

SB 337 B STAFF MEASURE SUMMARY

Senate Committee On Rules

Action Date: 05/30/23

Action: Do pass with amendments and refer to Ways and Means by order of the President.

Vote: 3-2-0-0

Yeas: 3 - Lieber, Manning Jr, Steiner

Nays: 2 - Hansell, Knopp

Fiscal: Fiscal impact issued

Revenue: No revenue impact

Prepared By: Amie Fender-Sosa

Meeting Dates: 5/11, 5/23, 5/30

WHAT THE MEASURE DOES:

BRIEF OVERVIEW: Modifies the makeup of the Oregon Public Defense Commission (commission) to include appointments or recommendations from each branch of government (January 1, 2024); transfers the commission from the judicial branch to the executive branch (January 1, 2025) and provides that until July 1, 2027, the executive director and commission members serve at the pleasure of the Governor; beginning July 1, 2027, the executive director serves at the pleasure of the voting members of the commission and commission members may be removed by the Governor only for inefficiency, neglect of duty or malfeasance in office; disallows economic incentives or disincentives in the pay structure that could interfere with the ability of appointed counsel to provide effective assistance of counsel and prohibits flat fee model; requires commission to hire trial-level employee attorneys; directs the commission to contract directly with providers, making the commission responsible for selecting, appointing, paying, and supervising the individual attorneys appointed to represent indigent defendants (July 1, 2025); prohibits subcontracting with an exception for nonprofits (July 1, 2027); requires the commission to promulgate and enforce standards, provide oversight and supervision, collect specific data, and regularly report to the Legislative Assembly on progress and needs. Declares emergency, effective on passage.

DETAILED SUMMARY:

COMMISSION MEMBERSHIP AND EXECUTIVE DIRECTOR

Modifies membership of the commission. Removes directive that the Chief Justice of the Supreme court serve as an ex officio, nonvoting member. Directs the Chief Justice to appoint nine voting members, three of which must be chosen from recommendations of the Legislative Assembly, three of which must be chosen from recommendations by the Governor, and four nonvoting members, which are a member of the Senate, a member of the House, and two public defense attorneys, one from an urban area and one from a rural area. Specifies qualifications to serve on the commission and specifies who may not serve on the commission. Sets term limits. Allows Chief Justice to remove any member of the commission for cause. Provides 45 days for the Chief Justice to fill a vacancy; if vacancy not filled within 45 days, allows commission to fill the vacancy while commission remains in the judicial department. Entitles the members to the statutory per diem rate for service and allowable expense reimbursement. Staggers initial terms of the commissioners. New commission takes effect January 1, 2024. Maintains the membership requirements of the commission upon transfer to executive branch.

While under the judicial branch, directs the commission to appoint a director, who has a term of office of four years, which may be terminated for cause after notice and a hearing. Provides that once the commission transfers to the executive branch, the Governor shall appoint an executive director of the commission, subject to confirmation by the Senate and shall appoint a successor before the expiration of the executive director's term.

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Clarifies that the person serving as executive director of the commission on January 1, 2025, may finish the person's term as executive director and is eligible for reappointment. Provides that until July 1, 2027, the executive director and members of the commission serve at the pleasure of the Governor and may be removed by the Governor at any time. Beginning on July 1, 2027, the executive director serves at the pleasure of the voting members of the commission and the Governor may remove a commission member only for inefficiency, neglect of duty or malfeasance in office.

DUTIES OF COMMISSION

Sets out duties and restrictions of voting and nonvoting members. Requires the commission to establish minimum standards for the delivery of public defense services that provide for the effective assistance of counsel to eligible persons throughout the state, and must meet Oregon and U.S. constitutional requirements. Requires the commission to develop and oversee implementation, enforcement and modification of minimum policies, procedures, standards and guidelines to ensure the public defense providers are providing effective assistance of counsel consistently. Policies will apply to employees and any entity with which the commission contracts.

Requires contracts entered into by the commission to include requirement for data collection of information necessary for reporting to the Legislative Assembly. Directs the commission to conduct survey and economic analysis to establish the hourly pay rate for panel counsel no later than July 1, 2025 and to apply that rate to contracts entered into beginning July 1, 2027.

Also requires of the commission: reporting to the Legislative Assembly, Governor and the Chief Justice every two years concerning compliance with minimum policies, recommendations for legislative changes, etc.; centralizing services and resources; in consultation with the Oregon Judicial Department, ensuring the existence of policies that create a standardized process for determining and verifying financial eligibility for public defense services; entering into contracts or interagency agreements with the Oregon Department of Administrative Services (DAS) for the purpose of supporting state public defense population forecasts and other related forecasts; paying invoices submitted to the commission within 45 days of receipt or in accordance with statewide accounting policies established by the Oregon Department of Administrative Services.

