



ACT 263/01

CRIMINAL HISTORY RECORD CHECKS

REPORT TO THE 2003 LEGISLATURE

Prepared By
Hawaii Criminal Justice Data Center
Department of the Attorney General

State of Hawaii
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FOREWORD

This report was prepared in response to Act 263, SLH 2001, Relating to Criminal History Record Checks, which established a representative Working Group within the Department of the Attorney General to review policy issues concerning the non-criminal justice access and use of criminal history record information for employment and licensing purposes and to make recommendations to the Legislature.

The Department of the Attorney General extends its sincerest appreciation to the members of the Working Group for their hard work, taking on this massive task in addition to their already overflowing workload with such professionalism and objectivity. Their dedication to the directive and their ability to put the mission of the Working Group before their own jurisdictional perspectives were commendable as evidenced in the consensus from all 27 members on all issues and the proposed legislation.

EXECUTIVE SUMMARY

Act 263, Session Laws of Hawaii (SLH) 2001, Relating To Criminal History Record Checks was passed by the 2001 State Legislature to implement the recommendation of the 2001 Legislative Reference Bureau's (LRB) study on issues relating to the use of criminal history record checks in the State of Hawaii.

Act 263, SLH 2001, provided for the establishment of a temporary Criminal History Record Check Working Group (hereinafter "Working Group") to review the policy issues raised by the LRB Study. All the major players named in this Act were represented in the Working Group with the exception of the Civil Service Commission. Working Group members included private and public employers, private and public employee representatives, and licensing programs' designees.

The Working Group was charged with reporting back to the 2003 State Legislature with their recommendations and proposed legislation. Thirteen (13) issues were specifically included in the Act for the Working Group to address.

Recommendations of the Working Group

One prevailing requirement was the need for consistency within similar employment/licensing function, regardless of jurisdictional boundaries. For example, there were discrepancies in employment practices between the State, the Counties and the Judiciary. These are all governmental agencies, for which there was no significant reason for following disparate practices for the same type of employment check.

On the other hand, there were differences in practices and standards that the Working Group agreed were justified, requiring that a delicate balance be maintained for public versus private employers, for general employment versus licensing functions, and for care providers or employees responsible for, or in contact in any way with the more vulnerable populations (such as the elderly, the youth, and those individuals diagnosed as having mental or physical disabilities), and for public safety.

Legislation Overview:

The following legislative changes are being proposed:

1. Chapter 378, HRS:

Section 378-2.5, HRS – Employer inquiries into conviction record. Proposed language would specify the entities that are exempt from the post-offer provision and would exclude any incarceration time from the ten year look back period.

2. Chapter 831, HRS:

Section 831-3.1, HRS – Prior convictions; criminal records; non-criminal standards. Conflicts between Chapter 831, HRS vs. Chapter 846, HRS and Chapter 831, HRS vs. Chapter 378, HRS were addressed. Included was the deletion of ambiguous language related to the age and types of criminal history information that can be used for employment and licensing type purposes. In order to provide parity with private employers, the State and counties will be allowed to consider criminal convictions under the ten year rational relationship standard.

Section 831-3, HRS – Rights retained by convicted person. Clarification of ambiguous language.

3. Chapter 846, HRS – Hawaii Criminal Justice Data Center:

Standard language for criminal history record checks is being proposed, along with the deletion of program specific language for individual non-criminal justice programs.

4. Revisions to the following in order to incorporate proposed standard CHRC language in Chapter 846, HRS, for existing authorized programs:

- Chapter 78, HRS – Public Service.
- Chapter 281, HRS – County Liquor Commissions; criminal history checks.
- Chapter 302A, HRS – Education. Department of Education.

- Chapter 302A, HRS – Education, Employees of private schools.
- Chapter 321, HRS – Employees of the Department of Health, its providers and sub-contractors; criminal history checks.
- Chapter 333F, HRS – Services For Persons With Developmental Disabilities Or Mental Retardation. Department of Health.
- Chapter 346E, HRS – Nursing Facility Tax. Department of Human Services.
- Sections 346-16, -17, -19.6, HRS – Department of Human Services. Child Care Providers and Foster Boarding Homes.
- Sections 346-19.7, HRS – Prospective adoptive parents; standards and home studies. Department of Human Services.
- Sections 346-151, -154, HRS – Child care facilities. Department of Human Services.
- Sections 352-1, -5.5, HRS – Criminal history record checks. Hawaii Youth Correctional Facilities.
- Section 353C-5, HRS – Criminal history record checks. Department of Public Safety.
- Section 463-9, HRS – Form of application for license. Private Investigators and Guards.
- Sections 571-2, -34 HRS – Criminal history record checks. Judiciary’s detention facilities.

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ACT 263, SESSION LAWS OF HAWAII 2001
CRIMINAL HISTORY RECORD CHECKS
REPORT TO THE 2003 STATE LEGISLATURE

Act 263, Session Laws of Hawaii (SLH) 2001, Relating To Criminal History Record Checks was passed by the 2001 State Legislature to implement the recommendation of the 2001 Legislative Reference Bureau's (LRB) study on issues relating to the use of criminal history record checks in the State of Hawaii.

I. Background

Criminal history record information is collected and maintained by the Department of the Attorney General's Hawaii Criminal Justice Data Center for offenders who have been arrested in the State of Hawaii. Two decades ago, this information was available primarily to criminal justice agencies for criminal justice purposes only. Since then, statutes at both the state and federal level have been passed for the use of this information for non-criminal justice purposes. This trend has seen an even more accelerated growth in recent years.

Each year, the State Legislature has been faced with an ever-growing number of new requests for statutory authorization to use criminal history record information as part of employment background checks, certifications, and licensing of individuals. The existing statutes reflect a piecemeal approach to the use and dissemination of criminal history information resulting in inconsistencies across programs that need to be addressed.

Senate Concurrent Resolution No. 122, Session 2000, requested that the LRB conduct a comprehensive study of this area that would provide a review of a number of issues including current legislation, both federal and state, with recommendations for determining who should be subject to these background checks, whether Hawaii should be an open records state, and if legislation is necessary.

The LRB Study was submitted to the 2001 State Legislature, along with legislation that was passed as Act 263, SLH 2001.

Act 263, SLH 2001, provides for the establishment of a temporary Criminal History Record Check Working Group (hereinafter "Working Group") to review the policy issues raised by the LRB Study. The Working Group was charged with reporting back to the 2003 State

Legislature with their recommendations and proposed legislation. Thirteen (13) issues were included in the Act for the Working Group to address. A copy of Act 263, SLH 2001 is included as Attachment A.

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II. Working Group Proceedings

A. Working Group Organization:

The agencies and boards named in Act 263, SLH 2001, to participate in the Criminal History Record Check Working Group were contacted to designate their representatives and alternates. In addition, Ms. Liane M. Moriyama, Administrator of the HCJDC, and Ms. Kathy Watanabe, Supervising Deputy Attorney General for the Employment Law Division, were named chair and co-chair respectively by the Attorney General. Additional participants from the Department were added to the Working Group.

All the major players named in Act 263, SLH 2001 were represented in the Working Group with the exception of the Civil Service Commission. The Commission declined to participate because the agency would be replaced in 2002. Working Group members included private and public employers, private and public employee representatives, and licensing programs' designees. See Attachment B for a completed list of participants.

The first meeting was held in December 2001, and subsequent meetings were held regularly through December, 2002.

B. Working Group Approach:

The Working Group's first approach to the issues in the Act was to group similar issues together and to divide members into sub-working groups reflecting their specific interest in these issues. This resulted in two sub-working groups, one focused on employment related issues and the other on licensing functions. Nonetheless, there was a significant overlap, with a number of issues affecting both groups.

After in-depth discussions in separate sessions, the group reconvened as a whole in order to reach consensus on the issues raised and to develop the necessary changes needed to existing State laws to address the primary problems at hand:

- Disparate practices.
- Inconsistencies.
- Duplicative language in the statutes.

C. Act 263, SLH 2001 Active Issues

The following are the point-by-point responses by the Working Group on the 13 issues specifically identified in Act 263, SLH 2001:

(1) Should Hawaii employment practices law with respect to the use of criminal history record information also apply to licensing decisions? If there should be any differences, what should those differences be?

Response:

The standard for consideration of criminal history record information for a private employer is very limited. Chapter 378, Hawaii Revised Statutes (HRS) has a number of provisions that limit such use, including:

- That it is discriminatory for an employer to consider the arrest and court record of an individual applying for employment, Section 378-2(1)(A), HRS;
- That criminal conviction information can be considered only for a “look-back” period of ten years, and only after an offer of employment has been made, Section 378-2.5(b) and (c), HRS; and
- That a rational relationship must exist between the job requirements and the nature of the conviction, Section 378-2.5(a), HRS.

The Working Group concurred that governmental agencies have different significantly different interests and responsibilities from the private employer. Under certain circumstances, this would warrant the use of criminal history record information by governmental

agencies that must be balanced by additional guidelines, to avoid misuse of such sensitive information, and by an appeals process to provide recourse for those cases where applicants believe they were not fairly treated.

Specifically, the responsibilities of governmental agencies for the employment and licensure of service providers for vulnerable sectors of the community such as the very young, the elderly, or individuals diagnosed as having mental or physical disabilities, call for more stringent employment/licensing standards. For example, government licensing operations, like Child Care Licensing under the Department of Human Services (DHS), are charged with protecting young children from harm while they are in out-of-home placements. The Department is required to ensure the suitability of these child care environments and to protect infants, toddlers, and individuals up to the age of 13 from being harmed while under the care of such licensees. A check of criminal history and child abuse records of persons seeking employment or licensure as child care providers is performed. DHS bars persons with convictions related to violence, sex, or drug offenses from working with young children. This prohibition could be permanent or for a specific period of time (e.g. 5 years), depending on the severity of the offense.

- (2) Are there any guidelines to determine when a conviction is “rationally related” to the job? If so, what are they?

Response:

The Hawaii Civil Rights Commission (HCRC) investigates complaints of employment discrimination arising from an employer’s hiring decision based on the rational relationship of an applicant’s conviction to the job. In investigations of such complaints, an employer is required to show a rational relationship between the conviction and the duties and responsibilities of the position. Although no administrative rules or guidelines have been adopted by the HCRC to set forth when a conviction is “rationally related” to the job, the rational relationship standard is not a difficult one to satisfy, requiring only a showing of an understandable or rational connection between the offense and how it may affect an individual’s ability to perform the job duties and functions. Almost any conceivable relationship between the offense and the job will likely satisfy the rational relationship standard. The HCRC enforcement section has determined that records of conviction for crimes of violence or dishonesty meet the rational relationship standard for a broad range of jobs.

The legislative history surrounding the enactment of HRS § 378-2.5 provides ample grounds for applying this standard most expansively to enable employers to protect their businesses, customers and employees. Representative Terrance Tom, then Chair of the House Judiciary Committee, which amended the bill, rose on the floor to speak in favor of the bill saying:

the “rational relationship” between the job and the conviction is the lowest standard you can look at. We took that standard because “rational” is a lot lower than “substantial”. “Rational” is a lot lower than “reasonable”. “Rational” is a very, very low and fair relationship to establish.

1998 House Journal at 770, testimony on House Bill 3528. Likewise, Rep. Pendelton stated:

The intent of this body, and I just wanted to make it clear that, at least for my thinking, that I think that pretty much any conviction would bear “rational relationship” to job qualifications. For example, if someone were convicted of a violent crime or a crime where physical violence was committed against someone else, I think any employer who wants to keep his or her employee safe, any conviction like that would bear relationship on the employer/employee relationship.

I also think that any conviction involving integrity, theft, anything like that, bears a “rational relationship” to any kind of employee situation regardless of whether you’re driving a truck or teaching kids. Also, DUIs, other kinds of things that bear on whether a person has propensity for playing fast and loose with the rules, or the person is civic-minded and understands that there are certain rules and behaviors that are required of all of us as citizens, I think any kinds of convictions that bear on those kinds of issues would be rationally related.

And so I want the record to clearly reflect that just about any conviction, I think, if a person cannot live up to the rules established by the State of Hawaii, the rules which set forth what is acceptable conduct in our State, if you cannot live up to that and you commit a crime and are duly convicted, I think that is going to bear on the employer/employee relationship.

- (3) When statutory authorization, or a Bona Fide Occupational Qualification (BFOQ) requirement, or both, allows consideration of arrest and court record:
- (A) Is age of convictions that may be considered limited to convictions less than 10 years old?
 - (B) Is there an age limit for arrests that may be considered?

- (C) Are arrests required to be reasonably necessary to the operation of the business and substantially related to the job?
- (D) Is a conditional offer of employment required before consideration of conviction data or non-conviction data, or both are allowed?

Response:

Age of convictions:

For a statutory authorization (where an employer is specifically allowed by state or federal law to consider convictions when hiring for particular jobs) or a BFOQ, there is no limitation regarding the age of convictions that may be considered. For all other cases, under Section 378-2.5, HRS, the limitation on consideration of convictions up to ten years was considered a reasonable period of time to determine that an individual was no longer involved in criminal behavior and should be given an opportunity for employment.

However, the Working Group believes that the calculation of the ten year time period should be changed to take into consideration the fact that a recently-released individual, who may have been incarcerated for more than ten years, would not have a conviction record that could be considered by an employer. Because the arrest and court record law was designed to balance an individual's right to employment with an employer's right to prevent harm to its business, employees, and persons who may fall under its care, a strict ten year time period could prevent employers from considering convictions for violent and serious crimes where the individual serves a long sentence. To address this problem, the Working Group recommends an amendment to Section 378-2.5, HRS that allows employers to exclude any period of incarceration from the ten year period. Not counting the period of incarceration will enable employers to consider the more serious offenses for which employers have a significant concern.

