Testimony before the Pennsylvania Senate Judiciary Committee hearing on occupational licensing reform

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Mr. Chairman and members of the committee, thank you for the opportunity to address you today regarding criminal records and occupational licensing. My name is Brendan Lynch and I am a staff attorney with Community Legal Services of Philadelphia. As you may know, my organization is a nonprofit office that provides legal services to low-income Philadelphia residents. In my work in the Employment Unit, I very frequently see clients for whom a criminal record is a barrier to a living wage.

I commend the Chairman for calling today's hearing to address an important issue that affects the ability of thousands of Pennsylvanians to pursue a career. I would like to describe the concerns that my office has with the current set of laws governing licensure, and set out some of the principles that we believe should be applied in the licensing context.

At Community Legal Services, the people we see who need help with licenses are very low-income Pennsylvanians who are seeking a pathway out of poverty. A job as a barber, or a cosmetologist, or a licensed practical nurse, or a certified nurse aide, may not be a path to great wealth, but it can be a means to a stable income and a path to financial independence. You need a license, a registration, or a certificate from the state to perform any of these professions, and the denial of a license can keep people trapped in poverty.

In our office, the professions with which clients are most often seeking assistance are barbering, cosmetology, and nursing, but, to the best of my knowledge, criminal record restrictions are applied to applicants for all of the professions which are governed by the Bureau of Professional and Occupational Licensing.

In our work with our clients, we regularly find that standards for the use of criminal records are vague and overly broad, and they are applied in ways that are unfair, that keep people trapped in poverty, and that unnecessarily prevent qualified people from working as professionals. From our experience, these standards regularly result in unnecessary discipline that hurts workers, taxpayers, and residents who seek to obtain professional services, while doing nothing to make Pennsylvanians any safer.

Our clients at CLS include people who seek to practice various professions but whose applications for a license or registration have been denied, or whose licenses or registrations have been revoked, or suspended, for a variety of reasons. (For the sake of brevity, I will refer to license denials in my testimony today, but these other types of sanction can also profoundly affect workers. Also, I will be referring to "applicants" for a license, but my observations today apply equally to people who are applying to renew a license, and even to people who get notice of possible discipline while holding a license.)

The licensing statute which affects the greatest number of our clients is Section 9124 of CHRIA, the Criminal History Record Information Act. [18 Pa.C.S.A. § 9124] CHRIA provides that licensing boards have the discretion to deny a license on the basis of any felony at all, regardless of whether it has any relation to the practice of the profession, or on the basis of a misdemeanor which is related to the profession. In addition to being extremely broad in scope, we believe that the statute is sometimes applied in an unconstitutional manner.

The end result is that people who have the skills and the training to perform an occupation successfully are nevertheless deprived of the opportunity to do so. Very often, when a person is denied based on a criminal record, there is no evidence that the actions for which the person was convicted had anything to do with the practice of the profession. Likewise, there usually is no evidence that the person's ability to perform the duties of the profession were affected by the crime or by the circumstances that led to the crime.

There is also no limitation in CHRIA on the age of a conviction that can be used to deny a license. Although decisions from Pennsylvania courts have held that licensing boards cannot use very old convictions as sufficient reason, all by themselves, to deny a license, there is nothing in the law which makes clear exactly how far back they can go. Based on the law as it is currently written, there is no limit to how far back they can go.

The licensing boards that are overseen by the Department of State generally have two statutes which set the legal standard for the use of criminal record information in licensing: first, there is CHRIA, and second, there is the practice act for the profession regulated by that particular board.

There are many different practice acts, and some of them date back to the Great Depression. They often describe the standards to be applied by licensing boards in very vague language. For instance, the Barber License Law was enacted in 1931. The section which governs suspension or revocation of a barber license does not mention criminal records at all, or explain how they should be considered in barber licensing. Rather, the Law provides that the State Board of Barber Examiners may suspend or revoke a license for any applicant who "engages in unethical or dishonest practice or conduct".

