



## King County

### Committee of the Whole

#### STAFF REPORT

<b>Agenda Item:</b>	5-11	<b>Name:</b>	Patrick Hamacher, Amy Tsai, Nick Wagner
<b>Proposed No.:</b>	2013-0108 to 0109, 2013-0210 to 0212, 2013-0215 to 0216	<b>Date:</b>	May 1, 2013
<b>Invited:</b>	<ul style="list-style-type: none"><li>• Dave Chapman, Director, Office of Public Defense</li><li>• Dwight Dively, Director, Office of Performance, Strategy and Budget (PSB)</li><li>• Susan Slonecker, Senior Prosecuting Attorney, Prosecuting Attorney's Office</li><li>• Patti Cole-Tindall, Labor Relations Director, Office of Labor Relations</li></ul>		

#### SUBJECT

Ordinances regarding the reorganization of the Office of Public Defense (2013-0108), supplemental request for funding (2013-0109), charter amendments for the selection of the chief Public Defender (2013-0210 to 0212), an interim plan (2013-0215), and supplemental request for funding the interim plan (2013-0216).

#### 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.

Proposed Ordinances **2013-0210 through 2013-0212** present three alternatives for the selection process of the chief Public Defender.

Proposed Ordinance **2013-0215** would create an interim structure for public defense until a final structure can be decided upon and put into place. Proposed Ordinance **2013-2016** is a supplemental request for the costs of implementing the interim structure.

## **BACKGROUND**

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.

### Lawsuit Drives Public Defense Changes

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.

### Pending and Related Legislation

PO 2013-0108 (Public Defense Department) – In response to the Court ruling and settlement, the County Executive has proposed the creation of a Department of Public Defense with two major Divisions, one that would handle the bulk of cases and calendar assignments and another that would primarily handle conflict cases. PO 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.

PO 2013-0109 (Supplemental) – There is a supplemental budget request for transition costs to effectuate the proposed public defense model. PO 2013-0109 would provide a supplemental appropriation of \$4.9 million from the General Fund, with 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.

Motion 13886 (Transition Plan) – Adopted April 8, 2013, Motion 13886 requested that the Executive transmit legislation to the County Council to cover the transition from the current model to a new public defense structure.

PO 2013-0210, -0211, -0212 (Charter Amendments) – Three ordinances were introduced on April 18 that are alternative forms of a charter amendment that would create a Department of Public Defense within the executive branch and a process for selecting a County Public Defender to head the department. The amendments differ primarily in the method of selecting the County Public Defender: appointment by a Public Defense Oversight Commission (2013-0210), election by county voters (2013-0211), or appointment by the Executive, subject to confirmation by the Council (2013-0212).

PO 2013-0215 (Interim Ordinance) – In response to Motion 13886, on April 25, 2013, the Executive transmitted an interim structure for public defense. This proposal would create a new department of public defense with four divisions, which would be in place until such time as the Council decides on a new public defense structure and that structure is implemented.

PO 2013-0216 (Interim Supplemental) – There is a supplemental budget request with a net impact of \$2.3M that reflects costs related to establishing an interim structure.

## **ANALYSIS**

This is the fifth hearing on the proposed ordinances for public defense. 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?

Previous staff reports have discussed alternatives, independence, and conflicts in some detail. This staff report covers the following topics:

- 1) Executive's interim proposal for migration (PO 2013-0215)
- 2) One-time budget requests pertaining to the interim proposal (PO 2013-0216)
- 3) Conflicts
- 4) Charter amendments (PO 2013-0210 to 0212) and proposed striking amendment S1.

## **PO 2013-0215 OPD Interim Ordinance**

On April 8, 2013, the Council adopted Motion 13886 (see Attachment 18), which requested that the Executive transmit legislation to the County Council to cover the transition from the current model to a new public defense structure. The motion expressed the Council's commitment to a thoughtful process to ensure that the new model that was selected would be consistent with best practices. The motion also recognized that implementing the new structure would take time, and that the county would need an interim structure on July 1 to ensure uninterrupted delivery to indigent public defense clients of their constitutionally-guaranteed right to assistance of counsel.

On April 25, the Executive transmitted a proposal for an interim public defense structure (PO 2013-0215, "interim ordinance") and a supplemental budget request reflecting transition cost estimates (PO 2013-0216, "interim supplemental").

