

BILL ANALYSIS

C.S.H.B. 1754
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Criminal Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Interested parties contend that in the years since the enactment of the Texas Fair Defense Act, much progress has been made in improving indigent criminal defense in Texas. State expenditures for indigent defense have gone from no spending prior to the passage of the act to nearly \$30 million in a recent fiscal year, mainly as a result of various dedicated fees. Over the past decade, observers note, the number of defendants receiving appointed counsel has increased by almost 50 percent.

Despite this progress, some parties note that modifications to the act are necessary to enhance the independence and accountability of the state agency with oversight of indigent defense, reduce the burdens on counties that want to establish a public defender's office, and establish a procedure for counties to establish managed assigned counsel programs, also known as private defenders.

As proposed, C.S.H.B. 1754 sets out changes relating to the reorganization of powers and duties among agencies and entities in Texas that provide representation to indigent defendants in criminal cases and to the reorganization of funding sources for indigent defense and observers note that the reforms contained in this legislation were developed or approved by the Task Force on Indigent Defense.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the governing board of the Texas Indigent Defense Commission in SECTION 1 of this bill and that rulemaking authority previously granted to the Task Force on Indigent Defense is transferred to the Texas Indigent Defense Commission in SECTION 17 of this bill.

ANALYSIS

C.S.H.B. 1754 amends the Government Code to establish the Texas Indigent Defense Commission as an agency in the judicial branch of this state that operates under the direction and supervision of a governing board. The bill provides for a governing board of the commission consisting of eight ex officio members and five appointive members, requires the board to exercise its powers and perform its duties independently of the Texas Judicial Council, provides that the executive director is appointed by the board, and sets forth the qualifications of the executive director. The bill establishes the board's membership and terms, provides for the appointment of members by the governor, and requires board members to disclose information regarding the member's association with an application for technical support grant funds. The bill sets out provisions relating to board vacancies, frequency of board meetings, member compensation and expense reimbursement, voting and quorum procedures for board meetings, and board member immunity from liability for damages arising from an act or omission within the scope of board duties. The bill requires the board to adopt rules as necessary to implement the bill's provisions relating to the commission. The bill makes the commission subject to the Texas Sunset Act and, unless continued in existence by the act, abolishes the commission and

makes provisions of law related to the commission expire on September 1, 2023.

C.S.H.B. 1754 creates the fair defense account as an account in the general revenue fund to be appropriated only to the commission for the purpose of implementing the bill's provisions relating to the commission and to the office of capital writs for the purposes of implementing that office. The bill authorizes the commission to accept gifts, grants, and other public or private funds to pay commission expenses and 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. The bill requires the board of the commission, in accordance with the rules and procedures of the Legislative Budget Board, to prepare, approve, and submit a legislative appropriations request.

C.S.H.B. 1754 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 and sets out elements required to be included in the standards and policies. The bill sets out procedures for the submission and adoption of proposed policies and standards and requires any qualification standards adopted by the board that relate to the appointment of counsel in a death penalty case to be consistent with the standards under provisions of state law relating to appointment of counsel in such a case. The bill prohibits an attorney who is identified by the commission as not satisfying performance or qualification standards adopted by the board from accepting an appointment in a capital case.

C.S.H.B. 1754 requires the commission to develop a county reporting plan that establishes statewide requirements for counties relating to reporting indigent defense information that includes provisions designed to reduce redundant reporting by counties and to take into consideration the costs to counties of implementing the plan statewide. The bill 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. The bill authorizes the commission to revise the plan as necessary to improve monitoring of indigent defense policies, standards, and procedures in Texas. The bill requires the commission to annually submit to the governor, lieutenant governor, speaker of the house of representatives, and the Texas Judicial Council and to publish in written and electronic form a report containing any information submitted to the commission by a county regarding indigent defense and other specified information and recommendations. The bill requires the commission to annually submit to the Legislative Budget Board and the Texas Judicial Council and to publish in written and electronic form a detailed report of all expenditures made in performing the commission's duties, including distributions made to counties to provide indigent defense services. The bill authorizes the commission to issue other reports relating to indigent defense as determined to be appropriate by the commission.

