Tape #83

Both sides

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

Ninth Meeting, October 9, 1969

Minutes

Members Present: Representative Wallace P. Carson, Jr., Chairman
Representative Harl H. Haas
Attorney General Johnson (delayed)

Members Absent: Senator Kenneth A. Jernstedt

Staff Present: Mr. Roger D. Wallingford, Research Counsel

The meeting was called to order at 1:40 p.m. by Chairman Carson in Room 315, Capitol Building, Salem.

Abuse of Public Office; P.D. No. 1; September 1969.

Section 1. Abuse of public office; definitions.

Mr. Wallingford explained that no new definitions are proposed but that three definitions appearing in other Articles are incorporated. Subsection (1) refers to the definitions of "benefit" and "public servant" in the Bribery Article. Subsection (2) refers to the definition of "high managerial agent" in the Article on Parties to Crime. It reads as follows:

> "'High managerial agent' means an officer of a corporation or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employes."

Section 2. Official misconduct in the second degree.

Mr. Wallingford advised that official misconduct has been broken down into two degrees. A section on official misconduct was first discussed when the Bribery Article was considered. The subcommittee's decision was to delete the section from the Bribery Article. The deleted section, however, was not in exactly the same form as that in the draft on Abuse of Public Office.

Representative Haas asked if this was a usual crime in most states.

Mr. Wallingford replied that it was and noted that the commentary sets out some examples of the types of criminal prosecutions arising under the Misconduct in Office penal statutes of other states--New Jersey, Florida, Kansas and Wisconsin. (See Draft Commentary, p. 5.) He noted, also, that there is a proliferation of Oregon statutes covering the same type of conduct; sixteen of these are listed on page 2 of the draft and there would actually be quite a few more if the regulatory statutes were checked.

Chairman Carson asked if the proposed draft would repeal these statutes and Mr. Wallingford replied that this was the intent.

Mr. Wallingford explained that the only difference between the degrees of official misconduct is that first degree requires an "intent to obtain a benefit for himself [the actor] or to harm another" while second degree requires only a knowing violation of a statute, rule or regulation.

Chairman Carson referred to the language "lawfully adopted rule or regulation" contained in section 2 and asked why it was felt necessary to use the words "lawfully adopted".

Mr. Wallingford replied that there might be some question as to whether the violation of some rule not lawfully adopted could be made a crime.

Chairman Carson thought that without the words "lawfully adopted" the presumption would be that the rule or regulation had been lawfully adopted.

Mr. Wallingford assumed that if the modifying words were deleted so that the section read "...knowingly violates any statute or rule or regulation..." and the rule or regulation had been illegally adopted, the defendant could then raise this as a defense. He did not feel that the deletion of the language would do harm to the section.

Chairman Carson felt the retention of the language was poor from a grammatical standpoint and placed too much emphasis on "lawfully adopted" as a matter of defense.

Representative Haas asked if the language were deleted, if the unlawful adoption of a rule would still be a defense. He cited the example of the problems experienced by the Board of Pharmacy when it was held that the Board had not conformed to the statute in regard to its dangerous drug list. He wondered if the deletion of the term "lawfully adopted" would preclude this defense.

Mr. Wallingford observed that the section requires a knowing violation but does not necessarily require that the defendant have knowledge that the rule or regulation was lawfully adopted. In most cases, the defendant would not have this knowledge. In this sense, the defendant would have an advantage in that even if he knowingly violates a rule, he would have an "out" if it was later determined that the rule was not lawfully adopted.

Representative Haas still thought this should be an element of proof for the state.

Chairman Carson suggested that the subcommittee leave the section as drafted and when it is considered by the Commission he will raise the questions brought up by the subcommittee discussion. No objection was raised to this approach.

Section 3. Official misconduct in the first degree.

Mr. Wallingford read the section and explained that subsection (1) refers to acts of omission or nonfeasance and subsection (2) refers to acts of commission or misfeasance or malfeasance, all of which require the intent to obtain a benefit for the actor or to harm another.

