## STAFF REPORT

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| **Agenda Item:** |  | **Name:** | Jenny Giambattista  |
| **Proposed No**.: |  | **Date:** | February 22, 2019 |

**SUBJECT**

The Charter Review Commission is considering whether the Public Defender should be an elected official to “match” the status of the Prosecuting Attorney. This staff report is intended to provide information on the current process for selecting the King County public defender, identify jurisdictions with an elected public defender, and highlights the general pro and cons might be to an elected public defender.

**SUMMARY**

While prosecutors in almost all states are elected at a local level, the public defender is typically appointed. In King County candidates for Public Defender are selected by the Public Defense Advisory Board, a finalist is chosen by the Executive, and confirmed by the King County Council. The Public Defender serves as the Director of the Department of Public Defense within the Executive branch. The King County Code and Charter include specific provisions to strengthen the independence of the Public Defender.

The decision on whether the Public Defender should be an elected official is a policy decision that will vary depending on how someone views the role of the public defender and the electorate, the benefits of an elected office, and the current selection process.

**BACKGROUND**

**The Department of Public Defense Established as a County Department in 2013**

In response to a Washington Supreme Court ruling and the proposed settlement of a class action lawsuit against King County regarding county benefits for public defense agency employees (Dolan v. King County)[[1]](#footnote-1), the employees of the nonprofit public defense agencies joined the County on July 1, 2013, as county employees with full benefits.

In November 2013, voters approved a charter amendment creating the King County Department of Public Defense headed by a County Public Defender; and also created the King County Public Defense Advisory Board (“the Board”)[[2]](#footnote-2).

The specific duties of the Department and County Public Defender are set out in K.C.C. 2.60 (Attachment 1).

**The Current Process for Selecting the County Public Defender**

Section 350.20.61 of the King County Charter (Attachment 2) requires the Public Defender be appointed by the County Executive from candidates recommended by the Public Defense Advisory Board. The appointment is subject to confirmation by the County Council and is for a term that runs concurrently to the Prosecuting Attorney, unless removed earlier by the Executive for cause. The removal may be appealed by the defender to the Council. The Executive may reappoint the Public Defender to additional terms, subject to confirmation by the Council.

The selection process for the Public Defender is prescribed in detail in K.C.C. 2.60.026 (Attachment 1). The process begins with a national recruitment of candidates by the Executive, who then provides to the Public Defense Advisory Board the names, resumés, and other relevant information about all candidates who meet the qualifications for office set forth in the KCC. Within 60 days the Board is required to recommend three candidates, one of whom the Executive must appoint. The Executive has the option to ask the Board to recommend three additional candidates, and then choose from among the six. The Executive’s appointment is subject to confirmation by the Council.

If the Council rejects the Executive’s appointment, K.C.C. 2.60.020 includes specific provisions outlining the process by which the Public Defense Advisory Board is to recommend additional candidates.

The qualifications for the Public Defender are established in K.C.C. 2.60.026 C.

The county public defender must be an attorney admitted to practice law in any jurisdiction within the United States and in active status and good standing.  The county public defender shall, within two years after appointment, be an attorney admitted to practice law in the courts of the state of Washington and an active member of the Washington State Bar Association in good standing and shall, at the time of appointment, have at least seven years of experience as an attorney primarily practicing criminal defense, including both felonies and misdemeanors, as well as supervisory and managerial experience.

**Independence of the Public Defender**

In 2013 as the Council reviewed various proposals on how to structure county public defense services, the Council evaluated which structure could best address the principle of independence as contained in the first of The *American Bar Association’s Ten Principles of a Public Defense Delivery System* (2002) (Attachment 3).[[3]](#footnote-3) The Principles were created as a practical guide for government officials, policymakers and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems.[[4]](#footnote-4)

The first principle states, “The public defense function, including the selecting, funding, and payment of defense is independent…The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.”

The adopted charter amendment and implementing ordinance included several elements to address independence. For example, the initial selection of candidates for the County Public Defender is assigned to the Public Defense Advisory Board (PDAB). There are also provisions in place to ensure the board has the relevant expertise and represents diverse interests in order to make sound recommendations on the selection of a public defender. The public defender has a 4-year term and can otherwise only be removed by the Executive for cause whereas other appointed department directors serve at will. The public defender can appeal removal to the Council and the Council can either affirm or reverse the removal with an affirmative vote of five Council members.

