Public Defense Criminal Justice Reform
Advisory Task Force

Report and Recommendations

to the King County Council and King County Executive
August 30, 2013

Members:

Christie Hedman (Chair)  Washington Defender Association
Marvin Lee  Hollenbeck Lancaster Miller & Andrews
Sophia Byrd McSherry  Washington State Office of Public Defense
Karen Murray  Associated Counsel for the Accused
Jon Ostlund  Whatcom County Public Defender (Ret)
Brenda Williams  UW School of Law Tribal Court Public Defense Clinic
George Yeannakis  TeamChild
August 30, 2013

King County Council Executive Constantine
King County Courthouse King County Chinook Building
514 Third Ave., Suite 1200 401 Fifth Ave., Suite 800
Seattle, Washington 98104 Seattle, Washington 98104

Dear King County Council and Executive Constantine:

The King County Public Defense Criminal Justice Reform Advisory Task Force (PDAT) is pleased to convey its report and recommendations in response to its charge in Ordinance 17588 on whether it is feasible to use outside services as a means of promoting innovative public defense work.

The PDAT met seven times starting on June 26, 2013. Due to the short time frame, the task force presents an overview of potential options identified after reaching consensus on the recommendations. We recommend the County use outside services as a means of promoting innovative public defense work, and as a means of ensuring King County’s continuing commitment to the provision of client-centered, social justice based public defense services.

The recommendation includes the essential element that social justice oriented/holistic defense be the foundation for all public defense services in King County, not just for an outside entity or entities. It is critical that the Department of Public Defense (DPD), all of its divisions as well as conflict counsel and public defense service contractors provide the same level of quality and access to services based in holistic defense principles. All public defense clients deserve high quality services and it is important that specialization within divisions or outside entities not favor one type of client over another.

The task force’s time frame limited our ability to receive input from the broader community on our final recommendations. Therefore, we strongly urge distribution of the final task force report to the stakeholder community, including posting on the PDAT web site for comment before the County chooses to take any final action on the recommendations. Additionally, we recommend the County utilize the Public Defense Advisory Board, if established as contained in the proposed charter amendment and related legislation, or a similar entity, to provide the additional information gathering, detail, and analysis that the task force was unable to complete due to its time constraints.

Thank you for the opportunity to serve on the task force. We would be pleased to answer questions or to provide further information as you consider our recommendations.

Respectfully,

The Public Defense Criminal Justice Reform Advisory Task Force
King County Public Defense Criminal Justice Reform
Advisory Task Force Members

Christie Hedman, Chair
Washington Defender Association

Marvin Lee
Hollenbeck Lancaster Miller & Andrews

Sophia Byrd McSherry
Washington State Office of Public Defense

Karen Murray
Associated Counsel for the Accused Division
King County Department of Public Defense

Jon Ostlund
Whatcom County Public Defender (Ret)

Brenda Williams
UW School of Law Tribal Court Public Defense Clinic

George Yeannakis
TeamChild
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Section 1: Acknowledgements

The Public Defense Criminal Justice Advisory Task Force (PDAT) thanks the King County Council and the King County Executive for the opportunity to provide recommendations on county options for preserving the type of innovative thinking and criminal justice reform efforts that have been a part of the nationally recognized work of the nonprofit public defender agencies serving King County over the past forty years.

The Task Force especially would like to thank the nonprofit public defense corporations: the Associated Counsel for the Accused (ACA), the Northwest Defender Association (NDA), Society of Counsel Representing Accused Persons (SCRAP) and The Defender Association (TDA), who shared information on their specialized areas of social justice work and their perspectives on preserving innovative thinking and criminal justice reform efforts.
Section 2: Executive Summary

For over 40 years, King County contracted with private, nonprofit corporations for the provision of most public defense services. Because these corporations were viewed as independent contractors, their employees did not receive county benefits. As a result of a settlement agreement in a class action lawsuit, public defenders became county employees July 1, 2013, requiring restructuring of the public defense system. In May 2013, the Council adopted an in-house structure for public defense as an interim solution until such time as it adopts a final structure for public defense (Ordinance 17588).

Ordinance 17588 authorizes the Public Defender to contract for services of outside counsel for conflict cases or when the Public Defender otherwise finds it appropriate to seek outside defense services and funding is available. The ordinance also directed creation of a Public Defense Criminal Justice Reform Advisory Task Force (PDAT) to submit a report and recommendation on whether it is feasible to use outside services as a means of promoting innovative public defense work.

The PDAT met seven times between June 25, 2013 and August 28, 2013. In developing its recommendations, the PDAT heard from the nonprofit public defense agencies formerly providing King County public defense services on the equity and social justice innovations in their offices as well as from the director of the Department of Public Defense. The task force had a special presentation from Thomas Giovanni, a national expert on holistic defense, and considered consultations and correspondence with individuals and organizations, and related public defense reference materials. The task force also relied on the expertise of PDAT members in the history and practice of public defense.

Principles of Innovation

The PDAT distilled information and discussions into four main categories that are characteristics of innovative public defense programs, as follows:

1. Sustainable resources;
2. Engagement and relationship building with community, governmental, and justice system partners;
3. Commitment to client-centered/holistic defense; and
4. Ability and freedom to advocate on client issues and system reform.

Dolan Considerations

The Dolan decision presented a series of factors leading to the Court’s conclusion that the public defender class members were de facto state employees eligible to enroll in the Public Employees Retirement System (PERS). While the decision does not preclude contracting with outside service providers, the task force believes the following factors should be taken into consideration when implementing the solution:
• The greatest protection from future liability would be to contract with an existing entity or entities;
• Any entity must be financially viable and independent of the county;
• Any entity must determine its own formal structure including composition of their boards, articles and bylaws;
• Any entity should have a mix of work (public defense, social justice, law reform, etc.) and additional sources of organizational funding, clients, and/or other work separate from County funding for the provision of public defense services;
• In contracting, funds should be sufficient to enable the provision of salaries and benefits to the outside providers’ employees that is competitive with salaries and benefits received by DPD employees; and
• In contracting, the County should not regulate the salary or benefits any outside entity.

