



King County

Committee of the Whole

STAFF REPORT

Agenda Item:	5-6	Name:	Patrick Hamacher, Amy Tsai
Proposed No.:	2013-0108 2013-0109	Date:	April 17, 2013
Invited:	<ul style="list-style-type: none">• Dave Chapman, Director, Office of Public Defense• Dwight Dively, Director, Office of Performance, Strategy and Budget (PSB)• Sheryl Willert, Attorney, Williams, Kastner and Gibbs (Special Deputy Prosecuting Attorney for public defense legal advice)		

SUBJECT

Two ordinances reorganizing the Office of Public Defense and providing funding to finance the reorganization.

SUMMARY

As a result of the Dolan lawsuit, the County Executive has proposed changes to the structure for county public defense services. Currently, the County contracts with four non-profit public defense organizations. The Executive's proposal would create a new County Department of Public Defense.

Proposed Ordinance 2013-0108 would create the Department of Public Defense and the Public Defense Advisory Board.

Proposed Ordinance 2013-0109 would provide a supplemental appropriation of \$4.9 million (net \$3.1 million) to various capital projects and operating budgets to effectuate the transition to a new model for provision of public defense services.

BACKGROUND

Every citizen has a constitutional right to legal representation when accused of a matter where loss of liberty is possible (6th Amendment of U.S. Constitution; Article 1, Sec. 22 of Washington State Constitution). There are a myriad of different ways this constitutional right is carried out across the country. Some states provide public defense at the state level and some at the local level, with varying proportions of funding coming from each. Some jurisdictions provide public defense staffed by

government employee defenders, some by contract, some by assigned counsel, and some by a mixture of these. These systems vary in how they select their public defender, whether they have an advisory board, and even in their policy approach to the practice of public defense as will be discussed below.

State law requirements for effective legal representation for indigent persons in Washington State are found in RCW Chapter 10.101. The county's public defense system is codified at K.C.C. Chapter 2.60.

The following background is a condensed summary of the background on indigent defense, the Dolan lawsuit, and the proposed ordinances from previous staff reports in this Committee on March 20 and April 3, 2013. Additionally, Motion 13886 adopted by the Council on April 8, 2013 is summarized below.

Today, King County contracts with four private, nonprofit corporations for the provision of most public defense services. In January 2006, a class action lawsuit was filed against King County, alleging that the employees of these agencies were county employees and that King County had a duty to enroll them in the Public Employees' Retirement System (PERS). In a ruling upheld by the Washington State Supreme Court, the trial court held that the nonprofits were "arms and agencies" of King County, making the employees of those nonprofits employees of King County for purposes of PERS enrollment.

In April 2012, King County began making employer contributions to PERS for those employees and the employees' PERS contributions have been deducted from the salaries paid to them by each public defender organization. In March 2013, the Council approved a settlement agreement between King County and the Plaintiffs which must now go through a judicial approval process before it can become effective. The settlement agreement would recognize the plaintiffs as county employees on July 1, 2013, with full benefits, but leaves up to King County how public defense would be structured.

Proposed Ordinance 2013-0108

In response to the Court ruling and settlement, the County Executive has proposed a public defense delivery model (Proposed Ordinance 2013-0108) that proposes the creation of a Department of Public Defense. The County Executive has proposed organizing the Department into two major Divisions, one that would handle the bulk of cases and calendar assignments and another that would primarily be designed to handle conflict cases.

A draft organizational chart of the proposed two-division model is attached as Attachment 5. There would be a department director, two chief deputies and two assistant chief deputies. Each of the two divisions would have a separate pool of attorneys, supervisors, paralegals, investigators, social workers, and other support staff. The first division would handle 60 percent of cases and the second division would handle 30 percent (tending to be the more complex cases such as multi-defendant felonies that have a greater likelihood of being conflicted out by the first division), with

an estimated 10 percent of cases needing to be handled by a private attorney from the assigned counsel panel when a case is deemed to have a conflict in both divisions according to a unified conflicts policy that is presently in development.

The Department Director would, among other things, ensure that the Department employs the needed expertise to ensure effective delivery of defense services, ensure the American Bar Association "Ten Principles for a Public Defense System" guide the development, management and department's standards, and follow State Supreme Court caseload standards.

Proposed Ordinance 2013-0108 would also establish a Public Defense Advisory Board to make recommendations to the department director on department policies, operations and matters of budget. The advisory board would issue biannual reports, including a review of the Executive's proposed annual public defense budget.

The advisory board would consist of seven members nominated by the County Executive and confirmed by the County Council, including a member of the state bar (WSBA), the King County bar (KCBA), a minority bar association, a retired King County court judge, a law school faculty member from the state, and two members from community organizations serving indigents in King County.

Proposed Ordinance 2013-0109: Supplemental Budget Request

There is also a supplemental budget request for transition costs to effectuate the proposed public defense model. Proposed Ordinance 2013-0109 would provide a supplemental appropriation of \$4.9 million from the General Fund (at a net cost of \$3.1 million after removing the double-counting of an internal transfer from the General Fund to some of the projects).

The requests include the following:

- \$499,000 onboarding personnel including 20% contingency
- \$124,000 supplies including 20% contingency
- \$755,000 vehicle purchase
- \$780,000 computers
- \$749,000 case management system
- \$250,000 facilities planning and tenant improvement contingency

Motion 13886: Transition Plan

On April 8, 2013, the Council adopted Motion 13886. This motion recognizes that the process of implementing a new public defense system will take time in order to do it in a thoughtful manner that protects individuals' constitutionally guaranteed right to assistance of counsel. Motion 13886 notifies the Executive that the County Council is unlikely to make a decision regarding the future structure for the delivery of public defense services on the timeline requested by the Executive. It further requests that the Executive transmit legislation to the County Council to cover the transition from the

current model to the new model proposed by the Executive. The motion further notes that full implementation may take six months or longer.

ANALYSIS

This is the third hearing on the two proposed ordinances. The proposed ordinances are not yet ready for action.

On March 20, 2013, Council staff identified six main areas of analysis that will be fleshed out over the course of several Committee of the Whole briefings. Those areas include:

- 1) Alternatives – Are there alternative models that should be considered?
- 2) Timeframe – Is the timeframe for migration reasonable?
- 3) Independence – Does the proposed model adequately address the issue of independence of the public defense system?
- 4) Conflicts – Is the proposed model sufficient to handle case conflicts?
- 5) Annualized budget – Is the proposed departmental budget and FTE request reasonable? (Particularly given the unknown status of outside contracts)
- 6) One-time budget – Are the supplemental requests for one-time costs reasonable?

This staff report provides additional analysis on the alternative models of public defense. In particular, Councilmembers raised questions regarding public defender districts and public corporations. Councilmembers also had questions regarding the extent to which the Executive's proposed model would affect social justice and other programs run by the current non-profit agencies. This staff report also continues the independence analysis, and addresses conflicts.