Other practice acts require that an applicant have "good moral character," and many of them say that an applicant can be rejected on the basis of a "crime of moral turpitude." These phrases are extremely broad and vague, and they do not have any specific legal definition. Courts in Pennsylvania have found that a very broad range of crimes can be considered crimes of moral turpitude, including misdemeanor offenses. In addition, the practice acts, like CHRIA, have no limitation on the age of a conviction that can be used to deny a license.

The general thrust of these provisions is that applicants can be denied a license for an extremely broad array of offenses which are less serious than felonies and which often have nothing to do with the profession. Moreover, it is extremely difficult to know in advance, without doing significant legal research, whether a particular offense would be considered an act of moral turpitude.

We are very concerned that both CHRIA and the practice acts are too vague and too broad, and, in combination, give the licensing boards too much discretion to reject applicants based on records that are not directly related to their suitability to practice the profession.

Not only do licensing boards apply overly broad and vague standards to their determinations, they also do so with virtually no guidance to the public. The law does not require that these independent boards put out regulations or policy statements to inform the public about how they will apply the law. In many cases, even an expert legal researcher could not look at your record and tell you whether or not you qualify for a license.

In fact, licensing boards sometimes switch between their practice act and CHRIA, picking and choosing which law to use in order to justify a predetermined outcome rather than consistently applying their practice act. Under current Pennsylvania law, the Boards are permitted to do this - they can ignore the limitations of the practice act and use CHRIA as the authority to deny license when the applicant has a felony conviction. Or, if it is more convenient, they can ignore CHRIA and deny licenses based upon misdemeanors which are not connected to the practice of the profession but which the board believes fall into the very broad array of misdemeanors that can be considered immoral, or unethical, or dishonest.

There is a fundamental degree of unfairness when applicants cannot have any assurance about which laws they may have applied to them, or in what way the law may be applied, or how it may affect them.

Even when the licensing boards explain clearly how they are applying the laws in a particular cause, the result of having such broad laws is often unfair and unjust: people are often denied improperly and unnecessarily.

Some health care-related professions have automatic 10-year bans for people convicted of certain offenses, without regard to any other factors. Such a lengthy and inflexible rule is too broad and too harsh. Moreover, Pennsylvania courts have rules that automatic lifetime exclusions based on criminal records are unconstitutional. Under the same principles, automatic 10-year bans are very highly suspect. It goes against basic principles of fairness when the government applies a presumption that someone must be unfit to perform an occupation, and gives that person no possible way to show that the presumption is wrong in their particular case. We therefore agree with recommendation of the recent report to the governor that Pennsylvania should abandon automatic criminal record bans in licensing statutes.

We should also note that research has demonstrated that black and Hispanic defendants are disproportionately and unfairly affected by the criminal justice system. They are more likely to be arrested and convicted, and more likely to be sentenced to prison, for the same behavior as white offenders. So there is a significant concern that licensing boards which punish people for having convictions will be copying and repeating the unfairly heavy burden of the criminal justice system on black and Hispanic Pennsylvanians who seek to work as professionals.

In many cases, an unnecessary denial of a license also represents a waste of taxpayer dollars. For instance, you may be aware that approximately half of all barbering schools in the

commonwealth are located within state correctional institutions. The barber license requires that an applicant have 1250 hours of practice working as an apprentice barber before a person can sit for the barber exam. Many people put in their time and get their training while incarcerated - their schooling is literally being paid for directly by the state. Other private training programs are often subsidized, directly or indirectly, by government funding. We have a strong interest in seeing our tax dollars not go to waste.

Also, all of us benefit from a robust pool of skilled, trained professionals to carry out the many different functions that they perform in society. And especially in the case of barbers, where people are trained while they are incarcerated, the training is an investment in fighting crime. It is very well established that a job is the best guarantee that a person with a conviction will not return to a life of crime. The Department of Corrections invests in barber education specifically as a way to provide a career path that will keep people away from criminal activity in the future. And even when professional training is not directly provided by the state, it is still in the state's interest to see that people with convictions in their pasts can find gainful employment in the future.

