

BILL ANALYSIS

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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

In the 10 years since the Fair Defense Act (FDA) was enacted, much progress has been made in improving indigent criminal defense in Texas. State expenditures for indigent defense have gone from \$0 prior to the passage of the FDA, to \$28.8 million in fiscal year 2009 thanks to various dedicated fees. Since 2002, the number of defendants receiving appointed counsel has increased by 45 percent, going from about 324,000 appointments in 2002, to just over 470,000 in 2009.

Despite this progress, modifications to the Fair Defense Act are needed to enhance the independence and accountability of the Task Force on Indigent Defense; reduce the burdens on counties that would like to establish a public defender office; and establish a procedure for counties to establish managed assigned counsel programs, also known as "private defenders."

All of the reforms contained in S.B. 170 were developed or approved by the Task Force on Indigent Defense, including: changing the name of the Task Force on Indigent Defense to the Texas Indigent Defense Commission (commission); making the commission an independent agency within the judicial branch; requiring the commission to be subject to sunset review to ensure it is carrying out its legislative mandate; adding two defense lawyer representatives, including a public defender representative, to the commission; creating a procedure for counties to establish "managed assigned counsel" programs, also known as "private defender" programs; revising the public defender statute so that private requests for bids do not have to be sent out when counties want to establish a public defender office; and suggesting that oversight boards be established for public defender offices, which is a nationally recognized best practice.

As proposed, S.B. 170 amends current law relating to the reorganization of powers and duties among agencies in this state that provide representation to indigent defendants in criminal cases and to the reorganization of funding sources for indigent defense.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the governing board of the Texas Indigent Defense Commission in SECTION 1 (Sections 79.018 and 79.021, Government Code) of this bill.

Rulemaking authority previously granted to the Texas Judicial Council is rescinded in SECTION 16 (Article 26.05, Code of Criminal Procedure).

Rulemaking authority previously granted to the Task Force on Indigent Defense is transferred to the Texas Indigent Defense Commission in SECTION 18 of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Subtitle F, Title 2, Government Code, by adding Chapter 79, as follows:

CHAPTER 79. TEXAS INDIGENT DEFENSE COMMISSION

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 79.001. DEFINITIONS. Defines "assigned counsel program," "board," "commission," "contract defender program," "council," "crime," "defendant," "executive

director," "indigent defense support services," "juvenile offense," "managed assigned counsel program," "office of capital writs," and "public defender's office" in this chapter.

Sec.79.002. ESTABLISHMENT OF COMMISSION. (a) Establishes the Texas Indigent Defense Commission (commission). Provides that the commission is an agency in the judicial branch of this state.

(b) Provides that the commission operates under the direction and supervision of a governing board (board).

Sec. 79.003. SUNSET PROVISION. Provides that the commission is subject to Chapter 325 (Texas Sunset Act). Provides that, unless continued in existence as provided by that chapter, the commission is abolished and this chapter expires September 1, 2023.

[Reserves Sections 79.004-79.010 for expansion.]

SUBCHAPTER B. ADMINISTRATIVE PROVISIONS

Sec. 79.011. ESTABLISHMENT OF BOARD; COMPOSITION. (a) Provides that the commission is governed by a board consisting of eight ex officio members and seven appointive members.

(b) Requires the board, except as provided by Section 79.037, to exercise the powers and perform the duties under this chapter independently of the Texas Judicial Council (council).

Sec. 79.012. EXECUTIVE DIRECTOR. (a) Provides that the executive director of the commission (executive director) is appointed by the board.

(b) Provides that the executive director:

(1) must be a licensed attorney;

(2) must demonstrate an interest in the standards for and provision of criminal defense services to indigent individuals;

(3) may not engage in the private practice of law; and

(4) may not accept money, property, or any other thing of value not authorized by law for services rendered under this chapter.

Sec. 79.013. EX OFFICIO MEMBERS. Sets forth certain ex officio members of the board.

Sec. 79.014. APPOINTMENTS. (a) Requires the governor to appoint with the advice and consent of the senate seven members of the board. Sets forth certain criteria for those appointments.

