



HAWAI`I CIVIL RIGHTS COMMISSION

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March 17, 2009
Rm. 329, 8:30 a.m.

To: The Honorable Ryan I. Yamane, Chair
Members of the House Committee on Health

From: Coral Wong Pietsch, Chair, and Commissioners of the Hawai`i Civil Rights
Commission

Re: S.B. No. 1137, S.D.2

The Hawai`i Civil Rights Commission (HCRC) has enforcement jurisdiction over state laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state-funded services. The HCRC carries out the Hawai`i constitutional mandate that "no person shall be discriminated against in the exercise of their civil rights because of race, religion, sex or ancestry". Art. I, Sec. 5.

The HCRC opposes S.B. No. 1137, S.D.2, which amends §378-2.5 to allow the Hawaii health systems corporation to conduct criminal history record checks on all employees, applicants seeking employment, current and prospective volunteers, providers or contractors. The HCRC has not opposed narrowly drawn exceptions allowing pre-offer inquiries into records of criminal convictions for positions that involve **unsupervised** contact with vulnerable persons – children, the elderly, persons with disabilities. However, the proposed exception is not narrowly drawn, and there is no reason that the health systems corporation's interests cannot be

addressed by the post-offer inquiry and consideration of record of criminal conviction allowed under §378-2.5. At prior hearings on this bill, the corporation testified that it can currently obtain the needed information from the FBI criminal history bank through the Hawaii Criminal Justice Data Center after an employment offer is made. Requests for a further statutory exception should be carefully scrutinized, or an endless line of requestors for similar exceptions will threaten to swallow up the rule.

Under Chapter 378, persons with an arrest and court record are protected against employment discrimination. These provisions were passed in 1974 to promote the rehabilitation and employment of convicted persons because the legislature recognized that such persons are not inherently and permanently bad and that opportunities afforded to other citizens should be made available to them. SCRep 862-74, 1974 Senate Journal at 1079.

In 1998 H.R.S. § 378-2.5 was passed as a legislative compromise, in which all interested government and private parties were at the table and agreed to a broad exception to the arrest and court record protection, allowing post-offer inquiry into and consideration of records of conviction convictions if the convictions are rationally related to the duties and responsibilities of the job and occurred within 10 years of the application (excluding periods of incarceration). In addition, under §378-2.5(d) employer pre-offer inquiries into conviction records are allowed only where employment involves: a) **unsupervised** contact with vulnerable persons (children, the elderly, the disabled, prisoners, etc.); 2) licensing of detective and security guard agencies; 3) schools; 4) financial institutions and positions involving the handling of money; 5) co-op and AOA managers; and 6) police and the courts.

§378-2.5(d) was meant to consolidate and codify existing exceptions, not to provide an avenue for carving out additional exceptions. Given that § 378-2.5 was agreed upon as the exception to the arrest and court record protection, the provisions of § 378-2.5(d) are literally exceptions to the exception. There is little reason why additional employer entities should be granted this “super” exception, absent a showing that the post-offer inquiry and consideration of records that are rationally related to the duties of the position is somehow not sufficient – a showing that they cannot be subject to the same law as all other employers. It is important to remember that these employers are not prohibited from inquiry and consideration of records of criminal conviction – they can inquire and consider rationally related convictions the same as every other employer, post-offer.

The HCRC opposes S.B. No. 1137, S.D. 2 because it is not clear that all the Hawaii health care systems positions are unsupervised, and there is no express reason why the health systems cannot make post-offer inquiries, continue to obtain information from the FBI criminal history bank through the HCJDC, and consider convictions if the convictions are rationally related to the duties and responsibilities of those jobs, in the same manner that all employers are allowed under H.R.S. §378-2.5.

The Commission urges the legislature exercise restraint in granting requests for statutory exceptions to arrest and court record protections under Chapter 378, in order to maintain the original rehabilitative and employment purposes of the statute.



HAWAII HEALTH SYSTEMS
C O R P O R A T I O N

"Touching Lives Everyday"

**House of Representatives
Committee on Health
Representative Ryan I. Yamane, Chair
Representative Scott Y. Nishimoto, Vice Chair**

Tuesday, March 17, 2009
8:30 a.m.
Conference Room 329
Hawaii State Capitol

Testimony Supporting SB 1137 SD2 Relating to Health
Authorizes Hawaii Health Systems Corporation to conduct criminal history record checks

Thomas M. Driskill, Jr.
President and Chief Executive Officer
Hawaii Health Systems Corporation

On behalf of the Hawaii Health Systems Corporation (HSSC) Corporation Board of Directors, thank you for the opportunity to present testimony in strong support of SB 1137 SD2 that authorizes HHSC to conduct criminal history record checks.