There are two main elements to the interim proposal. First, the ordinance establishes a four-division interim department of public defense. This structure would be in place until such time as the Council passes and the county implements a new final public defense structure. Steps would be taken insofar as they are necessary to implement the interim solution; hence there is an adjusted supplemental request that is lower than the original supplemental request. Second, the ordinance includes a list of the actions that remain to be resolved in order for the interim structure to be successfully implemented on July. **The proposed ordinance is an emergency ordinance and would take effect immediately upon Council adoption.**

### *Interim Structure*

The interim ordinance provides for the following:

- Removes the Office of Public Defense from under the Department of Community and Human Services (DCHS) and creates a new Department of Public Defense.

Under each of the main alternatives presently being considered by the Council (in-house, public corporation, and public defender district), there would be a public defender department with a Chief Defender, with duties depending upon the structure selected. Creating an interim department that is separate from DCHS puts the department closer on par to the Prosecuting Attorney's Office and adds a layer of independence by not having the Chief Defender report to the director of DCHS.

- The department should have four divisions.

The proposed interim structure envisions that the employees on July 1 would remain in their current locations with a division structure that matches the four non-profit defender agencies. This structural similarity promotes continuity in services by avoiding disruptions and complications that could arise if offices and equipment were moved or groups of employees were merged into fewer divisions. As discussed in the unresolved

issues section below, the ability to implement this plan would require agency cooperation.

- Duties of the department include the direct provision of public defense services. The director of the department manages the department, ensures employment of sufficient staff to effectively deliver public defense services, and is guided by the ABA principles for standards for a public defense system.

With the recognition of defender agency employees as county employees on July 1, the current model must change. As a result, the county will need to provide public defense services until such time as a final structure is selected by the Council and implemented.

Note that OPD is presently engaged in discussions with SCRAP about having the county continue the ROYAL project with DCHS after July 1 until at least the end of the year. SCRAP expressed strong interest in this possible interim solution. In order for the department to be able to perform this function, the interim ordinance should authorize social justice work as a duty of the department. This could be done via an amendment either at Committee or at Council.

- The current director of OPD is the interim director of the department.

The interim director for the department would be the current OPD director, who is David Chapman. The interim director could continue to serve in that position indefinitely at the will of the Executive, presumably until a new public defense structure was selected by the Council. The interim director would be eligible to apply for the director position of the department, which, unless the Council's final defense structure provided for a different structure or selection process, would be done by Executive appointment subject to confirmation by the Council.

- The Council requests the Executive to negotiate any agreements necessary to implement the Dolan settlement. Unresolved issues that may require agreements are listed by example in Attachment 1 to the proposed ordinance.

As has been mentioned in previous staff reports, many issues remain to be resolved before July 1 in order to have a smooth transition of public defense services. Examples are listed in Attachment 1 to the proposed ordinance and are discussed in the next section of the staff report below. This provision in the proposed ordinance recognizes that the Executive may need to negotiate agreements in seeking resolution of these issues. As noted in the Findings, the County recognizes the value of the expertise and contribution of the defender agencies and the need to work with them collaboratively to achieve the mutually desired goal of continuing to provide quality service to public defense clients.

- Conflicts that cannot be resolved in-house will be sent to an assigned counsel panel. The department shall also develop a conflicts policy to determine when a conflict exists.

The proposed ordinance continues the current practice of assigning unresolvable conflicts to an assigned counsel panel of private attorneys. It also requires a conflicts policy. OPD is currently working with a workgroup that includes representatives from the defender agencies and private counsel to develop the conflicts policy.

- The department may enter into agreements to provide services to the state of Washington, tribal governments and municipalities in King County on a full cost recovery basis, subject to Council approval when required.

The proposed ordinance provides that the department can enter into agreements to provide services to other entities, including the ones with which the public defense agencies presently have contracts, so long as there is full cost recovery. Full cost recovery ensures that the General Fund does not subsidize work done for non-King County entities.

Staff have analyzed the components of the interim proposal and concluded that the terms appear to be reasonably constructed to include those elements required for creation of an interim in-house employee structure while leaving the door open for alternative models should the Council choose to adopt a different final structure. This is further supported by the reduction in the supplemental request to reflect the interim period, as discussed in the supplemental section below.

