

NCCUSL Committee on Scope and Program

Project Proposal

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Description of Project

Uniform Law Commission Legislative Counsel, Nicole Julal, in conjunction with Todd Belcore, Staff Attorney at the Sargent Shriver National Center on Poverty Law, and Stephen Saltzburg, former Chair of the American Bar Association (ABA) Criminal Justice Section, propose the appointment of a Study Committee to ascertain whether the Uniform Criminal History Records Act (1986) can be revised to address changes in the area of criminal history record information, new developments in federal law, and new trends relating to the use of criminal records.

This proposal serves a follow-up to a 2008 proposal submitted by the ABA Criminal Justice Section. Attached for your review is the 2008 ABA proposal as well as the disposition letter sent from the Scope and Program Committee Chair.

The Uniform Criminal History Records Act (UCHRA) (1986)

The UCHRA (1986) provides first for the collection in a single, statewide, centralized compilation of all criminal history records in the state, recording all arrests and charges under the criminal law of the state and the subsequent history of the processing of those charges through final disposition or completion of sentence, and second, provides rules to govern the dissemination of those records from the central repository, to aid police, other law enforcement agencies, and the courts, and to meet the justifiable public needs for information about an individual's past convictions of crime or his current involvement as a defendant in a criminal proceeding.

The UCHR was adopted, in modified form, in only one jurisdiction: Illinois.

Revising the Uniform Criminal History Records Act (1986)

Much has happened in the area of criminal history record information since the adoption of the UCHRA in 1986. For example, all states now have established criminal history repositories and all states now include biometric information as a part of a criminal history record. Biometric information was not addressed in the UCHRA (1986). Perhaps more importantly, there has been a dramatic increase in the use of criminal history records for non-criminal justice purposes. Moreover, some jurisdictions have adopted procedures for providing certificates of rehabilitation or expungement of records, which often will occur years after a conviction and sentence are imposed and served.

The information provided in this proposal is intended to make it clear that a revision to the UCHRA is timely and necessary.

Need for and Benefits of Uniformity in this Subject Matter

When it comes to criminal history record information, the one thing that most individuals, law enforcement, private companies, and federal agencies all agree on is that criminal history records and the statutes that govern them are far from uniform.

As criminal history checks for non-criminal justice purposes have become more prevalent, many of the inconsistencies and imperfections in their administration, security controls, and privacy protections – have become troublesome. Laws relating to non-law enforcement access to criminal records also vary

widely from jurisdiction to jurisdiction. It is also important to consider recent federal legislation (the 2008 National Crime Prevention and Privacy Compact) on the subject and its impact on relevant state laws and practices.

A study committee would be able to perform a thoughtful and thorough review of the many facets affecting this area of law and make recommendations on how to address them, perhaps by revising an existing ULC product on the topic, the UCHRA which is now, for the most part, outdated.

Criminal History Records¹

The heart of the mission of state and federal criminal history repositories is to maintain comprehensive criminal history records. The criminal history record typically contains arrest charges for which the taking of fingerprints from the criminal suspect at the time of arrest is either required or authorized by law. Generally, the recording of charges and other information accompanies the transmission or forwarding of arrest fingerprints to the repository. Both then become the basis for initiating a new record or adding to an existing record.

In addition to state criminal history repositories, there are federal criminal history repositories. In 1993, the Brady Handgun Violence Prevention Act established a National Instant Criminal Background Check System (NICS). The NICS was designed to immediately search the background check inquiries for prospective firearms purchasers. The significance of the NICS is that it obtains information from three nationally held databases:

Interstate Identification Index (III): The Interstate Identification Index (III), is an “index-pointer” criminal history record system that ties the computerized files of the FBI and the State-level centralized files maintained by each State into a national system.

National Crime Information Center (NCIC): A computerized database of documented information consisting of 18 files: seven property files (boats, guns, license plates, securities, vehicles, and vehicle and boat parts) and 11 person files (convicted sex offender registry, foreign fugitives, identity theft data, immigration violators, missing persons, protection orders, supervised release, unidentified persons, individuals in U.S. Secret Service protective custody, violent gangs and terrorist organizations, and wanted persons).

NICS Index: Records contributed by local, state, and federal agencies pertaining to individuals federally prohibited the transfer of a firearm, such as users of illegal drugs, those with disqualifying mental health histories, illegal aliens, persons dishonorably discharged from the military, and individuals who have renounced their U.S. citizenship.

