

AARON M. FREY  
ATTORNEY GENERAL



STATE OF MAINE  
OFFICE OF THE ATTORNEY GENERAL  
6 STATE HOUSE STATION  
AUGUSTA, MAINE 04333-0006

TEL: (207) 626-8800  
TTY USERS CALL MAINE RELAY 711

REGIONAL OFFICES  
84 HARLOW ST. 2ND FLOOR  
BANGOR, MAINE 04401  
TEL: (207) 941-3070  
FAX: (207) 941-3075

125 PRESUMPCOT ST., SUITE 26  
PORTLAND, MAINE 04103  
TEL: (207) 822-0260  
FAX: (207) 822-0259

14 ACCESS HIGHWAY, STE. 1  
CARIBOU, MAINE 04736  
TEL: (207) 496-3792  
FAX: (207) 496-3291

**Testimony in Support of Amendment to LD 2290, *An Act to Correct Inconsistencies, Conflicts and Errors in the Laws of Maine***

Senator Carney, Representative Moonen, and honorable members of the Joint Standing Committee on Judiciary, my name is Aaron Frey, I live in Bangor, and I have the privilege to serve as Maine's Attorney General. I am here today to testify in support of the amendment to LD 2290, *An Act to Correct Inconsistencies, Conflicts and Errors in the Laws of Maine*.

In this Legislature's first session, it enacted LD 765, "*An Act to Establish an Exception to the Hearsay Rule for Forensic Interviews of a Protected Person*." This law, codified at 16 M.R.S. § 358, authorized courts to admit into evidence recordings of forensic interviews of protected persons – *i.e.*, children and those adults eligible for protective services. The law permits a court to allow admission only if several specified criteria are met, including, in criminal matters, that the protected person is available to be cross-examined. Although we understand the intent was to make this exception to the hearsay rules apply to pending matters, LD 765 did not expressly say that. This has resulted in confusion and inconsistent application, with at least some courts concluding that in the absence of an express exemption from 1 M.R.S. § 302, the hearsay exemption does not apply to pending criminal matters. This oversight may result in child victims and witnesses not receiving the protections the Legislature clearly intended to provide. The proposed amendment to the errors and omissions bill would appropriately address this oversight and align the law with what was originally intended.

I understand concerns may be raised that applying the hearsay exemption to conduct that was committed before the exemption's enactment violates the prohibition against *ex post facto* laws. Essentially, laws violate the *ex post facto* clauses of the United States and Maine Constitutions if they make conduct criminal that was not previously criminal, elevate the level of a criminal offense, increase the punishment for an offense, or alter the rules of evidence in a manner that reduces the quantum of evidence necessary for a conviction. This amendment does none of these things, and, after having carefully reviewed cases from the United States Supreme Court and other jurisdictions, I am confident that the amendment would withstand constitutional challenge.

There is a distinction between a law that relates to the procedures by which facts may be placed before the factfinder and one that addresses the sufficiency of the facts needed to meet the burden of proof. Laws that lessen the amount of evidence needed for a conviction than what was required at the time of the conduct may violate the prohibition against *ex post facto* laws. On the

other hand, a law that simply allows for introduction of evidence that might not have been admissible at the time of the conduct is a matter of procedure and does not violate that prohibition. The amendment to LD 2290 is such a law – rather than changing the evidence necessary for a conviction, it simply addresses the admissibility of evidence and fully comports with the state and federal Constitutions.

I urge the Committee to vote ought to pass on the amendment to LD 2290 and correct the inadvertent omission in LD 765 of language expressly making the hearsay exemption applicable to pending matters. I would be happy to answer any questions the Committee may have.