Representative Haas commented that under present Oregon law, in the area of malicious prosecution, if a district attorney files a complaint without substantiating facts, he is cloaked with immunity because he acted under color of office. Under the proposed draft provisions, while the defendant would not have a civil remedy, he could very possibly prosecute the district attorney criminally.

Mr. Wallingford agreed that the intent to harm another would cover an act of malice and that it would be an unauthorized exercise of official duties to maliciously bring prosecution without substantiating facts. Both section 2 and section 3 require a "knowing" violation of duty, however, and it is not intended that ordinary neglect of duty or negligent performance of duty be covered.

Chairman Carson asked Mr. Wallinford if he was satisfied that sections 2 and 3 replace the numerous statutory provisions presently found in the Oregon law.

Mr. Wallingford thought the draft provisions covered the existing statutes. Some crimes involving official misconduct will be covered by the Theft, Embezzlement or other Article. The rationale behind some of the present statutes is obscure by now since the existing law has been enacted over a period of a hundred years. There is a wide disparity in the penalty provisions which range from 30 days to 20 years. Mr. Wallingford anticipated that section 2

of the draft would be classed a misdemeanor and section 3 a low grade felony when the penalty sections are added.

Chairman Carson recalled that Marion County District Attorney Gortmaker had requested the Legislature do something with regard to ORS 260.480 which requires that "the district attorney shall, under penalty of forfeiture of his office, prosecute any and all persons guilty of any violation of any provision of the election laws, the penalty of which is fine or imprisonment, or both, or removal from office." Mr. Gortmaker maintained he was forced to prosecute all sorts of election violation cases. District attorneys of other counties in which violations occurred did not prosecute and in turn were reported to the Oregon State Bar for failure to prosecute.

Representative Haas noted that legislative action making the office of district attorney non-partisan has put a different light on some of the problems because there had always been concern about the difficulty of obtaining prosecution where the violator of the election laws and the district attorney were of the same political party. He felt that if tempered with common sense, ORS 260.480 was a pretty good statute.

Mr. Wallingford noted that ORS 162.510 is the existing official misconduct statute which applies to everyone in the state except judges of the Supreme Court, the Governor and members of the Legislature. It would seem, he said, to also apply to district attorneys and reads:

> "...who wilfully...refuses to perform any duty or service pertaining to his office, with intent...the manifest hindrance or obstruction of public justice or business... whether...particularly intended or not...."

Chairman Carson wondered if the draft provisions would allow the district attorney enough discretion to exercise his common sense.

Mr. Wallingford observed that neither section 2 nor section 3 is intended to cover any official action requiring discretion. He felt it a fact, however, that a district attorney exercises discretion in areas that are really not discretionary. The district attorney might feel, for example, that it would not be profitable for the state to prosecute a case where a statute might be found requiring that he prosecute. In such a case the district attorney could possibly be prosecuted under the proposed draft although under section 3 there would have to be an "intent to obtain a benefit... or to harm another". Section 2, however, does not require such an intent, only a "knowing" violation of a statute which pertains to his office.

Chairman Carson remarked that often penalties imposed depend upon the importance a judge places on the type of crime committed and, even more often, prosecutions depend upon the importance a district attorney places on the type of crime committed. He felt this to be wrong from the correction standpoint. At the same time, he said, a district attorney must be allowed enough leeway to exercise common sense.

Representative Haas asked if the district attorney really has discretion to refuse to accept a complaint if adequate evidence to issue a complaint is presented to him.

Mr. Wallingford understood that the district attorney must accept the complaint but he did not think he could be forced to act on it. An action would have to be brought in mandamus to force the district attorney to act. Mr. Wallingford could not recall this ever being done in Oregon in respect to a district attorney although it has been with respect to circuit court judges and sheriffs. There is no way, he said, to draft an official misconduct criminal statute without creating some possible hazards if it is misused. Perhaps, he continued, what these statutes should be concerned with is forfeiture of office rather than imposition of a criminal penalty.

Chairman Carson thought that the language "with intent to obtain a benefit...or to harm another" made section 3 less objectionable in regard to the points he raised, but it still left section 2 questionable.

