

Reforming the *Criminal Records Act*

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Introduction

Those who have completed their sentences and discharged their debt to society for criminal wrongdoing face significant discrimination in many areas because of their criminal records. A 2014 report by the Canadian Civil Liberties Association states that “[a]n increasing number of Canadian organizations – employers, volunteer managers, educational institutions, licensing bodies and governments – are incorporating police record checks into their hiring and management practices” (p. 5).

Those seeking relief from the effects of old criminal records through record suspensions or pardons have led crime-free lives for years after completing their sentences and have demonstrated a positive transformation. Relief from the discrimination of a criminal record would allow individuals to pursue improved employment opportunities, to secure housing and to contribute more fully to their communities which would be a benefit to society more broadly. The granting of pardons or record suspensions under the *Criminal Records Act* results in significant human rights protections under the Canadian Human Rights Act. Until a pardon or record suspension is granted, those with criminal records will continue to experience stigma and a denial of liberties beyond the proportionate penalty initially imposed for the crime.

The procedures and legislation relating to relief from criminal records have led to a costly, inefficient, arbitrary system that is often discriminatory in its results. The need to reform the *Criminal Records Act* is clear and the current Minister of Public Safety, Ralph Goodale, has indicated that he is committed to reforms. After an analysis of the issues associated with the present regime, options for reform of the *Criminal Records Act* will be explored in this paper.

Barriers Caused by Criminal Records

According to the most recent numbers from Public Safety Canada (2016), approximately 3.8 million Canadians have a criminal record, and nearly ninety percent of those criminal records remain open. Sentences imposed by criminal courts in Canada deny offenders liberties and/or property as a form of punishment. However, even after sentences are completed and debts to

society are repaid, a denial of liberties continues. Those with criminal records face significant barriers and experience discrimination.

The awarding of a pardon or a record suspension under the *Criminal Records Act*¹, however, provides legal protection from discrimination. Section 3(1) of the *Canadian Human Rights Act*² defines prohibited grounds of discrimination as including a ‘conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.’

Accordingly, those with a record suspension or a pardon have human rights protections in the federally-regulated sector against discriminatory practices such as a denial of goods, services, facilities or accommodation, or being subject to adverse differentiation because of a criminal conviction. Ontario’s human rights code³ provides similar protections.

The clear implication is that those who have completed their sentences but have not yet received a pardon or record suspension lack human rights protections. They will continue to experience a denial of liberties as a result of the conviction beyond the proportionate sentence imposed for the crime. A pardon or a record suspension under the *Criminal Records Act* will trigger some human rights protections.

Those with criminal records experience discrimination in the following areas:

Employment

Finding employment is possibly the most significant problem for individuals with criminal records. Increasingly employers seek criminal record checks as part of the hiring process. Employers can simply decline to hire individuals with criminal records and applicants with records can be immediately disqualified. For many other jobs, while it may be possible to apply with a criminal record, it could be a considerable disadvantage. Even non-conviction criminal records can be extremely prejudicial when applying for jobs.

¹ *Criminal Records Act* (R.S.C., 1985, c. C-47)

² *Canadian Human Rights Act* (R.S.C., 1985, c. H-6)

³ *Human Rights Code*, R.S.O. 1990, c. H.19

Discrimination in employment against those with criminal records has significant consequences for the successful reintegration of those who have finished their criminal sentences. Those who are gainfully employed after leaving prisons are much less likely to reoffend. If people are unable to find employment, they easily feel cut off from society. The John Howard Society of Ontario argues that the stigma of a criminal record actually makes society less safe.⁴

Individuals with criminal records may be desperate to get a job and are therefore vulnerable to exploitation by employers who might offer them below market wages.⁵

Bondability

Individuals with a criminal record may be unable to be bonded which could be a disadvantage in securing employment. Many employers will require that their employees be insured in situations where the work may include sensitive data, handling of financial information or cash, interaction with customers or work in the vulnerable sector.⁶ The inability to be bonded will therefore affect a great number of job opportunities.

Adoption Eligibility

In Canada, those wanting to adopt a child will be subject to a criminal records check. While having a criminal record may not be an absolute bar to adopting in Canada, it makes the process more difficult and the outcome more uncertain. Many countries, such as China, specify that no one with a criminal record is eligible to adopt.⁷ The adoption process is very difficult and if the individual is qualified in all other respects then it would be unfair for a criminal record to prevent adoption.

4 <http://www.johnhoward.on.ca/wp-content/uploads/2014/09/counter-point-6-police-records-and-stigma-challenging-stereotypes.pdf>

5 <http://www.canadianlawyermag.com/legalfeeds/1601/jobs-program-for-offenders-could-lead-to-discrimination.html>

6 <https://pardonservicescanada.com/blog/are-you-bondable-the-implications-for-canadians-with-a-criminal-record>

7 <https://www.adoption.on.ca/international-adoption>

Child Custody

Criminal records can arise in child custody disputes. When assessing the character of a parent seeking custody, a judge can take a criminal record into account. If it is in the best interests of the child to remain with or have access to a parent, a past criminal conviction could have a disproportionately harsh consequences for both the parent and the child.

Housing

It is often more difficult for those with a criminal records to find housing. Applications for apartment rentals can ask if prospective tenants have criminal records. Without adequate housing, the likelihood of further criminal involvement is greater.

