

HOUSE BILL REPORT

HB 1542

As Reported by House Committee On:

Judiciary
Appropriations

Title: An act relating to indigent defense services.

Brief Description: Providing indigent defense services.

Sponsors: Representatives Lantz, Hinkle, Appleton, Rodne, Lovick, Newhouse, Buri, Darneille, Williams, McDermott, Clibborn, Schual-Berke, O'Brien, McIntire, Kagi, Hasegawa, Dickerson, Green, Kenney and Kilmer.

Brief History:

Committee Activity:

Judiciary: 2/9/05, 2/18/05 [DPS];

Appropriations: 3/2/05, 3/3/05 [DP2S(w/o sub JUDI)].

Brief Summary of Second Substitute Bill

- Authorizes the Office of Public Defense to disburse appropriated funds to counties and cities for public defense services.
- Provides that 90 percent of those funds will go to eligible counties on a formula basis, and 10 percent will go to no more than five eligible cities on a grant basis.
- Establishes standards for the delivery of public defense services.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Lantz, Chair; Flannigan, Vice Chair; Williams, Vice Chair; Priest, Ranking Minority Member; Rodne, Assistant Ranking Minority Member; Campbell, Kirby, Springer and Wood.

Minority Report: Do not pass. Signed by 1 member: Representative Serben.

Staff: Bill Perry (786-7123).

Background:

Both the federal and state constitutions contain guarantees of the right to legal representation for an accused person in a criminal prosecution. Court decisions at both the federal and state

levels have construed these provisions to require public funding of indigent legal representation in criminal prosecutions in which the accused's liberty is at stake. Statutes and court decisions have also extended the right to publicly funded counsel to other cases, such as involuntary commitments, dependencies, and juvenile cases. The right also attaches to criminal appeals, and special rules apply in capital punishment cases.

The Washington statute on indigent defense declares that:

"...effective legal representation should be provided for indigent persons and persons who are indigent and able to contribute, consistent with the constitutional requirements of fairness, equal protection, and due process in all cases where the right to counsel attaches."

A determination of indigence is to be made for any person requesting the appointment of counsel in a criminal, juvenile, involuntary commitment, dependency, or other case in which the right to counsel attaches. The indigent defense services law defines an indigent person as one who:

- receives public assistance in one of several enumerated forms; or
- has been involuntarily committed to a public mental health facility; or
- has an income of 125 percent or less of the federal poverty level; or
- has insufficient available funds to retain counsel.

Most criminal defendants are found to be indigent within this definition and therefore eligible for legal representation at public expense. The court may determine that a person is indigent under this definition, but nevertheless able to contribute to the cost of his or her legal counsel. In such cases, the court is to require the person to make payments toward the cost of his or her legal representation.

Generally, the funding of trial-level indigent defense costs are a local responsibility.

Counties and cities are required to adopt standards for the delivery of public defense services. The local service delivery standards are to cover:

- compensation, duties, training, qualifications, supervision, monitoring, and evaluation of counsel;
- caseload limits;
- expert witness fees and other costs;
- administrative costs and support services;
- limitations on private practice;
- substitution of attorneys or assignment of contracts;
- client complaints;
- cause for termination of contracts or removal of attorneys; and
- nondiscrimination.

The standards endorsed by the state Bar Association may serve as guidelines for the counties and cities.

A variety of delivery methods are used for public defense services. Some local jurisdictions provide indigent defense services through their own public defense agencies. Other jurisdictions contract with private non-profit agencies or with individual law firms or

attorneys. Still others assign counsel on a case-by-case basis from lists of available attorneys. Some jurisdictions may use combinations of these delivery systems.

The Office of Public Defense (OPD) was created in 1996 to administer state-funded indigent defense services for criminal appeals. The OPD also processes requests from counties to the Legislature for reimbursement for "extraordinary criminal justice costs," including indigent defense costs associated with aggravated murder cases. The Director of the OPD is appointed by the state Supreme Court. The director is supervised by an 11-member advisory with a chair and two other members appointed by the Supreme Court, one member appointed by the Court of Appeals, two by the Governor, four by the Legislature, and one by the Bar Association. The OPD is scheduled to sunset in 2009.

In 2003, the Board of Governors of the state Bar Association appointed a Blue Ribbon Panel on Criminal Defense. The panel was created in response to concerns about the delivery of indigent defense services. The panel was directed to develop recommendations for the Board of Governors regarding various aspects of indigent defense services.

Summary of Substitute Bill:

A mechanism is established for providing state funding of local indigent defense services.

The OPD is to disburse appropriated funds to eligible cities and counties for public defense services. Local jurisdictions may apply for funds if they meet certain requirements, including requiring public defenders to get annual training approved by the OPD. Applicants must also report financial and caseload information on public defense services for the previous year. Individuals and entities that contract with local jurisdictions to provide public defense services must report to the local jurisdiction hours they have billed for nonpublic defense legal services.

