

MAINE STATE LEGISLATURE

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SECOND REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

No. 2443

S.P. 932

In Senate, March 3, 1988

Approved for Introduction by a Majority of the Legislative Council pursuant to Joint Rule 26.

Reference to the Committee on Judiciary suggested and ordered printed.

JOY J. O'BRIEN, Secretary of the Senate

Presented by Senator BRANNIGAN of Cumberland.

Cosponsored by Representative PARADIS of Augusta.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-EIGHT

AN ACT to Amend the Maine Tort Claims Act.

1
2

3 Be it enacted by the People of the State of Maine as
4 follows:

5 **Sec. 1.** 14 MRSA §8103, sub-§2, as amended by PL
6 1987, c. 402, Pt. A, §103, is repealed.

7 **Sec. 2.** 14 MRSA §8103, sub-§3, as amended by PL
8 1987, c. 110, is repealed.

1 Sec. 3. 14 MRSA §8104, as amended by PL 1985,
2 c. 569, §5, is repealed.

3 Sec. 4. 14 MRSA §§8104-A, 8104-B, 8104-C and
4 8104-D are enacted to read:

5 §8104-A. Exceptions to immunity

6 Except as specified in section 8104-B, a
7 governmental entity is liable for property damage,
8 bodily injury or death in the following instances.

9 1. Ownership; maintenance or use of vehicles,
10 machinery and equipment. A governmental entity is
11 liable for its negligent acts or omissions in its
12 ownership, maintenance or use of any:

13 A. Motor vehicle, as defined in Title 29, section
14 1, subsection 7;

15 B. Special mobile equipment, as defined in Title
16 29, section 1, subsection 14;

17 C. Trailers, as defined in Title 29, section 1,
18 subsection 18;

19 D. Aircraft, as defined in Title 6, section 3,
20 subsection 5;

21 E. Watercraft, as defined in Title 12, section
22 662, subsection 12;

23 F. Snowmobiles, as defined in Title 12, section
24 7821, subsection 5; and

25 G. Other machinery or equipment, whether mobile
26 or stationary.

27 The provisions of this section do not apply to the
28 sales of motor vehicles and equipment at auction by a
29 governmental entity.

30 2. Public buildings. A governmental entity is

1 liable for its negligent acts or omissions in the
2 construction, operation or maintenance of any public
3 building or the appurtenances to any public building.
4 Notwithstanding this subsection, a governmental entity
5 is not liable for any claim which results from:

6 A. The construction, ownership, maintenance or
7 use of:

8 (1) Unimproved land;

9 (2) Historic sites, including, but not
10 limited to, memorials, as defined in Title
11 12, section 601, subsection 1; or

12 (3) Land, buildings, structures, facilities
13 or equipment designed for use primarily by
14 the public in connection with public outdoor
15 recreation;

16 B. The ownership, maintenance or use of any
17 building acquired by a governmental entity for
18 reasons of tax delinquency, from the date of
19 foreclosure and until: actual possession by the
20 delinquent taxpayer or the taxpayer's lessee or
21 licensee has ceased for a period of 60 days; or

22 C. The ownership, maintenance or use of any
23 building acquired by a governmental entity by
24 eminent domain or by condemnation until actual
25 possession by the former owner or the owner's
26 lessee or licensee has ceased for a period of 60
27 days;

28 3. Discharge of pollutants. A governmental
29 entity is liable for its negligent acts or omissions
30 in the discharge, dispersal, release or escape of
31 smoke, vapors, soot, fumes, acids, alkalines, toxic
32 chemicals, liquids or gases, waste materials or other
33 irritants, contaminants or pollutants into or upon
34 land, the atmosphere or any water course or body of
35 water, but only to the extent that the discharge,
36 dispersal, release or escape complained of is sudden
37 and accidental.

1 4. Road construction, street cleaning or repair.
2 A governmental entity is liable for its negligent acts
3 or omissions arising out of and occurring during the
4 performance of construction, street cleaning or repair
5 operations on any highway, town way, sidewalk, parking
6 area, causeway, bridge, airport runway or taxiway,
7 including appurtenances necessary for the control of
8 those ways including, but not limited to, street
9 signs, traffic lights, parking meters and guardrails.
10 A governmental entity is not liable for any defect,
11 lack of repair or lack of sufficient railing in any
12 highway, town way, sidewalk, parking area, causeway,
13 bridge, airport runway or taxiway or in any
14 appurtenance.

