

Operational Review of Oregon's Public Defense System

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Executive Summary

Background. SB 145, enacted by the 2001 Legislative Assembly, establishes a Public Defense Services Commission (PDSC). Early in the 2003-2005 biennium, the PDSC will assume total responsibility for Oregon's public defense system, except the appointment of counsel which will remain a judicial function but subject to PDSC rules. The PDSC assumed responsibility for the former State Public Defender's office (now the Office of Public Defense Services) October 1, 2001. This office provides representation for eligible persons in the majority of criminal, probation and parole appeals. The PDSC will assume responsibility for the remainder of public defense appeals (e.g., termination of parental rights, civil commitment, and postconviction relief) and all trial level cases effective October 1, 2003. The proponents of SB 145 and the legislature, by passing SB 145, sought to bring all public defense under a single administration, whose exclusive responsibility is ensuring the quality and effectiveness of Oregon's public defense system.

The background section of this operational review report includes information about the genesis of SB 145, the new commission's responsibilities, and the PDSC members and composition. The responsibilities of the PDSC during the 2001-2003 biennium are two-fold: to oversee the operations of the new Office of Public Defense Services (OPDS); and to work in collaboration with the State Court Administrator/Judicial Department to merge the OPDS and the Indigent Defense Program into one cohesive and effective organization.

This operational review report was prepared at the request of the State Court Administrator (SCA) and the PDSC to: provide an overview of the present state of the indigent defense system in Oregon; identify and present the crucial issues facing the SCA and the PDSC in the integration of the current two systems; and recommend the best model for the new organization and improvements that will achieve the stated structure and goals of SB 145. The report represents a collaborative effort by representatives of the OPDS and the Indigent Defense Services Division, along with Geoffrey Guilfooy of Aldrich Kilbride & Tatone LLP, CPAs and Business Consultants.

Goals and Scope of the Review. The overall goal of the operational review was to present the SCA and PDSC with a new structure for the combined trial and appellate functions that improves the overall quality, efficiency and effectiveness of the system. Ten specific goals of the review are stated in this section of the report, including for example: identify systems and structures to optimize the allocation of existing funding and full-time equivalent position authority within and between the OPDS and the Oregon Judicial Department; and identify an organization structure for the OPDS and direct service delivery system(s) that will best ensure accountability, effectiveness and consistency of representation and administrative functions, and the efficient provision of representation and administrative functions.

Overview of the Present Public Defense System. Central to the report is an overview of the present system of providing public defense in Oregon. With the passage of SB 145, Oregon joins a growing number of states that have established an independent commission to oversee the provision of public defense services. With the exception of the appellate OPDS, Oregon's system relies on the private sector for provision of legal and related services. This section of the report provides information on the OPDS and how the remainder of public defense representation currently is provided. This section of the report also provides information on the types of cases for which public defense services are mandated and the standard and method for determining who is eligible for such representation.

Current Resources. The staff and financial resources that currently exist to provide statewide public defense services and the administration thereof are detailed in this section of the report. The

independent consultant retained for purposes of the operational review and report determined it is evident from the review of the workloads of the Indigent Defense Services Division (IDSD) and the OPDS that both offices are inadequately staffed.

Issues and Concerns With the Existing System. There are a number of issues and concerns that were identified during the operational review that impact the overall quality, effectiveness and efficiency of the current public defense system. This section of the report provides background and information gleaned during the review process on nine areas identified as being of greatest concern:

- Significant changes in the nature of public defense representation over the past ten years;
- Compensation disparity;
- Quality of indigent defense services;
- Preauthorization of non-attorney services (e.g., interpreters, investigators, psychologists) and timely, efficient processing of payments;
- High caseloads;
- Consistency and availability of training;
- Public education, including education of the legislature and media;
- Collaboration between appellate and trial counsel; and
- Complex case assistance.

Public Defense Services Commission Accomplishments to Date. The PDSC first met August 29, 2001 and has met a total of ten times as of this report's date, including a two-day planning session in November 2001. The commission is responsible for appointing a public defense services executive director. An acting Executive Director was appointed at the first meeting of the PDSC. The PDSC and staff have spent considerable time, in consultation with the Legislative Fiscal Office and the Executive Department, in identifying position authority and permanent financing within existing resources for the hiring of an Executive Director, currently planned for December 2002. In addition, the PDSC continues to address issues critical to the transition of the Indigent Defense Program next biennium and the operation of the OPDS, including the following:

- Joining with the SCA in commissioning the operational review, and guiding and monitoring its progress;
- Facilitating cooperative working relationships and workload solutions between the OPDS and the IDSD on interim and longer-term matters;
- Approving newly negotiated contracts with indigent defense providers and supporting the pilot appellate contract and OPDS pilot assistance with postconviction relief appeals;
- Developing a legislative agenda and legislation to improve public defense services;
- Monitoring caseload backlogs and performance of OPDS staff attorneys;
- Identifying methods and advancing efforts to better provide the resources and compensation of OPDS employees and indigent defense providers, while recognizing the present resources available to the system and the current budget climate; and
- Identifying and working toward making improvements in areas of public defense representation (geographic and case type) that are in greatest need of assistance, including the establishment of a postconviction relief workgroup to propose legislative, administrative and funding recommendations.

Proposed Organization Structure, Other Recommendations and Recommended Implementation Plan. The merger of the OPDS, the IDSD, and the Indigent Defense Program must result in an integrated organization that is flexible, responsive, efficient and effective in serving those who

provide and receive public defense services. The PDSC recognizes current resources are limited and that there is an expectation by many that the new organization will be cost-neutral. In addition, the PDSC has clearly communicated its belief that it can play a major role in improving the overall quality and consistency of public defense services.

The operational review report includes a proposed organization structure that includes an Executive Director's office – responsible for program accountability and quality assurance, legislative matters, and the effective management of the system's financial and operational resources. One unit of the new proposed Office of Public Defense Services will be responsible for ensuring legal services are provided in a competent, consistent and effective manner. This Legal Services unit combines direct (state FTE position) legal services and contracted services. The second of two units, Business Services, is responsible for the fiscal, operations and information management of the new agency. This function includes accounting, budgeting, information technology, and business and case expense management. Business Services also provides the reception and administrative support services to the OPDS as a whole.

Because of the need to implement the merger, integrate and stabilize the internal systems, and to make the new organization fully operational by October 1, 2003 or July 1, 2003, as is being recommended by the PDSC, the operational review team recommends the PDSC not propose major changes during the 2003-2005 biennium to the present delivery system for indigent defense services.

Included in this section of the report are a number of other recommendations the Operational Review Team believes the PDSC and the legislature need to consider to improve the quality of representation and the effectiveness and efficiency of the integrated system overall. These recommendations include:

- Adopt a multi-biennium strategy to improve the compensation of OPDS employees and other public defense providers;
- Clarify criteria and goals and revise the contracting process to create a system of long-term service providers, while at the same time, ensuring access and recruitment of new attorneys, and the rewarding of quality of representation, creativity, innovation and efficiency;
- Streamline the process for requesting pre-approval and payment of non-attorney case related expenses;
- Adopt a classification and compensation system for OPDS employees similar to the Department of Administrative Services and adopt personnel rules similar to those adopted by the Judicial Department;
- Reevaluate and revise OPDS employee work schedules to meet workload demands;
- Establish caseload standards and ensure cases handled by Legal Services attorneys comply with such standards, and consider the establishment of standards for private sector public defense providers; and
- Explore the establishment of a resource center to assist public defense attorneys and a training college for new public defense attorneys, similar to the assistance provided prosecutors by the Department of Justice.

The report concludes with a proposed implementation schedule which recognizes that both the OPDS and the IDSD offices “ ... are currently stretched and working diligently just to keep up with daily demands.”

Operational Review of Oregon's Public Defense System

Background

The 2001 Oregon Legislative Assembly passed Senate Bill 145 (Chapter 962, Oregon Laws 2001) to establish the Public Defense Services Commission (PDSC) and the Office of Public Defense Services. The new legislation merges the administration of the State Public Defender's office (SPD) and the Indigent Defense Program. Since 1965, the SPD has existed as a judicial branch agency under the administration of the State Public Defender Committee, and governed by a portion of ORS Chapter 151. The remainder of ORS Chapter 151 governs Oregon's Indigent Defense Program. This program has existed since 1983, when the state assumed the responsibility from the counties for providing public defense services, other than those provided by the SPD. Since 1987, the Indigent Defense Services Division (IDSD) of the State Court Administrator's office has primarily been responsible for the Indigent Defense Program.

The purpose of both entities is similar – to provide legal services for those who cannot afford legal counsel in those cases required by the United States Constitution, the Oregon Constitution and state statutes. The SPD provides representation only at the appellate level, filing criminal, probation violation and parole appeals. The SPD services are provided directly by state employee attorneys. The IDSD is responsible for providing for legal representation at every other stage of criminal proceedings. In addition, the IDSD is responsible for providing for legal representation for eligible children and parents in dependency and termination of parental rights trial- and appellate-level cases and representation in delinquency, postconviction relief, habeas corpus, and civil commitment trial- and appellate-level cases. The IDSD has no staff attorneys; all of the services for which it is responsible are provided through contractors. The proponents of SB 145 (the 1999-2001 Public Defense Services study commission and the Oregon Judicial Department) and the legislature, by passing SB 145, sought to bring all public defense under a single administration, whose exclusive responsibility is ensuring the quality and effectiveness, including efficiency and accountability, of Oregon's public defense system.

At the request of the Judicial Department and others, the 1999 Legislative Assembly established the study commission referenced above. The Commission's primary tasks were to study Oregon's public defense system and recommend improvements to the legislature. The study commission met regularly over the 1999-2001 interim and received substantial testimony from providers of public defense services, judges, district attorneys, and others concerned with the criminal and juvenile justice systems. The study commission also had the benefit that Oregon's public defense system has been extensively studied by many different public and private entities (i.e., thirteen studies and reviews having been conducted over the past thirteen years).

The most prevalent themes of the testimony received and the reports reviewed by the study commission were:

- The current system has many features that should be preserved;
- An adequate defense must be adequately funded;
- Training and financial support of public defense attorneys and other providers -- particularly those involved in specialty and non-traditional areas of public defense such as death penalty, postconviction relief, abuse and neglect, and termination of parental rights cases -- require immediate attention and improvement;

- Direct involvement of the judiciary in the current public defense system is contrary to national standards and creates all of the conflicts the national standards recognize as critical to avoid; and
- An adequate public defense system must be adequately staffed and resourced administratively.

Overall, the study commission learned the public defense function in Oregon is:

- A function that is constitutionally and statutorily mandated, yet often viewed and treated with less importance than those mandates would suggest;
- A critical component of the trial- and appellate-level systems that are responsible for Oregon's criminal, juvenile, civil commitment, and postconviction relief/habeas corpus cases where deficiencies in quality or resources adversely impact the other components of those systems;
- Broader than most understand it to be, including, for example, representation of children who have been removed from their homes due to alleged child abuse;
- A system that is impacted substantially by factors outside the control of its administrators or providers; and
- Structured in a manner – with the separate administration of the State Public Defender's office and the Indigent Defense Program and the direct involvement of the judiciary – that is inefficient and presents competing and conflicting demands on the Judicial Department to the detriment of the public defense function and court operations.

