

CRIMINAL HISTORY RECORD CHECKS IN HAWAII: ISSUES AND OPTIONS

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FOREWORD

This study was prepared in response to Senate Concurrent Resolution No. 122, Senate Draft 1 (2000). That Concurrent Resolution directed the Legislative Reference Bureau to conduct a study concerning criminal history record checks to include a summary of applicable federal and state law, the feasibility of making Hawaii an open records state, a review of the manner in which employers may conduct criminal history record checks, and a framework for determining who or what positions should be subject to criminal history record checks. This report contains the results of that study.

The Bureau extends its appreciation to all of those who assisted in this study. Particular thanks are extended to Liane M. Moriyama, Administrator; Hannah N. Kawakami, Assistant Administrator; and Norma Ueno, Criminal History Record Checks Unit Supervisor, Hawaii Criminal Justice Data Center, for their assistance and cooperation.

Wendell K. Kimura
Acting Director

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Fact Sheet

CRIMINAL HISTORY RECORD CHECKS IN HAWAII: ISSUES AND OPTIONS

I. Highlights

Hawaii's laws relating to criminal history record checks are entangled in a significant state of confusion, not quickly or easily clarified. The various laws that govern access and use of criminal history records and laws that authorize criminal history record checks, when considered together, are often redundant, unnecessary, duplicative, or inconsistent, overlapping in some areas and conflicting in others.

There is little common understanding of what is meant by the term "criminal history record check", what criminal history records are available to employers or the general public, and how those records can be used in employment and licensing decisions. Criminal history record checks cannot be examined in isolation, related laws governing access and use must also be considered. All stakeholders must be involved and informed.

Existing law already allows an employer to investigate the job applicant or employee's Hawaii conviction data. Hawaii conviction data is public record and freely available to the public. Employers may ask about and consider criminal convictions that are less than ten years old and rationally related to the job. For most positions, this is sufficient to determine employment suitability.

Hawaii should:

- Revise existing laws, including laws governing access and use of criminal history record information and those authorizing criminal history record checks to use uniform terminology, and either clarify or repeal redundant, unnecessary, duplicative, inconsistent, or overlapping laws. New laws should not be adopted in isolation.
- Consider adopting as administrative rules or departmental practices *Guidelines for Screening Persons Working With Children, the Elderly, and Persons in Need of Support* issued in 1998 by the United States Attorney General.
- Create a criminal history record check working group of all stakeholders to resolve policy issues raised by the study relating to the access and use of criminal history record information for the noncriminal justice purposes of employment and licensing determinations and submit recommendations to the legislature.
- Develop a public service program to educate the public on criminal history record check issues.

- Consider the creation of abuse and neglect registries for children, the elderly, and the disabled where they do not exist.
- Consider designation of 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 in the absence of an authorizing statute.
- Not expand public access to include unrestricted to nonconviction data. Existing law makes Hawaii an "open records" state for purposes of unrestricted public access to Hawaii criminal conviction data.

II. Frequently Asked Questions

1. What are criminal history records and where are they?

Answer: Criminal history records trace an individual's involvement through the criminal justice system. An individual's "criminal history record information" includes both conviction data and nonconviction data (arrests that did not result in a valid conviction).

The Hawaii Criminal Justice Data Center (Data Center) is the state repository for criminal history record information for state law offenders who were arrested in Hawaii. The Data Center does not maintain records for federal offenders or individuals arrested and convicted in other states.

2. Is Hawaii criminal history record information public record?

Answer: Hawaii conviction data is freely accessible by the general public.

Nonconviction data, or arrest records more than twelve months old where the individual was not subsequently convicted, is not public record and dissemination is limited by law to authorized agencies and individuals. Nonconviction data includes acquittals and dismissals.

3. How are Hawaii conviction records accessed by the public?

Answer: Conviction data may be accessed on Public Access computers at the Data Center, the main county police departments, and the Kona police department on Monday through Friday from 8:00 a.m. to 4:30 p.m.

To search the conviction database, the subject's name, social security number, sex, and birth date is needed. A printed copy of a Public Access search costs \$10.00.

If some of the personal identification information for the subject to be checked is unknown, the Data Center will conduct a name based check for \$15.00. The Data Center will conduct a fingerprint based check of conviction data for \$25.00. A fingerprint based check provides the most accurate results.

Because Hawaii conviction data is public record, no law is needed for an employer to conduct a criminal history record check to see whether a job applicant or employee has a criminal conviction record.

4. Who may access nonconviction data?

Answer: Dissemination of nonconviction data is limited by law to criminal justice agencies, state and county government agencies authorized to conduct criminal history record checks to determine employment and licensing suitability, and other authorized agencies and individuals.

Any record subject may review his or her own criminal history record information, including nonconviction data, to challenge the accuracy and completeness of the information. Any application by a record subject to access and review the subject's own criminal history record information must include the applicant's fingerprints.

5. When can an employer ask about or consider conviction records in employment decisions?

Answer: Employers may ask about and consider criminal convictions less than ten years old that are rationally related to the duties and responsibilities of the job.

For job applicants, an employer must first make a conditional offer of employment before inquiry and consideration is permitted. The conditional job offer may be withdrawn if the applicant has a conviction record rationally related to the job.

6. Can arrest records not followed by a valid conviction be considered in employment decisions?

Answer: Generally, an employer may neither ask about nor consider arrest records where the individual was not subsequently convicted.

A limited exception allows employers to consider an individual's "arrest and court record" as a bona fide occupational qualification (BFOQ), subject to certain conditions. A BFOQ must be reasonably necessary to the normal operation of the business and substantially related to the functions and responsibilities of the job.

7. What is the Hawaii Sex Offender Registry?

Answer: The Sex Offender Registry (Registry) contains information on convicted sex offenders registered and living in Hawaii. It is freely available to the general public at the same locations as Hawaii conviction data. The Registry is also available online at www.hawaiigov.org.

The Registry may be searched by offender's name or zip code. The information shown for positive hits include the offender's name, street name (but not address) of the residence and place of employment, vehicle(s) driven, photograph, and crime for which the offender was convicted.

If the offender was not arrested in Hawaii, a search of the Hawaii conviction database would not turn up information on the convicted offender since the conviction database is based on Hawaii arrests.

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Chapter 1

INTRODUCTION

Nature of the Study

During the Regular Session of 2000, the Legislature adopted Senate Concurrent Resolution No. 122, S.D. 1 (S.C.R. No. 122, S.D. 1), entitled "Requesting the Legislative Reference Bureau to Conduct A Study Concerning Criminal History Record Checks." A copy of the Concurrent Resolution is included as Appendix A.

Objective of the Study

S.C.R. No. 122, S.D. 1, recognized that Hawaii state laws relating to criminal history record checks have been enacted "piecemeal" and lack consistency. Although Hawaii employment practices law establishes that a hiring and firing decision made because of an individual's arrest and court record is unlawful employment discrimination, it permits employers to consider conviction data if certain conditions are met. A number of statutorily authorized criminal history record checks have been enacted over the years, while each legislative session sees new requests to "carve out additional exceptions" for criminal history record checks.

Rather than continuing the piecemeal authorization of criminal history record checks, S.C.R. No. 122, S.D. 1, requests the Bureau to "conduct a study concerning criminal history record checks," to include:

- (1) A review of the legal ramifications of requiring criminal history record checks;
- (2) A summary of applicable federal and state law;
- (3) A review of how criminal record checks may be conducted;
- (4) A framework for determining who or what positions should be subject to criminal history record checks;
- (5) Recommendations for dealing with the issue of criminal history record checks, and legislation, if applicable; and
- (6) The feasibility of making Hawaii an open records state.

Organization of the Study

This study is organized into ten chapters. Chapter 2 provides an overview of what criminal history records are, where they are located, and the what the term "criminal history

record check" generally means. Chapter 3 discusses federal and state law, including Hawaii, that governs the dissemination or access and availability of criminal history records. Chapter 4 describes how Hawaii employment practices law relates to criminal history record checks by restricting an employer's use or consideration of an individual's "arrest and court record" in hiring and firing decisions. Chapter 5 looks at restrictions that apply only to the State's use and dissemination of certain criminal records in state employment and licensing matters. Chapter 6 highlights the findings and recommendations of the National Task Force on Privacy, Technology and Criminal Justice Information lengthy and detailed study of issues relating to access and use of criminal history record information. Chapter 7 discusses issues relating to Hawaii's becoming an open records state where all criminal history record information is available for public inspection. Chapter 8 presents the United States Attorney General's guidelines for employment and licensing screening people who work with the vulnerable populations of children, the elderly, and the disabled. Chapter 9 presents a summary of applicable law and other issues. Chapter 10 contains the Bureau's recommendations.

Chapter 2

CRIMINAL HISTORY RECORDS AND CRIMINAL HISTORY RECORD CHECKS: AN OVERVIEW

Introduction

This study focuses on issues concerning criminal history record checks for the noncriminal justice purposes of employment and licensing. Essential to a review of the "issue of criminal history record checks" is an understanding of just what is a "criminal history record" and "criminal history record check". This chapter provides an overview of those terms.

It is important to note from the start that criminal history record checks must be conducted within the constraints of federal and state laws that govern not only the availability or dissemination of criminal history record information, but also applicable laws that dictate any limitation on the inquiry, consideration, or use of those records. The term "*criminal history record information*", as used throughout this study, specifically refers to both conviction data and arrest, or nonconviction, data as defined in federal and Hawaii law.¹ Laws governing dissemination and use of conviction data often differ significantly from those relating to "criminal history record information" that includes nonconviction data.²

Recently, criminal history record checks have been labeled "politically popular".³ They are undeniably playing an increasingly vital role for noncriminal justice agencies in determining suitability for employment, and especially for license applications and jobs involving the safety and well-being of children, the elderly, and the disabled. Recent years have seen a marked increase in the demand by these agencies for criminal history record checks for jobs or licenses involving a responsibility for these vulnerable populations.

The steady increase in demand is presumably tied, at least in part, to changes in technology and the increased availability of information. The societal changes that have caused the increased demand for criminal history record checks are creating a pattern of essentially ad hoc policy making at the local, state, and national level. The result is a patchwork of state and federal laws that authorize the dissemination and use of criminal history record information in

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1. 28 C.F.R. section 20.3, Hawaii Rev. Stat., section 846-1.
 2. See, e.g., Hawaii Rev. Stat., section 846-9 (dissemination limitations do not apply to conviction data).
 3. Naftzger, *The Questions about Criminal Background Checks*, State Legislatures, May 1999, at 11.

such a variety of ways that they defy description. It is literally true that no two state statutes on noncriminal justice access are identical.⁴

Traditionally, criminal history records were available only to criminal justice agencies to use for criminal justice purposes.⁵ Criminal justice agencies' use of criminal history record information in employment decisions has long been allowed. Following this principle, Hawaii has routinely permitted dissemination of state criminal history record information to its criminal justice agencies⁶ for purposes that include criminal justice agency employment screening.⁷ On the other hand, dissemination and use of criminal history record information for noncriminal justice purposes, including employment and licensing determinations, is subject to numerous constraints of federal and state law.

In the last twenty years, exceptions have been carved out of federal law to allow limited use of criminal history record information to conduct criminal record checks for noncriminal justice purposes. Federal criminal history record information may be disseminated to officials of federally chartered or insured banks, certain segments of the securities industries, registered futures associations and nuclear power plants, and officials of state and local government for the noncriminal justice purposes of licensing or employment, if authorized by statute.⁸

Similarly, Hawaii law authorizes several state agencies to receive state and national criminal history record information for noncriminal justice licensing purposes to check the suitability of operators and employees of adult foster homes, child caring institutions, group child care home, liquor license applicants, and private detective and security guards. Legislation passed by the Hawaii State Legislature during the 2000 Regular Session requires, beginning July 1, 2000, criminal history record checks for employees of private schools and prospective adoptive parents.⁹ Statutorily authorized criminal history record checks for employment suitability screening includes employees of public schools, staff of Hawaii Youth Correctional Facilities, juvenile detention facilities, and Public Safety Department correctional facilities.

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4. Bureau of Justice Statistics, U.S. Department of Justice, Compendium of State Privacy and Security Legislation: 1999 Overview (July 2000) at 9.
 5. In addition to criminal justice employment matters, other criminal justice uses of criminal history record information include: bail and other pretrial determinations; prosecution, including decisions about upgrading charges; enhancement of sentences, particularly relating to chronic offenders; preparation of presentence reports and probation eligibility decisions; correctional classification purposes; and determination of parole eligibility. Bureau of Justice Statistics, U.S. Department of Justice, Use and Management of Criminal History Record Information: A Comprehensive Report (1993) at 39.
 6. Hawaii Rev. Stat., section 846-1, defines criminal justice agency to mean courts or a government agency (or subunit thereof) that performs the administration of criminal justice pursuant to statute or executive order, and allocates a substantial part of its annual budget to criminal justice administration.
 7. Hawaii Rev. Stat., section 846-10.
 8. 28 C.F.R. section 50.12.
 9. Hawaii Rev. Stat., sections 346-19.6 and 846-44.

Criminal History Records –What Are They and Where They Are

To discuss the issues relating to criminal history record checks, it is necessary to understand what criminal history records themselves are. Generally, criminal history records trace an individual's involvement through the criminal justice system.¹⁰ Criminal record systems are based on either fingerprints or names. Federal criminal history record information and most states', including Hawaii's, criminal history record information is indexed by both: by subject name and by fingerprints.

In fingerprint based systems, an individual's fingerprints are inked and rolled on a fingerprint roll card. The rolled fingerprint must be scanned into a computer, digitally converted, and stored in a federal or state automated fingerprint information system before it is useful as a searchable database for criminal history record checks. Today, many jurisdictions take fingerprints by using an automated, direct read technology, Livescan. Livescan takes an inkless picture of a subject's finger, converting the picture into a digital record. An improvement over traditional rolled prints, Livescan produces a clearer fingerprint record in seconds. Name based systems use a person's date of birth, social security number, or other means of personal identification to index criminal history.

Federal Criminal History Records

At the federal level, the Federal Bureau of Investigation (FBI) serves as the central repository of criminal history record information for federal offenders. United States Department of Justice regulations define "criminal history record information" to mean information collected by criminal justice agencies on individuals including identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, sentencing, correctional supervision, and release.¹¹ Identification information that does not indicate involvement of the individual in the criminal justice system is not considered to be criminal history record information.¹² In simpler language, federal law establishes that, for purposes of a national criminal history record check, a subject's criminal history record includes conviction information, and information on arrests that did not result in a valid conviction.

10. The criminal history record contains information concerning criminal justice cycles. A cycle begins with arrest, indictment, citation or similar event, and contains information concerning the initiating event, charges, dispositions of those charges, and corrections actions taken in response to those dispositions. Events within a cycle are linked by a unique tracking number and linked to other cycles for that individual by fingerprint based identification. Bureau of Justice Statistics, U.S. Department of Justice, Increasing the Utility of the Criminal History Record: Report of the National Task Force (Dec. 1995) at 14 n.38.

11. 28 C.F.R. section 20.3.

12. *Id.*

Criminal history record information in the federal system includes information only for "serious and/or significant adult and juvenile offenses".¹³ Criminal history information not maintained in the system includes arrests and court actions relating "only to nonserious charges, e.g., drunkenness, vagrancy, disturbing the peace, curfew violation, loitering, false fire alarm, nonspecific charges of suspicion or investigation, traffic violations".¹⁴ Exceptions to the traffic violation exclusion that are included in an individual's criminal history record are arrests for manslaughter, driving under the influence of drugs or liquor, and hit and run.¹⁵

The FBI also holds information on arrest records and dispositions for state law offenders. State reported information is voluntarily submitted to the FBI and is fingerprint supported. States follow the federal regulations and submit criminal history record information only for felonies and serious or significant misdemeanor arrests and dispositions. Federal law and regulations govern dissemination of both federal and state criminal history records held by the FBI. Federal law also governs use of federally held information to the extent that federal law authorizes dissemination only for certain noncriminal justice purposes.

Hawaii Criminal History Records

The Hawaii Criminal Justice Data Center (Data Center) is responsible for criminal justice data in Hawaii. Part of that responsibility includes serving as the state repository for criminal history records for state law offenders.¹⁶

The State definition of "criminal history record information" parallels the federal definition. Like the federal system, a subject's "criminal history record information" includes both conviction data and nonconviction data (information on arrests that did not result in a valid conviction). Also similar to the federal definition, Hawaii criminal history record information does not include intelligence or investigative information, identification information to the extent that such information does not indicate involvement of the individual in the criminal justice system, and information derived from offender-based transaction statistics systems which do not reveal the identity of an individual.¹⁷

13. 28 C.F.R. section 20.32(a).

14. 28 C.F.R. section 20.32(b).

15. *Id.*

16. Hawaii Rev. Stat., section 846-1.

17. *Id.*

The Data Center holds criminal history record information based on Hawaii arrests only, from felony arrests to petty misdemeanors and violations.¹⁸ The Data Center may contain arrest information on federal offenses or military charges if the arrest was made in Hawaii, but these records would not indicate the arrest charge and would show only that the individual was turned over to a federal or military agency. The Data Center does not maintain conviction information for federal or military offenses.¹⁹ The Data Center's criminal history records are indexed by both the name and fingerprints of the record subject. The criminal history record information also contains other identifiable information such as social security number, sex, and date of birth for each record subject.

Other information that may reflect an individual's involvement in the criminal justice system but that is not within the statutory definition of "criminal history record information" held by the Data Center includes:

- (1) Wanted posters;
- (2) Original records of entry, such as police blotters, maintained by criminal justice agencies and compiled chronologically;
- (3) Court records of public and judicial proceedings;
- (4) Published court or administrative opinions and proceedings;
- (5) Traffic offense records kept to regulate operator licenses; and
- (6) Announcements of executive clemency or pardon by the paroling authority or governor.²⁰

Arrest records found in police blotters are specifically excluded as "criminal history record information" and are considered public information. However, to obtain arrest information from a police blotter, a requestor must know the date and location of the arrest. This requirement maintains the public's right to know, while preventing "fishing expeditions" through police records.

Additionally, although Data Center's Sex Offender Registry (Registry) is readily accessible to the public and now available online at the Data Center's website, conviction data for

18. The Data Center also maintains publicly accessible Hawaii's Sex Offender Registry which may contain conviction information for registered sex offenders who live in Hawaii, but who were not arrested in Hawaii.

19. Email from Hannah Kawakami, Assistant Administrator, Hawaii Criminal Justice Data Center, to writer (September 27, 2000).

20. Hawaii Rev. Stat., section 846-8.

sex offenders who were not arrested in Hawaii is not within the statutory definition of criminal history record information.

Criminal History Record Checks

The area of "criminal history record checks" often leads to confusion because of a lack of consistency in terms that refer to checking an individual's criminal history. The terms "criminal background check", "criminal history check", "criminal record check", "criminal history record check", and "background check" are all used at various times in conversation or statutory language. Whichever term used is usually intended to refer to examination of some particular government records at a state or national level, or both, to determine if an individual has ever been arrested or convicted of a felony or misdemeanor.

Use of the term "background check" when referring to a check only of an individual's criminal history is not appropriate. A criminal history record check is not the same as a "background check". A criminal history record check reflects an individual's involvement (or lack thereof) in the criminal justice system. In contrast, background checks may include a criminal history record check of various sources that may indicate an individual's criminal history or involvement in the criminal justice system, but background checks may also include employment reference checks, confirmation of education, review of credit reports and driving records, and other screening mechanisms.²¹

Some people consider a criminal history record check to be a review of the Data Center's publicly accessible database of Hawaii conviction information. Others use the term more broadly to mean a state and nationwide fingerprint analysis and name search of criminal history records held in central or state repositories. In this study, the term "criminal history record check" generally refers to a screening tool that examines an individual's "criminal history record information" (both conviction data and nonconviction data) held by a state or federal repository to determine suitability for employment, in both the public and private sector, and for licensing purposes.

Because criminal history record information is indexed by name and by fingerprints in federal and state repositories, criminal history record checks are logically conducted through either name based or fingerprint based searches, or both. Fingerprint searches are viewed as more accurate than name checks because of the uniqueness of an individual's fingerprint patterns. Identification errors in fingerprint searches are extremely low. Direct read fingerprint

21. Consumer information on employees and applicants disclosed in background checks, including those background checks that disclose criminal history record information, are required to follow procedures mandated by the Fair Credit Reporting Act (FCRA), 15 U.S.C. section 1681 et seq. The FCRA restriction applies only to consumer information (including criminal history record information) reported by commercial sources. State or federal criminal record repositories are not considered commercial sources.

technology now provides very accurate fingerprints, allowing quick responses with a very low incidence of error.

Name checks can much more easily result in false positive or false negative results. A name check may find no criminal history because the subject was arrested or convicted using an alias, or is now using an alias because of prior involvement in the criminal justice system. Conversely, a name check may indicate a criminal record when an innocent person has the same name as an individual with a criminal history. Name and fingerprint checks can be conducted at the state level, national level, or both, depending on the requestor and the purpose of the check.

National Criminal History Record Checks

Generally, a national criminal history record check for a noncriminal justice purpose requires state statutory authorization.²² Federal records are available as matter of course for criminal justice use, while noncriminal justice availability is limited. The FBI is authorized to disseminate criminal history records to:

- (1) Federal and state criminal justice agencies for criminal justice purposes, including criminal justice employment screening;
- (2) Federal noncriminal justice agencies for authorized purposes including national security and federal employee background screening;
- (3) Federally chartered or insured banks, authorized securities and commodities industry segments, and nuclear power plants; and
- (4) State and local governments for the noncriminal justice purposes of criminal history record checks for employment and licensing purposes when authorized by a state statute approved by the U.S. Attorney General.²³

22. The standards used by the FBI to approve state statutes authorizing national criminal history record checks for noncriminal justice purposes have been established by a series of memoranda issued by the Office of Legal Counsel, U.S. Department of Justice and require:

- (1) Authorization by legislative enactment;
- (2) Authorization must require fingerprinting of applicant;
- (3) Statute must, expressly or by implication, authorize use of FBI records to screen applicant;
- (4) Statute must not be overly broad in its scope and must identify the specific category of applicants/licenses; and
- (5) Must not be against public policy.

23. Bureau of Justice Statistics, U.S. Department of Justice, Use and Management of Criminal History Record Information: A Comprehensive Report (1993) at 51.

Congress has acknowledged the usefulness of criminal history record checks by, *inter alia*, mandating checks for security clearances and federal jobs involving national security duties,²⁴ for firearms purchases,²⁵ and requiring states to establish sex offender registries²⁶ mandatory community notification²⁷ and a national database to track sex offenders, requiring lifetime registration for offenders.²⁸

Additionally, to encourage states to conduct national criminal history record checks for the protection of children, the elderly, and individuals with disabilities, Congress enacted the National Child Protection Act (NCPA) of 1993.²⁹

Because many states did not enact implementing state legislation as suggested in the NCPA, Congress subsequently enacted the Volunteers for Children Act (VCA) of 1998.³⁰ The VCA amended the National Child Protection Act to authorize any qualified entity to request fingerprint based national criminal history record checks to be conducted by the FBI of their volunteers and employees, even if there is no authorizing state statute.

National Criminal History Record Check Requirements and Results

For the noncriminal justice purposes of licensing and employment screening, the FBI is the primary source for criminal history record information for federal and other state offenders. In general, FBI information is not available to the public, although applications from federal banks, securities and commodities firms are sent directly to the FBI.³¹

To request a national fingerprint based criminal history record check for the noncriminal justice purposes of employment and licensing, the requestor must be either:

- (1) Authorized by a state statute that measures up to the FBI standards; or

24. 5 U.S.C. section 9101.

