SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: February 11, 1998 Revised: _____ _____ _____ _____

Subject: Waiver of Sovereign Immunity

	Analyst	Staff Director	Reference	Action
1.	Barrow	Miller	CJ	Favorable
2.			JU	
3.				
4.				
5.				

I. Summary:

Senate Bill 454 provides specifically that employees of corporations, including private prison guards, are considered to be "state agencies or subdivisions" for purposes of granting sovereign immunity, but such immunity is waived to pay claims of $100,000 or less as specified in §768.28, Florida Statutes.

This bill substantially amends the following section of the Florida Statutes: 768.28.

II. Present Situation:

Private Vendors Contracting with the Correctional Privatization Commission Are Statutorily Prohibited from Claiming Sovereign Immunity in Tort Cases

Chapter 957, Florida Statutes, is the Correctional Privatization Commission Act. Within it, the Legislature has provided for the creation of the Correctional Privatization Commission and the requirements and restrictions that must be complied with in order for the Commission to enter into contracts with private vendors to construct and operate correctional facilities within the Florida state prison system.

Contract requirements for private vendors are provided in §957.04, Florida Statutes. Requirements and restrictions for private contractors operating private correctional facilities are also provided in statute. *See*, §957.05, Florida Statutes. Pursuant to subsection (1) of §957.05, Florida Statutes, private vendors that contract with the Correctional Privatization Commission are *expressly liable in tort* with respect to the care and custody of inmates under its supervision and for any breach of contract. The statute goes on to state:

Sovereign immunity may not be raised by a contractor, or the insurer of that contractor on the contractor's behalf, as a defense in any action arising out of the performance of any contract entered into under this chapter or *as a defense in tort*, or any other application, with respect to the care and custody of inmates under the contractor's supervision and for any breach of contract. (emphasis added)

Insurance Coverage Is Required for Private Vendors Contracting with the Department of Corrections

Pursuant to §944.713, Florida Statutes, insurance against liability is *required* of private vendors who contract with the Department of Corrections to operate state correctional facilities. A bidder is required to provide an adequate plan of insurance against liability, including liability for violations of an inmate's civil rights by an insurance agency licensed in this state, pursuant to Chapter 287, Florida Statutes. §944.713 (1), Florida Statutes. The insurance plan must, at a minimum, protect the Department from actions of a third party, assure the private vendor's ability to fulfill the conditions of the contract, and provide adequate protection for the Department against claims arising as a result of any occurrence during the term of the contract on an occurrence basis. The adequacy of the insurance plan will be determined, at the bidder's expense, by an independent risk management or actuarial firm selected by the Department of Management Services. The risk management or actuarial firm selected must have demonstrated experience in assessing public liability of state government.

Section 944.713 (2), Florida Statutes, requires the Department’s contract with the private vendor to provide for indemnification of the state by the private vendor for any liabilities incurred up to the limits provided under §768.28(5), Florida Statutes. The contract must provide that the private vendor, or the insurer of the private vendor, is liable to pay any claim or judgment for any one person which does not exceed the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments arising out of the same incident or occurrence, does not exceed the sum of $200,000. In addition, the contractor must agree to defend, hold harmless, and indemnify the Department against any and all actions, claims, damages and losses, including costs and attorney's fees.

Sovereign Immunity in the State of Florida

Section 13 of Article X of the Florida Constitution provides that the State of Florida and its subdivisions may, by general law, make provision for the bringing of suit as to all liabilities. Thus, through legislative enactment, the state has waived its sovereign immunity for liability for torts, but only to the extent specified in §768.28 (1), Florida Statutes. The types of actions at law against the state or any of its agencies or subdivisions that may be prosecuted to recover damages in tort for money damages against the state or its agencies or subdivisions are for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision if the employee was acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general

laws of Florida under §768.28 (1), Florida Statutes. The law authorizes that any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

Under current law, state agencies or subdivisions are defined under §768.28(2), Florida Statutes:

> As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Spaceport Florida Authority.

This waiver of sovereign immunity is limited, however. The state and its agencies and subdivisions are liable for tort claims in the same manner and to the same extent as private individuals under like circumstances, but liability cannot not include punitive damages or interest for the period before judgment. The liability of the state is authorized up to a certain dollar amount. Neither the state nor its agencies or subdivisions are liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000.

