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Senator Anne Carney, Chair
Representative Amy Kuhn, Chair
Joint Committee on Judiciary
5 State House Station, Room 438
Augusta, ME 04333

RE: LD 1101: An Act to Address the Limited Availability of Counsel in Courts to Represent Indigent Parties in Matters Affecting Their Fundamental Rights

Dear Senator Carney, Representative Kuhn, and Honorable Members of the Judiciary Committee:

The Maine Association of Criminal Defense Lawyers is a non-profit organization that has nearly 300 member attorneys who practice criminal defense across the state. Since 1992, MACDL has advocated for its members and the people we are fortunate to represent in courtrooms throughout Maine and at the State House.

The vast majority of our members do a significant amount of work representing indigent people charged with crimes. I am one of those attorneys. My practice and my professional life are dedicated to providing the highest level of representation possible to my clients, from those facing relatively minor, though potentially life-altering, charges to those accused of murder. The Commission's standards and support help to ensure that I, and my colleagues, am resourced in a way to ensure high-quality representation to my clients—no less than they deserve.

I am here today on behalf of MACDL to testify in opposition to LD 1101. Our concern is simple: passage of this bill would undermine the purpose of the Commission on Public Defense Services and erode the right of the accused to the constitutionally mandated **effective** assistance of counsel.

The most meaningful way this Committee can ensure that MCPDS has increased capacity to address the crisis Maine finds itself in is to fund MCPDS at the level it needs to bring on dozens more public defenders and attract more appointed counsel to its ranks. The State of Maine is always represented by attorneys whose sole focus is criminal prosecution—we need a cadre of public defenders who are similarly supported and specialized to do this work. Increasing that capacity will take significant investment and time—but it will be worth it.

What this Committee should not do is authorize Maine's judges to appoint any lawyer they see fit to represent the accused, creating a disastrous end-run around very structure and foundation of the Commission itself. This bill would undo the great work that the Commission—with the help of this Committee—has undertaken over the course of years. It would be a shame—and possibly disastrous for the future of the Commission and the clients we represent.

From the beginning of this crisis of unrepresented people, there has been a concerted effort at disinformation by people who know—or should know—better. People are waiting to be

appointed counsel not because defense counsel are lazy, refusing to take cases, or are deterred from the allegedly onerous standards for joining the MCPDS rosters. No. The numbers are clear.

Even more than five years since the beginning of the COVID-19 pandemic in March 2020, the criminal system is holding on to 6,000 more cases than it did before the pandemic. As of March 7, 2025, there are more than 2,700 more felonies pending in the criminal dockets across the state (nearly 66 percent more than pre-pandemic levels) and nearly 3,200 more misdemeanors pending in the criminal dockets (more than 27 percent higher than pre-pandemic levels). The entire criminal legal system was overwhelmed far before COVID was even known—over the past half-decade, the system has nearly collapsed under its own weight, bogged down by thousands of more pending cases.

But somehow—somehow!—this entitled, unmotivated, complacent defense bar, and the Commission that oversees them, have managed to "cover" nearly all of these cases. No one in this room would make the argument that 500, 50, even 5 people being deprived the right to counsel is conscionable or acceptable on any level. However, the defense bar and MCPDS have ensured that thousands of people have received counsel—not just warm bodies with bar cards, but counsel that is trained, experienced, vetted, and approved by MCPDS to provide high-quality and effective representation.

The solution to this state-created crisis cannot be—it must not be—to go back to the way things were before the Commission was created in 2009, to where judges would appoint whomever they determined fit to represent the accused—with no qualifications or standards in place, no oversight, no supervision, no mandatory training, no limit whatsoever on the number of cases one can take on, no expertise required. Back then, the Judicial Branch wanted the creation of the Commission so that it would not have to pay for attorneys out of its own budget. And now, they are attempting once more to have control over what they rightfully relinquished, at the Commission's expense. That former system would not pass constitutional muster—if people received effective representation, it was most certainly despite that system, not because of that system. Even today, with the improvements made by the Commission and the investments made into the Commission by the Legislature, the Superior Court has determined that Maine is depriving far too many indigent people their right to counsel—and, by extension, their right to a fair trial.

It may seem so very long ago, but in April 2019, the Sixth Amendment Center published its report critiquing Maine's indigent defense system. This very Committee (some of whose members were on that iteration of the Committee) took it upon themselves, in consultation with then-MCILS and the Appropriations Committee, to pass legislation that would implement the recommended, necessary improvements brought to light by the Sixth Amendment Center.

They did this because they recognized how vitally important a well-funded, well-supported Commission was to the functioning of our court systems and, indeed, our democracy. Since then, investments into the Commission have helped to ensure that thousands of people receive effective assistance of counsel—standards and qualifications and other rules promulgated by the Commission are based on best practices and national standards. Abandoning them now would be disastrous.

