

ACT 220

S.B. NO. 2343

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

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

SECTION 1. To protect the health and safety of the elderly and disabled, the legislature recognizes the need to generate timely and accurate background checks in

the form of positive fingerprint identification for persons providing care or having access to residents of skilled nursing facilities, intermediate care facilities, adult residential care homes, expanded adult residential care homes, assisted living facilities, home health agencies, hospices, adult day health centers, special treatment facilities, therapeutic living programs, intermediate care facilities for the mentally retarded, hospitals, rural health centers, and rehabilitation agencies, including applicants for licensure to any of these facilities, facility operators, prospective facility employees and facility adult volunteers, and, in the case of any facility operated in a private residence, all adults living in the home other than the clients, and service providers who have direct contact with individuals receiving services who may be frail, elderly, or disabled.

SECTION 2. Chapter 321, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§321- Criminal history record checks. (a) For the purposes of this section:

“Adults” means individuals aged eighteen years or older.

“Applicant” means a person or entity seeking licensure to operate a healthcare facility. If the applicant is an entity, the term “applicant” shall also include its principals, directors, partners, managers, agents, and representatives to the extent that any of these individuals will have access to or contact with clients, their finances, assets, personal property, medical records, or individually identifiable information.

“Conviction for a relevant crime” means any federal or state conviction for any relevant crime as defined in this section.

“Criminal history record name inquiry” means a record check by name for any federal or state conviction for any relevant crime as defined in this section.

“Department” means the department of health.

“Direct patient access employee” means any individual, including a volunteer, who has access to a patient or resident of a healthcare facility, or any provider through employment or through an agreement or contract with such a facility or provider. Such individuals include but are not limited to: physicians, nurses, nursing assistants, home health aides, therapists, activities personnel, and support staff (i.e., housekeeping, dietary, etc.) who have direct access to patients or patient belongings.

“Disqualifying information” means a conviction for a relevant crime or a finding of patient or resident abuse.

“Healthcare facility” means a facility or setting where a frail, elderly, or disabled adult receives care or is provided living accommodations such as a skilled nursing facility, intermediate care facility, adult residential care home, expanded adult residential care home, assisted living facility, home health agency, hospice, adult day health center, special treatment facility, therapeutic living program, intermediate care facility for the mentally retarded, hospital, rural health center, and rehabilitation agency.

“Name inquiry” means a criminal history record check conducted by using the name and other identifying information of the individual, in lieu of a fingerprint check.

“Operator” means an individual or entity that is licensed or is seeking licensure to operate a healthcare facility and is responsible for the management and overall operations of that healthcare facility.

“Relevant crime” means:

- (1) Any offense described in 42 United States Code §1320a-7 (Section 1128(a) of the Social Security Act); or
- (2) A crime of such a serious nature or circumstance that the department finds its perpetrator to pose a risk to the health, safety, or well-being of

a patient or resident. This includes but is not limited to murder, manslaughter, assault, sex offenses, domestic violence, theft or forgery, arson, kidnapping, or possession, use, sale, manufacture, or distribution of dangerous drugs or controlled substances.

(b) The department shall adopt rules pursuant to chapter 91 to ensure the reputable and responsible character of all prospective applicants, operators, direct patient access employees, and adult volunteers of a healthcare facility, and, in the case of any healthcare facility operated in a private residence, all adults living in the home other than the clients. These rules, among other things, shall specify how the department may conduct criminal history record checks in accordance with section 846-2.7.

(c) All applicants and prospective operators shall:

- (1) Be subject to criminal history record checks in accordance with section 846-2.7;
- (2) Authorize the disclosure to the department of criminal history record information;
- (3) Sign a waiver form stating that the department shall not be liable to the applicant or prospective operator; and
- (4) Consent to be fingerprinted for the purpose of requesting criminal history record information from the Federal Bureau of Investigation and the Hawaii criminal justice data center.

(d) All prospective direct patient access employees and adult volunteers of healthcare facilities and, in the case of any healthcare facility operated in a private residence, all adults living in the home other than the clients shall:

- (1) Consent to be fingerprinted;
- (2) Provide all necessary information for the purpose of enabling the department to conduct the criminal history record checks; and
- (3) Sign a waiver form stating that the department shall not be liable to the employee or volunteer.

(e) The department may request criminal history record information which includes Federal Bureau of Investigation data through the Hawaii criminal justice data center on all prospective applicants, operators, direct patient access employees, and adult volunteers of healthcare facilities. In addition, in the case of any healthcare facility to be operated in a private residence, the department of health may request criminal history record information which includes Federal Bureau of Investigation data through the Hawaii criminal justice data center for all adults residing in the home who are not clients.