In order to provide parity with private employers, changes to Section 831-3.1, HRS are being proposed to allow the State and counties to consider criminal convictions under the 10-year rational relationship standard.

Age limit of arrest records and use of arrest records:

Generally, records of arrest without conviction cannot be considered at all regardless of age. Most employers under state law do not have statutory authorization to obtain or consider arrest records which are confidential under Chapter 846, HRS. A limited number of employers have statutory authorization to obtain state and national criminal history record information which could include arrest

records without any age limit for the arrest.

The Working Group discussed the pros and cons of allowing employers to consider arrests, which do not result in convictions, including arrests and indictments, which lead to a deferred acceptance of a guilty plea (DAG) or deferred acceptance of a plea of no contest (DANC). Based on the Working Group's review of the current statutes and the finding that DAG/DANC pleas are not allowed for offenders with the more serious offenses, the Working Group is recommending that public employers be allowed to consider an arrest record only for investigative purposes in those instances where the Department of Human Resources Development (DHRD), Judiciary, and the Counties seek parity and consistency with those public employers that are allowed to obtain criminal history information (including arrest records) because their employees are involved with vulnerable populations or public safety (see #5 for details).

Pre-offer versus post-offer:

For employers with a statutory authorization under state or federal law or a BFOQ, a conditional job offer is not required before consideration of conviction data.

All other private and public employers are required to make a conditional offer of employment before obtaining criminal conviction information under Section 378-2.5, HRS. The Working Group identified ambiguities in Section 378-2.5, HRS which led several employers with statutory authorizations to believe that a conditional offer of employment was required before a criminal history background check could be conducted. To eliminate the confusion, the group recommends an amendment to Section 378-2.5, HRS to specifically advise employers with statutory authorizations of their right to conduct a criminal history record check before an offer of employment is made. The proposed amendment will include a reference to the statutes authorizing these employers to conduct such inquiries.

- (4) Does a criminal history record check that is authorized, but not required, by statute constitute a BFOQ exception that allows consideration of arrest and court records?

Response:

A criminal history record check that is authorized, but not required, by statute constitutes an exception under Section 378-3(1), HRS, which provides that the employment discrimination law does not “repeal or affect any law, ordinance, or government rule having the force and effect of law.” This would supersede the general prohibition against discrimination because of arrest and court record in Section 378-2, HRS.

However, a criminal history record check that is authorized, but not required, by statute is not considered a BFOQ exception because a BFOQ is separately authorized under Section 378-3 (2), HRS and may be established by an employer that can show it is “reasonably necessary to the normal operation of a particular business or enterprise, and that it has a substantial relationship to the functions and responsibilities of prospective or continued employment.” Employer-established BFOQs are narrowly tailored exceptions from the general prohibition against discrimination because of arrest and court record.

- (5) Should Hawaii employment practices law be amended to expressly authorize consideration of both conviction and non-conviction data when an employer is statutorily authorized to conduct a criminal history record check of an individual’s criminal history record information (which includes both conviction data and non-conviction data) to determine employment suitability? If so, what restrictions, if any, should be imposed on an employer’s consideration of criminal history record information?

Response:

Presently, only conviction data are available to the public. Non-conviction data are not available to the public under Section 846-9, HRS; however, non-conviction data is provided to certain government agencies by statutory authorization.

The Working Group had significant discussions on the merits and value of non-conviction data as one of the factors in determining job suitability. It also discussed the appropriateness of such a change to Chapter 831, HRS, with its broad applicability to government and licensing functions. The group agreed that while non-conviction data alone may not provide a conclusive basis for determining job suitability, it can provide justification for further investigation.

However, it was concluded that DHRD, Judiciary, and County personnel offices would seek to address the apparent inequity that currently exists with certain positions that have contact with vulnerable populations or involve public safety, but are not background checked to the same extent (non-conviction and national data) set by the legislature for the Department of Education (DOE),

Department of Human Services (DHS), Department of Public Safety (DPS), and Department of Health (DOH). These positions are instead filled by another government agency like DAGS, but the individuals will work in close proximity to employees who are subject to broader criminal history background checks, including non-conviction and national data. For example, DAGS employees dispatched to a school campus to do repairs are not checked to the same extent that a cafeteria worker or custodian or school employee is. In these instances, parity is being sought by the employers based on the vulnerable population involved.

- (6) Should Section 378-3, HRS, be amended to repeal paragraph (8) because it is unnecessary, duplicative, and potentially confusing?

Section 378-3, HRS, establishes “Exceptions”, stating that nothing in Chapter 378, HRS, part I, “Discriminatory Practices”, shall be deemed to prohibit or prevent public or private schools from considering criminal convictions in determining suitability for employment in close proximity to children. Sections 846-43 and 846-44, HRS, independently authorize public and private schools to conduct criminal history record checks for employment screening and Section 378-2.5, HRS, allows consideration of convictions. Other statutes that authorize other agencies to conduct employment criminal history record checks are not included as “exceptions” in Section 378-3, HRS. To include some, but not all, statutorily authorized criminal checks in Section 378-3, HRS appears to be both unnecessary and confusing.

Response:

Section 378-3(8), HRS, which allows public and private schools to consider criminal convictions in determining suitability for employment in close proximity to children, existed prior to the enactment of Sections 846-43, HRS and Section 846-44, HRS. The Working Group believes that Section 387-3 (8), HRS, plays an important role in alerting the public to the statutory authorization for public and private schools and should remain in the employment discrimination law. Sections 846-43 and 846-44, HRS contain detailed procedures on the use of criminal convictions by public and private schools which are not in Section 378-3(8), HRS, and under legislative changes being proposed by the Working Group, Sections 846-43 and 846-44, HRS will be incorporated into Chapter 302A, Education. Accordingly, the group does not recommend deleting Section 378-3(8), HRS.

- (7) Although aggrieved civil service applicants may appeal to the civil service commission, the rights of a similarly aggrieved applicant for a state job that is not civil service are unclear. Should the civil rights commission investigate complaints (by persons other than those applying for state or county civil service jobs) related to the prohibitions in Section 831-3.1, HRS, on the State’s use of certain criminal records in state employment decisions? If not the civil rights commission, then who?

Response:

Aggrieved applicants for general employment can appeal to the HCRC, which has jurisdiction over cases alleging employment discrimination. The HCRC does not have jurisdiction to investigate complaints related to Section 831-3.1, HRS. Section 831-3.1(b), HRS gives the state and counties broader latitude than private employers to consider matters in an individual's criminal history, but as a safeguard allows the individual to meet and rebut any adverse findings.

In the case of governmental agencies, denials of employment are not necessarily discriminatory actions in violation of Chapter 378, HRS. Besides the requirement that there be a direct relationship between the offense and the job being sought, a governmental agency must make a determination that the person has not demonstrated sufficient rehabilitation to warrant the public trust. So an aggrieved person who applies for non-civil service employment has recourse through internal complaint procedures pursuant to Section 76-42, HRS, which are established in various State and County rules, and for civil service employment to the Merit Appeals Board, as described in Section 76-14, HRS.

The HCRC will investigate complaints to determine if the employment discrimination law has been violated. But the HCRC cannot enforce the substantive provisions in Section 831-3.1, HRS.

(8) Similarly, what remedies are (or should be) available for license applicants who believe their license was denied or revoked based on the State's use of non-conviction or conviction data?

Response:

A governmental agency that is authorized to use criminal history record information as part of a licensure process must provide for an appeals process for individuals whose applications are denied or whose licenses are revoked. The individual departments need to develop and adopt procedures for standards and time lines that should be followed in hearing these appeals.

As an example, under Section 346-12, HRS, the Fair Hearings Statute, a license applicant or recipient deeming oneself aggrieved, is entitled to an appeal to the Administrative Appeals Office of DHS. There are hearings officers available to review such complaints against DHS. Specific programs address the right to a hearing in adopted rules. The appeals process can be made for any decision

that adversely affects the applicant or recipient. DHS has and requires discretion in granting, suspending, or revoking licenses. However, they also believe that there must be an adequate remedy available for license applicants through an established appeals process.

(9) Since the unlimited availability of Hawaii conviction data allows public access to convictions regardless of age, does this conflict with an employer's ability to consider only those rationally related convictions less than ten years old? If so, how should the conflict be reconciled?

Response:

The Working Group does not believe that there is a conflict between allowing public access to records of conviction regardless of age and the employer's ability to consider convictions for a ten year period. The fact that an employer has access to conviction records beyond the ten year limit does not necessarily mean that such records would be used. If an employer considered convictions outside the ten year time period, it would violate the law. By analogy, an employer may have knowledge of an employee's or prospective employee's apparent race, sex, or age, but cannot discriminate on any of these bases.

(10) Does the prohibition in 28 CFR Section 20.21(b) continue to restrict states that received federal funding in connection with the collection, storage, dissemination of criminal history record information in the dissemination of state non-conviction data?

Response:

No. 28 CFR Section 20.21(b) states: Limitations on dissemination. Insure that dissemination of non-conviction data has been limited, whether directly or through any intermediary only to:

(1) Criminal justice agencies, for purposes of the administration of criminal justice and criminal justice agency employment;

(2) Individuals and agencies for any purpose authorized by statute, ordinance, executive order, or court rule, decision, or order, as construed by appropriate State or local officials or agencies;

(3) Individuals and agencies pursuant to a specific agreement with a criminal justice agency to provide services required for the administration of criminal justice pursuant to that agreement. The agreement shall specifically authorize access to data, limit the use of data to purposes for which given, insure the security and confidentiality of the data consistent with these regulations, and provide sanctions for violation thereof;

(4) Individuals and agencies for the express purpose of research, evaluative, or statistical activities pursuant to an agreement with a criminal justice agency. The agreement shall specifically authorize access to data, limit the use of data to research, evaluative, or statistical purposes, insure the confidentiality and security of the data consistent with these regulations and with Section 524(a), HRS of the Act and any regulations implementing Section 524(a), HRS and provide sanctions for the violation thereof. These dissemination limitations do not apply to conviction data.

All of the above provisions on limitations on dissemination are already a part of Section 846-9, HRS, which provides the statutory guidelines for criminal history information disseminated from the statewide criminal history record information system (CJIS-Hawaii).

(11) Consider repeal of S831-3.1, HRS, which restricts the State's use, distribution, and dissemination of certain criminal records in employment and licensing decisions to eliminate redundant, unnecessary, duplicative, or conflicting laws.

The State is subject to Hawaii law governing the dissemination and use of criminal history record information in employment decisions in the same manner as any other employer.

Clarification of the State's authority to access and use criminal history record information for licensing purposes is recommended. Limitations identical to those limiting access and use in employment matters are suggested.

Response:

The Working Group has drafted new language to clarify the applicability of Section 831-3.1, HRS for public employment and licensure use. State departments with specific authority to conduct criminal history record checks for employment or licensure purposes have reviewed their statutes for currency and relevance. Further, an amendment has been proposed to Section 378-2.5, HRS

to make clear the exemption of the State and its political subdivision from this particular statute dealing with pre-employment inquiries of criminal history records.

- (12) If Section 831-3.1, HRS is retained, clarification of “non-criminal standards such as good moral character, temperate habits, habitual intemperate use of intoxicants, trustworthiness, and the like” is recommended.

Various state departments are required to develop standards, which include criminal history record checks, to assure the “reputable and responsible character” of certain license or employment applicants. The mandatory use of criminal history record checks to assure “reputable and responsible character” in one statute and the prohibition against consideration of convictions when considering “good moral character” should be clarified and distinguished.

Response:

Section 831-3.1, HRS has been redrafted to eliminate the applicability of non-criminal standards for employment purposes to address this concern.

- (13) Whether the Department of Education and other youth-service organizations should be required to use the Hawaii sex offender website to investigate their volunteers, and if so, what should be the parameters of such use?

Response:

On November 22, 2001, a Hawaii Supreme Court ruling forced the shutdown of the State’s sex offender website, which had provided the most effective means of the public’s access to this information. Although convicted sex offenders are still required to register and the information is still available to law enforcement, a convicted sex offender must first go through a civil court hearing before the information on this offender can be made public, pursuant to Act 234, Session Laws of Hawaii 2002. There are currently over 1,900 convicted sex offenders on the registry.

The Department of Education promotes and encourages schools to use volunteers in the classroom, playground, and after school programs, and supports the concept of screening volunteers through the use of the sex offender website when it again becomes available, as convicted sex offenders are processed through court hearings.

However, it is primarily an issue of resources and funding. In order to properly implement such a program, the department will need a system to track the estimated 100,000 volunteers that may need to be screened. Requiring schools and program managers to screen volunteers with the current staffing formula would place an undue burden on the school administrative staff and discourage extra-curricular activities.

The Department of Education is responsible for public school programs and cannot comment on behalf of “other youth service organizations”.

D. Additional Working Group Issues:

Perjury versus False Swearing:

Statutory language used in conjunction with criminal background checks has not been consistent in past legislation. Perjury does not appear to be the appropriate criminal offense for these situations, because such false statements are not submitted under an oath or in an official proceeding. There are three statutory provisions that could be more appropriately used under these circumstances:

- Section 710-1061 (False swearing in official matters; misdemeanor)
- Section 710-1062 (False swearing; petty misdemeanor)
- Section 710-1063 (Unsworn falsification to authorities; misdemeanor)

The Working Group recommends that ‘under penalty of law’ be added to the proposed standard language in Chapter 846, and that it be used consistently in statutory language relating to providing false information for criminal background checks.