Because the Executive transition plan had not been transmitted as of the time of the writing of this staff report, the migration and budgetary issues are not discussed further in this staff report. **However, Council staff note that time is short, and many transition issues remain to be resolved or analyzed, including, for example:**

- **leasing of space**
- **information technology equipment**
- **case management system logistics**
- **status of bargaining (labor negotiations for pay and layoff process)**
- **which employees are joining the county**
- **status of non-county contracts with the state, Seattle and tribes**
- **status of social justice programs run by the defender agencies**
- **future status or role of the non-profit agencies,**
- **how to implement an interim model that complies with Dolan and does not foreclose public defense structure options for the Council's decision-making,**
- **how the interim chief defender will be selected, and**
- **most importantly, ensuring the smooth continuation of existing cases and continued ability to handle case conflicts.**

Alternatives to the Executive's Proposed Model

The analysis of alternative models for the structure of public defense services involves consideration of policy, legal and financial issues. The April 3 staff report identified alternative models to the Executive's proposal being analyzed by staff, including 1) independent contractors, 2) public defense services by contract bid, 3) public defender district, 4) public corporation with joint-employee status, or 5) retaining the current non-profits with joint-employee status.

At the April 3 meeting, Councilmembers asked questions about the public defender district and public corporations. Some additional background information is provided below. Legal analysis of these alternatives may be discussed in Executive Session.

Public Defender Districts

In 1969, the state created the ability for a county, adjoining counties, or a county and any city within it, to create a public defender district (Chapter 36.26 RCW).

Public defender districts have the following characteristics:

- The public defender is appointed by a committee consisting of a superior court judge, a practicing attorney and a member of the county commission or council from each participating county (RCW 36.26.030).
- The term of the Public Defender must coincide with the elected term of the prosecuting attorney (RCW 36.26.040).
- The Public Defender must make an annual report to each County Council (RCW 36.26.050).
- Expenses for services rendered or costs incurred are recorded and charged to the responsible jurisdiction, with some cost sharing allowed, and expenditures are subject to Chapter 36.40 RCW (county budgets) and other statutes relating to county or city expenditures (RCW 36.26.050).
- Public Defender compensation is set by the County Council, and for single-county districts may not exceed the compensation of the County Prosecutor (RCW 36.26.060).

In the April 3 staff report, Benton-Franklin County was identified as one example of a public defender district, but further investigation revealed this to be incorrect. The Benton and Franklin Counties Office of Public Defense is administered by an Indigent Defense Coordinator appointed by the Boards of County Commissioners of Benton and Franklin County (B.C.C. 5.18.040). Their cases are handled largely by contract attorneys with a few staff.

Whatcom County has a variation of the public defender district utilizing an advisory committee,¹ but its Public Defender is appointed by their Executive and confirmed by their Council (W.C.C. 2.09.090).

¹ The Whatcom advisory committee consists of one Superior Court judge appointed by the Presiding Superior Court judge; one District Court judge appointed by the Senior District Court judge; one appointee

Based on conversations with the state Office of Public Defense, there is only one known public defender district in the state, Spokane County. The public defender district has been in place in Spokane County since 1970, the year after public defender districts were created in state law. Legislative history on the reason for the creation of Spokane's defender district was not available.

Independence – The Spokane Public Defender may only be terminated for cause by county code, although this is not a specific requirement of the public defender district statute. Each term, the selection committee consists of the then-presiding Superior Court judge, president of the local bar association, and chair of the County Board of Commissioners.

It has been discussed in previous staff reports that the ABA principle of independence recommends separation from the judiciary. Specifically, "The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel....Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense."

The requirement for public defender districts that a Superior Court judge play a significant role in the selection of the Public Defender appears to be in conflict with the ABA principle of independence. However, the Spokane Public Defender reports no issues with independence in his practice. The Public Defenders in Spokane County have each had tenures of 10 years or more. There have been only three Public Defenders since the creation of the Public Defender District.

Conflicts – Spokane County has two completely separate public defender offices to handle conflicts. In addition to the office of the main Public Defender, there is a second Public Defender who has a slightly lower salary who oversees a separate office. The other Public Defender holds the same 4-year term of office as the main Public Defender. Spokane County also has an arrangement with the City of Spokane whereby they handle some of each other's misdemeanor conflict cases. King County conflicts will be discussed below, but as the analysis of alternative structures moves forward, it is worth bookmarking Spokane County's approach to conflicts and analyzing whether these variations would provide any additional conflicts relief in King County.

Other Observations – The selection committee for the Spokane County Public Defender convenes for the sole purpose of selecting the Public Defender and setting his salary. It does not have an advisory function, something which the current Spokane County Public Defender believes would be helpful in his practice. Although an advisory board and an oversight board are discussed as two options in the Independence section below, it should be noted that they are not mutually exclusive.

by the Whatcom County Bar Association from its membership not connected with the office of the prosecuting attorney, the office of the public defender, or with any conflict of interest cases from the assigned counsel office of Whatcom County; one non-lawyer appointed by the County Executive; and one member of the County Council appointed by the Council.

The public defender district is a model that appears to work at least in Spokane County. It does not dictate the structure of the public defender office; its primary effect is in prescribing the method of selection for a term of years, make-up of the selection committee, and compensation-setting. All of these together have allowed Spokane County, at least in the opinion of its Public Defender, to achieve independence in the professional handling of cases. If King County were to choose this option, this selection method would likely not require a charter amendment, but a charter amendment would be needed if collective bargaining powers are vested in someone other than the Executive. A comparison of this selection method with others is discussed further in the independence section below.

Public Corporations

State law (RCW 35.21.730) authorizes cities and counties to create public corporations by ordinance to perform public functions with liabilities limited to the assets and properties of the corporation.

The Cultural Development Authority, 4Culture, is an example of a county-created public development authority. It has an Executive Director, is governed by a Board of Directors, and reports annually to the Council. 4Culture is funded largely from hotel-motel tax revenues. The City of Seattle has several public development authorities, such as the Pike Place Market Preservation and Development Authority and the Museum Development Authority for the Seattle Art Museum.

The current defender agencies have proposed a public corporations model that is designed to emulate the features of the current four non-profit defender agencies within a public corporation context. Their public corporations schematic is attached as Attachment 6 to this staff report. Under this model, an administrative County Office of Public Defense would enter into service agreements with multiple public corporation boards for the provision of public defense services. Each public corporation would have its own executive director chosen by its board and such other administrative positions as determined by its board. The employees of the public corporation would simultaneously be county employees and employees of the public corporation. It is not clear whether there are any examples of a similar dual employment status.

The defender agencies propose that the County Council would establish the public corporations via an ordinance that would set forth the public purpose of the corporations to provide a system for provision of indigent defense legal services. The defender agencies further propose that the ordinance would include the following:

- Acknowledge that the public corporations would be independent of each other to handle case conflicts, and independent of the County, the Prosecutor, and the judiciary in order not to compromise individual client advocacy, the defense function, and policy reform.
- Give the public corporations the duty and authority to manage the core individual and systemic advocacy functions of their offices consistent with their independent

professional judgment. This includes negotiating the terms and conditions of employment with their staff (if represented) and directing and supervising the legal and advocacy work done by the office.

- Approve charters for the four corporations, which would include identification of board characteristics:
 - Board members would be appointed by the County Executive from nominations made by the bar associations, other specified organizations and the defender offices, subject to confirmation by the County Council;
 - The County Council would be authorized to remove a board member or an entire board for cause, including a finding of failure to discharge duties.
- The charters would also specify the extent of the oversight required to be exercised by the County pursuant to RCW 35.21.745.² The County and State would have the authority to audit the corporations' performance, but with regard to individual and systemic advocacy and the exercise of professional judgment, the audit would be limited to ensuring that the board is exercising meaningful oversight and that the corporations are exercising their independent judgment.
- The charters could specify that the corporations adhere to risk management protocols, e.g., regarding nondiscriminatory hiring, firing and working conditions.