Thanks to the NICS, background checks as it relates to the purchasing of firearms in the majority of cases can render results in a matter of minutes after data is entered into the NICS.

Non-criminal Justice Background Checks

¹ The information contained herein and after was excerpted in part from the website of SEARCH, The National Consortium for Justice Information and Statistics (<http://www.search.org/programs/policy/records/>) – 12/20/11.

The use of criminal history record information for non-criminal justice purposes is increasingly in demand. The *Attorney General's Report on Criminal History Background Checks*, Office of the Attorney General, U.S. Department of Justice states:

"There is widespread interest in obtaining access to reliable criminal history record information to screen an individual's suitability for employment, licensing, or placement in positions of trust.

The interest comes from private and public employers, as well as non-profit organizations, when employees and volunteers work with vulnerable populations such as children, the elderly and disabled persons.

It is based on a desire or perceived need to evaluate the risk of hiring or placing someone with a criminal record in a particular position, and is intended to protect employees, customers, vulnerable persons, and business assets.

Employers and organizations are subject to potential liability under negligent hiring doctrines if they fail to exercise due diligence by determining whether an applicant has a criminal history relevant to the responsibilities of a job, and also by determining whether placement of the individual in the position would create an unreasonable risk to other employees or the public.

In addition to litigation risk, employers want to assess the risks to their assets and reputations posed by placing persons with criminal histories in certain positions. To meet these business needs, employers can - and frequently do - ask applicants whether they have criminal histories.

Such employers and organizations want access to criminal history records to determine whether applicants are answering questions about their criminal histories truthfully and completely.

They believe that accessing good criminal history information is the only way to perform due diligence to protect employees, assets, and the public. Public employers' need for the information often goes beyond considering job suitability and includes security clearance determinations."

In response to the growing demand for criminal history record information, some states maintain free websites that provide public access to criminal records. Public Law 92-544, passed by Congress in 1972, allows noncriminal governmental agencies and private entities within states to obtain criminal record information from the Federal Bureau of Investigations if the state's legislature, or in some states a city council, board of supervisors or other local legislative body, has passed a statute authorizing access, and if the statute is approved by the U.S. Attorney General.

The use of the Interstate Identification Index, a database that also feeds to NICS, for non-criminal justice purposes is overseen by the National Crime Prevention and Privacy Compact (Compact). This Compact is discussed in more detail later.

Many private companies now provide criminal record check services for fees ranging from a few dollars to more expensive and extensive background checks. However, these checks are primarily named-based, although they may include other identifiers such as Social Security number or date of birth, and can be circumvented by an individual using an alias or a counterfeit identification document.

Summary/Analysis of Existing State Law and Trends Concerning this Subject

The need for uniformity in the realm of criminal records becomes incredibly apparent when you consider several relevant, empirically grounded, extraordinarily troubling trends: 1) More individuals have criminal records now than at any point in America history; 2) Criminal records that are produced by background check companies - and even governments - are home to inaccurate, unreliable or poorly represented information about the individual searched; 3) Employers have immense difficulty interpreting a record accurately even when the background's information is accurate due to lack of uniformity in the content and presentation of the background; 4) Employers use background checks in their hiring decisions more than ever; and 5) A significant majority of employers refuse to hire individuals with criminal records.

Historic Number of People with Criminal Records in the U.S.

Taken in turn, the well-documented staggering increase in the number of arrests, charges and convictions over the past two decades has resulted in over 65 million men and women being saddled with criminal records that prove to be barriers to employment. (NELP Report, "65 Million 'Need Not Apply': The Case for Reforming Criminal Background Checks for Employment). Unfortunately, it is incredibly difficult for the vast number of individuals with criminal records to gain access to employment opportunities because they are often unjustly discriminated against (i.e. denied job opportunities) because of their record. However, the issue is that many are actually denied jobs for things they, in fact, did not do, or because of the inaccurate or poor listing of charges on their record by background check companies or the courts.

Ensuring uniformity in content and presentation of criminal records in the governmental and private sectors would ensure that people are at least being judged on their actual record rather than on reports that do not reflect the truth of the matter relating to a person's background.