Senate Bill 145, which establishes the current PDSC, is the product of the study commission's work. The legislation adds Oregon to a near majority of states that have adopted an independent commission model for the oversight and provision of public defense representation. The American Bar Association, the National Legal Aid and Defenders' Association and other experts in the public defense function recommend an independent commission model. SB 145 implements the Oregon State Bar's Indigent Defense Task Force #1's recommendation in 1994 that the responsibility for public defense be housed within an independent commission within the Judicial Branch.

SB 145 amends ORS Chapter 151 to provide the framework for the PDSC. The PDSC remains within the Judicial Branch, but is independent of the Judicial Department with respect to budget and administrative responsibilities. All of the duties and responsibilities of the former SPD Committee, the former governing body of the SPD, were transferred to the PDSC, effective October 1, 2001. The duties and responsibilities of the State Court Administrator and the Judicial Department for the Indigent Defense Program and the IDSD will similarly be transferred October 1, 2003.

SB 145 requires the Chief Justice, along with the Chair of the PDSC, to present public defense budgets to the Legislative Assembly. The Commission is comprised of seven members, appointed by the Chief Justice. The Chief Justice serves *ex officio* as the eighth member (non-voting). Two of the seven members must be non-attorneys and one member must be a former prosecutor. One member must be an attorney engaged in criminal defense representation (but who is not primarily engaged in representing individuals at state expense). The initial terms of PDSC members are staggered to provide continuity, with four-year terms thereafter.

Public Defense Services Commission

Member	Term Expiration
BARNES H. ELLIS, <i>Chair</i> <i>Stoel Rives LLP</i>	2005
SHAUN S. MCCREA, <i>Vice-Chair</i> <i>McCrea PC</i>	2004
CHIEF JUSTICE WALLACE P. CARSON, JR.	Ex-Officio Permanent Member
JAMES M. BROWN <i>Enfield Brown Collins Knivila & Cook</i>	2004
HENRY H. LAZENBY, JR. <i>Portland Development Commission</i>	2003
JOHN R. POTTER <i>Oregon Criminal Defense Lawyers Association</i>	2005
JANET C. STEVENS <i>Bend Bulletin</i>	2002
R. JON YUNKER <i>Willamette University's Atkinson Graduate School of Management</i>	2003

The responsibilities of the PDSC during the 2001-2003 biennium are two-fold: to oversee the operations of the new Office of Public Defense Services (OPDS), the former SPD; and to work in collaboration with the State Court Administrator (SCA) to merge the OPDS and Indigent Defense Program into one cohesive and effective organization. The challenges presented by the merger are formidable.

The SCA, in conjunction with the PDSC, has entered into a contract with Aldrich Kilbride & Tatone LLP (AKT) to conduct an operational review of both the OPDS and the Indigent Defense Program, to identify and present the crucial issues facing the SCA and the PDSC in the integration of the two systems, and to make recommendations as to how this integration can best be accomplished. This report represents the work of members of the staffs of OPDS, IDSD and AKT. The goal of the operational review is to present the PDSC and the SCA with the best model for the new organization. The participating staff members have been formed into five teams whose duties are to analyze a portion of the current system and to report on the transition of that portion of the system into a new format. The primary purpose of this report is to provide recommendations of the transition team and to report on efforts to develop an implementation plan that will achieve the stated structure and goals of SB 145.

Goals and Scope of the Operational Review

The SCA and the PDSC requested AKT work with a team of staff representing the OPDS and the IDSD to review the trial and appellate public defense systems and their administration. The goal of the review is to present the SCA and the PDSC with a new structure for the combined trial and appellate functions that improves the overall quality, efficiency and effectiveness of the system. Specifically, the goals of the review are as follows.

- Identify the full-time equivalent state employee position authority and financing necessary to hire the Executive Director for the new organization. (Note: The team presented this information to the PDSC at its February 22 and March 21, 2002 meetings. Plans are proceeding to hire the Executive Director by December 31, 2002. See Appendix 1 for additional information.)

- Identify systems and structures to optimize the allocation of existing funding and full-time equivalent position authority within and between the OPDS and the Oregon Judicial Department. (Note: This goal is addressed in the *Proposed Organization Structure* section of this report.)
- Identify the existing Oregon Judicial Department staff and resources, other than those existing within the IDSD, that are exclusively or partially responsible for providing administrative support to the present Indigent Defense Program and the IDSD, excluding the Indigence Verification Program which will remain the responsibility of the SCA's office. (Note: This goal is addressed in the *Proposed Organization Structure* section of this report.)
- Identify additional resources, including full-time equivalent positions, deemed necessary to the performance of the PDSC's responsibilities under SB 145 once the Indigent Defense Program is transferred to the Commission for purposes of inclusion within policy packages to be submitted for the 2003-05 biennium by the Oregon Judicial Department and/or the PDSC. (Note: This goal is addressed in the *Other Recommendations* section of this report.)
- Identify improvements in case processing and other methods of reducing backlogs/increasing efficiencies and improving the quality and consistency of representation within the OPDS. (Note: The issue of appellate backlogs is discussed in detail in Appendix 2 of this report.)
- Identify improvements and efficiencies within the IDSD, and to the extent other SCA divisions and court operations are responsible for supporting the IDSD and the Indigent Defense Program, within those resources. (Note: This goal is addressed in the *Proposed Organization Structure* section of this report.)
- Identify an organization structure for the OPDS and direct service delivery system(s) that will best ensure accountability, effectiveness and consistency of representation and administrative functions, and the efficient provision of representation and administrative functions. (Note: This goal is addressed in the *Proposed Organization Structure* section of this report.)
- Identify program improvements that may best be pursued during the 2001-03 biennium. (Note: This goal is addressed in the *PDSC Accomplishments To Date* section of this report.)
- Establish a management system for the PDSC and the OPDS that best assures the provisions and intent of SB 145 are met. (Note: This goal is addressed in the *PDSC Accomplishments To Date* and *Proposed Organization Structure* sections of this report.)
- Establish the costs and benefits of each recommendation contained within the final operational review report. (Note: This information is being developed and will be presented to the SCA and the PDSC as part of the budget preparation process.)

To carry out the operational review and accomplish the above goals, five teams were formed. Those teams and their responsibilities follow.

Indigent Defense Services Division Review Team

This team reviewed and documented the division's positions; processes; internal operations; contract negotiation and monitoring; performance measurement systems; and the Indigent Defense Program's payment systems. The team also interviewed 14 public defense providers representing nonprofit public defenders, attorney consortia and other contract and non-contract attorneys to obtain their input regarding how the division and system are working and what they believe should change when the IDSD and the Indigent Defense Program transfer to the OPDS and the PDSC.

Trial and Appellate Court Public Defense Systems Review Team

This team identified the number of full-time equivalent positions and other resources currently in the trial and appellate courts that provide for the review of public defense attorneys' requests for non-attorney services and the processing of fee and expense invoices. The team reviewed the internal and external processes for these functions, their effectiveness and relative efficiency. The team calculated the number of positions from the court system that need to be transferred to the OPDS as required by SB 145 and is studying more efficient systems. This team's work is ongoing.

State Court Administrator and Other Agencies Review Team

This team is working with the SCA and her staff to determine the number of full-time equivalent positions and other Oregon Judicial Department resources that provide support to the IDSD and the Indigent Defense Program. This team's work is ongoing.

Office of Public Defense Services Review Team

This team reviewed the internal and external processes of the Office of Public Defense Services. The team focused on management and staffing, case management and backlogs, administrative processes, information systems, and productivity and performance measurement.

Comprehensive Review and Integration Team

The purpose of this team is to coordinate and monitor the activities and progress of each of the above teams. This team reviews their work, accepts or refines their conclusions and recommendations, and communicates the review's progress with the PDSC and the SCA.

Overview of the Present System for Providing Public Defense

Oregon has joined a growing number of states that have established an independent commission to oversee the provision of public defense services. There are at least 22 other states that use this method to administer the delivery of services. The actual legal services delivery systems used by other states' commissions vary. Some states, such as Colorado, have a state system in which almost all of the public defense providers (at least those for criminal defense representation) are employed by the state.

With the exception of the appellate OPDS and the administrative IDSD, Oregon's system relies on the private sector for provision of legal and related services. The IDSD currently has more than 80 contracts for legal services in 35 of Oregon's 36 counties. These contracts cover approximately 94 percent of the approximately 165,000 annual trial-level caseload. These contracts range in size from the large nonprofit public defender office that exclusively provides public defense representation, to the sole practitioner who may spend only a small portion of his or her total time on court-appointed cases. Below is a brief description of the types of legal services contracts and the manner in which non-contract services are provided.

TRIAL LEVEL SERVICES

Nonprofit Public Defender Contractors

Currently, there are ten nonprofit public defender offices under contract to provide representation in 11 counties. Nonprofit public defenders are the primary indigent defense service providers in the majority of those counties with a public defender contract. These contractors accept appointment to most case types, and often have investigators and paralegals on staff. The largest nonprofit public defender contractor employs approximately 50 attorneys. The smallest public defender employs six attorneys.

A nonprofit public defender office is governed by a Board of Directors, whose responsibilities include hiring a director. The director is responsible for the day-to-day operation of the office, managing personnel and technological services, training staff, and administering the budget, and in some cases provides direct representation services.

Consortium Contractors

Another type of contract is the consortium contract. The IDSD currently has approximately 30 contracts with attorney consortia. Some consortia are small, with only 3 or 4 members while others have 30 to 50 members and employ full-time administrative staff. A consortium member may be a sole practitioner or an attorney from a large firm. Some only accept a few court-appointed cases, while other consortium members may be full-time under the contract. The majority of these contracts cover a wide range of case types. An increasing number of consortium contracts are specialty contracts; e.g., juvenile dependency and termination of parental rights cases only.

Law Firm and Sole Practitioner Contractors

A number of contracts are with law firms or sole practitioners who devote the majority of their time to contract work. Most of these contracts cover a range of case types while several are specialty contracts for only one type of case. The IDSD currently has 18 contracts with sole practitioners for death penalty cases. These contracts cover multiple counties and include other complex case types as needed.

Non-Contract Attorneys

A number of attorneys provide legal representation on a case-by-case (non-contract) basis and are compensated at an hourly rate. In one county, all providers are non-contract, hourly paid attorneys. Those attorneys wishing to accept such court appointments indicate their willingness and qualification to do so by submitting a form to the IDSD, which maintains a master list and supplies local lists to courts.

Non-Attorney Services

In addition to legal services, the Indigent Defense Account also provides funding for non-attorney providers for services that are reasonable and necessary to the legal representation in a case; e.g., interpreters, investigators, psychologists, court reporters and forensic experts. Generally, these services are provided on an hourly rate basis. A judge or administrative authority must preauthorize all non-attorney services.

APPELLATE LEVEL SERVICES

Office of Public Defense Services

Starting in 1965, the State Public Defender has continuously handled the vast majority of appeals of indigent persons convicted of crimes. SB 145 dissolved the State Public Defender and reconstituted that agency as the Office of Public Defense Services (OPDS). At present, the OPDS remains responsible for the filing of the majority of criminal appeals for indigent persons. The OPDS also files the majority of appeals from probation and parole cases, and recently has begun accepting appeals from contempt cases. On a pilot basis and in an effort to further improve the quality of representation, the OPDS will begin handling postconviction relief appeals this biennium. Other types of appeals may become part of the OPDS workload as the need arises and its ability to process cases remains high.