The defender agencies suggest that there could be efficiencies subject to the respective independence of the corporations, such as common trainings and acquisition of materials and services in bulk.

The defender agencies' proposal also discusses legal issues which are summarized here, but analysis is reserved for Executive Session. The proposal suggests that a charter amendment to Section 550 Career Service Positions and Section 890 Employee Representation would likely be required. The proposal also discusses the limitation of liabilities provided to counties forming public corporations, under RCW 35.21.730(d). Since the employees of the public corporations would be County employees in accordance with *Dolan*, the proposal states that it is not clear that this statutory provision would effectively shield the County from all liability, but that the County and the public corporations could identify and mitigate those risks through training supplemented by insurance, if necessary and available, e.g. for professional liability in the practice of law.

Independence – The ability of the public corporation model to achieve independence in its ability to advocate for clients, policy reform and budgets is in part a legal question. Subject to legal analysis, because this model emulates the separate structure of the current non-profit agencies, and oversight of the Council appears limited to audits and the appointment and for-cause termination of board members, this model does appear to provide the Executive Directors with a large degree of independence both over client representation and policy advocacy.

² RCW 35.21.745(1) states: (1) Any city, town, or county which shall create a public corporation, commission, or authority pursuant to RCW 35.21.730 or 35.21.660, shall provide for its organization and operations and shall control and oversee its operation and funds in order to correct any deficiency and to assure that the purposes of each program undertaken are reasonably accomplished.

The funding structure for public defense corporations would likely be more akin to departmental funding allocations than typical public corporations. For instance, the Cultural Development Authority receives a small amount of General Fund money, but is largely funded through dedicated hotel-motel tax revenues. Funding options for public defense corporations may require further legal analysis.

Conflicts – Again subject to any legal limitations, because the defender agencies' proposed public corporation structure emulates the separate status of the non-profit entities, it is likely that the ability of that system to handle conflicts would be similar to the system that exists today. Whether the system that is in place today is as efficient as an in-house model in handling conflicts is a question that the Executive is examining. This is discussed in the conflicts section below.

A public corporation model has features that appear to promote independence and conflicts management. If this model is legally viable, then it may be the model that most resembles today's public defense structure. Questions that remain are:

- Can a public corporation legally be formed for the purpose of performing a county's constitutionally required obligations?
- Can public corporations legally exist with a joint-employee status, and if so, what would that joint-employee status look like?
- Would a charter amendment be required?
- Under a public corporation model, would the Council retain sufficient oversight to be able to satisfy the county's constitutional duty to provide effective indigent representation?
- Would the public corporation model provide a level of independence and conflicts management that meets the county's needs in the most efficient manner (compared to other alternatives) and at a reasonable cost? (This is a policy question, but one that must be informed by legal analysis.)

The legal analysis of these alternatives will continue to be covered in Executive Session.

Social Justice Programs and Other Non-profit Agency Work

Councilmembers asked for additional information on other work performed by the nonprofit defender agencies that may be adversely impacted if the county moves to an in-house system and the nonprofit defender agencies cease to exist. In particular, questions were asked about The Defender Association's (TDA's) Racial Disparity Project and the Society of Counsel Representing Accused Persons' (SCRAP's) Raising Our Youth as Leaders (ROYAL) Project. This staff report summarizes these two programs. Conversations with the defender agencies and Executive staff are still continuing to fully assess the impact of a possible in-house model on these programs, and options for their continuation.

In addition, this section discusses other activities of the non-profit agencies that could be impacted by an in-house move. These activities include contracts with non-county entities, as well as advocacy and community engagement activities.

Social Justice Projects

Racial Disparity Project (4.2 FTE, \$459,000) – The Defender Association does work with the grant-funded Racial Disparity Project (RDP) that seeks to reduce racial imbalance in the criminal justice system through community organizing, public education and legal advocacy.

For instance, in 2000, the RDP engaged in extensive advocacy and case representation efforts to assist individuals, disproportionately African Americans, who were in a vicious cycle of having their car impounded by Seattle due to driving with a suspended license for non-payment of traffic fines, and therefore being unable to drive to work to make money to repay their fines. Among other things, the team provided self-help training to clients in how to request reduction of fines, waiver of collection fees, time payments, and conversion of fines to community service. The team represented certain individuals in Driving While License Suspended (DWLS) charges. Ultimately Seattle's DWLS car impoundment program was ended.

Presently, the RDP's primary focus is on Law Enforcement Assisted Diversion (LEAD), a pre-booking diversion program for low-level drug and prostitution offenders, with the involvement of the Seattle City Mayor, King County Executive, King County Prosecuting Attorney's Office, Seattle City Attorney, King County Sheriff's Office, and Seattle Police Department. LEAD is a pilot program developed with community public safety leaders to address low-level drug and prostitution crimes in the Belltown neighborhood in Seattle and the Skyway area of unincorporated King County. The program allows law enforcement officers to redirect low-level offenders engaged in drug or prostitution activity to community-based services, saving costs of jail and prosecution.

Staffing for the RDP is 4.2 FTE, including a supervisor (0.5 FTE), staff attorney (1.0 FTE), legal fellow (1.0 FTE), LEAD program director (0.7 FTE), and organizer (1.0 FTE). It has an annual grant-based budget of \$459,000, including the following:

- \$214,000 Ford Foundation
- \$150,000 Open Society Foundation
- \$ 25,000 Drug Policy Alliance
- \$ 60,000 RiverStyx Foundation
- \$ 10,000 Social Justice Fund Northwest

It is likely that most if not all of the RDP's funding would not be transferrable to an in-house program because the grants target non-governmental entities.

Two issues for the survival of this program if the county moved to an in-house public defense system would be 1) whether the program could find a home with an outside entity, or 2) whether the program could continue to engage in the same kinds of activities if it were an in-house program. With regard to the former, RDP staff expressed the concern that an outside entity would lose the day-to-day client contact and contact with the routine operation of the justice system that informs their work. With

regard to the latter, an in-house agency would need the authority to dedicate resources to community engagement and legal advocacy on racial disparity issues.

An in-house program would also need alternative sources of funding, possibly from the county itself. Also, since the RDP provides an outside lens looking in on racial imbalances in a governmental criminal justice system, the effectiveness of the RDP as an agent of change would likely be limited by becoming a program within the system. To keep this program in-house and intact, the county would likely need to explore structures for the RDP that would allow it to exist within the county with an independent voice of its own, with recognition that the RDP might at times take issue with King County's criminal justice practices.

ROYAL (4.4 FTE including 1.4 from SCRAP, \$291,000) – SCRAP has an annual contract for Project ROYAL (Raising Our Youth as Leaders) with the King County Department of Community and Human Services, Community Services Division (DCHS/CSD), to provide prevention and intervention services to at-risk youth. Almost 90 percent of its funding comes from King County grants. Staff for ROYAL is 4.4 FTE, including two case managers, one mentor-life coach, a project director, and a part-time screener. The project director and screener are employed by SCRAP.