Recommendations

• **It is essential that social justice oriented/holistic defense be the foundation for all public defense services in King County, not just for an outside entity or entities.** It is critical that the Department of Public Defense (DPD) and all of its divisions as well as conflict counsel and public defense services contractors provide the same level of quality and access to services based in holistic defense principles. All public defense clients deserve high quality services and it is important that specialization within divisions or an outside agency not favor one type of client over another.

• **Contracting with an outside entity or entities to enhance and supplement public defense practice would be beneficial both to public defense clients and to King County.** A separate entity or entities would allow access to funding and services that are not available to governmental agencies. Independence from county government also would allow class action and other litigation strategies to effectuate change on behalf of the public defense client community that the DPD might be prohibited from pursuing.

• **The Dolan decision presented a series of factors that led to the decision that the public defender class members were King County employees for purposes of PERS; it does not preclude contracting with outside entities.** We would recommend, however, that any contract provide sufficient funding to enable the provision of similar salaries and benefits to outside entity employees as received by DPD employees, and that the contract not be any entity’s sole source of funding. The County would not regulate the salary or benefits of any outside entity.

• **Contracting with a nonprofit entity or entities appears to be the best model for providing these services.** A nonprofit agency would be able to access funding available only to nonprofits, would have the benefit of an independent board of directors, and would provide these constitutionally mandated services through a not for profit model which allows the use of public funding for public defense services in a manner that does not provide a possible conflicting profit motive.
- The Department of Public Defense Advisory Board, in conjunction with the Executive Office, Department of Public Defense, would be an appropriate group to develop the Request for Qualifications and selection process for contracting with an outside entity or entities. Their involvement will provide a context for the shared values and holistic work to be done by the DPD and the outside entity or entities as well as the practice and social justice activities that can be done by the entity or entities.

- It is valuable for the outside entity or entities to receive a portion of the public defense caseload and across a range of case types, not just conflict cases. The public defense providers from whom the PDAT received input, both local and national, all agreed that the social justice/system improvements aspects of the work are best achieved in conjunction with the daily provision of public defense services. All of the examples of current King County initiatives began as a result of direct client representation.

- The County should ensure the independence of its division directors and promote their public defender employees' ability to freely advocate on behalf of their clients and be involved in social justice reforms as identified in Section 6 (DPD Social Justice Activities) in this report. The task force identified independence as a cornerstone of the previous public defense system in King County. Where the task force recommends services through an outside entity or entities, the same principles of independence should likewise be promoted, encouraged and preserved within the DPD.

- The DPD should coordinate with the outside entity or entities or other organizations in litigation or advocacy efforts. The task force identified cooperation amongst defense counsel as another cornerstone of the previous public defense system in King County. Where the task force recommends services through an outside entity or entities, the same principle of cooperation between DPD and the outside entity or entities likewise should be promoted, encouraged and preserved within the DPD.

- The outside entity or entities should be included in county public defense related policy groups. Where the county utilizes an outside entity or entities to ensure the preservation of the innovative hallmarks of the previous system, the county should ensure the outside entity or entities are included as a part of the justice system in King County.

Recommended Follow-up:

The task force’s short time frame limited our ability to receive input from the broader community on our final recommendations or to conduct an informed analysis of the financial implications of the various models. We strongly urge that:

- County staff conduct further research on the public corporation model;
- County staff conduct analysis of the financial implications of the various models;
Distribution of the final task force report to the stakeholder community and posting on the PDAT site for comment before the County chooses to take final action on the task force recommendations; and

The County utilize the Public Defense Advisory Board, if established as contained in the proposed charter amendment and related legislation, or a similar entity, to provide the additional information gathering, detail and analysis that the task force was unable to complete due to its time constraints.
Section 3 : Overview and Background Information

Overview and Background

For over 40 years, King County contracted with private, nonprofit corporations for the provision of most public defense services. In January 2006, a class action lawsuit, Dolan v. King County, was filed against King County, alleging that the employees of these agencies were county employees and that King County had a duty to enroll them in the Public Employees' Retirement System (PERS). In a ruling by the Washington State Supreme Court, the court held that the nonprofits were “arms and agencies” of King County, making the employees of those nonprofits de facto employees of King County for purposes of PERS enrollment. In April 2012, King County commenced employer contributions to PERS for King County’s public defenders.

In March 2013, the Council approved a proposed settlement agreement for the Dolan class action that is undergoing a judicial approval process. Under the terms of the settlement agreement, the County recognized the plaintiffs as county employees on July 1, 2013, with full benefits, but leaves up to King County how public defense would be structured.

In May 2013, the Council adopted an in-house structure for public defense as an interim solution until such time as it adopts a final structure for public defense (Ordinance 17588). Ordinance 17588 also created the Public Defense Criminal Justice Advisory Task Force and requested this report and recommendation. The creation and duties of this task force are discussed further in Section 4 below.

In July 2013, the Council adopted Ordinance 17614, proposing a charter amendment to make permanent a Department of Public Defense charged with providing public defense legal services and fostering and promoting system improvements, efficiencies, access to justice and equity in the criminal justice system. The proposed charter amendment will be placed on the November 2013 general election ballot.
Section 4: The Task Force Process

Authorizing the Task Force

On May 20, 2013, the Council adopted an in-house structure for public defense as an interim solution until such time as it adopts a final structure for public defense (Ordinance 17588).

Ordinance 17588 authorizes the Public Defender to contract for services of outside counsel for conflict cases or when the Public Defender otherwise finds it appropriate to seek outside defense services and funding is available. The ordinance also directed creation of a Public Defense Criminal Justice Reform Advisory Task Force (PDAT) to submit a report and recommendation on whether it is feasible to use outside services as a means of promoting innovative public defense work. The section of Ordinance 17588 creating the task force is attached as Appendix A.

Appointing the Task Force

The PDAT consists of seven members. Ordinance 17588 required that the PDAT consist of one member appointed by the Washington State Office of Public Defense, one member appointed by the King County Bar Association, two at-large members appointed by the County Executive, one member from the faculty of a Washington state law school appointed by the Chair of the Council and two at-large members appointed by the Chair of the Council.