If a local jurisdiction receives funds from the OPD, it must document that it is meeting the standards of the Bar Association or making "appreciable demonstrable improvements" in services, including:

- the service delivery standards which cities and counties are required to adopt, and for which the Bar Association standards should serve as a guideline;
- requiring training for public defense attorneys;
- with respect to counties only, requiring specified enhanced training and experience for attorneys handling first or second degree murder cases, persistent offender cases, or any class A felony;
- requiring contracts to address compensation for extraordinary cases; and
- funding for the costs of expert witnesses and investigators.

If the OPD determines that a local jurisdiction receiving funds has not substantially complied with these requirements, the OPD may terminate funding. A determination to terminate funding is appealable to the OPD Advisory Board, whose decision is final.

Distribution from total available appropriated funds by the OPD is to be as follows:

- 90 percent of the total goes to eligible counties:
 - 6 percent of which is divided equally among the eligible counties;
 - 94 percent of which is distributed as follows:
 - 50 percent pro rata, based on county population; and
 - 50 percent pro rata, based on county criminal filings; and
- 10 percent of the total goes to no more than five eligible cities as determined by the OPD based on grant applications.

Substitute Bill Compared to Original Bill:

The substitute eliminates a reference to achieving all of the Bar Association standards for indigent defense services as part of a local jurisdiction's eligibility to continue receiving state money. The substitute retains the requirement that the city or county make appreciable demonstrable improvements in delivering indigent defense services under the specific standards enumerated in the bill, (i.e., adoption of a plan that should use the bar standards as a guideline; training for attorneys; special qualifications for attorneys handling serious cases; compensation for extraordinary cases; and payment of experts and investigators).

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: The right to counsel is fundamental under our constitutions, and as such its support and enforcement are a state responsibility. Washington has provided public funding for indigent defendants since at least 1909. Current funding is local, and no two jurisdictions have the same system. The one common denominator is that defender caseloads are too large. Many local jurisdictions have no real standards for service delivery at all. Recent reports have demonstrated the seriousness of the problem in some jurisdictions. Statewide, caseload problems are clogging jails and courts. The system is not fair to defendants or to victims. The worst bottleneck in the system is caused by the lack of defense attorneys. The current system is also costing local jurisdictions more than they can afford, but even more importantly, the system is not adequately ensuring the quality of the defense services that are delivered. Ineffective assistance of counsel cases result in injustices as well as unnecessary retrials. The criminal justice system works best with competent and well-prepared counsel on both sides. The OPD has experience in dealing with county applications for money and with imposing and evaluating delivery systems.

Testimony Against: None.

Persons Testifying: Representative Lantz, prime sponsor; Gary Alexander, Chief Justice of the Washington Supreme Court; Jon Ostlund, Washington State Bar Association; Anne Daly,

Washington Defender Association; Joanne Moore, Office of Public Defense; Jennifer Shaw, Washington American Civil Liberties Union; Tammy Fellin, Association of Washington Cities; Tom McBride, Washington Association of Prosecuting Attorneys; and Al Carter, Grays Harbor County Commissioner.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Judiciary. Signed by 23 members: Representatives Sommers, Chair; Fromhold, Vice Chair; McDonald, Assistant Ranking Minority Member; Bailey, Buri, Cody, Conway, Darneille, Dunshee, Grant, Haigh, Hinkle, Hunter, Kagi, Kenney, Linville, McDermott, McIntire, Miloscia, Priest, Schual-Berke, Talcott and Walsh.

Minority Report: Do not pass. Signed by 5 members: Representatives Alexander, Ranking Minority Member; Anderson, Assistant Ranking Minority Member; Armstrong, Clements and Pearson.

Staff: Nona Snell (786-7153).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Judiciary:

The second substitute bill adds a null and void clause, making the bill null and void unless funded in the budget.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Second Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed. However, the bill is null and void unless funded in the budget.

Testimony For: This is a good piece of risk management legislation. We must provide indigent defense. It's a constitutional mandate, and there's evidence that we are failing. The bill creates a way of training legal counsel to provide proper and effective defense for low-income people. It's a strong education bill. Pass with a null and void clause and we'll keep working on it because of it's paramount importance. The bill is a part of a bigger package that includes civil defense. The bill creates an office within the Office of Public Defense. The counties need and want it. They will work on implement it in an effective way. If the state picked up the entire cost of public defense, it would be expensive, but this bill is making sure people are represented. The state bar association worked with the Board of Judicial Review and stakeholders on the bill. The indigent rate is stable across the state at about 85 percent for people charging felony crimes. County commissioners would be taught to contract effectively with counsel. Washington is one of only ten states that don't participate in criminal defense at

the trial level. Counties spend about \$78 million on public defense. There's a budget request for \$25 million to be distributed through the bill's mechanism. It's important that we adequately fund indigent defense, because, currently, case loads are unacceptably high. There is strict accountability that goes with money to counties. The bill would allow defense council more time to develop alternatives to clients sitting in prisons.

Testimony Against: None.

Persons Testifying: (In support) Representative Lantz, prime sponsor; Gail Stone, Washington State Bar Association; Sophia Byrd, Association of Counties; and Sally Harrison, Washington Defenders Association and Washington Association of Criminal Defense Lawyers.

Persons Signed In To Testify But Not Testifying: None.