

State of Hawaii
Department of the Attorney General



**2005 REPORT OF THE CRIMINAL
HISTORY RECORD CHECK
WORKING GROUP**

*Submitted to
The Twenty-Third State Legislature
Regular Session of 2005*

2005 Report of the Criminal History Record Check Working Group

PURPOSE

This report was prepared for the Twenty-Third State Legislature, Regular Session of 2005, pursuant to section 19, Act 95, Session Laws of Hawaii 2003, which requested a report from the Criminal History Record Check Working Group (hereinafter "Working Group") of its responses, findings, and recommendations, including any proposed legislation and identification of resources necessary to support or enforce recommendations for new or amended law and policy.

BACKGROUND OF ACT 95

In January 2001, the Legislative Reference Bureau published a report entitled, "Criminal History Record Checks in Hawaii: Issues and Options," which contained a review of existing statutes pertaining to issues related to the access and use of criminal history records. One of the report's recommendations was the establishment of a Working Group composed of various stakeholders to address specific issues identified in the report.

The resulting legislation, Act 263, Session Laws of Hawaii 2001, established a temporary Working Group to review the policy issues raised by the Legislative Reference Bureau report.

The product of the Working Group's recommendations culminated in proposed legislation submitted to the Legislature for the Regular Session of 2003. Act 95, Session Laws of Hawaii 2003, extended the Working Group until June 30, 2005, to continue its work on tasks assigned by the Legislature on additional issues related to the use of criminal history record information for employment, licensing, and other matters.

WORKING GROUP PROCEEDINGS

Organization and Process of the Group:

The current membership of the Working Group has remained the same since its inception in 2003, with the exception of adding the Office of the Public Defender as required by Act 95. The administrative support of the Working Group has been shared between the Executive Branch Departments of the Attorney General and of Human Resources Development. A list of the chairpersons and participants can be found in Attachment A.

The Working Group's approach has also remained consistent with the approach followed in the prior years. The same rules of procedure and quorum have been followed. Issues were researched and discussed by the group, and decisions were based on either consensus or voting by majority rule.

ACTIVITIES OF THE WORKING GROUP

The Working Group focused on two major activities this past year. The first activity was to finalize responses to a memorandum dated March 27, 2003, from the Chair of the House Committee on Judiciary which referred specific issues to the Working Group to address. The second major activity, which is still on-going concerns a clarification of the role and responsibility of the Working Group. Both activities are described further below:

Activity: Responses of the Working Group to the House Committee on Judiciary's memorandum.

During the Regular Session of 2003, the House Committee on Judiciary referred several questions to the Working Group concerning the access and use of nonconviction data, clarifying definitions and practices, and standardizing statutory language across existing statutes. See Attachment B. The Working Group met on January 9, 2004, to discuss and vote on responses to each specific question in the memorandum. The formal responses appear in Attachment C.

Activity: Request for clarification of the role and responsibilities of Working Group.

Act 263 established the Working Group as a temporary entity to review policy issues raised by the LRB report. The Working Group conducted its review of the LRB issues within the parameters of existing statutes dealing with criminal history records. Although the Working Group was extended to June 30, 2005, the discussion on issues remained within the existing statutes, as amended by Act 95.

During the Regular Session of 2004, a question was raised about the scope of the Working Group's authority and responsibility. A letter dated March 19, 2004, from the Working Group to the Chair of the House Committee on Judiciary, stated the Working Group's belief that it did not have the authority or responsibility to "screen" proposed legislation initiated by agencies for the use and access of criminal history record information. See Attachment D.

The House Committee on Judiciary responded with a request for the Working Group to review bills seeking authority for the use and access of

criminal history records along with a request for legal advice from the Attorney General. See Attachment E.

A request for legal advice from the Working Group was submitted to the Attorney General on August 10, 2004, and is pending. See Attachment F.

If the legal advice is that the Working Group is responsible for screening proposed legislation by agencies for the use and access of criminal history records, the issue of resources and legal liability for the Working Group will need to be addressed.

After the Working Group met on October 28, 2004, to finalize this report, a memorandum from LRB was received by the Working Group on or about December 6, 2004. The Working Group has not had the opportunity to review and discuss the memorandum and to take a position prior to the submission of this report.

RECOMMENDATIONS OF THE WORKING GROUP

The Working Group has completed its tasks as assigned by the Legislature. Act 95 set up a foundation upon which new agencies can follow when seeking the ability to access and use criminal history records. New agencies can use the existing statutes as a template to fashion their own legislative proposals. For example, agencies seeking authority for state and national criminal history record information would refer to chapter 846, Hawaii Revised Statutes. For employment purposes, several statutes like section 352-5.5 or 353C-5, Hawaii Revised Statutes, articulate an agency's employment suitability standards. Section 352-5.5, Hawaii Revised Statutes, articulates the employment suitability standards for the Department of Human Services and section 353C-5 articulates the employment suitability standards for the Department of Public Safety.

Even though the Attorney General has not rendered an opinion about the propriety of having the Working Group review and make recommendations about the use and access of criminal history records, the Working Group believes that it is ultimately the Legislature's prerogative to make public policy determinations about when there should be use and access of criminal history records.

We believe that the recommendations of the Working Group and the subsequent adoption of statutory changes by the Legislature have established a viable reference point against which all future requests for criminal history record checks can be evaluated. The statutes now depict authorizations for two distinct groups: (1) those state agencies, regulatory in nature, that are charged with protecting vulnerable populations; and (2) those employers that have an interest in determining whether the specific criminal conviction history of a job applicant represents a job qualification or danger to other employees in the workplace.

Given the construction of the chapters authorizing regulatory and employer checks, we believe that the Legislature is in a position to evaluate requests for criminal history record check authorization and, therefore, does not require the continued services of the Working Group for that purpose. For example, chapter 346, Hawaii Revised Statutes, for human services and chapter 831, Hawaii Revised Statutes, lay out requirements for conducting criminal history record checks to protect children in child care settings. Any state agency wanting to request authority would draft authorizing language in a bill that would be located within the state agencies' authorizing statute for the program. The agency could use language similar to that which already exists for agencies with current authority. The agency would also be subject to the provisions of chapter 831. Similarly, the agency would also be governed by statutes that articulate that agency's suitability standards such as section 352-5.5, Hawaii Revised Statutes, which articulates the standards for the Department of Human Services and section 353C-5, Hawaii Revised Statutes, which articulates the standards for the Department of Public Safety, as noted above in the first paragraph of this section.

In addition to this statutory guidance, the Legislature can always seek guidance from the Attorney General or the Hawaii Criminal Justice Data Center if there are specific questions that arise in this area. It seems that the combination of these materials provides more than adequate guidance to assist the Legislature in making decisions.

Therefore, the Working Group recommends that it be allowed to sunset as of June 30, 2005, because it is no longer needed to address the issues outlined in the LRB study as well as additional issues referred by the Legislature during the Regular Session of 2003.

Attachments:

Working Group Participants Roster
Memorandums
Letters

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HOUSE OF REPRESENTATIVES

STATE OF HAWAII
STATE CAPITOL
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March 27, 2003

MEMORANDUM

To: Criminal History Record Check (CHRC) Working Group

From: Representative Eric G. Hamakawa
Chair, House Judiciary Committee

RE: SB 830 SD 1 HD 1 and Companion Bill HB 641 HD 3,
Criminal History Record Checks

Since its inception in 2002, the Criminal History Record Check Working Group (CHRC) significant progress toward establishing uniformity and clarification in statute. However, a number of issues remain unresolved or only partially resolved in S.B. NO. 830, S.D. and its companion bill, H.B. No. 641, H.D. 3.

As a point of clarification, S.B. No. 830, S.D. 1 was gutted by the House Committee on Labor and Public Employment and the substance of its companion bill, H.D. No. 641, H.D. 3, was inserted as the H.D. 1 for S.B. No. 830, S.D. 1. In addition to inserting the contents of H.B. 641, H.D. 3, the House Committee on Labor also made additional amendments to S.B. No. 830, S.D. 1, the most significant of which is discussed in the last section of paragraph 1 below. As a result, S.B. No. 830 S.D. 1, H.D. 1 and H.B. No. 641 are companion bills that are substantially the same, except for the new amendments added to S.B. No. 830, S.D. 1, H.D. 1, by the House Committee on Labor.

It should be beneficial for the CHRC to continue its work and address the following issues:

1. Most importantly, determine whether each type of position in question actually requires a "criminal history record check" that includes nonconviction data (i.e., arrests not followed by conviction). The term "criminal history record check" should not be used to refer to a disclosure of only an applicant or employee's conviction information, as it is much broader than that. Availability and use of an individual's nonconviction data disclosed by a "criminal history record check" poses a serious potential invasion of privacy. Careful consideration should be given to authorizing criminal history record checks that disclose, by definition, nonconviction data.

Representative Eric G. Hamakawa
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Attachment B

Conviction information is a public record and available to the public including employers without limitations at the Hawaii Criminal Justice Data Center (Center) (although its use by employers is limited by section 378-2.5, HRS). Mandatory checks of an applicant or employee's conviction record may be more appropriate for some job positions now subject to a "criminal history record check." Generally, a "criminal history record check" to review an individual's criminal history record, including nonconviction data, is recommended only for positions with responsibility for or in close proximity to our "most vulnerable population," -the aged, disabled, and children.

For example, H.B. No. 641, in section 281- , beginning on page 5, authorizes criminal history record check in accordance with section 846- (proposed new section) for liquor license applicants. Section 831-3.1 allows a person "who has been convicted of a felony" to be denied a liquor license, page 51. As a result, it appears that a check of the applicant's conviction data is sufficient. If so, there is no reason to authorize a "criminal history record check" that includes nonconviction data.

Similarly, in S.B. No. 830, S.D. 1, H.D. I, the definition of "applicant", starting on page 5, lines 19-21, is unclear and may be found to be overbroad. By reading the definition of "applicant" together with subsections (a) and (b) on page 4, the bill appears to require a criminal history record check of a person applying for a job simply because the "duty, location, work site, or assignments" place the person applying for a position "in close proximity" to another employee who is by law, subject to a criminal history record check. Subsection (a) of the proposed section 848- (a) on page 17-18, as drafted, appears to indicate that a state "criminal history record check" includes a review of an individual's nonconviction data. Access to and use of an individual's nonconviction data poses a serious potential invasion of privacy. Our committee revised this section in attempt to address this concern but further work is needed to specifically identify the positions for which criminal history record checks are needed.

2. Enact authorizing statutes in the relevant chapters of HRS for positions that require a criminal history record check; and provide that the authorized criminal history record check shall be conducted by the Center upon request by the authorized agency, pursuant to section 846- .
3. Repeal superfluous language relating to criminal history record checks in the various statutory sections that now authorize such checks.
4. Rely on section 846- to establish uniform requirements and procedures for all parties (e.g., the prospective employer, the Center, the applicant) for any statutorily authorized or required criminal history record check. In both H.B. No. 641 and S.B. 830, S.D. 1, H.D. 1, procedures and requirements relating to record checks are not uniform.

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For example, in the numerous statutes authorizing criminal history record checks for a variety of positions or licenses, employers or agencies are authorized to consider "conviction of a crime" or "conviction of an offense for which incarceration is an option" in hiring and firing decisions. There is no indication why these considerations are expressed using a variety of terminologies.

Similarly, the various authorizing criminal history record checks require applicants or employees to provide inconsistent information to the state or county agency as part of the criminal history record check process. Subjects of criminal history record checks should be required to comply with uniform procedures, regardless of employer.

5. Define "criminal history record check" in chapter 846 to mean a review of the individual's criminal history record information as defined in section 846-1; however, if a review of an individual's entire criminal record is deemed necessary, then consider whether both a national and state criminal history record check should be required.
6. Clarify language relating to requesting and conducting criminal history record checks. For example, the proposed new section 846- , on page 16 of H.B. No. 641, states that the agencies may conduct criminal history record checks, but also provides that the Center may charge reasonable fees for criminal history record checks that the Center performed. Inconsistent language can be harmonized by stating that the authorized agencies "request" the Center to "perform" or "conduct" the check.
7. It is uncertain what specific information is provided by the Center after conducting a criminal history record check requested by an authorized agency. The proposed section 846- , on page 16, appears to place no limits on information provided, in contrast to section 378-2.5, at pages 42-45, which prohibits consideration of an employee's (and presumably prospective employee's) convictions that are more than ten years old; excluding imprisonment time. The inconsistency can be corrected by amending section 846- to conform to the provisions of section 378-2.5.
8. For those positions subject to a criminal history record check that includes nonconviction data, the bill provides no clarification or guidelines regarding the use and scope of nonconviction data that is obtained from a criminal history record check. This is particularly true of the Department of Human Service's reliance on adult and child perpetrator records as part of its background checks for certain provider and employee positions. (See H.B. 925, H.B. 1192)
9. An employer's use of conviction data more than ten years old is unclear under current law and neither H.B. No. 641 nor S.B. No. 830, S.D. 1, H.D. 1, provide clarification on the issue.

Generally, existing law in section 378-2 provides that an employment decision made because of "arrest and court record" is an unlawful discriminatory employment practice, although current section 378-2.5 establishes requirements

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for employers' consideration of conviction information. The broad language of section 378-3(1) arguably allows for consideration of convictions more than ten years old and nonconviction data are examples of issues that are in need of clarification.

10. Clarify the scope of inquiry relating to "annual name inquiry into the state criminal history record file", see page 38, line 18-19, of H.B. No. 641. Other statutes establish similar "name inquiry" requirements. This language appears to authorize an annual check of an individual's conviction record (public information). If so, all language authorizing such an inquiry should be revised to specify that the department is to make an "annual name inquiry into the individual's criminal conviction records".
11. Review and identify additional positions in state and county governments for which criminal history record checks should be authorized; review legislation, authorizing criminal history record checks enacted since the CHRC group conducted its review, for consistency and uniformity with the statutory changes proposed in this session.

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**ACT 95, SESSION LAWS OF HAWAII 2003
WORKING GROUP ON CRIMINAL HISTORY RECORD CHECKS**

**Responses to House Committee on Judiciary Memorandum
March 27, 2003**

Question 1:

Most importantly, determine whether each type of position in question actually requires a "criminal history record check" that includes nonconviction data (i.e., arrests not followed by conviction).

Response: The objectives of the Working Group, as enumerated in Act 263, Session Laws of Hawaii 2001, did not include the re-examination of each program that had already been authorized by the State Legislature to receive criminal history record information as part of their requirements for employment and/or licensing. The State Legislature found these programs to warrant access to this information, which includes nonconviction data. It appears that the Legislature is asking for a broader policy level on recommendations and guidelines.

The term "criminal history record check" should not be used to refer to a disclosure of only an applicant's or employee's conviction information, as it is much broader than that. Availability and use of an individual's nonconviction data disclosed by a "criminal history record check" poses a serious potential invasion of privacy. Careful consideration should be given to authorizing criminal history record checks that disclose, by definition, nonconviction data.

Response: It is clear that 'criminal history record check' includes both conviction and nonconviction data. The State Legislature was especially cognizant of the sensitive nature of confidential, nonconviction data, particularly in the early 1990's when the first state programs (child care providers and the Department of Education employees) were statutorily authorized to receive this information. The programs are well aware of the significance of this confidential information, and as such, programs have rules in place in addition to specific program statutory language for the management of this information within the employment and/or licensing procedure. Actual 'use' of this information as the basis for specific action is very restrictive. However, the value of this information for existing programs was discussed at length in the Working Group. See page 8, Active Issue #5, of the Act 263/01 Report to the 2003 Legislature.¹

There was extensive discussion on the subject of examination of nonconviction data vs. its use in determining employment and licensing decisions. See Working Group minutes from February 15, 2002, June 21, 2002, October 1, 2002, and December 5, 2002. The language as drafted in Section 831-3.1 provides for the examination of nonconviction data to determine whether a further review the individual's suitability for employment is warranted. The nonconviction data in itself cannot be the basis for the denial of employment or licensure.

Conviction information is a public record and available to the public including employers without limitations at the Hawaii Criminal Justice Data Center (Center) (although its use by employers is limited by Section 378-2.5, HRS). Mandatory checks of an applicant's or employee's conviction record may be more appropriate for some job positions now subject to a "criminal history record check". Generally, a "criminal history record check" to review an individual's criminal history record, including nonconviction data, is recommended only for positions with responsibility for or in close proximity to our "most vulnerable population," - the aged, disabled, and children.

For example, H.B. No. 641, in Section 281- , beginning on page 5, authorizes criminal history record check in accordance with section 846- (proposed new section) for liquor license applicants. Section 831-3.1 allows a person "who has been convicted of a felony" to be denied a liquor license, page 51. As a result, it appears that a check of the applicant's conviction data is sufficient. If so, there is no reason to authorize a "criminal history record check" that includes nonconviction data.

Response: Over the last decade and more, there have been more than 20 state programs authorized by the State legislature to receive criminal history record information for purposes of employment and/or licensing. Generally, the majority of these programs have been those that service the aged, disabled, children, and public safety.

However, there are other significant programs outside of these categories that the State Legislature has found to warrant this information (for example, liquor license applicants, private guards and detectives, firearms applicants, and adult correction officers at the prisons). These programs can individually substantiate the significance of examining this information and the negative repercussions to public safety that could have resulted, if only examination and use of conviction information were available.

