

Memorandum: Criminal Records Review Issues

To: Senator Donna Bailey
Representative Rachel Talbot Ross
Criminal Records Review Committee
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From: Donald G. Alexander¹

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Re: Issues Before the Criminal Records Review Committee

Pursuant to Resolves 2021, ch. 121, the Criminal Records Review Committee has objectives to consider (i) options for expungement, sealing, vacating or otherwise limiting or barring public access to criminal records; (ii) “clean slate” legislation; (iii) whether, after some time limit, “some or all criminal records should not be publicly available;” (iv) information “about the harms and benefits of making criminal records confidential;” and (v) “who, if anyone, should continue to have access to criminal records that are not publicly available.”

Viewing the materials provided for the Committee meetings and some discussions at Committee meetings to date, the principal objectives of the Committee appear to be identification of ways that limiting access to criminal history records may assist individuals with criminal records to move toward full participation in society by improving their access to employment, credit, housing, security clearances, professional licensing, education, and opportunities to participate in adult guardianships or conservatorships, or become adoptive or foster parents where criminal records now pose a bar or at least a challenge to consideration of individuals’ applications in these areas.

The proposals before the Committee to achieve these objectives focus primarily on amendment of the criminal records statutes, though the Committee materials also suggest the Committee may propose amendments to professional licensing or housing access statutes to limit criminal records

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barriers and perhaps a constitutional amendment of some purpose, possibly to have some legislative involvement in pardoning or commutation decisions.² Pending proposals address both adult and juvenile criminal record history. However, this memo does not separately address juvenile records proposals in any detail, as access to juvenile records is already significantly limited. P.L. 2021, ch. 365, enacted significant amendments to clarify and limit access to juvenile court proceedings and case records.

One proposal meriting particularly serious consideration appears to be LD 1459 which would adopt 15 M.R.S.A. ch. 310-A to allow persons to petition the court to limit or bar dissemination of their criminal history record, subject to detailed conditions and limitations. This legislation would apply statewide and replace a pilot program, applicable in only a few courts, that expired in 2019. Other proposals being considered include: LD 473 to condition landlords' participation in the rental assistance program on their agreement not to consider potential tenants' criminal history, credit score, or rental history; and LR 2503 to limit consideration of prior convictions for drug offenses in licensing to grow or sell marijuana and related products.

Current Law

The Criminal History Record Information Act, 16 M.R.S.A. §§ 701 – 710, addresses criminal history records and access to those records in considerable detail. In § 703(2) it specifies what criminal records are confidential, meaning public access to such records is limited. Sub-§ 2 states:

2. Confidential criminal history record information. "Confidential criminal history record information" means criminal history record information of the following types:

A. Unless the person remains a fugitive from justice, summons and arrest information without disposition if an interval of more than one year has elapsed since the date the person was summonsed or arrested and no active prosecution of a criminal charge stemming from the summons or arrest is pending;

² The Committee materials include a provision from the Colorado Constitution, but that provision only requires that the Legislature receive notice of and explanation of pardon or commutation decisions. It does not appear to give the Legislature pardon or commutation authority or require legislative approval. In Maine the Governor's exclusive authority to pardon individuals or commute sentences is stated in Art. V. Pt. 1, § 11 of the Maine Constitution and 15 M.R.S.A. §§ 2161-2163.

- B. Information disclosing that the responsible law enforcement agency or officer has elected not to refer a matter to a prosecutor;
- C. Information disclosing that the responsible prosecutorial office or prosecutor has elected not to initiate or approve criminal proceedings;
- D. Information disclosing that a grand jury has determined that there is insufficient evidence to warrant the return of a formal charge;
- E. Information disclosing that a criminal proceeding has been postponed for a period of more than one year or dismissed because the person charged is found by the court to be mentally incompetent to stand trial or to be sentenced;
- F. Information disclosing that a criminal charge has been filed, if more than one year has elapsed since the date of the filing;
- G. Information disclosing that a criminal charge has been dismissed by a court with prejudice or dismissed with finality by a prosecutor other than as part of a plea agreement;
- H. Information disclosing that a person has been acquitted of a criminal charge. A verdict or accepted plea of not criminally responsible by reason of insanity, or its equivalent, is not an acquittal of the criminal charge;
- I. Information disclosing that a criminal proceeding has terminated in a mistrial with prejudice;
- J. Information disclosing that a criminal proceeding has terminated based on lack of subject matter jurisdiction;
- K. Information disclosing that a criminal proceeding has been terminated because the court lacked jurisdiction over the defendant; and
- L. Information disclosing that a person has petitioned for and been granted a full and free pardon.

