

# An Assessment of the Utility and Accuracy of Prison-Jail Cost Estimates



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## Introduction

Since the 2014 session, the Legislative Research Council ("LRC") has prepared 251 prison-jail cost estimates. These estimates, required by statute,<sup>1</sup> analyze the potential increase to the cost of corrections at the state level and/or the cost of jailing at the local level due to a proposed bill or amendment.

Despite their prevalent use, to date, LRC has not studied the accuracy of these prison-jail cost estimates or directly surveyed their utility in legislative, executive, and judicial decision-making. With this issue memo, LRC seeks to find out more about the efficacy of prison-jail cost estimates within the Legislature and beyond.

## Beginnings of Prison-Jail Cost Estimates

In 2012, then Governor Dennis Daugaard, Chief Justice David Gilbertson, Senate Majority Leader Russell Olson, and House Majority Leader David Lust requested the support of Pew Charitable Trusts ("Pew") to improve the quality and cost-effectiveness of the state's criminal justice system. South Dakota was soon elected to join the Justice Reinvestment Initiative ("JRI"),<sup>2</sup> a public-private partnership between the Bureau of Justice Assistance and Pew to help states understand their correctional trends and adopt policies and practices to better manage their inmate populations.<sup>3</sup>

With assistance through the JRI, the newly formed Criminal Justice Initiative Work Group, including representatives from all three branches of government and other criminal justice stakeholders, set forth to review sentencing, corrections, probation, and parole data and then develop policy recommendations primarily intended to reduce the prison population and improve offender accountability. By November 2012, the work group published its final report, including eighteen separate recommendations.<sup>4</sup>

One of the work group's recommendations, labeled recommendation "O," was to "[e]nsure policy makers are aware of the impact of all legislative proposals or public policy questions posed to voters that could affect prison populations."<sup>5</sup> This recommendation was to be achieved by "requir[ing] fiscal notes be placed on bills and ballot initiatives impacting the prison population."<sup>6</sup>

<sup>1</sup> [SDCL § 2-9-33](#) (2022); *see also* [SDCL § 2-9-34](#) (2022).

<sup>2</sup> South Dakota Department of Corrections, "Criminal Justice Initiative - Work Plan," accessed October 5, 2022, <https://doc.sd.gov/documents/about/CriminalJusticeInitiativeWorkPlan.pdf>.

<sup>3</sup> Bureau of Justice Assistance, "Justice Reinvestment Initiative (JRI): Overview," accessed October 5, 2022, <https://bja.ojp.gov/program/justice-reinvestment-initiative/overview>.

<sup>4</sup> South Dakota Legislative Research Council, "South Dakota Criminal Justice Initiative Final Report," November 2012, <https://mylrc.sdlegislature.gov/api/Documents/Attachment/116361.pdf>.

<sup>5</sup> *Ibid*, 10.

<sup>6</sup> *Ibid*.

The next year, during the 2013 legislative session, the Legislature passed the South Dakota Public Safety Improvement Act ("SDPSIA"),<sup>7</sup> codifying the recommendations made by the work group. Incorporating recommendation "O," Section 71 of the SDPSIA added a new section to chapter 2-1 of South Dakota Codified Law:

A fiscal impact statement shall be attached to any bill or amendment or measures proposed by ballot initiative that may impact state prison or county jail populations. The requirement for a fiscal impact statement includes those bills or amendments that increase the periods of imprisonment authorized for existing crimes, that add new crimes for which imprisonment is authorized, that impose minimum or mandatory minimum terms of imprisonment, or that modify any law governing release of prisoners from imprisonment or supervision.

The sponsor of such legislation or such ballot initiative shall request and allow sufficient time to prepare a fiscal impact statement from the Bureau of Finance and Management or the Legislative Research Council. The fiscal impact statement shall be completed no later than the day the bill is submitted to the committee with subject matter cognizance. Any ballot initiative shall have a fiscal impact statement attached to the Attorney General's statement required pursuant to § 2-13-9 or 12-13-25.1.<sup>8</sup>

Section 72 of the SDPSIA further added conditions on what needed to be in these new fiscal impact statements:

A fiscal impact statement pursuant to § 2-1-19 shall include the following:

- (1) An analysis of the specific components of the bill or the ballot initiative that will impact the prison and jail population;
- (2) The projected cost of the impact of the bill on the state prison system and the aggregate cost to county jails on an annual basis and cost of the bill over a ten year period; and
- (3) Operational costs and capital costs including all manner of construction.<sup>9</sup>

In 2014, LRC began drafting fiscal impact statements explaining the possible effect of bills and amendments on the cost of running prisons and jails in South Dakota. Afterwards, over several years, the language of SDCL 2-1-19 and 2-19-20 were heavily amended and subsequently transferred to SDCL 2-9-33 and 2-9-34, respectively. To date, four bills have amended the statutes covering these fiscal impact statements:

- In 2015, the Legislature renamed "fiscal impact statements" to "prison-jail cost estimates" and clarified that such estimates must be completed "before the bill is considered by any standing committee of the Legislature."<sup>10</sup>
- In 2017, the Legislature reduced the scope of prison-jail cost estimates to exclude misdemeanor penalties, only requiring an estimate for a bill or amendment with a Class 1 misdemeanor penalty upon legislator

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<sup>7</sup> [2013 S.D. Session Laws, Ch. 101 \(SB 70\)](#).

