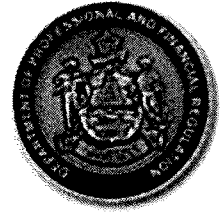




Janet T. Mills
Governor

STATE OF MAINE
DEPARTMENT OF
PROFESSIONAL & FINANCIAL REGULATION



Joan F. Cohen
Commissioner

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Joint Standing Committee on Judiciary

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**Testimony of Kristina Lunner, Deputy Commissioner
Department of Professional and Financial Regulation
In Opposition to L.D. 1911**

An Act to Automatically Seal Criminal History Record Information for Certain Crimes

Senator Carney, Representative Kuhn, and Members of the Committee, my name is Kristina Lunner and I am the Deputy Commissioner for the Department of Professional and Financial Regulation (DPFR or the Department). Thank you for the opportunity to share the Department's concerns with LD 1911. The Department is an umbrella regulatory agency that includes the Bureaus of Insurance, Consumer Credit Protection, and Financial Institutions; the Offices of Securities and Professional and Occupational Regulation (OPOR); and five affiliated licensing boards, including the Boards of Medicine, Osteopathic Medicine, Nursing, Optometry, and Professional Engineers. Collectively, the Department's mission is to protect the public through effective professional licensing, financial regulation, and consumer protection.

The Department opposes LD 1911 because it would significantly impair the ability of Department agencies and affiliated boards to conduct meaningful criminal background checks on individuals seeking licensure or renewal. Criminal history information is a critical tool that the Department uses to fulfill its public protection responsibilities and its obligations pursuant to various interstate licensing compacts. That criminal history review can reveal conduct that is highly relevant to an agency's or board's responsibility to impose appropriate safeguards, monitoring, or conditions on applicants or licensees to protect the public.

I would like to note that for Maine licensing boards, criminal history is not an automatic bar to licensure. Maine law (Title 5, Chapter 341) guides the use of criminal history in the context of license eligibility determinations. Importantly, Chapter 341 provides that a criminal conviction *shall not operate as an automatic bar to state licensure*. Per Maine law, a licensing board *may* take criminal history into account but *only if* the licensing agency determines that the applicant has not been sufficiently rehabilitated to warrant the public trust. *The applicant is always given the opportunity to prove rehabilitation*. We believe the current process of allowing the licensing

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boards the discretion to determine if an applicant is sufficiently rehabilitated is working well, as evidenced by the overwhelming majority of applicants becoming licensed despite past criminal history.

Similarly, the Maine Uniform Securities Act directs the securities administrator to consider whether to condition, limit or deny an application based on multiple factors, including Class D and E crimes involving fraud and dishonesty, but only if such action is “in the public interest.” 32 M.R.S. 16412. The vast majority of applications are approved, and no application is conditioned or denied without individualized consideration.

The Department recognizes that LD 1911 raises an important policy question: how to balance the goal of providing a fresh start to individuals following criminal convictions against the need to give regulators sufficient discretion to make informed decisions on the relevance of that past conduct to public protection. While the statutory balance is ultimately for policymakers to determine, the Department believes LD 1911, as drafted, tips the scale too far by limiting regulatory access to information essential to public safety and consumer protection.

As amended, LD 1911 would explicitly prohibit criminal justice agencies from giving certain Department agencies and affiliated boards criminal history information relating to a wide range of offenses. In addition to certain drug offenses, the bill would mandate automatic sealing of many Class D and E crimes, including:

- Unlicensed practice under 10 M.R.S. § 8003-C,
- Corrupt practices under Title 17-A, chapter 25,
- Offenses against public administration under Title 17-A, chapter 31, and
- Fraud offenses under Title 17-A, chapter 37.

LD 1911 would also require automatic sealing of all Class C convictions more than 10 years old, all Class B convictions more than 15 years old, and any criminal charge that was dismissed following successful completion of a deferred disposition agreement.