Mr. Wallingford commented that perhaps section 2 was not needed. While it is a lesser crime, section 2 is actually much broader and opens up more possibilities for abuse than does section 3.

Representative Haas asked Mr. Wallingford for an example of the kind of misconduct to be covered by section 2.

Mr. Wallingford replied that there are no examples of Oregon cases but referred to page 14 of the draft which cites some cases from other states. These are examples of official oppression cases, he said, but they could just as well be prosecuted under official misconduct. He noted, also, that in studying the cases cited that almost every one could have been prosecuted under some other statute, i.e., extortion, accessory to perjury. The Kansas statute cited (Kan Stat Ann 21-807) includes both official oppression and official misconduct. The Langley case is the only criminal case that he could find that has ever gone up in Oregon involving this issue. Langley, the Multnomah County District Attorney, was fined $100 and removed from office for wilfully refusing to diligently prosecute persons

guilty of violating the state gambling law. Mr. Wallingford thought he could just as well been charged under ORS 162.510, which provides for:

> "...imprisonment in the penitentiary for not more than one year, or by imprisonment in the county jail for not less than three months...or by fine of not less than $50 nor more than $500, or by dismissal from office with or without either of any such punishments."

Representative Haas wondered if the penalty provisions would not take care of the questions raised by Chairman Carson.

Chairman Carson posed a situation where a district attorney knows the law requires him to prosecute to the full extent of the law, etc., but when a wife comes in with a complaint against her husband the district attorney refuses to become involved in the domestic difficulty. Under the provisions of section 2 the wife can then go to the Attorney General and charge the district attorney with official misconduct in the second degree, of which he is guilty.

Representative Haas agreed but thought this was the law presently.

Mr. Wallingford also thought this would seem to be the law now under ORS 162.510, the general statute prohibiting unlawful acts and omissions by public officers. He advised, however, that as far as he could determine, the statute has never been used.

Chairman Carson stated that he did not like the statute but was fearful of removing it in that the threat of it being in the code might have some beneficial deterrent effect.

Representative Haas thought the code should contain something like this to insure proper performance; otherwise, the district attorney is put in the position of being able to do more than the office intends for him to do.

Representative Carson thought perhaps Representative Haas was right and suggested that section 2 be retained. He favored repeal of laws in the areas where it is thought the district attorney should have discretion.

Representative Haas concurred with Chairman Carson on the retention of section 2, as drafted.

Section 4. Official oppression.

Mr. Wallingford advised that "official oppression" is really just another form of official misconduct.

Representative Haas asked how section 4 differed from subsection (2) of section 3.

Mr. Wallingford replied that the only real difference is that section 3 requires an "intent to obtain a benefit for himself or to harm another", whereas, the official oppression section only requires knowledge that "his conduct is illegal". Section 4, particularly subsection (2), he continued, is somewhat analogous to a civil rights statute. Oregon presently does not have an official oppression statute although ORS 421.105 prohibits violence and injury to penitentiary inmates. There is a statute, ORS 659.020, which declares the state's public policy against discrimination.

Chairman Carson and Representative Haas supported the section as drafted.

Section 5. Misuse of confidential information.

Mr. Wallingford stated that this section would provide new law for Oregon.

Chairman Carson was concerned about the language "...which may be affected..." found in subsection (1).

Representative Haas asked if to "speculate or wager", as used in subsection (2), meant to buy stock.

Mr. Wallingford agreed that the terms would apply primarily to stock transactions and said that the terms were meant to be used interchangeably. "Wager" does not mean betting, as such, as that would be an illegal transaction, in any event. He read the definition of "wager" found in Webster's New Collegiate Dictionary (1961 ed): "That which is risked on an uncertain event; a bet. To hazard; risk; or venture...." This definition, he admitted, conflicts with the section because as it is used in the draft, "wager" is not meant to imply "an uncertain event".

Representative Haas asked what subsection (2) added that was not already covered by subsection (1).

Chairman Carson asked the meaning of the word "speculate".