Some of the more problematic areas of this proposed legislation are:

- No definition of "qualified": This bill would authorize any judge to appoint any attorney whom they deem "qualified" to take on the representation, yet there is no definition or holding to account what "qualified" actually means. The Commission has fleshed out precisely what qualified counsel must be—through training, experience, and more. This proposal would do away with necessary case load limits that both protect the clients from being represented by completely overwhelmed defenders and protect the

defenders from becoming completely overwhelmed. Our clients deserve more than the best guesses of a judge or justice. They deserve more than a few minutes of their beyond-capacity lawyer's time. The constitution demands more than just gut takes by a judge.

- Allowing counsel to undertake "limited" representation: Again, there is no explanation as to what this actually means. Our clients are entitled to full representation at all stages of their cases. This ostensibly piece-meal approach to representation seems to harken back to horizontal representation—instead of the vertical (same attorney) representation that is a national standard. Our clients deserve to be represented fully by a single attorney throughout the course of that representation.
- Compensation: This bill would require the Commission to pay these allegedly "qualified" counsel the full rate as attorneys who have been deemed qualified and rostered by the Commission. This requirement for payment is not contingent on these attorneys being answerable to the Commission's rules, qualifications, or policies. This would completely undermine the authority of the Commission to oversee and ensure the provision of high-quality and effective representation of indigent people in this state.
- "Inherent authority": The courts do not have inherent authority to appoint attorneys to represent those entitled to counsel—this is fiction. Even pursuant to the court's own rules (M.R.U. Crim. P. 44), the initial assignment of counsel must be finally approved by the Commission. Once again, the courts want to exercise authority over defense counsel and which defendants are entitled to counsel, but they do not want the responsibility of paying that counsel or ensuring that they are at all truly qualified to do the work. This is a huge step backwards.
- Governor's Office Proposed Amendments (03/18/25): These proposed amendments would prohibit employed public defenders from advocating for themselves as part of a union. It would prevent them from advocating for increased pay. It would undercut any effort by public defenders to manage their caseloads properly—to ensure that we do not fall into the trap of overwhelmed and completely ineffective public defender systems that too many states have. Essentially, it would force public defenders to choose between staying employed and managing their caseloads in a way to ensure high-quality representation. This would not encourage attorneys to become public defenders or to continue to be public defenders. It is wholly unnecessary and betrays an animus against the public defenders who are the future of MCPDS.
- More Governor's Office Proposed Amendments (03/18/25): The standard shouldn't be what is merely "efficient", as is proposed. It is *effective*—that was the point of the Sixth Amendment Report, that is the finding of the Superior Court, that is the meaning of the Sixth Amendment. The other language in this amendment is surplusage and non-sensical. I don't know what "Maine-based experience" means. Maine is special in many ways, but the ways in which our attorneys should practice criminal defense is not so special as to These standards and qualifications—most of which have been in place since 2009—are based on national best practices and the experience of the Commission attorneys and staff (with input from stakeholders). They are not driving anyone away from doing this work—that is a red herring (and a severely beaten dead horse) that Director Jim Billings can speak to with data. The proposal that case load standards be tied to how a case resolves is simply unworkable. One Commissioner—one Commissioner alone—has taken issue with the standards and qualifications that are the bedrock of MCPDS's ability to effectuate its statutory duties. "Engaged participation by the diverse attorneys admitted to Maine practice" is flowery language that only means allowing any lawyer with a passing interest in criminal law and a bar card represent people who are at risk of incarceration. Nothing is preventing people from doing this work: a two-day video training, a short application, petitions for waivers for either trial or practice experience to qualify for higher-level representation. This is beyond basic. If people don't want to play by these rules, that doesn't mean that we should just scrap them. Sometimes squeaky wheels just enjoy hearing themselves squeak.

It is critical for MCPDS to be responsible—independently—for both the oversight and evaluation of defender services. It must have the authority to create and ensure standards for effective representation. MCDPS's independence insulates it from the whims of political

pressure or judicial interference—no matter how beneficent in its intention. This bill would take this independence away from MCPDS.

One of the most widespread and pernicious problems facing public defender offices and appointed counsel systems across the country is the burden of crushing caseloads. MCPDS must be allowed to enforce realistic and appropriate workload standards to ensure effective representation. This bill would take that power away from MCPDS.

This bill is presented as emergency legislation—we appreciate that the Legislature is considering what it can do to address the crisis in our courts. However, as stated above, what the Legislature can do best to ensure that Maine is fulfilling its constitutional obligations to the accused is to support and fully fund MCPDS, allowing it to hire dozens more full-time public defenders, pay for training for appointed counsel, and work on recruitment and retention efforts to attract new attorneys to this essential work and to hold on to the attorneys who have done this work so well for so long. We cannot sacrifice quality to supposedly "fix" this problem. This bill would create far more issues than it would remedy. It would do nothing to ensure that people are receiving the representation to which they are constitutionally-entitled. We can do better, and we must do better than this.

When defense attorneys are telling this Committee that the rules, standards, and qualifications enforced by the Commission are both necessary and important—the very attorneys whom are affected by these same rules, standards, and qualifications—this Committee should listen.

Thank you for your consideration, for your attention to this vitally important matter, and for allowing me to speak with you all today. I would be happy to try to answer any questions by the Committee.

Sincerely,

Tina Heather Nadeau, Esq.
MACDL Executive Director