

MAINE STATE LEGISLATURE

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1 FIRST REGULAR SESSION
2

3 ONE HUNDRED AND TWELFTH LEGISLATURE
4

5 Legislative Document

No. 1386

7 H.P. 969

House of Representatives, April 25, 1985

8 Submitted by the Department of Human Services pursuant to Joint Rule

24.

9 Reference to the Committee on Judiciary suggested and ordered printed.

EDWIN H. PERT, Clerk

10 Presented by Representative Stevens of Bangor.

11 Cosponsored by Senator Carpenter of Aroostook, Representative
Melendy of Rockland and Representative Kimball of Buxton.

12 STATE OF MAINE
13

14 IN THE YEAR OF OUR LORD
15 NINETEEN HUNDRED AND EIGHTY-FIVE
16

17 AN ACT to Protect Abused Children.
18

19 Be it enacted by the People of the State of Maine as
20 follows:

21 Sec. 1. 4 MRSA §1152, sub-§6, is enacted to
22 read:

23 6. Proceedings related to licensure of adult and
24 child-care facilities. Notwithstanding any other
25 statutes or rules governing the admissibility of evi-
26 dence, in any proceedings related to facilities li-
27 censed pursuant to Title 22, sections 1817 and 7801,
28 in which allegations of abuse or neglect are in-
29 volved, the court may admit into evidence oral and
30 written out-of-court statements made by an adult or
31 child who is or has been a resident of the licensed
32 facility or a recipient of services from the licensed
33 facility and the court may rely on this evidence to
34 the extent of its probative value. The court may al-
35 low for the testimony of such a person to be taken in
36 chambers with only counsel present, provided that the
37 statements made are a matter of record.

1 Sec. 2. 15 MRSA §1205, sub-§§1 and 2, as enacted
2 by PL 1983, c. 411, are repealed and the following
3 enacted in their place:

4 1. Mental or physical well-being of a person.
5 On motion of the attorney for the State and at an in
6 camera hearing, the court finds that the mental or
7 physical well-being of that person will more likely
8 than not be harmed if that person were to testify in
9 open court; and

10 2. Examination and cross-examination. Pursuant
11 to order of court made on such a motion, the state-
12 ment is made under oath, subject to all of the rights
13 of confrontation secured to an accused by the Consti-
14 tution of Maine and the United States Constitution
15 and the statement has been recorded by any means ap-
16 proved by the court, and is made in the presence of a
17 judge.

18 Sec. 3. 17-A MRSA §207, sub-§2, as enacted by PL
19 1975, c. 499, §1, is amended to read:

20 2. Assault is a Class D crime, except in in-
21 stances of bodily injury to another who has not at-
22 tained his 10th birthday, provided that the actor has
23 attained his 18th birthday, in which case, it is a
24 Class C crime.

25 Sec. 4. 17-A MRSA §251, sub-§1, ¶C, as amended
26 by PL 1975, c. 740, §44, is repealed and the follow-
27 ing enacted in its place:

28 C. "Sexual act" means:

29 (1) Any act between 2 persons involving di-
30 rect physical contact between the sex organs
31 of one and the mouth or anus of the other,
32 or direct physical contact between the sex
33 organs of one and the sex organs of the oth-
34 er;

35 (2) Any act between a person and an animal
36 being used by another person which act in-
37 volves direct physical contact between the
38 sex organs of one and the mouth or anus of
39 the other, or direct physical contact be-

1 tween the sex organs of one and the sex or-
2 gans of the other;

3 (3) Any act involving direct physical con-
4 tact between the sex organs or anus of one
5 and an instrument or device manipulated by
6 another person when that act is done for the
7 purpose of arousing or gratifying sexual de-
8 sire or for the purpose of causing bodily
9 injury or offensive physical contact; or

10 (4) A sexual act which may be proved with-
11 out allegation or proof of penetration.

12 Sec. 5. 17-A MRSA §251, sub-§1, ¶D, as enacted
13 by PL 1975, c. 499, §1, is amended to read:

14 D. "Sexual contact" means any touching of the
15 genitals, sex organs or anus, directly or through
16 clothing, other than as would constitute a sexual
17 act, for the purpose of arousing or gratifying
18 sexual desire or for the purpose of causing bodi-
19 ly injury or offensive physical contact.

