Legal Aid Society
OF THE DISTRICT OF COLUMBIA
MAKING JUSTICE REAL

Testimony of Chinh Q. Le, Legal Director;
Shirley Horng, Senior Staff Attorney; and Amanda Korber, Staff Attorney
Legal Aid Society of the District of Columbia

Public Hearing on Bill 21-0706:
The "Fair Criminal Record Screening for Housing Act of 2016"

Committee on the Judiciary

July 25, 2016

The Legal Aid Society of the District of Columbia[1] enthusiastically supports the spirit behind the Fair Criminal Record Screening for Housing Act of 2016. The consideration of irrelevant and unreliable arrest and conviction records is a serious barrier to housing for those trying to re-enter their communities and begin their lives again. For this reason, Legal Aid has been a long-time proponent of precluding housing providers from misusing criminal records, and the bill is an important step forward in this effort. We submit this written testimony to make two global suggestions that we believe would help the Council better meet the goals that it set out to achieve with this proposed legislation, and to propose important specific changes to the existing bill to increase housing opportunities for District residents.

With regard to our global suggestions: ***First***, we urge the Council to expand the scope of this bill to provide District residents with *comprehensive* protection against housing providers' use of discriminatory and unnecessary tenant screening procedures, beyond merely limiting the consideration of criminal records. ***Second***, we urge the Council to amend this bill to provide *substantially greater* protections against the use of prospective tenants' arrests or convictions.

Finally, if the Council intends to proceed with the bill in its current form, we ask that the bill: (1) be expanded to cover tenant-based subsidy providers, not just housing providers; (2) not exempt from coverage District laws that require and/or allow denials based on criminal records; (3) prohibit housing providers from *considering* criminal records, not just from inquiring about or requiring prospective tenants to disclose them; and (4) require housing providers to give prospective tenants written notice of the reason why their offer for housing was rescinded, and give applicants a reasonable time in which to respond.

We appreciate the opportunities that we have had to discuss some of these issues with Councilmember McDuffie and others to date, and we look forward to continuing to work with the Committee and the Council as this bill moves forward.

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[1] The Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." For more than 80 years, Legal Aid attorneys and volunteers have served tens of thousands of the District's neediest residents. Legal Aid currently works in the areas of housing, family, public benefits, consumer, and appellate law. More information about Legal Aid can be obtained from our website, www.LegalAidDC.org, and our blog, www.MakingJusticeReal.org.

I. Taking a Comprehensive Approach to Fair Tenant Screening, Rather than Singling Out the Use of Criminal Records

We urge the Council to consider taking a comprehensive approach to regulating housing providers' tenant screening procedures instead of exclusively focusing the bill on criminal histories. In our experience, when housing providers screen potential tenants, they typically do not pull criminal records separately from other types of records. Instead, most large housing providers use services that provide them with an extensive report on potential tenants, which include information about the applicants' criminal background, landlord-tenant and other court filings,[2] credit reports, and judgments. Unless the services that housing providers utilize significantly change their practices, it seems unrealistic and impractical that housing providers will pull, but not consider or look at, applicants' criminal history when evaluating them on all other factors.

Given this reality and the disparate impact that restrictive screening practices have on tenant applicants—*particularly individuals with limited means and people of color, who are disproportionately involved with the criminal justice system and who have the fewest housing options available to them*—we believe the Council should consider taking a comprehensive approach to fair tenant screening. The most effective way to do so would be to redraft the bill to address criminal records screening together with all of the other factors that housing providers are typically considering at the same time.[3] Legal Aid is currently working with other advocates to develop such a proposal to present to the Council, and we welcome the opportunity to meet with Councilmembers to share ideas and assist in drafting a bill that would take a holistic approach to fair tenant screening.

If the Council's goal is to ensure that housing providers screen potential tenants based on only relevant factors, we urge the Council to consider looking at the whole tenant selection process, not just at how criminal records are used. Of course, the Council can redraft this bill in ways other than the one proposed above that could also better address the reality of how housing providers select tenants. Legal Aid is ready to work with the Council to explore these options.

II. In the vast majority of circumstances, a potential tenant's criminal records should not be considered at all.

If the Council proceeds with a bill that focuses only on criminal records, we urge it to expand significantly the protections the bill currently provides. The Council ought to give serious

[2] Past eviction records are a particularly problematic screening tool. Eviction records in the District are available to the public, including housing providers, regardless of the disposition of the case. That means housing providers can view landlord and tenant actions filed against a prospective tenant even if the case was dismissed by the plaintiff on or before the first hearing or resulted in judgment in favor of the tenant.

[3] If the Council is inclined to take a comprehensive approach, we urge it to refocus the bill on the few relevant and nondiscriminatory factors a landlord may consider when screening a potential tenant. For example, in most scenarios, the only consideration relevant to whether a person will be a good tenant is whether he or she can afford the rent, his or her recent history of meeting financial obligations, and landlord references going back a reasonable amount of years.

consideration to whether housing providers should ever consider a prospective tenant's criminal record, before or after a conditional offer is made.