<sup>8</sup> [SDCL § 2-1-19](#) (2013).

<sup>9</sup> [SDCL § 2-1-20](#) (2013).

<sup>10</sup> [2015 Session S.D. Laws, Ch. 15 \(SB 113\)](#).



request and never requiring an estimate for a bill, amendment, or ballot measure with a Class 2 misdemeanor penalty. Additionally, the Bureau of Finance and Management was relieved from any duty to prepare prison-jail cost estimates, leaving only the Legislative Research Council to complete them.<sup>11</sup>

- In 2018, the Legislature added a requirement to estimate any impact to the prison or county jail population in the fiscal note process for initiated measures and initiated constitutional amendments per SDCL 2-9-30 rather than the prison-jail cost estimates process.<sup>12</sup>
- In 2020, the Legislature allowed for the delivery of prison-jail cost estimates electronically and moved back the timeline for completion to "before final disposition is taken on the bill or amendment by any standing committee of the Legislature."<sup>13</sup>

### Current Practices within LRC

Within LRC, the process for drafting prison-jail cost estimates in recent sessions has followed a similar pattern involving both research and fiscal staff. All data necessary for the preparation of prison-jail cost estimates comes from other agencies, as LRC does not have the resources or access necessary to compile this data itself. Before session, fiscal staff collects the most recent Sheriff Management Study from the Attorney General ("AG"), Jail/Pen Sentencing Report from the Unified Judicial System ("UJS"), and inmate length of stay and average daily cost information from the Department of Corrections ("DOC").

During session, research staff develops the queue of bills in need of a prison-jail cost estimate according to SDCL 2-9-33. Research staff takes on the task of drafting all prison-jail cost estimates, including reviewing current statutes and determining whether a projection of future costs is necessary or feasible. This analysis entails a determination of whether the bill proposes a crime likely to result in convictions and whether enough reliable data is available to make a projection. The same analysis goes for amendments affecting corrections and/or jailing costs when such amendments are proposed.

Fiscal staff helps provide cost projections when they can be reasonably made. In those cases, fiscal staff will request crime-specific conviction data from UJS to extrapolate future populations. Fiscal staff will then rely on sentencing and cost of incarceration data to predict the future correctional cost to the state and counties. Sometimes, out-of-state conviction data will be used instead when those states provide such data in a timely manner. Usually, estimates providing a projection will explain the potential cost in terms of the average length of stay (based on the severity of the crime) and the cost per day to incarcerate (based on what facility the individual is expected to be placed).<sup>14</sup>

The finished draft is then reviewed by the Director of LRC for his approval. Before publishing a prison-jail cost estimate, the draft is also sent to members of what is known as the rapid response team, including personnel from

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<sup>11</sup> [2017 S.D. Session Laws, Ch. 17 \(HB 1001\)](#).

<sup>12</sup> [2018 S.D. Session Laws, Ch. 80 \(SB 13\)](#).

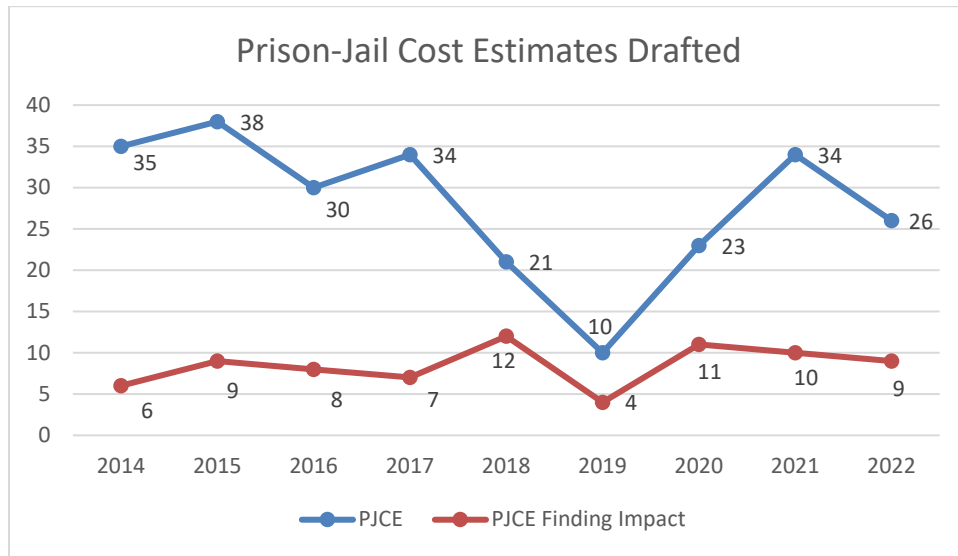
<sup>13</sup> [2020 S.D. Session Laws, Ch. 11 \(HB 1002\)](#).

<sup>14</sup> As an example, see South Dakota Legislative Research Council, "Prison/Jail Population Cost Estimate Statement – Senate Bill 72," January 19, 2022, <https://mylrc.sdlegislature.gov/api/Documents/226418.pdf>.



AG, DOC, UJS, and the Bureau of Finance and Management ("BFM"). LRC gives the rapid response team 24 hours to propose any edits to the draft. From start to finish, LRC expects the normal drafting process to take around ten days.

Of the 251 prison-jail cost estimates prepared by LRC over the last nine sessions, 76 of them suggested a possible impact on prisons and/or jails resulting from the passage of the bill or amendment in question.



