Joint Standing Committee on Criminal Justice & Public Safety

Public Hearing on LD 476, *An Act To Provide Licensed Assisted Living and Nursing Facilities Levels of Care for Incarcerated Persons*

TESTIMONY OF GLBTQ LEGAL ADVOCATES & DEFENDERS, BY MARY L. BONAUTO, DELIVERED BY ANTHONY LOMBARDI

Ought to Pass

March 24, 2021

Senator Deschambault, Representative Warren, and the Honorable Members of the Criminal Justice and Public Safety Committee,

Good Morning. GLAD urges this Committee to vote ought to pass on LD 476: *An Act To Provide Licensed Assisted Living and Nursing Facilities Levels of Care for Incarcerated Persons*.

This bill is necessary to adapt Maine's state prisons to the aging population they serve. By requiring the State prison system to provide for long term care, such as assisted living and nursing facilities, the Department of Corrections (the "Department") would provide medically and personally necessary care to individuals and increase efficiency in facility administration. In assessing eligibility for long term care, it would use our existing standards for medical and social needs using the Medicaid eligibility assessment.[1]

Nationally, an increasing percentage of state prison populations are comprised of people age 55 and older. In Maine that percentage stood at 10.81% in 2015, the last year for which data was available in the National Corrections Reporting Program.[2] We are not aware of any publicly available Maine statistics on this point because the Department reports average ages only.[3] According to 2017 analysis of the National Inmate Survey of the U.S. Department of Justice, Bureau of Justice Statistics, 5.5% of men in state prisons identified as gay or bisexual and 3.8% identified as men who have sex with men.[4] Among women in prison, 42.1% were sexual minorities, which includes 33.3% lesbian or bisexual women and 8.8% women who have sex with women.[5] Additionally, a study of nearly 28,000 transgender adults showed patterns of arrest,

[1] The existing standards under M.R.S. ann. tit. 22, § 3174-I are attached as an addendum to this written testimony for reference.

[2] This is based on then-reported population of 241 persons aged 55 or older out of a total prison population of 2230. Emily Widra, *Since you asked: How many people aged 55 or older are in prison, by state?* (May 2020), available at: https://www.prisonpolicy.org/blog/2020/05/11/55plus/.

[3] The February 2021 MDOC Adult Data Report lists average ages of 41 for men and 38 for women. Rabdakk Liberty et al., *February 2021 MDOC Adult Data Report*, ME. DEP'T OF CORRECTIONS (Mar. 8, 2021), available at: https://www.maine.gov/corrections/sites/maine.gov.corrections/files/inline-files/Feb%202021%20Monthly%20Adult%20Data.pdf.

[4] *See* Ilan H. Meyer, *Lesbians, Gay Men and Bisexuals in U.S. Jails and Prisons*, SAMSHSA'S GAINS CENTER (Jan. 22, 2019), available at: https://prainc.com/lesbians-gay-men-bisexuals-jails-prisons/.

[5] *Id.* These rates of incarceration far exceed the percentage of LGB people in the adult population as a whole: it is estimated that LGBT individuals comprise approximately 4.5% of the population in the United States. *See* The Williams Inst., *LGBT Demographic Data Interactive* (Jan. 2019), available at: https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#about-the-data.

incarceration, and profiling, with 2% of respondents reporting being incarcerated in the previous year.[6] We do not have data on the aging population among these groups.

As a baseline, we all know that increasing age can bring changes in virtually every aspect of bodily function.[7] Just like other people, some incarcerated persons will become compromised in performing activities of daily living like bathing and performing personal hygiene, dressing, eating, toileting and transferring, or will develop dementia or severe cognitive changes. Some older incarcerated persons will experience hearing and vision loss, making it much harder to follow instructions or communicate with others. Some will not be able to climb stairs or walk long distances when required, let alone climb to a top bunk, or in some instances, or get up from their beds, or move from place to place without assistance. Others will need supervision or assistance with dressing and bathing, even assuming they remain willing to do so. Staff may have to assist people with going to the bathroom, or if they are incontinent, with helping them to clean themselves and any soiled area, and soothing concerns of incarcerated persons nearby. Like others, incarcerated persons with dementia are likely to be irritable and depressed and may become socially inappropriate.