It is very important as your memorandum points out, to remember that conviction information is already public record, and available to anyone, regardless of the reason for which this public information may be used/considered. There is a significant distinction between examination of information, and what information can be used/considered as a basis for employment/licensing action. As such, program statutory language is more specific about ensuring that, while examination of nonconviction data is authorized by statute for that program, only conviction information can actually be used/considered for denial of employment/licensing. As stated earlier, there was lengthy discussion in the Working Group specifically about the examination of nonconviction data, what role it plays in investigations within a program's procedures, and the restrictions of its use/consideration in the actual decision-making.

Therefore, although in the case of liquor license applicants and other programs, it appears that only conviction information matters, which is not true. The statutory language is stating that only conviction information can actually be used/considered as the basis for employment/licensing decisions, while nonconviction data cannot be used/considered.

Similarly, in S.B. No. 830, S.D. 1, H.D. 1, the definition of "applicant", starting on page 5, lines 19-21, is unclear and may be found to be overbroad. By reading the definition of "applicant" together with subsections (a) and (b) on page 4, the bill appears to require a criminal history record check of a person applying for a job simply because the "duty, location, work site, or assignment" place the person applying for a position "in close proximity" to another employee who is by law, subject to a criminal history record check. Subsection (a) of the proposed Section 848- (a) on page 17-18, as drafted, appears to indicate that a state "criminal history record check" includes a review of an individual's nonconviction data poses a serious potential invasion of privacy. Our committee revised this section in attempt to address this concern, but further work is needed to specifically identify the positions for which criminal history record checks are needed.

Response: The referenced language is meant to ensure that, for example, the state worker assigned to school repair work, and hence, in the same work environment as school teachers, custodians, etc. who work in close proximity to school children, would be subject to the same criminal history record check process as those who would fall under the Department of Education's statutory authorization. See page 9, Active Issue #5, of the Act 263/01 Report to the 2003 Legislature.

The bill's language was to ensure that it covered all existing authorized programs, and that the language would be standardized and not require separate updating with every new program that is authorized in the future.

Question 2:

Enact authorizing statutes in the relevant chapters of HRS for positions that require a criminal history record check; and provide that the authorized criminal history record check shall be conducted by the Center upon request by the authorized agency, pursuant to Section 846- .

Response: This was a major objective of the legislation. See pages 16, 17, items #3, 4 of the Act 263/01 Report to the 2003 Legislature. The standard language enacted for chapter 846 includes all the shared requirements of a criminal history record check for authorized programs, and any program specific requirements were moved to the program's individual statute in the proposed legislation. This was done only for existing authorized programs, and not for any new program.

Question 3:

Repeal superfluous language relating to criminal history record checks in the various statutory sections that now authorize such checks.

Response: See item #2 above. This was also a major objective of the Working Group. See page 2, B of the Act 263/01 Report to the 2003 Legislature. In addition, Chapter 846, Part III, Background Checks is being repealed, because all program specific language is being incorporated into their individual statutes.

Question 4:

Rely on section 846- to establish uniform requirements and procedures for all parties (e.g. the prospective employer, the Center, the applicant) for any statutorily authorized or required criminal history record check. In both H.B. No 641 and S.B. 830, S.D. 1, H.D.1, procedures and requirements relating to record checks are not uniform.

For example, in the numerous statutes authorizing criminal history record checks for a variety of positions or licenses, employers or agencies are authorized to consider "conviction of a crime" or conviction of an offense for which incarceration is an option¹ in hiring and firing decisions. There is no indication why these considerations are expressed using a variety of terminologies.

Similarly, the various authorizing criminal history record checks require applicants or employees to provide inconsistent information to the state or county agency as part of the criminal history record check process. Subjects of criminal history record checks should be required to comply with uniform procedures, regardless of employer.

Response: This was also an objective of the Working Group. See page 15, Recommendations of the Working Group, Act 263/01 Report to the 2003 Legislature. To the extent possible, the standard language for chapter 846 included those requirements that were consistently shared, and related specifically to both state AND national criminal history record checks. As such, the information required of the applicant/licensee were those minimally required to meet both the FBI's requirements and the HCJDC's requirements for ensuring an accurate match/no match on a search for an individual in the statewide repository of criminal history record information.

The entire background check process used by programs can vary significantly because of the type of jobs/licenses for which individuals are being evaluated. The criminal history record check is only one facet. In order to preserve the unique requirements of each of the authorized programs, specialized requirements and procedures were maintained in each program's individual

statute. Based on the diversity of these programs, it would be nearly impossible to reach agreement on uniform procedures that go beyond what is minimally required just for the criminal history record check.

The use of offense for which incarceration is an option¹ may be more to provide a distinction of the severity of a criminal act. This specifically references a misdemeanor offense or higher. *The inconsistent terminology maybe the result of the differing needs of the individual programs.*

Question 5:

Define "criminal history record check" in chapter 846 to mean a review of the individual's criminal history record information as defined in section 846-1; however, if a review of an individual's entire criminal record is deemed necessary, then consider whether both a national and state criminal history record check should be required.

Response: We could add the reference to the section 846-1 definition to the proposed standard language by changing H.B. No. 641, page 17, line 3 to read "history record check, which shall include criminal history record information, as defined in section 846-1."

All the programs that do fingerprint-based state checks and reference this standard language have both state and national fingerprint-based checks. Those programs that have authorization for national checks would obtain any Hawaii information on the Federal Bureau of Investigation's (FBI) national file anyway, so it made sense for the programs to also receive the state record, which information would be more complete and timely. Thus far, in this day and age when offenders relocate so easily, programs find it necessary to have both state and national record information. It is a known and substantiated fact that state-based records are more complete than FBI records.

Further, the FBI requires specific language, pursuant to Public Law 92-544, for their approval of a state program's examination of an individual's national record, and the proposed standard language for chapter 846 provides this.²

Question 6:

Clarify language relating to requesting and conducting criminal history record checks. For example, the proposed new section 846- , on page 17 of H.B. No. 641, states that the agencies may conduct criminal history record checks, but also provides that the Center may charge reasonable fees for criminal history record checks that the Center performed. Inconsistent language can be harmonized by stating that the authorized agencies "request" the Center to "perform" or "conduct" the check.

² *There are no programs that just do fingerprint-based statewide criminal history record checks. They all have both state and national. So, again, they are asking us to review programs and determine whether the national level check is necessary. This is new.*

Response: We could be getting into a "war of words" on this one. Standard language says that the agency will conduct, but HCJDC can still charge fees; however, if the agency "conducts", then manpower concerns on front-end processing can be addressed versus stopping new initiatives. Further, fees still apply for HCJDC in back-end processing and continual data quality improvement.

Question 7:

It is uncertain what specific information is provided by the Center after conducting a criminal history record check requested by an authorized agency. The proposed Section 846- , on page 16, appears to place no limits on information provided, in contrast to Section 378-2.5, at pages 42-45, which prohibits consideration of an employee's (and presumably prospective employee's) convictions that are more than ten years old; excluding imprisonment time. The inconsistency can be corrected by amending Section 846- to conform to the provisions of Section 378-2.5.

Response: The circumstances under which Section 378-2.5 and the standard language for chapter 846 apply differ. Section 378-2.5 covers a broader base of employers and perspective employees/employees, including the private sector, which generally does not have access to criminal history record information. For these employers, it addresses the use/consideration of conviction information, which is already public record, and not the more restrictive examination of criminal history record information, which would include nonconviction information. The proposed standard language for chapter 846 would apply to programs that are authorized to receive criminal history record information, including nonconviction data. See page 3 and 6, Active Issues #1 and 3, of the Report to the 2003 Legislature.

Question 8:

For those positions subject to a criminal history record check that includes nonconviction data, the bill provides no clarification or guidelines regarding the use and scope of nonconviction data that is obtained from a criminal history record check. This is particularly true of the Department of Human Service's reliance on adult and child perpetrator records as part of its background checks for certain provider and employee positions. (See H.B. 925, H.B. 1192)

Response: Programs that receive criminal history record information, which includes nonconviction data, cannot directly use/consider such information for employment/licensing decisions. This area was discussed extensively by the Working Group. There was unanimous consensus on the value of examining nonconviction data, as the basis for which further investigation could be made on an individual and behavior to further substantiate or dismiss any factors that could impact an employment/licensing decision. Programs also have additional rules and procedures in place that govern the management of this confidential information, which provides for program variances for the different

types of employment/licensing background checks being done. Further, there are appeal processes as part of the checks and balances. See pages 10-11, Active Issues #7 and 8, of the Report to the 2003 Legislature.³

Question 9:

An employer's use of conviction data more than ten years old is unclear under current law and neither H.B. No. 641 nor S.B. No. 830, S.D. 1, H.B. 1, provide clarification on the issue.

Generally, the existing law in Section 378-2 provides that an employment decision made because of "arrest and court record" is an unlawful discriminatory employment practice, although current Section 378-2.5 establishes requirements for employers' consideration of conviction information. The broad language of Section 378-3(1) arguably allows for consideration of convictions more than ten years old and nonconviction data are examples of issues that are in need of clarification.

Response: The proposed legislation clarifies what can be excluded from the ten year look back period - specifically any incarceration time. For the more serious offenses which would require substantial time in prison, the limitation to a strict ten year period would not provide sufficient time to evaluate rehabilitation, or the likelihood of recidivism. Convictions falling outside of the ten year look back period cannot be used/considered at all. See pages 6,11, Active Issues #6,1 1 , of the Report to the 2003 Legislature.

Question 10:

Clarify the scope of inquiry relating to "annual name inquiry into the state criminal history record file: see page 38, line 18-19, of H.B. No. 641, the statutes establish similar "name inquiry" requirements. This language appears to authorize an annual check of an individual's conviction record (public information). If so, all language authorizing such an inquiry should be revised to specify that the department is to make an "annual name inquiry into the individual's criminal conviction records".

Response: We recommend that the language remain as is. The initial criminal history record check is fingerprint-based, and provides the program with an individual's record at that time. When obtaining legislative approval, a program may propose and be authorized for follow-up annual name inquiries into the state criminal history record file in order to determine if there have been changes to the record. Such programs would already be authorized to receive criminal history record information, so the annual name inquiry would likewise include the same - conviction and nonconviction information.

The discussion by the Working Group about the examination vs. use of nonconviction information are substantially documented in the Working Group minutes from the February 15, 2002, June 21, 2002, October 1, 2002, and December 5, 2002 meetings.

Question 11:

Review and identify additional positions in state and county governments for which criminal history record checks should be authorized; review legislation; authorizing criminal history record checks enacted since the CHRC group conducted its review, for consistency and uniformity with the statutory changes proposed in this session.

Responses: All criminal history record checks enacted through 2002 were reviewed and included in the Report and the proposed legislation. The Working Group specifically advised any agency, which was not yet authorized for criminal history record checks, that the agency needed to propose separate legislation, on its own, in order to obtain legislative approval for any new program.

The proposed standard language for chapter 846 and for the individual programs in H.B. 641 must be first enacted as one package in order for the Department of the Attorney General to provide guidelines to any new programs for drafting consistent and uniform language for their programs. That was the primary reason for the changes to chapter 846 and the individual statutes in the current legislation.

The request for the Working Group to review any additional programs that should be authorized for criminal history record checks is new and beyond what was provided in Act 263, Session Laws of Hawaii 2001. We would need more definitive guidelines from the State Legislature to assist in this effort. There are many, many more programs waiting in the wings to be authorized for this information, which can be a daunting task.

ACT 263, SLH 2001
CRIMINAL HISTORY RECORD CHECK WORKING GROUP
FEBRUARY 15, 2002

TIME: 9:00 a.m.

LOCATION: State Office Tower
Department of Attorney General
15th Floor Conference Room (Room 1500)
235 South Beretania Street
Honolulu, Hawaii 96813

PRESENT:	Liane Moriyama	AG/HCJDC
	Hannah Kawakami (Alt)	AG/HCJDC
	Norma Ueno (Alt)	AG/HCJDC
	Kathleen Watanabe	AG/Employment Law
	Jennifer Salvador (Alt)	AG/Employment Law
	Pacita Woodward (Alt)	AG/Employment Law
	Lisa Itomura	AG/Public Safety
	Candace Park	AG/Health & Human Services
	Kurt Spohn	AG/Criminal Justice
	Deborah Emerson	AG/Commerce & Economic Dev.
	Herbert Lau	AG/Labor
	Brian Kagihara	Dept. of Health
	Gary Kemp	Dept of Human Services
	Larry Kamakawiwoole	Dept. of Commerce & Consumer Affairs
	Mark Morita (Alt)	Dept. of Commerce & Consumer Affairs
	Llewella Rogers (Alt)	Dept. of Public Safety
	Mae Yamasaki	Dept. of Education
	Cecilia Domingo (Alt)	Hawaii Association of Private Schools
	William Hoshijo	Civil Rights Commission
	John Ishihara (Alt)	Civil Rights Commission
	Dale Osorno	Hawaii Govt. Employees Association
	Renee Nagahisa	Hawaii Health Systems
	Paul Saito	Hawaii Chamber of Commerce
	Sharlene Hara	Dept. of Human Resources Development
	Barbara Tomita	Judiciary
	Sandy Abe	C&C Personnel

ABSENT:	Russell Suzuki	AG/Education
	George Hom (Alt)	AG/Education
	Diane Erickson	AG/Administration
	Brian Nakamura	Hawaii Labor Relations Board
	Val Kunimoto (Alt)	Hawaii Labor Relations Board
	John Carroll	Honolulu Liquor Commission
	Wally Weatherwax (Alt)	Honolulu Liquor Commission
	Thomas Mendonca (Alt)	Honolulu Liquor Commission
	Jean Mardfin	Legislative Reference Bureau
	Ken Takayama (Alt)	Legislative Reference Bureau
	Dave Kajihira	HPD Personnel
	Glenn Kajiyama	HPD Personnel

I. Call To Order

There being a quorum present, a meeting of the Act 263, SLH 2001 Criminal History Record Check Working Group was duly called to order at 9:10 a.m. by the Chairperson, Ms. Moriyama.

II. Approval of January 17, 2002 Criminal History Record Check Working Group Meeting Minutes

Ms. Moriyama informed the Working Group that although there were three (3) sets of meeting minutes in the handouts, she asked that the Working Group focus only on the January 17, 2002 Criminal History Record Check Working Group Meeting Minutes and asked if there were any revisions. Sub-Working Group discussions would be handled as status reports. See III. below.

Since there were no revisions, a motion was made by Mr. Kemp, seconded by Mr. Ishihara, and unanimously carried, to accept the January 17, 2002 Criminal History Record Check Working Group Meeting Minutes, as submitted.

III. Status Reports From Sub-Working Groups

Ms. Moriyama informed the Working Group that she had been advised that since no substantive decisions would be made in the Sub-Working Groups' meetings, these meetings do not have to operate under the Sunshine Law. As such, it was unnecessary to post the Sub-Working Groups' meeting agenda on-line as well as having the availability of formal minutes, although notes of these meetings would continue to be taken. She advised the Working Group that the other two (2) sets of minutes covered discussions in Sub-Working Group #1 and #2, respectively.

Ms. Moriyama summarized the highlights of the meeting as bulleted on p. 3 of the Sub-Working Group #1 meeting minutes, which were as follows:

- Vulnerable community needs to be defined.
- The need to incorporate or expand exemptions for a vulnerable community.
- Define the specific appeal processes available for licensing functions.
- The 10-year limitation on the employers' ability to consider rationally related convictions should be loosened for the vulnerable community.

On the 3rd bulleted item, Ms. Moriyama informed the group that she received the reference materials on licensing appeals procedure from the various agencies represented in Sub-Working Group #1, which upon review indicated that there was some type of appeal process currently available in the licensing areas. On the 4th bulleted item, Ms.

Moriyama advised that further discussion on this item would continue in today's Sub-Working Group meeting.

Ms. Moriyama asked the Working Group if any of the Sub-Working Group #1's summarized issues needed clarification or expansion. Mr. Kemp asked that on p. 2, 2nd paragraph, 1st sentence, be revised from "to remove the exemption on Chapter 831-3.1" to "to maintain the exemption on Chapter 831-3.1". Mr. Kemp also stated that the next statement should be revised from "Mr. Kagihara added that this exemption should apply" to "Mr. Kagihara added that this exemption should be expanded". Since the Sub-Working Groups were considered informal, a discussion proceeded on whether these revisions would be incorporated into an amended set of minutes. Ms. Moriyama confirmed the Sub-Working Groups' minutes would be amended accordingly with items as currently recommended as well as any other items presented later in the Sub-Working Groups' meetings.

Ms. Watanabe stated that Sub-Working Group #2 had a lively discussion on their related issues. The focus of the discussion was on what people's priorities were and the different perspectives offered from various individuals. The discussion also centered around whether Act 263 should be kept, repealed, or amended. Mr. Ishihara addressed concerns that some items toward the conclusion of the Sub-Working Group's discussion were not noted in the minutes, such as the standard of proofs. Ms. Watanabe acknowledged Mr. Ishihara's concerns accordingly.