Several reasons explain this gap between the number of total drafted estimates and drafted estimates with impacts.

At times, the changes to criminal law suggested in a bill or amendment are simply found to have no likely future effect on the state's criminal justice system. In one such instance, during the 2022 Session, HB 1037, which subsequently was passed by the Legislature, proposed to revise the penalty for willful violations by grain buyers and grain warehouse operators from a Class 6 felony to punishable as theft under 22-30A.<sup>15</sup> In looking at the history of convictions under the statute to be amended, SDCL 49-43-62, LRC found there had been no convictions since the statute took effect in 2013. Thus, the impact on prison and jail cost was determined to be negligible.<sup>16</sup>

Other times, LRC may be asked to find the fiscal impact of a new criminal offense not on the books in any other state. For example, during the 2022 session, HB 1208 intended to prohibit chemical abortion drugs.<sup>17</sup> At the time, only Texas appeared to have a similar law in effect, but that law had been in effect for just two months, leaving no available data to project future correctional costs in South Dakota.<sup>18</sup> In other cases, states with usable, relevant

<sup>15</sup> [2022 S.D. Session Laws, Ch. 177 \(SB 1037\)](#).

<sup>16</sup> South Dakota Legislative Research Council, "Prison/Jail Population Cost Estimate Statement – House Bill 1037," January 19, 2022, <https://mylrc.sdlegislature.gov/api/Documents/226286.pdf>.

<sup>17</sup> [2022 S.D. HB 1208, 97th Legislative Session](#).

<sup>18</sup> South Dakota Legislative Research Council, "Prison/Jail Population Cost Estimate Statement - House Bill 1208," February 3, 2022, <https://mylrc.sdlegislature.gov/api/Documents/230676.pdf>.



convictions data may not respond in time for LRC to utilize it during session, also resulting in an estimate without a projection.

Further, some bills propose new crimes for which data collection necessary to determine a future fiscal impact cannot be accomplished. House Bill 1069 intended to include out-of-state convictions as the basis for an enhanced penalty for certain drug crimes.<sup>19</sup> While there had been almost 1,000 convictions under the relevant statute, SDCL 22-42-2, no database of information on their criminal backgrounds, including out-of-state convictions, was available in South Dakota. Without that information, no impact could be determined.<sup>20</sup>

While LRC always puts forward a prison-jail cost estimate when needed, the process for doing so depends on the nature of the criminal penalty at issue and the data available to make a fiscal projection.

### Review of Suggested Best Practices

Best practices for prison-jail cost estimates in the legislative context are yet difficult to ascertain, as it seems assessments as to what they should be are rarely done. One 2012 study by Leachman et al., a joint effort between the Center on Budget and Policy Priorities and the American Civil Liberties Union, directly investigated how states analyzed the budgetary impact of criminal justice reforms. They summarized best practices for preparing prison-jail cost estimates as follows: "All criminal justice fiscal notes should be consistent, properly researched, detailed, and accessible."<sup>21</sup>

As to consistency, the study suggests writing estimates for all criminal justice bills, updating estimates when an amendment might affect them, producing estimates in a consistent format, and relying on a non-partisan body to lead the process.<sup>22</sup> By law, South Dakota meets these requirements.<sup>23</sup> South Dakota law also requires detailed prison-jail cost estimates:<sup>24</sup> they must look at ongoing impacts and consider localities along with the state.<sup>25</sup> And LRC meets accessibility best practices through publishing the estimates on its website in the same place the bill and amendment can be found.<sup>26</sup>

Where South Dakota differs from the Leachman et al. best practices is proper research. To be properly researched, the study says a fiscal note should "[i]nclude an estimate of the savings, costs, or revenue gains, and avoid claiming an indeterminate impact."<sup>27</sup> Specifically, "To be useful, a fiscal note needs to indicate the magnitude of the fiscal impact, even if the estimate is imprecise. Having an estimate, even if approximate, will allow legislators to

<sup>19</sup> [2022 S.D. HB 1069, 97th Legislative Session.](#)

<sup>20</sup> South Dakota Legislative Research Council, "Prison/Jail Population Cost Estimate Statement – House Bill 1069," February 4, 2022, <https://mylrc.sdlegislature.gov/api/Documents/232305.pdf>.

<sup>21</sup> Michael Leachman, Inimai Chettiar, and Benjamin Geare, "Improving Budget Analysis of State Criminal Justice Reforms: A Strategy for Better Outcomes and Saving Money." *SSRN Electronic Journal* (2012), 3, <https://doi.org/10.2139/ssrn.1991413>.

<sup>22</sup> *Ibid.*, 9–13.

<sup>23</sup> See [SDCL § 2-9-33](#).

<sup>24</sup> See [SDCL § 2-9-34](#).

<sup>25</sup> *Ibid.*, 19–23.

<sup>26</sup> Leachman et al., "Improving Budget Analysis," 24.

<sup>27</sup> *Ibid.*, 13.



understand the possible or probable fiscal impacts of legislation."<sup>28</sup> Indeed, LRC at times does not offer a proposed impact in its estimates, including times when no estimate is given.