20 Sec. 6. 17-A MRSA §251, sub-§1, ¶F is enacted to
21 read:

22 F. "Sex organs" means sexual reproductive or-
23 gans.

24 Sec. 7. 17-A MRSA §253, sub-§2, as amended by PL
25 1983, c. 326, §§1 to 3, is further amended to read:

26 2. If he engages in sexual intercourse or a sex-
27 ual act with another person, not his spouse, and

28 A. He has substantially impaired the other
29 person's power to appraise or control his sex
30 acts by administering or employing drugs, intoxi-
31 cants, or other similar means; ~~or~~

32 B. He compels or induces the other to engage in
33 such sexual intercourse or sexual act by any
34 threat; ~~or~~

1 C. The other person suffers from mental disabili-
2 ty that is reasonably apparent or known to the
3 actor, and which in fact renders the other sub-
4 stantially incapable of appraising the nature of
5 the contact involved; ~~or~~

6 D. The other person is unconscious or otherwise
7 physically incapable of resisting and has not
8 consented to such sexual intercourse or sexual
9 act;

10 E. The other person is in official custody as a
11 probationer or a parolee, or is detained in a
12 hospital, prison or other institution, and the
13 actor has supervisory or disciplinary authority
14 over such other person; ~~or~~

15 F. The other person has not in fact attained his
16 18th birthday and is a student enrolled in a pri-
17 vate or public elementary, secondary or special
18 education school, facility or institution and the
19 actor is a teacher, employee or other official
20 having instructional, supervisory or disciplinary
21 authority over the student-;

22 G. The other person has not attained his 18th
23 birthday and the actor is a parent, stepparent,
24 foster parent, guardian or other similar person
25 responsible for the long-term general care and
26 welfare of that other person; or

27 H. The other person has not attained his 18th
28 birthday and is a resident in a private or public
29 nursery school, children's home, day-care facili-
30 ty, residential child-care facility, drug treat-
31 ment center, camp or similar school, facility or
32 institution regularly providing care or services
33 for children, and the actor is a teacher, employ-
34 ee or other person having instructional, supervi-
35 sory or disciplinary authority over that other
36 person.

37 Sec. 8. 17-A MRSA §253, sub-§5, as amended by PL
38 1983, c. 326, §4, is further amended to read:

39 5. Violation of subsection 2, ~~paragraph~~
40 paragraphs A, C ~~or~~ and E is a Class B crime. Viola-

tion of subsection 2, paragraph B, D ~~or~~, F, G or H is a Class C crime.

Sec. 9. 17-A MRSA §255, sub-§2, as enacted by PL 1975, c. 499, §1, is repealed and the following enacted in its place:

2. Violation of subsection 1, paragraphs A, B, D and E, is a Class D crime. Violation of subsection 1, paragraph C, is a Class C crime. The sentencing class for each such violation is one class higher than it would otherwise be if the State pleads and proves that sexual contact involved direct physical contact between the sex organs or anus of one and the finger or fingers of the other. That sexual act may be proved without allegation or proof of penetration.

Sec. 10. 17-A MRSA §256 is enacted to read:

§256. Probation for long-term treatment

1. Notwithstanding section 1202, subsection 1, a person convicted of a Class A, B, C or D crime in this chapter may be placed on probation for a period not to exceed the schedule in subsection 2, if long-term treatment of the actor is indicated.

2. A person convicted of a Class A, B, C or D crime may be placed on probation for a period not to exceed the maximum period of incarceration allowable under each class of crime.

Sec. 11. 19 MRSA §764, sub-§1, as amended by PL 1983, c. 583, §26, is further amended to read:

1. Filing. Any adult who has been abused by a family or household member may seek relief by filing a sworn petition in an appropriate court alleging that abuse.

When any minor child in the care or custody of a family or household member has been abused by a family or household member, an adult responsible for that child or a representative of the Department of Human Services may seek relief by filing a petition alleging that abuse.

1 Sec. 12. 19 MRSA §765, sub-§2, as amended by PL
2 1983, c. 583, §26, is further amended to read:

3 2. Temporary orders. The court may enter any
4 temporary orders authorized under subsection 4 as it
5 deems necessary to protect the plaintiff or minor
6 child from abuse, on good cause shown in an ex parte
7 proceeding. Immediate and present danger of physical
8 abuse to the plaintiff or minor child shall consti-
9 tute good cause. Any order shall remain in effect
10 pending a hearing pursuant to subsection 1.