(f) The department shall make a name inquiry into the criminal history records or conduct criminal history record checks of all prospective applicants, operators, direct patient access employees, and adult volunteers at the healthcare facility, and, in the case of any healthcare facility operated in a private residence, all adults living in the home other than the clients.

(g) The department may revoke or suspend a current license, impose penalties or fines, or deny an application for a license under rules adopted pursuant to chapter 91 if the applicant, operator, employee, or adult volunteer at the healthcare facility or, in the case of any healthcare facility operated in a private residence, any adult living in the home other than the client, refuses to authorize the department to conduct a criminal history record check, obtain criminal history record information for verification, or consent to be fingerprinted. In addition, the department may revoke or suspend a current license, impose penalties or fines, or deny an application for a license if the applicant, operator, direct patient access employee, or adult volunteer at the healthcare facility, or, in the case of a healthcare facility operated in a private residence, any adult living in the home other than the client, has any disqualifying information. The department may also revoke or suspend a current license, impose penalties or fines, or deny an application for a license if the

department determines, based upon consideration of the criminal history information, that the applicant, operator, direct patient access employee, or adult volunteer at the healthcare facility, or, in the case of a healthcare facility operated in a private residence, any adult living in the home other than the client, is unsuitable to work or live in close proximity to the residents of the healthcare facility such that the health, safety, and welfare of the residents of the healthcare facility could be at risk.

(h) Notwithstanding any other law to the contrary, for purposes of this section, the department shall be exempt from section 831-3.1 and need not conduct investigations, notifications, or hearings under this section in accordance with chapter 91.

(i) The fee charged by the Federal Bureau of Investigation and the Hawaii criminal justice data center to perform criminal history record checks may be passed on to all applicants, operators, direct patient access employees, and adult volunteers at the healthcare facility and, in the case of a facility operated in a private residence, all adults living in the home other than the clients.

(j) The department, in obtaining and relying upon the criminal history record checks, is presumed to be acting in good faith and shall be immune from civil liability for taking or recommending action based upon the criminal history record information. The good faith presumption may be rebutted upon a showing by the person or entity of a lack of good faith, and proof by a preponderance of the evidence, that the department relied upon information or opinion that it knew was false or misleading.

(k) Any applicant or operator who receives information from the department relating to a criminal history record check of a direct patient access employee or adult volunteer or, in the case of a healthcare facility operated in a private residence, an adult living in the home other than the clients, is presumed to be acting in good faith and shall be immune from civil liability for taking or recommending action based upon the department's recommendation or direction. Nothing in this section shall affect rights, obligations, remedies, liabilities, or standards of proof under chapters 368 and 378.

Criminal history record information shall be used exclusively by the department for the sole purpose of determining whether an applicant, operator, direct patient access employee, or adult volunteer at a healthcare facility, or, in the case of a facility operated in a private residence, any adult living in the home other than the clients is suitable for working or living in close proximity to residents of a healthcare facility such that the health, safety, and welfare of the residents would not be at risk."

SECTION 3. Chapter 346, Hawaii Revised Statutes, is amended by adding to part IV a new section to be appropriately designated and to read as follows:

"§346- Criminal history record checks. (a) For the purposes of this section:

"Conviction for a relevant crime" means any federal or state conviction for any relevant crime as defined in this section.

"Criminal history record name inquiry" means a search by name, and other identifying information, using the state computerized criminal history record information system.

"Department" means the department of human services.

"Name inquiry" means a criminal history record check conducted by using the name and other identifying information of the individual, in lieu of a fingerprint check.

"Relevant crime" means:

- (1) Any offense described in 42 United States Code §1320a-7 (Section 1128(a) of the Social Security Act); or

- (2) A crime of such a serious nature or circumstance that the department finds its perpetrator to pose a risk to the health, safety, or well-being of a patient or resident. This includes but is not limited to murder, manslaughter, assault, sex offenses, domestic violence, theft or forgery, arson, kidnapping, or possession, use, sale, manufacture, or distribution of dangerous drugs or controlled substances.
- (b) The department shall adopt rules pursuant to chapter 91 establishing standards regarding the reputable and responsible character of service providers who have direct contact with individuals receiving services under this part, including:
- (1) Licensed adult day care center operators, employees, new employees, subcontracted service providers and their employees, and adult volunteers;
 - (2) Purchase of service contracted and subcontracted service providers and their employees serving clients of the adult and community care services branch;
 - (3) Foster grandparent program, senior companion program, and respite companion program participants; and
 - (4) Contracted and subcontracted service providers and their employees and new employees who provide home and community-based services under Section 1915(c) of the Social Security Act (42 U.S.C. §1396n(c)).
- (c) Individuals identified in subsection (b) shall:
- (1) Meet the standards regarding the reputable and responsible character of service providers;
 - (2) Be subject to criminal history record checks in accordance with section 846-2.7;
 - (3) Shall sign a waiver form stating that the department shall not be liable to the individual; and
 - (4) Provide consent to the department to obtain criminal history record information for verification.