Mr. Wallingford again referred to Webster's New Collegiate Dictionary (1961 ed) and read: "To ponder a subject in its different aspects and relations...to theorize from conjectures without sufficient evidence. To enter into a transaction or venture the profits of which are conjectural or subject to chance; to buy or sell with the expectation of profiting by fluctuations in price."

Chairman Carson thought the language in sub (1), "acquires a pecuniary interest...which may be affected" included the provisions set out in subsection (2). He asked if there was agreement that the language "which may be affected" in sub (1) is tied to the fact the actor must buy or acquire a pecuniary interest as a result of confidential information he has obtained and does not apply to a situation where the public servant coincidentally buys stock which may be affected by official action. He cited the Haynesworth situation involving the Brunswick Corporation stock as an example.

Representative Haas thought the language "if in contemplation of official action by himself or by a governmental unit...or in reliance on information to which he has access...he acquires..." would take care of such a situation. It would cover only misuse of public information.

Mr. Wallingford did not think the provisions of the section would apply to the Brunswick situation. The Brunswick stock was in no way affected by the decision made and it is Judge Haynesworth's contention that the stock was not acquired in reliance upon the information he had obtained that had not yet been made public.

Chairman Carson reiterated his stand that an individual should not be hung on coincidence; however, if he takes information received by virtue of his being a judge or legislator or public administrator and uses it for personal gain, he should be made subject to the law.

Representative Haas thought it would be a prima facie case if: (1) the individual was a public official; (2) he had access to and did acquire public information that was not made public; and (3) after acquiring that information, he acquired a pecuniary interest in property that "may be affected" by that information.

Mr. Wallingford thought this would be the case and that it would be right except for the point raised by Chairman Carson as to the broadness of the language "which may be affected". Perhaps, he said, this is a little too broad. Does the language "which may be affected" mean that the property or enterprise does not <u>have</u> to be affected; that the prosecutor does not even have to show that it <u>was</u> affected, but only that at the time of acquisition that it <u>could</u> have been affected.

Chairman Carson pointed out that, on the other hand, if the language is deleted, the intent might be evil on the part of the public official, but if the circumstances do not work out, he will not have committed a crime. The actor would have to profit in order to be a criminal.

Mr. Wallingford thought that this was another type of statute that would involve the discretion of the district attorney. He did not feel it was the type of statute that would be used unless there was a gross impropriety.

Chairman Carson thought the retention of the language "may be affected" was desirable and Representative Haas agreed that it was needed--otherwise it would have the effect of sanctioning the misuse of public information as long as it did not work out satisfactorily.

Representative Haas moved to amend section 5 by deleting subsection (2) and renumbering subsection (3) to make it sub (2).

Mr. Wallingford suggested that subsection (2) be deleted and the present subsection (3) be incorporated into the present subsection (1). Since there would then be but one paragraph, all subsection designations could be dropped.

Representative Haas moved the amendment to section 5 as outlined by Mr. Wallingford. The motion carried unanimously.

Chairman Carson stated, for the minutes, that rather than eliminating subsection (2) of section 5, it was felt that the provisions of sub (2) were covered in the present subsection (1) and these provisions will be carried forward in the amended version of section 5.

Section 6. Concealing a conflict of interest.

Mr. Wallingford explained that this is not, in substance, a conflict of interest statute but proscribes failing to disclose a conflict of interest. Subsection (1) states the crime and subsection (2) defines what is meant by the term "conflicting interest". Mr. Wallingford felt the section was quite narrowly drawn because the defendant would have to be a director, officer or high managerial agent of the private company or corporation which is dealing with the government; he must know a conflict of interest exists; and he must be exercising a substantial, discretionary function.

Chairman Carson thought the section contained some rather vague definitions and he wondered if they would stand the test of constitutionality. He wondered, for example, what "...disclose in advance a known conflicting interest...to...the public" meant. What is telling "the public"--telling a newspaper reporter? What if the defendant informed a newspaper and the conflict of interest information was not published. Another problem, he continued, is the meaning of the language "...a substantial interest in the private entity...."

