BILL 21-0706 FAIR CRIMINAL RECORD SCREENING FOR HOUSING ACT OF 2016
COUNCIL OF THE DISTRICT OF COLUMBIA
July 11, 2016

COMMITTEE ON THE JUDICIARY
Chairperson Kenyan McDuffie

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Thank you very much for the opportunity to testify today on behalf of The Washington Lawyers' Committee for Civil Rights and Urban Affairs (the "Washington Lawyers' Committee"). The Washington Lawyers' Committee was founded in 1968 to address civil rights violations and racial justice and poverty-related issues in our community through litigation and other advocacy, including mobilizing the pro bono resources of the private bar. Among the areas in which the Committee works are fair and equal housing opportunity through its Fair Housing Project, and criminal justice reform, including prisoners' rights, through its D.C. Prisoners' Project.

The bill being considered today, Bill 21-0706, "The Fair Criminal Record Screening for Housing Act of 2016" (the "Housing Act"), addresses a serious problem on which both these projects have focused: the improper denial of housing to returning citizens and others based on past arrest and conviction records. In a 2014 report on the collateral consequences of arrests and convictions in the DC region, the Committee concluded that "the denial of housing as a result of even minor past convictions in DC is a painful reality."[1] And in DC, there are more than 60,000 residents with past convictions, and some 8,000 additional residents return from incarceration each year.[2] One of the report's recommendations was that the Council enact a "ban the box" type law with respect to housing, as it has done concerning employment.

Accordingly, the Washington Lawyers' Committee strongly supports the Housing Act. The Act represents a critical step forward in the effort to ensure successful reentry of returning citizens into society, reduce recidivism, and advance racial justice. It also follows successful efforts by the District and other jurisdictions to expand access to employment (in D.C.) and housing (San Francisco, CA; Newark, NJ) for individuals with criminal records and their families.

Removing barriers to housing will be a major boost for people of color who are disproportionally arrested and convicted of crimes. As of 2012, African Americans totaled just under half the population of Washington D.C., but made up over 92% of the individuals

[1] Washington Lawyers' Committee for Civil Rights and Urban Affairs, The Collateral Consequences of Arrests and Convictions under D.C., Maryland, and Virginia Law ("WLC REPORT") AT 15 (OCTOBER 22, 2014)
[2] *Id.* at 1.

sentenced in D.C. Superior Court.[3] In light of the stark disparities that result from the criminal justice system, barriers to housing based on applicants' criminal records often have a disparate impact on minority individuals and households. And, as the Council is well aware, housing discrimination against people of color and those who rely on subsidized housing or have prior criminal histories is a continuing reality for many[4] as is residential segregation in the District.[5] By decreasing the number of discriminatory denials of housing against returning citizens and by ensuring that this segment of the population is integrated into housing complexes throughout the District—all of which will be equally required to conform to the Housing Act—this new law should help combat discrimination against formerly incarcerated persons and reduce segregation.

Further, as explained in our 2014 report, research demonstrates that stability is a key component in reducing recidivism in the United States and housing plays an integral role in securing stability upon re-entry. The Housing Act will assist returning citizens in finding stable home environments by reducing discrimination and unfair use of prior criminal history to deny housing. And it is wrong to further penalize those who have served their sentences by denying them housing when they return to DC and try to start a new life. This bill is an important step in the right direction for all these reasons.

It is the Washington Lawyers' Committee's position, however, that Bill 21-0706 does not go far enough to protect the rights of returning citizens. For the reasons I will describe, the Washington Lawyers' Committee urges the D.C. Council to strengthen this bill to further the goals of removing barriers to housing and achieving stability upon re-entry by: (1) allowing for a private right of action in addition to the administrative process already established under the bill; (2) setting clear limitations on housing providers' discretion on what types of convictions can properly form the basis for rejecting a prospective tenant; and (3) requiring housing providers to set up and engage in a clearly defined interactive case-by-case process by which to assess a tenant applicant's candidacy for housing on the basis of criminal history, including affirmatively sharing records relied upon in rejecting an applicant. I am pleased to state that the National Lawyers' Committee for Civil Rights Under Law joins in this testimony.

1. The Need for a Private Right of Action

[3] *See* WLC Report, at i.

[4] *See generally* WLC Report at i, 14-16; Equal Rights Center, Will You Take my Voucher?: An update on Housing Choice Voucher discrimination in Washington D.C. at 7 (March 2013).