New employees and adult volunteers shall consent to be fingerprinted, shall supply the necessary information to enable the criminal history record check prior to the start of employment or volunteering, and shall sign a waiver form stating that the department shall not be liable to the employee or volunteer.

(d) The department shall obtain criminal history record information through the Hawaii criminal justice data center on individuals identified in subsection (b) for the first two years that an individual identified in subsection (b) is required to have such checks, and shall conduct a criminal history record name inquiry into the state criminal history records annually or biennially thereafter.

(e) The department may take appropriate action if it finds that the criminal history of the individual identified under subsection (a) may pose a risk to the health, welfare, and safety of service recipients. Such action may include:

- (1) Denying a certificate of approval to operate an adult day care center; or
- (2) Refusing to use an individual as a service provider.

(f) Notwithstanding any other law to the contrary, for purposes of this section, the department shall be exempt from section 831-3.1 and need not conduct investigations, notifications, or hearings under this section in accordance with chapter 91.

(g) The costs of processing fingerprints and the state criminal history record checks may be borne by the employer or by the employee or individual who is being screened.

(h) The department, in obtaining and relying upon the results of the state criminal history record checks, is presumed to be acting in good faith and shall be immune from civil liability for taking or recommending action based upon the

criminal history record information. The good faith presumption may be rebutted upon a showing by the person or entity alleging a lack of good faith, and by a preponderance of the evidence, that the department relied upon information or opinion that it knew was false or misleading.

(i) Nothing in this section shall affect the rights, obligations, remedies, liabilities, or standards of proof under chapters 368 and 378.

(j) The criminal history record information obtained under this section shall be used exclusively by the department for the purpose of establishing the reputable and responsible character of the individuals identified in subsection (b) such that the health, welfare, and safety of service recipients will not be at risk.”

SECTION 4. Section 378-2.5, Hawaii Revised Statutes, is amended by amending subsection (d) to read as follows:

“(d) Notwithstanding subsections (b) and (c), the requirement that inquiry into and consideration of a prospective employee’s conviction record may take place only after the individual has received a conditional job offer, and the limitation to the most recent ten-year period, excluding the period of incarceration, shall not apply to employers who are expressly permitted to inquire into an individual’s criminal history for employment purposes pursuant to any federal or state law other than subsection (a), including:

- (1) The State or any of its branches, political subdivisions, or agencies pursuant to section 831-3.1 and section 78-2.7;
- (2) The department of education pursuant to section 302A-601.5;
- (3) The department of health with respect to employees, providers, or subcontractors in positions that place them in direct contact with clients when providing non-witnessed direct mental health services pursuant to section 321-171.5;
- (4) The judiciary pursuant to section 571-34;
- (5) The counties pursuant to section 846-2.7;
- (6) Armed security services pursuant to section 261-17(b);
- (7) Providers of a developmental disabilities domiciliary home pursuant to section 333F-22;
- (8) Private schools pursuant to section 378-3(8) and section 302C-1;
- (9) Financial institutions in which deposits are insured by a federal agency having jurisdiction over the financial institution pursuant to section 378-3(9);
- (10) Detective agencies and security guard agencies pursuant to sections 463-6(b) and 463-8(b);
- (11) Employers in the business of insurance pursuant to section 431:2-201.3;
- (12) Employers of individuals or supervisors of individuals responsible for screening passengers or property under 49 U.S.C. §44901 or individuals with unescorted access to an aircraft of an air carrier or foreign carrier or in a secured area of an airport in the United States pursuant to 49 U.S.C. §44936(a);
- (13) The department of human services pursuant to ~~[section]~~ sections 346- and 352-5.5;
- (14) The public library system pursuant to section 302A-601.5;
- (15) The department of public safety pursuant to section 353C-5;
- (16) The board of directors of a cooperative housing corporation or the manager of a cooperative housing project pursuant to section 421I-12; [and]

- (17) The board of directors of an association of apartment owners, or the manager of a condominium project pursuant to section 514A-82.1[-];
and
 (18) The department of health pursuant to section 321- .”