The PDAT members were required by Ordinance 17588 to have demonstrated interest and expertise in the subject of public defense. A knowledge of government operations and budget was also desired, and a demonstrated history of working collaboratively to find solutions to complex problems and willingness to commit the time necessary to attend meetings of the task force and to actively support development of the task force report.

Meeting Structure and Process

The PDAT met seven times between June 25, 2013 and August 28, 2013. The ground covered by the task force in those meetings are detailed below.

**June 25, 2013:** Introductory remarks were delivered by Chair Gossett and Councilmember Dembowski. The task force reviewed background materials and established meeting protocols. The PDAT determined what information to include on a task force web site and how best to gather public input and steps to gathering necessary information to perform its charge.

**July 12, 2013:** Dave Chapman, DPD Director, provided an overview of the transition and how he envisioned equity and social justice (ESJ) activities could be provided by DPD and a potential outside agency. Presentations were provided by representatives from ACA, NDA, SCRAP and TDA on their ESJ activities and their suggestions for future structure and activities. Additionally, other jurisdictions were surveyed on public defense ESJ activities; the four
nonprofits filled out a survey on their ESJ activities; and a public comment form was established on the web.

**August 1, 2013:** The task force discussed the scope of its charge and considerations for development of outside entity or entities alternatives, including review of the preliminary results of the survey to other jurisdictions, nonprofit agency ESJ surveys, and a draft report format.

**August 9, 2013:** The task force discussed the parameters of the Dolan decision, reviewed the survey and office inventory results, and continued work on the report and recommendations.

**August 16, 2013:** Thomas Giovanni and Emily Harris of the Brennan Center’s Community Oriented Defender Network in New York spoke with the task force on national programs and their review of current holistic defense/social justice practices in King County. The task force reviewed the results of the staff compilation and analysis of the office inventories.

**August 23, 2013:** PDAT discussed draft recommendations.

**August 28, 2013:** PDAT continued to work to reach consensus on draft recommendations.

**August 30, 2013:** Final report submitted to the Council.

**Decision Making: A Consensus Approach**

The PDAT process was guided by principles of transparency, respect for different perspectives, and commitment to meeting the task force's charge.

The PDAT agreed to Protocols defining the decision-making approach of the group, which can be found in Appendix B. The PDAT agreed to operate by consensus. The goal was to reach unanimous consensus – meaning that all members can support or live with the recommendations that emerge from the group’s work. If unanimous consensus could not be reached, differences of opinion were to be noted and included as part of the final recommendations.

As part of the transparent public process, all meetings were open to the public. Comments or questions were allowed by the public at the discretion of the Chair at each meeting. A public comment form was also made available on the PDAT web site. Meeting agendas and minutes were also publicly available on the web site.

**Information Considered by the Task Force**

The PDAT members represented a broad array of experience in the public defense arena. Their different backgrounds and organizational ties provided a broad cross-section of public defense expertise which the group could draw upon in its discussions and formulation of recommendations. The combined public defense history and knowledge of the group was critical to the group's ability to take on the assigned task and produce a product within the allotted time.
The expertise of the task force included the following:

**Christie Hedman (Chair)** has been Executive Director of the Washington Defender Association since 1989 and has been a member of the TeamChild Board since its inception. She has represented public defender interests on numerous committees and workgroups, including the Washington State Law and Justice Advisory Council, the Washington State Byrne Grant Committee, and is a standing member of the Washington State Bar Association’s Council on Public Defense. Nationally, she is a member of the National Association of Criminal Defense Lawyers, has served on the Executive Committee of the American Council of Chief Defenders and is active in the National Legal Aid and Defender Association, the National Criminal Justice Association, and the Alliance for Justice.

**Marvin Lee** is a Senior Trial Attorney at the law firm of Hollenbeck, Lancaster, Miller & Andrews in Bellevue, WA, where he works defending commercial and large loss civil lawsuits. Prior to this he was a public defender at the Northwest Defenders Association (NDA) where he specialized in complex litigation, including defending first degree murder, bank robbery, and other high profile cases. He also supervised and trained investigators and attorneys in the Seattle Municipal Court, RALJ, and Seattle District Court units. In his five years at NDA, he worked on various collaborative efforts in criminal justice reform, including the four-agency Racial Disparity drug enforcement litigation and working with the City of Seattle and King County in multiple harm reduction projects. Mr. Lee began his legal career as a deputy district attorney in Riverside County, California. While there, in addition to receiving multiple certificates of commendation for excellent trial work from the District Attorney, he also taught a class to domestic violence victims in navigating the criminal justice system. He currently serves as a King County District Court judge pro tem and arbitrator for the King County Superior Court. He has spoken at numerous CLE forums, both civil and criminal, including serving as a Faculty Speaker at the Washington State Bar Association Criminal Justice Institute. He served on the King County Bar Association Task Force on Racial and Class Disparity and served on the planning committee and as a speaker for the Washington State Criminal Justice Reform Summit. He is also the winner of the 2004 Irwin Schwartz Scholarship Prize, awarded by the Washington Association of Criminal Defense Attorneys.

**Sophia Byrd McSherry** has served as Deputy Director of the Washington State Office of Public Defense since 2007. She was the Law and Justice Policy Director at the Washington State Association of Counties for seven years and worked at King County for three years. As a former newspaper reporter, editor, and editorial writer, Sophia was one of four U.S. journalists to receive an American Political Science Association Congressional Fellowship in 1990-1991.

