

Joint Submission to Public Safety Canada
Engagement on the Automated Sequestering of Criminal Records

British Columbia Civil Liberties Association
Canadian Association of Elizabeth Fry Societies
Canadian Civil Liberties Association
Debra Parkes, Professor and Chair in Feminist Legal Studies, University of British Columbia
Elizabeth Fry Society of Mainland Nova Scotia
Elizabeth Fry Toronto
Empowerment Council
John Howard Society of Canada
John Howard Society of New Brunswick
John Howard Society of Ontario
Prisoners' Legal Services
Tareq Bawwab, Community Expertise Committee, Fresh Start Coalition

Thank you for the opportunity to provide further comments on the automated sequestering of criminal records (“ASCR”). The signatories to this submission appreciate the time being dedicated to examining how to implement an automated system in Canada. We wanted to take this opportunity to provide further thoughts on certain points that arose during the consultation sessions conducted by Public Safety Canada in May and June 2022.

In particular, we are providing further submissions on:

1. The broadly accepted values underpinning the Canadian criminal justice system, which we believe should motivate policymaking in this setting and inform the objectives of any law governing criminal records;
2. The evidence regarding how criminal record checks relate to these objectives generally;
3. Evidence regarding the relationship between criminal records and violence, intimate partner violence, and sexual offences;
4. Ways to ensure that an ASCR system combats systemic discrimination; and
5. Specific policy recommendations regarding the objectives, scope, and criteria that should be associated with an ASCR system.

1. Values and objectives

At various points during the consultation sessions, participants were prompted to consider what values they thought should inform policy in this area, and then reflect on how these values might impact policy choices on the scope and characteristics of an ASCR system.

We believe there is very broad alignment regarding the basic values that should animate our criminal justice policy, and in particular, the values that should inform sentencing and post-sentencing impacts. Many of these values have formed the basis for legal decisions in the criminal justice sphere for generations. They are enshrined in international human rights instruments, form part of the Canadian constitution, and are reflected in key criminal justice legislation such as the *Criminal Code*, the *Youth Criminal Justice Act*, and the *Corrections and Conditional Release Act*. Although various formulations exist, some key touchstones include a justice system that:

- Seeks to maintain a just, peaceful and safe society;
- Respects basic human rights and human dignity;
- Ensures both procedural and substantive equality, including by actively combatting systemic discrimination;
- Delivers sentences that are fair and proportionate; and
- Incorporates a post-sentencing penal system that is humane, respects residual individuals' dignity and residual rights, is responsive to sentenced individuals' needs, and focuses on rehabilitation and reintegration.

Our current criminal justice system does not always reflect these values, in its structure or operation. There is no doubt, however, that these basic tenets should drive policy and legal work in this area.

In our view, the fundamental and widely accepted values listed above should inform Canada's approach to administering criminal records. At every step of our justice system, we should aim for laws and policies that actively combat systemic discrimination and help rectify historic and contemporary societal inequalities. When a person is found guilty of a crime, our justice system strives to impose a just and fair sentence. The administration of that sentence – whether that takes place in prison or in the community – is guided by a focus on rehabilitation and reintegration, with the overarching goal of furthering safety for all communities. The policy objectives animating how we deal with criminal records after a person has completed their

sentence should, therefore, similarly focus on equality, rehabilitation, reintegration, and community safety.

Other values, such as vengeance, may inform public sentiment and response to crime. But as the Supreme Court of Canada has noted, vengeance – which is “an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person” – has “no role to play in a civilized system of sentencing.”¹

2. How does the post-sentencing administration of criminal record checks relate to the objectives of rehabilitation, reintegration, and public safety?

Over the past two decades, there has been a significant increase in the use of criminal records outside of the justice system. Today, criminal records checks are commonly used to screen individuals applying for jobs, volunteer positions, and housing. Employers and others who request these record checks assume that a criminal record is a useful tool to identify individuals who might be violent towards staff or clients or might commit non-violent crimes such as fraud and theft. This widely held belief, however, has been clearly contradicted by decades of social science evidence on criminal records and recidivism.