(b) Provides that the board members serve staggered terms of two years, with three members' terms expiring February 1 of each odd-numbered year and four members' terms expiring February 1 of each even-numbered year.

(c) Requires the governor, in making appointments to the board, to attempt to reflect the geographic and demographic diversity of the state.

(d) Prohibits a person from being appointed to the board if the person is required to register as a lobbyist under Chapter 305 (Registration of Lobbyists) because of the person's activities for compensation on behalf of a profession related to the operation of the commission or the council.

Sec. 79.0145. INITIAL BOARD MEMBERS. (a) Provides that the initial board consists of the following members: Sharon Keller; Wallace Jefferson; Jeff Wentworth; Roberto Alonzo; Sherry Radack; Alfonso Charles; John Whitmire; Pete Gallego; Olen Underwood; Jon Burrows; Knox Fitzpatrick; Anthony Odiorne; Glen Whitley; and two members appointed by the governor as provided by Section 79.014, with the term of one member expiring February 1 of the next odd-numbered year and the term of one member expiring February 1 of the next even-numbered year.

(b) Provides that this section expires when the last member of the initial board is appointed.

Sec. 79.015. PRESIDING OFFICER. Requires the board to select a chair from among its members.

Sec. 79.016. DISCLOSURE REQUIRED. (a) Requires a board member who is a chief public defender or who is an attorney employed by a public defender's office in a county that applies for funds under Section 79.036 to disclose that fact before a vote by the board regarding an award of funds to that county. Prohibits that board member from participating in such a vote.

(b) Requires that a board member's disclosure under Subsection (a) be entered into the minutes of the board meeting at which the disclosure is made or reported, as applicable.

(c) Prohibits the commission from awarding funds under Section 79.036 to a county served by a chief public defender or other attorney who fails to make a disclosure to the board as required by Subsection (a).

Sec. 79.017. VACANCIES. Requires that a vacancy on the board be filled for the unexpired term in the same manner as the original appointment. Requires that an appointment to fill a vacancy be made not later than the 90th day after the date the vacancy occurs.

Sec. 79.018. MEETINGS; QUORUM; VOTING. (a) Requires the board to meet at least four times each year and at such other times as it considers necessary or convenient to perform its duties.

(b) Provides that seven members of the board constitute a quorum for purposes of transacting the business of the board. Authorizes the board to act only on the concurrence of six board members or a majority of the board members present, whichever number is greater. Authorizes the board to adopt policies and standards under Section 79.034 only on the concurrence of eight board members.

(c) Entitles a board member, except as provided by Section 79.016 to vote on any matter before the board, except as otherwise provided by rules adopted by the board.

Sec. 79.019. COMPENSATION. Prohibits a board member from receiving compensation for services on the board but entitles a board member to be reimbursed for actual and necessary expenses incurred in discharging board duties. Provides that the expenses are paid from funds appropriated to the board.

Sec. 79.020. IMMUNITY FROM LIABILITY. Provides that a member of the board performing duties on behalf of the board is not liable for damages arising from an act or omission within the scope of those duties.

Sec. 79.021. RULES. Requires the board to adopt rules as necessary to implement this chapter.

[Reserves Sections 79.022-79.030 for expansion.]

SUBCHAPTER C. GENERAL POWERS AND DUTIES OF COMMISSION

Sec. 79.031. FAIR DEFENSE ACCOUNT. Provides that the fair defense account is an account in the general revenue fund that may be appropriated only to the commission for the purpose of implementing this chapter, and the office of capital writs for the purpose of implementing Subchapter B (Office of Capital Writs), Chapter 78 (Capital Writs Committee and Office of Capital Writs).

Sec. 79.032. ACCEPTANCE OF GIFTS, GRANTS, AND OTHER FUNDS; STATE GRANTS TEAM. (a) Authorizes the commission to accept gifts, grants, and other funds from any public or private source to pay expenses incurred in performing its duties under this chapter.

(b) Authorizes the State Grants Team of the Governor's Office of Budget, Planning, and Policy to assist the commission in identifying grants and other resources available for use by the commission in performing its duties under this chapter.