**Karen W. Murray** is a Senior Attorney and Seattle Municipal Court Supervisor and has been a public defender since 1992. She currently co-chairs the King County Bar Association (KCBA) Rev. Dr. Martin Luther King, Jr. Celebration Luncheon and is an active member of the Washington State Minority and Justice Commission, KCBA Future.
of the Law Institute, KCBA Public Policy Committee and the YWCA People of Color Executive Council. She is the past president of the Loren Miller Bar Association (LMBA) and former co-chair of the Drug Policy Project’s Disparate Impact Task Force. In recognition of her significant contributions to LMBA and KCBA, she received the Loren Miller Bar Association Excellence in the Practice of Law Award, the Outstanding Dedication and Commitment Award, and the 2012 LMBA Ronald R. Ward’s President Award. She also received the King County Bar Association’s 2001 and 2010 President’s Award, the King County Bar Foundation Champion of Diversity Award and Special Recognition Award in Advancing Diversity in the Law from Seattle University Law School Black Students Association. Recently, she was notified by the Washington State Bar Association that she would be the 2013 recipient of the WSBA Annual Public Service Award because of her ongoing commitment and dedication to public service. Karen has presented locally and nationally at numerous Continuing Legal Education seminars and community forums.

Jon Ostlund was appointed as the first director of the Whatcom County Public Defender’s office upon the passing of the ordinance creating the office as a government public defender. He served in that capacity for 24 years until his retirement in 2006. Afterwards, he worked for several months with both the Skagit County Public Defender’s Office (also a government public defender organization), the Snohomish County Defender Association (a nonprofit), and consulted with Island County in developing their contract for public defender services. Jon served for seven years on the Washington State Sentencing Guidelines Commission and, after leaving, served on several committees, and task forces for the Commission, most notably on the task force redrafting the Drug Sentencing Alternative, making that a viable sentencing alternative for the first time. He has been a member of the Board of Directors of the Washington Defender Association since 1982, served several terms as a governor of the Washington Association of Criminal Defense Attorneys, and from 2001-2004 was a member of the Board of Governors of the Washington State Bar Association. In that capacity, he was principally responsible for the creation of the WSBA Committee on Public Defense, and after the expiration of his term on the Board of Governors, he served for 6 years as Co-Chair of that Committee, and am currently a member of its successor, the WSBA Council on Public Defense. Jon was also one of the two plaintiff’s experts on the Grant County suit.

Brenda Williams is a Lecturer and Supervising Attorney for the Tribal Court Public Defense Clinic at the University of Washington School of Law. She represents Native Americans charged in the Tulalip Tribal Court and supervises students through the trial process. Additionally, she provides administrative assistance to the Native American Law Center through fundraising and organizational supervision and presents frequently on criminal procedure specific to Tribal Court practice. Prior to joining the faculty in 2008, she served for 10 years as a public defender at The Defender Association in Seattle representing clients in all areas of public defense, including juvenile and adult felony practice and dependency proceedings. In addition to her law degree, Professor Williams received a Master of Public Administration from the University of Washington's Evans School of Public Affairs, where she focused on policy work within the criminal justice system. She has previously served on the Washington State Bar Association Board of
Governors and has received the University of Washington's Law Women's Caucus Outstanding Contribution to Women in the Law Award and the Excellence in Leadership Award from the National Latino Law Student Association.

**George Yeannakis** is Special Counsel at TeamChild, a civil legal services firm in Seattle, Washington. Through a grant from the MacArthur Foundation’s Models for Change Initiative he provides youth advocacy training and technical assistance to juvenile defense attorneys. George established the Youth Advocacy Clinic at Seattle University Law School and was a lecturer for the Children and Youth Advocacy Clinic at the University of Washington. He was a staff and supervising attorney with two public defense firms in Seattle for over twenty years.

In developing its recommendations, the PDAT also considered special presentations from guest speakers at PDAT meetings, consultations and correspondence with individuals and organizations, and related public defense reference materials.

*Presentations.* The PDAT invited representatives from the nonprofit defender agencies to present on the types of innovative activities and programs undertaken by the agencies while providing public defense services to King County. Representatives of nonprofit defender agencies who presented included: Anne Daly (SCRAP), Lisa Daugaard (TDA), Eileen Farley (NDA), Floris Mikkelsen (TDA), and Karen Murray (ACA). The director of the Department of Public Defense (DPD), Dave Chapman was invited to present on the functioning of the Department of Public Defense and answer questions regarding conflicts and other matters. Thomas Giovanni of the Brennan Center in New York was also invited to present to the PDAT; he spoke on the holistic defense approach to public defense.

*Consultations/correspondence.* As part of its information-gathering, the PDAT members engaged in correspondence and communications with individuals and entities outside of King County. Public defense offices within Washington state and nationally were surveyed for their innovation activities. PDAT members also conversed with public defense offices from across the nation on their holistic practices. During PDAT meetings, the chair also accepted comments from visitors, which included representation from defender agency/division staff and other voices such as from the National Legal Aid and Defender Association (NLADA) and Seattle University School of Law.

*Reference materials.* The PDAT members reviewed various materials to inform its discussions and deliberations. One of the most helpful materials was the submission by the four nonprofit defender agencies of a summary of the equity and social justice activities engaged in by their organizations, which is discussed further below in the Development of Task Force Concepts subsection of this report and is attached as Appendix C. The PDAT also conducted an electronic survey of other public defense systems innovative practices in Washington state and nationally. Other materials considered by the PDAT included, for example, the court opinions from the *Dolan* class action and Council staff reports on the structure of public defense that were presented in the Committee of the Whole earlier this year.
Section 5: Scope of Report

Due Date

The task force was charged with submitting a report and recommendation by August 30, 2013.

Task Force Report Elements

1) Preservation of innovative thinking and criminal justice reform efforts

The PDAT was created in order to utilize expertise of the local and regional public defense communities in identifying county options for preserving the type of innovative thinking and criminal justice reform efforts that have been a part of the nationally recognized work of nonprofit public defender agencies serving King County over the past forty years.

Within the purpose statement are embedded several concepts. The Council recognized that over the past forty years, the nonprofit public defender agencies providing public defense services in King County have developed a national reputation for excellence. The purpose statement indicates that innovative thinking and criminal justice reform efforts by the nonprofit defender agencies have been a component of that national reputation.