Section 703(3) then provides a 28-line definition of what is and is not “Criminal history record information.”

Section 705 states many exceptions to the confidentiality requirements for law enforcement and other statutorily authorized agencies and purposes, and even for public dissemination of information indicating a dismissal, acquittal, or other final termination of a proceeding.

A criminal records review would do well to clarify the definition of “Criminal history record information” and the exceptions to the confidentiality requirement, particularly as the courts and the State move more towards a

digital record keeping system that may make identification and separation of individual items in a court docket, file, or registry of actions more challenging.

Many other statutes also address access to and use of criminal records. For example, 5 M.R.S.A. § 5301 addresses how the many State professional licensing boards may disqualify an applicant for a professional license because of a criminal record. The criminal records which may be considered in deciding whether or not to issue a professional license include:

A. Convictions for which incarceration for less than one year may be imposed and which involve dishonesty or false statement;

B. Convictions for which incarceration for less than one year may be imposed and which directly relate to the trade or occupation for which the license or permit is sought;

C. Convictions for which no incarceration can be imposed and which directly relate to the trade or occupation for which the license or permit is sought;

D. Convictions for which incarceration for one year or more may be imposed; or

E. Convictions for which incarceration for less than one year may be imposed and that involve sexual misconduct by an applicant for [a long list of health, personal care, and counselling related licenses, and also the Board of Trustees of the Maine Criminal Justice Academy.]”

Beyond these general statutes, many statutes relate to individual licensing, employment, or assistance decisions that require some criminal history record check and mandate some disqualifications from eligibility. The Committee has already received from the Director of the State Bureau of Identification a substantial list of Maine statutes authorizing national criminal history records checks through the FBI, followed by a list of federal statutes authorizing or requiring such records checks for various federally supported activities. Significant alteration of these criminal records check and qualification requirements may be a bit of a challenge, particularly when federal requirements are involved.

The challenges to limiting access to criminal records have been addressed in detail in written documents and appearances before the Committee by the Commissioner of the Department of Professional and Financial Regulation, the Director of the State Bureau of Identification in the Maine Department of Public Safety, the Director of the Office of Child and

Family Services in the Department of Health and Human Services, and the Superintendent of the Bureau of Insurance in the DPFR. These materials demonstrate the importance of criminal records checks and qualification limits based on criminal records to protect integrity and public safety in many programs.

Issues for a Maine Criminal Records Program

A. Information in the Public Domain

Solutions to concerns about criminal records (or other records of court actions) limiting one's ability to fully participate in society must recognize the capacity of any individual to use digital technology to find information that is a matter of public record. Potential employers, credit bureaus, security clearance investigations, lending institutions, landlords, even potential dating partners, may conduct digital and social media records searches to see what they can learn about a person before entering or approving a professional license, security clearance, or a business or personal relationship. Access to and use of such information, once it is in the public domain, cannot be limited by access and confidentiality requirements applicable only to records in court or government agency files or data bases.

In Maine, much information identifying individual encounters with law enforcement and the justice system is published in local newspapers and on news websites before the matter reaches the courts and, sometimes, before final decisions to prosecute or not prosecute have been made. *See, for example*, the following from Central Maine Newspapers: (1) Dec. 4, 2021, p. B3, "Police" report indicating four persons arrested for specified reasons, and including the person's name, age, and place of residence; (2) Dec. 3, 2021, p. B3, "Police" report indicating six persons arrested for specified reasons, and including the person's name, age, and place of residence; (3) Dec. 2, 2021, p. B3, item headed "Somerset County Grand Jury Indicts 30 People on 86 Counts," beginning with a report about an individual indicted for calling in bomb threats, then listing all 30 individuals indicted with their name, age, place of residence and the charge or charges against them, and concluding with a statement: "An indictment is not a finding of guilt, but an indication there is enough evidence to move forward with a trial." Print and online news in Maine regularly includes reports of particular events that result in individuals being charged with a crime or require other police involvement.

In this public reporting, identifying individuals charged with even minor crimes, Maine, and other states with similar demographics, may differ from large metropolitan areas where public news reporting identifying individuals charged with minor crimes is rare, if it occurs at all. That difference may need to be recognized in developing ideas to accomplish the Committee's objectives. Google searches of the publicly identified individuals today or 10 years from now may indicate the names and criminal charges of those individuals, even if the charge was dismissed or had a final resolution that would render the criminal record of that individual confidential under the current CHRIA.