Sec. 79.033. LEGISLATIVE APPROPRIATIONS REQUEST. Requires the board, in accordance with the rules and procedures of the Legislative Budget Board (LBB), to prepare, approve, and submit a legislative appropriations request that is separate from the legislative appropriations request for the council and is used to develop the board's budget structure. Requires the board to maintain the board's legislative appropriations request and budget structure separately from those of the council.

Sec. 79.034. POLICIES AND STANDARDS. (a) Requires the commission to develop policies and standards for providing legal representation and other defense services to indigent defendants at trial, on appeal, and in postconviction proceedings. Authorizes the inclusion of certain policies and standards as set forth in this section.

(b) Requires the commission to submit its proposed policies and standards developed under Subsection (a) to the board for adoption. Requires the board to adopt the proposed policies and standards as appropriate.

(c) Requires that any qualification standards adopted by the board under Subsection (b) that relate to the appointment of counsel in a death penalty case be consistent with the standards specified under Article 26.052(d) (relating to standards adopted by the local selection committee for the qualification of attorneys to be appointed to represent indigent defendants in capital cases in which the death penalty is sought), Code of Criminal Procedure. Prohibits an attorney who is identified by the commission as not satisfying performance or qualification standards adopted by the board under Subsection (b) from accepting an appointment in a capital case.

Sec. 79.035. COUNTY REPORTING PLAN; COMMISSION REPORTS. (a) Requires the commission to develop a plan that establishes statewide requirements for counties relating to reporting indigent defense information. Requires that the plan include provisions designed to reduce redundant reporting by counties and provisions that take into consideration the costs to counties of implementing the plan statewide. Requires the commission to use the information reported by a county to monitor the effectiveness of the county's indigent defense policies, standards, and procedures and to ensure compliance by the county with the requirements of state law relating to indigent defense. Authorizes the commission to revise the plan as necessary to improve monitoring of indigent defense policies, standards, and procedures in this state.

(b) Requires the commission to annually submit to the governor, lieutenant governor, speaker of the house of representatives, and council and, publish in written and electronic form, a report containing the information submitted to the commission under Section 71.0351; and regarding the quality of legal

representation provided by counsel appointed to represent the indigent defendants; current indigent defense practices in the state as compared to state and national standards; efforts made by the commission to improve indigent defense practices in the state; and recommendations made by the commission for improving indigent defense practices in the state.

(c) Requires the commission to annually submit to LBB and the council, and to publish in written and electronic form, a detailed report of all expenditures made under this subchapter, including distributions under Section 79.036.

(d) Authorizes the commission to issue other reports relating to indigent defense as determined to be appropriate by the commission.

Sec. 79.036. TECHNICAL SUPPORT; GRANTS. (a) Requires the commission to:

(1) provide technical support to assist counties in improving their indigent defense systems, and promote compliance by counties with the requirements of state law relating to indigent defense;

(2) direct the comptroller of public accounts (comptroller) to distribute funds, including grants, to counties to provide indigent defense services in the county; and

(3) monitor each county that receives a grant and enforce compliance by the county with the conditions of the grant, including enforcement by directing the comptroller to withdraw grant funds, or require reimbursement of grant funds by the county.

(b) Requires the commission to direct the comptroller to distribute funds as required by Subsection (a)(2) based on a county's compliance with standards adopted by the board and the county's demonstrated commitment to compliance with the requirements of state law relating to indigent defense.

(c) Requires the board to adopt policies to ensure that funds under Subsection (a)(2) are allocated and distributed to counties in a fair manner.

(d) Prohibits a county from reducing the amount of funds provided for indigent defense services in the county because of funds provided by the commission under this section.

Sec. 79.037. ADMINISTRATIVE SUPPORT. Requires the Office of Court Administration of the Texas Judicial System and the commission to provide administrative support to each other as necessary to carry out this chapter.

SECTION 2. Amends Section 71.001, Government Code, as follows:

Sec. 71.001. DEFINITIONS. Defines "public defender's office" in this chapter. Redefines "defendant" in this chapter. Deletes existing definitions of "assigned counsel program," "contract defender program," "crime," "indigent defense support services," "public defender," and "juvenile offense" in this chapter. Makes nonsubstantive changes.