Ms. Watanabe concluded that Sub-Working Group #2's discussion was summarized by dividing the issues into the following two areas as reflected on p. 8 of the minutes:

POLICY ISSUES

1. Public Safety
2. Ability/Opportunity for Gainful Employment
3. Safe Harbor for Employer
4. Uniformity of Law
5. Employer Good Faith Discretion
6. Mitigating Factors for Employment
7. Freedom of Information

LEGAL ISSUES

1. Statutory Interpretation
2. Exceptions
3. Extending Exceptions
4. Status vs. Behavior
5. Definition of "criminal record"
6. Access to Info vs. Ability to Consider Info

After a brief discussion on the summary of Policy and Legal Issues, Ms. Watanabe reiterated that the group tried to prioritize the issues and create a workable list. She also stated that today's Sub-Working Group meeting was a good time to regroup.

A discussion followed with reference to Sub-Working Group #1's last bulleted summary item on loosening the 10-year limitation on the employers' ability to consider rationally related convictions for the vulnerable community. Ms. Moriyama concluded that this issue would be expanded upon in today's Sub-Working Group #1's meeting.

IV. Inactive Issues

Ms. Moriyama stated that when LRB first drafted the report, there were about 25-30 issues identified. At the Legislature and with all the testimonies presented, HCJDC focused on the thirteen (13) Active Issues that were actually in the Bill to be addressed by this Task Force. There were eleven (11) Inactive Issues, which were assigned to HCJDC for action. Ms. Moriyama stated that Ms. Ueno updated the status on these Inactive Issues and would report on some of the actions HCJDC has taken so far on these items.

Ms. Ueno proceeded to review the handout on the eleven (11) Inactive Issues of Act 263 as attached.

V. Announcements

Ms. Moriyama announced that the Hawaii Criminal Justice Data Center would be having a demonstration of all the different systems currently available at its offices on Thursday, February 21, 2002, at 9:00 a.m. There would be demos on the following:

- Front Entrance Fingerprint Reader.
- Applicant Electronic LiveScan, which the DOE and DHS are currently actively pursuing to obtain a 24-hour response time from the FBI on national fingerprint checks.
- Automated Fingerprint Identification System (AFIS).
- Public Access.
- Criminal History Record Information System (OBTS/CCH).

For those unable to attend, Ms. Moriyama informed the Working Group that a special session could be rescheduled later by contacting Norma Ueno directly at HCJDC or via e-mail.

Ms. Moriyama informed the Working Group that Sub-Working Group #1 would be meeting thereafter in the 12th Floor Conference Room, and Sub-Working Group #2 would remain in the 15th Floor Conference Room.

VI. Adjournment

Since there were no further topics for discussion, a motion was made by Mr. Ishihara, seconded by Ms. Itomura, and unanimously carried, to adjourn the meeting at 10:00 a.m.

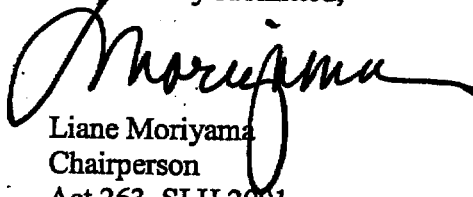
Respectfully submitted,

Liane Moriyama
Chairperson
Act 263, SLH 2001
Criminal History Record Check Working Group

VI. Adjournment

Since there were no further topics for discussion, a motion was made by Mr. Ishihara, seconded by Ms. Itomura, and unanimously carried, to adjourn the meeting at 10:00 a.m.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Moriyama", written in a cursive style. The signature is positioned above the typed name and title.

Liane Moriyama
Chairperson
Act 263, SLH 2001
Criminal History Record Check Working Group

INACTIVE ISSUES

ACT 263

2/12/02

ISSUES	RESPONSIBLE AGENCY/PERSON	ACTION/POSITION
<p>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.</p>	<p>Norma/FBI</p>	<p>Draft standard bill language based on new FBI guidelines and submit for comments.</p>
<p>2. Clarify the scope of the "criminal history record checks" conducted by the Hawaii Criminal Justice Data Center.</p> <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? 	<p>-</p>	<p>Non-conviction information must be fingerprint-based. National standard is to conduct fingerprint searches in conjunction with name searches.</p>
<p>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.</p>	<p>Norma/Legal</p>	<p>Update chart for standardization.</p>
<p>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?</p>	<p>-</p>	<p>No, the criminal history system is primarily for criminal justice agencies. To have to modify for certain non-criminal justice purposes would be a significant effort.</p>
<p>5. Should Hawaii conviction data be made available to the public online, similar to the sex offender registry?</p>	<p>Hannah</p>	<p>Policy determination that will be addressed in the Department, pending final outcome of sex offender web site.</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>Liane</p>	<p>Follow-up at the national level—bill before Congress to amend VCA. As written, it requires a state agency like the Data Center to make a suitability determination.</p>

<p>7. Should criminal history record information be purged when it "no longer serves a public purpose"?</p>	<p>--</p>	<p>No, how would "no longer serves a public purpose" be defined and applied.</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>--</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. We do delete 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>Hannah</p>	<p>Look at redoing fee structure. Legislative call, but we would caution against the expansion of exemptions. These fees are the ONLY funding source for keeping the data on the criminal history system accurate and timely. There has not been a request for general funds since the establishment of this fund and accuracy of Hawaii's CCH has increased to 89%, making it in the top 14% 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>On hold, refer to #6</p>	<p>Just passes the buck to another state "authorized" agency. Best addressed via the congressional bill.</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>On hold, refer to #6</p>	<p>Does the state have the authority to override federal law? Would recommend the route of the congressional bill.</p>

ACT 263, SLH 2001
CRIMINAL HISTORY RECORD CHECK WORKING GROUP
JUNE 21, 2002

TIME: 9:00 a.m.

LOCATION: State Office Tower
Department of Attorney General
15th Floor Conference Room (Room 1500)
235 South Beretania Street
Honolulu, Hawaii 96813

PRESENT:	Liane Moriyama	AG/HCJDC
	Hannah Kawakami (Alt)	AG/HCJDC
	Kathleen Watanabe	AG/Employment Law
	Jennifer Salvador (Alt)	AG/Employment Law
	Pacita Woodward (Alt)	AG/Employment Law
	Lisa Itomura	AG/Public Safety
	Candace Park	AG/Health & Human Services
	Kurt Spohn	AG/Criminal Justice
	Colette Akahoshi	Dept. of Health
	Pankaj Bhanot	Dept. of Human Services
	Larry Kamakawiwoole	Dept. of Commerce & Consumer Affairs
	Llewella Rogers (Alt)	Dept. of Public Safety
	Mae Yamasaki	Dept. of Education
	Francis Keeno	Dept. of Education
	Cecilia Domingo (Alt)	Hawaii Association of Private Schools
	William Hoshijo	Civil Rights Commission
	John Carroll	Honolulu Liquor Commission
	Robert Durick (Alt)	Honolulu Liquor Commission
	Dale Osorno	Hawaii Govt. Employees Association
	Renee Nagahisa	Hawaii Health Systems
	Paul Saito	Hawaii Chamber of Commerce
	Sharlene Hara	Dept. of Human Resources Development
	Vera Onouye (Alt)	Dept. of Human Resources Development
	Barbara Tomita	Judiciary
	Sandy Abe	C&C Personnel
	Dave Kajihira	HPD Personnel
ABSENT:	Deborah Emerson	AG/Commerce & Economic Dev.
	Rod Tam (Alt)	AG/Commerce & Economic Dev.
	Russell Suzuki	AG/Education
	George Hom (Alt)	AG/Education
	Herbert Lau	AG/Labor

ABSENT:	Robyn Kuwabe (Alt)	AG/Labor
	Diane Erickson	AG/Administration
	Brian Nakamura	Hawaii Labor Relations Board
	Val Kunimoto (Alt)	Hawaii Labor Relations Board
	Jean Mardfin	Legislative Reference Bureau
	Ken Takayama (Alt)	Legislative Reference Bureau
	Norma Ueno	AG/H CJDC

I. Call To Order

There being a quorum present, a meeting of the Act 263, SLH 2001 Criminal History Record Check Working Group was duly called to order at 9:10 a.m. by the Chairperson, Ms. Moriyama.

II. Approval of May 22, 2002 Criminal History Record Check Working Group Meeting Minutes

Ms. Moriyama asked the Working Group to review the May 22, 2002 Criminal History Record Check Working Group Meeting Minutes and asked if there were any revisions.

Since there were no revisions to the minutes, a motion was made by Ms. Osorno, seconded by Mr. Kajihira, and unanimously carried, to accept the May 22, 2002 Criminal History Record Check Working Group Meeting Minutes.

III. Reports

A. Section 378-2.5, HRS

Ms. Moriyama asked the group to refer to the green handout on Section 378-2.5, which was created by the sub-committee consisting of Mr. Hoshijo (lead), Mr. Ishihara, Mr. Saito, and Ms. Hara.

Mr. Hoshijo explained that he created via consensus a proposed draft amendment, which would exclude periods of incarcerations from the 10-year look back restriction. He said that there was also some shared concerns about employers needing clarification of the timing of an inquiry, where they would have a statutory/licensing exception as explained in the 2nd paragraph of the transmittal memorandum handout. He emphasized that it was true that where an employer establishes a BFOQ or falls under a statutory exception, pre-offer inquiry into and consideration of (narrowly defined) conviction records are allowed.

Mr. Hoshijo clarified that, for example, with the Security Guards and Security Licensing, the group would want the statute to allow for a pre-offer inquiry because in each area the exceptions differ. Thus, the group would need to look at each area and determine if it is appropriate to allow a pre-offer inquiry although there may be problems with federal regulations that we may not even know of.

Ms. Moriyama stated that basically each of the programs listed under section (c) would be conducted a case-by-case basis on whether each program wanted to do a pre-offer inquiry. She explained that currently, the private employer could only do it after the offer has been made.

Mr. Hoshijo agreed with Ms. Moriyama's statement and added this is the area where the discussion is heading, i.e., regarding whether in some instances, the employer could make the pre-offer with some sense of caution, and whether the employers are authorized not to make it until post-offer.

Ms. Moriyama confirmed that with Security Licensing, DCCA would need to take a look at their requirements to see if a pre-offer inquiry was appropriate and to make sure that the employers cover all bases that a BFOQ was established ahead of time. Mr. Hoshijo stated that any exceptions would have to be established ahead of time.

Ms. Moriyama asked the Working Group what was the next step beyond the 378-2.5 draft, i.e., regarding everyone's program areas, what it is that the group needs to do or follow-up on?

Ms. Hara stated that for their agency, everything is done pre-offer, same as DCCA, although there were some situations where there was an exception.

For the private employers, Mr. Saito explained that the statute, 378-2.5 was not clear, that it was his understanding that everyone needed a criminal background during a post-offer unless there is an exception.

Ms. Tomita stated that for their agency, previously, the criminal background check was done during the pre-offer. However, 3 years ago, their staff attorney advised them that it should be done during the post-offer.

Mr. Saito added that if the employer has an exception, the employer should do the criminal background check during the pre-offer. However, since the statute is not clear, employers need to be cautious and do the criminal background check during the post-offer. When Ms. Moriyama asked what were the exceptions, Mr. Saito

replied that it was 378-2.5, i.e., security guards, condominium associations, etc. Mr. Hoshijo advised that the exceptions are outside 378-2.5.

Ms. Yamasaki advised that the DOE currently does criminal background checks during the post-offer because an attorney from the Civil Rights Commission advised the DOE a few years ago that it must not do it during the pre-offer.

Mr. Saito commented that because there is an ambiguity in the law, no one is confident to say whether the criminal background check could be done during the pre-offer or post-offer. Mr. Saito asked the group to refer to the criminal history task force questionnaire (lavender colored, #22) distributed at the start of the Working Group meetings, on some of the references that he submitted, i.e., insurance employees under 431:2-201.3(a), security guards under 261-17 (b), private detectives under 463-6(b) and 463-8, that these are statutory exceptions that do not really say an employer can do a pre-offer record check. Mr. Hoshijo added that specific exceptions could be included, but it needs to be identified.

Ms. Moriyama said that for state employers, it is clear that the employer could do a pre-offer with the exception of Judiciary and DOE. Ms. Tomita said that maybe the statutes are not clear if the attorney advised the Judiciary to change their policy from pre-offer to post-offer, though she preferred to have a pre-offer check. Ms. Abe added that City & County could not do a pre-offer check.

Mr. Spohn stated that according to 378-2.5, it does not include public employers and suggested that perhaps 378-2.5 should read instead of "employers' inquiries on conviction records, etc." to "private employers' inquiries on conviction records, etc.", because if it is read without the legal knowledge of knowing where these various exceptions are scattered throughout the HRS, then one would assume that public employers cannot do this. However, if one is knowledgeable in the law and researches the entire HRS and finds out what the exceptions are, then one can say, for example, under 378-2.5 (3) sub-section (1), it can be done. As a matter of clarification, he recommended that the group could clarify it by perhaps changing the title or having a sub-section under the exceptions and state that nothing herein shall apply to public employers or to State, County, or Federal employers.

Ms. Moriyama asked if the sub-section in 378-2.5 does not apply to private employers. Mr. Hoshijo replied that there needs to be some protection and specific statutory exceptions in certain areas prior to establishing a rationale relationship.

Mr. Spohn added that since there are some public employers that are barred from pre-offer inquiry, that perhaps it should be noted that anyone covered by the State's hiring law, is not subject to this. He added that in drafting statutory laws, there should be cross-references, i.e., one does not want to establish general exceptions except as provided in the HRS, because the honest employer trying to figure it out would basically need to hire a lawyer to do research. Thus, Mr. Spohn recommended a listing of everything under the exceptions, in other words, wherever there is an exception granted by the HRS, there would be a line telling the exceptions #1-#11 so someone would know that they are excluded and perhaps even having a title of the exception that gives the exception.

With reference to the list of exceptions that Mr. Saito listed on his questionnaire (lavender, #22) that was distributed at the start of the Working Group meetings, Mr. Saito stated that the exceptions listed were not all inclusive. Mr. Spohn suggested that these exceptions should be placed into 378.3. Mr. Saito said that these are some of the exemptions and statutes that the private employers have to deal with. He commented that it might be very helpful to make the statute very clear, not necessarily by numbering the exceptions, but list it closer to the top of 378-2.5.

Mr. Hoshijo stated if private employers list those specifically exempted, the unexpected consequence would be to omit someone.

Mr. Spohn stated there was a way to get around this. He suggested that in 378-3.1, sub-section (1) would read "repeal or affect any law or ordinance or government rule having force and effect of law, including but not limited to, the following statutory sections". Thus, if one is missed, an individual would say that there is a statutory section that has the effective law and that individual would still come in under sub-section (1), but for all the ones that there's no argument about, those would be listed.

Mr. Saito suggested that this should be separated since the intent is to verify whether is pre-offer is allowed.

Mr. Hoshijo suggested that it be placed under 378-2.5 (d) so that other protections would not get messed up and to prevent unintended consequences.

Mr. Spohn stated that wherever it is placed, it should be in an area where there is a signal there to the employers who are not governed specifically, that they know that they are not governed because of this section.

Ms. Moriyama confirmed that the group is looking at drafting sub-section (d) to 378-2.5 to clearly show that there are exceptions that do not apply to the public employer, which Mr. Saito and Mr. Hoshijo will try to coordinate.

With reference to post-offer, Mr. Spohn referred to the green draft on 378-2.5(c), excluding periods imprisonment would accomplish what the group wants because the longer the person's period of imprisonment, the longer that period is excluded. However, he asked if one cannot examine any record that exceeds 10 years excluding period of imprisonment, how do you calculate that it has been 10 years and wouldn't one need the record?

Mr. Hoshijo replied the possibility of setting the system up where the employer could look into the database.

Mr. Spohn expressed the uncertainty of the language to do this. He suggested that instead of saying that the employer may examine the employee's record, revise it to say that the employer may consider the employee's record since the existing statute bars one from even seeing it, and by extension, it would also bar one from asking the person if they have a record. Thus, according to the existing statute and probably according to the current draft, the employer would be barred from asking if an employee has a record and from doing any investigation to check if they have a record unless that record is within the last 10 years. If the employer looks at the record for 10 years and the person was incarcerated for 20 years, the employer would not see that conviction. Thus, Mr. Spohn inquired what the harm would be as long as the employer has a pre-examination offer, from allowing the employer to have access to person's entire adult criminal record?

Mr. Hoshijo responded by stating how the question is posed to the applicant and when one gets into calculation, the issue gets more complicated. Mr. Spohn said that supposedly an applicant was made a job offer and that person's criminal record was checked.

Mr. Hoshijo agreed with the kind of inquiry that could be made by the employer and recommended that on the draft amendment to HRS 378-2.5, (c), line 4, be revised from "the period for which the employer may [examine] the employee's conviction record" to "the period for which the employer may consider the employee's conviction record". Ms. Moriyama reiterated that the employer could see everything on the conviction record, but it may not be considered at times.

Mr. Spohn recommended changing the statute to say that the employer could look at the entire record and not say that the employer could only look at the record that goes back 10 years. He felt that once the employer knows about a conviction, then there is a bright line what the employer could consider.

Ms. Moriyama reiterated that Mr. Hoshijo wanted HRS 378-2.5, (c), line 4, be revised from "the period for which the employer may [examine] the employee's conviction record" to "the period for which the employer may consider the employee's conviction record". Ms. Park suggested on checking on the legislative history on this item.

