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Mr. Chairman and Members of the Committee:

The American Civil Liberties Union of Idaho and the American Civil Liberties Union (collectively, "ACLU") submit the following comments regarding House Bill 236, the "State Public Defender Act."

The Statement of Purpose describes this bill as a response to the Idaho Supreme Court's holding that the state remains liable for inadequate provision of public defense in this state under the Sixth Amendment of the US Constitution, and as a means to "affect" the class action lawsuit that resulted in that ruling before it is "scheduled to go to trial early next year." The ACLU represents, and has represented, the class of indigent defendants in Idaho who have for many years been prosecuting the *Tucker v. State of Idaho* case to which the Statement of Purpose refers. Much to the ACLU's disappointment, the terms of the bill, as currently drafted, fall far short of establishing a system that can meet constitutional muster or that will avoid a trial in that case, and will only perpetuate the systemic problems underlying the claims in that litigation. The ACLU's principle concerns regarding the bill are set forth below:

1. **The Bill Fails to Secure Defender INDEPENDENCE (19-6004(4), (6) & (7), 19-6007, 19-5904 and 19-847(6) & (7))**

Ensuring that public defense is independent from judicial and political influence is paramount to achieve a constitutional system. Political and judicial independence is the very first among the American Bar Association's TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, the most authoritative national standard on such systems. The Sixth Amendment Center, which the Idaho Legislature has invited to advise it several times over the past decade during the Legislature's work to remedy Idaho's public defense system, states that "Independence of the defense function is the first of the ABA Principles because without it, most of the other ABA Principles are unobtainable." Sixth Amendment Center, "The preeminent need for independence of the defense function," https://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/the-preeminent-need-for-independence-of-the-defense-function-aba-principle-1/.

To mitigate independence concerns related to the governor's selection of the state public defender, governor's appointees to the role should serve for a renewable term of five years, rather than four as the bill currently provides, so that they are not destined to come and go at the whim of each newly elected governor. Again, a similar arrangement for hiring the State Appellate Public Defender should be put in place.

The use of a panel of district magistrate commissioners selected by the governor to nominate for the governor a slate of candidates for the State Public Defender position is also problematic and creates independence concerns. These same independence concerns are raised by the bill's process for hiring District Public Defenders, which empowers the district magistrates commission to hire District Public Defenders, with only permissive input from the State Public Defender. Both of these provisions are contrary to the Sixth Amendment's mandate that the

public defense function, including the selection of defense counsel, be free from political influence.

To maximize independence, as the Sixth Amendment requires, district magistrate commissioners should be removed from both processes. District bar associations should instead each select a private criminal defense lawyer to serve on a body to select a shortlist from which the governor will select the State Public Defender and should also assist the State Public Defender in selecting District Public Defenders.

The bill's grant of authority to the governor to remove a State Public Defender for, among other reasons, "good cause shown," fails to provide the State Public Defender with due process or a hearing. This again infringes on the constitutionally mandated independence that the public defense function must have, and should be changed.

While American Bar Association standards referenced in the bill require that individual defenders' independence from political and judicial influence must be protected, the bill does not expressly make clear that county commissioners, prosecutors and judges should play no role whatsoever in the selection, oversight, financing or otherwise of public defense services. This is particularly important where, unless the bill is changed, contracts with public defenders in numerous counties who are not employed by the state may remain in place for six years.

2. **The Bill Fails to Mandate the STANDARDS to be Maintained (19-6005(1), (4), (5), (7), (8) & (9))**

The bill authorizes the State Public Defender to implement the American Bar Association's most current maximum attorney caseload standards for effective representation, but it does not make clear that those limits are not to be exceeded. That is not enough in our view to assure that every indigent defendant's case receives adequate attention and representation. The legislature should make clear that Idaho's indigent defenders are not to take on cases that exceed workload capacities prescribed by the ABA by reference to national workload limits, including the numerical caseload limits adopted by the National Advisory Commission on Criminal Justice Standards and Goals (NAC) until the ABA replaces those. The bill should also make clear that the State Public Defender has the "responsibility," and not just the "power," to implement, monitor compliance with, and enforce those national workload standards.

Moreover, while mandating compliance with the ABA's caseload standards for employed full-time front-line defenders who have neither supervisory and administrative responsibilities or private law practices on the side is a positive step, many public defenders have either or both, particularly if they are providing public defense pursuant to contract or have significant management responsibility in institutional public defense offices. For this reason, the bill should make clear that caseload standards must be adjusted - at least for defenders who devote less than all of their work time to the representation of indigent defendants - based on the extent of non-direct client workload responsibilities of individual attorneys providing public defense. The bill

should also require that workload and caseload standards be monitored and reported, and that compliance be enforced by the State Public Defender.

While the bill's express recognition of the most current ABA standards for the provision of public defense in Idaho, generally, is an excellent step in the right direction, its failure to be specific in some respects about what minimum standards of defense service the State Public Defender is statutorily obligated to provide leaves open too much room for the perpetuation of systemic failure. The bill should make clear, for example, that the state must ensure that defenders have time and private space for confidential client meetings, represent each client throughout all proceedings in their case, and receive regular reviews and supervision to assure compliance with applicable indigent defense standards. The bill should also make clear that it is the State Public Defender's responsibility to monitor and enforce compliance with all of the standards adopted for public defense in Idaho, and not just within the State Public Defender's power to do so.