The attorneys and staff of the OPDS are all state employees. The office has hiring standards and provides its own training. The OPDS attorneys are paid at rates that are 10 percent to 35 percent below their counterparts in the Attorney General's office. The OPDS support staff are classified according to the state's classification system, but are compensated at rates lower than other legal secretaries in the state system.

Contract Appeals

In January 2002, the IDSD began contracting with a consortium of experienced attorneys to provide backlog relief for the OPDS and for OPDS conflict cases. This contract is the first appellate contract undertaken by the IDSD and serves as a "pilot" contract during the current biennium. This consortium contract has been expanded, again on a pilot basis, to include postconviction relief (PCR) appeals. These attorneys are in private practice and are accepting the cases for a flat fee per appeal, with some limitations.

Hourly Paid Appellate Cases

All other indigent defense appellate cases (for example, juvenile dependency, civil commitment, and habeas corpus) are assigned to hourly paid, non-contract attorneys. Attorneys who are willing and qualified to do appellate cases submit a form to the IDSD. A list is provided to the courts and used by the IDSD staff to locate an attorney for a specific appeal.

Non-Attorney Expenses

The primary non-attorney expense for appellate cases is for the preparation of transcripts from the original trial-level case. The approximately \$1.0 million annual expense of transcripts for all appeals, including those which the OPDS handles, are paid from the Indigent Defense Account.

MANDATED PUBLIC DEFENSE CASES AND FINANCIAL ELIGIBILITY

The United States Constitution, Oregon's Constitution and/or Oregon statutes require the appointment of counsel at state expense for those who are unable to retain suitable counsel in certain legal proceedings. Generally, these proceedings are limited to those that involve the potential for the loss of one's liberty (e.g., criminal, probation violation and civil commitment cases) or the loss of other rights determined to be so essential as to demand the assistance of counsel (e.g., termination of a person's parental rights).

The following is a summary of the constitutional and statutory mandates for:

- types of cases in which a person is entitled to state-paid counsel, if determined financially eligible; and
- criteria for determining whether a person is financially eligible for state-paid counsel.

Case Type Eligibility Criteria

Oregon's Indigent Defense Program is responsible for providing legal representation in the following types of state trial-level proceedings for persons who are determined financially eligible for appointed counsel (see financial eligibility below). The number of cases and each case type's percentage of the total, trial-level public defense caseload are listed for FYE 2001.

- **Criminal** proceedings, ranging from misdemeanors to death penalty cases (86,618 cases – 52 percent);
- **Child Abuse and Neglect** proceedings, including dependency and termination of parental rights proceedings and review hearings—all of which require the appointment of counsel for children who are the subject of these proceedings and the appointment of counsel for financially eligible parents (34,442 cases – 21 percent);
- **Probation Violation and Extradition** proceedings (27,769 cases – 17 percent);
- **Juvenile Delinquency and Probation Violation** proceedings (10,309 cases – 6 percent);
- **Contempt** proceedings, including nonpayment of court-ordered child support and violations of Oregon's Family Abuse Prevention Act (3,896 cases – 2 percent);
- **Civil Commitment and Psychiatric Security Review Board** proceedings (2,292 cases – 1 percent); and
- **Postconviction Relief and Habeas Corpus** proceedings (776 cases – <1 percent).

In addition, persons who are determined to be indigent are entitled by constitutional provisions or statutes to appointed counsel on appeal of any of the above types of cases.

The OPDS is responsible for the majority of criminal, probation violation, and parole board appeals. The Indigent Defense Program is responsible for providing appellate counsel in all other appeals, plus the cost of transcripts for both OPDS and Indigent Defense Program appeals. The number of indigent defense appeals represents approximately one percent of the total public defense caseload.

Financial Eligibility Criteria

The Oregon statutory standard for determining who is financially eligible to receive services paid from the Indigent Defense Account mirrors that established under the federal constitution. Specifically, “. . . a person is indigent if the person is determined to be financially unable to retain adequate counsel without substantial hardship in providing basic economic necessities to the person or the person's dependent family” (ORS 135.050 and ORS 151.485). An applicant for state-paid representation is required to provide a verified financial statement, listing detailed information regarding income, assets, debts, and dependents.

The eligibility standard is implemented statewide under a two-pronged means test.

First prong: Federal food stamp guidelines (130% of the federal poverty level) serve as the first determinant of eligibility. If the applicant's income is less than or equal to the eligibility level for food stamps, the applicant is presumed to be eligible for appointed counsel, unless the applicant has liquid assets that could be used to hire an attorney. For example, the Federal food stamp gross income eligibility level for a family of four is \$22,956 per year.

Second prong: If an applicant's income exceeds food stamp standards, that person is eligible for state-paid counsel only if the applicant's available income and liquid assets are determined to be insufficient to hire an attorney, depending upon the seriousness of the pending case(s). The “privately hired attorney” guideline rate currently used, for example, for a DUI case is \$750. If an applicant has available income and assets exceeding \$750, guidelines provide that indigence verification court staff recommend the court deny the request for appointment of counsel.

Current Resources to Provide Services

This section describes the staff and financial resources that currently exist to provide statewide trial and appellate level public defense services. It is evident from the review of the workloads of the IDSD and the OPDS that both offices are inadequately staffed.

Staffing

The OPDS currently is staffed with 41 positions filling 40.2 full-time equivalents (FTE). One FTE Senior Public Defender position and 0.5 FTE Office Specialist 2 position are vacant and will be combined with a 0.5 FTE Deputy Public Defender 2 position to create permanent funding for an Executive Director for the PDSC (see Appendix 1). The vacant positions were created by the 2001 Legislative Assembly to provide support for cases received as a result of the passage of HB 2348 (parole appeals). In addition, the OPDS presently employs one person as a paralegal in a temporary position. Below are the position titles for the permanent positions, the number of FTE and the top step of the monthly salary ranges.

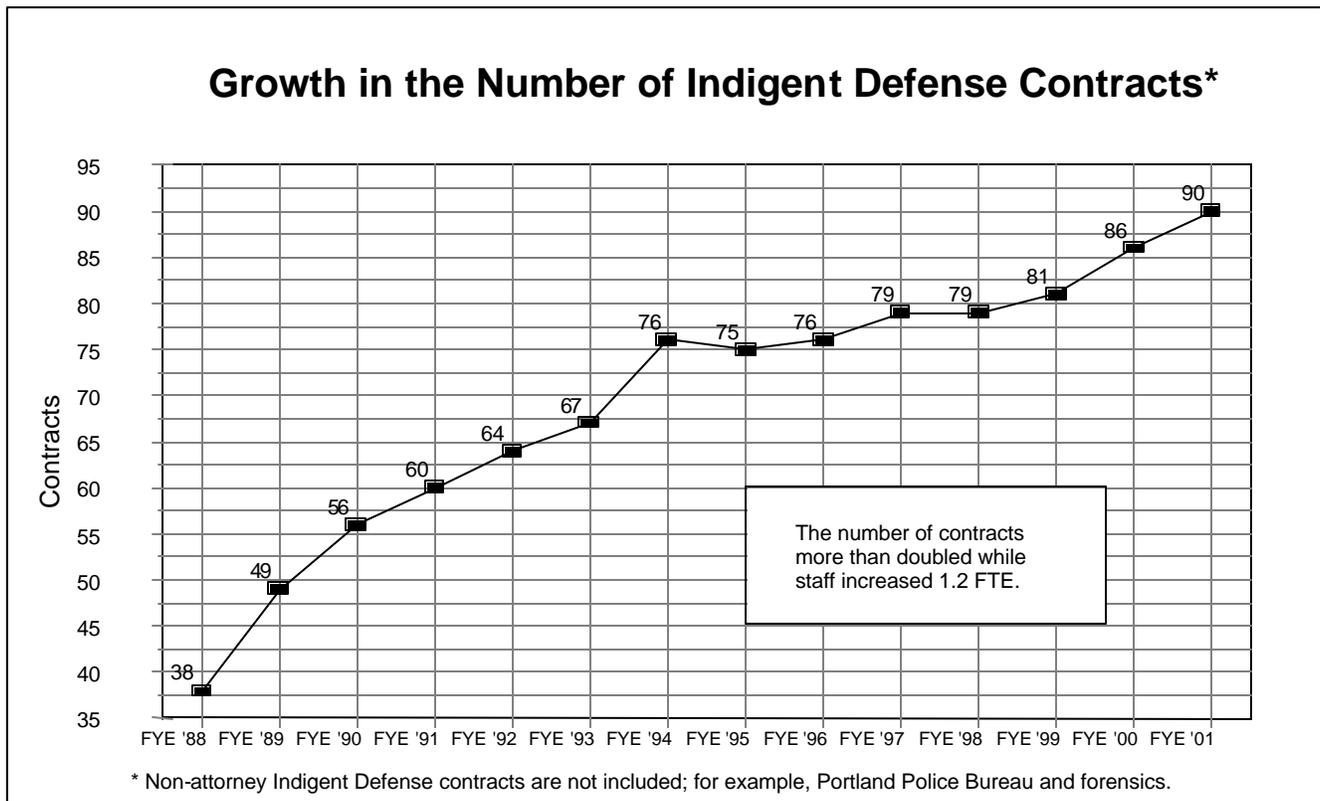
Position Title	Number Of Positions	Number Of FTE	Monthly Salary Range Top Step
Public Defender	1	1.0	\$7,344
Chief Deputy Public Defender	2	2.0	\$6,996
Senior Deputy Public Defender	6	6.0	\$5,763
Deputy Public Defender 2	12	12.0	\$5,229
Deputy Public Defender 1	6	6.0	\$4,523
Executive Assistant	1	1.0	\$4,099
Office Specialist 2	11	10.2	\$2,470
Office Specialist 1	1	1.0	\$2,143
Office Assistant 2	1	1.0	\$1,891

The Indigent Defense Services Division is currently staffed with a combination of general fund and other fund positions. There are 10 employees (9.2 FTE positions). Below are the position titles, the number of FTE and the top step of the monthly salary ranges.

Position Title	Number Of Positions	Number Of FTE	Monthly Salary Range Top Step
Indigent Defense Services Director	1	1.0	\$7,426
Indigent Defense Analyst	7	6.3	\$4,557
Court Operation Specialist III	1	0.9	\$2,801
Court Operation Specialist II	1	1.0	\$2,538

The other-funded positions are financed from the Application and Contribution Program. This program requires those who apply for court-appointed counsel, who are determined to be financially able, to pay an application fee and contribute towards the cost of the anticipated attorney fees. Other positions available through this program are vacant until sufficient funds are collected to sustain them.

Despite significant increases in the number of contracts that are the responsibility of the IDSD over the past 13 years and other shifts in responsibility from the local courts to the IDSD, the IDSD's staffing level has remained relatively static. In FYE 1988, the IDSD had 5.8 general fund FTE; in FYE 2001 that number was 7.0 FTE. The following chart shows the growth in the number of contracts.



Funding

The OPDS was appropriated \$5,914,734 for the 2001-03 biennium. Of that sum, \$174,088 was “new money” earmarked for additional staff to process HB 2348 cases (parole appeals). Special legislative sessions in early 2002 reduced the budget by \$51,893 leaving \$5,862,841 available to fund the office's operations.

