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Uniform Law Commission

## **Meeting-Accuracy of Criminal Records Drafting Committee**

Robert J Tennessen, Chair  
Opening Remarks

### **INTRODUCTION**

I commend the reporters, Steve and Jordan, for their work in preparing this initial draft of an act to improve the accuracy of criminal history records.

Many committee members and observers have been through this process before and have seen the initial drafts of acts evolve and develop through the conversation and valuable insights provided by all participants. I expect the same will occur with this act and I am counting on you to make this happen.

The act will be changed and improved before it is read for the first time at the ULC annual meeting in July 2016. By then we will be working from a third draft. At that meeting we will receive the criticisms, suggestions, and comments of the committee of the whole whose members will be eager demonstrate their great analytical and drafting skills, knowledge, and skepticism and policy expertise. We will be humbled but not daunted. We will then spend the next year carefully considering their advice as we work through three more drafts to be ready for a final reading in 2017.

In recent years inaccuracies in criminal history records has received considerable national attention - often because of the egregious consequences of significant errors.

### **CONSEQUENCES OF ERRONEOUS CRIMINAL RECORDS**

The devastating consequences of inaccurate criminal history records have been well documented by the people and organizations represented at this table: wrongful arrests, incarceration, loss of job opportunities, denial of a license and other opportunities.

The magnitude of the problem was chronicled in the February 2015 GAO Report to Congressional Requesters regarding *Criminal History Records*, which noted that “from fiscal

years 2009 through 2013, about 120 million criminal history record checks were conducted through the FBI for non-criminal-justice purposes.”

According to a National Employment Law Project (NELP) report on FBI background checks, in fiscal year 2012 the FBI issued approximately 23.7 million rap sheets for non-criminal justice purposes, including 17 million for employment and licensing, over six times that of 2002.

The failure to report dispositions is highly significant because approximately one-third of all felony arrests never lead to a conviction. The NELP report estimated that nearly 500,000 workers each year may be severely prejudiced against in their quest for employment due to flaws in the FBI criminal record system.

According to NELP, inaccurate records disproportionately affect people of color. African Americans make up 14% of the population, but account for 28% of arrests.

Errors in criminal history records, maintained by criminal justice agencies, are propagated throughout the background checking process.

### **PAST AND CURRENT EFFORTS TO IMPROVE ACCURACY**

The ULC is not the first organization to attempt to improve the accuracy of criminal records nor is this our first effort. Twenty-nine years ago the ULC approved the Uniform Criminal History Records Act.

Almost 20 years ago Congress passed legislation initiating the National Criminal History Improvement Program (NCHIP). That program represented a close collaboration among the Bureau of Justice Statistics, the FBI, and state criminal justice agencies. Since then additional organizations such as SEARCH, The National Center for State Courts, the Conference of State Court Administrators, some states, and others have sought to improve accuracy.

### **PRINCIPAL REASON FOR INACCURACY**

Research has revealed a number of factors contributing to errors in criminal records, the primary ones include:

1. The failure to report and record disposition of an arrest in a timely manner.
2. The lack of fingerprints or biometric identifiers that precludes the matching of arrests and dispositions.
3. The lack of case numbers that precludes matching when transferring data among agencies.

4. RAP sheets containing information pertaining to a different person.
5. Stolen identities used by criminals.
6. A person with a similar name or identity is mistakenly associated with a person having a criminal record.

### **WHY INACCURACIES PERSIST**

Some of the reasons these inaccuracies persist include:

1. Failure of some prosecutors to report declinations to prosecute to the central repository.
2. Failure of some courts to report dispositions to the central repository.
3. Failure to collect or transmit biometric information precludes matching of arrest and disposition records.
4. Lack of anyone with overall responsibility for the accuracy of the entire criminal history record system.
5. Victims of identity theft or mistaken identity are often unaware of their predicament until some untoward act occurs such as an arrest or loss of a job opportunity.
6. In some instances, people are not informed of their right to have the information corrected.

