



AMERICAN CIVIL LIBERTIES UNION

Oregon

May 22, 2023

Senate Committee on Rules
Oregon State Legislature
900 Court St. NE
Salem, OR 97301

RE: Testimony in Support of SB 337 with -5 Amendment, with concern about maintaining constitutional independence and request that the Governor's unlimited powers over PDSC and OPDS be temporary

Chair Lieber, Vice-Chair Knopp, and Committee Members,

The ACLU of Oregon is a nonpartisan, nonprofit organization dedicated to preserving and enhancing civil liberties and civil rights with more than 27,000 members statewide.

The purpose of this letter is to provide our position on the -5 amendment which incorporates the following requests made by the Governor as part of SB 337's transfer of oversight of public defense from the judiciary to the executive branch:

- Allow the Governor to appoint the director with confirmation by the Senate. The director would serve at the pleasure of the Governor. This would bring the agency in line with other public safety agencies in the executive branch.
- Allow the Governor to remove Commission members at her discretion.
- Require that the agency be subject to the same human resources guidelines and policies as other executive branch agencies.
- Empower an implementation workgroup composed of members of the executive, legislative, and judicial branches to monitor the progress of the commission and agency.

The ACLU of Oregon supports SB 337 with the -5 amendment. However, we are concerned about the Governor's request that the director of the Office of Public Defense Services (OPDS) serve at her pleasure and that she have the power to remove members of the Public Defense Services Commission (PDSC) at her discretion.

The independence of the public defense system is constitutionally mandated. *Polk County v. Dodson*, 454 U.S. 312 (1981). For decades, public defense experts have emphasized the need for the public defense function to be free from the whims of politics so that public defenders can zealously advocate for their clients and for state accountability to constitutional safeguards. The critical value of independence should not be compromised lightly, and all government leaders should remain vigilant in building a public defense system grounded in the American Bar Association Principles for the public defense system, which start with independence.¹

So that our state does not eschew its constitutional mandate, we request that the Governor only hold such immense power over public defense on a temporary basis while she engages in the urgent oversight needed to ensure that the public defense system transitions effectively to the executive branch and is brought into compliance with other constitutional mandates, as well as legal mandates to ensure public systems are equitable and fair.

- I. We agree with the Governor that at the current time, she needs sufficient oversight tools to create necessary change and accountability with public defense; indeed, in our experience, PDSC and OPDS’s internal legal compliance, risk management, and accountability mechanisms appear to be broken.**

The Governor is requesting additional oversight powers over PDSC and the OPDS ED because she believes such powers are necessary to address the level of dysfunction that currently exists with our state’s public defense agency. Although we have concerns about the impact of such unlimited powers on the constitutionally-required independence of public defense, we do not disagree with the Governor’s position that such powers may be necessary as public defense transitions to be overseen by her office. The ACLU of Oregon’s own experience with PDSC and OPDS indicates that the agency has been unable to meet basic and core organizational requirements such as legal compliance, risk management, and accountability mechanisms.

- ❖ ***Our experience with the agency indicates that entrenched senior leadership may not take seriously their responsibility to comply with the law and ensure appropriate accountability; the agency has failed to fully and timely investigate and address significant concerns about potential unlawful practices such as retaliation and gender-related pay inequities.***

¹ [ABA Ten Principles of a Public Defense Delivery System](#)

During 2021, ten people – mostly women defense attorneys – communicated with the ACLU of Oregon about significant concerns in two main areas: (1) that many of these individuals had faced serious situations of retaliation from OPDS, including multiple situations of retaliation by the same leadership-level male employee of OPDS, and (2) that there appeared to be systemic issues of OPDS paying women defense attorneys less pay than male defense attorneys for comparable work.

We communicated these concerns to PDSC and OPDS in August 2021, and Ed Jones, the Interim ED at that time, initiated an investigation via a third party investigator.

It is deeply troubling that as of today – almost 22 months after we raised the concerns to PDSC – the investigation still has not been finished and no actions have been taken to address the significant concerns raised by so many women attorneys.

After we asked PDSC for an update about the investigation in October 2022, the Oregon Department of Justice let us know, “The investigation was paused because of a **delay in OPDS producing information** responsive to Ms. Goldsmith’s [the investigator’s] requests.” [Bolding added]

The current Executive Director, Jessica Kampfe, was hired in October 2022 and was not at OPDS when we initially communicated the concerns to PDSC in August 2021. However, there are other senior leaders at PDSC and OPDS who have long held positions of power, and the lack of a completed investigation indicates little to no apparent effort by these senior leaders to facilitate oversight. This deteriorates public trust and raises questions about why some might be uninvested in reaching answers and accountability.

The fact that entrenched senior leadership at PDSC and OPDS is unable to or refuses to ensure that the agency completes a full investigation of serious, potentially unlawful conduct so that they can appropriately address the situation is consistent with the Governor’s observation that this agency is “not fully functioning.” Indeed, this situation indicates that the agency’s leadership is unable to ensure basic and core functions such as legal compliance, risk management, and accountability mechanisms. As such, we support, on a temporary basis, the Governor’s request for the oversight powers that she has requested to address the very troubling lack of accountability and basic functioning for the agency charged to provide such a critical constitutional right.