Studies have shown that a criminal record check, on its own, does not accurately assess the level of risk a particular individual poses to clients, colleagues, or organizational property. There is currently no strong evidence to suggest that instances of workplace violence are higher for those who have criminal records than those who do not.² Additionally, past criminal convictions do not indicate an increased likelihood to commit a work-related offence.³ Put simply, you cannot predict that an individual is likely to commit a violent workplace offence, or engage in workplace fraud or theft, simply by looking at a criminal record.⁴ Indeed, employees with and

¹ *R v M (CA)*, [1996] 1 SCR 500 at para 80.

² See Keith Soothill, Les Humphreys and Brian Francis, “Middle-class offenders as employees – Assessing the risk: A 35-year follow-up,” *Journal of Offender Rehabilitation* 52, no. 6 (2013): 407; Patricia Harris and Kimberly Keller, “Ex-offenders need not apply: The criminal background check in hiring decisions,” *Journal of Contemporary Criminal Justice* 21, no. 1 (2005): 6; Megan C. Kurlychek, Robert Brame and Shawn D. Bushway, “Scarlet letters and recidivism: Does an old criminal record predict future offending?” *Criminology and Public Policy* 5, no. 3 (2006): 483.

³ Keith Soothill, Les Humphreys and Brian Francis, “Middle-class offenders as employees – Assessing the risk: A 35-year follow-up,” *Journal of Offender Rehabilitation* 52, no. 6 (2013): 407.

⁴ *Ibid.*

without criminal records commit crimes at work at about the same rate.⁵ Although there are evidence-based risk assessment tools that are used in the criminal justice system, the factors that are disclosed on a criminal record check, namely convictions and sometimes non-conviction records or police contacts, “depart markedly from criteria included in commonly accepted and validated assessments of offender risk.”⁶

Studies also demonstrate that, even outside the workplace, the nature of an offence is unlikely to be an accurate predictor of the same offence being committed in the future, a practice referred to as “specialization.” Existing literature concludes that specialization is not very common, even in the case of sexual offences or domestic violence.⁷

Although a criminal record does not predict whether or not someone will engage in a particular type of criminal activity, there is a time-limited correlation between a recent criminal record and the likelihood of future justice system involvement more generally.⁸ As more time passes, however, the “knowledge that one committed an offence becomes less of a predictor of whether offending will take place again in the future.”⁹ This is because most people who commit a criminal offence do not go on to become career criminals and many “age out.”¹⁰ Studies show that the longer an individual goes without justice system involvement, the less likely it becomes that they will re-offend. After a few years, there is virtually no difference in the risk of offending between those with a prior conviction and those without.¹¹

To summarize, the evidence shows that criminal record checks are not useful as general workplace, volunteer, or housing safety screening tools. A criminal record alone cannot be used

⁵ Patricia M. Harris and Kimberly S. Keller. “Ex-Offenders Need Not Apply: The Criminal Background Check in Hiring Decisions.” *Journal of Contemporary Criminal Justice* 21, no. 1 (2005): 6-30.

⁶ *Ibid.*

⁷ See Bouffard, Leana A. and Sara B. Zedaker. “Are Domestic Violence Offenders Specialists? Answers from Multiple Analytic Approaches.” *The Journal of Research in Crime and Delinquency* 53, no. 6 (2016): 788-813; see also Soothill, Keith, Brian Francis, Barry Sanderson, and Elizabeth Ackerley. “Sex Offenders: Specialists, Generalists—Or Both? A 32-Year Criminological Study.” *British Journal of Criminology* 40, no. 1 (2000): 56-67.

⁸ Yoko Murphy, Jane B. Sprott, and Anthony N. Doob. “Pardoning People Who Once Offended.” *Criminal Law Quarterly (Toronto)* 62, no. 1-2 (2015): 209-225 at 211.