This bill updates prison practices to ensure that facilities can and do provide long-term care, whether through in-house or community care, for their aging population.[8] The duty to provide appropriate medical and mental health care on an individualized basis, and to accommodates a person's disabilities from aging, are fundamental legal commitments in our justice system.[9]

Along with providing necessary care, this bill would likely increase efficiencies and quality in prison administration. Although "long term care" can be for short or long periods of time[10], it requires interpersonal skills and training to manage and provide appropriate care for individuals as they confront these challenges. A prison environment emphasizing regimentation and population control provides the wrong setting for staff to provide for the personal, medical, mental health, and cognitive issues confronting this population. Individuals who are incontinent or cannot use facilities on their own may need help immediately but have no call button to push to seek staff assistance. It is too much to ask of the individuals incarcerated as well as to staff to ask correctional officers to do their jobs *and* to be doctors, nurses, home health workers, physical and occupational therapists, dementia specialists, among other things. No amount of staff training, even if it were available, would substitute for the care needed by some persons. As the U.S. Department of Justice, Office of the Inspector General put it, an aging population will require "increased trips outside of institutions to address their medical needs" even as "institutions lack Correctional Officers to staff

[6] This rate was much higher for transgender women of color, including Black (9%) and American Indian (6%) women. *See* Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 190 (Dec. 2016), available at: https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.
[7] The Mayo Clinic, *Aging: What to Expect* (Nov. 19, 2020), available at https://www.mayoclinic.org/healthy-lifestyle/healthy-aging/in-depth/aging/art-20046070 (describing changes to: the cardiovascular system; bones, joints and muscles; the digestive system; the bladder and urinary tract, memory and thinking skills; eyes and ears; teeth; skin; weight).
[8] Nat'l Inst. of Health, *What is Long Term Care?* (May 01, 2017), available at: https://www.nia.nih.gov/health/what-long-term-care.
[9] Notably, prisons that exhibit "deliberate indifference to serious medical needs" may be liable for violations of the 8th Amendment prohibition of cruel and unusual punishment. *Estelle v. Gamble*, 429 US 97, 104 (1976).
[10] *See* Nat'l Inst. Of Health, *supra* note 8.

these trips."[11] The increased needs and staff unavailability for off-premises medical visits, along with the reality that prisons "have limited medical staff within institutions" results in "aging inmates experience delays receiving medical care."[12] Even the physical layout of prison is not suited to many individuals, whether because of the lack of lower bunks, which are essential for inmates with limited mobility, or a lack of accessible accommodations for persons restricted to wheelchairs, including the unavailability of elevators.[13]

Last and certainly not least, passing this bill is the right thing to do.[14] Many of us have lost parents, relatives, and siblings to health conditions, and some of us lost family members during Covid, whether because of Covid or otherwise. As a family member of a dying person, you may be thinking – how can I support and comfort them? Are they getting what they need? Are they in pain and what can I do about it? Are they being treated like a beloved human being? This bill asks us to provide that needed care for those who have to spend their final months, weeks, days in a State prison, and as a result, to ensure they do not die alone.

Thank you for your consideration, and we hope that you will unanimously vote ought to pass on LD 476.

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[11] *See* U.S. Dep't of Just., *Statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice before the U.S. Senate Committee on Homeland Security and Governmental Affairs concerning "Oversight of the Bureau of Prisons: First-Hand Accounts of Challenges Facing the Federal Prison System"* (Feb. 2016), available at: https://oig.justice.gov/node/777.

[12] *See* U.S. Dep't of Just. Off. of the Inspector *Gen., The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* (published May 2015, revised Feb.2016), at ii, available at https://oig.justice.gov/reports/2015/e1505.pdf; *id.* at 16-17 (noting lack appropriate staffing levels to address the needs of an aging inmate population and provide limited training for this purpose).

[13] *Id.*

[14] Further, it is possible that the bill could save resources for the State, depending on the Medicaid eligibility for services provided in the community, though more research is needed on this topic.

§3174-I. Medicaid eligibility determinations for applicants to nursing homes

1. Needs assessment. In order to determine the most cost-effective and clinically appropriate level of long-term care services, the department or its designee shall assess the medical and social needs of each applicant to a nursing facility. If the department chooses a designee to carry out assessments under this section, it shall ensure that the assessments are comprehensive and objective.

A. The assessment must be completed prior to admission or, if necessary for reasons of the person's health or safety, as soon after admission as possible.

B. The department shall determine whether the services provided by the facility are medically and socially necessary and appropriate for the applicant and, if not, what other services, such as home and community-based services, would be more clinically appropriate and cost effective.

B-1. For persons with severe cognitive impairments who have been assessed and found ineligible for nursing facility level care, the department, through its community options unit, shall review the assessment and provide case management to assist consumers and caregivers to receive appropriate services.

B-2. The department shall establish additional assessment practices and related policies for persons with Alzheimer's disease and other dementias as follows.

(1) For persons who have been assessed using the department's primary assessment instrument and found to have cognitive or behavioral difficulties but who do not require nursing intervention with the frequency necessary to qualify for nursing facility level of care, the department shall administer a supplemental dementia assessment for those persons with cognitive and behavioral impairments. By May 1, 1996, the criteria reflected in this supplemental dementia assessment and the scoring mechanism must be incorporated into rules adopted by the department in consultation with consumers, providers and other interested parties. The assessment criteria proposed in the rulemaking must consider, but are not limited to, the following: orientation, memory, receptive communication, expressive communication, wandering, behavioral demands on others, danger to self or others and awareness of needs.

