

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: April 2, 1998 Revised: _____

Subject: State Correctional Facilities

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Barrow</u>	<u>Miller</u>	<u>CJ</u>	<u>Favorable</u>
2.	_____	_____	<u>WM</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This bill would create the "Tobacco-Free Prisons Act." It would prohibit the possession or use of tobacco products by an inmate housed in a state correctional facility or a private correctional facility. It would authorize a superintendent to designate smoking areas for employees to use tobacco products on the grounds of a correctional facility. Possession of a tobacco product by an inmate in a state or private correctional facility would be a disciplinary infraction subject to punishment determined to be appropriate by the facilities' disciplinary authorities and allowed by administrative rule. The bill would take effect upon becoming a law with the provisions of this bill being implemented as soon as possible, but with full implementation by January 1, 2000.

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Litigation Generated By Smoking in Prisons

There have been lawsuits filed nationwide by non-smoking inmates alleging that adverse or hazardous prison conditions are caused by the close proximity of inmates who smoke. To alleviate this problem for non-smoking inmates in Florida, the department has at each major institution at least one non-smoking dormitory. In 1993, the Florida Department of Corrections designated at least one non-smoking dormitory in each prison in response to the U. S. Supreme Court case of *Helling v. McKinney*, No. 91-1958 (decided June 18, 1993) which involved a Nevada state prisoner. The *McKinney* case expanded the "deliberate indifference" test that was used by the Court in *Estelle v. Gamble*, 429 U.S. 97 (1976). In *McKinney*, the Court used the "objective-subjective" test for an inmate to prove a violation of the Eighth Amendment right against cruel and unusual punishment. To be successful in a legal action, an inmate would need to prove:

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- (a) That he or she is being exposed to unreasonably high levels of environmental tobacco smoke;
 - (b) That scientific and statistical evidence support the assertion that the potential harm from exposure to environmental tobacco smoke is serious, and that it is likely that injury to health will result in the future as a result of the exposure;
 - (c) That the risk of exposure is not one that today's society chooses to tolerate; and
 - (d) That prison authorities' current attitudes and conduct ignore the possible dangers posed by exposure to environmental tobacco smoke.

In *Helling v. McKinney, supra*, the inmate, McKinney, was successful in his claim that his involuntary exposure to the environmental tobacco smoke (commonly referred to as "second-hand smoke") of his cellmate and other inmates' posed an unreasonable risk to McKinney's health, which subjected him to cruel and unusual punishment in violation of the Eighth Amendment.

Criminal Justice Committee Staff's Survey Conducted of Florida Prison Superintendents

On February 13, 1996, staff of the Senate Criminal Justice Committee surveyed the superintendents of 54 major correctional institutions in Florida. The survey asked the superintendents about their views on some correctional amenities. Among other amenities, superintendents were asked whether they believe tobacco products should be prohibited for inmates.

Of the 54 surveys sent, 46 or 85 percent responded to the survey. Fourteen respondents, or approximately 30 percent, believe tobacco products should be prohibited for all inmates. One additional respondent believes that tobacco should be prohibited for youthful offender inmates, but not adult inmates. Two respondents, or 4 percent, stated they did not care or were not sure whether tobacco should be banned for inmates. Twenty-nine respondents, or 63 percent, stated they do not believe tobacco should be prohibited for inmates.

The survey asked the respondent superintendents to explain their answers. A majority of the respondents provided more than one reason for their answers.

Ten respondents believe tobacco products should be prohibited "to reduce health care costs" or "to reduce health risks." Four respondents cited personal safety or fire hazards as one of their reasons for prohibiting inmate use of tobacco products. Two respondents stated that inmates under 18 years of age should not be able to smoke. Other reasons cited in support of a smoking prohibition were: they "don't want to be exposed to other's smoke"; they have "a problem keeping smoke-free areas smoke-free"; cigarettes are "used for bartering and gambling" in institutions; lighter fluid or components of matches "can be used as propellant for 'zip guns'"; and that it is "counterproductive as an agency charged with the care of inmates to allow them to

smoke.” One respondent noted that if there were to be a ban on smoking, there should be a ban for everyone to ensure success.

