept or implement those recommendations
- ▶ The OIGs have no law enforcement role
 - ▶ OIGs have no power or authority to prosecute or bring any legal action, criminal or civil, against executive branch or judicial branch employees or private citizens
- ▶ OIG investigations are backward looking
 - ▶ Not playing “gotcha”
 - ▶ Designed to examine individual complaints and issues to determine if broader patterns or problems exist that necessitate legislative action
- ▶ The OIGs have oversight over two populations only - child welfare & corrections

The Current Situation

- ▶ On August 16th, 2023, Attorney General Hilgers issued an Attorney General’s Opinion concluding that the statutes governing the OIGs were in violation of the separation of powers provisions of the Nebraska State Constitution
- ▶ Immediately following the issuance of the AG Opinion, both the Department of Health & Human Services and the Department of Correctional Services immediately cut off access to information for not just the OIGs, but also for the Ombudsman’s Office
- ▶ On September 1st, 2023, Speaker Arch & former Senator Briese entered into a contract with Marnie Jensen of the Husch Blackwell law firm to represent the Legislature in matters related to the AG Opinion
- ▶ Outside counsel worked in coordination with the Speaker’s Office, the Executive Board Chair’s Office, and the Ombudsman’s Office in much of 2023 and 2024 to address both the short-term implications of the opinion and a long-term legislative solution

Responding to the AG's Opinion

LB 1321 (2024)

- ▶ Last session, in response to the Attorney General's Opinion regarding the OIGs, Speaker Arch introduced LB 1321 in attempt to legislatively resolve the issues raised by the opinion
 - ▶ Several other members also introduced legislation attempting to address these issues, including LB 1293 (Conrad), LB 1343 (Wayne), and LR 284CA (DeBoer)
- ▶ While the initial focus of negotiations with the Executive & Judicial Branches was the OIGs, it became obvious that the issue of the Legislature's oversight function involved multiple entities and offices within the Legislature, including:
 - ▶ Offices of Inspector General (Child Welfare & Corrections)
 - ▶ Public Counsel/Ombudsman
 - ▶ Legislative Performance Audit
 - ▶ Judiciary Committee
 - ▶ Health & Human Services Committee

Memorandum of Understanding

- ▶ On February 14th, Senator Aguilar & Speaker Arch signed a memorandum of understanding (MOU) with the Executive Branch to allow the work of the OIGs and Ombudsman's Office to proceed while the special committee conducted its work and developed further legislation
- ▶ The MOU included an information sharing agreement which largely mirrored the provisions of current law, as well as some agreed-upon provisions included in LB 1321
- ▶ Since the adoption of the MOU, both the Ombudsman's Office and the OIGs have reported that access has largely been restored to the levels experienced prior to the AG's Opinion
- ▶ Provisions of the MOU will remain in effect until the closing of the 109th Legislature, 1st Session, unless extended by mutual agreement

LR 298 Special Committee

- ▶ In order to establish a process to consider the broader issue of legislative oversight, Speaker Arch introduced and the Legislature passed LR 298, which created the Legislative Oversight Review Special Committee of the Legislature
- ▶ The LR 298 Special Committee was tasked with studying the structure and organization of legislative oversight functions among the various legislative divisions and offices, as well as the structure and organization of legislative oversight functions in other state legislatures
- ▶ Committee consisted of:
 - ▶ All members (voting and non-voting) of the Executive Board
 - ▶ Chairperson of the Health & Human Services Committee
 - ▶ Chairperson of the Judiciary Committee
 - ▶ Three at-large members of the Legislature
- ▶ Staff support for the LR 298 Special Committee was provided by Trevor Fitzgerald, Counsel to the Executive Board, Lisa Johns, Research Analyst to the Speaker, and Laurie Weber, Procedural Advisor to the Speaker

LR 298 Committee Timeline

- ▶ May 22nd - Committee members receive briefings from division directors, OIGs, and Counsel to the Executive Board on the role each office plays in legislative oversight
- ▶ June 25th - Committee members receive briefing from outside legal counsel on constitutional and statutory authority for legislative oversight
- ▶ June 25th - Carl Levin Center for Oversight and Democracy presents a comparative analysis of oversight models in other states to committee members
- ▶ Late summer/early fall - Speaker Arch and staff meet with division directors and OIGs to discuss possible restructuring concepts
- ▶ September 25th - Committee members begin initial discussions for restructuring and direct Counsel to the Executive Board to begin drafting legislation
- ▶ December 9th - Committee provides general support of proposed restructuring summary, with specific feedback and suggestions for additional changes

LR 298 Committee Proposed Legislation

Major Themes

- ▶ Creates the Division of Legislative Oversight
 - ▶ Legislative Audit Office
 - ▶ OIG for Child Welfare
 - ▶ OIG for Corrections
- ▶ Confirms Legislative Control over the Public Counsel/OIGs
- ▶ Confirms Legislative Authority & Purposes
- ▶ Updates & Clarifies Subpoena Authority
- ▶ Addresses Access to Information
- ▶ Addresses OIG Interaction w/ Law Enforcement
- ▶ Other Various Changes

Creating the Division of Legislative Oversight



Proposed Division of Legislative Oversight

- ▶ The proposed legislation would move the Legislative Audit Office, OIG for Child Welfare, and OIG for Corrections into a new legislative division, the Division of Legislative Oversight
- ▶ The Division of Legislative Oversight would work at the direction of a 9-member Legislative Oversight Committee (replaces the Performance Audit Committee), consisting of the following members:
 - ▶ Speaker of the Legislature
 - ▶ Chairperson of the Executive Board
 - ▶ Chairperson of the Appropriations Committee
 - ▶ Chairperson of the Health & Human Services Committee
 - ▶ Chairperson of the Judiciary Committee
 - ▶ Four at-large members of the Legislature, appointed by the Executive Board
- ▶ The Chairperson and Vice-Chairperson of the Legislative Oversight Committee would be elected by majority vote of the committee

Division of Legislative Oversight (cont.)