25. Pub L. No. 103-159, 107 Stat. 1536.

26. 42 U.S.C. section 14071.

27. Pub L. No. 104-145, 100 Stat. 1345.

28. 42 U.S.C. sections 14071, 14072.

29. Pub. L. 103-209. The NCPA urged states to require national checks to determine whether an individual has been convicted of a crime that bears upon the individual's fitness to care for the safety and well being of this vulnerable population.

30. Pub. L. 105-251, title II, section 212, Oct. 9, 1998, 112 Stat. 1874.

31. Bureau of Justice Statistics, U.S. Department of Justice, Use and Management of Criminal History Record Information: A Comprehensive Report (1993) at 52.

- (2) A "qualified entity" under the NCPA seeking to determine a care provider's fitness to have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities.³²

A name based check alone is never available to noncriminal justice agencies, organizations, or individuals, even if the request is submitted to an authorized state agency or is authorized by statute.

To request a national criminal history record check when there is no authorizing statute, a "qualified entity" may request a national criminal history check but must submit the request through an "authorized agency" designated by the state to receive federal criminal history record information.³³ In making the request, the qualified entity must first provide a set of fingerprints for the subject to be checked and a disclosure statement signed by the subject. In Hawaii, the Data Center is the only currently State designated "authorized authority".

Because a qualified entity may not receive information directly from the FBI, the authorized agency receives the FBI information on behalf of the requestor. Upon receipt of the FBI records, the National Child Protection Act states that the "authorized agency shall make a determination whether the provider [record check subject] has been convicted of, or is under pending indictment for, a crime that bears upon the provider's fitness to have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities and shall convey that determination to the qualified entity."³⁴ In practice, however, the Data Center does not actually make the suitability determination. Instead, the Data Center reviews the federal criminal history record information, and informs the qualified entity either that the applicant has no record, or if a FBI record for the applicant is returned, the Data Center notifies the requestor that the applicant may have a record and advises the requestor to check further with a particular state.

In contrast, if a state statute authorizes a state agency to conduct a national fingerprint based criminal history check for employment or licensing purposes, the requesting agency will receive information on federal arrests and convictions, if any, and information on any state arrest records and dispositions held by the FBI. An authorized national fingerprint criminal record check includes arrest information for federal offenders and other state offenders even where the

32. 42 U.S.C. section 5119(c). A "qualified entity" is a business or organization, whether public, private, for-profit, not for profit, or voluntary, that provides for care, treatment, education, training, instruction, supervision, or recreation to children, the elderly or the disabled. A "provider" means a person who is employed by or volunteers with a qualified entity, owns or operates a qualified entity or has or may have unsupervised access to children, elders, and the disability for whom the qualified entity provides care. A provider also includes prospective employees and volunteers.

33. 42 U.S.C. section 5119a(a)(3).

34. 42 U.S.C. section 5119a(b)(4).

subject was not convicted. Because the check is fingerprint based, it may also include arrest or conviction information when the subject was using an alias, including the name used.

Hawaii Criminal History Record Checks

A "criminal history record check" is defined by the Hawaii Criminal Justice Data Center's web site as "a search of a person's criminal history by name or fingerprints" and states that it is also known as a "police abstract" or "rap sheet". Unfortunately, Hawaii law provides no consistent definition of "criminal history record check". A few statutes even authorize or require a criminal history record check, but provide either no definition or a vague definition.³⁵

Most commonly, however, Hawaii statutes authorizing or requiring criminal history record checks mean:

- (1) An examination of an individual's criminal history record by initial fingerprint analysis and name inquiry into state and national criminal history record files, a subsequent fingerprint analysis for new hires and rehires, and a name inquiry into the state criminal history record files;³⁶ or
- (2) A search for the individual's fingerprints in the FBI criminal history record files, and if found, an analysis and any other information pertaining thereto, and a criminal history record check conducted by the Hawaii Criminal Justice Data Center.³⁷

The Legislature should note that in requiring or authorizing state or federal criminal history checks, the criminal history record check requirements must be considered together with

35. See, e.g., Hawaii Rev. Stat., section 463-9, which states that the board of private detectives and guards "shall request criminal history records" as part of its background investigation of license applicants and directs the Data Center to "provide such information." Although the records to be provided are not defined, Liane Moriyama, Administrator, Hawaii Criminal Justice Data Center, reports that such a request has never been made. Telephone interview with Liane Moriyama, Administrator, Hawaii Criminal Justice Data Center, December 20, 2000. Licensing qualifications require that detective and guard agency employees shall "not have been convicted" of a crime that reflects unfavorably on the employees fitness to engage in the profession. Presumably, the statute authorizes an employer to conduct a name check through the Data Center of convictions only. Any employer has this right under existing Hawaii law, and statutory authorization is unnecessary and confusing.

36. Hawaii Rev. Stat., sections 346-16, 346-151, 352-1, and 571-2. Although statutory language seems to dictate both a name based and a fingerprint based examination, it is the general practice of the Data Center, however, to conduct only a name check of Hawaii nonconviction data and conviction data unless a state agency specifically requests a fingerprint check. The Data Center then sends the record subject's fingerprints to the FBI for the statutorily authorized national check. Telephone interview with Liane Moriyama, Administrator, Hawaii Criminal Justice Data Center, December 20, 2000.

37. Hawaii Rev. Stat., sections 846-42, 846-43, 846-44, and section 1, Act 146, Session Laws of Hawaii 2000.

Hawaii laws on employment, public service, the uniform status of convicted persons, and the dissemination of Hawaii criminal records. These laws and other issues relating to criminal history record checks are discussed in subsequent chapters.

Hawaii – Criminal History Record Check Requirements and Results

Ordinarily, Hawaii's criminal history record information is available only for criminal justice purposes. As discussed earlier, Hawaii "criminal history record information" includes conviction data and information on arrests not followed by a valid conviction, or "nonconviction data". To conduct a Hawaii criminal history record check that includes nonconviction data, a noncriminal justice agency or individual requestor must have statutory authorization.

It is important to remember, however, that even without an authorizing statute, existing Hawaii law permits any public or private employer and any member of the general public to conduct a check of Hawaii criminal conviction information by a name or fingerprint check. Hawaii conviction records are considered public records and are available without restriction to the general public at Public Access Terminals at the Data Center and the main police department in each county, and in the Kona police office. Although access to arrest records where the individual was not subsequently convicted is prohibited unless authorized by statute,³⁸ arrest records that resulted in a conviction are included in the publicly accessible conviction data.

Despite the unrestricted access or availability of Hawaii conviction data, employment law limits an employer's use or consideration of conviction data in decisions concerning hiring or termination.³⁹ An employer, public or private, may consider a criminal conviction less than ten years old in making a hiring or firing decision if the conviction bears a "rational relationship" to the duties and responsibilities of the job.⁴⁰ For a prospective employee, the employer must make a conditional offer of employment before the employer may inquire and consider the criminal conviction. The "rational relationship" requirement applies to both employees and prospective employees.⁴¹ An employer who conducts a check of conviction data on an employee or job applicant through the Data Center may discover convictions more than ten years old that the employer is forbidden to use or consider by Hawaii employment law.

Any member of the general public may search the Data Center's Hawaii conviction database if they have the subject's name, social security number, sex and date of birth. A printed copy of a Public Access search costs \$10.00. If the requestor lacks some personal identification information for the subject to be checked, the requestor can ask the staff of the Data Center to do

38. Hawaii Rev. Stat., section 846-9.

39. Hawaii Employment Practices Act is discussed in further detail in Chapter 4.

40. Hawaii Rev. Stat., section 378-2.5.

41. *Id.*

a name based check for \$15.00. If the requestor has fingerprints of the subject to be checked, the Data Center will conduct a fingerprint check of conviction data for \$25.00. As discussed earlier, fingerprint checks provide the most accurate results.

The general public, including public and private employers, also has unrestricted access to conviction information in Hawaii's Sex Offender Registry (Registry). The Registry contains information on convicted sex offenders registered in Hawaii and is available in the same locations as Hawaii conviction data. The Registry now has the added convenience of being available online at: www.hawaii.gov.org or www.state.hi.us.

The Registry may be searched by offender's name or by zip code. If a Registry entry is found, the offender's name, street name (but not address) of residence and place of employment, vehicle(s) driven, photograph, and the crime for which the offender was convicted are given. If a sex offender moves to Hawaii after conviction, he or she is required to register with the Sex Offender Registry. If the sexual offender's arrest was not in Hawaii, and he or she has not been arrested since moving to Hawaii, a name or fingerprint search of the Data Center's criminal history record information (where authorized by statute) or publicly available conviction database would not turn up information on the convicted sex offender. Although freely available, an employer's use and consideration of sex offender conviction is subject to employment law restrictions.

Information in police blotters, court records, and certain other public information, including sex offender convictions not based on Hawaii arrests, would not be reported in a criminal history record check mandated by statute because that information, even though the information may establish an individual's involvement in the criminal justice system, is not within the statutory definition of "criminal history record information." Information in these excluded records may be examined if certain limitations are met (and if the requestor knows where to look). For example, an employer (or any other member of the public) would need to know which court holds public proceeding records of an incident involving a particular individual. To get arrest information from a police blotter information, a requestor must know the date of arrest. "Fishing expeditions" are not allowed. Hawaii employment law would prohibit consideration of any arrest information discovered and would allow consideration of conviction information, subject to certain limitations.

Criminal history record checks mandated or authorized by state statute direct the Data Center to provide criminal history record information (including nonconviction data) based on name checks or fingerprints, or both. Criminal history record checks conducted through the Data Center are not subject to the notice and other requirements of the Fair Credit Reporting Act because criminal history information is considered government records when provided by the Data Center, not consumer information.

Limitations on inquiries, consideration, or use of criminal history record information for employment and licensing purposes, however, are not the province of the Data Center. In connection with criminal history record checks for noncriminal justice employment and licensing purposes, the Data Center's primary function is the dissemination of criminal history records as allowed by law.

Chapter 3

DISSEMINATION OF CRIMINAL HISTORY RECORD INFORMATION: ACCESS AND AVAILABILITY

Introduction

An individual's involvement in the criminal justice system is reflected in his or her criminal history records in federal and state criminal record repositories, as well as in other "noncriminal history record information" documents that may evidence criminal arrests or convictions. The effectiveness of a criminal history record check, whether at the federal or state level, or both, is determined in part by what criminal history records are available and accessible for review.

Federal and state laws, as well as federal regulations and state administrative rules, establish availability of criminal history record information. Dissemination is primarily based on the type of information to be distributed (conviction or nonconviction information); the identity of the requestor and intended use of the information is also considered. Federal law and regulations determine what criminal history record information on federal and state offenders held by the Federal Bureau of Investigation (FBI) may be distributed and who may receive it. States make their own decisions on disseminating their state's criminal history record information.

As discussed in Chapter 2, criminal history record information has long been available to federal and state criminal justice agencies for law enforcement use and the administration of criminal justice. Access to complete and accurate information aids criminal justice agencies in making informed decisions. This chapter focuses on the dissemination of federal and state criminal history record information for use by noncriminal justice agencies or individuals for noncriminal justice purposes of employment and licensing screening.

In Hawaii, the laws establishing the Hawaii Criminal Justice Data Center (Data Center) control dissemination of Hawaii criminal history record information. In matters of state employment and licensing, the State and its political subdivisions or agencies are subject to additional restrictions on the dissemination of certain criminal records.¹ Other Hawaii laws discussed in later chapters limit the permissible inquiry, use, and consideration of criminal history record information for public and private employment and licensing purposes.

1. See discussion in Chapter 5 on restrictions on the State's use, distribution, and consideration of certain criminal records in government employment and licensing matters.

Dissemination of Federal Criminal History Record Information

As the federal central repository, the FBI performs federal criminal history record information functions for federal and state criminal justice agencies and for noncriminal justice agencies and other entities where authorized by law. Criminal history record information on federal offenders and state offenders in any United States Department of Justice criminal history record information system is available to criminal justice agencies for criminal justice purpose without limitations.² Any federal agency authorized by federal statute or executive order also may receive federal criminal history record information.³

Dissemination outside of the federal government for noncriminal justice purposes is limited. For purposes of licensing or local/state employment, dissemination of federal criminal history record information is permitted only when authorized by an approved state statute⁴ and then only to state and local government agencies.⁵ Dissemination is also authorized to federally chartered or insured banking institutions for employment screening, as well as certain segments of the industry, securities, futures associations, and nuclear power plants.⁶ FBI criminal history record information is never directly accessible by the public for any purpose.⁷

In the absence of statutory authorization, recent amendments to the National Child Protection Act (NCPA) allow a "qualified entity designated by the State to contact an authorized agency of the State to request a national criminal fingerprint background check" to determine suitability for employment around children, the elderly, and the disabled.⁸ Because federal criminal history records may be disseminated only to authorized state agencies, the authorized agency receives the information from the FBI on behalf of the qualified entity and, the Act states, the "authorized agency shall make a determination whether the provider [record check subject] has been convicted of, or is under pending indictment for, a crime that bears upon the provider's fitness to have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities and shall convey that determination to the qualified entity."⁹ The actual procedure varies somewhat from the language of the federal law.

2. 28 C.F.R. section 20.33(a)(1).

3. 28 C.F.R. section 20.33(a)(2). Federal law appears to authorize dissemination to Federal agencies for any authorized purpose.

4. 28 C.F.R. section 20.33(a)(3), 28 C.F.R. section 50.12.

5. Pub. L. 92-544, 86 Stat. 1115.

6. 28 C.F.R. section 50.12.

7. The only private access is that of a record subject. An individual may obtain a copy of his or her record from the FBI to review and challenge the accuracy or completeness of its system. 28 C.F.R. section 20.34.

8. 42 U.S.C. section 5119a(a)(3).

9. 42 U.S.C. section 5199a(b)(4) (emphasis added). Although 42 U.S.C. section 5119a(a)(1) encourages a "nationwide background check" to determine if a provider has been convicted of a crime bearing upon the provider's fitness to care for children, the elderly, or the disabled, section 5119a(b)(4) directs the authorized agency to determine whether the provider has been convicted or "is under pending indictment for" a crime bearing upon the provider's fitness to provide care.

In Hawaii, the "authorized agency", or agency currently authorized to receive federal criminal history record information, is the Data Center. Because the Data Center has expressed concerns relating to its responsibility for making suitability determinations, it does not actually determine the applicant's suitability for employment.¹⁰ Instead, after reviewing the federal records, the Data Center informs the qualified entity either that the applicant has no record, or when the FBI returns a record on the applicant, the Data Center informs the requestor that the applicant may have a record and advises the requestor to check further with a particular state.¹¹

Authorized criminal history record information recipients, including state employment and licensing agencies, receive the record subject's entire FBI criminal history record, including arrest records not followed by a valid conviction. FBI records obtained under this authorization cannot be disseminated outside of the receiving departments, related agencies, or other authorized entities, and may be used only for the purpose requested.¹² The exchange of records is subject to cancellation if the criminal history information is disseminated outside of the

10. The Data Center has stated that they do not want the responsibility for making the employment decisions for qualified entities, such as private schools. Letter from William C. Temple, Criminal Justice Information Services Division (CJIS), Federal Bureau of Investigation, U.S. Department of Justice, to Liane Moriyama, Administrator, Hawaii Criminal Justice Center (April 14, 2000). Authorized agencies in other states have expressed similar concern. The NCPA states that a qualified entity is not liable for damages because of its failure to conduct a background check, and also establishes that a State is not liable for damages because of a qualified entity's failure to take action adverse to an applicant who was the subject of a record check. However, no provision establishes that the State or its authorized agency is not liable for damages because of its action in suitability determinations for qualified entities. As a result, there is legislation pending in Congress to amend the National Child Protection Act to address the issue of authorized agencies making the suitability determination for qualified entities. Alternatively, the State may designate more than one "authorized agency" to implement the Act.

See, Criminal Justice Information Services Information Letter 99-3, The Volunteers for Children Act - Amending the National Child Protection Act (Dec. 1, 1999). (States may determine that governmental agencies which routinely regulate these activities are in a better position to determine these applicants' fitness than, for example, the State Police [in Hawaii, the Data Center]:" A state may designate more than one "authorized agency" to ensure that employment decisions are made by the agency best situated by experience and expertise in the substantive field. Although the state agency that makes the "qualified entity" designation is not identified in the NCPA, "it will likely be the same governmental "authorized agency" that is performing the background screening, and that designation should be made either on a case by case basis or by class.)

11. If an authorized agency does not make the suitability determination, and instead points the qualified entity to the state where an applicant has a record, advising the qualified entity to "check further in a particular state", the qualified entity is then subject to that state's law on the dissemination of criminal history record information. The private schools [qualified entities] need to be aware that state CHRI [criminal history record information] is governed by the laws of the particular state and that there will most likely be additional charges and requirements. Letter from William C. Temple, Criminal Justice Information Services Division (CJIS), Federal Bureau of Investigation, U.S. Department of Justice to Liane Moriyama, Administrator, Hawaii Criminal Justice Center (April 14, 2000). This procedure is likely not only to increase the cost and the time required to complete a national criminal history record check, but may prevent a qualified entity from obtaining the information. It is quite possible that other state laws do not permit dissemination of criminal history record information to unauthorized public or private agencies in other states, making the provisions of the National Child Protection Act essentially useless to the qualified entity requesting a national criminal history record check.

12. 28 C.F.R. section 50.12.

receiving agency.¹³ Officials should not deny employment or a license until the record subject has had time to correct or complete the information received from the FBI.¹⁴

Information on state offenders becomes subject to federal laws when submitted to the FBI. Because state offender information held by the FBI is disseminated in the same manner as federal offender criminal history record information, some state noncriminal justice agencies receive state offender information from the FBI that they could not obtain directly from the state repository.

Summary of FBI Dissemination

To summarize, FBI criminal history record information is intended for use primarily by criminal justice agencies for criminal justice purposes. Federal criminal history records, including information on state offenders held by the FBI, may be disseminated for noncriminal justice purposes only to legally authorized state and local government officials. An authorizing statute is ordinarily required to conduct a nationwide criminal history record check for the noncriminal justice purpose of employment and licensing screening. An exception exists to allow national criminal history record checks to be conducted to determine the suitability for work around children, the elderly, and the disabled even in the absence of an authorizing statute. FBI criminal history records may only be used for the purpose requested and may not be distributed outside of the receiving government agency.

Although there is no direct public access to FBI criminal history record information, any individual may review and challenge, for accuracy, his or her own criminal history records in the FBI.¹⁵

Dissemination of State Criminal History Record Information

Although dissemination of state criminal history record information is largely a matter of state law, federal law has helped to shape state policies. Despite the failure of Congressional efforts to setup nationwide dissemination standards for state criminal history record systems, federal regulations to implement the Crime Control Act of 1973¹⁶ distinguished between conviction and nonconviction information and attempted to limit states' dissemination of nonconviction data for those systems that had received federal funding.¹⁷

Federally funded states were required to insure that nonconviction data was disseminated only for criminal justice related purposes, and only to individuals and agencies "authorized by

13. 28 U.S.C. section 20.33(a)(4).

14. 28 C.F.R. section 20.33(b).

15. 28 C.F.R. section 20.34. To obtain a review, the record subject must make the request through a law enforcement agency, verify his identity by fingerprint comparison, and submit any required processing fee.

16. Pub. L. 93-83, 87 Stat. 197, 42 U.S.C. 3701, et seq.

17. 28 C.F.R. sections 20.3, 20.21(b).

statute".¹⁸ Congress deemed the limits established for disseminating nonconviction data essential to protect the privacy of information and to assure that the information is used only for law enforcement and criminal justice and other lawful purposes.¹⁹ The regulations placed no limits on dissemination of state conviction data.²⁰

With those federal directives, policy on noncriminal justice access to criminal history record information was "essentially left up to the legislatures and governors of the individual states."²¹ As might be expected, there is great diversity in the state schemes establishing dissemination for noncriminal justice purposes. It is probably safe to say that, in most states, noncriminal justice access and use of criminal history record information laws are a "patchwork of statutory and regulatory provisions resulting from independent lobbying efforts by particular groups rather than a comprehensive review of the issues and development of a consistent, balanced, statewide policy. It is literally true that no two State statutes on noncriminal justice access are identical."²²

Although almost all states have followed the federal recommendation of distinguishing between conviction information and current arrests less than one year old, and "nonconviction" data (arrests not followed by a valid conviction), access to nonconviction information for noncriminal justice purposes may be more restrictive under state law.²³ Often, nonconviction data is either unavailable or may be distributed only to certain types of users. In many states, authorized noncriminal justice requestors do not receive the subject's full criminal history record information, often receiving only conviction information. Most states, however, place few restrictions on conviction information.

Noncriminal justice dissemination of state criminal history record information (which includes both conviction information and nonconviction data) is most commonly allowed for licensing boards and some governmental and private employers screening applicants for sensitive positions, such as those involving public safety, supervision of children, the elderly, or the disabled, or custody of valuable property.²⁴

State laws on dissemination vary from "open record" states where anyone can get criminal history record information for any purpose to laws that severely limit noncriminal justice access and use.²⁵ Further, many states do not specify which noncriminal justice agencies

18. 28 C.F.R. sections 20.3, 20.21(b).

19. Commentary for 28 C.F.R. section 20.21(b).

20. 28 C.F.R. section 20.21(4) (Commentary on this section notes that "under these regulations, conviction data and pending charges could continue to be disseminated routinely. No statute, ordinance, executive order, or court rule is necessary" to disseminate state conviction data).

21. Bureau of Justice Statistics, U.S. Department of Justice, *Compendium of State Privacy and Security Legislation: 1999 Overview* (July 2000) at 8.

22. *Id.* at 9.

23. *Id.* at 4.

24. *Id.* at 9.

25. In Florida, an "open record" state, the Florida Department of Law Enforcement releases all arrest information in the state's central repository to the public "regardless of whether there is a court disposition on the arrest and regardless of what the disposition is if it is there. The only exception to this are records

may receive criminal history record information. Rather, they define classes or type of agencies or organizations that may obtain certain types of records for specified purposes.²⁶ Some states require the subject's fingerprints be submitted for any noncriminal justice access and almost all states charge fees for processing noncriminal justice record searches.²⁷

Summary of State Dissemination Law

Because dissemination of criminal history record information is largely a matter of state law and policy determinations, state statutes governing dissemination of criminal history records for noncriminal justice purposes are "so varied as to defy classification."²⁸ States share two common elements in their criminal history record information dissemination policy:

- (1) A majority of states allow access to certain criminal history records for certain compelling noncriminal justice purposes, including background screening by licensing boards and private employers for applicants for sensitive positions including care for vulnerable populations, public safety, supervision of property or fiduciary responsibilities; and
- (2) Most states follow the federal approach of distinguishing between conviction records and nonconviction records.²⁹

Generally, states put few limits on dissemination of conviction information, while access to nonconviction data for noncriminal justice purposes is limited.