11 Sec. 13. 19 MRSA §765, sub-§3, ¶A, as amended by
12 PL 1983, c. 583, §26, is further amended to read:

13 A. When the courthouse is closed and no other
14 provision can be made for the shelter of an
15 abused family or household member or minor child,
16 a complaint may be filed before any District
17 Court Judge or Superior Court Justice. Upon a
18 showing of good cause, as defined in subsection
19 2, the court may enter any temporary orders
20 authoized under subsection 4 as it deems neces-
21 sary to protect the plaintiff or minor child from
22 abuse.

23 Sec. 14. 19 MRSA §766, sub-§2, as amended by PL
24 1983, c. 583, §26, is further amended to read:

25 2. Duration. Any protective order or approved
26 consent agreement shall be for a fixed period not to
27 exceed one year. At the expiration of that time, the
28 court may extend an order, upon motion of the plain-
29 tiff, for such additional time as it deems necessary
30 to protect the plaintiff or minor child from abuse.
31 Upon motion by either party, for sufficient cause,
32 the court may modify the order or agreement from time
33 to time as circumstances require.

34 Sec. 15. 19 MRSA §766-A, as amended by PL 1983,
35 c. 583, §26, is further amended to read:

36 §766-A. Confidentiality of plaintiff's address

37 To protect the plaintiff or minor child, the
38 court may order the omission or deletion of his ad-
39 dress from any papers available to the public.

1 Sec. 16. 22 MRSA §4007, sub-§1, as enacted by PL
2 1979, c. 733, §18, is amended to read:

3 1. Procedures. All child protection proceedings
4 shall be conducted according to the rules of civil
5 procedure and the rules of evidence, except as pro-
6 vided otherwise in this chapter. At the request of a
7 party, all the proceedings shall be recorded. All
8 proceedings and records shall be closed to the pub-
9 lic, unless the court orders otherwise.

10 Sec. 17. 22 MRSA §4008, sub-§3, ¶B, as enacted
11 by PL 1979, c. 733, §18, is amended to read:

12 B. A court on its finding that access to those
13 records may be necessary for the determination of
14 any issue before the court or a court requesting
15 a report from the department pursuant to Title
16 19, section 533 or 751. Access to such a report
17 shall be limited to counsel of record unless oth-
18 erwise ordered by the court. Access to actual
19 records shall be limited to in camera inspection,
20 unless the court determines that public disclo-
21 sure of the information is necessary for the res-
22 olution of an issue pending before it;

23 Sec. 18. 22 MRSA §4011, sub-§1, as amended by PL
24 1983, c. 354, §3, is further amended to read:

25 1. Reasonable cause to suspect. When, while act-
26 ing in his professional capacity, a medical or
27 osteopathic physician, resident, intern, emergency
28 medical technician, medical examiner, physician's as-
29 sistant, dentist, dental hygienist, dental assistant,
30 chiropractor, podiatrist, registered or licensed
31 practical nurse, Christian Science practitioner,
32 teacher, guidance counselor, school official, social
33 worker, homemaker, home health aide, medical or so-
34 cial service worker, psychologist, child care person-
35 nel, mental health professional or law enforcement
36 official knows or has reasonable cause to suspect
37 that a child has been or is likely to be abused or
38 neglected, he shall immediately report or cause a re-
39 port to be made to the department. Notwithstanding
40 the definition of abuse or neglect set forth in sec-
41 tion 4002, subsection 1, a person required to report
42 under this section shall report to the appropriate

1 district attorney's office when the suspected abuse
2 or neglect is attributable to a person not responsi-
3 ble for the child.

4 A. Whenever a person is required to report in
5 his capacity as a member of the staff of a medi-
6 cal or public or private institution, agency or
7 facility, he shall immediately notify the person
8 in charge of the institution, agency or facility,
9 or his designated agent, who shall then cause a
10 report to be made. The staff may also make a re-
11 port directly to the department.

12 B. Any person may make a report if that person
13 knows or has reasonable cause to suspect that a
14 child has been or is likely to be abused or ne-
15 glected.