C.S.H.B. 1754 requires, in each county and not later than November 1 of each odd-numbered year and in the form and manner prescribed by the commission, the preparation and delivery to the commission of a copy of all rules and forms that describe county procedures for providing indigent defendants with counsel, any revisions to those rules or forms previously submitted to the commission, or verification that rules and forms previously submitted still remain in effect. The bill requires a local administrative district judge in each county, or the person designated by the judge, to prepare and provide the reports with respect to all rules and forms adopted by the judges of the district courts trying felony cases in the county and requires the local administrative statutory county court judge in each county, or the person designated by the judge, to prepare and provide the reports with respect to all rules and forms adopted by the judges of the county courts and statutory county courts trying misdemeanor cases in the county. The bill requires a local administrative judge serving the judges of two or more levels of courts having jurisdiction over offenses with the highest classification of punishment, or the judge's designee, who adopt the same formal and informal rules and forms to submit the reports. The bill requires the chair of the juvenile board in each county, or the person designated by the chair, to

prepare and provide the reports with respect to all rules and forms adopted by the juvenile board. The bill requires, in each county, the county auditor, or the person designated by the commissioners court if the county does not have a county auditor, to prepare and send to the commission in the form and manner prescribed by the commission and on a monthly, quarterly, or annual basis, with respect to legal services provided in the county to indigent defendants during each fiscal year, information showing the total amount expended by the county to provide indigent defense services and an analysis of the amount expended by the county in certain jurisdictions, in cases for which a private attorney or public defender is appointed for an indigent defendant and for which counsel is appointed for an indigent juvenile, and for investigation, expert witness, or other litigation expenses. The bill requires, as a duty of office, each district and county clerk to cooperate with the county auditor or the applicable designee and the commissioners court in retrieving the information required to be sent to the commission.

C.S.H.B. 1754 requires the commission to 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; to distribute in the form of grants any funds appropriated for grants in an effort to assist counties in providing indigent defense services in the county; and to monitor each county that receives a grant and enforce compliance by the county with the conditions of the grant, including enforcement by withdrawing grant funds or requiring reimbursement of grant funds by the county. The bill requires the commission to distribute funds 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 and sets out minimum requirements and procedures for the adoption of those policies and standards. The bill prohibits a county from reducing the amount of funds provided for indigent defense services in the county because of funds provided by the commission. The bill requires the Office of Court Administration of the Texas Judicial System to provide administrative support, including information technology services support, to the commission as necessary to carry out the bill's provisions relating to the commission.

C.S.H.B. 1754 requires the governor, as soon as possible after the bill's effective date, to appoint the initial governing board of the Texas Indigent Defense Commission and to appoint two members whose terms expire on February 1 of the next odd-numbered year and three members whose terms expire on February 1 of the next even-numbered year. The bill, on the date the last appointee to the initial governing board takes office, abolishes the Task Force on Indigent Defense and transfers the powers, duties, obligations, rights, contracts, records, personnel, property, and unspent appropriations of the task force to the commission. The bill makes all rules of the task force continue in effect as rules of the commission until superseded by a rule of the commission. The bill authorizes the members and the director of the task force, until the date the task force is abolished, to continue in office and exercise their powers and duties under the law that governed the task force before the bill's effective date and provides that the prior law is continued in effect for that purpose. The bill 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 the bill's provisions.