Interstate Dissemination

Although the FBI maintains the Interstate Identification Index, an index-pointer system, to facilitate the interstate exchange of criminal history records for criminal justice purposes, no system currently links all state repositories for efficient state to state exchanges of criminal history record information for noncriminal justice purposes. State repositories voluntarily send

that are sealed or expunged by a court order." Email from Martha Wright, Chief, User Services Bureau, Florida Department of Law Enforcement, to writer (September 9, 2000). Unlike Hawaii, Florida has no restrictions on the dissemination, inquiry, use, or consideration of criminal history records for noncriminal justice purposes of employment or licensing. Tennessee, on the other hand, prohibits noncriminal justice access and use except for very limited purposes that are specifically authorized by statutes and subjects any unauthorized distribution to criminal charges. Bureau of Justice Statistics, U.S. Department of Justice, Compendium of State Privacy and Security Legislation: 1999 Overview (July 2000) at 9.

26. For example, some states statutorily authorize the use of criminal history records for any occupational licensing or employment purposes, while other states authorize their use only for screening applicants for high risk occupations, like those involving the public safety, supervision of children, or custody of cash, valuable property or information. *Id.*

27. *Id.*

28. *Id.*

29. Bureau of Justice Statistics, U.S. Department of Justice, Use and Management of Criminal History Record Information: A Comprehensive Report (1993) at 41.

fingerprints and arrest and disposition information on state law offenders to the FBI, while maintaining a name and fingerprint based criminal history record system in their own central repository. Without a connecting system for interstate exchange, the FBI has been the source of information on federal offenders as well as state offenders for national or interstate record searches for noncriminal justice purposes.

Recently, Congress adopted the National Crime Prevention and Privacy Compact (Compact) of 1998 to create a decentralized national criminal history records system for both criminal justice and noncriminal justice use. Essentially, the Compact allows participating states to access the Interstate Identification Index for noncriminal justice purposes authorized by federal or state law. Permissible noncriminal justice purposes recognized in the Compact include background checks for governmental licensing and employment. When the Compact is fully implemented, states will access the Index for efficient interstate exchange of criminal history records for criminal justice and noncriminal justice purposes.

Interstate Identification Index

The Interstate Identification Index (III or Index), maintained by the FBI, is an "index-pointer" criminal history record system that connects the FBI's computerized files and each state's centralized files into a national system. The III contains personal identification information for all individuals arrested for felonies or serious misdemeanors under state or federal law, supported by a National Fingerprint File. Currently, only criminal justice agencies may use the III to determine whether an individual has committed any state or federal offenses. The Index includes identification information, such as name, birth date, race, sex, etc., and federal and state identification numbers.

If a criminal history record search by a criminal justice agency results in a "hit" in the Index, it "points" to the state holding the records and the records are exchanged directly between the participating states or between a participating state and federal agencies, using telecommunication links. Dissemination and use of the records obtained from the holding state is governed by the laws of the state that receives the criminal history information.

To participate in the III, a state must meet specific standards, including being a single source submission repository (sole conduit for all information for criterion offenses within the state to the FBI); have fingerprint supported records; and maintain complete, accurate, and timely records. A state must also maintain an automated records system and be capable of responding automatically to all interstate or federal or state requests.

National Crime Prevention and Privacy Compact

In 1998, Congress approved the National Crime Prevention and Privacy Compact to facilitate interstate exchange of criminal history records for legally authorized noncriminal

justice purposes.³⁰ The Compact provides a decentralized and efficient exchange of criminal history records among participating states and the federal government by authorizing the use of the Interstate Identification Index for noncriminal justice purposes. Upon ratification by two states, Montana and Georgia, the Compact became effective on April 28, 1999.³¹

The Compact defines "noncriminal justice purposes" to mean purposes authorized by federal or state law other than purposes relating to criminal justice activities, including employment suitability, licensing determinations, immigration and naturalization matters, and national security clearances.³² Full implementation of the Compact will eliminate duplication of records maintained by the states and the FBI, and provide a faster response and more complete record for interstate exchanges for noncriminal justice purposes.³³ Cost savings are predicted at both the federal and state levels.³⁴

Under the Compact, an authorized agency in a participating state will electronically contact the FBI, which will then direct the requestor to the appropriate state or federal database in the same 'index-pointer' manner that the Index is now accessed by criminal justice agencies for criminal justice purposes. Dissemination and use of the records obtained from interstate exchanges under the Compact is governed by the laws of the receiving state.³⁵

Currently, Hawaii is not a participating III state. By 2002, Hawaii is expected meet the qualifications to become a participating state and will be ready to share state criminal history record information electronically with other states and the federal government for both criminal justice and noncriminal justice purposes. In order to become a participating state for noncriminal justice purposes, including licensing and employment screening, Hawaii must pass legislation to ratify the National Crime Prevention and Privacy Compact. Ratification will not affect

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30. 42 U.S.C. section 14611 et seq. The Compact does not expand or diminish the noncriminal justice purposes for which criminal history records may be used, it merely facilitates their exchange in a more efficient and effective manner. Letter from Andrew Fois, Assistant Attorney General, U.S. Department of Justice, to The Honorable New Gingrich, Speaker, U.S. House of Representatives (undated).
 31. A State must meet the requirements to participate in the III for criminal justice uses as a preliminary step to ratifying the III Compact to gain access to the Index for noncriminal justice purposes. As of December 20, 2000, eight states have ratified the Compact. Ratification of the Compact by almost all states is expected within two to five years.
 32. 42 U.S.C. section 14616(b)(4).
 33. Noncriminal justice users will receive electronic responses instead of FBI mailed responses. Increased automation and system improvements that occurred as perquisite to III participation by criminal justice agencies has increased state level efficiency. Records maintained by state repositories are often more up-to-date than FBI files. In some instances, disposition information is not submitted to the FBI by the States. Without complete dispositions, the utility of record information is somewhat limited. Additionally, many states maintain records of some misdemeanor offense not submitted to the FBI. Bureau of Justice Statistics, U.S. Department of Justice, Resource Materials on the National Crime Prevention and Privacy Compact (January 1998) at 3.
 34. When the III Compact is fully implemented, only first arrest information for state level offenders will be sent to the FBI to integrate the offender's name into the Index. The state repository will keep any subsequent criminal history on an individual. Participating states will be required to make all unsealed criminal history records available in response to authorized noncriminal justice requests.
 35. The III Compact also establishes a federal-state council authorized to adopt rules and procedures governing the use of the III system for noncriminal justice purposes.

dissemination of Hawaii criminal history record information within the state or Hawaii laws governing its use and consideration.

Dissemination of Hawaii Criminal History Record Information

As the state repository for criminal history record information in Hawaii, the Hawaii Criminal Justice Data Center is responsible for, *inter alia*, the dissemination of criminal history record information, balancing the right of the public and press to be informed with the right of the privacy of individuals and the need for law enforcement agencies to have the tools to prevent and detect crime.³⁶ Dissemination is defined to mean "transmission of criminal history record information to individuals and agencies."³⁷

Generally, the Hawaii Uniform Information Practices Act (UIPA) requires that government agencies make government records available for public inspection and copying unless state law restricts access to the requested records.³⁸ Records that are protected from disclosure to the public by a specific federal or state law are not subject to UIPA disclosure requirements.³⁹

For criminal history records, Hawaii follows the federal approach and distinguishes between conviction information and nonconviction data for purposes of dissemination.⁴⁰ State law specifically limits dissemination of nonconviction data.⁴¹ For noncriminal justice purposes, nonconviction data may be disseminated only to individuals and agencies authorized by statute or ordinance, or to agencies of state or federal government authorized to conduct employment suitability investigations or eligibility for security clearances.⁴² In addition, dissemination of "criminal history record information" (which includes both conviction information and

36. Hawaii Rev. Stat., section 846-2.5.

37. Hawaii Rev. Stat., section 846-1.

38. Hawaii Rev. Stat., section 92F-11.

39. Hawaii Rev. Stat., section 92F-13(4).

40. Specifically, chapter 846 governs the dissemination of "nonconviction data," "criminal history record information", and "conviction data".

41. Dissemination of nonconviction data is limited in section 846-9, Hawaii Rev. Stat., while dissemination of criminal history record information is limited in section 846-10, Hawaii Rev. Stat. Nonconviction data" is defined as "arrest information without a disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; or information disclosing that the police have elected not to refer a matter to a prosecutor, or that a prosecutor has elected not to commence criminal proceedings, or that proceedings have been indefinitely postponed, as well as all acquittals and dismissals." Section 846-1. Many states that disseminate conviction data also allow access to arrest records less than one year old. Because Hawaii statutes prohibit dissemination of nonconviction data more than one year old, it is unclear whether dissemination of current (less than one year old) arrest information is also prohibited. The Data Center has requested clarification from the Attorney General's office on the question of disseminating arrest information within the first year, based on the statutory definition of "nonconviction data". Email from Liane Moriyama, Administrator, Hawaii Criminal Justice Data Center to writer (October 30, 2000).

42. Hawaii Rev. Stat., section 846-9.

nonconviction data) for noncriminal justice purposes is limited to "individuals and agencies who are provided for in this chapter or by rule or regulation."⁴³

Chapter 846, Hawaii Revised Statutes, however, does not limit the dissemination of conviction data. Instead, Hawaii law specifically states "These limitations do not apply to conviction data".⁴⁴ Since there is no state law restricting access to conviction data, conviction information is freely available to the general public under the Hawaii Uniform Information Practices Act.

Certain documents not within the definition of "criminal history record information" may nonetheless indicate an individual's involvement in the criminal justice system. Because these documents are not considered criminal history record information, they are not subject to the dissemination limitations established in chapter 846. Their availability may be subject to certain restrictions or limitations, depending on the document. For example, to get arrest information available in a police blotter, a requestor is required to know the date of the arrest.

Summary of Hawaii Criminal History Record Information Dissemination

Hawaii law places no restrictions on the dissemination of conviction information. Conviction information is considered a public record and is available for review at Public Access terminals at the Data Center in Honolulu, each county police department's main office, and the Kona police department office.⁴⁵

Like most other states, Hawaii limits dissemination of nonconviction data for noncriminal justice use. Only state agencies authorized to conduct criminal history record checks to determine employment suitability or security clearances, or individuals and agencies authorized by statute may receive nonconviction data.⁴⁶ "Criminal history record information" (which includes both conviction information and nonconviction data) may be disseminated for noncriminal justice purposes only to "individuals and agencies who are provided for in this chapter or by rule or regulation."⁴⁷

43. Although "nonconviction data" may be disseminated to agencies authorized to conduct investigations to determine employment suitability, dissemination of "criminal history record information" to these agencies is not expressly authorized" in section 846-10, Hawaii Rev. Stat. Some agencies, however, are statutorily authorized to "obtain criminal history record information", *e.g.*, sections 846-42(c), 333F-22, 346-19.6, 346-154, and 353C-5, Hawaii Rev. Stat. Inconsistent use of similar but related terminology is confusing, making the Data Center's authority to disseminate "criminal history record information" to agencies authorized, but not by chapter 846, to receive this information is unclear.

44. Hawaii Rev. Stat., section 846-9.

45. Although not within the definition of criminal history record information, information on convicted sex offenders registered in Hawaii is available without limitation at the same location in the Sex Offender Registry also maintained by the Data Center. The Registry is also available online at the Data Center's website at www.hawaii.gov/HI_SOR/.

46. Hawaii Rev. Stat., sections 846-9(5) and 846-9(6).

47. Hawaii Rev. Stat., section 846-10.

Although criminal history information in other documents that are excluded from the statutory definition of "criminal history record information" are not subject to dissemination restrictions established in chapter 846, Hawaii Revised Statutes, the access and availability of this information may be subject to other limitations.

It bears repeating that the availability or access to criminal history record information, whether conviction or nonconviction data, does not dictate whether that information may be used or considered in employment or licensing decisions.

Chapter 4

EMPLOYMENT LAW LIMITATIONS ON CRIMINAL HISTORY RECORD CHECKS: JUST BECAUSE YOU CAN SEE IT DOESN'T MEAN YOU CAN USE IT

Introduction

In conducting criminal history record checks to determine suitability for employment, public and private employers must remember to consider the limitations or constraints of relevant employment laws to avoid employment discrimination liability.¹ Even criminal history record information that may be freely disseminated or available for public inspection without restriction may be subject to stringent limits on its use or consideration by employers in hiring and firing decisions. The availability of criminal history information does not guarantee that it can be used by employers, whether public or private, in making employment decisions.

Because of the significant difference between arrest records not followed by a conviction and conviction records, this chapter uses "arrest records" to refer specifically to only those arrest records where the individual was not subsequently convicted. The term "nonconviction data" also refers only to those arrests not followed by a conviction. "Conviction records" (or "conviction data") that include information on individual's arrest and subsequent conviction are a separate category of criminal history records, to be distinguished from "arrest records" or "nonconviction data" where the record subject was not convicted.

Although federal law does not specifically protect arrest or conviction records in employment decisions, inquiries about and consideration of arrests is generally forbidden if the person was not convicted. The United States Equal Employment Opportunity Commission (EEOC) has determined that an employment decision based solely on an arrest for which there was no conviction may adversely impact certain minorities and is likely to constitute employment discrimination. Employers may inquire about and consider relevant convictions, subject to certain limitations.

At the state level, "fair employment laws" or similar laws may restrict an employer's ability to inquire about or consider an applicant's criminal history. Inquiries into or consideration of arrest or conviction records, or both, may be prohibited or subject to restrictions. Because an arrest, by itself, is not an indication of guilt and because minorities have suffered proportionately more arrests than others have, the potential for employment discrimination has led many states to completely bar inquiry and consideration of nonconviction information. Inquiries and consideration of conviction information where relevant to job performance are often permitted.

1. The Federal government contends some state or local government licensing decisions may be subject to employment discrimination liability where arrest or conviction records are improperly used. The applicability of Hawaii employment practices law to licensing decisions is uncertain.

In a related matter, an employer's failure to determine an employee, potential employee, or volunteer's prior criminal history may result in harm to other employees or third parties and expose the employer to tort liability based on negligence in hiring, supervising, or retaining an individual.² A delicate balancing act is required to avoid employment discrimination charges by an employee or prospective employee, while using reasonable care that may dictate conducting checks of certain criminal history records to screen an individual's fitness and suitability for employment.

United States Equal Employment Opportunity Commission and Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 (Title VII)³ prohibits employment discrimination based on race, color, religion, sex, or national origin. The United States Equal Opportunity Employment Commission administers and enforces Title VII. The EEOC and three other federal agencies⁴ adopted the Uniform Guidelines on Employee Selection Procedure (Guidelines)⁵ to establish uniform employment decisions and promote equal employment opportunities.⁵ The Guidelines apply to public and private employers who employ fifteen or more employees, labor organizations, employment agencies, and to state and local government licensing and certification duties to the extent they are covered by federal law.⁶ They provide a framework for employers for determining the proper use of employee selection procedures, including those used to make decisions such as hiring, retention, promotion, transfer, demotion, dismissal, or referral.

A basic principle of the Guidelines provides that any employment practice that adversely impacts the job opportunities of members of a race, sex, or ethnic group disproportionately screening them out is unlawfully discriminatory unless the process is justified in accordance with federal law. Adverse impact occurs when there is a substantially different rate of selection in hiring, promotion, or other employment decisions that disadvantages a protected class member.⁷

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2. Negligent hiring requires a court to find that: (1) at the time of the injury, an employment relationship existed between the employer and employee; (2) the employee was unfit for the position; (3) the employer knew or should have known that the employee was unfit for the position; (4) the employee negligent or intentionally caused the victim's injury; and (5) the employee's negligence was the proximate cause of the victim's injury. A victim may seek punitive damages from an employer who was reckless or grossly negligent in hiring.
 3. Pub. L. 88-352, 42 U.S.C. section 2000e et seq.
 4. Other federal agencies that adopted the Guidelines include the Civil Service Commission, and the U.S. Departments of Labor and Justice.
 5. The Guidelines are legally binding under a number of civil rights laws and are applied by federal and state agencies in enforcing Title VII and related laws.
 6. Although courts are divided on the issue, the federal government contends that some kinds of licensing and certification that denies persons access to employment opportunity may be enjoined under the Civil Rights Act of 1964, as amended.
 7. Adverse impact is normally found when the selection rate for one group is less than 80% (4/5) that of another, commonly referred to as the 4/5 rule.

Criminal history record checks that authorize or require an employer to consider an individual's criminal history record may adversely impact certain minorities. A hiring or firing procedure that causes adverse impact may be used only if there is evidence that:

- It is job related for the position in question; and
- Its continued use is justified by business necessity.

Demonstration of job relatedness is identical to establishing the validity of a process. For job relatedness and validity, the EEOC uses three validity strategies recognized by the American Psychological Association.⁸ To prove business necessity of using a particular procedure, an employer must establish that use of the procedure is essential to the safe and efficient operation of the business and there are no alternative procedures available that are substantially equally valid to achieve the business objectives with a lesser adverse impact.

To ask about and consider arrest records where the individual was not convicted, an employer must establish job relatedness and business necessity. Ordinarily, since arrests not followed by a conviction do not prove a criminal act, they can bear no "rational relation" to job performance and cannot be considered for hiring or firing decisions. Consequently, questions about arrest records are generally prohibited because they are inherently biased against or adversely impact applicants in certain protected minorities based on the disproportionate effect on job opportunity for those minorities. The EEOC is likely to find discriminatory an employment decision based solely on arrest records where there was no conviction. The EEOC Policy Guidance on the Consideration of Records states that a "blanket exclusion of people with arrest records will almost never stand scrutiny."⁹

Similarly, United States Court of Appeals for the Ninth Circuit has found employment discrimination where an employer's failure to hire based solely on an arrest record not followed by a conviction adversely impacted a racial minority and was not justified by business necessity.¹⁰ Other courts have held that because an arrest, by itself, does not determine guilt, a job applicant's arrest record alone does not prove an inability to perform a job consistent with the trustworthy and efficient operation of a business. Courts have also found that consideration of arrest records, or nonconviction data, was not a business necessity.

While questions relating to an applicant's nonconviction or arrest record are generally improper, questions concerning an applicant's conviction record may be asked if job related.

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8. Validation is the demonstration of the job relatedness of a selection procedure. The recognized validity strategies are: (1) Criterion-related validity-a statistical demonstration of a relationship based on a selection procedure and job performance of a sample of workers; (2) Content validity- a demonstration that the content of a selection procedure is representative of important aspects of performance on the job; and (3) Construct validity- a demonstration that a selection procedure measures construct (something believed to be an underlying human trait or characteristic honesty) and that the construct is important for successful job performance.
 9. U.S. Equal Employment Commission, Policy Guidance on the Consideration of Arrest Records, EEOC Compliance Manual, section 604, Vol. II, App. Doc. No. N-915-061 (September 7, 1990).
 10. Gregory v. Litton Industries, 472 F.2d 631 (9th Cir. 1972).

Clearly, an arrest not followed by a conviction is different in nature than a conviction. A conviction is a result of due process procedure that establishes an individual's guilt in committing a crime.

The EEOC allows employers to ask job applicants about convictions before an employment offer is extended, but an employer can only consider the conviction in making hiring decisions if the conviction bears some relationship to the job. An employer cannot use convictions as an absolute bar to employment. EEOC Guidelines require an employer to establish a "business necessity" to use conviction information in employment decisions. In establishing business necessity, an employer must consider three factors to justify the consideration of a conviction record:

- (1) Nature and gravity of the offense for which convicted;
- (2) Amount of time that has elapsed since the applicant's conviction and/or completion of sentence; and
- (3) The nature of the job in question as it relates to the nature of the offense committed.

Employment Practices in Hawaii

Hawaii employment practices law provides that an employer's refusal to hire or discharge from employment any individual "because of ... arrest and court record" is an unlawful discriminatory practice.¹¹ Generally, the law establishes a prohibition against employer inquiries or consideration not only of arrest records, but also convictions. Hawaii employment law applies to any employer with one or more employee, including the State, or any of its political subdivisions.¹² The Hawaii Civil Rights Commission (Commission) enforces the State's discrimination laws.¹³

Arrest records not followed by a valid conviction are restricted by laws concerning the dissemination of criminal history records and employment discrimination. The availability of arrest records, or nonconviction data, for noncriminal justice purposes is very limited. For criminal history record checks to determine employment suitability, arrest records not followed by a conviction may be disseminated only to authorized state or federal agencies or other

11. Hawaii Rev. Stat., section 378-2. Section 378-1 broadly defines "arrest and court record" to include any information about an individual having been questioned, apprehended, taken into custody or detention, held for investigation, charged with an offense, served a summons, arrested with or without a warrant, tried, or convicted pursuant to any law enforcement or military authority.

12. The United States, however, is excluded from the definition of employer.

13. In establishing the Civil Rights Commission, the Hawaii legislature declared discrimination to be against public policy and recognized discrimination "because of race, color, religion, age, sexual orientation, marital status, national origin, ancestry, or disability". See, Hawaii Rev. Stat., section 368-1. Discrimination based on "arrest and court record" is not recognized in the legislative purpose and intent in establishing the Commission.

authorized individuals or agencies. Hawaii employment practices law generally forbids an employer's use of nonconviction data in hiring and firing decisions. An employment decision made because of an individual's "arrest and court record" (both conviction data and nonconviction data) is unlawful employment discrimination.

Conviction information, on the other hand, is freely available to the public and may be used in screening employees or volunteers, if certain limitations are met. Although conviction information is a public record that is available or accessible for inspection without restriction, its use or consideration in hiring and firing decisions is not unlimited.

A 1998 amendment to Hawaii employment practice law permits an employer to inquire about and consider an employee or potential employee's criminal conviction record if the conviction bears a "rational relationship to the duties and responsibilities of the position" and if the conviction is less than ten years old.¹⁴ For job applicants, an employer must first make a conditional offer of employment before the employer may ask about or consider an applicant's conviction record. The employer may withdraw the conditional employment offer if the employer finds that the applicant has a conviction record that is rationally related to the duties and responsibilities of the job sought.¹⁵

Because Hawaii law does not define "rational relationship", it is unclear when a conviction would be sufficiently "rationally related" to the duties of a job to allow an employer to consider it. Unlike the EEOC, The Hawaii Civil Rights Commission has not adopted Guidelines or administrative rules to provide instruction or establish uniform practices. Presumably, the federal EEOC Guidelines that determine whether a "business necessity" exists that allows consideration of a conviction might be applied to test the "rational relationship" required by Hawaii law. At the state level, the Wisconsin Department of Workforce Development, Equal Rights Division, provides assistance in that state for determining whether a conviction is "substantially related" to the job, which may aid a Hawaii "rational relation" determination. The Wisconsin "substantially related" test looks at the circumstances of an offense, where it happened, when, etc. – compared to the circumstances of a job – where is this job typically done, when, etc. The more similar the circumstances, the more likely it is that a substantial relationship will be found.

In addition to the permitted use of conviction information established in section 378-2.5, Hawaii employment law carves out several other "exceptions" not prohibited by chapter 378, Hawaii Revised Statutes. Employers may establish and maintain "bona fide occupational qualifications [BFOQ] reasonably necessary to the normal operation of a particular business or

14. Hawaii Rev. Stat., section 378-2.5. In explaining the 1998 amendment on its website at www.state.hi.us/hrct/index.html, the Civil Rights Commission uses language potentially confusing to employers and employees alike when it notes that the amendment was made "to allow perspective employers to investigate a job applicant's criminal record after the employer has made a conditional offer to hire; the job offer may then be withdrawn if the applicant has a conviction record related to the duties of the position." In broadly defining "arrest and court records" and subsequently stating that the amendment allows an employer to investigate an applicant's criminal record, the Commission does not indicate or clarify that the amendment allows inquiry about and consideration only of rationally related conviction data less than ten years old.