We understand that there are competing concerns when considering whether a housing provider may consider a housing applicant's criminal record. Presumably, the purpose of allowing housing providers to consider an applicant's criminal history is to protect the safety of other tenants and to reduce the housing provider's exposure to any liability it may be vulnerable to if it leases residential property to someone whom it knows to have a criminal record.[4] However, these concerns must be balanced against two other important considerations.

First, the reality is that any law allowing housing providers to consider criminal records at all is a law that disproportionately impacts the District's most impoverished communities and communities or color. With only a few exceptions,[5] a person with means who has criminal convictions can purchase a home, or live with family members who own their home, anywhere. It is only poor people, and people who cannot afford to own a home, who are rendered homeless or denied housing because of their past records. By allowing housing providers to consider criminal convictions, even if only after a conditional offer is made, the law would be formalizing, and expressly condoning, this type of inequality.

Second, *all returning residents*—even those who have committed more serious offenses or who are more recently exiting the criminal justice system—need housing. Given the extremely limited services in the District for individuals' transition out of the criminal justice system, if a person without means can lawfully be denied housing based on his or her record, where is that person supposed to live? The Council should work to affirmatively provide supports for its most vulnerable residents, not legalize ways to deny them basic needs. It is in the entire community's interest that such individuals have access to housing once they have served their time, as stable housing upon release significantly reduces recidivism.[6] The District will be safer, and our residents better served, when we remove housing barriers for formally incarcerated individuals.

For these reasons, we urge the Council to consider whether a housing provider should ever—before or after making an offer—inquire about, learn about, or consider a person's criminal history.

III. Specific Changes that the Council Should Make to the Bill in its Current Form

Despite the two overarching concerns discussed above, Legal Aid is nonetheless excited about this bill and committed to working with the Council to strengthen it in its current form. Legal Aid has identified at least four changes that, if made to the bill with its current scope and objective, would better protect District residents as they seek safe and stable housing.

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[4] In order to address this concern, the law could provide some protection from liability to landlords who rent to individuals with criminal records, as the Council has done for employers who hire applicants with criminal records in the employment context. D.C. Code § 24–1351.

[5] E.g., individuals convicted of some sex crimes cannot live within a certain proximity to certain locations.

[6] See Report of the Reentry Policy Council, available at *https://csgjusticecenter.org/wp-content/uploads/2013/03/Report-of-the-Reentry-Council.pdf* (last visited on July 22, 2016) at p. 259.

First, the bill should be expanded to cover tenant-based subsidy providers, not just housing providers. Currently, this bill only protects "applicants" to housing, and "applicant" is defined as "any person considered, who requests to be considered, or who intends in good faith to request to be considered, for *tenancy within a housing accommodation*." (emphasis added). This excludes from coverage providers of tenant-based rental assistance within the District, such as the D.C. Housing Authority and Community Connections Housing Authority. Because individuals who face barriers when trying to reenter their communities most often need access to affordable housing, it is critically important that this bill cover subsidy providers as well as housing providers.

Second, this bill should not exempt from coverage District laws that require and/or allow denials based on criminal records. Related to our preceding concern, the type of housing this bill exempts—public housing—is precisely the housing that most needs to be covered by this bill. For example, the D.C. Housing Authority's regulations currently permit it to deny public housing to individuals who have been arrested, but not charged or convicted of, violent criminal activity.[7] This policy is needlessly restrictive; not only does it extend beyond the requirements under the federal regulations, it is, in fact, contrary to the recent guidance issued by HUD's Office of General Counsel.[8] There is no reason applicants to subsidized housing should have any less protection against a housing provider's use of unreliable arrest records than a person on the private market. The bill can address this problem by simply striking "District law" from the exemptions it provides, leaving an exception from the bill's coverage only for federal laws.

Third, the bill should prohibit housing providers from considering criminal records, not just from inquiring about them or requiring prospective tenants to disclose them. Currently, this bill prohibits housing providers from making "an inquiry about or requir[ing] an applicant to disclose or reveal" an arrest or criminal conviction. However, in order to actually stop housing providers from improperly considering criminal records at this initial stage—a major objective of this bill—it should prohibit housing providers from *considering* them even if an applicant voluntarily discloses the information, or the housing provider obtains the information through another means.

Finally, the law should require housing providers to give tenants written notice of the reason why their offer for housing was rescinded, and give applicants a reasonable time in which to respond. This notice should include a copy of the tenant report that the housing provider relied on. Currently, the bill requires housing providers to consider a person's criminal conviction in light of mitigating factors, including "[a]ny information produced by the applicant, or produced on his or her behalf, in regard to his or her rehabilitation and good conduct since the occurrence of the criminal offense." However, unless housing providers are required to notify prospective tenants in writing of their opportunity to present mitigating factors, is it unlikely the housing provider would get the type of information from tenants that the law envisions.

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[7] 14 D.C.M.R. §6109.7(a)(2).

[8] *See* Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate Transactions, available at *https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHAStandCR.pdf* (last visited on July 24, 2016) at p. 5.

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This bill is an important step forward in helping the District's residents re-enter our communities and to move forward with their lives. We welcome the opportunity to work with the Council to strengthen it, and to achieve our mutual goals of promoting equal opportunity and prohibiting unfair discrimination.