ROYAL provides case management, mentorship, and life skills training, encouraging education and jobs as an alternative to detention for moderate to high-risk youth of color in the juvenile justice system. The program serves youth of color with an emphasis on African American youth; male and female, ages 14 to 18, in Seattle, Renton, and Kent. Most of the youth are at poverty level and some are homeless. Almost all of them (99 percent) have a current or prior arrest record and all have court fines. Sixty percent are involved in gangs and 30 percent consider themselves to be affiliated with gangs.

ROYAL has qualified for designation as a “promising program” (Reinvesting in Youth Promising Program Evaluation). Based on an annual DCHS/CSD evaluation, on average over 75 percent of participating youth do not re-offend (82 to 84 percent for the past two recidivism evaluations), with 85 percent of those youth deeply gang involved. ROYAL also reports a 67 to 72 percent success rate at keeping those youth from going into the adult criminal justice system.

Executive staff are examining keeping the program in-house for at least a transition period, and the manager of the program is exploring 501(c)(3) options in case its current home is no longer available. Because the project does not provide direct legal representation, separation from an in-house public defense system could be successful if a new home is found for the program.

Non-County Contracts

There is non-county contract work engaged in by the defender agencies that could be impacted by an in-house migration.

The State Sexually Violent Predator contract and the Seattle Municipal Court (SMC) contract for misdemeanors were discussed in the April 3 staff report. The State Office

of Public Defense reports being engaged in positive conversations with the county Office of Public Defense regarding continuation of the contracts.

The Seattle Municipal Court work is a larger body of work that has unresolved issues, including whether defender agency employees working on those contracts will join the county on July 1, whether the county can achieve full cost recovery with SMC, the implications of labor negotiations, and how taking on the SMC work could affect conflicts (presently OPD does not have case conflicts information for SMC contracts because they fall outside the scope of county work).

SCRAP also provides legal advice to about ten tribes, including maintaining contracts for tribal court with three of the tribes, and providing general legal advice and guardian ad litem work for others. This work is not labor intensive; for some tribes it involves one tribal court day per month. However, it is work that the tribes are very interested in continuing with the defender agency attorneys. The SCRAP attorneys likewise feel a personal commitment to continuing the work. Although the tribes could likely find replacement attorneys to provide the services, some of the tribes have been working with SCRAP for five to six years. Council staff have asked Executive staff to investigate the financial impacts of continuing these contracts.

Community-Oriented Public Defense

King County has a national reputation for having one of the most well-respected public defender services in the country.³ Part of the reputation comes from recognition of the county's holistic and community-oriented approach to criminal justice.⁴

For example, the county has therapeutic courts (e.g., drug diversion, mental health, and veterans treatment courts) where participants in the criminal justice system work together to address the defendants' underlying issues while holding them accountable. The defender agency expertise in these areas is well respected at the national level. For example, the Associated Counsel for the Accused (ACA), which is the defender agency that handles the mental health and drug court cases, has given national presentations and trainings about their work.⁵ They also played a significant role in helping Seattle establish its own veteran's court program. Expertise in these specialty courts will continue under any public defense structure. However, using that expertise to advance the county's national reputation via participation in conferences, trainings or collaborative work will require upper level support and prioritization of resources.

The defender agencies' community-oriented approach to public defense includes volunteer activities undertaken by staff who feel a personal calling in doing indigent

³ See, e.g., The Spangenberg Group. King County, Washington Public Defender Case-Weighting Study (2010).

⁴ See, e.g., Taylor-Thompson, K. (2004). Taking it to the streets. 29 N.Y.U. Rev. L. & Soc. Change 153 ("The Defender Association's innovative practice throughout its thirty-four year history has earned the office a reputation for setting the standard for criminal defense.")

⁵ E.g., panel presentation on Seattle and King County's mental health courts at the 30th Annual Conference of the National Organization of Forensic Social Work, Advancing Forensic Practice: Promoting Innovation Worldwide, April 2013.

defense work. As one example, the Associated Counsel for the Accused created an internal Community Engagement Committee.⁶ The committee meets bimonthly to coordinate and expand community outreach and volunteer opportunities for ACA's attorneys and staff. The committee's mission is to formalize outreach efforts to deal with legal issues that affect clients, address specific community needs that are not being met, and then volunteer services to address those needs, whether legal or not. Sample activities include serving dinner to the homeless and conducting neighborhood legal workshops.

The building of community relationships is also evidenced in defender agency boards. Their boards of directors, 33 members total across the four agencies, consist of criminal defense bar leaders, retired judges, law firm partners, law professors, community leaders, former clients, and alumni attorneys. The affiliations of their board members provide an additional connection to the community and understanding of community needs and issues.⁷ In an in-house defense structure, an advisory board would be smaller with fewer community connections.

The Northwest Defender Association (NDA) has worked with OneAmerica, Northwest Immigrants Rights Project, ACLU Washington and others on King County's practice of accepting ICE (Immigration and Customs Enforcement) holds in the King County jail.⁸ As part of that work, NDA commissioned a study by University of Washington sociologist Katherine Beckett, who found that, in 2011, inmates with ICE detainers spent an average of 30 days more in jail than those without, and that just slightly more than half the inmates with ICE detainers were either not charged with an offense or were charged with only a misdemeanor offense. NDA has also worked with the Justice Management Institute (JMI), using a grant from the American Bar Association, to develop an upgraded case management system to track client identifiers such as previous military experience, immigration concerns or mental illness, to better serve client needs and collect data to support future grant applications.

Legal advocacy efforts, such as the ICE hold issue, that seek to change the county's policies would be more difficult in an in-house defense system, because it would be difficult to devote staff resources to activities for which there is no officially adopted county policy, or especially if it were counter to county policy. Such work might occur in the context of Council-driven requests, as the Council is the policy making body of the county, but would be less likely to originate within the public defense agency itself. An

⁶ Murray, K.W. (May 2011). Law day offers a chance to reflect and contribute. Bar Bulletin.

⁷ These board members have connections to entities such as the University of Washington School of Law Child Advocacy Clinic, Center for Children and Youth Justice, Governor's African American Affairs Commission, Seattle/King County NAACP, Seattle's Central Area Motivation Program (CAMP), the African American/Jewish Coalition for Justice, Re-Investing in Youth, Equal Employment Opportunity Commission, Verizon, Allstate, Lake Washington Technical College, Kent School District, Kent Parks Foundation, Japanese American Chamber of Commerce, LegalVoice, Northwest Ballot Watch, Pet Partners, Seattle Women's Commission, Senior Services Transportation, Washington State Forensic Investigation Council, and Washington Society of Certified Public Accountants.

⁸ ICE places a 48-hour detainer hold on jail inmates deemed deportable, and requests counties to release those inmates into ICE custody for possible deportation proceedings. (See Turnbull, L. County Council may restrict holds on jailed immigrants. Seattle Times, Apr. 11, 2013.)

in-house system would also be ineligible for some grants restricted to non-profits; it is unknown how that compares to availability of grants for governmental entities.

