

ACT 263

H.B. NO. 161

A Bill for an Act Relating to Criminal History Record Checks.

Be It Enacted by the Legislature of the State of Hawaii:

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

SECTION 2. (a) There is established within the department of the attorney general, for administrative purposes, a temporary criminal history record check working group to review policy issues concerning the noncriminal justice access and use of criminal history record information for employment and licensing purposes as raised in the legislative reference bureau study. 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.

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

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

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

(c) The working group shall consider delineating the subject matter of criminal history records by replacing the statutory term “arrest and court record” with the broader term “nonconviction data”. The working group shall consider the most appropriate definition of this term as it applies to the subject matter of criminal history record checks. 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. 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.

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. Issues that the working group shall address include but are not limited to:

- (1) Should Hawaii employment practices law with respect to the use of criminal history record information also apply to licensing decisions? If there should be any differences, what should those differences be?
- (2) Are there any guidelines to determine when a conviction is “rationally related” to the job? If so, what are they?
- (3) When statutory authorization, or a Bona Fide Occupational Qualification (BFOQ) requirement, or both, allows consideration of arrest and court record:
 - (A) Is age of convictions that may be considered limited to convictions less than ten years old?
 - (B) Is there an age limit for arrests that may be considered?
 - (C) Are arrests required to be reasonably necessary to the operation of the business and substantially related to the job?
 - (D) Is a conditional offer of employment required before consideration of conviction data or nonconviction data, or both are allowed?
- (4) Does a criminal history record check that is authorized, but not required, by statute constitute a BFOQ exception that allows consideration of arrest and court records?
- (5) Should Hawaii employment practices law be amended to expressly authorize consideration of both conviction and nonconviction data when an employer is statutorily authorized to conduct a criminal history record check of an individual’s criminal history record information (which includes both conviction data and nonconviction data) to determine employment suitability? If so, what restrictions, if any, should be imposed on an employer’s consideration of criminal history record information?
- (6) Should section 378-3, Hawaii Revised Statutes, be amended to repeal paragraph (8) because it is unnecessary, duplicative, and potentially confusing?

Section 378-3, Hawaii Revised Statutes, establishes “Exceptions”, stating that nothing in chapter 378, part 1, Hawaii Revised Statutes, “Discriminatory Practices”, shall be deemed to prohibit or prevent public or private schools from considering criminal convictions

in determining suitability for employment in close proximity to children. Sections 846-43 and 846-44, Hawaii Revised Statutes, independently authorize public and private schools to conduct criminal history record checks for employment screening and section 378-2.5, Hawaii Revised Statutes, allows consideration of convictions. Other statutes that authorize other agencies to conduct employment criminal history record checks are not included as “exceptions” in section 378-3. To include some but not all, statutorily authorized criminal checks in section 378-3 appears to be both unnecessary and confusing.

- (7) Although aggrieved civil service applicants may appeal to the civil service commission, the rights of a similarly aggrieved applicant for a state job that is not civil service are unclear. Should the civil rights commission investigate complaints (by persons other than those applying for state or county civil service jobs) related to the prohibitions in section 831-3.1, Hawaii Revised Statutes, on the State’s use of certain criminal records in state employment decisions? If not the civil rights commission, then who?
- (8) Similarly, what remedies are (or should be) available for license applicants who believe their license was denied or revoked based on the State’s use of nonconviction or conviction data?
- (9) Since the unlimited availability of Hawaii conviction data allows public access to convictions regardless of age, does this conflict with an employer’s ability to consider only those rationally related convictions less than ten years old? If so, how should the conflict be reconciled?
- (10) Does the prohibition in 28 CFR section 20.21(b) continue to restrict states that received federal funding in connection with the collection, storage, dissemination of criminal history record information in the dissemination of state nonconviction data?
- (11) Consider repeal of section 831-3.1, Hawaii Revised Statutes, which restricts the State’s use, distribution, and dissemination of certain criminal records in employment and licensing decisions to eliminate redundant, unnecessary, duplicative, or conflicting laws.

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

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

- (12) If section 831-3.1, Hawaii Revised Statutes, is retained, clarification of “noncriminal standards such as good moral character, temperate habits, habitual intemperate use of intoxicants, trustworthiness, and the like” is recommended.

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

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

(d) The working group shall be fully designated and constituted by no later than thirty days after the effective date of this Act and shall convene on a regular basis. In conducting the review, the working group shall seek consensus and, where consensus is not possible, identify the competing viewpoints and goals with respect to the issue in question so that the legislature may be fully advised of the full range of policy choices presented.

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

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

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

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

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

(Approved June 22, 2001.)