For the respondents who replied that tobacco products should not be prohibited for inmates, the most common reason cited, by 15 respondents, is that such a prohibition would “increase the anxiety and stress” of inmates which would “create a hostile environment” and “create security problems.” Twelve respondents believe that, if banned, cigarettes would become a contraband problem creating more work for correctional officers and creating a “black market” for cigarettes. Five respondents believe it should not be prohibited because people are “nicotine addicted.” Four respondents replied that tobacco should not be banned because cigarette sales “produced revenue” at the canteens for the Inmate Welfare Trust Fund and that tobacco is “legal.” Three respondents believe that inmates should be left to “make their own decision” as to whether they should smoke. Other reasons the respondents provided to support continued tobacco product use by inmates include: inmates “don’t have a right to a smoke-free environment or a smoking environment”; a ban would “create problems with staff discipline/corruption”; to prohibit smoking would “subject DOC to litigation and DOC would lose”; it’s not their “job to change the lawful habits learned in the free world”; and the department would “need to restrict visitor privileges” to help control contraband to successfully ban tobacco in prisons.

Some respondents who believe tobacco should not be banned from prisons believe that tobacco use in prisons should have further restrictions. Four respondents believe that smoking should not be allowed in dormitories/beds and should be restricted to designated areas (outside). Three respondents who advocate continued inmate tobacco use believed that inmates should be encouraged to stop smoking for health reasons. Another respondent who believes inmate tobacco use should not be prohibited stated that possibly a phase-out of smoking would be best.

The Department’s Policy on the Inmate Use of Tobacco Products

The Florida Department of Corrections (department) and the Correctional Privatization Commission (commission) currently allow tobacco-using inmates to use tobacco products within state correctional facilities. Rule 33-20.001, *Florida Administrative Code*, provides the current policy of the department on smoking for *all* of the institutions, including youthful-offender facilities. Generally speaking, there is a restriction on smoking in all indoor areas at institutions and other facilities. However, a superintendent may designate areas where inmates are housed or where inmate activities are held as “smoking areas.” Smoking is prohibited in dormitories that are designated as “non-smoking dormitories.” Individual superintendents or supervisors of correctional facilities may also further restrict areas where inmates may use tobacco products in their respective facilities.

For instance, individual superintendents may restrict smoking in their institutions by not allowing smoking by inmates or visitors in visiting parks. If smoking in the visiting parks is not permitted, superintendents may also prohibit inmates and visitors from leaving the visiting park to go to an outdoor area to smoke and return to the visiting park. The department recently polled 50 of its major adult institutions (Everglades, Santa Rosa, Okeechobee, and Moorehaven C.I.s were not

included in the poll) to determine if smoking is allowed in the visiting parks. Out of 50 institutions, only five institutions allow smoking in the visiting parks. However, out of the 45 institutions that do not allow smoking in the visiting parks, 40 superintendents allow inmates and visitors to “step to an outdoor area” to smoke and return to the visiting park, according to the poll. Some institutions are split into more than one unit and the units may vary as to the institutional smoking policy. The East Unit of Central Florida Reception Center (CFRC) allows inmates and visitors to step out to smoke and return to the visiting park, but the Main Unit of CFRC does not allow it. The Main Unit of Union C.I. also allows inmates and visitors to step out to smoke and return to the visiting park, but the Death Row Unit of Union C.I. does not.

The Department’s Tobacco Policy for Youthful Offenders

The Department of Corrections’ policy on smoking for youthful offenders appears to be fairly similar to the policy for adult facilities. According to the department, it does not have a “separate smoking policy” for youthful offenders. However, the department states that it discourages smoking for youthful offenders. Tobacco products are not sold in canteens in youthful offender facilities. The sale of tobacco products to a minor is unlawful in the state of Florida under s. 859.06, F.S., which is a second-degree misdemeanor. However, it is not unlawful for a minor to possess tobacco products.

In Florida facilities, youthful offenders must rely on outside family and friends to provide them with tobacco products. When asked, the department did not know whether there is a limit on the amount of tobacco products that may be provided by outsiders to youthful offenders.