Other Issues:

During the 2000 legislative hearings on Act 263, there were other issues that were discussed and for which the HCJDC was given the lead, but not included in the Act itself. These issues were also brought to the table during the Working Group meetings, as many of them subsequently surfaced during the Active Issues discussion, and some that were later addressed through the proposed legislation. A summary of these other issues can be found in Attachment C.

III. Recommendations of the Working Group

One prevailing requirement was the need for consistency within similar employment/licensing function, regardless of jurisdictional boundaries. For example, there were discrepancies in employment practices between the State, the Counties, and the Judiciary. These are all governmental agencies, for which there was no significant reason for following disparate practices for the same type of employment check. For example, based on their legal review, the Judiciary determined that it could not obtain conviction information pre-offer, while the State and Counties could.

On the other hand, there were differences in practices and standards that the Working Group agreed were justified, requiring that a delicate balance be maintained for public versus private employers, for general employment versus licensing functions, and for care providers or employees responsible for, or in contact in any way with the more vulnerable sectors of society - such as the elderly, the youth, and those individuals diagnosed as having mental or physical disabilities.

A. Legislation Overview:

The following legislative changes are being proposed:

1. Chapter 378, HRS:

Section 378-2.5, HRS – Employer inquiries into conviction record. Proposed language would specify the entities that are exempt from the post-offer provision and would exclude any incarceration time from the ten year look back period.

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criminal convictions under the ten year rational relationship standard.

Section 831-3, HRS – Rights retained by convicted person. Clarification of ambiguous language.

3. Chapter 846, HRS – Hawaii Criminal Justice Data Center:

Standard language for criminal history record checks is being proposed, along with the deletion of program specific language for individual non-criminal justice programs.

4. Revisions to the following in order to incorporate proposed standard CHRC language in Chapter 846, HRS, for existing authorized programs:

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- Chapter 281, HRS – County Liquor Commissions; criminal history checks.
- Chapter 302A, HRS – Education. Department of Education.
- Chapter 302A, HRS – Education, Employees of private schools.
- Chapter 321, HRS – Employees of the Department of Health, its providers and sub-contractors; criminal history checks.
- Chapter 333F, HRS – Services For Persons With Developmental Disabilities Or Mental Retardation. Department of Health.
- Chapter 346E, HRS – Nursing Facility Tax. Department of Human Services.

- Sections 346-16, -17, -19.6, HRS – Department of Human Services. Child Care Providers and Foster Boarding Homes.
- Sections 346-19.7, HRS – Prospective adoptive parents; standards and home studies. Department of Human Services.
- Sections 346-151, -154, HRS – Child care facilities. Department of Human Services.
- Sections 352-1, -5.5, HRS – Criminal history record checks. Hawaii Youth Correctional Facilities.
- Section 353C-5, HRS – Criminal history record checks. Department of Public Safety.
- Section 463-9, HRS – Form of application for license. Private Investigators and Guards.
- Sections 571-2, -34 HRS – Criminal history record checks. Judiciary’s detention facilities.

IV. LEGISLATIVE PROPOSALS

Please refer to the following page

Report Title:

Criminal History Record Checks

Description:

Implements the recommendations of the criminal history record check working group, as established pursuant to Act 263, SLH 2001, to address inconsistencies and duplicative statutory language authorizing record checks for employment background checks, certifications, and licensing of individuals.

A BILL FOR AN ACT

RELATING TO CRIMINAL HISTORY RECORD CHECKS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that each year the
2 legislature has been faced with an ever-growing number of new
3 requests for statutory authorization to use criminal history
4 record information as part of employment background checks,
5 certifications, and licensing of individuals.

6 The large amount of legislation, spread across an equally
7 large number of statutes, has made it a difficult task to ensure
8 that all affected statutes are covered when making statutory
9 changes. The variety of legislation that covers these programs
10 has resulted in a piecemeal approach that now reflects
11 conflicting language and inconsistencies across the programs,
12 which the affected programs and the legislature want addressed.

13 Senate Concurrent Resolution No. 122 (2000) requested that
14 the legislative reference bureau conduct a comprehensive study
15 of this area that would provide a review of a number of issues
16 including current legislation, both federal and state, with
17 recommendations for determining who should be subject to these
18 background checks, whether Hawaii should be an open records

1 state, and if legislation was necessary. The bureau's study was
2 submitted to the 2001 legislature, along with legislation that
3 was enacted as Act 263, Session Laws of Hawaii 2001.

4 The bureau's study found that Hawaii's laws relating to
5 criminal history record checks were entangled in a significant
6 state of confusion, not quickly or easily clarified. The
7 various laws that govern access and use of criminal history
8 records and laws that authorize criminal history record checks,
9 when considered together, are often redundant, unnecessary,
10 duplicative, or inconsistent, overlapping in some areas and
11 conflicting in others. Moreover, the study found that there was
12 little common understanding of what is meant by the term
13 "criminal history record check", what criminal history records
14 are available to employers or the general public, and how those
15 records can be used in employment and licensing decisions.
16 Criminal history record checks cannot be examined in isolation;
17 related laws governing access and use must also be considered.
18 All stakeholders must be involved and informed. Accordingly,
19 the study recommended the creation of a criminal history record
20 check working group of all stakeholders to resolve policy issues
21 raised by the study relating to the access and use of criminal
22 history record information for the noncriminal justice purposes

1 of employment and licensing determinations and submit
2 recommendations to the legislature.

3 The purpose of this Act is to implement the recommendations
4 of the criminal history record check working group, as
5 established pursuant to Act 263, to address disparate practices,
6 inconsistencies and duplicative language in the statutes
7 authorizing criminal history record checks for employment
8 background checks, certifications, and licensing of individuals.
9 A report that details the proceedings and recommendations of
10 this group has been submitted to the 2003 legislature.

11 This Act clarifies and eliminates conflicting language in
12 sections 831-3.1, 378-2.5, and 831-3, Hawaii Revised Statutes,
13 and eliminates inconsistencies in individual program statutes by
14 adopting standard language in chapter 846, and amending the
15 authorizing program statutes by referencing these standard
16 requirements for criminal history record checks.

17 SECTION 2. Chapter 78, Hawaii Revised Statutes, is amended
18 by adding a new section to be appropriately designated and to
19 read as follows:

20 "§78- Criminal history record checks. (a) The State or
21 any of its branches, political subdivisions, or agencies shall
22 develop standards to assure the reputable and responsible

1 characters of applicants and employees, which shall include
2 criminal history record checks in accordance with section
3 846- .

4 (b) The State or any of its branches, political
5 subdivisions, or agencies shall obtain criminal history
6 information through the Hawaii criminal justice data center on
7 applicants and employees whose duty, location, work site, or
8 assignments place them in close proximity to employees of a
9 department or agency authorized to conduct criminal history
10 record checks.

11 (1) This information shall be obtained in the same manner
12 and shall be used to the same extent as is authorized
13 for a particular department or agency;

14 (2) The Hawaii criminal justice data center may assess
15 applicants a reasonable fee for each criminal history
16 record check conducted. The information obtained
17 shall be used exclusively for the stated purpose for
18 which it was obtained, and shall be subject to such
19 federal laws and regulations as may be now or
20 hereafter adopted; and

21 (3) The State or any of its branches, political
22 subdivisions, or agencies may deny employment to an

1 applicant or employee in the same manner as a
2 department or agency which is authorized by law to
3 conduct criminal history record checks for its
4 employee when the applicant or employee whose duty
5 location, work site, or assignments place them in
6 close proximity with an employee of the department or
7 agency.

8 (c) For the purposes of this section:
9 "Applicant" means a person who seeks to become an employee.
10 "Employee" means a person holding a position whose duty
11 location, work site, or assignments places that person in close
12 proximity to other positions in a department or agency which is
13 authorized by law to conduct criminal history record checks for
14 its employees who work there."

15 SECTION 3. Chapter 281, Hawaii Revised Statutes, is
16 amended by adding a new section to be appropriately designated
17 and to read as follows:

18 "§281- County liquor commissions; criminal history
19 record check. (a) The respective county liquor commissions may
20 request a criminal history record check on an applicant for a
21 liquor license in accordance with section 846- . The criminal

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1 history record check, at a minimum, shall require the applicant
2 to disclose whether:

- 3 (1) The applicant has been convicted in any jurisdiction
4 of a crime that would tend to indicate the applicant
5 may be unsuited for obtaining a liquor license; and
6 (2) The judgment of conviction has not been vacated.

7 For the purpose of this section, the criminal history
8 disclosure made by the applicant may be verified by the liquor
9 commission by means of information obtained through the Hawaii
10 criminal justice data center. The applicant shall provide the
11 Hawaii criminal justice data center with personal identifying
12 information which shall include, at a minimum, the applicant's
13 name, social security number, date of birth, and sex. This
14 information shall be secured only for the purpose of conducting
15 the criminal history record check authorized by this section.

16 (b) The applicant shall submit to the liquor commission:

- 17 (1) A statement signed under penalty of law whether the
18 applicant has ever been convicted of a crime other
19 than a minor traffic violation;

- 20 (2) Written consent to the liquor commission to request
21 and obtain criminal history record information for
22 verification;

1 (3) Permission to be fingerprinted.
2 (c) The liquor commission shall obtain criminal history
3 record information through the Hawaii criminal justice data
4 center on the applicant. The information obtained shall be used
5 exclusively for the stated purpose for which it was obtained and
6 shall be subject to applicable federal laws and regulations
7 currently or hereafter in effect."

8 SECTION 4. Chapter 302A, Hawaii Revised Statutes, is
9 amended by adding two new sections to be appropriately
10 designated and to read as follows:

11 "§302A- Employees of the department of education and
12 teacher trainees in any public school; criminal history record
13 checks. (a) The department of education, including the Hawaii
14 state public library system, shall develop procedures for
15 obtaining verifiable information regarding the criminal history
16 of persons who are employed, seeking employment, or seeking to
17 serve:

- 18 (1) As teacher trainees in any public school; or
19 (2) In the Hawaii state public library system,
20 in positions which place them in close proximity to children.
21 These procedures shall include criminal history record checks in
22 accordance with section 846- .

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1 Information obtained pursuant to this subsection shall be
2 used exclusively by the employer or prospective employer for the
3 purpose of determining whether or not a person is suitable for
4 working in close proximity to children. All such decisions
5 shall be subject to federal laws and regulations currently or
6 hereafter in effect.

7 (b) The employer or prospective employer may refuse to
8 employ, may:

- 9 (1) Refuse to issue a teaching or other educational
10 certificate to;
- 11 (2) Revoke the teaching or other educational certificate
12 of;
- 13 (3) Refuse to allow or continue to allow teacher training;
14 or
- 15 (4) Terminate the employment of any employee or applicant,
16 if the person has been convicted of a crime, and if the employer
17 or prospective employer finds by reason of the nature and
18 circumstances of the crime that the person poses a risk to the
19 health, safety, or well-being of children. The refusal,
20 revocation, or termination may occur only after appropriate
21 investigation, notification of results and planned action, and

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1 opportunity to meet and rebut the finding, all of which need not
2 be conducted in accordance with chapter 91.

3 (c) This section shall not be used by the department to
4 secure criminal history record checks on persons who have been
5 employed continuously by the department, including the state
6 public library system, on a salaried basis prior to July 1,
7 1990.

8 (d) For the purpose of this section, notwithstanding any
9 other law to the contrary, the department of education,
10 including the Hawaii state public library system, shall be
11 exempt from section 831-3.1 and need not conduct its
12 investigations, notifications, or hearings in accordance with
13 chapter 91.

14 §302A- Employees of private schools; criminal history
15 record checks. (a) Private schools shall develop procedures
16 for obtaining verifiable information regarding the criminal
17 history of persons who are employed or are seeking employment in
18 positions that place them in close proximity to children. These
19 procedures shall include criminal history record checks in
20 accordance with section 846- . The private school and
21 designated organization shall establish safeguards and
22 procedures to protect against inadvertent or inappropriate

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1 disclosure of information obtained under this section. The fee
2 charged by the Hawaii criminal justice data center to perform
3 criminal history record checks may be passed on to the applicant
4 by the private school or designated organization.

5 (b) Information obtained pursuant to this section shall be
6 used exclusively by the private school or designated
7 organization for the purpose of determining whether or not a
8 person is suitable for working in close proximity to children.
9 All decisions shall be subject to federal laws and regulations
10 currently or hereafter in effect.

11 (c) Private schools may refuse to employ or may terminate
12 the employment of an employee or applicant if the person has
13 been convicted of an offense for which incarceration is a
14 sentencing option, and if the private school finds by reason of
15 the nature and circumstances of the crime that the person poses
16 a risk to the health, safety, or well-being of children. This
17 refusal or termination may occur only after appropriate
18 investigation, notification of results and planned action, and
19 opportunity to meet and rebut the finding.

20 (d) The State, the Hawaii criminal justice data center,
21 and their respective officers and employees, shall be immune
22 from civil liability for any official act, decision, or omission

1 performed pursuant to this section that is not the result of
2 gross negligence or wilful misconduct. The State, the Hawaii
3 criminal justice data center, and their respective officers and
4 employees shall be immune from civil liability for any act,
5 decision, omission to act or decide, or use of the information
6 by any private school or designated organization authorized to
7 receive or who receives information pursuant to this section.

8 (e) This section shall not be used by the private schools
9 to secure criminal history record checks on persons who have
10 been employed continuously by the private school on a salaried
11 basis prior to July 1, 2000.

12 (f) For the purposes of this section:

13 "Designated organization" means a private organization that
14 receives the criminal history record checks on behalf of private
15 schools."