C.S.H.B. 1754 requires the office of capital writs to receive funds for personnel costs and expenses from the fair defense account established under the bill's provisions, rather than under state law relating to the task force. The bill requires the commission, rather than the task force, to provide administrative support necessary under state law relating to an appointment list for death penalty counsel when the office of capital writs does not accept or is prohibited from accepting such an appointment. The bill requires the comptroller of public accounts to deposit in the fair defense account established under the bill's provisions, rather than under state law relating to the task force, a specified percentage of remitted fees from state bar members. The bill requires the public defender appointed by the attorney general to the membership of the human trafficking prevention task force to be a chief public defender employed by a public defender's office or an attorney designated by the chief public defender. The bill removes the definitions of "assigned counsel program," "contract defender program," "crime," "indigent defense support services,"

and "juvenile offense" from provisions of law relating to the Texas Judicial Council. The bill redefines "defendant," for purposes of those provisions of law, by reference to the bill's provisions relating to the Texas Indigent Defense Commission and redesignates the term "public defender" as "public defender's office." The bill defines "assigned counsel program," "board," "commission," "contract defender program," "council," "crime," "defendant," "executive director," "indigent defense support services," and "juvenile offense." The bill provides for the meaning of "office of capital writs" by reference and for the meanings of "managed assigned counsel program" and "public defender's office" by reference to the Code of Criminal Procedure. The bill repeals provisions of law relating to the creation and operations of the Task Force on Indigent Defense and to indigent defense information required to be submitted to the Office of Court Administration of the Texas Judicial System and makes nonsubstantive and conforming changes.

C.S.H.B. 1754 amends the Code of Criminal Procedure to authorize 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, to create a department of the county or by contract designate a nonprofit corporation to serve as a public defender's office, rather than appointing a governmental entity or nonprofit corporation to serve as a public defender, and makes that authorization apply also on written approval of a judge of those courts trying cases under the juvenile justice code. The bill makes conforming changes in provisions relating to procedures for creating or designating those entities and relating to proposals for the public defender's office required to be submitted by those entities to the county commissioners courts. The bill requires a commissioners court or the commissioners courts jointly, in creating or designating a regional public defender's office, to specify, among other elements, 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, if the public defender's office is a nonprofit corporation. The bill adds to the elements required to be specified the powers and duties that have been delegated to an oversight board for a public defender's office established under the bill's provisions. The bill removes from the list of elements to be specified whether the public defender is appointed to serve a term or serve at the pleasure of the commissioners court or courts, the term of appointment for such a public defender, and the procedures for removing the public defender. The bill requires the applicable commissioners court or courts to require a written plan from a governmental entity serving as a public defender's office. The bill adds to the information required to be included in the governmental entity's written plan and a nonprofit organization's proposal for the public defender's office 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.

C.S.H.B. 1754 prohibits a public defender's office from accepting, rather than authorizing the office to refuse, appointment by a court to represent an indigent defendant under certain circumstances. The bill specifies that the prohibition applies to a conflict of interest that has not been waived by a client. The bill, in the authorization for a judge to remove a person employed by a public defender's office for violating certain prohibitions relating to private practice and accepting valuables for services rendered, specifies that the authorization applies to a person's removal from the case.

C.S.H.B. 1754 authorizes the commissioners court of a county or the commissioner courts of two or more counties to establish an oversight board for a public defender's office created or designated in accordance with provisions of law relating to arraignment. The bill requires a commissioners court or courts that establish an oversight board to appoint members of the board, which may include an attorney, the judge of a trial court in Texas, a county commissioner, a county judge, a community representative, and a former client or a family member of a former client of the public defender's office for which the oversight board was established. The bill authorizes a commissioners court or courts to delegate to the oversight board any power or duty of the commissioners court to provide oversight of the public defender's office, including recommending selection and removal of a chief public defender, setting policy for the office, and

developing a budget proposal for the office. The bill prohibits an oversight board from gaining access to privileged or confidential information.

C.S.H.B. 1754 authorizes a 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. The bill 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 managed assigned counsel program. The bill requires a commissioners court or commissioners courts, in appointing an entity to operate a managed assigned counsel program, to specify the types of cases in which the program is authorized to appoint counsel for an indigent defendant or a juvenile defendant and the courts in which the counsel appointed by the program may be required to appear and the term of any agreement establishing a program and how the agreement may be terminated or renewed. The bill requires the commissioners court or commissioners courts to require a written plan of operation from an entity operating a program that must include certain specified budgetary and administrative information and policies. The bill requires such a program to have a director and requires that director, unless the program uses a review committee, to be a member of the State Bar of Texas, to have practiced law for at least three years, and to have substantial experience in the practice of criminal law.