Nothing precludes a judgment or judgments to be claimed and rendered in excess of the $100,000 or $200,000 amounts. Cases may be settled and paid pursuant to §768.28 (5), Florida Statutes, up to $100,000 or $200,000, as the case may be. Any portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature through the passage of “claims bills.”

Notwithstanding the limited waiver of sovereign immunity provided in statute, the state or an agency or subdivision thereof may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the Legislature. However, statutorily it is provided that the state or agency or subdivision thereof has not waived any defense of sovereign immunity or to have increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the $100,000 or $200,000 waiver provided in §768.28 (5), Florida Statutes. The limitations of liability set forth in §768.28 (5), Florida Statutes, apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity before July 1, 1974.

There are certain statutory requirements that must be followed for a plaintiff to bring suit against the state. In actions brought pursuant to this section, process must be served upon the head of the agency concerned and also upon the Department of Insurance. The department or the agency being sued would have 30 days within which to answer a complaint. §768.28 (7), Florida Statutes. Limitations are also statutorily provided regarding suits against the state. For instance,

no attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25% of any judgment or settlement. §768.28 (8), Florida Statutes.

If an employee of the state or its subdivisions acts within the scope of his or her employment and is found to be liable in torts, that officer, employee, or agent of the state or of any of its subdivisions cannot be held *personally liable* in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, *unless* such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. §768.28 (9) (a), Florida Statutes. However, the statutes recognize that such officers, employees, or agents must be considered an adverse witness in a tort action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function. According to §768.28 (9) (a), Florida Statutes, the exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers must be by action against the governmental entity, or the head of such entity in her or his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions will not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or when such acts are committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

The liability of the state through its agencies or subdivisions for certain types of private vendors that contract with the Department of Corrections and the Department of Juvenile Justice are specifically addressed in Florida Statutes. Health care providers or vendors, or any of their employees or agents, that have contractually agreed to act as agents of the Department of Corrections to provide health care services to inmates of the state correctional system are to be considered agents of the State of Florida, Department of Corrections, for the purposes of §768.28, Florida Statutes, while acting within the scope of and pursuant to guidelines established in said contract or by rule. *See*, §768.28 (10) (a), Florida Statutes. The contracts with the private vendors must provide for the indemnification of the state by the agent for any liabilities incurred up to the limits set out in §768.28, Florida Statutes. *Id.* Providers or vendors, or any of their employees or agents, that have contractually agreed to act on behalf of the state as agents of the Department of Juvenile Justice to provide services to children in need of services, families in need of services, or juvenile offenders are, solely with respect to such services, statutorily deemed to be agents of the state for purposes of this section while acting within the scope of and pursuant to guidelines established in the contract or by rule. *See*, §768.28 (11) (a), Florida Statutes. Just as with private health care providers for facilities of the Department of Corrections, a contract must provide for the indemnification of the state by the agent for any liabilities incurred up to the limits set out in §768.28, Florida Statutes. *Id*.

Although there are limitations on the liability of the state through its agencies and subdivisions, such entities are not necessarily discouraged from obtaining insurance coverage. For instance, §768.28 (12), Florida Statutes, states "[l]aws allowing the state or its agencies or subdivisions to buy insurance are still in force and effect and are not restricted in any way by the terms of this act." Additionally, the state and its agencies and subdivisions are authorized to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they may choose, or to have any combination thereof, in anticipation of any claim, judgment, and claims bill which they may be liable to pay pursuant to this section. *See*, §768.28 (15) (a), Florida Statutes. Agencies or subdivisions, and sheriffs, that are subject to homogeneous risks may purchase insurance jointly or may join together as self-insurers to provide other means of protection against tort claims, any charter provisions or laws to the contrary notwithstanding. *Id*.

Immunity from liability in a federal jurisdiction is also expressly preserved in statute. Section §768.28 (17), Florida Statutes, reads:

> No provision of this section, or of any other section of the Florida Statutes, whether read separately or in conjunction with any other provision, shall be construed to waive the immunity of the state or any of its agencies from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States, unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in federal court. This subsection shall not be construed to mean that the state has at any time previously waived, by implication, its immunity, or that of any of its agencies, from suit in federal court through any statute in existence prior to June 24, 1984.

