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TO: Honorable Margaret Rotundo, Senate Chair
Honorable Jeremy Fischer, House Chair
Members, Joint Standing Committee on Appropriations & Financial Affairs

Honorable Bill Diamond, Senate Chair
Honorable Stan Gerzofsky, House Chair
Members, Joint Standing Committee on Criminal Justice and Public Safety

Honorable Barry Hobbins, Senate Chair
Honorable Deborah Simpson, House Chair
Members, Joint Standing Committee on Judiciary

FROM: ⁹⁶⁷ Grant Pennoyer, Director
Office of Fiscal and Program Review

DATE: November 15, 2007

SUBJECT: **Final Report of the Study to Review the Process of Determining the Costs of Changes to Criminal Penalties**

Attached please find the final report of the "Study to Review the Process of Determining the Costs of Changes to Criminal Penalties" submitted pursuant to Public Law 2007, chapter 436.

Our study group met four times over the summer and fall with the main objective of developing an improved fiscal note process that accurately forecasts the costs of changes in criminal law and to appropriate funds to cover these costs. The group reviewed the fiscal notes on 16 specific bills that were carried over to the 2nd Regular Session of the 123rd Legislature. The Office of Fiscal and Program Review is currently in the process of updating the fiscal notes for these 16 bills based on the additional information gathered through this study. When completed, these updated fiscal notes, based on the bills as they were engrossed on the Special Appropriations Table at the end of the 1st Regular Session, will be forwarded to you.

I hope you find this report useful. Included in this report are some policy choices that will further guide the process for dealing with legislative changes to criminal penalties.

cc: David Boulter, Executive Director
Patrick Norton, Director, OPLA
Marion Hylan-Barr, OPLA
Margaret Reinsch, OPLA
OFPR Staff

**STATE OF MAINE
123rd Legislature
First Regular Session**

**Final Report
of the Study to Review the Process of
Determining the Costs of Changes to Criminal Penalties**



November 15, 2007

**Prepared by the
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I. INTRODUCTION/BACKGROUND

During the First Regular Session of the 123rd Legislature, members of the Joint Standing Committee on Appropriations and Financial Affairs expressed dissatisfaction with the vagueness of fiscal notes for legislation dealing with statutory changes in the criminal code. This dissatisfaction was driven by the Department of Corrections budget requests to address prison overcrowding issues. Many legislators felt that properly assigning a cost to legislation implementing new crimes or enhancing the penalties for existing crimes would help address prison overcrowding issues in the future. The main objective of this study was to implement an improved fiscal note process that accurately forecasts the costs of changes in criminal law and appropriates funds to cover these costs.

A. Implementing Legislation

During the Appropriations Table process of the 123rd Legislature's First Regular Session, the Joint Standing Committee on Appropriations and Financial Affairs voted to carry over 16 bills of the Joint Standing Committee on Criminal Justice and Public Safety, choosing to enact one bill (LD 1627) related to Domestic Violence and use that bill as a vehicle to require the review of the fiscal note process and use the new process to estimate the fiscal impact of the 16 bills. Section 6 of LD 1627, also known as Public Law 2007, chapter 436, requires the Office of Fiscal and Program Review, the Department of Corrections and the Judicial Department to review the accuracy of the fiscal notes for these bills and to more accurately forecast the cost of changes in law of criminal penalties. The Office of Fiscal and Program Review was charged with staffing the review and reporting to the Joint Standing Committee on Appropriations and Financial Affairs, the Joint Standing Committee on Criminal Justice and Public Safety and the Joint Standing Committee on Judiciary by November 15, 2007.

The Legislature also added additional research requirements to the sections of statute that require the Judicial Department and the Department of Corrections to submit statements to the Office of Fiscal and Program Review describing the impact on their respective departments of proposed legislative changes. Public Law 2007, chapter 240, Part YYY added the additional requirements. The State Court Administrator is now required to contact the Chief Justice of the Superior Court, the Chief Judge of the District Court, a statewide association of prosecuting attorneys, a statewide association of criminal defense attorneys and a statewide association of trial attorneys. The Commissioner of Corrections is required to contact a statewide association of prosecuting attorneys, the judicial branch and a statewide association of county sheriffs to obtain accurate financial estimates for the correctional system regarding the number of additional probationers, the number of additional incarcerated individuals and the number of additional jail and prison beds that may be needed from enactment of such legislation.