C.S.H.B. 1754 authorizes a 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, each of whom must meet the requirements of a director, may not be employed as a prosecutor, and may not be included on or apply for inclusion on the public appointment list. The bill requires the program's public appointment list to contain the names of qualified attorneys who apply to be included on the list, meet any applicable requirements specified by the procedure for appointing counsel for indigent defendants and the Texas Indigent Defense Commission, and are approved by the program director or review committee. The bill authorizes a court to replace an attorney appointed by the program for the same reasons and in the same manner described by provisions of law regarding counsel for indigent defendants. The bill entitles a managed assigned counsel 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. The bill authorizes a managed assigned counsel program to employ personnel and enter into contracts necessary to perform the program's duties as specified by the commissioners court or commissioners courts. The bill prohibits a payment for compensation of counsel appointed in a county that operates a managed assigned counsel program to be made until a form itemizing the services performed by appointed counsel is sent to the director of the program and until the director approves the payment and makes conforming changes relating to the disapproval of the requested amount.

C.S.H.B. 1754 repeals a provision of law establishing the indigent defense representation fund as a separate account in the general revenue to be funded from certain court costs and used for the same purposes as the fair defense account. The bill, for purposes of provisions of law relating to a public defender's office, provides for the meaning of "oversight board," redesignates "public defender" as "public defender's office," redefines "governmental entity," and makes conforming and nonsubstantive changes. The bill, for purposes of the managed assigned counsel program, defines "managed assigned counsel program" and "program," and provides for the meaning of "governmental entity" by reference.

C.S.H.B. 1754 amends the Local Government Code to make conforming changes in provisions of law relating to certain court fees assessed on conviction for support of indigent defense representation through the indigent defense fund.

C.S.H.B. 1754 repeals the following provisions:

- Article 26.05(i), Code of Criminal Procedure
- Section 71.0351, Government Code
- Subchapter D, Chapter 71, Government Code

EFFECTIVE DATE

September 1, 2011.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 1754 differs from the original by defining "commission" as the agency known as the Texas Indigent Defense Commission, whereas the original defines "commission" as the permanent standing committee of the Texas Judicial Council known as the Texas Indigent Defense Commission. The substitute differs from the original by specifying that the commission is established as an agency in the judicial branch of this state, whereas the original specifies that the commission is established as a permanent standing committee of the council. The substitute contains a provision not included in the original making the commission subject to the Texas Sunset Act and, unless continued in existence by the act, abolishing the commission and making provisions of law related to the commission expire on September 1, 2023.

C.S.H.B. 1754 differs from the original by providing for five appointive members of the commission's governing board, whereas the original provides for seven appointive members. The substitute omits a provision included in the original authorizing the designee of the chief justice of the supreme court and the designee of the presiding judge of the court of criminal appeals to serve in place of those judges as ex officio members of the board. The substitute differs from the original by requiring the governor to appoint five members of the board, whereas the original requires the governor to appoint seven members. The substitute differs from the original by requiring one appointed board member to be a practicing criminal defense attorney and one member to be a chief public defender in Texas or the chief public defender's designated attorney employed by the public defender's office, whereas the original requires two such criminal defense attorney members and two chief public defenders or their designated attorneys. The substitute differs from the original by making two members' terms expire February 1 of each odd-numbered year and three members' terms expire February 1 of each even-numbered year, whereas the original establishes those terms for three and four members, respectively. The substitute omits a provision included in the original providing for the initial board membership and the names of those members. The substitute differs from the original by establishing that six members of the board constitute a quorum, rather than seven as in the original; authorizing the board to act on the concurrence of five board members, rather than six as in the original; and authorizing the board to adopt policies and standards relating to indigent defense services only on the concurrence of seven board members, rather than eight as in the original. The substitute omits a provision included in the original, in a provision providing for exceptions to a board member's entitlement to vote on any matter before the board, requiring council ratification of rules adopted by the board. The substitute omits a provision in the original requiring the board to submit rules adopted under the bill's provisions relating to the commission to the council for ratification and requiring the council to ratify a rule as appropriate. The substitute omits a provision not included in the original making a conforming change to reflect the requirement that the council ratify the rules.

