



## King County

### Committee of the Whole

#### STAFF REPORT

<b>Agenda Item:</b>	5-8	<b>Name:</b>	Patrick Hamacher, Amy Tsai, Nick Wagner
<b>Proposed No.:</b>	2013-0108, 2013-0212, 2013-0237, 2013-0242	<b>Date:</b>	June 5, 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></ul>		

**SUBJECT:** Ordinances regarding the structure of public defense, including an Executive-proposed two-division structure (2013-0108), a charter amendment for the selection of the chief Public Defender by the Executive (2013-0212), implementing ordinance for the charter amendment (2013-0242), and public defender district (2013-0237).

#### **SUMMARY**

As a result of the Dolan lawsuit, the county is re-examining its structure for county public defense services. Currently, the County contracts with four non-profit public defense organizations. The Executive has proposed a two-division in-house department of public defense (2013-0108).

On May 20, the Council adopted an in-house structure for public defense and supplemental appropriation as an interim solution until such time as it adopts a final structure for public defense (Ordinance 17588 and 17589). Ordinance 17588 also directed creation of a Public Defense Criminal Justice Reform Advisory Task Force.

Two possible models for a final public defense structure were briefed in greater detail in Committee in response to Councilmember questions, including the following:

- **PO 2013-0212** is a proposed charter amendment that would create an in-house department with the Public Defender appointed by the Executive, with measures put into place to insulate the Public Defender from political influence. **PO 2013-0242** is the implementing ordinance accompanying the charter amendment, and contains many of the individual policy choices that would be necessary to implement this approach.
- **PO 2013-0237** is a proposed Public Defender District, where the chief defender is selected by a selection committee outlined in state law. This approach gives

the Public Defender the option to contract some portion of indigent defense-related work to outside entities besides the assigned counsel panel.

This staff report summarizes the issues (independence, oversight, etc.) that have been previously briefed for the two proposed models. It also summarizes the newly created Public Defense Criminal Justice Reform Advisory Task Force. In addition, timelines are presented for placing a charter amendment on the November ballot.

## **BACKGROUND**

### **Dolan Lawsuit**

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. 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.

### **Executive Proposed Model (PO 2013-0108)**

In response to the Court ruling and settlement, the County Executive has proposed the creation of a Department of Public Defense with two 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.

### **Interim Department of Public Defense (Ordinance 17588 and 17589)**

On May 20, the Council adopted Ordinance 17588, creating a new department of public defense that initially should have four divisions. This department will be in place until such time as the Council decides on a new public defense structure and that structure is implemented. The Executive is in the process of transitioning staff of the four nonprofit public defense agencies to in-house county employees. Up to 355 staff will be brought onto the county payroll system as of July 1, 2013. As part of that ordinance, the Council created a Public Defense Criminal Justice Reform Advisory Task Force, discussed

further below. The Council also approved a supplemental appropriation request to fund the transition.

#### Exec Appointment Charter Amendment (PO 2013-0212)

There is a proposed charter amendment, PO 2013-0212, that would create a Department of Public Defense with the chief defender appointed by the Executive from names recommended by an advisory board, subject to confirmation by the Council. An implementing ordinance (PO 2013-0242) provides additional details on the charter requirements.

PO 2013-0212 is a proposed charter amendment that, subject to voter approval, would amend the King County charter as follows:

- Creates a career service Department of Public Defense
- Creates a county Public Defender
  - Selected by Executive from three names submitted by an advisory board, subject to Council confirmation
  - Terminated by Council for cause with six votes
  - Serving a renewable four-year term
  - Qualifications include being admitted to practice law in Washington with 10 years of criminal defense experience and other qualifications as set by ordinance.
- Creates a Public Defense Advisory Board which recommends three names for chief defender to the Executive when there is a vacancy, plus review, reporting and advising duties for the department.
- The Public Defender bargains working conditions; the Executive bargains wages and benefits.

#### Implementing Ordinance to Charter Amendment (PO 2013-0242)

PO 2013-0242 is the implementing ordinance to the charter amendment that contains all of the details that the charter amendment authorizes the council to create by ordinance. Subject to voter approval of the charter amendment, the implementing ordinance does the following:

- Sets duties of the Public Defender
  - Manages the department
  - Follows state standards and, to the extent possible, ABA principles
  - Prepares annual budget and annual report on ABA principles
  - May advocate and work for social justice and criminal justice reform
- Sets qualifications of the Public Defender
  - Licensed attorney with 10 years of experience
  - Attorney in good status with the bar
  - Experience with felonies and misdemeanors
  - Supervisory and managerial experience