However, such best practice is not without detractors. The conclusion of Leachman et al. that an estimate must be made assumes "legislators are imperfectly informed as to the expected fiscal impact of proposed changes in sentencing policy, and . . . these legislators are less likely to enact criminal sentences that future legislators would not consider cost-justified if the expected fiscal impact of proposed sentencing changes are clearly disclosed and explained at the time the proposed sentence is contemplated and debated."<sup>29</sup> Thus, reaching an impact somewhat rests on whether the goal of the prison-jail cost estimate process is to provide the most accurate information or to dissuade the passage of the bill or amendment under review, with the latter goal well beyond the purpose and scope of LRC.

And no matter how accurate the result sought, it is not always possible to avoid preparing prison-jail cost estimates with an indeterminate impact: "there are two circumstances under which an indeterminate fiscal impact is provided: (1) the fiscal impact cannot be determined, given all known available data; and (2) the fiscal impact cannot be determined, because certain data, which is known to exist, have not been made available to the fiscal analyst."<sup>30</sup> Whenever possible, "[t]he fiscal note process should be structured to avoid the latter situation. As data collection often consumes more time than data analysis in preparing a fiscal impact statement, sufficient time must be set aside for the data collection process."<sup>31</sup>

With data collection habitually deciding whether an estimate can be made, the Leachman et al. study suggests drawing on multiple data sources: "For example, analysts may need to draw on projections of the state's future prison population, data on arrest patterns for certain crimes, information from other states on the impact of similar criminal justice policies, studies by the U.S. Department of Justice, and other sources."<sup>32</sup> To retrieve such a wealth of information, analysts should "draw on the expertise of budget experts and other staff in executive branch departments and local government agencies, including law enforcement, courts, prosecutors, public defenders, or corrections, parole, and probation departments."<sup>33</sup>

At current, such data collection best practices are not readily practicable in South Dakota. Here, "[a] regular session of the Legislature shall be held each year and shall not exceed forty legislative days ... [.]"<sup>34</sup> Due to SDCL 2-9-33 requiring prison-jail cost estimates "be completed for a bill or amendment before final disposition is taken on the bill or amendment by any standing committee of the Legislature[,]" all estimates must be finalized within a far shorter timeframe. While SDCL 2-9-33 requires "[t]he sponsor of the legislation or amendment [to] allow sufficient time to prepare a cost estimate from the Legislative Research Council[,]" "sufficient time" is not defined. And in practice, no standards exist to ensure LRC has enough time to prepare a prison-jail cost estimate

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<sup>28</sup> *Ibid.*

<sup>29</sup> W.C. Bunting, "The Regulation of Sentencing Decisions: Why Information Disclosure Is Not Sufficient, and What to Do about It." SSRN Electronic Journal, 2014, 18, <https://doi.org/10.2139/ssrn.2402890>.

<sup>30</sup> *Ibid.*, 17.

<sup>31</sup> *Ibid.*

<sup>32</sup> Leachman et al., "Improving Budget Analysis," 18.

<sup>33</sup> *Ibid.*

<sup>34</sup> [SD Const. Art. III, sec. 6.](#)





when additional data is needed. LRC collects general criminal justice data before session, but it often cannot foresee what specific data will be required until session itself.

Moreover, there exists no centralized process or database for collecting criminal justice data in South Dakota allowing for efficient, effective analyses by LRC. UJS compiles data on convictions and initial sentencing, both for jails and prisons. However, DOC collects all data on actual lengths of incarceration and the cost of corrections by crime classification on a per average basis. These data are not collated in a way to effectively track anyone through the criminal justice system. As to individuals in jail, generalized data on the cost of holding them available through the AG but only through a voluntary survey of counties performed every two years, leaving many counties unaccounted for. No other county-level criminal justice data is regularly collected by a centralized state entity, including data on arrests and prosecutorial discretion, so the extent to which these initial contacts with the criminal justice system affect state and local correctional costs down the road is entirely unknown.

While questions subsist as to prioritizing putting forward estimates without considering credibility first, the need for strong data poses a real concern under the current state framework. LRC acting alone may improve objectivity, but such a setup risks decreased accuracy caused by the need to synthesize data from multiple sources and the time and resource-crunch present during a legislative session. Both difficulties limit in-depth evaluations providing increased value to legislators and the public.

### Use in Other States

As of 2022, nineteen states, including South Dakota, *expressly* require fiscal impact statements be attached to any bill adding a criminal offense to state law or affecting the sentencing of an existing crime.<sup>35</sup> In reviewing these existing statutes requiring some form of prison-jail cost estimates in the legislative process, it is clear no model act or significant consistency shapes how these laws came to pass.

For one, unlike South Dakota, some of these states require an estimate when a bill may *lower* the costs of corrections. In Rhode Island, RI Gen. Laws § 42-56-39 states, "All acts, bills and resolutions *having an effect* on the revenues, expenditures, fiscal liability, bed space, staff or programs of the department of corrections . . . shall be accompanied by a brief explanatory statement or note which sets forth the estimated dollar effect[.]" (emphasis added). South Dakota requires prison-jail cost estimates for bills potentially *increasing* costs per SDCL 2-9-33.<sup>36</sup>

South Dakota is in the minority in requiring estimates for the possible effect of bills on the cost of running jails,<sup>37</sup> as most states require fiscal impact statements solely when an effect on *state* funding is predicted. Missouri is

<sup>35</sup> The other eighteen states are Colorado, Connecticut, Illinois, Iowa, Kansas, Kentucky, Missouri, Mississippi, Nevada, North Carolina, New Mexico, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. Other states may still write fiscal notes for these types of bills but do not explicitly require them.