A history of fraud or theft is an important licensing consideration and public protection tool for all Department agencies and boards, but especially the financial regulatory agencies. The Bureau of Insurance, for example, takes into consideration crimes involving dishonesty (fraud, theft), and the entire record of those crimes when making licensing determinations for insurance industry professionals. These insurance professionals have access to sensitive financial information and consumers rely on the judgement of these professionals to make important decisions with potentially large financial impacts on the lives of the consumers. The Bureau must have access to information regarding the criminal history of officers, directors, and ultimate controlling persons of Maine domiciled insurance companies as part of the initial insurance company licensing process and ongoing solvency monitoring. The Insurance Code (Title 24-A) currently does not have a time limit for consideration of those crimes and the sealing of those

records contemplated by this bill could allow a person with a history of fraud or theft to gain a trusted position as a broker or agent or other insurance industry professional

The Bureau processes applications for both resident and non-resident insurance professionals. These applicants complete a uniform application utilized by most states, facilitating reciprocity in a field where many licensees hold licenses in multiple jurisdictions. This uniform application requires applicants to self-disclose criminal history. Similarly, the Office of Securities uses a uniform national application form for broker agents and investment adviser representatives that requires disclosure of all felony arrests, charges and convictions as well as dishonesty-related misdemeanors regardless of when the offense occurred, although offenses more than 10 years old and unrelated to securities or dishonesty are not grounds for adverse licensing action under the Maine Uniform Securities Act.

Drug offenses can be an important indicator for a board – especially when licensees have access to prescribing systems and controlled substances like physicians, pharmacists, dentists, nurses, and veterinarians.

As originally drafted, LD 1911 preserved the existing ability of criminal justice agencies to share confidential criminal history record information with Department agencies and affiliated boards by cross-referencing the exemptions in 15 M.R.S. § 2265.

As amended, however, LD 1911's amendment in proposed section 2403 (3) would explicitly prohibit the dissemination of sealed criminal history information to professional licensing agencies pursuant to section 2265(6). This significant change would prevent many of the Department's licensing boards, commissions and programs from obtaining comprehensive background checks currently allowed by section 2265. The fingerprinting exemption in section 2265(8) also has limited applicability, as not all of the boards and agencies that require fingerprinting—such as the medical licensing board—are required to do so by state or federal law.

The sealing of criminal history would put at risk Maine's ability to comply with the requirements of national licensing compacts. Licensing compacts require their member states to comply with certain uniform rules. Removing the ability for Maine licensing entities to review criminal history would impact Maine's ability to remain a member of those compacts. For example, the Physician Associate (PA) Compact requires its member states to determine if Physician Associates have ever been convicted of a crime and conviction of a misdemeanor is a disqualifying event for the applicant. The compacts to which Maine belongs which may be affected by LD 1911 include: Nursing, Physician Associate, Counseling, Dental Practice, Occupational Therapy, Physical Therapy, Psychology, Speech-Language and Audiology, and Social Work. If Maine is removed from these multi-state compacts, Maine patients would have less access to care, it would be more difficult to attract providers to Maine, and Maine-licensed professionals would have reduced employment opportunities across state lines.

LD 1911 also creates ambiguity about whether individuals whose criminal history has been sealed would be required to disclose that criminal history to Department agencies and boards. The amended bill's proposed section 2405 provides that an individual with sealed criminal history information does not have to disclose the sealed information except in response to inquiries from "criminal justice agencies and other entities that are authorized to obtain the Sealed Record information under section 2265." It is unclear whether such individuals would be required to disclose the sealed information in response to inquiries from professional licensing agencies, which are referenced in section 2265, but carved out in the bill's proposed section 2403(3). The Department supports the continuation of the existing disclosure requirement, as it ensures regulators and licensing boards can continue to review applicants' criminal history as part of their essential public protection roles.

The bill also does not appear to limit the number of times an individual's criminal history may be automatically sealed, raising additional concerns for regulators tasked with evaluating patterns of conduct.

Finally, we note that this bill goes far beyond the reforms recommended in the December 2004 report by the Criminal History Review Committee ("CRRC Report"), which notably did not explore the impact of sealing on Department agencies and boards and did not solicit input from Department representatives. As such, the Department believes this bill is premature. As noted in the CRRC Report:

- ***Recommendation G (vi):***

G. Enact legislation establishing a permanent criminal records review commission to conduct ongoing review of the laws, rules and procedures pertaining to criminal history record information in this State, using LD 2252 from the 131st Legislature as a model but further specifying that the issues studied by the Commission shall include but are not limited to the topics for further study identified in other committee recommendations:

vi. Whether and how to amend the laws governing consideration of criminal history record information by professional and occupational licensing agencies.

- **Appendix G to the report of the Criminal Records Review Committee** includes the following: *"Note: The CRRC has not explored the use of sealed criminal records by DPFR under state and federal law."*

For these reasons, the Department respectfully opposes LD 1911 and urges the Legislature to carefully consider its impact on the public protection roles of professional licensing and financial regulation in Maine.