WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND URBAN AFFAIRS

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON HEALTH

"Removing Barriers to Occupational Licenses Amendment Act of 2017"

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Washington Lawyers' Committee for Civil Rights and Urban Affairs
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Thank you for this opportunity to provide written testimony regarding the proposed "Removing Barriers to Occupational Licenses Amendment Act of 2017" (B22-0523). For nearly fifty years, the Washington Lawyers' Committee for Civil Rights and Urban Affairs ("the Committee") has addressed issues of discrimination, racial injustice, and entrenched poverty through litigation and policy advocacy. The Committee applauds the introduction of this bill, which recognizes the pervasive and often insurmountable barriers to reentry that have exacerbated economic instability and homelessness in our most vulnerable communities.

Access to occupational licenses is vital for many returning citizens, and this bill takes a crucial step forward in reforming the prison-to-poverty pipeline that ensnares so many of our clients. As it is currently written, however, the bill contains ambiguous and broadly-drafted language that threatens to undermine its legislative purpose. If implemented without the revisions we propose below, this bill may sustain the very barriers to occupational licensing that it seeks to eradicate. The Committee therefore urges the Council to adopt the following changes:

1. **Insert Time Limits on the Consideration of Adult Convictions**

Our returning citizen clients have repeatedly witnessed how three-year to decades-old convictions, often unrelated to the employment they seek, persist in barring their access to employment. To adequately protect returning citizens from unjust discrimination, this bill must do more to limit how licensing boards consider aging convictions. The Committee urges the Council to insert time limits on the relevancy of adult convictions or, alternatively, to create a presumption in favor of the applicant when the conviction at issue has adequately aged. Failing to do so will permit licensing boards to continue discriminating against returning citizens who, despite a history of compliance and rehabilitation, are forever stigmatized by past mistakes.

Studies have shown that the risk of recidivism falls dramatically as time elapses after a conviction. After five to seven years without a subsequent conviction, an individual with a criminal record presents no statistically greater risk of future criminal activity than an individual

with *no* prior convictions.[1] Although re-arrest rates can reach 45% in the first year following release, these rates fall sharply, by more than half in the second year and by an additional half in the third year.[2] Generally, those that complete three years without a subsequent conviction pose a very low risk of recidivism, and those that complete five to seven years without a subsequent conviction pose the same low risk of criminal activity as any individual with no criminal record.[3]

This bill should recognize this diminishing risk of recidivism by incorporating time limits on the consideration of adult convictions. Just as licensing boards are prohibited from considering juvenile adjudications or sealed convictions under the proposal, they should be prohibited from reviewing adult convictions beyond their point of relevancy. Misdemeanor convictions, which reflect crimes of low seriousness, should not be taken into account three years or more after the date of conviction. Felony convictions should not be taken into account five years or more after the date of conviction.

In so amending this bill, the Council would be following the footsteps of DC employers that already recognize the diminished relevancy of aged convictions. For example, the Washington Metro Area Transit Authority ("WMATA"), which employs over ten thousand individuals in the DC metro area, altered their policy to impose narrow time limits when reviewing the criminal history of potential employees. As of July 2017, WMATA does not take certain misdemeanor and felony convictions into account once five years has elapsed, and for applicants whose convictions fall within this "look back" period, WMATA will consider the applicant's individual history and evidence of rehabilitation before rendering a final decision. We urge the Council to look to WMATA's practice as a blueprint for this bill, which can and must do more to protect returning citizens from relentless employment discrimination.

At a minimum, the bill should create a presumption in the applicant's favor at the three-year and five-year marks for a misdemeanor and felony conviction, respectively, that a licensing board must then overcome to deny an application based on that history. Creating this sliding scale of presumptions acknowledges the difference in severity between misdemeanor and felony convictions, but it also recognizes the research that confirms a diminishing risk of recidivism over time. For how long must we require returning citizens to actively prove their fitness, to verify their humanity and self worth, before we allow their record of compliance and rehabilitation to speak for itself?

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[1] Vincent Schiraldi, Bruce Western and Kendra Bradner. *Community-Based Response to Justice-Involved Young Adults*. New Thinking in Community Thinking, pp. 15 (Sept. 2015).
[2] Piehl, Anne Morrison. *Putting Time Limits on the Punitiveness of the Criminal Justice System*. The Hamilton Project, pp. 11-12 (Oct. 2016).
[3] *See e.g.*, Mitchell, S. D. (2011, Spring). *Impeding Reentry: Agency and Judicial Obstacles to longer Halfway House Placements*. Michigan Journal of Race and Law, pp. 235-320; James, N. (2015). *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism*; Travis, J., Crayton, A., & Mukamal, D. A. (2009). A New Era in Inmate Reentry.