15 §8104-B. Immunity notwithstanding waiver

16 Notwithstanding section 8104-A, a governmental
17 entity is not liable for any claim which results from:

18 1. Undertaking of legislative act. Undertaking
19 or failing to undertake any legislative or
20 quasi-legislative act, including, but not limited to,
21 the adoption or failure to adopt any statute, charter,
22 ordinance, order, rule, policy, resolution or resolve;

23 2. Undertaking of judicial act. Undertaking or
24 failing to undertake any judicial or quasi-judicial
25 act, including, but not limited to, the granting,
26 granting with conditions, refusal to grant or
27 revocation of any license, permit, order or other
28 administrative approval or denial;

29 3. Performing discretionary function. Performing
30 or failing to perform a discretionary function or
31 duty, whether or not the discretion is abused and
32 whether or not any statute, charter, ordinance, order,
33 resolution or policy under which the discretionary
34 function or duty is performed is valid or invalid;

35 4. Performing prosecutorial function. Performing
36 or failing to perform any prosecutorial function
37 involving civil, criminal or administrative
38 enforcement;

1 5. Activities of state military forces. The
2 activities of the state military forces when receiving
3 state active duty pay under Title 37-B, section 143,
4 in accordance with Title 37-B, sections 181 and 182,
5 intervention in insurrections and Title 37-B, section
6 183, human health emergency assistance; and

7 6. Leasing of state-owned property. The leasing
8 of state-owned property, including buildings, to other
9 organizations pursuant to Title 5, chapter 154.

10 §8104-C. Wrongful death action

11 Subject to any immunity provided by this chapter
12 or otherwise provided by law, actions for the death of
13 a person brought by the personal representatives of
14 the deceased person against a governmental entity or
15 employee shall be brought in the same manner that is
16 provided for similar actions in Title 18-A, section
17 2-804 and amounts recovered shall be disposed of as
18 required in that section; provided that the
19 limitations of sections 8104-D and 8105 shall apply.

20 §8104-D. Personal liability of employees of a
21 governmental entity

22 Except as otherwise expressly provided by section
23 8111 or by any other law, and notwithstanding the
24 common law, the personal liability of an employee of a
25 governmental entity for negligent acts or omissions
26 within the course and scope of employment shall be
27 subject to a limit of \$10,000 for any such claims
28 arising out of a single occurrence and the employee is
29 not liable for any amount in excess of that limit on
30 any such claims.

31 Sec. 5. 14 MRSA §8105, sub-§1, as enacted by PL
32 1977, c. 2, §2, is amended to read:

33 1. Limit established. In any action for
34 damages claim or cause of action permitted by this
35 chapter, the claim for and award of damages,
36 including costs, against both either a governmental
37 entity and or its employees, or both, shall not
38 exceed \$300,000 for any and all claims arising out of

1 a single occurrence.

2 **Sec. 6. 14 MRSA §8107, sub-§1, as enacted by PL**
3 **1977, c. 2, §2, is amended to read:**

4 1. Notice requirements for filing. Within 180
5 days after a any claim or cause of action against
6 a governmental entity permitted by this chapter
7 accrues, or at a later time within the limits of
8 section 8110, when a claimant shows good cause why
9 notice could not have reasonably been filed within the
10 180-day limit, a claimant or his personal
11 representative shall file a written notice containing:

12 A. The name and address of the claimant, and the
13 name and address of his attorney or other
14 representative, if any;

15 B. A concise statement of the basis of the claim,
16 including the date, time, place and circumstances
17 of the act, omission or occurrence complained of;

18 C. The name and address of any governmental
19 employee involved, if known;

20 D. A concise statement of the nature and extent
21 of the injury claimed to have been suffered; and

22 E. A statement of the amount of monetary damages
23 claimed.

24 **Sec. 7. 14 MRSA §8107, sub-§4, as amended by PL**
25 **1977, c. 591, §3, is repealed and the following**
26 **enacted in its place:**

27 4. Substantial notice compliance required. No
28 action may be commenced against a governmental entity
29 or employee in the Superior Court unless the notice
30 provisions required by this section are substantially
31 complied with and unless the claim has first been
32 denied by the governmental entity in question or is
33 deemed denied pursuant to section 8108. The
34 requirement that no action may be commenced prior to
35 denial of the administrative claim shall not apply
36 when good cause can be shown why notice could not

1 reasonably have been filed within the 180-day limit
2 set forth in subsection 1 and when less than 120 days
3 remain between the date of giving notice and the
4 expiration of the statute of limitations pursuant to
5 section 8110. In such a case the Superior Court
6 shall, if requested by the governmental entity, stay
7 all proceedings after the filing of the complaint for
8 such time as will allow the governmental entity 120
9 days to act on the administrative claim.

