

Public Defense Services Commission					
	2017-19 Actual	2019-21 Legislatively Adopted	2019-21 Legislatively Approved *	2021-23 Current Service Level	2021-23 Governor's Budget
General Fund	309,088,199	342,319,238	342,078,348	396,803,692	379,627,352
Other Funds	4,700,093	4,039,068	13,586,941	4,449,667	13,449,667
Total Funds	313,788,292	346,358,306	355,665,289	401,253,359	393,077,019
Positions	76	81	90	79	112
FTE	75.80	80.80	86.47	78.80	106.05
* Includes Emergency Board and administrative actions through January 2021					

Program Description

The Public Defense Services Commission (PDSC) was established as an independent state agency in 2001. By statute, the Commission is to “establish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution, and Oregon and national standards of justice.”

The agency is organized into three divisions: (1) Appellate Division consists of public defense attorneys who represent eligible persons at the appellate court level and is responsible for providing appellate representation on criminal matters, juvenile dependency and termination of parental rights cases, and parole cases. The Appellate Division has two sections; the Criminal Appellate Section (CAS) and the Juvenile Appellate Section (JAS). This is accomplished primarily using staff attorneys. (2) Professional Services Account (PSA) consists of the funding for contract defense services, including attorneys, investigators, and expert witnesses, contracted attorney support staff, and case managers as well as non-routine expenses including psychological evaluations, discovery, etc. The PSA may include funding for the Parent and Child Representation Program (PCRP) and can be further delineated into death penalty and non-death penalty cases. PSA costs are primarily at the trial court level. (3) Contract and Business Services Division is responsible for administering the public defense contracts that provide legal representation for eligible persons, processing requests and payments for non-contract fees and expenses, and the budget and other financial activities of the Commission.

Applicants for state-appointed counsel pay a \$20 application fee unless the fee is waived for financial hardship reasons. In addition, the court may find that individuals are able to pay a contribution towards their defense costs. PDSC transfers ACP revenues back to the Judicial Department to support program Verification Specialist positions in the courts and uses the remaining revenue to support the Contract and Business Services Division. ACP cash balances above reserve requirements have also been used to augment Professional Services Account expenditures.

The number of cases is affected by numerous factors, including crime rates and demographic factors, such as population size and age distribution. When, for example, law enforcement is reduced or expanded as a result of economic conditions, the number of arrests and prosecutions can change. The state of the economy also affects the number of people who are financially eligible for public defense services and it may affect funding levels for public safety and judicial services.

CSL Summary and Issues

The 2021-23 current service level budget for the agency totals \$401.3 million total funds, including \$396.8 million General Fund and \$4.5 million Other Funds. The budget includes 79 positions and 78.8 FTE. The CSL is \$46.1 million, or 13%, more than the 2019-21 legislatively approved budget of \$355.2 million and has 11 fewer position (7.67 FTE) than the approved budget. The decline of nine of the positions is attributable to an interim Emergency Board action (April 2020), discussed in more detail under the Emergency Board/Special Legislative Actions section, and whose roll-up costs have yet to be incorporated in the 2021-23 budget.

PDSC's decision to move to a new contracting model (discussed in more detail below), and other changes, were done outside of the routine biennial budget development process and timelines and therefore were not incorporated into the 2021-23 current service level. The current service level, which was calculated based on a financial rather than a case-based forecast, is significantly underfunded. Savings in reduced death penalty cases has been "absorbed" by the agency due to higher trial-level contract costs under the new model and higher PSCP costs.

The Commission directed that the agency (i.e., the Office of Public Defense Services) implement the new contracting model in a budget neutral manner; however, that has not been the case. PDSC is having difficulty quantifying the financial impact the agency's procurement activities related to the new contract model, including accounting for adjustments made for the overpayment of case credits under the prior contract model. In addition, some new contracts have already been amended.