<sup>36</sup> "The requirement for a cost estimate includes each bill or amendment that meets the penalty requirements of this section and that increases the period of imprisonment authorized for an existing crime, that adds a new crime for which imprisonment is authorized, that imposes a minimum or mandatory minimum term of imprisonment, or that modifies any law governing release of a prisoner from imprisonment or supervision."

<sup>37</sup> Only Colorado, Connecticut, Kansas, Kentucky, Ohio, Oregon, South Carolina, South Dakota, and Virginia require cost estimates explicitly for bills affecting jails.



one such state that only requires estimates for bills affecting prisons: RSMo § 217.022 says, "The fiscal note of any legislation introduced into either house of the general assembly that would affect the number of persons supervised by the Missouri department of corrections or affect any program or service provided by the department shall be accompanied by a prison impact statement[.]" (emphasis added). The South Dakota Legislature appropriates the budget for state government, not the budgets for counties.

South Dakota is in the minority in that the *legislative* branch must draft the prison-jail cost estimates.<sup>38</sup> States often designate the drafting of such estimates to their respective department of corrections or a related entity. Virginia delegates the activity to its independent sentencing commission through VA Code § 30-19-1:4, which states, "The Virginia Criminal Sentencing Commission shall prepare a fiscal impact statement reflecting the operating costs attributable to and necessary appropriations for any bill which would result in a net increase in periods of imprisonment in state adult correctional facilities." Why the Legislature eventually decided that LRC be the sole entity available to prepare prison-jail cost estimates is not clear, but out of the states requiring them, South Dakota has by far the smallest available legislative staff at 58 employees as of 2015, which includes LRC staff and the staff of the Department of Legislative Audit.<sup>39</sup>

States requiring their own version of prison-jail cost estimates appear to have done so independently, making it uncertain as to why or how they decided on such a process. Virtually every state has a fiscal note process otherwise, allowing legislators to inquire into the fiscal impact of bills when they so choose,<sup>40</sup> further complicating the need for separately defined prison-jail cost estimates. Nonetheless, it appears South Dakota ended up with one of the more intensive prison-jail cost estimate processes currently active.

### Case Study of Accuracy

Given the time passed since the preparation of prison-jail cost estimates was first required by South Dakota law, a novel opportunity exists to examine the accuracy of earlier estimates in which the bill reviewed was subsequently passed by the Legislature. For this issue memorandum, five separate prison-jail cost estimates prepared between 2014 and 2018 are evaluated below based on now-available convictions and corrections data to determine how closely the original projected incarcerated populations and sentences match reality. These estimates were chosen because they all concluded the bills in question would lead to increased incarceration costs using state convictions and sentencing data, albeit through different methods.

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<sup>38</sup> Only Colorado, Iowa, Nevada, North Carolina, Ohio, Oregon, South Dakota, Tennessee, and Texas require cost estimates be prepared explicitly by an agency under control of the state's legislature.

<sup>39</sup> National Conference of State Legislatures, "Size of Legislative Staff," May 18, 2021, <https://www.ncsl.org/research/about-state-legislatures/staff-change-chart-1979-1988-1996-2003-2009.aspx>. The definition of legislative employee for this study was "any person other than a state legislator who draws a salary or compensation from the budget of the legislature."

<sup>40</sup> Elizabeth McNichol, Iris J. Lav, and Kathleen Masterson, "Better Cost Estimates, Better Budgets," Center on Budget and Policy Priorities, November 24, 2015, 2, <https://www.cbpp.org/research/state-budget-and-tax/better-cost-estimates-better-budgets>.





**Senate Bill 46 (2014)**

Senate Bill 46 from the 2014 Session is "an act to revise certain provisions regarding animal welfare and to provide a felony penalty for cruelty to animals."<sup>41</sup> The prison-jail cost estimate focused on the addition of a felony offense for animal cruelty, which is now codified in SDCL 40-1-2.4.<sup>42</sup> LRC found about twenty cases of inhuman treatment of animals coming before courts in the state on an annual basis.<sup>43</sup> Not knowing the extent of how many of those cases would rise to the level of a felony case, it was assumed an average of two new felony convictions every year were to be expected.<sup>44</sup>

This year, UJS was asked to find how many convictions there have been under SDCL 40-1-2.4 since its codification. South Dakota courts have convicted nobody under SDCL 40-1-2.4. While the prison-jail cost estimate posited the new felony offense would cost the state a total of \$94,609 to \$141,912 every year,<sup>45</sup> it has actually cost the state nothing with respect to incarceration at any level.

