

JANET T. MILLS GOVERNOR STATE OF MAINE DEPARTMENT OF CORRECTIONS 111 STATE HOUSE STATION AUGUSTA MAINE 04333-0111

RANDALL A. LIBERTY COMMISSIONER

TESTIMONY OF

RANDALL A. LIBERTY, COMMISSIONER DEPARTMENT OF CORRECTIONS

NFNA

LD 1946

An Act To Ensure Constitutionally Adequate Contact with Counsel Judiciary Committee February 28, 2022

Senator Carney and Representative Harnett all other distinguished members of the Committee on Judiciary, I am Randall Liberty, Commissioner of the Maine Department of Corrections providing testimony neither for nor against LD 1946.

The Department of Corrections recognizes the importance of ensuring the constitutional protections associated with privileged communication between residents of MDOC facilities and their legal counsel. In addition to those protections outlined in constitutional law and state statute, there are multiple polices that afford residents ample opportunity for and protections of privileged communications with legal counsel.

We can all agree that finding a balance between protecting attorney-client confidentiality and appropriate monitoring to ensure safety is key. The Department sees some areas of this bill as overly broad and unless the terms are defined, the bill will have the unintended consequence of creating ambiguity to the detriment of facility staff, residents, and legal counsel.

For example, Section A-1 (3) uses the terms "monitor" and "intercept" and Part D-1 uses "eavesdropping," without defining the terms. Leaving these terms up to interpretation will negatively burden correctional employees who could be accused of and found guilty of eavesdropping according to the proposed Class C crime (Part D) simply by walking through an area where a call is being made. This ambiguity also creates concerns in the instance when an officer is reviewing a call they don't believe is privileged because a resident did not specify the number as that of their legal counsel. As soon as the officer realizes it is in fact a privileged attorney-client call, they stop listening. However, in this instance the officer could be considered guilty of the proposed Class C crime. Without definition, the term "monitor" may be interpreted in a way that would prevent a facility from even having a video camera in a room where a privileged legal call or legal visit may take place.



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Further, there is not clarification in the bill that the confidential communications must be related to legal matters. Without this clarification, conceivably, counsel could engage in communications that are personal or criminal in nature (which has in fact happened) and yet these would be considered confidential. Along these lines, Section A-4's requirement that a resident be allowed to receive all documents sent by counsel is problematic, as it does not include exemptions for documents that are not connected with legal representation, and it prohibits DOC staff from ensuring documents that may be detrimental, illicit, inflammatory, or incite violence are not kept by residents.

The Department's intention is to work in collaboration with the sponsor, and therefore suggest the following amendment to address the issues outlined above:

15 MRSA § 709, sub-§ 4 is amended to read:

4. Intercept. "Intercept" means to hear, record or aid another to hear or record the contents of any wire or oral communication through the use of any intercepting device by any person other than:

A. The sender or receiver of that communication;

B. A person within the range of normal unaided hearing or subnormal hearing corrected to not better than normal; or-

C. A person given prior authority by the sender or receiver- except as provided in paragraph <u>D; or</u>

D. a person given prior authority by all parties to the communication if the communication would otherwise be protected by the attorney-client privilege and either the sender or receiver of that communication is a person who is residing in a Department of Corrections facility or a jail or other county correctional facility.

For purposes of this subsection, "prior authority" must be explicit and does not include consent implied based on the sender or receiver continuing to communicate after receiving a notification or warning that the communication will be heard or recorded.

30-A MRSA § 1566 is enacted to read:

§ 1566. Privileged communications.

Any person who is incarcerated in a jail or other county correctional facility has a right to reasonable access to the means to engage in communications protected by the attorney-client privilege that preserve the confidentiality of those communications, which means may include visits, mail, telephone, video or other electronic communication.

34-A MRSA § 3031, sub-§ 11 is enacted to read:

<u>**11. Privileged communications.**</u> Reasonable access to the means to engage in communications protected by the attorney-client privilege that preserve the confidentiality of



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those communications, which means may include visits, mail, telephone, video or other electronic communication.

The Department agrees with Rep. Harnett that we should do as much as we can to support reasonable opportunity for privileged attorney-client communication, and the Department does. As it is now, residents have reasonable access to confidential visits, calls, and correspondence. We are concerned however that the language in Section A-4 (11) allowing for communications via phone, video, or electronic means at a minimum of two times a day (without cost to residents as indicated in Sec. A-1 (2)) would be both burdensome to staff and costly to the department. The Department currently provides indigent residents with about 10 minutes of free calls per week. As part of a currently pending bill, LD 1175, the MDOC proposed increasing this to 30 minutes of free calls for indigent residents for privileged attorney-client calls. Going beyond that however, to include any resident, even those who have notable bank accounts, would come at a disservice to residents, as free calls are paid out of a special facility fund called the Inmate Benefit Fund (IBF). The IBF is a unique account that is used at the discretion of the wardens to make purchases that specifically benefit the residents. For example, the IBF pays for indigent services, along with cable television, gym and sports equipment, free greeting cards so residents can send special cards during holidays to loved ones, special facility-wide holiday meals, ice cream events, and treats for groups of residents upon achieving milestones, like educational graduations.

Given the cost issue to the residents and the Department, and the fact that other legislation is addressing the expansion of the amount of time indigent clients have to communicate with their attorney on privileged legal matters, we ask these sections of the bill are stricken.

There are several other concerns with this bill as written that would create an undue burden to Departmental staff, including:

- Section A-1 and Part E's logging, audit, and retrospective audit requirements as they would tax an overburdened workforce whose primary focus on safety and security is already impacted by staffing shortages.
- Part C-1 prevents anyone from participating in a criminal investigation or from testifying in a criminal case if that person has "received" inadvertently any confidential communications, even if the individual never asked for the communication and never read the communication or listened to it. This puts an onus on staff that is beyond burdensome and would impact prosecutions inside and outside the DOC.
- Part C-1's civil penalty of up to \$10,000 and for a private cause of action for damages may
 encourage residents to bring forward lawsuits that would be nearly impossible to fight against
 given how vague the terms are, as previously noted in this testimony. If there was a sudden
 uptick of civil suits brought against our staff for such vague infractions, it would certainly
 hamstring the Department's recruitment and retention efforts, impacting safety and security.



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Lastly, the Department has significant concerns with the creation of a new Class C crime of unauthorized eavesdropping. Beyond what we've already provided about the ambiguity of the terms, we believe it is inconsistent with existing crimes.

Randall A. Liberty Commissioner Maine Department of Corrections