Education

An individual with a criminal record may be unable to pursue certain areas of study or certain career paths. Studies in medicine, nursing, child care and other fields, particularly involving the vulnerable sector, require a criminal records check. This will also have an effect on employment opportunities.

Volunteer Opportunities

Many organizations, particularly those dealing with vulnerable members of society, will screen out volunteers with criminal records. The inability to volunteer is unfortunate because it allows those who have harmed society in the past to make a positive contribution. Volunteering could also be a step towards full employment or work experience for some individuals. It can also deny organizations committed to helping prisoners and supporting safe reintegration from benefiting from successful peer-support programs.

Changes to the *Income Tax Act*⁸ which took effect in 2012 identify those convicted of a “relevant criminal offence” as “ineligible persons” to serve on boards of charitable organizations. “Relevant criminal offences” are defined as criminal offences under the laws of Canada or an act that would be a criminal offence if committed in Canada. Once a pardon or a record suspension has been awarded, then they are no longer “relevant criminal offences” for the purposes of the *Income Tax Act*. While there is a belief that the new legislative provisions would be interpreted narrowly to apply only to crimes relating to financial dishonesty (misappropriation of funds, intentional misstatements in financial records, forgery or alteration of financial documents, and fraud) or relevant to the operation of the charity, the provisions may have a chilling effect on the charities’ willingness to have people with criminal records on their boards of directors. Some charities, like the John Howard Society which has a charitable objective of helping prisoners and supporting their reintegration back into communities, may be denied the guidance of those with relevant experience.

Travel

Travel restrictions limit the civil liberties of an individual. While those with criminal records may travel within Canada, foreign travel is often a problem. When traveling to the US, a criminal record can create a great deal of uncertainty. US officials have discretion to refuse admittance to individuals with a criminal record. The uncertainty will lead to many individuals seeking out expensive waivers.⁹ There is also no guarantee that foreign governments, such as the United States, would recognize a Canadian record suspension. For some individuals being limited in terms of travel will also be a detriment in job opportunities.

Commercial Victimization

For many individuals there will be a desperate attempt to seek relief from the effects of a criminal record. Many individuals with criminal records are vulnerable to unscrupulous

8 *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)), s. 149.1(1)

9 <http://globalnews.ca/news/1886768/crossing-the-canada-us-border-with-a-criminal-record/>

companies that promise more relief from criminal records than they can deliver. An internet searches may confuse websites of private companies with official Government of Canada websites. Certain companies may charge significant fees to process record suspension applications for those who may not even be eligible for a record suspension. These companies may also charge significant fees to assist individuals seeking waivers to the US.

Individuals with criminal records are vulnerable to marketing strategies of companies that seek to profit from assisting in record suspension applications. These companies may give individuals false hope or distort the reality of record suspensions.

General Social Stigma

While about 10% of Canadians have a criminal record and most do not reoffend, there are many public misperceptions about what it means to have a criminal record. If it becomes known that neighbours and acquaintances have criminal records, they may become ostracized. Due to the fear and stigma associated with past criminal behaviour, those with criminal records experience social exclusion. Those who have lived crime-free for years after completing their sentences have demonstrated a strong commitment to overcoming their pasts and becoming contributing members of our society.

Purpose of the *Criminal Records Act*

Those saddled with criminal records are often marginalized, excluded from society and experience discrimination. The *Criminal Records Act* is intended to provide relief from the ongoing punishment of a criminal conviction and has the effect of removing barriers to employment, housing, and other federal domains. The effect of a record suspension is set out in s. 2.3 (b) of the act and ‘requires that the judicial record of the conviction be kept separate and apart from other criminal records and removes any disqualification or obligation to which the applicant is, by reason of conviction, subject under any Act of Parliament ...’.

Relief from the continuing negative effects of a criminal record should promote restorative justice.

Evolution of the *Criminal Records Act*

Canada's pardon program – which came into effect when the *Criminal Records Act* was enacted in 1970 – allowed individuals to apply to have their criminal records sealed so that any conviction information would not appear while conducting a background check in the Canadian Police Information Center [CPIC]. More than 450,000 pardons were granted in Canada before the previous Conservative government introduced various legislative changes beginning in 2010. The new record suspension program, introduced as part of a broader tough-on-crime agenda, has raised concerns among people with criminal records as well as with the individuals and organizations that provide re-entry and reintegration supports in the community – such as the John Howard Society¹⁰.

The two legislative reforms amending the *Criminal Records Act* brought by the previous government made the process more onerous and, in some cases, impossible. Bill C-23A – *Limiting Pardons for Serious Crimes Act* – received Royal Assent in June 2010 and served to extend the wait period before pardon eligibility to ten years (from five) for persons convicted of violent offences or persons convicted of sexual offences against a child. Additional guidelines for reviewing pardon applications and granting pardons were also included in this Bill. For example, the Parole Board of Canada would now need to consider whether granting someone a pardon would 'bring the administration of justice into disrepute.' Finally, Bill C-23A also allowed for more information to be included during the investigation process in order to ensure that the applicant has been of good conduct in the community, including a statement from the applicant regarding the 'measurable benefit'¹¹ that a pardon would provide to their sustained rehabilitation and reintegration.

10 The John Howard Society is comprised of sixty-five offices across Canada, each delivering evidence-based programs to individuals who have (or who are at risk of having) contact with the criminal justice system. The John Howard Society promotes effective, just, and humane responses to crime (The John Howard Society of Canada, n.d.).