[5] *See* Peter Tatian, Josh Leopold, et al., *Affordable Housing Needs Assessment for the District of Columbia, Phase II*, An Urban Institute Research Report (May 2015) at page 18 (noting that Wards 4, 7, and 8 are among the four D.C. wards with the highest "clear black non- Hispanic majorities"—the fourth being Ward 5; *see also id.* at 19 (indicating that "[p]overty affects Wards 7 and 8 more than any other area in the City"); *see generally supra* note 29 and Aaron Blake, The Fix, The Washington Post, *The remarkable racial segregation of Washington, D.C., in 1 map*, (June 19, 2015), available at: https://www.washingtonpost.com/news/the-fix/wp/2015/06/19/the-remarkable-racial-segregation-of-washington-d-c-in-1-map/ ((highlighting that "the vast majority of Census tracts on the east side of D.C. are overwhelmingly black, while the vast majority of western tracts are overwhelmingly white," with some tracts "in southeasetern D.C. hav[ing] less then 1 or 2 percent white residents").

As the history of civil rights enforcement in this country has shown, private enforcement of civil rights statutes has been crucial to the progress we have made. Federal civil rights laws like 42 U.S.C. 1983, the Fair Housing Act, Title VII of the 1964 Civil Rights Act, the Americans with Disabilities Act, and more all authorize victims of discrimination to sue in order to obtain appropriate relief. DC has recognized this principle as well, authorizing a private right of action in addition to administrative remedies. These provisions have played a major role in encouraging compliance with civil rights laws, and we strongly recommend that the Housing Act should do the same.

A. To reduce the administrative burden on the Office of Human Rights and avoid unnecessary and harmful delays for complainants, the Council should add a private right of action.

As the Council well knows, the Housing Act comes on the heels of the DC Fair Criminal Records Screening for Employment Act ("Employment Act") in 2014, and in many respects, the Housing Act mirrors the prior legislation. Since the Employment Act's passage, the Office of Human Rights ("OHR") has seen an increase of 114 percent in the amount of complaints it receives.[6] Based on these figures regarding the implementation of a somewhat similar law, it is likely that there would be a comparable increase in the number of filed complaints under the Housing Act.

This significant uptick in complaints has caused substantial delays in reaching a resolution in many cases. For example, the Office of the District of Columbia Auditor ("ODCA"), in its assessment of the effects of the Employment Act, determined that there are an average of 171 days between the filing of a complaint and the first scheduled mediation date. Further, an average of twenty-five days then passes before the case is closed, meaning that the typical complaint can take 196 days before a resolution is achieved.[7] While it is uncertain just how much the Housing Act will affect wait times, it is clear that the Housing Act will likely add to the caseload and to further delay in resolution, possibly exceeding 200 days. The Committee's clients have often experienced substantial delays in mediating and obtaining final determinations from the OHR following its investigation of various matters, including in housing investigations, which according to the procedures established under the District of Columbia Human Rights Act ("DCHRA"), should be expedited.

Bearing in mind these facts, giving returning citizens the option of a private right of action could reduce the OHR's administrative burden and enhance its ability to timely investigate and resolve cases by diversifying the methods for redressing grievances and providing dual tracks for raising claims under the Housing Act.[8] A combination of both the

[6] Jason Juffras et. al., The Impact of "Ban the Box" in the District of Columbia [hereinafter, The Impact of "Ban the Box"], at 13 (2016).
[7] *Id*. at 13-14.
[8] In landlord-tenant disputes in the District of Columbia, mediation is generally reached quicker than in the OHR system. In a case scheduled for a bench trial, the landlord-tenant court actually gives the opportunity for same-day mediation if both parties consent. In a case scheduled for a jury trial, the parties are required to attend mediation before the first court date in order to work out a settlement. Landlord and

private right of action and the administrative process already established under the Housing Act could thus reduce the burden on the OHR and ensure greater efficiency in challenging violations under the Housing Act as well as assist complainants in obtaining a faster resolution of their denial of housing issues.

If the goal of such laws is to reduce barriers to re-entry— in this case in housing— experiencing delays between the filing of a complaint and the case's resolution could undermine returning citizens' trust in the complaint process. Relatedly, many possible complainants may forego challenging denials of housing (or employment under the Employment Act) in the future because of the lengthy administrative process.[9] If an applicant chooses not to complain on account of the long delays involved with the process for challenging discriminatory denials of housing, this only harms the applicant, unlike the housing provider that retains the ability to accept a new applicant. Conversely, a returning citizen may have nowhere else to go. This is especially true because many returning citizens, far more so than the average population, only have the resources to stay in certain, low-cost or subsidized housing,[10] which further reduces their ability to find available housing.

