

February 29, 2024

To: Governor Tina Kotek
Speaker Dan Rayfield
Senate President Rob Wagner

Re: Failure to Create Fiscal Impact Statement Compliant with ORS 173.029 on HB 4002

Governor Kotek, Speaker Rayfield, and Senate President Wagner,

We are writing to express significant concerns regarding the fiscal impact statement (FIS) issued on February 28, 2024, for HB 4002, and violations of ORS 173.029. We ask that you, as Oregon's political leaders, do not violate the law in a rush to advance HB 4002.

ORS 173.029(1) requires a fiscal impact statement for any measure reported out of a committee that would "create a new crime or increase the period of incarceration allowed or required for an existing crime."

The fiscal impact statement issued for HB 4002 as it was reported out of the Joint Committee On Addiction and Community Safety Response facially violates ORS 173.029 in several glaring and egregious ways. These shortcomings violate not only the letter of the law but the purpose of the law to inform legislators and the public about the true fiscal impact of creating new crimes and increasing periods of incarceration.

The statute requires reporting about the fiscal impact on law enforcement agencies, the courts, district attorney offices, public defense, and corrections to the extent practicable.

Impact on Local Law Enforcement

The fiscal impact statement for HB 4002 includes absolutely no information about the fiscal impact on local law enforcement agencies. This facially violates the statutory mandate. The statute is clear that the Legislative Fiscal Officer shall determine and describe:

"The fiscal impact on state and local law enforcement agencies, including an estimate of the increase in anticipated number of arrests annually."¹

The FIS says nothing about the anticipated number of arrests annually by any local law enforcement agency. City police and county sheriffs' departments are not even mentioned in the FIS.

Impact on Jails

The statute requires an estimate of the increase in the number of county jail beds to be used annually as a result of the bill. This information is absent from the FIS. The statute is clear that the FIS shall include "an estimate of the increase in the anticipated number of bed-days to be used annually at both the state and local level." Information about the expense to county jails and the increased number of bed-days they will use is completely absent.

Local governments will bear the brunt of the increased costs of criminalization of drug possession. Legislators need to know about these costs to their constituents, and the public needs to know about the cost that the legislature would impose on their city and county governments if HB 4002 is passed. An FIS such as this one

¹ ORS 173.029(2)(a).

that provides information on the fiscal impact to state agencies but conceals the local impact through omission is misleading.

Ten Year Impact Requirement

The FIS violates the requirement to describe the fiscal impact for 10 years. ORS 173.029(3) requires that:

“The fiscal impact statement required under this section must describe the fiscal impact that the measure would, if enacted, have on the state as well as on local governmental units for 10 years, beginning on the effective date of the measure.”

The FIS only provides information on the 2023-2025 and 2025-2027 biennia. The only exception is the Oregon Department of Corrections, which provides projections through the 2031-2033 biennium. This is a facial violation of the law. It is also a telling indicator of the shortsightedness of the proponents of hasty passage of HB 4002.

Impact on Public Defense

The section of the FIS prepared by the Public Defense Commission (PDC) acknowledges that additional public defense attorneys to represent people prosecuted as a result of HB 4002 simply do not exist. PDC presents cryptic cost projections ranging from \$12.2 million to \$61.4 million. It then warns:

“PDC does not believe that even if either fiscal impact option were to be funded that the agency would be able to acquire the associated level of provider contract attorney capacity or hourly attorney capacity, as neither capacity is thought to currently exist within the state at those levels.”

First, this is a facial violation of ORS 173.029 because it fails to even attempt to estimate the actual cost to hire public defense attorneys given the lack of available attorneys to hire. The true cost would have to include the exorbitant expense of recruiting and training attorneys who currently practice in other states or choose other practice areas. The PDC bases its projections on an assumption that the right to an attorney under the Oregon Constitution and the U.S. Constitution will simply be violated. In its written testimony to the committee, the PDC was very clear:

“OPDC anticipates that many persons charged under HB 4002 will join the backlog of unrepresented persons waiting for a public defender.”²

An FIS cannot be premised on the wholesale violation of constitutional rights.