11 Beyond asking the applicant to indicate how a record suspension would support rehabilitation and any positive changes they have made since their conviction, the measurable benefit form also requires the applicant to reiterate the circumstances of their offence.

The second set of changes came in 2012 under Bill C-10 – *Safe Streets and Communities Act*.

This legislation contained the following changes:

- The term ‘pardon’ was replaced with the term ‘record suspension’
- The waiting period before eligibility changed from three years to five years for all summary offences, and from five years to ten years for all indictable offences
- All individuals convicted of a sexual offence against a child are now ineligible to apply
- All individuals with three or more indictable offences on their criminal record are now ineligible to apply

In addition to these amendments to the *Criminal Records Act*, the previous government also increased the application fee on two occasions. In December 2010, the fee was raised from \$50 to \$150 and in February 2012, the fee went up to \$631. This second fee hike was approved despite strong opposition from the community. A public consultation report (Parole Board of Canada, 2011) reveals that out of 1,086 responses only 12 were in favour of the new \$631 user fee. Others spoke out against the increase in the media:

It will make it much more difficult for people to get a pardon... And it'll be the people that we're working with -- people that are low-income, that are just at the bottom end of the employment ladder... And frankly that's not a good thing. We want to see people moving on, and moving beyond their criminal past.

(John Hutton – Executive Director of the John Howard Society of Manitoba – as quoted in *The Canadian Press*, 2011)

All of these changes, including the higher application fees, were said to be made in the name of community safety (Sullivan, 2014). Former Public Safety Minister, Vic Toews, along with other Conservative Members of Parliament said that these changes would protect victims and communities from dangerous people like Karla Homolka and Graham James – two extremely rare cases that have been used on various occasions to justify increasingly punitive criminal justice policies and practices. In reality, making legislative changes on the basis of sensationalized cases does not reflect best practice and the changes to the *Criminal Records Act* have arguably made communities less safe by hindering successful reintegration (Murphy et al. 2015).

Collateral Consequences of Punishment

Numerous studies reflect on the collateral consequences of punishment and the long-term impact of a criminal record on reintegration. While most of this literature comes from other jurisdictions (primarily the United States) it can certainly be applied to the Canadian context – especially in light of recent changes to our criminal records management and expungement system.

What Jeremy Travis (2002) terms *invisible punishment* is what many people with criminal records experience after they have fulfilled the requirements of their sentence. Invisible punishments deny individuals access to various social domains such as employment, housing, education, and volunteer opportunities. Many scholars are interested in understanding the impact of a criminal record on finding employment. Devah Pager – an American sociologist who has conducted research on the impact of a criminal record on finding employment – writes about the reasons why employers are hesitant to hire people with criminal records.

The majority of employers claim that they would not knowingly hire an applicant with a criminal background. These employers appear less concerned about specific information conveyed by a criminal conviction and its bearing on a particulate job, but rather view this credential as an indicator of general employability or trustworthiness.

(Pager, 2007, p. 5)

Other researchers (see Blumstein & Nakamura, 2009; Kilgour, 2013) speak of the relationship between criminal records and employment and share concerns about the changing experience of reintegration in the face of changing criminal records management and expungement processes.

Impact of the New Record Suspension Program

Various sources illustrate the negative impact of the Record Suspension Program, including media reports, experiences of front-line workers, and testimonials from individuals with criminal records. Some information has also been incorporated from two public forums which centred on the changes made to the *Criminal Records Act*, and other documents acquired through the John Howard Society network. Individuals with criminal records are willing to share their experiences of exclusion in order to demonstrate the hardships created by the new record

suspension regime, but some wish to remain anonymous for fear that they might experience even further discrimination in the community.

Media Reports

It is argued by some that the media played an important role in the elimination of Canada's pardon program, specifically through the sensationalization of both Graham James and Karla Homolka. However, more recent media reports have been quite critical of the new record suspension program and some reporters have highlighted individual cases which demonstrate the hardships created by the new regime.

Alia Pierini was 19 when she was charged with drug trafficking, extortion and aggravated assault. In 2005, she was sentenced to five years in custody.

When she was released, Pierini said, she felt "a lot of hope" of having a "legitimate life." But she quickly found that with a criminal record, "it's constantly a battle ... when it comes to gaining employment."

"If I had a pardon I could just imagine what else I could do with my life," Pierini said. She wants to train to be a social worker to help other women coming out of prison, but the school told her she couldn't do a practicum with a criminal record.

In addition to limiting her career prospects, Pierini said not being pardoned means she can't get quality housing. The place she lives in now runs out of water in the summer, she said.

While looking for housing online "almost every place I click on [says] 'must pass criminal record check,'" Pierini said. "Just seeing that is discouraging."

But one of the toughest consequences of a criminal record is the impact on her two sons.

"My [younger] son, who I had after my incarceration and doesn't really know about prison, begs for me to come and volunteer at his school and come build gingerbread houses and come ... on field trips and I'm not allowed to," Pierini said. "My kids shouldn't be still paying for my crime that I committed."

(Ireland, 2016)

Another story in the same article speaks to the barrier caused by the increased user fee.

Bentley Williams, 48, lives in eastern Ontario. It's been more than 25 years since he was convicted of theft, possession of stolen property, break and enter and mischief. He was sentenced to probation and paid restitution.

