

COUNCIL OF THE DISTRICT OF COLUMBIA

COMMITTEES ON
BUSINESS, CONSUMER, AND REGULATORY AFFAIRS
AND
COMMITTEE ON FINANCE AND REVENUE

JOINT PUBLIC HEARING ON SECTIONS 6, 7, 8, AND 9 OF B20-466, THE
MARIJUANA LEGALIZATION AND REGULATION ACT OF 2013

OCTOBER 30, 2014

TESTIMONY OF THE
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS
AND URBAN AFFAIRS

Thank you, Chairman Orange and Chairman Evans for holding this hearing today on Sections 6, 7, 8, and 9 of the Marijuana Legalization and Regulation Act of 2013.

I am Deborah Golden, Director of the DC Prisoners' Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs. I wish to note at the outset that the Committee has not yet taken a position as to what the Council's response should be to the outcome of the Initiative 71 vote.

Since its founding more than 45 years ago, the Washington Lawyers' Committee has developed a wide range of litigation, advocacy, and educational programs and projects addressing a broad range of civil rights, discrimination, and poverty concerns, including those relating to the criminal system and the war on drugs. As you may know, in 2013, in cooperation with the firm of Covington and Burling LLP and a distinguished panel of senior and retired judges, the Committee issued a report entitled "Racial Disparities in Arrests in the District of Columbia, 2009-2011." This report was widely cited as a reason for decriminalizing marijuana and continues to be cited by Councilmember Grosso as he introduced this legislation.

Last week, in cooperation with the same law firm and the same judges, we issued a report of the collateral consequences of arrest and conviction. Both reports are available on our website.

Today, I will discuss on the findings and recommendations in those reports that are relevant to this bill and reiterate principles that, no matter what the Council decides, we think are important to keep in mind.

Data on Marijuana Arrests Before Decriminalization.

As has been discussed, marijuana arrests in DC were conducted in a racially disparate way. We would like to remind the Council that many of the arrest patterns in DC raise serious questions of racial disparities.

Additionally, it is important to note that most arrests in DC are not for violent crimes. Our analysis of adult arrests in the District of Columbia from 2009 through 2011 found that, of more than 142,000 arrests recorded in that period, almost one-fourth were for traffic offenses, one-fifth were for drug offenses, and one-tenth were for “disorderly conduct.” In contrast, less than one out of twenty arrests was for an offense classified as “violent” under the FBI’s Uniform Crime Reporting system. In 2012 and 2013, D.C.’s Metropolitan Police Department reported a total of more than 84,000 arrests (including more than 6,000 juvenile arrests), of which more than 14 percent were drug arrests.

African Americans are disproportionately likely to be arrested and convicted. The Washington Lawyers’ Committee’s analysis of adult arrests in D.C., for instance, found that more than eight in ten adult arrests from 2009 through 2011 were of African Americans, including nine out of ten drug arrests, even though African American adults made up only 47.6 percent of the city’s population and used illegal drugs at similar rates as whites. Sixty-three percent of drug arrests were for simple possession charges (including possession of drug paraphernalia), and African American arrestees accounted for nearly nine out of ten simple possession drug arrests during the study period. These disparities appeared to persist through the court process, with about 87 percent of D.C. Superior Court cases that could be matched to an arrest involving African American defendants. That conclusion is consistent with the D.C. Sentencing Commission’s finding that of the 2,154 felony offenders sentenced by the D.C. Superior Court in 2012, 92.8 percent were African American. Overall, the rate of incarceration of African Americans in D.C. has been estimated to be some 19 times the rate of whites.

Even just looking at marijuana, we see that decriminalization of marijuana in the District of Columbia has not ended discriminatory and racially disparate enforcement of marijuana laws. According to an analysis by the Drug Policy Alliance, roughly 77 percent of the tickets for marijuana possession were issued in communities of color in the District.

Collateral Consequences of All Arrests and Convictions Must Be Minimized

The problem of collateral consequences of arrest or conviction – penalties on those formerly arrested or convicted of crime that are imposed not by penal laws but by ancillary rules, statutes, or practices that make it much harder to obtain a job, housing, or other necessities – is significant and growing. In Washington, D.C., some 60,000 District residents, about 10 percent of D.C.’s population, have been convicted of an offense, with approximately 8,000 additional residents released from incarceration each year. The Council on Court Excellence has estimated, “nearly half of previously incarcerated persons...may be jobless with little prospect of finding consistent work.”