SECTION 5. Section 846-2.7, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

- “(b) Criminal history record checks may be conducted by:
- (1) The department of health on operators of adult foster homes or developmental disabilities domiciliary homes and their employees, as provided by section 333F-22;
 - (2) The department of health on prospective employees, persons seeking to serve as providers, or subcontractors in positions that place them in direct contact with clients when providing non-witnessed direct mental health services as provided by section 321-171.5;
 - (3) The department of health on all applicants for licensure for, operators for, and prospective employees, and volunteers at one or more of the following: skilled nursing facility, intermediate care facility, adult residential care home, expanded adult residential care homes, assisted living facility, home health agency, hospice, adult day health center, special treatment facility, therapeutic living program, intermediate care facility for the mentally retarded, hospital, rural health center and rehabilitation agency, and, in the case of any of the above-related facilities operating in a private residence, on any adult living in the facility other than the client as provided by section 321- .
 - [~~(3)~~] (4) The department of education on employees, prospective employees, and teacher trainees in any public school in positions that necessitate close proximity to children as provided by section 302A-601.5;
 - [~~(4)~~] (~~5~~) The counties on employees and prospective employees who may be in positions that place them in close proximity to children in recreation or child care programs and services;
 - [~~(5)~~] (~~6~~) The county liquor commissions on applicants for liquor licenses as provided by section 281-53.5;
 - [~~(6)~~] (~~7~~) The department of human services on operators and employees of child caring institutions, child placing organizations, and foster boarding homes as provided by section 346-17;
 - [~~(7)~~] (~~8~~) The department of human services on prospective adoptive parents as established under section 346-19.7;
 - [~~(8)~~] (~~9~~) The department of human services on applicants to operate child care facilities, prospective employees of the applicant, and new employees of the provider after registration or licensure as provided by section 346-154;
 - [~~(9)~~] (~~10~~) The department of human services on persons exempt pursuant to section 346-152 to be eligible to provide child care and receive child care subsidies as provided by section 346-152.5;
 - [~~(10)~~] (~~11~~) The department of human services on operators and employees of home and community-based case management agencies and operators and other adults, except for adults in care, residing in foster family homes as provided by section 346-335;
 - [~~(11)~~] (~~12~~) The department of human services on staff members of the Hawaii youth correctional facility as provided by section 352-5.5;
 - [~~(12)~~] (~~13~~) The judiciary on employees and applicants at detention and shelter facilities as provided by section 571-34;

- ~~[(13)]~~ (14) The department of public safety on employees and prospective employees who are directly involved with the treatment and care of persons committed to a correctional facility or who possess police powers including the power of arrest as provided by section 353C-5;
- ~~[(14)]~~ (15) The department of commerce and consumer affairs on applicants for private detective or private guard licensure as provided by section 463-9;
- ~~[(15)]~~ (16) Private schools and designated organizations on employees and prospective employees who may be in positions that necessitate close proximity to children; provided that private schools and designated organizations receive only indications of the states from which the national criminal history record information was provided as provided by section 302C-1;
- ~~[(16)]~~ (17) The public library system on employees and prospective employees whose positions place them in close proximity to children as provided by section 302A-601.5;
- ~~[(17)]~~ (18) The State or any of its branches, political subdivisions, or agencies on applicants and employees holding a position that has the same type of contact with children, dependent adults, or persons committed to a correctional facility as other public employees who hold positions that are authorized by law to require criminal history record checks as a condition of employment as provided by section 78-2.7; [and]
- (19) The department of human services on licensed adult day care center operators, employees, new employees, subcontracted service providers and their employees, and adult volunteers as provided by section 346- ;
- (20) The department of human services on purchase of service contracted and subcontracted service providers and their employees serving clients of the adult and community care services branch, as provided by section 346- ;
- (21) The department of human services on foster grandparent program, senior companion program, and respite companion program participants as provided by section 346- ;
- (22) The department of human services on contracted and subcontracted service providers and their current and prospective employees that provide home and community-based services under Section 1915(c) of the Social Security Act (42 U.S.C. §1396n(c)), as provided by Section 346- ; and
- ~~[(18)]~~ (23) Any other organization, entity, or the State, its branches, political subdivisions, or agencies as may be authorized by state law.”

SECTION 6. There shall be established a working committee of five members with representatives from the department of health, department of human services, provider organizations and community, as appointed by the directors of the department of health and department of human services to meet minimally on a quarterly basis to review and evaluate the process undertaken by the departments in effecting criminal history record checks and provide recommendations to the directors of the departments as relevant. Members shall serve a term of two years which may be extended at the discretion of the directors of the departments and will report to departmental administrators as designated by the directors.

SECTION 7. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 8. This Act shall take effect upon its approval.

(Approved June 21, 2006.)

Note

1. Edited pursuant to HRS §23G-16.5.