The Indigent Defense Services Division receives an administrative allocation from the Judicial Department's biennial appropriation. The 2001-03 allocation to the IDSD totals \$953,931 to administer the Indigent Defense Account. The Indigent Defense Account receives a separate appropriation from that for the Judicial Department's court operations and administration. This appropriation pays for the expense of providing direct legal services to indigent persons. The Indigent Defense Account was appropriated \$163.7 million for the 2001-03 biennium. A reduction of \$12.4 million occurred as a result of the March 2002 special legislative session, leaving the Indigent Defense Account funding for the current biennium at \$151.3 million.

Issues and Concerns With the Existing System

There are a number of issues and concerns that were identified during the operational review that impact the overall quality, effectiveness and efficiency of the current public defense system.

Significant Changes in the Nature of Public Defense Representation Over the Past Ten Years

Those attorneys and other professionals who have been involved in the criminal and juvenile justice systems for many years express frustration with a number of changes that have occurred over the past ten to fifteen years. For example, the decrease in judicial discretion is frequently cited by defense attorneys and their staff as significantly diminishing their sense of hope that even a small number of clients will be able to break a cycle of criminal behavior and abuse.

The number of persons in the system who are the product of families or other environments that include sexual abuse, drug and alcohol addiction and mental illness is reported to have increased exponentially over the past decade. The severity of public defense clients' abuse, mental illnesses and drug addictions (e.g., methamphetamine) and the inadequacy of community resources to address these are cited by jail guards, as well as public defense providers and others in the system, as being horrific.

With this said, there are some positive changes that have occurred as the result of collaboration between judges, prosecutors, defense attorneys, treatment providers and local and state government programs over the past ten years. The most frequently mentioned improvements are "family courts" that are established and committed to addressing an entire family's legal and social issues as a whole, drug courts, and community courts where the community gets a direct benefit back from an offender and the offender is better assisted with unmet needs by the community.

Compensation Disparity

By far the greatest concern among public defense staff attorneys and indigent defense contractors is the issue of compensation. In many instances, attorneys who prosecute crimes or who are on the "other side" of indigent defense cases are compensated at higher levels than those who defend indigent individuals. The example most commonly cited is that the guideline hourly rate for private attorneys appointed to indigent defense cases, outside a legal services contract, is \$40 per hour – a rate established in 1991. Efforts to obtain additional funding from the legislature by the submission of policy packages to increase the hourly rate have not been successful. Because of compensation discrepancies and the significant student loan debt many attorneys carry, it is increasingly difficult to recruit and retain attorneys within the public defense system.

It will be important for the OPDS's Executive Director's salary to be set at a level that will attract highly qualified applicants. The Executive Director's salary range will establish the benchmark for OPDS attorney and staff salaries. Proper compensation for OPDS employees and other public defense providers is an increasingly critical factor in attracting and retaining quality employees/providers.

Quality of Indigent Defense Services

Adequate funding and quality services go hand in hand. An important issue is how best to establish a system that ensures accountability for quality of services, as well as fiscal accountability. The goal for the administrators of public defense funds is to provide "adequate representation." For practitioners, however, the goal ethically must be one of doing the best job possible, given limited resources and time. Most public defense practitioners are highly motivated people who are dedicated to public service and to their clients. For them, the system must give them the opportunity to obtain the required training, support and compensation so that they can provide a level of representation that ensures their clients are justly represented, while recognizing the limitations on resources.

Non-attorney Preauthorization and Payment

Historically, local courts have had the final word on preauthorization and payment for non-attorney services; e.g., interpreters, experts, and investigation outside legal service contracts. The existing approval and payment processes can lead to statewide inconsistency in how these expenses are incurred and reimbursed.

Another difficulty reported by providers is the length of time it takes to be paid for services, except those that are provided under contract and paid on a regular monthly basis. Currently the trial courts begin the payment process with the final steps being completed by a division other than the IDSD of the SCA's office. It reportedly is not unusual for a provider to wait 6 weeks to be paid. SB 145 provides that the responsibility for the review of requests for preauthorization of these expenses and for processing the providers' fee statements will be centralized within the OPDS. The OPDS will be in a position to achieve consistency in the approval and payment processes and to reduce the time between submission of invoices and payment.

Caseloads

The number of cases accepted by the OPDS for appeal has long been an issue. At present, the OPDS accepts appeals, regardless of the number of attorneys available to do the appeals, and regardless of the fluctuation in the number of appeals. At times, this has produced a significant backlog. Appeals are processed on a "first in, first out" basis. Problems from several years ago led to a backlog of cases that has not yet been fully resolved. The Court of Appeals presently allows extensions of time of up to 300 days between the time the transcript is settled until the brief is due to be filed. Most of the OPDS attorneys have at least one case at any given time that is in danger of default and being dismissed. Many attorneys have more than one such case. Indigent Defense Program providers historically also have been required to accept caseloads that test their ability to provide adequate and timely representation. The systemic issue for the PDSC is establishing workload standards and limitations that protect against inadequate representation. The PDSC will need to determine and establish policies and methods to best allocate caseloads throughout the system to ensure quality and adequate representation.

Training

Only a few defender units have in-house training for new attorneys and on-going training resources. The Oregon Criminal Defense Lawyers Association provides seminars for continuing legal education, as does to a more limited extent, the Oregon State Bar. Concern has been expressed about the training levels of various providers, and some categories of indigent defense have been significantly limited in training altogether, at least until recently; i.e., civil commitment, postconviction relief and juvenile dependency. The PDSC should examine and determine whether to institute mandatory training requirements for new and existing public defense providers, how to provide training most cost effectively, and how to ensure adequate funding for training.

Public Education

Many providers believe the public, legislature and the media misunderstand or are in need of additional education with respect to the public defense function. The PDSC should examine ways to broadly communicate and enhance legislative and public understanding about the importance of ensuring that individuals eligible for public defense are appropriately represented.

The public defense function is more than a government service delivery program for the poor. It is a function based upon constitutionally and statutorily mandated rights. It is not simply a "benefits" program where the eligibility criteria can be adjusted based upon funding or the demand for services. It is required to provide legal representation to those who often are adjudicated to be the worst of the worst. And it is required to provide legal representation to some of this state's most vulnerable – such as child victims of abuse and those with significant mental illnesses.

Attorneys who accept public defense work risk ethical complaints being filed by dissatisfied clients and the filing of lawsuits against the lawyer, when a client alleges malpractice or as was the case recently, a client severely maimed himself awaiting transfer from a jail to the State Hospital. With this said, the administrators and the providers of public defense remain responsible for ensuring that scarcer and scarcer state resources are not inappropriately or inefficiently expended to meet the legal mandates. Administrators and providers need to better educate the public and the legislature with respect to the costs and demands of the public defense function and its relation to the other criminal and juvenile justice system components.

Trial and Appellate Collaboration

The PDSC has expressed significant interest in establishing ways that various public defense attorneys and administrators can assist each other, such as establishing systems to foster feedback between appellate attorneys and trial attorneys. Other collaborative efforts such as brief banks, transcript banks and shared research should be explored and funded.

Resource Center

Many trial attorneys complain that prosecutors have ready access to the Attorney General's appellate staff, even in the middle of trial. The OPDS does its best to provide the same service, and an attorney is available every day to answer questions from the trial bar. The PDSC should discuss and implement ways to increase this resource, including providing attorneys to assist with complex trials, in the manner of the Department of Justice's District Attorney Assistance Program.

PDSC Accomplishments to Date

The PDSC first met August 29, 2001. In November 2001, the PDSC held a two-day session to begin planning and setting goals for improving Oregon's public defense system. A number of issues were discussed and the benefits of the planning session are evident in the ambitious agenda and open discussions PDSC is pursuing with members of the indigent defense community, legislative and executive branch staff, and the public. An acting Executive Director was appointed by the PDSC in August, 2001.

The Commission is meeting monthly and has and continues to address critical issues, including the following:

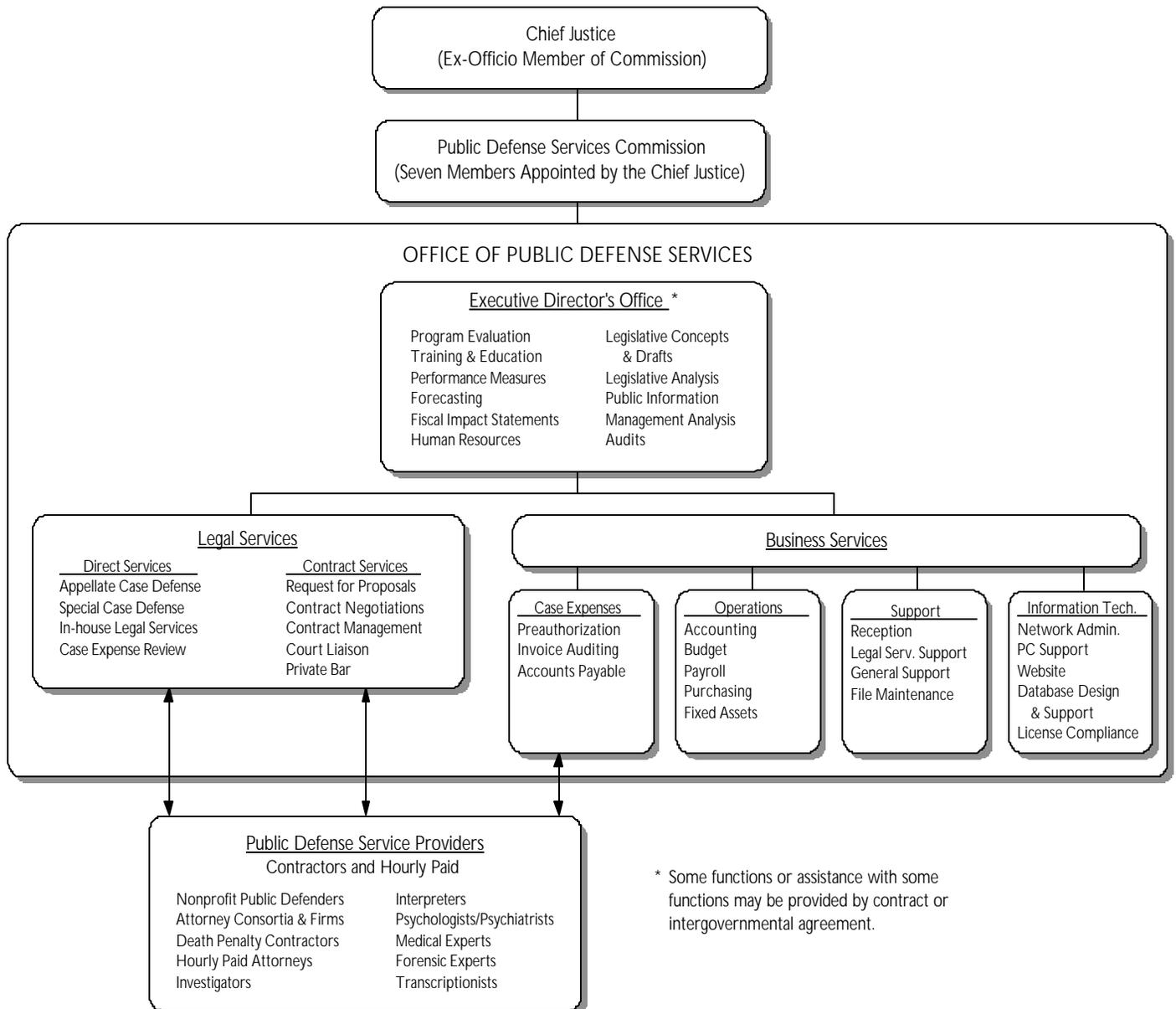
- Identifying position authority and permanent financing within existing resources for the hiring of an Executive Director;
- Drafting and approving a position description for the Executive Director and developing a plan to recruit the Executive Director by December 2002;
- Joining with the SCA in commissioning the operational review and guiding and monitoring its progress;
- Facilitating cooperative working relationships and workload solutions between the OPDS and the IDSD on interim and longer-term matters;
- Approving newly negotiated contracts with indigent defense providers and supporting the pilot appellate contract discussed above and the OPDS pilot assistance with postconviction relief appeals;
- Developing a legislative agenda and legislation to improve public defense services;
- Monitoring caseload backlogs and performance of the OPDS staff attorneys;
- Identifying methods and advancing efforts to better provide the resources and compensation of OPDS employees and indigent defense providers, while recognizing the present resources available to the system and the current budget climate;

- Identifying and working toward making improvements in areas of public defense representation (geographic and case type) that are in greatest need of assistance, including the establishment of a postconviction relief workgroup to propose legislative, administrative and funding recommendations;
- Meeting with and soliciting input from the OPDS staff and public defense providers;
- Supporting the IDSD and the OPDS interim efforts to improve the system for preparation and payment of transcripts for appeals; and
- Locating an office that will house the merged OPDS.