### *Remaining Actions to Resolve*

The interim ordinance (PO 2013-0215) identifies transition items that the current Office of Public Defense (OPD) must address with the four private, nonprofit public defender agencies in order to bring the non-profit employees on board as county employees on July 1 and ensure uninterrupted public defense services.

These transition items include 1) wrapping up existing contracts, 2) office logistics, 3) administrative processes, and 4) determining the status of non-county activities currently performed by the non-profit agencies. The full list of transition items is included in Attachment A to PO 2013-0215.

### **Issue 1: Resolution of existing case contracts**

- Contractual prepayment of open cases – on track pending ability to take the open cases back from agencies

The contracts with the non-profit agencies for public defense work expire on June 30, 2013. The county prepays agencies for assigned cases. For cases that are prepaid but not completed by the end of the contract period, the contract specifies how to calculate the leftover amount of prepayment owed to the county. Recovering unspent prepayments for existing case contracts appears to be progressing on schedule. There are contractual methods for calculating repayment of prepaid cases back to the county. The county needs to verify that the non-profit agencies have sufficient funds to make the repayments (currently estimated to be about \$2 million), reach agreement on the

amount of the repayments using the contract methodology, and accomplish collection of the amounts from the agencies. **Recapturing prepayments of existing case contracts assumes that the defender agencies will turn over open cases to the county on July 1; this is an assumption that may not be fully resolved yet.**

- Completion of contract reconciliation for case services – on track

There is also a quarterly reconciliation process to true up monthly payments with actual caseloads. This year, caseloads are below projections and the current estimate is for approximately \$1 million to be returned by the non-profit agencies to the county.

## **Issue 2: Office logistics**

OPD is making progress on office logistics required to implement an interim structure by July 1, but much work remains to be done prior to July 1 in configuring the new case management system and importing data into it, establishing the status of agency office equipment, and finalizing space planning and lease agreements. These are discussed further below.

- Case management system – data migration not started

The Executive's proposal would have the defender agency employees continue work on their existing cases in their current locations. New county employees would need access to their existing case files and a functional case management system (CMS).

OPD's goal is to have all data for open cases migrated into one vendor system to be ready to use by July 1. Toward that end, OPD and KCIT with the assistance of a consultant selected the software SCRAP uses, for the county's unified CMS. The system is an "off the shelf" system used nationwide for case management. The county has completed a contract with the vendor and is currently setting up the required servers to host the application and associated enterprise database. It has also made arrangements with SCRAP for assistance with data configuration and training of staff.

To complete the migration, all of the agencies will need to provide copies of their case management databases to the vendor, both for configuration as well as for using the new system. If they do not, then divisions who have not completed the migration process will need to operate parallel systems until the migration is complete. That would be less efficient, but will help ensure continuity of data.

To date, agencies have not yet completed a nondisclosure agreement with the vendor or provided the vendor a copy of their database. Agency directors raised questions about data confidentiality and who would pay for the system. OPD drafted an agreement at agency request on April 15 to reflect that King County would pay for data migration, the system and licenses, with provisions recognizing the protection of privileged data. Discussions between the agencies and OPD are continuing.

- Office equipment – negotiations requested

OPD requested information technology equipment and software inventory from all agencies. Most agency equipment appears to meet county standards (one agency submitted inventory data that was less usable). This information has informed the Executive's request for supplemental authority for interim equipment. However, after an adequate inventory has been conducted, the county will need to reach agreement with the agencies on use of the equipment. OPD has requested that discussion with the agencies but it has not yet occurred.

- Interim space planning – progress on most of the negotiations

The defender agencies currently occupy space around the King County Courthouse in downtown Seattle, the Maleng Regional Justice Center in Kent, and the Youth Services Center in First Hill. Their leases end at various times ranging from July 31, 2013 (ACA & SCRAP Kent leases) to January 1, 2022 (NDA downtown Seattle lease). County agencies including the Facilities Management Division have toured the facilities and are in negotiations with the agencies and landlords for county use of the current facilities beginning July 1. OPD expects to either reach satisfactory agreements with the defender agencies or have backup options prior to June 30. Staff analysis is continuing on the status of the backup options.

Tables 1 and 2 below show the distribution of space across defender agencies overall and by location. Failure of the County to achieve successful negotiations with any one agency would have the potential to affect up to a third of the total space presently occupied by the defender agencies. Therefore, until the County achieves satisfactory office space arrangements with the agencies, finding space alternatives should be a high priority to prevent the interruption of client services.

