2021 LEGISLATIVE SUMMARY BRIEF

CRIMINAL JUSTICE

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See the **2021 Legislative Summary Report** for Criminal Justice, which highlights policy measures that received a public hearing during Oregon's 2021 Regular Legislative Session.

CRIMES

In 2009, the Legislative Assembly amended ORS 163.412, the crime of sex abuse in the second degree, to provide increased penalties for certain sexual abuse committed by a person who was the victim's coach at the time of the abuse. Senate Bill 649 further amends the statute to provide those same increased penalties for the crime of sex abuse in the second degree for certain sexual abuses committed against a minor when the defendant is the victim's teacher.

Senate Bill 752 (SB 752) provides legislative clarification of existing law after a recent Court of Appeals decision. In *State v. Haltom*, the court held that the "does not consent" element of second-degree sexual abuse under ORS 163.425(1)(a) (2019), absent clear legislative intent, is a "conduct element" and requires a knowing mental state, contrary to some local jurisdiction's procedural practice. SB 752 creates an affirmative defense to an allegation of second-degree sexual abuse based on non-consent if a jury finds the defendant reasonably believed the victim did consent to the sexual intercourse. The measure also amends sex offender registration exceptions under sex abuse in the second degree to align with existing exceptions.

CRIMINAL PROCEDURES

In 2017, the Legislative Assembly reconvened the Public Safety Task Force (PSTF) to study security release, including the disparate impact on racial and ethnic populations, and alternative mechanisms of reducing failure to appear at court hearings. In December of 2020, the PSTF submitted its final report with recommendations for changes to Oregon's pretrial framework. Senate Bill 48 adopts some of the PSTF's recommendations. The measure eliminates certain mandatory minimum security amounts currently in statute and requires courts and pretrial release officers to conduct individualized assessments when making release determinations and setting security.

House Bill 2002, House Bill 2169, Senate Bill 191, and Senate Bill 401 (*all not enacted*) proposed to modify several aspects of the criminal justice system by repealing certain mandatory sentences, amending limitations on reductions in prison and probationary sentences, reducing law enforcement arrest authority, and directing Justice Reinvestment funds to be distributed to culturally specific and response service providers.

Among Oregon's statutory exceptions to the inadmissibility of hearsay in certain court proceedings are statements offered against a party who engages in wrongful conduct intended to cause the declarant to be unavailable as a witness, and the witness is in fact made unavailable. A recent Oregon Supreme Court decision, *State v. Iseli,* held that the unavailability of the witness had not been established because the state had not sought a material witness warrant or a remedial contempt order against the victim, and therefore certain hearsay statements of the witness should not have been admitted. Senate Bill 177 amends the hearsay statute and states that the proponent of a statement is not required to issue a material witness warrant in order to establish the unavailability of a witness.

Applying to set aside a conviction, arrest, or citation can be a difficult-to-navigate process. With Senate Bill 397, the Legislative Assembly sought to streamline that process. If a sentence on a qualifying conviction has been served and a defendant does not have any pending criminal charges, and after the passage of a period of time, a person may apply by motion to the appropriate court for an order setting aside an arrest or conviction. The measure modifies the procedure for filing a motion to set aside a conviction, arrest, citation, or charge; eliminates fees, fingerprinting, and background checks; and reduces the waiting period for filing the motion for several categories.

Under Oregon criminal statutes relating to sexual offenses, a person is considered incapable of consenting to a sexual act if the person is “mentally defective” as defined by statute. Senate Bill 566 removes the term mentally defective and instead states that a person is incapable of consent if the person is incapable of appraising the nature of their conduct and provides specific factors for the trier of fact to consider in evaluating a person's ability to appraise the nature of their conduct.

Prior to the passage of Senate Bill 620 (SB 620), a person sentenced to probation was required to pay a monthly fee to offset the costs of supervising the probation, parole, post-prison supervision, or other supervised release (ORS 423.570, 2019). Timely payment of the fee was a condition of such probation, parole, post-prison supervision, or other supervised release. SB 620 repeals the authority to impose or collect a monthly fee to offset the costs of conducting an individual's court-ordered supervision.