B. Meetings and Participants

The participants in the Study Group met 4 times over the summer and fall of 2007 on August 14, September 12, October 19, and November 2. The participants included:

Legislative Attendees:

Rep. Janet Mills
Sen. William Diamond
Rep. Anne Haskell
Rep. Stan Gerzofsky

Legislative Staff:

Grant Pennoyer
Marc Cyr
J. Timothy Leet
Marion Hylan-Barr
Margaret Reinsch

Other Members:

Scott Ferguson, Corrections Service Center
Denise Lord, Department of Corrections
Sherry Wilkins, Judicial Department
John Pelletier, Judicial Department
Evert Fowle, Kennebec County District Attorney
Geoffrey Rushlau, Sagadahoc, Knox, Lincoln, & Waldo Counties District Attorney
Walter McKee, Criminal Defense Attorney
Sheriff Jim Madore, Aroostook County Sheriff's Department
Vic Labrecque, Cumberland County Sheriff's Office
Genie Beaulieu, Finance Director, Cumberland County Sheriff's Office
Philip Roy, Somerset County Commissioner's Office, Chairman
Robert Howe, Howe, Cahill & Company
Alex McPhedran, Maine State Federation of Firefighters
John Martell, Professional Firefighters of Maine

II. FINDINGS

Over the course of the study, the group identified several findings and policy choices for the Legislature to review and consider. The main objective of this study was to implement an improved fiscal note process that more accurately forecasts the costs of changes in criminal law and appropriates funds to cover these costs. To that end, the group laid out a decision-tree flow chart to guide the analysis of bills affecting the criminal code (see Appendix B). The group agreed that initial determination of the incremental number and type of criminal cases would be determined by the Judicial Department. The Department of Corrections would use this information and further analyze the number and length of sentence for the identified crime or similar crime to establish a cost to the Department of

Corrections. Over the last 2 meetings, the group focused its efforts on a review of the 16 bills carried over and referred back to the Joint Standing Committee on Criminal Justice and Public Safety using this new process. The group identified the following findings and policy choices for the Legislature.

A. New Process - Difficult and Resource Intensive

Predicting the number of new cases resulting from legislative changes in criminal law is challenging for the affected departments and time-consuming. The group used a new process to analyze the changes to the criminal code. While the departments did not seek input from all of the groups identified in the law, that required input occurred at the meetings. It was clear that there were differing opinions among the participants that required some time to reach consensus on the impact of each bill.

The initial determination is usually based on a complex legal analysis of the bill that must be established before the financial impact can be determined. Under the new process, the bulk of this analysis would be borne by the Judicial Department. This new process will require better communication between the Judicial Department and the Department of Corrections. The Judicial Department and the Department of Corrections will be required to make difficult and subjective determinations on legal issues before they reached any conclusions on forecasting required cost estimates.

The Judicial Department and the Department of Corrections data collection continues to improve. Implementing a new bill analysis process that identifies detailed costs of trials, court-time, indigent defense, forensic examinations, incarceration, probationary costs and average lengths of stays will allow the Joint Standing Committee on Criminal Justice and Public Safety to obtain accurate fiscal data and encourages better informed decisions.

B. New Process - Implement for Positive Committee Reports Only

During a typical Legislature, the number of bills that have a potential impact on the Judicial Department and the Department of Corrections is staggering. The Judicial Department submits a fiscal statement for approximately 10-15% of all proposed legislation each year including amendments and other budget proposals. During the First Regular Session of the 123rd Legislature, the Office of Fiscal and Program Review assigned 279 bills to the Judicial Department and 80 bills to the Department of Corrections. The bills not only include those that are referred to the Joint Standing Committee on Criminal Justice and Public Safety, but also include hunting and fishing violations, business and professional regulation changes, motor vehicle violations and others referred to numerous other committees. Currently, 90% of those bills are assessed using a fiscally non-specific statement that does not identify projected caseload, sentencing or other financial information. Given the number of bills affecting the Judicial Department and the Department of Corrections in a legislative session, the new revised analysis will require additional staff resources for the Judicial Department, the Department of Corrections and the Office of Fiscal and Program Review.