Proposed Organization Structure

The PDSC has determined that the merger of the OPDS, the IDSD, and the Indigent Defense Program must result in an integrated organization that is flexible, responsive, efficient and effective in serving those who provide and receive public defense services. The PDSC recognizes current resources are limited and that there is an expectation by many that the new organization will be cost-neutral. In addition, the PDSC has clearly communicated its belief that it can play a major role in improving the overall quality and consistency of public defense services.

Recognizing these goals, the Operational Review Team proposes the following organization structure for the 2003-05 biennium:



Executive Director's Office

For the PDSC and the OPDS to be effective, there must be a highly visible Executive Director who is knowledgeable and involved with the legislature and the public defense community. The Executive Director must be a strong Chief Executive and Chief Financial Officer for the state's public defense operation. He or she will be responsible for the overall quality of representation and the effective management of the system's financial and operational resources. The Executive Director reports directly to the PDSC and is accountable for executing the PDSC's policies, ensuring compliance with Oregon's public defense statutes, and ensuring the provision of direct legal services as mandated by the federal and state constitutions and state statutes and as directed by SB 145, consistent with national and state standards of representation.

Legal Services

Legal Services is responsible for ensuring that all public defense providers perform their responsibilities in a competent, consistent and effective manner. Staff attorneys provide legal representation in appellate cases, focusing primarily on criminal and postconviction relief appeals, but may be deployed to handle other case types where FTE service is found to be advantageous. Staff attorneys may also provide assistance to trial-level attorneys providing representation to indigent clients. The contracts unit negotiates and monitors contracts with attorneys and other professionals in the private sector, and acts as liaison with the trial courts. Legal services also will provide review of requests for pre-approval of non-attorney expenses in conjunction with Business Services.

Business Services

Business Services is responsible for the fiscal, operations and information management of the agency. This function includes accounting, budgeting, information technology, and business and case expense management. Business Services also provides the reception and administrative support services to the OPDS as a whole.

The proposed organization structure will integrate the operations of the OPDS and the present IDSD and the Indigent Defense Program. The separation of the IDSD from the SCA's office and the integration of the IDSD and the OPDS is a major undertaking that will require significant effort and some additional costs in the 2003-05 biennium. The consolidation of the two offices requires the creation of several administrative functions in the OPDS that were previously provided in part by the Judicial Department and the Department of Administrative Services. Although there will be some additional cost in 2003-05, we expect that as the new organization is implemented, there will be opportunities for greater efficiency and potential for savings in the 2005-07 biennium.

Public Defense Service Providers

The "Public Defense Services Providers" shown in the proposed organization structure are the attorney and non-attorney, independent contractors who provide 99 percent of total public defense services. They are located in a box outside the Office of Public Defense Services only because none of these providers are state employees of that office.

These private sector attorneys and other professionals are critical to the public defense function. This is true not only because of their number and proportionate coverage of the overall workload. These providers ensure a diversity of expertise, experience, methodologies, and private business models in a government mandated sector. These independent contractors range from the retired Oregon State Police forensics expert in Eastern Oregon to the young attorney who foregoes practice in a large civil law firm to represent children who have been abused or neglected, provided the young attorney is fortunate not to have incurred substantial student loan debt. They include attorneys in successful private practices who were young, public defenders 20 or more years ago, and who now accept public defense cases when a judge or a public defense administrator asks for assistance in particularly difficult cases.

The proposed new organization structure envisions enhanced interactions and collaboration between the merged OPDS and these non-state employee providers. For example, larger public defender offices that have training resources can be “tapped” to provide training for smaller contractors. Also, it is clear that greater efficiencies can be realized by improving the technology available both for the OPDS and the providers.

Other Recommendations

Because of the need to implement the merger, integrate and stabilize the internal systems, and to make the new organization fully operational, we are recommending that the PDSC not propose major changes during the 2003-2005 biennium to the present delivery system for indigent defense services.

However, there are a number of other recommendations the Operational Review Team believes the PDSC and the legislature should consider to improve the quality of representation and the effectiveness and the efficiency of the integrated system overall. Those recommendations are as follows:

Recommendation 1

Adopt a multi-biennium strategy to improve the compensation of OPDS employees and other public defense providers.

It is essential that the compensation (salaries and benefits) of OPDS employees and other public defense providers be reviewed and compared to each other and their counterparts in the criminal and juvenile justice systems. It is essential then that the funding necessary to provide comparable compensation within the public defense system itself for attorneys and staff and within the justice system as a whole be secured. OPDS attorneys are compensated at levels below their counterparts in the Department of Justice, who in many cases have similar or lesser duties and responsibilities. The same holds true for many contract attorneys and staff. Those who provide legal representation on an hourly rate basis, with few exceptions, receive the same hourly rate as that provided in 1991. These providers are especially out of sync with their fellow defense attorneys and counterparts.

The compensation issue is not new. Both the OPDS and the IDSD have submitted budget policy packages to increase compensation over past biennia without success.

Appendix 4 contains an analysis prepared by the OPDS showing the disparity between OPDS attorneys and their counterparts in the Department of Justice, the Judicial Department and the Legislative Counsel Office. This appendix also includes an analysis prepared by Metropolitan Public Defender Services, Inc. that shows the disparity between the Multnomah County District Attorney’s office and its staff. This is representative of the disparities that exist in other counties such as Deschutes and Lane Counties.

These discrepancies have made it very difficult to locate and retain attorneys as indigent defense providers, particularly in some geographic locations and for some case types, such as postconviction relief. As a result, overall system quality and efficiency suffers. The IDSD expends substantial staff time in locating and convincing attorneys to accept appointment to cases where more local counsel should be available.

Recognizing it is unlikely that the 2003 legislature can provide sufficient General Fund resources to completely rectify the issues of compensation during the next biennium, the Operational Review Team recommends that the PDSC develop a three-biennium strategy, with improvements charted for each of the biennia, for submission to the legislature. The goal of the strategy would be to educate the legislature on the current compensation issues and obtain legislative commitment to adopt the three-biennium strategy. We recommend that the PDSC immediately assign the transition team responsibility for calculating the amount of funding necessary for inclusion in the PDSC’s budget requests for 2003-05, 2005-07 and 2007-09.

Recommendation 2

Clarify criteria and goals and revise the contracting process to create a system of long-term service providers while at the same time, ensuring access and recruitment of new attorneys to the system, and the rewarding of quality of representation, creativity, innovation and efficiency.

During the indigent defense contract provider interviews, the issue of disparities between the compensation amounts contract providers receive was raised. There are a number of reasons for differences, including the types of cases a contractor agrees to accept, staffing levels and types of staffing, geographical location in terms of cost-of-living and its ability to attract providers, longevity of the contractor, lack of available or competing contractors, actual caseloads, the form of the contractor's business (i.e., nonprofit public defender, consortium, hourly provider, etc.), and the way the negotiation process plays out. Systemwide under-funding has made it difficult for IDSD staff to equalize funding and eliminate funding discrepancies. Progress has been made, but further improvement is necessary.

Criteria for contracting and contracting goals need to be clearly established and consistently applied. For example, it currently is not clear whether the IDSD's role is to contract for the greatest number of cases at the lowest cost (low-bid contracting) or contract with those organizations and attorneys most likely to be able to provide quality representation at a market rate under that of the private sector. This and the resource levels within the IDSD and Indigent Defense Account historically have resulted in protracted contract negotiations where some contractors may continue to provide representation under extensions of a contract. In addition, not all of the IDSD analysts approach contracting the same way. This creates further contracting discrepancies.

We recommend that the PDSC:

- Devote sufficient administrative resources to the Contracts Unit of the proposed organization for the OPDS so that contracts are negotiated in a timely and consistent manner;
- Establish clear goals and criteria for consistent and effective contracting; and
- Ensure such goals and criteria encourage long-term, quality contract services that are cost-effective, ensure access and recruitment of new attorneys, and reward creativity, quality of representation, innovation and efficiency on the part of contractors.

Recommendation 3

With the transition, transfer and other pressing issues that the PDSC needs to address during this and the next biennium, the OPDS and the PDSC should defer any decisions with respect to systemic changes in the delivery of public defense legal services, except where clearly indicated.

The current independent contractor and private bar system of providing the majority of public defense legal services overall is working well. With the improvements recommended in Recommendation 2, and the pressing other business of the PDSC during this interim and next biennium, we recommend the PDSC continue to study the current contract system and service and defer any decisions that would significantly impact that system until further study and consultation is concluded.

Recommendation 4

Streamline the processes for requesting pre-approval and payment of non-attorney case related expenses. Most of those providers who were interviewed indicated that the processes for submitting for pre-approval and payment of non-attorney case-related expenses, such as medical records and outside investigation and professional services, were timely and working fairly well. Generally, requests for pre-approval of such expenses in Aggravated Murder and Ballot Measure 11 cases are reviewed by the IDSD. Judges and local court staff generally review the remainder.

All billings for such services (as well as non-contract attorney fee statements) are processed for review and payment through the local courts. With judge approval, the billings are then forwarded to the Financial and Administrative Services Division of the SCA's office, which reviews the billings a second time and processes them for payment. With the establishment of proper internal controls within the merged OPDS, this duplicative system for processing public defense billings can be greatly improved in terms of ensuring that payments are processed appropriately and in a consistent and timely manner.

We recommend that the PDSC ensure improved systems (personnel and technological) be implemented when the Indigent Defense Program transfers into the OPDS. All non-attorney case expenses should be reviewed and preauthorized by the OPDS's Business Services, with the assistance of Legal Services when necessary, including the administrative final decisions of partial or full denials when appealed. Business Services must be adequately staffed and must design its approval and payment processes to provide for payment of approved expenses within a thirty-day period.

Recommendation 5

Adopt the Department of Administrative Services' classification and compensation system for OPDS employees and develop personnel rules.

The PDSC has the statutory responsibility to establish an employee compensation plan and accordingly, classification system that is commensurate with other state agencies. The Operational Review Team met with both the personnel directors for the Oregon Judicial Department and the Department of Administrative Services (DAS).