Qualified immunity from suits in tort is also expressly preserved in instances where a contract is entered into with another agency or subdivision of the state. Neither the state nor any agency or subdivision of the state waives any defense of sovereign immunity, or increases the limits of its liability, upon entering into a contractual relationship with another agency or subdivision of the state. *See*, §768.28 (18), Florida Statutes. Such a contract must not contain any provision that requires one party to indemnify or insure the other party for the other party's negligence or to assume any liability for the other party's negligence; however, this does not preclude a party from requiring a nongovernmental entity to provide such indemnification or insurance. *Id*.

The *Richardson v. McKnight* Case

On March 19, 1997, the United States Supreme Court issued a decision finding that prison guards employed by a private firm operating a prison in Tennessee were not entitled to a qualified immunity from suit by prisoners charging a federal §1983 violation. *See generally*, *Richardson v. McKnight*, 1997 WL 338548 (1997). In the *Richardson* case, inmate Ronnie Lee McKnight filed a constitutional tort action against two prison guards claiming he was injured by extremely tight physical restraints placed upon him by the guards.

In examining the history of immunity applicable to privately employed prison guards, the Court found that there was no conclusive evidence of an historical tradition of immunity for private

parties carrying out these functions. Therefore, the Court concluded that history did not provide significant support for the immunity claim by the private prison guards.

The guards argued that the functions they perform as prison guards support the immunity doctrine's purposes, such as "protecting 'government's ability to perform its traditional functions' by providing immunity where 'necessary to preserve' the ability of government officials 'to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service'," whether their employer was private or public. *Id*. at 6-7 (citing *Wyatt v. Cole*, 504 U.S. 158, 167 (1992)). The guards reasoned that since private prison guards perform the same work as state prison guards, they must require immunity to a similar degree.

The U.S. Supreme Court, however, found that to agree with the arguments of the prison guards would be to misread the Court's precedents. *Id*. at 7. The Court stated that it has sometimes applied a functional approach in immunity cases, but only to decide which type of immunity a public officer should receive, absolute or qualified. The Court, however, citing *Tower v. Glover*, found that it had never held that the mere performance of a governmental function could make the difference between unlimited §1983 liability and qualified immunity, especially for a private person who performs a job without government supervision or direction. 467 U.S. 914, 922-923 (1984). The Court noted that a purely function approach is a bit difficult since government and private industry may engage in fundamentally similar activities, such as electricity production or mail delivery.

The Court made what it believed to be important differences that are critical for an immunity analysis. The Court opined that the most important special government immunity-producing concern is "unwarranted timidity," and that such is less likely to be present, or at least not special, when a private company subject to competitive market pressures operates a prison. *Richardson*, *supra* at 7. The Court argued that competitive pressures mean not only that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job. *Id*.

The court believed that such pressures existed in the *Richardson* case. The Court believed that the private prison guards were different from government employees. It observed that government employees typically act within a different system because that system is responsible through elected officials who are, in turn, responsible to voters. *Id*. at 8. Additionally, that system is often characterized by multi-department civil service rules that may limit the incentives and the flexibility to reward or punish individual employees. Thus, the Court found no special immunity-related need to encourage "vigorous performance" by a private contractor. *Id*.

Another important difference the Court noted was that "privatization" helps to meet the immunity-related need "to ensure that talented candidates" are "not deterred by the threat of damages suits from entering public service." *Id*. The Court reasoned that it does so in part because of the comprehensive insurance-coverage requirements needed. The Court also reasoned

that because private prison-management firms are free from many civil service law restraints, the private firm could off-set any increased employee liability risk with higher pay or extra benefits, unlike a government department. *Id*.

III. Effect of Proposed Changes:

The definition of "state agencies or subdivisions" would be expanded to specifically include employees of corporations, including private prison guards, under §768.28, Florida Statutes. Employees of corporations who act as instrumentalities or agencies of the state would be immune from tort (negligence) liability if such employees or agents are acting within the scope of their employment and have not acted in bad faith.

Pursuant to §768.28, Florida Statutes, private correctional officers would still make the state susceptible to liability within the waiver that is authorized in statute: a claim or a judgment by any one person which does not exceed the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, does not exceed the sum of $200,000.

