Written Submissions of Cannabis Amnesty

Public Safety Canada's Targeted Stakeholder Engagement on the Automated Sequestering of Criminal Records

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PREFACE

Cannabis Amnesty is an independent, not-for-profit organization dedicated to righting the wrongs caused by decades of cannabis criminalization in Canada. We strive to achieve justice and equity for the most vulnerable communities by educating, inspiring and mobilizing on issues related to cannabis. It was founded in April 2018 in response to the absence of federal legislation addressing the serious consequences of criminal convictions for actions that would no longer be illegal under the new Cannabis Act. Through our programs and campaigns, we advocate for legislative reform, work to educate the public, dismantle barriers to economic opportunity and champion equity within the cannabis industry. Cannabis Amnesty has pressed the federal government to enact legislation to delete criminal records relating to the simple possession of cannabis, launched public education campaign to fight the stigma associated with cannabis convictions and worked on criminal justice reform to make sure that the legal structures that allowed Black and Indigenous communities to be overrepresented in cannabis prosecutions are dismantled. Because of our advocacy, research and lobbying efforts in relation to cannabis amnesty, we are uniquely positioned to comment on legislative regimes that seek to address and remedy the impact of criminal records on the lives of Canadians.

I. INTRODUCTION – LESSONS FROM THE CANNABIS CONTEXT

As the Government considers an automated sequestering of criminal records (ASCR) regime in Canada, a lot that can be learned from the development and execution of the pardon process in relation to simple cannabis convictions. The legalization of cannabis in Canada was followed by widespread calls for the deletion of criminal records for cannabis offences that would no longer be illegal, namely, simple cannabis possession offences. Advocacy organizations like Cannabis Amnesty lobbied the government to expunge criminal records in relation to these offences, not only because the persistence of criminal records impeded reintegration and placed unnecessary socio-economic burdens on law-abiding Canadians, but also because these impacts were disproportionately felt by Black and Indigenous persons due to disproportionate enforcement.[1]

In response to pressure from organizations like Cannabis Amnesty who, post-legalization, continued to highlight the injustice of maintaining these criminal records, the federal government introduced Bill C-93, *An Act to provide no-cost, expedited record suspensions for simple possession of cannabis*, in 2019.

With the coming into force of Bill C-93, the government has provided a way for individuals to apply for an expedited records suspension without having to pay a $631 (now $50) application fee. The regular pardon regime requires applicants pay an application fee in addition to all the ancillary costs involved. They must also demonstrate that they have been of good conduct and paid any outstanding fines or victim surcharges. There is also a wait period of up to 10 years before a pardon application can be made. Bill C-93 attempted to ease the process for individuals by waiving the $631 application fee, removing the wait period, accepting application even if there are outstanding fees and extending the application to non-Canadian citizens or residents, etc.[2]

Bill C-93, however, was not an ASCR regime and consequently, was flawed in two fundamental ways:

- **Not automatic:** Bill C-93 did not provide for the automatic expungement of criminal records — it required an application. We know from the C-93 experience that where the government institutes an application-based pardons regime, the uptake and participation from affected communities is extremely low.

- **Not truly free:** Bill C-93 waives the $631 application fee, but Canadians will still be required to pay to obtain documents needed to complete their application—their certified criminal record from the RCMP and any supporting documents from the police of

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[1] See Rachel Browne, "Black and Indigenous people are overrepresented in Canada's weed arrests" (18 April 2018), online: *Vice News*.
[2] See Public Safety Canada "Bill C-93 – No-fee, Expedited Pardons for Simple Possession of Cannabis Backgrounder" (5 July 2019), online: *Government of Canada*.

jurisdiction. In many cases, these costs are prohibitive and constitute a significant barrier to access.