Avoiding delays in resolving cases may also help in other ways. As stated above, stability is highly important for returning citizens because it reduces the chances of recidivism. The D.C. Mayor's Office on Returning Citizens Affairs estimated that between 2008 and 2014, close to half of returning citizens will return in some capacity to the criminal justice system.[11] This high rate of recidivism directly affects society; it increases the costs associated with the criminal justice system and negatively impacts public safety. Moreover, studies show that barriers to housing directly contribute to that lack of stability that makes the recidivism rate so high.[12]

Relatedly, homelessness can be a serious issue for many returning citizens. Returning citizens, at a far higher rate than the average population, are in economically infeasible positions. A study of New York returning citizens shows that when returning citizens' only housing option is a homeless shelter, nearly a third of those returning citizens return to prison within two years. What's more — the average yearly cost to taxpayers nationwide for a single homeless individual is upwards of $30,000 according to the Brennan Center for Justice.[13] Therefore, having returning citizens run the risk of becoming homeless results in economic costs as well.

Perhaps most significantly, by hindering a returning citizen's ability to resolve his or her denial of housing quickly, the administrative process provided for under the Housing Act may itself create another unintended barrier to securing affordable housing. Additional studies show that a lack of housing increases the barriers associated with applying for and acquiring a job.

Tenant Mediation Program, http://www.dccourts.gov/internet/public/aud_mediation/mediatelt.jsf (last visited July 8, 2016).

[9] The Impact of "Ban the Box", *supra* note 6, at 14.

[10] *See generally* WLC Report (discussing the premise that due to lack of jobs and housing, returning citizens do not have the resources necessary for higher-priced housing).

[11] The Impact of "Ban the Box", *supra* note 6, at 4.

[12] WLC Report, *supra* note 1, at 2.

[13] WLC Report, *supra* note 1, at 2.

These two factors—unemployment and lack of housing—are likely to force returning citizens back into the same or similar activities as the ones that placed them in the criminal justice system in the first place. While these factors may not be the direct byproduct of a lengthy administrative process for resolving discriminatory denials of housing, when combined with the other collateral consequences of previous convictions, the delays in the Housing Act's process could become yet another contributing factor—albeit on a smaller scale—to a returning citizens' ability to obtain housing and a stable environment, both of which play an integral role in avoiding recidivism.

B. The procedures and remedies available under the administrative process governing the Housing Act are insufficient as the sole mechanism for redressing discriminatory denials of housing on the basis of arrest or conviction records.

Under the DCHRA, the law that governs administrative processes for other forms of housing and employment discrimination, an aggrieved person has the option of filing his or her discrimination claims with the OHR. Should the OHR find probable cause to believe discrimination occurred and the parties are unable to resolve their issues through conciliation, the claim will proceed to a hearing before the Human Rights Commission. The DCHRA, however, also specifically allows an aggrieved party to bring a private right of action, including in instances of discriminatory denials of housing.[14] Through a private right of action filed before a court of competent jurisdiction, an aggrieved person is entitled to a panoply of remedies that often exceed those under the Housing Act depending on how the court chooses to fashion relief.

First, under the DCHRA, a court has the power to offer immediate injunctive relief to a plaintiff to "preserve the status quo or prevent irreparable harm."[15] Although injunctive relief is also afforded under the administrative process as early as the time the complaint is filed, issuing such relief requires the OHR to "certify the matter to the Corporation Counsel [now D.C.'s Office of the Attorney General]" who in turn can bring any action necessary to effectuate either option.[16] The additional process for obtaining such critical injunctive relief would therefore amount to a further hurdle to obtaining timely housing for a returning citizen.

Further, through a civil action, a plaintiff would be entitled to an array of remedies not limited to those afforded through the administrative process under the DCHRA,[17] including "any relief [that a court] deems appropriate."[18] And, even though the Housing Act additionally provides for civil penalties against housing providers who engage in discriminatory practices, only half of those funds go to the complainant.