With Ordinance 17588, the County moved from having a contract-based public defense system to an in-house system. In keeping with the proposed settlement agreement from the Dolan litigation, the employees of the nonprofit defender agencies were brought in-house on July 1, 2013. With the underlying structure of public defense fundamentally changing in King County, the Council created the PDAT to identify options for preserving the type of innovative thinking and criminal justice reform efforts that were previously associated with the nonprofit public defense agencies.

2) Feasibility of using outside entities

This report is advisory in nature and is intended to provide the King County Council and the King County Executive recommendations on the feasibility of the County using outside entities to perform county public defense-related services that promote system improvements and efficiencies in the King County public defense system through innovative approaches to criminal justice reform.

In accordance with Ordinance 17588, the PDAT considered the following issues in its work:

- Examine county public defense-related services that would supplement, not replace the work performed by the Department of Public Defense;
- Consider the pros and cons of each proposed approach;
- Consider the ability of each approach to efficiently and effectively promote system improvements and efficiencies compared to what could be achieved by the department;
Consider the financial cost of the recommended alternatives; and

Include in the report and recommendation an assessment of the steps necessary to ensure that the independent entity will not be treated as an “arm and agency” of King County under the *Dolan* decision.

### Development of Task Force Concepts

#### 1. Defining Innovation

Faced with the task of developing options for the preservation of innovative thinking and criminal justice reform efforts that have characterized the county public defense system for over 40 years, the PDAT began its analysis by defining what "innovation" is.

It was agreed that the goal of innovation is to achieve equity and social justice for all within the justice system (characteristics of innovation are discussed further below). The County has characterized equity social justice issues for county public defense in proposed charter language that it has placed on the November 2013 general election ballot. Sections of the proposed charter language speaking to equity and social justice are as follows (emphasis added):

Section 350.20.60. Duties of the Department of Public Defense.  
The duties of the department of public defense shall include providing legal counsel and representation to indigent individuals in legal proceedings, including those in the superior and district courts for King County and in appeals from those courts, to the extent required under the sixth amendment to the United States Constitution or Article I, Section 22, of the Constitution of the State of Washington.  **The department of public defense shall also foster and promote system improvements, efficiencies, access to justice and equity in the criminal justice system.** Additional duties may be prescribed by ordinance. Elected officials shall not interfere with the exercise of these duties by the department; however, the enactment of appropriation ordinances does not constitute interference. The department shall not have its duties, as established in this section, decreased by the county council or the county executive.

…

Section 350.20.65. Public Defense Advisory Board.  
The public defense advisory board is established to review, advise and report on the department of public defense in a manner that may be prescribed by ordinance.  **The board shall also advise the executive and council on matters of equity and social justice related to public defense.…**

### Principles of Innovation

In the course of gathering information, the task force heard from the nonprofit public defense agencies formerly providing King County public defense services on the equity and social justice innovations in their offices. The task force also brought in a national speaker on holistic defense, Thomas Giovanni, from the Brennan Center for Justice at the New York University School of
Law. The task force also relied on the expertise of PDAT members in the history and practice of public defense.

The PDAT distilled information and discussions into four main categories that are characteristics of innovative public defense programs, as follows:

1. **Sustainable Resources**
   a. Access to types of funding
   b. Ability to freely advocate for funding
   c. Adequate resources for having a trained, qualified workforce
   d. Reasonable workloads, including caseload limits under CrR3.1, CrRLJ3.1, and Ju9.2

2. **Engagement and relationship building with community, governmental, and justice system partners**
   a. Volunteer activities
   b. Pro bono activities (legal services)
   c. Leveraging and building partnerships with community and other entities
   d. Leveraging and building partnerships with government and justice system entities

3. **Commitment to the cause of client-centered / holistic defense**
   a. Understanding current client issues (via case representation, etc.)
   b. Training workforce in holistic skills

4. **Ability and freedom to advocate on client issues and system reform**
   a. Case representation
   b. Lobbying and legislative advocacy
   c. A seat at the table
   d. Freedom to challenge the status quo
   e. Ability to litigate against governmental entities

**Agency Social Justice Survey Results**

Nonprofit agencies formerly providing county public defense services were asked to provide a list of general activities and specific programs that promoted innovative system improvements. They were asked to identify any collaborators, sources of funding, other types of funding that could be available, and whether it could be done in-house or outside of a department. Each agency was asked to list the activities in order of importance (such as greatest impact).

The reported activities were also categorized based on which principle of innovation they demonstrated.

The activities and programs listed by the agencies were reviewed in depth by the task force and helped to form the basis for the task force’s recommendations regarding the importance of the principles of holistic defense and social justice being a foundation for all public defense work in
King County. The activities and programs listed by the agencies, many of which are continuing within the DPD, are attached in Appendix C to this report.

**Holistic Defense**

In addition to vigorous case advocacy, holistic defense treats the client’s intersection with the justice system as an opportunity to address root causes of the contact in order to effectively prevent future contacts. Holistic defense is an opportunity to address underlying issues that may bring clients into the justice system, through the use of professional support staff (social workers, paralegals, and investigators), community engagement and innovative reform. Innovative ideas come from various perspectives both within and outside the justice system.

The Bronx Defenders, a nonprofit public defense organization in New York, provides an excellent example of how innovative, holistic, and client-centered criminal defense, family defense, civil legal services, social work support and advocacy can promote justice in low-income communities by keeping families together. Their mission is characterized as:

We look beyond individual cases to challenge entrenched problems that drive individuals into the justice system through community education, leadership development, impact litigation, and legislative reform. We operate on multiple levels: as a provider of Holistic Defense working one-on-one with clients and families; as a community resource; and as a force for systemic change advocating with policymakers. We seek partnerships with community-based providers and leverage their expertise to ensure that our clients’ expressed needs are addressed. We also rely upon our deep connections to community members to alert us to emerging trends that directly impact our clients’ well-being.

**2. Desirable Characteristics of an Outside Entity or Entities**

After identifying the four main characteristics of innovative public defense, the PDAT identified the desirable characteristics of an outside entity or entities, and mapped those program characteristics onto the four characteristics of innovation.