King County government is known for its community-oriented approach to criminal justice, such as with the treatment courts. It also values community engagement and the Council has passed an ordinance on equity and social justice. Therefore, if the defender system is moved in-house, county innovations, collaborative work and community engagement are likely to continue within the public defense department. However, advocacy efforts that the defender agencies have engaged in in their role as outside entities looking in, likely would be fundamentally changed going forward for the reason explained above.

Independence

Independence of public defense is the first of the ABA Ten Principles for a Public Defense System ("ABA principles"). The ABA principle of Independence for public defense is that "the structure of the system should provide a degree of independence from external influence in its operations." In determining how independence could be achieved for public defense in King County, this analysis considers the history of King County public defense and the issues it has faced as guidance for how independence could be addressed.

To summarize previous staff reports, independence has two aspects. First is the ability to be free from political influence in individual case handling and client representation. The second aspect that has received most stakeholder attention in King County is the ability of the chief defender to effectively lobby for funding. In order to achieve these two aspects of independence, a chief defender must be sufficiently insulated from political influences that he or she feels free to act in the best interest of public defense for indigent clients, without fear of inappropriate reprisal or being unduly swayed by conflicting incentives.

Various options considered for selection of the chief defender under an in-house model include:

Charter amendment required:⁹

- Elected defender
- Appointed by a board for a fixed term, removable for cause
- Candidates nominated by a board but appointed by the Executive and confirmed by the Council for a fixed term, removable for cause

Charter amendment not required:

- Candidates nominated by an advisory board but appointed by the Executive and confirmed by the Council not for a fixed term, at will

⁹ If the Council were to approve the creation of an in-house public defense department, the King County Charter requires the Executive to appoint the chief officer (Charter 340.10) subject to confirmation by a majority of the Council (Charter 340.40). The chief officer would be an at-will position (Charter 340.60). Any of the alternatives below that established a different selection or termination procedure for a chief public defender would require a charter amendment.

- Executive's proposal: At-will appointment

In addition, two alternative models discussed above that would affect the level of independence of the public defense system include the public defender district and public corporations. Because the public defender district is essentially an alternative mechanism for selection of the chief defender, it is included in the table below. The public corporation model would seek to achieve independence via an alternative structure, as opposed to by how the chief defender is selected. Therefore, the public corporation model is not included in this comparison.

The table below rank orders the selection options from best to worst in their ability to achieve the two aspects of independence (case independence and lobbying for funding). Ultimately, however, the ability of a selection system to achieve independence will depend on a myriad of factors including the political climate of the region, the will of the elected officials to support or promote effective public defense, the health of the jurisdiction's economy, etc. For example, as has been discussed previously there are examples of very good elected defender systems and very bad ones. The rationale for the ordering is discussed further below the table.

Table 1. Ability of chief defender selection methods to achieve independence.

Professional independence in case representation and client advocacy (Best to worst)	Political freedom to lobby for funding (Best to worst)
Board appointment, for cause ©	Elected defender ©
Public defender district committee appointment, for cause (?)	Board appointment, for cause ©
Board nomination, Executive appointment, for cause ©	Public defender district committee appointment, for cause (?)
Board nomination, Executive appointment, at will	Board nomination, Executive appointment, for cause ©
Elected defender ©	Board nomination, Executive appointment, at will
Executive appointment, at will	Executive appointment, at will

© = charter amendment required

(?) = charter amendment may be required for collective bargaining

The ordering of column 1, Independence in Case Representation, is based on the assumption that selection systems that create the least incentive to be swayed by political factors will result in the best independence in case representation. At the bottom of this list is an Executive appointment at will, which has the least job security. Under this selection method, the chief defender has the greatest incentive to follow the direction of the Executive who employs and can fire the chief defender at will. However, as was noted in the April 3 staff report, in a 2000 report of King County's public defense system,¹⁰ the Public Defense Study Oversight Committee¹¹ "felt that it was unlikely that

¹⁰ The Spangenberg Group. King County Public Defense Study Final Report (June 2000).

any County Executive would terminate the Director of Public Defense who was doing a good job, was a strong advocate for indigent defense and had the support of the commission," where the commission was a board that the Committee recommended be created for recommending names for appointment and acting in an advisory capacity.

The second lowest ranked selection method for independence in case representation is the elected defender, due to the potential to be swayed by political agendas in running for office. The Executive's proviso report accompanying PO 2013-0108 noted The Spangenberg Group's concerns that the process of running for office, raising money and campaigning makes it more difficult to make case decisions free from political influence. As was noted in the April 3 staff report, the ABA notes that it may be more difficult, but possible, to achieve independence if the chief defender is elected or chosen by a political body such as a county council. Similarly, The Spangenberg Group has weighed in that "[e]lected public defenders would certainly not meet the standard of being independent from political influence."¹² Some would argue that the elected defender should be the lowest ranked. Concerns were raised with Florida's elected defender that his campaign included a pledge not to challenge the credibility of police officers at trial. The article noted the common political platform "tough on crime" is at odds with the role of the public defender.¹³

The remaining selection options are variations of the board selection process. Appointments with for-cause termination rank above all of the at-will methods because the for-cause positions have greater job security. Appointments by separate bodies are ranked higher than appointments by the Executive because having multiple individuals involved in the selection process affords a greater degree of protection than placing it in the hands of one individual.

Finally, the board appointment to a for-cause position is more highly ranked than the similar public defender district appointment process, because the public defender district selection committee includes the types of individuals the ABA principles suggest should be far removed from the process, including a member of the judiciary that the chief defender practices in front of, and an elected official.

The ordering of Column 2, Independence to Lobby for Funding, closely follows that of Column 1, because both aspects of independence are promoted when there is greater job security. In the case of lobbying for funding, greater job security promotes the political freedom to advocate for unpopular issues. For lobbying purposes, however, being an elected official makes the chief defender a peer of the Council who adopts the budget. In addition, the elected defender is extremely difficult to remove until his or her term is up. These considerations result in the elected defender receiving the highest ranking for ability to lobby for funding.

¹¹ Convened by the county in September 1999, this committee consisted of many members of King County and Seattle criminal justice systems and governments.

¹² The Spangenberg Group. The Indigent Defense System in Nebraska: An Update (Oct. 2004)

¹³ Frederick, B. More on elections of public defenders and solicitors. Trial Theory, Dec. 16, 2008. http://www.trialtheory.com/ethics/more_on_elections_of_public_de/

Setting aside the influence of political campaigning on an elected defender, in general a selection system that offers greater job security will provide greater independence, both in freedom to represent cases according to one's professional judgment, as well as freedom to advocate for budget or policy changes. Thus, selection systems that have removal-for-cause provisions and appoint the chief defender for a term of years will tend to have greater independence than at-will positions. Similarly, systems that make the position less accountable to the political structure, such as by use of a nonpartisan board, create an additional buffer that offers a greater level of independence.

To the extent that a nonpartisan board plays an advisory function, this may further facilitate independence, both by having a board that can itself be an independent voice, as well as having an actively engaged body to which political officials may feel some accountability. As was noted by the Spokane County Public Defender, advisory boards also serve an additional useful function of providing advice and a sounding board to the Public Defender. In counties such as Whatcom and Spokane, the nomination and selection committees respectively have that as their sole function, and convene only as needed for those functions. These systems provide a structural layer of protection for independence but not an additional voice for the system. A model that incorporates both would be possible, by adding an advisory board such as was proposed by the Executive on top of any of these selection systems.

