

Public Defense Services Commission
SB0337-1 Testimony before the Senate Committee on the Judiciary
March 30, 2023

Chair Prozanski and Members of the Senate Judiciary Committee.

My name is Max Williams. Some of you may know me as a former Chair of the House Committee on the Judiciary or a former director of the Department of Corrections. I appear here today as a member of Oregon's Public Defense Services Commission. The Public Defense Services Commission (PDSC) is a public body of nine members appointed by the Chief Justice of the Supreme Court. The PDSC has existed for more than twenty years and has had scores of members in that time. I offer this testimony on behalf of the full Commission, its Chair, Per Ramfjord, Vice Chair, Paul Solomon, and my fellow commissioners, Peter Buckley, Alton Henry, Lisa Ludwig, Jennifer Nash, Jennifer Parish Taylor, and Kristen Winemiller.

As the Commission is currently constituted, we have among the nine of us:

- Two former legislators, one of whom co-chaired the Joint Committee on Ways & Means and one of whom headed the House Committee on the Judiciary,
- Five members who work with nonprofits that serve communities receiving public defense services, two of whom also have the direct experience of having faced criminal charges, themselves,
- A former agency head, and
- Five attorneys, four of whom are practicing criminal defense attorneys and three of whom have professional careers that at one point focused on the provision of state public defense services in Oregon.
- Although none of our members are from Central or Eastern Oregon, we stretch from the California border to the Columbia, include the perspective of commissioners raised in rural agricultural communities and have achieved a good demographic balance in almost every respect.

The breadth of this experience provides us with the variety of perspectives we need to fulfill our mission, as a Commission, to ensure the provision of constitutionally required services to those in Oregon who are accused of a crime and lack the resources to obtain their own legal counsel. We take that responsibility and the constitutional obligation very seriously and, as you are aware, have been working extremely hard to address the crisis of unrepresented persons currently in our judicial system.

I want to specifically offer the Commission's thanks to the staff of OPDS who have been working tirelessly with us to address this gap and also to thank the providers in the system who have stepped up in a variety of ways to close this gap. Thank you, all.

We submit this testimony today to express the Commission's conditional support for SB337-1, as amended. We have specific recommendations about how the changes the bill calls for can be effectively implemented.

Historic choices made decades ago – long before the institution of the PDSC – have contributed to the crisis we face today. The fixed rate contracting system was designed to save the state money, and while it may have done so, it also has resulted in a lack of sufficient transparency and data collection that I think we all believe is necessary to address the overwhelming needs of the system today.

SB0337-1 offers improvement in how public defense resources will be deployed. The Commission recognizes the refinements in this amended version of the bill and, as a Commission, we believe that *if implemented properly* the general approach envisioned by the amended bill would be an improvement over the status quo. To call out a few improvements in this amended version of the bill:

- We agree that defense attorneys should be compensated on an hourly basis. That is the most fair and just model for providing representation to the people of this state who find themselves facing criminal accusations and are unable to pay the cost of their own defense. Additionally, it allows for a greater sense of uniformity in compensation across the various provider models and provides a greater degree of transparency allowing program analysis and budget planning to ensure a properly funded public defense system.
- That said, we should transition away from the current model in a manner that allows our current providers to adjust. For providers who often work on twenty cases a day, and may have scores of conversations to log every day, hourly billing can add an hour to each work day. The State's need for better data is obvious. It should be equally obvious that we must pay providers, fairly, for the time it takes to provide that data. The Commission strongly recommends that in adopting this model, the legislature also provide a sufficient budget allocation to increase provider compensation to address the administrative and operational requirements as we transition to hourly billing. The Commission believes that the federal benchmarks of \$164 for attorneys and \$75 for investigators were well considered, and the right place to start while professionals work to affirmatively determine what constitutes 'parity'.

- We agree that the Commission should begin to employ some number of trial level public defenders as salaried state employees. The Commission encourages the creation of a state salaried strike force to assist providers and courts where there is a gap in service or where caseload and complexity require additional resources. A 30% target for state employed public defenders by 2031 may not be unreasonable. We do recommend, however, that both the Legislature and the Commission undertake additional econometric modeling to determine the long-term cost of growing the state employee portion of the system before fully committing to that number.
- With respect to the Commission itself, the amended version of the bill requires that the Commission have members with substantially more familiarity with state public defense practice in Oregon, which we view as critical to the success of the mission. We support the emphasis on including individuals who have faced criminal charges, and we agree that including Commissioners with legislative experience is valuable.