16 SECTION 5. Chapter 321, Hawaii Revised Statutes, is
17 amended by adding a new section to be appropriately designated
18 and to read as follows:

19 "§321-___ Employees of the department of health, its
20 providers and subcontractors; criminal history checks. (a) The
21 department of health shall develop procedures for obtaining
22 verifiable information regarding the criminal history of persons

1 who are seeking employment, or seeking to serve as providers or
2 subcontractors in positions that place them in direct contact
3 with clients when providing non-witnessed direct mental health
4 services on behalf of the child and adolescent mental health
5 division of the department of health. These procedures shall
6 include but not be limited to criminal history record checks in
7 accordance with section 846- .

8 (b) Except as otherwise specified, any person who seeks
9 employment with the department of health, or who is employed or
10 seeks employment with a provider or subcontractor in a position
11 that necessitates non-witnessed direct contact with clients when
12 providing non-witnessed direct mental health services on behalf
13 of the child and adolescent mental health division, shall:

14 (1) Be subject to criminal history record checks in
15 accordance with section 846- ; and
16 (2) Provide to the department of health written consent
17 for that department to obtain other information for
18 verification.

19 Information obtained pursuant to subsection (a) and this
20 subsection shall be used exclusively by the department of health
21 for the purposes of determining whether a person is suitable for
22 working in a position that necessitates non-witnessed direct

1 contact with clients when providing non-witnessed direct mental
2 health services on behalf of the child and adolescent mental
3 health division. All such decisions shall be subject to federal
4 laws and regulations currently or hereafter in effect.

5 (c) The department of health may refuse to employ or may
6 terminate the employment of any employee or applicant if the
7 person has been convicted of an offense for which incarceration
8 is a sentencing option, and if the department of health finds by
9 reason of the nature and circumstances of the crime that the
10 person poses a risk to the health, safety, or well-being of
11 clients receiving non-witnessed direct mental health services.
12 Such refusal or termination may occur only after appropriate
13 investigation, notification of results and planned action, and
14 opportunity to meet and rebut the finding, all of which need not
15 be conducted in accordance with chapter 91.

16 (d) This section shall not be used by the department of
17 health to secure criminal history record checks on persons who
18 have been employed continuously on a salaried basis prior to
19 July 1, 2000.

20 (e) Nothing in this section shall prohibit criminal
21 history record checks on employees of all providers and
22 subcontractors.

1 (f) For the purposes of this section:

2 "Provider" means any organization or individual that
3 intends to enter into a contract with or is currently contracted
4 by the child and adolescent mental health division of the
5 department of health to provide direct mental health services to
6 the department's eligible clients.

7 "Subcontractor" means any organization or individual that
8 enters into a contract or agreement with a provider to provide
9 direct mental health services to the department's eligible
10 clients.

11 (g) Notwithstanding any other law to the contrary, the
12 department of health shall be exempt from section 831-3.1 for
13 purposes of this section and need not conduct its
14 investigations, notifications, or hearings in accordance with
15 chapter 91."

16 SECTION 6. Chapter 421I, Hawaii Revised Statutes, is
17 amended by adding a new section to be appropriately designated
18 and to read as follows:

19 "§421I- Employees of cooperative housing corporations;
20 background check. The board of directors of a cooperative
21 housing corporation, or the manager of a cooperative housing
22 project, upon the written authorization of an applicant for

.B. NO.

1 employment as security guard or manager or for a position that
2 would allow the employee access to the keys of or entry into the
3 units in the project or access to corporation funds, may conduct
4 a background check on the applicant, or direct another
5 responsible party to conduct the check. Before initiating or
6 requesting a check, the board of directors or the manager first
7 shall certify that the signature on the authorization is
8 authentic and that the person is an applicant for employment.
9 The background check, at a minimum, shall require the applicant
10 to disclose whether:

11 (1) The applicant has been convicted in any jurisdiction
12 of a crime that would tend to indicate the applicant
13 may be unsuited for employment as an employee with
14 access to corporation funds or the keys of or entry
15 into the units in the project; and

16 (2) The judgment of conviction has not been vacated.

17 For the purpose of this section, the criminal history disclosure
18 made by the applicant may be verified by the board of directors,
19 manager, or other responsible party, if so directed by the board
20 or the manager, by means of information obtained through the
21 data center. The board or manager may conduct a criminal
22 history record check directly through the Hawaii criminal

1 justice data center. The applicant shall provide the Hawaii
2 criminal justice data center with personal identifying
3 information which shall include, at a minimum, the applicant's
4 name, social security number, date of birth, and sex. This
5 information shall be secured only for the purpose of conducting
6 the criminal history record check authorized by this section.
7 Failure of a cooperative housing corporation or the manager to
8 conduct or verify or cause to have conducted or verified a
9 background check shall not alone give rise to any private cause
10 of action against the corporation or manager for acts and
11 omissions of the employee hired."

12 SECTION 7. Chapter 846, Hawaii Revised Statutes, is
13 amended by adding a new section to part I to be appropriately
14 designated and to read as follows:

15 "§846- Criminal history record checks. (a) The agencies
16 and other entities named in this subsection may conduct criminal
17 history record checks on the personnel identified to determine
18 suitability or fitness for permit, licensing, or employment
19 purposes; provided that the Hawaii criminal justice data center
20 may charge a reasonable fee for the criminal history record
21 checks performed. The criminal history record check shall
22 require the submission of fingerprints to the Federal Bureau of

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1 Identification for a national criminal history record check and
2 to the Hawaii criminal justice data center for a state criminal
3 history record check which shall include non-conviction data.
4 The information obtained shall be used exclusively for the
5 stated purpose for which it was obtained:

6 (1) The department of health on operators of adult foster
7 homes or developmental disabilities domiciliary homes
8 and their employees as established under section 333F-
9 22;

10 (2) The department of health on prospective employees,
11 persons seeking to serve as providers, or
12 subcontractors in positions that place them in direct
13 contact with clients when providing non-witnessed
14 direct mental health services on behalf of the child
15 and adolescent mental health division as established
16 under chapter 321;

17 (3) The department of education on employees, prospective
18 employees, and teacher trainees in any public school
19 in positions that necessitate close proximity to
20 children as established under chapter 302A;

21 (4) The counties on employees and prospective employees
22 who may be in positions which place them in close

- 1 proximity to children in recreation or child care
2 programs and services;
- 3 (5) The county liquor commissions on applicants for liquor
4 licenses as established under chapter 281;
- 5 (6) The department of human services on operators and
6 employees of child caring institutions, child placing
7 organizations, and foster boarding homes as
8 established under chapter 346;
- 9 (7) The department of human services on prospective
10 adoptive parents as established under chapter 346;
- 11 (8) The department of human services on applicants to
12 operate child care facilities, prospective employees
13 of the applicant, and new employees of the provider
14 after registration or licensure as established under
15 chapter 346;
- 16 (9) The department of human services on persons exempt
17 pursuant to section 346-152 in order to be eligible to
18 provide child care and receive child care subsidies as
19 established under chapter 346;
- 20 (10) The department of human services on operators and
21 employees of home and community-based case management
22 agencies and operators and other adults, except for

- 1 adults in care, residing in foster family homes as
2 established under chapter 346;
- 3 (11) The department of human services on staff members of
4 the Hawaii youth correctional facility as established
5 under section 352-5.5;
- 6 (12) The judiciary on employees and applicants at detention
7 and shelter facilities as established under section
8 571-34;
- 9 (13) The department of public safety on employees and
10 prospective employees who are directly involved with
11 the treatment and care of persons committed to a
12 correctional facility or who possess police powers
13 including the power of arrest as established under
14 section 353C-5;
- 15 (14) The department of commerce and consumer affairs on
16 applicants for private detective or private guard
17 licensure as established under section 463-9;
- 18 (15) Private schools and designated organizations on
19 employees and prospective employees who may be in
20 positions that necessitate close proximity to
21 children; provided that the private schools and
22 designated organizations receive only indications of

1 the states from which the national criminal history
2 record information was provided as established under
3 chapter 302A;

4 (16) The public library system on employees and prospective
5 employees whose positions place them in close
6 proximity to children as established under chapter
7 302A; and

8 (17) The State or any of its branches, political
9 subdivisions, or agencies on applicants and employees
10 whose duty location, work site, or assignment places
11 that person in close proximity to other positions in a
12 department or agency which is authorized by law to
13 conduct criminal history record checks for its
14 employees who work there as established under chapter
15 78.

16 (b) The applicant shall provide to the requesting agency:

17 (1) Consent to obtain the fingerprints and conduct the
18 criminal history record check;

19 (2) Identifying information required by the Federal Bureau
20 of Investigation, which at a minimum includes name,
21 date of birth, height, weight, eye color, hair color,
22 gender, race, and place of birth; and

1 (3) A statement indicating whether or not the person has
2 ever been convicted."

3 SECTION 8. Chapter 333F, Hawaii Revised Statutes, is
4 amended as follows:

5 1. By deleting the definitions of "criminal history record
6 check" and "criminal history record information" in section
7 333F-1.

8 [~~"Criminal history record check" means an examination of~~
9 ~~an individual's criminal history records by means including, but~~
10 ~~not limited to, fingerprint analysis and name inquiry into state~~
11 ~~and national criminal history record files.~~

12 ~~"Criminal history record information" means criminal~~
13 ~~history information received from state and national criminal~~
14 ~~history record checks."]~~

15 2. By amending section 333F-22(a) to read:

16 "(a) The department shall adopt rules pursuant to chapter
17 91 to assure the reputable and responsible character of an
18 applicant to operate an adult foster home or developmental
19 disabilities domiciliary home, of existing providers and their
20 employees, of current and prospective employees of the
21 applicant, and of new employees of the provider after
22 certification or licensure, which shall provide for, but not be

1 limited to, criminal history record checks[-] in accordance with
2 section 846- .

3 3. By amending section 333F-22(c), (d), and (e) to read:

4 "(c) An applicant to operate an adult foster home or
5 developmental disabilities domiciliary home [~~shall submit to the~~
6 ~~department, with the applicant's application for certification~~
7 ~~or licensure, statements signed under penalty of perjury by the~~
8 ~~applicant]~~ and all current and prospective employees of the
9 applicant [~~indicating whether the applicant or any of the~~
10 ~~current or prospective employees of the applicant have ever been~~
11 ~~convicted of a crime other than a minor traffic violation~~
12 ~~involving a fine of \$50 or less and providing]~~ shall be subject
13 to criminal history record checks in accordance with section
14 846- , and shall provide consent to the department to [~~conduct~~
15 ~~a criminal history record check and to]~~ obtain other criminal
16 history record information for verification. [~~The applicant and~~
17 ~~current or prospective employees of the applicant shall also be~~
18 ~~fingerprinted for the purpose of a national criminal history~~
19 ~~record check.]~~

20 (d) Each existing provider or provider [~~shall submit to~~
21 ~~the department statements signed under penalty of perjury by]~~
22 and all employees hired after the initial licensure or

1 certification of the existing provider or provider [indicating
2 ~~whether any of the employees has ever been convicted of a crime~~
3 ~~other than a minor traffic violation involving a fine of \$50 or~~
4 ~~less and providing] shall be subject to criminal history record
5 checks in accordance with section 846- , and shall provide
6 consent to the department to [~~conduct a criminal history record~~
7 ~~check and~~] obtain other criminal history record information for
8 verification. [~~The employees shall also be fingerprinted for~~
9 ~~the purpose of the national criminal history record check.~~]~~

10 (e) The department is authorized to obtain criminal
11 history record information through the Hawaii criminal justice
12 data center on existing providers and their employees upon their
13 next licensure or certification renewal date, and on any
14 applicant and all current and prospective employees of the
15 applicant including all new employees after the applicant is
16 issued a certification or license under this chapter. [~~The~~
17 ~~Hawaii criminal justice data center may assess the existing~~
18 ~~providers and their employees, applicants, current or~~
19 ~~prospective employees, or new employees of the applicant a~~
20 ~~reasonable fee for each criminal history record check~~
21 ~~performed.] "~~

1 SECTION 9. Chapter 346, Hawaii Revised Statutes, is
2 amended as follows:

3 1. By deleting the definition of "criminal history record
4 check" in section 346-16.

5 [~~"Criminal history record check" means an examination of
6 an individual's criminal history record through:~~

7 ~~(1) An initial fingerprint analysis and name inquiry into
8 state and national criminal history record files;~~

9 ~~(2) Subsequent fingerprint analyses for new hires and
10 rehires; and~~

11 ~~(3) A name inquiry into the state criminal history record
12 files."]~~

13 2. By amending section 346-17 to read:

14 **"§346-17 Child placing organizations, child caring
15 institutions, and foster boarding homes; authority over,
16 investigation of, and standards for. (a) No child placing
17 organization shall engage in the investigation, placement, and
18 supervision of minor children in foster care unless it meets the
19 standards of conditions, management, and competence set by the
20 department of human services.**

21 **(b) No child caring institution shall receive minor
22 children for care and maintenance unless it meets the standards**

1 of conditions, management, and competence to care for and train
2 children set by the department.

3 (c) No foster boarding home shall receive for care and
4 maintenance any child unless:

5 (1) It meets with the standards of conditions, management,
6 and competence set by the department; and

7 (2) The foster boarding home applicant successfully
8 completes foster parent training; provided that after
9 July 1, 1999, new special licensed or relative foster
10 home care providers shall successfully complete foster
11 parent training within the first year following
12 placement of the first child into the new special
13 licensed or relative foster home.