SECTION 3. Amends Sections 71.0351(a), (e), and (f), Government Code, as follows:

(a) Changes references from the Task Force on Indigent Defense (task force) to the commission. Requires that certain information be prepared and provided to the Office of Court Administration of the Texas Judicial System and the commission. Makes conforming changes.

(e) Makes conforming and nonsubstantive changes.

(f) Provides that a reporting plan developed by the commission is under Section 79.035(a), rather than under Section 71.06(a). Makes conforming changes.

SECTION 4. Amends Section 78.052(b), Government Code, to require the office of capital writs to receive funds for personnel costs and expenses from the fair defense account under Section 79.031, rather than under Section 71.058.

SECTION 5. Amends Section 78.056(b), Government Code, to make conforming changes.

SECTION 6. Amends Section 81.054(c), Government Code, to designate Section 79.036, rather than Section 71.062, as the section under which requirements are set out for demonstration or pilot projects that promote best practices for indigent defense. Makes a conforming change.

SECTION 7. Amends Section 402.035(c), Government Code, as follows:

(c) Changes the composition of the Human Trafficking Prevention Task Force to include one representative from the Department of State Health Services (DSHS) appointed by the chief administrative officer of DSHS, rather than a representative from the Texas Alcoholic Beverage Commission (TABC) appointed by the chief administrative officer of TABC; and a chief public defender, appointed by the attorney general, employed by a public defender's office, as defined by Article 26.044(a), Code of Criminal Procedure, or an attorney designated by the chief public defender. Makes a nonsubstantive change.

SECTION 8. Amends Article 26.04, Code of Criminal Procedure, by amending Subsections (a), (d), and (f) and adding Subsection (f-1), as follows:

(a) Requires a court to appoint an attorney from a public appointment list using a system of rotation, unless the court appoints an attorney under Subsection (f), (f-1), (h) (relating to an alternative program for appointing counsel), or (i) (relating to the appointment of an attorney to represent a defendant accused of a felony).

(d) Makes conforming changes.

(f) Authorizes the court or the courts' designee, in a county in which a public defender's office is created or designated under Article 26.044, to appoint that office to represent the defendant in accordance with guidelines established for the office. Makes conforming changes.

(f-1) Authorizes the managed assigned counsel, in a county in which a managed assigned counsel program is operated in accordance with Article 26.047, to appoint counsel to represent the defendant in accordance with guidelines established for the program.

SECTION 9. Amends the heading to Article 26.044, Code of Criminal Procedure, to read as follows:

Art. 26.044. PUBLIC DEFENDER'S OFFICE.

SECTION 10. Amends Article 26.044, Code of Criminal Procedure, by amending Subsections (a)-(m) and adding Subsections (b-1) and (c-1), as follows:

(a) Defines in this chapter "oversight board" and redefines "governmental entity." Replaces the definition of "public defender" with "public defender's office." Makes nonsubstantive changes.

(b) Authorizes the commissioners court of any county, on written approval of a judge of a county court, statutory county court, or district court trying criminal cases or cases under Title 3 (Juvenile Justice Code), Family Code, in the county, to create a department of the county or by contract to designate a nonprofit corporation to serve as a public defender's office, rather than appoint a governmental entity or nonprofit corporation to serve as a public defender. Authorizes the commissioners courts of two or more counties

to enter into a written agreement to jointly create or designate and jointly fund a regional public defender's office. Requires the commissioners court, in creating or designating a public defender's office under this subsection, to specify or jointly specify, if creating or designating a regional public defender's office:

- (1) the duties of the public defender's office;
- (2) the types of cases to which the public defender's office may be appointed under Article 26.04(f) and the courts to which an attorney employed by the public defender's office may be required to appear;
- (3) if the public defender's office is a nonprofit corporation, the term during which the contract designating the public defender's office is effective and how that contract may be renewed on expiration of the term, rather than whether the public defender is appointed to serve a term or serve at the pleasure of the commissioners court or the commissioners courts; and
- (4) if an oversight board is established under Article 26.045 for the public defender's office, the powers and duties that have been delegated to the oversight board, rather than if the public defender is appointed to serve a term, the term of appointment and the procedures for removing the public defender.

Makes conforming changes.

