OFFICE OF POLICY AND LEGAL ANALYSIS
BILL ANALYSIS

TO: **Members, Joint Standing Committee on Criminal Justice and Public Safety**

FROM: **Jane Orbeton, Legislative Analyst**

DATE: **March 25, 2021**

LD: **710 An Act Regarding the Maine Criminal Code**

Testimony
1. Representative Warren introduced the bill as sponsor and spoke in support. John Pelletier, representing the Criminal Law Advisory Commission, spoke in favor of the bill and presented an amendment, Part G, to address the Maine Supreme Judicial Court opinion in *State v. Weddle*. Tina Nadeau, speaking for the Maine Association of Criminal Defense Lawyers (MACDL), supported Part F and section G-3. District Attorney Todd Collins provided written testimony in favor of Part F but suggested that the culpable state of mind be reduced from "knowingly" to "recklessly." Arthur Jones, representing the Restorative Justice Project of Maine, submitted testimony in support of the bill.
2. Tina Nadeau, representing the Maine Association of Criminal Defense Lawyers, spoke in opposition to Part A and Part B and sections G-1 and G-2.
3. Michael Kebede, from the ACLU, spoke and provided written testimony. Mr. Kebede opposes Part A and discussed the purpose and effect of Part D.

Summary – This bill does the following:

1. In Part A it enacts a new Class C crime for the reckless violation of a duty of care or protection that results in death or serious bodily injury to the child. It also corrects the grammar in Title 17-A, section 554, sub-§1, ¶C, moving the word "recklessly" on page 1 line 12. This clarifies that the crime is endangering the welfare of the child and the prohibited conduct is recklessly violating a duty of care.

MACDL and ACLU oppose.

2. In Part B it amends the crime of gross sexual assault against a person under 12 years of age the crime of gross sexual assault against a person under 14 years of age, both of which are Class A crimes, by requiring that the actor be at least 3 years older than the other person.

MACDL opposes. MACDL proposes as an amendment that the actor, on page 1 at lines 22 and 27 must be at least 14 years old to be charged under section 253, subsection 1, paragraph B or C.

3. In Part C it amends Title 15, section 393 to recognize convictions in the tribal courts of the Passamaquoddy Tribe and the Penobscot Nation as disqualifying domestic violence convictions for the purposes of the prohibition against firearms created by Title 15, section 393, subsection 1-B. It makes Title 15, section 393 more consistent with the Maine Criminal Code by using the phrase "another jurisdiction" to reference the courts defined by that term.

A question was asked about why throughout Part C the new defined term of "another jurisdiction" is used but on page 2 at line 28 a court order of a "tribe" is not amended. The drafter and the Revisor discussed this and made the choice to leave "tribe" on line 28 as it is a cross-reference to the protection from abuse law under Title 19-A, chapter 101 (Ferdico page 371) which refers to the tribal courts of the Passamaquoddy Tribe and the Penobscot Nation by name and does not use "another jurisdiction."

4. In Part D, in response to *State v. LeBlanc-Simpson*, 2018 ME 109, it clarifies that a judicial officer in issuing a written release order under Title 15, section 1026, subsection 2-A or 3 must inform a defendant of the conditions of release, that the conditions take effect and are fully enforceable immediately and that failure to appear or comply with conditions may result in revocation of bail and additional criminal penalties. The bill provides that a condition of release takes effect and is fully enforceable immediately as of the time the judicial officer sets the condition, unless the bail order expressly excludes a condition of release from immediate applicability, if the defendant is advised of the conditions and that failure to appear or comply with the conditions may subject the defendant to revocation of bail and additional criminal penalties. This bill provides that the notice required in order for a condition of release to take effect immediately may be provided by a judicial officer, a law enforcement officer or an employee of a county or regional jail or a correctional facility having custody of the defendant.

5. In Part E it amends the probation statutes to reflect the current practice of the Department of Corrections with respect to calculating the period of probation. A probationer receives credit for a full day of probation on the day probation commences, regardless of the time of day, and receives no credit for a day on which probation is tolled. The period of probation ends when the final day of the probation period ends.

