Office of the Federal Ombudsman for Victims of Crime
Bureau de l'ombudsman fédéral des victimes d'actes criminels

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Écoutées. Respectées. **Les victimes d'abord.**

Victim-Centred Considerations for the Consultation on the Review of Record Suspensions

Submission to Public Safety Canada

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Canada

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The Office of the Federal Ombudsman for Victims of Crime

The Office of the Federal Ombudsman for Victims of Crime (OFOVC) is an independent resource for victims in Canada. It was created in 2007 to ensure that the federal government meets its responsibilities to victims of crime.

Our mandate relates exclusively to matters of federal jurisdiction and enables us to

- promote access by victims to existing federal programs and services for victims;
- address complaints of victims about compliance with the provisions of the *Corrections and Conditional Release Act* that apply to victims of crimes committed by offenders under federal jurisdiction;
- promote awareness of the needs and concerns of victims and the applicable laws that benefit victims of crime, including promoting the principles set out in the *Canadian Statement of Basic Principles of Justice for Victims of Crime* with respect to matters of federal jurisdiction, among criminal justice personnel and policy makers;
- identify and review emerging and systemic issues, including those issues related to programs and services provided or administered by the Department of Justice Canada or the Department of Public Safety and Emergency Preparedness Canada, which impact negatively on victims of crime; and
- facilitate access by victims to existing federal programs and services by providing them with information and referrals.

We are also involved in ongoing discussions with the government about our mandate in relation to the *Canadian Victims Bill of Rights* (CVBR). The CVBR, which came into effect on July 23, 2015,[1] gives registered victims of crime a more effective voice in the criminal justice system and provides statutory rights for victims to information, protection, participation and to seek restitution. As well, victims who

[1] The *Victims Bill of Rights: An Act to Enact the Canadian Victims Bill of Rights and to Amend Certain Acts* created the legislative recognition of victims' rights and made amendments to the *Criminal Code*, *Corrections and Conditional Release Act*, *Canada Evidence Act*, and *Employment Insurance Act*. While almost all technical amendments came into force on July 23, 2015, some amendments to the *Corrections and Conditional Release Act* came into force on June 1, 2016. http://www.parl.gc.ca/content/hoc/Bills/412/Government/C-32/C-32_4/C-32_4.PDF

believe that any of their rights under the CVBR have been infringed or denied by a federal entity have the right to file a complaint with its complaint mechanism.

An important part of the OFOVC's work is to ensure that victims of crime in Canada are informed, considered, protected and supported. This includes ensuring that victims have a voice when the government is developing or updating federal programs and services, legislation and regulations.

Introduction

In Canada, under the *Criminal Records Act* (CRA),[2] a record suspension (formerly referred to as a 'pardon') enables people with a criminal record[3] to have it set aside, with the objective of helping them access employment, educational and other opportunities and to reintegrate into society. Specifically, a record suspension "allows people who were convicted of a criminal offence, but have completed their sentence and demonstrated that they are law-abiding citizens for a prescribed number of years, to have their criminal record kept separate and apart from other criminal records"[4] in systems under federal control,[5] including the Canadian Police Information Centre (CPIC) database.[6] A suspended record can only be unsealed and disclosed by the Minister of Public Safety in special circumstances related to national security or the administration of justice—for example, in the context of criminal investigations, vulnerable sector checks, or pre-adoption checks.

Under the CRA, the Parole Board of Canada (PBC)—an agency within Public Safety Canada's portfolio and reporting to the Minister of Public Safety—is the sole federal agency in Canada responsible for processing record suspension applications and making record suspension decisions. The PBC can order, refuse to order and revoke a record suspension.

The Government of Canada is reviewing legislative amendments made to the criminal justice system over the past decade. As part of this work, Public Safety Canada has launched a review of record suspensions under the CRA. The review includes consultations undertaken with stakeholders and partners in person, as well

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[2] *Criminal Records Act* (R.S.C., 1985, c. C-47). Accessed November 30, 2016 from http://laws-lois.justice.gc.ca/eng/acts/C-47/page-1.html

[3] Eligibility for a record suspension excludes individuals convicted of a Schedule 1 offence as listed under the CRA (sexual offences involving a child), unless the Parole Board of Canada is satisfied that they meet the exception conditions as per section 4(3) of the CRA, and those with more than three (i.e., four or more) offences prosecuted by indictment, each with a prison sentence of two years or more.

[4] Government of Canada. What is a Record Suspension? Accessed November 29, 2016 from https://www.canada.ca/en/parole-board/services/record-suspensions/what-is-a-record-suspension.html

[5] While the *Criminal Records Act* applies only to records kept by federal organizations, most provincial/territorial and municipal criminal justice agencies also restrict access to their records once they are told that a record suspension has been ordered.