14 (d) The department shall adopt rules pursuant to chapter
15 91 relating to:

16 (1) Standards for the organization and administration of
17 child placing organizations;

18 (2) Standards of conditions, management, and competence
19 for the care and training of minor children in child
20 caring institutions and foster boarding homes; and

1 (3) Standards of conditions and competence of operation of
2 foster boarding homes as may be necessary to protect
3 the welfare of children.

4 (e) All rules of the department shall have the force and
5 effect of law, and any violation thereof or of this section
6 shall be punishable by a fine of not more than \$200.

7 (f) As a condition for a certificate of approval, any
8 organization, institution, or home shall ~~[meet]~~:

9 (1) Meet the standards to assure the reputable and
10 responsible character of its operators and employees
11 ~~[by complying with the requirements of a]~~;

12 (2) Be subject to criminal history record ~~[check under~~
13 ~~section 346-19.6.]~~ checks in accordance with section
14 846- ; and

15 (3) Provide consent to the department to obtain other
16 criminal history record information.

17 New employees of the organization, institution, or home shall be
18 fingerprinted within five working days of employment.

19 (g) Upon approval of the organization, institution, or
20 home, the department or its authorized agents shall issue a
21 certificate of approval that shall continue in force for one
22 year or for two years if the organization, institution, or home

1 meets the criteria established by the department, unless sooner
2 revoked for cause. The certificate shall be renewed by the
3 department or its authorized agents, after annual or biennial
4 investigation, if the investigation discloses that the
5 organization, institution, or home continues to meet with the
6 standards set by the department. The certificate of approval
7 shall be a permit to operate the child placing organization,
8 child caring institution, or foster boarding home, and no person
9 or organization shall operate or maintain the organization,
10 institution, or home without the certificate.

11 (h) Any child placing organization, child caring
12 institution, or foster boarding home shall be subject to
13 investigation at any time and in a manner, place, and form as
14 may be prescribed by the department or its authorized agents.

15 (i) As used in this section, "foster parent training"
16 means training or instruction in special skills and knowledge to
17 care for foster children.

18 (j) The department shall obtain criminal history record
19 information through the Hawaii criminal justice data center on
20 all operators, employees, and new employees of child care
21 institutions, child placing organizations, and foster boarding
22 homes subject to licensure pursuant to this section.

1 (k) The department may deny a certificate of approval if
2 an operator, employee, or new employee of the facility was
3 convicted of a crime other than a minor traffic violation
4 involving a fine of \$50 or less and if the department finds that
5 the criminal history record of an operator, employee, or new
6 employee poses a risk to the health, safety, or well-being of
7 the children in care.

8 (l) The department shall make a name inquiry into the
9 criminal history records for the first two years of
10 certification of a foster boarding home and annually or
11 biennially thereafter depending on the certification status of
12 the home."

13 3. By repealing section 346-19.6.

14 ~~["§346-19.6 [Criminal history record checks: child caring~~
15 ~~institutions, etc.]—The department shall develop standards to~~
16 ~~assure the reputable and responsible character of operators and~~
17 ~~employees of child caring institutions, child placing~~
18 ~~organizations and foster boarding homes as defined in this~~
19 ~~chapter which shall include but not be limited to criminal~~
20 ~~history record checks.~~

21 ~~An applicant for a certificate of approval shall submit~~
22 ~~statements signed under penalty of perjury by the operators,~~

1 ~~employees and new employees of the facility, indicating whether~~
2 ~~the operators, employees or new employees were ever convicted of~~
3 ~~a crime other than a minor traffic violation involving a fine of~~
4 ~~\$50 or less and providing consent to the department to conduct a~~
5 ~~criminal history record check and to obtain other criminal~~
6 ~~history record information for verification. The operators and~~
7 ~~employees of the facility shall be fingerprinted for the purpose~~
8 ~~of complying with the criminal history record check. New~~
9 ~~employees of the facility shall be fingerprinted within five~~
10 ~~working days of employment for the purpose of complying with the~~
11 ~~criminal history record check.~~

12 ~~The department shall obtain criminal history record~~
13 ~~information through the Hawaii criminal justice data center on~~
14 ~~all operators, employees, and new employees of child care~~
15 ~~facilities subject to licensure pursuant to this section. The~~
16 ~~Hawaii criminal justice data center may assess the operators,~~
17 ~~employees or new employees a reasonable fee for each criminal~~
18 ~~history record check conducted. The information obtained shall~~
19 ~~be used exclusively for the stated purpose for which it was~~
20 ~~obtained, and shall be subject to such federal laws and~~
21 ~~regulations as may be now or hereafter adopted.~~

1 ~~The department may deny a certificate of approval if an~~
2 ~~operator, employee, or new employee of the facility was~~
3 ~~convicted of a crime other than a minor traffic violation~~
4 ~~involving a fine of \$50 or less and if the department finds that~~
5 ~~the criminal history record of an operator, employee, or new~~
6 ~~employee poses a risk to the health, safety or well being of the~~
7 ~~children in care.~~

8 ~~The department shall make a name inquiry into the criminal~~
9 ~~history records for the first two years of certification of a~~
10 ~~foster boarding home and annually or biennially thereafter~~
11 ~~depending on the certification status of the home."]~~

12 4. By amending section 346-19.7 to read:

13 " ~~[+]§346-19.7 [Criminal history record checks:~~
14 ~~prospective] Prospective adoptive parents; standards and home~~
15 ~~studies. [+] (a) The department shall develop standards to~~
16 ~~assure the reputable and responsible character of prospective~~
17 ~~adoptive parents as defined in this chapter.~~

18 (b) The department shall develop procedures for obtaining
19 verifiable information regarding the criminal history of persons
20 who are seeking to become adoptive parents. These procedures
21 shall include ~~[but not be limited to]~~ criminal history record
22 checks~~[. The Hawaii criminal justice data center may charge a~~

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1 ~~reasonable fee for criminal history record checks performed by~~
2 ~~the Federal Bureau of Investigation.] in accordance with section~~
3 ~~846- .~~

4 (c) Except as otherwise specified, any person who seeks to
5 become an adoptive parent shall ~~[meet]:~~

6 (1) Meet all standards and requirements as established by
7 the department ~~[and shall be required to provide to~~
8 ~~the department:]~~

9 ~~(1) A sworn statement indicating whether or not the person~~
10 ~~has ever been convicted of an offense for which~~
11 ~~incarceration is a sentencing option, and the details~~
12 ~~thereof];~~

13 (2) [Written consent for the department to conduct a] Be
14 subject to criminal history record [check as provided
15 in subsection (b)] checks in accordance with section
16 846- ; and

17 (3) Provide consent to the department to obtain other
18 information for verification[; and

19 ~~(3) Permission to be fingerprinted for the purpose of the~~
20 ~~Federal Bureau of Investigation criminal history~~
21 ~~record check.]~~

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1 Information obtained pursuant to subsection (b) and this
2 subsection shall be used exclusively by the department for the
3 purpose of determining whether or not a person is suitable to be
4 an adoptive parent. All such decisions shall be subject to
5 federal laws and regulations currently or hereafter in effect.

6 (d) The department may deny a person's application to
7 adopt a child or children if either of the prospective adoptive
8 parents was convicted of an offense for which incarceration is a
9 sentencing option, and if the department finds by reason of the
10 nature and circumstances of the crime that either of the
11 prospective adoptive parents poses a risk to the health, safety,
12 or well being of the child or children. Such denial may occur
13 only after appropriate investigation, notification of results
14 and planned action, and opportunity to meet and rebut the
15 finding, all of which need not be conducted in accordance with
16 chapter 91.

17 (e) The department may authorize or contract for home
18 studies of prospective adoptive parents for children under the
19 department's custody by experienced social workers with
20 specialized adoption experience.

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1 ~~[(f) For the purposes of this section, "criminal history~~
2 ~~record check" means an examination or search for evidence of an~~
3 ~~individual's criminal history by means of:~~

4 ~~(1) A search of the individual's fingerprints in the~~
5 ~~Federal Bureau of Investigation criminal history~~
6 ~~record files and, if found, an analysis and any other~~
7 ~~information available pertaining thereto; and~~

8 ~~(2) A criminal history record check conducted by the~~
9 ~~Hawaii criminal justice data center.] "~~

10 5. By deleting the definition of "criminal history record
11 check" in section 346-151.

12 ~~["Criminal history record check" means an examination of~~
13 ~~an individual's criminal history record through:~~

14 ~~(1) An initial fingerprint analysis and name inquiry into~~
15 ~~state and national criminal history record files;~~

16 ~~(2) Subsequent fingerprint analyses for new hires and~~
17 ~~rehires; and~~

18 ~~(3) An annual name inquiry into the state criminal history~~
19 ~~record files."]~~

20 6. By amending section 346-154(a), (b), (c), and (d) to
21 read:

1 "(a) The department shall develop standards to ensure the
2 reputable and responsible character of an applicant to operate a
3 child care facility, prospective employees of the applicant, and
4 new employees of the provider after registration or licensure,
5 which shall include ~~[but not be limited to]~~ criminal history
6 record checks in accordance with section 846- and child abuse
7 record checks.

8 (b) An applicant to operate a child care facility shall
9 ~~[submit]~~ :

- 10 (1) Be subject to criminal history record checks in
11 accordance with section 846- ;
- 12 (2) Submit to the department under penalty of [false
13 swearing,] law, statements signed by the applicant and
14 prospective employees of the applicant [+
15 ~~(1)~~ ~~indicating]~~ indicating whether the applicant or any of
16 the prospective employees has ever been ~~[convicted of~~
17 ~~a crime other than a minor traffic violation involving~~
18 ~~a fine of \$50 or less, or ever been]~~ confirmed to have
19 abused or neglected a child, including threatened
20 harm; and
- 21 ~~[-(2) Providing]~~ (3) Provide consent to the department to
22 conduct a criminal history record check in accordance

1 with section 846- and a child abuse record check and
2 to obtain criminal history and child abuse record
3 information for verification. [~~The applicant and~~
4 ~~prospective employee of the applicant shall be~~
5 ~~fingerprinted for the purpose of complying with the~~
6 ~~criminal history record check.~~]

7 (c) A provider shall [~~submit~~]:

8 (1) Be subject to criminal history record checks in
9 accordance with section 846- ;

10 (2) Submit to the department under penalty of [false
11 swearing,] law, a statement signed by any employee
12 hired after the initial licensure or registration[~~+~~
13 ~~(1) Indicating~~] indicating whether the employee has ever
14 been [~~convicted of a crime other than a minor traffic~~
15 ~~violation involving a fine of \$50 or less, or ever~~
16 ~~been~~] confirmed to have abused or neglected a child,
17 including threatened harm; and

18 [~~(2) Providing~~] (3) Provide consent to the department to
19 conduct a criminal history record check in accordance
20 with section 846- and a child abuse record check and
21 to obtain criminal history and child abuse record
22 information for verification. [~~The employee shall be~~

1 ~~fingerprinted for the purpose of complying with the~~
2 ~~criminal history record check.]~~

3 (d) The department shall obtain criminal history record
4 information through the Hawaii criminal justice data center and
5 child abuse record information from the department on the
6 applicant and any prospective employee of the applicant,
7 including any new employee after the applicant is issued a
8 registration or license under this part [~~—The Hawaii criminal~~
9 ~~justice data center may assess the applicant, prospective~~
10 ~~employee, or new employee a reasonable fee for each criminal~~
11 ~~history record check conducted. The information obtained shall~~
12 ~~be used exclusively for the stated purpose for which it was~~
13 ~~obtained and shall be subject to applicable federal laws and~~
14 ~~regulations.], which shall include an annual name inquiry into
15 the state criminal history record files."~~

16 SECTION 10. Chapter 352, Hawaii Revised Statutes, is
17 amended as follows:

18 1. By deleting the definition of "criminal history record
19 check" in section 352-1.

20 ~~["Criminal history record check" means an examination of~~
21 ~~an individual's criminal history record through:~~

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- 1 ~~(1) An initial fingerprint analysis and name inquiry into~~
- 2 ~~state and national criminal history record files;~~
- 3 ~~(2) Subsequent fingerprint analyses for new hires and~~
- 4 ~~rehires; and~~
- 5 ~~(3) An annual name inquiry into the state criminal history~~
- 6 ~~record files."]~~

7 2. By amending section 352-5.5 to read:

8 " ~~[+]~~§352-5.5 ~~[+]~~ **Criminal history record checks.** (a) The

9 department shall develop standards to assure the reputable and

10 responsible characters of staff members of the Hawaii youth

11 correctional facility which shall include ~~[but not be limited~~

12 ~~to]~~ criminal history record checks ~~[+]~~ in accordance with section

13 846- .

14 (b) Staff members, as defined in section 352-5, including

15 any new staff members, shall ~~[submit a statement under penalty~~

16 ~~of perjury indicating whether the staff member was ever~~

17 ~~convicted of a crime other than a minor traffic violation~~

18 ~~involving a fine of fifty dollars or less and providing]:~~

19 (1) Be subject to criminal history record checks in

20 accordance with section 846- ; and

1 (2) Provide consent to the department to [~~conduct a~~
2 ~~criminal history record check and to~~] obtain other
3 criminal history record information for verification.
4 [~~The staff members shall be fingerprinted for the purpose of~~
5 ~~complying with the criminal history record check.~~] New staff
6 members shall be fingerprinted within five working days of
7 beginning employment for the purpose of complying with the
8 criminal history record check.

