



Task Force on State Public Defender Operations

64th Montana Legislature

PO BOX 201706
HELENA, MONTANA 59620-1706
(406) 444-3064

HOUSE MEMBERS

RANDY BRODEHL
KIMBERLY DUDIK
KENNETH HOLMLUND

SENATE MEMBERS

DAVID HOWARD
JIM KEANE
CYNTHIA WOLKEN

PUBLIC MEMBERS

HON. JAMES HAYNES
MIKE EAKIN
JASON TRINITY HOLDEN
WENDY HOLTON
JULI PIERCE

COMMITTEE STAFF

DAVE BOHYER, RESEARCH DIRECTOR
JULIE JOHNSON, ATTORNEY
FONG HOM, SECRETARY

MINUTES

September 12, 2016
Room 137, Capitol Building
Helena, Montana

Please note: This document is a Minutes Log and provides a notation of the time elapsed between the beginning of the meeting and the time at which the item was presented or discussed, a motion was made, or a vote was taken. The narrative presented here is provided only as a guide to the audio or video record of the meeting. The official discussion, motion, or vote is available on the audio or video archive of this meeting. The Legislature does not prepare a transcript of meeting activities. The time designation may be used to locate the referenced discussion on the audio or video recording of this meeting.

Access to an electronic copy of these minutes and the audio or video recording is provided from the Legislative Branch home page at <http://leg.mt.gov>. On the left-side menu of the home page, select Committees, then Interim. Once on the page for Interim Committees, scroll down to the appropriate committee. The written Minutes Log, along with the audio and video recordings, is listed by meeting date on the interim committee's web page. Each of the "Exhibits" is linked and can be viewed by clicking on the Exhibit of interest. All Exhibits are public information and may be printed.

Please contact the Legislative Services Division at 406-444-3064 for more information.

COMMITTEE MEMBERS PRESENT

REP. KIMBERLY DUDIK, Chair
REP. RANDY BRODEHL, Vice Chair

SEN. DAVID HOWARD
SEN. JIM KEANE
SEN. CYNTHIA WOLKEN

REP. KENNETH HOLMLUND

HON. JAMES HAYNES
MIKE EAKIN
JASON TRINITY HOLDEN
WENDY HOLTON
JULI PIERCE

STAFF PRESENT

DAVE BOHYER, Research Director
JULIE JOHNSON, Attorney
FONG HOM, Committee Secretary

VISITORS' LIST (Attachment 1)

AGENDA (Attachment 2)

COMMITTEE ACTION

The Task Force on State Public Defender Operations took action on the following:

- approved LCpd1a, LCpd06, and LCpd07 as amended;
- approved LCpd04, LCpd05, LCpd09, and LCpd10 as drafted; and
- approved a conceptual bill dealing with abandonment of a child by the parents.

CALL TO ORDER/ROLL CALL - Presiding Officer Rep. Dudik

00:00:01 Rep. Dudik called the meeting to order at 8:05 a.m. The secretary called roll.
(Attachment 3)

Welcome and Overview of Agenda

00:01:22 Rep. Dudik gave an overview of the agenda.

Introduction of new administrative director

00:02:46 Rep. Dudik introduced Scott Cruse as the new administrative director of the Office of State Public Defender.

00:03:29 Scott Cruse gave a brief biography of himself.

00:04:47 Rep. Dudik briefly discussed the recent complaints against the Public Defender Commission.

BILL DRAFT REVIEW

Staff overview of bill draft

00:05:38 Sheri Scurr, Committee Staff (Exhibit 1)

00:08:35 LCpd1a (Exhibit 2)

Committee Questions on LCpd1a

00:33:22 Rep. Brodehl asked if Judge Haynes was in agreement with LCpd1a.

00:33:35 Judge Haynes questioned the ongoing role of the contract attorney.

00:39:05 Rep. Brodehl asked Ms. Scurr to discuss the strategic plan.

00:41:54 Rep. Brodehl discussed the position of the central services administrator that appears to be on a level with the chief public defender, chief appellate defender, and the chief conflict defender.

00:43:25 Sen. Wolken said she likes having a contract manager under central services but is confused as to why that fourth branch of chief conflict defender is needed.

00:48:58 Ms. Pierce asked if the major crimes unit is also considered a conflict unit within the state public defender system.

00:51:16 Sen. Keane discussed tracking finances and asked if there was a way that the Legislature could be assured that budgets could be tracked.

00:54:55 Mr. Holden asked about the additional fiscal amount attached to this bill.

Public Comment on LCpd1a

None.

00:58:55 LCpd1b ([Exhibit 3](#))

Public Comment on LCpd1b

None.