Ms. Moriyama summarized the direction of the discussion as follows:

- The group is still working on 378.2-5 (green sheet), sub-section (d), which Mr. Saito will work on the language to spell out the exceptions.
- Based on Mr. Spohn's comments, Mr. Hoshijo will review 378-2.5 (c), line 4, to change the word "[examine]" to "consider".
- Ms. Park's point on checking the legislative history is important to consider.
- In addition, Ms. Tomita and Ms. Yamasaki will check and review the basis for their areas in not being able to do pre-offer inquiries and from the logic in their analysis and rationale from their respective areas, it might be a learning experience and something that needs to be rectified. Mr. Saito asked that the letters advising the Judiciary and DOE to change from pre-offer to post-offer inquiries be faxed to him at 523-6001 for his review.

B. Section 831-3.1, HRS

Ms. Moriyama stated the Ms. Itomura, Ms. Salvador, and Mr. Kamakawiwoole worked together on creating the first lavender set consisting of 3 separate drafts on 831-3.1, HRS. Ms. Moriyama advised that the second lavender set consisted of comments from Mr. Kamakawiwoole, which was incorporated into the 3 separate drafts. Ms. Moriyama said that the last lavender set was from Ms. Salvador, which consisted of some pages from the LRB's original study that could bring the group back in focus and possibly be used as a reference in today's discussion.

Ms. Salvador explained that the 3 drafts were amended in varying degrees. In the first draft, suggestions from the last meeting were incorporated into the document. One suggestion was from Ms. Hara in being able to look at arrest records like other state agencies. This suggestion was reflected in sub-section (a) as arrest or conviction.

Ms. Salvador advised that in sub-section (b), nos. (1) and (3) were deleted since Ms. Hara wanted those types of information available to her.

Ms. Salvador stated that Ms. Hara requested a 10-year window in which public employers did not have to conduct a finding on a rehabilitated applicant when there was a direct relationship with the crime and the possible job.

In sub-section (c), Ms. Salvador said that as the group discussed, when considering non-criminal standards, the public employer already has criminal standards set forth. However, Mr. Kamakawiwoole wanted sub-section (c) left in. Thus, Ms. Salvador deleted any employment wording from sub-section (c), but left the section in for the licensing group.

In sub-section (d), Ms. Itomura said that she expanded this area by adding "Department of Health or state other state or government agency". Although it might be a little too broad, she stated that DHS and DOH were very adamant in not losing the ability to deny licenses and permits to individuals and organizations. She explained that this was the easiest way to amend sub-section (d) rather than trying to fit it in another sub-section. She mentioned that all 3 drafts have the same language. In sub-section 831-3.1 (b), she added this to avoid any conflict with 846 and deleted the words "distributed, or disseminated".

In the second draft, Ms. Salvador explained that she separated all of Mr. Kamakawiwoole's recommendations and incorporated what he had submitted into the first draft.

In the third draft, Ms. Salvador advised that this draft was basically the same as the second draft except that in sub-section (d), she moved some items for clarity reasons. Thus, it begins with "provided that a period of at least 10 years has elapsed since said date of arrest or conviction, a refusal, suspension, or revocation under sub-section (c) may occur only".

Ms. Itomura stated all 3 drafts incorporated all of the recommendations in various ways. The only item she questioned was why Mr. Kamakawiwoole wanted to keep sub-section (c), when considering non-criminal standard in the first draft since most people wanted to get rid of that entire sub-section because it had no definition and conflicted with other standards in other employment laws or sections. Mr. Kamakawiwoole confirmed that would follow-up on this item with Ms. Emerson.

Mr. Spohn agreed with Ms. Itomura on the relevance of having sub-section (c) remain in 831-3.1. Mr. Spohn also pointed out that the title of 831-3.1 is the Uniform Act on Status of Convicted Persons, so people will assume to thread

lightly. However, the Uniform Act was rejected by 48 states and adopted only by Hawaii and New Hampshire. He advised that most states have a section of the model penal code, which deals with the status of convicted persons, and Hawaii is a model penal code state. Therefore, he suggested taking the entire model penal code and inserting the Uniform Act on the Status of Convicted Persons. He mentioned that 831-3.1 was not part of the Uniform Act on the Status of Convicted Persons, which was something that was added. Mr. Kamakawiwoole reconfirmed that he would take this issue back to the appropriate parties.

Mr. Hoshijo questioned what was the legal significance of arrest without a conviction. He expressed his concern whether it was a good policy to attach consequences to arrest without a conviction. Thus, by having an arrest without a conviction, there would be an employment consequence attached to arrest. Ms. Hara stated that a rationale relationship still needs to be considered and that she cannot use this information even though an individual has admitted guilt.

Ms. Hara stated that there is a conditional employment stipulation where the employer would wait until the outcome before an employment decision is made.

Mr. Spohn suggested creating a standard where employer could make a determination that if there is an arrest, the employer could investigate and if there is any evidence that convinces the employer that the individual did the act he/she is accused of, then employer may withheld employment. Ms. Itomura stated that this situation would create a mini-trial for the employer and a liability problem.

Ms. Moriyama asked how do employers find out about DAG/DANC since HCJDC does not disseminate that information on convictions. The only agencies that receive this information are DOE, DHS, and DOH.

Ms. Hara stated that they could not use DAG/DANC as a verification of character. Although an investigation starts from an arrest record, their agency could only look at other indicators and do an independent investigation. She said since that holding on advance creates a difficult situation for the department, direction is needed on whether or not to mitigate on arrests.

Mr. Spohn responded if it is based on probable cause by the judge or the grand jury, then the person is not guilty until proven beyond a reasonable doubt.

Ms. Moriyama said that if Ms. Hara could do a pre-offer and receive the full criminal history, which includes arrest and convictions on an individual, how often does it happen that in the period between the offer and hiring process that individual gets arrested and gets on the front page? She stated that the working group could not fix everything, but could come to a better situation.

Ms. Hara said that their agency tries to make predictions on whether or not a person will become a successful employee by looking at character, morals, behavior, etc. via employment records, credentials, neighborhood assessments, etc. However, it is difficult for their agency to make decisions when there is a situation where a prospective gets arrested and cannot use the arrest information for a decision.

Ms. Moriyama clarified that Ms. Hara wants arrest information on a daily basis such as DHS and DOE, to use as a pre-indicator. But as far as finding out about an arrest in a post-offer, then the only thing is to hold it advance. Ms. Watanabe suggested that if the group makes any changes, the group needs to weigh the impact of the situation and maintain a mutual balance. Ms. Moriyama reiterated DOE, DHS, PSD, and private schools could get arrest information and could use it as appropriate, which is built into their statute, which is what DHRD wants. Ms. Abe agreed with Ms. Hara that the arrest information could be used as a starting point and could lead to other areas in reviewing a person's character.

Mr. Hoshijo commented that the group needs to get away from arrest with convictions information as disqualification of employment since there could be an equal protection problem, where classes of employees are being treated differently. He said that by looking at conduct at work versus outside conduct to disqualify someone, the employer feels restricted and suggested perhaps an independent investigation would be better. Mr. Spohn suggested the possibility of adding a provision that says provided that no employment decisions will be made solely on the basis of a person's arrest.

Ms. Moriyama asked Ms. Tomita's opinion from the Judiciary standpoint. Ms. Tomita would like to use arrest information, but liability is involved. Although she felt torn on this issue, she felt that the arrest information would show an individual's character.

Ms. Moriyama summarized that the public employers would like to be brought up to par like the DOE and DHS by having access to arrest record. She said that DAG/DANC makes it difficult since guilt is admitted and cannot be used. From a DOE and DHS perspective, the information is seen, but further investigation is needed to determine a person's character. Ms. Yamasaki added that the severity of the charges also needs to be considered, i.e., a DAG/DANC could be given for a misdemeanor sexual assault.

Mr. Spohn asked about very old arrests. He felt that if arrest was going to be considered, then arrest resulting in acquittal should not be considered as well as distinguishing that the types of arrests be limited to arrest for criminal cases that

are still pending. Mr. Kajihiro stated that HPD sees everything and goes by the statute of limitations of each case via the penal code.

Mr. Spohn added that once a person is arrested, the statute of limitations stops since the statute of limitations states that an individual needs to be charged within a certain period of time after the crime has been committed. Thus, rather than use the statute of limitations, he suggested using a specific number of years, which would perhaps be easier for the employers to calculate. He asked if it was possible to allow the employer the ability to investigate without mandating it, i.e., allow them to investigate when the situation warrants, but not mandating that every arrest be investigated. Ms. Watanabe felt this would be a problem if investigations were done inconsistently.

Ms. Moriyama stated that the Working Group is now trying to define the scope of arrest. She turned the discussion to Ms. Kawakami since there is an AG opinion pending, an issue that HCJDC has been trying to deal with for a while, which may be interesting for the group and which may help in the definition of what kind of information becomes public.

Ms. Kawakami said that a legal request was sent to the Admin Division on what HCJDC can disseminate, or especially, as it relates to arrest charges that have pending dispositions, if 1 year has not elapsed, i.e., released pending investigation. She stated that this seemed to categorize a particular type of arrest without conviction as disseminable or public information.

Ms. Kawakami stated that questions were also posed to Admin that dealt with DAG/DANC cases. Ms. Kawakami said that currently, HCJDC considers all of this as non-conviction information falling into a gray area. Thus, Ms. Kawakami advised that she would follow-up with the Admin Division on these pending legal requests.

Ms. Moriyama stated that since these opinions may impact the group's efforts and it may be the compromise the group needs for arrest information. Therefore, HCJDC is posing these questions, which could be in 846, but to interpret it is an uncertainty. Ms. Moriyama felt that the group was not going to resolve the arrest issues today, but asked everyone to talk about it in-house and to be aware that this would be a topic for the next meeting because a resolution is needed on 831-3.1. She stated that if the group reviews the handouts that Ms. Salvador had put together on the LRB studies, it would show that the group needs to concentrate its efforts in 831-3.1. She recommended that the Working Group reread Chapter 831-3.1.

Ms. Moriyama summarized the status on 831-3.1 as follows:

- Concentrate more on the arrest definition area. Mr. Kamakawiwoole will consult with his department and his Deputy AG as far as non-criminal standards.
- Focus more closely on the 3 drafts on 831-3.1 since this would be a big area of discussion for the next meeting.
- Ms. Moriyama asked the group to look at why 831-3.1 (b) (2) still needed to remain in the drafts.
- Ms. Moriyama referred to 831-3.1 (b) (1) on convictions that have been in expunged. She said that since this seemed like an oxymoron because convictions cannot be expunged, she asked the group to examine if this area should remain.

At 10:55 a.m., the Working Group took a break and the meeting reconvened at 11:05 a.m.

C. Statutes Modifications

1. DHS/DOH

Ms. Moriyama advised that Ms. Park had provided handouts during the last meeting, which are being used as samples by the other agencies that are working on drafts. Ms. Park had no updates to her original submissions, but was open to any modifications.

2. DOE

Mr. Keeno reported on the statutes modifications for DOE. Although he did not have anything to report, he advised that the DOE has Chapter 302A, which is the laws that relate to the Department of Education. The unique history on criminal history background check is no longer in 846 and will be in 302A and renumbered. Based on this morning's discussion, he would like the DOE to do the following:

- Conduct a pre-offer inquiry for all applicants.
- Consider all criminal convictions and that the DOE should be able to consider it.

- A decision cannot be based solely on arrest records. He looks at arrest records as unsubstantiated complaints, which the arrest could either end in a conviction, which is a determination, or to trigger further investigation, which we may or may be able to do. DOE cannot use arrest records to disqualify a candidate and needs to find other evidence of character or poor risk.
- With reference to DAG/DANC, he said that DAG is an admission of guilt regardless of the conviction, which could be considered as a confession. DANC is different since it is an unsubstantiated statement.
- He felt that the this morning's discussion reflected a conflict between interests, protecting the employee, clientele, or customers versus hiring the convicted felons to put them back into society, i.e., a balancing issue that employers are required to do. If an employer is going to take a chance and hire a convicted felon, then he would want some protection or safeguards for the employer, i.e., immunity for employer or that liability be capped.

Ms. Hara commented that the jurisdiction issues with people who work on the school grounds and who are not employed by the DOE, i.e., school health aides, etc. were never quite resolved. After a brief discussion, Mr. Keeno said that after background checks are done on non-DOE employees, notifications should be given to the employees' agency.

Mr. Keeno and Ms. Yamasaki will work on incorporating Mr. Keeno's concerns on the draft of the statute changes.

3. PSD

Ms. Itomura said that she did not get a chance to modify 353 and will submit a draft at the next meeting.

4. DCCA

Ms. Moriyama advised that Mr. Kamakawiwoole's comments were incorporated into the drafts created by Ms. Salvador on 831-3.1 as discussed earlier.

5. County Personnel

Ms. Moriyama referred to the prior discussion on the issues relating to full arrest information and pre-offer to county personnel.

Mr. Kajihiro referred to item #13 on the Draft Language For Criminal History Record Checks (yellow handout) that was created by Ms. Ueno and distributed at the last meeting. He questioned whether or not HPD civilian employees are covered under this item for background checks. Ms. Moriyama felt that law enforcement and criminal justice agencies did not fall under this item. Ms. Moriyama inquired if there was a county authority for non-sworn government personnel. Although Mr. Kajihiro thought that county personnel was covered under 831-3.1, Ms. Watanabe and Ms. Itomura thought it was under City Ordinance. Ms. Abe also questioned a similar issue on Parks and Recreation. Ms. Watanabe suggested that Corporate Counsel should be consulted for background checks on HPD civilian employees, firearms permit, and Parks and Recreation.

6. Liquor Commission

Ms. Moriyama told the group that although Mr. Carroll had to leave, Mr. Durick advised her that their attorney, Ms. Anna Hirai, that was reviewing the Liquor Commission's statute. She also distributed copies of Mr. Carroll's handouts on the Liquor Commission's statutes, which would be modified.

7. Judiciary Detention Facilities

Ms. Tomita stated that item #12, the language drafted by Ms. Ueno on the yellow handout distributed at the last meeting, looked fine. Ms. Moriyama suggested that Ms. Tomita review 571-33 and 571-34 since some changes may be needed to reference 846 and to use Ms. Park's submissions as guides.

8. DOT Airport Security

Ms. Moriyama said that since Ms. Ueno was working on this item and has been on sick leave, more research is needed and this issue would be presented at the next meeting.

IV. Report to Legislature

A. Draft Report Outline

Ms. Moriyama turned the discussion over to Ms. Kawakami and asked the group to refer to the goldenrod handout on the Report to the 2003 Legislature Draft Outline.

Ms. Kawakami explained the handout referred to the structure of the report that would be due to the Legislature 20 days before the opening of the session. She asked the group to review it and recommend any suggestions or changes.

Ms. Kawakami noted that the report would consist of an Executive Summary and would contain attachments, including the initial resolution, LRB Study, and the meeting minutes, which would be used to provide background information on how the Working Group's discussions have proceeded.

Ms. Kawakami stated that the key item in the report is the 13 Active Issues (yellow handout created by Ms. Ueno and distributed at the start of the Working Group meetings), which is a good summary of the key issues that the report would have to address. She stated that the Inactive Issues pulled out of the testimonies and the original bill draft would also include responses and recommendations by the HCJDC as well.

Ms. Kawakami advised that the Legislative Bill resulting from the Working Group's work and discussion would be important. She mentioned that the LRB has offered its assistance in the actual draft. She asked the group to either e-mail, fax, or call her regarding any suggestions on this report.

Ms. Moriyama concluded that the main part of the report in addition to the draft legislation was going to be dealing with the Active Issues, which was itemized in the legislation. She said that in addition, many of the Inactive Issues, which were assigned directly to the Data Center, have been addressed with the redrafting of the standard criminal history language.

B. Reread LRB Report

Ms. Moriyama recommended that the group reread the LRB Report, which would assist in drafting the report.

Ms. Kawakami suggested that the group could get a copy of the report by referring to the LRB website via Government in Hawaii to Legislative Reference Bureau, and scrolling to the report under 2002.

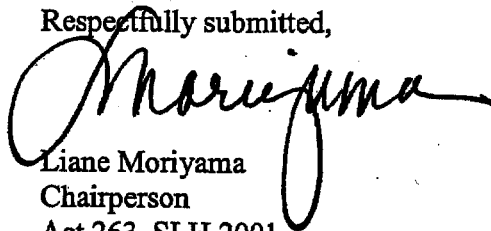
V. Announcements

Ms. Moriyama said that there were no announcements.

VI. Adjournment

Since there were no further topics for discussion, a motion was made by Ms. Watanabe, seconded by Mr. Saito, and unanimously carried, to adjourn the meeting at 11:45 a.m.

Respectfully submitted,



Liane Moriyama
Chairperson
Act 263, SLH 2001
Criminal History Record Check Working Group

ACT 263, SLH 2001
CRIMINAL HISTORY RECORD CHECK WORKING GROUP
OCTOBER 1, 2002

TIME: 9:00 a.m.

