

**Testimony of Rachel Rintelmann
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**Before the Committee on the Judiciary and Public Safety
Council of the District of Columbia:
Bill 22-0404
“Criminal Record Accuracy Assurance Act of 2017”
December 14, 2017**

The Legal Aid Society of the District of Columbia¹ submits this testimony to both support and recommend amendments to Bill 22-0404, the Criminal Record Accuracy Assurance Act of 2017 to ensure meaningful enforcement of the incredibly important goal of protecting the privacy of individuals whose records have been sealed, expunged or set aside.

There can be no doubt that individuals with criminal records face innumerable barriers to reentry and community reintegration. As highlighted in the Council for Court Excellence’s powerful 2016 report, *Beyond Second Chances*, a person’s criminal record can substantially impair his ability to reach his full potential long after his formal involvement with the criminal justice system has ended. In the employment context alone, a study has shown that having a criminal record reduced the likelihood of a callback or job offer by an average of nearly 50 percent.² Black men with criminal records were twice as likely to face negative consequences as similarly situated white men.³ According to a survey by the Society for Human Resource Management, more than 92 percent of U.S. employers performed criminal background checks for some or all positions, and that of those that did such checks, 73% said that even a nonviolent misdemeanor conviction would be “somewhat” or “very influential” in their hiring decision.⁴ As you can imagine, then, the impact of the improper disclosure of sealed or expunged criminal records can be huge, excluding even those with sealed records from the workforce and the housing market.

We applaud, therefore, the Council’s commitment to ensuring through this legislation that the sealing of records results in meaningful protection of those entitled to such relief. There remains a very real problem nationwide of background screening companies reporting on now-

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.

² Council for Court Excellence, *Beyond Second Chances: Returning Citizens’ Re-Entry Struggles and Successes in the District of Columbia*, December 2016 at pg. 42 (available at <http://www.courtexcellence.org/news-events/bsc>), citing Pager, D., & Western, B. (2009) *Investigating prisoner re-entry: The impact of conviction status on the employment prospects of young men*. Washington D.C.: DOJ., p. 4.

³ *Id.*

⁴ Holzer, H., Raphael, S., & Stoll, M. (2003). How willing are employers to hire ex-offenders? *Focus*, 23(2), 40-43.

sealed records, sometimes called “zombie” records, and it can have critical and lasting implications for affected individuals.⁵ We thank Councilmember Robert White for his commitment to grappling with this issue, and we are encouraged to see the support it has enjoyed thus far in the form of six additional co-introducers and two co-sponsors. We devote the remainder of our testimony to highlight ways in which this legislation can be made stronger and more protective of those who stand to benefit from it.

The Law Should Require Registration of Criminal History Providers Operating in the District of Columbia and Increase the Burden for Verification of Criminal Records

There are hundreds of background checking agencies operating in the United States. Advocates in other jurisdictions have highlighted for Legal Aid the many challenges in pursuing legal action against these agencies, many of which have no local presence, and some of which operate primarily from outside of the country. In order to best protect the interests of persons aggrieved under this legislation, we believe that all criminal history providers operating in the District of Columbia should be required to be licensed by the city, provide a local registered agent, and provide evidence that they are bonded and insured. The protections of this legislation are meaningless if the criminal history provider cannot be held accountable because they remain outside of the District’s enforcement reach.

Often, the records reported by criminal history providers are pulled from online public databases, without careful analysis of whether the record actually belongs to the person being screened. Individuals with common names, for example, may face denials of housing and employment based on the record of an entirely different individual. And, by the time they have realized the wrong, it is too late to correct it. Someone who has lost a housing or job opportunity due to misreporting on offenses belonging to other people should not have to go through a time-consuming complaint process to vindicate their rights. Instead, greater protections should be put into place to ensure that such misreports are never made. We recommend language requiring criminal history providers to verify by at least two independent mechanisms that each record to be reported is actually attributed to the person being screened. A mere name search of public online records should not be enough to meet this high standard. The risk of harm is simply too great to risk the reporting of misinformation.

The Office of Human Rights Should Not be the Sole Mechanism for Enforcement

Legal Aid opposes the use of the Office of Human Rights as the sole mechanism for enforcement of this law for multiple reasons. First, this law would affect a population not protected by the D.C. Human Rights Act, and so the Office of Human Rights (“OHR”) is not a natural home for enforcement actions. Second, and more importantly, our advocates and our clients have experienced a number of barriers in pursuing other actions before OHR, and our assessment is that it is often ineffective in protecting the rights and interests of individuals appearing before it. We have seen, for example, well-supported legal claims dismissed without

⁵ See, e.g. Joe Palazzo and Gary Fields, *Fight Grows to Stop Expunged Criminal Records Living on in Background Checks*, Wall St. J., May 7, 2015 (telling the story of Helen Stokes, who was denied from two senior housing complexes due to then-sealed arrest records).

litigation. We have also seen cases in which mediators have pressured complainants into unfavorable settlements of claims, often resulting in outcomes far worse than they would have faced had they lost at a hearing. Cases filed before OHR also often move extremely slowly, with complainants sometimes hearing nothing for many months after claims are filed. We have heard many of our clients express concern about lengthy delays in Ban the Box enforcement actions in particular.

Finally, a separate reality is that it is statistically likely that the people most affected by criminal reporting in violation of this legislation will be low-income and black. The District's approach of limiting legal remedies available on this, and the two Ban the Box laws recently enacted, is inconsistent with the approach taken on legal actions more likely to affect higher income, white District residents. While we support the *option* of a low-barrier enforcement mechanism like OHR, we oppose the *requirement* that rights be enforced through OHR. We worry that this approach risks sending a message that violations of law more likely to affect low-income black residents are somehow less important, or that the rights violated are somehow less worthy of vindication.

Aggrieved Persons Should be Entitled to Pursue a Private Right of Action

Finally, setting aside our concerns with the OHR process, we believe the current fine-based enforcement mechanism is inadequate. First, in addition to monetary relief, we believe that the legislation should provide for injunctive relief, specifically a requirement that the report be corrected and the incorrect or sealed information not be used for future background checks. But most importantly, there are very real and very substantial harms caused by the misreporting of criminal histories; jobs opportunities and housing – both scarce and in high demand in the District – are lost, trapping individuals and families in dire economic and personal circumstances. In some cases, this may cost the District additional money in public benefits and shelter on behalf of individuals and families who would otherwise be able to achieve some level of economic independence and housing stability. Damages flowing from the misreporting of criminal information will often far exceed the small fines currently included in the legislation – the loss of the opportunity for stable and long-term employment income, for example, is worth far more than \$500 (half of the \$1000 fine complainants would split with OHR). Moreover, for large screening companies, these fees – even the highest fee of \$5,000 – are too small to be an effective deterrent, with companies likely to view them as just another cost of doing otherwise lucrative business.

We believe that persons aggrieved under this law must be entitled a private right of action for enforcement of the rights created in this legislation, including claims for damages and with a three-year statute of limitations rather than the year currently provided. This needn't necessarily supplant the right of complainants to file before OHR, but filing before OHR simply should not be the sole available remedy. This is the only way to truly protect persons affected by this issue, while at the same time making clear to criminal history providers that they cannot report inaccurate information with impunity.

In sum, we are very encouraged by the commitment the introduction of this bill shows to increasing protections for individuals who have had involvement with the criminal justice system. We believe that, with certain modifications, this legislation has the potential to provide broad-reaching and meaningful relief for much of our client community. We thank you for the opportunity to testify on this legislation, and look forward to continuing conversations about how best to meet the needs of our shared community going forward.