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INTERIM TESTIMONY 2014

House Committee on Judiciary and Civil Jurisprudence

Study the potential issues involving civil liability for interacting with ex-offenders. In particular, examine the implications of H.B. 1188 (83R) and the potential expansion of similar protections to landlords.

Dear Members of the Committee,

My name is Sarah Pahl. I am a Policy Attorney for Texas Criminal Justice Coalition (TCJC). Thank you for allowing me this opportunity to present testimony on effective strategies for addressing housing barriers that impact men and women seeking a second chance.

OVERVIEW OF H.B. 1188 AND APPLICABILITY TO LANDLORDS

H.B. 1188, passed in the 83rd Legislative Session, gave business owners—whether employers, general contractors, premises owners, or other third parties—more hiring options by limiting their liability on charges of negligently hiring or failing to adequately supervise an employee who has a criminal conviction. However, causes of action still may be permitted for offenses committed by employees in the routine performance of their duties if the business owner knew or should have known of the conviction and the conviction is for a sexually violent offense, or an act under 3(g), Article 42.12 of the Texas Code of Criminal Procedure, commonly known as aggravated offenses.

Private landlords are similarly situated to employers: They are concerned about assuming liability if they rent or lease to an individual with a criminal record. Specifically, some private landlords use criminal records—including arrest—to justify rejecting otherwise qualified applicants,¹ asserting the increased risk of civil liability from lawsuits.² This leaves many individuals scrambling to find housing. The barriers that limit access to adequate housing not only affect those released from incarceration; they can also affect anyone with a criminal record, even a wrongful arrest.

The protection given to business owners should be extended to landlords who rent or lease to individuals with a criminal record. Doing so will improve family stability, increase public safety, and reduce the likelihood of recidivism—saving taxpayers the needless high costs associated with re-incarceration. However, any language that would insulate landlords who deny housing to those with arrests, criminal convictions, or deferred adjudications merely as a guise for denying housing based upon race or other similar protected status should be strongly opposed.

HOUSING FOR INDIVIDUALS WITH A CRIMINAL RECORD

Not only is there a general shortage of affordable housing for individuals with a criminal record, but many are at a general financial disadvantage due to limited employment opportunities and, in the case of those recently released from incarceration, no funding with which to pay the typical start-up costs of renting a residence (*i.e.*, application fees, security deposits for a residence and utilities, or even purchasing furniture and basic household items). Additionally, individuals with a criminal record may be banned from public housing programs, fall victim to incomplete or inaccurate criminal record searches, and experience groundless discrimination based on an offense that does not threaten public safety.

HOUSING FOR INDIVIDUALS WITH A CRIMINAL RECORD (CONTINUED)

Inability to access stable and affordable housing causes those with a criminal record to be more susceptible to recidivism, violating probation or parole supervision, and treatment failure (especially for substance abuse and mental illness).³ While many public housing providers are prohibited by law from renting to people with certain convictions,⁴ private landlords retain discretion as to when and to whom to rent their properties. That leaves individuals with a criminal record struggling to find stable and affordable housing. In turn, **Texas communities see a decrease in public safety, as individuals are forced to find less legitimate means to survive, and an increase in state spending, as individuals are re-incarcerated.**