Additionally, the King County Charter Section 350.20.60 includes specific provisions, underlined in the following text, related to system advocacy (not addressed in the ABA principles) and independence of the public defense function.

The duties of the department of public defense shall include providing legal counsel and representation to indigent individuals in legal proceedings, including those in the superior and district courts for King County and in appeals from those courts, to the extent required under the sixth amendment to the United States Constitution or Article I, Section 22, of the Constitution of the State of Washington.  The department of public defense shall also foster and promote system improvements, efficiencies, access to justice and equity in the criminal justice system.  Additional duties may be prescribed by ordinance.  Elected officials shall not interfere with the exercise of these duties by the department; however, the enactment of appropriation ordinances does not constitute interference.  The department shall not have its duties, as established in this section, decreased by the county council or the county executive.

The Public Defense Advisory Board has expressed concern about the independence of the Public Defender and the position’s ability to serve as an advocate for the Department’s clients and system reform. The PDAB issued a statement in support of the Public Defender’s independence that is included as Attachment 5.

**Jurisdictions with Elected Public Defenders**

While prosecutors in almost all states are elected at a local level, the public defender is typically appointed. The most common method of selection of the chief public defender and the one used in almost half of the states calls for appointment by a statewide public defense policy coordinating board. The next most common method of selection involves appointment by the governor or some other state-level elected official or by county supervisors or other local elected officials. Each of these methods of selection prevails in about half a dozen states. Finally, a few jurisdictions rely on appointment by one or more trial judges or through some collaboration between trial judges and the public defense board.[[5]](#footnote-5)

The following are jurisdictions with elected public defenders:

* San Francisco County
* Lancaster County, Nebraska
* Tennessee except for Shelby County (Memphis)
* Florida has 20 “Circuits” each with an elected public defender

**Pros and Cons of an Elected Public Defender**

Academic Articles

Council staff identified two academic article which addressed the topic of electing public defenders. In the 2010 law review article titled, *Public Elections and Popular Control over Criminal Justice* (Attachment 4)*,* Robert. F. Wright offers an explanation of why most prosecutors are elected and public defenders are not. Prosecutors have broad discretion to apply the state criminal code to fit local policy preferences about where to focus the limited prosecutorial resources. Given the extent of the prosecutor's power, Wright states that it is not surprising that American voters have treated the prosecutor position as an elected office. Whereas, public defenders have limited flexibility and discretion in how public defense services are delivered. All cases must be defended according to what is in the client’s best interest. Therefore, Wright argues, the electorate does not need to exercise restraint or provide direction to the public defender.

Furthermore, Wright notes that for a prosecutor, his or her client is the public so direct accountability to the public makes sense. The public defender, on the other hand, does not exactly serve as an agent for the public. While the public pays the public defender to provide the constitutionally required defense, the attorney represents the client.

A different perspective is presented in a 2018 article by Bryan C. McCannon which analyzed the impact of public defender and prosecutor elections on case outcomes using caseload data from Florida where both public defenders and prosecutors are elected. According to McCannon’s analysis, the election cycle for both prosecutors and public defender impacts the outcomes of a case. Public defenders are able to obtain plea bargains at a higher rate[[6]](#footnote-6) and jury trial outcomes favor the defendants during re-election. According to McCannon, these results are consistent with the argument that public defender re-elections incentivize quality defense. (This assumes plea bargains are a sign of quality defense. However, whether a plea bargain is a positive outcome depends upon the wishes of a client and details of the plea bargain.) McCannon does caution that systemic shifts in outcomes may or may not be in clients’ best interests and suggests that additional research is required before well-informed policy can be construed.

Previous Studies by King County

The issue of electing a public defender in King County has been considered by previous stakeholders. In 2013 a proviso response titled *Creation of a County Public Defense Agency* rejected the option of an elected public defender and repeated many of the concerns about an elected public defender raised in a 2000 Spangenberg Report titled *King County Public Defense Study.* In this 2000 report, the authors identify concerns that the public defense function might be compromised by the political process of electing a public defender and recommended appointment with the assistance of an oversight commission. (A 1993 report by the Spangenberg Group gave Nebraska’s public defense system poor ratings on independence precisely because many of their counties elected their public defenders. The Spangenberg Group found that the process of running for office, raising money and campaigning makes it more difficult to make case decisions free from political influence.)