The department stated that they are currently making strides in restricting the use of tobacco products for some youthful offenders. At Hillsborough C.I., a youthful offender facility for 14 to 18 year olds, the superintendent has banned smoking altogether for inmates. Indian River C.I., also a youthful offender facility for 14 to 18 year olds, is starting to institute a smoke-free policy. However, smoking is allowed in the other youthful-offender facilities, which typically house 19 to 24 year olds. The facilities that house the older group of youthful offenders can and do also house younger youthful offenders.

The Status of Smokers in Florida State Prisons

Adult inmates may purchase cigarettes from canteens within the institutions. Sales at canteens assist in generating moneys that are deposited into the Inmate Welfare Trust Fund. Moneys in the Inmate Welfare Trust Fund may be used for statutorily-authorized purposes. Currently, such moneys may be used to employ personnel and for operating and fixed capital expenses associated with correctional education to provide literacy programs, vocational training, and academic programs, fixed capital and operating expenses to employ personnel to operate libraries, chapels, and visiting pavilions, among other uses. s. 945.215 (1) (b), F.S.

The Department of Corrections estimates that between 65 and 75 percent of the inmate population smokes cigarettes. In December 1995, the department performed a random check at

several institutions to determine the percentage of inmates who smoke. For a sampling of smoking in correctional institutions, the department estimates the following:

<u>Institution</u>	<u>Percentage of Smokers</u>
Florida State Prison (open population)	53%
Florida State Prison (Work Camp)	63%
Charlotte C.I. (open population)	70%
Union C.I. (open population)	72%
Broward C.I. (open population)	74%
Tomoka C.I. (open population)	71%
Tomoka C.I. (work camp)	66%
Indian River C.I. (youthful offenders)	25%

While inmates are in disciplinary confinement, they are not permitted to smoke. Approximately 700 inmates are in this type of 24-hour lockup confinement at any given time. This type of confinement is usually temporary and inmates may smoke when they return to the open population in the institution.

Most Florida County Jails Prohibit Smoking for Inmates

A survey conducted by the Florida Sheriffs Association in August 1994 revealed that 55 out of 67 Florida counties prohibited inmate smoking and possession of tobacco products in their jails. According to the Florida Sheriffs Association, it is believed that even more Florida counties have since banned inmate smoking and possession of tobacco products in their jails. Apparently, bans on inmate possession of tobacco products by Florida jails were in response to out-of-state litigation instituted by non-smoking inmates who were successful in their challenges against exposure to second-hand smoke.

Subsection 951.22(1), F.S., prohibits the possession or introduction of any tobacco products by inmates in any county detention facility, if it is not otherwise authorized by the sheriff or officer in charge of any jail. Local jails that have banned inmate smoking have done so by jail rule. The rules invoked by sheriffs or jail administrators declare that cigarettes and tobacco products are contraband. As such, tobacco products are confiscated if they are possessed by a person who is being “booked” into a jail.

The large majority of the jails that have prohibited tobacco products have also prohibited indoor smoking for staff. Therefore, in most Florida jails, staff may only smoke tobacco outside.

According to the Florida Sheriffs Association, when county detention facilities instituted their ban on inmate possession of tobacco products, most did so with little or no time for transition for smoking inmates. Therefore, most jails originally had their smoking inmates go “cold turkey.” Currently, all jails that prohibit inmate possession of tobacco products have smoking defendants go “cold turkey” upon being processed into a jail. Sheriffs and jail administrators maintain that

they have not had any incidence of inmate violence or riotous behavior as a result of prohibitions on inmate possession of tobacco, according to the Florida Sheriffs Association.

Sheriffs and jail administrators noted a marked increase in sales of candies and other items in their commissaries after implementing bans on inmate possession of tobacco in their jails. Sales of these kind have remained higher since inmate tobacco bans were implemented.