**Senate Bill 26 (2016)**

Senate Bill 26 from the 2016 Session is "an act to revise certain provisions concerning sex offender registration and to require an offender to notify of intended foreign travel."<sup>46</sup> This bill contains three new proposed criminal violations: one under SDCL 22-24B-2 (notification of address, employment, or school enrollment), one under SDCL 22-24B-8 (requiring date of birth when registering as a sex offender), and a new violation (notification of intent to travel outside of the United States). However, LRC found just changes to SDCL 22-24B-2 would result in any measurable cost to the state because the other changes were not likely to create new violations.<sup>47</sup> Specifically, the prison-jail cost estimate suggests an additional four people per year would be convicted under SDCL 22-24B-2, resulting in an additional cost to the state of \$212,035 every year.<sup>48</sup>

Importantly, SDCL 22-24B-6 already criminalized not reporting a change in school enrollment or employment before the passage of SB 26. This prison-jail cost estimate assumed South Dakota courts would convict people for failing to notify police under SDCL 22-24B-2 at the same rate they did under SDCL 22-24B-6 for failing to notify about a change in residence. This has not been the case. According to UJS, on average, from 2012 through 2016, 12.6 people were convicted per year under SDCL 22-24B-2. From 2017 through 2021, 12.4 people were convicted per year under the same statute. Based on this data, no evidence exists to say SB 26 has had an effect on the South Dakota criminal justice system.<sup>49</sup>

<sup>41</sup> South Dakota Legislative Research Council, "Legislative Incarceration Fiscal Impact Statement – Senate Bill No. 46," February 7, 2014, 1, <https://mylrc.sdlegislature.gov/api/Documents/29926.pdf>.

<sup>42</sup> [SDCL 40-1-2.4](#) states, "No person may subject an animal to cruelty. A violation of this section is a Class 6 felony."

<sup>43</sup> SD LRC, "SB 46," 1.

<sup>44</sup> *Ibid*, 2.

<sup>45</sup> *Ibid*.

<sup>46</sup> South Dakota Legislative Research Council, "Prison/Jail Population Cost Estimate Statement – Senate Bill No. 26," January 27, 2016, 1, <https://mylrc.sdlegislature.gov/api/Documents/37995.pdf>.

<sup>47</sup> *Ibid*, 1–2.

<sup>48</sup> *Ibid*, 2–3.

<sup>49</sup> As to [SDCL 22-24B-8](#), UJS data does not show any increase in convictions under this provision. And only one conviction has materialized under the new provision, [SDCL 22-24B-37](#).



**Senate Bill 63 (2018)**

Senate Bill 63 is "an act to revise certain prohibitions regarding methamphetamines and to create a mandatory penalty for a violation thereof."<sup>50</sup> The Legislature created a new Class 3 felony for manufacturing, distributing, dispensing, or possessing, with intent to distribute, methamphetamine which is now codified in SDCL 22-42-4.3. Included were two enhancements: a violation of SDCL 22-42-4.3 is a Class 2 felony if the violator possesses certain materials, such as a firearm or materials used for manufacturing and a Class 1 felony if a minor is involved.<sup>51</sup>

Due to the significant number of people being convicted under SDCL 22-42-2 (unauthorized manufacture, distribution, counterfeiting, or possession of Schedule I or II substances as felony) for handling methamphetamine, LRC originally predicted about 70 people would be convicted under SDCL 22-42-4.3 every year with varying sentence lengths due to the nature of the statute.<sup>52</sup> After an amendment limited the scope of the statute to those handling more than five grams of methamphetamine, LRC revised its estimate to about 22 people per year convicted.<sup>53</sup>

Through 2021, twelve people have been convicted under SDCL 22-42-4.3, an average of four per year. While SDCL 22-42-4.3 provides enhanced penalties for those drug offenders dealing in larger quantities of methamphetamine, SDCL 22-42-2 already provided a criminal offense covering the exact same behavior. It appears that despite the new statute, a rash of additional convictions has not emerged as predicted.

**Senate Bill 65 (2018)**

Senate Bill 65 is "an act to revise certain provisions regarding drug deliveries that result in death and to provide a penalty therefor."<sup>54</sup> The act added a provision to SDCL 22-42-2 which states, "Any person who, for consideration, intentionally distributes any controlled substance or counterfeit substance in violation of this section and another person dies as a direct result of using that substance, the sentence for the principal felony shall be enhanced by increasing the class of the principal felony two levels."

LRC relied on data from the Department of Health regarding drug overdoses, which revealed an average of around 41 accidental drug overdose deaths in the state per year.<sup>55</sup> Taking into account uncertainty related to law enforcement practices and prosecutorial discretion, LRC estimated five convictions under SDCL 22-42-2 every year requiring a penalty enhancement. More importantly, LRC estimated the average sentence for those convicted under this new provision would increase an additional 791 days to 6,703 days depending on the original felony.

<sup>50</sup> South Dakota Legislative Research Council, "Prison/Jail Population Cost Estimate Statement – Senate Bill No. 63," February 1, 2018, 1, <https://mylrc.sdlegislature.gov/api/Documents/48170.pdf>.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*, 2.

<sup>53</sup> South Dakota Legislative Research Council, "Prison/Jail Population Cost Estimate Statement – Senate Bill No. 63wb," February 27, 2018, 1, <https://mylrc.sdlegislature.gov/api/Documents/49905.pdf>.

<sup>54</sup> South Dakota Legislative Research Council, "Prison/Jail Population Cost Estimate Statement – Senate Bill No. 65," February 5, 2018, 1, <https://mylrc.sdlegislature.gov/api/Documents/47862.pdf>

<sup>55</sup> *Ibid.*



From 2016 through 2018, 107 individuals were convicted under SDCL 22-42-2 per year on average. Since then, the number of convictions for manufacturing, distributing, or possessing a schedule I or II drug has fallen considerably. From 2019 through 2021, the average number of convictions under SDCL 22-42-2 per year declined to around 78. Furthermore, the average sentence for those convicted has not changed. From 2016 through 2018, the average penitentiary sentence was about 1,554 days. From 2019 through 2021, the average sentence fell to 1,512 days. Admittedly, without knowing exactly how many people received a penalty enhancement as proscribed under SDCL 22-42-2,<sup>56</sup> there remains some uncertainty as to whether the prison-jail cost estimate for SB 65 proved reliable. Yet, based on the overall conviction and sentencing data available, it does not appear the bill increased the financial burden of prisons in the state in any way.