**Table 1. Overview of Defender Agency Space Usage**

Agency	Staff*	Staff %	% Space	Sq Ft.
ACA	112	31%	32%	40,466
TDA	105	30%	23%	28,785
SCRAP	77	22%	29%	36,772
NDA	61	17%	16%	20,651
Total	355	100%	100%	126,674

\* from Oct 2012 pay list

**Table 2. Defender Agency Space Usage by Location**

Agency	Downtown Seattle	First Hill	Kent	Total
ACA	29,696 (41%)		10,770 (44%)	40,466 (32%)
TDA	21,526 (30%)	4,429 (15%)	2,830 (12%)	28,785 (23%)
SCRAP		26,002 (85%)	10,770 (44%)	36,772 (29%)
NDA	20,651 (29%)			20,651 (16%)
Total	71,873 (100%)	30,431 (100%)	24,370 (100%)	126,674 (100%)



### **Issue 3: Administrative processes**

The county is on track with its internal timelines for setting up internal payroll and benefits systems and other internal processes for bringing non-profit agency employees on board by July 1 such as creating access cards and preparing new employee orientation and PeopleSoft training. A lot of this work is occurring in the Finance and Business Operations Division and Human Resources Division. This aspect was previously discussed in the April 3 staff report, and the county appears to continue to be on target. Administrative aspects that require working with the agencies are still in beginning stages as discussed further below.

- Communication protocols and resources – negotiations not started

OPD presently plans to keep in place each agency's attorney and staff communication protocols until the Council decides on a final public defense structure. OPD also plans to have employees continue to use their current communications equipment (phones, mobiles, etc.). These steps require reaching an agreement with the agencies. Discussions have not yet begun on these issues.

- Employee administrative services – county work on track, agency negotiations not started

Although the Finance and Business Operations Division is working on payroll for after July 1, the defender agencies need to be able to complete their final payroll through June 30, process final payments on the county contracts, and pursuant to the settlement arrange for employees to cash out their current vacation time with an opportunity to repurchase some or all of it with King County. This work needs to be done in coordination with the agencies. Discussions have not yet begun on these issues.

### **Issue 4: The future of non-county activities**

- Status of non-County contracts – contracts with full cost recovery can continue

OPD is in discussions with the state for the Sexually Violent Predator contract, and believes it will be able to continue providing the service on a full cost recovery basis. This is dependent on the agencies who currently hold the contracts not creating an issue with transitioning the contracts to the county.

There have been fewer discussions with the City of Seattle for misdemeanor services, but OPD hopes to be able to take on the contract with full cost recovery. The ability to do so will be impacted by the wages of the attorneys performing that body of work to the extent that the wages are higher than what the agencies were paying. Wages are a subject of bargaining and have not been fully resolved, although agency employees have been provided with the county scale for equivalent positions. Again, the ability of the county to take on the contract is dependent on both cost and willingness of the agencies holding the contracts to transition the contracts to the county.

There have been no discussions with the tribes for continuation of tribal contracts. The work is minimal and would be permitted under the proposed interim ordinance if full cost recovery can be achieved.

- Status of social justice programs – analysis is continuing for permanent long-term solutions

The 2013 SCRAP contract with the Department of Community and Health Services runs through June 30, 2013, but DCHS has funds set aside (\$147,050) to support the project for the remainder of the year. OPD believes it will be able to take on this contract for the remainder of 2013. That will provide transition time to examine alternatives.

It is unknown at this time what will happen to the Racial Disparity Project. It is housed within TDA and whether TDA employees will choose to convert to county employment is unknown at this time. As discussed in the April 17 staff report, its funding would likely be compromised if converted to a county program. Becoming a county program, or continuing to exist in a non-profit agency whose role no longer includes providing public defense services to the county, are both options which would likely impact the program's efficacy.

Council staff have been directed to examine options for preserving these programs long-term in whatever final public defense structure is chosen. Staff will continue to analyze options as decisions on the final public defense structure are narrowed.

#### **PO 2013-0216 OPD Interim Supplemental**

There is a proposed interim supplemental budget ordinance that would change the Office of Public Defense appropriation to the Department of Public Defense appropriation. It would provide a supplemental appropriation of \$4 million from the General Fund (at a net cost of \$2.3 million after removing the double-counting of an internal transfer from the General Fund to the capital projects).