BARRIERS TO HOUSING FOR INDIVIDUALS WITH A CRIMINAL RECORD

- **Affordability and availability.** Housing affordability remains a problem not only for low-income individuals and families, but also for those with a criminal record. Plus, Texas has fewer available units for low-income households than the national average.⁵ Because individuals released from incarceration have no income when they are released and may struggle to find employment, they face heightened financial barriers to pay rent, in addition to initial application fees and a security deposit. Some individuals are not even allowed to hold bank accounts due to their crimes, which further limits their ability to secure housing. When unable to access public or affordable housing, some resort to living in the old, familiar, crime-ridden neighborhoods that facilitated their original criminal activity. This cycle must be broken.
- **Potential exploitation.** Although many individuals released from incarceration expect to live with their families, some may not be allowed to return to the family home if the family lives in public housing (see “Legal Restrictions” section below),⁶ if the relationships with family members are strained, or if individuals have no family members at all. Individuals with few housing options face potential exploitation by the people they live with, whether family members or others, who possess the power to terminate the living arrangements on a whim.⁷ For example, a man recently released from incarceration may live with a brother who is in a gang and threatens to kick him out if he does not perform gang-related tasks. Or a recently-released woman may be forced to cook, clean, or otherwise “serve” her roommates in order to maintain the room or couch she rents. Finally, landlords may ask for the maximum security deposit or increase rent due to an applicant’s “high risk” status,⁸ taking advantage of the fact that a person released from incarceration does not have access to the same housing options as those who have not been incarcerated.
- **Housing providers often rely on inaccurate or incomplete criminal records.** A survey conducted by the U.S. Department of Justice Bureau of Justice Statistics in 2010 found that, in Texas, only 69% of all arrests in the state database had a final disposition recorded, and only 50% of felony charges were updated with a final disposition.⁹ In fact, since 2006, the number of final case dispositions reported to the state criminal history repository has decreased over five percent.¹⁰ This means that more than half of all Texas criminal records are not up-to-date and individuals may be denied housing without cause. Additionally, even if certain records are ordered sealed or expunged, there is no guarantee that third-party commercial vendors will purge the information from their system or that the event will be erased from media archives.¹¹
- **Legal restrictions.** While private landlords are afforded discretion regarding whether to lease to individuals with a criminal record, public housing authorities (PHAs) must refuse housing to individuals, or any member of the household, who are subject to lifetime sex offender registration or have been convicted of drug-related criminal activity involving the production or manufacture of methamphetamine in federally-assisted housing.¹² Further, most PHAs exercise their discretion to deny applicants with criminal histories that are not included in the mandated restrictions, even if they can show evidence of rehabilitation.¹³

BARRIERS TO HOUSING FOR INDIVIDUALS WITH A CRIMINAL RECORD (CONTINUED)

- **Vague rental selection criteria do not clearly communicate why an individual’s rental application may be denied.** H.B. 3101, passed in the 80th Legislative Session, mandated that landlords “make available” printed notice of the landlord’s selection criteria and the grounds for which the rental application may be denied.¹⁴ However, the sample rental application provided by the Texas Apartment Association merely states “You acknowledge that you had an opportunity to review our rental selection criteria, which include reasons your application may be denied, such as criminal history, credit history, current income, and rental history.”¹⁵ This boilerplate language does not indicate which criminal history factors (*e.g.*, type of offense, length of time since last offense, or even history of an isolated arrest) the landlord will consider and, therefore, does not truly give the applicant proper notice of selection criteria.

KEY FINDINGS

- Nearly a million individuals cycle through local jails every year in Texas,¹⁶ while approximately 650,000 people are under some form of state supervision (incarceration, probation, or parole) on an annual basis.¹⁷ Further, there were over one million arrests in Texas in 2012.¹⁸
- **The Department of Justice Bureau of Justice Statistics reported that Texas has logged a grand total of 10,883,600 individuals in the state criminal history file.**¹⁹ Individuals who are released from incarceration or who have a criminal record, even those with an arrest that never led to a conviction, must overcome many obstacles to becoming self-supporting, contributing members of their society. One such challenging obstacle is housing.
- **The likelihood of recidivism increases when individuals with a criminal record are denied housing.**²⁰ Texas taxpayers pay for the costly reincarceration of these individuals at the price of over \$50 per person per day in state facilities²¹ and almost \$60 per person per day in the county jails.²²
- Men with histories of incarceration were found to be twice as likely to experience housing instability and four times more likely to experience homelessness than those without a criminal record, and those most recently incarcerated were 69% more likely to have insecure housing than those without histories of incarceration.²³
- Limiting access to housing among individuals with a criminal record ultimately hurts their children and threatens family security. One out of every 28 children in the United States has at least one parent who is incarcerated; one out of every nine African American children grows up with an incarcerated parent.²⁴ **Denying individuals with a criminal record opportunities to access stable and affordable housing punishes entire families—preventing children from reunifying with their parents and increasing the likelihood of homelessness among children.**

COST-SAVING AND PUBLIC SAFETY-DRIVEN SOLUTIONS

- **Limit liability for landlords who choose to lease or rent to individuals with a criminal record.** As H.B. 1188 provided protection to employers who choose to hire individuals with certain criminal records, similar protection should be extended to landlords to limit their liability solely for renting or leasing to someone with a criminal record. Ultimately, this will help individuals with a criminal record stabilize their living situation, better support their families, and live law-abiding lives in our communities.