01:01:52 LCpd02 ([Exhibit 4](#))

Committee Questions on LCpd02

01:11:51 Rep. Dudik asked about staffing decisions, what positions are added in each region, and what that data is based on.

01:13:49 Rep. Dudik asked about subsection (3)(b), which says that the commission shall review and approve any proposal to create permanent staff positions.

Public Comment on LCpd02

01:14:45 Jim Taylor, Legal Director, ACLU of Montana

01:17:20 Rep. Dudik asked about the salary of the administrator director.

01:19:30 Ms. Scurr deferred Rep. Dudik's question to Greg DeWitt, Fiscal Analyst, Legislative Fiscal Division.

Cost comparison: current law, LCpd1a, LCpd1b, and LCpd06 - Greg DeWitt, Fiscal Analyst, Legislative Fiscal Division

01:21:11 Mr. DeWitt ([Exhibit 5](#))

Committee Questions

01:27:31 Judge Haynes asked about the salary that is grandfathered in.

01:27:50 Ms. Scurr

01:28:05 Mr. DeWitt

01:29:59 Sen. Keane asked about a line item in the budget for contracted services for the Office of the Public Defender.

01:30:30 Mr. Holden commented about changing the civil services to an exempt category.

01:30:50 Rep. Dudik asked about the current salary structures in the Public Defender System.

BREAK (Reconvened at 10:14 a.m.)

02:08:19 LCpd09 ([Exhibit 6](#))

Public Comment on LCpd09

02:10:01 Jim Taylor, Chief Legal, ACLU

02:12:29 LCpd03 ([Exhibit 7](#))

Committee Questions on LCpd03

02:14:59 Rep. Brodehl asked about any fiscal impacts to agencies with LCpd03.

02:15:10 Sen. Keane asked Beth McLaughlin to comment on the bill.

02:15:57 Beth McLaughlin, Court Administrator, Supreme Court, said that the Court is not sure what the fiscal impact of this bill would be and that the Court is not in favor

of this bill.
02:19:19 Rep. Dudik asked Ms. McLaughlin about the federal system.
02:20:33 Rep. Holmlund asked Ms. Johnson who would be responsible for the collection of fees.

02:21:31 LCpd04 (**Exhibit 8**)

Committee Questions on LCpd04

02:23:11 Judge Haynes asked about 47-1-111(1)(f), eligibility.
02:24:00 Ms. Pierce said that subsection (f) was stricken in LCpd03, but subsection (f) in LCpd04, was not stricken.
02:25:33 Judge Haynes asked about eligibility determination.
02:27:10 Rep. Dudik asked about the appeal process.
02:28:07 Mr. Eakin asked about the time lag of appeals and if a determination is being made within DPHHS on the appeal, what happens to the criminal cases and the speedy trial issues.
02:29:40 Ms. Pierce asked about the number of employees that the department would need to conduct the inquiries, where the employees would be located, the transfer of money from one function under the Office of the State Public Defender budget to another agency, and whether or not there have been conversations with the department regarding those issues.

Public Comment on LCpd04

02:35:34 Fritz Gillespie, Chair, Public Defender Commission
02:39:52 Jim Taylor, ACLU

02:43:05 LCpd05 (**Exhibit 9**)

Committee Questions on LCpd05

02:44:38 Sen. Wolken asked about the hierarchy of payments.
02:47:13 Rep. Brodehl asked about the 250 and 800 numbers that Ms. Johnson provided.
02:47:39 Rep. Dudik asked if those numbers increase with inflation.
02:48:01 Sen. Keane asked about fee collection made by the Department of Revenue.
02:48:43 Rep. Dudik asked if the Public Defenders Office has any collection ability.

Public Comment on LCpd05

02:49:25 Jim Taylor, ACLU

02:52:19 LCpd06 (**Exhibit 10**)

Committee Questions of LCpd06

02:58:10 Rep. Brodehl said he will support LCpd06 only if there is buy-in.
02:58:54 Sen. Wolken said she would like to move LCpd06 forward.
03:04:41 Mr. Holden suggested that the Task Force look for separate funding.
03:09:19 Ms. Pierce discussed educating the courts and the prosecutors about the holistic approach.
03:11:20 Rep. Dudik discussed the new section 1 on page 2 of the bill.
03:12:52 Mark Murphy, County Attorneys Association, commented on the skepticism of

- 03:15:29 putting lawyers in the social work area.
Ms. McLaughlin said that the two most important things to look at is, are the judges supportive in approaching the problem in that manner and availability of treatment.
- 03:16:46 Herman Watson, Attorney, Bozeman, supported alternative treatment programs.
- 03:17:51 Jim Taylor, ACLU, supported LCpd06.
- 03:23:16 Rep. Dudik commented on providing a report on tracking money and expenditures.
- 03:24:59 LCpd07 ([Exhibit 11](#))

Committee Questions on LCpd07

- 03:26:17 Ms. Pierce discussed the fiscal note attached to LCpd07, how district courts fund its studies, and expanding the scope to contract attorneys.
- 03:28:16 Judge Haynes discussed having the study done by an accredited agency and having a weighted caseload study for district courts.