9 (c) The department shall obtain criminal history record
10 information through the Hawaii criminal justice data center on
11 all staff members and new staff members of the Hawaii youth
12 correctional facility. [~~The Hawaii criminal justice data center~~
13 ~~may assess the staff members and new staff members a reasonable~~
14 ~~fee for each criminal history record check conducted. The~~
15 ~~information obtained shall be used exclusively for the stated~~
16 ~~purpose for which it was obtained, and shall be subject to such~~
17 ~~federal laws and federal regulations as may be now or hereafter~~
18 ~~adopted.~~] The department may conduct an annual name inquiry into
19 the state criminal history record files.

20 (d) The department may deny employment to a staff member
21 or new staff member who was convicted of a crime other than a
22 minor traffic violation involving [~~fifty dollars~~] \$50 or less

1 and if the department finds that the criminal history record of
2 the staff member or new staff member poses a risk to the health,
3 safety, security, or well-being of youths under supervision and
4 confinement."

5 SECTION 11. Section 353C-5, Hawaii Revised Statutes, is
6 amended to read as follows:

7 "**§353C-5 Criminal history record checks.** (a) The
8 department shall develop standards to assure the reputable and
9 responsible characters of staff members of its correctional
10 facilities which shall include [~~but not be limited to~~] criminal
11 history record checks.

12 (b) For the purposes of this section[~~, "staff~~]:

13 "Staff member" means any employee of the department of
14 public safety who is directly involved with the treatment and
15 care of persons committed to a facility or who possesses police
16 powers including the power of arrest[~~, and "prospective~~].

17 "Prospective staff member" means any applicant for a job in
18 the department of public safety that is directly involved with
19 the treatment and care of persons committed to a facility or
20 that requires the exercise of police powers including the power
21 to arrest in the performance of its duties.

1 ~~[Every staff member and prospective staff member shall~~
2 ~~submit a statement under penalty of unsworn falsification to~~
3 ~~authorities indicating whether the staff member or prospective~~
4 ~~staff member was ever convicted of a crime other than a minor~~
5 ~~traffic violation involving a fine of \$50 or less and providing~~
6 ~~consent to the department to conduct a criminal history record~~
7 ~~check and to obtain other criminal history record information~~
8 ~~for verification. The staff member shall be fingerprinted for~~
9 ~~the purpose of complying with the criminal history record check.~~
10 ~~The prospective staff member shall be fingerprinted and the~~
11 ~~criminal history record check shall be completed prior to~~
12 ~~beginning employment.]~~

13 (c) The department shall obtain criminal history record
14 information through the Hawaii criminal justice data center in
15 accordance with section 846- , on all staff and prospective
16 staff members of the department of public safety. ~~[The Hawaii~~
17 ~~criminal justice data center may assess prospective staff~~
18 ~~members a reasonable fee for each criminal history record check~~
19 ~~conducted. The information obtained shall be used exclusively~~
20 ~~for the stated purpose for which it was obtained, and shall be~~
21 ~~subject to such federal laws and federal regulations as may be~~
22 ~~now or hereafter adopted.]~~ Prospective staff members shall be

1 fingerprinted and the criminal history record check shall be
2 completed prior to beginning employment.

3 (d) The department may deny employment to a prospective
4 staff member who was convicted of a crime other than a minor
5 traffic violation involving a fine of \$50 or less and if the
6 department finds from the prospective staff member's criminal
7 history record that the prospective staff member poses a risk to
8 the health, safety, security, or well-being of inmates under
9 supervision and confinement, other staff, or the public at
10 large.

11 (e) Staff members shall not be subject to termination
12 based on findings in their criminal records except for those
13 whose conviction of a crime occurred after May 8, 1989, or under
14 circumstances in which a staff member is [a] fugitive from
15 justice. The convictions of staff members subject to
16 termination must be for crimes other than a minor traffic
17 violation involving a fine of \$50 or less, and the staff member
18 must pose a risk to the health, safety, security, or well-being
19 of inmates under supervision and confinement, other staff, or
20 the public at large."

21 SECTION 12. Section 378-2.5, Hawaii Revised Statutes, is
22 amended to read as follows:

1 " [†]§378-2.5 [‡] **Employer inquiries into conviction record.**

2 (a) Subject to subsection (b), an employer may inquire about
3 and consider an individual's criminal conviction record
4 concerning hiring, termination, or the terms, conditions, or
5 privileges of employment; provided that the conviction record
6 bears a rational relationship to the duties and responsibilities
7 of the position.

8 (b) Inquiry into and consideration of conviction records
9 for prospective employees shall take place only after the
10 prospective employee has received a conditional offer of
11 employment which may be withdrawn if the prospective employee
12 has a conviction record that bears a rational relationship to
13 the duties and responsibilities of the position.

14 (c) For purposes of this section, "conviction" means an
15 adjudication by a court of competent jurisdiction that the
16 defendant committed a crime, not including final judgments
17 required to be confidential pursuant to section 571-84; provided
18 that the period for which the employer may [examine] consider
19 the employee's conviction record shall not exceed ten years[-],
20 excluding periods of imprisonment. If the employee or
21 prospective employee represents that the period of imprisonment
22 was less than what is shown on the employee's or prospective

1 employee's conviction record, an employer shall provide the
2 employee or prospective employee with an opportunity to present
3 documentary evidence of a date of release to establish a period
4 of imprisonment that is shorter than the sentence imposed for
5 the employee's or prospective employee's conviction.

6 (d) Notwithstanding subsection (b), the requirement that
7 inquiry and consideration of a prospective employee's conviction
8 record may take place only after the individual has received a
9 conditional job offer shall not apply to employers who are
10 expressly permitted to inquire into an individual's criminal
11 history for employment purposes pursuant to any provision of the
12 federal or state statutory law, other than subsection (a),
13 including:

- 14 (1) The State or any of its branches, political
15 subdivisions, or agencies pursuant to section 831-3.1;
16 (2) The department of education pursuant to chapter 302A;
17 (3) The department of health with respect to employees,
18 providers, or subcontractors in positions that place
19 them in direct contact with clients when providing
20 non-witnessed direct mental health services on behalf
21 of the child and adolescent mental health division
22 pursuant to chapter 321;

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- 1 (4) The judiciary pursuant to section 571-34;
- 2 (5) The counties pursuant to section 846- ;
- 3 (6) Armed security services pursuant to section 261-17(b);
- 4 (7) Providers of a developmental disabilities domiciliary
5 home pursuant to section 333F-22;
- 6 (8) Private schools pursuant to section 378-3(8) and
7 chapter 302A;
- 8 (9) Financial institutions in which deposits are insured
9 by a federal agency having jurisdiction over the
10 financial institution pursuant to section 378-3(9);
- 11 (10) Detective agencies and security guard agencies
12 pursuant to sections 463-6(b) and 463-8(b);
- 13 (11) Employers in the business of insurance pursuant to
14 section 431:2-201.3;
- 15 (12) Employers of individuals or supervisors of individuals
16 responsible for screening passengers or property under
17 49 U.S.C. §44901 or individuals with unescorted access
18 to an aircraft of an air carrier or foreign carrier or
19 in a secured area of an airport in the United States
20 pursuant to 49 U.S.C. §44936(a);
- 21 (13) The department of human services pursuant to section
22 353-5.5;

- 1 (14) The public library system pursuant to chapter 302A;
2 and
3 (15) The department of public safety pursuant to section
4 353C-5."

5 SECTION 13. Section 463-9, Hawaii Revised Statutes, is
6 amended to read as follows:

7 "**§463-9 Form of application for license.** Application for
8 a license shall be made on a form prescribed by the board which
9 may require a statement of the applicant's full name, age, date
10 and place of birth, residence and business address, the business
11 or occupation the applicant has engaged in for ten years
12 immediately preceding the date of the filing of the application
13 with names and addresses of employers, the date and place of any
14 arrest or conviction of a crime where there has not been any
15 order annulling or expunging the sentence or of any offense
16 involving moral turpitude, whether the applicant has received
17 treatment for any psychiatric or psychological disorder, or
18 whether the treatment has ever been recommended, and such
19 information, including fingerprints of the applicant and such
20 other information as the board may require to investigate the
21 character, competency, and integrity of the applicant. The
22 board shall conduct such investigation of the applicant's

1 background, character, competency, and integrity as it deems
2 appropriate, and shall request, in accordance with section
3 846-, criminal history records of the applicant from each
4 jurisdiction in which the application form indicates the
5 applicant lived for any substantial period of time. The Hawaii
6 criminal justice data center shall provide such information on
7 request to the director of commerce and consumer affairs."

8 SECTION 14. Section 514A-82.1, Hawaii Revised Statutes, is
9 amended to read as follows:

10 " **[[[§514A-82.1]]] Employees of condominiums; background**
11 **check.** The board of directors of an association of apartment
12 owners or the manager of a condominium project, upon the written
13 authorization of an applicant for employment as security guard
14 or manager or for a position which would allow the employee
15 access to the keys of or entry into the units in the condominium
16 project or access to association funds, may conduct a background
17 check on the applicant or direct another responsible party to
18 conduct the check. Before initiating or requesting a check, the
19 board of directors or the manager shall first certify that the
20 signature on the authorization is authentic and that the person
21 is an applicant for such employment. The background check, at a
22 minimum, shall require the applicant to disclose whether the

1 applicant has been convicted in any jurisdiction of a crime
2 which would tend to indicate that the applicant may be unsuited
3 for employment as a condominium employee with access to
4 association funds or the keys of or entry into the units in the
5 condominium project, and the judgment of conviction has not been
6 vacated. For the purpose of this section, the criminal history
7 disclosure made by the applicant may be verified by the board of
8 directors, manager, or other responsible party, if so directed
9 by the board or the manager, by means of information obtained
10 through the Hawaii criminal justice data center. The applicant
11 shall provide the Hawaii criminal justice data center with
12 personal identifying information which shall include, at a
13 minimum, the applicant's name, social security number, date of
14 birth, and gender. This information shall be secured only for
15 the purpose of conducting the criminal history record check
16 authorized by this section. Failure of an association of
17 apartment owners or the manager to conduct or verify or cause to
18 have conducted or verified a background check shall not alone
19 give rise to any private cause of action against an association
20 or manager for acts and omissions of the employee hired."

21 SECTION 15. Chapter 571, Hawaii Revised Statutes, is
22 amended as follows:

1 1. By amending the definition of "criminal history record
2 check" in section 571-2 to read:

3 "Criminal history record check" means ~~[an examination of~~
4 ~~an individual's criminal history record through:~~

5 ~~(1) An initial fingerprint analysis and name inquiry into~~
6 ~~state and national criminal history record files;~~

7 ~~(2) Subsequent fingerprint analyses for new hires and~~
8 ~~rehires; and~~

9 ~~(3) An annual name inquiry into the state criminal history~~
10 ~~record files.~~

11 submission of an individual's fingerprints and other identifying
12 information to the Federal Bureau of Investigation and to the
13 Hawaii criminal justice data center in accordance with section
14 846 ."

15 2. By amending section 571-34 to read:

16 "[+]§571-34[+] **Criminal history record checks.** The
17 judiciary shall develop standards to assure the reputable and
18 responsible character of employees of detention facilities
19 defined in this chapter which shall include but not be limited
20 to criminal history record checks. ~~[Employees of]~~ All employees
21 and applicants for employment at facilities established under
22 section 571-33 ~~[, including new employees shall submit a~~

1 ~~statement under penalty of perjury indicating whether the~~
2 ~~employee or new employee was ever convicted of a crime other~~
3 ~~than a minor traffic violation involving a fine of fifty dollars~~
4 ~~or less. The statement]~~ shall be subject to criminal history
5 record checks and shall provide consent to the judiciary to
6 ~~[conduct a criminal history record check and to]~~ obtain other
7 criminal history record information for verification.
8 ~~[Employees shall be fingerprinted for the purpose of complying~~
9 ~~with the criminal history record check. New employees shall be~~
10 ~~fingerprinted for the purpose of complying with the criminal~~
11 ~~history record check.]~~ The judiciary shall obtain criminal
12 history record information through the Hawaii criminal justice
13 data center on all employees and ~~[new employees. The Hawaii~~
14 ~~criminal justice data center may assess employees and new~~
15 ~~employees a reasonable fee for each criminal history record~~
16 ~~check conducted. The information obtained shall be used~~
17 ~~exclusively for the stated purpose for which it was obtained,~~
18 ~~and shall be subject to such federal laws and federal~~
19 ~~regulations as may be now or hereafter adopted.]~~ applicants.
20 The judiciary may deny employment to an employee or ~~[new~~
21 ~~employee]~~ applicant who was convicted of a crime ~~[other than a~~
22 ~~minor traffic violation involving a fine of fifty dollars or~~

1 ~~less and if the judiciary finds that the person's criminal~~
2 ~~history record indicates that the employee or new employee poses~~
3 ~~a risk to the health, safety, security, or well being of youths~~
4 ~~under detention]."~~

5 SECTION 16. Chapter 831, Hawaii Revised Statutes, is
6 amended to read as follows:

7 1. By amending section 831-3 to read:

8 "**§831-3 Rights retained by convicted person.** Except as
9 otherwise provided by [~~this chapter and chapter 351, part VI,~~]
10 law, a person convicted of a crime does not suffer civil death
11 or corruption of blood or sustain loss of civil rights or
12 forfeiture of estate or property, but retains all of the
13 person's rights, political, personal, civil, and otherwise,
14 including the right to hold public office or employment, to
15 vote, to hold, receive, and transfer property, to enter into
16 contracts, to sue and be sued, and to hold offices of private
17 trust in accordance with law."