Since the implementation of the statutes requiring Judicial and Correctional Impact Statements (see Appendix A for amended versions), the Office of Fiscal and Program Review and the affected departments have developed some expedited methods for dealing with the substantial number of affected bills. The current process provides a very cursory review of the bills and assigns them to some general categories of impact. The Office of Fiscal and Program Review also has abbreviated the description of the impact within its fiscal notes. It is unlikely that the initial review will be able to change much without the investment of substantial new resources.

The additional analysis will need to be concentrated after the committee begins to work the bill after the public hearing. Committees will need to be aware of the questions that need to be asked and incorporate those questions and analysis into work sessions and committee deliberations, so that there will be less of a need for independent research to make the determination of caseload impact. Additional communication will be required between committee staff and the agencies responsible for fiscal impact determination.

C. Additional Resources Required to Implement New Process

Even assuming a cursory initial review and the delay of the more intensive analysis of the new process, the Office of Fiscal and Program Review and the Judicial Department will require additional resources. The Judicial Department provided a belated Judicial Impact Statement for the changes required by PL 2007, c. 240 Part YYY, see Appendix C for that statement). The Office of Fiscal and Program Review will also require additional staff hours during a session to provide the additional analysis and the more specific impact of the new process, including drafting appropriation sections for those additional bills needing funding.

The State Court Administrator is required to contact the Chief Justice of the Superior Court, the Chief Judge of the District Court, a statewide association of prosecuting attorneys, a statewide association of trial lawyers and any other parties to provide the most accurate estimate of the judicial branch financial impact of such legislation. The Judicial Department is encouraged to convey the projected number of additional cases and other relevant financial information to the Department of Corrections to assist them in determining additional incarceration and probation costs. The Commissioner of the Department of Corrections is then required to contact a statewide association of prosecuting attorneys, the judicial branch and a statewide association of county sheriffs and other parties to assist in providing an accurate estimate of the correctional impact.

D. County Correctional Impacts and Special Appropriations Table Process

Those bills that affect the State's correctional institutions are set aside and reviewed through the Special Appropriations Table process. However, there are many bills that include Correctional and Judicial Impact statements for Class D and E crimes and other criminal offenses that have sentences of less than 1 year. These offenses only affect the county correctional institutions. At this time, there is no direct effect on state finances for these types of changes to the criminal code. These changes are not considered state

mandates under the State Mandate Law (see 30-A MRSA, section 5685). While the State has begun to utilize the county correctional system more to address prison overcrowding and paying for additional space for state prisoners, there is still no direct financial impact on state finances. This would certainly change if the Governor's proposed merger of the State and county correctional systems were implemented.

Bills adding new crimes or enhancing the class of certain crimes are not state mandates pursuant to the "State Mandate" law because enforcement at the local level is discretionary and the laws are not directed specifically at local units of government. Sentences for new and enhanced Class D and E crimes are served in a county jail. The Legislature may consider an option to expand the Appropriations Table net to set aside bills that establish or enhance Class D and E crimes in addition to the other higher classes that affect state correctional facilities.

E. Reserve Account within the Department of Corrections

Even after the complex legal decisions and analysis of the statewide costs to the Department of Corrections are estimated, there is the additional complication of determining which institution would be affected by the new sentences. The Department of Corrections is continually reacting and reassigning the prisoner population at the State correctional institutions to address overcrowding issues and has recently begun to purchase space at county correctional facilities. Bills that result in additional costs may include specific appropriations to cover these costs. The creation of a special reserve account or program within the Department of Corrections may allow some flexibility for the department to offset the cost to any of the affected institutions or programs.