Public Comment on LCpd07

- 03:31:37 Jim Taylor, ACLU

03:34:47 LCpd08 ([Exhibit 12](#))

Committee Questions on LCpd08

- 03:35:26 Rep. Dudik asked if Public Defender System has this authority.

03:35:58 LCpd10 ([Exhibit 13](#))

Committee Questions on LCpd10

- 03:38:26 Sen. Howard asked about putative "person" and not putative "father".
- 03:40:15 Rep. Holmlund asked about instances where a mother abandons the child and the father raises the child.
- 03:45:49 Rep. Dudik discussed amending the bill to make it a putative father or mother or a parent who has abandoned the child, in which case the parents would not be entitled to counsel until they appear in court and requests one.

03:49:43 LCpd11 ([Exhibit 14](#))

Committee Questions on LCpd11

- 03:52:32 Rep. Dudik asked about tracking and where it would be reported to.
- 03:53:09 Rep. Brodehl asked about section 1, subsection (2).

Public Comment on LCpd11

- 03:55:09 Jim Taylor, ACLU
- 03:58:13 Wendy Johnson, Contract Manager, OPD
- 04:01:18 Ms. Holton asked Wendy Johnson about the cap.
- 04:02:49 Mr. Eakin asked Ms. Johnson about discounting travel time.
- 04:03:30 Rep. Dudik asked about travel time not taken by an attorney.

04:05:42 Ms. Holton asked about actual appearances versus appearing on paper.
04:07:40 Rep. Dudik asked Ms. McLaughlin if the court system would be willing to work with the Public Defender's Office to develop protocols for how to make the court system more efficient as to when people have to travel or when they can appear by telephone.

Public Comment

04:09:09 Herman Watson, Attorney, Bozeman

LUNCH (Reconvened at 1:38 p.m.)

COMMITTEE EXECUTIVE ACTION ON BILL DRAFTS AND ANY OTHER FINAL RECOMMENDATIONS

Motion on LCpd1a

05:32:47 Judge Haynes moved to approve LCpd1a with the governor appointing the Chief Executive and the Public Defender Commission be advisory.

Amended Motion

05:37:53 Rep. Brodehl moved to amend LCpd1a, to recommend that the Public Defender Advisory Commission submit five nominees to the governor, and that that position be hired not appointed, and that that position be subject to all state laws regarding state employees.

05:39:00 Rep. Brodehl explained the reasons for his motion.

Committee Discussion

05:39:59 Sen. Keane said that if the governor appointed someone and six months later, that person accepted another job, would the appointment process have to come up with five more candidates?

05:40:25 Judge Haynes asked about the five versus the three nominees.

Motion to amend Rep. Brodehl's amendment

05:41:02 Judge Haynes moved to amend the Rep. Brodehl's amendment for the Public Defender Commission to submit three nominees to the governor.

Vote

05:41:18 The motion to amend Rep. Brodehl's amendment passed unanimously by voice vote.

05:42:10 Mr. Holden asked about the director who is appointed but can only be fired for cause. He expressed his frustration that OPD doesn't have qualified lawyers and why does implementing a director and putting in an additional department head solve that problem.

05:47:06 Ms. Pierce asked for clarification between LCpd1a and LCpd1b.

05:48:55 Mr. Holden asked if the nominations are binding upon the governor to make a selection from the three nominees.

05:51:07 Rep. Brodehl discussed a friendly change to the amendment.
05:51:35 Ms. Scurr said that as the motion stands is that the governor would have to pick from the three but you could amend the amendment again and give the governor discretion to decline to appoint any of the three nominees, and in which case it would have to go back to the Commission for another set of three.

Substitute Motion

05:52:10 Rep. Brodehl made a substitute motion to add the language that the Public Defender Commission submit three nominees to the governor for selection and should the governor choose to not select from those three, then the Commission would submit three more nominees, and the governor would be bound to pick one of the three and the position would be hired, not appointed, and subject to all state laws regarding state employees.

