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

In Support of:

LD 2250, An Act to Allow the Department of Corrections to Comply with the Federal Prison Rape Elimination Act of 2003

Senator Carney, Representative Moonen and distinguished members of the Joint Standing Committee on Judiciary, I am Randall Liberty, Commissioner of the Maine Department of Corrections (DOC) providing testimony in strong support of our department bill, LD 2250, An Act to Allow the Department of Corrections to Comply with the Federal Prison Rape Elimination Act of 2003. As explained below, this is a critically important bill making a small change to Maine employment law under Title 5, Section 7070 that currently stands in the way of our ability to fully comply with Federal regulations established pursuant to the Prison Rape Elimination Act. The Department thanks Sen. Carney for sponsoring this bill on our behalf and is especially grateful in consideration of the late-session timing.

Background:
The Prison Rape Elimination Act (PREA – 34 U.S.C. Ch 303) is a federal law that requires all correctional facilities to comply with relevant standards established by United States Department of Justice (U.S. DOJ). Under PREA, each of our State's correctional facilities undergo compliance audits on a two-year cycle. MaineDOC has an excellent record of PREA compliance and has often been ahead of other states in meeting (and sometimes even exceeding) the baseline PREA standards. If you're interested in learning more, you can find our past reports on our webpage: https://www.maine.gov/corrections/data/compliance.

PREA was originally enacted in 2003, but U.S. DOJ didn't finish developing the standards necessary to implement the law until about 2012. Until recently, U.S. DOJ has been taking an approach focused on assisting states with compliance and has allowed a pathway for corrective action for any standard that falls short. However, U.S. DOJ is now shifting to a stricter regulatory model that will have greater consequences when standards are not met.

The reason we need an after-deadline bill:
It recently came to our attention that, due to certain confidentiality provisions in Maine employment law, we are unable to comply with the PREA standard under 28 CFR §115.73 (attached) that requires us to share certain information regarding the outcome of a PREA investigation with the resident who made the allegation. Specifically, the confidentiality provisions in Title 5, section 7070(2)(E) prevent us from being able to comply with the requirement to "inform the inmate as to whether the allegation has been determined to be substantiated, unsubstantiated, or unfounded." Even if we were to provide this information without using personally identifying information, telling a resident that their complaint was "unsubstantiated" or "unfounded" risks violation of 7070 because it acknowledges that there was a complaint of misconduct against an employee that was investigated and it is obvious to the resident who that employee is. Further, stating that the complaint was "substantiated" also looks like a violation of 7070, as that statement likely constitutes "other information or materials that may result in disciplinary action."

In circumstances where final discipline is issued as a result of a substantiated allegation, the final discipline is a public record, so that is the one circumstance where current law doesn't create an issue. The problem arises in circumstances when: (1) no discipline is issued as a result of an investigation; or (2) discipline is issued and then grieved so the discipline does not become final (potentially for years).

Without the minor changes being made by LD 2250 we will not be able to meet the requirements of PREA in our upcoming audits this fall. Failing our audits would result, at a minimum, in a 5% reduction to our Federal grant funding (over $80,000) and limit our ability to accept residents from other PREA-certified entities, such as county jails, other states, or the Federal system. This would directly affect any resident transfers under interstate compacts and inhibit our ability to take advantage of certain transfer provisions in Maine law, such as 34-A M.R.S. §3069-A, which allows the Commissioner to accept a transfer from a jail to a State correctional facility of an adult resident for the purpose of providing intensive mental health care and treatment.[1]

LD 2250 Language:
As printed, LD 2250 has been narrowly drafted to allow our department to comply with the specific PREA standard at issue. However, it's worth noting that the language goes slightly beyond the baseline requirement of the PREA standard in two ways:

(1) The PREA standard only applies to allegations of "sexual abuse" (for which we use the term "sexual misconduct"). Our draft goes one step further by also including allegations of "sexual harassment." We felt like it made sense to have the same notification process for both, given the nexus that often exists between them and the fact that such investigations often overlap.