In order to successfully promote innovation in public defense, any outside entity should have the following characteristics:

**Sustainable Resources:** Access to types of funding, ability to freely advocate for funding, adequate resources for having a trained, qualified workforce

- Sustainability
- Ability to recruit and retain high quality staff
- Funding not related to caseload to coordinate efforts, conduct studies, and procure experts for litigation
- Ability to be flexible with staffing, funding, and resources
Engagement and relationship-building with community, governmental, and justice system partners: Volunteer activities, pro bono legal services, leveraging and building partnerships with other entities

- Relationships with community groups and nonprofits to respond to immediate problems
- Ability to leverage other resources, such as law schools and their clinical programs (law schools are also discussed under the options considered)
- Identification of how pro bono/volunteer opportunities fit into the mission of the organization, particularly with regard to community relationships

Commitment to the cause of client-centered holistic defense: Understanding current client issues via case representation, etc., training workforce in holistic skills

- Having a holistic defense framework for how innovation will occur
- Having a clearly articulated social justice policy
- Client based
- Clients in a representative mix of public defense casework representing a predetermined percentage of county public defense caseload, in order to be able to take advocacy positions on the full range of public defense issues and be aware of issues across case types as they arise
- In order to have a representative mix of cases, the outside entity or entities cases should not come solely from DPD conflict case assignments
- Expertise in public defense and policy development and advocacy

Ability and freedom to advocate on client issues and system reform: Case representation, lobbying and legislative advocacy, having a seat at the table, independence to challenge the status quo, ability to litigate against government entities

- Independence
- Ability to litigate provides a mechanism to address systemic problems which is an important tool to facilitate challenges to a resistant status quo
- Liability: Willing and able to take higher risks because exposure is not as great
- Ability to interact effectively with the County's public defense system in order to integrate innovation into the system – having a good relationship with DPD, the criminal justice system, and the County

Other

- Ability to move more quickly than government agencies
- Identification of how the outside entity or entities will foster new ideas

3. Funding and Resources

Having sustainable resources is one of the key characteristics of successful innovation. This includes having access to a stable source of funding, freedom to lobby for funding, as well as being able to apply the funding toward desired innovative goals.

Independent financial sustainability in particular also has implications for the Dolan "arms and agencies" consideration.
Entities differ in their access to different types of funding. Types of funding available may include:

- Private grants – these are primarily available to nonprofit 501(c)3 entities;
- Government grants – these are more likely to be available to government entities than private grants are;
- County General Fund – the County has limited non-dedicated revenue available which is its General Fund; and
- Contract work – an entity may engage in work that brings in outside dollars (an outside entity or entities contracting with the County for public defense services would be paid with General Fund dollars).

4. *Dolan Considerations*

The *Dolan* decision presented a series of factors leading to the Court’s conclusion that the public defender class members were *de facto* state employees eligible to enroll in the Public Employees Retirement System (PERS). While the decision does not preclude contracting with outside service providers, the task force believes the following factors should be taken into consideration when implementing the solution:

- The greatest protection from future liability would be to contract with an existing entity or entities;
- Any entity must be financially viable and independent of the county;
- Any entity must determine its own formal structure including composition of their boards, articles and bylaws;
- Any entity should have a mix of work (public defense, social justice, law reform, etc.) and additional sources of organizational funding, clients, and/or other work separate from County funding for the provision of public defense services;
- In contracting, funds should be sufficient to enable the provision of salaries and benefits to the outside providers’ employees that is competitive with salaries and benefits received by DPD employees; and
- In contracting, the County should not regulate the salary or benefits any outside entity.
Section 6: Considerations

As mentioned above, the PDAT was tasked with considering the pros and cons of each proposed approach, its ability to efficiently and effectively promote system improvements and efficiencies, and compare the approach to what could be achieved by the department.

The options for outside entities considered by the PDAT are discussed below, beginning with a description of DPD as a starting point. Although DPD is not an outside entity, understanding its social justice role was felt by the PDAT to be important for framing how an outside entity or entities would interact with DPD in creating innovation. Understanding DPD's role also was felt to be important for purposes of being able to compare the various options with what could be achieved by the department.

This section concludes with a general discussion of other outside entity options that were considered by the PDAT.

DPD Social Justice Activities

If the charter amendment proposed by the County is adopted by voters in the November general election, the Department of Public Defense will have equity and social justice as a charter-required duty. The proposed charter language directs the department to "foster and promote system improvements, efficiencies, access to justice and equity in the criminal justice system."

The charter is the equivalent of a county-level constitution, and institutionalizing principles of justice and equity into DPD's mandate has the potential to open the door to a new era of departmental social justice innovation. Toward that end, the PDAT identified elements of equity and social justice that should be incorporated into the new county DPD framework, as well as areas of caution.

The task force determined that it is essential that social justice oriented/holistic defense is the foundation for all public defense services in King County, not just for an outside entity or entities. It is critical that the Department of Public Defense (DPD) and all of its divisions as well as conflict counsel and public defense services contractors provide the same level of quality and access to services based in holistic defense principles. All public defense clients deserve high quality services and it is important that specialization within divisions or an outside agency not favor one type of client over another.

The County should ensure the independence of its division directors and their public defender employees' ability to advocate on behalf of their clients and to coordinate with the outside service provider or other organizations in litigation or advocacy efforts. Within DPD, independence might be promoted, for example, via the development of policies and job descriptions. Special funding potentially could be allocated within the division budgets to support advocacy work that may require additional expert services and attorney time. Commitment to advocacy and holistic defense should be a fundamental criterion in the selection of Department and division directors.
Other factors that will promote social justice advocacy within the DPD include:

- Incorporation of social justice advocacy for the accused or for social justice reform into job descriptions and performance evaluations;
- Development of a social justice policy;
- Fostering collaboration and a good working relationship between DPD and the outside entity or entities in pursuing joint social justice work (ideally they would complement each other);
- Involvement of the outside entity or entities in social justice policy discussions and decision making; and
- Expectation for DPD to include participation with the separate entity or entities as a part of its reporting (code, annual report, performance measures).