16 C. ~~A person shall not be required to report when~~
17 ~~the factual basis for knowing or suspecting abuse~~
18 ~~or neglect comes from treatment of a person re-~~
19 ~~sponsible for the child; the treatment was sought~~
20 ~~by that person for a problem of abuse or neglect~~
21 ~~and there is little threat of serious harm to the~~
22 ~~child.~~

23 C. When the basis for knowing or suspecting
24 abuse or neglect comes from the person responsi-
25 ble for the abuse or neglect who is seeking men-
26 tal health treatment for the problem of abuse or
27 neglect, a report shall be made in accordance
28 with this section. The department shall seek
29 consultation with the reporter if the department
30 initiates civil court action or makes a referral
31 to law enforcement.

32 Sec. 19. 22 MRSA §4015, as amended by PL 1983,
33 c. 781, §2, is further amended to read:

34 §4015. Privileged or confidential communications

35 The husband-wife and physician and
36 psychotherapist-patient privileges under the Maine
37 Rules of Evidence and the confidential quality of
38 communication under Title 20-A, sections 4008 and
39 6001, to the extent allowed by applicable federal
40 law; Title 24-A, section 4224; and Title 32, sections

1 1092-A and 7005; and Title 34-B, section 1207, are
2 abrogated in relation to required reporting, cooper-
3 ating with the department or a guardian ad litem in
4 an investigation or other child protective activity
5 or giving evidence in a child protection proceeding.
6 Information released to the department pursuant to
7 this section shall be kept confidential and may not
8 be disclosed by the department except as provided in
9 section 4008.

10 Statements made to a psychiatrist or licensed
11 psychologist in the course of counseling, therapy or
12 evaluation may not be used against the client in a
13 criminal proceeding except to rebut the client's tes-
14 timony contradicting those statements. Nothing in
15 this section may limit any responsibilities of the
16 professional pursuant to this Act.

17 Sec. 20. 30 MRSA §509 is enacted to read:

18 §509. Investigation of child abuse cases

19 The district attorneys may direct the investiga-
20 tion of any offense under Title 17, chapter 93-B, and
21 Title 17-A, chapter 11, or Title 17-A, sections 207,
22 208 and 556, wherein a victim may not have attained
23 his 18th birthday, and may designate, by geographical
24 boundaries or otherwise, a particular law enforcement
25 agency to have primary responsibility for that inves-
26 tigation.

27 Any case involving the sexual or physical abuse
28 of children which is discovered by or reported to any
29 law enforcement department or officer shall be imme-
30 diately reported by that department or officer to the
31 appropriate district attorney or assistant district
32 attorney or, in their absence, to the Attorney Gener-
33 al or one of his assistants.

34 Sec. 21. 34-B MRSA §1207, sub-§1, ¶B-1 is en-
35 acted to read:

36 B-1. Information shall be disclosed to the De-
37 partment of Human Services for the purpose of co-
38 operating in an investigation or any other activ-
39 ity pursuant to Title 15, chapter 507, or Title
40 22, chapter 1071, pursuant to an agreement be-

1 tween the department and the Department of Human
2 Services. The agreement, specifying the circum-
3 stances and conditions by which disclosure shall
4 be made, shall be promulgated as rules by the de-
5 partment in accordance with the Maine Administra-
6 tive Procedure Act, Title 5, chapter 375;

7 STATEMENT OF FACT

8 Section 1 applies to children's and adults' tes-
9 timony in administrative licensing proceedings.

10 Children or adults who are victimized in the fa-
11 cility may be further traumatized by having to testi-
12 fy in open court, subjected to intense, often confus-
13 ing, cross-examination, about the abuse in the pres-
14 ence of th perpetrator whom they often fear. This
15 bill makes it possible for the court to lessen the
16 trauma to child and adult victims by questioning them
17 away from the alleged perpetrator, while still pro-
18 tecting the rights of the accused to cross-
19 examination of the child witness.

20 This bill allows oral statements made by a child
21 or an adult and recorded to be admitted as evidence
22 and relied upon by the court to the extent of its
23 probative value.