LOCATION: State Office Tower
Department of Attorney General
14th Floor Conference Room (Room 1400)
235 South Beretania Street
Honolulu, Hawaii 96813

PRESENT:	Liane Moriyama	AG/HCJDC
	Hannah Kawakami (Alt)	AG/HCJDC
	Norma Ueno (Alt)	AG/HCJDC
	Kathleen Watanabe	AG/Employment Law
	Jennifer Salvador (Alt)	AG/Employment Law
	Pacita Woodward (Alt)	AG/Employment Law
	Lisa Itomura	AG/Public Safety
	Candace Park	AG/Health & Human Services
	Kurt Spohn	AG/Criminal Justice
	Herbert Lau	AG/Labor
	Brian Kagihara	Dept. of Health
	Garry Kemp	Dept. of Human Services
	Daeleen Ohigashi (Alt)	Dept. of Human Services
	Clayton Kitamori	Dept. of Public Safety
	Mae Yamasaki	Dept. of Education
	William Hoshijo	Civil Rights Commission
	John Ishihara (Alt)	Civil Rights Commission
	Dale Osorno	Hawaii Govt. Employees Association
	Renee Nagahisa	Hawaii Health Systems
	Paul Saito	Hawaii Chamber of Commerce
	Sharlene Hara	Dept. of Human Resources Development
	Vera Onouye (Alt)	Dept. of Human Resources Development
	Susan Uchimura (Alt)	Judiciary
	Mark Rosen	Legislative Reference Bureau
	Sandy Abe	C&C Personnel
	Maxine Baba (Alt)	C&C Personnel
	Dave Kajihiro	HPD Personnel

ABSENT:	Deborah Emerson	AG/Commerce & Economic Dev.
	Rod Tam (Alt)	AG/Commerce & Economic Dev.
	Russell Suzuki	AG/Education
	George Hom (Alt)	AG/Education
	Diane Erickson	AG/Administration
	Larry Kamakawiwoole	Dept. of Commerce & Consumer Affairs
	Mark Morita (Alt)	Dept. of Commerce & Consumer Affairs
	Brian Nakamura	Hawaii Labor Relations Board
	Val Kunimoto (Alt)	Hawaii Labor Relations Board
	Robert Witt	Hawaii Association of Private Schools
	Cecilia Domingo (Alt)	Hawaii Association of Private Schools
	John Carroll	Honolulu Liquor Commission
	Wally Weatherwax (Alt)	Honolulu Liquor Commission
	Allan Gaylord (Alt)	Honolulu Liquor Commission
	Robert Durick (Alt)	Honolulu Liquor Commission

I. Call To Order

There being a quorum present, a meeting of the Act 263, SLH 2001, Criminal History Record Check Working Group was duly called to order at 9:05 a.m. by the Chairperson, Ms. Moriyama.

II. Approval of May 22, 2002 Criminal History Record Check Working Group Meeting Minutes

Ms. Moriyama asked the Working Group to review the August 8, 2002 Criminal History Record Check Working Group Meeting Minutes and asked if there were any revisions.

Mr. Kajihiro mentioned that on p. 7, 1st sentence, be revised from "Since the Working Group felt comfortable with the above items, Ms. Section Moriyama proceeded with 831-3.1(b)" to "Since the Working Group felt comfortable with the above items, Ms. Moriyama proceeded with Section 831-3.1(b)".

A motion was made by Ms. Osorno, seconded by Mr. Kemp, and unanimously carried, to accept the August 8, 2002 Criminal History Record Check Working Group Meeting Minutes, as revised.

III. Legislative Packet to LRB

Ms. Moriyama introduced Mr. Mark Rosen of the Legislative Reference Bureau, who has been assigned to draft legislation for the Working Group. Ms. Moriyama referred to the

lavender handout, Draft Language to LRB, which contained a summary sheet created by Ms. Ueno with related attachments. Ms. Moriyama stated that Items 1-18 listed on the summary sheet have been forwarded to Mr. Rosen. Ms. Moriyama mentioned that part of today's discussion would focus on the remaining items listed on the bottom portion of the summary sheet denoted with the heading, "Sections that are pending, or updates are ready to be sent to LRB". Ms. Ueno proceeded to update the group on the status of the remaining items as follows:

Ms. Ueno confirmed that since she has received an updated version of Section 831-3.1 from Ms. Salvador, this item is ready to be forwarded to Mr. Rosen.

On Section 846-43, which is the DOE section, Ms. Ueno stated that the draft on this item has been completed and is ready to be forwarded to Mr. Rosen.

Ms. Ueno mentioned that although she is working with Ms. Domingo on Section 845-44 for the private schools, this item is nearing its completion.

Ms. Ueno advised that she is working with Corporation Counsel on acquiring a draft for 846-42 for the Liquor Commission.

Ms. Ueno informed the group that she is working with Ms. Itomura on Section 353C5 for the Public Safety Department.

Lastly, Ms. Ueno stated that since there is a section on Airport Security in the Statutes, Section 261-1-17, she spoke to the Deputy AG-Airport, who confirmed that the agency wants to keep that statute. Thus, more work needs to be done in this area.

Ms. Ueno stated that as soon as she gets everything together, the final package will be sent to Mr. Rosen. She asked those that have completed work on their statutes, to review their respective statute to ascertain that what was sent to Mr. Rosen was correct.

Ms. Moriyama stated that the items that were forwarded to Mr. Rosen were previously discussed and drafted. She mentioned that 831-3.1 and 846-43, listed on the bottom of the summary sheet, were included in the lavender packet.

Mr. Ishihara asked for a discussion on 831-3.1. His understanding for the change was that DHRD wanted to look at certain job categories, where the state agency would be hiring for positions working at agencies having some type of authorization to consider arrests, such as DOE and PSD. He stated the changes in 831-3.1 are very broad and would open the door to all arrests, whereas the position the group took earlier was that generally, arrests should not be used as a factor to determine employment.

Mr. Ishihara stated that the proposed change in paragraph (b) allows records of arrests to be disclosed. The current Paragraph (b) prohibited the state from disclosing records of

arrests not followed by valid convictions. Thus, the change would eliminate these items and would affect the HCJDC.

Ms. Moriyama stated that with reference to State versus 378, the part in paragraph (b) that was a problem for HCJDC was the word "disseminated", and that there was a conflict between 846 and possibly 831, because it was limiting HCJDC's dissemination. This was the reason why "disseminated" was eliminated. Ms. Moriyama confirmed that 846 states that conviction information is public.

Mr. Hoshijo questioned on how would it impact a candidate who has an arrest pending trial and whether there are set internal standards. Ms. Hara confirmed that there are set internal standards and that arrests would not be used as a sole reason to disqualify someone. Mr. Ishihara said that was good in a sense, but it wasn't clear in the statutes, so that intent might not be followed by those who come later, and it does appear that arrests could be used in a more negative sense.

Mr. Spohn felt that the addition of "arrest" in paragraph (a) actually provides additional protection to someone that is arrested because the language says "solely by reason by prior arrest or conviction". Thus, without the language, one cannot be disqualified solely by reason of a prior arrest or of a conviction, and that one needs to look at the actual language.

Mr. Ishihara said that his concern was that since the state could consider arrests, it would give the private sector employers a foot in the door to say they would like to consider arrests also. Ms. Moriyama confirmed that since private sector employers are covered under 378-2.5, changes made would need to be done via hearings process, etc.

Mr. Saito stated perhaps 831-3.1 was drafted too broadly and it looked like it could open the door to all arrest records. Mr. Saito also expressed concerns regarding the use of non-conviction language versus arrest language as well as excluding information on DAG/DANC.

Ms. Domingo confirmed that private schools could see both arrest and conviction information per 846-44.

Ms. Hara added that some employees are covered for safety reasons such as police officers, fire fighters, etc., but the DAGS employees are not covered.

Mr. Hoshijo felt the discussion should be focused on hiring.

Mr. Spohn stated that this statute says that if a person is arrested, they cannot be disqualified or fired solely on the basis of an arrest. If the school board finds out nothing more than the fact that a teacher was arrested for a mutual affray where that person may

not be guilty of anything and perhaps acting in self-defense, then without reservation, that person could not be fired or disqualified based on the language of paragraph (a).

Mr. Rosen added that no one has raised the issue of presumption of innocence and that taking out paragraph (a) could open all kinds of issues.

Mr. Spohn agreed with this since an individual cannot be dismissed or disqualified for hire based solely on an accusation. He said that one of the things that the group should avoid is the distinction between the criminal process and civil process. An adverse collateral consequence to a conviction or arrest is not the same thing as punishment in the penal code. Thus, if an employer is trying to make a rational decision on whether to hire an individual, and this person may have an adverse collateral consequence to their arrest or conviction, an adverse collateral consequence is not the same as criminal punishment. In other words if the individual doesn't get a job at a department selling jewelry because he/she has a conviction for stealing jewelry, that is not punishment for the individual not getting the job, that is the adverse collateral consequence to the conviction or arrest. He mentioned that although discrimination is not a good thing, the employer needs to ask whether the discrimination is unfair. The individual is not being punished by the State, but simply has an adverse collateral consequence to their conviction or arrest. The courts have upheld that just because a person has an adverse collateral consequence to their conviction does not mean that they are entitled to all the same rights as a criminal defendant would have before that individual is convicted.

Mr. Ishihara stated that there is a difference between not getting a job because of an arrest versus not getting a job because of a conviction. Thus, by putting arrest in paragraph (a) and taking it out from paragraph (b) makes a fundamental change, and that Mr. Spohn was lowering the protection for the presumption of innocence and protection against considering arrests.

Ms. Moriyama stated that this item was going to be a key area and that one of the things in talking to LRB was the emphasis that the Working Group would be submitting one bill. This would be due to the fact that if any of the items fail, the entire legislation would fail since all of the items are integrated. Thus, if 831 does not succeed, but 378 and 846 do, then the entire bill fails. She explained that the reason why the items are integrated is to set a level of standardization. She said that although this discussion is good, however, at this point in time, concrete recommendations are needed on changes to the existing draft so that the group could move forward. She confirmed that she has heard 2 things:

- Create an entire section on how arrest information should be dealt with, similar to what was done for convictions, or,
- Remove the deletion of paragraph (b) (1).

She said that if 831 cannot be resolved, then the group's work could just cease with the final report stating the reasons for the group's inconclusive outcome.

Mr. Hoshijo felt that arrest without conviction should not be considered. Ms. Moriyama added that if Mr. Hoshijo could make this belief philosophically acceptable to the group, every effort should be made to accomplish this, because it would take us a step further through the legislation.

Ms. Hara suggested using arrest record and inserting it into 831 relative to the job and apply rehabilitation as a trade-off.

Mr. Spohn did not feel that the group was far apart in its discussion since no one believes that an individual should be fired simply because he/she was arrested. He said that group's discomfort with the previous language lies with the fact that certain employers do not want to be held to the standard of the arrest record. Thus, Mr. Spohn recommended that the group create equivalent language on how the employer would use arrest information to the language that we currently have on how conviction information is used. He said that the language should be narrowly drawn so that it would be very clear that it is absolutely prohibited to have an adverse collateral consequence occur merely because a person has been accused of something. However, on the other hand, he asked that the language be left a little open, so if there is clear and convincing evidence that the person's behavior is inappropriate for the job, the employer's hands would not be completely tied.

Based on Mr. Spohn's statement, Ms. Itomura said that this would refer back to previous group discussions where the employer would need to conduct its own investigation. Thus, a reasonable mechanism is needed.

Mr. Kemp stated that although his agency has the ability to currently look at arrest information, he almost took away that privilege due to his discomfort on how his staff could be using this information. However, his staff convinced him that access to the arrest information was helpful in monitoring people who work with children, and not used to make a decision. Thus, his agency is now drafting rule language to say that the arrest information could only be used in monitoring people. Mr. Kemp suggested putting in language that would describe an acceptable way where individuals could look at arrest information and for what purpose, so that it is clear to all.

Mr. Spohn suggested that the group should keep in mind the difference between the criminal standards of proof beyond a reasonable doubt and civil standards on preponderance. If an employer can prove the preponderance that the employee is misbehaving, then that employee could be fired. However, that employee with the same misbehavior could be taken to court and found not guilty in the criminal court of law because he/she could not be proven guilty beyond a reasonable doubt. He felt that we may have to have language on this, but it should be a guiding principle since a criminal

defendant without any doubt is entitled to the presumption of innocence. However, a criminal defendant is considered to be not guilty unless proven guilty beyond a reasonable doubt by competent evidence. On one hand, the state is held to a very high standard since the State could actually deprive that person of his/her freedom and incarcerate them. However, because of the judicial process, it would make it difficult for the State to deprive an individual of his/her freedom. He didn't feel it was fair to hold the employers to that same standard as to whether or not they could dismiss a person.

Mr. Saito clarified that employers do not hold civil standards in making decisions, but rather, employers use business judgments by looking at the violation of the company's policy, and then judge whether that employee needs disciplining. Thus, it has nothing to do with the criminal standards. When applying a statute like this, criminal standards would not apply, only the civil standards that are issued by the public policy of the State.

Mr. Spohn suggested inserting language that a person cannot be dismissed based on arrest alone, but the violation be based on the business judgment of the employer.

Ms. Moriyama confirmed that Mr. Ishihara, Ms. Salvador, and Ms. Hara would work on language in this area. Ms. Moriyama said that the consensus of the group seems to be to qualify the use of arrest information.

Mr. Kajihira suggested adding to paragraph (c), line 4, that any arrest or conviction of a criminal offense could be used with the 3 criteria listed. Ms. Hara did not want to use arrest information and elevate it to the same level as a conviction. Ms. Watanabe stated that the group was making it more complicated on the issue of whether or not arrests should be looked at.

Ms. Moriyama reiterated that Mr. Ishihara, Ms. Salvador, and Ms. Hara would meet and draft some language pertaining to the statute area.

At 10:00 a.m., the Working Group took a break and the meeting reconvened at 10:10 a.m.

IV. Report Drafting – Committee Status

Ms. Moriyama turned the discussion on Report Drafting over to Ms. Kawakami with the status on what the committee has done on the Active Issues.

Ms. Kawakami said that although the committee has not met formally, it has had a lot of volunteers who were helpful in responding to the 13 Active Issues as noted on the yellow handout. She noted that on many of the questions, there was only one response since the responses were coordinated and issued through one volunteer. Only a few items had more than one response. She stated that a number of the responses were worked on together by Mr. Ishihara and Mr. Saito, although only one name might be reflected. Ms.

Kawakami advised that after this morning's discussion, she was uncertain on how some of the answers might change, i.e., the possibility of arrest information records not being used at all.

Ms. Kawakami proceeded to brief the group on the Active Issues Responses as follows:

1. She stated that this issue dealt with the employment practices law, its applicability to general employment versus licensing decisions, and if there should be any differences. She noted from the responses received from Mr. Kemp and Mr. Kagihara, there are differences between the 2 types of employment practices with reference to the DHS and DOH programs based on the agency's responsibility for protecting and servicing the vulnerable community by Mr. Kemp. She stated the possibility of using Mr. Kagihara's opening paragraph since it summarizes the reasons for differences between the 2 types of employment practices. Ms. Kawakami said that she would draft a consolidated response.
2. Ms. Kawakami said that this issue dealt with guidelines to determine when a conviction is "rationally related" to the job. Mr. Ishihara stated that he tried to show what the commission is doing. Ms. Kawakami said that this response is acceptable and will be redrafted for the report.
3. Ms. Kawakami advised that this issue had a number of factors that dealt with the use of convictions, how old the convictions were, etc. Mr. Ishihara said that he noted that some of the terminology used in the different questions varied. Thus, he tried to clarify the distinction between a statutory authorization, the specific statutes that allow certain employers to consider convictions for certain types of jobs, and the general exception in 378-2.5, which allows all employers to consider convictions after making a conditional job offer.
 - a. Mr. Ishihara stated for there is no age limit for statutory authorizations. Also, language was added about the way to change the method of calculating the 10-year time period.
 - b. Mr. Ishihara noted that generally, records of arrest without conviction cannot be considered at all, so there is no 10-year limit.
 - c. Mr. Ishihara stated that generally, records of arrest cannot be considered at all.
 - d. Mr. Ishihara advised that for statutory authorizations or a BFOQ, a conditional job offer is not required before consideration of conviction data and that non-conviction data including arrests, should not be considered at all.

Ms. Hara wanted clarification on the responses for (b) and (c) with respect to 831 and BFOQ. Mr. Hoshijo recommended it would be helpful to have something on how employers establish a BFOQ.

4. Mr. Ishihara attempted to clarify the distinctions on the exceptions created by laws in Section 378-3(2) and the concept of BFOQ. Thus, 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 HRS 378-3.
5. Mr. Ishihara stated that he needed to clarify that non-conviction data is not provided to the public under 831-3.1(b). He stated that it was his understanding that the working group has agreed that non-conviction data is not a reliable indicator of job suitability. The law should not be amended to allow consideration of non-conviction data, including records of arrest without conviction, in any employment action.
6. Ms. Kawakami stated that there was a specific paragraph on this issue that would allow public and private schools to consider criminal convictions in determining suitability for employment for those in close proximity to children. She stated that Mr. Ishihara and Mr. Saito preferred to leave that paragraph in. Mr. Saito stated the working group recognized that confusion exists as to whether employers with statutory authorizations were entitled to conduct pre-offer criminal background checks and that the group recommended an amendment to 378-2.5 to clarify that employers with statutory authorizations could conduct pre-offer inquiries into conviction records with reference to the statutes authorizing private and public schools to conduct such inquiries. DOE felt that it was okay to delete the language in 378-3 as long as 378-2.5 allows for consideration of convictions.
7. Ms. Kawakami said that this issue dealt with aggrieved civil service applicants and avenues of appeals that are open to those that are non-civil service as well as the Civil Rights Commission's role in that process. She stated that Mr. Ishihara and Ms. Hara contributed their responses, which were basically that the Civil Rights Commission does not have jurisdiction to investigate complaints related to the prohibitions in 831-3.1. Ms. Hara said that 831-3.1 specifically addresses civil service and that an aggrieved person who applies for non-civil service employment has recourse through internal complaint procedures pursuant to 76-42, which are outlined in the various State and County rules, and the Merit Appeals Board or Civil Service Commission, whichever is applicable.
8. Ms. Kawakami stated that this question dealt with remedies for license applicants who believe their license was denied or revoked based on the State's use of non-conviction or conviction data. She said that Mr. Kemp drafted a response that basically outlines an appeals process that is applicable to the licensing type of function.