2. Narrow the Broadly-Drafted Language Interpreting a "Directly Related" Conviction

The bill recognizes that a licensing board should "consider an applicant's pending criminal accusation or prior conviction only if the pending criminal accusation or prior conviction is *directly related* to the occupation for which the license is sought." It then enumerates four factors that the licensing board must consider when determining whether a conviction is, in fact, "directly related" to the sought occupation. The proper formulation of these factors is essential to ensuring that an unrelated conviction will not obstruct an otherwise qualified applicant's path towards a licensed profession. The first factor, which emphasizes the District's legitimate interest in securing equal access to employment for returning citizens, and the fourth factor, which mandates the consideration of any evidence of the applicant's rehabilitation and fitness, are crucial elements to weigh in this determination. However, the Committee is concerned that the broad language governing the second and third factors encourages an unnecessarily expanded interpretation of the phrase "directly related."

As written, the second factor requires the licensing board to consider whether the elements of the offense are "directly related to the specific duties and responsibilities of the occupation." But in the practice of any occupation, a professional may be responsible for numerous levels of "specific duties." A barber, for example, is primarily tasked with cutting, trimming or shaving hair, but he may also be tasked with performing clerical duties, sterilizing his equipment, answering phones, supervising other workers, sweeping floors, ordering supplies, recommending or selling cosmetic supplies, or helping to assess skin or hair conditions. If a prior conviction is reviewed with respect to *any* specific duty or responsibility of the sought occupation, licensing boards may be empowered to consider minute, uncommon, or ancillary duties when making these determinations.

Accordingly, based on an analysis untethered to the actual, primary responsibilities at issue, licensing boards may be permitted to reject otherwise qualified applications. The risk of these unintended consequences surely weighs in favor of tightening the precision of this drafted language. We also note that the bill should strengthen the language used to describe the *degree* of relatedness between the prior conviction and the sought occupation, which would bolster the safeguards intended by this bill. The Committee therefore urges the Council to alter the bill's language such that licensing boards must consider whether the elements of the offense are "directly and substantially related to the specific primary duties and responsibilities of the occupation."

We further recommend a substantive edit to the third factor, which requires the licensing board to weigh whether the sought occupation "offers the opportunity for the same or a similar offense to occur." Again, a careful review of this language reveals that the licensing board may consider whether the sought occupation offers *any* opportunity for the occurrence of a similar

offense. It cannot be the council's intention to assert that even a 1% chance of reoccurrence should influence the licensing board's determination. The Committee therefore urges the Council to alter this language such that the licensing board must consider whether the sought occupation "offers a high likelihood that the same or a substantially similar offense will occur."

3. Require the Licensing Boards to Educate its Applicants of the Relevant Factors when Interpreting Whether a Conviction is "Directly Related" to the Sought Occupation

Finally, more must be done to strengthen the educational requirements in this bill. Without guaranteed access to necessary and relevant information, applicants will be deprived of a full and fair opportunity to respond to a notice of potential denial, suspension, or revocation.

The Council should include a requirement under subsection (f) that requires written disclosure of the full list of relevant factors when determining whether a conviction is "directly related" to the sought occupation. Licensing boards are not required to publicize the "directly related" factors enumerated in the bill, nor are they required to inform applicants – even those who may face denial, suspension, or revocation of their licenses – of this full list of relevant considerations. It is true that before any such decision is formally rendered, the board must notify the applicant in writing of (a) the offense that formed the basis for the denial as well as (b) the rationale for deeming the offense "directly related" to the sought employment. Notably, however, the licensing board could limit their explanation solely to the factors that supported denial, and the applicant would remain unaware of those factors that *weighed in their favor* when the board reviewed their criminal history. Without access to the full list of relevant factors in this notice, the applicant will be at a severe disadvantage when challenging the board's initial finding.

This preliminary notice must also include "[e]xamples of additional information that the applicant . . . may produce to demonstrate his or her rehabilitation and fitness," but there is no guarantee of quality or quantity in this proffered list of examples. As written, a licensing board could comply with the bill by providing no more than two nearly identical examples. The vagueness of this provision carves out ample space for licensing boards to potentially abuse their discretion. Given that the bill helpfully enumerates *seven* examples of evidence of rehabilitation or fitness in subsection (d)(4), it would be very easy to, at a minimum, require the inclusion of these seven examples in the written notice.

Finally, there is no requirement that applicants be informed of other resources, such as the potential availability of legal counsel that could assist with their efforts in responding to a preliminary denial notice or appealing a final decision. Even if the notice could not identify specific legal service providers or agencies, it must, at a minimum, assert that applicants may seek legal aid or counsel during this process.

This bill recognizes a crucial truth: that those with criminal records deserve equal access to employment but that numerous barriers have long obstructed their pathway to economic stability. But allowing ambiguous and imprecise language to remain in the bill will render futile its efforts to eradicate reentry barriers to occupational licensing. Many of the deficiencies identified above were mirrored in the language of the Fair Criminal Records Screening Act of 2014, which has failed to adequately protect returning citizens from employment discrimination. The Committee therefore urges the Council to adopt the changes outlined above, which will give teeth to the reform envisioned by the bill.