Representative Haas cited a situation where a state legislator has a substantial stock interest in a contracting firm and a bill for an appropriation to build a new state building comes before the legislature. Right at this point, would the proposed provisions come into play?

Mr. Wallingford thought the question would be whether or not the legislator had "a substantial discretionary function"--would he award the contract; would there be sealed bids.

Chairman Carson asked if it would not be conceivable today to have an interest in a corporate entity and not be apprised of it--such as through ownership of mutual fund stock.

Mr. Wallingford thought if a person had large stock holdings it would be possible. With all of the recent mergers and consolidations, it is difficult to know who actually own many companies.

Representative Haas noted that the late Senator Dirksen had retained his membership in an Illinois law firm while he served in Congress. This firm represented various contractors and Senator Dirksen voted in Congress on legislation that materially affected these clients.

Mr. Wallingford advised that there is federal criminal law on concealing or failing to disclose a conflict of interest but that it is rarely applied to United States Senators. In respect to Senator Dirksen, he added, he did not make an effort to conceal the various transactions in which he was involved--it was common knowledge that he was a member in name only of a Peoria law firm which did a good deal of government business. He never denied that he steered a number of clients to the firm and that he received a percentage of the profits.

Chairman Carson did not think the section was drawn to include, or that it intended to include, such discretionary action as that exercised by a legislator when he votes for a bill authorizing a highway building or other new state buildings, even though he may later submit a bid on that building.

Mr. Wallingford referred the members to page 17 of the Draft which lists a number of state statutes which are in point and noted that most of them concern various public servants involving themselves in government contracts.

Chairman Carson thought the intent of the section is to get at the kind of conduct being uncovered in the Army investigations where supply officers and club officers form a corporation on the outside and then deal with themselves. There is nothing illegal done in the sense of embezzling funds, etc.

Mr. Wallingford noted that the provisions of the section would not make forming such corporations illegal; it would only make the failure to declare such an interest illegal.

Representative Haas asked if the provisions would cover a case where an insurance commissioner owns stock in an insurance company doing business with the State of Oregon.

Mr. Wallingford thought it might apply with respect to a discretionary function--where an insurance commissioner makes a decision regarding revocation of a license where the facts are in dispute, or a decision regarding a rate increase which he could approve or disapprove. This would involve a pecuniary transaction. Any time an insurance company's license is revoked, he continued, it probably involves a pecuniary transaction, although he thought the term is used in section 6 in a contractual sense.

Representative Haas thought the section should cover this type of situation.

Chairman Carson agreed but added that he did not want to get down to the point of wondering if a legislator in the contracting business could vote on a budget or building authorization. This is the reason he felt concern about the vagueness of some of the terms used in the section.

Mr. Wallingford agreed that there might be a problem with the language "a substantial interest in the private entity". He did not think there would be a problem with the meaning of "a substantial discretionary function" and Chairman Carson agreed.

Chairman Carson understood the phrase "owns directly or indirectly" used in subsection (2) was to pick up situations involving family holdings; however, this is a euphemism, he said, as one cannot own indirectly. A wife may own stock but this does not make the husband an indirect owner. He wondered if "owns indirectly" would have any legal definition other than, perhaps, through a trust. He suggested that perhaps the subsection should read, "...a director, officer or high managerial agent...owns or has an interest in...."

Representative Haas observed that an official, then, could merely divest himself of his holdings by transferring them to his wife during the period of time the conflict of interest existed and he would be in the clear.

Chairman Carson's only objection was to the word "indirectly"; he was convinced in his own mind that it was too vague to withstand the test of constitutionality.

Mr. Wallingford stated that obviously when the private entity in which the public servant is interested is owned 90% by his wife, there is a very real conflict of interest, even though the public servant has no stock interest in the company at all. It is very common now, he continued, to have property arrangements involving property ownership by a wife or by children.

Chairman Carson reminded the members that the section's provisions concern disclosure not divestiture; because of this he felt the section's provisions could be relatively tough.

Mr. Wallingford noted that it is necessary to determine what a "conflicting interest" is before getting to the issue of the failure of the public servant to disclose it.