"I learned my lesson," Williams said. "I've been a law-abiding citizen ever since then."

Now married and the father of a teenage son and a 10-year-old daughter, Williams wants to apply for a pardon. "It's just something I want off my back and my life's history," he said. "I want to have it gone before I die. I don't want it hanging over me."

But Williams can't afford to pay the cost of a pardon application, which was raised to \$631 from \$150 under the former Conservative government. He worked for years as a labourer before hurting his back. He's now on social assistance.

Others have used media platforms to decry the elimination of Canada's pardon program, such as Steve Sullivan (2014) – the former federal ombudsman for victims of crime.

By making it harder for people convicted of crimes to obtain pardons, the government is making it far harder for those people to find jobs – to support their families, to pay taxes, to make restitution to their victims and find safe housing.

The complete overhaul of the pardon system was never justified as a means to reduce crime; it was, in fact, a stupid thing to do. It works against the interests of public safety.

Howard Sapers – from the Office of the Correctional Investigator – along with criminologists and other criminal justice professionals have also been quoted in the media criticizing the changes to the *Criminal Records Act*, with specific concern about the increase in both cost and wait time before eligibility (Crawford, 2013).

Public Forums and Personal Stories

In April 2013, the Criminalization and Punishment Education Project¹² [CPEP] hosted a public forum in Ottawa to discuss the changes made to Canada's pardon system. Speakers at the event highlighted their personal frustrations with the new record suspension program, with many of the concerns revolving around access to meaningful employment.

I knew that finding employment with a criminal record would be difficult, however, before this legislation was passed I would have been able to apply for a pardon soon after I was finished my degree. This change means I will no longer be eligible for a [record suspension] until the year 2019... While I have always assumed responsibility for my actions and the effect they have had on others, I feel I have not given the impression that I am enough of a threat to society that this type of restraint be imposed on me for as long as six more years.

(Anonymous)

Being unable to ever receive a record suspension will impede my ability to obtain employment, to earn an honest living, and to successfully reintegrate into society because so many employers now require a criminal background check.

(Anonymous)

A gentleman by the name of Ray, who was already in the process of applying for a pardon when the 2012 changes came into effect, shared an excerpt from a letter that he wrote to his Member of Parliament asking for support:

I have sent over 200 resumes. I have been declined for every single one of them because of my record.

Other speakers moved beyond the employability issue and spoke to the psychological and social impacts of trying to move forward with a criminal record. Low self-esteem and feelings of isolation are often expressed by those who feel they cannot escape the mark of criminality.

¹² The Criminalization and Punishment Education Project is a group of students, professors, front-line workers, those affected by criminalization and punishment, and other community members who work together on research and public education projects in order to effect social change. More information available at: www.cp-ep.org.

Another forum, held in Halifax in April 2015, continued this conversation with frontline workers and other community partners who provide services and supports to people with criminal records. Again, many speakers were concerned about the impact of a criminal record on finding employment:

[W]e see many men and women trapped in income assistance programs or in low-wage, insecure and irregular employment because their criminal record effectively renders them ineligible for jobs that they would otherwise be qualified for.

(Testimony from a front-line worker at the
John Howard Society of Nova Scotia)

Others pointed to the obstacles created by the new \$631 application fee:

For some, getting a record suspension would be a solution to their problem. However, even those who meet the eligibility criteria, and pose very strong candidates, are often unable to afford the expenses attached to applying for a record suspension. On a regular basis we encounter the following situation: Without gainful employment individuals can't afford a record suspension. At the same time, without getting a record suspension individuals cannot obtain gainful employment.

(Testimony from a front-line worker at the
John Howard Society of Nova Scotia)

This lose-lose situation is all too familiar for many criminalized individuals.

Jeanette is a professional artist who came into contact with the criminal justice system in her thirties as a result of living in an abusive situation. Her victimization and subsequent criminalization has affected her ability to find employment post-incarceration and has even impacted her ability to continue her work as an artist.

I had built up a reputable name in my field which is now destroyed because of my very public criminal record. I can no longer earn a living in the career I spent my whole life perfecting.

There is no room in my small house to work and I have been looking for a studio space. This is very painful because not only have I been refused by those in my field to let me into any workspace, but they are very insulting to me as

well. It has been impossible to make any friends with my criminal record being so public and therefore I have no support network.

Aside from her professional aspirations, Jeanette's criminal record also impacts her personal life.

I am currently engaged to be married. My fiancé and I are incapable of having children of our own and considered adoption. However, I cannot adopt with a criminal record... I've basically lost out on the chance to ever be a mother.

Finally, Jeanette speaks to the difficulty she had finding safe housing as more and more landlords and property management companies are requiring background checks.

I was released just over two years ago and never was able to find a residential place to rent. I first started off voluntarily in a half-way house, then slept on a friend's couch while searching for apartments. No one would rent to me... I finally met my fiancé and moved in with him. Now my neighbours call him telling him about all the things they read online about my conviction.

Jeanette's situation is not unique. Many people with criminal records in Canada face similar frustrations long after they have served their sentence and after making personal efforts at successful reintegration. Pardons were a relief from this frustration, but the new record suspension regime – along with the permanency of media and internet reports about individual convictions – prolongs the punishment that individuals experience after they have repaid their debt to society.

