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COMMENTS ON 2010-H 7754,
RELATING TO DCYF CRIMINAL RECORD CHECKS

The ACLU opposes this bill, including a revised proposed Sub A that DCYF has shared with us. We believe that the significant expansion of DCYF criminal records checks for employees, volunteers and others that is contained in this legislation is unnecessary, overly intrusive and ultimately counter-productive.

Attached is a letter we sent to the Department last month, outlining in detail our opposition to this legislation. The Sub A makes some minor changes to the bill, but those changes do not affect the bulk of our written comments in any meaningful way.

In summary, we believe that the incident that has prompted this bill – the arrest on drug charges of a juvenile probation officer – only highlights the vast limitations of the approach embodied by the legislation. The reasons this is so are described in more detail in our letter.

We are also concerned that this legislation deviates in significant ways from standards already in place in similar statutes dealing with criminal records checks. To give a few examples: unlike this bill, virtually all other statutes "grandfather" current employees from having to go through these intrusive checks; they bar the employer from receiving the person's entire criminal record history, instead providing access only to any "disqualifying information" that may be in the person's report; and they do not require the job applicant to pay for the cost of a fingerprinting check.

For all the reasons expressed in the attached letter, we urge opposition to H-7754 and its Sub A. Thank you for considering our views.

Submitted by: Steven Brown, Executive Director

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March 8, 2010

BY E-MAIL

Mike Burk
DCYF
101 Friendship Street
Providence, RI 02903

Dear Mike:

Thank you for providing me a copy of your Department's draft legislation that would require employees and volunteers at DCYF to undergo a nationwide criminal records check, including fingerprinting. I appreciate your request for our feedback in light of the bill's civil liberties implications for DCYF employees, volunteers and job applicants.

Before addressing specifics of the draft bill, I think it important to explain in some detail why we question the underlying premise of the legislation in the first place. Although I recognize that our concerns are unlikely to persuade you to reconsider introducing a bill like this, at the very least we hope it will encourage a reexamination of its broad scope.

This initiative was prompted by the arrest on drug charges of a juvenile probation officer who had worked for DCYF for approximately 16 years. From our perspective, this incident only exemplifies the many reasons – both practical and from a policy perspective – that nationwide criminal checks are not the panacea they purport to be.

The ACLU has long been concerned about the expansion of fingerprinting requirements to various occupations. Fingerprint checks in employment are humiliating and intrusive, time-consuming, costly, potentially inaccurate, often ineffective in ferreting out inappropriate applicants and a diversion from more effective reference-checking. I will attempt to briefly address these general concerns below, as nothing in the publicly-identified facts surrounding this probation officer's arrest undermines those objections.

Effectiveness: Perhaps most important, fingerprinting and reliance on national criminal records checks can have precisely the opposite effect of their intent. We find that these checks often serve as a lazy substitute for a thorough *general* background check of an applicant, which is much more likely to uncover information about an applicant that an employer would want to know, and which may include, but by no means be limited to, a criminal record history.

According to the *Providence Journal* article about Mr. Ayer, his last arrest was in 1988. That arrest resulted in the imposition of a one-year prison sentence in 1989. Only five years later, DCYF hired Mr. Ayer as a juvenile probation counselor by DCYF. For us, this sequence of events only confirms the point made above. If any reasonable type of background check had been conducted on Mr. Ayer – based on his resume, work history and references – DCYF would almost certainly have discovered this prison record in his recent past. But it is almost just as certain that thorough employment and reference checks are even *less* likely to be conducted by busy personnel if a nationwide criminal record check requirement is in place.

Inaccuracy: The National Crime Information Center (NCIC) is the most extensive system of criminal history records in the United States. Despite, or because of, this, the information is riddled with inaccuracies. A 2001 Bureau of Justice Statistics (BJS) study of NCIC found that "name searches of the NCIC are not fully reliable and existing criminal record files may be incomplete or inaccurate, particularly with respect to case disposition information." As a result, "there is a substantial risk that the user will make an incorrect or misguided decision." The study concluded that "inadequacies in the accuracy and completeness of criminal history records is the single most serious deficiency affecting the Nation's criminal history record information system." Despite these confirmed weaknesses, the Justice Department announced in 2003 that the NCIC would be exempt from a provision of the federal Privacy Act that requires an agency to "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." The rationale given for the exemption was that "it is impossible to determine in advance what information is accurate, relevant, timely and complete."