Representative Haas suggested substituting the wording "owns directly or controls" for the language "owns directly or indirectly" used in subsection (2) of section 6.

Mr. Wallingford commented that there would then have to be a determination of who actually controlled the stock. So far, he thought the subcommittee had two problems: the question of to whom the public servant must disclose his conflict of interest and, secondly, what interests must be disclosed.

The subcommittee recessed for ten minutes, reconvening at 3:00 p.m. Attorney General Johnson now present.

Chairman Carson briefly reviewed for Mr. Johnson the subcommittee's action on Abuse of Public Office, P.D. No. 1, and outlined the questions raised by the members in regard to section 6.

Mr. Johnson felt the standard imposed was quite wide--the jury would have to decide whether or not the public servant exercised "a substantial discretionary function" and whether or not he had a "substantial interest" in the private entity. He questioned whether this was something which should be handled criminally. He had always felt the answer to this type of problem was mandatory public disclosure before the fact.

Mr. Wallingford thought this might be applicable to elected officials but he noted that most public servants dealing in government contracts are long time civil servants who are not directly answerable to the public.

Mr. Johnson made the point that this type of statute is more and more becoming a tool to politically embarrass people rather than to discourage the conduct it was designed to deter.

Chairman Carson agreed with this point but drew attention to the military investigation now underway which is uncovering the fact that there are civil servants owning outside corporations from whom purchases are made at great financial gain.

Mr. Johnson again raised the question of whether or not this type of conduct could be taken out of the criminal field.

Mr. Wallingford observed that one of the problems involved is that it is extremely difficult to draft a conflict of interest criminal statute--not a disclosure statute--making it a crime to have a conflict of interest. This is why he approached the problem in the manner set out in section 6. Obviously, he continued, the provisions of the section would not come into play until after the transaction has been completed and the public servant has made the profit and is revealed in some way. It is obvious that someone who knows he has a conflict of interest is either going to disqualify himself, is going to act without telling anyone about the conflict, or is going to ask the Attorney General for an opinion as to whether there exists a conflict.

Mr. Wallingford drew attention to the fact that none of the numerous statutes cited as existing law on page 17 of the Draft are in the criminal code. The penalties, in most cases, are fairly consistent--most of them being misdemeanors.

Chairman Carson thought he and Representative Haas favored something being done in this area but he could not support section 6 as long as it contained the vague language concerning what constitutes a conflicting interest and to whom the public servant reports the conflict.

Mr. Wallingford felt that narrowing the provisions of subsection (1) would resolve one problem--the public servant could be required to disclose to the Attorney General only. Resolving the problem in subsection (2) would be more difficult from a drafting point of view.

Chairman Carson suggested eliminating subsection (2) from the draft and footnoting it to the Commission explaining that while there is substantial interest in this area, the subcommittee had raised a number of points and had decided that the subsection in its present form was not satisfactory.

Mr. Wallingford advised that when drafting Preliminary Draft No. 2 he would rewrite the section and try to solve, as well as possible, the problems raised. This revision, then, could be studied by the Commission.

Chairman Carson announced that since there was no objection to this approach, it would be followed.

Prostitution and Related Offenses; P.D. No. 1; August 1969.

Representative Carson understood that in the Sex Offenses Draft the male has been defined out of the offense of rape; that is, it deals only with the male act upon the female. Now, in the proposed Prostitution Draft, he noted, the definition of a "prostitute" means either a male or female person.

Mr. Wallingford agreed with this statement, adding that this definition was relatively new in the law. It is felt that male prostitution is an equal problem.

Mr. Johnson commented that this is an area of law that is weakly enforced, at any rate. There is a distinction, he said, particularly in the male prostitute area, from the standpoint of who is profiting from the crime. There is also the old problem when both sides are made a party to the crime--when the victim is made guilty of a crime, the enforcement problem is increased.

Chairman Carson asked who the victim is, in the classic sense, in the crime of prostitution.