F. Criminal Code Bills – Review and Prioritization

The study group also discussed the benefits and issues associated with a review by the Joint Standing Committee on Criminal Justice and Public Safety of all bills on the Special Appropriations Table affecting the criminal code and the number of criminal cases. The participants, who were members of the Criminal Justice and Public Safety Committee, felt that a final review of all those bills affecting the Judicial Department and the Department of Corrections by the Criminal Justice and Public Safety Committee at the end of the session would improve the changes to the criminal code by providing additional legal analysis and a more coordinated approach to enacting laws affecting the criminal code. Given the number of bills coming out of other committees that affect the criminal code, as noted earlier, the Criminal Justice and Public Safety committee thought this additional review would provide consistency in the treatment of all bills affecting the criminal code and would provide another hurdle to try to avoid unnecessary impacts to the judicial and correctional systems. The difficulty with this additional review is timing. Typically, this review would come at the end of the session after all the bills have been reported out of all committees and at the same time as other committees are submitting their priorities for bills on the Special Appropriations Table pursuant to Joint Rule 314 subsection 7. Time constraints are the major impediment to this type of review. This will also add to the workload of the staff of the Criminal Justice and Public Safety Committee.

APPENDIX A
IMPLEMENTING LEGISLATION



STUDY TO REVIEW AND IMPROVE CORRECTIONAL AND JUDICIAL IMPACT STATEMENTS

IMPLEMENTING LEGISLATION

Public Law 2007, c. 436, section 6:

Sec. 6. Review process and availability of data to determine the cost of new criminal penalties. The Office of Fiscal and Program Review, the Department of Corrections and the Judicial Department shall jointly review bills carried over from the First Regular Session of the 123rd Legislature that have a potential impact to future inmate populations of correctional facilities. The Director of the Office of Fiscal and Program Review or the director's designee shall chair the review and shall convene the first meeting no later than August 15, 2007. The objective of the review is to identify and implement within existing resources where possible the factors, processes and data that would assist in more accurately forecasting the cost of changes in law of criminal penalties. The Office of Fiscal and Program Review shall staff the review and report the findings on or about November 15, 2007 to the Joint Standing Committee on Appropriations and Financial Affairs, the Joint Standing Committee on Criminal Justice and Public Safety and the Joint Standing Committee on Judiciary.

Public Law 2007, c. 240, Part YYY:

Sec. YYY-1. 4 MRSA §17, sub-§17, as enacted by PL 1993, c. 675, Pt. C, §9, is amended to read:

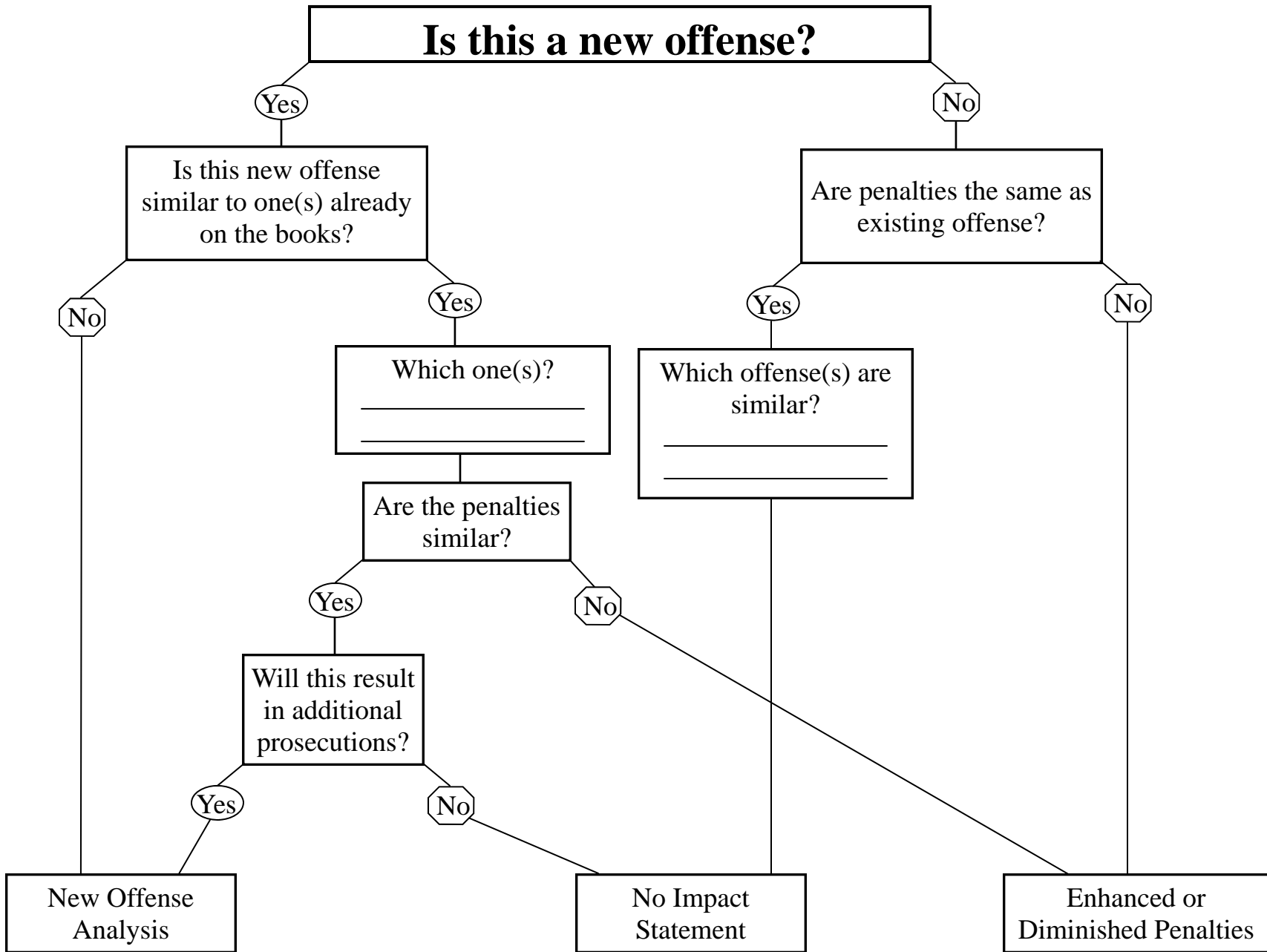
17. Statement of fiscal effect on judicial system. Apply the following requirements when the State Court Administrator prepares statements pertaining to the impact that executive orders and proposed legislation have upon judicial system resources, including the cost or savings to the judicial system. The State Court Administrator, in preparing such impact statements, shall make inquiry of the Chief Justice of the Superior Court, the Chief Judge of the District Court, a statewide association of prosecuting attorneys, a statewide association of criminal defense attorneys, a statewide association of trial attorneys and any other parties, as appropriate, in order to provide the most accurate estimate of the judicial branch impact of such legislation, by fiscal year.