All other restrictions and requirements of §768.28, Florida Statutes, would apply to suits brought against the state for actions of any private correctional officer that results in an alleged tort.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Pursuant to §768.28 (15)(b), Florida Statutes, claims files maintained by any risk management program administered by the state, its agencies, and its subdivisions are confidential and exempt from the provisions of §119.07(1) and §24(a), Article I of the Florida Constitution until termination of all litigation and settlement of all claims arising out of the same incident, although portions of the claims files may remain exempt, as otherwise provided by law. Claims files records may be released to other governmental agencies upon written request and demonstration of need, but such records held by the receiving agency will remain confidential and exempt as provided for in paragraph (b).

Section §768.28 (15)(c), Florida Statutes, provides that portions of meetings and proceedings conducted pursuant to any risk management program administered by the state, its agencies, or its subdivisions, which relate solely to the evaluation of claims filed with the risk management program or which relate solely to offers of compromise of claims filed with the risk management program are exempt from the provisions of §286.011 and §24(b), Article I of the Florida Constitution. Until termination of all litigation and settlement of all claims

arising out of the same incident, persons privy to discussions pertinent to the evaluation of a filed claim are not subject to subpoena in any administrative or civil proceeding with regard to the content of those discussions.

If private correctional officers are expressly included in the definition of "state agencies or subdivisions," minutes of the meetings and proceedings of any risk management program administered by the state, its agencies, or its subdivisions, which relate solely to the evaluation of claims filed with the risk management program or which relate solely to offers of compromise of claims filed with the risk management program are exempt from the provisions of §119.07(1) and §24(a), Article I of the Florida Constitution until termination of all litigation and settlement of all claims arising out of the same incident. *See,* §768.28 (15)(d), Florida Statutes.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Private correctional corporations currently under contract in Florida would experience an indeterminate, positive fiscal impact as a result of this bill *if* the state per diem payments *are not* proportionately adjusted to reflect the reduction in costs incurred by the private corporations by not having to pay for insurance coverage for private correctional officers.

C. Government Sector Impact:

The state and counties would experience an indeterminate, positive fiscal impact as a result of this bill *if* the state per diem payments *are* proportionately adjusted to reflect the reduction in costs incurred by the private corporations by not having to pay for insurance coverage for private correctional officers.

VI. Technical Deficiencies:

None.

VII. Related Issues:

By authorizing such immunity in tort through specific inclusion of private correctional officers in the definition of "state agencies or subdivisions" under §768.28, Florida Statutes, such statutory language would be in direct conflict with the plain meaning of §§ 944.713 and 957.05 (1), Florida Statutes. Without providing proper amendment or deletion of the aforementioned statutory language, it is questionable whether a court would find a general reference to the immunity of private correctional officers controlling over the more specific statutes addressing tort liability of such persons in Chapters 944 and 957, Florida Statutes. However, the enactment of this bill would be the latest expression of the Legislature's intent regarding the liability in tort of corporations and private correctional officers. Furthermore, the qualified immunity would be provided to employees of corporations, not just employees of corporations that are in the business of constructing or operating prisons, who are acting as instrumentalities of the state or its subdivisions.

There are policy implications that the Legislature may wish to consider. Since the creation of the Correctional Privatization Commission and the execution of contracts for the operation of correctional facilities in the state prison system, facilities operating pursuant to Chapter 957, Florida Statutes, have been approached in a different manner than facilities operated by the Department of Corrections. Part of the reasoning as to why there is "legal authority" that excludes private facilities subject to Chapter 957 from compliance with the same restrictions and requirements for the Department of Corrections' facilities is because the private correctional facilities are not "state facilities." Thus, prohibitions such as those against purchasing and providing television access to inmates, or providing air conditioning in facilities do not apply to facilities operated by private vendors through Chapter 957, Florida Statutes. It has been successfully argued that "state facilities" are only those facilities operated by the Department of Corrections. So, the requirements of working inmates in chain gangs and striving to meet certain inmate work goals do not pertain to privatized facilities in the state prison system through Chapter 957, Florida Statutes. By changing the prior legislative intent from no sovereign immunity authorized for private correctional officers to sovereign immunity in excess of $100,000, the reasoning that privatized facilities are to be treated as separate from correctional facilities operated by the Department of Corrections may conceivably begin to weaken. If the line of distinction between public and private facilities begins to blur, privatized prisons may, at some point, become susceptible to the requirements and restrictions mentioned above, among others provided in statute and chapter law.

VIII. Amendments:

None.