If a criminal record is made private or is expunged, a person doing a digital records check may be left with what was in the newspaper, social media, or online information source, and may not learn of a perhaps lesser offense, or decision not to prosecute, that would have been reflected in the expunged record. Some potential employers, licensing authorities, or others seeking records of one's past, seeing a Google search report of an arrest or indictment, and having a choice to interview several applicants for a job or to rent an apartment, may not consider the applicant with the criminal record further.

The present confidentiality exception in CHIRA to allow disclosure that an action was finally dismissed, or resulted in an acquittal, allows a member of the public with a legitimate need to know to learn how a charge against an individual resolved, but only if the person elects to check.

An example of an issue once a record becomes part of the public domain: In 2008 or 2009, the Law Court vacated a conviction for a sex offense. At a retrial, the person charged was acquitted. Reading CHIRA indicating that criminal records resulting in an acquittal are confidential, the person or his representative asked that the Law Court opinion vacating the conviction after the first trial be removed from the public record on the Court's website and in the many legal publications circulating broadly. Because the opinion was in the published public record, the person was advised that the opinion could not be removed from the websites, electronic research services, and books where it was available for research.

Records of filings and adjudications of civil actions such as debt collections, foreclosures, evictions, and damages judgments similarly become part of the public record once they are reported in the press or online or are

collected from the courts by credit bureaus, landlord organizations, or other entities outside the control of the courts and government agencies.

B. Employment, Credit, Licensing, and Other Application Forms.

Present or proposed laws making criminal records confidential with a goal of improving opportunities to be considered for employment, credit, professional licensing, education or other matters do not reach the job, credit, education, or licensing application process. Such applications regularly ask about arrests or charges, not convictions, with the applicant then invited to provide any explanation about the arrest or charge. Some application forms ask broader questions covering participation in any civil or criminal action. Following is a question from the Legislative Staff Questionnaire for Gubernatorial Nominees that was used in early 2021

ARE YOU OR HAVE YOU EVER BEEN A PARTY OF CIVIL OR CRIMINAL COURT LITIGATION EITHER PERSONALLY OR AS AN OFFICER OR A CORPORATION, ASSOCIATION, OR OTHER LEGAL ENTITY? DESCRIBE THE CIRCUMSTANCES OF ANY SUCH LITIGATION?

Such questionnaires require an honest applicant to disclose prior encounters with the criminal justice system, even if the official court or SBI record is confidential or expunged – and even if there has been a pardon. The pardon or case dismissal may be part of an explanation of the event, but the event must be disclosed.

C. Alternatives to Consider

(1) If the goal of legislation is to limit consideration of a prior criminal record after passage of a certain amount of time and with an appropriate demonstration of rehabilitation or change in life, one alternative would be to legislate to bar consideration of the record of a particular crime in consideration of an application for employment, credit, security clearance, housing, professional licensing, education, or other activity where the criminal record might be considered.

That is the approach suggested in LD 473, proposing to bar consideration of criminal records in rental assistance applications, or LR 2503, proposing to limit consideration of prior drug conviction records in applications for licenses to grow or sell marijuana. Such limitations are likely to work only in

government administered programs or licensing activities, and even in such programs, the limitations may prove problematic when there are several applicants for a position and discretionary choices must be made.

(2) An alternative might be to create a State program that would allow persons, after passage of a certain amount of time after conviction for certain crimes, to participate in a program leading to a certificate of rehabilitation or change of life from the circumstances that led to commission of the crime. This could be disclosed on applications and let the issue be considered by the potential employer or other person or entity considering the application for employment, licensing, credit, security clearance, housing, education or other activity. Such a rehabilitation or qualification certificate might be addressed as part of consideration of LD 1459, that would authorize persons to petition to limit public access to criminal records. Such early disclosure, and with a certificate of rehabilitation or qualification, would likely promote more favorable consideration than would be the case when a potential employer, landlord or other person later learns of a charge or conviction for the first time in a Google search.

(3) The accuracy of criminal records and whether they are up to date is a continuing problem. A criminal record for a single charge may be reviewed and adjusted by local police, county corrections officials, District Attorneys, courts, the State Bureau of Identification, the Department of Corrections and others. The Criminal Records Review Committee may want to consider whether to take some action to improve criminal record accuracy and currency. The Uniform Law Commission has proposed a Uniform Criminal Records Accuracy Act. Attachment 1 is a summary of that Act. A copy of the draft Act can also be provided if consideration of the Act is deemed appropriate, although the draft appears a little more complicated than may be needed for Maine.