C.S.H.B. 1754 omits provisions included in the original establishing that the commission is administratively attached to the Office of Court Administration of the Texas Judicial System and that information exchanged between the commission and the office of court administration for purposes of providing or receiving legal support services is protected by the attorney-client privilege. The substitute differs from the original, in the provision requiring the office of court

administration to provide administrative support to the commission, by specifying that such support includes information technology services support, whereas the original specifies that the support includes human resources, budgetary, accounting, purchasing, payroll, information technology, and legal support services. The substitute omits a provision included in the original specifying that the legislative appropriations request required to be prepared, approved, and submitted by the board is separate from the legislative appropriations request for the council and is used to develop the budget structure for the board and the commission. The substitute omits a provision included in the original requiring the board to maintain the legislative appropriations request and budget structure separately from those of the council and to make the legislative appropriations request and budget structure available to the council on request. The substitute omits a provision included in the original requiring the commission to submit its policies and standards relating to indigent defense services to the council for ratification and requiring the council to ratify such policies and standards as appropriate. The substitute differs from the original by requiring certain indigent defense information in each county to be prepared and provided to the commission not later than November 1 of each odd-numbered year, whereas the original requires such information to be provided at the time prescribed by the commission and as otherwise requested. The substitute differs from the original by requiring that information to include a copy of all formal and informal rules and forms relating to a county's procedures in providing indigent defendants with counsel and any revisions to the rules or forms previously submitted to the commission, whereas the original requires the information to include an initial report containing the copy and a supplemental report containing the revisions. The substitute contains a provision not included in the original requiring such information to include verification that rules and forms previously submitted still remain in effect.

C.S.H.B. 1754 differs from the original by requiring the commission to distribute in the form of grants any funds appropriated for the purposes of technical support to counties for indigent defense services to assist counties in providing the services in the county, whereas the original requires the commission to direct the comptroller of public accounts to distribute funds, including grants, for such purposes. The substitute omits a provision included in the original making conforming changes to reflect the comptroller's authority in distributing funds and grants. The substitute omits a provision included in the original requiring the commission to submit policies and standards adopted by the board relating to technical support and grants to counties for indigent defense services to the council for ratification and requiring the council to ratify a policy or standard as appropriate.

C.S.H.B. 1754 differs from the original, in the provision authorizing the creation of a public defender oversight board in a county, by specifying that, among other persons, members may include an attorney or judge of a trial court in Texas, rather than a criminal or juvenile defense attorney or the judge of a trial court in Texas that has criminal jurisdiction as in the original. The substitute contains a provision not included in the original authorizing the membership of the public defender oversight board to include a former client or a family member of a former client of the public defender's office for which the oversight board was established. The substitute contains a provision not included in the original prohibiting an oversight board established under the substitute's provisions from gaining access to privileged or confidential information. The substitute contains a provision not in the original repealing Section 71.0351, Government Code, relating to indigent defense information required to be submitted to the Office of Court Administration of the Texas Judicial System. The substitute differs from the original by requiring the governor to appoint two members of the governing board of the Texas Indigent Defense Commission whose terms expire on February 1 of the next odd-numbered year and three members whose terms expire on February 1 of the next even-numbered year, whereas the original requires the governor to appoint three and four members, respectively, to those terms.

C.S.H.B. 1754 differs from the original in nonsubstantive ways to reflect certain grammatical constructions and bill drafting conventions.