COST-SAVING AND PUBLIC SAFETY-DRIVEN SOLUTIONS

- **TCJC would oppose any language that could be used to insulate landlords who deny housing to those with arrests, criminal convictions, or deferred adjudications merely as a guise for denying housing based upon race or other similar protected status.** Given that African Americans comprise only 12.3% of the Texas population but account for over 25% of those arrested,²⁵ TCJC would oppose efforts to use arrests alone as a basis for denying housing for African Americans or other similarly affected protected classes. These policies disparately impact members of protected classes and may violate the Fair Housing Act.
- **Provide fiscal incentives to promote accessible and affordable housing.** The use of fiscal incentives, such as tax credits for landlords that provide public housing, and developers who build supportive housing for those who have been released from incarceration, should be identified and promoted. For example, the Second Chance Act, signed into law on April 9, 2008, authorizes federal grants to government agencies and nonprofit organizations to provide support and services to reduce recidivism.²⁶
- **Remove barriers within Public Housing Authorities (PHAs).** As discussed in the “Legal restrictions” section above, most individuals released from incarceration are restricted from public housing. While the explicit restrictions set out by federal statute will likely not be changed, local PHAs should revise their internal policies to consider all other applicants on a case-by-case basis, rather than categorically denying applicants based on other criminal issues.
- **Strengthen funding for reentry programs and case managers.** The Texas Department of Criminal Justice’s Reentry and Integration Division (TDCJ-RID) has recently added 13 reentry case managers to focus on helping reentering individuals secure employment.²⁷ Similarly, TDCJ-RID should be appropriated adequate funds to strengthen case management resources focused on finding housing solutions for those released from incarceration. Funds should also be designated for local public and private entities to provide housing case management services.

Citations on following page.