❖ ***Our collective experience indicates that PDSC’s senior leadership may not have necessary competence in hiring and management practices to effectively oversee and ensure a functioning public defense agency.***

It is no secret that before Ms. Kampfe was hired into the executive director position in October 2022, there were multiple situations involving OPDS’s two prior executive directors that raised serious concerns about lack of effective and competent management at PDSC and OPDS. The following are some of the news headlines about these situations along with links to the articles in the footnotes:

- June 19, 2019: “A New Bar Complaint Against the State’s Top Public Defender Comes as His Agency Seeks a Total Revamp—and a Lot More Money; Metropolitan Public Defender has fought to keep the details of the bar complaint secret”²
- June 14, 2021: “Oregon Office of Public Defense Services out of money: ‘It’s a tough thing to try to explain’”³
- August 15, 2022: “Dysfunction at Oregon public defense agency revealed in memo”⁴
- August 18, 2022: “The head of Oregon’s public defense system is fired, after months of tumult”⁵
- October 11, 2022: “Former Oregon public defense leader files lawsuit over firing”⁶

The fact that between 2018 and 2023, OPDS has had three executive directors and one interim – and that one of these EDs was in the position for less than eight months and has a current lawsuit against the State of Oregon – also raises significant questions about whether PDSC has been able to engage in effective hiring and management practices regarding OPDS’s executive director.

In most situations, the ACLU of Oregon would not support a proposal by the Governor that the OPDS executive director serve at her pleasure and that she be able to remove PDSC members at her discretion. But independence also cannot become a shield for evading accountability for a constitutional crisis and serious allegations of retaliation and discrimination.

² [June 19, 2019 Willamette Week article.](#)

³ [June 14, 2021 Oregonian article.](#)

⁴ [August 15, 2022 Oregonian article.](#)

⁵ [August 18, 2022 OPB article.](#)

⁶ [October 11, 2022 OPB article.](#)

Unfortunately, Oregon’s collective experience with PDSC and OPDS over the past five years consists of multiple alarming situations demonstrating this agency’s inability to navigate basic and core organizational functions including legal compliance, risk management, and accountability mechanisms.

We are hopeful that Ms. Kampfe’s leadership will help repair and restore these basic functions. We also agree with the Governor that in order to best ensure needed change with this agency, the Governor should be provided with what we consider to be emergency powers that are necessary for effective oversight of this agency at this time.

We only support the Governor having such powerful tools on a temporary basis, and we believe that strong and effective leadership of public defense in Oregon will find a path that is constitutional, grounded in care and equity, and invested in decreasing Oregon’s overreliance on the criminal legal system.

II. In order to meet constitutional requirements, there should be a clear and timely transition plan to create independence for PDSC and OPDS.

Experts on constitutional requirements and public defense are clear that:

- “Professional and political independence of public defender services is required to ensure that clients receive constitutional representation and that the results produced by the criminal legal system are valid and reliable.”⁷
- “The primary structural method of ensuring independence is the creation of a nonpartisan Governing Board that oversees the delivery of defender services and does not interfere with the individual representation of clients.”⁸
- “The public defense function, including the selection, funding, and payment of defense counsel, is independent.”⁹
- “... national standards call for states to create independent statewide commissions in which members are selected by diverse appointing authorities, so that no single branch of government has the ability to usurp power over the chief defender or exert outsized influence over the delivery of public defense services.”¹⁰

⁷ [NAPD Policy Statement](#).

⁸ *Id.*

⁹ [ABA Ten Principles of a Public Defense Delivery System](#)

¹⁰ [Sixth Amendment Center](#). “The Right to Counsel in Oregon.”

We believe that Oregon's leaders, including the Governor, embrace constitutional requirements, best practices, and truly wish to establish a public defense system in Oregon that meets the state's constitutional and moral obligations to Oregonians.

We request that the Governor and legislative leaders work together to ensure that the powers requested by the Governor are granted on a temporary basis and that the state engage in steps before the end of the Governor's current term to provide independence to public defense consistent with constitutional principles and best practices.

III. Important reminder: we cannot address the public defense emergency in Oregon without creating necessary checks and balances on unnecessary prosecutions in our criminal legal system.

As the Legislature acts, it is important to keep in mind why our public defense system is unable to meet the constitutional rights of Oregonians who cannot afford a lawyer.

The fundamental challenges faced by public defense in Oregon arise from our state's failure to create necessary checks and balances on prosecutions in our criminal legal system, as well as a general overreliance on the system to respond to public health needs. Like most other states in our country, Oregon has continued to increase its criminal codes and increase the number of people who are arrested, charged, convicted, and incarcerated. Instead of focusing our criminal legal system resources on crimes that actually affect public safety, the system is too often used to police and lock up people who are of color, poor, homeless, have physical or mental disabilities, have health situations involving substance abuse, hold other marginalized identities, or have otherwise fallen through our society's lack of effective social safety nets.

If our state is unable to fix the fundamental problem of over-criminalization instead of providing strong social safety nets, Oregon will continue to see an under-resourced, unconstitutional public defense system.

Please contact us if you have any questions or we can be of assistance.

Thank you,

Jessica Maravilla
Policy Director, ACLU of Oregon

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Executive Director, ACLU of Oregon

Enclosures: Our communications regarding the women attorneys' concerns are at www.aclu-or.org/en/campaigns/fighting-gender-based-discrimination-public-defense-system