Given the known racial disparities in arrests and convictions, such employment barriers have an unavoidable and disproportionate impact on communities of color. In recent years, we have sought to reduce these barriers through legislation limiting the role criminal history may play in public (and in some cases private) employment decisions. We also have sought to challenge these barriers in court. For instance, the Committee, along with the firm of Arnold and Porter LLP and the NAACP Legal Defense and Education Fund, recently filed suit against the Washington Metropolitan Area Transit Authority (WMATA), alleging that WMATA’s “overly broad, unjustifiably rigid and unduly harsh” background check policy “unfairly and disproportionately limits opportunity for qualified African-American employees and applicants in violation of federal and local antidiscrimination laws.”

We wish to thank the Council for passing Bill B20-467 to seal marijuana-related criminal records. We also thank the Council for the more stringent “Ban the Box” law, the Fair Criminal Record Screening Act of 2014, which will go into effect next month.

The earlier version of this law took effect in June 2013, and research has shown that it has already produced positive results. D.C.’s Office of Human Resources found that 76% of post-law applicants for municipal jobs who had a criminal record were in fact suitable for government employment, but would likely have been disqualified from consideration for employment if the D.C. law were not in place.

Starting next month, employers with more than ten employees must consider the following seven factors in determining the extent to which they will take criminal history into account in making a hiring or retention decision:

- (1) The specific duties and responsibilities necessarily related to the employment sought or held by the applicant;
- (2) The bearing, if any, of the criminal offense for which the applicant was previously convicted will have on his or her fitness or ability to perform one or more such duties or responsibilities;
- (3) The time which has elapsed since the occurrence of the criminal offense;

- (4) The age of the applicant at the time of the occurrence of the criminal offense;
- (5) The frequency and seriousness of the criminal offense;
- (6) Any 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; and
- (7) The public policy that it is generally beneficial for ex-offenders to obtain employment.

An employer may withdraw a conditional offer of employment based on an applicant's conviction history, but only for a "legitimate business reason" that is "reasonable" in light of the seven factors outlined above. If an offer is withdrawn, the applicant is entitled to request within 30 days and receive a written statement explaining the legitimate business reason for the action in light of the seven factors.

There is every reason to expect that the effect on employment opportunities in the private sector will be as great as the effects in the public sector have been.

Implications for Any Response to Initiative

The Washington Lawyers' Committee, consistent with recommendations of the American Bar Association, recommends that any law or regulation that imposes a collateral consequence of a criminal record meet the following four requirements:

Necessity. All collateral consequences must be justified by a specific need based on a demonstrated relationship between the nature and time of the offense and the rights or conduct to be restricted. For instance, if an individual is convicted on embezzlement charges, restrictions on that individual's ability to serve as a certified public accountant would be appropriate, at least for some period of time. However, it would not be justifiable to impose the same restrictions based on a conviction from 20 years ago for shoplifting.

Due Process. Collateral consequences should rarely if ever be triggered by mere arrests or charges that have not resulted in a conviction. The law should not impose a disability on an individual without the government having met its burden of proving the individual's guilt in court.

Flexibility. To the greatest extent possible, collateral consequences should be imposed on a discretionary, rather than mandatory, basis, taking into account a particular individual's circumstances and factors.

Rehabilitation. Once an individual has completed his or her sentence, the primary goal of the criminal justice system should be to ensure the individual's successful reintegration into

society, thus reducing the risk of recidivism. Even where collateral consequences are determined to be necessary (within the meaning of Principle (a)), these consequences should be designed to impose the least possible impairment on an individual's ability to reintegrate.

Specifically applying these principles to the legislation under consideration, we urge that individuals with records should be as eligible as anyone else for jobs and other opportunities in the new industry, consistent with the requirements of a reasonable legitimate business reason. People returning home should not be shut out of any new industry and opportunities.

Other Legislation to Consider

There are areas not covered in the current bill that the Committee believe would be important to include.

If a regulated industry of any kind is adopted, the Council should bar private or public housing providers from denying housing to anyone who has a license or works in this new industry. Without such protection, we worry that legitimate business owners or employees would be penalized.

Also, we encourage the Council to investigate ways to make the effects of these new laws retroactive so that people who are incarcerated now for marijuana can be freed once this legislation takes effect.

Finally, the Council should also minimize, to the greatest extent possible, creating new criminal penalties. We ask you to consider treating unlicensed selling of marijuana as a civil offense punishable by a fine or diversion program.

Thank you for your time and consideration of these issues.