9. Ms. Kawakami mentioned that this item dealt with unlimited availability to conviction data in which Mr. Ishihara responded that the working group does not believe that there is a conflict between allowing public access to conviction records regardless of age and the employer's ability to consider convictions for a 10-year period.
10. Ms. Kawakami pointed out that this item relates to the Code of Federal Regulations requirements on dissemination of non-conviction information and whether we are in conflict with some of these requirements. She researched what the Code of Federal Regulations includes as far as language on the limitations on disseminations, and basically, she found language similar to 846-9. She is still trying to follow-up on item (4), which references section 524(a), with the FBI, though she feels there is no conflict.
11. Ms. Kawakami proceeded to this item, which is to consider the repeal of 831-3.1. She said that after this morning's discussion on 831-3.1, we would wait for its redraft from those members who will be meeting on the use of arrest information.
12. Ms. Kawakami explained that this item dealt with clarification of noncriminal standards such as good moral character, temperate habits, etc. and developing standards for these items. She said that Ms. Hara responded that 831-3.1 was redrafted to eliminate the applicability of non-criminal standards for employment purposes.
13. Ms. Kawakami stated that this item would be going to the Legislature, which dealt with using the Hawaii sex offender website to investigate volunteers, in particular, the DOE. She said that Ms. Yamasaki still needs to follow-up on this item. Ms. Kawakami reminded the group that the sex offender website has been inactivated since November 2001. Ms. Moriyama added that this item came with the Active Issues because there was a bill in the legislature introduced by Sen. Brian Kanno that wanted DOE, AYSO, Little League, etc., to be mandated to have their volunteers checked against the sex offender website. Since that bill did not go anywhere, it was placed as another issue for the Task Force, which became moot when the website was inactivated. Although HCJDC has the registration information, that information is limited only to law enforcement agencies. Mr. Kemp expressed concerns on protecting children and hopes that this issue could be resolved. Ms. Hara suggested that perhaps contracts with private contractors should designate that the State would be permitted to do background checks on their employees.

Ms. Kawakami summarized the Active Issues Responses as follows:

- Although she would need to follow-up with Mr. Ishihara and Mr. Saito on some of the responses, it would be a good approach to group the 13 Active Issues logically into sub-groups so that the committee could craft the responses

from a better perspective. On some of these issues, i.e., items #3 and #4, cover a lot of the BFOQ, and for some of the other items that are similar in topic, Ms. Kawakami wanted to try to organize an approach that would work better.

- On the time table, Ms. Kawakami said that the Working Group is a little behind schedule. Since the report needs to go through a process, she would like to do a submission to AG, B&F, and the Governor sometime in early November 2002.

V. Inactive Issues Status

Ms. Moriyama referred to the salmon colored handout on Inactive Issues, which was previously submitted to the Working Group. She informed the group that some of the narrative was updated in the Action/Position section. Ms. Moriyama stated that although some of these issues were taken out from the bill, it ended up being addressed by the committee anyway.

Ms. Moriyama asked that item #7, "should criminal history record information be purged when it no longer serves a public purpose?" be discussed. In the previous draft that was distributed to the Working Group, the answer was "no". Ms. Moriyama questioned the phrase "no longer serves a public purpose" since there are the expungement law and legislation that allows expungement on a conviction, pertaining to drug and DUI convictions under 21 years of age, which Ms. Ueno discussed at the previous meeting. Although this is HCJDC's belief, she asked the group if anyone felt that criminal history record information should be deleted and what would be the definition of "no longer serves a public purpose".

Mr. Ishihara asked what was the purpose for these items to be purged, i.e., too much data?

Ms. Moriyama felt that maybe LRB thought it would be an opportunity to redefine expungements or even a purge situation relating to criminal history record information, but the group needs to define "no longer serves a public purpose".

Mr. Saito suggested that in the amendment to 831-3.1, the group should state that no criminal record information should be purged. Ms. Yamasaki added that some individuals believe that when they are pardoned, they have no records, that the term should be forgiven, but not forgotten, that only non-convictions will be expunged.

The consensus of the group is that no additional purging, besides those that are statutorily allowed to be expunged, is necessary.

VI. Open Issues

Although Ms. Moriyama did not have any open issues, this item was inserted into the agenda and will be placed on future agendas since the Working Group was coming down to the wire. Also, this item would provide an avenue for the participants to discuss issues relating to the legislative drafting, or later, testimonies.

VII. Announcements

Ms. Moriyama expressed her appreciation on everyone's responses via e-mails, drafts, redrafts, and coordination with the other participants on the submission of responses to the various issues. She asked that this process be continued because HCJDC will be resourced strapped due to the roll-out of its new criminal history data system, which will be known as CJIS-Hawaii, to 3,500 new users and 2,500 PCs on the desktop, sometime during November 4-18, 2002. Trainings have been scheduled on data entry and inquiry on Oahu and the Neighbor Islands. She asked the participants to please notify HCJDC immediately if anyone has not received a training notice.

Mr. Ishihara inquired on the method of submission for the Working Group's meeting minutes with the report. Ms. Moriyama confirmed that the minutes would be submitted as a separate document, possibly given only upon request, and that the gist of the report would focus on the major areas.

VIII. Adjournment

Since there were no further topics for discussion, a motion was made by Mr. Ishihara, seconded by Mr. Saito, and unanimously carried, to adjourn the meeting at 11:25 a.m.

Respectfully submitted,

Liane Moriyama
Chairperson
Act 263, SLH 2001
Criminal History Record Check Working Group

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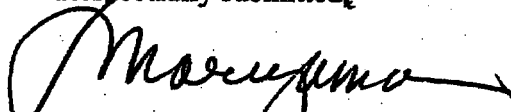
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Respectfully submitted,



Liane Moriyama
Chairperson
Act 263, SLH 2001
Criminal History Record Check Working Group

ACT 263, SLH 2001
CRIMINAL HISTORY RECORD CHECK WORKING GROUP
DECEMBER 5, 2002

TIME: 9:00 a.m.

LOCATION: State Office Tower
Department of Attorney General
14th Floor Conference Room (Room 1400)
235 South Beretania Street
Honolulu, Hawaii 96813

PRESENT:

Liane Moriyama	AG/HCJDC
Hannah Kawakami (Alt)	AG/HCJDC
Norma Ueno (Alt)	AG/HCJDC
Jim Halvorson (Alt)	AG/Employment Law
Kathleen Watanabe	AG/Employment Law
Pacita Woodward (Alt)	AG/Employment Law
Candace Park	AG/Health & Human Services
Herbert Lau	AG/Labor
Brian Kagihara	Dept. of Health
Garry Kemp	Dept. of Human Services
Mark Morita	Dept. of Commerce & Consumer Affairs
Clayton Kitamori	Dept. of Public Safety
Llewella Rogers (Alt)	Dept. of Public Safety
Francis Keeno (Alt)	Dept. of Education
John Ishihara (Alt)	Civil Rights Commission
Dale Osorno	Hawaii Govt. Employees Association
Renee Nagahisa	Hawaii Health Systems
Gary Hynds (Alt)	Hawaii Health Systems
Sharlene Hara	Dept. of Human Resources Development
Vera Onouye (Alt)	Dept. of Human Resources Development
Barbara Tomita	Judiciary
Maxine Baba (Alt)	C&C Personnel
Dave Kajihiro	HPD Personnel

ABSENT:

Lisa Itomura	AG/Public Safety
Bryan Yee (Alt)	AG/Public Safety
Kurt Spohn	AG/Criminal Justice
Rick Damerville (Alt)	AG/Criminal Justice
Deborah Emerson	AG/Commerce & Economic Dev.
Rod Tam (Alt)	AG/Commerce & Economic Dev.
Russell Suzuki	AG/Education
George Hom (Alt)	AG/Education
Diane Erickson	AG/Administration

ABSENT:	Brian Nakamura	Hawaii Labor Relations Board
	Val Kunimoto (Alt)	Hawaii Labor Relations Board
	Robert Witt	Hawaii Association of Private Schools
	Cecilia Domingo (Alt)	Hawaii Association of Private Schools
	John Carroll	Honolulu Liquor Commission
	Wally Weatherwax (Alt)	Honolulu Liquor Commission
	Allan Gaylord (Alt)	Honolulu Liquor Commission
	Robert Durick (Alt)	Honolulu Liquor Commission
	Paul Saito	Hawaii Chamber of Commerce
	John Knorek (Alt)	Hawaii Chamber of Commerce
	Ken Takayama	Legislative Reference Bureau
	Mark Rosen (Alt)	Legislative Reference Bureau

I. Call To Order

There being a quorum present, a meeting of the Act 263, SLH 2001, Criminal History Record Check Working Group was duly called to order at 9:25 a.m. by the Chairperson, Ms. Moriyama.

Ms. Moriyama introduced Mr. Jim Halvorson, the new Supervising Deputy Attorney General, for the AG-Employment Law Division, to the Working Group. She announced that although Ms. Watanabe has moved over to the Department of Human Resources Development, she would continue as an active Working Group participant.

II. Approval of October 1, 2002 Criminal History Record Check Working Group Meeting Minutes

Ms. Moriyama asked the Working Group to review the October 1, 2002 Criminal History Record Check Working Group Meeting Minutes and asked if there were any revisions.

Since there were no revisions, a motion was made by Mr. Kajihira, seconded by Ms. Osorno, and unanimously carried, to accept the October 1, 2002 Criminal History Record Check Working Group Meeting Minutes, as submitted.

III. Update on Section 831-3.1, HRS

Prior to reviewing the Legislative Report that was submitted to the LRB, Ms. Moriyama expressed her appreciation to Ms. Salvador, Mr. Ishihara, Ms. Hara, Ms. Tomita, and Ms. Abe for their efforts on creating compromise language in revising Section 831-3.1, HRS that was acceptable to the Working Group. Since Ms. Salvador and Mr. Ishihara were running a little late, she asked Ms. Hara to summarize the compromise language.

Ms. Hara stated that the compromise dealt with changes to Section 831-3.1, HRS; Section 378, HRS; a new section in Chapter 78, HRS; and an amendment to Section 846, HRS. She explained that since the state wanted to originally have the ability to get arrest information for all divisions, the compromise was the ability to utilize arrest information for certain cases. This information is not to be used to qualify anyone, but used only as a red flag and limited to positions that work in close proximity to positions in other departments that already have mandatory authority to do related criminal history record checks.

Ms. Hara said that the question became whether the public sector employers would be on par with the private sector employers on the 10-year look back period, which was also included in Section 831-3.1, HRS. She explained that the public sector employers have the 10-year look back period similar to the private sector employers, where there is a need to determine the rational relationship, but that the 10-year period includes periods of incarceration. However, the relationship of rehabilitation or lack of rehabilitation as a criterion for anything beyond the 10-year period would still be used to qualify an applicant. As such, the 10-year look back period needed to be placed in Section 831-3.1, HRS and the State needed to be added as an exemption in those circumstances where the Working Group wanted to extend criminal history record checks to include arrest information or conditions for State departments that already have this authority.

Ms. Moriyama advised that the items Ms. Hara spoke about could be referenced on p. 5 in the lavender packet of the items that went to LRB. Ms. Hara added that Section 831-3.1, HRS is a companion to Section 378-2.5, HRS. Ms. Salvador drafted a new section in Section 378-2.5, HRS, which is comparable to Section 353, HRS.

Ms. Moriyama stated that Section 831-3.1, HRS had been on the table from our initial meeting. She said that although the personnel officers initially wanted arrest information for all positions, the Working Group's initial stance was not to authorize anything new that had not already received prior authorization from the Legislature. However, the group believed that it may have been an oversight of the Legislature, not to include certain agencies, i.e., a DAGS employee working on a school campus and having the same access to children as DOE personnel. The group's mission on vulnerable positions was to create a compromise position that was sensible and could be explained to the Legislature.

Ms. Moriyama added that what remains important in all of this is that the recommendations remain true to the mission of the Working Group. She stated that the problem was that although personnel officers wanted to get all criminal history information for all positions, there wasn't anything in the statute that the group could refer to that the Legislature had already preauthorized prior to the establishment of the Working Group. She said that the Legislature wants the Working Group to point out the inconsistencies, especially with the vulnerable groups.

Ms. Osorno wanted clarification on certain items. She expressed her concerns in trying to read the documents from a layman's perspective and asked if there was a difference between a crime and any crime as referenced in Section 831-3.1, HRS, specifically, in sub-sections (b), last sentence, and (c), first sentence, and asked whether these have to relate to the job? Ms. Osorno said that she was looking for consistency in language and questioned whether the committee looked at it differently. Ms. Moriyama mentioned that the language used was not intentional.

Ms. Osorno said that sub-section (b) states "when such crime bears a rational relationship" and in sub-section (c) it states, "when such offense directly relates" to the performance. She asked if there was a definition of "crime bears a rational relationship". Mr. Ishihara responded that there was no definition since it was a broad standard. Ms. Osorno asked whose standard was this based on. Mr. Ishihara stated that in the report the group discussed rational relationships (page 6) and the term was used very broadly. Mr. Ishihara felt that before the rational relationship standard was inserted, it was very difficult since one could not exclude people on the basis of any kind of conviction, except if one had a specific statute or authorization. Thus, when the rational relationship standard was inserted, it changed the outlook for the private employer. The proposed change to Section 831-3.1, HRS puts the State and Counties on the same footing as the private employers looking at convictions within the past 10 years under the rational relationship standard.

Mr. Ishihara said that prior to the change for the private employers, the State had a little more flexibility, but the crime had to be directly related to the applicant's possible performance to the job. After the change, the State had less flexibility than private employers. With the new change, the State will have the same flexibility for crimes within the past 10 years, and if the State is going to do anything beyond 10 years, then they would have to use the directly related standard.

Ms. Moriyama referred to the green handout from Mr. Hynds of the Hawaii Health Systems Corporation. She stated that the Mr. Hynds also focused on "when such crime bears a rational relationship" in paragraph (b) as well as paragraph (c) "when such offense directly relates".

Mr. Hynds stated that in the first 2 paragraphs, (a) and (b), the State is allowed to deny employment when the crime has a rational relationship, and in paragraph (c), it requires a conviction that "directly relates" to the possible performance in the job. Mr. Ishihara said that (a) and (b) reference the rationale relationship standard, which could apply up to the 10-year period and that (c) references anything beyond 10 years, which has to be directly related. He said that this is how the situation existed prior to these proposed changes. Any crime would have to be directly related with no time limit for the State to consider the crime.

Ms. Osorno questioned the last paragraph, 3rd line of Section 831-3.1, HRS, where it states "after investigation in accordance with Chapter 91, HRS, or in the case of employment in the Civil Service, after appropriate investigation". She asked what was the definition of "appropriate investigation"? Ms. Moriyama stated that the definition would be whatever the existing definition is currently since the language has not changed. Mr. Ishihara replied that the first part referring to Chapter 91, HRS would relate to licensing and the other part, which does not have to be in accordance to Chapter 91, HRS, would be employment in Civil Service. Ms. Osorno stated that she now understood the clarification.

Ms. Osorno had a question on the new sub-section (e) in Section 831-3.1, HRS, where it states, "A person deemed ineligible for employment in the Civil Service shall be entitled to appeal any and all adverse decisions to the Civil Service Commission or Merit Appeals Board". She asked if one is a current employee, the contract may cover it, but would this hinder one from going through the contract? Ms. Moriyama did not think so since this sub-section was only moved from where it was previously located and not changed. Thus, whatever applies now for a current employee would still remain the same, that is, a violation of the collective bargaining agreement is a grievance matter, not a matter for the Civil Service Commission or Merit Appeals Board.

Ms. Osorno expressed her concerns on clarity due to the change in administration and since the Working Group was working on revisions, she felt it would be better to insert any revisions now that would further clarify Section 831-3.1, HRS.

Mr. Halvorson mentioned that in the pre-Civil Service reform, one could appeal either through the Civil Service Commission Appeals Board or through Collective Bargaining.

Ms. Moriyama stated that the paragraph refers to someone that is applying for employment. She reiterated that the group is not changing anything that already pre-existed and that Section 831-3.1, HRS was only reformatted.

Mr. Ishihara felt that the paragraph applies to current employees because if one looks at sub-section (c), it says, "when the offense directly relates to the applicant's possible performance in the job which the employee holds". Therefore, if the existing employee gets terminated because of a crime that is directly related to the job under the old provision, which is being moved to sub-section (e), it does state that a person being ineligible for employment with Civil Service shall be entitled to appeal, etc.