10 A claim filed under this section shall not be held
11 invalid or insufficient by reason of an inaccuracy in
12 stating the time, place, nature or cause of the claim,
13 or otherwise, unless it is shown that the governmental
14 entity is in fact prejudiced. A claim filed under this
15 section shall not be held invalid solely because a
16 claim based on the same facts was filed under a
17 different statutory procedure and was disallowed.

18 Sec. 8. 14 MRSA §8109, sub-§4 is enacted to
19 read:

20 4. Release. The acceptance by a claimant of any
21 settlement under this section shall be final and
22 conclusive on the claimant and shall constitute a
23 complete release of any further claims against the
24 governmental entity and against any employees of the
25 governmental entity whose acts or omissions gave rise
26 to the claim.

27 Sec. 9. 14 MRSA §8111, sub-§1, as amended by PL
28 1987, c. 427, §§1 and 2, is repealed and the following
29 enacted in its place:

30 1. Immunity. Notwithstanding any liability that
31 may have existed at common law, employees of
32 governmental entities shall be absolutely immune from
33 personal civil liability for the following:

34 A. Undertaking or failing to undertake any
35 legislative or quasi-legislative act, including,
36 but not limited to, the adoption or failure to
37 adopt any statute, charter, ordinance, order,
38 rule, policy, resolution or resolve;

1 B. Undertaking or failing to undertake any
2 judicial or quasi-judicial act, including, but not
3 limited to, the granting, granting with
4 conditions, refusal to grant or revocation of any
5 license, permit, order or other administrative
6 approval or denial;

7 C. Performing or failing to perform any
8 discretionary function or duty, whether or not the
9 discretion is abused; and whether or not any
10 statute, charter, ordinance, order, resolution,
11 rule or resolve under which the discretionary
12 function or duty is performed is valid;

13 D. Performing or failing to perform any
14 prosecutorial function involving civil, criminal
15 or administrative enforcement.

16 E. Any intentional act or omission within the
17 course and scope of employment; provided that
18 immunity shall not exist in any case in which an
19 employee's actions are found to have been in bad
20 faith; or

21 The absolute immunity provided by this subsection
22 shall be applicable whenever a discretionary act is
23 reasonably encompassed by the duties of the
24 governmental employee in question, regardless of
25 whether the exercise of discretion is specifically
26 authorized by statute, charter, ordinance, order,
27 resolution, rule or resolve and shall be available to
28 all governmental employees, including police officers
29 and governmental employees involved in child welfare
30 cases, who are required to exercise judgment or
31 discretion in performing their official duties.

32 **Sec. 10. 14 MRSA §8111, sub-§2, as enacted by**
33 **PL 1977, c. 2, §2, is amended to read:**

34 **2. Attachment and trustee process.** Attachment,
35 pursuant to Rule 4A, Maine Rules of Civil Procedure,
36 and trustee process, pursuant to Rule 4B, Maine Rules
37 of Civil Procedure, shall not be used in connection
38 with the commencement of a civil action against an
39 employee of a governmental entity based on a-

1 negligent any act or omission of such the
2 employee in the course or and scope of his
3 duties employment.

4 **Sec. 11.** 14 MRSA §8112, sub-§1, as repealed and
5 replaced by PL 1987, c. 427, §3, is repealed and the
6 following enacted in its place:

7 1. When governmental entity is not liable. A
8 governmental entity, with the consent of the employee,
9 shall assume the defense of and, in its discretion,
10 may indemnify any employee against a claim which
11 arises out of an act or omission occurring within the
12 course and scope of employment and for which the
13 governmental entity is not liable.