24 In section 2, the method by which such
25 out-of-court statements are made is left to the
26 court's discretion. The use of videotape or other
27 electronic means is encouraged. An in camera hearing
28 is one which is closed to the general public, but
29 open to the parties, attorneys, witnesses, essential
30 personnel, such as bailiffs, court reporters, clerks,
31 equipment operators and other persons whose presence
32 the presiding judge or justice deems necessary.

33 Section 3 amends the law so that bodily injury to
34 a child under 10 years of age by an adult will become
35 a Class C crime rather than the present Class D crime
36 of simple assault.

37 Section 4 amends the definition of a "sexual act"
38 in a number of respects. First, it identifies 3 al-

1 ternative forms of "sexual act." The first form
2 mirrors the present definition, except that the
3 phrase "act of sexual gratification" is removed on
4 the grounds that, given the physical contacts de-
5 scribed, no concern exists for excluding "innocent"
6 contacts. The 2nd form ensures that direct physical
7 contacts between the victim's sex organs or anus and
8 the mouth, anus or sex organs of a nonhuman, e.g., a
9 dog, made use of by a 2nd person are included within
10 the definition of a "sexual act." Stated somewhat
11 differently, the 2nd form addresses the same act
12 specified in the first form, except that these acts
13 are between one person and an animal being used by
14 another person. In this form, the animal is, in
15 fact, an animate device or instrument utilized by an-
16 other human being. Of course, the animal utilized
17 may, but need not, be under the actual control and
18 direction of the 2nd person. As with the first form,
19 given the physical contacts described, no concern ex-
20 ists for excluding "innocent" contacts. The 3rd and
21 final form mirrors the present definition, except in
22 one particular. For this alternative, given the
23 physical contacts described, a legitimate concern ex-
24 ists for excluding "innocent" contacts, such as for
25 proper medical purposes or other valid reasons. See
26 State v. Keaten, 390 A.2d 1043, 1045 (Me. 1978),
27 State v. Lyons, 466 A.2d 868 (Me. 1983). Hence the
28 contacts described are limited to those done "for the
29 purpose of arousing or gratifying sexual desire," or
30 "for the purpose of causing bodily injury or offen-
31 sive physical contact." The latter purpose is not
32 included in present law. It has been added to con-
33 front the growing evidence that actors do not neces-
34 sarily perform such insults for the purpose of giving
35 or deriving sexual pleasure or satisfaction; instead,
36 physical contacts may well be performed for the pur-
37 pose of causing physical harm to or to degrade the
38 victim. Of course, as with sexual gratification,
39 where it is immaterial as to whether the participants
40 subjectively derived pleasure or satisfaction from
41 the act, it is equally immaterial whether the victim
42 was actually injured or subjectively found the con-
43 tact to be degrading. The focus is instead on wheth-
44 er these acts were performed by the actor for these
45 purposes. See State v. Alley, 385 A.2d 1175, 1178
46 (Me. 1978). Although, under the latter circum-
47 stances, the conduct would undoubtedly constitute an

1 assault or aggravated assault against the victim be-
2 cause the physical contacts involve the sex organs or
3 anus, it is deemed appropriate to additionally in-
4 clude it here.

5 Section 5 amends the definition of "sexual con-
6 tact" so that it will include digital manipulation or
7 invasion of the anus. This conduct is not uncommon
8 where the victim is a child. It further replaces the
9 word "genitals" with the phrase "sex organs" to con-
10 form the terminology used to describe both "sexual
11 act" and "sexual contact." Lastly, the purpose of
12 "causing bodily injury or offensive physical contact"
13 has been added for the reason given for its inclusion
14 relative to "sexual act" described in section 4.

15 Section 6 provides a definition of "sexual or-
16 gans."

17 Section 7 expands upon the types of persons who
18 commit gross sexual misconduct with a person under
19 age 18. This includes persons providing for long-
20 term general care and welfare of minors, as well as
21 service providers and employees of out-of-home educa-
22 tional, treatment, social or recreational facilities
23 which provide care or services for minors.

24 Section 8 adds a violation under sections 5 and 6
25 to those which are a Class C crime.

26 Section 9 increases the penalty for unlawful sex-
27 ual contact when that contact involves penetration or
28 direct manipulation.

29 Section 10 is intended to give judges the author-
30 ity to place a person convicted of a sexual crime
31 against a child on probation so that long-term treat-
32 ment may be a condition of release. When persons
33 have committed sexual crimes against children, long-
34 term treatment which exceeds 1, 2 or 3 years is often
35 indicated.