18 2. By amending section 831-3.1 to read:

19 "**§831-3.1 Prior convictions; criminal records; noncriminal**
20 **standards.** (a) A person shall not be disqualified from public
21 office or employment by the State or any of its branches,
22 political subdivisions, or agencies except under section 831-

1 2(c), or be disqualified to practice, pursue, or engage in any
2 occupation, trade, vocation, profession, or business for which a
3 permit, license, registration, or certificate is required by the
4 State or any of its branches, political subdivisions, or
5 agencies, solely by reason of a prior conviction of a crime;
6 provided that ~~[with]~~:

7 (1) With respect to liquor licenses, a person who has been
8 convicted of a felony may be denied a liquor license
9 by the liquor commission~~[-]~~; and

10 (2) A person who within the past ten years, excluding any
11 period of incarceration, has been convicted of a crime
12 with a rational relationship to the duties and
13 responsibilities of a job, occupation, trade,
14 vocation, profession, or business may be denied
15 employment, a permit, license, registration, or
16 certificate.

17 ~~(b) [The following criminal records shall not be used,~~
18 ~~distributed, or disseminated by the State or any of its~~
19 ~~political subdivisions or agencies in connection with an~~
20 ~~application for any said employment, permit, license,~~
21 ~~registration, or certificate.]~~

22 ~~(1) Records of arrest not followed by a valid conviction,~~

- 1 ~~(2) Convictions which have been annulled or expunged;~~
- 2 ~~(3) Convictions of a penal offense for which no jail~~
- 3 ~~sentence may be imposed;~~
- 4 ~~(4) Conviction of a misdemeanor in which the period of~~
- 5 ~~twenty years has elapsed since date of conviction and~~
- 6 ~~during which elapsed time there has not been any~~
- 7 ~~subsequent arrest or conviction.~~

8 ~~Except as provided in paragraphs (1) to (4), the] The State~~
9 or any of its branches, political subdivisions, or agencies may
10 consider as a [possible] justification for the refusal,
11 suspension, or revocation of any employment or of any permit,
12 license, registration, or certificate, any conviction of [a
13 ~~penal offense]~~ any crime, except those which have been expunged,
14 occurring within the past ten years, excluding any period of
15 incarceration, when that crime bears a rational relationship to
16 the duties and responsibilities of the job, occupation, trade,
17 vocation, profession, or business for which a permit, license,
18 registration, or certificate is applied for or held.

19 (c) The State or any of its branches, political
20 subdivisions, or agencies may consider as a possible
21 justification for the refusal, suspension, or revocation of any
22 employment or of any permit, license, registration, or

1 certificate, any conviction of a crime, not occurring within the
2 past ten years, excluding any period of incarceration, except
3 those which have been expunged, when [such] that offense
4 directly relates [~~(i) to the~~] to:

- 5 (1) The applicant's possible performance in the job
6 applied for [~~or (ii) to the~~];
7 (2) The employee's possible performance in the job which
8 the employee holds [~~or (iii) to the~~];
9 (3) The applicant's or holder's possible performance in
10 the occupation, trade, vocation, profession, or
11 business for which a permit, license, registration, or
12 certificate is applied for or held.

13 For the purpose of this subsection, such refusal,
14 suspension, or revocation may occur only when the agency
15 determines, after investigation in accordance with chapter 91,
16 or in the case of employment in the civil service, after
17 appropriate investigation, notification of results and planned
18 action, and opportunity to meet and rebut the finding, all of
19 which need not be conducted in accordance with chapter 91, that
20 the person so convicted has not been sufficiently rehabilitated
21 to warrant the public trust [~~provided that discharge from~~
22 probation or parole supervision, or a period of two years after

1 ~~final discharge or release from any term of imprisonment,~~
2 ~~without subsequent criminal conviction, may be considered as one~~
3 ~~of many factors to determine sufficiency of rehabilitation. A~~
4 ~~person deemed ineligible for employment in the civil service~~
5 ~~shall be entitled to appeal any and all adverse decisions to the~~
6 ~~civil service commission within twenty days after the notice of~~
7 ~~action has been sent to the person].~~

8 ~~[(e)]~~ (d) When considering noncriminal standards [~~such as~~
9 ~~good moral character, temperate habits, habitual intemperate use~~
10 ~~of intoxicants, trustworthiness, and the like,]~~ in the granting,
11 renewal, suspension, or revocation of any employment or any such
12 permit, license, registration, or certificate, the [agency]
13 State or any of its branches, political subdivisions, or
14 agencies shall not take into consideration the conviction of any
15 crime except as provided by [~~subsection]~~ subsections (b) [~~-~~] and
16 (c). [~~Nothing in this section shall be construed to otherwise~~
17 ~~affect a proceeding before any agency which does not involve the~~
18 ~~conviction of a crime.]~~

19 (e) A person deemed ineligible for employment in the civil
20 service may appeal all adverse decisions to the civil service
21 commission or merit appeals board, whichever applies, within

1 twenty days after the notice of action has been sent to the
2 person.

3 ~~[(d) This]~~ (f) Notwithstanding any law to the contrary,
4 this section shall not apply to:

5 (1) Denials by the department of human services, the
6 department of health, or any other branch, political
7 subdivision, or agency of any certificate of approval,
8 license, or permit to any organization, institution,
9 home, or facility subject to licensure under [chapter]
10 chapters 321, 333F, and 346;

11 (2) Denials of employment as a staff member of a youth
12 correctional facility operated under chapter 352;

13 (3) Denials of employment as an employee of a detention or
14 shelter facility established or designated pursuant to
15 section 571-33; [and]

16 (4) Denials of employment as a staff member of a
17 correctional facility operated under chapter 353 [-];
18 and

19 (5) Denials of employment by the State or any of its
20 branches, political subdivisions, or agencies for
21 positions whose duty location, work site, or
22 assignments places that person in close proximity to

1 other positions in a department or agency which is
2 authorized by law to conduct criminal history record
3 checks for its employees who work there. The State or
4 any of its branches, political subdivisions, or
5 agencies may conduct criminal history record checks
6 and use the information obtained to the same extent as
7 the department or agency. In the case of employment
8 in the civil service, a refusal, suspension, or
9 revocation of any employment may occur only after
10 appropriate investigation, notification of results and
11 planned action, and opportunity to meet and rebut any
12 finding, which need not be conducted in accordance
13 with chapter 91, that the person does not warrant the
14 public trust."

15 SECTION 17. Act 273, Session Laws of Hawaii 2001, is
16 amended as follows:

17 1. By deleting the definition of "criminal history record
18 check" in section 346-A in the new part added to the Hawaii
19 Revised Statutes in section 1.

20 ~~["Criminal history record check" means an examination of~~
21 ~~an individual's criminal history record through:~~

- 1 ~~(1) A search of the individual's fingerprints in the~~
2 ~~Federal Bureau of Investigation criminal history~~
3 ~~record files;~~
- 4 ~~(2) Further analysis and search for other information~~
5 ~~available for individuals found in the Federal Bureau~~
6 ~~of Investigation criminal history record files;~~
- 7 ~~(3) Subsequent fingerprint analyses for required~~
8 ~~individuals; and~~
- 9 ~~(4) A name inquiry into the state criminal history record~~
10 ~~files."]~~

11 2. By amending section 346-E in the new part added to the
12 Hawaii Revised Statutes in section 1 to read:

13 "**§346-E Criminal history record checks.** (a) The
14 department shall develop standards to ensure the reputable and
15 responsible character of operators and employees of the home and
16 community-based case management agencies and operators and other
17 adults, except for adults in care, residing in community care
18 foster family homes as defined in this chapter, which shall
19 include but not be limited to criminal history record checks[~~-~~]
20 in accordance with section 846- .

21 (b) An applicant for a home and community-based case
22 management agency license [~~shall submit statements signed under~~

1 ~~penalty of perjury by the] and operators, employees, and new~~
2 ~~employees of [the] a home and community-based case management~~
3 ~~agency[, indicating whether the operators, employees, or new~~
4 ~~employees have ever been convicted of a crime other than a minor~~
5 ~~traffic violation involving a fine of \$50 or less, and the~~
6 ~~details thereof.~~

7 ~~The operators, employees, and new employees shall also~~
8 ~~provide consent to the department to conduct a criminal history~~
9 ~~record check and to obtain other criminal history record~~
10 ~~information for verification. The operators and employees of~~
11 ~~the home and community-based case management agency] shall be~~
12 ~~[fingerprinted for the purpose of complying with the] subject to~~
13 ~~criminal history record [check.] checks in accordance with~~
14 ~~section 846- , and shall provide consent to obtain other~~
15 ~~criminal history record information for verification. New~~
16 ~~employees of the home and community-based case management agency~~
17 ~~shall be fingerprinted within five working days of employment,~~
18 ~~for the purpose of complying with the criminal history record~~
19 ~~check requirement.~~

20 ~~[The department shall obtain criminal history record~~
21 ~~information through the Hawaii criminal justice data center on~~
22 ~~all operators, employees, and new employees of home and~~

1 ~~community-based case management agencies subject to licensure~~
2 ~~pursuant to this section. The Hawaii criminal justice data~~
3 ~~center may assess the operators, employees, and new employees a~~
4 ~~reasonable fee for each criminal history record check conducted.~~
5 ~~The information obtained shall be used exclusively for the~~
6 ~~stated purpose for which it was obtained and shall be subject to~~
7 ~~federal laws and regulations as may be now or hereafter~~
8 ~~adopted.]~~

9 The department shall make a name inquiry into the criminal
10 history records for the first two years a home and community-
11 based case management agency is licensed and annually or
12 biennially thereafter depending on the licensure status of the
13 home and community-based case management agency.

14 (c) An applicant for a certificate of approval as a
15 community care foster family home [~~shall submit to the home and~~
16 ~~community-based case management agency, statements signed under~~
17 ~~penalty of perjury by the operators]~~ and operators and other
18 adults residing in [the] a community care foster family home[,
19 ~~except for adults receiving care, indicating whether they have~~
20 ~~been convicted of a crime other than a minor traffic violation~~
21 ~~involving a fine of \$50 or less. The operators and other adults~~
22 ~~residing in the home, except for adults receiving care,~~] shall

.B. NO.

1 be subject to [~~also provide consent to the certifying agency to~~
2 ~~conduct a~~] criminal history record [~~check~~] checks in accordance
3 with section 846- , and [~~to~~] shall obtain other criminal
4 history record information for verification. [~~The operators and~~
5 ~~other adults residing in the home, except for adults receiving~~
6 ~~care, shall be fingerprinted for the purpose of complying with~~
7 ~~the criminal history record check.~~]

8 The certifying agency shall obtain criminal history record
9 information through the Hawaii criminal justice data center on
10 all operators and other adults residing in the community care
11 foster family home, except for adults receiving care, subject to
12 certification pursuant to this section. The Hawaii criminal
13 justice data center may assess the operators and other adults a
14 reasonable fee for each criminal history record check conducted.
15 The information obtained shall be used exclusively for the
16 stated purpose for which it was obtained and shall be subject to
17 federal laws and regulations as may be now or hereafter adopted.

18 The certifying agency shall make a name inquiry into the
19 criminal history records for the first two years a community
20 care foster family home is certified and annually or biennially
21 thereafter depending on the certification status of the
22 community care foster family home."

1 SECTION 18. Part III of chapter 846, Hawaii Revised
2 Statutes, is repealed.

3 SECTION 19. Statutory material to be repealed is bracketed
4 and stricken. New statutory material is underscored.

5 SECTION 20. This Act shall take effect upon its approval;
6 provided that section 17 of this Act shall take effect on June
7 29, 2003, only if a bill that repeals the sunset provision in
8 section 6 of Act 273, Session Laws of Hawaii 2001, is passed by
9 the legislature in the regular session of 2003, and becomes an
10 Act.

11

INTRODUCED BY: _____

HOUSE OF REPRESENTATIVES
TWENTY-FIRST LEGISLATURE, 2001
STATE OF HAWAII

ACT 263
H.B. NO. 161
H.D. 2
S.D. 2
C.D. 1

A BILL FOR AN ACT

RELATING TO CRIMINAL HISTORY RECORD CHECKS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The purpose of this Act is to implement the
2 recommendation of the legislative reference bureau's study for
3 the creation of a representative working group to resolve policy
4 issues raised in the bureau's study by conducting a
5 comprehensive review and analysis of all issues related to the
6 noncriminal justice access and use of criminal history record
7 information for employment and licensing determinations and
8 other related criminal history record check issues.

9 SECTION 2. (a) There is established within the department
10 of the attorney general, for administrative purposes, a
11 temporary criminal history record check working group to review
12 policy issues concerning the noncriminal justice access and use
13 of criminal history record information for employment and
14 licensing purposes as raised in the legislative reference bureau
15 study. The working group shall review existing laws governing
16 access and use of criminal history record information, laws
17 authorizing criminal history record checks for noncriminal



1 justice purposes of employment and licensing, and other criminal
2 history record check issues and make recommendations to the
3 legislature.

4 (b) The working group shall be composed of members to be
5 appointed by the attorney general and shall include but not be
6 limited to participants representing or from the following
7 agencies and groups:

- 8 (1) Department of the attorney general;
- 9 (2) Department of health;
- 10 (3) Department of human services;
- 11 (4) Department of commerce and consumer affairs;
- 12 (5) Department of public safety;
- 13 (6) Department of education;
- 14 (7) Hawaii labor relations board;
- 15 (8) Independent or private school association;
- 16 (9) The Hawaii criminal justice data center;
- 17 (10) The civil rights commission;
- 18 (11) The civil service commission;
- 19 (12) County licensing boards;
- 20 (13) Public employee unions;
- 21 (14) Public and private employers;
- 22 (15) Department of human resources development;

1 (16) Judiciary; and

2 (17) Legislative reference bureau.