⁹ *Ibid.*

¹⁰ A. Blumstein & K. Nakamura (2009). “Redemption in the presence of widespread criminal background checks.” *Criminology*, 47(2), 327-359.

¹¹ See Megan C. Kurlychek, Robert Brame and Shawn D. Bushway, “Scarlet letters and recidivism: Does an old criminal record predict future offending?” *Criminology and Public Policy* 5 no. 3 (2006): 483; Megan C. Kurlychek, Robert Brame and Shawn D. Bushway, “Enduring risk? Old criminal records and short-term predictions of criminal involvement,” *Crime and Delinquency* 53, no. 1 (2007): 64; A. Blumstein and K. Nakamura, “Redemption in the presence of widespread criminal background checks,” *Criminology* 47, no. 2 (2009): 327.

to predict the likelihood of future violent actions, and therefore cannot be used to accurately identify and mitigate risks specific individuals may pose to organizations, staff, and clients. Particularly after a few years have passed, accessing information about an individual’s criminal history has no value in predicting future involvement with the justice system.

On the other hand, social science research has demonstrated that the widespread use of criminal records has clear negative impacts on individuals’ rehabilitation.¹² Ultimately, the barriers posed by a criminal record negatively impact public safety by making it harder for a person to remain crime-free after they have finished their sentence. The automated sequestering of criminal records would help break down barriers that exist for people with criminal records, thus furthering the objectives of public safety, rehabilitation and reintegration.

3. Should an automatic regime apply to violent offences, including intimate partner violence and sex offences?

During the consultations, particular questions were raised regarding the public safety implications of limiting disclosure of old criminal records associated with “violent offences.” There were also specific questions regarding how an automatic system would apply to intimate partner violence and sex offences, and the impact that automatically limiting disclosure of old records would have on vulnerable populations.

a. ASCR and “violent” offences

Categories of offences that are considered “violent” frequently sweep in a wide range of conduct. Women, for example, are often charged with assault with a weapon when they use regular household objects – a telephone, a tea towel, or a water bottle – to defend themselves from their abusive partners.¹³ Even spitting on someone constitutes assault. The Department of Justice considers the offence of “uttering threats” a violent offence, including any threat made towards

¹² See Curt T. Griffiths, Yvon Dandurand and Danielle Murdoch, *The Social Reintegration of Offenders and Crime Prevention* (Ottawa: National Crime Prevention Centre, 2007); Dominique Fleury and Myriam Fortin, “When working is not enough to escape poverty: An analysis of Canada’s working poor,” Human Resources and Social Development Canada (2006); Christopher Uggen, “Work as a turning point in the life course of criminals: A duration model of age, employment and recidivism,” *American Sociological Review* 65, no. 4 (2000): 529.

¹³ See Women Abuse Council of Toronto, [Women Charged with Domestic Violence in Toronto: The Unintended Consequences of Mandatory Charge Policies](#) (March 2005) at 7-9; see also Canadian Civil Liberties Association and Education Trust, [Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention](#) (July 2014) at 22.

another individual's personal property.¹⁴ The wide range of behaviours that can lead to a “violent” criminal record is one of the reasons that criminal records, in and of themselves, are not predictive of a current or future risk of violent behaviour. Indeed, violent offences are not exceptions to the general principle that re-offending declines over time.¹⁵

Individualized, proportionate sentencing is a cornerstone of our justice system in part because such a wide range of individual circumstances and actions can lead to a criminal finding of guilt. Determining what happens with a person's criminal record after they have completed their sentence should not be about whether they deserve to be punished – that is what the sentencing process is for. Decisions on how to administer old criminal records should instead aim to protect community safety and assist with rehabilitation and reintegration. None of these ends are served by carving out a separate regime to deal with “violent” offences.