What both points boils down to is accessibility. The Bill C-93 regime is simply inaccessible. It is rife with avoidable bureaucratic complexity, unnecessary costly axillary fees and as a result, continues to amplify the systemic barriers that impact marginalized communities including Black and Indigenous persons. The application-based record suspension program process is time-consuming, lengthy and onerous on individuals. An estimated 10,000 Canadians are eligible for the expedited pardon program[3], yet as of March 1, 2022, a total of 852 applications have been received. Of these applications, only 536 have been approved with 310 deemed incomplete or ineligible and 3 have been accepted only to later be discontinued.[4] This extremely low rate of engagement demonstrates that the current system is failing Canadians. Cannabis Amnesty has been advocating for an automatic sequestering regime since the implementation of the *Cannabis Act* in 2018. In our submissions to the House Of Commons' Standing Committee On Public Safety And National Security Studying Bill C-93[5], we noted many of the issues that have since transpired with the implementation of C-93 including difficulty accessing the pardons application and high costs as a barrier to submitting an application.[6]

The failure of Bill C-93 demonstrates that application-based regimes are not successful and provides further evidence that an ASCR approach would be more effective. It is our hope that any new pardon regime introduced by this government takes heed of the lessons learned from the shortcomings of Bill C-93.

II.   OUTLINE OF POSITION

Cannabis Amnesty supports an ASCR system in Canada. Many other jurisdictions around the world have successfully implemented such regimes and Canada can as well.[7] Cannabis Amnesty supports capturing all non-violent convictions - including cannabis related charges - within an ASCR regime.

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[3] See Public Safety Canada "Cannabis Pardons" (27 November 2020), online: *Government of Canada.*
[4] Parole Board of Canada, Correspondence Unit, 24 March 2022
[5] See Submissions To The House Of Commons' Standing Committee On Public Safety And National Security Studying Bill C-93 (1 May 2019) *Our Commons.*
[6] Samantha McAleese, "Identifying, Navigating, Resisting, and Eliminating Structural Stigma and the Collateral Consequences of Punishment" (29 April 2022). [Doctoral Dissertation]. Carleton University, Ottawa, Canada.
[7] John Howard Society Ontario "The Invisible Burden" (21 Feburary 2019), online. *John Howard ON.*

PART 1: BENEFITS OF ASCR SYSTEM IN CANADA

A. Employment, Recidivism and Accessible Reintegration into Society

One major benefit of an ASCR system in Canada is that it has the potential to break the cycle of recidivism for many ex-offenders. Research shows that there is a link between the maintenance of criminal records and the rates of recidivism with employment opportunities being the link between the two.[8] The impact a criminal record has on an individual's ability to obtain and keep gainful employment is incredibly difficult to overcome. Research from Ontario demonstrates that more than 60% of employers require a criminal record check for potential employees and almost 60% of respondents indicated they would never knowingly hire a person with a criminal record.[9] If post-conviction reintegration is truly one of the objectives of our penal system, then our criminal record regime should facilitate that reintegration instead of continuing to punish individuals long after they have served their debt to society.

Unemployment is an important risk factor contributing to future criminal behaviour.[10] The persistence of criminal records stands in the way of many Canadians who could meaningfully contribute to the economy and society at large. Records have a greater reach beyond just impacting opportunities for employment. These include limiting travel, access to social services, loans qualifications and much more.[11] Maintaining criminal records for actions that are no longer illegal or long after an individual's debt to society has been paid does nothing for public safety. Indeed, the maintenance of criminal records contribute to recidivism and makes the public more unsafe.[12]

It is important to examine why more Canadians are not accessing application-based record suspension regimes like the one created through Bill C-93, despite the fact that receiving a record suspension has the potential to drastically change a person's life for the better. In a recent study, participants described their contact with the record suspension regime as one full of "hopelessness, powerlessness and despair".[13] There are many barriers to accessing a pardon including the application costs and associated fees, the long wait times, the eligibility restrictions and the actual application process itself.[14] This sense of hopelessness associated with the pardon application process itself is insidious– not only does it act as a deterrent for those who wish to put their past

