

## **UNIFORM LAW COMMISSIONERS' MODEL PUBLIC DEFENDER ACT**

### **Prefatory Note**

In 1959, the Conference adopted a Model Defender Act based on careful study and close cooperation with the National Legal Aid and Defender Association, the Standing Committee on Legal Aid Work of the American Bar Association, and its Section of Criminal Law.

Later study, made in the new light cast by Supreme Court decisions such as *Gideon v. Wainwright*,<sup>1</sup> *Escobedo v. Illinois*<sup>2</sup> and *Miranda v. Arizona*,<sup>3</sup> suggested the advisability of reevaluating the earlier work of the Conference. As a result, the Conference adopted the Model Defense of Needy Persons Act in 1966.

There were two main features to that Act. It set up (1) a procedure for assuring that the rights of needy persons accused of crime would be protected in accordance with constitutional mandates, and (2) an organizational system and framework by which adequate counsel and other needed facilities could be provided at state expense. In the latter respect, it adopted the so-called "county option" plan, which left it up to each county whether to set up a public defender, adopt a court-assigned counsel plan, use the services of legal aid groups, or adopt some combination of these approaches.

Since 1966, the Model Act has been enacted in variously modified forms in about a dozen states. A recent example is Wisconsin.

Although the procedural provisions of the 1966 Model Act have apparently been satisfactory, the same has not been true of the provisions built around the county option plan. In 1967, the President's Commission on Law Enforcement and Administration of Justice recommended that "jurisdictions that have not already done so should move from random assignment of defense counsel by judges to a coordinated assigned counsel system or a defender system...each state should finance assigned counsel and defender systems on a regular and statewide basis."

The National Defender Conference, held in 1969, made clear that each state should have an organization at the state level headed by a defender general or director of defense. This was intended to assure better coordination and consistency of approach throughout the state, and better consultation with the several branches of state government. It was also intended to reduce the administrative burden on court personnel and provide more efficient and more experienced defense counsel services to needy persons accused of crime.

Because of this shift in thinking, some states have been changing their legislative approaches accordingly. Unfortunately, this has led them to overlook the superior procedural safeguards of the Model Defense of Needy Persons Act, particularly those relating to the need for counsel between the time a person is first detained and the time he is formally charged or, in many instances, the time he is formally arrested.

The purposes of the proposed Model Public Defender Act, therefore, are twofold:

- (1) to continue and update the procedural safeguards provided by the Model Defense of Needy Persons Act. These are contained for the most part in sections 1-9.
- (2) to shift from the county-option approach to a state-wide defender system.

This shift does not mean that the flexibility of the county option plan is to be replaced by the rigidities of a monolithic bureaucracy. The proposed act preserves the options of using court-assigned attorneys and the services of legal aid bureaus, but it provides that these options will be exercised on a coordinated basis at the state level.

In its work, the Committee has continued its liaison with other bodies, particularly the interested agencies of the American Bar Association. The Committee is especially grateful for the help provided by the National Legal Aid and Defender Association, specifically through General Charles L. Decker, Director of its National Defender Project.

In carrying out its functions with respect to providing adequate procedural safeguards, the Committee has been guided by the views of the Supreme Court. Throughout, the objective has been to assure fair treatment for the needy defendant within the bounds of what is administratively practicable.

In general terms, *Gideon v. Wainwright* gave the needy criminal defendant the same right to legal representation in a State court under the 14th amendment (whether "equal protection" or "due process") that the 6th amendment gives to criminal defendants in Federal courts.<sup>4</sup> The minimum requirements of representation, therefore, are to be found not only in the express assurance made in *Gideon* itself but also in what the court had previously found to be required of Federal proceedings under the 6th amendment.

According to the majority opinion, written by Mr. Justice Black, "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Representation is assured "unless the right is competently and intelligently waived" (citing *Johnson v. Zerbst*<sup>6</sup> the first case to extend the right to counsel to needy persons). At the same time, in *Douglas v. California*,<sup>7</sup> the Court extended the needy person's right to counsel to include at least his first appeal.

As for the necessary expenses of defense other than the services of an attorney, the Supreme Court, in *Griffin v. Illinois*<sup>8</sup> and *Draper v. Washington*,<sup>9</sup> has assured the needy defendant in a Federal criminal case the right to a free transcript (or its equivalent) on appeal.