Application Process Issues

Complicated Application Process

In addition to the costs and overly restrictive criteria, the application requirements themselves can exclude some who would otherwise be entitled to relief from their criminal pasts. Even though there are guides available to assist applicants, the process is complicated and those who are illiterate, with low levels of academic attainment, or with cognitive impairments may not have the capacity to complete the application forms. Further, marginalized people may have difficulty obtaining the documents needed to complete the application forms.

While the Parole Board of Canada clearly states on its website that applicants do not require any form of legal representation or support from a third party when applying for a pardon/record suspension, many applicants will be challenged by the application process and will want assistance. Those wishing to apply may turn to commercial pardon service providers that are easily found on the internet. The Parole Board Canada website contains a warning about fraudulent services that take advantage of individuals who are not familiar with the applications process:

It has come to the PBC's attention that certain false and misleading information is circulating on the Internet about the record suspension application process.

It has also come to our attention that some companies are using symbols and visuals on their websites and marketing materials similar to the Government of Canada's and/or making misleading claims and guarantees, both of which are causing confusion for applicants.

(Parole Board of Canada, 2016)

Despite these warnings, many people find themselves accessing the services provided by these third-party companies who liken themselves to tax preparation services.

Rachel Cave (2015) from CBC News reported on one of these companies in November 2015 when Charlene Pitre, a woman from Saint John, came to her with a complaint.

Charlene Pitre said she thought she was dealing with a federal agency when she paid \$901.64 to [a third-party company] to complete an application.

She realized her mistake when the company told her she would have to pay a separate fee of \$631 to the [Parole Board of Canada].

When Pitre did speak directly to the parole board, she was told she could have made the application on her own.

The Parole Board of Canada is thus aware that the existing procedural requirements make people vulnerable to for-profit services that may be exploiting the applicants. Resources it has made available to assist people with the application process – including video tutorials and a 1-800 helpline – may not be enough consumer protection for those wanting pardons and record

suspensions. These commercial pardon companies can mislead vulnerable individuals who have little knowledge of the criminal record expungement system in Canada. A less complicated expungement application process would eliminate the perceived need for third-party assistance and would also facilitate a more fair and efficient system.

Inefficient Application Process

Once the applications are submitted to Parole Board Canada, they are screened and some are sent back to the applicants for additional information. The review process itself takes time and resources and a significant backlog has resulted. Reports of the backlog of pardon applications at the Parole Board of Canada began in 2012 when Bruce Cheadle from the Canadian Press wrote that approximately 22,500 files remained unprocessed. A representative from the Parole Board of Canada stated that the backlog was a result of the new service standards attached to the more expensive record suspension applications, along with budget cuts. In March 2015, Cheadle reported that approximately 6,000 pardon applications remained unprocessed and the Parole Board of Canada pointed once again to a lack of resources. The most recent report came a couple of months later in May 2015 in which Conservative Member of Parliament Steven Blaney (Minister of Public Safety) announced that the Parole Board of Canada would, in fact, be provided the funding required to process the remaining 5,000 pardon applications.

As of May 2016, the Parole Board of Canada has still not finished processing all of the backlogged pardon applications¹³. This means that some people have now been waiting upwards of five years to receive their pardon. A notice on the Parole Board of Canada's website tells applicants that they can have their files switched over to the new record suspension program if they pay the new \$631 application fee. The issue with this suggestion is two-fold. First of all, not all applicants will have access to that kind of money (primarily because they cannot find employment due to their criminal record). The second problem is that some of the individuals who applied for a pardon might not be eligible under the new requirements of the record suspension program. Therefore, encouraging people to switch their applications over to the new

¹³ Updates regarding the backlog are available to applicants on the Parole Board of Canada's website: <http://pbc-clcc.gc.ca/prdons/backlog-eng.shtml>

regime is not an acceptable solution to the ongoing backlog. Since a record suspension or a pardon results in human rights protections, it arguably brings the administration of justice into disrepute to be denying people protection from discrimination to which they would otherwise be entitled because of administrative inefficiencies.

Vague Criteria and Arbitrary Results

The recent legislative reforms provide wide discretionary power based on vague criteria to Parole Board members to grant or deny record suspensions and this leads to arbitrary results. Reflecting the *Criminal Records Act* requirements, the Parole Board of Canada provides a Decision-Making Policy Manual to all Board members. Among other things, this document outlines the criteria for granting pardons or record suspensions. In terms of making those decisions, Board members are given the following instructions:

When making a decision on a pardon or a record suspension application, Board members will assess whether the applicant has been of good conduct... Board members will also assess whether the pardon or record suspension would provide a measurable benefit to the applicant, would sustain the applicant's rehabilitation into society, and would not bring the administration of justice into disrepute.

(Parole Board of Canada, 2015, p.2)

There can be little doubt that a pardon or a record suspension and the attendant human rights protections against discrimination are a benefit to any applicant. Similarly, being protected from discrimination based on a spent criminal record supports successful reintegration and is a protective factor against reoffending. Giving a parole board member an opportunity to deny someone human rights protections because it has not been persuaded that protection from discrimination is a measurable benefit or sustains rehabilitation is inviting unfair and arbitrary decisions.

Assessing “good conduct” is subjective and far too vague a criterion on which to deny someone access to human rights protections. It could include a range of non-criminal behaviour that is not

relevant to an assessment of whether the person has been rehabilitated and no longer participating in criminal activity.