b. ASCR and sex offences

“Sex offender” is a term used to designate someone who has been found guilty of a sex offence. The term is highly stigmatized. Although individuals who have been convicted of certain sex offences are currently ineligible to receive a record suspension, scholars note that the public attitude that those convicted with these offences are “unreformable” drives this policy decision, rather than evidence-based factors.¹⁶ Few people are aware of the wide range of actions that can lead to the label of “sex offender.” For example, sex offences can include things such as “indecent exposure,” which is a broad offence that could include urinating in a public place, masturbating in your own home near a window, or having consensual sex in a remote public location.¹⁷ Academic studies do not support the widely held belief that those convicted of sexual-based offences are more likely to commit sex crimes in the future.¹⁸ Criminologists point out most individuals who have been convicted of such offences are not “specialists,” meaning that

¹⁴ Department of Justice Canada, [Family Violence Laws](#). March 7, 2022.

¹⁵ K. Nakamura and A. Blumstein, “Potential redemption for sex offenders,” in A. Blokland and P. Lussier (eds.), *Sex offenders: A criminal career approach* (John Wiley & Sons, 2015) at 373-404.

¹⁶ M. Denver and B. Behlendorf, “Shifting peaks and cumulative consequences: Disqualifying convictions in high-security jobs” (2021), *Journal of Research in Crime and Delinquency*, 1-48; see also Justin T. Pickett, Christina Mancini, and Daniel P. Mears (2013). “Vulnerable Victims, Monstrous Offenders, and Unmanageable Risk: Explaining Public Opinion on the Social Control of Sex Crime.” *Criminology* 51(3), 729-759.

¹⁷ See *R v Langlais*, 2008 NBCA 20; *R v Campbell*, 1979 CarswellOnt 1884, 4 WCB 193; *Parrett v Vanderford*, 2001 BCSC 23; *R v Parsons*, 1962 CarswellBC 9, [1963] 3 CCC 92; *R v Bérubé*, 2016 ONCJ 332.

¹⁸ Terance D. Miethe, Jodi Olson, and Ojmarrh Mitchell. (2006) “Specialization and Persistence in the Arrest Histories of Sex Offenders: A Comparative Analysis of Alternative Measures and Offence Types.” *Journal of Research in Crime and Delinquency*, 43, 204-229.

they do not persistently commit sex crimes.¹⁹ Even evidence-based risk prediction tools, which take into account a wide range of factors far beyond an individual's criminal record, are unable to predict future acts with any certainty. One study, for example, showed that of those convicted of sex offences deemed "high-risk" by evidence-based prediction tools, 80% were never reconvicted of another sexual offence.²⁰ Similar to individuals with other types of records, if people with records for sexual offences do have further contact with the criminal justice system, it is not likely to be due to a sex offence.²¹ With respect to youth convicted of a sex offence, studies show that the vast majority will never be convicted of another sex offence (87%).²² Again, if they were to commit another sex offence, it was very likely to be in the first few years after the initial conviction. Individuals who have been convicted of a sex offence are, similar to other general populations, subject to the general trend that the likelihood of re-involvement with the justice system declines over time.²³

We agree that there is a role for enhanced workplaces screening before individuals are given significant authority over a vulnerable person. This is achieved, however, through the vulnerable sector check – which allows certain suspended records to be unsealed. Organizations that are responsible for at-risk populations should also be proactively checking in and observing staff and volunteer interactions, regardless of whether an individual has a criminal record. Reinforcing the notion that you can "screen out" "dangerous" individuals through a criminal records check provides a false – and dangerous – sense of security. Broadly excluding individuals with criminal records for sexual offences from accessing record suspensions unnecessarily prevents a large number of people from accessing basic jobs, housing and achieving day-to-day stability.

c. ASCR and intimate partner violence

Similar to other categories of offences, past convictions related to intimate partner violence are not reliable predictors of the likelihood an individual will commit these crimes in the future.

¹⁹ Terance D. Miethe, Jodi Olson, and Ojmarrh Mitchell. (2006) Specialization and Persistence in the Arrest Histories of Sex Offenders. *Journal of Research in Crime and Delinquency*, 43, 204-229.

²⁰ R. Karl Hanson, Andrew J.R. Harris, Elizabeth Letourneau, and L. Maaikje Helmus (2018). *Psychology, Public Policy, and Law*, 24(1), 48-63.