At the Joint Committee On Addiction and Community Safety Response hearing on February 27, 2024, Senator Floyd Prozanski, a member of the Committee, stated:

“With the lack of defense attorneys, as we’ve heard through the testimony, over 2,800 people currently in this state are eligible for public defense but do not have it. Of that, 170 plus are sitting in jail right now without an attorney. And we’re getting ready to put in, from what the testimony showed, somewhere between 2000 and 4000 cases on top of the problem we have not addressed. I cannot see how we’re moving forward when we do not have the infrastructure in place.”³

To pass HB 4002, the legislature would intentionally choose to violate the constitutional right of thousands of Oregonians protected by the Sixth Amendment to the U.S. Constitution and Article 1, section 11 of the Oregon Constitution to have an attorney to represent them when they face criminal charges.

² <https://olis.oregonlegislature.gov/liz/2024R1/Downloads/PublicTestimonyDocument/114415>

³ <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2024021292> at 19:50.

Racial and Ethnic Disparity

To pass HB 4002, legislators would intentionally increase the disparately harmful impact of criminal prosecution on people of color, in violation of the Equal Protection Clause of the U.S. Constitution Equal Privileges and Immunities Clause of the Oregon Constitution. The Racial and Ethnic Impact Statement prepared for the legislature on February 26, 2024, by the Oregon Criminal Justice Commission, stated that criminalization of possession of controlled substances will result in racial disparities.

At the Joint Committee On Addiction and Community Safety Response hearing on February 27, 2024, Representative Andrea Valderrama, a member of the Committee, stated:

“We’ve heard a lot about the harm that the war on drugs has had on Black and Brown communities, and I want to name that still modern day institutional and systemic racism within Oregon institutions do exist... we heard from experts across the country and here in Oregon sharing information about the disproportionately high rates of potentially fatal overdoses post incarceration, some difficulties securing housing and jobs post incarceration and overall disproportionate concerns around Black and Brown communities with an approach that focuses on criminal justice. In particular, I was most concerned about some of the data that we heard in the Racial and Ethnic Impact Statement yesterday which did highlight that there may be additional challenges for our communities—longer prison sentences for Latinx communities, higher rates of conviction for Black individuals. This is really concerning to me. I know we spent a lot of time working to address that disproportionate impact.”⁴

Oregonians need to know, without equivocation, that their legislators stand for justice and the equitable treatment of all Oregonians. Passing legislation that historical evidence clearly shows will have a disparate impact on Oregonians of color would only affirm to Oregonians of color that they hold a second-class status in Oregon.

In Conclusion

Given that multiple aspects of the engrossed version of HB 4002 will create new crimes, increase the period of incarceration allowed or required for an existing crime, and modify current criminal sentencing laws, it follows that the Legislature must comply with the fiscal impact statement requirements in ORS 173.029.

The fiscal impact statement, inadequate though it is, confirms that HB 4002 will lead to extraordinary costs to state and local governments; financial costs that will be borne by taxpayer dollars, logistical costs taken on by criminal legal system stakeholders, and human costs brought by War on Drug policies that treat public health issues as correctional issues. While the logistical and human costs are already well known and studied, Oregonians deserve to know the true financial impact of HB 4002, and the law requires that this information must be provided.

HB 4002 has been rushed and primarily crafted by a limited number of special interest groups without the requisite background on addiction, public health, and civil rights. Those with expertise in addiction and public health were ignored; those with expertise on civil rights were dismissed. HB 4002 represents a hurried and closed-door process whose proponents were unwilling to engage with evidence and appreciate the broad and total impact of this policy. By all metrics, HB 4002 will overwhelm a public defense system that has already collapsed and create additional harm to the very communities the proponents are claiming to help.

The mandates of ORS 173.029 are clear and require the legislature to thoughtfully consider the true impacts of policies that create new crimes.

⁴ <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2024021292> at 10:53.

The OJRC will seek to immediately enforce the mandates of ORS 173.029 if HB 4002 is passed. Enforcement by the courts may include declaratory and injunctive relief.

Thank You,

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Senator Kate Lieber, Senate Majority Leader
Senator Floyd Prozanski, Chair of the Senate Committee on Judiciary
Representative Ricki Ruiz, Co-Chair of the BIPOC Caucus
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