The criminal defendant's right to counsel covers every critical stage of the proceedings against him. It includes arraignment<sup>10</sup> and preliminary hearing.<sup>11</sup> In *Escobedo*, the Supreme Court held that under some circumstances at least, a person under arrest for murder has a constitutional right to the presence of counsel while the police interrogate him as a suspect.<sup>12</sup> Accordingly, it threw out a confession obtained while the counsel retained by the accused was excluded from the interrogation. On the basis of *Gideon* and *Escobedo*, it seemed likely that the Supreme Court would extend the same protection to needy suspects.

In *Miranda*, the Supreme Court held that once a person (in that case, a needy person) had been taken into custody by the police no confession, admission, or exculpatory statement made outside the presence of counsel could be used against him, unless, after being fully informed as to his rights, he had waived his right to counsel voluntarily, knowingly, and intelligently.<sup>13</sup>

From these cases, it has seemed clear that:

- the supreme court has extended to state cases the protections that it provides in Federal cases;
- it has extended to needy persons the protections that it provides to persons of adequate means;

- it has made the right to counsel absolute and not dependent on particular circumstances or, except in some respects for petty offenses, on the nature of the crime;
- it is interested in the suspect from the moment he is taken into custody or comes into court to plead; and
- it is tending to extend its protection of needy persons to all aspects of an "adequate defense," including necessary facilities for investigation and trial.

The approach of the new Model Act is not to define the exact limits of the right to an adequate defense, but to provide that, whatever the Supreme Court says it consists of for persons of adequate means, the needy person is entitled to the same protection and that, to the extent that he is unable to pay for it, he is entitled to have it paid for by the state.

Also, there has been no attempt in it to codify the other aspects of a constitutionally adequate criminal procedure. For instance, the act says nothing about the suspect's right to remain silent, or his right to bail. It is confined to equipping the needy person with necessary defensive facilities. Lest anyone read a negative implication into this limited coverage, section 16 has been included to prevent one from arising. As a model, rather than uniform act, it is designed for the typical state and seeks only as much uniformity as is consistent with local conditions. Matters most likely to vary from state to state are in brackets.

## **UNIFORM LAW COMMISSIONERS' MODEL PUBLIC DEFENDER ACT\***

### **Section 1. Definitions**

In this Act, the term:

(1) "detain" means to have in custody or otherwise deprive of freedom of action;

(2) "expenses," when used with reference to representation under this Act, includes the expenses of investigation, other preparation, and trial;

(3) "needy person" means a person who at the time his need is determined is financially unable, without undue hardship, to provide for the full payment of an attorney and all other necessary expenses of representation or who is otherwise unable to employ an attorney.

(4) "serious crime" includes --

(i) a felony;

(ii) a misdemeanor or offense any penalty for which involves the possibility of confinement for more than 6 months or a fine of more than \$500; and

(iii) an act that, but for the age of the person involved, would be a serious crime.

### **Section 2. Right to Representation, Services, and Facilities**

**(a) A needy person who is being detained by a law enforcement officer without charge or judicial process, or who is charged with having committed or is being detained under a conviction of a serious crime, is entitled:**

**(1) to be represented by an attorney to the same extent as a person having his own counsel; and**

**(2) to be provided with the necessary services and facilities of representation (including investigation and other preparation), as authorized or later approved by the court. The attorney, services and facilities, and court costs shall be provided at public expense to the extent that the person, at the time the court determines need, is unable to provide for their payment without undue hardship.**

**(b) A needy person who is entitled to be represented by an attorney under subsection (a) is entitled:**

**(1) to be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney and including revocation of probation or parole;**

**(2) to be represented in any appeal; and**

**(3) to be represented in any other post-conviction proceeding that the attorney or the needy person considers appropriate, unless the court in which the proceeding is brought determines that it is wholly frivolous.**

**(c) A needy person's right to a benefit under subsection (a) or (b) is not affected by his having provided a similar benefit at his own expense, or by his having waived it, at an earlier stage.**

### **Section 3. Notice and Provision of Representation**

**(a) If a person who is being detained by a law enforcement officer without charge or judicial process, or who is charged with having committed or is being detained under a conviction of a serious crime, is not represented by an attorney under conditions in which a person having his own counsel would be entitled to be so represented, the law enforcement officer, [magistrate], or court concerned shall:**

**(1) clearly inform him of the right of a needy person to be represented by an attorney at public expense; and**

**(2) if the person detained or charged does not have an attorney, notify the appropriate public defender that he is not so represented.**

**This shall be done upon commencement of detention, formal charge, or postconviction proceeding, as the case may be. As**

used in this subsection, the term "commencement of detention" includes the taking into custody of a probationer or parolee.