Sec. YYY-2. 34-A MRSA §1402, sub-§9, as enacted by PL 1989, c. 925, §17, is amended to read:

9. Statement of correctional system impact. The commissioner shall prepare statements pertaining to the impact that proposed legislation has upon correctional system resources, including the cost that the correctional system would bear. The commissioner shall make inquiry of a statewide association of prosecuting attorneys, the judicial branch, a statewide association of county sheriffs and any other parties, as appropriate, in order to provide the most accurate estimates of the correctional system impact, including the number of additional probationers, the number of additional incarcerated individuals and the number of additional jail and prison beds that may reasonably be anticipated from enactment of the legislation, by fiscal year. Whenever practicable, the statements must also include the impact of such legislation in future biennia as well. For purposes of this subsection, the correctional system includes correctional facilities and services operated or funded by the State or by any county government. The statements must be furnished to the appropriate committee of the Legislature for the information of its members and ~~for inclusion in bills that receive an "ought to pass" report when reported by the committee~~ to the legislative staff office designated to collect and assemble fiscal information for use of legislative committees under Title 3, section 163-A, subsection 10. The statements must be considered in the preparation of the fiscal note included in a committee amendment or other amendment if the legislation or amendment has a fiscal impact on the correctional system. A statement is not required for any legislation that has no impact upon the correctional system.

APPENDIX B

DECISION-MAKING FLOW CHART FOR BILL ANALYSIS



New Offense Analysis

Judicial

How many individuals do you reasonably anticipate being prosecuted for the new offense?

How many individuals charged with this offense will require court appointed counsel?

How many individuals charged with this offense will demand a jury trial?

How much court time or how many court appearances do you anticipate that individuals charged with this offense will require?

If your answers to any of the above questions is "minimal," please explain how you arrive at this conclusion?

Corrections

How many individuals charged with this offense will be detained in jail pending trial?

How many individuals charged with this offense will require probationary supervision?

What is the class of crime?

How many convictions will result in state jail time in FY 08, 09, 10, 11?