Finally, the fact that the DCHRA gives victims of discrimination in housing the opportunity to file a private right of action[19] is telling and an indication that the Council deemed it appropriate and necessary to afford full relief to victims of discrimination, regardless of the

[14] D.C. Code § 2-1403.16.
[15] D.C. Code § 2-1403.07.
[16] D.C. Code § 2-1403.07.
[17] "The Fair Criminal Records Screening for Housing Act of 2016." Bill 21-0706, Sec.3(d); *see also* D.C. Code § 2-1403.07, -1403.13(a), -1403.16(b).
[18] D.C. Code § 2-1403.16(b).
[19] D.C. Code § 2-1403.16.

type of claim raised by a complainant or the protected class under which such claims are raised. Bearing in mind the Council's interests in "assist[ing] in the successful integration of those with a criminal history by removing barriers to securing adequate housing accommodations" under the Housing Act, among other objectives, and the inadequate and not comparable relief afforded under the present bill, it is the Washington Lawyers' Committee's position that allowing for an administrative-based process and set of remedies as well as a private right of action will best ensure that returning citizens who are victims of housing discrimination are afforded the fullest range of benefits and remedies under the Housing Act.

2. The Need for a Limit on the Discretion that Housing Providers May Use for Purposes of Admission or Denial of Housing Based on Criminal Record

Under the Housing Act, although providers cannot simply refuse to consider applicants with past conviction records, such records can be considered under certain circumstances. As demonstrated by past experience, however, it is important that the process by which providers consider such past records be carefully structured to avoid abuse of discretion and ensure that those with past records are treated fairly. As discussed below, we suggest specific steps to accomplish this goal by limiting what convictions can be relied on to deny housing and by providing for an individualized process for considering applicants.

Under the Housing Act, the decision on whether to deny a returning citizen housing on the basis of a past criminal record would rest on five enumerated factors. These enumerated factors—the nature and the severity of the criminal offense, the age of the tenant applicant when the criminal offense occurred, time that has lapsed since the criminal offense, and the steps an applicant has taken towards rehabilitation—are the only guidance that housing providers are offered under the Housing Act to help steer their decision-making process.[20] The combination of the broad-based nature of these factors and the correlating discretion housing providers are permitted to exercise, without further concrete and specific measures for individualized assessments of tenant applicants' candidacy, may lead to further denials of housing that would run contrary to the bill's purpose.

The fact that the bill prohibits consideration of arrest records, which do not establish that a person has engaged in unlawful conduct, is certainly consistent with recent guidance from the U.S. Department of Housing and Urban Development ("HUD"), which concludes that barring people from housing because of arrest records is likely to violate the federal Fair Housing Act because of its disparate impact on minorities. With respect to convictions, the guidance issued by HUD to public housing authorities ("PHA") included a set of best practice factors for PHAS similar to the factors established in the Housing Act. HUD's recommended factors are to be considered as a PHA exercises discretion in setting policies or making decisions on whether to terminate the lease of a PHA resident or deny admission to an applicant of a PHA property on the basis of a criminal conviction.[21] Despite HUD's explanation that PHAs should carefully use discretion when analyzing these factors, however, serious abuses of discretion have been

[20] "The Fair Criminal Records Screening for Housing Act of 2016." Bill 21-0706, Sec.3(d).
[21] U.S. Dep't of Housing & Urban Dev. Office of Public and Indian Housing, Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions [hereinafter, HUD 2015 Guidance] (2015).

documented.

A recent report issued by the Shriver Center offers examples of discretion run afoul, including denial of housing based on twenty year old convictions and denials of housing based on any criminal conviction.[22] The D.C. Municipal Regulations further illustrate how unbridled discretion can contribute to discriminatory denials of housing, an issue that may be further exacerbated by an arrest record-only prohibition such as the one set forth in the Housing Act. The D.C. Municipal Regulations give broad discretion to private owners of subsidized housing in making tenant applicant housing determinations, discretion which was abused in a case that the Washington Lawyers' Committee is currently litigating on behalf of Maurice Alexander.

What happened to Mr. Alexander is all too typical of the problems faced by DC residents with past convictions, even of minor offenses. Sixty-eight years old at the time, Mr. Alexander was denied housing on the basis of a seven year old misdemeanor for which he spent just ten days in jail. After having been denied housing by three different providers, Mr. Alexander was rendered homeless and suffered great emotional distress, as well as separation from his young son, before he was able to find a public housing placement from the DC Housing Authority.[23] Rejections of people like Mr. Alexander have occurred despite the fact that the United States Interagency Council on Homelessness has also determined that a previous criminal conviction does not predict whether one will succeed or fail in their housing accommodations.[24]