The 2019-21 PDSC budget used one-time Title IV-E Foster Care funding to expand the Parent and Child Representation Program to four counties; however, there currently is insufficient current service level funding for this expansion, the cost of which is estimated at \$5 million. An adjustment (i.e., fund shift of General to Other Funds) is also needed to reflect the continuation of Title IV-E Foster Care funding.

Like the Legislative Branch, Judicial Branch agencies, are allowed to keep any unspent General Fund balances at the end of a biennium. PDSC is currently forecasting no General Fund carryforward even given what should have been saving resulting from the pandemic.

Policy Issues

There are a number of policy and legal issues facing PDSC, including the following:

Sixth Amendment Center Report - In late 2018, the Sixth Amendment Center released the findings of its review of Oregon's indigent public defense system. Among other things, the independent review found the state's method of contracting for public defense services – the fixed

fee per case model — did not meet constitutional standards. In September 2020, the Commission approved a “new” contracting model that is being implemented for contracts that take effect January 1, 2021. The contracts are based on the number of attorneys and support staff required to handle the projected caseload. The agency will pay a single statewide rate for each full-time equivalent attorney and each support staff (or fraction thereof), and a regionally-adjusted rate for administrative costs. There are caps on the number of cases an attorney can handle. The Sixth Amendment Center report led to the introduction of reform legislation (HB 3145) in the 2019 Legislative Session. The legislation failed to gain passage; however, some actions were taken in the 2019-21 budget to begin to address issues raised in the report. In regard to the public defense contracts, a budget note was adopted directing the PDSC to develop a new contract model. PDSC, however, has developed no implementation plan associated with the Sixth Amendment Center report findings, including which findings the agency has chosen to accept, nor has the agency undertaken a financial analysis related to the cost of adopting the recommendations.

HB 4004 (2020) - HB 4004 from the Legislative Session in 2020 remained at the second chamber desk upon adjournment. This measure would have expanded the membership of the Public Defense Services Commission from seven to nine members and require the adoption of specific policies by the Commission for contracting with public defense providers. A similar measure, HB 2003, was introduced during the Legislative Session in 2021. The Sixth Amendment Center Report found that the composition of PDSC does not adhere to national standards, in that all commissioners are appointed by the judiciary, while the legislative and executive branches of government have no equal voice in the commission’s affairs.

United States Supreme Court’s decision in Ramos v. Louisiana, 140 S Ct 1390 (Apr 20, 2020) - The U.S. Supreme Court ruled in Ramos v. Louisiana that the Sixth Amendment to the U.S. Constitution (rights related to criminal prosecutions) requires that guilty verdicts for criminal jury trials be unanimous. The decision affects not only those persons currently in custody, but persons who have served their sentence and post-prison supervision but have a felony conviction from some time in the past. All those persons would currently be able to bring a post-conviction relief case challenging their conviction. The key issue for these cases is whether the Ramos rule should be made retroactive, which will ultimately be decided by the U.S. Supreme Court and the Oregon Supreme Court. The Oregon Supreme Court has just recently begun issuing decisions related to Ramos cases. Hundreds of criminal convictions have been pending appeal before Oregon’s appellate courts awaiting the Ramos decision and it is anticipating that thousands of cases could be filed over the next biennium seeking relief from non-unanimous criminal convictions.

Other Policy Issues - The Legislature in 2021 will likely continue discussions around public safety system and policing reforms as well as the implementation of Ballot Measure 110 (2020) and the decriminalization of certain drug offenses.

Pandemic

State and federal courts are providing essential services; however, courts are operating at reduced capacity. There is presumed to be a growing backlog of existing criminal cases due to the pandemic and new cases arising from the pandemic, which will impact future

prosecutorial and investigative activities. While the Professional Services Account should have been experiencing some level of reduced expenditure related to the pandemic, that has yet-to-occur.