15. Hawaii Rev. Stat., section 378-2.5(b).

enterprise, and that have a substantial relationship to the functions and responsibilities of prospective or continued employment".¹⁶ Additionally, an employer is allowed to hire or fire an individual based in his or her ability to perform the work in question.¹⁷

Based on the BFOQ exception and/or an authorizing statute, an employer may use "arrest and court records" when conducting criminal history record checks required or authorized by federal or state statute. Under the BFOQ exception, authorized agencies or individuals may ask about or consider an individual's "arrest or court record" in employment decisions where there is a sufficient nexus to job performance.¹⁸ The BFOQ is a "narrow exception to the statutory protection"¹⁹ of arrest and court record and must be reasonably necessary to the normal operation of the business and substantially related to the functions and responsibilities of the position.²⁰

An employment decision based on an individual's failure to meet the job's bona fide occupational qualifications or ability to perform the job would not subject an employer to employment discrimination liability. An employer may assert any legitimate nondiscriminatory business reason as the basis for an employment decision. Choosing a better qualified candidate is a legitimate nondiscriminatory reason. Misconduct on the job may be considered even if the employee was not arrested or convicted.²¹

In summary, an employer is generally prohibited from making hiring or firing decisions "because of ... an individual's arrest and court record." Employers may ask about and consider an individual's conviction record if certain conditions are met. Subject to certain limitations, an employer may even consider an individual's arrest and court record in conducting criminal history record checks authorized by federal or state statute. But, an employer's unrestricted access to information about an individual's conviction data does not guarantee the employer's unrestricted ability to use or consider the information in hiring or firing decisions. Where an employer is authorized to check an individual's criminal history record information to determine employment suitability, it is unclear whether the statutory authorization, the BFOQ exception, or both, operate to remove the restrictions in section 378-2.5, permitting the employer to consider arrest and court records, or conviction and nonconviction data, that are over ten years old. Presumably, the BFOQ exception established in section 387-3 dictates that an employer may consider only those arrests and court records reasonably necessary to the operation of the

16. Hawaii Rev. Stat., section 378-3(2).

17. Hawaii Rev. Stat., section 378-3(3). Other exceptions allow public and private schools to consider criminal convictions in determining suitability to jobs working in close proximity to children and allow federally insured financial institutions to refuse to hire or to fire any person based on convictions involving dishonesty or breach of trust.

18. Hearing on H.B. No. 3528 before the Senate Committee on Human Resources, Nineteenth State Legislature, Regular Session of 1998 (Testimony of Claudio Suyat, Chairperson, Hawaii Civil Rights Commission).

19. *Id.*

20. Hawaii Rev. Stat., section 378-3.

21. Hearing on H.B. No. 3528 before the Senate Committee on Human Resources, Nineteenth State Legislature, Regular Session of 1998 (Testimony of Claudio Suyat, Chairperson, Hawaii Civil Rights Commission).

business and substantially related to the functions and responsibilities of the job. The age of the criminal history records that may be considered in these circumstances is uncertain.²²

Negligent Hiring, Supervising, or Retention

Federal and state fair employment laws protect employees and promote equal employment opportunities, dictating the permissible use or consideration of arrest and conviction records, or criminal history record information, in hiring and firing decisions. Other federal and state laws govern dissemination of criminal history record information. A related criminal history record check issue is an employer's duty of care to take steps necessary to prevent injury to others by employees or volunteers.²³ When an unfit, incompetent, or unsuitable employee or volunteer injures others, an employer may be directly liable. An employer must use reasonable care in hiring and retaining employees and volunteers who are competent and fit for their jobs or responsibilities. What is considered "reasonable care" will depend on the circumstances of each decision. The greater the risk of harm, the higher the degree of care necessary in employment decisions.

The most common reason for employer liability is the failure to obtain criminal history data. An employer is liable for negligent hiring or negligent retention if the employer knew or should have known that the employee or job applicant was unfit for the job.²⁴ If a reasonably conducted investigation would have revealed facts indicating that the job applicant or employee was undesirable, the failure to conduct the investigation is considered negligence.

However, there can be no liability for failure to check records that are not accessible. For example, an employer cannot be held liable based upon a failure to conduct a national criminal history record check where there is no state law authorizing the employer to submit fingerprints to the FBI to request a nationwide check. In contrast, if an employer has legal access to state or FBI files, either directly or through a designated state agency, a failure to conduct a state or national criminal history record check may be considered as part of the employer's "reasonable care" in hiring.

It is less clear, however, whether an employer who has legal access to see federal or state criminal history records can be found negligent if state law restricts or limits the employer's

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22. The Hawaii Civil Rights Commission was provided with advance, draft copies of Chapters 4 and 5 of this study and asked to submit comments or clarifications. Additionally, questions on certain issues were submitted via email to Commission staff for clarification. Although two members of the Commission staff provided helpful information in meetings with the writer, the Commission did not otherwise respond to the Bureau's subsequent written requests for comments on Chapters 4 and 5 or clarification of other issues.
 23. The relationship between employer and employee creates a limited duty owed by the employer to others to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others. This duty is the basis for claims against an employer for negligent hiring, retention, and supervision. The reasonable care in hiring also applies to selecting volunteers.
 24. Factors considered regarding whether an employer knew or should have known about an individual's background include: the availability of such information; burden, cost and delay in obtaining background information; whether adequate sources exist that justify a finding of fitness, and whether unanswered questions or negative indicate indicators exist.

ability to use and consider the information. For example, an employer has unlimited access to Hawaii conviction information, but is able to inquire about and consider only rationally related convictions less than ten years old. Consequently, an employer who conducted a check of Hawaii conviction data and discovered a conviction that was more than ten years old would be legally unable to ask about or consider that conviction in hiring and firing decisions. Logically, the employer should not be found negligent for failing to consider conviction information that he or she had access to and could see but could not use or consider, but this is a gray area in Hawaii law.

An employer's duty of care is of particular concern for those positions with responsibility for vulnerable populations. A job applicant with a relevant criminal history must not be allowed unsupervised access to children, the elderly, or the disabled, and given the opportunity to victimize a member of such a vulnerable population. The sensitive nature of the work with children, the elderly, and the disabled, and the positions of trust or responsibility held by employees or volunteers working with them, may establish liability where an employer fails to conduct some level of criminal history record check.

Although an employer or "qualified entity" that provides care for children, the elderly, or the disabled is authorized under the National Child Protection Act to request a nationwide criminal background check through an authorized agency, even in the absence of an authorizing state statute, liability issues for qualified entities are uncertain. The Act expressly states that a qualified entity shall not be liable in an action for damages solely for failure to conduct a criminal background check on a provider and that state agency is not liable for the qualified entity's failure to take action adverse to a provider who was subject of a background check.

In Hawaii, however, the authorized agency does not make the suitability determination as contemplated by the current language of the National Child Protection Act. Instead, the authorized agency, because of its own liability concerns, acts as an "index pointer", upon receipt of federal criminal history from the FBI, and directs the employer to request information from another state. In addition to the added time and cost resulting from such an "index pointer" approach, it is possible that a "qualified entity" may encounter some difficulty in receiving criminal history record information from another state. Because few qualified entities nationally have requested criminal history record checks under the recent amendments to the Act, the operation and effect of the Act remains to be tested. Because of concerns of authorized agencies as well as qualified entities, Congressional legislation to amend the Act to clarify several issues is pending.

At least one court has held that the "sensitive nature" of the position is relevant in determining reasonable care. "The sensitive nature of the employment, coupled with the opportunity and temptations incident to it, would lead to the conclusion that a prudent employer in these circumstances should rely on more than the absence of specific evidence or statements that a potential employee is dishonest or criminally inclined."²⁵

25. Welsh Mfg., Div. of Textron v. Pinkerton's, 474 A.2d 436 (R.I. 1984). When an employee is being hired for a sensitive occupation, mere lack of negative evidence may not be sufficient to discharge the obligation of reasonable care.

Not surprisingly, federal and state laws most often permit the noncriminal justice use or consideration of an individual's criminal history record information, or some portion thereof, to determine suitability for jobs or licensing in sensitive positions involving public safety, custody of valuable property, and particularly those positions involving responsibility for children, the elderly, or disabled individuals.

Given the potential liability for employers, the significance of criminal history record checks is clear. An employer should base hiring decisions on whether an applicant's criminal history indicates that the applicant would be unfit for the particular job in question. An employer who fails to exercise reasonable care in selecting an individual in light of the risk created by the job to be filled is subject to negligent hiring, supervision, or retention liability. The reasonable care required for effective screening and the rational relationship of any criminal history to the job at issue require an employer's careful consideration in employment decisions.

According to the U.S. Equal Employment Opportunity Commission, the basic principle in determining the acceptability of any applicant question is: can the employer demonstrate a job-related reason for asking the question? In asking an applicant questions, the interviewer should decide whether or not the information is really necessary in order to evaluate the applicant's qualifications, level of skills and overall competence for the job in question.

Chapter 5

GOVERNMENT EMPLOYMENT AND LICENSING: SPECIAL CONSIDERATIONS

Introduction

As discussed in Chapters 3 and 4, the dissemination and use of Hawaii criminal history record information is regulated primarily by two state laws. In establishing the parameters for the dissemination of Hawaii conviction data and nonconviction data, the law that created the Hawaii Criminal Justice Data Center (Data Center) as the state repository for criminal history records for Hawaii offenders, chapter 846, Hawaii Revised Statutes, also determines what criminal history records are available or accessible.¹ Hawaii employment practices law governs the use of criminal records, and generally limits an employer's ability to make inquiries about and consider an employee or job applicant's arrest and court record in hiring and firing decisions.² Federal law and regulations determine dissemination or availability of federal criminal history records for noncriminal justice purposes.

In addition to the fundamental principles established by these laws, Hawaii laws relating to public service and the status of convicted persons place additional constraints on the State's use, distribution, and dissemination of certain criminal history information in decisions concerning state employment and licensing matters.³ These laws apply only to the State and its political subdivisions or agencies. They do not affect private employers' ability to access or use criminal history record information. Private employers are subject only to Hawaii employment practices law and the general principles of criminal history record information dissemination established in chapter 846.

Restrictions on Criminal History Records Checks for State Employment and Licensing

The State is subject to Hawaii law governing the dissemination and use of criminal history record information in state employment decisions in the same manner as any other employer. In addition, the State is subject to added restrictions in state employment and licensing matters that further cloud the issue of criminal history record checks.

1. Hawaii Rev. Stat., sections 846-8 to 846-10.

2. Hawaii Rev. Stat., sections 378-2 to 378-2.5.

3. Certain situations that prohibit public employment will not be discussed in this study. Any officer of enlisted member of the militia who is dishonorably discharged or discharged from the national guard may not be employed by the state or county, unless pardoned by the governor. *See*, Hawaii Rev. Stat., section 121-27. Any person convicted of an any act, attempt, or conspiracy to overthrow the state or federal government is also barred from public employment. *See*, Hawaii Rev. Stat., section 831-2(c).

The Uniform Act on Status of Convicted Persons (Act) limits the State's "use, distribution, and dissemination" of certain criminal records in decisions concerning state employment and licensing. Public service law forbids questioning state job applicants about arrests (presumably where there was no conviction), but allows any question about any conviction.⁴ As a result, the State's ability to conduct criminal history record checks to screen potential state employees and license applicants is subject to various statutes that overlap in some areas, conflict in others, and leave some areas uncertain or ambiguous.

Chapter 831 – State Employment and Licensing

Hawaii's Uniform Act on Status of Convicted Persons was adopted in 1974 to encourage the rehabilitation of convicted offenders.⁵ Hawaii apparently adopted the Act in response to a series of reports on the entire spectrum of criminal justice issued by the National Advisory Commission on Criminal Justice Standards and Goals (Commission).⁶ The Commission recommended that by 1975 states should enact legislation "repealing all mandatory provisions depriving persons convicted of criminal offenses of civil rights or other attributes of citizenship,"⁷ including mandatory provisions denying convicted offenders government issued licenses or prohibiting state employment. Hawaii's Act eliminated the disqualification of convicted offenders from state employment or licensure solely (emphasis in original) because of a prior conviction.⁸

More than twenty five years later, the Act continues to provide that a prior conviction by itself may not be the basis for disqualification from state employment or licensure. In protecting the civil rights of convicted offenders, the law also limits the State's use, distribution, and dissemination of certain criminal records in connection with applications for state employment and state required permits, licenses, registration, or certificates (license). The State may consider certain convictions, subject to restrictions.⁹ Arrest records not followed by a valid conviction and certain conviction records may not be used, distributed, or disseminated.¹⁰

4. Hawaii Rev. Stat., section 78-2.5.

5. S.C.R. No. 177-74, Seventh State Legislature, Regular Session (1974).

6. Appointed by the Administrator of the Law Enforcement and Administration of Justice (LEAA), United States Department of Justice, and supported by \$1.75 million in LEAA grant, the Commission as directed to formulate national criminal justice standards and goals for crime reduction and prevention at state and local levels. *See*, House Journal 262 (1974).

7. House Journal 262 (1974).

8. S.C.R. No. 998-78, S.C.R. No. 177-74, Seventh State Legislature, Regular Session (1974).

9. Hawaii Rev. Stat., section 831-3.1.

10. Hawaii Rev. Stat., section 831-3.1.

Use and Consideration

Until 1998, Hawaii employment law clearly established that an employer's hiring or firing decision made "because of ... arrest and court record" was an unlawful discriminatory practice. All employers, public and private, were generally prohibited from asking about and considering conviction and nonconviction data. The State, however, was authorized under the Act to consider certain convictions in employment and licensing decisions, subject to certain conditions. Two years ago, the Legislature amended Hawaii's employment practices law to allow any employer, public or private, limited consideration of criminal conviction records of current or prospective employees. As a result, private employers are now allowed limited consideration of conviction information in employment decisions, a right long held by the State in state employment and licensing matters.

Arguably, Hawaii employment practices law and the Uniform Act on Status of Convicted Persons both protect convicted offenders from employment discrimination. Both laws impose restrictions on the State as employer. Both laws allow only limited consideration of certain convictions. Under Hawaii employment practices law, the State, like any other employer, may inquire and consider an "individual's criminal conviction record" within the last ten years if the conviction record is rationally related to the duties and responsibilities of the job.¹¹ Under section 831-3.1, however, the State's ability to consider a job or license applicant's conviction information is subject to a number of confusing restrictions that appear to conflict with employment law. The two laws, read together, result in conflict, confusion, and uncertainty.

Under the Uniform Act on Status of Convicted Persons, the State is forbidden to use, distribute, or disseminate the following criminal records in connection with any state employment or license application:

- (1) Records of arrest not followed by a valid conviction;
- (2) Convictions which have been annulled or expunged;
- (3) Penal convictions not subject to jail sentence; and
- (4) Misdemeanor convictions more than twenty years old where subject has had no subsequent arrest or conviction.¹²

Chapter 831 Versus Hawaii Employment Practices Law

Both Hawaii employment practices law and the Uniform Act on Status of Convicted Persons adhere to the general principle forbidding consideration of arrests not followed by valid conviction in employment decisions. Although both laws permit the State limited consideration

11. Hawaii Rev. Stat., section 387-2.5.

12. Hawaii Rev. Stat., section 831-3.1(b).

of conviction data in employment decisions, restrictions in the two laws are not readily reconciled.

Subject to certain limitations, chapter 831, Hawaii Revised Statutes, allows the State to consider "any conviction of a penal offense" for which a jail term may be imposed if the offense is directly related to an applicant or employee's possible job performance or the applicant or holder's possible performance in the trade or occupation for which the license is sought or held.¹³ However, the State shall not consider convictions of any crime in employment or licensing decisions when considering "noncriminal standards such as good moral character, temperate habits, habitual intemperate use of intoxicants, trustworthiness".¹⁴

Despite the basic prohibition against state employment or licensing decisions based solely on a conviction, a limited few convictions automatically bar the person convicted from public employment or justify denial of a license application.¹⁵

In contrast to employment practices law, chapter 831 distinguishes between convictions, prohibiting the use or consideration of annulled or expunged convictions, convictions of penal offenses for which no jail term may be imposed, and misdemeanor convictions more than twenty years old where there has been no subsequent arrest or conviction, and permits the State to consider any penal conviction subject to imposition of a jail term that directly relates to the applicant or employee's possible job performance. For state employment and licensing purposes, the age of convictions that may be considered is not restricted. Under employment practices law, employers may inquire about and consider only convictions less than ten years old. On the other hand, private employers are not limited, as is the State, to consideration of convictions of penal offenses subject to imprisonment.

Private employers may consider convictions less than ten years old that are rationally related to the duties and responsibilities of the job. The State may consider any convictions of a penal offense of any age that directly relate to the applicant, employee, or holder's possible performance in the job applied for or for which a license is sought or held. The similar but inconsistent terminology only adds to the confusion surrounding criminal history record check issues.¹⁶

13. Hawaii Rev. Stat., section 831-3.1(b).

14. Hawaii Rev. Stat., section 831-3.1(c).

15. A conviction for an act, attempt, or conspiracy to overthrow the state or federal government bars public employment. *See*, Hawaii Rev. Stat., section 831-2(c). Similarly, an officer or enlisted member of the military who has been dishonorably dismissed or discharged from national guard may not hold state or county employment, unless pardoned by the governor. *See*, Hawaii Rev. Stat., section 121-27. In licensing decisions, a felony conviction may justify a denial of a liquor license. *See*, Hawaii Rev. Stat., section 831-3.1(a).

16. Section 831-3.1(a) states that a person shall not be disqualified from state employment or to practice a trade or occupation for which a license is required by the State solely by reason of a prior conviction of a crime. The State also is prohibited from considering the conviction of any crime in connection with noncriminal standards of good moral character, trustworthiness, etc. In contrast, subsection (b) permits consideration of any conviction of a penal offense.

Section 831-3.1(b) also mandates that the State's refusal, suspension, or revocation of any employment or license may occur only after an investigation conducted in accordance with chapter 91, Hawaii Revised Statutes, determines that the person has not been "sufficiently rehabilitated to warrant the public trust".¹⁷ Discharge from probation or parole supervision or a two-year period after discharge or release without subsequent conviction are factors to consider in determining the sufficiency of rehabilitation.¹⁸ Private employers, under section 378-2.5, Hawaii Revised Statutes, are not required to determine whether a convicted job applicant or current employee has been rehabilitated.

The restrictions imposed on the State's use of certain criminal history records in employment decisions also apply to state licensing decisions. The State's denial of a license required to participate in a trade or occupation clearly affects an individual's employment opportunities. Whether restrictions on the State's use of certain criminal records for licensing decisions conflict with employment practices law depends on the applicability of chapter 378 to licensing decisions. Although the State, as licensing agent, is not an applicant's employer, the United States Equal Opportunity Employment Commission contends that some state licensing functions may violate Title VII of the Civil Rights Act of 1964. Since Hawaii employment law specifically protects arrests and court record, where Title VII does not, an even stronger argument might be made by the Hawaii Civil Rights Commission that chapter 378 governs the State's use of arrest and court records in both employment and licensing decisions.

Although the Act allowed the State limited use of certain conviction information in hiring and firing decisions that was not granted to private employers until 1998, section 831-3.1 is no longer necessary. Its provisions overlap and conflict with the employment practices law. In some areas, it subjects the State to limitations not imposed on private employers, and in others it grants the State broader authority than private employers.

Whether some provisions of chapter 831 should be retained to protect convicted offenders in licensing decision, is uncertain. If Hawaii employment practices law is deemed to include use of criminal history record information in licensing matters, convicted persons would be sufficiently protected in licensing decisions by chapter 378. If not, some of chapter 831's provisions should be revised for uniformity and clarity, and retained in some form to provide guidelines for criminal history record checks in state licensing matters.

Dissemination and Distribution

In addition to restrictions imposed on the State's use of certain criminal history records in employment and licensing decisions, chapter 831 establishes similar restrictions on the State's distribution and dissemination of certain criminal records in connection with both employment and licensing decisions. The Act predates Hawaii laws governing the dissemination of criminal history record information as established in chapter 846, Hawaii Revised Statutes.

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17. A person deemed ineligible for civil service employment may appeal to the civil service commission. Appeal procedure for a license applicant or holder, or an employee or job applicant for a position that is not classified as civil service is not stated in section 831-3.1.
 18. Hawaii Rev. Stat., section 831-3.1(b).

Because the Act's original purpose was to restrict the use and consideration of criminal history records, its provisions governing distribution and dissemination were less significant. At present, chapter 846 establishes clear rules for dissemination of criminal history record information that make the distribution and dissemination provisions of the Act unnecessary. As discussed below, restrictions established in section 831-3.1 on the State's distribution and dissemination of certain criminal records conflict with the criminal history record information dissemination principles established in chapter 846.

In licensing and state employment matters, section 831-3.1 prohibits the State or any of its political subdivisions or agencies from distribution or dissemination of:

- (1) Records of arrest not followed by a valid conviction;
- (2) Convictions which have been annulled or expunged;
- (3) Penal convictions not subject to jail sentence; and
- (4) Misdemeanor convictions more than twenty years old where subject has had no subsequent arrest or conviction.¹⁹

Chapter 831 Versus Chapter 846, Hawaii Criminal Justice Data Center

As the State's repository for criminal history records, the Hawaii Criminal Justice Data Center is responsible for the dissemination of criminal history record information to individuals and agencies pursuant to the guidelines established in chapter 846, Hawaii Revised Statutes. The Data Center is expressly defined as a state agency.²⁰

The Uniform Act on Status of Convicted Persons, however, sets out additional restrictions on the distribution, and dissemination by the State or its agencies of certain criminal records in connection with applications for state employment or state required licenses necessary for certain occupations, professions, trade, or business. Arguably, these restrictions on the distribution and dissemination of certain criminal records apply to the Data Center as the state agency responsible for the dissemination of criminal history records.

Ordinarily, conviction information is considered public record and available for review by the general public. Section 846-9 expressly states that dissemination limitations do not apply to conviction data. On the other hand, criminal history record information, including nonconviction data, may be disseminated only to authorized individuals and agencies.²¹

19. Hawaii Rev. Stat., section 831-3.1(b).

20. Hawaii Rev. Stat., section 846-1.

21. Hawaii Rev. Stat., sections 846-9 to 846-10.

The prohibition in section 831-3.1 against the distribution, and dissemination of penal convictions not subject to jail sentence and misdemeanor convictions more than twenty years old conflicts with the doctrine that conviction records are public records available for review without restriction. Because Hawaii law governing the dissemination of criminal history record information provides that "dissemination limitations do not apply to conviction data", all Hawaii conviction data is considered a public record and should be freely accessible by the general public, including the State, as employer or licensing agent. As the central repository and a state agency, the Data Center is responsible for the dissemination of all conviction data. The restrictions on the use and dissemination of certain conviction records in section 831-3.1, however, conflict with the established principle that all conviction data is freely available for inspection by the public, and with the Data Center's responsibility to disseminate or make available all Hawaii conviction data.

Additionally, Hawaii law establishing the Data Center clearly provides that the dissemination of nonconviction data and criminal history record information (which includes nonconviction data) is prohibited. Dissemination of nonconviction data is limited to individuals or agencies authorized by statute, or individuals or agencies provided for in chapter 846 or by rule or regulation.²² Consequently, the restriction in section 831-3.1(b) on the State's distribution or dissemination of arrest records not followed by a valid conviction in state employment and licensing issues is superfluous.

Exemptions

Senate Concurrent Resolution No. 122, S.D. 1, recognized that Hawaii state laws relating to criminal history record checks have been enacted piecemeal and lack consistency. Each legislative session sees new legislation introduced seeking authority to conduct a state or national criminal history record check for employment or licensing purposes. To avoid potential conflicts with the prohibitions on the use, distribution, and dissemination of certain criminal history records in chapter 831 (and other laws), the Legislature enacted a variety of exemptions in response to requests for criminal history record checks from various groups.