It includes the following appropriations:

- \$41,481,187 and 19.75 FTE which is the OPD 2013 adopted budget
- \$496,000 to the department for onboarding personnel, supplies, and contingency (transmitted as \$490,000 that will need a technical amendment)
- 355 additional FTE to cover the migration of defender agency employees to the county
- \$1,529,000 in King County Information Technology capital projects for computers and the case management system, and
- \$250,000 in Building Repair and Replacement capital projects for facilities planning and tenant improvement contingency.

This supplemental request is \$882,000 less than the supplemental request accompanying the original public defense proposal (PO 2013-0208 and -0209), because it is based on amounts deemed necessary for implementation of the interim solution only. **Further supplemental requests would be expected depending on the**

**final public defense structure approved by the Council.** The table below compares the original supplemental request (PO 2013-0209) to the proposed interim supplemental request (PO 2013-0216).

**Table 3. Comparison of Original Supplemental to Interim Supplemental**

	<b>2013-0209 Original</b>	<b>2013-0216 Interim</b>	<b>Difference</b>
Personnel onboarding	\$499,000	\$442,000	(\$57,000)
Supplies	\$124,000	\$54,000	(\$70,000)
Vehicle purchase	\$755,000	\$0	(\$755,000)
Computers	\$780,000	\$780,000	\$0
Case Management System	\$749,000	\$749,000	\$0
Facilities planning	\$100,000	\$100,000	\$0
Tenant improvements	\$150,000	\$150,000	\$0
<b>Total</b>	<b>\$3,157,000</b>	<b>\$2,275,000</b>	<b>(\$882,000)</b>
<b>FTEs</b>	<b>275</b>	<b>355</b>	<b>80</b>

The original supplemental request was described in detail in the March 20 staff report. This staff report describes the items with no change compared to the 2013-0209 supplemental and then discusses the supplemental requests that show a decrease.

*Requests with \$0 change*

Computers – The \$780,000 amount for computers and technology staff time assumes that roughly a third of the existing machines, or 100, would need to be replaced in 2013. Although OPD and KCIT continue to refine their analysis of the technology need, as discussed above the County has not yet reached agreement with the defender agencies on use of equipment in the defender agency offices. Therefore, it appears reasonable not to adjust the estimate at this time. Future adjustments to this request may be needed as more information becomes known.

Case Management System – The \$749,000 request for the case management system (CMS) funds staff time to gather requirements, select an interim solution, pay for licenses, data migration and training. Consolidating case management between the four defender agencies onto one system is an efficiency that OPD believes will help reduce the number of cases being re-referred due to conflicts. Investing in a unified system for the County appears reasonable regardless of the final structure of public defense selected by the Council.

Facilities – Long term planning (\$100,000) is an activity that will be needed if the Council decides to provide public defense services in-house. Otherwise, funding for this planning could be delayed. However, the status of using the current leased spaces is not completely certain, and office placement of staff is critical to their ability to continue to handle their caseloads. Long-term planning may also serve an additional function of helping the County to analyze its near-term options. Therefore, leaving a budget for future space planning appears reasonable.

There is also a \$150,000 request for tenant improvements to make any needed modifications to existing space. The Facilities Management Division is in the process of surveying the sites and still believes these improvements may be necessary. Partially, the need will depend upon the future status of non-county contracts and of the non-profits themselves, and whether separate space in the existing offices will need to be created to split County employees from defender agency staff. Work on tenant improvements would be approved by OPD and the Office of Performance, Management and Budget prior to expenditure.

#### *Requests less than Original Supplemental*

Fleet – The largest reduction occurs with the elimination of the request for fleet acquisition. The fleet acquisition was premised upon adoption of an in-house public defense structure. OPD can reimburse investigators and social workers for mileage in the same manner as defender agencies currently do. Therefore, until the final structure of public defense is adopted by the Council, it is not necessary nor advisable to commit to a large fleet acquisition at this time. However, if the Council were to adopt an in-house model, then this amount would be included in a future supplemental request.

Personnel and Supplies – There is a 20 percent reduction in the request for personnel and supplies (including an 11 percent reduction in personnel onboarding costs and a reduction in over half of the supply costs). This reduction includes eliminating two months of salary for the two division directors that were originally proposed to be hired in the May to June timeframe. It also reduces supply costs to emergency equipment, ORCA card expenses, and other supplies viewed as necessary for the interim. If the Council were to adopt an in-house model, there could be an additional request for supplies included in a future supplemental request.

