



**Testimony of Becky Straus, Legislative Director
In Support of HB 3168 and
In Opposition to HB 2828 and HB 3331
House Committee on Consumer Protection and Government Efficiency
March 21, 2013**

Chair Holvey and Members of the Committee:

Thank you for the opportunity to provide testimony to address the four proposals before you today relating to the criminal background check process for certain employment or licensure. As related proposals were brought forth in the 2012 session, we appreciated the willingness of this committee to move the discussion to a work group. The 2012 committee recognized that the web of criminal background checks in Oregon is a complex discussion and the ACLU was happy to participate in the resulting work group to learn more and share our perspective. The bills before you today are, by my understanding, informed in large part by the work group's report.

The ACLU supports HB 3168, we are neutral on HB 3330, and we are opposed to HB 2828 and 3331. Again, thank you for the opportunity to provide further detail on those positions.

Duplicative or Expensive Background Checks

When this issue came up most recently in 2012, the problem that was articulated by proponents at the time was the inefficiency of criminal background checks in the employment setting. Anecdotally, they presented evidence of individuals that were working or volunteering at multiple, but related facilities, and were required to undergo a separate background check for each placement (movement between different long term care facilities is an example). It is important to remain mindful of this problem that motivated the work group and the bills before you, so as not to move forward with any proposals that are not targeted at these issues or that might represent a disproportionate response to the challenges at hand.

HB 3168

HB 3168 is the best approach to address the problem of duplicative background checks and the ACLU supports its passage. The bill would direct the Department of Administrative Services to develop categories of background checks that would enable greater portability of checks based upon the area in which an applicant is working, as opposed to based on the entity authorizing the check, as is the current structure. Part of this new "cluster" system, as it is described in the work group report, would also facilitate reevaluation of what list of crimes would disqualify an applicant from the area of employment.

Both of these strategies will move Oregon significantly forward in reducing inefficiency and high cost in background checks, while also preserving the public safety interest upon which the checks are predicated. We urge your support for HB 3168.

HB 3330

The work group recommended a move away from paper and ink fingerprint collection toward better integration of electronic capture technology. To the extent that electronic capture – through LiveScan technology or otherwise – preserves the protections against retention of the prints that are embedded in current law, the ACLU is neutral on HB 3330.

HB 2828

HB 2828 would repeal the law in Oregon that requires destruction of fingerprint records upon completion of a criminal background check for employment purposes. In our view, this repeal is shortsighted and risky, and reaches beyond the recommendations contemplated by the background check work group. We urge you to reject this proposal.

Importance of Fingerprint Record Destruction

For decades, ACLU has been involved in legislation related to the continued expansion of criminal history background checks requiring fingerprinting and submission to the FBI. In 2005, under the leadership of Representative Cameron, we worked on omnibus legislation that significantly expanded the number of departments, agencies and boards that may conduct FBI fingerprint checks. We worked hard at that time to ensure that the necessary safeguards be put in place.

One of the most important safeguards was to continue the ongoing prohibition on retaining fingerprints and on sending fingerprints to the FBI unless the FBI returns or destroys those fingerprints or returns them to OSP to do the same.¹ This protection is critical to avoid the creation of any fingerprint database of individuals who have never been convicted of a crime, even when prints are retained with their consent.

The government should not be retaining fingerprints of innocent Oregonians. Doing so would expose anyone in the database to risk of misuse by those with access, would upset the careful balance of rights and interest that were put in place at the outset of the background check program, and is generally a dangerous precedent to set.

Rap-Back Program

Part of the reason that HB 2828 contemplates a repeal of the fingerprint destruction requirement is because the repeal is a necessary prerequisite to establishing a statewide “Rap-Back” program. For entities that sign up with the Oregon State Police (OSP), their subscription would provide notification of any activity on an employee’s criminal record – including pre-conviction, arrest information – when that employee has previously been through the criminal background check process through the entity. Rap-Back creates an Oregon where, for certain professions,

¹ ORS 181.533(5)&(6) and ORS 181.534(4),(5)&(6)

employment means constant monitoring of even innocent activities that may be wholly unrelated to safe and competent workplace conduct.

And, while HB 2828 stops short of permitting retention of fingerprint records by the FBI, we are nevertheless concerned about the likelihood that fingerprint records of innocent Oregonians will soon be entangled in the FBI's Next Generation Identification (NGI) project. By the FBI's own words, NGI is a "state-of-the-art biometric identification services" system with the goal of amassing detailed profiles of Americans using electronic finger and palm prints, photos with face-recognition technology, iris scans, tattoos, etc., all linked to names, associations, residence history, criminal history, and employment.²

There are a great deal of alternatives to fingerprint retention and a state Rap-Back program that would address the problem identified by some employees here in Oregon without wading into these highly intrusive and uncertain options, the scale of which is out of our control. We respectfully ask that you consider HB 3168 as an alternative to HB 2828 and do not move forward with the latter.

HB 3331

Finally, we have concerns about the Voluntary Central Criminal Records Check Registry ("Registry"), which provides an option for applicants to apply for registration that would certify that the applicant does not have any criminal history.

First, a system like this seems to invite discrimination from employment based on membership status in the Registry. At the very least there should be clear and strict guidelines to avoid any relationship between employment decisions and placement in the Registry.

Second, a central tenant of the current criminal background check program is that the statutory disqualifying crimes have some relation to the employment or role at issue. This principle would seem to suggest that it is irrelevant whether the applicant has a completely "clean" criminal record, but rather that he or she does not have any convictions for disqualifying crimes. The Registry would undermine this principle.

Third, it is unclear whether this process would save any money or meaningfully reduce the number of background checks that are conducted on an individual. HB 3331 proposes quarterly checks and those checks would be name-based state record checks, so would not change any requirement to conduct fingerprint-based checks for records outside of Oregon. The renewal fee every two years would be a burden to the applicant.

The idea of a Registry, or "clean box," was discussed in the work group. Opinions were mixed on its utility and some members of the work group expressed concern over the issues raised above. Because it is unclear that moving forward with this proposal would solve the problem of duplicative checks (because FBI checks would still be needed), and because of the other

² http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/ngi

concerns mentioned above, we respectfully ask that you wait on this proposal, as well, so that proponents might think it through a little bit further.

Thank you for the opportunity to provide comments. Please feel free to contact me at any time with any questions that you may have.