Intrusiveness and humiliation: Fingerprinting has long been associated, quite accurately, with criminal suspects since it is they who are routinely subjected to this imposition. When job applicants are required to give fingerprints, there is an inevitable stigma of being treated as criminals. That is, after all, what fingerprinting is all about. Adding insult to injury, it is also worth noting that the current state laws requiring fingerprinting focus almost exclusively on *low-paying and female-dominated* jobs. Depending on what criminal records subject an applicant to disqualification, individuals may find themselves having to explain minor offenses in their past to strangers in order to salvage a job. Mr. Ayer's case again seems to prove the point. Leaving aside what was his then-relatively recent conviction in 1989 – which, as I noted, a general background check could have uncovered – his other criminal charges were all alleged to have taken place in the 1970's – more than 30 years or so from this current arrest. We reject the notion that such old criminal history information should play a part in a state agency's employment decision-making or that a job applicant should be forced to release all of this information.

Costs: The proposed bill would require job applicants to pay for the required fingerprint checks. At the cost of $36 a check, this is not an insubstantial amount. Frankly, we consider it insulting to force job applicants to pay for the "privilege" of being fingerprinted, and of having to prove their innocence in order to apply for a job with your agency. If the state feels it is important enough to fingerprint job applicants, the state should be willing to pay for it. Requiring these individuals to pay is especially galling since the state has otherwise recognized that employers should not be allowed to charge a fee for filing employment applications. See R.I.G.L §28-6.3-1. Yet this would essentially be an exemption from that prohibition.

In light of all these arguments against fingerprinting and its effectiveness, we are troubled that the Department seeks to cast so wide a net in applying this to just about any individual in the agency – volunteer, applicant, consultant and current employee alike – who works with minors. Based on the incident that has prompted this bill, we could understand it if DCYF sought to require thorough criminal record checks for probation officers or others working for the agency in a quasi-law enforcement capacity. That is relatively uncontroversial. But it is another matter entirely to impose a blanket mandate on so many other employees and volunteers at the agency.

As you are aware, the General Assembly has been cautious over the years in authorizing criminal record checks for various occupations. And when it has authorized such checks, the legislature has often included a number of safeguards to protect the privacy and due process rights of applicants and employees. Some of those protections are missing in this bill. For example:

● Other statutes "grandfather" current employees, and apply criminal record check mandates on a prospective basis so as to affect only new employees, i.e., people who have been conditionally hired pending a records check. This bill proposes to "periodically" require current employees to undergo this process. Not only does the bill contain no objective standards to determine who will be subjected to these periodic checks, it offers additional broad authority to conduct checks when an employee "is alleged to have committed a crime, charged with committing a crime and/or convicted of committing a crime." But it is unclear what is meant by a person "alleged" to have committed a crime. By whom? The employer? An anonymous complaint? Further, by failing to limit the type of "crime" that triggers this national check, the Department is authorized to demand fingerprints from employees charged with, to give one simple example, "disorderly conduct" during a protest march or numerous other petty offenses.

● Other statutes bar employers from receiving the person's entire criminal record history. Instead, the police agency conducting the check only notifies the employer that a "disqualifying" criminal conviction has been found, and leaves it to the employee or applicant to decide whether to reveal the offense at issue. Among other things, this prevents the agency from obtaining extraneous criminal record information – including information about arrests not followed by convictions, which an employer is explicitly barred by law from seeking. However, this bill requires the police to forward the results of "*any* criminal record" to the Department.

● Other statutes create a concise list of the specific offenses that potentially disqualify an applicant from employment, and, even in those instances, still provide discretion to the hiring body to employ the individual. Although some current DCYF-related statutes do leave the list of "disqualifying" offenses to rule-making, they also allow for discretion, which is absent from this bill.

● Other statutes not only establish a process for applicants to be notified of any disqualifying information found, but also instruct them on an appeals process that may be used to dispute any erroneous information returned.

As these safeguards suggest, criminal background checks were meant to be used sparingly in the employment setting. In the absence of a compelling reason to implement such checks, we believe that DCYF should reconsider this bill, or at least limit it to individuals working for DCYF in a quasi-law enforcement capacity. Even in those instances, the process used should be constrained to operate in a manner like those contained in similar statutes, which contain safeguards such as those noted directly above.

We realize that issues of privacy and liberty may seem quite abstract when talking about efforts to protect minors, but as suggested above, intrusions on privacy, such as fingerprinting, are often undertaken although other available means would actually be *more* effective. Our right to privacy has been lost over the years – and continues to be whittled away – through slow erosion, not through dramatic changes. It is therefore especially important to recognize these incremental losses of privacy, which in isolation may seem minor, but when added together, are not. In dealing with an emotion-laden issue, such as protecting the most vulnerable among us, it easy to resort to simplistic and knee-jerk "solutions" that sound good and seem impossible to resist. We encourage you, however, to resist the temptation, and to instead examine this proposal with a much more skeptical eye.

Thank you in advance for your attention to our views and concerns. We hope you will give them your careful consideration.

Sincerely,

Steven Brown
Executive Director

cc: Patricia Martinez
Kevin Aucoin
Jorge Garcia
Sen. Rhoda Perry