These changes are significant and, when implemented appropriately, will assist in bringing stability to the public defense system. **But I do not need to remind the Committee that at the bottom of these issues is a funding crisis that for years has impacted both the quality of the system and its ability to attract and retain attorneys. Without a fully funded public defense system, including financially appropriate compensation to the providers across all provider models, no amount of restructuring the model will stabilize Oregon's public defense system.**

Our specific comments and suggestions for additional changes to the -1 version of the bill fall into two broad categories. The first set is addressed to prospective changes to the service delivery model. The second set reflect steps that would ensure the independence of the public defense system that is required in our democracy.

I will conclude my remarks with comments on related issues that the Commission believes should be considered in conjunction with this bill. All are intended to provide the public and providers with confidence that the changes will provide stability, fair compensation and excellent representation to those accused in this state.

On the transition to hourly billing:

- We recommend a phased transition to hourly billing over a longer period of time: three phases, to be specific, beginning July 1, 2025. OPDS staff almost certainly will need additional runway to design, develop and implement the infrastructure necessary to operate effectively with this monumental shift in billing, tracking and payment systems. Additionally, current contract providers under the existing model will need time to organize, train and restructure their business practices to ensure robust service delivery. These are people's lives and livelihoods, who are currently providing the majority of this important service and we should respect their needs in transitioning to a different model. While we support this restructuring, it must be recognized as the fundamental restructuring it is.
- Further, we recommend that the bill not presume the abolishment of contracts with private firms and consortia but, instead, enact measures to obtain reliable, current data from all provider types, including non-profits and state salaried employees. Our current private providers are instrumental to the smooth functioning of the judicial system, and are valued in every judicial district across the state. They are important partners in this transition and should be treated as such. We recommend a framework for relying on local input from each judicial district in the state.
- We recognize that as the Judiciary Committee you don't have control of the budget discussion, but we would recommend that, with respect to the timetable for the transition, additional resources be directed to OPDS so that our staff will be ready to address these changes. We have urged our staff to make rapid progress in two critical areas. The first is development of the financial administration portal that will track cases from assignment to closure. The second is to substantially increase staffing for the units that support hourly providers. We recommend that funds be appropriated for both efforts in the '23-'25 biennium, as if the transition were to begin now, so that OPDS staff can make sufficient progress in both areas well before the transition actually occurs. Both projects must be developed and stress-tested, backward and forward, before the switch is flipped. *Just as the changes this bill envisions are fundamental, they require fundamentally different infrastructure than is currently in place.*

- We have confidence in Director Kampfe, and we want you to give her the latitude she needs to complete this transition successfully. Our strong recommendation is that the time frame currently written into this bill be expanded to three phases, with the proviso that the Commission be allowed to accelerate it once the infrastructure has been tested and proven to be reliable.

Concurrently, a somewhat longer timeframe will allow current providers reasonable opportunity to adjust existing overhead commitments to the new model. Many have operated at the state's direction for decades and have built up local ecosystems to meet the state's demands. We believe the goals of this legislation can be met without eroding their investments, to allow for a well-planned transition. A longer horizon also will allow firms and consortia to convert to non-profit status, if they determine that is in their best interest.

Our recommended timeline and parameters:

1. For '25-'27, maintain all provider types.
 - a. Include a contract provision that requires hourly time keeping from July 1, 2025 to June 30, 2026 in five broad categories, for all provider types. Time must be recorded in these categories, to include travel, but without referencing the client for whom the work is done: court appearances, conferences and calls, legal research and writing, record gathering and review, and investigation/witness interviews.
 - b. From July 1, 2026 to June 30, 2027, require individual attorneys to report their time directly. They report time in the same five broad categories but also designate the client for whom the work is done. Estimated payments will be advanced each month (even if the portal fails) but OPDC will reconcile the hours-to-payments quarterly and pays contractors for any additional hours worked.
2. For '27-'29, and forward, individual attorneys bill through a billing portal. Authorizations for case expenses and provider payments are managed through the same portal. All compensation is made on an hourly basis. Hourly itemization should be general enough that client confidentiality is not breached and the process of billing is not onerous. By this point, we presume providers will be compensated at a rate that approximates parity.