It is therefore especially disheartening when low-income workers with criminal convictions devote their time to professional training, and invest some combination of their own money and taxpayer dollars, in becoming qualified to pursue a profession, only to learn at the very end of the process that they will not be permitted to work in that field due to their criminal record.

Sometimes a school or training program will screen applicants before they are admitted to see if they will be eligible to work in the field once they are done - but, in many cases, they don't do that. And even when they want to do screening, it is often very difficult for a training program to predict whether or not an applicant will be allowed to practice their profession in the future, due to the fact that the criminal records standards are so broad and so vague, and there is virtually no guidance from the boards on how those standards will be applied. So there are many people who make a life plan to work in a particular field, and save up their money to afford the classes they need, and invest a great deal of time and money in preparing to work in a particular profession - only to be denied a license at the very end of the process.

So, if licensing boards can keep people trapped in poverty, and cause them to waste their money on training that they ultimately can't use, and waste taxpayer dollars, when they deny a license unnecessarily, why do they do it? Licensing boards have broad discretion, and they do not have to apply criminal records restrictions in an overly broad way, yet they often do so. So, why do they do this? Part of the reason is that many boards have come to view themselves as having a mission to act as a second criminal court, and to administer a second punishment as a way of sending a message that they disapprove of criminal behavior, even when it has no connection to the work of the profession that they are regulating.

The State Board of Barber Examiners, for example, has declared in its disciplinary rulings that, in some cases, it revokes or suspends a license because it wants to "send a clear message about the severity of [the applicant's] violations."

Of course, there are cases in which the crime itself appears to raise concerns about the applicant's ability to practice the profession. But in many cases, the Board decides to send a message of disapproval to someone who has been convicted of breaking a completely unrelated law – even though there is no reason to think that the person's criminal record affects his or her ability to practice the profession competently and safely.

When a license applicant comes to the attention of a licensing board as a result of a conviction, that person has already been ordered by a court of law to serve a sentence which is designed to send the defendant a message about the seriousness of the crime. The question is whether we need our licensing boards to duplicate the courts' efforts, and to add an additional voice of condemnation, on top of the voice of the courts.

There is no good evidence that an effort by a licensing body to quote-unquote "send a message" even works – the message is not received. This is especially true when the penalty imposed by the Board comes so long after the events that are the cause of concern. I have seen cases in which an applicant received notice of a proposed penalty from a Board years after their arrest. In those circumstances, a license denial does not come across as a clear statement of society's values. Rather, it is typically received as a bewildering, belated punishment for something that they are already trying to put behind them.

There is also no evidence of a deterrent effect from license denials. When an applicant for licensure has a criminal conviction on his or her record, by definition, the possibility of future jail time has already failed to deter them. The idea that someone contemplating a crime would not be deterred by the threat of incarceration, but would be deterred by a possible future lost license, seems highly dubious at best.

In conclusion: When people have been convicted, and have served their sentence, and have paid their debt to society, they should be able to make plans for the future. They should be able to estimate fairly whether or not they will be able to make an honest living in a particular profession, or if they need to make alternate plans to have gainful employment.

As long as licensing boards have extremely broad discretion to deny licenses under multiple laws, and can pick and choose between those laws, and apply extremely broad and vague standards, and the boards have no obligation to set out rules about the use of criminal records in licensing, no one can say with confidence whether a person with a conviction will be able to practice a profession in the future – and people will continue to waste their time and money. For those reasons, it is especially critical that criminal records restrictions of professional licenses be narrowly and carefully drawn to exclude only those people who must be excluded for the health and safety of the Commonwealth. Licensing boards should focus on their core mission to protect public health and well-being; they should leave it to the courts to send general messages of disapproval of criminal activity or to try to indirectly deter future offenses.