6. In Part F it amends the law to respond to the issue identified by the Law Court in State v. Asaad, (2020 ME 11), specifically the absence of a culpable state of mind requirement in the Class C crime of gross sexual assault under Title 17-A, section 253, subsection 2, paragraph M. The bill requires the State to prove, as an element of that crime of gross sexual assault, that the defendant engaged in the prohibited conduct knowing that the other person had not expressly or impliedly acquiesced. Part F proposes adding the culpable mental state of mind of "knows" as an element of Class C gross sexual assault, Class C unlawful sexual contact, Class D unlawful sexual contact and Class D unlawful sexual touching.

MACDL supports.

DA Todd Collins proposes reducing the culpable state of mind requirement in Part F from "knowingly" to "recklessly."

See Title 17-A, section 35 (Ferdico page 19) for the culpable states of mind or *mens rea* in the Criminal Code. Culpable state of mind ranges from the highest to the lowest: from intentionally, to knowingly, to recklessly, to criminal negligence.

INFORMATION REQUESTED:

1. Michael Kebede was asked to provide information on violations of conditions of release.

Proposed Committee Amendment to LD 710
An Act Regarding the Maine Criminal Code

Proposed by the Criminal Law Advisory Commission

Amend the bill by adding a new Part G to read:

PART G

Sec. G-1. 29-A MRSA section 2521, subsection 6 is amended to read:

6. Period of suspension. Except as provided in subsection 6-A or when a longer period of suspension is otherwise provided by law, the suspension is for a period of 275 days for the first refusal, 18 months for a 2nd refusal, 4 years for a 3rd refusal and 6 years for a 4th refusal.

Sec. G-2. 29-A MRSA section 2521, subsection 6-A is enacted to read:

6-A. Period of suspension when there was probable cause to believe that death occurred or will occur as a result of an accident. Except when a longer period of suspension is otherwise provided by law, if in addition to the probable cause set forth in sub-section 1, there was also probable cause to believe that death occurred or will occur as a result of an accident, the suspension is for a period of 1 year for a first refusal under this section.

Sec. G-3. 29-A MRSA section 2522 is repealed.

SUMMARY

In Part G, in response to *State v. Weddle*, 2020 Me. 12, the amendment repeals 29-A MRSA section 2522, which was found in the *Weddle* case to be unconstitutional in that it required the driver's blood to be taken without consent and without probable cause to believe that the driver was impaired by alcohol or drugs at the time the driver's blood was taken. The amendment also moves the one-year period of suspension for refusal to take a chemical test when there is probable cause to believe that death occurred or will occur as a result of an accident from Title 29-A, section 2522 to the law on implied consent to a chemical test.

Policy Decisions Presented by LD 710, An Act Regarding the Maine Criminal Code
(Prepared by Jane Orbeton, OPLA Analyst, March 25, 2021)

1. **Part A** – Whether to create a Class C crime of endangering the welfare of a child by endangering the health, safety or welfare by recklessly violating a duty of care or protection resulting in death or serious bodily injury to the child?

> **Under current law**, a person who recklessly endangers the health, safety or welfare of a child by violating a duty of care or protection is guilty of Class D endangering the welfare of a child under Title 17-A, section 554, subsection 1, paragraph C.
> **In Part A**, CLAC proposes to create a Class C crime of endangering the welfare of a child for conduct that endangers the health, safety or welfare of a child by recklessly violating a duty of care or protection resulting in death or serious bodily injury to the child.

2. **Part B** – Whether to amend the crimes of gross sexual assault of a victim under age 14 and gross sexual assault of a victim under age 12 to require that the actor be at least 3 years older than the victim?

> **Under current law**, Class A gross sexual assault of a victim under age 14 and Class A gross sexual assault of a victim under age 12 do not have a minimum age for the actor. Title 17-A, section 253, subsection 1, paragraphs A and B (Ferdico page 46).
> **In Part B,** CLAC proposes to add to Class A gross sexual assault of a victim under age 14 and Class A gross sexual assault of a victim under age 12 the requirement that the actor is at least 3 years older than the victim.