The pandemic has resulted in an increase in the filing of state habeas petitions. Habeas corpus is a legal remedy, under state and federal constitutions, available to adults in custody to challenge the conditions of their confinement due to either the failure of a jail or prison to provide adequate care for a serious medical condition or sentencing errors that keep persons incarcerated past a sentence date. Each case is unique to the medical condition of the petitioner and must be coordinated with the Department of Corrections (DOC). A class action lawsuit (Maney et al v. Brown et al) was filed by prisoners held by DOC and that matter is expected to last into the 2025-27 biennium.

Other Significant Issues and Background

PDSC is facing a convergence of governance, procurement, human resource management, financial management, performance management, information technology, and funding challenges, which have been brought to the forefront due in part to the agency's recent change to a new contracting model for public defense services as well as the expansion of the PCR program.

Current Biennium Deficit

PDSC forecasted a General Fund deficit for the current 2019-21 biennium due to the following: (1) contract model change; (2) Parent Child Representation; (3) Ramos decision; (4) pandemic/Habeas Corpus petitions. The contract model changes may not be budget neutral as has been originally reported. This deficit may also be attributable to non-routine expenditures. The deficit of \$7.6 million General Fund was funded by the Legislature [HB 5042 (2021)]. In addition, PDSC is now projecting a new General Fund budget deficit for the remainder 2019-21 biennium, which is currently estimated at \$3 million.

Emergency Board/Special Legislative Actions

PDSC has had budgetary adjustments resulting from Emergency Board meetings in April, August, and December of 2020 and January of 2021. Adjustments were also made during the Second Special Legislative Session in August of 2020. Several of the more noteworthy actions included:

- Emergency Board Action (April 2020) approved \$3.9 million for nine positions (9.00 FTE) and information technology services to improve oversight of indigent defense contracts as well as to provide a rate increase for related investigator and interpreter services (Policy Package #081 April 2020 Emergency Board totals \$2.9 million and nine positions (9.00 FTE) in roll-up costs). Of note, is that almost immediately after receiving authorization of new positions, the agency reclassified a number of the position administratively.
- Second Special Legislative Session Action (August 2020) - eliminated the \$16.1 million special purpose appropriation, which was the remaining balance of a \$20.0 million appropriation that was available for allocation to the Public Defense Services Commission for caseload activities, including activities designed to improve public defense caseloads.

- Second Special Legislative Session Action (August 2020) - the Financial Management System Replacement Project (SB 5532 2019 budget note) was initially funded with a \$2 million special purpose appropriation. Based on the current project timeline, the funds were not needed in the current biennium and were disappropriated.
- Second Special Legislative Session Action (August 2020) - provided \$9 million Federal as Other Funds for Title IV-E Foster Care to fund legal representation of certain children and/or parents and training for contract providers and reduced General Fund by \$4.5 million. Federal policy was revised to allow states to claim Title IV-E administrative costs (at a 50% match rate) for independent legal representation of children and their parents when (1) the children are candidates for Title IV-E foster care, or (2) the children are in foster care and the legal representation assists the subject children and parents to prepare for and participate in foster care legal proceedings, such as court hearings related to a child's removal from the home.
- Emergency Board Action (January 2020) - provided \$514,091 Other Funds from the Department of Administrative Services and the Coronavirus Relief Funding for costs associated with the legal filing of Habeas Corpus petitions for eligible adults in custody.

Budget Notes

The Legislature in 2019 approved a series of budget note for PDSC and that primary centered around the Sixth Amendment Center report findings.

Budget Note: (SB 5532 2019) - The Commission is directed to work collaboratively with the Oregon Judicial Department and other stakeholders to identify and begin implementing system changes to improve quality assurance and oversight of the Commission's public defense services contracts, specifically on indigent defense. The Commission is directed to report to the Joint Committee on Ways and Means during the 2020 legislative session on changes identified and/or implemented to address quality assurance issues raised in the 2019 report by the Sixth Amendment Center.