What is the anticipated additional state cost of incarceration in FY 08, 09, 10, 11?

How many convictions will result in county jail time in FY 08, 09, 10, 11?

What is the anticipated additional county cost of incarceration in FY 08, 09, 10, 11?

Enhanced or Diminished Penalties

Judicial

If penalties are enhanced or diminished, how many additional or fewer individuals will demand a jury trial?

If penalties are enhanced or diminished, how many additional or fewer individuals will require court appointed counsel?

How much court time or how many court appearances do you anticipate that individuals will require because of the change in penalties?

Corrections

How many individuals will be detained in jail pending trial solely due to enhanced penalties for this offense?

Has the class of crime changed?

How will the changed penalties increase or decrease state jail time in FY 08, 09, 10, 11?

What is the anticipated additional state cost or savings from incarceration in FY 08, 09, 10, 11?

How will the changed penalties increase or decrease county jail time in FY 08, 09, 10, 11?

What is the anticipated additional county cost or savings from incarceration in FY 08, 09, 10, 11?

APPENDIX C

**JUDICIAL IMPACT STATEMENT IDENTIFYING
REQUIRED ADDITIONAL RESOURCES**

RESOURCES NEEDED BY THE JUDICIAL BRANCH TO MEET A HIGHER STANDARD OF FISCAL IMPACT STATEMENT PREPARATION:

Current practice:

- Each session, the JB submits a fiscal statement for approximately 1/3 of all proposed legislation – including associated amendments and budget proposals related to fine/revenue proposed by the executive branch. (600-800/year)
- Currently, many of those bills are assessed using a fiscally non-specific statement that contains general information. Most bills (90%) are reviewed in a general manner, without caseload, sentencing or financial details.
- Current staff to do this work is part (1/3 -1/2) of one Court Management Analyst position (who is also responsible for development & distribution of all court statistics, fiscal & caseload research & analysis for management the judiciary, annual report & publication editor, responding to public & legislative requests, coordination of post-legislative session implementation, and other projects as assigned)
- Within the JB, the Court Management Analyst initiates and coordinates communication and analysis regarding pending legislation amongst several judges and staff. Submits statements to OFPR and the joint standing committees as approved by the Chiefs of Court.

Assumptions:

- All responses to pending legislation must be done in a timely manner, as is current practice, with statements expected to be complete prior to the public hearing.
- The JB must use the same detail and scrutiny with all bills and proposals, not just criminal related. (DHHS, protective custody, family matters, mental health, civil process, etc.)
- Detailed cost of court process must be researched and determined (costs of trials, court time, indigent defense, forensic examinations, technology related changes, etc.). These costs must be updated periodically.
- Fiscal statement details will be submitted for all impacts of \$1,000 or more (or amount as determined by OFPR)

The New process is expected to include:

- The JB will have primary responsibility to analyze and detail potential impact of each LD on caseload, process, including but not limited to sentencing, or extended hearings. This added responsibility for the initial review and analysis must be met expeditiously so that other agencies can prepare statements based on the caseload/sentencing statements provided by the Judicial Branch.
- The JB must communicate with other agencies who will be impacted: DOC, county jails, AG, DHHS, etc.
- As outlined 4 MRSA §17, sub-§17, as amended by PL 2007, c. 240, Part YYY, the JB "shall" communicate with several outside agencies & organizations to gather information prior to making a statement.

- Caseload, revenue and indigent defense data detail to be required for most bills.

Fiscal Impact:

These expanded responsibilities will cause a significant impact on the workload of the Administrative Office of the Courts. In addition, this work must be done in a timely manner, so as not to delay the legislative process. The work cannot be performed without additional resources, especially given the current inadequate level of staffing.

These resources would be needed in order to meet the increased demands for communication, consultation and detail for each statement submitted by the JB:

1 Senior Research Analyst, range 17:
\$47,345 plus benefits @ 60% (\$28,407) = \$75,752

1 Programmer Analyst, range 15:
\$40,482 plus benefits @ 60% (\$24,289) = \$64,771

.5 Research Assistant, range 13:
\$17,454 plus benefits @ 65% (\$11,345) = \$28,799

One time set-up costs: \$9,000

\$169,322 personal services
\$9,000 All Other
\$178,322 TOTAL