Because most criminal history record checks were adopted as exceptions to section 831-3.1, State agencies that are statutorily authorized or required to conduct criminal history record checks for employment or licensing decisions are largely unaffected by its constraints. Section 831-3.1 specifically states that the restrictions do not apply to the Department of Human Services' denials of licenses under chapter 346, denials of employment as a staff member of a youth correctional facility, correctional facility or as an employee of detention or shelter facility.

Other agencies exempt their statutorily required criminal record checks from chapter 831 restrictions in the statute that mandates them to conduct the checks. For example, section 846-43 requires employees of the Department of Education, teacher trainees, and county employees who

22. Hawaii Rev. Stat., sections 846-9 to 846-10.

work in close proximity to children to undergo a "criminal history check" but provides that the Department of Education and the counties "shall be exempt from section 831-3.1."²³

Although most state agencies authorized or required to conduct criminal history record checks for employment or licensing purposes have been exempted from the provisions of chapter 831 that restrict the use, distribution, and dissemination of certain criminal records, there is at least one exception. The Department of Health (DOH) is mandated to conduct state and national criminal history record checks for operator and employees of adult foster homes and developmental disabilities domiciliary homes,²⁴ but apparently is not exempted from the restrictions of section 831-3.1. It is unclear how the restrictions established in chapter 831 affect DOH's ability to conduct the required criminal history record checks or the Data Center's ability to disseminate certain criminal history records to DOH.

Given the existing parameters on the dissemination of criminal history record information in chapter 846 and the limitations on an employer's ability to consider a job applicant or employee's criminal convictions in chapter 378, additional restrictions in chapter 831 may hinder the effective performance of both the Data Center and any state agency not exempt from chapter 831 but required to conduct state criminal history record checks in connection with state employment and licensing. Additionally, since most state agencies required to conduct state criminal history record checks are exempt from the restrictions of section 831-3.1, its usefulness is highly questionable.

Public Service Law: Chapter 78, Hawaii Revised Statutes

Hawaii public service law provides that no applicant for employment by the State or any political subdivision or agency thereof shall be required to answer, orally or in writing, whether the applicant has been arrested.²⁵ Any questions concerning criminal convictions, including the arrest and circumstances related to the conviction, are permitted.²⁶ This law does not affect licensing decisions by the State, it applies only to applicants for State employment. It does not apply to private employers. In considering the issues raised by this law, the legislature should note that section 78-2.5 is scheduled to be repealed July 1, 2002, by Act 253, Session Laws of Hawaii 2000, the civil service reform law.

Section 378-2 prohibits any employer, including the State, from basing hiring and firing decisions on "arrest and court record". Further, section 831-3.1 prevents the State's use, distribution, and dissemination of "records of arrest not followed by a valid conviction" in connection with applications for state employment (as well as license applications). The prohibition in section 78-2.5 against asking a state job applicant whether or not the applicant has been arrested is unnecessary.

23. Hawaii Rev. Stat., section 846-43(g).

24. Hawaii Rev. Stat., section 333F-22.

25. Hawaii Rev. Stat., section 78-2.5.

26. Hawaii Rev. Stat., section 78-2.5.

Section 78-2.5 allows the State to inquire about a job applicant's conviction record, including the arrest and other circumstances related to the conviction. The State's authority to consider any conviction, however, is not expressly established in section 78-2.5.

Public service law gives the State, as an employer, apparently unrestricted authority to ask questions about a job applicant's conviction record. It provides no express limitations on questions concerning convictions: no requirement that convictions must be within the last ten years, subject to incarceration, rationally related to the duties and responsibilities of the job or directly related to the applicant's possible job performance; or that a conditional job offer must be extended prior to inquiry and consideration. This broad authority conflicts with the limited authority to consider certain rationally related convictions granted to employers in Hawaii employment practices law and the state's authority to consider convictions of penal offenses directly related to possible job performance established in section 831-3.1.

The unconditional authority section 78-2.5 gives the State to inquire about a job applicant's criminal convictions conflicts with the restrictions established by Hawaii employment practices law, as well as the Uniform Act on Status of Convicted Persons, and is gratuitous.

In conclusion, to avoid employment discrimination liability and uphold the rights of convicted persons, the State must make employment and licensing decisions within the restraints of several related, and, at times, conflicting laws. A comprehensive review of these laws is needed to provide uniformity in understanding, application, and enforcement.

Chapter 6

NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY AND CRIMINAL JUSTICE INFORMATION 1998-2000

Introduction

Any change to existing Hawaii law relating to criminal background checks, including laws that establish dissemination, permissible use, and consideration of criminal history records for noncriminal justice purposes, should include a thorough analysis of existing law combined with a careful balance of related public policy issues. A National Task Force on Privacy, Technology and Criminal Justice Information (Task Force) recently concluded the Millennium Privacy Project, a two-year study on related issues in connection with federal and state criminal history record information. The findings and recommendations of the Task Force, briefly discussed below, provide useful guidelines for the Legislature. Legislators may want to review the report of the Task Force for more detailed information.

The National Task Force

SEARCH, the National Consortium for Justice Information and Statistics, is a nonprofit state criminal justice support organization created by and for the states. A membership group comprised of one gubernatorial appointee from each state, the District of Columbia, Puerto Rico, and the Virgin Islands, governs SEARCH. Members are primarily state level justice officials responsible for policy issues relating to criminal history information. SEARCH promotes the effective and appropriate use of information, identification, and communications technology for states and local criminal justice agencies.

In 1998, SEARCH initiated a two-year project relating to the collection, use, and dissemination of criminal justice information. The project was funded by and operated under the auspices of the Bureau of Justice Statistics in the Office of Justice Programs at the United States Department of Justice. SEARCH established a Task Force of academics, criminal justice officials (including representatives from law enforcement, the courts, corrections, and prosecution), private sector compilers and resellers of criminal justice record information, the media and the criminal justice user community. The project resulted in a comprehensive report, describing existing law and policy for criminal justice record information that includes recommendations for new criminal justice information law and policy; a survey of public opinion on privacy and criminal justice information; and a national conference held in Washington, D. C., May 31 and June 1, 2000, to discuss developing criminal justice information privacy issues.¹

1. Bureau of Justice Statistics, U.S. Department of Justice, Draft Report of the National Task Force on Privacy, Technology and Criminal Justice Information (May 2000) at 12-13.

The Study

Although "criminal justice information" includes criminal history record information; criminal intelligence information; criminal investigative information; disposition information; identification record information; nonconviction information; and wanted person information, the Task Force focused on complex issues of access to criminal history record information, specifically privacy concerns arising from the increased use of criminal history record information for criminal justice and noncriminal justice purposes. It analyzed emerging policies and principles relating to the collection, use, and disclosure of arrest and convictions records (criminal history record information).

The Task Force, and related National Conference on Privacy, Technology and Criminal Justice Information, studied the growing debate over acceptable access to criminal history record information in the modern information environment. Advances in technology are breaking down traditional barriers to access and de facto privacy protections of arrest and conviction records. Noncriminal justice agencies and the private sector have been granted greater access to national criminal history records in recent years to screen employees or applicants jobs working with vulnerable populations or in industries allowing access to large sums or money or sensitive areas such as airports and national security facilities. Although public opinion generally supports background screening for public safety purposes, the increased access also raises concerns about the potential erosion of constitutional rights and privacy expectations.²

The Task Force identified change drivers that are shaping the new information environment, including:

- (1) Public concern over threats to personal privacy;
- (2) The information culture that has created a demand for and market in information, including criminal justice information;
- (3) Information, identification, and communication technology changes;
- (4) Criminal justice system integration that creates new and powerful information resources;
- (5) More cooperative, criminal justice systems operating as "business models";
- (6) Noncriminal justice demand;
- (7) Commercial compilation and sale of criminal history record information;

2. *Id.* at 8.

- (8) Government statutes and initiatives providing information quicker, cheaper to more users;
- (9) Juvenile justice reform; and
- (10) Automation of criminal justice intelligence systems that are creating detailed personal profiles for law enforcement use.

In particular, the Task Force stated that the "persistent and ever-increasing demand by noncriminal justice users to obtain criminal history record information has had a pervasive and important impact on the availability of information."³ The Task Force identified two driving forces behind the continuing increase in demand for criminal history record information for noncriminal justice purposes, particularly by employers and volunteer organizations:

- (1) A desire to make informed hiring decisions that assess potential risk prospective employees may pose to the hiring organization, its employees, or its clients; and
- (2) A desire to minimize potential legal exposure that could result from hiring individuals without conducting a criminal history check.⁴

In discussing negligent hiring and employer liability issues raised by criminal history record checks, the Task Force noted that increases in criminal background checks, particularly for jobs not considered "positions of trust" or not serving vulnerable populations, raise additional policy issues concerning the successful reintegration of former offenders into society, including the risk that they will be unable to get jobs and "consigned to a permanent underclass."⁵

Task Force Recommendations

In adopting recommendations for the handling of criminal history record information, the Task Force concluded that the scope of issues pointed to a need for the establishment of an institutionalized entity responsible for making considered public policy recommendations with respect to all issues associated with the increasing demand for criminal justice information and the privacy risks associated with collection and use of the information.

As its initial recommendation, the Task Force recommended the statutory creation of a body for a term of three years that would:

- (1) Build upon the work of the Task Force, considering information and privacy issues;

3. *Id.* at 8.

4. *Id.* at 116.

5. *Id.* at 118.

- (2) Consider and make policy recommendations to federal and state legislative, executive, and judicial branches of government; and
- (3) Consider information and privacy issues concerning criminal justice information, including criminal history record information.

Secondly, recognizing that many state laws governing noncriminal justice access and use of criminal history record information were enacted during the 1970s and 1980s and that the demand for this information by noncriminal justice users in today's new "information age" continues to increase, the Task Force recommended the development of a new generation of criminal history record information and privacy law and policy, which considers public safety, privacy, and government oversight interests. "This law and policy should be so broad in scope, so as to address the collection, maintenance, use, and dissemination of criminal justice record information by law enforcement agencies, including state central repositories and the FBI, the courts and commercial compilers and reseller of criminal justice information."⁶

Of particular interest is the Task Force's explicit recommendation urging the development of a new generation of confidentiality and disclosure law and policy for criminal history record information. Any new policy should take into account the type of criminal history record information; the extent to which the database contains other types of criminal justice information (victim and witness information or intelligence or investigative information) and sensitive personal information; the purpose for the intended use; and the redissemination by downstream users.⁷

The Task Force's Commentary on the recommendation for the development of new law and policy related to the confidentiality and disclosure of criminal history record information may provide some guidelines for consideration of issues related to criminal history record checks and the dissemination and use of criminal history record information. Specifically, the Task Force commented that:

- (1) The source of the criminal history record information (e.g., court system, police records, or central repository) should not play a part in assessment of privacy risk. Whether the source is a central repository or court should not effect privacy risk to individual.
- (2) However, the type of criminal history information is more likely to have an impact on privacy:
 - (a) Juvenile justice records should be treated differently than adult CHRI; and
 - (b) Witness and victim information also requires different treatment.

6. *Id.* at 161.

7. *Id.* at 163.

- (3) The purpose of the intended use should play a part in developing a privacy policy. Relevant questions concerning use include:
- (a) Should the traditional distinction between criminal justice uses and noncriminal justice uses be continued?
 - (b) Should there be any distinction among criminal justice uses?
 - (c) Should governmental, noncriminal criminal justice be treated differently than private, noncriminal justice uses?
 - (d) Should national security use continue to receive a high priority? Is there a meaningful distinction between employment and licensing uses?
 - (e) Should the identity (as opposed to the purpose) of the prospective user be a criterion for imposing restrictions?⁸

Although the Task Force recommended that new criminal justice privacy law and policy should continue to distinguish between conviction information and nonconviction data, it also specifically recognized that disclosure of nonconviction information records may be appropriate in certain instances.⁹ The distinction between conviction information and nonconviction information was described as a "cornerstone of criminal history record privacy policy".¹⁰

The recommendation to protect nonconviction information more stringently than conviction records was based on:

- (1) The presumption of innocence attached to nonconviction records; and
- (2) The likely frustration of the policy of offender rehabilitation and the disparate impact on racial minorities that would result from dissemination of nonconviction records.

The example most frequently cited by Task Force members as an appropriate disclosure of nonconviction information involved sexual offenses against young children and rape arrests where the victim failed to testify.¹¹ Members felt that parents would "want to know that a prospective child care worker had been arrested for child molestation, even if this individual was never convicted."¹²

Other recommendations urged the use of fingerprints to support and access criminal history record information based on enhanced data quality and accuracy, sealing or expunging

8. *Id.* at 165-166.

9. *Id.* at 182.

10. *Id.*

11. *Id.* at 182-183.

12. *Id.* at 183.

criminal history record information when the record no longer serves an important public safety or other public policy interest, treatment of juvenile offender records in the same manner as adult records where the record would be a felony or violent misdemeanor if committed by an adult where required by public safety considerations, and limiting or prohibiting the combining of different types of criminal justice record information into databases that are accessible by noncriminal justice user.

The voluminous report submitted by the Task Force, after two years of review and analysis, reflects the complexity of issues surrounding the dissemination and use of criminal history record information for both criminal justice and noncriminal justice purposes. Policy decisions on the appropriate dissemination and use of criminal history record information are central to criminal history record check laws.

Hawaii laws on criminal history record checks have been enacted piecemeal and lack consistency. Related laws that govern the dissemination and use of criminal history record information are confusing, overlapping, and at times, conflicting. Despite the unsettled state of the applicable laws, each legislative session continues to see new requests for legislation authorizing criminal history record checks for employment and licensing screening. Before authorizing or requiring additional criminal history record checks, the Legislature should consider all related fundamental issues, balancing public safety with privacy expectations.

Although this study points out inconsistencies and conflicts in Hawaii law and provides recommendations for change, a comprehensive review of policy and law is desirable, in light of the patchwork approach used over the years, changes in technology, unending demand for criminal history record checks by a wide variety of public and private requestors, and the growing commercialization of government records. Areas that the Legislature should consider range from technical issues that call for statutory revision to provide consistent terminology and resolve conflicts between existing laws, to broad policy issues that require a consideration of an individual's privacy rights in connection with the dissemination and use of criminal history record information. A comprehensive review of all the interrelated issues concerning criminal history record checks presents the Legislature with the opportunity to develop a new generation of law and policy relating to the effective and appropriate dissemination and use of criminal history record information, balancing the public's need to know with the record subject's right to privacy.

Chapter 7

OPEN RECORDS

Introduction

Senate Concurrent Resolution No. 122, S.D. 1 (2000), requested the Bureau to address the issue of making Hawaii an "open records" state that would allow the general public, including noncriminal justice agencies, unrestricted access to state nonconviction information. Open records or freedom of information laws provide that government records are available for inspection by the public unless federal or state law specifically exempts them. Generally, an open records law establishes access to government records, making them available for dissemination without restriction. Additional laws often modify public access or availability by exempting certain records or limiting the permitted use of a public record.

According to this philosophy, open access to government records is "fundamental to the survival of a democratic government" and "permits citizens to watch over the workings of government".¹ Public access to government records gives citizens information to make decisions about government programs, legislative and regulatory options, and political candidates. It promotes confidence in the political system. It is a resource that supports economic development. Access to public records helps find missing people, tax evaders, estate heirs, fund beneficiaries, court witnesses, and delinquent child support obligors.

Public access, however, also raises significant privacy concerns. Technologies exist today that make access to public records easy and may reveal information that some individuals consider private. In the past, even those government records that were considered public records provided a certain level of privacy simply because they were hard to access or use. Today, state computerized records make these protections less meaningful.

All states and the federal government have enacted some form of open records or freedom of information law to ensure public access to government records.² This does not mean that criminal history record information is publicly available in all states, but some types of information are more available than before.³ Open records laws often have a variety of exemptions providing that certain categories of information are not available for public inspection. Of the recently enacted state public record legislation, a significant portion concerns exemptions.⁴ More than half of the states exclude criminal justice information from their freedom of information laws.⁵ States have a wide variety of law authorizing or prohibiting

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1. Rita Thiemert, *State Public Records Privacy*, Vol. 8, No. 30, NCSL LegisBrief (June/July 2000).
 2. *Id.*
 3. Bureau of Justice Statistics, U.S. Department of Justice, *Compendium of State Privacy and Security Legislation: 1999 Overview* (July 2000) at 8.
 4. Thiemert, *supra*, n.1.
 5. Generally, access to some types of criminal history records by noncriminal justice governmental agencies and private entities has increased for licensing and screening of applicants for sensitive positions involving

access by various types of groups or individuals (criminal justice agencies, governmental noncriminal justice agencies, and private agencies or individuals) to various types of information (conviction, nonconviction, and current arrest information).

Open Records in Other States

In 1995, the Hawaii Criminal Justice Data Center conducted a survey that asked states to describe their dissemination policy for noncriminal justice use as either: open records,⁶ conviction only, or closed records.⁷ Although fourteen states classified their noncriminal justice dissemination policy as "open records", the survey indicates that very few states are truly "open records" states with no restriction on dissemination of criminal history records.

Many so called open records states require written consent or fingerprints of the record subject, while others allow access by noncriminal justice agencies only when authorized by state law. Some states that are often cited as an open records state exclude criminal history record information from their open records or freedom of information law. Other states restrict the use of criminal history record information.

Few states are truly "open records" states for the purposes of both access and use of criminal history record information. Unrestricted access to information that an employer may not lawfully use is essentially meaningless. Federal and state law generally prohibits use of nonconviction data for other than criminal justice purposes. The United States Equal Opportunity Employment Commission (EEOC) generally prohibits employers from asking any questions about arrests not followed by a valid conviction, even though "arrest and court record" is not protected under Title VII of the Civil Rights Act of 1964. The EEOC has found that use of nonconviction data adversely impacts certain minorities and any employment decision based solely on nonconviction data is likely to subject an employer to liability for employment discrimination.

Some states expressly prohibit discrimination in hiring and firing decisions based on an individual's criminal history record. For example, although Wisconsin is often cited as an "open records" state, that state's fair employment law limits the use of criminal history record information, i.e., employers can see anything as long as they don't use it improperly. Similar to Hawaii employment practices law, Wisconsin's fair employment law limits use by establishing that discrimination in employment or licensing decisions based on a criminal record or pending charge is prohibited. Unlike Hawaii, Wisconsin further provides that it is not discrimination to decline to hire or license a person based on the person's arrest or conviction that is substantially related to the circumstances of the particular job or licensed activity.

public safety, supervision of children, or custody of valuable property. Bureau of Justice Statistics, U.S. Department of Justice, Compendium of State Privacy and Security Legislation: 1999 Overview (July 2000) at 16.

6. Open records was defined to mean that both conviction and nonconviction information is disseminated without restriction. Hawaii Criminal Justice Data Center, Survey on Dissemination Policies, July 1995.
7. Neither conviction nor nonconviction information is freely disseminated in a closed records state. *Id.*

In contrast, Florida makes all state generated criminal history records available by any member of the public for any purpose, upon payment of the applicable fees.⁸ All arrests in the state repository are released to the public, including arrests without dispositions. Only sealed and expunged records are exempted under Florida law.⁹

Although states often permit consideration of relevant convictions, use of nonconviction data in employment and licensing determinations is generally forbidden. By prohibiting use of nonconviction data, states acknowledge that an arrest, by itself, does not establish an individual's guilt and is of little probative value. Because minorities have suffered proportionately more arrests than others, use of nonconviction data is likely to lead to employment discrimination and reduce the job opportunities for many minorities. As a result, many states completely ban inquiries and consideration of nonconviction data in employment or licensing decisions. This reasoning restricting use of nonconviction data also lends support to continued restrictions on the access to nonconviction data.

State of "Open Records" in Hawaii

Under the Uniform Information Practices Act, chapter 92F, Hawaii Revised Statutes, government records must be available for public inspection and duplication during regular business hours, unless disclosure is protected by federal or state law.¹⁰ Chapter 846, Hawaii Revised Statutes, regulates dissemination of Hawaii criminal history record information and follows the federal pattern of distinguishing between conviction records and nonconviction records.

Chapter 846 restricts dissemination or disclosure of Hawaii nonconviction data. Because state law protects disclosure of nonconviction data, it is not a government record that is open to disclosure in Hawaii and access is generally prohibited. For noncriminal justice purposes, nonconviction data is available only to government agencies authorized to conduct employment suitability investigations and to individuals and agencies authorized by statute.

On the other hand, section 846-9 expressly states that "dissemination limitations do not apply to conviction data". Because Hawaii conviction data is not protected from disclosure by law, it is considered a public record and is freely available for inspection by the general public at public access computer terminals maintained by the Hawaii Criminal Justice Data Center. For

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8. Noncriminal justice recipients of criminal history records are (1) agencies and organizations statutorily authorized to receive state and FBI information, and (2) unauthorized agencies and organizations who receive Florida criminal history records pursuant to Florida's public records law. Typically, requests from unauthorized agencies and organizations are "name only" requests filed to employment screening. Fingerprint will be compared if submitted by any unauthorized requestor. For agencies and organizations authorized by states information is requested primarily for employment checks, but also licensing bureaus, universities, state commissions, and state lottery agency. Bureau of Justice Statistics, U.S. Department of Justice, Draft Report of the National Task Force on Privacy, Technology, and Criminal Justice Information (May 2000) at 43.
 9. Email from Martha Wright, Chief of User Services Bureau, Florida Department of Law Enforcement, to writer (September 20, 2000).
 10. Hawaii Rev. Stat., section 92F-13(4).

purposes of public access to government records, Hawaii is an "open records" state for Hawaii conviction information.

It must be remembered that Hawaii employment law governs the use of criminal history record information without regard to its availability. Unrestricted access does not mean that an employer may use or consider conviction data without restrictions. An employer may consider only certain convictions, subject to limitations. The permitted access and use of Hawaii conviction information illustrates how open records access may be limited by state law restricting its use. Anyone can see Hawaii conviction records, but employers are still limited in their ability to use conviction information in hiring and firing decisions. Unrestricted access is of little significance if use or consideration of the information is prohibited or unreasonably restricted.

Any legislation to make Hawaii a true open records state, granting unrestricted public access to conviction data and nonconviction data would be of little significance without dramatic changes to Hawaii employment practices law. Currently, any employment decision made because of an individual's arrest and court record is unlawful employment discrimination. Any meaningful change to this law that expands an employer's permitted use of arrest and court record is likely to be challenged and face stiff opposition. Without changes in the permitted use of criminal history record information, unlimited access is of little importance, as employers will simply be able to see a greater amount of information that they cannot legitimately use.

Summary

Although statutory revisions that would promote uniformity and clarity in the existing laws governing both access and use are desirable, the current law governing access to criminal history records generally provides levels of access that balance the public's right to know with a record subject's right to privacy. Currently, Hawaii is an "open records" state for Hawaii conviction data. Conviction data is freely available to the general public, including public and private employers. Conviction information on registered sex offenders living in Hawaii is also available to the public without restriction in the Hawaii Sex Offender Registry (Registry). As a result, the public already has unrestricted access to Hawaii conviction data and conviction information on registered sex offenders living in Hawaii. The current access to Hawaii conviction data and sex offender information is sufficient for most public and private employers.