- ▶ Day-to-day operations of the Division of Legislative Oversight would be overseen by a Director of Legislative Oversight, appointed by the Executive Board upon the recommendation of the Legislative Oversight Committee
- ▶ The Inspectors General would be appointed to a term of 5 years by the Director of Legislative Oversight with the approval of the Chairperson of the Executive Board, the Chairperson of the Legislative Oversight Committee, and the Chairperson of the relevant standing committee
 - ▶ Health & Human Services for the OIG for Child Welfare
 - ▶ Judiciary for the OIG for Corrections

Confirming Legislative Control

- ▶ The proposed legislation transfers statutes governing the Ombudsman's Office, the OIG for Child Welfare, and the OIG for Corrections to Nebraska Revised Statutes Chapter 50, which contains other statutes governing legislative divisions
- ▶ The Public Counsel/Ombudsman would still be appointed by a 2/3rds vote of the Legislature for a 6-year term, but could be removed for cause by a majority vote of the Executive Board
- ▶ The Legislative Oversight Committee would be required to be notified prior to public release of OIG investigation reports

Confirming Legislative Authority & Purposes

- ▶ The proposed legislation incorporates legislative findings in statutes governing the Division of Legislative Oversight, OIG for Child Welfare, and OIG for Corrections regarding existing legislative authority and purposes, including:
 - ▶ The Legislature's inherent power to investigate;
 - ▶ The Legislature's constitutional authority to require that state agencies provide information to the Legislature;
 - ▶ The Legislature's constitutional authority to vest general control and management of state reformatory and penal institutions as determined by the Legislature; and
 - ▶ The role of the Division of Legislative Oversight and the OIGs in providing full-time legislative oversight and assisting in the development of legislation
- ▶ The bill also clarifies the duty of the Legislature to provide for both short-term and full-time legislative oversight of matters related to the operation of state government

Updating & Clarifying Subpoena Authority

- ▶ Subpoena authority for various legislative divisions and offices would be clarified and updated to mirror the general legislative subpoena statutes
- ▶ General legislative subpoena statutes were updated to respond to the Nebraska Supreme Court ruling in *State ex rel. Peterson v. Ebke*
 - ▶ LB 681 (2020) updated general legislative subpoena statutes in response to the *Ebke* decision, but failed to update legislative subpoena statutes located several other places in statute

Addressing Access to Information

- ▶ Removes OIG mandatory direct computer access
 - ▶ Information shall be provided to the OIGs in the most efficient and timely way, in a manner that is least burdensome to the department or agency, and in a manner which maintains confidentiality
- ▶ Creates a process by which the Executive or Judicial Branch may object to production or disclosure of legally privileged information to the OIGs and negotiate terms of production or disclosure of such information
- ▶ Provides that any confidential information or records shared with the Division of Legislative Oversight, Ombudsman's Office, or OIGs shall remain confidential and provides penalties for unlawful disclosure similar to current Legislative Performance Audit statutes

Addressing Access to Information (cont.)

- ▶ Confidential information may be shared by the OIGs with:
 - ▶ Chairperson of the Legislative Oversight Committee;
 - ▶ Chairperson of the Executive Board; or
 - ▶ Chairperson of the relevant standing committee
 - ▶ Health & Human Services for the OIG for Child Welfare
 - ▶ Judiciary for the OIG for Corrections
- ▶ Confidential information may be shared with the full Legislative Oversight Committee at the discretion of the Chairperson

Addressing OIG Interactions w/ Law Enforcement

- ▶ In the OIG statutes:
 - ▶ Provides that law enforcement agencies may provide relevant information to the OIGs
 - ▶ Provides that the OIGs shall suspend an investigation upon request by a law enforcement agency
- ▶ Previously, law enforcement agencies were required to provide relevant information and the OIGs were not required to suspend an investigation upon request

Other Changes

- ▶ Updates statutory language on general access to agency information by the Legislature
- ▶ Clarifies that legislative requests for information are not subject to the limitations under public records statutes
 - ▶ Legislature has greater access to information than members of the public
 - ▶ Legislature has access to items excepted from disclosure under the public records statutes
- ▶ Names the Ombudsman statutes the “Office of Public Counsel Act”
- ▶ Clarifies that reports and investigations conducted by the Ombudsman’s Office are not considered public records for purposes of the public records statutes
- ▶ Strikes language providing for discipline for sanction for failure to cooperate with an OIG investigation
- ▶ Makes various clean-up changes to the OIG statutes

What’s Next?

Next Steps in January