(2) The language in the bill keeps the information "confidential" but allows disclosure of a determination that the allegation was substantiated, unsubstantiated, or unfounded to the alleged victim. The language uses the term "alleged victim" rather than specifying "resident of a correctional facility" because we'd like to be able to have the same notification process for both residents and staff. PREA was designed with a focus on protecting prisoners ("residents" in our system), which makes sense given the context surrounding its enactment, however we take sexual misconduct and sexual harassment amongst our staff just as seriously and we feel that parity in our investigative processes is best practice.

[1] The Intensive Mental Health Unit (IMHU) at the Maine State Prison is the housing unit for residents with serious mental illnesses, persistent disabling personality disorders, or severe cognitive impairments who require structured intensive mental health services. The purpose of the IMHU is to help residents function at their optimal levels, under the least restrictive conditions necessary, while working towards the reduction of criminogenic risk factors. The goal is to improve quality of life, prepare for return to general population housing units, if possible, and, when appropriate, prepare for release back into the community, return to jail, admission to a state mental health institute, or transfer to an out-of-state correctional facility.

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Compliance with PREA matters greatly to Maine Department of Corrections because ensuring the safety and well-being of those within our system is both part of our correctional philosophy under the Maine Model of Corrections and just the right thing to do. The changes implemented in this bill would be important to us even if it were not for the consequences associated with losing PREA certification. For these reasons, we hope that you will support this proposal.

This concludes my testimony.

I am happy to answer questions.

Randall A. Liberty
Commissioner
Maine Department of Corrections

§7070. Personnel records

Every appointment, transfer, promotion, demotion, dismissal, vacancy, change of salary rate, leave of absence, absence from duty and other temporary or permanent change in status of employees in both the classified service and the unclassified service of the Executive and Legislative Departments must be reported to the officer at such time, in such form and together with such supportive or pertinent information as the officer by rule prescribes. [RR 2023, c. 1, Pt. B, §42 (COR); RR 2023, c. 1, Pt. B, §50 (AFF).]

The officer shall maintain a perpetual roster of all officers and employees in the classified and unclassified services, showing for each person such data that the officer considers pertinent. [RR 2023, c. 1, Pt. B, §43 (COR); RR 2023, c. 1, Pt. B, §50 (AFF).]

Records of the Bureau of Human Resources are public records and open to inspection of the public during regular office hours at reasonable times and in accordance with the procedure as the officer may provide. [RR 2023, c. 1, Pt. B, §44 (COR); RR 2023, c. 1, Pt. B, §50 (AFF).]

The following records shall be confidential and not open to public inspection, and shall not be "public records," as defined in Title 1, section 402, subsection 3: [PL 1985, c. 785, Pt. B, §38 (NEW).]

1. Papers relating to applications, examinations or evaluations of applicants. Except as provided in this subsection, applications, resumes, letters and notes of reference, working papers, research materials, records, examinations and any other documents or records and the information they contain, solicited or prepared either by the applicant or the State for use in the examination or evaluation of applicants for positions as state employees.

A. Notwithstanding any confidentiality provision other than this subsection, applications, resumes and letters and notes of reference, other than those letters and notes of reference expressly submitted in confidence, pertaining to the applicant hired are public records after the applicant is hired, except that personal contact information is not a public record as provided in Title 1, section 402, subsection 3, paragraph O. [PL 2007, c. 597, §5 (AMD).]

B. Telephone numbers are not public records if they are designated as "unlisted" or "unpublished" in an application, resume or letter or note of reference. [PL 1989, c. 402, §1 (NEW).]

C. This subsection does not preclude union representatives from access to personnel records, consistent with subsection 4, which may be necessary for the bargaining agent to carry out its collective bargaining responsibilities. Any records available to union representatives which are otherwise covered by this subsection shall remain confidential and are not open to public inspection; [PL 1989, c. 402, §1 (NEW).]

[PL 2007, c. 597, §5 (AMD).]