In weighing alternative selection systems, as noted above, public defender systems succeed or fail based on many factors, of which the selection system is only one part. The preservation of independence is a much greater concern in jurisdictions with corrupt practices and majorly lacking internal controls; a problem which fortunately King County does not face.

With King County's reputation, and more importantly, commitment, to effective indigent defense, it is highly likely that under any of the selection alternatives presented above, including the Executive's proposal, the county would be able to achieve a level of independence sufficient to effectively meet the county's constitutional obligations. However, the greater the level of independence provided, the easier it will be to provide effective representation, and also it will increase the strength of the chief defender's client and program advocacy, and therefore by extension the features of King County's public defense system that make it a strong program and give it its national reputation.

Conflicts

Background

The following is a summary of the conflicts background that was provided at the March 20, 2013 COW meeting.

The Washington State Bar Association defines conflicts of interest in the Rules of Professional Conduct (RPC). RPC Rule 1.7, Conflict of Interest; Current Clients, states that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Notwithstanding the existence of a concurrent conflict of interest, a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

Presently, OPD initially reviews cases, obtains discovery information as soon as possible, and assigns counsel. If a conflict is identified, then OPD generally strives to first reassign the case to another defender agency. If none of the other agencies can provide the representation, then OPD assigns the case to an attorney on the assigned counsel panel if a private attorney has not been hired by the defendant. OPD maintains a list of independent contract lawyers available to handle cases that agencies cannot accept due to a conflict of interest. This list of independent contract attorneys is known as the Assigned Counsel Panel.

In King County, three common reasons for reassignment of counsel for the accused include: (1) current or former client conflicts – either as a witness, suspect, co-defendant, or victim (53% of conflicts), (2) the court appoints a different agency (11%), or (3) an agency reports an internal conflict (9%).

OPD Assumptions

OPD figures show that for many years the number of conflicts cases transferred to outside assigned counsel with four defender agencies has remained steadily in the 8 to 10 percent range. OPD estimates that under the proposed two-division model, the first division could handle 60 percent of the cases, the second division would handle 30 percent of the cases due to conflicts within the first division, and assignments to assigned council would remain at the current rate of about 10 percent.

Intuitively, one might expect that as four sections are collapsed to two, the number of conflicts would increase as there are fewer alternative sections to transfer cases to prior to resorting to the assigned counsel panel. However, OPD identified several factors that it expects to keep conflicts rates steady, including the following:

- On July 1, OPD expects offices to continue to function much like they do today with four units. The movement of attorneys into two divisions would occur over time after July 1, allowing for transition case assignment planning.
- Not all agencies handle all case types; therefore, there are already fewer than four agency alternatives for some of the conflicts cases, making those more analogous to the two-division model.
- Each defender agency uses individual databases to manage cases; OPD believes that moving to a unified case management system will create efficiencies in conflicts identification and assignment.
- Each defender agency has its own conflicts policies; OPD believes that a unified standard for what kinds of situations qualify for conflicts reassignment will create efficiencies in the long run. OPD convened a workgroup in January of this year to develop a common conflicts policy and procedure. The workgroup consists of a private bar member and three employees from each of the county's four current defender agencies.

There is not sufficient information to determine whether these assumptions will achieve the projected savings. Councilmembers should assume that the Executive's cost estimates for assigned counsel expenses are lower than would actually be experienced if the Executive's proposal were implemented.

Ability of In-House Model to Handle Conflicts

Can an in-house structure that consolidates four agencies into one department with two or more divisions comply with RPC requirements for handling conflicts? Answering this question requires a legal analysis of the extent to which conflicts of an employee will be legally imputed to others with whom the employee has worked or will work. This issue is undergoing additional legal analysis that will be presented in a future Executive Session.

OPD has convened a case conflicts workgroup to develop and recommend a common conflicts policy, including common procedures for identification of and options for resolving case conflict issues due to service transition. As mentioned above, the workgroup consists of a private bar member and three employees from each of the county's four current defender agencies. A draft of the policy was completed at the end of March and will be part of the legal analysis.

If the Executive's proposed model were deemed to be less effective at handling conflicts, depending on the reason, follow-up questions could include whether the addition of more divisions would help, or whether King County might be able to use a strategy similar to Spokane County, which created two discrete public defender departments.

60-30-10 Division

The Executive's allocation of 60 percent of cases to Division 1, 30 percent to Division 2, and 10 percent to Assigned Counsel, was based on a review of in-house public defense

systems across the country and in the State of Washington, in addition to OPD experience with assigned counsel. The percentage of cases handled by the primary division in 10 jurisdictions ranged from a low of 50 percent to a high of 94 percent, with a median of about 75 percent. Therefore, 60 percent would be well within this range. However, state rules on conflicts can vary, as can individual agency policies. Even OPD suggests that the variation in conflict policies between the four defender agencies within King County is great enough to affect the percentage of conflicts cases. Therefore, use of other jurisdiction percentages does not appear to be useful except as a very rough guide.

Current Conflict Rates

A starting premise of OPD is that there is an average conflict rate of 8 to 10 percent per year. Although this number may be technically accurate, the use of this number bears further study. Involuntary Treatment Act (ITA) cases have a very low percentage of conflicts. Ten of 3,354 ITA cases (0.3%) experienced a conflict in 2012, and six of those went to assigned counsel. Yet ITA cases comprised 19 percent of the total number of cases heard in 2012. As a result, if ITA cases were excluded from the analysis, the total percentage of conflict cases in 2012 would rise from 16 percent to 20 percent. Similarly, the percentage of cases being referred to assigned counsel would rise from 8 percent to 10 percent. Staff analysis is continuing on how different types of cases are handled, and what conflict rate would be the best comparison point.

Number of Agencies Handling Cases

OPD assumes that because some case types are not heard by all agencies, that reduction from four agencies to two divisions will not show as great an increase as might be expected. This assumption will require further analysis. Some types of cases, such as contempt of court and involuntary treatment act (ITA) cases, experience very few conflicts.¹⁴ Other cases, such as dependencies¹⁵ and felonies which are handled by three to four agencies, experience high rates of conflicts. Thus, the type of case appears to have a larger effect on conflict rates than the number of agencies handling the cases.

This is not to say, however, that the number of agencies has no effect. For felonies, there is some evidence that having additional agencies to handle conflicts could reduce the number of conflict cases sent to assigned counsel. Specifically, all four agencies handle felony cases in downtown Seattle, but NDA does not handle felony cases at the MRJC. Thus, felony data provides one snapshot of the effect of adding an additional

¹⁴ Contempt of court cases are handled by only one agency (ACA) at MRJC, and handled by only two agencies (NDA and SCRAP) at the King County Courthouse. Six cases (4%) of 161 contempt of court cases experienced a conflict in 2012, and four (2.5%) went to assigned counsel. Similarly, ITA cases are only handled by one agency (TDA). Ten cases (0.3%) of 3,354 ITA cases experienced a conflict in 2012, and six of those went to assigned counsel.

¹⁵ Out of 2,776 case conflicts, 353, or 29 percent of them, were dependencies, even though dependencies only comprise 7 percent of the total case assignments (1,232 out of 17,241).

agency on case conflicts. NDA appears to have about 24 percent of the total felony attorneys handling cases in downtown Seattle (9 of 38).¹⁶ The felony conflict rate at MRJC with three agencies is 34 percent with three defender agencies. With four agencies in downtown Seattle, the felony conflict rate is 25 percent, or about 9 percent less.