### House Bill 1293 (2018)

House Bill 1293 is "an act to increase the penalty for certain assaults committed against firefighters or emergency medical technicians while engaged in the performance of their duties."<sup>57</sup> Under SDCL 22-18-1.05, which previously enhanced the penalty for a simple assault or aggravated assault when against a law enforcement officer, the Legislature sought to include several new emergency personnel, including firefighters, ambulance service personnel, Department of Corrections personnel, and health care facility personnel engaged in patient care.<sup>58</sup>

LRC wrote three separate prison-jail cost estimates for HB 1293, as two separate amendments changed the applicable personnel included in the statute. In the end, LRC estimated an additional ten individuals would be convicted under SDCL 22-18-1.05 every year due to the changes to statute included in the bill.<sup>59</sup>

Convictions under SDCL 22-18-1.05 took a significant turn in 2017. From 2011 through 2016, the average number of convictions per year under this statute was 84. But from 2017 through 2018, the average number of convictions jumped to 128 per year. Then, from 2019 through 2021, after the changes to SDCL 22-18-1.05 were codified, the average number of convictions per year rose again to 151, more than double the estimated growth in convictions predicted by LRC. Unfortunately, there is no way to know without reviewing all individual cases whether the convictions at issue were based on an assault against a law enforcement officer or a separate public officer added to SDCL 22-18-1.05 by HB 1293.<sup>60</sup> To some extent, it appears convictions followed a trend present before HB 1293, but a firm answer as to whether the prison-jail cost estimate seemingly *underestimated* how many convictions would result from the change in law, without more data, is unavailable.

<sup>56</sup> UJS categorizes its data by penalty classification only, so it is not possible to find out who received a penalty enhancement as opposed to who simply received a more severe penalty beforehand.

<sup>57</sup> South Dakota Legislative Research Council, "Prison/Jail Population Cost Estimate Statement – House Bill No. 1293," February 13, 2018, 1, <https://mylrc.sdlegislature.gov/api/Documents/49008.pdf>.

<sup>58</sup> *Ibid.* See also South Dakota Legislative Research Council, "Prison/Jail Population Cost Estimate Statement – House Bill No. 1293ja," February 14, 2018, 1, <https://mylrc.sdlegislature.gov/api/Documents/49197.pdf>; South Dakota Legislative Research Council, "Prison/Jail Population Cost Estimate Statement – House Bill No. 1293jc," February 20, 2018, 1, <https://mylrc.sdlegislature.gov/api/Documents/49403.pdf>.

<sup>59</sup> SD LRC, "HB 1293jc," 1.

<sup>60</sup> UJS does not separate convictions data based on the victim, and there exists one statute covering assault against public officers.



## Summary of Case Studies

For the five prison-jail cost estimates reviewed, three found an impact despite no such impact materializing to date, while two others appeared to misestimate the future fiscal impact either above or below actual outcomes. With the benefit of hindsight, it is easier to spot assumptions to alter or come up with additional data to collect that would help bring the original results in line with the results seen today.

Yet, under the circumstances in which these estimates were produced, it would be wrong to suggest they were produced inadequately. The varying results seen can just as simply be attributed to the difficulty of accurately predicting human behavior, particularly criminal behavior, using limited data. Knowing firm estimates are already far and few between, this brief survey of previous estimates suggests accuracy is difficult to achieve.

## Survey of Use and Utility

Along with reviewing previous prison-jail cost estimates, LRC has also asked a range of legislators, AG staff, DOC staff, UJS staff, and BFM staff to gauge how much they use and rely on prison-jail cost estimates.

The following short survey was anonymously sent to members of the Senate and House Judiciary committees and the leadership of the two houses:

1. When a prison-jail cost estimate is available, how often do you use the information therein when deciding how to vote on a bill or amendment?
  - a. Always, usually, sometimes, rarely, or never
2. When a prison-jail cost estimate is available, how often do you read it?
  - a. Always, usually, sometimes, rarely, or never
3. To what extent do you find the information provided in prison-jail cost estimates applicable?
  - a. Always, usually, sometimes, rarely, or never
4. Would you like to see prison-jail cost estimates provided during future legislative sessions?
  - a. Yes or no
5. Please include any additional comments you may have regarding prison-jail cost estimates. Your responses are confidential unless you include your name.

Similar questions were also posed to four staff members of other agencies (DOC, UJS, AG, BFM) on an informal basis to allow for candid feedback.