Persons accused of crimes may often be held in pre-trial detention for long periods of time. During this time, most inmates are not allowed to use tobacco products because of the prohibitions instituted in almost all of Florida's jails. Many defendants also remain in jails after they have been sentenced while they await transport to a facility of the Department of Corrections. These defendants also are prohibited from using tobacco if the respective jails have banned it. Therefore, the vast majority of inmates who are considered "smokers" who are coming into the state correctional system have been smoke-free or tobacco-free for a considerable period of time before coming into the state system. As a result, if the state assumed a tobacco-free policy, most inmates coming into the state correctional system would simply be maintaining the tobacco-free status that they were subject to while they were in local detention facilities.

Tobacco Use Increases Health Risks

The department, in addition to others, acknowledge that smoking exacerbates certain physical conditions such as hypertension, pulmonary disease, diabetes, among many other medical conditions. It is also acknowledged that certain types of cancer are definitively linked to smoking. The department is reluctant to assess the number of inmates who have cancer or other medical conditions as a result of their tobacco use. The department also states that it is difficult to determine the number of inmates who are treated for illnesses that are worsened by the fact that they use tobacco.

Data received from the department's Office of Health Services for the month of March, 1995 may provide a snapshot of the types of treatments sought for health conditions that *may* be related to or worsened by tobacco product use. *See*, Department of Corrections, *Monthly Workload & Utilization Report*, p. 4 (March 1995) (Office of Health Services). In that month, a total of 3,552 inmate cases were treated statewide for hypertension in chronic-disease clinics. (Inmate cases means the number of *treatments* rendered within that month.) Nine hundred sixty-nine (969) inmate cases were treated for diabetes in chronic-disease clinics. There were 3,376 inmate cases statewide that were treated for asthma. There were another 2,779 inmate cases that were treated under the category of "general medicine" in chronic-disease clinics in March 1995.

The total annual expenditures for health care by the department has been increasing over the last several years. Compared to the average Florida citizen, the rate of health care cost increase for the Department of Corrections has remained below the rate of cost increase for the average state citizen. Nevertheless, the cost of inmate medical care is very high.

For FY 1996-97, the Legislature appropriated approximately \$213 million for inmate health services. For FY 1995-96, the department received \$208,255,084 in appropriations for health care. In FY 1994-95, the total health care expenditure for the department was \$178,192,737. In FY 1993-94, the state prison system’s total health-care expenditure was \$172,184,267. In FY 1992-93, the total health-care expenditure for the state correctional system was \$151,503,740.

This cost broken down further translates to an estimated health care per diem rate of \$7.91 per inmate for FY 1994-95. In FY 1993-94, the health care per diem rate was \$8.25. The health care inmate per diem for FY 1992-93 was \$8.14.

Increases in Inmate Health Expenditures

Fiscal Year	Annual Cost Per Inmate
1990-91	\$2,923
1991-92	\$3,080
1992-93	\$3,147
1993-94	\$3,163
1994-95	\$3,040
1995-96	\$3,148
1996-97	\$3,207*

Source: Office of Program Policy Analysis and Government Accountability, *Review of Inmate Health Services Within the Department of Corrections*, p. 4 (11/27/96).

* Annual cost figure obtained from the Department’s Annual Report for 1996-97, p. 35, by multiplying the \$8.91 health care cost per day by 365.

The Office of Program Policy Analysis and Government Accountability (OPPAGA) appraised the Department of Corrections’ Office of Health Services in a study and report entitled, *Review of Inmate Health Services Within the Department of Corrections* (Nov. 27, 1996). OPPAGA provides many strategy options that should be undertaken to assist in limiting the rate of increase in health care costs as the prison population continues to grow. One of the options involves the implementation of additional preventative health care measures, such as a smoking cessation program. In presenting this option, OPPAGA notes there are advantages and disadvantages. The advantages identified are that there would be a reduction in long term treatment costs as inmates maintain their health, the programs would act to occupy inmates, reducing idleness, and that inmates would be educated and instilled with a responsibility for their own health. The disadvantages OPPAGA noted were that additional staff would be needed to develop and implement programs, the cost of implementing such programs, limited institutional space, and the preventative program may not achieve measurable cost savings or even affect inmate behavior.