- Defines examples of what constitutes removal "for cause"
  - The Public Defender can be removed prior to the expiration of his or her term by the Council for cause with 6 votes.
  - The charter amendment specifies that grounds include the grounds for vacancy of elective office under Section 680 of the county charter.
  - The implementing ordinance lists "for cause" examples:
    - failure to meet the qualifications for office
    - conviction of a crime, or
    - a finding or stipulation of misconduct under the Washington Rules of Professional Conduct.
- Sets compensation for the Public Defender at the same level as the Prosecutor.
- Sets duties of the Public Defense Advisory Board
  - The charter amendment charges the advisory board with recommending three names to the Executive when there is a Public Defender vacancy.
  - The implementing ordinance requires the advisory board to regularly review activities and plans of the department, make recommendations to the Public Defender on matters concerning the department, and issue at least annually a report to Executive and Council on the state of county public defense and a report reviewing the proposed budget for public defense.
- Sets membership and selection process of the Public Defense Advisory Board. The advisory board includes ten members with one representative from each of the following:
  - 1) Washington Association of Criminal Defense Lawyers;
  - 2) Washington State Office of Public Defense;
  - 3) Washington Defender Association;
  - 4) King County Bar Association;
  - 5) a minority bar association;
  - 6) a nonpartisan organization focusing on mental health (such as the King County Mental Health Advisory Board);
  - 7) a nonpartisan organization focusing on substance abuse (such as the King County Alcoholism and Substance Abuse Administrative Board);
  - 8) a nonpartisan organization focusing on veterans (such as the King County Veterans Program Advisory Board);
  - 9) a nonpartisan organization focusing on poverty; and
  - 10) a nonpartisan organization focusing on juvenile justice.

The Council appoints each board member by motion from among one or more individuals nominated by the entity that the member will represent and from submitted applications. The Law Justice Health and Human Services Committee may review applicants, interview and make recommendations. The advisory board members serve staggered three year terms and members may be removed by the Council with 6 votes.

- Sets qualifications of the Public Defense Advisory Board. Board members must have substantial relevant experience and may not hold elected office or have ties to the prosecutor's office or courts.

#### Public Defender District (PO 2013-0237)

There is a proposed ordinance, PO 2013-0237, that would create a public defender district (PDD) as allowed by state law (Chapter 36.26 RCW). The proposed ordinance also gives the Public Defender the option to contract some portion of indigent defense-related work to outside entities besides the assigned counsel panel.

The reliance on state law authorization allows the county to implement certain measures that promote independence of the office, without requiring an amendment to the county charter. PO 2013-0237 does the following:

- A public defender district for King County is created.
- The Public Defender must be a qualified attorney licensed to practice law in Washington State. The PDD model incorporates as recommended qualifications the same qualifications that are required in PO 2013-0242, the implementing ordinance to the Executive-Appointed structure discussed above.
- The Public Defender is selected and may be removed by a three-member selection committee. The selection committee consists of the chair of the County Council, the presiding judge of the Superior Court or his or her substitute, and the president of the King County Bar Association or his or her substitute. The selection committee is encouraged to consider three candidates recommended by a public defense advisory board.
- The Public Defender serves a term of four years, coterminous with the elected term of the Prosecutor.
- The Public Defender compensation may not exceed that of the Prosecutor.
- The Public Defender makes an annual report of costs and expenditures to the Council and Executive.
- A public defense advisory board (PDAB) is created. PDAB's characteristics mirror those of the advisory board in the implementing ordinance to the Executive-Appointed model discussed above (2013-0242),
- The Public Defender is authorized to contract for services when the department is unable to take a case due to in-house conflicts of interest,<sup>1</sup> or when the Public Defender finds it appropriate to do so and funds are available.

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<sup>1</sup> The PDD model also retains the ability of the Public Defender to use the assigned counsel panel to handle conflicts.

## **ANALYSIS**

Table 1 below summarizes the elements of each proposal compared to the Executive's proposed model and Council-adopted interim structure. The black border indicates elements for which a charter amendment would be required.