14 In lieu of assuming the defense of an employee, a
15 governmental entity shall have the option of paying an
16 employee's reasonable attorneys' fees and defense
17 costs. A governmental entity shall not be liable for
18 its employee's attorneys' fees and defense costs in
19 the event that the employee is determined to have
20 acted in bad faith or is found to be criminally liable
21 for the acts or omissions in question.

22 This subsection shall not apply if the employee
23 settles the claim without the consent of the
24 governmental entity.

25 This subsection shall not apply if notice is not
26 required to have been filed as provided in section
27 8107, if the employee does not notify the governmental
28 entity within 30 days after receiving actual written
29 notice of the claim or within 15 days after the
30 service of a summons and complaint, and if the
31 governmental entity is prejudiced.

32 **Sec. 12.** 14 MRSA §8112, sub-§2, as repealed and
33 replaced by PL 1977, c. 578, §4, is amended to read:

34 2. When the governmental entity is liable. A
35 governmental entity shall, with the consent of the
36 employee, assume the defense of and shall indemnify
37 any employee against a claim which arises out of an
38 act or omission occurring within the course or and

1 scope of his employment and for which the
2 liability of the governmental entity is asserted
3 sovereign immunity has been waived under section 8104,
4 under another statute or by legislative
5 authorization. If the defense of its employee would
6 otherwise create a conflict of interest between the
7 governmental entity and the employee, the governmental
8 entity shall be liable for reasonable fees for the
9 employee's attorney and for his court costs. These
10 obligations shall not exist in the event that the
11 employee is determined to have acted in bad faith or
12 is found to be criminally liable for the acts or
13 omissions in question. In lieu of assuming the
14 defense of an employee, the governmental entity shall
15 have the option of paying an employee's reasonable
16 attorneys' fees and defense costs.

17 This subsection shall not apply if the employee
18 settles the claim without the consent of the
19 governmental entity.

20 This subsection shall not apply if notice is not
21 required to have been filed as provided in section
22 8107, if the employee does not notify the governmental
23 entity within 30 days after receiving actual written
24 notice of the claim against him or within 15 days
25 after the service of a summons and complaint upon
26 him, and if the governmental entity is prejudiced
27 thereby.

28 Sec. 13. 14 MRSA §8112, sub-§2-A is enacted to
29 read:

30 2-A. Suits against employees under federal law.
31 A governmental entity may, with the consent of the
32 employee, assume the defense of and may indemnify any
33 employee against any claim brought under any federal
34 law which arises out of an act or omission occurring
35 within the course and scope of that employment. In
36 lieu of assuming the defense of an employee, the
37 governmental entity may pay the employee's reasonable
38 attorneys' fees and court costs.

39 Sec. 14. 14 MRSA §8112, sub-§3, as repealed and
40 replaced by PL 1987, c. 427, §4, is amended to read:

1 3. Act or omission outside course or scope of
2 employment. When a governmental entity assumes the
3 defense of In cases when a governmental entity is
4 obligated to indemnify an employee under subsection
5 1 or 2, the governmental entity may refuse to
6 indemnify its employee if the a court determines
7 that the act or omission of the employee occurred
8 outside the course or and scope of his that
9 employment.

10 **Sec. 15.** 14 MRSA §8112, sub-§8 is enacted to
11 read:

12 8. Liability under section 8104-D. A
13 governmental entity shall purchase insurance or
14 self-insure on behalf of its employees to insure them
15 against their personal liability to the limit of their
16 liability under section 8104-D and, to the extent that
17 insurance coverage is not available, shall assume the
18 defense of and indemnify those employees to the limit
19 of their liability under section 8104-D.

20 **Sec. 16.** 14 MRSA §8116, first ¶, as amended by
21 PL 1985, c. 713, §1, is further amended to read:

22 The legislative or executive body or any
23 department of the State or any political subdivision
24 may procure insurance against liability for any claim
25 against it or its employees for which immunity is
26 waived under this chapter and including any activity
27 not described in this chapter, but for which immunity
28 is waived by another act or under any other law. If
29 the insurance provides protection in excess of the
30 limit of liability imposed by section 8105, then the
31 limits provided in the insurance policy shall replace
32 the limit imposed by section 8105. If the insurance
33 provides coverage in areas where the governmental
34 entity is immune, the governmental entity shall be
35 liable in those substantive areas but only to the
36 limits of the insurance coverage. Reserve funds,
37 excess insurance or reinsurance contracts maintained
38 by a governmental entity, by an insurer providing
39 liability insurance or by a public self-funded pool to
40 meet obligations imposed by this Act shall not

1 increase the limits of liability imposed by section
2 8105.