3. **Part C** – Whether to amend the laws prohibiting certain persons from owning or possessing firearms to add the Criminal Code definition of "another jurisdiction," thereby providing uniformity and recognizing convictions in the Passamaquoddy Tribe and the Penobscot Nation tribal courts as disqualifying domestic violence convictions?

> **Under current law**, in the laws prohibiting certain persons from owning or possessing firearms (Title 15, chapter 15, section 393) (Ferdico page 447) reference is made to crimes and court orders from jurisdictions that are listed inconsistently as the United States, Maine, other states, a territory or and commonwealth and tribal courts. The lists in the different subsections of section 393 are inconsistent and tribal courts are omitted from some but not all lists, resulting in section 393 not recognizing convictions in Passamaquoddy Tribe and Penobscot Nation tribal courts as disqualifying domestic violence convictions.
> **In Part C,** CLAC proposes to define "another jurisdiction" by reference to Title 17-A, section 2, subsection 3-B, providing uniformity and recognizing convictions in the tribal courts of the Passamaquoddy Tribe and the Penobscot Nation as disqualifying domestic violence convictions.

4. **Part D** – Whether to clarify that a bail release order must include notice by the judicial officer issuing the release order that the conditions of release take effect and, unless otherwise specified, are enforceable immediately if the defendant is so advised and that failure to comply may result in revocation of bail and additional criminal penalties?

Under current law, in the Bail Code (Title 15 chapter 105-A) (Ferdico page 323) the release order must include notice of penalties for failure to appear and penalties including immediate issuance of an arrest warrant.
In Part D, CLAC proposes to add to the release order notification that the conditions of release take effect immediately, unless otherwise specified, and are immediately enforceable and that failure to comply may result in revocation of bail and additional criminal penalties.

5. Part E – Whether to specify in counting the days of probation that: (1) the day of release from imprisonment counts as a full day regardless of the time of release; (2) if the court finds a violation of probation, the period of probation is tolled on the day of delivery of a summons or filing notice that the person cannot be located or has been arrested; and (3) the period of probation ends when the final day of probation ends?

Under current law, in the probation subchapter (Title 17-A, chapter 67, subchapter 1) (Ferdico 207) the date that probation begins is the date of release from imprisonment but it is unclear whether only the actual hours of probation count of the day counts as a full day.
In Part E, CLAC proposes to count the first day of probation as a full day, not to count the day that probation is tolled (interrupted) and to end probation when the final day of probation ends.

6. Part F – Whether to add to the variants of gross sexual assault, unlawful sexual contact and unlawful sexual touching that include the element of the victim not knowingly or impliedly acquiescing to the sexual act that the actor knows that the victim has not acquiesced?

Under current law, there is no culpable state of mind of the actor (17-A, section 35) (Ferdico page 19) in the variants of gross sexual assault, unlawful sexual contact and unlawful sexual touching that include the element of the victim not knowingly or impliedly acquiescing to the sexual act.
In Part F, CLAC proposes to add to the variants of gross sexual assault, unlawful sexual contact and unlawful sexual touching that include the element of the victim not knowingly or impliedly acquiescing to the sexual act that the actor knows that the victim has not acquiesced.

7. Part G – Proposed amendment from CLAC - Whether to repeal the requirement in the motor vehicle implied consent law that requires an investigating law enforcement officer in an accident in which a death has occurred or the officer has probable cause to believe a death will occur to administer a blood test to the driver as soon as practicable, to repeal the 1-year suspension for refusal and to enact a requirement of a chemical test and a 1-year suspension for refusal?

Under current law, the implied consent law (Title 29-A, section 2522, subsections 2 and 3) (Ferdico Motor Vehicle Laws page 410) requires in a fatal or believed to be fatal accident a blood test of the driver without consent, without probable cause, and without a warrant and provides a 1-year suspension for refusal. *State v. Weddle*, 2020 Me. 12, ruled these provisions of law unconstitutional.
In Part G, CLAC proposes to repeal Title 29-A, section 2522 and to enact Title 29-A, section 2521, subsection 6-A to require a chemical test of the driver in an accident that is fatal or believed to be fatal and to provide a 1-year license suspension for refusal.