Commercial Criminal Background Checks are Unreliable

Commercial background checking agencies regularly fail to reflect the truth when it comes to reporting an individual's criminal record. Failing to reflect the truth takes on many forms: wrongly attributing cases to the subject of their search (false positives); incorrectly listing case outcomes, grades of offenses, or charges; reporting the same case multiple times; failing to list case dispositions; and, failing to correct reported instances of identity theft or the sealing or expungement of a given record. (<http://www.nelp.org/page/-/SCLP/2010/NELPandCLSFCRANewNoticesComments.pdf?nocdn=1>).

Background check companies attribute some of the blame for their erroneous reporting on how difficult it is to create a program that can swiftly and accurately organize data from government records. The argument being that it is cost prohibitive for the company to have an employee manually retrieve each record from every court that every person has ever frequented. Therefore, it is critical that the criminal records data housed in the various local, state and federal government databases be presented in a uniform way so that, in turn, there can be a program that accurately, swiftly, and cost efficiently transcribes the data from all those sources into a quality commercial background report. Now, however, each level of government within a state features different content and presentation of a person's criminal history in their records. That variance is even greater when comparing records from different

states or localities across different states.

Employers Have Immense Difficulty Interpreting a Record Accurately

In the interim, employers are left to rely on an unreliable, error prone and inaccurate data that, even when comparing commercial background reporting companies, can feature different content or presentation. If the recent flood of lawsuits against employers who are unjustly discriminating against individuals with criminal records is any indication, employers are also interested in having a more reliable tool (a truthful background check) to use when making their hiring decisions.

If every background report an employer received looked the same, held the same information and was presented in the same format, it would be much easier for them to properly assess a record rather than just throw their hands up in frustration and throw the applications with the 'confusing' background reports in the garbage. This would help more applicants be considered in a just way while helping employers avoid lawsuits that mar their reputation and financial standing.

Employers Use Background Checks in their Hiring Decisions More Than Ever

According to the Society of Human Resource Management (which boasts over a quarter million employers as members), in 1996 only 51% of employers used criminal background checks for their hiring decisions (Evren Esen, SHRM Workplace Violence Study, 2004, at 19). By contrast, in 2010 the same organization found that over 92% of their member organizations (employers) used criminal background checks in their hiring decisions (<http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx>).

This shocking increase in the number of people with criminal records—coupled with the staggering increase in the use of criminal records in determining employment eligibility—are why it is timely and vital to revisit the notion of ensuring uniformity in the content, manner, presentation and formatting of criminal records so that: the growing population of men and women with records will not be unjustly denied the opportunity to care for themselves and their families; commercial background reporting agencies can produce a better quality product; and, employers will be more likely to properly interpret a person's record and assess their candidacy for various positions.

A Significant Majority of Employers Refuse to Hire Individuals with Criminal Records

As significant as it is that 92% of employers use criminal records in the hiring process, that figure is even more disturbing given that 65% of employers surveyed by the National Institute for Justice refuse to hire individuals with criminal records—regardless of the offense on the individual's record (<https://www.ncjrs.gov/pdffiles1/nij/184253.pdf>).

What All This Means

A person who is routinely rejected by employers still needs to find a way to eat, keep a roof over their heads, and provide for their families. Consequently, studies consistently show that failing to give individuals with criminal records (particularly those who are just released from prison) a chance to

acquire gainful employment significantly increases their risk of committing another crime (recidivating). According to a study in Illinois that followed 1,600 individuals recently released from state prison, only 8 percent of those who were employed for a year committed another crime, compared to the state's 54-percent average recidivism rate (American Correctional Assoc., 135th Congress of Correction, Presentation by Dr. Art Lurigio (Loyola University) Safer Foundation Recidivism Study (August 8, 2005)).

Given the exorbitant recidivism rate in Illinois and in other states, a significant portion of the over \$68 *Billion* that the federal, state and local governments spent on corrections in 2006 alone (versus \$9 billion in 1982 –both statistics per the U.S. Bureau of Justice Statistics) is spent on people who, if they could access the employment market, have already had contact with the criminal justice system. Therefore, reducing the number of people who recidivate would at once save the government money spent on corrections costs and increase public safety.

Given the above, a policy ensuring that criminal records have some uniformity as it relates to content, presentation and format would help do much more than improve data management for background check companies, it would increase public safety, save the government money, help employers avoid getting sued and help men and women across our nation get the jobs they need to take care of themselves and their families.