3 Sec. 17. 14 MRSA §8116, 3rd ¶, as amended by PL
4 1985, c. 599, §3, is repealed and the following
5 enacted in its place:

6 A governmental entity may purchase insurance or
7 may self-insure on behalf of its employees to insure
8 them against any personal liability for which a
9 governmental entity is obligated or entitled to
10 provide indemnity under section 8112.

11 Sec. 18. 14 MRSA §8116, 4th ¶, as enacted by
12 PL 1977, c. 2, §2, is amended to read:

13 Any insurance purchased by the State under this
14 section shall be purchased through the Maine
15 Insurance Advisory Board Department of
16 Administration, Risk Management Division.

17 STATEMENT OF FACT

18 The Maine Revised Statutes, Title 14, sections
19 8103 and 8104 of the Maine Tort Claims Act are
20 intended to clarify the existing law without affecting
21 any substantive changes. The bill restates in section
22 8103 the general principle of immunity formerly
23 embodied in Title 14, section 8103, subsection 1. As
24 in the prior law, Title 14, section 8104-A then
25 contains a listing of the specific areas in which
26 there is a waiver of immunity.

27 The provisions contained in Title 14, section
28 8103, subsection 2, of the existing law, which specify
29 instances in which a governmental entity remains
30 immune despite the waivers of sovereign immunity in
31 Title 14, section 8104 have been inserted in Title 14,
32 sections 8104-A and 8104-B;

33 1. Existing Title 14, section 8103, subsection 2,
34 paragraphs A, B and C are restated as new sections
35 Title 14, section 8104-C, subsections 1, 2 and 3.

1 This is more logical because these provisions are not
2 really examples of cases in which governmental
3 entities remain immune. Instead, they create specific
4 immunities which exist notwithstanding the waivers of
5 immunity in Title 14, section 8104-A.

6 2. Title 14, section 8104-B, subsection 4 is
7 new. It expressly codifies the common law doctrine of
8 prosecutorial immunity. While prosecutorial decisions
9 would almost certainly also be immune under the
10 existing discretionary immunity, the case law treats
11 prosecutorial immunity as a separate doctrine and it
12 is therefore appropriate to include such immunity in a
13 separate provision.

14 3. Title 14, section 8103, subsection 2,
15 paragraph E in the existing law has been recodified as
16 new Title 14, section 8104-B, subsection 5.

17 4. Title 14, section 8103, subsection 2,
18 paragraphs F, H and I in the existing law have been
19 recodified as exceptions to the waiver of immunity
20 contained in Title 14, section 8104-A, subsection 1.

21 5. Existing Title 14, sections 8103, subsection
22 2, paragraph G and 8104, subsection 3, have been
23 combined in Title 14, section 8104-A, subsection 3.

24 6. Title 14, sections 8103, subsection 2,
25 paragraph J and 8104, subsection 4, in the existing
26 law have been combined in Title 14, section 8104-A,
27 subsection 4.

28 7. Title 14, section 8103, subsection 2,
29 paragraph K has been eliminated as unnecessary since
30 it merely restates the last full sentence in Title 14,
31 section 8104-A, subsection 1.

32 8. Title 14, section 8103, subsection 2,
33 paragraph L in the existing law has been recodified as
34 Title 14, section 8104-B, subsection 6.

35 9. Title 14, section 8103, subsection 2,
36 paragraph D in the existing law has been eliminated as
37 unnecessary since the decision not to provide services

1 is plainly covered by the discretionary immunity
2 contained in Title 14, section 8104-B, subsection 3.

3 Title 14, section 8103, subsection 3 in the
4 existing law, which deals with the personal liability
5 of government employees for negligent acts or
6 omissions, has been recodified as a separate provision
7 in Title 14, section 8104-D. Some minor changes have
8 been made for purposes of clarity, but the substance
9 of that provision remains unchanged. Similarly, Title
10 14, section 8104, subsection 5, in the existing law
11 has been recodified as Title 14, section 8104-C. This
12 provision, which pertains to wrongful death actions
13 against governmental entities, was not intended to be
14 an additional exception to immunity, but rather a
15 specific authorization for wrongful death actions in
16 cases where immunity was otherwise waived. Placing
17 this provision in a separate section is consistent
18 with the Law Court's recent decision in Darling v.
19 AMHI, No. 4604, (Law Docket No. CUM-87-2, decided
20 December 22, 1987).