Guidelines have been provided for assessing whether or not ordering a record suspension would bring the ‘administration of justice into disrepute’ as follows:

When determining whether the granting of a pardon or ordering a record suspension would bring the administration of justice into disrepute, Board members may consider the following:

- a. the nature, gravity and duration of the offence;*
- b. the circumstances surrounding the commission of the offence;*
- c. information relating to the applicant’s criminal history;*
- d. in the case of a service offence, any service offence history of the applicant that is relevant to the application; and*
- e. the factors listed under section 1.1 of the CRR¹⁴*

(Parole Board of Canada, 2015, p.5)

These guidelines are interpreted by individual Board members who exercise significant discretion when making decisions about criminal records. This discretionary power has been the subject to legal challenges and the decision of the Parole Board overturned on review.

In the 2016 federal court decision in *Spring v. Canada*¹⁵, the Board’s decision to deny a record suspension on the grounds that it would bring the administration of justice into disrepute was quashed because the decision was found to lack transparency and intelligibility and was unreasonable. In that case, no explanation was given to support the Board’s conclusion that granting a record suspension would shock the public collective conscience and bring the administration of justice into disrepute. The Board recognized that a record suspension would have a measureable benefit and sustain the applicant’s successful reintegration but expressed concern that the seriousness of the original offence and “credible concerns” would bring the administration of justice into disrepute. The failure to explain why relevant and directly contradictory evidence did not allay the “credible concerns that granting a pardon would bring

14 CRR refers to Criminal Records Regulations, available at: <http://laws.justice.gc.ca/PDF/SOR-2000-303.pdf>

15<http://www.canlii.org/en/ca/fct/doc/2016/2016fc87/2016fc87.html?searchUrlHash=AAAAAQATInJlY29yZCBzdXNwZW5zaW9ulGAAAAB&resultIndex=1>

the administration of justice into disrepute” prompted the federal court to conclude that the Parole Board decision to deny the record suspension was unreasonable.

Reforming the *Criminal Records Act*

The current regime for relieving the prejudicial effects of a criminal record is fraught with problems. The Minister of Public Safety, Ralph Goodale, indicated in January 2016 that the government was prepared to amend the *Criminal Records Act* and consultations on directions for reform have been undertaken.

In early May 2016, the Parole Board of Canada (PBC) launched a public (online) consultation regarding the \$631 user fee that applicants are required to pay when seeking a record suspension. The fee was first raised from \$50 to \$150 in December 2010 and was increased again to \$631 in February 2012 (this is a 1,162% increase in two years). The PBC facilitated public consultations prior to the 2012 fee hike (Parole Board of Canada, 2011) but the results of this consultation process were completely ignored¹⁶. The primary focus of the 2016 fee structure consultation¹⁷ was on the \$631 cost-recovery application fee, there was space within the survey to comment on other elements of the record suspension regime (such as wait times, eligibility requirements, and service standards). Given the identified problems with the *Criminal Records Act*, the focus on costs was far too narrow.

A further online consultation on the review of the record suspension system was held by the government from November 7 to December 16, 2016. This followed the Minister of Public Safety, Ralph Goodale, announcement in January, 2016 that his department would consider meaningful reforms to *the Criminal Records Act* (Crawford, 2016). Further comments from the Minister’s office indicated that “the government will review the waiting period, fee and new name with a view to considering fairness, proportionality and the role that expunging a criminal record plays in rehabilitation” (Bronskill, 2016). The website advises that reforms to the

¹⁶ Out of 1,086 responses only 12 were in favour of the new \$631 user fee.

¹⁷ The public consultation questionnaire was available until June 6, 2016 at the following link: <http://pbc-clcc.gc.ca/consultation/index-en.shtml>

Criminal Records Act over the past 10 years have affected record suspensions and need to be considered in the context of the 10% of Canadians who have a criminal record and on the safety of communities. It provides ‘the review of the *Criminal Records Act* is aimed at ensuring that record suspensions are:

- consistent with the Government of Canada’s goals to increase public safety;
- providing value for money;
- evidence-based; and,
- aligned with the *Charter of Rights and Freedoms* and Canadian values¹⁸.

The results of the November to December 2016 consultation have yet to be made public.

Objectives of a Reformed *Criminal Records Act*

The forthcoming legislative amendments should strive to (a) promote public safety by supporting the successful reintegration of those who have completed their criminal sentences and (b) achieve fairness and efficiencies in the process. The objective is not to forgive a person’s past criminal wrong but to recognize the debt to society has been discharged by the completion of the sentence imposed by the courts and to allow the person to be restored to the community as a contributing member without continuing penalization for the past wrong. People should no longer be unprotected from discrimination in housing, employment, education and other areas of civil society because of a spent criminal record. Protecting individuals from discrimination and protecting human rights is consistent with *Charter of Rights and Freedoms* and Canadian values. This should be achieved through a fair and efficient process.

Identified Weaknesses of the Current System

Research and consultations have identified a number of significant flaws with the current system, including:

- (a) Discriminatory based on:

¹⁸ <https://www.canada.ca/en/services/policing/parole/consultation-record-suspensions.html>

Poverty – The application fee is expensive for prospective applicants and is an insurmountable barrier to many who would otherwise be entitled to relief from old criminal records. Given the human rights protections that result from a pardon or a record suspension, some are denied protection from discrimination simply due to poverty and the inability to afford the application fee.

