

CLAC MEMORANDUM/TESTIMONY
LD 765 (NFNA)

TO: Senator Anne Carney
Representative Matt Moonen
Joint Standing Committee on Judiciary

FR: Criminal Law Advisory Commission (CLAC)
c/o laura.yustak@maine.gov

RE: LD 765, An Act to Permit Recordings of a Protected Person to Be Admissible in Evidence

DA: March 15, 2023

The Criminal Law Advisory Commission (CLAC)* respectfully submits the following testimony neither for nor against LD 765, as members are divided on the proposal. Although CLAC members support the policy of protecting vulnerable persons who may be traumatized by the court process and applying national best practices to achieve these goals, CLAC members expressed concerns about the broad language of the bill. The bill would limit role of the trial court with respect to assessing the reliability and admissibility of evidence, in particular, prior statements of witnesses. Trial court judges exercise their discretion in applying the Rules of Evidence to such evidence; this bill usurps that role to the extent that it makes admissibility largely contingent upon statutorily-defined qualifications of the interviewer and interview circumstances. CLAC also identified the following specific issues.

Section 1: Anyone under the age of 18 would automatically be a “protected person,” without consideration of individualized factors. This is a broad category without regard to witness competency, traditionally a matter within the purview of the judge, and unrelated to age of the witness as an element of any crime, including sexual assault crimes against children.

With regard to adult “protected persons,” it is not clear how the determination would be made as to whether a person is “eligible” for services (for example, if a person is not already receiving services) and therefore protected.

Section 4: It is not apparent why prosecuting attorneys were stricken from this provision, while law enforcement agencies remain included (as having access to the records). Prosecuting attorneys are listed separately and included in Section 5, which addresses access to the recordings.

Section 5: In proposed § 4019 (9-A)(D)(1), the responsible prosecuting attorney should also be given an opportunity to indicate its position on disclosure of the records, so that the factors identified in 16 M.R.S. § 804 may be identified and addressed by the court. The approach of proposed (9-A)(E) was supported, but would be more appropriately addressed by Court rules rather than by statute.

*CLAC is an advisory body established by the Legislature. 17-A M.R.S. §§ 1351-1357. It consists of 9 members appointed by the Attorney General. Our current members include current defense attorneys, prosecutors, Maine Bar Counsel, and a retired practitioner with experience as defense counsel, prosecutor and in court administration. In addition, three sitting judges and one retired practitioner, appointed by the Chief Justice of the Supreme Judicial Court, and, by statute, the Co-

Chairs of the Legislature's Committee on Criminal Justice and Public Safety, serve as consultants. The Supreme Judicial Court's Criminal Process Manager serves as liaison from the Court to CLAC. CLAC advises the Legislature on matters relating to crimes in the Criminal Code and in other Titles, the Bail and Juvenile Codes, and with respect to other statutes related to criminal justice processes.