21 The change to existing Title 14, section 8105,
22 subsection 1, is not designed to change existing law,
23 but merely to clarify language that might be
24 susceptible to misinterpretation.

25 The change to Title 14, section 8107, subsection
26 1, is designed to make that subsection consistent with
27 the language of Title 14, section 8107, subsection 4.
28 The Law Court held in Darling v. AMHI that the Maine
29 Tort Claims Act required notice to be given before
30 suit was brought against governmental employees for
31 acts or omissions within the course and scope of their
32 employment and the change therefore codifies existing
33 law.

34 The change to Title 14, section 8107, subsection 4
35 is designed to eliminate an anomaly under existing
36 law. The bill currently provides that a claimant must
37 send a notice of claim to a governmental entity before
38 filing suit and a governmental entity has 120 days to
39 respond to the claim. However, there is no express
40 provision prohibiting the filing of a complaint before
41 the 120 days have elapsed. This change allows

1 governmental entities to investigate and settle claims
2 before any lawsuit is filed. In the event that the
3 120-day requirement might cause a claimant to miss the
4 statute of limitations, the change provides that the
5 claimant would be entitled to file the complaint, but
6 the governmental entity may then obtain a stay from
7 the court for such time as will allow it a total of
8 120 days to act on the claim.

9 The change to Title 14, section 8109, is designed
10 to make that section consistent with Title 14, section
11 8114, subsection 1, which makes a judgment against a
12 governmental entity a bar against any further claim
13 against the governmental employee involved. The
14 change is designed to ensure that a settlement with a
15 governmental employee has the same effect.

16 The changes to Title 14, section 8111 are designed
17 to clarify the immunity available to governmental
18 employees sued in their individual capacity. First,
19 as in Title 14, section 8104-B, subsection 4, an
20 express provision for prosecutorial immunity is
21 contained in the new Title 14, section 8111,
22 subsection 1, paragraph D. The remaining changes in
23 Title 14, section 8111 are designed to clarify the
24 scope of the immunities contained in that section and
25 in some cases to correct certain statements in
26 judicial decisions concerning the discretionary
27 immunity contained in Title 14, section 8111,
28 subsection 1, paragraph C.

29 In this respect, it bears emphasis that the
30 immunities contained in Title 14, section 8111 are
31 intended to serve important governmental purposes.
32 Government officials are frequently required as part
33 of their jobs to take actions that have serious
34 consequences for the individuals affected. Obvious
35 examples are the actions of law enforcement officers
36 investigating crimes and child protective workers
37 investigating allegations of child abuse. If these
38 government officials were faced with the constant
39 possibility of personal liability, the inevitable
40 result would be that they would be hesitant to take
41 necessary enforcement action and the public interest
42 would suffer.

1 Since governmental entities largely retain
2 sovereign immunity, it is unfair for individual
3 government employees to be exposed to personal damage
4 claims in cases where they are taking actions required
5 as part of their jobs. When government employees are
6 acting on behalf of a governmental entity which is
7 itself immune, it is apparent that even the most
8 dedicated government employees would not remain in
9 government service if they were subjected to personal
10 liability whenever they exercised their judgment.
11 These concerns motivated the original enactment of the
12 immunities contained in Title 14, section 8111 and the
13 changes are designed to resolve certain problems that
14 have become apparent in light of subsequent experience.

15 The legislative history of the Maine Tort Claims
16 Act in 1977 demonstrates that the discretionary
17 immunity was intended to be absolute. To the extent
18 that MacKerron v. Madura, 474 A.2d 166 (Me. 1984), can
19 be read to suggest that only a qualified immunity was
20 intended, it is incorrect. The addition of language
21 specifying absolute immunity in the initial sentence
22 of Title 14, section 8111, subsection 1, is intended
23 to solve this problem.