Illiteracy or cognitively impaired – The application process is complicated requiring the assembly of documents and the completion of forms. Those who are illiterate, cognitively impaired or without adequate education may well be entitled to relief from their old criminal records but may not be able to complete the complicated application process. This would leave them unprotected from discrimination due to their inability to complete the application process.

Marginalization – The assembly of the required documents for the application process may be difficult for those leading disordered lives on the fringes of society. They may be battling mental disorders, have moved frequently, and without access to records. They may well be living crime free lives and being of good conduct but with little ability to document it. These may be the very people who most need protections from discrimination in housing, employment and other domains but would be unable to complete and afford the application process.

(b) Unsubstantiated Restrictions and Vague

The older pardon system for relief from criminal records was quicker and simpler and effective. In 2006, Ruddell & Winfree suggested that the United States look to Canada's pardon program as an example of how to support safe and effective reintegration. They wrote that "[s]ealing an offender's criminal record provides a number of social benefits" (p. 457) and highlighted the 96% success rate of the pardon granting system. No evidence was provided to justify legislative reforms over the last 10 years lengthening the required crime-free periods, excluding some classes of prior offences, and changing the assessment criteria. It appears to be punitive and not designed to support reintegration or

promote public safety. These changes have consigned many who have overcome their criminal pasts and are anxious to contribute more fully in their communities to unnecessary delays and life time exclusions. These reforms were not based on evidence.

The introduction of vague, subjective criteria to be applied by Parole Board members in granting, denying, or revoking record suspensions results in arbitrary decisions. Specifically, assessing good conduct, measureable benefit to the applicant, sustaining rehabilitation and whether the administration of justice would be brought into disrepute is open to many interpretations. Two equally situated applicants could receive different results depending on the judgements of different Parole Board members. This undermines a sense of fairness in the process. Moreover, since protections against discrimination through human rights legislation result from a favourable *Criminal Records Act* decision, people could be denied human rights protections based on decisions that are arbitrary. This is inconsistent with Charter and Canadian values.

(c) Inefficiencies

The introduction of time-consuming and expensive application processes (the costs of which are borne by the applicant) have resulted in significant bureaucratic inefficiencies and unnecessary backlogs. The unnecessarily complicated application process makes applicants vulnerable to private interests profiting from assisting with applications. Many other countries and the Canadian youth justice system provide relief from the ongoing punishments of a criminal record as an operation of law once the crime free periods have been met without elaborate application and assessment requirements.

Directions for *Criminal Records Act* Reforms

There are two main options for the reform of the *Criminal Records Act*: 1. Reversing the amendments made over the last decade and restoring the key elements of the legislative and operational practices prior to 2010; or 2. Adopting a records management system that included

closing a criminal record as an operation of law once the sentence and crime free period had been reached.

Option A: Reversing the 2010 and 2012 Amendments to the *Criminal Records Act*

There is little evidence to support the need for and benefits of the recent amendments to the *Criminal Records Act*. Higher application fees, longer wait times before eligibility, and complete exclusion from the barriers of a criminal record prolong punishment long after the penalty for the crime has been served and people have been leading crime-free lives. These changes appear inconsistent with the mission statement and operating principles of the Parole Board of Canada (2000), such as: “the timely integration of offenders” and “[respecting] the inherent potential and dignity of all individuals and the equal rights of all members of society.”

Past mistakes don't determine who you are. We only live one life and sometimes make the wrong choices, but we shouldn't be condemned forever because of them. Life is hard enough as it is, and when trying to build a better life we should be supported instead of being thrown under the bus.

(S.G., pardon recipient)

For the approximately 1 in 10 Canadians who have a criminal record, revoking the 2010 and 2012 changes to the *Criminal Records Act* would return to a system that best supports reintegration. The pardon program helped individuals move beyond the stigma associated with their previous criminal convictions and removed barriers to social domains such as employment, education, and housing. Additionally, the term ‘pardon’ allowed for the added benefit of providing forgiveness, closure, and redemption while also guaranteeing human rights protection under the *Canadian Human Rights Act*.

The previous government defended the changes to the *Criminal Records Act* on the grounds that many Canadians felt that the pardon program was too lenient (The Canadian Press, 2010), but it is clear from these public forums and other reports from frontline workers and advocates that the community favours forgiveness and acceptance over more punitive and exclusive policies.

While returning to the pre-2010 *Criminal Records Act* regime would make it more fair and effective, it would miss an opportunity to correct certain misperceptions, render the system less susceptible to ideological or incident-driven changes, and make the system more efficient. Receiving a “pardon” may be meaningful for the recipient but it conveys that the criminal act is being forgiven. The applicant will have already discharged the full penalty imposed by the courts for the crime. The state is not pardoning that behaviour but simply allowing the person to move on and be restored to his or her community without being discriminated against because of the old criminal record. A more neutral term might be ‘closing’ the record.

Returning to the pre-2010 regime does not address the issues that emerged about the problems associated with having to apply for relief. Even a reduced application fee can have a prejudicial effect on accessing the relief for the poor. The requirement to gather documents and complete application forms can be a significant barrier for those with literacy problems, cognitive impairments or for those who are marginalized.

Managing applications also results in bureaucratic costs and potential inefficiencies that could be addressed by other approaches.