Tobacco Reduction or Elimination in Prisons Measured by a Recent Nationwide Survey

A survey was conducted in 1995 by Dean Tim Flanagan and Dr. Wesley Johnson from the College of Criminal Justice of Sam Houston State University in Huntsville, Texas. Those researchers surveyed 823 prison superintendents and wardens nationwide. Of those surveyed, 641 responses were obtained by the research team. Among other things, the respondents were asked whether their state had reduced or eliminated the use of tobacco products. Further, the respondents were asked their view on whether the use of tobacco products should be reduced or eliminated in prisons. Forty-four percent (44%) of the respondents indicated that tobacco products have been reduced or eliminated in their prisons. Fifty-seven percent (57%) of the respondents indicated that they believe tobacco product use should be reduced or eliminated in prisons.

Other States That Have Eliminated or Limited Tobacco Use in Prisons

The Federal Bureau of Prisons, in addition to state prison systems, has begun to examine the possibility of implementing a smoke-free environment or restricting tobacco use in prisons. According to the publication, *Corrections Alert*, issued in 1995, at least 13 prison systems in the United States and at least 2 prison systems in Canada have implemented or are in the process of implementing a smoke-free policy. See, *Corrections Alert*, p. 2, vol 2, no. 18 (special insert) (Aspen Publishers, Inc.) (December 11, 1995). Another publication, *On the Line*, which is published by the American Correctional Association, has provided updated and detailed information relating to the use of tobacco products in correctional facilities across the country. See, American Correctional Association, *On the Line*, p. 1, 3 (Vol. 21, No.1) (January 1998). As of late 1997, prison systems within the United States which have implemented, or are in the process of implementing, a total smoking ban, as reported in *On the Line* are: Alabama, Connecticut, Idaho, Indiana, Minnesota, Montana, North Dakota, Oregon, Texas, and Utah. Minnesota is one of the most recent states to ban smoking statewide for inmates, which was in the summer of 1997.

State	Total Ban	No Ban	Partial Ban	Comments
Alabama	X			
Alaska			X	
Arizona			X	
Arkansas			X	
California			X	
Colorado			X	All new facilities are non-smoking.
Connecticut	X			
Delaware		X		
District of Columbia			X	

State	Total Ban	No Ban	Partial Ban	Comments
Florida			X	Smoke-free dorms are available.
Georgia			X	
Hawaii			X	
Idaho	X			
Illinois		X		Non-smoking housing is available.
Indiana	X			
Iowa			X	
Kansas			X	
Kentucky			X	
Louisiana			X	
Maine			X	
Maryland			X	
Massachusetts			X	
Michigan			X	
Minnesota	X			
Mississippi			X	
Missouri		X		Smoking in cells only; not common areas.
Montana	X			
Nebraska			X	
Nevada		X		
New Hampshire			X	
New Jersey			X	
New Mexico			X	
New York			X	
North Carolina			X	
North Dakota	X			
Ohio		X		
Oklahoma			X	
Oregon	X			
Pennsylvania			X	
Rhode Island			X	
South Carolina			X	

State	Total Ban	No Ban	Partial Ban	Comments
South Dakota			X	
Tennessee			X	
Texas	X			
Utah	X			
Vermont			X	
Virginia			X	
Washington			X	
West Virginia			X	Regional jails have full bans.
Wisconsin			X	
Wyoming			X	Some facilities are smoke-free.

Source: ACA, *On the Line*, p. 3 (Vol. 21, No. 1) (January 1998).

Prison systems which have implemented a ban on smoking have been able to incorporate the assistance of the American Heart Association, the American Lung Association, and the American Cancer Society. These associations have provided videos, reading materials, instructional materials, and funding to some states to implement their smoke-free policies. Texas received funding and assistance from these associations. Because of their assistance, Texas did not expend *any state funds* to provide policy-transition assistance such as smoking cessation assistance.

Georgia, which had implemented a smoke-free policy, has since rescinded its smoking ban as of February 1, 1996, citing problems with contraband and “black marketing.” Georgia, however, has maintained smoking restrictions by prohibiting indoor smoking by inmates. Georgia does not sell any matches or lighters at its commissaries to discourage smoking. Inmates may now only light cigarettes at lighters that are permanently mounted outdoors.