The Judicial Department's classification and compensation system is oriented toward the court system. Consequently, there are a very limited number of classifications and the classifications do not match the administrative responsibilities of the IDSD well.

Currently, OPDS staff are included in the DAS classification and compensation system. However, the attorney staff are in a series of classifications with compensation unique to that office rather than classifications that mirror those established for DOJ attorneys and staff.

With a new OPDS structure, we recommend the PDSC adopt its own compensation and classification system that in all or most respects mirrors those that already exist within the DAS system. It is also essential for the PDSC to adopt personnel policies. Currently, the IDSD is subject to the Judicial Department's personnel policies. The OPDS does not have formally adopted policies, but generally follows the Department of Administrative Services policies. We recommend that the PDSC adopt personnel policies similar to those of the Judicial Department, provided an exception to ORS Chapter 240 is legislatively approved.

Recommendation 6

Reevaluate and, where necessary, revise OPDS employee work schedules to meet the workload demands of the new organization.

The nature of the OPDS's work requires the agency to look outside of the Salem area for employees with the required experience. A significant number of the OPDS and the IDSD employees do not live in Salem. Recognizing the compensation issues discussed throughout this report, intangible benefits such as telecommuting, flexible work schedules, or work at home days create a non-financial benefit and a broader market from which to draw employees. The OPDS and the IDSD have both approved alternative working arrangements for a number of employees. Many employees have indicated this was a major consideration in their decision to work for the OPDS and the IDSD.

The new OPDS organization will have legal and business services work units that have significantly different duties and workload demands than the current OPDS and the IDSD. While we support

flexibility in scheduling, these decisions must be made so that agency efficiency and productivity are not impacted. When the OPDS and the IDSD are fully integrated, we recommend review of all employees' work schedules to assure that the PDSC's work is accomplished efficiently and effectively.

Recommendation 7

Establish case and/or workload standards and establish a system to ensure cases handled by Legal Services attorneys comply with such standards and consider the establishment of standards for private sector public defense providers.

The former SPD Committee set a cap on the number of appeals each attorney in the State Public Defender's office should handle. The figure was set at four merit appeals per attorney per month. This policy was not effectively implemented for a number of reasons, including overall availability of public defense resources.

The combined Legal Services unit recommended for the merged agency gives PDSC flexibility to contract with private sector counsel. The PDSC should be able to establish and enforce case and workload standards for the number of appeals handled by state employee attorneys. The OPDS has determined that an average appellate attorney can process no more than 42 weighted merit appeals per year. The PDSC should review this determination and establish a standard. Even at the 42 weighted merit appeals per year standard, Oregon will be in the top three states in terms of the number of appeals processed per attorney. The IDSD has agreed to experiment with contracting out some OPDS backlog and "excess" appeals this biennium to determine its effectiveness in managing caseloads. PDSC may also consider setting workload standards for all or some of those case types where independent contractors provide services.

Recommendation 8

Explore establishment of a resource center to assist public defense attorneys and a training college for new public defense attorneys.

Many public defense attorneys have identified a significant gap between the assistance the Attorney General's office provides district attorneys and the level of assistance the OPDS provides to public defense attorneys. This is especially true for death penalty and other complex cases. In those cases, the Attorney General sends attorneys to some counties when requested to provide assistance. Similar assistance is not available to public defense attorneys due to the lack of resources in the OPDS.

Training opportunities for public defense attorneys who are new to the practice are limited. We believe there is merit in establishing a mandatory training college for new public defense attorneys regardless of whether they are employed by nonprofit public defenders, contract offices or functioning as sole practitioners.

As the first step, the PDSC should appoint a committee to explore and recommend ways to establish a resource center that is staffed by Legal Services and to evaluate how to use training resources presently available throughout the public defense system to establish a training college.

Recommended Implementation Plan

This report contains a number of recommendations that will significantly impact the workloads of the IDSD and the OPDS. Both of these offices are currently stretched and working diligently just to keep up with daily demands. It is important that progress is made on the recommendations in this report and on the integration of the new organization. However, change of this magnitude must be realistically staged. Therefore we recommend that the tasks and recommendations in this report be implemented as follows:

Task/Recommendation	By 8/31/02	By 12/31/02	By 6/30/03	By 12/31/03
Continue to refine and finalize the position levels, duties and responsibilities in the new organization structure.	X			
Develop and finalize the 2003-05 biennial budget request and the policy packages required to implement the new organization structure and funding for Recommendation 1.	X			
Recruit the PDSC Executive Director.		X		
Ensure all PDSC proposed 2003-05 legislation is finalized.	X			
Recommendation 1 Adopt a multi-biennium strategy to improve the compensation of employees and non -employee service providers.	X			
Recommendation 2 Clarify criteria and goals and revise the contracting process to create a system of long-term service providers while at the same time, ensuring access and recruitment of new attorneys to the system, and the rewarding of quality of representation, creativity, innovation and efficiency.			X	
Recommendation 3 With the transition, transfer and other pressing issues that the PDSC needs to address during this and the next biennium, the OPDS and PDSC should defer any decisions with respect to systemic changes in the delivery of public defense legal services, except where clearly indicated.				
Recommendation 4 Streamline the processes for requesting pre-approval and payment of non-attorney case related expenses.			X	
Recommendation 5 Adopt the Department of Administrative Services' classification and compensation system for OPDS employees and develop personnel rules.		X		
Recommendation 6 Reevaluate and, where necessary, revise OPDS employee work schedules to meet the workload demands of the new organization.			X	

Task/Recommendation	By 8/31/02	By 12/31/02	By 6/30/03	By 12/31/03
<p>Recommendation 7 Establish case and/or workload standards and establish a system to ensure cases handled by Legal Services attorneys comply with such standards and consider the establishment of standards for private public defense providers.</p>			X	
<p>Recommendation 8 Explore establishment of a resource center to assist public defense attorneys and a training college for new public defense attorneys.</p>				X
<p>Complete the integration of the IDSD and the implementation of the new PDSC organization structure and systems.</p>				X

Commendation

The Operational Review Team appreciates the cooperation, insights and perspectives received to date from PDSC members, Oregon state agency employees, IDSD contract and non-contract service providers, and others who have assisted with this project. We were impressed throughout the project with participants' concerns and genuine commitment to providing the highest quality services and representation possible to those who depend on the system for their legal representation.

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Appendices

Executive Director**Appendix 1**

OPDS Appellate Case Backlog Analysis.....**Appendix 2**

OPDS Proposed Organization Chart and Staffing**Appendix 3**

Compensation.....**Appendix 4**

Executive Director

The following is an excerpt from the PDSC Executive Director position description that was submitted to and approved by the Commission at its March 21, 2002 meeting. The Department of Administrative Services is currently reviewing the position description and the financing plan. The PDSC's goal is to fill the position no later than December 31, 2002.

SECTION 3. DESCRIPTION OF DUTIES

The Executive Director's statutory duties are as follows:

1. Recommend to the PDSC how to establish and maintain, in a cost-effective manner, the delivery of legal services to persons entitled to, and financially eligible for, appointed counsel at state expense under Oregon statutes, the Oregon Constitution, the United States Constitution and consistent with Oregon and national standards of justice.
2. Implement and ensure compliance with contracts, policies, procedures, rules and standards adopted by the commission or required by statute.
3. Prepare and submit to the PDSC for its approval the biennial budget of the commission and the OPDS.
4. Negotiate contracts, as appropriate, for providing legal services to persons financially eligible for appointed counsel at state expense. All contracts are subject to the review and approval of the PDSC.
5. Employ personnel or contract for services as necessary to carry out the responsibilities of the Executive Director and the OPDS.
6. Supervise the personnel, operation and activities of the OPDS.
7. Provide services, facilities and materials necessary for the performance of the duties, functions and powers of the Public Defense Services Commission.
8. Pay the expenses of the PDSC and the OPDS.
9. Prepare and submit to the commission and the Legislative Assembly an annual report of the activities of the OPDS.
10. Provide for legal representation, advice and consultation for the commission, its members, the Executive Director and staff of the OPDS, as necessary.

The following anticipated duties of the Executive Director are based upon the above statutory duties and the current duties of the Indigent Defense Services Division Director and the Acting Executive Director of the OPDS. These duties may be changed or allocated differently depending upon the structure and the level of personnel and other resources eventually made available to the PDSC and the OPDS.

DUTIES

Manager of the Office of Public Defense Services and PDSC Support

- Serve as the PDSC's chief executive and financial officer to ensure the effective management of the OPDS. Develop, monitor and promote the mission, goals and objectives of the PDSC and the OPDS. Provide for all support resources and information necessary for the PDSC to perform its statutory and other responsibilities effectively and timely. Prepare an annual report on the activities of the OPDS and submit the report to the PDSC, as well as to the Legislative Assembly.
- Employ, supervise and provide for the training of senior management and other OPDS staff. Prepare and revise, as needed, a compensation plan for the OPDS that, if adopted by the PDSC and properly funded, is commensurate with other state agencies and provides for parity for professional and non-professional staff. Provide for human resources systems, policies and support for proper management and staff assistance. Provide for information technology systems and support necessary for the effective and efficient operation of the OPDS.

- Provide for accounting and auditing systems, policies and procedures, and staffing that ensure fiscal accountability, compliance with all state laws, and the review and processing of Public Defense Services Account obligations in a timely manner. Provide for the review and approval of administrative costs for the OPDS and PDSC and proper management of the fiscal resources appropriated to the PDSC, the OPDS and the Public Defense Services Account. Ensure the establishment and revision of all other necessary office policies and operating procedures in a timely manner and ensure compliance therewith.

Manager of Oregon's Public Defense System

- Serve as the PDSC's chief executive and financial officer to ensure the effective management of the statewide public defense system and the provision of quality, mandated legal representation to those who are eligible. Develop, monitor and promote the mission, goals and objectives of the PDSC and the OPDS.
- Provide for the preparation and revision, as needed, of public defense policies and procedures, as required by law and as otherwise necessary, in accordance with national and state standards for the public defense function and submit the same for adoption by the PDSC. Such policies and procedures include, but are not limited to professional qualification and performance standards for legal representation, compensation rates and limitations, financial eligibility for appointed counsel, the appointment of counsel and procedures for contract negotiations. Provide for management systems and personnel to ensure timely monitoring of expenditures from the Public Defense Services Account and trending of caseloads.
- Provide for management systems and personnel trained to review attorney and non-attorney written contract proposals, including methods to assess the quality of and cost-effectiveness of the proposed services. Provide policy and procedures for OPDS staff responsible for negotiating preliminary agreements for contract services. Review all preliminary agreements and submit proposed contracts to the PDSC for approval.
- Serve on or provide for OPDS representation on local, statewide and national committees that impact or are involved with the public defense function; e.g., state criminal justice advisory committee, the Juvenile Court Improvement Project, Oregon State Bar public defense task forces. Provide support to local public defense providers, as needed, for improvements to the justice systems within which they work.