²¹ Anthony N. Doob and Rosemary Gartner. "Some Recent Research on Sex Offenders and Society's Responses to Them." Centre for Criminology and Sociolegal Studies at the University of Toronto, (2013): 1-28.

²² Claire Hargreaves and Brian Francis (2014). The Long Term Recidivism Risk of Young Sexual Offenders in England and Wales – Enduring Risk or Redemption? *Journal of Criminal Justice*, 42, 164-172.

²³ Maria Jung, Jane B. Sprott, and Anthony N. Doob. "An Overview of *Criminological Highlights* Summaries of Research Related to Pardons." Centre for Criminology & Sociolegal Studies (2020): 1-52 at 6.

As mentioned above, evidence-based risk prediction tools, including tools designed to identify the risk of intimate partner violence, take into account a wide array of considerations that need to be assessed in terms of analyzing recidivism. This includes things such as: gender, age, existence of a prior criminal record, the seriousness and sentence for prior convictions, the sentence and prison sentence length for the domestic violence convictions, the total number of lifetime convictions and number of charges that did not result in a conviction.²⁴ Even including all these factors, evidence-based domestic violence risk prediction tools remain very limited predictive tools. For example, one study evaluating one of the most popular evidence-based domestic violence risk prediction tools found that it was “performing little better than random” at predicting which domestic violence perpetrators would reoffend.²⁵

There are also significant practical limitations in using criminal record checks to prevent future instances of intimate partner violence. Police record checks are a consent-based system, meaning that police records pertaining to an individual cannot be accessed without the individual knowing a record check is taking place and providing their consent. Even if criminal record checks were useful risk mitigation tools, it is not reasonable to expect women to ask potential partners to consent to a criminal record check before entering into a romantic relationship.

Perhaps counterintuitively, many organizations that work directly with women impacted by intimate partner violence support a comprehensive automatic sequestering regime because of the impact that old criminal records and the current application-based record suspension system have on their clients.

Women impacted by intimate partner violence are brought into conflict with the justice system in a variety of ways. Dual charging, for example, can occur when both individuals at the scene are arrested because the officer is unsure of who the aggressor is. Most women who use violence against an intimate partner do so to defend themselves.²⁶ A 2004 Toronto-area study of women charged with domestic violence, for example, showed that 90 percent of women charged had a

²⁴ Tomas P. Lebel, Ros Burnett, Shadd Maruna, and Shawn Bushway (2008). The ‘Chicken and Egg’ of Subjective and Social Factors in Desistance from Crime. *European Journal of Criminology*, 5(2), 131-159; Tonry, Michael (2019). Predictions of Dangerousness in Sentencing: Déjà Vu All Over Again. *Crime and Justice: A Review of Research*, 48, 439-482.

²⁵ Emily Turner, Juanjo Medina, and Gavin Brown (2019). Dashing Hopes? The Predictive Accuracy of Domestic Abuse Risk Assessment by Police. *British Journal of Criminology*, 59, 1013-1034.

²⁶ Kathleen J. Ferraro, *Neither Angels nor Demons: Women, Crime and Victimization* (Hanover: University Press of New England, 2006).

history of physical, emotional, and sexual abuse by the partner they allegedly assaulted.²⁷ Once charged with an offence, however, there can be few opportunities for women to provide context for their actions; many are automatically treated as “offenders” rather than “victims.”²⁸ Even where the charges are ultimately withdrawn or a woman is found not guilty, the increased police attention and bail conditions imposed while waiting for the initial charges to be resolved can lead to a criminal record.

4. ASCR and systemic discrimination

One of the major flaws in our criminal justice system is the historic and ongoing systemic discrimination against marginalized groups. Black people and members of other racialized communities, Indigenous persons, and those experiencing homelessness, mental health challenges, and addictions, along with others who are marginalized, are disproportionately policed and criminalized – and therefore overrepresented in police databases. The systemic discrimination that these groups face is not confined to the criminal justice system and is entrenched within many other areas of contemporary society. A record suspension regime that does not actively work to ameliorate these inequalities risks becoming yet another institutional process that furthers systemic discrimination within and beyond the criminal justice system.