A list of courts by case type and the agencies that accept those cases is attached as Attachment 7 to this staff report.

Impact of Conflicts on Cost

Legal analysis is being conducted on the ability of the two division model to handle conflicts. However, the policy analysis must also consider cost impacts. Felonies and dependencies account for 57 percent of the total conflicts experienced in 2012 (see Figure 1 below, showing 29 percent dependencies and 28 percent felonies). Fortunately, according to OPD, dependencies cost the least per case for assigned counsel. Unfortunately, OPD also reports that felonies cost the most per case for assigned counsel.

To put these percentages into perspective, felonies represent 32 percent of the total number of cases heard in King County (they are the most frequent type of case). Dependencies are only 7 percent (ranking behind misdemeanors, ITAs, and juvenile crimes in frequency). Thus, felonies are slightly overrepresented in number of conflicts experienced, but dependencies are extremely overrepresented in number of conflicts experienced.

The majority of conflict cases that end up having to be referred to assigned counsel are felonies. Although 91 percent of felonies involve one co-defendant, as the number of co-defendants rises, the number of assignments to counsel that is necessary increases. As shown in Figure 2 below, 59 percent of assigned counsel cases are felonies. Dependencies are the next most frequent type of case referred to assigned counsel, comprising 19 percent of the total assigned counsel cases.

¹⁶ NDA has about 16 percent of the total attorneys handling felony cases across the four agencies (9 of 57), but the other agencies divide their attorneys between the courthouses.

Fig. 1. Distribution of Total Case Conflicts in 2012

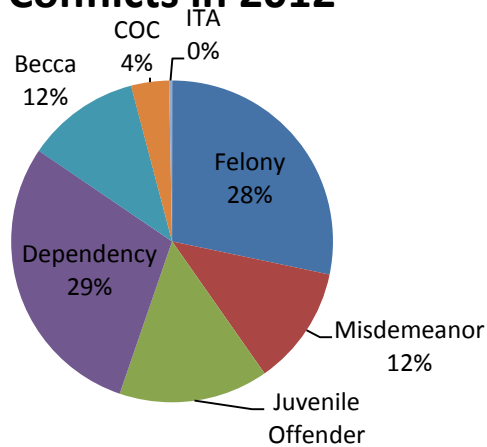
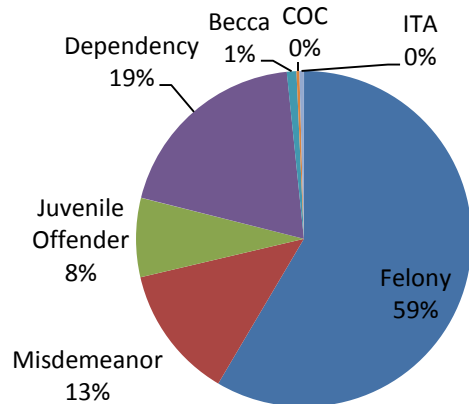


Fig. 2. Distribution of Assigned Counsel Cases in 2012



Staff analysis on the monetary costs of conflicts by case type is continuing.

Next Steps

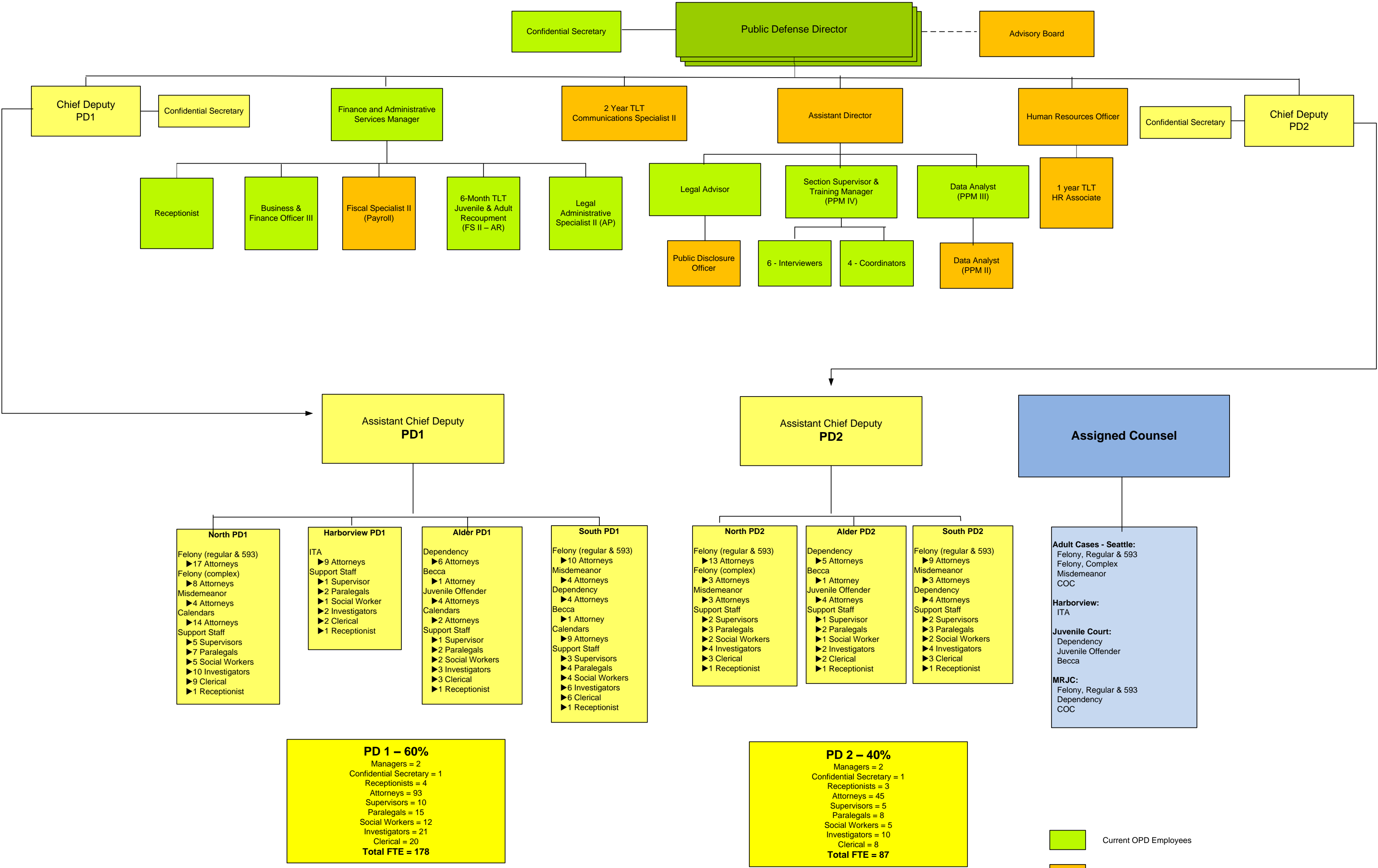
As noted above, Proposed Ordinance 2013-0108 and 2013-0109 are not yet ready for Committee action. The next staff report will continue analysis of the six issue areas, with an emphasis on the migration plan.

