

SB 1137



HAWAI`I CIVIL RIGHTS COMMISSION

830 PUNCHBOWL STREET, ROOM 411 HONOLULU, HI 96813 · PHONE: 586-8636 FAX: 586-8655 TDD: 568-8692

February 27, 2009
Rm. 211, 9:00 a.m.

To: The Honorable Donna Mercado Kim, Chair
Members of the Senate Committees on Ways and Means

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

Re: Comments on S.B. No. 1137, S.D.1

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

The HCRC opposes S.B. No. 1137, S.D.1, which amends §378-2.5 to allow the Hawaii health systems corporation to conduct criminal history record checks on all employees, applicants seeking employment, current and prospective volunteers, providers or contractors. The HCRC has not opposed narrowly drawn exceptions allowing pre-offer inquiries into records of criminal convictions for positions that involve **unsupervised** contact with vulnerable persons – children, the elderly, persons with disabilities. However, the proposed exception is not narrowly drawn, and there is no reason that the health systems corporation's interests cannot be

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

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

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

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

The HCRC opposes S.B. No. 1137, S.D. 1 because it is not clear that all the Hawaii health care systems positions are unsupervised, and there is no express reason why the health systems cannot make post-offer inquiries, continue to obtain information from the FBI criminal history bank through the HCJDC, and consider convictions if the convictions are rationally related to the duties and responsibilities of those jobs, in the same manner that all employers are allowed under H.R.S. §378-2.5.

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