Ms. Moriyama said that the Working Group was not trying to address Civil Service reform, and if in fact there was a problem with Civil Service reform, then Civil Service should have addressed the issue then.

Mr. Halvorson stated that Civil Service reform did not necessarily go through all the statutes for their reform. However, he felt that the issue should be clarified via remedial

action since it was on the table and suggested perhaps inserting a phrase such as, "shall be entitled to appeal to grieve through an applicable collective bargaining unit or appeal through the Civil Service Commission Appeals Board".

Ms. Moriyama reiterated that the Working Group's focus is to clarify the statutes since it is not the intent to rectify any process except in criminal history standardization.

Mr. Halvorson felt that we were not changing anything, but just assuring that the language was not inconsistent with the intent of Act 263. He felt that Ms. Osorno's concerns trying to protect the collective bargaining rights were justifiable. Ms. Moriyama asked Mr. Halvorson if the Working Group could receive something in writing as a point of clarification to which he concurred.

IV. Update on Legislative Package to LRB

Ms. Moriyama referred to the lavender handout on the Legislative Package to the LRB and the 4 green handouts, which were updates or new information relating to the Legislative Package. She turned the discussion over to Ms. Ueno.

Ms. Ueno confirmed that the lavender handout was sent to the LRB, which included all of the affected statutes, starting with Section 831-3.1, HRS, to new language in Section 846, HRS, and ending with Chapter 78, HRS. However, she noted that after this morning's discussion, there would probably be more changes to the report.

Ms. Moriyama noted that currently there are only 2 changes:

- Section 831-3.1, HRS, sub-section (c) - clarify beyond the 10 years.
- Section 831-3.1, HRS, sub-section (e) - obtain clarifying language from Mr. Halvorson.

Ms. Park mentioned a change in Section 846, HRS, item no. 15, which Ms. Moriyama confirmed would be discussed later.

Ms. Ueno proceeded to cover the items on the green handouts starting with Hawaii Health Systems. She stated that HHS expressed its concern on Section 846, HRS in the new language on item no. 15 that dealt with private schools, specifically, that private schools may receive only indications of the states from which the national criminal history record information was provided as established under Chapter 302A, HRS. However, Mr. Hynds noted there was nothing addressed in Chapter 302A, HRS and there was no reference to criminal history checks. Ms. Ueno said that reference was made on 4th page from the back of the lavender packet and that these were the changes that were being made to Section 846-44, HRS, which is the current chapter dealing with private

schools, and which would be moved to Chapter 302A, HRS. Thus, item no. 15 would be kept "as is".

Ms. Moriyama added since the Hawaii Council of Private Schools is running all checks for the private schools, each private school does not need to do individual checks. Ms. Ueno said that since the private school is not a government entity, national checks cannot be disseminated to them. She explained that what was done was to take the report from the FBI, look at what state has criminal history record information, and inform the private school that this person may have a record in this particular state. It was put in the statutes for the reason that there would be no misunderstanding by the FBI on our intention to include that information.

Ms. Park expressed her concern on the word "indications", which connotes information or list of the states. Mr. Hynds recommended that "specifications" would be a better word. Ms. Ueno responded by saying the word "specify" cannot be used and a better term would be "may have".

A question was raised on why item no. 16 of Section 846, HRS was deleted. Ms. Ueno said that the DOT wanted to keep this information in case something happened to the Federal law. However, since no language was received before the packet was sent, it was deleted.

Mr. Morita expressed his concerns on item no. 14 of Section 846, HRS and said that the insurance division should be added to do criminal history background checks. He said that the insurance division is covered by Section 431, HRS and has NCIC access via the HPD. Ms. Ueno stated that the insurance division is not mentioned since the agency could get criminal history background checks. Ms. Park stated that individuals on the list already have the authority to do checks on the national level. Ms. Moriyama said there was a previous discussion on this issue and it was decided that the insurance division would be left "as is". In response to Mr. Morita's question on whether it was unnecessary for the insurance division to be on the list, Ms. Moriyama replied she was uncertain whether it would be appropriate for the agency to be on the list. In response to Mr. Morita's question if the insurance division has access, she positively replied via NCIC.

Ms. Ueno proceeded with Mr. Hynds' memo on Section 378-2.5, HRS, regarding the changes to sub-section (d) from "may only take place" to "may take place only", which would be forwarded to Mr. Rosen of the LRB.

Ms. Ueno moved on to Section 831-3.1, HRS of Mr. Hynds' memo regarding sub-sections (a), (b), and (c). Ms. Moriyama questioned the tolling provision in sub-section (a) for periods of incarceration. Mr. Hynds stated that one does not count periods of incarceration for the 10-year period. Mr. Ishihara suggested perhaps putting in "except for periods of incarceration" in Section 831-3.1, HRS, sub-section (a).

With reference to Section 831-3.1, HRS not being accurately quoted, Ms. Moriyama thanked Mr. Hynds for pointing this out due to the Ramseyer formatting.

On the e-mail from Ms. Salvador regarding input from the Judiciary on new legislation, Ms. Ueno stated that Ms. Jody Hagerman, Judiciary's Staff Attorney, wanted to include their branch in Section 378-2.5, HRS. Ms. Tomita said that Ms. Hagerman was concerned on the reference to the "State, political sub-divisions, and agencies". Since the Judiciary might not be interpreted as part of the State, she wanted a definition that the State includes Judiciary or any State branches of government (Judiciary, Executive, and Legislative) so that the Judiciary is clearly covered.

Ms. Ueno proceeded to the single green sheet noted with Section 1 on the top. She stated that this was the draft of the purpose paragraph of the legislative packet, which was forwarded to Mr. Rosen.

Lastly, Ms. Ueno reviewed the draft language in Section 846, HRS, sub-section (b) (3) regarding a sworn statement signed under penalty of law indicating whether or not the person has ever been convicted. She said that if one looks at the statutes, there are many inconsistencies with some statements signed under penalty of perjury and others have penalties under false swearing, etc. Thus, there was a concern on which law is actually applicable. For consistency, it was decided to use a very generic, general type of statement, by changing it to "a statement signed under penalty of law".

Ms. Moriyama added that perjury, unsworn falsification, and false swearing might apply in different situations. Thus, there are 3 statutory provisions that could be more appropriately used under these circumstances for Sections 710-1061, 710-1062, or 710-1063, HRS. Therefore, she felt that in using the term "under penalty of law", that there would possibly be some standardization.

At 10:33 a.m., the Working Group took a break and the meeting reconvened at 10:45 a.m.

V. Draft of Report to the Legislature

Ms. Kawakami referred to the blue handout, Act 263 – Criminal History Record Checks, Report to the 2003 Legislature, which was also the same report that was previously e-mailed to the Working Group. She informed the group that the yellow handouts were additional proposed information that would be added to the report based on the outcome from today's discussion. She mentioned that based on some of this morning's discussion, more information would probably be added. She extended her appreciation for everyone's comments and asked the Working Group to further discuss all items as referenced on the yellow handouts, which were not incorporated into the draft report.

Ms. Kawakami proceeded to focus on the areas with substantive changes as referenced on the yellow handouts starting with the set numbered page 9, Age Limit of Arrest Records and Use of Arrest Records, which was submitted by Mr. Ishihara. She informed the group that the changes submitted by Mr. Ishihara could be referenced on the blue report as captioned on the left side of each page of the yellow handout. The changes on this item dealt primarily with the initial statement, "Generally, records of arrest without conviction cannot be considered at all regardless of age". The original statement had the same intent, but was probably not as clear. In addition, there were changes at the bottom of the 2nd paragraph, last sentence, "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". Ms. Kawakami said that on the original draft, there was narrative on the vulnerable populations and this item would now add public safety. She opened this matter up for discussion.

Mr. Ishihara recommended deleting the word "information" from 1st paragraph, 4th line. Thus, the 4th line would read "arrest records which are [is] confidential under Chapter 846, HRS".

On Pre-offer versus post-offer, Mr. Kemp stated that terminated people with arrest records would have individuals monitoring them over periods of time depending on the severity of the arrest.

Ms. Kawakami said that Ms. Hara commented on having the ability to do external background checks for those working with vulnerable populations. Ms. Moriyama added that DOE uses arrest information not to make a decision, but as a clue to probe deeper. Ms. Osorno asked if this situation applies to current employees in a grievable matter. Mr. Halvorson replied that if there is an arrest, that would be a clue that something is wrong. Ms. Kawakami added that DHS and DOE have rules in place on this matter.

Ms. Osorno asked if we put in the additional items referenced on the yellow pages, what will the information be used for? Ms. Moriyama replied that the information would be added to the report, which would put more narrative in laymen's language, and which would be put into Ramseyer format by Mr. Rosen of the LRB. She explained that the Working Group was trying to answer each of the questions that were posed in Act 263 and that the Working Group was trying to address those questions in a narrative or report format. In the use of arrest of records, the group was trying to explain what was discussed, what action was taken and reference that information to the legislation. In the legislation, the only thing that would change was in the area of allowing the vulnerable groups the same standing, which was discussed by Ms. Hara in Section 831-3.1, HRS.

Mr. Ishihara added that Ms. Osorno raised a good question. He confirmed that when we had discussions on Section 831-3.1, HRS, it was extended to include people working with vulnerable populations that were covered by DOE or DHS. There were concerns about

how DHRD would be using those arrest records, which Ms. Hara confirmed that it would be used only for purposes of investigation. He stated, however, the way the item was written, it doesn't really say that this would be done.

Ms. Kawakami suggested inserting "to consider an arrest record for investigative purposes".

Mr. Kajihira recommended that Ms. Hara should be consulted on this matter first since there might be a recent arrest and that alone could be used to see if there is a pattern. Ms. Kawakami stated that she would check with Ms. Hara if additional wording is needed.

Ms. Kawakami proceeded with item no. (5) on page 10 of the yellow handout. She stated that the change is in the last sentence, "The group agreed that non-conviction data does not provide a reliable indicator of job suitability". Ms. Kawakami wanted to discuss this item with the group because she was uncertain if everyone felt the same way. She indicated that p. 11 includes additional editing, with the addition of "public safety" and dealing with the vulnerable populations as well.

Ms. Moriyama felt that the statement added on p. 10 was contrary to Mr. Kajihira's concerns. Ms. Moriyama felt that while non-conviction data alone does not provide a reliable indicator of job suitability, it could be clarified further. Mr. Ishihara felt that the sentence should remain "as is". After a brief discussion, Ms. Onouye suggested using the language, "that non-conviction data alone may not provide a reliable basis for determination of job suitability, it can provide justification for further investigation, however".

Ms. Kawakami proceeded on to p. 17 of the yellow handout and reflected the revisions in each of the legislative sections that would be part of the parity. She pointed out the addition of the statement, "In order to provide parity with the private employers, the State and the Counties will be allowed to consider criminal convictions under the 10-year rational relationship standard".

Mr. Ishihara suggested adding the sentence that "the Working Group recommended that the State has parity with private employers" in Section 831-3.1, HRS.

Ms. Kawakami proceeded with the next yellow handout on Additional Working Group Issues. She said that this was a summary of 2 additions to the report, which would be inserted after the Active Issues, or on p. 15, before III. Recommendations of the Working Group, of the blue report. She explained that this area summarizes the issue previously discussed on perjury versus false swearing. In anticipation that the group would agree with the term "under penalty of law", the second paragraph was inserted to communicate the inconsistencies in the language.

Ms. Kawakami stated the last area to be included in the report was a section on Other Issues in order to incorporate the Inactive Issues that were discussed during earlier meetings. She focused on Item no. 5, which a statement was added at the end to indicate the status of the sex offender website, which was shutdown on November, 2001.

Ms. Kawakami moved on to p. 2 of the Other Issues report, item no. 7, which was discussed at the last meeting on whether or not the criminal history record information should be purged. She said that the consensus of the group was that there should not be purging of any criminal history record information as there is sufficient opportunity for purging through the expungement process as defined in Section 831-3.2, HRS.

Ms. Kawakami stated that all the other responses remain the same. She pointed out that many of these issues had been discussed in our meetings and therefore, she wanted to add the Other Issues as an attachment to the report. She stated that a Foreword and an Executive Summary would be included in the report. She mentioned that also included in the report were Attachment A - Act 263, Attachment B - a list of the Working Group Participants, and Attachment C - Other Issues.

In addition, Ms. Kawakami requested if a consensus on the legislation and the report could be obtained today since the deadline for submission to the Governor for transmittal to the Legislature is December 13, 2002, and the deadline for transmittal to the Legislature is December 26, 2002.

With reference to the issue on appealing to the Civil Service Commission or the Merit Appeals Board as earlier discussed, Mr. Halvorson stated that he checked on Act 253, HRS during the meeting break and recommended that Section 831-3.1, HRS (e) be deleted on the lavender handout since that portion was previously covered under Chapter 76-14, HRS. Ms. Tomita agreed with Mr. Halvorson.

VI. Preparation for 2003 Legislature

Ms. Moriyama stated that there would probably be one more Working Group meeting to discuss the group's strategy on approaching this issue at the Legislature once the assignment is made. She said that it would be highly effective to have as many participants as possible at the Legislature to testify since it would reflect a more collective stand. HCJDC will be taking the lead and will be notifying all of the committee members of any hearings etc. She reminded the group that Act 263 does not sunset until June 2003.

Ms. Moriyama asked the group if they would be comfortable on taking a roll call today as to whether each member of the group supports the report and legislation as drafted since it would be good for the record and for testifying. The other alternative would be to delay the roll call if the group wanted to wait and see the report first, which would be

sometime before December 10, 2002. Although she preferred to do the roll call now since all items were on the table and it would just be a matter of trust and faith that the changes to the report as discussed today are done and forwarded to Mr. Rosen. She mentioned that she did not think that anything that was discussed today was overly substantial, and that the focus was more on clarification. She stated that if the primary participant is not present at today's meeting, then the alternate participant would respond to the question, "Do you support the report and the proposed legislation?"

Mr. Halvorson asked if this could be called a vote of confidence instead of a roll call. Since everyone was appointed to this Working Group, Ms. Moriyama wanted to know how each individual stood on the legislation and report being submitted to the Legislature. Therefore, she preferred to refer to as a roll call.

Mr. Morita felt that this was not something that he had authority to say anything and preferred to pass it by his Director first. Ms. Moriyama responded that the focus would not be from the position of the department, but from the point of view of the appointed member of the Working Group. Since this did not make a difference for Mr. Morita, Ms. Moriyama stated that we could note down Mr. Morita's concerns during the roll call. Mr. Ishihara commented that for the Civil Rights Commission, a recommendation needs to be made to the commission. The following chart reflects the participants' responses to the roll call.

CRIMINAL HISTORY RECORD CHECK TASK FORCE
ROLL CALL LIST

<u>NAME OF DESIGNEE</u>	<u>AGENCY/ DEPT.</u>	<u>YES</u>	<u>NO</u>	<u>CONCERNS</u>
<u>*Alternate Designee</u>				
Sandy Abe *Maxine Baba	City & County Personnel	X		
John Carroll *Robert Durick *Allan Gaylord *Wally Weatherwax	Honolulu Liquor Comm.	X		Response received 12/23/02.
Deborah Emerson *Rod Tam	AG-Commerce & Economic Dev. Div.			
Diane Erickson	AG-Administration Div.			
Sharlene Hara *Vera Onouye	Dept. of Human Resources Development	X		
William Hoshijo *John Ishihara	Hawaii Civil Rights Commission			Recommend to the commission.
Lisa Itomura *Bryan Yee	AG-Public Safety Div.	X		Response received 12/16/02 as corrected on 12/13/02 to Hannah Kawakami.
Brian Kagihara *Collette Akahoshi *Allan Ishikawa	Dept. of Health	X		
Dave Kajihiro	Honolulu Police Dept.	X		

<u>NAME OF DESIGNEE</u> <u>*Alternate Designee</u>	<u>AGENCY/ DEPT.</u>	<u>YES</u>	<u>NO</u>	<u>CONCERNS</u>
Larry Kamakawiwoole *Mark Morita	Dept. of Commerce & Consumer Affairs			Confer with Director first.
Garry Kemp *Daeleen Ohigashi	Dept. of Human Services	X		
Clayton Kitamori *Llewella Rogers	Dept. of Public Safety	X		
Herbert Lau *Robyn Kuwabe	AG-Labor Div.	X		
Liane Moriyama *Hannah Kawakami *Norma Ueno	AG-Hawaii Criminal Justice Data Center	X		
Renee Nagahisa *Gary Hynds	Hawaii Health Systems	X		
Brian Nakamura *Valerie Kunimoto	Hawaii Labor Relations Board			
Dale Osorno	Hawaii Government Employees Asso.	X		As a member of the Working Group, yes, but subject to a final review by the Director.
Candace Park *Michelle Nakata	AG-Health & Human Services Div.	X		
Paul Saito *John Knorek	Hawaii Chamber of Commerce	X		Supports the report as drafted subject to a concern as addressed in a 12/27/02 e-mail to Ms. Kawakami.
Kurt Spohn *Rick Damerville	AG-Criminal Justice Div.	X		Response received on 12/13/02.
Russell Suzuki *George Hom	AG-Education Div.			
Ken Takayama *Mark Rosen	Legislative Reference Bureau			
Barbara Tomita *Susan Uchimura	Judiciary	X		
Kathy Watanabe *Jennifer Salvador *Jim Halvorson	AG-Employment Law Div.	X		
Robert Witt *Cecilia Domingo	Hawaii Asso. Of Independent Schools	X		Response received on 12/13/02.
Mae Yamasaki *Francis Keeno	Dept. of Education	X		Response received on 12/13/02.