Pro and Con Summary

The Charter Review Commission requested a listing of the pro and cons of an elected public defender. The question of whether the County Public Defender should be an elected office is a political decision. The arguments in favor of an elected public defender are listed below in the “Pro” column and those arguments against a public defender are listed in the “con” column. The arguments in each column are largely subjective and whether an argument is a “pro” or a “con” depends on core beliefs about voters and the role public defense.

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| **Pros** | **Cons** |
| An elected office would provide more visibility and independence for the public defender and thus allow the public defender to better advocate for the needs of clients without concern of offending those that appointed him or her. | The public defender can advocate for the needs of their clients under the current charter.  |
| Voters are best qualified to select a public defender. | The Public Defense Advisory Board, Executive, and Council have the resources and expertise to identify the best qualified candidate. |
| The status and appeal of an elected office may encourage a more diverse set of candidates and offer more opportunities for those interested in running for elected offices.  | Running for office may discourage otherwise well qualified candidates. It may attract candidates who are more interested in winning an elected office than in serving as public defender. Running for office would take time away from managing the Department and overseeing the quality of public defense services.  |
| An elected public defender would be accountable to the voter. | Accountability to the voters occurs through the elected officials who appoint the public defender. |
| An elected public defender would be more likely to meet with and voters and reflect the views of the electorate. An elected public defender would be responsive to the interest of the voters. | The practice of criminal defense should not be guided by public opinion. The policy preferences of voters may not align with the criminal defense needs of DPD clients particularly if the public sentiment is to be “tough on crime.”[[7]](#footnote-7) Voters, generally whiter and richer than public defense clients, may not understand the criminal defense needs of clients.  |
| The public can vote out of office a public defender who is not meeting their expectations. | It is difficult for the public to assess the performance of a public defender. If an elected public defender is not performing his or her job well, there would be no way to remove him or her until an election. |
| An elected public defender could publicly advocate for the budgetary resources needed by the department. | The Department’s budget request to the Executive is already available. The Public Defense Advisory Board is required to review and report to the Council on the Executive’s proposed budget for public defense.  |

**ATTACHMENTS**

1. King County Code 2.60 Public Defense
2. King County Charter Section 350.20.61
3. American Bar Associations 10 Principles for Public Defense
4. Robert F. Wright, Public Defender Elections and Popular Control over Criminal Justice, 75 Missouri Law Review. (2010)
5. Statement from the Public Defense Advisory Board (August 2018)
6. Los Angeles Times Editorial Board, Why L.A. doesn’t need an elected public defender
1. In August 2011, the Washington State Supreme Court ruled in *Dolan v. King County* that the four nonprofit public defense organizations with whom the County has historically contracted for public defense services had become “arms and agencies” of King County and not independent contractors. The Supreme Court determined that the *Dolan* class, which includes all current and certain former employees of the nonprofit public defense organizations, are employees of the County for purposes of membership in the Public Employees Retirement System (PERS). [↑](#footnote-ref-1)
2. Ordinance 17614 [↑](#footnote-ref-2)
3. Hamacher, Tsai, Wagner Staff Report for Proposed Ordinances 2013-0212, 0215, 0216, 0237, 0242 (May 15, 2013) [↑](#footnote-ref-3)
4. ABA Ten Principles of a Public Defense Delivery System (2002) [↑](#footnote-ref-4)
5. Robert F. Wright (2010), *Public Defender Elections and Popular Control over Criminal Justice,* 75 Missouri Law Review. [↑](#footnote-ref-5)
6. At the mean, there is a 12.3% increase in the plea bargain rate and a decrease of 30.8% in trail convictions when public defenders are in election cycle. Bryan C. McCannon (2018), *Debundling Acountability: Prosecutor and Public Defender Elections in Florida*. 12-13 and 19-20. [↑](#footnote-ref-6)
7. Los Angeles Times Editorial Board (March 19, 2018) *Why L.A. doesn’t need an elected public defender.(*Attachment 6) [↑](#footnote-ref-7)