



**Seattle**  
**City Attorney's Office**

Peter S. Holmes, City Attorney

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October 30, 2020

Seattle City Council President M. Lorena González  
Seattle City Councilmember Lisa Herbold  
Seattle City Councilmember Debora Juarez  
Seattle City Councilmember Andrew Lewis  
Seattle City Councilmember Tammy Morales  
Seattle City Councilmember Teresa Mosqueda  
Seattle City Councilmember Alex Pedersen  
Seattle City Councilmember Kshama Sawant  
Seattle City Councilmember Dan Strauss  
Seattle City Hall  
600 4<sup>th</sup> Avenue, 2<sup>nd</sup> Floor  
Seattle, WA 98104

*Via email*

Dear Councilmembers:

I am writing regarding the proposal to redefine the terms “duress” and “de minimis” to create new means of defense for certain misdemeanor-level offenses rooted in poverty, behavioral health crises, or substance abuse. I understand model language was developed by the King County Department of Public Defense (DPD) in partnership with other advocacy organizations, and some of that content may inform a forthcoming refined proposal to be sponsored by Councilmember Herbold. DPD’s model legislation has received significant attention over the past few days, so in the interests of transparency and candor I am writing all of you to share my and my office’s thoughts and suggestions regarding this proposal. These legislative decisions are yours to make, and I hope my perspective provides you some insight that may help shape your decisions should you decide to adopt a bill.

This letter reflects my policy input regarding this proposal, not my office’s legal advice, so we do not consider it attorney-client privileged. My attorneys are always available to provide privileged legal advice regarding any proposed legislation through a separate communication.

First, several of the provisions in this bill codify what my office already practices. Since I became City Attorney in 2010, I have worked to move the City Attorney's Office away from prosecuting property crimes that appeared to be committed out of survival necessity; for example, no city prosecutor is interested in sending an impoverished new parent to jail for stealing baby food. It's not only a just choice by prosecutors, it's also one reenforced by Seattle jurors who are loath to convict for crimes committed out of pure necessity. I have also long supported efforts to divert defendants with behavioral health issues to appropriate treatment rather than traditional prosecution when there is evidence that treatment may help address the defendant's behavior.

My office has made great strides in expanding diversion opportunities, thanks in large part to our strong collaboration with DPD, the Seattle Municipal Court, and community stakeholders. While codifying many of the elements in DPD's proposal isn't necessary to continue reducing traditional prosecution and expanding diversion opportunities, I can appreciate your interest in adding permanency to the way Seattle approaches prosecution alternatives. Thank you again, Councilmembers, for recently allocating my office funding to conduct a racial equity toolkit to expand pre-filing diversion opportunities to those older than 24-years-old.

I do have concerns that other elements of DPD's draft proposal could negatively impact our existing diversion efforts and our specialty court programs such as Mental Health Court and Veterans Treatment Court. However, with some revisions, which I discuss below, I believe you could make constructive additions to Seattle's criminal legal code.

Currently, the proposal treats both "meeting an immediate basic need" and "experiencing symptoms of a behavioral health disorder" the same. We suggest treating them separately because in the courtroom context poverty and mental health issues present distinct challenges.

We believe "meeting an immediate basic need" is best structured exclusively as an affirmative defense that a defendant can raise at trial, while "experiencing symptoms of a behavioral health disorder" is better structured as a diversion alternative that a judge can order where certain criteria are present. When a behavioral health crisis causes a person to assault a stranger, dismissing the case without the judge also directing the person to treatment could potentially leave that person's unique condition unaddressed. A new statutory diversion structure would better complement Seattle Municipal Court's existing mental health programs and, in our view, better serve defendants.

We also suggest removing the amendments to the "de minimis infraction" section of the Seattle Municipal Code – that section is a little-used provision stemming from amendments to the Seattle Municipal Code in the early 1970s with no parallel in Washington state law, and the concepts raised in the proposal could be better implemented with different statutory structure.

For the “meeting an immediate basic need” defense, rather than amending the existing “duress” affirmative defense, we suggest the common law “necessity” affirmative defense be codified into the Seattle Municipal Code. The necessity defense, the elements of which are as follows (taken from Washington Pattern Criminal Jury Instruction 18.02), largely addresses the issues raised in the proposed additions to the “duress” defense:

- (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
- (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law; and
- (3) the threatened harm [to the defendant] was not brought about by the defendant; and
- (4) no reasonable legal alternative existed.

On the mental health provisions, we recommend removing the “experiencing symptoms of a behavioral health disorder” language from the proposed affirmative defense and “de minimis” sections and instead placing it within a new statutory diversion structure, which could formalize an approach similar to that already used by Seattle’s therapeutic Mental Health Court and Veterans Treatment Court. We suggest structuring this so a defendant could ask a judge to order diversion (with treatment) in lieu of prosecution (i.e., with dismissal of charges upon completion of a diversion/treatment program) if the defendant can establish that (1) the facts underlying the elements of the charged offense were a result of the defendant experiencing symptoms of a behavioral health disorder, (2) diversion/treatment in lieu of prosecution is reasonably likely to address the defendant’s conduct that led to the charges, (3) diversion/treatment in lieu of prosecution does not present a demonstrated risk to public safety, and (4) a suitable diversion/treatment program is available. We recommend including the Municipal Court (along with the CAO and DPD) in discussions regarding the specifics of this language and identifying appropriate diversion/treatment programs.

We believe restructuring DPD’s proposed legislation along these lines would keep it consistent with the spirit of the proposal while setting it up to function more practically and effectively within the Seattle Municipal Court’s structure. More important than any legislation you could adopt or amendment I could recommend is that resources must be provided to assist individuals with the underlying issues that led to them to committing the crime. Whether the funds are federal, state, county, local, or philanthropic, there is a very real need. My office has been in dialogue with DPD regarding their proposal earlier this week, and we are happy to participate in further discussions with Councilmembers and staff, DPD, the Municipal Court, and all other stakeholders as these concepts develop.

Very truly yours,



Peter S. Holmes  
Seattle City Attorney

cc: Director Anita Khandelwal, King County Department of Public Defense  
Presiding Judge Willie Gregory, Seattle Municipal Court  
Judge Faye Chess, Seattle Municipal Court  
Judge Andrea Chin, Seattle Municipal Court  
Judge Anita Crawford-Willis, Seattle Municipal Court  
Judge Adam Eisenberg, Seattle Municipal Court  
Judge Catherine McDowall, Seattle Municipal Court  
Judge Damon Shadid, Seattle Municipal Court  
Mayor Jenny Durkan