2. Personal information. Records containing the following, except they may be examined by the employee to whom they relate when the examination is permitted or required by law:

A. Medical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders; [PL 1985, c. 785, Pt. B, §38 (NEW).]

B. Performance evaluations and personal references submitted in confidence; [PL 1985, c. 785, Pt. B, §38 (NEW).]

C. Information pertaining to the credit worthiness of a named employee; [PL 1985, c. 785, Pt. B, §38 (NEW).]

D. Information pertaining to the personal history, general character or conduct of members of the employee's immediate family; [PL 1997, c. 124, §2 (AMD).]

D-1. Personal information, including that which pertains to the employee's:

(1) Age;

(2) Ancestry, ethnicity, genetic information, national origin, race or skin color;

(3) Marital status;

(4) Mental or physical disabilities;

(5) Personal contact information, as described in Title 1, section 402, subsection 3, paragraph O;

(6) Personal employment choices pertaining to elected payroll deductions, deferred compensation, savings plans, pension plans, health insurance and life insurance;

(7) Religion;

(8) Sex, gender identity or sexual orientation as defined in section 4553, subsection 9-C; or

(9) Social security number.

Such personal information may be disclosed publicly in aggregate form, unless there is a reasonable possibility that the information would be able to be used, directly or indirectly, to identify any specific employee.

When there is a work requirement for public access to personal information under this paragraph that is not otherwise protected by law, that information may be made public. The State Human Resources Officer, upon the request of the employing agency, shall make the determination that the release of certain personal information not otherwise protected by law is allowed; and [PL 2019, c. 451, §1 (RPR); PL 2023, c. 412, Pt. D, §3 (REV).]

E. Except as provided in section 7070-A, complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it imposes or upholds discipline. The decision must state the conduct or other facts on the basis of which disciplinary action is being imposed and the conclusions of the acting authority as to the reasons for that action. If an arbitrator completely overturns or removes disciplinary action from an employee personnel file, the final written decision is public except that the employee's name must be deleted from the final written decision and kept confidential. If the employee whose name was deleted from the final written decision discloses that the employee is the person who is the subject of the final written decision, the entire final written report, with regard to that employee, is public.

For purposes of this paragraph, "final written decision" means:

(1) The final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or

(2) If the final written administrative decision is appealed to arbitration, the final written decision of a neutral arbitrator.

A final written administrative decision that is appealed to arbitration is no longer confidential 120 days after a written request for the decision is made to the employer if the final written decision of the neutral arbitrator is not issued and released before the expiration of the 120 days; [PL 2023, c. 159, §1 (AMD).]

This subsection does not preclude union representatives from having access to personnel records, consistent with subsection 4, that may be necessary for the bargaining agent to carry out its collective bargaining responsibilities. Any records available to union representatives that are otherwise covered by this subsection remain confidential and are not open for public inspection;
[PL 2023, c. 159, §1 (AMD); PL 2023, c. 412, Pt. D, §3 (REV).]

The relevant PREA standard is as follows.

§ 115.73 Reporting to inmates (*this is also a hyperlink to a webpage that contains a PDF of the federal standards*)

(a) Following an investigation into an inmate's allegation that he or she suffered sexual abuse in an agency facility, the agency shall inform the inmate as to whether the allegation has been determined to be substantiated, unsubstantiated, or unfounded.
(b) If the agency did not conduct the investigation, it shall request the relevant information from the investigative agency in order to inform the inmate.
(c) Following an inmate's allegation that a staff member has committed sexual abuse against the inmate, the agency shall subsequently inform the inmate (unless the agency has determined that the allegation is unfounded) whenever:

(1) The staff member is no longer posted within the inmate's unit;
(2) The staff member is no longer employed at the facility;
(3) The agency learns that the staff member has been indicted on a charge related to sexual abuse within the facility; or
(4) The agency learns that the staff member has been convicted on a charge related to sexual abuse within the facility.

(d) Following an inmate's allegation that he or she has been sexually abused by another inmate, the agency shall subsequently inform the alleged victim whenever:

(1) The agency learns that the alleged abuser has been indicted on a charge related to sexual abuse within the facility; or
(2) The agency learns that the alleged abuser has been convicted on a charge related to sexual abuse within the facility.

(e) All such notifications or attempted notifications shall be documented.
(f) An agency's obligation to report under this standard shall terminate if the inmate is released from the agency's custody.