At the special meeting of the Committee of the Whole on April 24, the County Council will hear additional analysis on conflicts and a first hearing on the Executive's proposed interim solution if it is available.





ATTACHMENTS

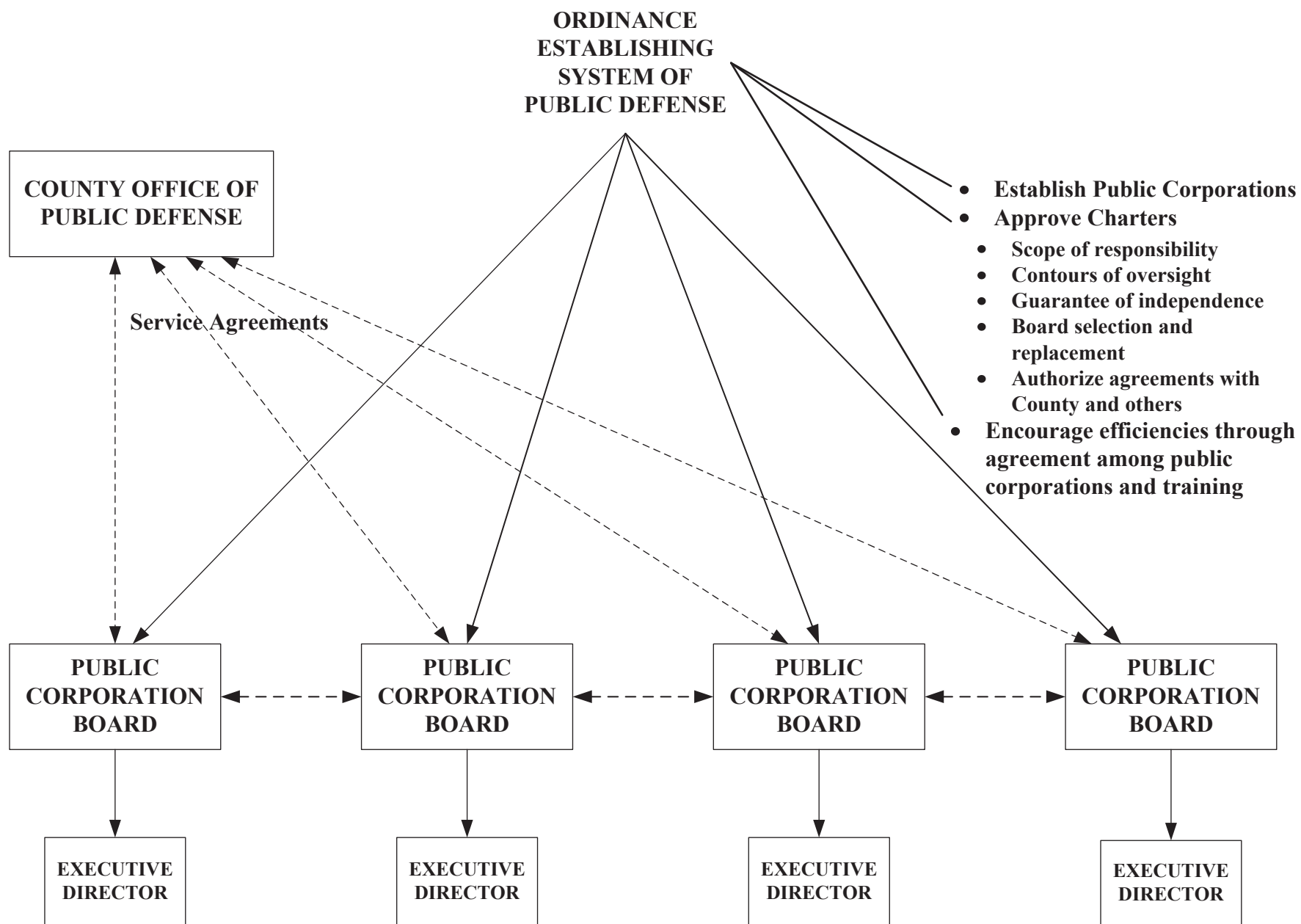
1. Proposed Ordinance 2013-0108
2. Proposed Ordinance 2013-0109
3. Transmittal letter
4. Fiscal notes
5. Draft organizational chart of Executive's proposed in-house structure
6. Organizational schematic of Defender Agencies' proposed public corporations model
7. List of courts by case type and agencies accepting cases

DRAFT



Notes:
FTE built on budgeted 2013 case credits

-  Current OPD Employees
-  New Public Defense Positions
-  PD1 and PD2 Staffing
-  Assigned Counsel

KING COUNTY COUNCIL

COURTS AND COURT LOCATIONS

Attachment 7

Type of Case	Location	Court Selection in HOMER	Agencies that Accept Case
Regular Felony	Downtown Courthouse (“SEA” cases)	Superior – KCCH	ACA, NDA, SCRAP, TDA
	MRJC (“KNT” cases)	Superior – MRJC	ACA, SCRAP, TDA
Felony – Domestic Violence	Downtown Courthouse (“SEA” cases)	Superior DV – KCCH	ACA, NDA, SCRAP, TDA
	MRJC (“KNT” cases)	Superior DV – MRJC	ACA, SCRAP, TDA
Drug Court	Downtown Courthouse (“SEA” cases)	Drug Court – KCCH	ACA
	MRJC (“KNT” cases)	Drug Court – MRJC	ACA
Expedited Felony	Downtown Courthouse	District – West	ACA, NDA, SCRAP, TDA
Misdemeanor	Downtown Courthouse	District – West	NDA, SCRAP, TDA
	Redmond Courthouse	District – East	SCRAP
	Burien Courthouse, MRJC	District – South	ACA, SCRAP
	Vashon	District – South	A/C
	Shoreline City	Shoreline Municipal	Schlotzhauer
	Kenmore City	Kenmore Municipal	Mackie
	Redmond City	Redmond Municipal	Stein / Jacobson / Price
Misdemeanor – Domestic Violence	Downtown Courthouse	District DV – KCCH	SCRAP
	MRJC	District DV – MRJC	ACA, SCRAP, TDA
Misdemeanor Appeals	Downtown Courthouse	Superior – KCCH	ACA, NDA, SCRAP, TDA
	MRJC	Superior – MRJC	ACA, SCRAP, TDA
Juvenile Offender	DYS	Juvenile – Superior	ACA, NDA, SCRAP, TDA
Dependency	DYS or Downtown Courthouse (“SEA” cases)	Juvenile – Superior	ACA, NDA, SCRAP, TDA
	MRJC (“KNT” cases)	Superior – MRJC	ACA, NDA, SCRAP, TDA
Becca/ARY/Chins	DYS or Downtown Courthouse (“SEA” cases)	Juvenile – Superior	ACA, SCR, TDA-new cases
	MRJC (“KNT” cases)	Superior – MRJC	ACA, SCRAP
Contempt of Court	Downtown Courthouse (“SEA” cases)	Superior – KCCH	NDA, SCRAP
	MRJC (“KNT” cases)	Superior – MRJC	ACA
ITA	Anywhere	Superior – KCCH	TDA
Mental Health Court	Anywhere	Mental Health Court – District	ACA

July 2010