III. Effect of Proposed Changes:

Possession or use of tobacco products would be prohibited for inmates in a state or private correctional facility regardless of the inmate’s location in relation to the physical plant of the facility. Therefore, inmates who are under the care, custody, and control of a state or private correctional facility would not be allowed to use or possess tobacco products whether the inmates are within the confines of the correctional facility or beyond the boundaries of a correctional facility. Visitors who are not employees of the Department of Corrections or the Correctional Privatization Commission, as defined in the bill, would also be prohibited from possessing or using tobacco products while in a state or private correctional facility.

Employees of the Department of Corrections or a privatized facility would still be allowed to possess and use tobacco products on the premises of a state correctional facility. The superintendent or supervisor of each state correctional facility would be permitted to designate

other special smoking areas for use by employees besides the out-of-doors, generally. The superintendents must also establish policies for the disposal of used tobacco products by employees to avoid possession and use by inmates.

An inmate in the state-level correctional system who possesses or uses any tobacco product would commit a disciplinary infraction and could be subject to forfeiture of gain-time or the right to earn gain-time in the future as well as any other punishment deemed appropriate by the disciplinary authority. These other punishments would include confinement and chain gang work assignments, among others.

Pursuant to the statement of legislative intent, the Department of Corrections and the Correctional Privatization Commission would be required to make smoking cessation assistance *available* to inmates to implement the tobacco product prohibition. This requirement does not necessarily mean that the department or the commission are directly responsible for *providing* such assistance. Rather, such assistance may be made available to inmates by outside sources actually providing the assistance.

The bill would be effective upon becoming a law. The Department of Corrections and the Correctional Privatization Commission would be required to implement the provisions of this bill as soon as possible, but the requirements of this bill must be fully implemented by January 1, 2000.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Inmates would not be able to buy tobacco products in prisons. This would have a negative fiscal impact on the inmates because of the resulting reduction in moneys deposited in the Inmate Welfare Trust Fund. Moneys in the Inmate Welfare Trust Fund are currently used to provide funding for the employment of personnel, fixed capital outlay, other operating expenses for educational programs, libraries, visiting pavilions, and chapels. Therefore, moneys used for these purposes would be reduced proportionately by the reduction in sales of tobacco products in canteens.

Tobacco companies would also experience a negative fiscal impact if Florida's inmates are prohibited from using tobacco products. Tobacco companies will have less retail sales of tobacco products because Florida inmates would not be allowed to use tobacco products after the ban. This negative fiscal impact is indeterminate.

Florida hospitals could also feasibly be negatively impacted by this bill. Hospitals could possibly experience a reduction in the inmate patients they would care for if there is a reduction in the health care cases after the tobacco ban.

C. Government Sector Impact:

It is likely that there would be a positive fiscal impact for the state because there would be a reduction in inmate health problems related to the use of tobacco products. Therefore, there should be a reduction in the health care expenditures by the Department of Corrections or the state through contracts between the Correctional Privatization Commission and private correctional vendors.

The department is not necessarily required by this bill to expend funds to provide smoking cessation assistance for smoking inmates as part of the implementation of the ban. The bill only requires that smoking-cessation assistance be made *available* to inmates. Other states that have implemented a smoke-free policy, such as Texas and Georgia, did not have their respective Department of Corrections expend additional funds to provide smoking cessation assistance. In both states, external private resources were tapped to obtain written materials and video tapes to assist smoking inmates making the transition. Both states obtained assistance from the American Cancer Society, the American Lung Association, and the American Heart Association. Georgia indicated that it also provided additional smoking cessation assistance through its counseling services that were already provided in its prisons. As mentioned in the present situation in this analysis, Georgia has somewhat "backpedaled" from the ban to now allow inmates to smoke outdoors.

There will be an indeterminate negative fiscal impact on prison canteen sales as a result of the loss of cigarette and tobacco product sales. The Department of Corrections has estimated that there will be an annual loss of approximately \$1.9 million in profits from tobacco sales. However, committee staff anticipates that this loss in canteen sales will be off-set to some

degree by an increase in the sales of other products to assist in the cessation of nicotine cravings, such as gum, candy, and nicotine patches.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