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[8] Megan Denver Garima Siwach & Shawn D. Bushway, "A New Look at the Employment and Recidivism Relationship Through the Lens of a Criminal Background Check" (2017) 55:1 Criminology at 174.
[9] Supra at 7.
[10] Robert Apel & Julie Horney, "How and why does work matter? Employment conditions, routine activities, and crime among adult male offenders" (2017) 55:2 Criminology at 307.
[11] See Brian McGlashan, "Consequences of Having a Criminal Record in Canada" (24 February 2022), online: *McGlashan Law*.
[12] Ericka B. Adams, Elsa Y. Chen & Rosella Chapman, " Erasing the mark of a criminal past: Ex-offenders' expectations and experiences with record clearance" (2016) 19:1 Punishment & Society at 23.
[13] Supra at 6.
[14] Ibid.

behind them, but research shows that it serves as a factor that increases the likelihood that an individual will re-offend.[15]

> **RECOMMENDATION #1:** *All convictions for non-violent offences should be eligible for automatic sequestering of criminal records, including all cannabis convictions.*

PART 2: IMPLEMENTATION OF ASCR SYSTEM IN CANADA

B. Immediate Automation for Cannabis Records

The new ASCR regime should provide for the immediate and automated sequestering of all criminal records for simple cannabis possession offences. The legalization of cannabis in 2018 and the passing of Bill C-93 demonstrate an appetite in Canadian society to recognize the disproportionate and unnecessary stigma and burden that results from simple cannabis possession charges. Yet an estimated 10,000 Canadians are still living with the collateral consequences of cannabis convictions four years later.[16] All cannabis offences no longer under the *Controlled Drugs and Substances Act* should immediately be sequestered; since legalization, there remains no principled reason to maintain these records. Bill C-93 eliminated the wait period, completion of sentence, paying of associated fees and some other eligibility criteria, but despite this regime, the barriers associated with criminal records persist. A new pardon regime should go one step further and automate pardons - or ideally expungements - for all simple cannabis convictions as soon as it is implemented.

> **RECOMMENDATION #2:** *All simple cannabis possession convictions should immediately be automatically sequestered.*

C. Systemic Racism within the Criminal Justice System

The reality for many Black and Indigenous communities from coast to coast to coast is that they are more likely to have encounters with the criminal justice system than other Canadians. These communities are overpoliced, they overpopulate correctional institutions and they are overrepresented in the Canadian criminal justice system.[17] An example can be seen in the

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[15] Ibid.

[16] Supra at 3.

[17] Akwasi Owusu-Bempah, "Race, Crime and Criminal Justice in Canada" in *The Oxford Handbook of Ethnicity, Crime, and Immigration (*Oxford: Oxford University Press, 2014).

disproportionately higher rates of cannabis convictions among Black and Indigenous people even though they consume cannabis at equal rates as white Canadians.[18]

The existence of systemic racism in our criminal justice system–a phenomenon recognized by our federal government– allows for the over-representation of Black and Indigenous persons in cannabis arrest.[19] Research indicates racial bias exists within the administration of the Canadian criminal justice system.[20] As a part of Public Safety's mandate to combat discrimination in the criminal justice system[21], it is essential that proactive steps are taken to assess, evaluate and ultimate eradicate systemic racism from the justice system.

It is, therefore, important that when new systems and processes like the ASCR regime contemplated by the government are developed, its design incorporates evidence-based approaches to combating systemic racism in the administration of justice in Canada. The first step towards this objective is the collection of data disaggregated by race. The collection and publication of this data can help provide useful information that can support the development of future social and criminal policy, support research on the relationship between race and the administration of the criminal justice system and provide transparency to the general public.[22] Further, with the collection and analysis of this data, informed decisions can be made to address, correct and mediate areas in which disproportionate outcomes based on race are found.