Legislative - Budget, Fiscal Impact Statements, Substantive Law and Education

- Prepare the biennial budget of the PDSC and the OPDS and submit the budget for the PDSC's approval. Advocate and provide the support and education services necessary for the legislative adoption of an operations and direct services budget that will ensure the effective and efficient administration and provision of public defense services. Prepare budget presentations, documents and reports for the PDSC and the Public Safety Subcommittee of the Ways & Means Committee, in support of the biennial current service level budget and policy packages. Appear before the Public Safety Subcommittee to assist the PDSC and Chief Justice in the presentation of the budget request and respond to questions from subcommittee members and staff.
- Provide for the identification and drafting of legislative concepts necessary for the effective management of the PDSC, the OPDS and the public defense program. Review legislative counsel bill drafts and amend as needed. Write testimony for submission to the Legislative Assembly regarding bills that involve or impact the public defense program, the PDSC or the OPDS. Appear before legislative (generally, judiciary) committees, provide testimony and address legislators' questions on bills and the public defense program.
- Provide for the review and assessment of bills that will impact (fiscally, procedurally, substantively) the public defense system. Provide for the preparation of formal Fiscal Impact Statements (FIS) for submission to the Legislative Fiscal Office, generally under very short time frames.
- Serve on or provide for OPDS-representation on work groups established by legislative committee chairs on topics related to public defense and the justice systems in which public defense representation is mandated.
- During legislative interims, as well as during legislative sessions, actively engage in educational and outreach efforts to enhance legislators' understanding and appreciation of the public defense function and system in Oregon, including the positive impact the function has on other justice system components.
- Prepare an annual report on the activities of the OPDS and submit the report to the PDSC and Legislative Assembly.

Additional Duties

- Review and respond to contacts from the press, judges, trial court administrators, legislators, other states' and governments' public defense programs, and others on issues relating to the Oregon's public defense system. Provide for legal representation, as needed, for the PDSC and OPDS staff, including the review of subpoenas and public records requests. Meet with public defense providers on a regular basis, including local visits. Arrange and directly participate in outreach efforts to educate the public, private sector businesses and organizations, and state and local government representatives on the public defense function and the importance of its role.

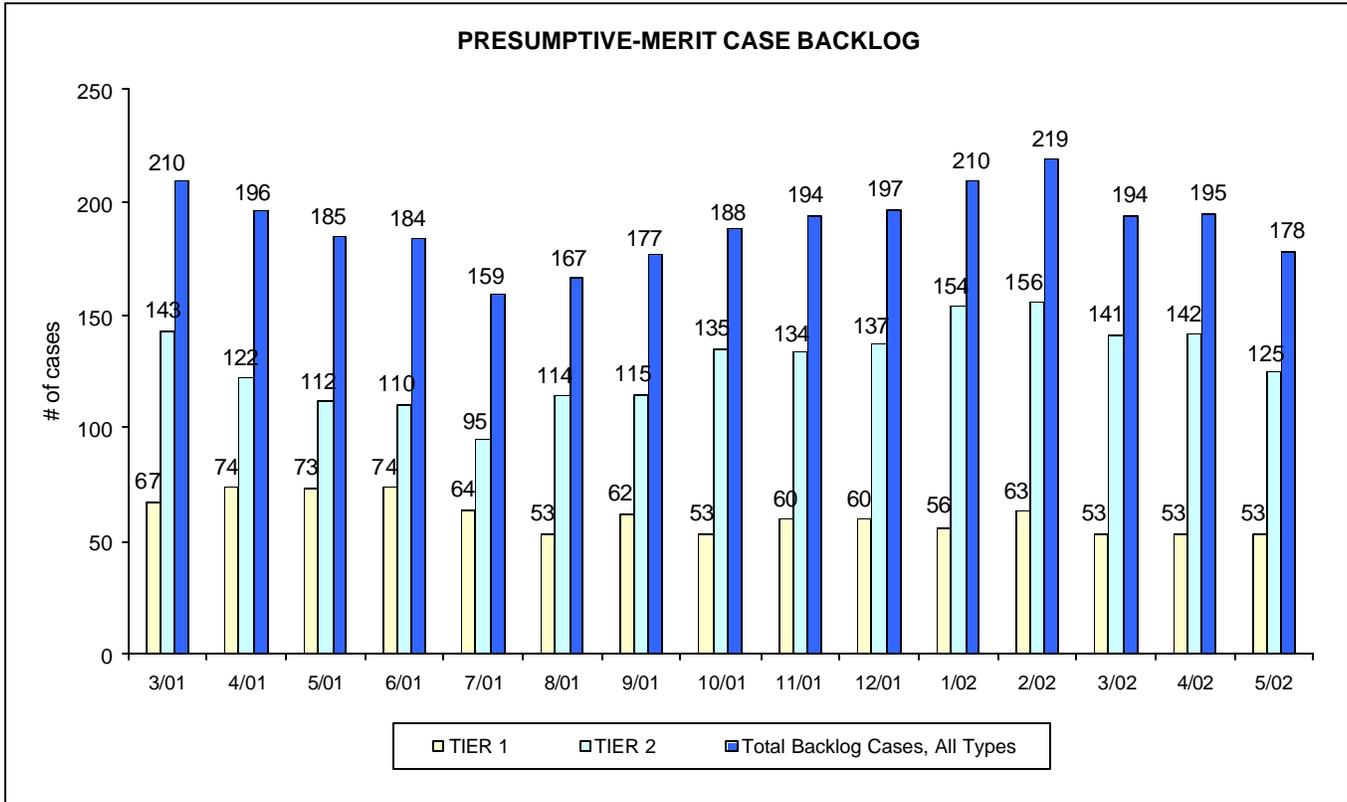
OPDS Appellate Case Backlog Analysis

May 2002 OPDS Caseload Status Report

- ◆ Caseload problems are with timely processing of non-capital appeals. Except in one rare situation, all non-capital appeals start in the Court of Appeals; consequently, this report focuses only on non-capital appeals.
- ◆ The biggest hurdle in case processing is completing opening-brief stage. By now attorneys have completed that stage in virtually all cases assigned before March 2001; consequently, this report mainly focuses on the 14-month period from March 2001 to April 2002.
- ◆ The Office's cases are sorted into two main groups: (1) presumptive-merit and (2) presumptive-Balfour (or HB 2351).
 - "Presumptive-merit" means appeals stemming from jury, bench, and stipulated-facts trials, conditional pleas, parole appeals, and state's appeals.
 - "Presumptive-Balfour" means appeals stemming from guilty and no-contest pleas, and from probation violation and resentencing hearings.
 - HB 2351 imposes "colorable claim of error" requirement on filings of notices of appeal in most presumptive-Balfour cases whose judgments were entered after January 1, 2002. So far this requirement has reduced the Office's filings in such cases by nearly 70%.
 - Historically, around 30% of attorney time was been spent on presumptive-Balfour portion of caseload. Post-HB 2351, this could decrease to 10%.
- ◆ Most pressing caseload problem is the Office's case backlog.
 - Backlog is measured by number of presumptive-merit cases whose opening brief is still due and is on extension beyond the initial 210-day period the Court of Appeals allows Office attorneys to file opening briefs.
 - For non-Office attorneys, court rules allow 49 days to file briefs, but with one "no-questions-asked" first extension of 28 days, for a 77-day total.
 - Office attorney may get additional extensions until total exceeds 300 days. At that point, the court issues a "no further extension" (NFE) order. Absent an emergency, if the attorney does not complete briefing-stage within NFE deadline, the court can dismiss the appeal.
- ◆ Backlog measured as follows:
 - Tier 1:** cases over 300 days old (i.e., NFE cases)
 - Tier 2:** cases 211 to 300 days old
 - Total backlog**
- ◆ Current average time to complete briefing-stage on presumptive-merit cases: 320 days.
- ◆ Until 1997, the Court of Appeals allowed the Office an initial period of 119 days, rather than 210 days, to complete briefing-stage.
- ◆ Estimated time to complete under 119-day initial period: 181 days. Difference between current and former averages is 139 days (320 – 181), so nearly five months.
- ◆ Table A (Presumptive-Merit Case Backlog) shows on March 2001—start of 14-month measurement period—the backlog was 210 cases.
- ◆ Current backlog is 178 cases. Backlog previously was at or below that level July to September 2001.

- ◆ In measuring case assignments:
 - Assume that 5% of presumptive-merit cases will consolidate into other cases, and that 20% of presumptive-Balfour and HB 2351 cases will consolidate into other cases.
 - Assume that each four presumptive-Balfour cases are the weighted equivalent of one presumptive-merit case, and that each three HB 2351 cases are the weighted equivalent of one presumptive-merit case.

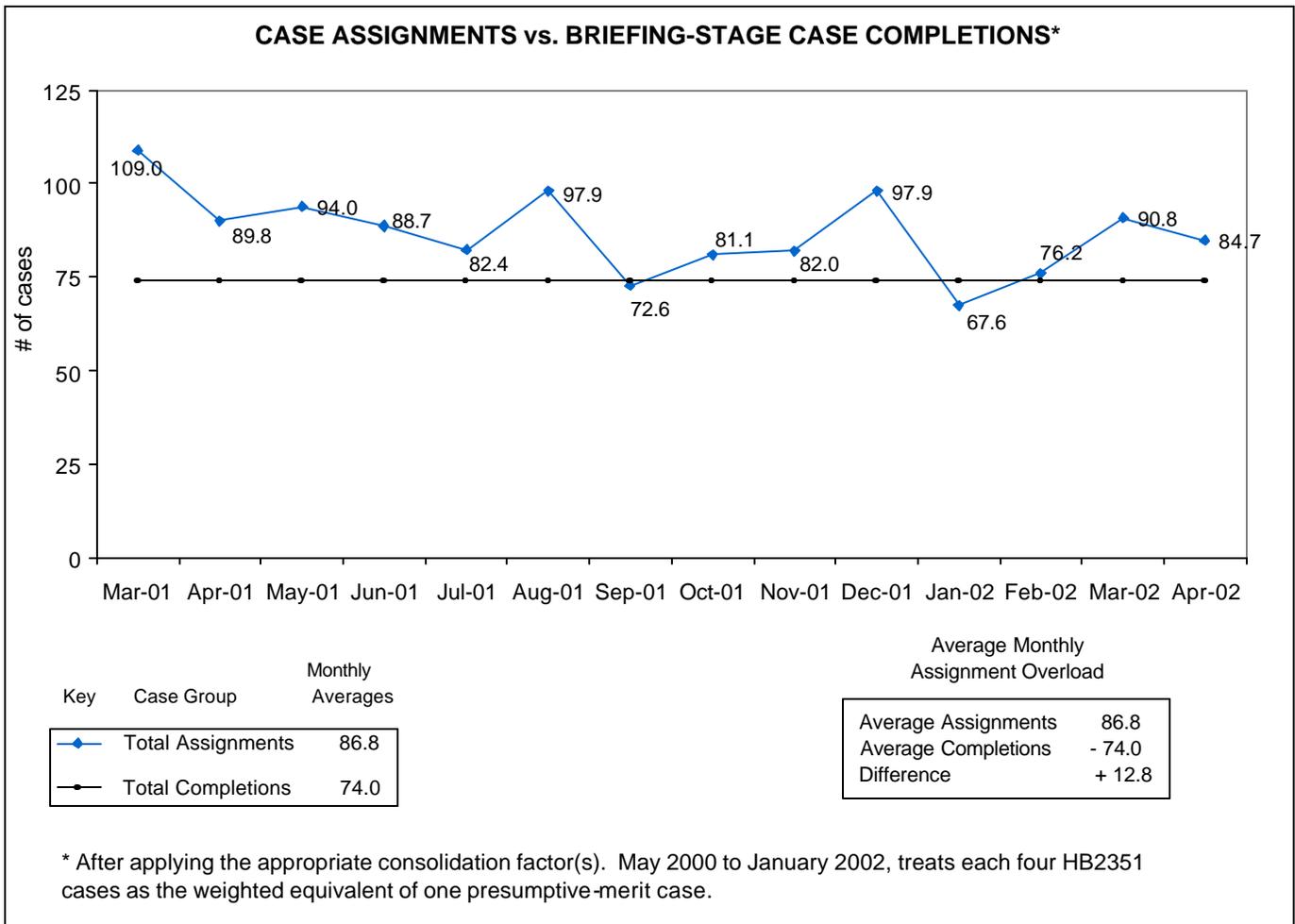
Table A



TIER DESCRIPTIONS	
Tier 1	Current NFE cases (301+ days since record settlement)
Tier 2	Total non-NFE cases on extension beyond initial 210-day briefing period

- ◆ **Table B** (Case Assignments vs. Briefing-Stage Case Completions) shows over 14-month period, Office assigned, post-consolidation, 1,215 presumptive-merit (weighted) cases.
- ◆ Over 14-month measurement period, Office attorneys completed, post-consolidation, presumptive-merit (weighted) briefing-stage work on approximately 1,042 cases. This yields monthly Office-wide average of 74 such cases, also shown in Table B.
- ◆ **Table B** shows difference between case assignments and completions over 14-month period. Difference equals case-assignment overload. Total overload for period: 12.8 average monthly overload x 14 months = 179 cases.