VII. Open Issues

Ms. Moriyama stated that many of the open issues were already addressed in today's meeting.

VIII. Announcements

Ms. Moriyama previously announced Ms. Watanabe's move from AG-Employment Law Division to the Department of Human Resources.

Ms. Moriyama announced that Ms. Kawakami would be retiring December 30, 2002 and would be volunteering her assistance thereafter.

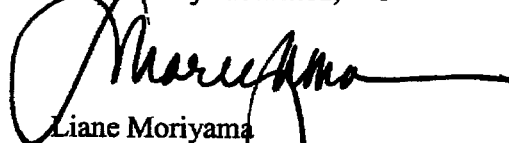
Ms. Moriyama expressed her appreciation for everyone's hard work and dedication to the Working Group's mission since it was above and beyond the call of duty and in addition to each individual's already overflowing workload. She was impressed that although everyone came representing its own jurisdiction, when it came down to the issues, everyone looked at the big picture and focused on what the mission was supposed to be. She stated that when this package is presented to the Legislature, it would be deemed significant work and the key reason for everyone's participation in the legislative process, such as testifying. Thus, close communication with the group would continue.

Mr. Ishihara asked for a motion to accept all the changes to the report as discussed and agreed upon today. A motion was made by Mr. Halvorson, seconded by Mr. Kemp, and unanimously carried, to accept the changes to the report as discussed and agreed upon today.

IX. Adjournment

Since there were no further topics for discussion, a motion was made by Mr. Kemp, seconded by Ms. Osorno, and unanimously carried, to adjourn the meeting at 11:40 a.m.

Respectfully submitted, .



Liane Moriyama
Chairperson
Act 263, SLH 2001
Criminal History Record Check Working Group

LINDA LINGLE
GOVERNOR OF HAWAII



KATHLEEN N. A. WATANABE
DIRECTOR

JANICE T. KEMP
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT
235 S. BERETANIA STREET
HONOLULU, HAWAII 96813-2437

March 19, 2004

Honorable Eric G. Hamakawa, Chair
House Committee on Judiciary
State Capitol, Room 302
Honolulu, Hawaii 96813

Dear Chairman Hamakawa:

We would like to take this opportunity to respond to a comment made at a February 11, 2003 hearing on H.B. No. 2448, Criminal History Record Checks for Service Providers of Office of Youth Services. The comment concerned the Working Group's screening and reviewing proposed legislation and recommending who should get background checks.

In its study entitled, Criminal History Record Checks in Hawaii: Issues and Options, the Hawaii Legislative Reference Bureau (LRB) recommended the creation of a Working Group to resolve policy issues raised in the study. The study stated "[t]he Working Group should be created for a specific period and directed to submit a report to the Legislature with its findings and conclusions, and recommendations for new law or revisions to present law, including suggested legislation." As a result, Act 263, Session Laws of Hawaii (SLH) 2001, established a Working Group to resolve policy issues raised by the LRB study related to the use and access of criminal history record information for employment and licensing determinations and other related check issues. Specifically, Act 263 mandated the following:

the Working Group shall review existing laws governing access and use of criminal history record information, laws authorizing criminal history record checks for noncriminal justice purposes of employment and licensing, and other criminal history record check issues and make recommendations to the legislature;

the Working Group shall consider policy issues applicable to access and use of criminal history record information, laws authorizing criminal history record checks, and other issues related to criminal history record checks for noncriminal justice purposes of employment and licensing;

Honorable Eric G. Hamakawa
March 19, 2004
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in formulating policy and law recommendations relating to access and use of criminal history record information to conduct criminal history record checks for noncriminal justice purposes of employment and licensing determinations, the Working Group shall balance the public's need to know, employer liability, the reintegration of convicted offenders into society, and the record subject's right to privacy; and

the Working Group shall identify statutes, administrative rules, and practices related to access and use of criminal history information and criminal history record checks for noncriminal justice employment and licensing purposes and make recommendations for repeal and amendment of existing laws and adoption of new laws.

The Working Group submitted its report to the 2003 legislature detailing its recommendations. In Act 95, SLH 2003, the legislature extended the working group to "continue its work on tasks as shall be assigned by the legislature relating to a comprehensive review and analysis of all issues related to the use of criminal history record information for employment, licensing, and other matters." The focuses of the Working Group's responsibilities were not changed.

In reading Act 263, SLH 2001 together with Act 95, SLH 2003, we do not believe that we have the responsibility or the authority to serve as a "screener" of proposed legislation initiated by agencies for the use and access of criminal history record information. We believe the Working Group would overstep its bounds if it were to take a position on the merits of these requests. This position is consistent with the manner in which we handled agency proposals during last year's legislative session wherein the Working Group specifically advised any agency, which was not yet authorized for criminal history record checks, that the agency needed to propose separate legislation, on its own, in order to obtain legislative approval for any program.

It appears that there is a concern that proposed legislation by agencies for the use and access of criminal history record information should be reviewed by the Working Group for consistency and uniformity with existing law. To meet its Act 263 mandate, the Working Group did recommend "technical" changes to existing laws to standardize language and practices where appropriate. However, to task this Working group with a continuing responsibility to provide a technical review of new legislation would duplicate the function of the Department of the Attorney General (AG). The AG in conjunction with the Hawaii Criminal Justice Data Center (HCJDC) already performs this function for any new legislation proposed by Executive branch agencies in dealing with the use and access of criminal history information. In regard to legislation

Honorable Eric G. Hamakawa

March 19, 2004

Page 3

proposed by external agencies or private entities, the Legislative Reference Bureau provides a similar technical review. It would be a logical step to have the LRB coordinate with the AG/HCJDC on any bill proposal dealing with criminal history record checks for conformance with the standards established in Act 95, SLH 2003.

If the concern has to deal more with a substantive review of legislation regarding the merits of new requests for the use and access of criminal history record information and making a determination of who should get background checks, then the Working Group believes that this function is outside of the scope of the Working Group's purview and that it is the legislature's prerogative to make the determination as to who should be checked.

In the case of public employment or licensure, the Working Group has already identified a "vulnerable population group" (i.e., children, dependent adults, persons committed to a correctional facility) for which public interest outweighs any privacy interest and has recommended that criminal history record checks for positions with responsibility for or in close proximity with this vulnerable group. However, there are other significant programs outside of this vulnerable population group that the State legislature may find warrant this information (e.g., detectives, firearms applicants, explosive handlers). We believe decisions of this nature, because of the multiple stakeholders and the public policy decisions involved, requires the public forum afforded in the legislative process.

The Working Group was convened on March 3, 2004 to discuss this issue and the members have concurred with this position.

We respectfully submit this letter for your consideration.

Sincerely,



JENNIFER SALVADOR, Co-Chair
Act 263, SLH 2001, Criminal History Record
Check Working Group
Department of the Attorney General



SHARLENE HARA, Co-Chair
Act 263, SLH 2001, Criminal History Record
Check Working Group
Dept. of Human Resources Development



HOUSE OF REPRESENTATIVES

STATE OF HAWAII
STATE CAPITOL
HONOLULU, HAWAII 96813

May 12, 2004

**Ms. Jennifer Salvador Department of
the Attorney General Hale Auhau 425
Queen St. Honolulu, HI 96813**

Dear Ms. Salvador:

Act **95, SLH 2003**, extended the term of the Criminal History Records Check Working Group to June 30, 2005, to continue its work on tasks as shall be assigned by the Legislature. Last session, a number of bills were introduced seeking authority to conduct criminal history record checks on a target population. Most of these bills were not passed by the Legislature. **The** Judiciary Committee had serious concerns about the propriety of some of these requests. If history is any indication, many of these requests are likely to resurface in the Legislature.

This is to request that your group, in conjunction with seeking a legal opinion from the attorney general, review the requests **to determine:**

1. **The facts that support the request for authority to conduct criminal history record checks;**
2. **Whether a compelling state interest exists to justify the checks;**
3. **Whether the target group is narrowly tailored to meet the compelling state interest to conduct the checks;**
4. **Whether the organization seeking the information has in place appropriate safeguards to maintain confidentiality of the data, appropriate policies or regulations to implement the background checks process, including the intended use for the information;**
5. **Whether the proposed bill needs to be amended to conform with standardized statutes in existing law relating to criminal history record checks; and**
6. **A review of the due process protection or any constitutional issues related to the "adult abuse perpetrator" and " child abuse perpetrator" data base checks.**

Attached is a summary of the bills that requested authority to conduct criminal history record checks, with our specific comments. We appreciate the work of the working group in ensuring that background checks are authorized in a consistent and lawful manner. If you have any questions, please call myself or my committee clerk, Joy Kobayashi, at 586-8480.

Sincerely,

Rep. Eric G. Hamakawa
Chair
House Committee on Judiciary

cc: Rep. Blake Oshiro
Sen. Colleen Hanabusa Director Lillian
Koller Director Chiyome Fukino, MD
Superintendent Patricia Hamamoto
Director Mark Recktenwald Attorney
General Mark Bennett Chief Justice
Ronald Moon

Representative Eric G. Hamakawa
Third District
South Hilo-Puna

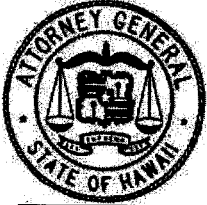
State House of Representatives
State Capitol, Room 302 • Honolulu, Hawaii 96813 Phone: (808) 586-8480 • Fax: (808)
586-8484 • email: repamakawa@capitol.hawaii.gov

Attachment E

SUMMARY OF 2004 BILLS SEEKING CRIMINAL HISTORY RECORD CHECKS AUTHORITY

Senate Bill	House Bill	Description	Comments
2923 SD1	2448	<p><i>Report Title: Criminal History Record Checks Description:</i> Authorizes the Office of Youth Services to obtain criminal history and child abuse record information on employees, prospective employees, and volunteers of its providers and subcontractors in positions that necessitates close proximity to youth. (SB2923 SD1)</p>	<p>Consider whether the state has a compelling state interest in conducting such checks on the target group of providers or subcontractors, i.e. employees, prospective employees and volunteers; Consider whether being subjected to child abuse record checks is appropriate; consider whether the test of "convicted of an offense for which incarceration is a sentencing option" or "ever been confirmed to have abused or neglected a child, including threatened harm" is appropriate to reject or terminate the person.</p>
2946	2471	<p><i>Report Title: Criminal History Record Checks Description:</i> Provides the Department of Health with the authority to conduct criminal history record checks on adults living with individuals with developmental disabilities in uncertified or unlicensed residences. Criminal history checks would be conducted on adults unrelated to the person with developmental disabilities, and would apply to situations where the person with developmental disabilities is not living with their family. (SB2946)</p>	<p>Consider whether the state has a compelling interest in conducting such checks on unrelated adults living in with a person with developmental disabilities in an unlicensed or uncertified home.</p>
	2857	<p><i>Report Title: Criminal History Record Checks; DOE Description:</i> Requires the department of education to conduct Criminal history record checks providers and subcontractors who perform unsupervised mental or behavioral health services. (HB2857)</p>	<p>Consider whether the state has a compelling state interest in conducting checks on providers and subcontractors who perform unsupervised services.</p>

2904 SD2 HD1	2429	<p>Report Title: Escrow Depositories; Licensing and Regulation</p> <p>Description: Amends and updates procedures for the licensing and regulation of escrow depositories, allows licensing as LLC, strengthens confidentiality requirements, allows criminal background checks of license applicants, increases bonding requirement, and establishes receivership procedures; effective 2009. (SB2904 HD1)</p>	<p>Consider whether the target group of officers, directors, designated principal escrow officers, branch escrow officers of an applicant for license should be authorized for checks; consider what licensing actions should result if the checks reveal negative information that may not be pertinent to the public trust issues.</p>
2931 SD1	2456	<p>Report Title: Background Checks</p> <p>Description: Requires the Department of Human Services to establish standards, which shall include criminal history record, Adult Protective Service, and Child Protective Service checks, to ensure the reputable and responsible character of service providers who have direct contact with individuals receiving services. (SB2931 SD1)</p>	<p>Consider whether the state has a compelling interest to conduct checks on the target group; consider whether the "adult abuse perpetrator check" and "child abuse perpetrator check" data base is collected in a manner that provides sufficient due process protections to persons in that data base and whether the background check should include these two data bases.</p>
2633	1811	<p>Report Title: Child Protective Services; Removal</p> <p>Description: Requires establishment of CPS proceedings database. Defines "abuse". Requires criminal history record checks for people who report child abuse. Requires law enforcement authority to conduct initial investigation. Requires police to consult with CPS worker before assuming custody. Requires probable cause to believe child subject to imminent harm. (SB2633)</p>	<p>Consider whether the state has a compelling state interest in requiring a check on a person who reports abuse and what if any notice should be provided to the reporter.</p>
2637		<p>Report Title: Children; Guardians Ad Litem.</p> <p>Description: Requires guardians ad litem to undergo background check and drug testing; requires the judiciary to establish a system to monitor and evaluate the performance of guardians ad litem to ensure accountability; requires the auditor to perform a management and performance audit of the judiciary's guardian ad litem program.</p>	<p>Consider whether the state has a compelling state interest to conduct checks on persons appointed as guardian ad litem to determine whether the person is free of illegal drugs.</p>



Department of the Attorney General Employment Law Division

235 South Beretania Street, 15th Floor, Honolulu, Hawaii 96813
Telephone: 808-587-2900 Fax: 808-587-2965

DATE: August 10, 2004

TO: **The Honorable Mark J. Bennett**
Attorney General

THROUGH: **Richard T. Bissen, Jr.**
First Deputy Attorney General

James E. Halvorson
Supervising Deputy Attorney General

FROM: **Jennifer R. Salvador**
Deputy Attorney General
Employment Law Division
Co-Chair, Act 263, SLH 2001, Criminal History Record
Check Working Group

Sharlene Hara
Department of Human Resources Development Co-Chair,
Act 263, SLH 2001, Criminal History Record Check
Working Group

Kathleen N.A. Watanabe
Director
Department of Human Resources Development
(former Vice-Chair, Act 263, SLH 2001, Criminal
History Record Check Working Group)

Liane Moriyama
Administrator
Hawaii Criminal Justice Data Center
(former Chair, Act 263, SLH 2001, Criminal History
Record Check Working Group)

RE: Criminal History Record Check Working Group's Response to Letter from
Representative Eric Hamakawa's Dated May 12, 2004

By way of background, Act 263, Session Laws of Hawaii (SLH) 2001, Relating to
Criminal History Record Checks was passed by the 2001 Legislature to implement the
recommendations of the 2001 Legislative Reference Bureau's (LRB) study on issues

relating to 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 ("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. The Working Group submitted its report to the 2003 Legislature detailing its recommendations. In Act 95, SLH 2003, the Legislature extended the working group to "continue its work on tasks as shall be assigned by the legislature relating to a comprehensive review and analysis of all issues related to the use of criminal history record information for employment, licensing, and other matters."

By letter dated May 12, 2004, Rep. Eric Hamakawa requested that the Working Group, in conjunction with a legal opinion from the attorney general, review bills seeking authority to conduct criminal history record checks on target populations. Specifically, Representative Hamakawa's letter asked that the Working Group review the bills to determine:

1. The facts that support the request for authority to conduct criminal history record checks;
2. Whether a compelling state interest exists to justify the checks;
3. Whether the target group is narrowly tailored to meet the compelling state interest to conduct the checks;
4. Whether the organization seeking the information has in place appropriate safeguards to maintain the confidentiality of the data, appropriate policies or regulations to implement the background checks process, including the intended use for the information;
5. Whether the proposed bill needs to be amended to conform with the standardized statutes in existing law relating to criminal history record checks; and
6. A review of the due process protections or any constitutional issues related to the "adult abuse perpetrator" and "child abuse perpetrator" data base checks.

Prior to this letter, the Working Group had already advised Representative Hamakawa of its position on screening and reviewing proposed legislation in a letter dated March 19, 2004. In that letter, the Working Group explained that it did not believe

that it had the authority or responsibility to serve as a "screener" of proposed legislation initiated by agencies for the use and access of criminal history record information.

The Working Group now requests your legal advice as to the following:

1. Are we correct in our position as stated in our March 19, 2004 letter to Rep. Hamakawa?
2. Is the Working Group advisory in nature?
3. Do any decisions by the Working Group have legal force and effect of law?
4. Pursuant to Act 95, SLH 2003, the Working Group was assigned to work on tasks "as shall be assigned by the legislature." Does Rep. Hamakawa's request via letter signed by him as Chair of House Committee on Judiciary, constitute an assignment by the legislature? We note that Rep. Hamakawa is not seeking re-election in the upcoming election.
5. What kind of liability would the Working Group face if it is determined that the Working Group may make policy decisions on who should or should not get access to criminal history record information? Would the State indemnify the Working Group members?

If you have any questions on this matter, please feel free to call either Jennifer Salvador at 587-2900 or Sharlene Hara at 587-0988.

Attachments

cc: Charleen Aina
Deputy Attorney General

Russel A. Suzuki
Supervising Deputy Attorney General