Criminal History Record Checks

Purpose: HHSC is requesting the passage of a criminal history record check bill that would further define and allow the Hawaii Health Systems Corporation (HHSC) to perform criminal checks on all existing employees, prospective contractors, volunteers and vendors via the Hawaii Criminal Justice Data Center's (HCJDC) FBI checks. Such criminal history records checks are currently limited to prospective employees (applicants) after a conditional offer of employment is made.

The following legislation provides the justification to allow for the criminal history checks:

- ◆ The federal Volunteer for Children's Act, (**42 U.S.C. 5119** et. seq.) is federal legislation that allows the use of national fingerprint-based criminal history checks to

screen out volunteers and employees with relevant criminal records for those organizations and businesses dealing with children, elderly and disabled.

- ◆ **HRS 378-2.5 and 831-3.1**, allow employers to inquire into an individual's criminal conviction background after a conditional offer of employment has been made. This offer of employment may be rescinded if there is a conviction within the applicant's past ten years, excluding periods of incarceration that has a rational relationship to the duties and responsibilities of the position.
- ◆ **HRS 78-2.6** states that "All prospective employees, regardless of the position they will assume, shall demonstrate their suitability for public employment by: 1) passing a pre-employment controlled substance drug test if required by the employing jurisdiction; and 2) attesting that during the three-year period immediately preceding the date of application for employment, the person was not convicted of any controlled substance-related offense. If an applicant fails to meet the suitability requirements of the employing jurisdiction, the applicant shall be disqualified from further employment consideration or deemed ineligible for appointment under section HRS 76-29 on the basis of unsuitability for public employment."

In addition, these codes also provide further rationale for such criminal history checks:

- ◆ **42 US Code 1320a-7(1)** lists types of crimes such as fraud, theft, abuse and neglect that may result in exclusion from the Medicare program.
- ◆ **Code of Federal Regulation 42 CFR 483.13** requires nursing homes to do pre-employment check of all employees and not hire individuals who have been found guilty of abuse, neglect or mistreatment of residents by a court of law or have a finding entered into the State nurse aide registry.
- ◆ **Code of Federal Regulation 42 CFR 455.106** requires providers to disclose to Medicaid the identity of any person who has been convicted of a criminal offense related to a program under Medicare, Medicaid, or the Title XX program.
- ◆ **Joint Commission of Accreditation for Hospital Organizations (JCAHO)** requires standards outlined in the HHSC's polices/guidelines to be followed in accordance with the above Federal regulations.

HHSC has conducted State criminal history checks with the assistance of the Hawaii Criminal Justice Data Center (HCJDC) and the Office of Inspector General (OIG) / General Services Administration (GSA) checks utilizing a private contractor. These within-State checks and the OIG/GSA checks have been done since the creation of HHSC in 1997. As a consequence of a shortage of health care workers, HHSC, by necessity has recruited heavily from out-of-state. Convictions from out-of-state are not in the Hawaii State's data bank and cannot be obtained through this source. Although HHSC could probably access county criminal data banks for every county where the

applicant has worked, this process is lengthy and if an applicant wishes to hide conviction data, he or she can simply omit that county employment from the application. Therefore, the most efficient and effective process would be to access the FBI data bank where information on criminal history for all States is kept.

Since access to the FBI criminal history bank requires specific legislation granting this authority, HHSC has attempted several times to seek this legislation authority. With many other agencies requesting similar measures, the Legislature passed Act 263, SLH 2001, to create a working committee to resolve policy issues relating to the access and use of criminal history record information (for the purpose of employment and licensing). The Legislature implemented the recommendations of the working committee during the 2003 session. Accordingly, Act 95, SLH 2003, provided comprehensive amendments to various statutes pertaining to criminal history record checks, including revisions to chapters 78, 281, 302A, 302C, 321, 333F, 346, 352, 353C, 378-2.5, 421I, 463, 571, 831-3, 831-3.1, and 846, HRS. The working committee reminded all agencies and jurisdictions that individual legislative language for the respective agencies/jurisdictions would still be required in order to access the FBI files. HHSC has not been successful as yet with the proposed legislation authorizing HHSC to perform criminal history record checks utilizing the FBI fingerprint – based data bank and to be listed as one of the agencies in Chapter 846, HRS that grants this authority.

The HCJDC has recognized our problem and volunteered to assist the HHSC while we continue in our attempts to get the needed legislation. Therefore, in late January of 2004, HCJDC, utilizing their statutory authority, began doing FBI checks for HHSC. These checks were limited to prospective employees (those receiving employment offers). While we sincerely appreciate HCJDC efforts on our behalf, HHSC needs the proposed legislation to allow us direct access to the FBI files. Such legislation will enable HHSC to do the checks much faster and to expand the review of criminal history checks to current employees, vendors, consultants, volunteers and all others who may come into contact with our patients and residents. This authority will enable us to fulfill the intent of the various statutes, codes and regulations governing background history checks.

Thank you for this opportunity to testify before this committee. We strongly urge passage of this measure and respectfully request an effective date of July 1, 2009.