Some of the benefits that DPD employees have in promoting social justice advocacy include:

- Access to the King County Executive and a place at the table with other county justice related agencies in developing policies and programs;
- Access federal and other funding available to governmental agencies; and
- Collaboration/coordination with other county agencies to create programs or provide services to clients may be easier.

Challenges or restrictions include:

- As a governmental agency will not qualify for some grant funding; and
- May face county restrictions in applying for funding or promoting certain types of activities/programs.

**Potential Structures for the Independent Entity**

The PDAT considered four types of independent entities. These included 1) nonprofits, 2) public corporations, 3) law schools and clinical programs, and 4) for-profit private law firms.

1. **Nonprofit**

The 501(c)3 model emerged as the most feasible option for achieving desired characteristics of innovation. It is discussed further in its own section below. The benefits of this option include greater independence from political pressures; access to funding not available to governmental agencies; and a greater ability to partner with community groups and nonprofits to respond to immediate problems. The County already has a long history of contracting with nonprofit agencies for this type of work. Concerns include the inability to access federal and other funding available to governmental agencies; organizational financial stability; and ensuring its funding/staffing, etc. does not trigger *Dolan* issues.

2. **Public Corporation**

State law (RCW 35.21.730) authorizes cities and counties to create public corporations by ordinance to perform public functions with liabilities limited to the assets and properties of the
corporation. Under this proposed option, a public corporation would be formed for the purpose of fostering and promoting system improvements, efficiencies, access to justice and equity in the criminal justice system, via individual indigent criminal defense case representation as well as advocacy efforts.

The public corporation likely would be supported mostly by the County General Fund, plus any available grants. A public corporation can also establish a 501c3 nonprofit entity separate from the public corporation. Such an entity can make fundraising easier. A public corporation is subject to general laws regulating local governments, including, but not limited to, the requirement to be audited by the state auditor, open public record requirements, the prohibition on using its facilities for campaign purposes, the open public meetings law, the code of ethics for municipal officers, and the local government whistleblower law.

The task force did not have time to analyze this option in depth. However, in addition to the considerations above, other benefits are that a public corporation may be able to access federal and other funding available to governmental agencies as well as those available to nonprofits. As a governmental agency its funding/staffing, etc., may protect it from Dolan issues.

Concerns include that it already has been considered by the King County Council in its previous discussions regarding possible structures for public defense and was rejected as an option. It is not clear that the concerns would be the same for a separate supplementary entity as opposed to the primary provider of public defense.

3. Law Schools/Clinical Programs

Social justice work is often performed by law school clinical programs, evolving from the intersection of the need for innovation within the justice system, the availability of funding to support that change and the vast resource of student creativity and passion for change. Funding sources for clinics are diverse including government grants and private grants. If advocacy center models discussed below are pursued, a law school program may provide a good fit. However, law school clinical programs are less suited to handling a significant number of cases.

4. Private Law Firms

This option’s benefits include potential access to funding not available to governmental agencies and a law firm or other group may want to use this model as a way to provide pro bono legal services to public defense clients. The firm may see it as a way of expanding their employees’ trial and legal experience and also may have beneficial community, political or other connections.

Negative considerations related to this option include that a for-profit private entity may not be able to access funding available to nonprofits and/or governmental agencies; it does not seem appropriate for public defense services to be used to generate a profit; the firms are less likely to have experience collaborating with county, nonprofits or community groups in social justice efforts; and the County would need to ensure that funding and oversight of funded activities for the for-profit entity do not trigger Dolan issues.
Section 7 : The Nonprofit Model

Various permutations of a nonprofit model as a delivery system for innovation were discussed, including 1) a case-representation centered approach, 2) a holistic advocacy approach that does not rely on case representation, and 3) sample applications of existing models of justice centers for achieving innovation in King County's context. There may be other permutations of this model that were not explored by the task force and we would encourage that other innovative approaches be solicited if the County decides to contract for services. Whatever model or models may be selected, it is imperative that the County interact with its independent contractors differently than in the past (see Dolan considerations above).

The Independent Contractor Model

A 501(c)3 entity or entities could contract (via RFP) for a percentage of public defense casework from DPD, representing a mix of case types that would form the basis for their advocacy work and provide a focus for innovative programs and potential litigation strategies. The public defense providers from whom the PDAT received input (county, statewide and nationally) all agreed that the social justice/system improvements aspects of the work cannot be separated from the daily provision of public defense services. All of the examples of current King County initiatives began as a result of direct client representation. However, the perceived resemblance of this model to the prior structure for provision of services in King County would make it imperative that the County interact with their independent contractors differently than in the past (see Dolan considerations above).

The Bronx Defenders (http://www.bronxdefenders.org/) provides a model for what such an independent contractor might look like as it greatly expands the focus of representation from that within a traditional public defender office. Their focus is to look beyond individual cases to challenge entrenched problems that drive individuals into the justice system through community education, leadership development, impact litigation, and legislative reform. They operate on multiple levels: as a provider of Holistic Defense working one-on-one with clients and families; as a community resource; and as a force for systemic change advocating with policymakers. They seek partnerships with community-based providers and leverage their expertise to ensure that their clients’ expressed needs are addressed. They also rely upon their deep connections to community members to alert them to emerging trends that directly impact their clients’ well-being.

The Public Defender Service for the District of Columbia (http://www.pdsdc.org/) is another model program applying a holistic approach to representation and uses both general litigation skills and specialty practices to provide complete, quality representation in its complex cases. Two aspects of their expanded practice of interest are the Special Litigation Division, which handles a broad variety of litigation that seeks to vindicate the constitutional rights of PDS clients, to ensure equal justice to all D.C. defendants, and to reform unfair systemic criminal justice practices; and the Civil Legal Services Division, which provides wraparound services addressing issues facing children in the delinquency system and the needs of adult clients by providing representation in civil matters arising out of their criminal charges, such as those
related to public benefits entitlement, housing, child support, and health care services as well as immigration consequences.