Accordingly, a prohibition on use of arrest records alone, without a further ban on housing rejection due to misdemeanors and felony convictions other than those for drug and violent-related crime and/or criminal activity that affects the health, wellbeing, and safety of other tenants, will not go far enough to protecting a tenant applicant's enjoyment of his or her equal opportunity in housing on the basis of prior criminal history. Specifically, we suggest limiting the types of felony convictions that can lead to rejection of a tenant applicant to crimes of violence, drug-related crimes such as distribution or manufacturing of drugs while excluding drug possession in most instances, and crimes related to the health, wellbeing, and safety of other tenants. This corresponds to the limited categories of felony convictions that federal law authorizes federally assisted housing providers to use in excluding prospective tenants.[25] This could help reduce the number of unfair housing denials to returning citizens who otherwise could make valuable contributions to their tenant communities.

3. The Need for an Interactive, Case-by-Case Process for Assessing Tenant Applicants' Candidacy for Housing on the Basis of Criminal History

As currently drafted, the Housing Act places the burden on a tenant applicant whose "conditional offer was terminated or [against whom] an adverse action was taken" to "request,

[22]Marie Claire Tran-Leung, When Discretion Means Denials: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing, at V (2015).
[23] WLC Report, at 7.
[24] Tran-Leung, at 1.
[25] *See* 42 U.S.C. 13661(c).

within 30 days after [the action], that the housing provider afford the applicant" all records the housing provider relied on in considering the applicant, including criminal records, and a notice advising the applicant of his or her ability to file an administrative complaint with OHR, should the applicant wish to obtain further information regarding the housing provider's determination.[26] Rather than place the burden on tenant applicants to request this information and require applicants who have been denied housing to then attempt to engage in an individualized reconsideration process with the housing provider, the Council should consider amending Section 3(e) of the Act to require housing providers to affirmatively share all records the providers have relied on in making their determinations with respect to a tenant applicant's criminal history and to engage applicants in an individualized interactive process through which the tenant applicant would be granted a case-by-case assessment of the applicant's candidacy for tenancy. Section 3(e) should further be amended to provide that as part of the mandated individualized interactive process set up by the housing provider, the housing provider must consider all documentation and evidence of a tenant applicant's suitability as a tenant and reasons why the particular tenant should be permitted to join the particular resident community. The additional language advising an applicant of his or her ability to file an administrative complaint with OHR should nonetheless be retained in case the interactive process results in discriminatory denials of housing.

Through such an individualized process, a tenant applicant would be afforded the opportunity to learn the reasons a housing provider considered in withdrawing a conditional offer of housing, with documentation to support the housing provider's decision. Likewise the applicant could then present evidence of rehabilitation, recommendations, proof of wages, and other documentation that could influence the housing provider's decision and result in a reversal of a denial of housing.

Such a provision would be comparable to requirements under federal law that providers of public housing or Section 8 housing provide rejected applicants with notification and the opportunity to dispute the accuracy and relevance of the record before admission or assistance is denied.[27] In addition, it finds support in the ODCA report, which recommended in its findings on the Employment Act that a major outreach program is necessary for future, similar bills. In its report, the ODCA documented numerous businesses that were either unaware that the law applied to them or that did not know the exact requirements of the law.[28] If a business, with far more resources at its disposal, does not fully understand the process, then it can be expected that returning citizens, who have relatively few resources will know the full extent of their rights. They will all too often not know to ask for documentation or notice of opportunity to complain, and at the very least, housing providers should be required to provide both.

Conclusion

In closing, the Washington Lawyers' Committee firmly supports the Housing Act, which is clearly is a step in the right direction. We appreciate that the D.C. Council has completely disallowed the use of arrest records in making housing decisions and applaud the Council's

[26] "The Fair Criminal Records Screening for Housing Act of 2016." Bill 21-0706, Sec.3(e).
[27] HUD 2015 Guidance, at 4.
[28] The Impact of "Ban the Box", *supra* note 6, at 11.

efforts to continue the trend of combatting discrimination and injustice that faces returning citizens across the country. We do believe, however, that the Housing Act must be made stronger to adequately protect this vulnerable segment of our society so that we do not force them down the path of recidivism. A private right of action will help to achieve this by lessening the burden on the OHR and by giving denied applicants access to the full range of remedies available under the DCHRA. And further tightening a housing provider's discretion in deciding whether to deny housing based on past convictions, as well as a mandated interactive individualized process for assessing an applicant's candidacy for tenancy that requires transparency and record sharing as part of the process, will better protect returning citizens' rights and strengthen the Housing Act.