We believe these measures combined with those in the 'Ensuring Independence' section below could make progress in bringing the broader provider community in alignment with the legislation. Maintaining the confidence and commitment of our current provider community is critical to our ability, as a Commission, to meet our responsibility to provide counsel to every single Oregon resident who faces the challenge of a criminal prosecution.

Ensuring independence

The Budget

The final version of the bill should include additional safeguards to protect the OPDC budget. Since the bill includes a mandate for OPDC to analyze the costs of providing public defense services in our state and to set rates at a level that meet those costs, OPDC should be required to present to the Governor and the legislature a proposed budget each biennium based on the funding required to meet the mandate.

The Director

We strongly urge you to include language in the bill that transitions our current Director to the newly created position of OPDC Director. We believe that is your intent but there should be no room left for mischief in that regard. We think it's critical for OPDC stability and direction to maintain Director Kampfe's leadership. A newly appointed Commission will have the responsibility to review the Director's performance and evaluate the agency's needs, but it makes little sense to disrupt the leadership of the agency by statutory mandate. We urge you to remove that portion of the -1 amendment.

Ethics

Although we recognize the beneficial intent, the Commission is uncomfortable with provisions that could impinge on ethical mandates. The general understanding should be that public defenders follow the same ethical rules as the rest of the Bar. Mandating that an attorney handle all matters for a client could have the unintended consequence of preventing an attorney from withdrawing even when ethical rules would be breached by continuing the representation. We strongly include the inclusion of a caveat that recognizes that Oregon State Bar professional rules govern in the event language in the bill conflicts with those ethical dictates.

Commission size

Finally, given the Commission's mandate to adhere to public meetings laws, we urge caution with respect to the plan to increase the size of the Commission. Serving as a Commissioner will remain an only lightly compensated appointment so we encourage you to be mindful of the additional time it takes to confer with a dozen fellow Commissioners rather than eight. The Commission is large enough, already, to make it challenging to communicate as fluidly as necessary in a time of crisis. We have found nine to be a sufficient number, currently, and value the diversity in perspective our fellow Commissioners bring to the table.

Concluding Remarks

In conclusion, the Commission recognizes the tremendous time and thought that has gone into this effort to adapt our public defense system into one that *works* for the people of Oregon, one that ensures our ability as a state to meet our constitutional mandates and one that treats providers fairly. We believe that the agency can, with the appropriate resources and a reasonable timeline, implement changes that will stabilize and improve the system. As mundane a perspective as this is, the Director's ability to achieve those goals in support of justice requires stability. Stability will come from building better support into the system and treating providers with respect and the first step must be to substantially increase compensation for attorneys and investigators so that pursuing a profession in public defense is a responsible choice.

Endnotes

Three-phase transition to hourly billing:

For '25-'27, maintain all provider types. Include a contract provision that requires hourly time keeping from July 1, 2025 to June 30, 2026 in five broad categories, for all provider types.

- a. Time must be recorded in these categories, to include travel, but without referencing the client for whom the work is done: court appearances, conferences and calls, legal research and writing, record gathering and review, and investigation/witness interviews.
- b. Contract administrators are responsible for compliance. Failure to provide records by the 10th of the following month will decrease the following month's payment by a % equal to the reports not provided by the 10th.
- c. Payments during this contract cycle will be made on the basis of assumed averages for the case types contracted. Final accounting for contract compliance will compensate the consortia or firm on an hourly basis.
- d. Separate from parity-based compensation increases, contracts will increase 5% to manage the new time keeping requirement, 2.5% for the attorneys and 2.5% for the administrator.
- e. From July 1, 2026 to June 30, 2027, require individual attorneys to report their time directly. They will report time in the same five broad categories but will also designate the client for whom the work is done.
- f. The contract administrator will train and monitor members' timekeeping. Payment will reflect reports received by the 10th of the month prior.