#### *FTEs*

The supplemental request includes authorization for 355 FTEs to hire all of the staff currently employed at the defender agencies (plus two positions as described below). The original supplemental request for 275 FTEs included 272 new defense employees and three unfunded positions for flexibility in attorney needs; it did not include FTEs for defender agency staff performing non-county contract work (Seattle Municipal Court and Sexually Violent Predator contracts). This revised FTE allocation eliminates the three unfunded positions and provides the ability for the County to accept as many employees on July 1 as choose to join the County system. The final FTE count could be adjusted to match actuals at a later date.

The April 3 staff report identified 4 TLTs and 2 FTEs that have been brought on board to perform current work that is needed to prepare for the July 1 transition. The hiring of the four TLTs (communications, labor negotiations and two project managers) was accomplished within existing OPD appropriation authority. There were two FTEs hired including clerical payroll staff and a human resources associate. *Note that the 355 FTE request is intended by OPD to include these two FTEs.*

The proposed supplemental appears to support reasonably necessary elements of an interim county public defense system such as working towards a unified case management system and removing proposals for expenditures with more permanent impacts such as fleet acquisitions.

## **Conflicts**

### *Rules of Professional Conduct*

The Washington State Bar Association defines conflicts of interest in the Rules of Professional Conduct (RPC). RPC Rule 1.7, regarding conflicts of interest for current clients, states that a lawyer shall not represent a client if the representation of one client will be directly adverse to another client, or there is a significant risk that the representation will be materially limited by the lawyer's responsibilities to another client, former client, third person, or personal interest of the lawyer. However, the lawyer can represent such a client if he or she believes she can provide competent representation, the representation is not prohibited by law, the representation does not involve a claim by one client against the other represented by the lawyer in the same proceeding, and each client gives informed consent in writing.

RPC Rule 1.9, among other things, states that a lawyer who formerly represented a client cannot later represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client. It also requires that a lawyer not represent a person in a matter where the lawyer's former law firm had previously represented a client whose interests were materially adverse to that person and the lawyer acquired protected material information. However, in either of these circumstances, the former client can allow it by giving informed consent in writing.

RPC Rule 1.10 is the general rule on imputation of conflicts of interest. Generally, under Rule 1.10, a lawyer in a firm cannot represent a client when any one of the attorneys in the firm would be prohibited from doing so under Rule 1.7 or 1.9, unless screens that meet requirements laid out in Rule 1.10(e) are put in place to prohibit dissemination of information about the former representation.

RPC Rule 1.11(d) addresses conflicts of interest for current government officers and employees. Among other things, such employees are subject to Rule 1.7 and 1.9 and may not participate in a matter in which the lawyer participated while in private practice unless the government agency gives informed consent in writing.

### *County Conflicts Policies*

On April 24 the Committee received information in executive session regarding the ability of an in-house system to handle client case conflicts. In addition, the Committee was briefed on conflicts issues in the March 20 and April 17 staff reports.

PO 2013-0215, the proposed interim ordinance, adds the following conflicts language to the county code:

The department shall manage cases and assign counsel to avoid conflicts of interest, including but not limited to those that could arise from division-wide concurrent representation of more than one client involved in a single matter, such as co-defendants or defendant and a witness or suspect in the case or co-respondents or represented members of a family in a dependency case or a respondent and an adverse witness in a civil dependency case. If the department is unable to provide in-house representation when a conflict exists, it shall assign counsel from the assigned counsel panel. The department shall develop a policy to determine when a conflict exists and to avoid conflicting representation.

The policies that a public defense system adopts can have a significant impact on how many conflicts it determines to exist and how often it determines a case must be referred to another division, or failing ability to do that, to private outside counsel. 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 employees from each of the county's defender agencies. The conflicts policy is also being reviewed by Professor David Boerner from the Seattle University School of Law.

#### *Ability of Two-Division Model to Handle Conflicts*

As discussed in the April 17 staff report, OPD has proposed a two-division public defense structure, with the first division aiming to handle 60 percent of the caseload, the second division handling primarily conflicts from the first division at an estimated 30 percent of the cases, with the remaining 10 percent being referred to assigned counsel.