3 The working group shall be chaired by a representative from the
4 department of the attorney general.

5 (c) The working group shall consider delineating the
6 subject matter of criminal history records by replacing the
7 statutory term "arrest and court record" with the broader term
8 "nonconviction data". The working group shall consider the most
9 appropriate definition of this term as it applies to the subject
10 matter of criminal history record checks. The working group
11 shall consider policy issues applicable to access and use of
12 criminal history record information, laws authorizing criminal
13 history record checks, and other issues related to criminal
14 history record checks for noncriminal justice purposes of
15 employment and licensing. In formulating policy and law
16 recommendations relating to access and use of criminal history
17 record information to conduct criminal history record checks for
18 noncriminal justice purposes of employment and licensing
19 determinations, the working group shall balance the public's
20 need to know, employer liability, the reintegration of convicted
21 offenders into society, and the record subject's right to
22 privacy.

1 The working group shall identify statutes, administrative
2 rules, and practices related to access and use of criminal
3 history information and criminal history record checks for
4 noncriminal justice employment and licensing purposes and make
5 recommendations for repeal and amendment of existing laws and
6 adoption of new laws. Issues that the working group shall
7 address include but are not limited to:

8 (1) Should Hawaii employment practices law with respect to
9 the use of criminal history record information also
10 apply to licensing decisions? If there should be any
11 differences, what should those differences be?

12 (2) Are there any guidelines to determine when a
13 conviction is "rationally related" to the job? If so,
14 what are they?

15 (3) When statutory authorization, or a Bona Fide
16 Occupational Qualification (BFOQ) requirement, or
17 both, allows consideration of arrest and court record:

18 (A) Is age of convictions that may be considered
19 limited to convictions less than ten years old?

20 (B) Is there an age limit for arrests that may be
21 considered?

- 1 (C) Are arrests required to be reasonably necessary
2 to the operation of the business and
3 substantially related to the job?
- 4 (D) Is a conditional offer of employment required
5 before consideration of conviction data or
6 nonconviction data, or both are allowed?
- 7 (4) Does a criminal history record check that is
8 authorized, but not required, by statute constitute a
9 BFOQ exception that allows consideration of arrest and
10 court records?
- 11 (5) Should Hawaii employment practices law be amended to
12 expressly authorize consideration of both conviction
13 and nonconviction data when an employer is statutorily
14 authorized to conduct a criminal history record check
15 of an individual's criminal history record information
16 (which includes both conviction data and nonconviction
17 data) to determine employment suitability? If so,
18 what restrictions, if any, should be imposed on an
19 employer's consideration of criminal history record
20 information?

1 (6) Should section 378-3, Hawaii Revised Statutes, be
2 amended to repeal paragraph (8) because it is
3 unnecessary, duplicative, and potentially confusing?

4 Section 378-3, Hawaii Revised Statutes,
5 establishes "Exceptions", stating that nothing in
6 chapter 378, part I, Hawaii Revised Statutes,
7 "Discriminatory Practices", shall be deemed to
8 prohibit or prevent public or private schools from
9 considering criminal convictions in determining
10 suitability for employment in close proximity to
11 children. Sections 846-43 and 846-44, Hawaii Revised
12 Statutes, independently authorize public and private
13 schools to conduct criminal history record checks for
14 employment screening and section 378-2.5, Hawaii
15 Revised Statutes, allows consideration of convictions.
16 Other statutes that authorize other agencies to
17 conduct employment criminal history record checks are
18 not included as "exceptions" in section 378-3. To
19 include some but not all, statutorily authorized
20 criminal checks in section 378-3 appears to be both
21 unnecessary and confusing.

1 (7) Although aggrieved civil service applicants may appeal
2 to the civil service commission, the rights of a
3 similarly aggrieved applicant for a state job that is
4 not civil service are unclear. Should the civil
5 rights commission investigate complaints (by persons
6 other than those applying for state or county civil
7 service jobs) related to the prohibitions in section
8 831-3.1, Hawaii Revised Statutes, on the State's use
9 of certain criminal records in state employment
10 decisions? If not the civil rights commission, then
11 who?

12 (8) Similarly, what remedies are (or should be) available
13 for license applicants who believe their license was
14 denied or revoked based on the State's use of
15 nonconviction or conviction data?

16 (9) Since the unlimited availability of Hawaii conviction
17 data allows public access to convictions regardless of
18 age, does this conflict with an employer's ability to
19 consider only those rationally related convictions
20 less than ten years old? If so, how should the
21 conflict be reconciled?

1 (10) Does the prohibition in 28 CFR section 20.21(b)
2 continue to restrict states that received federal
3 funding in connection with the collection, storage,
4 dissemination of criminal history record information
5 in the dissemination of state nonconviction data?

6 (11) Consider repeal of section 831-3.1, Hawaii Revised
7 Statutes, which restricts the State's use,
8 distribution, and dissemination of certain criminal
9 records in employment and licensing decisions to
10 eliminate redundant, unnecessary, duplicative, or
11 conflicting laws.

12 The State is subject to Hawaii law governing the
13 dissemination and use of criminal history record
14 information in employment decisions in the same manner
15 as any other employer.

16 Clarification of the State's authority to access
17 and use of criminal history record information for
18 licensing purposes is recommended. Limitations
19 identical to those limiting access and use in
20 employment matters are suggested.

21 (12) If section 831-3.1, Hawaii Revised Statutes, is
22 retained, clarification of "noncriminal standards such

1 as good moral character, temperate habits, habitual
2 intemperate use of intoxicants, trustworthiness, and
3 the like" is recommended.

4 Various state departments are required to develop
5 standards, which include criminal history record
6 checks, to assure the "reputable and responsible
7 character" of certain license or employment
8 applicants. The mandatory use of criminal history
9 record checks to assure "reputable and responsible
10 character" in one statute and the prohibition against
11 consideration of convictions when considering "good
12 moral character" should be clarified and
13 distinguished.

14 (13) Whether the department of education and other youth-
15 service organizations should be required to use the
16 Hawaii sex offender website to investigate their
17 volunteers, and if so, what should be the parameters
18 of such use?

19 (d) The working group shall be fully designated and
20 constituted by no later than thirty days after the effective
21 date of this Act and shall convene on a regular basis. In
22 conducting the review, the working group shall seek consensus

1 and, where consensus is not possible, identify the competing
2 viewpoints and goals with respect to the issue in question so
3 that the legislature may be fully advised of the full range of
4 policy choices presented.

5 (e) The working group shall submit a report of its
6 findings and recommendations relating to access and use of
7 criminal history record information to conduct criminal history
8 record checks for noncriminal justice employment and licensing
9 purposes to the legislature not less than twenty days before the
10 convening of the regular session of 2003 which shall include
11 proposed legislation and identification of resources necessary
12 to support or enforce recommendations for new or amended law and
13 policy.

14 (f) The department of the attorney general shall provide
15 administrative support upon request from the working group.

16 (g) The legislative reference bureau shall provide
17 technical assistance to the working group on legislative
18 drafting and shall assist in drafting any legislation proposed
19 by the working group.

20 (h) The working group shall cease to exist on June 30,
21 2003.

APPROVED BY
GOVERNOR C

JUN 22 2003

22 SECTION 3. This Act shall take effect upon its approval.

Act 263, SLH 2001 Criminal History Record Check Working Group
List of Participants

AGENCY/ DEPARTMENT	<u>DESIGNEE</u>	<u>ALTERNATE DESIGNEE</u>
AG/HCJDC	Liane Moriyama, Chair	Hannah Kawakami Norma Ueno
AG/Employment Law	Kathleen Watanabe, Vice-Chair	Jennifer Salvador Pacita Woodward
Dept of Health	Brian Kagihara	Colette Akahoshi Alan Ishikawa
Dept of Human Services	Garry Kemp	Daeleen Ohigashi
Dept of Commerce & Consumer Affairs	Larry Kamakawiwoole	Mark Morita
Dept of Public Safety	Clayton Kitamori	Llewella Rogers
Dept of Education	Mae Yamasaki	Frances Keeno
Hawaii Labor Relations Board	Brian Nakamura	Valerie Kunimoto
Hawaii Association of Private Schools	Robert Witt	Cecilia Domingo
Civil Rights Commission	William Hoshijo	John Ishihara
Honolulu Liquor Commission	John Carroll	Wally Weatherwax Allan Gaylord Robert Durick
Hawaii Govt Employees Assn	Dale Osorno	
Hawaii Health Systems	Renee Nagahisa	
Hawaii Chamber of Commerce	Paul Saito	John Knorek
Legislative Reference Bureau	Mark Rosen	Ken Takayama
Department of Human Resources Development	Sharlene Hara	Vera Onouye
Judiciary	Barbara Tomita	Susan Uchimura
C&C Personnel	Sandy Abe	Maxine Baba
HPD Personnel	Dave Kajihira	
AG/Public Safety	Lisa Itomura	Bryan Yee
AG/Health & Human Services	Candace Park	Michelle Nakata
AG/Criminal Justice	Kurt Spohn	Rick Damerville
AG/Commerce & Econ Dev	Deborah Emerson	Rod Tam
AG/Education	Russell Suzuki	George Hom
AG/Labor	Herbert Lau	Robyn Kuwabe
AG/Administration	Diane Erickson	

OTHER ISSUES**ACT 263**

12/02/2002

<u>ISSUES</u>	<u>RESPONSIBLE AGENCY/PERSON</u>	<u>ACTION/POSITION</u>
1. Develop consistent and uniform terminology in laws relating to criminal history record checks, including laws governing access and use of criminal history record information.	HCJDC working w/ FBI	ACT 263 proposed legislation directly addresses this issue by standardizing language in HRS Ch 846 for all criminal history background checks for both the state and nationally.
2. Clarify the scope of the “criminal history record checks” conducted by the Hawaii Criminal Justice Data Center. <ul style="list-style-type: none"> ▪ Where a statute indicates a “fingerprint analysis and name inquiry” of “state criminal history record files”, are name checks only sufficient? 	HCJDC working w/ ACT 263 Task Force	Same as #1
3. Review all statutorily authorized or required criminal history record checks to see if there is a need to amend or repeal to conform to existing law, including standard definitions and uniform procedures to be adopted.	ACT 263 Task Force	Same as #1
4. Should statutorily authorized criminal history record checks direct the data center to disseminate to government agencies only criminal history record information, including conviction and non-conviction data, that is less than ten years old, or to check only criminal history record information less than ten years old if the data center is “conducting” the criminal history record check for authorized requestors?	ACT 263 Task Force	This is being addressed by the ACT 263 Task Force in its report and proposed legislation.

<p>5. Should Hawaii conviction data be made available to the public online, similar to the sex offender registry?</p>	<p>HCJDC/AG</p>	<p>A departmental policy will be determined following the implementation of the newly redesigned CJIS-Hawaii (formerly OBTS/CCH), which will be able to technically accommodate web access to statewide criminal conviction data. Please note that a Hawaii Supreme Court ruling shut down the State's sex offender website in November, 2001.</p>
<p>6. Does the National Child Protection Act, as amended by the Volunteers for Children Act of 1998, authorize a qualified entity to request a national criminal history record check for both employment and licensing purposes, in the absence of an authorizing statute?</p>	<p>HCJDC</p>	<p>Follow-up is being pursued at the national level because of the broad impact of this Act to all the states' central criminal history repository. There is presently a bill before Congress (S. 1868) to amend VCA. HCJDC is active in the tracking of this bill through its membership in the SEARCH Group, the national consortium of the state criminal history central repositories.</p>
<p>7. Should criminal history record information be purged when it "no longer serves a public purpose"?</p>	<p>ACT 263 Task Force 10/1/2002</p>	<p>The Working Group recommends that this information not be purged as there is sufficient opportunity for purging through the expungement process as defined in 831-3.2.</p>
<p>8. Clarify whether a conviction may be "annulled or expunged" and whether such an expunged conviction is removed from the conviction database. Section 831-3.1, HRS, prohibits use, distribution, or dissemination of "annulled or expunged convictions" in state employment and licensing matters. Although the data center's web site states that an arrest record may be expunged when the individual is not convicted and that the expunged arrest record is not available to the general public, this provides little guidance because arrest records where there was no subsequent conviction are never available to the general public, whether expunged or not.</p>	<p>HCJDC</p>	<p>§831-3.2 allows only for the expungement of non-convictions. §709-906 (now repealed) and §291-4.5 allow for the expungement of convictions under certain circumstances. HCJDC deletes the conviction from the criminal record database, but the information is retained on the expungement file and is made available to specified criminal justice/law enforcement agencies.</p>

<p>9. Whether an exemption for fees provided by the data center for criminal history record checks is appropriate for any additional categories or circumstances, such as adult foster care homes.</p>	<p>HCJDC</p>	<p>Related to #5. If a policy determination is made to make conviction data available through the internet, then the fees structure in §846-10.5 must be addressed and legislatively restructured. We would caution against the expansion of exemptions as these fees are the ONLY funding source for maintaining the accuracy, completeness and timeliness of the data on the criminal history system. There has not been a request for general funds since the establishment of this fund and accuracy of Hawaii's CCH has increased to 91%, making it in the top 15% in the nation.</p>
<p>10. Whether the State should designate an additional state agency as an "authorized agency" through which a qualified entity may request a national criminal history record check under the National Child Protection Act.</p>	<p>HCJDC</p>	<p>Refer to #6.</p>
<p>11. Should Hawaii's dissemination law be amended to authorize the data center to re-disseminate FBI records to a government agency requesting a national criminal history record check as a "qualified entity" under the Act where the government agency lacks statutory authorization.</p>	<p>HCJDC</p>	<p>Refer to #6.</p>