

## MEMORANDUM

**To: Members, Governing Board, California Institute for Regenerative Medicine**

**From: Bob Klein, Chairman, Governing Board  
Art Torres, Vice Chair, Governing Board, and Acting Chair, Legislative Subcommittee**

**Date: August 12, 2009**

**Re: Little Hoover Commission Report on CIRM**

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### INTRODUCTION

The Legislative Subcommittee met on July 16 and August 6, 2009, to consider the recommendations contained in the Little Hoover Commission's report on CIRM. (A full copy of the Little Hoover Commission's report is appended to this memorandum as Attachment A.) The Subcommittee considered reports from Board Counsel and CIRM management, heard comments from staff of the Little Hoover Commission and members of the public, and engaged in a thorough discussion of the Little Hoover Commission's report. The Legislative Subcommittee also reviewed a letter from Senator Dean Florez, the only member of the Little Hoover Commission who opposed the Commission's adoption of the report. (A copy of Senator Florez's letter is appended to this memorandum as Attachment B.) After considering the Little Hoover Commission's report, Senator Florez's letter, staff analysis, public comments, and board member discussion, the Legislative Subcommittee approved motions relating to the recommendations made by the Little Hoover Commission. Below, we summarize the Little Hoover Commission's recommendations, the staff's analysis, and the positions recommended by the Legislative Subcommittee.

The Little Hoover Commission's report includes three distinct categories of recommendations: (1) modifications to Proposition 71 that, based on the advice of board counsel, would require a new ballot measure; (2) policy changes that the Little Hoover Commission believes CIRM could implement on its own; and (3) modifications to Proposition 71 that would require legislative intervention:

#### **I. Modifications that Would Require a New Ballot Measure**

##### **A. Little Hoover Commission Recommendations**

(1) reduce the size of the Board from 29 to 15 (LHC report, p. 17-18; 31-32);

(2) reduce board members' terms from 8 or 6 years to 4 years, after the terms of current members expire (LHC report, p. 18-19; 32);

(3) concentrate appointment authority in the Governor by authorizing the Governor to appoint 11 of 15 members (2 members would be appointed by the Legislature and 2 members would be appointed by the President of UC) (LHC report, p. 18-19; 33);

(4) eliminate the Chair's statutory responsibilities and transfer them to the President (LHC report, p. 19; 32-33); and

(5) authorize the Board to select the chair and vice chair from among the 15 members (LHC report, p. 21-22; 32-33).

## **B. Staff Analysis**

At the Legislative Subcommittee meeting on July 16, 2009, Board Counsel James Harrison presented his analysis of the Legislature's authority to implement these changes through legislation, as opposed to a new ballot measure. (Mr. Harrison also prepared a detailed written analysis, which is appended to this memorandum as Attachment C.) Mr. Harrison explained that, under California law, an initiative may only be amended by the voters, unless the measure expressly permits legislative amendment. This limitation was designed to protect the people's power of initiative by preventing the Legislature from undoing what the people have done without the electorate's consent. Although Proposition 71 permits the Legislature to amend the law, it restricts this power to amendments that would enhance CIRM's ability to further the purposes of its grant and loan programs.

The Little Hoover Commission's recommendations are inconsistent with these limitations, Mr. Harrison explained, because they would contravene the intent of the voters and violate specific primary mandates of Proposition 71:

- The size of the Board was intended to ensure not only that CIRM has the expertise necessary to encompass the entire scientific and medical research pipeline from discovery to clinical application, but also to provide a diversity of viewpoints that enriches debates and improves outcomes. Reducing the size of the board almost by half would interfere with the deliberate design set forth in Proposition 71.
- By providing for six and eight year terms, the voters sought to protect the Board's scientific mission and also provide stability for CIRM to pursue its ambitious mandate. Limiting board member terms to four years would interfere with the independence and stability of the board.
- The diffusion of appointments among four constitutional officers was also intended to maintain the "independence" of board. Concentrating 11 of 15 appointments in the Governor and authorizing the board, rather than the four constitutional officers, to nominate the Chair and Vice Chair, is inconsistent with the voters' express intent to create an independent board to oversee CIRM.

- The assignment of statutory responsibilities to the Chair reflects the voters' intent to allocate financial/legal issues and scientific issues, respectively, to individuals with expertise in those fields. (The Chair's duties, for example, are aligned with the qualifications for Chair prescribed by Proposition 71.) Transferring the chair's statutory duties to the President would be inconsistent with the deliberate structure established by Proposition 71.