**At this time, staff analysis is not able to conclude whether a two-division model is sufficient for handling case conflicts, or whether there is a more optimal number of divisions that will result in fewer cases being sent to assigned counsel, which cost more.**

The number of cases referred to outside counsel has remained steadily in the 8 to 10 percent range across the four defender agencies over time. OPD believes that the 8 to 10 percent referral rate can be achieved in a two-division model. In support of that claim, OPD offers the following factors:

- A unified case management system will create efficiencies in conflicts identification and assignment compared to the current system in which each defender agency has its own case management system.
- A unified county policy on what situations qualify for conflicts reassignment will create efficiencies compared to each agency having its own conflicts policies. Situations that the County might not necessarily treat as a conflict may presently be treated by a defender agency as a conflict.
- Other jurisdictions across the country have been able to function with a two-division structure. (However, as noted in the April 24 staff report,

extrapolating from different jurisdictions to King County's situation is difficult when each jurisdiction has its own way of handling conflicts.)

- There are already fewer than four agency alternatives for handling certain types of cases, therefore making the conflict reassignment alternatives for those cases more analogous to the proposed two-division model. (However, as noted in the April 24 staff report, this situation does not apply to felonies, which have three to four agencies handling them. Since felonies tend to be the most expensive cases, the effect of this factor would be small.)

It is unknown whether these efficiencies will outweigh the added pressure on the system of reducing the number of available conflict buckets from four agencies down to two divisions. Staff have requested that OPD conduct additional conflicts projections from their database. Whether OPD will be able to provide useful information in the Council's timeframe for action that can better inform the Council's decision on a public defense structure is unclear because OPD does not have access to all of the agencies' conflicts data and must base its analysis on the reviews that are conducted within OPD's system. It is possible that legal review of OPD's conflicts policy will shed additional light on the efficacy of a two-division structure. If the Council adopts an in-house model as the final public defense structure, the number of divisions may need to be modified over time as implementation provides real data on ability of the system to handle conflicts.

### **Charter Amendments**

The committee was briefed last week on three approaches to creating a Department of Public Defense by charter amendment. They differ primarily in the method by which the department head—the County Public Defender—would be selected:

- Appointment by a public defense oversight commission (P.O. 2013-0210);
- Election by county voters (P.O. 2013-0211); or
- Appointment by the executive, subject to confirmation by the Council (P.O. 2013-0212).

There have been some changes since last week in the proposed amendments and in the draft ordinances that would implement them. The description below and the attached flow charts (Attachments 12-14) and summaries (Attachments 15-17) have been modified to reflect the changes.

1. The Commission Appointment amendment (2013-0210) provides for the County Public Defender to be appointed by a Public Defense Oversight Commission, the members of which would be appointed by the County Council. The Council would prescribe the membership of the oversight committee by ordinance. The composition of the commission and the method of appointing commission members has been revised since last week. The revised implementing ordinance would consist of nine members, with one member representing each of the following:

- a. The Washington Association of Criminal Defense Lawyers;
- b. The Washington State Office of Public Defense;
- c. The Washington State Bar Association;
- d. The King County Bar Association;

- e. A nonpartisan organization active in King County that focuses on mental health issues, such as the King County Mental Health Advisory Board;
- f. A nonpartisan organization active in King County that focuses on substance abuse issues, such as the King County Alcoholism and Substance Abuse Administrative Board;
- g. A nonpartisan organization active in King County that focuses on issues concerning military veterans, such as the King County Veterans Program Advisory Board;
- h. A nonpartisan organization active in King County that focuses on issues related to poverty;
- i. A nonpartisan organization active in King County that focuses on issues concerning youth.

Each group would nominate a single representative, whom the Council would review and, if it found the nominee acceptable, approve. This is analogous to the process that the Council has adopted for appointments to the Citizens' Election Oversight Committee.

The Commission would appoint the County Public Defender to an initial term of four years, could reappoint for additional four-year terms, and could remove the County Public Defender for cause, which the Council could define by ordinance. Under the associated implementing ordinance in its current form, appointment and reappointment of the County Public Defender would require a simple majority of the commission members; removal would require a supermajority. *Note that legal counsel is researching whether there is any legal obstacle to assigning appointive and removal powers and an oversight role to the commission.*

2. The Election amendment (2013-0211), unchanged from last week, provides for the County Public Defender to be elected by county voters, just as the Prosecuting Attorney is elected. Unlike the other two amendments, this amendment includes no provision for a group to oversee or advise the Department of Public Defense, since there is no corresponding group that oversees or advises the Prosecuting Attorney's Office. Removal of an elected County Public Defender would require the same grounds and procedures as for removal of the Prosecuting Attorney (or any other county elected official), which include removal by recall election.