36 Sections 11 to 15 of the bill extend the protec-
37 tion from abuse available to adult household members
38 from other household members to minor children in
39 that household. It also allows an adult responsible
40 for the child or the Department of Human Services to

1 seek relief on behalf of a child. This protection is
2 necessary to protect children who have been victims
3 of abuse in their homes, so that the alleged perpe-
4 trator can be removed from the home rather than the
5 child victim. This prevents further victimization of
6 the child.

7 Section 16 of this bill requires that all child
8 protection proceedings be recorded. With the in-
9 creasing complexity and gravity of the decisions be-
10 ing made at child protective hearings, a recording of
11 the hearing is essential. Recording is also neces-
12 sary as a basis for an appeal and to avoid confusion
13 over court orders.

14 Section 17 of this bill requires disclosure of
15 child protection records to a court where a child
16 protection proceeding is being conducted and the
17 court requests the department to conduct a divorce
18 custody or an adoption study.

19 Section 18 of this bill repeals the treatment re-
20 porting exemption. This has been recommended by the
21 Governor's Working Group on Child Abuse and Neglect,
22 the Department of Human Services and a variety of
23 groups concerned about protecting children.

24 The intent of this section is to encourage of-
25 fenders to seek and effectively utilize treatment, at
26 the same time providing any necessary protection and
27 treatment for the child and other family members.

28 After the investigation, the department may con-
29 vene a team to make recommendations regarding treat-
30 ment or prosecution. The team will review the na-
31 ture, extent and severity of abuse or neglect, the
32 safety of the child and the community, the needs of
33 the child and other family members for treatment and
34 the willingness of the person responsible for the
35 abuse or neglect to engage in treatment.

36 Members of the team may include a representative
37 of the department, a licensed or certified mental
38 health provider with expertise in child abuse and ne-
39 glect and a representative of the district attorney's
40 office. The reporter and the person responsible for
41 the abuse may be invited to participate.

1 The department has had considerable experience in
2 using multi-disciplinary teams to develop coordinated
3 case plans so that the various professionals collec-
4 tively share the risks in balancing the needs and
5 safety of the child, the community and the alleged
6 offender.

7 Section 18 also limits information from the re-
8 porter under these circumstances to child protection
9 services and any child protection civil proceedings.
10 Perjury by an alleged offender in a civil or criminal
11 proceeding is subject to current statutory sanctions.

12 Finally, section 18 requires the reporting of
13 child abuse by persons responsible for the child's
14 care. The new provision would make clear to citizens
15 that there is a place to report all suspected abuse
16 of children. In turn, the department would follow
17 its existing policy of reporting suspected crimes to
18 the local district attorney.

19 Section 19 clarifies that the confidentiality of
20 records of the Department of Mental Health and Mental
21 Retardation is also abrogated and provides incentive
22 for mental health treatment by preventing the use of
23 statements made to a psychologist or psychiatrist in
24 criminal proceedings, except to rebut possible perju-
25 ry by the client. This section further clarifies
26 that records passed to the Department of Human Ser-
27 vices will be treated confidentially.

28 Section 20 gives district attorneys the primary
29 authority for the management and prosecution of sexu-
30 al and physical abuse cases involving children as
31 victims. It assures maximum coordination and swift
32 action on these cases.

33 In section 21, the confidentiality of mental
34 health records is an important principle protected in
35 Maine law. The right to confidentiality is not abso-
36 lute and is appropriately abrogated in circumstances
37 involving health and safety. Presently, there exists
38 no specific statutory authority to disclose mental
39 health records in cooperation with child protective
40 activities where issues of the health and safety of
41 children are being addressed. The Department of Men-
42 tal Health and Mental Retardation and the Department

1 Human Services have worked cooperatively to identify
2 those circumstances and conditions where access to
3 mental health records and information should be pro-
4 vided, while maintaining appropriate standards of
5 confidentiality. Section 22 authorizes disclosure in
6 cooperation with an investigation or other child pro-
7 tective activity, encourages interdepartmental coop-
8 eration and mandates rulemaking to clarify situations
9 of appropriate disclosure for both child protective
10 workers and mental health providers.

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