(b-1) Requires the applicable commissioners court or commissioners courts to require a written plan from a governmental entity serving as a public defender's office.

(c) Makes conforming changes.

(c-1) Creates this subsection from existing text. Requires that a written plan under Subsection (b-1) or a proposal under Subsection (c) (relating to the solicitation of proposals for a public defender's office) include certain criteria including a policy to ensure that the chief public defender and other attorneys employed by the public defender's office do not provide representation to a defendant if doing so would create a conflict of interest that has not been waived by the client. Makes conforming changes.

(d) Makes conforming changes.

(e) Makes conforming changes.

(f) Requires the governmental entity or nonprofit corporation, to be eligible for appointment as a public defender, to be directed by a chief public defender with certain qualifications. Makes conforming and nonsubstantive changes.

(g) Makes conforming changes.

(h) Makes conforming changes.

(i) Prohibits the chief public defender or an attorney employed by a public defender, except as authorized by this article, from engaging in private practice of criminal law or from accepting anything of value not authorized by this article for services rendered under this article. Makes a conforming change.

(j) Prohibits a public defender's office from accepting an appointment under Article 26.04(f) if a conflict of interest exists that has not been waived by the client. Makes conforming and nonsubstantive changes.

(k) Authorizes a judge to remove from a case a person, rather than a public defender, who violates a provision of Subsection (i).

(l) Makes conforming changes.

(m) Entitles an attorney, if it is necessary that an attorney who is not employed by a public defender's office, rather than an attorney other than a public defender, be appointed, to the compensation provided by Article 26.05 of this code.

SECTION 11. Amends Chapter 26, Code of Criminal Procedure, by adding Article 26.045, as follows:

Art. 26.045. PUBLIC DEFENDER OVERSIGHT BOARD. (a) Authorizes the commissioners court of a county or the commissioners courts of two or more counties to establish an oversight board for a public defender's office created or designated in accordance with this chapter.

(b) Requires the commissioners court or courts that establish an oversight board under this section to appoint members of the board. Authorizes members to include a criminal or juvenile defense attorney, the judge of a trial court in this state that has criminal jurisdiction, a county commissioner, a county judge, and a community representative.

(c) Authorizes the commissioners court to delegate to the board any power or duty of the commissioners court to provide oversight of the office under Article 26.044, including recommending selection and removal of a chief public defender; setting policy for the office; and developing a budget proposal for the office.

SECTION 12. Amends Chapter 26, Code of Criminal Procedure, by adding Article 26.047, as follows:

Art. 26.047. MANAGED ASSIGNED COUNSEL PROGRAM. (a) Defines "governmental entity" and "managed assigned counsel program" or "program" (program) in this article.

(b) Authorizes the commissioners court of any county, on written approval of a judge of the juvenile court of a county or a county court, statutory county court, or district court trying criminal cases in the county, to appoint a governmental entity, nonprofit corporation, or bar association to operate a managed assigned counsel program (program). Authorizes the commissioners courts of two or more counties to enter into a written agreement to jointly appoint and fund a governmental entity, nonprofit corporation, or bar association to operate a program. Requires the commissioners court, in appointing an entity to operate a managed assigned counsel program under this subsection, to specify or the commissioners courts to jointly specify:

(1) the types of cases in which the program may appoint counsel under Article 26.04 or Section 51.10 (Right to Assistance of Attorney; Compensation), Family Code, and the courts in which the counsel appointed by the program may be required to appear; and

(2) the term of any agreement establishing a program and how the agreement may be terminated or renewed.

(c) Requires the commissioners court or commissioners courts to require a written plan of operation from an entity operating a program under this article. Requires that the plan of operation include:

(1) a budget for the program, including salaries;

(2) a description of each personnel position, including the program's director;

- (3) the maximum allowable caseload for each attorney appointed by the program;
- (4) provisions for training personnel of the program and attorneys appointed under the program;
- (5) a description of anticipated overhead costs for the program;
- (6) a policy regarding licensed investigators and expert witnesses used by attorneys appointed under the program;
- (7) a policy to ensure that appointments are reasonably and impartially allocated among qualified attorneys; and
- (8) a policy to ensure that an attorney appointed under the program does not accept appointment in a case that involves a conflict of interest for the attorney that has not been waived by all affected clients.