In summary, Board Counsel advised the Subcommittee that these amendments are inconsistent with the voters' intent and a primary mandate of Prop. 71 – namely the composition and structure of the board. For all of these reasons, Board Counsel concluded that the Legislature would have to place another measure on the ballot to amend these provisions, just as it did with Propositions 10 and 63, which it sought to amend through Proposition 1D and 1E, respectively, in the May 19, 2009 special election. (The voters rejected Propositions 1D and 1E by a substantial margin.)

### **C. Legislative Subcommittee's Proposed Position**

After considering this analysis, board member discussion, and public comment, the Legislative Subcommittee voted 8-0, with one abstention, to oppose these recommendations on the ground that, based on the advice of counsel, they would require another vote of the people.

**LEGISLATIVE SUBCOMMITTEE RECOMMENDATION: Oppose Little Hoover Commission recommendations 1 through 5 based on counsel's advice that the proposed amendments to Proposition 71 would require another vote of the people.**

## **II. Policy Changes that CIRM Could Implement**

### **A. Little Hoover Commission Recommendations**

- (6) modify the pre-application review process (LHC report, p. 26-27; 33-34);
- (7) identify all of the applicants in connection with an RFA on a trial basis (LHC report, p. 25; 34);
- (8) poll peer reviewers to determine whether they would resign if they were required to publicly disclose their financial interests (LHC report, p. 24-25; 34);
- (9) amend the minutes of board meetings to disclose vote tallies and recusals (LHC report, p. 25; 39);
- (10) add a provision to the board bylaws authorizing removal of members for cause (LHC report, p. 18; 33); and

(11) adopt a succession plan for leadership and a transition plan for the eventual expiration of bond funding (LHC report, p. 35-36).

## **B. Staff Analysis**

At the August 6, 2009, meeting of the Legislative Subcommittee, CIRM President Alan Trounson reported to the Subcommittee regarding CIRM management's position on items 6 through 8. Board Counsel James Harrison made a presentation regarding items 9 and 10 and Chairman Bob Klein addressed item 11. As was true of the July 16<sup>th</sup> meeting, staff from the Little Hoover Commission attended the meeting, provided comments, and responded to questions. The staff's analysis of these items is summarized below:

### **(6) Modify pre-application review process.**

The Little Hoover Commission recommended that CIRM modify its pre-application review process to enhance CIRM's transparency but offered no suggestions as to how the process should be modified. The ICOC agreed to have a trial period for the pre-application process over three RFAs: Basic Biology I, Disease Team Research Awards and Basic Biology II. This trial period is still in progress and the information collection is incomplete, as is the analysis and evaluation. The results of this experiment will be completed, analyzed and evaluated and presented to the ICOC in December 2009. CIRM staff will provide recommended modifications to the pre-application review process at that time.

**Staff Position: CIRM staff believes that this proposal is premature, but will provide recommended modifications to the Board in the future.**

### **(7) Identify all of the applicants in connection with an RFA on a trial basis.**

Citing Connecticut, the Little Hoover Commission recommended that CIRM identify, on a trial basis, all applicants for a particular request for applications to enhance CIRM's transparency. CIRM staff believes very strongly that this is inappropriate – no granting agencies of which they are aware follow this procedure, other than Connecticut. It is not considered a best practice nor is it commonly used. Confidentiality is critical to ensuring the integrity of the peer review process. The names of submitting institutions and individuals, as well as application content and peer evaluations, are kept confidential, except to those involved in the review process, to the extent permitted by law. Disclosure of scientists' failures in grant competition would have a negative impact on their careers and make them reluctant to propose highly innovative projects that often move the science forward. In addition, CIRM's plans to expand its partnerships with industry will be compromised by disclosure of unsuccessful applications that could thwart a company's ability to raise funds.

**Staff Position: Because of the importance of confidentiality in the peer review process, CIRM staff does not support this proposal.**

**(8) Poll peer reviewers to determine whether they would resign if they were required to publicly disclose their financial interests.**

Citing previous statements from CIRM that members of the Grants Working Group would resign if they were required to publicly disclose their financial interests, the Little Hoover Commission recommended that CIRM staff conduct an anonymous poll of its peer reviewers to determine whether they would resign if required to file public financial disclosure statements.