Roll Call Vote

05:55:08 The substitute motion passed unanimously on a roll call vote 11-0, with Sen. Howard's proxy voting yes. ([Attachment 4](#))

Judge Haynes' Motion to accept LCpd1a

05:55:25 Judge Haynes moved to accept LCpd1a as amended.

Committee Questions on the motion

05:56:22 Mr. Holden asked about the director position being a position that would require a Juris Doctorate.

05:57:00 Mr. Holden discussed the bill before the committee that will consider the appointment of a recommendation from the Public Defender Advisory Commission and if the intent of the drafter of the bill is that whoever they nominate would have at a minimum a Juris Doctorate.

Motion to Amend Judge Haynes' Motion

05:57:10 Mr. Holden moved to amend the amended LCpd1a to require that those three nominees from the Public Defender Advisory Commission, have at a minimum educational set, a Juris Doctorate.

Committee Questions

05:57:57 Rep. Brodehl said this position is just to manage a large organization.
06:01:15 Mr. Eakin asked about the ethical considerations of having a nonattorney supervise the practice of attorneys.

Roll Call Vote

06:05:11 The motion to amend the amended LCpd1a failed on roll call vote, 6-5 with Sen. Howard's proxy voting no. ([Attachment 5](#))

06:06:25 Rep. Dudik commented on section 39, contingency voidness on funding.
06:06:32 Mr. Holden commented on the need for contingency voidness.
06:09:32 Ms. Scurr discussed the bill as drafted not having a specified effective date.
06:11:01 Rep. Brodehl asked Ms. Scurr about the chart in LCpd1a.

Roll Call Vote on the Motion to accept LCpd1a as amended

06:13:34 The motion passed on roll call vote, 8-3 with Sen. Howard's proxy voting yes.
(Attachment 6)

Motion on LCpd02

06:13:41 Ms. Holton moved to forward LCpd02 as drafted.

Committee Discussion

06:14:38 Mr. Holden discussed improving the underlying representation of indigent defendants in Montana through the Office of the Public Defender.

Roll Call Vote

06:22:39 The motion failed on a roll call vote, 8-3 with Sen. Howard's proxy voting no.
(Attachment 7)

Motion on LCpd06

06:23:32 Sen. Keane moved to forward LCpd06 as drafted.

Amended Motion

06:24:32 Ms. Pierce moved for an amendment to section 1(2), that the pilot project must be established in two public defender offices located in communities that represent a cross section of Montana's population and that the county attorney and the district court judges in those communities are involved in the implementation of the pilot project.

06:25:00 Rep. Dudik asked the Department of Public Health and Human Services will also be involved.

Motion for Substitute Amendment

06:27:10 Sen. Keane made a motion to amend the number of locations for a pilot program to four.

Vote

06:28:50 The amendment passed unanimously by voice vote with Sen. Howard's proxy voting yes.

Motion

06:29:01 Sen. Keane moved that LCpd06 proceed as amended.

06:31:03 Mr. Holden and Ms. Holton asked about the role the social worker.

Substitute Motion

06:31:16 Rep. Holmlund discussed the termination date and made a motion to change the termination date of July 1, 2018, to July 1, 2021.

Vote

06:33:29 Rep. Holmlund's motion passed unanimously by voice vote with Sen. Howard's proxy voting yes.

Motion on LCpd06

06:33:37 Sen. Keane moved that LCpd06 proceed as amended.

Vote

06:34:32 The motion passed 10-1 on a voice vote with Sen. Howard's proxy voting no.

Motion on LCpd09

06:35:17 Sen. Wolken moved that LCpd09 proceed as drafted.

Vote

06:35:43 The motion passed unanimously by voice vote with Sen. Howard's proxy voting yes.

Motion on LCpd03

06:36:00 Sen. Wolken moved that LCpd03 proceed as drafted.

06:37:03 Judge Haynes and Sen. Wolken discussed conflicts by the courts and the Office of the Public Defender in eligibility determinations.

BREAK (reconvened at 2:55 p.m.)

06:49:04 *Sen. Wolken withdrew her motion.*

Motion on LCpd05

06:49:19 Rep. Brodehl moved that LCpd05 proceed as drafted.

06:49:50 Ms. Pierce discussed the bill not trumping any restitution and costs.

Vote

06:51:14 The motion passed 10-1, with Mr. Holden voting no and Sen. Howard's proxy voting yes.

Motion on LCpd04

06:52:34 Judge Haynes moved to proceed with LCpd04 as drafted.

06:55:35 Rep. Dudik discussed the Department of Public Health and Human Services establishing procedures and adopting rules to implement this section.