### **WHAT HAS BEEN DONE TO CORRECT THE PROBLEM?**

The National Criminal History Improvement Program (NCHIP) has been in place for 20 years. Through the FBI's Bureau of Justice Statistics, nearly \$600 million in direct grants has been awarded to states to improve the quality, timeliness, and immediate accessibility of criminal history records and related information.

Despite this significant expenditure of funds the US Attorney General's June 2006 report, *Criminal History Background Checks*, stated "although it is quite comprehensive in its coverage of nationwide arrest records for serious offenses, the Interstate Identification Index, III, is still missing final disposition information in a approximately 50% of the records."

Nine years later, in its February 2015 report to Congressional Requesters regarding *CRIMINAL HISTORY RECORDS*, the GAO said some progress has been made in improving the accuracy of criminal records, but major and significant problems remain:

*States have improved the completeness of criminal history records used for FBI and more records now contain both the arrest and final disposition but there are still gaps. Twenty*

*states reported that more than 75 percent of their arrest records had dispositions in 2012, up from 16 states in 2006.” (Introduction)*

*“Nevertheless, in 2012, 10 states reported that 50% or less of their arrest records had final dispositions.” (P.19)*

Some other initiatives to improve the accuracy of criminal record seem to have stalled. For example, according to the GAO report, a Disposition Task Force was formed by the FBI’s Advisory Policy Board in 2009 to address issues related to the completeness, accuracy, and availability of criminal records dispositions from court and prosecutors and develop a national strategy for improving the quality of disposition reporting. The Task Force is composed of representatives of state and local criminal justice systems, including state repositories, state courts, prosecutors, and Compact Council members, as well as federal criminal justice officials, from agencies such as the DOJ and OPM.

\*\*\* [T]he disposition task force established an initial set of goals in 2009, but under new leadership in 2012 determine that these goals will not address the greatest disposition-reporting challenge—the lack of national disposition-reporting standards. P. 24\*\*\*The task force decided to take a broader look at disposition-reporting issues, and evolved its initial goals into five broader goals and the foundation of a national strategy.” (P. 25.)

However, apparently not much has come of that effort. The GAO reported that the Task Force did not have a plan with time-frames or milestones for completing the best practices guide for achieving the remaining goals, which should also lead to a national strategy—an original 2009 objective for the task force. (P 25.)

The GAO report went on to say “after more than five years, the task force has not issued best practices or national standards for collecting and reporting disposition information or developed a national strategy, even though the disposition reporting has been a long-standing challenge. (P 25.)

Another initiative to improve criminal history records has been the “Criminal Justice Data Improvement Program” operated by the Bureau of Justice Statistics.

Still another effort to improve criminal history records is a Joint Task Force on Rap Sheet Standardization which has created a series of formats for transmitting detailed comprehensive criminal history information.

States must perform their responsibilities in order for our system of federalism to function properly. If states do not meet their obligations their functions will migrate to the federal

government. What, in our system of ordered-liberty, is a more important state duty than operating an honest and fair system of justice that does not disadvantage its citizens by carelessness and lassitude? It is morally unjust for states or anyone else to operate a system with known errors that can be effectively corrected.

Although some states have made attempts to improve accuracy of criminal history records the results are not satisfactory as evidenced by the Attorney General and GAO Reports.

### **SUMMARY OF CURRENT STATE LAW AND NEED FOR A UNIFORM SOLUTION**

Every state has established a Central Repository, some have established the right to examine and correct an inaccurate record—at least in theory—and some have established sanctions for violations. Alaska, for example, requires periodic audits of its criminal justice system to evaluate compliance with its standards including the reporting of declinations and dispositions.

The interstate flow of criminal history information for both criminal justice and non-criminal justice purposes, such as employment and licensing, strongly suggests the need for a uniform solution and it is a reason why the ABA and the ULC Scope and Program Committee recommended appointing this drafting committee and why the Executive Committee approved it.

Our challenge is to draft an act that improves the accuracy of criminal records and that is both effective and adoptable by the states.

The major elements of this draft have precedents in existing federal and state laws including mandatory requirements to report declinations and dispositions, use of biometric identification, rights to examine and correct information in a RAP sheet, remedies, and audits. This draft is the first cut at melding these into a coherent whole that will work throughout the country.