In considering making Hawaii an "open records" state for purposes of access to or availability of Hawaii criminal history record information, the recommendations in the recent draft report of the National Task Force on Privacy, Technology and Criminal Justice Information provide strong support for continuing the distinction between conviction data and nonconviction data. Any changes in the law that would create public access to nonconviction data should be carefully contemplated. Because nonconviction data does not establish an individual's guilt, adversely impacts certain minorities, and has little probative value, the Bureau recommends restrictions on access to Hawaii nonconviction data for other than criminal justice users. It bears repeating that, for purposes of criminal history record checks for noncriminal justice employment and licensing screening, discussions on issues relating to the access and availability

of criminal history record information should always include the related impact of Hawaii law governing an employer's use of criminal history record information. In employment and licensing decisions, access to criminal history records that may not be considered is pointless.

Chapter 8

GUIDELINES FOR EMPLOYMENT AND LICENSING SCREENING

Introduction

The Legislature requested the Bureau to provide a "framework for determining the classes of employees or types of industries that should be subjected to criminal history record checks."¹ Congress directed a similar request to the United States Attorney General (Attorney General), which resulted in the extremely useful "Guidelines for the Screening of Persons Working with Children, the Elderly, and Individuals with Disabilities in Need of Support (Guidelines)."²

Seeking to protect one of our most vulnerable populations, Congress passed the National Child Protection Act (NCPA), authorizing states to conduct national criminal record checks for individuals providing care for children.³ The Violent Crime Control and Law Enforcement Act of 1994, amended the NCPA, and expanded the states' authority to authorize criminal history record checks for providers of care for not only for children, but also for the elderly and disabled; it also directed the Attorney General to "develop guidelines for the adoption of appropriate safeguards by care providers and by States for protection children, the elderly, or individuals with disabilities from abuse."⁴

On May 8, 1998, President William Clinton announced the release of the Guidelines, hailing them as an important step in detecting potential abusers before they can do harm, and offering help to organizations that screen care givers and provide recommendations to states to strengthen their efforts in preventing caretaker abuse and neglect.⁵ The Guidelines summarize

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1. Senate Concurrent Resolution No. 122, S.D. 1 (2000).
 2. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-222.
 3. Pub. L. No. 103-209. In considering criminal history record check issues relating to vulnerable populations, it is important to remember that the National Child Protection Act encouraged states to determine whether a provider has been convicted of a crime bearing upon the provider's fitness to care for children, the elderly, or individuals with disabilities. Consideration of nonconviction data was not required or encouraged in suitability determinations.
 4. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-222.
 5. Office of Justice Programs, U.S. Department of Justice, Press Release (May 9, 1998). The American Bar Association (ABA) prepared the Guidelines under a grant from the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice (OJJDP). OJJDP was established by President and Congress in 1974 is located within the Office of Justice Programs of the U.S. Department of Justice. The Guidelines are based on an earlier project managed by the ABA Center on Children and the Law (Center): Effective Screening of Child Care and Youth Workers. The project reflects the collaborative efforts of an interdisciplinary staff and advisory boards made up of service providers, experts, and advocates seeking to prevent abuse of children, elderly, and the disabled. It is the culmination of several years of work. Federal, state, and local agencies and organizations, including the U.S. Justice Department's Child Exploitation and Obscenity Section, the Bureau of Justice Statistics and OJJDP's Missing and Exploited Children's Divisions worked with the Center to develop the Guidelines.

federal and state laws, providing specific suggestions for employment screening of employees and volunteers who care for the members of our society most susceptible to abuse. The Guidelines provide this population with additional protection from abuse by those responsible for their care.

It is the Bureau's belief that the Guidelines offered by the Attorney General in response to the mandate of the Violent Crime Control and Law Enforcement Act of 1994 provide a comprehensive response to the Legislature's request for guidelines on determining who should be subjected to criminal history record checks. Significantly, the Guidelines do not require criminal record checks for all care providers. Instead, they offer specific suggestions for screening applicants that provide an appropriate level of screening based upon specific situations. They present a logical decision model to guide the screening decisions of individuals and organizations, including model forms to be used in the employment process. This chapter presents a summary of the Guidelines. Because of the wealth of information presented in the Guidelines, interested persons are strongly encouraged to review the report in its entirety at ojjdp.ncjrs.org/pubs/guidelines/contents.html.

Purpose of Screening

Job applicants for sensitive positions should be screened to identify and eliminate potential abusers. In seeking to protect a vulnerable population from potential abuse, a number of states, groups, and coalitions have asked: How much screening should be done and who should decide? Volunteers or employees? Individual service providers or group and institutional providers? What kind of screening? Federal and state criminal history record checks? State central child abuse registry checks? In which states? Who has access to these information data bases? What kinds of limits should be placed on access to this information? Should these decisions be made at federal, state, or local levels? What determinations should be left to individual organizations? Should an individual be allowed to work or volunteer before the screening is completed? Who pays the screening cost?

The Guidelines are an excellent source of information to answer those questions. They give those who make screening decisions a foundation upon which to base their decision.⁶

6. In discussing the different types of information held by government agencies that may be used for screening, such as criminal history records or state central abuse records, the Guidelines note that these information systems were initially set up for purposes other than employment screening. Because a determination of the appropriate uses of these information compilations, including criminal history records, often involves conflicting public policies--the protection of children, the elderly, and individuals with disabilities from potentially abusive individuals, the rehabilitation of offenders, due process issues, and privacy interests, the resulting wide variety of state laws governing the type and scope of require screening is not unexpected. *See*, Office of Juvenile Justice & Delinquency Prevention, U.S. Department of Justice, *Guidelines for the Screening of Persons Working with Children, the Elderly, and Individuals with Disabilities in Need of Support* (April 1998) at 7.

Basic Principles of Screening

In recognition of states' interest in preventing the abuse of children, the elderly, and the disabled and reducing the related costs of investigations, prosecutions, and treatments, the Guidelines encourage states to analyze and amend or enact appropriate screening legislation. At a minimum, states are encouraged to require basic screening practices, statutorily authorize criminal record checks, and provide abuse prevention education and training.⁷

Other suggestions include the use of state regulatory powers to identify employers or volunteers unsuited for positions caring for vulnerable populations. Specific suggestions include:

- Increased role of state licensing agencies;
- Development of incentives for insurance companies to expand their role in coverage for qualified entities providing care, with insurance companies taking the lead in addressing concerns regarding suitability of persons working with vulnerable populations; and
- Implementation of statutorily required reports from employers noting employee or volunteer termination based on inappropriate conduct towards vulnerable population.⁸

Guidelines for Developing Screening Policies

Levels of Screening

Agencies or organizations should adopt a screening policy that addresses these issues, and may include a criminal history record check:

- Statements on minimum required screening standards;
- Guidelines on when more extensive screening practices should be used;
- Provisional hiring policies;
- Guidelines on how to assess screening information received;
- Maintenance and dissemination of background screening records; and
- Standards for working with vulnerable populations.

7. *Id.* at 10.

8. *Id.* at 13-14.

Applicants should be advised of the screening policy, and all applicants working with or near vulnerable populations should be subject to basic screening, to include:

- A comprehensive application form with a signed statement;
- Thorough personal interview that examines past employment and other indicators of potential problem behavior;
- Reference checks from past employers and personal contacts; and
- Confirmation of education status, where appropriate.

Where additional screening practices are appropriate, the Guidelines present a "decisionmaking model" to help organizations make this determination.

Decisionmaking Model

To assist states and organizations to develop a screening policy, the Guidelines present a decisionmaking model that provides a framework for deciding who should be subject to what level of screening, including criminal history record checks.⁹ Agencies and organizations should review their job categories and the tasks, as well as the potential harms, before deciding on the level of screening needed for each position. The model presents three basic steps: the assessment of triggers; evaluation of intervenors to decisionmakers; and an analysis and selection of screening practices.

- (1) Assessment of triggers: the setting, client contact, and special considerations:

Setting considerations:

- Presence of others;
- Who are others present;
- Monitoring and supervision of worker;
- Nature of worker's involvement with client population and agency; and
- Physical location of contact.

Contact considerations:

- Duration;
- Frequency and length of relationship; and

9. *Id.* at 16.

- Type of contact.

Special considerations

Are there any special circumstances that should be considered in the hiring or firing decision? For example, the vulnerability of the individuals served: an impaired ability to community impaired because of age, infirmity, life history or other reason increases vulnerability to abuse. Do any state laws or regulations require federal or state criminal history record checks for licensing or certification?

(2) Evaluation of intervenors to decisionmaking -- items that may limit or affect screening:

- Unavailable or inaccessible information -- criminal history record check not is authorized;
- Unexpected absences or departures -- an immediate need for staff intervenes in screening decisions;
- Liability concerns -- state or federal law protects employees from certain questions, or negligent hiring suits when clients injured by employee or volunteer;
- Presence of other risk reduction measures -- training programs or level of supervision; and
- Financial or human resources available for screening.

(3) Analysis and selection of screening practices:

A completion of steps 1 and 2 may indicate more than basic screening is warranted. Repeated one on one contact occurs between worker and child or dependent adult requires supplemental screening which might include:

- State or federal criminal history record check;
- Confirmation of education status;
- Motor vehicle record check;
- Central child or dependent adult abuse registry check;
- Sex offender registry check;

- Home visit;
- Psychological testing;
- Alcohol or drug testing; and
- Psychiatric history check.

Results of Screening

Agencies are also encouraged to have written policies that detail how information obtained in screening procedures is used. They are urged to complete the screening process before hiring an individual whenever possible. Otherwise, agencies should offer conditional employment, pending results, and restrict the employee to supervised situations until screening is completed. The Guidelines suggest a minimum standard providing that "automatic disqualification of a potential worker is appropriate when the screening results indicate that an individual, as an adult, perpetrated any crime involving a child or dependent adult, regardless of how long ago the incident occurred, or any violent crime within the past ten years."¹⁰

Disqualification based on other crimes or questionable behavior should involve consultation with appropriate professionals and consideration of:

- The relationship between the incident and job sought;
- Applicant's employment or volunteer history before and after the incident;
- Rehabilitation efforts;
- Likelihood that the incident would prevent applicant from performing job consistent with the safety and welfare of the population served by the agency;
- Circumstances and/or factors indicating the incident likely to be repeated;
- Nature, severity, number, and consequences of incidents;
- Circumstances of incident, including contributing societal or environmental conditions;
- Applicant's age at time of incident; and
- Time elapsed since the incident.¹¹

10. *Id.* at 15.

11. *Id.* at 15-16.

Interested parties should heed two caveats given in the Guidelines: First, suitability screening should supplement, not substitute for, an evaluation of skill development or competence. Second, all screening practices have limitations. A recognition of those limitations suggests post hiring practices and prevention procedures are highly desirable.

Conclusion

Employment and licensing screening is recognized as a permissible noncriminal justice use of criminal history record information. Criminal history record checks are acknowledged as a useful screening tool for certain jobs and licenses related to providing care for children, the elderly, and the disabled. Recognizing that positions most often subject to criminal history record checks involve working with this vulnerable population, this study has focused on criminal history record checks for those positions. The Bureau reminds readers, however, that criminal history background checks are also used to screen job and license applicants for other sensitive positions that involve custody or supervision of valuable property, sensitive information or large amounts of cash, or public safety.

State agencies and organizations that care for children, the elderly, and the disabled, must develop effective screening procedures to determine employment or licensing suitability. For positions that present a higher risk of potential abuse, authorized or mandatory state and federal criminal history record checks may be justified. The Guidelines for Screening of Persons working with Children, the Elderly, and Individuals with Disabilities in Need of Support is a valuable resource to help state agencies and organizations determine which positions should be subject to additional background screening that may include a state and/or federal criminal history record check. The report also includes as appendices a number of informative sample forms and suggestions on useful posthiring practices, including staff training, written organizational policies on abuse by staff, on the job supervision, and monitoring.

The Bureau recommends that state agencies that make employment and licensing decisions concerning the suitability of applicants for positions to work with children, the elderly, and the disabled adopt the decisionmaking model proposed by the Guidelines. The decisionmaking model provides a useful framework for deciding what positions should be subject to criminal history record checks as part of any employment or licensing screening. Agencies should conduct the recommended review of positions and tasks (including license applications) and potential for harm as a prelude to adopting written screening policies that include criminal history record checks.

Although the Guidelines were adopted to address the screening of persons who work with children, the elderly, and the disabled, the Bureau believes that the Guidelines' recommendations can be easily adapted to screen applicants for other sensitive positions.

Chapter 9

SUMMARY

Introduction

Senate Concurrent Resolution No. 122, S.D. 1 (2000), directed the Bureau to conduct a study of the issue of criminal history record checks. Essential to a review of the issues is an understanding of just what is a criminal history record and a criminal history record check. Conversations with a number of individuals indicated that "criminal history records" and "criminal history record check" mean different things to different people. Understanding of the subject of "criminal history record checks" issues is clouded by the lack of consistency in terms that refer to an investigation of an individual's criminal history. Laws establishing the dissemination and use of criminal history record information use different terminology. Laws authorizing criminal history record checks are similarly inconsistent. Key terms used in Hawaii law are discussed below.

The Bureau reviewed federal and state laws relating to criminal history record checks for the noncriminal justice purposes of employment and licensing. The effectiveness of a criminal history record check is determined in part by what criminal history records are available and accessible for review. Federal and state laws determine the availability of criminal history records.

The unrestricted availability of any or all of an individual's criminal history record information does not guarantee that an employer, public or private, can inquire about or consider that information. Public and private employers must remember that their use of this information in hiring and firing decisions is subject to constraints in Hawaii's employment practices law and Title VII of the Civil Rights Act of 1964.

The State and its political subdivisions are subject to additional restrictions on the use, distribution, and dissemination of certain criminal records in state employment and licensing matters. These additional restrictions do not affect private employers.

In Hawaii, there is no uniform understanding of what is meant by a criminal history record check. Although Hawaii law authorizes a number of criminal history record checks, there is no standard definition. Some authorized criminal history record checks require state checks, while other require national and state checks. Some require submission of the person's fingerprints, while others check only for the same name. Some checks appear to require a check of conviction data only. If this is a correct reading of those statutes, such statutory authorization is unnecessary. Current Hawaii law already allows employers to access and use conviction data, subject to certain restrictions. No change in the law is required to conduct a criminal history record check of Hawaii conviction records. Overall, however, the laws relating to the access and use of criminal history record information, when considered together, are often confusing and inconsistent, overlapping in some areas and conflicting in others.

A summary overview of the existing state of the law is as follows.

Definitions

- There is no uniform definition of "criminal history record check" in Hawaii law.
- Other terms used in connection with criminal history record checks are not consistent and may even be conflicting.
- Hawaii law governing the dissemination of criminal history record information, chapter 846, Hawaii Revised Statutes, determines what records are Hawaii criminal history records available or accessible.
- Hawaii employment law, chapter 378, Hawaii Revised Statutes, determines how criminal history records may be used in employment decisions.
- Hawaii dissemination law defines "criminal history record information" to include information on arrests where the individual was not convicted and conviction information.¹
- Hawaii dissemination law defines "nonconviction data" to mean arrest information without a disposition more than one year after arrest, and includes acquittals and dismissals.²
- Hawaii dissemination law establishes that there are no limits on dissemination of conviction data, but does not define the term.
- Hawaii employment practices law defines "Arrest and court record" to include information about an individual having been arrested or convicted.³
- Hawaii employment practices law defines "conviction" to mean an adjudication by a court competent jurisdiction that the defendant committed the crime, and provides that an employer may examine convictions not older than ten years old.⁴

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1. Hawaii Rev. Stat., section 846-1. Intelligence or investigative information, identification information that does not indicate involvement in the criminal justice system, and information from the offender-based transaction statistics systems that do not reveal individual identities is not "criminal history record information".
 2. Hawaii Rev. Stat., section 846-1.
 3. Hawaii Rev. Stat., section 378-1.
 4. Hawaii Rev. Stat., section 378-2.5(c).

Dissemination – Access and Availability of Criminal History Record

Federal Law

- For noncriminal justice employment and licensing, federal criminal history record information may be disseminated only to state and local government agencies authorized by statute, and approved by the United States Attorney General.
 - Authorized recipients receive both conviction data and nonconviction data on federal offenders and other state offenders that is held by the FBI.
 - Requires fingerprints of record subject.
 - In the absence of an authorizing statute, a "qualified entity" may request a national criminal background check to determine suitability for employment around children, the elderly, and the disabled.⁵
- There is no public access to federal or other states criminal history records held by the FBI.
 - A record subject, however, has a right to review and challenge the accuracy or completeness of criminal history record information maintained in United States Department of Justice system.

Hawaii Law

- Hawaii conviction (but not arrest) records may be disseminated to the public without limitation.⁶
 - Conviction information is freely accessible and available for inspection by the general public, including public and private employers.
- Nonconviction data, or arrest information more than twelve months old that is not followed by a valid conviction,⁷ is not routinely available to any employer, public or private.⁸

5. Although statutory authorization is no longer required, a qualified entity must submit the request through an "authorized agency" which, in turn, receives the criminal history record information from the FBI and makes the suitability determination on behalf of the qualified entity.

6. Hawaii Rev. Stat., section 846-9.

7. Hawaii Rev. Stat., section 846-1.

8. Because nonconviction data is defined to mean arrest information without a disposition more than one year after the arrest, it is uncertain whether arrest information without a disposition less than one year from arrest may be disseminated. The Hawaii Criminal Justice Data Center has requested clarification from the Department of the Attorney General. Many states classify arrest information less than twelve months old as "open arrests" and allow access to this information, along with conviction information.

- Nonconviction data may be disseminated only to state agencies authorized to conduct employment investigations or other agencies or individuals for any purpose authorized by statute.

As noted earlier, access to criminal history record information, whether arrest records where the individual was not convicted or conviction data, does not automatically mean that an employer may use this information in employment decisions.

Use – Inquiry and Consideration of Criminal History Record Information

Federal Law

- Screening suitability for licensing or state employment is a permissible noncriminal justice use of FBI criminal history record information, but requires authorization by federal or state statute approved by the United States Attorney General.
- An employer⁹ may not normally inquire or consider arrest records where the individual was not convicted.
 - The United States Equal Opportunity Employment Commission has found that consideration of nonconviction data adversely impacts certain minorities.
 - To use screening procedures that adversely impact protected classes, an employer must show evidence that the procedure is job related and a business necessity.
 - An employment decision based solely on nonconviction data that adversely impacts a protect class is likely to be considered employment discrimination.
- An employer may ask about convictions before extending a job offer, but may consider conviction information only if a business necessity is established.

Hawaii Law

- Although any employer may access Hawaii conviction records without restriction, Hawaii employment practices law generally prohibits all employers from using an individual's "arrest and court record" in employment decisions.

9. The Civil Rights Act of 1964 applies to all employers with fifteen or more employees, except the federal government.

SUMMARY

- "Arrest and court record" includes conviction information and information about arrests where the individual was not convicted.¹⁰
- Hawaii's employment practices law applies to any employer, public or private, with one or more employees.¹¹
- An employer's firing or hiring decision made "because of ... arrest and court record" is an unlawful discriminatory practice.¹²
- Employers may inquire and consider an employee or job applicant's conviction record, subject to limitations.
 - Convictions must be less than ten years old and rationally related to the job.
 - For job applicants, inquiry must be preceded by conditional offer of employment which may be withdrawn if the conviction is rationally related to the job.
- Employers are ordinarily prohibited from any use of records of arrests not followed by a valid conviction.
 - "Bona fide occupational qualifications" and statutorily authorized criminal history record checks may permit an employer to use (by inquiring about or considering) an employee or applicant's criminal history record information, including nonconviction data, to make employment decisions.
 - BFOQ must be reasonably necessary to the normal operation of a particular business and have a substantial relationship to the job.¹³
- When based on the BFOQ exception and/or an authorizing statute, an employer may use "arrest and court records", conviction and nonconviction data, in criminal history record checks if there is a sufficient nexus to job performance.¹⁴

10. Hawaii Rev. Stat., section 378-1.

11. Hawaii employment practices law does not apply to the federal government. Hawaii Rev. Stat., section 378-1.

12. Hawaii Rev. Stat., section 378-2.

13. Hawaii Rev. Stat., section 378-3.

14. In the same manner that access does not guarantee use, an employer cannot gain access to conviction data simply by claiming that a BFOQ exception requires its use or consideration. Nonconviction data may be disseminated only to statutorily authorized state agencies or individuals. Logically, only these authorized agencies or individuals can both receive and use criminal history record information that includes arrest records not followed by a conviction in hiring and firing decisions.

Additional Restrictions on Use of Criminal History Records Applicable Only to the State and Counties in Employment and Licensing

Chapter 831, Hawaii Revised Statutes

- Cannot disqualify a person from state employment or obtaining a state business or professional license solely because of prior conviction of a crime.
 - Felony conviction may be basis to deny a liquor license application.
- In connection with an application for state employment or license, the State may not use, distribute, or disseminate:
 - Records of arrest not followed by a valid conviction;
 - Annulled or expunged convictions;
 - Convictions of a penal offense for which no jail sentence may be imposed; and
 - Misdemeanor convictions more than twenty years old where there was no subsequent arrest or conviction,
- The State may consider any conviction of a penal offense (for which incarceration is a sentencing option) that directly relates to job performance or performance in the occupation for which license is applied or held.
 - No age limit provided for convictions that may be considered.
- Cannot consider any criminal conviction when considering noncriminal standards such as good moral character, temperate habits, habitual intemperate use of intoxicants, trustworthiness.
- State may make decision adverse to employee/job or license applicant/license holder only after an investigation shows the person has not been sufficiently rehabilitated to warrant the public trust.
 - Discharge from probation or parole supervision; period of two years after final discharge or release without subsequent criminal conviction is a factor to be considered in determining sufficiency of rehabilitation.
- Prohibitions against a state agency's distribution and dissemination of certain criminal history records conflicts with Hawaii Criminal Justice Data Center's responsibility to provide access to Hawaii conviction database without restrictions.

Chapter 78, Hawaii Revised Statutes (Public Service Law)

- Cannot ask about arrests as a condition precedent to state employment.

Exceptions

- Legislature has authorized a number of criminal history record checks.
- Most authorized criminal history record checks are exempt from the restrictions of chapter 831, Hawaii Revised Statutes, either by specific exception established in section 831-3.1, Hawaii Revised Statutes, or by exemptions from chapter 831 restrictions in the statute that authorizes the check.
- Some required checks may not be expressly exempted from chapter 831 restrictions.
- An agency's ability to conduct a required criminal history record check where agency is not expressly exempt from chapter 831 restrictions is not clear.

Conducting A Criminal History Record Check

- Employers who fail to use "reasonable care" in hiring employees may be liable for negligent hiring, retention, or supervision if the employee harms others and the employer knew or should have known that the employee was unfit.
- An employer may freely search the Data Center conviction database for information on convicted offenders arrested in Hawaii.
- Hawaii conviction database is available at Public Access Terminals at the Data Center and main police department in each county, and in Kona.
 - A search requires subject's name, social security number, sex, and birth data.
 - A printed copy of Public Access search costs \$10.
- Data Center will do a name check of conviction data for \$15 if requestor lacks some personal identification on the subject.
- Data Center will conduct a fingerprint check of conviction data for \$25.

- Employers may search conviction information in Hawaii's Sex Offender Registry in same locations as Hawaii conviction database and also on line at Data Center's website.
 - Registry may be searched by offender's name or zip code.
 - A successful search gives offender's name, street name (but not address) of residence and workplace, vehicle driven, photograph and crime for which offender was convicted.
 - Contains information on convicted offenders living, but not necessarily arrested, in Hawaii.