**Advocacy Center Model**

An advocacy-oriented nonprofit could provide a framework for promoting social justice programs and advocacy that the DPD might be prohibited from performing, especially as it relates to litigation, legislative advocacy, or the ability to receive funding not available to governmental entities. This model could be a good fit for a nonprofit affiliated with a law school. The long term willingness of the County to sustain these activities and the ability of the organization to work closely with the DPD for its client and issue referrals provide challenges to this approach.

The Brennan Center for Justice at the New York University School of Law ([http://www.brennancenter.org/](http://www.brennancenter.org/)) is an example of a nonpartisan law and policy institute that seeks to improve systems of democracy and justice. The Center’s work ranges from voting rights to campaign finance reform, from racial justice in criminal law to Constitutional protection in the fight against terrorism. It is a self-described "part think tank, part public interest law firm, part advocacy group, part communications hub."

Another example is the Center for Justice in Spokane, Washington ([http://www.cforjustice.org/](http://www.cforjustice.org/)) which was established in 1999 by a former public defender. Until 2004, the Center concentrated on poverty law, especially representing parents in dependency proceedings, indigent mothers, parents with mental disabilities, and many other under-served groups. In 2005, it began focusing its litigation resources on three growing initiatives: regional ecosystem health, human and civil rights, and government accountability. They continue to address poverty law through their Community Advocacy Program.

**TeamChild Model**

TeamChild ([http://www.teamchild.org](http://www.teamchild.org)) provides a model that supplements DPD public defense services while at the same time retaining client representation that is a valued component of the identification and promotion of innovative programs and connection to the community. TeamChild is a nonprofit organization that provides holistic representation and systemic advocacy to address the needs of court involved youth. TeamChild's staff attorneys provide civil legal services to juveniles who are involved in the juvenile justice system and work closely with public defenders to ensure their mutual clients receive holistic legal representation. The model emphasizes coordinated advocacy and has been proven to enhance access to support and services that reduce juvenile court involvement.

The mission and model of leveraging partnerships, managing volunteer attorneys, and pursuing outside funding opportunities could be adapted to provide a more holistic approach to representation and advocacy for adult public defender clients. A limitation to the current model, identified by other successful holistic representation providers, is the lack of an assigned juvenile offender caseload and participation in the day to day representation of juvenile respondents.
Section 8: Recommendation/Conclusion

Recommendations

- **It is essential that social justice oriented/holistic defense be the foundation for all public defense services in King County, not just for an outside entity or entities.** It is critical that the Department of Public Defense (DPD) and all of its divisions as well as conflict counsel and public defense services contractors provide the same level of quality and access to services based in holistic defense principles. All public defense clients deserve high quality services and it is important that specialization within divisions or an outside agency not favor one type of client over another.

- **Contracting with an outside entity or entities to enhance and supplement public defense practice would be beneficial both to public defense clients and to King County.** A separate entity or entities would allow access to funding and services that are not available to governmental agencies. Independence from county government also would allow class action and other litigation strategies to effectuate change on behalf of the public defense client community that the DPD might be prohibited from pursuing.

- **The Dolan decision presented a series of factors that led to the decision that the public defender class members were King County employees for purposes of PERS; it does not preclude contracting with outside entities.** We would recommend, however, that any contract provide sufficient funding to enable the provision of similar salaries and benefits to outside entity employees as received by DPD employees, and that the contract not be any entity’s sole source of funding. The County would not regulate the salary or benefits of any outside entity.

- **Contracting with a nonprofit entity or entities appears to be the best model for providing these services.** A nonprofit agency would be able to access funding available only to nonprofits, would have the benefit of an independent board of directors, and would provide these constitutionally mandated services through a not for profit model which allows the use of public funding for public defense services in a manner that does not provide a possible conflicting profit motive.

- **The Department of Public Defense Advisory Board, in conjunction with the Executive Office, Department of Public Defense, would be an appropriate group to develop the Request for Qualifications and selection process for contracting with an outside entity or entities.** Their involvement will provide a context for the shared values and holistic work to be done by the DPD and the outside entity or entities as well as the practice and social justice activities that can be done by the entity or entities.

- **It is valuable for the outside entity or entities to receive a portion of the public defense caseload and across a range of case types, not just conflict cases.** The public defense providers from whom the PDAT received input, both local and national, all
agreed that the social justice/system improvements aspects of the work are best achieved in conjunction with the daily provision of public defense services. All of the examples of current King County initiatives began as a result of direct client representation.

- **The County should ensure the independence of its division directors and promote their public defender employees' ability to freely advocate on behalf of their clients and be involved in social justice reforms as identified in Section 6 (DPD Social Justice Activities) in this report.** The task force identified independence as a cornerstone of the previous public defense system in King County. Where the task force recommends services through an outside entity or entities, the same principles of independence should likewise be promoted, encouraged and preserved within the DPD.

- **The DPD should coordinate with the outside entity or entities or other organizations in litigation or advocacy efforts.** The task force identified cooperation amongst defense counsel as another cornerstone of the previous public defense system in King County. Where the task force recommends services through an outside entity or entities, the same principle of cooperation between DPD and the outside entity or entities likewise should be promoted, encouraged and preserved within the DPD.

- **The outside entity or entities should be included in county public defense related policy groups.** Where the county utilizes an outside entity or entities to ensure the preservation of the innovative hallmarks of the previous system, the county should ensure the outside entity or entities are included as a part of the justice system in King County.

**Recommended Follow-up:**

The task force’s short time frame limited our ability to receive input from the broader community on our final recommendations or to conduct an informed analysis of the financial implications of the various models. We strongly urge that:

- County staff conduct further research on the public corporation model;

- County staff conduct analysis of the financial implications of the various models;

- Distribution of the final task force report to the stakeholder community and posting on the PDAT site for comment before the County chooses to take final action on the task force recommendations; and

- The County utilize the Public Defense Advisory Board, if established as contained in the proposed charter amendment and related legislation, or a similar entity, to provide the additional information gathering, detail and analysis that the task force was unable to complete due to its time constraints.
Section 9: Appendices

A. Ordinance 17588 section creating task force

B. PDAT Protocols

C. Agency Social Justice Survey Results