Senate Bill 704 amends Oregon’s existing extreme emotional disturbance defense and self-defense statutes by prohibiting a person from asserting a claim of self-defense or extreme emotional disturbance based on the discovery of the victim’s actual or perceived gender, gender identity, or gender expression.

Oregon law generally prohibits a person from secretly recording the conversations of others, with numerous exceptions, and covers the recording of conversations, radio communication, and telecommunication. House Bill 2459 includes video conferences within the definition of a "conversation" and extends the exception on recording oral communications that are part of public meetings, classes, or private meetings or conferences that the participants knew were being recorded, to include communication occurring through a video conferencing program.

Oregon statutes provide several categories of protection orders for individuals meeting certain qualifying risk factors and/or circumstances. Once granted, these orders impose restrictions on contact between the petitioner and an identified respondent. House Bill 2746, through the creation of the Hope Card Program, provides that the petitioner of a court-ordered protection order is provided a card containing information relevant to and necessary for confirming the existence of the protection order.

JUVENILES

In Oregon, adult offenders are housed at Department of Corrections (DOC) facilities and youth offenders are housed at Oregon Youth Authority (OYA) facilities, including the small number of juveniles who are prosecuted as adults and sentenced to terms of imprisonment at DOC before they reach age 20 (ORS 420.011; Senate Bill 1008 (2019)). When a juvenile reaches the age of 25 while at OYA with time remaining on their sentence, they are transferred to a DOC facility. Presently, release of DOC records regarding persons in the custody of DOC is covered by ORS 192.355(5) (2019), and the standard for release of records relating to youth in the custody of OYA can be found in ORS 419A.257 (2019). DOC youth in OYA custody are not considered to be under either standard for records release. Senate Bill 134 institutes a public interest test for OYA to release information or records prepared or maintained by the OYA regarding a person who is in the custody of DOC and temporarily assigned to a youth correctional facility, resolving ambiguity about which records disclosure standard should apply to those youth.

Letter bank programs provide incarcerated persons an opportunity to communicate to the victims regarding their criminal behavior, their understanding of the harm caused by their crime, and to acknowledge responsibility for the consequences of

their behavior. Inmates generally may also share the positive things they have done and the steps they have taken to change their lives. OYA does not have a letter bank program, although DOC does have rules allowing such a program (OAR 291-205-0200). Senate Bill 133 lays the foundation for OYA to create a letter bank program. The measure describes the purpose and scope of an OYA "facilitated dialogue and responsibility letter bank program" and the protections for communications within the program and allows OYA to disclose to a victim certain information about the youth offender.

Oregon law allows for youth offenders and their families to be assessed for costs throughout the juvenile court system process. Youth offenders and their families may be charged for the administrative costs of determining eligibility for legal and other services related to appointed counsel, a blood or buccal sample, mental health assessments or screenings, medical care, education services, supervision, and child support. Although not applied uniformly throughout the state, a youth offender and their family may also be sanctioned for failing to pay court-related costs. Those sanctions may include extended supervision, late fees, collections, and tax liens. Senate Bill 817 retroactively and proactively eliminates fees, fines, and court costs associated with juvenile delinquency matters and provides for court-appointed counsel at state expense for all juvenile delinquency matters. The measure does not affect restitution. Senate Bill 422 (*not enacted*), was an earlier version of the bill and did not include the elimination of fines.

When a youth has contact with law enforcement or the juvenile court, records are created. Some information in those records can be accessed by potential employers, landlords, and others. Approximately four percent of eligible youth successfully apply annually for their records to be expunged. After expunction, a person can legally state the record never existed, and the contact never occurred. The Legislative Assembly addressed the low percentage of qualified persons who were receiving the benefit of juvenile record expunction in Senate Bill 575 (SB 575). The automatic expunction process in SB 575 applies to youth who reach the age of 18 and have been referred but were never adjudicated. The measure also creates an automatic expunction procedure for certain types of juvenile records and provides for court-appointed counsel for financially eligible applicants in the beginning of the process.

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