"Big Picture" Policy Overview

- The National Task Force on Privacy, Technology and Criminal Justice, recently studied the acceptable access to criminal history record information in the new information age.
- The Task Force identified a number of change drivers that point to a need for the development of a new generation of law and policy for criminal history record information in light of those changes.
- Other sources describe state laws on the issue as a "patchwork" of statutes resulting from independent lobbying efforts by particular groups, rather than a comprehensive review of issues and policy. Hawaii is no exception. As Senate Concurrent Resolution No. 122, S.D. 1, properly noted, Hawaii laws relating to criminal history record checks have been enacted piecemeal and lack consistency.

Chapter 10

RECOMMENDATIONS

This Chapter contains the Bureau's recommendations concerning criminal history record checks. Proposed legislation to implement some of these recommendations is attached as Appendix B.

1. Open Records

Recommendation

Hawaii is an "open records" state for purposes of access to criminal conviction data. The Bureau recommends that Hawaii should not expand its current "open records" approach to allow public access to nonconviction data, i.e., arrests not followed by convictions. Employment practices law prohibits an employer's use of nonconviction data in employment decisions. Public access to nonconviction data would be of little significance because employers would only be able to see more information that they aren't supposed to use. Access to and use of nonconviction data should continue to be restricted. Assuming that people are really supposed to be innocent until proven guilty, records of arrests that are not followed by a valid conviction are of little probative value. Consideration of nonconviction data in employment and licensing determinations may also (in the view of the United States Equal Employment Opportunity Commission) adversely impact certain minorities. Unrestricted access to or use of Hawaii nonconviction data is therefore not generally desirable. Public access to conviction data should be continued, with reasonable limitations on use of conviction data in employment and licensing decisions.

Noncriminal justice access to nonconviction data for licensing and employment suitability determinations should continue to require statutory authorization. Statutory authorization allowing access (which, in turn, authorizes use) to nonconviction data for criminal history record checks should be granted only for sensitive positions of trust, most often positions that involve responsibility for the safety and well-being of children, the elderly, and the disabled. For most positions, an investigation of the job applicant or employee's Hawaii conviction data is sufficient to determine suitability. Even the National Child Protection Act, which encourages national criminal history record checks, directs a determination of whether a provider has been convicted of a crime bearing on the provider's fitness to care for children, the elderly, or the disabled. Employers may check Hawaii conviction data under existing law.

For criminal history record information that is disseminated pursuant to statutorily authorized criminal history record checks, additional safeguards are desirable, including provisions that limit the use of the information for the purposes given, insure the security and confidentiality of the data, establish sanctions for violation, and provide notice to the record subject that a background check may be conducted and information on the subject's right to challenge the information.

2. Guidelines for Determining Who Should be Subject to Criminal History Record Checks

Recommendation

The Bureau recommends that state or local government agencies adopt as administrative rules or departmental procedure the *Guidelines for Screening Persons Working with Children, the Elderly and the Individuals in Need of Support* (Guidelines) issued by the United States Attorney General. For employment and licensing decisionmakers, the Guidelines offer valuable information. The Guidelines' "Decisionmaking Model" provides a useful framework to identify positions that should include a criminal history record check as part of employment or licensing screening. Statutory authorization to conduct national and state criminal history record checks, or both, should be sought for positions identified. Private agencies, or "qualified entities" that provide care for children, the elderly, or the disabled, authorized to request a national criminal history record check on job applicants or volunteers under the National Child Protection Act, also should use these Guidelines in their screening decisions. A "qualified entity" may request a national criminal history record check through an "authorized agency" even when there is no authorizing statute.

As noted in Chapter 8, although the Guidelines were issued to aid in screening positions that provide care for children, the elderly, and the disabled, they can also be used to determine suitability in other positions of trust or sensitive positions.

3. Working Group

Recommendation

The National Task Force on Privacy, Technology and Criminal Justice Information (Task Force) conducted an in-depth study on issues related to federal and state criminal justice information, focusing on noncriminal justice access and use of criminal history record information, or conviction and nonconviction data. The Bureau supports the Task Force's recommendation for the development of a new generation of confidentiality and disclosure policy and law for criminal history record information that considers, among other issues, the type of record and its intended use. Accordingly, the Bureau recommends creation of a Working Group to resolve policy issues raised in this study.

The development of any new policy requires a thorough consideration and analysis of existing laws not only by the Legislature, but also by all affected parties and interested stakeholders. Criminal history record checks must be examined in light of laws governing the access and use of criminal history record information, not in isolation. The perspective of all stakeholders must be taken into account. Only after principles governing access and use of criminal history records have been carefully thought about, should the Working Group look at specific laws authorizing criminal history record checks and related issues.

RECOMMENDATIONS

The Working Group should consist of representatives from law enforcement agencies, the courts, corrections and prosecution, the Hawaii Criminal Justice Data Center, the Department of the Attorney General, the Hawaii Civil Rights Commission, public and private employers, state and county licensing agencies, and public employee unions. The Working Group should be attached for administrative purposes to the Department of the Attorney General, and its members appointed by the Attorney General. The Working Group should be created for a specific period and directed to submit a report by a specified date to the Legislature, with its findings and conclusions, and recommendations for new law or revisions to present law, including suggested legislation. The Bureau recommends that no major revisions to existing law be enacted until the Working Group has concluded its study and has submitted its report to the Legislature.

In formulating policy and law relating to the access and use of criminal history record information and criminal history record checks, the Working Group should balance the public's need to know, employer liability, offender rehabilitation, and the record subject's right to privacy. Among the issues that the Working Group should be directed to address are:

- Consistent and uniform terminology in laws relating to criminal history record checks, including laws governing access and use of criminal history record information.
- The scope of the "criminal history record checks" conducted by the Data Center should be clarified.
 - Where a statute indicates a "fingerprint analysis and name inquiry" of "state criminal history record files", are name checks only sufficient? Does a "fingerprint analysis" refer to a fingerprint based check of an individual's criminal history records?
- All statutorily authorized or required criminal history record checks should be reviewed, and amended or repealed to conform to existing law, including standard definitions and uniform procedures to be adopted.
 - Should statutes that authorize a check of Hawaii conviction data only to determine employment suitability be repealed to eliminate unnecessary laws and to promote clarity and uniformity since Hawaii law currently provides for unrestricted access and limited consideration of criminal convictions by employers?
- 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?
- Are there any guidelines to determine when a conviction is "rationally related" to the job? If so, what are they?

- When statutory authorization and/or a BFOQ requirement allows consideration of arrest and court record:
 - Is age of convictions that may be considered limited to convictions less than ten years old?
 - Is there an age limit for arrests that may be considered?
 - Are arrests required to be reasonably necessary to the operation of the business and substantially related to the job?
 - Is a conditional offer of employment required before consideration of conviction data and/or nonconviction data is allowed?
- 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 record?
- 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?
- Should section 378-3, Hawaii Revised Statutes, be amended to repeal paragraph (8) because it is unnecessary, duplicative, and potentially confusing?
 - Section 378-3 establishes "Exceptions", stating that nothing in chapter 378, part I, "Discriminatory Practices", shall be deemed to prohibit or prevent public or private schools from considering criminal convictions in determining suitability for employment in close proximity to children. Sections 846-43 and 846-44, 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 is both unnecessary and confusing.
- 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

RECOMMENDATIONS

State's use of certain criminal records in state employment decisions? If not the Civil Rights Commission, then who?

- 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?
- 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?
- Should statutorily authorized criminal history record checks direct the Data Center to disseminate to government agencies only criminal history record information, including conviction and nonconviction 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?
- Should Hawaii conviction data be made available to the public online, similar to the Sex Offender Registry?
- 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?
- Does the prohibition in 28 C.F.R. 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?
- Should criminal history record information be purged when it "no longer serves a public purpose"?
- Whether a conviction may be "annulled or expunged" and whether such an expunged conviction is removed from the conviction database should be clarified.
- Section 831-3.1, Hawaii Revised Statutes, prohibits use, distribution, or dissemination of "annulled or expunged convictions" in state employment and licensing matters. Although the Data Center's website 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.

- 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.
- 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 agencies 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.
- 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.
- 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.
- Should Hawaii dissemination law be amended to authorize the Data Center to disseminate FBI records to a government agency requesting a national criminal history check as an "qualified entity" under the Act where the government agency lacks statutory authorization.

4. How to Conduct a Criminal History Record Check

Discussion

Because of the past patchwork approach to criminal history record checks, the lack of uniform terminology, and the overlapping and confusing related laws that govern dissemination and use of criminal history records, there is little common understanding as to what a criminal

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history record check is, what records are available or accessible, or how they may be used in employment and licensing decisions. For most employers, current law provides sufficient access to and use of conviction data for criminal history record checks for all but the most sensitive jobs.

An outreach or educational program to inform the general public, in particular public and private employers and licensing agencies, about available resources and criminal history record check procedures under current laws would clarify commonly held misunderstandings or misinterpretations.

Recommendation

The Bureau recommends that the Hawaii Criminal Justice Data Center, in consultation with the Civil Rights Commission, develop an informational program to educate the general public, particularly public and private employers and licensing agencies, about what criminal history records are freely available, where they are, what information is needed to access these records, the cost involved, and how the information may be used. This program should include group presentations, as well as printed and other informational materials.

A public service program that educates public and private employers on how to conduct a criminal history record check, in the absence of statutory authorization, might eliminate some of the existing confusion and perhaps lessen the unending demand for statutory authorization for criminal history record checks. Some statutorily authorized criminal history record checks appear to authorize use of conviction data. These statutes unnecessarily duplicate an existing and unrestricted right held since 1998 by any person, including public and private employers, to freely access Hawaii conviction data.

5. Use of Conviction Data and Nonconviction Data

Discussion

Hawaii employment law generally prohibits hiring and firing decisions made "because of ... arrest and court record". An exception allows limited consideration of "criminal conviction record". As discussed above, the inconsistent terminology used to refer to criminal history record information, nonconviction data, and conviction data in Hawaii laws has caused uncertainty and confusion. Also, the general prohibition against the use of "arrest and court record" conflicts with the permissible inquiry and consideration of a "criminal conviction record," subject to limitations.

Recommendation

The Bureau recommends that section 378-2, Hawaii Revised Statutes, be amended to delete "and court record" be deleted from section 378-2 and "arrest" be changed to "nonconviction data". "Arrest" should be replaced with "nonconviction data" for clarity and uniformity. Because limited consideration of conviction data is expressly permitted by section

378-2.5, Hawaii Revised Statutes, the blanket prohibition against the use of "arrest and court record" is contradictory and confusing. If a general prohibition against the use of both "nonconviction data" and "conviction data" is desired, despite the permitted use of convictions, the Bureau recommends language prohibiting decisions "because of...nonconviction data and conviction data" or "because of...criminal history record information" for clarity and uniformity.

6. Changes for Clarity and Uniformity

Discussion

Terminology in Hawaii laws governing the access and use of criminal history records and authorizing criminal history record checks are inconsistent and confusing. A brief review of some of the key terms illustrates the confusion that has resulted from years of a patchwork approach to criminal history record checks.

Recommendation

The Bureau recommends revision to existing laws relating to access and use of criminal history record information to provide for uniform terminology that can be understood, used, applied, and enforced by appropriate parties. Criminal history record information includes both information on arrests where the individual was not subsequently convicted and information on the disposition of arrests resulting in a conviction. Standard terminology should be used to refer to both categories of information in all laws relating to access and use of criminal history records and criminal history record checks.

State statutes should be amended to consistently use the following terms in a consistent manner:

- (1) "Nonconviction data" should refer to information on arrests that are not followed by a valid conviction;
- (2) "Conviction data" should refer to where the individual was convicted. Arrest records that resulted in a conviction would be included in "conviction data". Information on arrests where the individual was not subsequently convicted would not be included in "conviction data";
- (3) "Criminal history record information" should refer to both nonconviction data and conviction data.

Additional refinement is necessary to clarify that "nonconviction data" includes arrests that are less than a year old. Chapter 846, Hawaii Revised Statutes, defines "nonconviction data" to refer to arrests more than twelve months old where the record subject was not convicted and restricts the dissemination of nonconviction data. As a result, the Data Center has asked for clarification on whether arrests less than twelve months old where there has been no conviction may be disseminated since they are excluded from the definition of "nonconviction data". Some

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states allow dissemination and use of nonconviction data less than twelve months old, presumably because these arrests are still "current" or "pending" and could result in convictions. But if nonconviction data generally should be excluded because a person is supposed to be innocent until proven guilty, it seems patently illogical to include arrest information concerning an innocent person just because it is less than one year old. This would make the person (if only for criminal history record purposes) presumptively guilty upon arrest until the passage of a year at which point the person becomes "innocent" and the records inaccessible. However, if at a future date the person is "convicted", then the records become accessible again.

Similarly, the scope of records to be checked in a "fingerprint analysis and name inquiry into state and national criminal history record files" should be clarified. If the intent is to inquire into an individual's "criminal history record information" held by the Data Center or FBI, then that term should be used. If "fingerprint analysis" refers to a fingerprint based record check, this should be clarified since the Data Center's general practice is to conduct a name inquiry only into an individual's conviction and nonconviction data unless a fingerprint inquiry is specifically requested.

Statutes that authorize a "criminal history record check...directly through the Hawaii Criminal Justice Data Center", "criminal history record check conducted by the Hawaii Criminal Justice Data Center, or "subsequent fingerprint analyses for new hires and rehires, and a name inquiry into the state criminal history record files" require clarification. The scope of the check and the responsibility of the Data Center are unclear, at least in part because of inconsistent terminology.

7. Statutorily Authorized Criminal History Record Checks

Recommendation

The Bureau recommends that a uniform definition of "criminal history record check" be used in statutes that authorize or require such checks. Because Hawaii conviction data is freely accessible to the general public and may be considered by employers, subject to certain conditions, no statutory authorization is necessary to permit access or use of convictions in employment decisions. A criminal history record check of Hawaii conviction records is sufficient for most public and private employers. Statutes that authorize a check of Hawaii conviction data to determine employment suitability should be repealed for clarity and uniformity.

For positions where an exception to the well established principle generally prohibiting access to and use of nonconviction data is desirable to determine employment suitability, primarily those positions of trust that involve care of vulnerable populations or public safety, the Bureau recommends that "criminal history record check" authorize checks of an individual's criminal history record information held by both state and national criminal history record systems, including conviction and nonconviction data. Any position sensitive enough to authorize exception to Hawaii's prohibition against access and use of nonconviction data would seem to be sensitive enough to also require a nationwide check, particularly if the individual has

only lived in Hawaii for a short time. This requirement of both state and national checks should be included in the definition of "criminal history record check".

Similarly, because of the potential for false positive and false negative "hits" on name based checks, any position that requires a criminal history record check should require the check to be conducted using the most reliable method, a fingerprint based check. In responding to a request to comment on proposed congressional legislation that would authorize name based criminal history record checks for volunteers, David Loesch, Assistant Director in Charge, Criminal Justice Services Division, of the Federal Bureau of Investigation (FBI), testified before the House Committee on the Judiciary that FBI remains "firmly opposed" to name based criminal history checks for noncriminal justice purposes. Mr. Loesch acknowledged the "consistent recognition of the preferability of a fingerprint based system" and stated that the FBI was taking steps to safeguard children and the elderly "without running the substantial risks posed by name based checks."

As suggested by the Guidelines for Screening Persons Working with Children, the Elderly, and Individuals with Disabilities in Need of Support, statutorily authorized or required criminal history record checks should notify the record subject that a criminal history record check will be conducted, that hiring or licensing may be subject to certain conditions pending completion of the check, and that the individual has the right to challenge the accuracy and completeness of any information received in a criminal history record check before a final employment or licensing determination is made.

Any criminal history record check for positions involving care of children, the elderly, or the disabled, should also recommend or require an investigation of the Hawaii's Sex Offender Registry, and State central abuse registries (indicating child abuse, elder, or dependent adult abuse or neglect). The Data Center should develop a system to flag offender files in the Sex Offender Registry where the victim was a child or dependent adult.

8. State Central Abuse and Neglect Registries

Recommendation

The Bureau supports the recommendation of the Guidelines for the Screening of Persons Working With Children, the Elderly, and Individuals With Disabilities in Need of Support for the creation of state central abuse and neglect registries for children, the elderly, and the disabled where they do not exist. Departments should establish clear policies for abuse, licensing, and certification registries for purposes of suitability screening. Departments should be encouraged to develop such registries and include within the meaning of abuse not only physical abuse or neglect, but also fiduciary abuse, exploitation, or mental harm. Additional information on the creation and establishment of central registries is available in the Guidelines.

9. Special Restrictions Applicable only to the State and Counties in Employment and Licensing

Recommendation

The Bureau recommends that the Legislature repeal the restrictions established in section 831-3.1, Hawaii Revised Statutes, on the State's use, distribution, and dissemination of certain criminal records in employment and licensing matters because the restrictions are unnecessary, confusing, restricting, and ambiguous. The Legislature should be aware that most state agencies authorized to conduct criminal history record checks for employment or licensing purposes have been expressly exempted from the limitations of section 831-3.1 and are largely unaffected by its constraints.

The general principles of access and use of criminal history record information in employment matters apply to all employers, including the State, making the restrictions in section 831-3.1 on the use, distribution, and dissemination of certain records in employment decisions unnecessary. Restrictions in section 831-3.1 relating to employment matters should be repealed.

Although limitations on the dissemination of criminal history record information generally restricts the State's access in licensing matters, Hawaii employment practice law's applicability to the State's use or consideration of an individual's "arrest and court record" in licensing decisions is uncertain. The Bureau recommends that Hawaii employment practices law's applicability to State's use of criminal history record information in licensing decisions be clarified by the working group. If applicable, the Bureau recommends that section 831-3.1 be repealed in its entirety.

For consideration by Working Group. Section 831-3.1, Hawaii Revised Statutes, prohibits use or consideration of convictions that have been "annulled or expunged." Section 831-3.2 provides for the expungement of the record of an arrest where the person was "not convicted" of a crime, but makes no provision for expunging conviction records. Whether a conviction may be "annulled or expunged" and whether such an expunged conviction is removed from the conviction database should be clarified. Although the Data Center's website 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.

The Bureau recommends that if employment practices law is determined to exclude licensing decisions, the Bureau recommends clarification of the State's authority to access and use of criminal history record information for licensing purposes. Limitations identical to those limiting access and use in employment matters are suggested. This authorization might be appropriately placed in chapter 846, Hawaii Revised Statutes.

If chapter 378, Hawaii Revised Statutes (the employment practices law), is deemed to apply to State licensing decisions, the Bureau recommends that section 378-2.5, Hawaii Revised

Statutes, be amended to allow limited use of relevant convictions in licensing matters. Alternatively, a new section that deals only with use in licensing should be enacted. This would clarify permitted inquiry and consideration of conviction data for license applicants not subject to a statutorily authorized criminal history record check. The State's use of criminal history record information in licensing matters for statutorily authorized criminal history record checks would be permissible, based on statutory authorization and as a BFOQ exception to the general prohibition on employment decisions "because of arrest and court record".

Alternatively, authority for the State's limited use of convictions in licensing decisions, including those not subject to authorized criminal history record checks, to parallel permitted use in employment decisions, might be included in chapter 846 if the Legislature determines that express authority should be granted. The State's permitted use of criminal history record information in statutorily authorized record checks for licensing also could be included in chapter 846. A prohibition against licensing decisions based on nonconviction data might be established.

If the restrictions established in section 831-3.1(c) that prohibit consideration of convictions when considering noncriminal standards in licensing, state employment, or both, are retained in section 831-3.1 or a new statute, the Bureau recommends clarification of "noncriminal standards such as good moral character, temperate habits, habitual intemperate use of intoxicants, trustworthiness, and the like". Some criminal history record check statutes mandate various state departments to develop standards, which shall include criminal history record checks, to assure the "reputable and responsible character" of certain license applicants or their employees. The mandatory use of criminal history record checks to assure "reputable and responsible character" in one statute is confused by a prohibition in a separate statute against consideration of convictions when considering noncriminal standards of "good moral character."

Regardless of the effects that employment practices law may have on the State's use of criminal history record information in licensing, section 846-9, Hawaii Revised Statutes, should be amended to authorize dissemination of nonconviction data to state or federal agencies authorized to conduct investigations determining employment or licensing suitability. Because section 846-9 does not specifically authorize dissemination of nonconviction data to state agencies authorized to conduct criminal history record checks for licensing purposes, the Data Center's authority to disseminate nonconviction data to state agencies authorized to conduct criminal history record check investigations to determine licensing suitability is uncertain. Presumably, the Data Center's authority to disseminate nonconviction data to "individuals and agencies for any purpose authorized by statute" provided in section 846-9 includes licensing, but most state and federal laws authorize such dissemination for "employment and licensing purposes".

Section 846-10.5, Hawaii Revised Statutes, establishes an exemption for fees charged by the Data Center services provided to state and county agencies for employment purposes, for child care facilities and certain tax exempt non-profitable charitable organizations. The Working Group should consider whether an exemption for fees is appropriate for any additional categories or circumstances, such as adult foster care homes.

Public Service Law

Recommendation

Section 78-2.5, Hawaii Revised Statutes, should be allowed to expire as scheduled on July 1, 2002 (as a result of Act 253, Session Laws of Hawaii 2000, the Civil Service Reform Law) because the section is unnecessary, conflicts with existing law, and ambiguous. The prohibition against arrest inquiries is established in chapter 378, Hawaii Revised Statutes. Section 78-2.5's unlimited authority to inquire about any conviction without authority to consider convictions conflicts with the limited authority to consider certain convictions established in Hawaii employment practices law and the Uniform Act on the Status of Convicted Persons.

10. Authorized Agency and Qualified Entity of the National Child Protection Act

Discussion

Although any Hawaii law that may be enacted, amended, or repealed in the State's implementation of the National Child Protection Act might more appropriately be an issue to be more thoroughly reviewed and analyzed by the Working Group recommended in paragraph 3, the Bureau makes the following recommendations for the Legislature's consideration:

Under the National Child Protection Act (Act), in the absence of statutory authorization, federal criminal history records may be disseminated only to authorized state agencies. A "qualified entity" must therefore submit the request through an "authorized agency" designated to receive or disseminate federal criminal history records. The Act requires the authorized agency to determine "whether the provider has been convicted of, or is under pending indictment for, a crime that bears upon an individual's fitness to have responsibility for the safety and well-being of children", and to convey that determination to the qualified entity. The Hawaii Criminal Justice Data Center as the only Hawaii "authorized agency" has expressed concerns relating to its responsibility for making these suitability determinations.

To ensure that the employment decision is made by the agency best situated by reason of experience and expertise in the substantive field, the Act allows the State to designate more than one "authorized agency".

Recommendation

For consideration by Working Group:

- (1) 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 Act. The newly designated "authorized agency" should be authorized to determine which entities are authorized to request national criminal history record checks as an "qualified entity" by the Act.

- (2) Should Hawaii dissemination law be amended to authorize the Data Center to redisseminate FBI records to a government agency requesting a national criminal history check as an "qualified entity" under the Act where the government agency lacks statutory authorization. Similarly, any state agency designated as an "authorized agency" under the terms of the Act should be authorized not only to receive federal criminal history records, but also to disseminate those records to the "qualified entity" where the "qualified entity" is a related state agency. Additionally, any "authorized agency" making the suitability determination should be required to formalize the criteria to be used in making the determination. Explicit identification of disqualifying criminal conduct is suggested.