Option B: Closing Criminal Records as an Operation of Law

Frontline workers, members of the general public, and individuals with criminal records prefer an automatic process in which records are considered ‘closed’ or spent several years after the completion of a sentence. This option makes criminal record relief an operation of law and would eliminate the need for many resources that are required by the current record suspension regime. Several countries around the world including Australia, England, and Spain have implemented this automatic process. In England, ‘spent records’ are regulated under the *Rehabilitation of Offenders Act* (1974). The wait times before criminal records are automatically closed vary depending on the offense, but the underlying sentiment of this program is to promote and support the safe reintegration of those who have been convicted of crimes. (Padfield, 2011).

Canada uses an automatic record closure process as part of the youth justice system record management system. The *Youth Criminal Justice Act* (YCJA) supports the rehabilitation and

reintegration of youth by restricting access to their criminal records and closing them after a certain length of time, depending on the offense as well as other factors.

Section 128(4) of the YCJA details the closing process of the youth criminal record from the Canadian Police Information Centre [CPIC]:

The Commissioner of the Royal Canadian Mounted Police shall remove a record from the automated criminal conviction records retrieval system maintained by the Royal Canadian Mounted Police at the end of the applicable period referred to in section 119; however, information relating to a prohibition order made under an Act of Parliament or the legislature of a province shall be removed only at the end of the period for which the order is in force.

The creation and management of youth criminal records in Canada are intended to protect the human rights of youth. Since a criminal record can severely limit employment (and other) opportunities later in life, the automatic closing of these criminal records is an important part of successful rehabilitation and reintegration.

The benefits of mirroring this automatic closure process in the adult criminal justice system are significant. First, by eliminating the need for the exhaustive investigation¹⁹ of each individual application, the Parole Board of Canada and the Ministry of Public Safety can save resources required to sustain the current record suspension program²⁰. The automatic process of closing the criminal record in the RCMP and CPIC databases is already in place and functions at a much lower cost. These savings will also benefit individuals with criminal records, many of whom cannot afford to pay the current \$631 user fee.

Second, the wait times in the YCJA (three years for summary offences and five years for indictable offences) reflect those of Canada's previous criminal records relief regime for adults. These shorter wait times before eligibility better support timely reintegration. Given that the pardon program boasted a 96% success rate (Ruddell & Winfree, 2006) it is fair to say that these

19 An automatic process would also eliminate the problems associated with discretionary and arbitrary decisions made by Parole Board members regarding record suspensions.

20 With the 2010 and 2012 legislative changes to the *Criminal Records Act*, the full cost to process a record suspension application has "been calculated to be \$725." The RCMP receives \$15 from this amount in order to cover the costs required to manage the record in CPIC (Canada Gazette, 2012).

wait times were sufficient in supporting effective rehabilitation and reintegration as well as public safety. Additionally, as employment is often cited as a factor that significantly reduces rates of recidivism (Correctional Service of Canada, 2012; Griffiths et al., 2007) the sooner that a person can seek meaningful employment without the burden of a criminal record, the better chance he or she will have at remaining crime-free in the community. Earlier closure of criminal records also promotes participation in a wide variety of pro-social behaviour and prevents discrimination in other key areas such as housing, volunteering, education, travel, etc.

The third benefit of this option has to do with language. In 2012, then Minister of Public Safety, Vic Toews, not only voiced his concern about the tax dollars of ‘ordinary Canadians’ paying for pardons, but he also eliminated the element of forgiveness from the program by replacing the term ‘pardon’ with the term ‘record suspension’ – which has a much more punitive connotation (The Toronto Star, 2016). This debate over language can be quelled by considering a new, more neutral term, such as ‘closed’ or ‘spent’ records. This language is used in other countries, such as England and Australia, and is a less contentious way to describe the sealing of criminal records from police databases.

There have been very few criticisms of the YCJA’s record management provisions and it would seem relatively easy to adapt those principles to the management of adult criminal records.

Conclusions

There is a strong argument to be made that the Government of Canada’s stated goals for reforming the *Criminal Records Act* could best be achieved through a system that provides for the automatic closure of records once the sentence and the crime-free periods have been completed. Canada’s effective and efficient youth justice system records management model could be adapted for adults. There is clear evidence that supporting effective reintegration and reducing reoffending increases public safety. Maintaining barriers to employment, housing, and other important aspects of pro-social development jeopardizes public safety more than it protects

it. Also, having a fair, objective access to relief from discrimination through human rights act protections is consistent with Charter and Canadian values.

There is little doubt of the need to reform the *Criminal Records Act*. As indicated in the 2015 Corrections and Conditional Release Statistical Overview, the number of record suspension applications has decreased since the 2010 and 2012 changes to the *Criminal Records Act* (Public Safety Canada, 2016). This means that many of the 3.8 million Canadians with a criminal record continue to endure discrimination in the community as a result of punitive and exclusionary policies and practices. Having a criminal record closed is an important milestone in the process of rehabilitation and reintegration as it offers those who have completed criminal sentences and remained crime free protection from discrimination under the *Canadian Human Rights Act* and allows them to move on with their lives in a safe and productive manner. The unnecessary changes to the *Criminal Records Act* have left many Canadians feeling hopeless, unable to find work, and enduring other collateral consequences of criminal records.

The current Minister of Public Safety supports amending the *Criminal Records Act*. While repealing 2010 and 2012 amendments would greatly improve the regime, moving to a system that closes records as an operation of law would provide a better foundation for a cost-effective, objective, and fair system and for achieving the policy objectives for the reforms.

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