(b) Upon commencement of any later judicial proceeding relating to the same matter, the presiding officer shall clearly inform the person so detained or charged of the right of a needy person to be represented by an attorney at public expense.

(c) If a law enforcement officer, [magistrate], or court determines that the person is entitled to be represented by an attorney at public expense, the officer, [magistrate], or court, as the case may be, shall promptly notify the appropriate public defender.

(d) Upon notification under this section or upon request by the person concerned, the Defender General shall represent the person with respect to whom the notification is made. If the Defender General is unable or unwilling to represent the person, the court concerned may assign an attorney to represent him. Representation may include co-counsel or associate counsel in appropriate cases.

(e) Information given to a person under this section is effective only if:

- (1) it is in writing or otherwise recorded;
- (2) he records his acknowledgment of receipt and time of receipt, or, if he refuses to make this acknowledgment, the person giving the information records that he gave the information and that the person informed refused so to acknowledge it; and
- (3) the material so recorded under paragraphs (1) and (2) is filed with the court next concerned.

#### **Section 4. Determination of Financial Need**

(a) The determination whether a person covered by section 2 is a needy person shall be deferred until his first appearance in court or in a suit for payment or reimbursement under section 9, whichever occurs earlier. Thereafter, the court shall determine, with respect to each proceeding, whether he is a needy person.

(b) In determining whether a person is a needy person and the extent of his ability to pay, the court may consider such factors as income, property owned, outstanding obligations, and the number and ages of his dependents. Release on bail does not necessarily disqualify him from being a needy person. In each case, the person, subject to the penalties for perjury, shall certify in writing or by other record such material factors relating to his ability to pay as the court prescribes.

(c) To the extent that a person covered by section 2 is able to provide for an attorney, the other necessary services and facilities of representation, and court costs, the court may order him to provide for their payment.

### **Section 5. Competence to Defend**

A person assigned the primary responsibility for representing a needy person must be licensed to practice law in this state and otherwise competent to counsel and defend a person charged with crime. Competence shall be determined by the court at the first court proceeding after the giving of primary responsibility.

### **Section 6. Replacement Defender**

At any stage, including appeal or other post-conviction proceeding, the Defender General or the court for good cause may assign a replacement attorney. The replacement attorney has the same functions with respect to the needy person as the attorney whom he replaces.

### **Section 7. Waiver**

A person who has been appropriately informed under section 3 may waive in writing, or by other record, any right provided by this Act, if the court, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. The court shall consider such factors as the person's age, education, and familiarity with the English language, and the complexity of the crime involved.

### **Section 8. Use of State Facilities**

An attorney representing a person under this Act is entitled to use any state, county, or municipal technical services and facilities for the development or evaluation of evidence that are available to the [state or local prosecutor].

### **Section 9. Recovery from Defendant**

(a) The Defender General, on behalf of the state, may recover reimbursement from each person who has received legal assistance or another benefit under this Act:

- (1) to which he was not entitled;
- (2) with respect to which he was not a needy person when he received it; or

**(3) with respect to which he has failed to make the certification required by section 4 (b); and for which he refuses to reimburse. Suit must be brought within 6 years after the date on which the aid was received.**

**(b) The Defender General, on behalf of the state, may recover reimbursement from each person, other than a person covered by subsection (a), who has received legal assistance under this Act and who, on the date on which suit is brought, is financially able to reimburse the state for it according to the standards of ability to pay applicable under sections 1 (3), 2 (a), and 4 (b), but refuses to do so. Suit must be brought within 3 years after the date on which the benefit was received.**

**(c) Amounts recovered under this section shall be paid into the [general fund] of the state.**

## **Section 10. Office Of Defender General**

**(a) The Office of Defender General is established in the executive branch of the state. The head of the office is the Defender General.**

**(b) The Defender General shall be appointed by the Governor, with the advice and consent of the [appropriate state legislative body], for a term of 6 years and until his successor is appointed and qualified. To be qualified for appointment, a person must be licensed to practice law in the state. He may be removed from office only as judges of courts of general jurisdiction are removed and only for the reasons for which such judges are removed. The Defender General is entitled to compensation at the annual rate of [\$].**

**(c) The Defender General has the primary responsibility for providing needy persons with legal services under this Act. He may provide these services personally, through deputies or assistants, through [district] public defenders employed under section 12 (a), or as provided by subsection (d). No other official or agency of the state may supervise the Defender General or assign him duties in addition to those prescribed by this Act. He may not practice law other than in the performance of his duties under this Act or engage in any other occupation, except as provided in section 17.**