3. The Executive Appointment amendment (2013-0212) provides for the County Public Defender to be appointed by the County Executive, subject to confirmation by the Council; however, the Executive would be required to make the appointment from among three candidates recommended by a Public Defense Advisory Committee. Under the associated implementing ordinance in its current form, the advisory committee would have the same membership and be appointed in the same manner as the Public Defense Oversight Committee that would be created by the Commission Appointment charter amendment. *Note that legal counsel is researching whether there is any legal obstacle to assigning this role to the advisory board.*



The Executive would appoint the County Public Defender to an initial term of four years and could reappoint for additional four-year terms, again subject to confirmation by the Council; however, the Executive would not be authorized to remove the County Public Defender. Only the Council would be authorized to do so, only for cause (which the Council could define by ordinance), and only by the affirmative votes of at least six Councilmembers.

Besides nominating candidates for appointment as County Public Defender, the Public Defense Advisory Committee would oversee the Department of Public Defense. This oversight role is intended to be analogous to the oversight role played by the Citizens' Election Oversight Committee. This oversight role was included in the original version of the Executive Appointment amendment, but was not called out in last week's staff report. The term "oversight" presumably would be defined in the implementing ordinance; its scope would require legal review on the permissible oversight duties of the committee versus the oversight obligations of the Council.

All three charter amendments provide that to be eligible for appointment or election, the County Public Defender must be admitted to practice law in Washington and have at least ten years of experience as an attorney primarily practicing criminal defense. All of the charter amendments would permit the Council to establish additional qualifications by ordinance for the County Public Defender.

All of the amendments would make the County Public Defender the county's bargaining agent for collective bargaining with the employees of the Department of Public Defense concerning working conditions other than compensation and benefits, which would be bargained by the Executive. This division of bargaining authority would be similar to the division of authority between the Executive and the Sheriff.

## **AMENDMENTS**

Staff are preparing two technical amendments for Committee consideration, including the following:

PO 2013-0215 Interim Ordinance – A proposed technical amendment is being prepared that would correct duplicative language, clarify the appointment process for the interim director, and add social justice program work to the authorized duties of the interim department.

PO 2013-0216 Interim Supplemental – A proposed technical amendment is being prepared that would correct typos in the ordinance and in the Attachment A General Government CIP.

There may be additional refinements to the language of the proposed charter amendments or implementing ordinances as staff receive further direction.

## **NEXT STEPS**

The Chair noted at the April 24 meeting the possibility of action at the May 15 meeting. Therefore, the next staff report will include a high level summary of issues discussed to date, as well as wrap up discussion of remaining issues from previous staff reports.

If a charter amendment is acted upon (2013-0210 to 0212), there would be an accompanying ordinance containing details of implementation. The implementing ordinances accompanying 2013-0210, 0211, and 0212 are being developed by staff.

## **ATTACHMENTS**

1. Proposed Ordinance 2013-0108 (Department of Public Defense)
2. Proposed Ordinance 2013-0109 (Supplemental)
3. Transmittal letter
4. Fiscal notes
5. Proposed Ordinance 2013-0210 (Charter Amendment Commission)
6. Proposed Ordinance 2013-0211 (Charter Amendment Election)
7. Proposed Ordinance 2013-0212 (Charter Amendment Advisory Commission)
8. Proposed Ordinance 2013-0215 (Interim Ordinance)
9. Proposed Ordinance 2013-0216 (Interim Supplemental)
10. Transmittal letter for 2013-0215 and 0216
11. Fiscal notes for 2013-0215 and 0216, revised
12. Flowchart PO 2013-0210 (Commission)
13. Flowchart PO 2013-0211 (Election)
14. Flowchart PO 2013-0212 (Advisory)
15. Summary PO 2013-0210 (Commission)
16. Summary PO 2013-0211 (Election)
17. Summary PO 2013-0212 (Advisory)
18. Motion 13886 (Interim Plan)