To put this request in context, it is important to understand that, under California law, members of an advisory group are not required to complete financial disclosure statements. Thus, CIRM already goes beyond the requirements of state law by requiring members of the Grants Working Group to disclose their financial, professional, and personal interests to CIRM, and CIRM requires recusal in the event of a conflict. Furthermore, pursuant to the legislative enhancements approved by the Board in 2005, CIRM has agreed to make these disclosure statements available to state auditors for review. Indeed, the State Controller has reviewed CIRM's conflict policies and records and determined that CIRM's conflict policies are more rigorous than National Institutes of Health requirements and that CIRM had complied with these policies. Thus, there is no evidence that suggests a need for modification of these policies.

However, CIRM staff are prepared to take an informal, anonymous poll of GWG members and alternates attending the next GWG meeting to find out whether they would be willing to continue serving if: (1) the financial disclosure documents that they are currently required to complete were to be made public, or (2) they were required to complete and make public the Form 700. CIRM will disclose the aggregate results of this poll.

**Staff Position: CIRM staff endorses the proposal to take an anonymous poll of GWG members.**

**(9) Amend board minutes to include vote tallies and conflicts.**

The Little Hoover Commission recommended that that the Governing Board amend the minutes of its meetings to include a tally of votes and recusals on grant applications. CIRM staff is in the process of amending the minutes of Governing Board meetings back to January 1, 2008, to include this information, and we will include this information in the minutes of meetings going forward. This information will be posted on CIRM's website.

**Staff Position: CIRM staff endorses this proposal.**

**(10) Add a provision to the Board's Bylaws to permit the removal of a board member for cause.**

The Little Hoover Commission recommended that the Governing Board add a provision to the Board's bylaws providing for the removal of members of the Board for cause. Under Proposition 71, members are appointed to serve fixed terms. (Health & Saf. Code, § 125290.20(c).) In upholding Proposition 71 against a constitutional challenge, the First District Court of Appeal construed this provision to permit removal of members only through a quo warranto action initiated by the Attorney General. (*California Family Bioethics Council v. California Institute for Regenerative Medicine* (2007) 147 Cal.App.4th 1319, 1354-1355.) The court's reading of Proposition 71 is consistent with California law, which provides that a member of an appointed body serves at the pleasure of the appointing authority only when the member's term is not fixed by law. (See Gov. Code, § 1301; *Brown v. Superior Court* (1975) 15 Cal.3d 52, 55-56.) Because the members of the Governing Board are appointed to serve terms prescribed by law, they are not subject to removal by the appointing authority. (This feature of Proposition 71 is not uncommon; indeed, numerous members of state commissions serve fixed terms, including the members of the Little Hoover Commission.)

Furthermore, Proposition 71 provides no authority for the Board to remove members. Indeed, the inclusion of a removal power in the Board's bylaws would interfere with the authority of the appointing powers to select the members whom the appointing authority believes are best suited for the position. The Governing Board, therefore, has no power to amend its bylaws to provide for the removal of members of the Board. It is important to note, however, that this limitation would not prevent the Board from requesting that the Attorney General initiate an action to remove a member for cause.

**Staff Position: Because the Board does not have the power to adopt a bylaws provision providing for the removal of members, CIRM staff does not support this proposal.**

**(11) Adopt a succession plan for leadership and a transition plan for the eventual expiration of bond funding.**

Chairman Bob Klein explained that he had announced his intention not to seek a second term 18 months before the expiration of his term in order to permit time for the Board to plan for a leadership succession and that a succession plan, including the possibility of a Board search committee which would make recommendations for candidates to the constitutional officers, was under development and would be brought to the Board for consideration. He also explained that the Board had a responsibility to engage in strategic financial planning and that a draft plan would be issued later this year. Chairman Klein explained that there were a number of options for future financing, including the possibility for additional bond authority, which would hinge on CIRM's performance.

**Chairman's Position: Chairman Klein endorses this proposal.**

**C. Legislative Subcommittee's Proposed Position**

The Legislative Subcommittee engaged in a substantive discussion of the Little Hoover Commission's recommendations and staff's analysis, took public comment, and questioned staff of the Little Hoover Commission. The Legislative Subcommittee then approved, by a unanimous vote, a motion recommending that the Board endorse the staff's positions on these items, as described above.