(2) The department shall reimburse a nursing facility for individuals who are eligible for care based on the supplemental dementia assessment only if the nursing facility demonstrates a program of training in the care of persons with Alzheimer's disease and other dementias for all staff responsible for the care of persons with these conditions. The department, in consultation with consumers, providers and interested parties, shall develop the requirements for training and adopt rules containing those requirements. By July 1, 1997, the department, in consultation with consumers, providers and interested parties, shall adopt rules establishing the standards for treatments, services and settings to meet the needs of individuals who have Alzheimer's disease and other dementias. These standards must apply to all levels of care available to such individuals.

(3) No later than January 15, 1997, the department shall report to the joint standing committee of the Legislature having jurisdiction over health and human service matters on the extent to which the use of the supplemental dementia assessment has expanded medical eligibility for nursing facility care to include persons with Alzheimer's disease or other dementias.

(4) Rules adopted pursuant to this subsection are major substantive rules as defined by Title 5, chapter 375, subchapter II-A.

C. The department shall inform both the applicant and the administrator of the nursing facility of the department's determination of the services needed by the applicant and shall provide information and assistance to the applicant in accordance with subsection 1-A.

D. [PL 1995, c. 170, §2 (RP).]

E. The department shall perform a reassessment of the individual's medical needs when the individual becomes financially eligible for Medicaid benefits.

(1) If the individual, at both the admission assessment and any reassessment, is determined not to be medically eligible for the services provided by the nursing facility, and is determined not to be medically eligible at the time of the determination of financial eligibility, the nursing facility is responsible for providing services at no cost to the individual until such time as a placement at the appropriate level of care becomes available. After a placement becomes available at an appropriate level of care, the nursing facility may resume billing the individual for the cost of services.

(2) If the individual is initially assessed as needing the nursing facility's services under the assessment criteria and process in effect at the time of admission or is admitted as covered by Medicare for nursing facility services, but is reassessed as not needing those services at the time the individual is found financially eligible, then the department shall reimburse the nursing facility for services it provides to the individual in accordance with the principles of reimbursement for residential care facilities adopted by the department pursuant to section 3173. In calculating the fixed-cost component of per diem rates for nursing facility services, the department shall exclude days of service for which reimbursement is provided under this subparagraph.

F. Prior to performing assessments under this section, the department shall develop and disseminate to all nursing facilities and the public the specific standards the department will use to determine the medical eligibility of an applicant for admission to the nursing facility. A copy of the standards must be provided to each person for whom an assessment is conducted. In designing and phasing in the preadmission assessment under this section, the department shall collaborate with interested parties, including but not limited to consumers, nursing facility operators, hospital operators and home and community-based care providers.

G. A determination of medical eligibility under this section is final agency action for purposes of the Maine Administrative Procedure Act, Title 5, chapter 375.

1-A. Information and assistance. If the assessment performed pursuant to subsection 1 finds the level of nursing facility care clinically appropriate, the department shall determine whether the applicant also could live appropriately and cost-effectively at home or in some other community-based setting if home-based or community-based services were available to the applicant. If the department determines that a home or other community-based setting is clinically appropriate and cost-effective, the department shall:

A. Advise the applicant that a home or other community-based setting is appropriate;

B. Provide a proposed care plan and inform the applicant regarding the degree to which the services in the care plan are available at home or in some other community-based setting and explain the relative cost to the applicant of choosing community-based care rather than nursing facility care; and

C. Offer a care plan and case management services to the applicant on a sliding scale basis if the applicant chooses a home-based or community-based alternative to nursing facility care.

The department may provide the services described in this subsection directly or through private agencies.

1-B. Notification by hospitals. Whenever a hospital determines that a patient will require long-term care services upon discharge from the hospital, the hospital shall notify the department prior to discharge that long-term care services are indicated and that a preadmission assessment must be performed under this section.

2. Assessment for mental illness, intellectual disability, autism or related conditions. The department shall assess every applicant to a nursing facility to screen for mental illness, intellectual disability, autism or other related conditions in accordance with the federal Nursing Home Reform Act, Public Law 100-203, Section 4211, 42 United States Code, Section 1396r. Such assessments are intended to increase the probability that any individual who has an intellectual disability, autism or other related condition or a mental illness will receive active treatment for that individual's condition.

3. Rules. The Department of Health and Human Services shall adopt rules in accordance with the Maine Administrative Procedure Act, Title 5, chapter 375, to implement this section.