3. **The Bill Fails to Assure Capable Experienced LEADERSHIP (19-6004(2) & (8), 19-850A and 19-5904)**

The bill establishes a new role of "State Public Defender" to head the "Office of State Public Defender" and oversee the delivery of public defense services state-wide. In spite of this immense and critical responsibility to meet constitutional expectations, the bill sets inadequate minimum qualification requirements for the role. To assure competency and capability at this senior leadership level, the bill should require at least seven years of criminal defense practice experience, at least five years of effective leadership and personnel management experience, and a demonstrated longstanding commitment to high quality public defense consistent with national standards.

While the bill provides that compensation is to be set by the governor, it does not – but should – also make clear that such compensation should be consistent with amounts paid to other state employed attorneys of similar experience, stature, and responsibility.

Notably, the bill perpetuates similarly inadequate qualification standards for the State Appellate Public Defender. These too should be adjusted upward to ensure that only highly qualified candidates are hired after the conclusion of the term of the incumbent in that role.

4. **The Bill Fails to Prescribe Hiring and Supervision of Necessary Non-Lawyer SUPPORT (19-6006)**

As it is widely known that the availability of social workers for indigent defendants can both aide in the provision of public defense by attorneys and significantly decrease the cost of such defense, social workers should be added to the list of non-lawyer personnel to be employed in the district public defense offices of the State Public Defender.

And while the bill provides that each District Public Defender is to supervise and assure compliance by defending attorneys in that district, it should also make clear that each district

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must also employ such investigators, social workers, paralegals, and other support staff and assistants as are currently deemed necessary by national standards for the delivery of effective public defense, and that they too must be supervised by the District Public Defender.

5. **The Bill Fails to Address County Defense-by-CONTRACT Problems (19-6005(1) and 19-6019(2))**

The bill allows the contracted-for public defense approach used by some counties to remain in place for years without otherwise addressing the flaws thereof that are inconsistent with ABA standards (e.g., lack of workload controls, inadequate access to investigation and expert resources, economic disincentives or incentives to effective representation). Solutions include (i) shortening the current 6-year sunset provision; and/or (ii) otherwise implementing reforms/controls to address these defects.

The bill also fails to eliminate contractual arrangements that effectively work around the existing state ban on fixed fee contracts. To reinforce the defender's primary obligation to his or her client, the bill provision that currently prohibits a pricing structure with a "single fixed fee for the services of the defending attorney and client-related expenses" should be revised to expressly prohibit a "fixed fee either for the services of the defending attorney over any length of time or for client- or case-related expenses of any kind."

6. **The Bill Fails to Define PARITY Between Defenders and Prosecutors**

The bill should contain express provisions to ensure that the state public defender—and attorneys employed by that office— have access to similar investigative, expert, and other support as is available to state prosecutors and are paid salaries that are commensurate with the amounts paid to other state employees (e.g., prosecutors) with similar experience, stature and responsibility.

The bill should also make clear that the legal services provided by public defenders to indigent persons accused of crime must be commensurate with those available to nonindigent persons.

7. **The Bill Fails to Clearly Mandate the Availability of TRAINING and Compliance Requirements (19-6005(5))**

While the bill empowers the State Public Defender to provide case type specific training and continuing legal education to public defenders, it fails to mandate such training or monitoring to assure defenders have appropriate skills, training, and experience to handle assigned cases and are in compliance with specified and clear standards. Stronger language is needed to ensure training is readily available to defending attorneys and is supportive of their compliance with the relevant standards.

8. **The Bill Fails to Ensure Continuation of CAPITAL DEFENSE Qualifications (19-6008(4) and 19-5905)(2))**

The bill would rescind capital defense qualifications, which are currently provided in PDC administrative rules, in 2024, without providing any certainty regarding their

replacement/retention. The administrative rules for capital defense qualifications should be expressly retained in the bill until such time as they are rescinded, replaced, or reaffirmed by the State Public Defender. It also appears that the bill would essentially sunset State Appellate Public Defender services for capital crimes along with the discontinuation of the Capital Crimes Defense Fund. This may be an unintended result of the current draft bill, but if not, it is incredibly problematic.

9. **The Bill Continues to Shift the Cost of Public Defense to Indigent Defendants (19-6011(7) and 20-514(4) & (7))**

The bill includes provisions making convicted indigent defendants (and the families of juvenile defendants) liable for reimbursement of the costs of their defense, whether they are found guilty or accepted a plea deal. While relief may be had if such liability would cause "manifest hardship," these reimbursement provisions should simply be eliminated entirely as illogical (by definition, such persons are indigent) and overreaching (defendants accept plea deals for many reasons unrelated to guilt or innocence, and such deals actually relieve the state of significant indigent defense costs).

10. **The Bill Fails to Provide Adequate FUNDING for a State-Wide Public Defense System**

Finally, while the funding mechanism for the new model of public defense is laid out in different legislation, this bill's Statement of Purpose states that $48 million is to be made available annually to fund public defense across the state beginning in FY25. Given recognized national standards for the provision of constitutionally effective public defense, and the bill's mandate that they be met, this level of public defense funding is already inadequate. The now outdated information we have on the current system suggests that a constitutionally adequate system would cost twice that, absent some effort to decriminalize minor offenses. Without adequate funding, this "new model" for public defense in Idaho is doomed to failure, this legislative effort will end up being a missed opportunity, and ACLU and its *Tucker* indigent defendants plaintiff class will be forced to continue to seek vindication of their Sixth Amendment right to counsel in Idaho through the courts.

For Questions or Comments, contact Leo Morales at LMorales@acluidaho.org or 208-344-9750x1203