**(d) Whenever appropriate, the Defender General may contract with private or public legal aid or other non-profit organizations that are equipped to provide the services to needy persons covered by this Act or to carry out any other function of the Office of Defender General. Each contract must provide (1) that the services performed shall meet the professional standards that this Act prescribes for services performed by the Office of the Defender General, and (2) that the services are subject to the Defender General's supervision and control.**

**(e) The Defender General shall supervise the training of all public defenders, and for this purpose he may establish a training course.**

**(f) Whenever appropriate, the Defender General may appear in legislative or administrative proceedings for the purpose of assuring adequate representation to the persons covered by this Act.**

**(g) The Defender General shall consult and cooperate with interested professional groups with respect to the causes of crime, the development of effective means for discouraging crime, the rehabilitation of convicted criminals, the administration of criminal justice, and the administration of the Office of the Public Defender.**

## **Section 11. Local Offices**

**The Defender General may establish as many branch or local offices as necessary to carry out his responsibilities under this Act. Each branch or local office shall be headed by a [district] public defender who is an assistant public defender selected by the Defender General. A [district] public defender is entitled to annual compensation not proportionately less than the compensation of the [county] prosecutor.**

## **Section 12. Personnel and Facilities**

**(a) The Defender General may employ, in the manner and at the compensation prescribed by the [appropriate legislative authority], as many deputy defenders general, public defenders (including [district] public defenders), investigators, clerks, stenographers, and other persons as necessary to carry out his responsibilities under this Act. Persons employed under this section, other than civil service employees, serve at the pleasure of the Defender General.**

**(b) A deputy defender general or public defender must be licensed to practice law in the state and competent to represent a person charged with crime. He may not otherwise engage in the practice of criminal law, except as provided in section 17.**

**(c) The Defender General shall be reimbursed from state funds for all reasonable expenses, including mileage and other travel expense, lodging, and subsistence incurred in carrying out his responsibilities under this Act.**

**(d) The [appropriate administrative authority] of the state shall provide appropriate facilities (including office space, furniture, equipment, books, postage, supplies, and interviewing facilities in jail) necessary to carry out the Defender General's responsibilities under this Act.**



### **Section 13. Court Assigned Attorneys**

If a court assigns an attorney under section 3 (d) or 6, it shall prescribe a reasonable rate of compensation for his services based on the complexity of the issues, the time involved, and other relevant considerations, and shall determine the direct expenses, necessary to representation, for which he should be reimbursed. Payment or reimbursement shall be made out of the [appropriate fund] of the state.

### **Section 14. Allocation of Expenses**

Any expense, including the cost of a transcript [or substitute for a transcript] that is directly and necessarily incurred by the [local governmental unit] in representing a needy person under this Act, is a charge against the state [and shall be reimbursed from the [appropriate fund] of the state].

### **Section 15. Additional Fees Forbidden**

A person who represents a needy person under this Act may not receive any fee for his services in addition to that provided under the Act.

### **Section 16. Reports**

(a) An attorney who is assigned by a court to represent a needy person under section 3 (d) or 6 shall report to the Defender General on his representation of the needy person, as prescribed by the Defender General.

(b) The Defender General shall submit an annual report to the [Governor] [legislature] showing the number of persons represented under this Act, the crimes involved, the outcome of each case, and the expenditures (totaled by kind) made in carrying out the responsibilities imposed by this Act.

### **Section 17. Representation in State and Federal Courts**

This Act applies only to representation in or with respect to the courts of this state. It does not prohibit the Defender General, a deputy defender general, or other public defender from representing a needy person in a Federal court of the United States, if:

- (1) the matter arises out of or is related to an action pending or recently pending in a court of criminal jurisdiction of the state; or

**(2) representation is under a plan of the United States District Court as required by the Criminal Justice Act of 1964 (18 U.S.C. 3006A) and is approved by the legislature.**

### **Section 18. Protections not Exclusive**

**The protections provided by this Act do not exclude any protection or sanction that the law otherwise provides.**

### **Section 19. Severability**

**If a provision, or an application of a provision, of this Act is held invalid, the valid provisions and applications that can be given effect without the invalid provision or application are intended to be in effect. To this end, the provisions of this Act are severable.**

### **Section 20. Repeal**

**The following acts and parts of acts are repealed:**

- (1)**
- (2)**
- (3)**