Table B



Assignment overload plus March 2001 backlog equals potential backlog, as follows:

Assignment overload: 179 cases
 3/01 backlog: 210 cases
 Potential backlog: 389 cases

- ◆ Remarkable that May 2002 backlog is “only” 178 cases.
- ◆ Three continuing concerns:
 - Unmanageable caseload standards. See Table C (Caseload Comparison Chart).
 - No “cap” or “ceiling” on case referrals the Office will accept.
 - Salary disparities of 10 to 34% compared to comparable positions in other state agencies. See **Appendix 4** See also ORS 151.216(1)(f) (requiring the PDSC to “[a]dopt a compensation plan for the office of public defense services that is commensurate with other state agencies”); ORS 240.190 (“declar[ing] * * * the public policy of the State of Oregon to attempt to achieve an equitable relationship between the comparability of the value of work * * * performed by persons in state service and the compensation and the classification structure within the state system”).

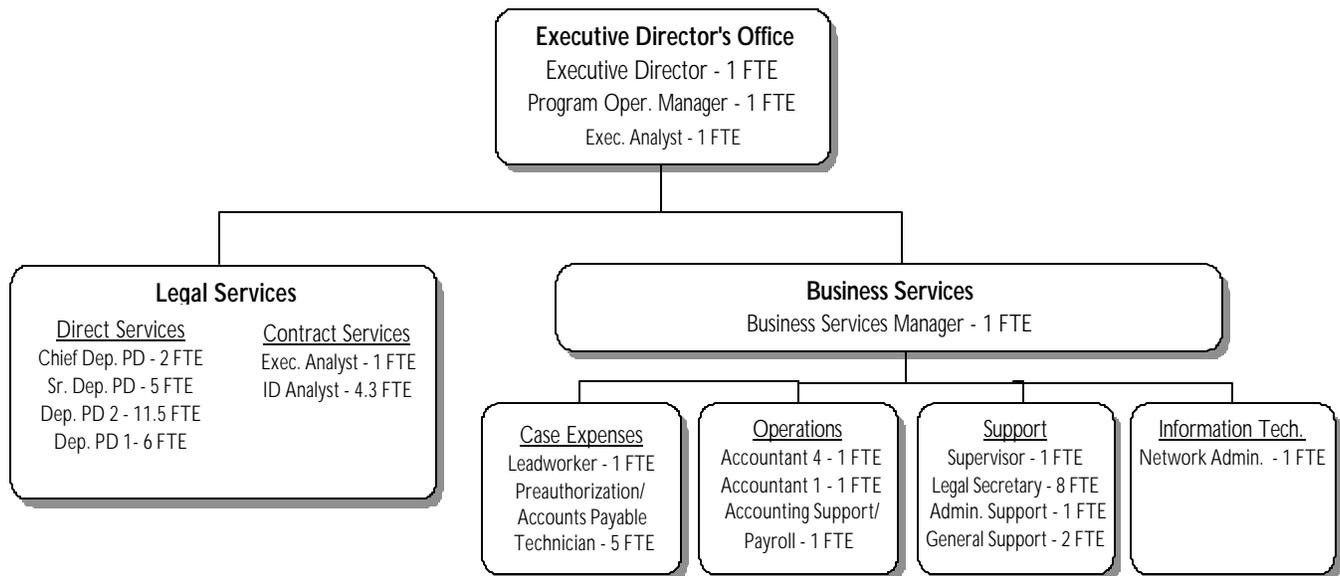
Table C CASELOAD COMPARISON CHART
 Per Attorney, Annual

Office of Public Defense Services ¹	
Standard before 7/24/00	61
Actual assignments 3/01 to 4/02 (annualized)	50
Standard since 7/24/00 ²	48
Briefing-stage completions 3/01 to 4/02 (annualized)	42
American Bar Association, National Legal Aid & Defender Ass'n, and Washington Defender Ass'n (recommended standard)	25
California State Public Defender	25
Colorado State Public Defender	25
Florida Public Defender Association	50
Georgia Indigent Defense Council	25
Indiana Public Defender Commission	25
Louisiana	
Louisiana Indigent Defense Services Board	50
Louisiana Appellate Project	40
Missouri State Public Defender System	28
Nebraska Commission on Public Advocacy	40
New York Legal Aid Society's Criminal Appeals Bureau	25
Vermont Office of the General Defender	25
Washington State	
Nielsen & Broman	36
Washington Appellate Project	33

¹ Post-consolidation presumptive-merit (weighted)

² Standards set by former Public Defender Committee. By operation of SB145, section 8, now are Commission standards.

OPDS Proposed Organization Chart and Staffing



Compensation

Attorney Compensation Comparisons

The following chart compares the current monthly salary ranges for OPDS attorneys and staff with their counterparts or attorneys with similar duties in the Department of Justice, the Judicial Department and the Legislature's Legislative Counsel Office. These comparisons demonstrate that attorney compensation in the OPDS lags behind compensation in other state agencies.

OFFICE OF PUBLIC DEFENSE SERVICES										
TITLE	SALARY RANGE	S1	S2	S3	S4	S5	S6	S7	S8	S9
PUBLIC DEFENDER	37	5229	5486	5763	6048	6342	6659	6996	7344	
CHIEF DEPUTY PUBLIC DEFENDER	36	4978	5229	5486	5763	6048	6342	6659	6996	
SR DEPUTY PUBLIC DEFENDER	32	4099	4308	4523	4745	4978	5229	5486	5763	
DEPUTY PUBLIC DEFENDER 2	30	3720	3903	4099	4308	4523	4745	4978	5229	
DEPUTY PUBLIC DEFENDER 1	28X	3223	3383	3546	3720	3903	4099	4308	4523	4745
PARALEGAL 1	17	1958	2054	2143	2252	2360	2470	2586	2710	
DEPARTMENT OF JUSTICE										
TITLE	SALARY RANGE	S1	S2	S3	S4	S5	S6	S7	S8	S9
DEPUTY ATTORNEY GENERAL (PEMI)	42X	6342	6659	6996	7344	7703	8088	8487	8916	9356
SOLICITOR GENERAL (PEMH)	40X	5763	6048	6342	6659	6996	7344	7703	8088	8487
ASSISTANT SOLICITOR GENERAL (PEMH)	40X	5763	6048	6342	6659	6996	7344	7703	8088	
SR ASSISTANT ATTORNEY GENERAL	36S	4988	5242	5501	5781	6069	6367	6686	7027	
ASSISTANT ATTORNEY GENERAL	29	3541	3718	3903	4101	4313	4529	4753		
PARALEGAL 2	21	2359	2472	2586	2709	2840	2971	3115	3272	
JUDICIAL DEPARTMENT										
TITLE	SALARY RANGE	S1	S2	S3	S4	S5	S6	S7	S8	S9
DIRECTOR INDIGENT DEFENSE	28	5540	5818	6110	6415	6737	7072	7426		
DEPUTY STATE COURT ADMINISTRATOR	30	6110	6415	6737	7072	7426	7796	8185		
APPELLATE LEGAL COUNSEL	28	5540	5818	6110	6415	6737	7072	7426		
ASSISTANT APPELLATE LEGAL COUNSEL	24	4557	4786	5027	5276	5540	5818	6110		
LEGAL COUNSEL	28	5540	5818	6110	6415	6737	7072	7426		
ASSISTANT LEGAL COUNSEL	26	5027	5276	5540	5818	6110	6415	6737		
APPELLATE STAFF ATTORNEY	26	5027	5276	5540	5818	6110	6415	6737		
LAW CLERK	17	3241	3402	3571	3750	3937	4134	4342		
PARALEGAL	10	2303	2418	2538	2663	2801	2938	3087		
LEGISLATIVE COUNSEL										
TITLE	SALARY RANGE	S1	S2	S3	S4	S5	S6	S7	S8	S9
LEGISLATIVE COUNSEL	41X	6342	6659	6996	7344	7703	8089	8488	8912	
CHIEF DEPUTY LEGISLATIVE COUNSEL	36	4978	5229	5486	5763	6048	6342	6659	6996	
SR DEPUTY LEGISLATIVE COUNSEL	35	4745	4978	5229	5486	5763	6048	6342	6659	
DEPUTY LEGISLATIVE COUNSEL	33	4308	4523	4745	4978	5229	5486	5763	6048	

¹ Same salary range as the Deputy Public Defender 1

² Same salary range as the Deputy Public Defender 2. The only difference is the PEM/D series has a ninth step.

³ Same salary range as the Senior Deputy Public Defender. The only difference is the PEM/E series has a ninth step.

In March 2002, Metropolitan Public Defender published and submitted a report to the Public Defense Services Commission entitled *Is Justice Equal? Factors affecting the recruiting and retention of staff at the Metropolitan Public Defender*. This report contains an extensive analysis demonstrating the salary disparity between attorneys at the Multnomah County District Attorney's office and the Metropolitan Public Defender. The following charts from the report compare the two organizations' annual attorney salaries in 1992 and 2002.

	Metropolitan Public Defender Jul-92	Multnomah County District Attorney Jul-92
Entry Level	\$25,206	\$30,777
1	\$27,696	\$33,784
2	\$29,568	\$36,018
3	\$31,452	\$37,814
4	\$33,324	\$39,714
5	\$35,208	\$41,676
6	\$37,092	\$43,806
7	\$38,964	\$45,957
8	\$40,848	\$48,254
9	\$42,720	\$50,718
10		\$53,223
11		\$55,875

	Metropolitan Public Defender Jan-02	Multnomah County District Attorney Jan-02
Entry Level	\$38,320	\$46,792
1	\$41,046	\$49,882
2	\$43,456	\$52,429
3	\$46,089	\$54,977
4	\$48,038	\$57,733
5	\$50,079	\$60,656
6	\$52,226	\$63,684
7	\$54,465	\$66,878
8	\$56,822	\$70,261
9	\$59,297	\$73,706
10		\$77,381
11		\$81,244

10-Year Comparison - Attorney Wage Scales