## Responses

Out of 39 legislators, 13 (33%) responded to the survey. The responses from that survey are as follows:

1. When a prison-jail cost estimate is available, how often do you use the information therein when deciding how to vote on a bill or amendment?
  - a. Always: 4
  - b. Usually: 3
  - c. Sometimes: 4
  - d. Rarely: 1
  - e. Never: 1



2. When a prison-jail cost estimate is available, how often do you read it?
  - a. Always: 4
  - b. Usually: 5
  - c. Sometimes: 3
  - d. Rarely: 1
  - e. Never: 0
3. To what extent do you find the information provided in prison-jail cost estimates applicable?
  - a. Always: 2
  - b. Usually: 5
  - c. Sometimes: 5
  - d. Rarely: 0
  - e. Never: 1
4. Would you like to see prison-jail cost estimates provided during future legislative sessions?
  - a. Yes: 10
  - b. No: 3

The legislators who responded to the survey generally have positive opinions about prison-jail cost estimates. Most of the respondents (69.2%) always or usually read the prison-jail cost estimates when they are published. More than half of respondents (53.8%) always or usually use information in estimates when deciding on a bill or amendment and find that information applicable to their decision making. And all but three respondents (76.9%) would like to see LRC continue to draft prison-jail cost estimates.

Still, in response to the opportunity to provide comments, some legislators took the opportunity to speak to their discontent with prison-jail cost estimates. Those comments include:

- "These are a waste of time and generally only used for delay."
- "One of my concerns is how accurate the estimates are. I am not sure that the information provided which are the basis for the reports is necessarily accurate."
- "The accuracy of these estimates is very difficult to achieve. There are just way too many variables. It's easy to dismiss new proposed punishments when we always are concerned about putting a price on it."

One comment supported the use of prison-jail cost estimates by the Legislature:

- "These estimates are useful not only because of their cost estimates, but also because of the [sic] their estimates of the number of potential cases that could be brought. The cost of incarceration and the number of cases affected by a bill can't be considered if the information isn't provided."

As to agency responses, several reported prison-jail cost estimates almost never affect their work during or after session. Both UJS and AG said they spend time considering the estimates primarily when it supports their position on the bill or amendment in question, but those instances are far and few between. Both agencies stated they would not likely miss the estimates if LRC stopped publishing them. Indeed, they also mentioned how the drafting process tends to slow down the bill hearing process without providing a significant benefit on the back end.



In speaking with DOC and BFM, they both explained how DOC puts together its own cost estimates for bills in much the same way LRC does now. Accordingly, DOC does not rely on LRC for determining the potential fiscal impact to prisons via proposed changes to the criminal justice system, although the agency will review LRC's estimates to check for alignment in the results. BFM also uses DOC's estimates, but the agency noted the value in having multiple parties weigh in to come up with a number.

### Summary of Survey Responses

While the legislators responding to the survey lean toward supporting the continuance of prison-jail cost estimates, such results represent merely a third of the legislators asked to respond to the survey. It is unclear whether the general lack of responses correlates to a pervasive disinterest in these estimates or not. The written opinions of respondents suggested the presence of discontent with the process and distrust in the conclusions made. Support for prison-jail cost estimates and the current analytical process surely persists, but it is not absolute.

Agencies, on the other hand, repeatedly noted indifference in whether LRC continues to draft prison-jail cost estimates during session. There have been limited instances of agencies relying on estimates in their own work, and when such estimates are needed to make budgetary decisions, DOC uses its own process. It is not evident the executive or judicial branches would be obviously affected by a change in how prison-jail cost estimates are produced.

### Conclusions

While prison-jail cost estimates have been a mainstay of the work of LRC during legislative sessions since 2014, doubt has crept in as to whether the process should remain as is. Based on the analysis above, LRC takes away three main conclusions about prison-jail cost estimates:

1. South Dakota law covering prison-jail cost estimates does not match that of other states, requiring more in-depth estimates while over-restricting who may participate in the process compared to the majority. The resulting accuracy of the estimates, or lack thereof, does not justify such a framework.
2. Not only are most prison-jail cost estimates not able to provide firm projections, but the accuracy of those prison-jail cost estimates offering some projected impact is inconsistent. The accuracy of prison-jail cost estimates is hampered by (1) limitations in available data predicting future convictions and the costs thereof and (2) limitations in time and resources needed to conduct more in-depth analyses. Based on suggested best practices, improving on both limitations would provide significant benefits.
3. Despite these limitations, several legislators still place their trust in these estimates and suggest a continuing role for them in the legislative process. Concerns still exist about the estimates' efficacy and their likelihood of slowing down the progress of bills. Both the executive and judicial branches do not consistently use prison-jail cost estimates in their work if they use them at all.

While the road to prison-jail cost estimates was certainly paved with good intentions, as part of a comprehensive improvement of the South Dakota criminal justice system, these estimates place a significant burden on LRC staff during legislative session while not regularly resulting in firm or faultless conclusions. While predicting future criminal behavior does not lend itself well to rigorous analysis, the current law makes such analysis difficult.





Overhanging time and resource limitations, which affect not just the drafting process but also data collection, have created mixed results.

Such limitations may be resolved in numerous ways. To name a few:

- Working on prison-jail cost estimates after session rather than during;
- Working on estimates only when requested by a legislator, like other fiscal notes; or
- Relying on the work of a more specialized agency, such as DOC.

A combination of these approaches may work best. Overall, a more robust pool of data would also help avoid future situations where better conclusions could have been made if more data were available to the drafters, although such a change would require far more agency involvement beyond the Legislature. Even if no changes were made, with the risks associated with producing these estimates now clearer, LRC can better adapt during session to make the most of the process as is.

This issue memorandum was written by Joey Knofczynski, Fiscal Analyst, on October 26, 2022, for the Legislative Research Council. It is designed to provide background information on the subject and is not a policy statement made by the Legislative Research Council.