Provides principled guidelines for the commission, including disallowing economic incentives or disincentives that could impair the ability of appointed counsel to provide effective assistance of counsel, and reviewing appointed counsel for efficiency and effective representation according to commission standards. Directs the commission to provide public defense compensation and resources that are commensurate with the character of service performed.

Directs the commission to hire trial-level attorneys who are employed by the commission, and to establish a trial division. Requires commission's policies to be available on commission website. Directs the executive director to appoint a deputy director and hire staff for the commission.

TRANSFER OF COMMISSION TO THE EXECUTIVE BRANCH

Transfers the Oregon Public Defense Commission from the judicial branch to the executive branch on January 1, 2025, and allows commission members and the executive director to finish serving their terms at the pleasure of the Governor.

Allows the commission, with approval of a majority of the members of the commission, to advocate for or against legislation, policies or budgets being considered by the Legislative Assembly. Allows the commission to adopt administrative rules, pursuant to the Administrative Procedures Act. Directs the Department of Administrative Services to issue state public defense population forecasts.

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DELIVERY MODELS

Directs the commission to conduct a survey and economic analysis to establish a formula for an hourly pay rate for appointed counsel who are not employees of the commission or a nonprofit. Creates minimum targets that 20 percent of all appointed counsel at trial level must be employed by the commission by January 1, 2031, and 30 percent by January 1, 2035. Directs the commission to establish, supervise and maintain a panel of qualified counsel who may be assigned directly to cases. Requires that payment of panel counsel may not provide a financial conflict of interest; prohibits flat fees per case starting July 1, 2025. Allows the commission to contract with nonprofit public defense firms. Provides explicit authority to the commission to contract with entities that subcontract with other entities or persons for the provision of public defense services until July 1, 2027.

OTHER

Changes the name of the Public Defense Services Commission to Oregon Public Defense Commission. Removes the title of Office of Public Defense Services. Defines “appointed counsel” and “nonprofit public defense organization.” Changes “nonroutine” fees to fees “subject to preauthorization requirement.” Includes the Oregon Public Defense Commission in the definition of state agency, removing its exemption from certain regulatory oversight, standards and processes. Contains conforming amendments. Requires regular reporting to the Legislative Assembly, until December 1, 2035. Specifies contents of report. Repeals reporting requirement January 2, 2036. Declares emergency, effective on passage.

TIMELINE

January 1, 2024 –

- Commission makeup changes: initially appointments by Chief Justice with recommendations required from executive and legislative branches; later appointment by Governor, and recommendations by judicial and legislative branches
- Commission must start collecting data from all contracted parties
- Department of Administrative Services forecasting begins

January 1, 2025 – Commission moves from judicial branch to the executive branch; executive director and commission members serve at the pleasure of the Governor

July 1, 2025 – Commission must have established hourly pay formula for panel attorneys

July 1, 2025 – Flat fee contracting prohibited; required to establish panel counsel

July 1, 2027 – subcontracting no longer permitted (exception for nonprofits)

July 1, 2027 – Commission members may be removed by the Governor, but only for inefficiency, neglect of duty or malfeasance in office; executive director serves at the pleasure of the voting commission members

January 1, 2031 – at least 20 percent of trial-level counsel must be commission employees

January 1, 2035 – at least 30 percent of trial-level counsel must be commission employees

REPORTING REQUIREMENT DATES

- May 15, 2024
- December 1, 2025
- December 1, 2026
- December 1, 2027
- December 1, 2029
- December 1, 2031
- December 1, 2033
- December 1, 2035

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ISSUES DISCUSSED:

- The -A8 amendment pushes out the dates to provide more time for the agency to execute successfully
- The current system is not working
- Oregon is the only state that contracts out 100 percent of its trial-level work through consortia
- Agency must heed Legislative Fiscal Office advice
- Excellent administrative structure needs to be in place; the agency needs to track outcomes; support services need to be in place
- Some models being used in eastern Oregon appear to be working
- The state has a constitutional duty to provide public defense

EFFECT OF AMENDMENT:

Makes technical changes and formatting adjustments. Clarifies that the person serving as executive director of the Oregon Public Defense Commission (commission) on January 1, 2025, may finish the person's term as executive director and is eligible for reappointment. Adds requirement that Governor appoint to the commission a public defense provider in either juvenile delinquency or dependency cases. Provides that the Governor shall appoint an executive director of the commission, subject to confirmation by the Senate and shall appoint a successor before the expiration of the executive director's term. The executive director is eligible for reappointment. If there is a vacancy for any cause, directs the Governor to make an appointment to become immediately effective for the vacated unexpired term. Provides that until July 1, 2027, the executive director and members of the commission serve at the pleasure of the Governor and may be removed by the Governor at any time. The person serving as executive director on July 1, 2027, may finish the person's term as executive director and is eligible for reappointment, but, beginning on July 1, 2027, serves at the pleasure of the voting members of the commission. Beginning July 1, 2027, the Governor may remove a commission member only for inefficiency, neglect of duty or malfeasance in office. The measure establishes duties of voting and nonvoting commission members. Clarifies duties of commission and adds certain duties, including that commission provide public defense compensation and resources that are commensurate with the character of service performed; enter into contracts or interagency agreements with the Oregon Department of Administrative Services for the purpose of supporting state public defense population forecasts and other related forecasts; pay invoices submitted to the commission within 45 days of receipt or in accordance with statewide accounting policies established by the Oregon Department of Administrative Services; and establish continuing legal education requirements for public defense providers who are employed by or contract with the commission that are specific to the subject matter and practice of each court-appointed counsel. Directs the commission to conduct survey and economic analysis to establish the hourly pay rate for panel attorneys no later than July 1, 2025 and to apply to contracts entered into beginning July 1, 2027. Removes directive that Chief Justice of the Supreme Court resolve any dispute between the Public Defense Services Commission and the Oregon Public Defense Commission during agency transfer. Defines "appointed counsel" and "nonprofit public defense organization." Amends transfer date for The Oregon Public Defense Commission from the judicial branch to the executive branch from January 3, 2025 to January 1, 2025. Provides explicit authority to the commission to contract with entities that subcontract with other entities or persons for the provision of public defense services until July 1, 2027. Includes the Oregon Public Defense Commission in the definition of state agency, removing its exemption from certain regulatory oversight, standards and processes. Requires contracts entered into by the commission to include requirement for data collection of information necessary for reporting to the Legislative Assembly.

BACKGROUND:

In 1963, the U.S. Supreme Court declared in *Gideon v. Wainwright*, 372 U.S. 335(1963) that anyone accused of a crime who cannot afford the cost of a lawyer "cannot be assured a fair trial unless counsel is provided for him." Under *Gideon*, the Sixth Amendment right to effective counsel is an obligation of the states via the due process clause of the Fourteenth Amendment.

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In Oregon, the Public Defense Services Commission (PDSC) oversees the Office of Public Defense Services (OPDS) as the state agency responsible for establishing and maintaining a public defense system that provides effective defense counsel for indigent defendants in criminal proceedings, youth in delinquency proceedings, and parents and children in dependency proceedings.

In 2018, the Sixth Amendment Center, a nonpartisan, nonprofit organization that provides technical assistance and evaluation services to policymakers focusing on the constitutional requirement to provide effective assistance of counsel, assessed the PDSC, OPDS, and the systems they maintain to provide public defense for indigent defendants in Oregon's criminal Justice system.

That assessment found: [T]he state has created a complex bureaucracy that collects a significant amount of indigent defense data, yet does not provide sufficient oversight or financial accountability. In some instances, the complex bureaucracy is itself a hindrance to effective assistance of counsel. Moreover, the report concludes that this complex bureaucracy obscures an attorney compensation plan that is at root a fixed fee contract system that pits appointed lawyers' financial self-interest against the due process rights of their clients, and is prohibited by national public defense standards.

In light of those findings, the Sixth Amendment Center made recommendations for changes to Oregon's defense system that have been under the consideration of an interim workgroup to address the Sixth Amendment Center's recommendations and ensure that the provision of public defense in Oregon is constitutional.

Senate Bill 337 B modifies the makeup of the Oregon Public Defense Commission (commission) to include appointments or recommendations from each branch of government (January 1, 2024); transfers the commission from the judicial branch to the executive branch (January 1, 2025) and provides that until July 1, 2027, the executive director and commission members serve at the pleasure of the Governor; beginning July 1, 2027, the executive director serves at the pleasure of the voting members of the commission and commission members may be removed by the Governor only for inefficiency, neglect of duty or malfeasance in office; disallows economic incentives or disincentives in the pay structure that could interfere with the ability of appointed counsel to provide effective assistance of counsel and prohibits flat fee model; requires commission to hire trial-level employee attorneys; directs the commission to contract directly with providers, making the commission responsible for selecting, appointing, paying, and supervising the individual attorneys appointed to represent indigent defendants (July 1, 2025); prohibits subcontracting with an exception for nonprofits (July 1, 2027); requires the commission to promulgate and enforce standards, provide oversight and supervision, collect specific data, and regularly report to the Legislative Assembly on progress and needs. Declares emergency, effective on passage.