The current application-based record suspension system exacerbates systemic discrimination in a number of ways. Those with the least resources – including community supports, financial security, education, and stability – are least able to pay the required fees and navigate the complex application process. People who have experienced poverty or personal instability before and after their conviction may have been unaware of or unable to pay the fine associated with their sentence. Individuals with histories of personal trauma – including the type of inter-generational trauma that leads to increased contact with the justice system – have difficulties completing the application, as it requires them to relive previous traumatic experiences. The very broad requirement that applicants demonstrate “good conduct” after the completion of their sentence requires the Parole Board to consider if the applicant was even suspected of breaking *any* laws – including provincial laws and municipal by-laws. This directly compounds the impacts of systemic discrimination that has been demonstrated in areas such as policing. Finally, some individuals are excluded from accessing record suspensions entirely due to stigma associated with their criminal record. An unsealed criminal record substantially impacts job and

²⁷ Shoshana Pollack et al., “Women Charged with Domestic Violence in Toronto: The Unintended Consequences of Mandatory Charge Policies” (2005).

²⁸ *Ibid.*

housing prospects, reinforcing cycles of poverty and justice system involvement for already marginalized individuals.

Although an automated system would eliminate the barriers posed by the application process itself, there remains a significant risk that an automated system, if inappropriately structured, would further entrench systemic discrimination. If, for example, a broad range of conditions had to be met before an individual received a record suspension – for example, avoiding all police contact or unproven charges – discriminatory patterns within the system would be extended and reinforced. As mentioned above, members of marginalized groups are more likely to be over-policed and criminalized. For example, Black and racialized men in Ontario and Quebec are significantly more likely to have contact with police and be arrested than white men and women.²⁹ Individuals with mental health or addictions issues frequently have their charges diverted into specialized courts or withdrawn altogether. Including non-conviction records or police contacts as considerations for access to a record suspension will therefore result in discriminatory outcomes. Similarly, including some categories of convictions – administration of justice convictions, for example – would significantly increase the discriminatory impacts of the record suspension system.

5. Summary of policy recommendations

The following list summarizes the key policy recommendations that we believe flow from the above principles and evidence.

- 1. The objectives of the law governing criminal records should be to support effective reintegration, rehabilitation, and community safety while also combatting systemic discrimination in the justice system.**
- 2. Eligibility for a record suspension should be determined by the absence of new convictions, other than administration of justice offences, during the wait period.**

Other criteria that are currently considered before granting a record suspension are very broad and include consideration of things like police contact. This strongly entrenches and perpetuates systemic discrimination against marginalized populations, including

²⁹ Ontario Human Rights Commission, [Key findings that are indicative of racial profiling](#); Holly Honderich, [Toronto police use more force against people of colour – report](#) (15 June 2022) BBC; Kalina Lafromboise, [Indigenous, black people more likely to be stopped by Montreal police: report](#) (7 October 2019) Global News.

Black persons, Indigenous people, people without stable housing, and individuals with mental health issues. In order to combat systemic discrimination, we would also recommend excluding administration of justice offences from the list of new convictions that would make a person ineligible for a record suspension. Similarly, payment of fines should not be taken into account when determining sentence completion.

3. An automatic record sequestration system should apply to all offences.

Current categories of excluded offences are based on stigma, not evidence. There is no evidence linking certain types of criminal records (including violent offences and sex offences) with an increased likelihood to commit those offences in the future. We will instead enhance community safety if we give people stability in employment and housing by eliminating the unnecessary barriers posed by old criminal records.

4. Current wait times (5 and 10 years) are not aligned with evidence and should be reduced.

We note that Bill C-31, introduced in the summer of 2021, would have decreased wait times back to 3 and 5 years, as was previously the case.