06:58:02 Mr. Holden, Rep. Brodehl and Ms. Holton discussed the major problems with LCpd04.

Roll Call Vote

07:02:05 The motion passed on a roll call vote 6-5, with Sen. Howard's proxy voting yes.

Motion on LCpd07

07:02:14 Mr. Holden moved to accept LCpd07 as drafted.

Substitute Motion

07:03:26 Ms. Pierce made a substitute motion to amend the first section to include all

divisions, and the second section to have all levels of the Office of the Public Defender inserted at the end of the second line; in the second subsection, include "enforceable caseload and workload standards".

07:07:38 Judge Haynes suggested that the committee wait to see what the study produces.

07:08:30 Ms. Pierce said she would agree to an amendment to her substitute motion.

Substitute Motion

07:08:42 Ms. Pierce made a substitute motion to amend the first and second section to include all levels of the Public Defender's Office.

Vote

07:09:08 The substitute motion passed unanimously by voice vote.

Motion to adopt LCpd07

07:09:32 Mr. Holden moved to adopt LCpd07 as amended.

Amended Motion/Vote

07:12:00 Ms. Pierce moved that the committee state that prior to its introduction into the Legislature that there be an appropriation. The motion passed 10-1, on a voice vote with Sen. Howard's proxy voting no.

Vote on LCpd07 as amended

07:13:18 The motion passed 10-1, with Sen. Howard's proxy voting no.

Motion/Vote on LCpd10

07:13:38 Rep. Dudik moved to accept LCpd10 as drafted. The motion passed 10-1, with Mr. Eakin voting no and Sen. Howard's proxy voting yes.

Conceptual Bill

07:15:28 Rep. Brodehl said he would like to bring a conceptual bill that would put in the same format as the bill that was passed dealing with abandonment by parents.

Discussion

07:16:03 Ms. Scurr asked about the issue of failure to serve the parents as the grounds for not receiving an attorney versus a finding of fact about abandonment.

07:16:10 Rep. Brodehl said that he would like both situations in the bill. Sen. Wolken asked if it is Rep. Brodehl's intention that if they can't find the mother, that the state would not have to pay for an attorney to attend all of the hearings, but if the mother is located and wants to participate, she would be able to get an attorney then. Rep. Brodehl said yes, if a parent was not available to be served in the past, then they would be subject to the regular process.

07:19:42 Mr. Eakin asked how the court would determine that the children were abandoned without appointing them counsel.

07:19:51 Judge Haynes agreed with Mr. Eakin, that if the mother is found, she has a right to an attorney until there is a determination of abandonment.

Substitute Motion

07:21:37 Judge Haynes moved for a substitute motion to state that if you are unable to locate a parent and until they are able to be located, the case moves forward.

Discussion

07:22:55 Ms. Johnson asked that in the event you cannot physically locate a parent, would there need to be service by publication as well. Judge Haynes said yes.

07:25:34 Mr. Eakin asked if the bill would include the exception for Indian Child Welfare Act cases. Rep. Dudik said yes.

Vote on Substitution Motion

07:26:02 The motion passed on a voice vote 7-4, with Ms. Holton, Mr. Holden, Mr. Eakin, and Ms. Pierce voting no, and Sen. Howard's proxy voting yes.

Motion on Conceptual Bill as amended

07:27:26 Rep. Brodehl moved the conceptual bill as amended.

Vote

07:29:16 The motion passed on a roll call vote passed 7-4 with Sen. Howard's proxy voting yes. ([Attachment 8](#))

07:29:41 Rep. Dudik summarized the bill drafts that have moved forward and the bill drafts that have not.

Motion on LCpd11

07:30:12 Rep. Brodehl moved LCpd11 forward as drafted.

Discussion

07:30:33 Judge Haynes expressed his concern regarding the collection of information on soft caps and the direction in which the new director would be taking. Rep. Dudik asked how long should the office be given to try things out.

07:34:09 Mr. Gillespie said that the Public Defender Commission will meet in October and in December with the intention to have soft caps for a certain number of offenses by the December meeting.

07:34:37 Rep. Brodehl asked if they would be prepared to help with bill language. Mr. Gillespie said they would.

07:34:58 *Rep. Brodehl withdrew his motion.*

FINAL REPORT

07:36:03 Ms. Scurr ([Exhibit 15](#))

07:42:04 Rep. Dudik thanks the committee members, staff, and agencies that have been involved in this process. Rep. Brodehl thanked the chair for her service.

ADJOURNMENT

07:43:18 With no further business before the committee, Rep. Dudik adjourned the meeting at 3:50 p.m.

CI0425 7178fhxa.