24 Moreover, the additional language at the end of
25 Title 14, section 8111, subsection 1, paragraph E is
26 intended to overrule the statement in True v. Ladner,
27 513 A.2d 257 (Me. 1986), that discretionary immunity
28 is only available when the exercise of discretion is
29 authorized by a specific statute or rule. To perform
30 their jobs effectively, many government employees are
31 required to exercise their discretion in areas which
32 are not specifically governed by a detailed statute.
33 Accordingly, discretionary immunity should exist
34 whenever the activity in question is in fact
35 discretionary and is important to the functioning of
36 the governmental activity involved. This is
37 consistent with the United States Supreme Court's
38 decisions on the subject of discretionary immunity in
39 such cases as Barr v. Matteo, 360 U.S. 564 (1958).

40 In addition, while there is little dispute that
41 discretionary immunity should be available to

1 government employees in policy-making positions, the
2 Law Court's decision in Kane v. Anderson, 509 A.2d 656
3 (Me. 1986), suggests that such immunity is not
4 available to lower level government employees.
5 Although police officers and child protective workers
6 do not exercise policy-making functions, their jobs
7 necessarily entail making judgment calls in difficult
8 circumstances. Frequently, such officials have to act
9 quickly in emergency situations. If discretionary
10 immunity were not available, such officials might
11 refrain from taking necessary action because of the
12 fear of being subjected to civil liability.
13 Accordingly, these officials should be entitled to
14 discretionary immunity for those exercises of judgment
15 which would be inhibited by the threat of civil
16 liability.

17 The changes to Title 14, section 8111, subsection
18 2, are designed to establish that attachment is not
19 available against employees of governmental entities
20 regardless of the nature of the cause of action being
21 brought against them.

22 The changes to Title 14, section 8112, involve the
23 question of indemnification of governmental
24 employees. Title 14, section 8112, subsection 1,
25 currently provides that when a governmental entity is
26 not liable, it is obligated to assume the defense of
27 an employee who is sued and has the discretion to
28 indemnify the employee for any judgment which is
29 awarded. The existing law further provides that if
30 there is a conflict of interest between the
31 governmental entity and the employee, the entity shall
32 pay for the employee's attorney rather than assuming
33 the defense. However, there might be certain other
34 circumstances in which it may not be appropriate for
35 the governmental entity to assume the defense of an
36 employee. The change would specify that the
37 government entity would always have the option, in
38 lieu of assuming the defense of any employee, of
39 paying the employee's attorneys' fees and defense
40 costs.

41 The existing law also provides that the
42 governmental entity shall not be liable for the

1 employee's attorneys' fees in the event the employee
2 is found to be criminally liable for the acts or
3 omissions in question. The changes would specify that
4 the governmental entity would also not be liable for
5 attorneys' fees if the employee is found to have acted
6 in bad faith.

7 The changes to Title 14, section 8112, subsection
8 2, are similar to the changes made to Title 14,
9 section 8112, subsection 1. The changes would specify
10 that the obligation to defend and indemnify an
11 employee would not exist if the employee is found to
12 have acted in bad faith or to be criminally liable.
13 This would mean, for instance, that the governmental
14 entity would not be liable for punitive damages
15 assessed against an employee based on the employee's
16 actual malice or bad faith.

17 The bill also adds a new section specifying that
18 governmental entities are entitled to defend and
19 indemnify any employees who are sued on claims brought
20 under federal law. Currently, the law is unclear as
21 to whether such authority exists in cases brought
22 against units of local government and this is an
23 increasingly important problem given the number of
24 lawsuits brought under the United States Code, Title
25 42, Section 1983.

26 In addition, certain language relating to the
27 obligation of a governmental entity to defend and
28 indemnify its employees for any liability under Title
29 14, section 8104-C has been moved from Title 14,
30 section 8116 to new Title 14, section 8112, subsection
31 8 since this provision logically belongs with the
32 provisions relating to indemnification.

33 Another change to Title 14, section 8116, is
34 designed to establish that a governmental entity may
35 purchase insurance or self-insure for any liability
36 which a governmental entity is either obligated to
37 provide or entitled to provide under Title 14, section
38 8112. This is designed to make it clear that the
39 authority of a governmental entity to purchase
40 insurance or to self-insure is coextensive with its
41 authority to indemnify. The remaining changes to

1 Title 14, section 8116 are designed to clarify
2 existing law without substantive changes.

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