- g. Payments during this phase will be made on the basis of assumed averages for the case types contracted. Final accounting and reconciliation will compensate individual attorneys on an hourly basis.
- h. Separate from parity-based compensation increases, contracts will increase 3% to manage the new time keeping requirement, 2.5% to individual attorneys and 0.5% to the contract administrator. The contract administrator will manage payments except the final reconciliation with individual attorneys.

For '27-'29, and forward, individual attorneys bill through a billing portal.

- i. Attorneys will be vetted for participation in panels, based on qualification.
 - j. Attorneys will be assigned to individual cases, for which they enter their own time through a portal.
 - i. Attorneys bill in the same broad categories but in client specific entries.
 - ii. The portal will be set up so each client – and each case for a client - is a separate matter.
 - iii. Attorneys will be allowed to submit vouchers monthly for any client for whom the attorney has done at least \$2,000 work, and when the case is closed.
 - iv. All compensation will be made on an hourly basis.
 - k. OPDC should deliver payment within 21 days of voucher submission. (Attorneys have significant overhead obligations. Most will have insufficient alternate income streams to meet those obligations if the turn-around is more than 21 days.)
 - l. If unable to deliver full payment within 21 days of a voucher's submission, OPDC should be required to deliver payment for 50% of the amount billed within 21 days of the voucher's submission. The Commission should be directed to take steps to correct any administrative deficiencies that cause delay to occur regularly.
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Endnotes on Ensuring Independence

OPDC discretion with respect to provider ratios

We believe it would be best to allow the Director to build the state salaried workforce methodically and in consultation with experienced practitioners and judges in each judicial district, with local consultation and input.

To accomplish that local consultation and to ensure that private bar services are delivered free of bias or interference, we recommend that the bill direct the Commission to:

- Appoint both a “Private Bar Director”, to administer hourly private bar providers, and a co-equal “Public Defense Director”, to oversee state employee providers.
- Ensure that there exists within the “Private Bar Division” an automatically constituted panel of the criminal defense providers qualified to handle complex cases. This state-wide panel should consist of panels for each individual judicial district. Unless circumstance requires ‘borrowing’ panel members from another judicial district, the panel of complex case qualified defense attorneys should make the following determinations for the judicial district in which they practice:
 - a. The Commission should ensure that the panel serves the function of vetting attorneys for inclusion on various panels, by qualification level.
 - b. The Commission should ensure that the panel also serves the function of reviewing vouchers for reasonableness. The Commission shall set standards for review, e.g., whenever an attorney bills more than 60 hours a week in two successive months or more than three times in a calendar year. The reviewers will assist the Private Bar Director in assuring that an attorney with high hours is not being assigned work at a rate that would require working more than 40 hours a week on a sustained basis.
 - c. The Private Bar Director should oversee the assignment of cases in keeping with the guidance of the panel of complex case qualified attorneys. Attorneys assigned to active service on the panel should rotate the assignment and, for the periods in which they are actively engaged in the review process or in advising any state employee on a related matter, should bill that administrative time hourly.

Benchmarks for providing equivalent resources across provider types

A state-wide plan should be adopted to determine the percentage of public employee and private bar assignments optimal for each judicial district. It should be assumed that state employee public defenders have an economy of scale that makes that office best suited to handle high volume work. It should be assumed that experienced private bar attorneys may be better positioned to handle complex cases.

In addition to achieving rough parity in compensation, private bar attorneys should not be saddled with administrative burdens that far exceed those imposed on non-profit or state-salaried public defenders.

Upon case assignment, the assigned attorney should receive, without request, an authorization the current equivalent of \$2,600 for investigation, \$2,600 for interpreters (when a language issue exists), and \$2,000 for paralegal/document management (when the case is complex).

The standard rate for investigators, pending further study, should be \$75. Paralegals should be paid \$50.

OPDC should be directed to process CSS requests in 72 hours and to pay vouchers of support personnel on the same terms as assigned attorneys.

The standard rate for attorneys also should reflect the complexity of the type of case and, pending further study, should be set at \$164.

At the Commission's direction, the scale should be evaluated by an economist or similarly objective professional every two years for parity with the state employee defenders and opposing counsel.

The Private Bar Division administrator should be directed to contract with OCDLA for training and to work with the panel of experienced attorneys to implement it. At least 50% of the training should include state employee public defenders.