The advisory group which produced the recent report to Governor Wolf about license requirements in Pennsylvania recommended that "the governor and administration officials

should examine the impact of criminal history bans and "good moral character" requirements on ensuring Pennsylvania residents are able to engage in the workforce without unnecessary barriers." We endorse that recommendation and we urge the General Assembly to enact legislation which will ensure that licensing boards in Pennsylvania abide by the follow nine principles for the use of criminal records in occupational licensing determinations. These guidelines will ensure that the license application process for Pennsylvanians who are trying to rebuild their lives will be clear, fair, and in keeping with constitutional requirements.

1. No profession should have a "blanket ban" that automatically disqualifies workers with certain records. Automatic lifetime bans are unconstitutional. (Peake v. Commonwealth, 132 A.3d 506, 521-522 (Pa.Cmwlth. 2015)(*en banc*).

2. Applicants should only be denied an occupational license for conviction of crimes that are directly related to the profession that the applicant seeks to practice.

3. Licensing boards should deny professional licenses on the grounds of a criminal record only when it is necessary to protect public health and well-being; responsibility for sending general messages of disapproval of criminal activity by punishing people after they have been convicted should be left to the courts in sentencing decisions.

4. Licensing boards should consider applicants on a case-by-case basis which considers all elements of the applicant's suitability to practice the profession, and considers the nature and seriousness of the offense, how much time has passed since the offense, and the relation between the offense and the profession.

5. Licensing boards should consider evidence of rehabilitation and any mitigating circumstances in connection with the offense.

6. Licensing boards should not use vague, outdated legal standards such as "good moral character" or "unethical or dishonest conduct" which leave applicants in the dark as to whether a conviction will mean disqualification.

7. Transparency should be promoted by providing clear guidance to applicants about criminal records restrictions on licensure. Interested persons should be able to learn from the board, in advance, whether their records excludes them from the profession.

8. One central state law should govern the use of criminal records in occupational licensing. This law should supersede inconsistent older laws and promote consistency and fairness through uniform standards.

9. Laws governing licensing should state explicitly that juvenile adjudications may not be used in consideration of an application for a license, registration, certificate, or permit, or as grounds to revoke or suspend a license, registration, certificate, or permit.

My colleagues and I hope that the General Assembly will be able to enact reforms that embody these principles in the near future. We appreciate the very helpful bills that have recently been proposed by the Chairman, Senator Greenleaf, and by Representative Cox and we welcome their attention to this important issue. In particular, we strongly endorse the provisions in Senate Bill 1273, recently introduced by the Chairman, which would eliminate the automatic 10-year bans in various practice acts, and which would amend Section 9124 to require that felonies, like misdemeanors, can only be used to deny a license when it is related to the practice of the profession. This would be a much-needed improvement to the law.

We would recommend that the bill be strengthened by adding a few additional points. 9124 should be amended to state explicitly that consideration of criminal records shall be governed solely by CHRIA, and that language in any practice act to the contrary is expressly superseded. That will ensure that licensing board cannot evade this sensible reform by citing vague, open-ended language in their practice acts about good moral character or unethical conduct.

We would also suggest that section 9124 state that convictions must be, not merely related, but directly related to the profession, in order to justify denial of a license. In addition, the law should state explicitly that, when considering a criminal record, licensing boards may not deny a license based solely on the fact of a conviction, but must consider each conviction on a case-by-case basis in the context of all factors that weigh in to the applicant's suitability to work in the profession – including evidence of rehabilitation and any mitigating circumstances in connection with the offense.

We would further recommend that the bill provide that a board may only deny a license on the grounds of a criminal record if it has determined, on clear and convincing evidence, that denial is necessary to protect public health and well-being. Finally, we would add that it would helpful to clarify that juvenile adjudications cannot be used to deny a license. Pennsylvania law already provides that juvenile adjudications are not convictions, but that point is not made clearly in the current language of section 9124.

Again, we commend the Chairman for his efforts to reform licensing in a sensible way by removing unnecessary barriers, and we hope to have the opportunity to work with this body to find the most appropriate approach to achieving these necessary reforms in the coming months.

Thank you for your attention to this matter. I would be happy to take any questions.