

# IDAHO CRIMINAL JUSTICE COMMISSION

*"Collaborating for a Safer Idaho"*  
Established 2005  
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Governor

## Recommendations of the Public Defense Subcommittee

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The Sixth Amendment of the U.S. Constitution provides that the accused shall enjoy the right to the assistance of counsel in all criminal prosecutions. As with other rights that are fundamental and essential to a fair trial, the vindication of the Sixth Amendment right to counsel is a state responsibility. Although a state may delegate its duty to apprise citizens of this right to counties, it is ultimately the state's responsibility to ensure that the constitutional obligation is met.

In 2009, the Idaho Criminal Justice Commission ("the Commission" or "ICJC") formed a Public Defense Subcommittee ("the Subcommittee") tasked with developing recommendations for improvement of Idaho's public defense system. In January of 2010, the National Legal Aid & Defender Association ("NLADA") released a report which suggested that Idaho is not adequately satisfying its Sixth Amendment obligations. For more than three years, the Subcommittee committed itself to identifying improvements to be made, and its efforts yielded four pieces of proposed legislation.

The first piece of legislation provides uniform eligibility requirements for the appointment of counsel at public expense. More specifically, the amendments—first—redefine the term, "serious crime," to include any offense the penalty for which includes the mere possibility of confinement. The Subcommittee observed that some Idaho courts—expecting that a jail sentence will ultimately not be imposed—do not appoint counsel, whereas other courts will appoint counsel if the applicable criminal statute provides for the mere possibility of a jail sentence. Constitutionally, a person is entitled to counsel if he or she faces actual imprisonment, even for violation of probation. In other words, a person may not be sentenced to incarceration or have his or her suspended sentence imposed without having been previously availed of the right to counsel. The proposed changes to § 19-851 will avoid ambiguity and will ensure that all Idahoans are appointed counsel under the same circumstances and in conformance with constitutional demands.

Similarly, the Subcommittee learned that there is variance in terms of who financially qualifies for appointment of counsel. While the current statute enumerates several factors that courts may consider, there is no uniform standard of financial eligibility. The proposed amendments will require the courts to presume a person is financially eligible for appointment of counsel if certain objective factors are present. However, the courts will still have discretion to either deny appointment of counsel in spite of the financial presumptions or to appoint counsel in lieu of them.

The Subcommittee also acknowledged that requiring a person to complete a financial affidavit in order to qualify for appointment of counsel puts the person in a constitutional predicament. Under penalty of perjury, a person could potentially be compelled to disclose information that would be incriminating, such as the existence of, say, illegal income or assets.

In such a situation, the person is forced to choose between the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel. To remedy this dilemma, the proposed amendments to § 19-854 will restrict the admissibility of information provided in financial affidavits. This will encourage full and accurate disclosure and behoove efforts to limit appointment of counsel to the truly indigent.

Next, the Subcommittee discovered that there is inconsistency in terms of whether people are required to contribute to or repay the cost of their court-appointed attorney. What is more, the Subcommittee is concerned that current contribution and recoupment practices may discourage people from requesting or accepting the appointment of counsel. Some counties require an application fee up-front and/or warn people that they may have to repay the cost of counsel with little-to-no notice of how much it will cost them. Because of this potential for discouragement, the Subcommittee recommends that § 19-854 be amended to prohibit pre-dispositional contribution and to limit post-dispositional recoupment to the costs associated with conviction, if any.

Last, the amendments to Title 19 add “defending attorney” as a defined term to include the myriad public defense practitioners in Idaho who are private attorneys appointed by the court on a case-by-case basis or contracted by the county on a systematic basis. The Subcommittee realized that many public defense attorneys do not currently file annual reports pursuant to § 19-864 because the statute only expressly applies to county offices of the public defender. By expanding the reporting requirements to all attorneys providing public defense services, the amendments will facilitate the collection of comprehensive data—a foundational prerequisite to meaningful assessment of Idaho’s public defense system.

The second and third pieces of legislation propose amendments to the Juvenile Corrections Act and the Child Protective Act, respectively. With regard to the Juvenile Corrections Act, the proposed legislation amends § 20-514 to expound the circumstances in which juveniles are appointed counsel and to conform their right to counsel to that of adults. The Subcommittee found that counsel is particularly important for juveniles, given that children generally may not understand or appreciate the legal process. For the same reason, the Subcommittee concluded that, although it is impractical to prohibit juveniles from waiving their right to counsel in all situations, certain proceedings should preclude waiver. As such, the amendments set forth particular requirements that must be met before a juvenile may waive the right to counsel and also enumerate the situations in which waiver is prohibited altogether.

Similarly, out of a concern for practical implications once again, instead of providing for the right to counsel in the diversion context, the Subcommittee decided to limit the admissibility of statements made by juveniles in pre-adjudication proceedings. While there is constitutional ambiguity and significant variance nationwide as to whether a juvenile is entitled to the assistance of counsel in the pre-adjudication context, the amendments will balance the rights of juveniles with the government’s interest in facilitating informal disposition of juvenile proceedings.

With regard to the Child Protective Act, the Subcommittee recognized that children over 12 should have their interests represented by an attorney that is acting as a zealous advocate. Currently, children are only unqualifiedly entitled to a guardian ad litem (“GAL”) in child protection proceedings. However, the GAL’s role is to protect the “best interests” of the child—not necessarily to advocate on behalf of the child’s own wishes. The amendments to § 16-1614 will allow children to have a voice in the critical decisions being made about their lives in child protection actions.

The final piece of legislation is reflective of a Subcommittee finding that the most significant trend in nationwide approaches to public defense reform has been the movement

toward state oversight of the public defense function. As such, the Subcommittee concluded that authority should be statutorily delegated to an independent commission to promulgate and enforce certain standards for public defense attorneys, including statewide training and continuing legal education requirements, data reporting requirements, core provisions for contracts between counties and private providers of public defense services, qualification standards, and caseload and workload controls.

The Subcommittee agreed on the substance and form of the proposed legislation creating the commission and providing for its duties. After discussion, the ICJC determined that the appropriate action was not to pursue passage of this proposed legislation, but rather to support the creation of an interim legislative committee to examine potential means of reforming Idaho's public defense system. During the 2013 legislative session, the Idaho legislature passed House Concurrent Resolution 026, establishing that interim legislative committee. Thereafter, the Subcommittee identified four critical areas that it recommends the ICJC ask the interim committee to consider: (1) the structure and organization of indigent defense delivery; (2) the oversight and accountability of indigent defense delivery; (3) the mechanisms, standards, and funding for training and education for "defending attorneys" as defined in Idaho Code § 19-851(1); and (4) long-range planning for stable and ongoing funding of indigent defense delivery.

Lastly, the Subcommittee has recognized that one cost of maintaining the status quo is the potential for litigation. The state of Idaho has made, and the Subcommittee believes, it should continue to make improvements in the delivery of indigent defense services in Idaho. The Subcommittee believes that the best way to make reforms in Idaho is through the legislative process. The landscape of indigent defense reform across the country has, however, been shaped to some extent by lawsuits. The Subcommittee believes that the legislative interim committee should be aware of the potential for litigation from special interest groups, including those from outside the state, aimed at forcing change in Idaho.