SENATE CONCURRENT
RESOLUTION

REQUESTING THE LEGISLATIVE REFERENCE BUREAU TO CONDUCT A STUDY
CONCERNING CRIMINAL HISTORY RECORD CHECKS.

1 WHEREAS, Hawaii state laws relating to criminal history
2 record checks have been enacted piecemeal and lack consistency;
3 and

4
5 WHEREAS, section 378-2, Hawaii Revised Statutes, prohibits
6 discriminatory employment practices on the basis of a person's
7 arrest and court record; and

8
9 WHEREAS, section 378-2.5, Hawaii Revised Statutes, permits
10 an employer limited inquiry into and consideration of criminal
11 conviction information, if it bears a rational relationship to
12 the duties and responsibilities of a position for which a
13 conditional offer of employment has been made; and

14
15 WHEREAS, various exceptions presently exist in the law to
16 permit criminal history record checks in select instances,
17 including but not limited to: employees in public and private
18 schools; operators and employees in child caring institutions
19 or foster homes and adult foster homes; correctional or
20 detention facilities; private investigators and guards; and
21 condominium employees; and

22
23 WHEREAS, a number of bills introduced during the regular
24 session of 2000 attempt to carve out additional exceptions for
25 criminal history record checks; and

26
27 WHEREAS, rather than continuing to impose requirements in
28 a piecemeal fashion, it is time for a comprehensive review of
29 the issue of criminal history record checks; now, therefore,

30
31 BE IT RESOLVED by the Senate of the Twentieth Legislature
32 of the State of Hawaii, Regular Session of 2000, the House of
33 Representatives concurring, that the Legislative Reference
34 Bureau is requested to conduct a study concerning criminal
35 history record checks; and

36
37 BE IT FURTHER RESOLVED that the Legislative Reference
38 Bureau is requested to include:

39
40 (1) A review of the legal ramifications of requiring
41 criminal history record checks;

42

- 1 (2) A summary of existing federal, state, and county
2 requirements involved with respect to criminal
3 history record checks;
- 4
- 5 (3) A review of the manner in which employers may conduct
6 criminal history record checks;
- 7
- 8 (4) A framework for determining the classes of employees
9 or types of industries that should be subjected to
10 criminal history record checks;
- 11
- 12 (5) Recommendations for dealing with the issue of
13 criminal history record checks and proposed
14 legislation, if applicable; and
- 15
- 16 (6) The feasibility of making Hawaii an open records
17 state, which would allow the general public,
18 including non-criminal justice agencies, to receive
19 state non-conviction information;

20 and

21

22 BE IT FURTHER RESOLVED that the Attorney General is
23 requested to provide assistance and cooperation to the
24 Legislative Reference Bureau upon request; and

25

26 BE IT FURTHER RESOLVED that the Legislative Reference
27 Bureau is requested to submit a report of its study to the
28 Legislature no later than twenty days before the convening of
29 the Regular Session of 2001; and

30

31 BE IT FURTHER RESOLVED that certified copies of this
32 Concurrent Resolution be transmitted to the Acting Director of
33 the Legislative Reference Bureau and the Attorney General.

34

35

Appendix B

Report Title:

Criminal History Record Checks

Description:

Implements certain LRB study recommendations concerning access and use of criminal history record information to conduct criminal history record checks for noncriminal justice employment and licensing screening; creates working group to make recommendations on policy issues raised by study.

A BILL FOR AN ACT

RELATING TO CRIMINAL HISTORY RECORD CHECKS.

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

1 SECTION 1. The legislature finds that there is little
2 common understanding of what is meant by the term criminal
3 history record check, what criminal history records are
4 available or accessible, or how those records may be used by
5 noncriminal justice state and county agencies or individuals in
6 employment and licensing decisions. "Criminal history records"
7 and "criminal history record checks" mean different things to
8 different people.

9 According to a study by the legislative reference bureau,
10 Hawaii laws that govern access and use of criminal history
11 record information and other laws that authorize criminal
12 history record checks, when considered together, are confusing
13 and inconsistent, overlapping in some areas and conflicting in
14 others. Hawaii's patchwork approach to statutory authorization
15 of criminal history record checks over the years has contributed
16 to the confusion. Although Hawaii law authorizes a number of
17 criminal history record checks, the term is not uniformly

Criminal History Record Checks

S.B. NO.

1 defined. Related laws that govern the dissemination and use of
2 criminal history records use different terminology to refer to
3 the same criminal history records. The lack of consistent
4 terminology and the related laws that overlap and conflict cloud
5 many people's understanding of "criminal history record check"
6 issues.

7 The effectiveness of a criminal history record check is
8 determined, in part, by what criminal history records are
9 available for review and whether the use of available criminal
10 history records is subject to any constraints established by
11 other law. Hawaii conviction data is public record and freely
12 available for inspection by the public. Hawaii employment
13 practices law allows any employer, public or private, to inquire
14 about and consider criminal convictions in employment decisions,
15 subject to certain restrictions. An employer may conduct
16 criminal history record check of Hawaii conviction data to
17 determine employment suitability under existing law. The
18 dissemination and use of arrest records where the individual was
19 not subsequently convicted (or "nonconviction data") for
20 noncriminal justice purposes that include employment and
21 licensing screening is generally prohibited.

S.B. NO.

1 The legislature finds that because state laws that govern
2 noncriminal justice access and use of criminal history record
3 information in Hawaii and many other states were enacted during
4 the 1970s and 1980s and because the demand for this information
5 by noncriminal justice users continues to increase in today's
6 new "information age", the development of a new generation of
7 policy and law relating to criminal history record information
8 is appropriate. Despite the confusing state of the applicable
9 laws, each legislative session continues to see new requests for
10 legislation authorizing criminal history records checks for
11 employment and licensing screening.

12 Instead of continued piecemeal authorization of criminal
13 history record checks, all related issues should be considered
14 together, balancing public safety with privacy expectations.
15 Criminal history record checks must be examined in light of laws
16 that govern the access and use of criminal history record
17 information, not in isolation. The perspective of all
18 stakeholders must be taken into account. Related issues include
19 negligent hiring and employer liability issues, as well as the
20 successful reintegration of former offenders into society. A
21 comprehensive review of the interrelated issues presents an
22 opportunity to develop a new generation of policy and law

Criminal History Record Checks

S.B. NO.

1 relating to the effective and appropriate dissemination and use
2 of criminal history record information, balancing the public's
3 need to know with the record subject's right to privacy.

4 Senate Concurrent Resolution No. 122, S.D. 1 (2000),
5 directed the legislative reference bureau to conduct a study of
6 the issue of criminal history record checks. The bureau's study
7 points out inconsistencies and conflicts in Hawaii law and
8 provides recommendations on criminal history record check
9 issues. Recommendations to be implemented by this Act include:

- 10 (1) Use of consistent, uniform terminology to refer to
11 criminal history record information, nonconviction
12 data, and conviction data in laws governing to
13 dissemination and use of criminal history record
14 information and in laws authorizing criminal history
15 record checks.
- 16 (2) Elimination of redundant, unnecessary, duplicative, or
17 conflicting laws.
- 18 (3) Clarification of section 846-9, Hawaii Revised
19 Statutes, to allow criminal history record information
20 to state or federal government agencies to conduct
21 employment and licensing suitability determinations.

S.B. NO.

1 in employment decisions. Section 378-1 defines the term "arrest
2 and court record" to include any information about both
3 convictions and arrests where there was no subsequent
4 conviction. Section 846-1 defines "criminal history record
5 information" to include both conviction data and nonconviction
6 data (arrests not followed by a valid conviction). Use of
7 different terms to refer to the same information is confusing.

8 Because section 378-2.5, HRS, now permits limited
9 consideration of criminal convictions, the prohibition in
10 section 378-2 against use of "arrest and court record" (which
11 includes both nonconviction and conviction data), more correctly
12 applies to those arrest records not followed by a valid
13 conviction (or "nonconviction data"). Section 378-2, HRS,
14 should be amended to replace "arrest and court record" with
15 "nonconviction data" to reflect the permitted use of conviction
16 data and to promote uniformity by using consistent terminology
17 to refer to criminal history records, whether nonconviction
18 data, conviction data, or both.

19 Accordingly, section 378-1, HRS, should be amended to
20 parallel amendments to section 378-2 by repealing the definition
21 of "arrest and court record" and add a new definition of
22 "nonconviction data" to parallel changes made to section 378-2.

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1 SECTION 2. Section 378-1, Hawaii Revised Statutes, is
2 amended:

3 1. By adding a new definition to be appropriately inserted
4 and to read as follows:

5 "Nonconviction data" means:

6 (1) Arrest information without a disposition if an
7 interval of one year has elapsed from the date of
8 arrest and no active prosecution of the charge is
9 pending;

10 (2) Information disclosing that:

11 (A) The police have elected not to refer a matter to
12 a prosecutor, or

13 (B) A prosecutor has elected not to commence criminal
14 proceedings; or proceedings have been
15 indefinitely postponed; and

16 (3) All acquittals and all dismissals."

17 2. By repealing the definition of "arrest and court
18 record".

19 [~~"Arrest and court record" includes any information about~~
20 ~~an individual having been questioned, apprehended, taken into~~
21 ~~eustody or detention, held for investigation, charged with an~~
22 ~~offense, served a summons, arrested with or without a warrant,~~

1 ~~tried, or convicted pursuant to any law enforcement or military~~
2 ~~authority."]~~

3 COMMENT ON SECTION 3

4 Section 378-2, HRS, should be amended to implement the
5 bureau's recommendation to use consistent, uniform terminology
6 to refer to criminal history record information in laws that
7 govern the dissemination and use of criminal history record
8 information and to clarify that employers may not use arrest
9 records where the individual was not convicted in employment
10 decisions, but may consider convictions, under certain
11 circumstances.

12 Because section 378-2.5, HRS, now permits limited
13 consideration of criminal convictions, the prohibition in
14 section 378-2 against use of "arrest and court record" (which
15 includes both nonconviction and conviction data), more correctly
16 applies to those arrest records not followed by a valid
17 conviction (or "nonconviction data"). References to arrest
18 records not followed by a valid conviction in laws concerning
19 access and use of criminal history records and criminal history
20 record checks should use the term "nonconviction data" for
21 uniformity.

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1 Section 378-2, HRS, should be amended to replace "arrest
2 and court record" with "nonconviction data" to reflect changes
3 in the employment practices law that permits limited
4 consideration of criminal convictions and to promote uniformity
5 by using consistent terminology to refer to criminal history
6 records, whether nonconviction data, conviction data, or both.

7 SECTION 3. Section 378-2, Hawaii Revised Statutes, is
8 amended to read as follows:

9 "**§378-2 Discriminatory practices made unlawful; offenses**
10 **defined.** It shall be an unlawful discriminatory practice:

11 (1) Because of race, sex, sexual orientation, age,
12 religion, color, ancestry, disability, marital status,
13 or [~~arrest and court record~~] nonconviction data:

14 (A) For any employer to refuse to hire or employ or
15 to bar or discharge from employment, or otherwise
16 to discriminate against any individual in
17 compensation or in the terms, conditions, or
18 privileges of employment;

19 (B) For any employment agency to fail or refuse to
20 refer for employment, or to classify or otherwise
21 to discriminate against, any individual;

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1 (C) For any employer or employment agency to print,
2 circulate, or cause to be printed or circulated
3 any statement, advertisement, or publication or
4 to use any form of application for employment or
5 to make any inquiry in connection with
6 prospective employment, which expresses, directly
7 or indirectly, any limitation, specification, or
8 discrimination;

9 (D) For any labor organization to exclude or expel
10 from its membership any individual or to
11 discriminate in any way against any of its
12 members, employer, or employees; or

13 (E) For any employer or labor organization to refuse
14 to enter into an apprenticeship agreement as
15 defined in section 372-2; provided that no
16 apprentice shall be younger than sixteen years of
17 age;

18 (2) For any employer, labor organization, or employment
19 agency to discharge, expel, or otherwise discriminate
20 against any individual because the individual has
21 opposed any practice forbidden by this part or has
22 filed a complaint, testified, or assisted in any

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1 proceeding respecting the discriminatory practices
2 prohibited under this part;

3 (3) For any person whether an employer, employee, or not,
4 to aid, abet, incite, compel, or coerce the doing of
5 any of the discriminatory practices forbidden by this
6 part, or to attempt to do so;

7 (4) For any employer to violate the provisions of section
8 121-43 relating to nonforfeiture for absence by
9 members of the national guard;

10 (5) For any employer to refuse to hire or employ or to bar
11 or discharge from employment, any individual because
12 of assignment of income for the purpose of satisfying
13 the individual's child support obligations as provided
14 for under section 571-52;

15 (6) For any employer, labor organization, or employment
16 agency to exclude or otherwise deny equal jobs or
17 benefits to a qualified individual because of the
18 known disability of an individual with whom the
19 qualified individual is known to have a relationship
20 or association; or

21 (7) For any employer or labor organization to refuse to
22 hire or employ, or to bar or discharge from

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1 "~~§846-9~~ **Limitations on dissemination.** Dissemination of
2 ~~[nonconviction data]~~ criminal history record information shall
3 be limited, whether directly or through any intermediary, only
4 to:

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

8 ~~[(2) Individuals and agencies specified in section 846-10;]~~

9 (2) The governor in individual cases or situations wherein
10 the governor elects to become actively involved in the
11 investigation of criminal activity or the
12 administration of criminal justice in accordance with
13 the governor's constitutional duty to insure that the
14 laws be faithfully executed;

15 (3) The attorney general in connection with the attorney
16 genera's statutory authority and duties in
17 the administration and enforcement of the criminal
18 laws and for the purpose of administering and insuring
19 compliance with the provisions of this chapter;

20 ~~[(3)]~~ (4) Individuals and agencies pursuant to a specific
21 agreement with a criminal justice agency to provide
22 services required for the administration of criminal

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1 justice pursuant to that agreement; provided that such
2 agreement shall specifically authorize access to data,
3 limit the use of data to purposes for which given, and
4 insure the security and confidentiality of the data
5 consistent with the provisions of this chapter;

6 [~~4~~] (5) Individuals and agencies for the express purpose
7 of research, evaluative, or statistical activities
8 pursuant to an agreement with a criminal justice
9 agency; provided that such agreement shall
10 specifically authorize access to data, limit the use
11 of data to research, evaluative, or statistical
12 purposes, and insure the confidentiality and security
13 of the data consistent with the purposes of this
14 chapter;

15 [~~5~~] (6) Individuals and agencies for any purpose
16 authorized by statute, ordinance, executive order, or
17 court rule, decision, or order, as construed by
18 appropriate state or local officials or agencies; and

19 [~~6~~] (7) Agencies of state or federal government which are
20 authorized by statute or executive order to conduct
21 investigations determining employment or licensing

1 SECTION 6. (a) There is established within the department
2 of the attorney general, for administrative purposes, a
3 temporary criminal history record check working group to review
4 policy issues concerning the noncriminal justice access and use
5 of criminal history record information for employment and
6 licensing purposes as raised in the legislative reference bureau
7 study. The working group shall review existing laws governing
8 access and use of criminal history record information, laws
9 authorizing criminal history record checks for noncriminal
10 justice purposes of employment and licensing, and other criminal
11 history record check issues and make recommendations to the
12 legislature.

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

- 17 (1) Department of the attorney general;
- 18 (2) Department of health;
- 19 (3) Department of human services;
- 20 (4) Department of commerce and consumer affairs;
- 21 (5) Department of public safety;
- 22 (6) Department of education;

- 1 (7) Judiciary;
- 2 (8) Hawaii labor relations board;
- 3 (9) Law enforcement agencies;
- 4 (10) Independent or private school association;
- 5 (11) Condominium associations;
- 6 (12) Private detective and security guard agencies;
- 7 (13) Groups or individuals that provide care for children,
- 8 the elderly and persons in need of support;
- 9 (14) The Hawaii criminal justice data center;
- 10 (15) The civil rights commission;
- 11 (16) The civil service commission;
- 12 (17) County licensing boards;
- 13 (18) Public employee unions; and
- 14 (19) Public and private employers.

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

17 (c) The working group shall consider policy issues
18 applicable to access and use of criminal history record
19 information, laws authorizing criminal history record checks,
20 and other issues related to criminal history record checks for
21 noncriminal justice purposes of employment and licensing. In
22 formulating policy and law recommendations relating to access

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1 and use of criminal history record information to conduct
2 criminal history record checks for noncriminal justice purposes
3 of employment and licensing determinations, the working group
4 shall balance the public's need to know, employer liability, the
5 reintegration of convicted offenders into society, and the
6 record subject's right to privacy.

7 The working group shall identify statutes, administrative
8 rules, and practices related to access and use of criminal
9 history information and criminal history record checks for
10 noncriminal justice employment and licensing purposes and make
11 recommendations for repeal and amendment of existing laws and
12 adoption of new laws. Issues that the working group shall
13 address include, but are not limited to:

14 (1) Consistent and uniform terminology in laws relating to
15 criminal history record checks, including laws
16 governing access and use of criminal history record
17 information.

18 (2) The scope of the "criminal history record checks"
19 conducted by the Hawaii criminal justice data center
20 should be clarified. Where a statute indicates a
21 "fingerprint analysis and name inquiry" of "state

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1 criminal history record files", are name checks only
2 sufficient?

3 (3) All statutorily authorized or required criminal
4 history record checks should be reviewed, and amended
5 or repealed to conform to existing law, including
6 standard definitions and uniform procedures to be
7 adopted.

8 Should statutes that authorize a check of Hawaii
9 conviction data only to determine employment
10 suitability be repealed to eliminate unnecessary laws
11 and to promote clarity and uniformity since Hawaii law
12 currently provides for unrestricted access and limited
13 consideration of criminal convictions by employers?

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

18 (5) Are there any guidelines to determine when a
19 conviction is "rationally related" to the job? If so,
20 what are they?

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- 1 (6) When statutory authorization, or a BFOQ requirement,
2 or both, allows consideration of arrest and court
3 record:
- 4 (A) Is age of convictions that may be considered
5 limited to convictions less than ten years old?
- 6 (B) Is there an age limit for arrests that may be
7 considered?
- 8 (C) Are arrests required to be reasonably necessary
9 to the operation of the business and
10 substantially related to the job?
- 11 (D) Is a conditional offer of employment required
12 before consideration of conviction data and/or
13 nonconviction data is allowed?
- 14 (7) Does a criminal history record check that is
15 authorized, but not required, by statute constitute a
16 BFOQ exception that allows consideration of arrest and
17 court record?
- 18 (8) Should Hawaii employment practices law be amended to
19 expressly authorize consideration of both conviction
20 and nonconviction data when an employer is statutorily
21 authorized to conduct a criminal history record check
22 of an individual's criminal history record information

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1 (which includes both conviction data and nonconviction
2 data) to determine employment suitability? If so,
3 what restrictions, if any, should be imposed on an
4 employer's consideration of criminal history record
5 information?

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

9 Section 378-3, Hawaii Revised Statutes,
10 establishes "Exceptions", stating that nothing in
11 chapter 378, part I, Hawaii Revised Statutes,
12 "Discriminatory Practices", shall be deemed to
13 prohibit or prevent public or private schools from
14 considering criminal convictions in determining
15 suitability for employment in close proximity to
16 children. Sections 846-43 and 846-44, Hawaii Revised
17 Statutes, independently authorize public and private
18 schools to conduct criminal history record checks for
19 employment screening and section 378-2.5, Hawaii
20 Revised Statutes, allows consideration of convictions.
21 Other statutes that authorize other agencies to
22 conduct employment criminal history record checks are

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1 not included as "exceptions" in section 378-3. To
2 include some but not all, statutorily authorized
3 criminal checks in section 378-3 appears to be both
4 unnecessary and confusing.

5 (10) Although aggrieved civil service applicants may appeal
6 to the civil service commission, the rights of a
7 similarly aggrieved applicant for a state job that is
8 not civil service are unclear. Should the civil
9 rights commission investigate complaints (by persons
10 other than those applying for state or county civil
11 service jobs) related to the prohibitions in section
12 831-3.1, Hawaii Revised Statutes, on the State's use
13 of certain criminal records in state employment
14 decisions? If not the civil rights commission, then
15 who?

16 (11) Similarly, what remedies are (or should be) available
17 for license applicants who believe their license was
18 denied or revoked based on the State's use of
19 nonconviction or conviction data?

20 (12) Since the unlimited availability of Hawaii conviction
21 data allows public access to convictions regardless of
22 age, does this conflict with an employer's ability to

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- 1 consider only those rationally related convictions
2 less than ten years old? If so, how should the
3 conflict be reconciled?
- 4 (13) Should statutorily authorized criminal history record
5 checks direct the data center to disseminate to
6 government agencies only criminal history record
7 information, including conviction and nonconviction
8 data, that is less than ten years old, or to check
9 only criminal history record information less than ten
10 years old if the data center is "conducting" the
11 criminal history record check for authorized
12 requestors?
- 13 (14) Should Hawaii conviction data be made available to the
14 public online, similar to the sex offender registry?
- 15 (15) Does the National Child Protection Act, as amended by
16 the Volunteers for Children Act of 1998, authorize a
17 qualified entity to request a national criminal
18 history record check for both employment and licensing
19 purposes, in the absence of an authorizing statute?
- 20 (16) Does the prohibition in 28 CFR section 20.21(b)
21 continue to restrict states that received federal
22 funding in connection with the collection, storage,

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1 dissemination of criminal history record information
2 in the dissemination of state nonconviction data?

3 (17) Should criminal history record information be purged
4 when it "no longer serves a public purpose"?

5 (18) Whether a conviction may be "annulled or expunged" and
6 whether such an expunged conviction is removed from
7 the conviction database should be clarified.

8 Section 831-3.1, Hawaii Revised Statutes,
9 prohibits use, distribution, or dissemination of
10 "annulled or expunged convictions" in state employment
11 and licensing matters. Although the data center's
12 website states that an arrest record may be expunged
13 when the individual is not convicted and that the
14 expunged arrest record is not available to the general
15 public, this provides little guidance because arrest
16 records where there was no subsequent conviction are
17 never available to the general public, whether
18 expunged or not.

19 (19) Consider repeal of section 831-3.1, Hawaii Revised
20 Statutes, which restricts the State's use,
21 distribution, and dissemination of certain criminal
22 records in employment and licensing decisions to

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1 eliminate redundant, unnecessary, duplicative, or
2 conflicting laws.

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

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

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

17 Various state departments are required to develop
18 standards, which include criminal history record
19 checks, to assure the "reputable and responsible
20 character" of certain license or employment
21 applicants. The mandatory use of criminal history
22 record checks to assure "reputable and responsible

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1 character" in one statute and the prohibition against
2 consideration of convictions when considering "good
3 moral character" should be clarified and
4 distinguished.

5 (21) Whether an exemption for fees provided by the data
6 center for criminal history record checks is
7 appropriate for any additional categories or
8 circumstances, such as adult foster care homes.

9 (22) Whether the State should designate an additional state
10 agency as an "authorized agency" through which a
11 qualified entity may request a national criminal
12 history record check under the National Child
13 Protection Act.

14 (23) Should Hawaii dissemination law be amended to
15 authorize the data center to redisseminate FBI records
16 to a government agency requesting a national criminal
17 history check as an "qualified entity" under the Act
18 where the government agency lacks statutory
19 authorization.

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

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

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

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

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

21 (h) The working group shall cease to exist on June 30,
22 2003.

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

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

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INTRODUCED BY: _____