Governmental Response to Accuracy Issues

The Fair Credit Reporting Act (15 U.S.C. § 1681) is the principle means by which commercial background checking companies are policed for accuracy. The Fair Credit Reporting Act (FCRA) requires the background checking companies, amongst other things, provides a copy of the report to the employer to then give the applicant to review for accuracy. Lastly, FCRA requires that agencies provide a no-cost means for individuals to contest the contents of a record. The issue, in practice, is that many applicants do not know they are entitled to a copy of their report and never get a chance to review it for accuracy. The other issue is that even when people do get a copy of their record, the record may not indicate that there is an opportunity to dispute the record or provide a clear means to do so. Consequently, FCRA alone is not sufficient to address the issues at hand and more must be done to ensure that criminal records reflect the truth as it relates to a person's background.

Impact of Federal Laws and Regulations on this Proposed Subject

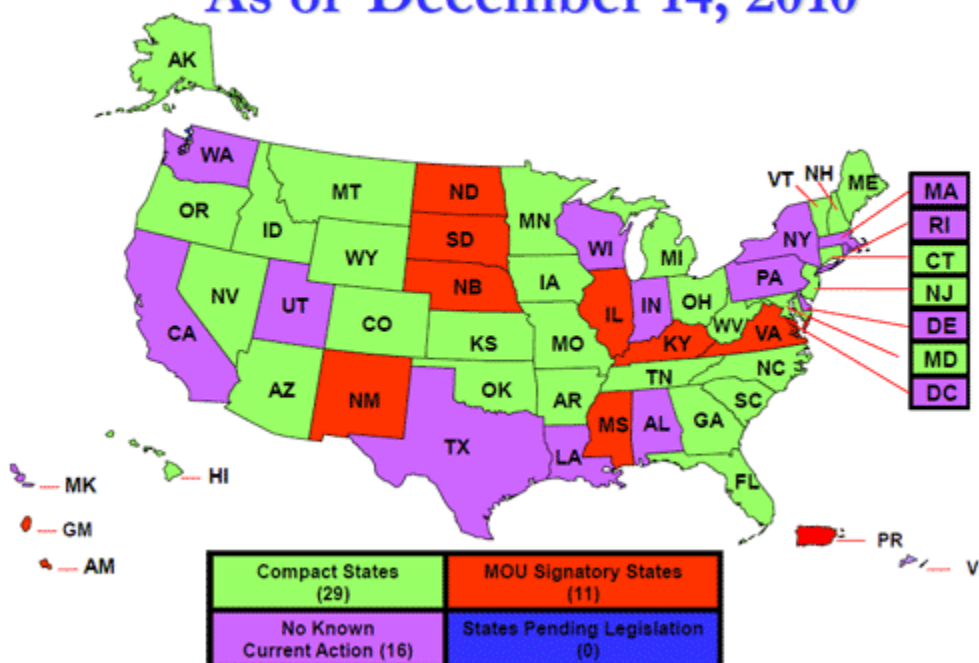
National Crime Prevention and Privacy Compact²

On October 9, 1998, President Clinton signed into law the National Crime Prevention and Privacy Compact, establishing an infrastructure by which states can exchange criminal records for noncriminal justice purposes according to the laws of the requesting state and provide reciprocity among the states

² Information contained in this section was obtained from the website of the Federal Bureau of Investigation (<http://www.fbi.gov/about-us/cjis/cc/cc>) – 12/20/11.

Compact States and Territories

As of December 14, 2010



Identity of Organizations or Persons Interested in the Subject Area, and Assessment of Support/Opposition

- American Bar Association Criminal Justice Division – supported the proposal in the past
- Sargent Shriver National Center on Poverty Law – supports the proposal

Availability of Existing Research and/or Financial Support

Existing research can be found from several reports released by the Department of Justice and the Federal Bureau of Investigations along with information that may be available from state agencies.

No financial support for this proposal has been identified at this time.

References

The supporting documents listed below can be provided to members of the Committee on Scope and Program upon request. These documents were not included as a part of this proposal because they are voluminous.

- 2008 Survey of State Criminal History Information Services (also can be found at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1755>)
- Use and Management of Criminal History Record Information: A Comprehensive Report, 2001 Update
- National Crime Prevention and Privacy Compact: Resource Materials (also can be found at http://www.fbi.gov/about-us/cjis/cc/the-compact/the_compact)
- A Memorandum of Understanding Between the State and the National Crime Prevention and Privacy Compact