Mr. Wallingford replied that, theoretically, it is society as a whole. He did not think it was the prostitute nor the patron, and, certainly, those promoting and profiting from prostitution are not being harmed. The problem, he said, is that money derived from prostitution is placed in other illegal activities, which, in the long run, are harmful. For example, many of the low class prostitutes in Portland are also heroin addicts; those promoting prostitution like to have the women working for them addicted since it makes them more manageable.

Section 1. Prostitution offenses; definitions.

Mr. Wallingford explained that subsection (1) incorporates three definitions taken from section 1 of the Sexual Offenses Draft--that of "sexual conduct", "sexual intercourse" and "deviate sexual intercourse". Subsection (2) defines the term "prostitute" to mean "a male or female who engages in sexual conduct for a fee." The term "fee" has not been defined as it does not necessarily have to be money. Some of the other states have defined "prostitute" by using the term "money" instead of "fee". One of the problems, he said, in defining a "prostitute" is that it becomes confused with the traditional "mistress", who, in effect, sells her sexual favors for consideration. It is not intended that this activity be made a crime.

Mr. Johnson thought it would be well to check with law enforcement authorities to see if some idea could be had as to how many prosecutions are based upon evidence provided by the male.

Mr. Wallingford said it was his understanding that prosecutions for prostitution are primarily based upon testimony of vice squad officers. A complaint is very rarely brought based upon a complaint by a private citizen who would most obviously be a patron. While the draft was submitting a patronizing section, he advised that he was against it because he felt it would create more problems than it would solve. For example, since most prosecutions are based upon testimony of vice squad officers, there is the problem of accomplice testimony, making it difficult for vice squad officers to operate.

Mr. Johnson thought the draft provisions would put the vice squad officer in violation. Under the language in section 2, "...if he engages in or offers or agrees to engage in sexual conduct..." he would be committing a crime.

Chairman Carson referred tothe definition of a "prostitute" and understood it meant to "engage in sexual conduct". He noted, then, that a person could be charged with prostitution without being a prostitute or without either of the parties being a prostitute since section 2 defines the crime of prostitution as "engages in or offers or agrees to engage in sexual conduct". If both persons agree to engage in sexual conduct, a crime has been committed.

Mr. Wallingford agreed, adding, however, that the word "prostitute" is not used in section 2, Prostitution.

Mr. Johnson referred to the language in section 2, "A person commits the crime of prostitution if he engages in...for a fee", and wondered if this language would not catch the patron.

Mr. Wallingford recalled that the question of whether or not the patron might be covered under the provisions of section 2 had come up before the subcommittee considered the draft. He construed the language "in return for a fee" to mean that the consideration was flowing only one way. The patron would not be engaging in conduct "in return for a fee".

Mr. Wallingford pointed out that the only defined term used in section 2 is "sexual conduct". This would cover more than sexual intercourse; it would cover homosexual conduct, also. He advised that the only applicable Oregon law today is the vagrancy statute, ORS 166.060, which states:

> "(1) The following described persons are guilty of vagrancy and shall be punished upon conviction by imprisonment in the county jail for a period not exceeding six months, or by a fine of not more than $100, or both:
>
> "(d) Every common prostitute."

Actually, then, the proposed section is much broader than the present law because, as noted previously, the term "sexual conduct" embraces additional forms of sexual conduct. He did not think that the term "common prostitute" would include homosexual conduct.

Mr. Johnson thought it would be adviseable to define the term "fee".

Mr. Wallingford admitted that the word was not defined and advised that California uses the term "money", New York and Michigan use the term "fee".

Mr. Johnson asked what would be done in the situation where a man sends his mistress an allowance.

Mr. Wallingford replied that it was not intended that the section's provisions cover this type of situation. Theoretically, the consideration in these instances would cover more than just sexual companionship.

Chairman Carson referred to Webster's New Collegiate Dictionary (1961 ed) and read the definition of the term "fee":

> "A charge fixed by law for certain services or privileges. Compensation for professional service. A fixed charge for admission, as to a museum, or for stated privileges; as, club fees. A gratuity; tip."