**Table 1. Comparison of proposed public defense structures**

<b>ELEMENTS</b>	<b>Ord. 17588 Interim and Exec Proposed (2013-0108)</b>	<b>Exec Appointment Charter Amendment (2013-0212/0242)</b>	<b>Public Defender District (2013-0237)</b>
<b>Who Selects the Public Defender?</b>	<ul style="list-style-type: none"> <li>• Exec appoints</li> <li>• Council confirms</li> </ul>	<ul style="list-style-type: none"> <li>• Exec appoints from 3 candidates nominated by advisory board</li> <li>• Council confirms</li> </ul>	<ul style="list-style-type: none"> <li>• Selection committee (Councilmember, judge, attorney) with nonbinding advice from advisory board</li> </ul>
<b>Who Can Remove the Public Defender?</b>	<ul style="list-style-type: none"> <li>• At will by Exec</li> </ul>	<ul style="list-style-type: none"> <li>• Removable by 2/3 Council for cause (definable by Council)</li> </ul>	<ul style="list-style-type: none"> <li>• Selection committee</li> </ul>
<b>Term of Appointment</b>	<ul style="list-style-type: none"> <li>• At will</li> </ul>	<ul style="list-style-type: none"> <li>• Four-year term with possible reappointment by Exec, subject to Council confirm.</li> </ul>	<ul style="list-style-type: none"> <li>• Four-year term with possible reappointment by selection committee</li> </ul>
<b>Who has authority to bargain collectively?</b>	<ul style="list-style-type: none"> <li>• Exec only, but opportunity could be provided for public defender to bring bargaining issues to Council's attention</li> </ul>	<ul style="list-style-type: none"> <li>• Exec bargains compensation and benefits</li> <li>• Defender bargains all other working conditions</li> </ul>	<ul style="list-style-type: none"> <li>• Exec only, but opportunity could be provided for public defender to bring bargaining issues to Council's attention</li> </ul>
<b>Financial accountability</b>	<ul style="list-style-type: none"> <li>• Council sets annual budget; receives annual reports</li> </ul>	<ul style="list-style-type: none"> <li>• Council sets annual budget; receives annual reports</li> </ul>	<ul style="list-style-type: none"> <li>• Council sets annual budget; receives annual reports</li> </ul>
<b>To whom does the Public Defender report (other than in budget process)?</b>	<ul style="list-style-type: none"> <li>• Exec</li> <li>• (2013-0108 adds review and reporting by advisory board)</li> </ul>	<ul style="list-style-type: none"> <li>• Exec (to the extent that the charter duties of a department director are applicable)</li> <li>• Review and reporting by Advisory board</li> </ul>	<ul style="list-style-type: none"> <li>• Exec could request performance reports</li> <li>• Review and reporting by Advisory board</li> </ul>

Issues of independence and oversight have been briefed previously. As previously stated, the greater the level of independence of the Public Defender (i.e., more immune to actions by political forces), the more ability the Public Defender has to manage the department with professional independence. However, with greater independence comes less accountability and oversight.

The Executive proposed model provides the greatest level of oversight and least amount of independence. The charter amendment model provides a high level of independence for an in-house department and still allows for avenues of financial and performance oversight. The public defender district model provides a moderate level of independence for an in-house department with somewhat less performance oversight to the extent that it further removes the Public Defender from the reach of the Council and Executive. However, the public defender district achieves its structure without requiring a charter amendment.

**The proposed ordinances are not yet ready for action because staff are continuing to perfect the language and awaiting policy direction on details, but the main issues affecting the Council's policy choices between the charter amendment and public defender district model have been briefed.**

### **Public Defense Criminal Justice Reform Advisory Task Force**

On May 20, the Council adopted an in-house structure for public defense as an interim solution until such time as it adopts a final structure for public defense (Ordinance 17588).

Ordinance 17588, as amended on May 20, authorizes the Public Defender to contract for services of outside counsel for conflict cases or when the Public Defender otherwise finds it appropriate to seek outside defense services and funding is available. The ordinance also directs creation of a Public Defense Criminal Justice Reform Advisory Task Force to advise on whether it is feasible to use outside services as a means of promoting innovative public defense work. The task force is summarized below.

#### **Purpose**

The purpose of the task force is to explore options for preserving innovative thinking and criminal justice reform efforts that have been one of the hallmarks of King County's national reputation for public defense. Some of the social justice activities of the county's nonprofit defender agencies were discussed in previous staff reports.

#### **Report and Recommendation**

The task force is charged with issuing an advisory report and recommendation by August 30, 2013, on the feasibility of using outside entities to perform county public defense-related services that promote innovative system improvements and efficiencies.

In making its report, the task force is to consider outside work that would supplement, not be a replacement for, departmental in-house services. The work at issue can be

characterized as a "carve-out" of a piece of public defense work. It is not an examination of options for full replacement of in-house services with outside services.

In examining the possible ways to use outside entities for this purpose, the task force is asked to weigh the pros and cons of each approach and the ability of each appropriate to promote system improvements and efficiencies compared to what could be achieved in-house.

The task force is directed to consider financial realities of the county. Public defense is supported by the general fund, so the financial cost of any recommended alternatives is an important factor.