Budget Note (HB 5050 2019) - The Oregon Public Defense Services Commission is directed to work with stakeholders to identify data public defense contractors should be required to submit to the Office of Public Defense Services as part of its contractual agreement. It is the Legislature's intent that OPDS, in establishing reporting requirements, obtain data that to the greatest extent possible will allow the agency to determine (1) the level and quality of services provided to each defendant, and (2) improvements in case outcomes for defendants.

Budget Note (HB 5050 2019) - The Oregon Public Defense Services Commission shall evaluate options for delivering indigent public defense services and adopt an approach that delivers quality public defense services. In its evaluation of public defense contract options, the Commission is directed to consider the findings of the January 2019 report by the Sixth Amendment Center entitled "The Right to Counsel." As part of its new contract model, the Commission shall require contract attorneys to provide information the Commission determines is needed to demonstrate the level and quality of services provided, and the case outcomes.

Budget Note: (SB 5532 2019) -The Public Defense Services Commission is directed to work closely with the LFO and regularly report on the status of the Financial Management System Replacement Project throughout the lifecycle of the project and follow the Stage Gate review process as administered by the LFO. The Commission is further directed to (1) retain the services of qualified project manager(s) with experience in planning and managing projects of this type, scope and magnitude; (2) retain the services of business systems analyst(s) with demonstrated experience working on modernization programs of this type, scope and magnitude; (3) develop and update the business case and foundational project management documents as required; (4) work with LFO to acquire independent quality management services as necessary to conduct an initial risk assessment, perform quality control (QC) reviews on the business case, procurement documents and foundational project management documents as appropriate, and perform ongoing, independent quality management services as directed by the LFO; (5) submit the updated business case, project management documents, initial risk assessment, and QC reviews to LFO for Stage Gate Review; and, (6) report back to the Legislature on project status during the 2020 Legislative Session and/or interim legislative committees.

Agency Request Budget

PDSC submitted a number of budget requests for consideration by the Legislature some of which include the following:

Trial Representation (\$14.1 million General Fund) - Requests funding to increase the statewide provider pool by 30 representational units. This package allows OPDS to address disparities between high workloads and attorney compensation for public defenders. Adding 30 representational unit will allow historically overloaded areas in the state to add capacity, enabling attorneys to lessen their caseloads and represent their clients to the best of their ability.

Contract and Business Services Infrastructure (\$2 million General Fund; 10 position/7.75 FTE) - Request administrative positions to perform the business functions necessary to support the public defense system.

Parent and Child Representation Program (\$4.9 million General Fund; 5 position/3.75 FTE) - Request to expansion of the Parent Child Representation Program (PCRP) into three additional counties, including Clackamas County, Douglas County and Clatsop County, plus added internal infrastructure to direct and oversee the expansion. Expansion to Multnomah County became effective July 1, 2020. The program is currently offered in Columbia, Coos, Lincoln, Linn, Yamhill and now Multnomah counties.

Appellate Mandated Caseload (\$2.2 million General Fund; 9 positions/6.75 FTE) - Requests additional attorneys and staffing to meet the Appellate Division - Criminal Section's key performance measure of attaining a median number of days to file the opening brief equal to 180 days past record settlement and add an Juvenile Appellate Section attorney position to address an increase in case intakes.

Information Technology Project - Case and Financial Management System - There was no policy package request submitted for the agency's information technology project.

Governor's Budget

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Reduction Options

Reduction options may be limited given the constitutional and legal requirements surrounding public defense; however, past recessionary periods have necessitated reductions to public defense. The state has a constitutional obligation to provide counsel for eligible persons and to provide for timely adjudication. If insufficient funding for public defense results in violation of these constitutional provisions, the court must dismiss the case and release the person. The Commission has no legal authority to control the number of public defense cases it receives, nor any authority to prioritize case-types. In the absence of any prioritization and adequate public defense funding, the courts would need to dismiss cases.

Key Performance Measures

A copy of PDSC's Annual Performance Progress Report can be found on the LFO website:

https://www.oregonlegislature.gov/lfo/APPR/APPR_PDSC_2021-01-21.pdf