> **RECOMMENDATION #3: Data regarding implementation of ASCR must be collected to study, evaluate and remedy systemic injustice in the *criminal justice system.***

D. The Problem with Relying on Discretion

A major benefit of the ASCR regime is the total removal of discretionary powers in the entire pardoning process. Contact with the criminal justice system at points in which the discretion of state actors is permitted is rife with bias and ultimately discriminatory results.[23] Systemic discrimination plays out in these instances and can create harmful consequences for racialized

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[18] Supra at 1.
[19] Ibid.
[20] Supra at 17.
[21] See Office of the Prime Minister "Minister of Public Safety Mandate Letter" (16 December 2017), online: *Prime Minister of Canada*
[22] Supra at 17.
[23] Scot Wortley & Gail Kellough, "Racializing Risk: Police and Crown Discretion and the Over-representation of Black People in the Ontario Criminal Justice System" in Anthony Harriott, Farley Brathwaite & Scot Wortley eds, *Crime and Criminal Justice in the Caribbean and Among Caribbean Peoples* (Kingston, Jamaica: Arawak Publications, 2004) 173.

Canadians, their families and their communities. Currently, the Minister of Public Safety retains the jurisdiction to disclose a sequestered record at their discretion under certain conditions.[24] Cannabis Amnesty adamantly believes that this should not be the case. Disclosures of a suspended criminal record mean that Canadians are living with the stigma and threat of possible re-criminalization on an issue that should be sealed and left in the past. The automated system should permanently delete records with no option to reinstate or potential of inadvertent disclosure. Canadians deserve the opportunity to move on with the next chapters of their lives without this constant threat looming over their shoulders. The removal of discretion does not mean there will be no oversight. Safeguards can be put in place to ensure the fully automated system is working as intended. One such safeguard is allowing individuals who were denied an automatic pardon the option to appeal. In this case, a review by the PBC is warranted. Also, a high-level review of the outcome of the sequestering at periodic benchmarks for race-based data analysis and other indicators could also provide the opportunity for PBC intervention at the macro level.

> **RECOMMENDATION #4:** *Remove discretion from the entire ASCR process.*

E. Expungements of Records over Pardons

The ASCR regime should provide for the permanent destruction of the judicial records of convictions from federal repositories and systems by providing for the automatic deletion of all eligible conviction entries in the CPIC database. The federal government has previously taken the position that although the enforcement of cannabis laws has been unjust to members or racialized communities, the remedy of expungement is reserved for the extraordinary circumstances where the criminalization of an activity *itself* was historically unjust, such as where a law violated the *Charter*.[25] Reserving expungement for records related to offences which have been found to be unconstitutional is an arbitrary distinction with no legal foundation which further erodes the public's confidence in the administration of justice.

No purpose is served by leaving the door open to future reinstatement. Expungements provide for the destruction or removal of the judicial records of convictions from federal repositories and systems. Once an expungement is ordered, the RCMP would be required to destroy any record of a conviction in its custody. The RCMP would also notify any federal department or agency that, to its knowledge, have records of the conviction and direct them to do the same. While records in relation to criminal offences do not exist in a single national database, records of conviction do. The Canadian Police Information Centre ("CPIC") is a national database maintained by the RCMP.

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[24] Supra at 2.
[25] Supra at 3.

If someone is arrested, charged and convicted of a crime, this record exists in the CPIC database. CPIC is the database that is accessible to foreign authorities such as the US Customs and Border Patrol and the database that is accessed by employers when they perform a background check of a job applicant. Therefore, automatically removing all ASCR eligible offence records from CPIC would go a long way to alleviate the impact of a past conviction on the lives of Canadians.

> **RECOMMENDATION #5:** *Move towards a record expungement model for all non-violent offences.*

III. CONCLUSION

Cannabis Amnesty implores the government to implement free, automatic, and permanent record deletions of simple cannabis possession records as part of a broader move to adopt an ASCR process. Cannabis Amnesty supports the ASCR regime for criminal records for all non-violent offences and believes that all Canadians are deserving of a second chance and the opportunity to reintegrate as a contributing member of society. The development of such a regime would go a long way towards removing the barriers that create hopelessness and encourage recidivism. A full ASCR regime would allow individuals who have paid their debt to meaningfully participate in their communities, secure good and stable jobs and become fully contributing members of society.