The task force is also directed to consider legal realities of the county. Specifically, the ordinance requires the task force's report to assume that a majority of the county's public defense work will be done by county employees and that the Dolan settlement that has received preliminary judicial approval will be the final settlement. The task force report must assess the steps necessary to ensure that any independent entity providing outside services will not be treated as an "arm and agency" of the county. These legal concepts are related to the fact that the task force's role is to examine a carve-out piece of defense-related services, with the main provision of public defense services done by county employees in-house. This provision expresses that the task force should only consider outside services that would be done by persons or entities who cannot be legally construed to be an "arm and agency" of the county.

In developing its recommendations, the task force is encouraged to seek input from other organizations. This has the effect of broadening stakeholder input into the process beyond the membership of the task force.

#### Task Force Membership

The task force members are to be appointed by June 3, 2013, which will be prior to this staff report briefing in committee.

The task force will consist of seven members with interest and expertise in public defense, including appointments by:

- Washington State Office of Public Defense
- King County Bar Association
- Washington state law school faculty appointed by the Council Chair
- Two at-large members appointed by the Council Chair
- Two at-large members appointed by the Executive

Task force members ideally should also have some knowledge of government operations and budget.

#### Staffing

The task force will be jointly staffed by the Council and Executive staff. Staff will provide technical and administrative support.



### Due Date

The task force's advisory report and recommendation are due August 30, 2013. As discussed below, the deadline for getting any charter amendment onto the November ballot is in early August. This, however, is not a problem because the scope of the report is to examine carve-out options that supplement the public defense structure. Even if the Council were to adopt a new public defense structure before August, the results of the task force will still provide useful information regarding options for outsourcing a portion of defense work to promote innovative criminal justice reform.

### Timelines

In order to place a charter amendment on the November general election ballot, the Council must submit a request for a special election to the county Elections Director by August 6, 2013, the date of the primary (RCW 29A.04.330). Therefore, if the Council wishes to adopt the Executive-appointed charter amendment structure and have the charter amendment placed on the ballot this November, PO 2013-0212 would need to be enacted with sufficient time for it to be effective by August 6.

Charter amendment ordinances have an effective date ten days after enactment by the Council. Table 2 below presents a range of possible dates for Council action that would meet an August 6 deadline, including the possibility of holding special committee or special Council meetings. A special meeting can be scheduled with a minimum of 24 hours advance notice to Councilmembers.

**Table 2. Timelines for November ballot measure.**

<b>Day</b>	<b>Date</b>	<b>Meeting</b>	<b>Action</b>
Wed.	June 5	COW	Today's COW meeting
<b>Wed.</b>	<b>July 10</b>	<b>Special COW</b>	<b>Last Wednesday COW meeting that would give time at Council for a one-week courtesy delay (non-emergency*)</b>
Mon.	July 15	Council	Last Council meeting that would give time for a one-week courtesy delay (non-emergency)
Wed.	July 17	COW	Last regular COW meeting that would give time for non-emergency Council action
Mon.	July 22	Special COW	Last special COW meeting that would give time for non-emergency Council action
<b>Mon.</b>	<b>July 22</b>	<b>Council</b>	<b>Last Council meeting for non-emergency action.</b>
Fri.	July 26	Special Council	Last special Council meeting for non-emergency action.
Mon.	July 29	Council	Last regular Council meeting prior to August Recess for emergency action.*
Fri.	Aug. 2	Special Council	Last special Council meeting prior to August Recess for emergency action.
Mon.	Aug. 5		Council Recess begins.
<b>Tues.</b>	<b>Aug. 6</b>		<b>Charter amendment ordinance deadline for filing with Elections.</b>

\* Non-emergency requires five votes; emergency requires six votes.

As can be seen in Table 2 above, July 10 is the last opportunity for a Wednesday COW meeting to vote a proposal out of committee that would provide the maximum amount of time for a non-emergency ordinance to be effective by August 6; this includes leaving time at Council for a one-week courtesy delay. At any time, COW could be relieved of the legislation, with action taken by the Council. July 22 is the last date for the Council to enact a charter amendment ordinance without declaring an emergency. July 29 is the last regular date for the Council to enact such an ordinance as an emergency.

### **NEXT STEPS**

Council staff will continue to incorporate any further Council direction on proposed legislation.

### **ATTACHMENTS**

1. Proposed Ordinance 2013-0108 (Executive Proposed)
2. Striking Amendment (S1) to PO 2013-0212, draft presented on May 15
3. Title Amendment (T1) to PO 2013-0212, draft presented on May 15
4. Proposed Ordinance 2013-0212 (Charter Amendment)
5. Striking Amendment (S1) to PO 2013-0242, draft presented on May 15
6. Proposed Ordinance 2013-0242 (Implementing Ordinance to 0212)
7. Proposed Ordinance 2013-0237 (Public Defender District)