(d) Requires that a program under this article have a director. Requires that a program, unless the program uses a review committee appointed under Subsection (e), be directed by a person who is a member of the State Bar of Texas; has practiced law for at least three years; and has substantial experience in the practice of criminal law.

(e) Authorizes the governmental entity, nonprofit corporation, or bar association operating the program to appoint a review committee of three or more individuals to approve attorneys for inclusion on the program's public appointment list described by Subsection (f). Sets forth certain requirements and restrictions applicable to each member of the committee.

(f) Requires that the program's public appointment list from which an attorney is appointed contain the names of qualified attorneys, each of whom applies to be included on the list, meets any applicable requirements specified by the procedure for appointing counsel adopted under Article 26.04(a) and the commission, and is approved by the program director or review committee, as applicable.

(g) Authorizes a court to replace an attorney appointed by the program for the same reasons and in the same manner described by Article 26.04(k) (relating to the authorization of a court to replace an attorney with other counsel).

(h) Entitles a program to receive funds for personnel costs and expenses incurred in amounts fixed by the commissioners court and paid out of the appropriate county fund, or jointly fixed by the commissioners courts and proportionately paid out of each appropriate county fund if the program serves more than one county.

(i) Authorizes a program to employ personnel and enter into contracts necessary to perform the program's duties as specified by the commissioners court or commissioners courts under this article.

SECTION 13. Amends Articles 26.05(a), (c), and (d), Code of Criminal Procedure, as follows:

(a) Makes a conforming change.

(c) Prohibits an attorney's fee from being paid under this article until the form for itemizing the services performed is submitted to the judge presiding over the proceedings or, if the county operates a program under Article 26.047, to the director of the program, and until the judge or director, as applicable, approves the payment.

(d) Makes a conforming change.

SECTION 14. Amends Section 11(a), Article 42.12, Code of Criminal Procedure, as follows:

(a) Authorizes certain conditions of community supervision, as set forth in this subsection to include, but not be limited to reimbursing the county in which the prosecution was instituted for compensation paid to appointed counsel for defending the defendant in the case, if counsel was appointed, or if the defendant was represented by a public defender's office, in an amount that would have been paid to an appointed attorney had the county not had a public defender's office, and attending counseling sessions for substance abusers or participate in substance abuse treatment services in a program or facility approved or licensed by DSHS, rather than the Texas Commission on Alcohol and Drug Abuse.

SECTION 15. Amends Section 133.107, Local Government Code, to make conforming changes.

SECTION 16. Repealer: Article 26.05(i) (relating to the indigent defense representation fund), Code of Criminal Procedure.

Repealer: Subchapter D (Texas Judicial Council), Chapter 71 (Task Force on Indigent Defense), Government Code.

SECTION 17. Requires the governor, as soon as possible after the effective date of this Act, to appoint the initial governing board of the commission in accordance with Subchapter B, Chapter 79, Government Code, as added by this Act. Requires the governor, to enable the staggering of terms as required by Sections 79.014(b) and 79.0145(a)(14) (relating to staggered terms for two members of the commission appointed by the governor) of that subchapter, to appoint three members whose terms expire on February 1 of the next odd-numbered year and four members whose terms expire on February 1 of the next even-numbered year.

SECTION 18. (a) Abolishes the task force established under Subchapter D, Chapter 71, Government Code, on the date the last appointee to the initial governing board of the commission takes office. Transfers the powers, duties, obligations, rights, contracts, records, personnel, property, and unspent appropriations of the task force to the commission on that date.

(b) Provides that all rules of the task force are continued in effect as rules of the commission until superseded by a rule of the commission.

(c) Authorizes the members and the director of the task force, notwithstanding the changes in law made by this Act, until the date the task force is abolished as provided by this section, to continue in office and exercise their powers and duties under the law that governed the task force before the effective date of this Act, and provides that the prior law is continued in effect for that purpose.

SECTION 19. Requires the commission and the Texas Judicial Council, not later than December 1, 2011, to adopt a memorandum of understanding to facilitate the timely implementation of this Act.

SECTION 20. Effective date: September 1, 2011.