Mr. Wallingford preferred the word "fee" rather than "money" because it seemed to him that a prostitute could be paid in many ways other than using money, although he admitted that most professional prostitutes would probably not be interested in consideration other than money. He did not feel it would make too much difference which word was used--fee or money--in that the present statute does not mention anything about consideration and prostitution is being prosecuted.

Representative Carson asked if the members were satisfied with the definition of "prostitution" as it is set out in section 2. He noted that it referred to the professional prostitute, male or female, to whom the fee is to be paid. Hearing no disagreement, the subcommittee moved on to consideration of section 3.

Section 3. Patronizing a prostitute.

Mr. Wallingford pointed out that this section uses the term "prostitute" so that where used it "means a male or female person who engages in sexual conduct for a fee." There is presently a

statute similar to the provisions of subsection (2) of section 3 and its purpose is to give considerable leverage to the law enforcement people. They have a problem, when raiding a house of prostitution, in distinguishing between those have culpability and those who do not.

Representative Haas wondered if subsection (2) should not contain language to the effect that he "knowingly enters and remains in a known place of prostitution...."

Mr. Wallingford replied that this had occurred to him when he was drafting the section but it seemed to him that if the "intent to engage in sexual conduct" had to be proved the element of "knowing" would not be required.

Mr. Johnson was excused at 3:45 p.m. to attend a meeting of the Emergency Board.

Mr. Wallingford directed attention to page 18 of the Draft which sets out eight different bases for finding section 3 objectionable; pages 17-18 list five in support.

Representative Haas asked if a police officer offered to pay a fee to a woman he thought was a prostitute if he would be in violation of the proposed statute.

Mr. Wallingford said that he would be in violation; however, in most confrontations with prostitutes, the vice squad member does not initially offer to pay--he agrees to pay. For this reason the word "agree" has not been used in the section. To build a prima facie case, they now often do pay the money; under the proposed statute the vice squad officer could not longer hand the money over.

Chairman Carson thought there was some provision now enabling vice squad officers to buy drugs. He wondered why this could not be built into the proposed draft.

Mr. Wallingford agreed that this could be done easily, adding that there are a number of exceptions in present law, as those relating to vice squad men dealing in drugs and intercepting communications. Mr. Wallingford did not favor section 3 and again stated his belief that it would not accomplish anything worthwhile; it would create more problems than it would solve. The only real thing in its favor is that if the prostitute is going to be prosecuted, it would seem fair and equitable to prosecute the patron whose continued patronage really supports the crime.

Representative Haas referred to page 18 of the Draft, to item "(7)" which states: "Prosecution threatens stability of home and

family, public exposure, damage to reputation, disgrace, divorce" and commented that this was a good point.

Mr. Wallingford agreed since prostitution is, in effect, a victimless crime and arrest and exposure creates a lot of social instability not warranted by the crime. He felt that the reasons for which prostitution is opposed really do not have much to do with the patron, except in the sense that if there were no longer patrons, there would no longer be prostitution. Another problem is the difficulty of enforcement--who is going to make the complaint. The only logical source would be a member of the female vice squad. Mr. Wallingford admitted, however, that having such a statute on the books might possibly act as a deterrent.

Chairman Carson commented that what seems to really be offensive is public solicitation by the prostitute. He asked if the subcommittee members were willing to go the way England has and allow prostitution as long as it does not offend the public mores.

Mr. Wallingford stated that he would favor this approach but that he did not think it would work in this country as it does in England because the problems are not the same in the two countries. England does not have the social mobility, the organized crime or the narcotics problem that the United States does.

Chairman Carson noted, too, that England's legislation is for an entire country, while the proposed draft legislates for a state. This, also, is a substantial difference.

Further discussion of the draft was deferred until the next subcommittee meeting.

Future Subcommittee Meeting Date

After some discussion, it was decided that Tuesday, October 21, or Wednesday, October 22, should be considered as dates for the next subcommittee meeting. Chairman Carson and Representative Haas favored having an all-day meeting, starting at 9:30 a.m.

The meeting was adjourned at 3:55 p.m.

Respectfully submitted,

Maxine Bartruff, Clerk
Criminal Law Revision Commission