**LEGISLATIVE SUBCOMMITTEE RECOMMENDATION: The Legislative Subcommittee recommends that the Board support the staff positions, as described above, on Little Hoover Commission recommendations 6 through 11.**

**III. Modifications that Would Require Legislative Intervention**

**A. Little Hoover Commission Recommendations**

(12) eliminate the 50 employee cap (LHC report, p. 19; 33);

(13) eliminate the 15-scientist cap on the GWG (CIRM currently has approximately 150 scientific members and alternates available to serve on peer review, so the cap has not presented a problem – for example, for the tools and technologies applications, we ran two concurrent peer review sessions) (LHC report, p. 26-27; 33-34); and

(14) require the Citizens' Financial Accountability Oversight Committee (CFAOC), which was created by Prop. 71 and which is chaired by the Controller, to conduct a performance audit (the CFAOC already conducts a review of CIRM's financial audit) (LHC report, p. 35).

**B. Staff Analysis**

CIRM President Alan Trounson reported to the Subcommittee regarding CIRM management's position on items 12 and 13 and Subcommittee Chair Art Torres reported regarding item 14.

**(12) Eliminate the 50-employee cap.**

The Little Hoover Commission recommended the elimination of the 50-employee cap in Proposition 71 in order to enhance CIRM's administrative flexibility. Currently, CIRM is challenged by the 50-employee cap. CIRM staff is reviewing various options for addressing this challenge, but CIRM remains committed to the six percent cap on bonds funds for administrative expenditures.

**Staff Position: CIRM staff recommends that CIRM review the options available for addressing the challenge posed by the 50-employee cap.**

**(13) Eliminate the 15-scientist cap on the GWG.**

The Little Hoover Commission recommended the elimination of the 15-scientist cap on the Grants Working Group to expand CIRM's capacity to review grant applications. However, elimination of the cap of 15 scientific GWG members/alternates will not significantly affect the GWG's capacity to review more grant applications. The real limiting factor for review is time. At a review meeting the GWG can only discuss and score about 50 total applications per day for regular research grants and perhaps 15 to 20 for larger proposals such as Disease Teams or Training Grants. Increasing the number of GWG members at a review will not speed up the rate at which each application is reviewed. In fact, it may increase that review time to accommodate discussion by additional members. Thus, regardless of the number of participating GWG members, review of additional applications will require additional meeting days and increased CIRM staff time to manage the reviews and write review summaries. CIRM staff believes (based on comments from reviewers) that larger groups would be less focused and engaged, and longer meetings would lead to reduced willingness to attend.

**Staff Position: Because the 15-scientist cap on the GWG does not limit CIRM's capacity to review applications, CIRM staff does not support this proposal.**

**(14) Require the CFAOC to conduct a performance review of CIRM.**

The Little Hoover Commission recommended expanding the authority of the Citizens' Financial Accountability Oversight Committee, which was created by Proposition 71 to review CIRM's annual independent financial audit and financial practices, to include a performance audit of CIRM. Vice Chair Art Torres explained that CIRM has already been subject to performance audits, including extensive audits conducted by the Bureau of State Audits and the State Controller. He also stated that the Legislature has authority to review CIRM's performance and added that CIRM's strategic scientific plan requires an independent panel of scientists to conduct a review of CIRM's performance in reaching the objectives outlined in the strategic plan. Given the existing authority of the Legislature and the Controller to review CIRM's performance and the independent scientific review required by CIRM's strategic plan, it is not necessary to expand the CFAOC's jurisdiction.

**Vice-Chair's Position: Because CIRM is already subject to performance review, Vice Chair Torres recommends that CIRM should not support this proposal.**

**C. Legislative Subcommittee's Proposed Position**

The Legislative Subcommittee engaged in a substantive discussion of the Little Hoover Commission's recommendations and staff's analysis, took public comment,



and questioned staff of the Little Hoover Commission. The Legislative Subcommittee then approved, by a unanimous vote, a motion recommending that the Board endorse the staff's positions on these items, as described above.

**LEGISLATIVE SUBCOMMITTEE RECOMMENDATION: The Legislative Subcommittee recommends that the Board support the staff positions, as described above, on Little Hoover Commission recommendations 12 through 14.**

### **CONCLUSION**

The Legislative Subcommittee makes the following recommendations to the Board:

- 1. Oppose Little Hoover Commission recommendations 1 through 5 based on counsel's advice that the proposed amendments to Proposition 71 would require another vote of the people.**
- 2. Support the staff positions, as described above, on Little Hoover Commission recommendations 6 through 14.**
- 3. Communicate CIRM's position to the Legislature.**

Attachments