Citations

- ¹ Lahny R. Silva, "Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders," *University of Cincinnati Law Review* 79 (2010): 170. "A 2007 study examined landlords' perspective toward housing released offenders. The study showed that out of 611 landlord and property managers who participated in the survey, 66% would not accept an applicant with a criminal history."
- ² Helen Gaebler, "Criminal Records in the Digital Age: A Review of Current Practices and Recommendations for Reform in Texas," (William Wayne Justice Center for Public Interest Law, The University of Texas School of Law, 2013): 6.
- ³ Faith E. Lutze, Jeffrey W. Rosky, and Zachary K. Hamilton, "Homelessness and Reentry: A Multisite Outcome Evaluation of Washington State's Reentry Housing Program for High Risk Offenders," *Criminal Justice and Behavior* 41 (2014): 473, accessed April 18, 2014, doi: 10.1177/0093854813510164.
- ⁴ Silva, "Clean Slate," 170-172.
- ⁵ National Low Income Housing Coalition, "America's Affordable Housing Shortage, and How to End It," (February 2013): 6, accessed on April 21, 2014, available at http://nlihc.org/sites/default/files/HS_3-1.pdf.
- ⁶ Clark, Lynn M., "Landlord Attitudes Toward Renting to Released Offenders," *Federal Probation* 71 (2007): 21.
- ⁷ *Ibid.*
- ⁸ Sarah Spangler Rhine, "Criminalization of Housing: A Revolving Door That Results in Boarded Up Doors in Low-Income Neighborhoods in Baltimore, Maryland," *University of Maryland Law Journal of Race, Religion, Gender and Class* 9 (2009): 347.
- ⁹ DeBacco, "Survey of State Criminal History Information Systems," Table 1.
- ¹⁰ *Ibid.*, showing that the number of final case dispositions reported in 2006 was 1,015,300 and the number of final case dispositions in 2010 was 959,700—a change of -5.48%.
- ¹¹ SEARCH, Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information (2010): 83, accessed on April 21, 2014, available at <http://www.search.org/files/pdf/RNTFCSCJRI.pdf>.
- ¹² 24 CFR 960.204; 24 CFR 982.553; *see also*, Gaebler, "Criminal Records in the Digital Age," 7.
- ¹³ Gaebler, "Criminal Records in the Digital Age," 7 ("With few exceptions, PHAs have tended to go beyond HUD's guidelines, excluding applicants with criminal histories who fall outside the two mandated categories. The practice is so widespread that in 2011 HUD Secretary Shaun Donovan issued an open letter to PHAs urging them to "balance" competing interests and revisit policies that unnecessarily exclude individuals solely on criminal history. The following year, a similar letter was sent to private HUD-assisted rental property owners. Of particular concern to HUD are individuals denied housing even though they have had no further involvement with the criminal justice system and/or show evidence of rehabilitation.").
- ¹⁴ H.B. 3101, 80th Leg., Reg. Sess. (Tex. 2007); TEX. PROP. CODE ANN. § 92.3515(a) (West 2013).
- ¹⁵ Texas Apartment Association (TAA), "Sample TAA Rental Application," accessed April 21, 2014, available at http://www.taa.org/images/images/2013_Rental_Application_-_for_web.pdf.
- ¹⁶ Texas Department of Criminal Justice (TDCJ), "H.B. 1711 Implementation Report," Submitted to the Governor, Lieutenant Governor, Speaker of the House, Senate Criminal Justice & House Corrections Committees (September 1, 2010): 4. "One million plus offenders are processed in local jails on an annual basis."
- ¹⁷ Texas Department of Criminal Justice (TDCJ), "Fiscal Year 2012 Statistical Year Report" (2013): 1, 4, 6. Total on hand in TDCJ facilities as of August 2012 equaled 152,303 individuals; total parolees under active supervision equaled 87,131 individuals; total community supervision population equaled 406,209 individuals. These populations total 645,643 individuals.
- ¹⁸ Texas Department of Public Safety (TDPS), "Crime in Texas: 2012" (2013): 75, access April 21, 2014, available at <http://www.dps.texas.gov/crimereports/12/citCh9.pdf>. Total number of arrests in 2012 was 1,056,215.
- ¹⁹ Dennis A. DeBacco & Owen M. Greenspan, "Survey of State Criminal History Information Systems, 2010," (Bureau of Justice Statistics, U.S. Department of Justice, 2011): Table 1, accessed on April 21, 2014, available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/237253.pdf>.
- ²⁰ Kathleen F. Donovan, "No Hope for Redemption: The False Choice between Safety and Justice in Hope VI Ex-Offender Admissions Policies," *DePaul Journal for Social Justice* 3 (Spring 2010): 205.
- ²¹ Legislative Budget Board (LBB), "Criminal Justice Uniform Cost Report: Fiscal Years 2010 to 2012," Submitted to the 83rd Legislature (Jan. 2013): 8, accessed April 17, 2014, available at http://www.lbb.state.tx.us/Public_Safety_Criminal_Justice/Uniform_Cost/Criminal%20Justice%20Uniform%20Cost%20Rep

ort%20Fiscal%20Years%202010%20to%202012.pdf. FY 2012 system-wide cost per person per day for state-operated facilities was \$50.04.

²² Texas Commission on Jail Standards, "Immigration Detainer Report: 3/1/2014," (March 25, 2014): 7, accessed April 21, 2014, available at <http://www.tcjs.state.tx.us/docs/ImmigrationDetainerReportCurrent.pdf>. The average daily cost to house an inmate as of March 1, 2014 was \$59.86 per day.

²³ Lutze, "Homelessness and Reentry," 41.

²⁴ Gaebler, "Criminal Records in the Digital Age," 11, citing Written Testimony of Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, July 26, 2011, Meeting of the EEOC to Examine Arrest and Conviction Records as a Hiring Barrier.

²⁵ Texas Department of Public Safety, *Crime in Texas: 2012* (2013), 82-83 (total number of arrestees identified as Black: 264,899; total number of arrestees identified as White and non-Hispanic: 405,933; total number of arrestees: 1,056,215), available at <http://www.dps.texas.gov/crimereports/12/citCh9.pdf>; United States Census Bureau, State & County QuickFacts: Texas (2014) (percentage of individuals identified as Black or African American: 12.3%; percentage of individuals identified as White non-Hispanic: 44.5%), available at <http://quickfacts.census.gov/qfd/states/48000.html>.

²⁶ The Council of State Governments Justice Center, "Second Chance Act," accessed April 21, 2014, available at <http://csgjusticecenter.org/nrrc/projects/second-chance-act/>.

²⁷ April Zamora (Director, Reentry and Integration Division, Texas Department of Criminal Justice), in discussion with the author, March 2014.