[6] CPIC is the key law enforcement database used by the Royal Canadian Mounted Police and other police forces.

as with the general public through an online process and/or written submission. The stated aim of the review is to "ensur[e] 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 values.[7]"

At the outset, I would like to note that, as Ombudsman, I do not typically comment on issues pertaining to offender rehabilitation. Those types of issues are outside the scope of my expertise and mandate. As such, I will not be making recommendations pertaining to how long an offender should wait before applying for a record suspension, for example, or regarding any of the other more technical aspects of the record suspension program under study in the review.

From my Office's perspective, changes to the record suspension system, however minor, may affect victims of crime. Just as the Government of Canada has invited the public, "including individuals with a criminal record, federal, provincial and territorial stakeholders, and organizations that are involved in the corrections and criminal justice system,[8]" to provide input to the review, it is equally important to ensure that the concerns of victims and victim-serving agencies are kept top of mind. This means ensuring that victims are an integral consideration in the consultations pertaining to the review of record suspensions, as well as in the subsequent development of any options for reform. I therefore welcome the opportunity to provide input into the review with the aim of contributing a victim-centred perspective for your consideration as you move forward in these important discussions and potential changes.

[7] Public Safety Canada. Consultation on the Review of Record Suspensions. Accessed November 29, 2016 from https://www.canada.ca/en/services/policing/parole/consultation-record-suspensions.html
[8] Ibid

Considerations and recommendations

Terminology: "record suspension" or other term versus "pardon"

Recommendation 1: The Government of Canada should continue to use the term "record suspension", or another suitable term, as opposed to the term "pardon". In the event the government decides to choose a new term, it is recommended that it be developed in consultation with others, including victims and victim-serving agencies. Efforts should be taken to ensure that all federal communication products refer to "record suspensions" (or any alternative new term) rather than "pardons".

The term "pardon" has connotations that can be offensive to some victims of crime. The word "pardon" implies forgiveness, which in crimes where there is direct harm to victims, is something that can only truly transpire between the victims who were harmed and their offender(s). From that perspective, the government alone cannot offer forgiveness for the crime committed against the victim(s), as could be inferred by the word "pardon". While acknowledging that many crimes for which individuals receive a record suspension are relatively minor in nature, it remains the case that others involve victims who have lifelong psychological, financial and physical impacts from being victimized. Any potential benefits derived from the use of the term "pardon" must consequently be weighed against the reality that the word "pardon" runs the risk of minimizing the harm that has been done to victims. Simply put, the term "pardon" should not be used out of respect to these victims and their lived experience.

Former Bill C-10, the *Safe Streets and Communities Act*, which received Royal Assent in March 2012, amended the CRA to substitute the term "record suspension" for the term "pardon". I recommend that the Government of Canada not return to the term "pardon" and continue to use the term "record suspension" or another suitable term, which could be determined in consultation with others, including victims and victim-serving agencies.

I would also recommend that the Government of Canada ensure that all public communication products refrain from using the term "pardon", except in cases

where, for example, the government is acknowledging the change in terminology from "pardon" to "record suspension". Currently, for example, a page on www.canada.ca, the Government of Canada's website, provides an "Update on the pardons backlog",[9] which includes several mentions of the word "pardon(s)" in lieu of "record suspension(s)".

Payment of fines

Recommendation 2: Payment of fines in relation to victims (e.g., restitution, victim fine surcharge) should continue to figure amongst eligibility criteria for a record suspension. To facilitate payment satisfaction, the government should explore options to enforce the payment of restitution orders to victims. The Government of Canada should also explore options to ensure that individuals have early awareness and understanding of their fines, along with plans for making payments.

Currently, as outlined in the CRA, individuals must have completed all of their sentences, including the "payment of any fine"[10] (including all surcharges, costs, restitution, and compensation orders) imposed for an offence. Proof of payment must be provided with the record suspension application and, if there is an amount owing, the application is rejected as ineligible for non-completion of sentence.

As well, there is a required waiting period that individuals must observe in order to be eligible for a record suspension. The waiting period begins only after all sentences have been completed. There is a waiting period of five years for a summary offence (or a service offence under the *National Defence Act*) and of ten years for an indictable offence (or a service offence under the *National Defence Act* for which the individual was fined more than $5,000, detained or imprisoned for more than six months).

[9] Government of Canada. Update on the pardons backlog. Accessed on November 30, 2016 from https://www.canada.ca/en/parole-board/services/record-suspensions/update-on-the-pardons-backlog.html
[10] Section 4(1) of the CRA. Accessed November 30, 2016 from http://laws-lois.justice.gc.ca/eng/acts/C-47/page-1.html

I strongly encourage the Government of Canada to continue to ensure that fulfilment of payment of fines in relation to victims (including, for example, payment of restitution orders[11] and the federal victim surcharge[12]) figures amongst eligibility criteria for a record suspension. This is important in order to uphold Canada's principles of sentencing, including promoting accountability and to ensure that victims receive the restitution they have been awarded. It also assists in finding greater efficiencies within the criminal justice continuum.

Accountability

While we acknowledge that some offenders face barriers to employment as a result of having a criminal record and/or undue financial hardship for a variety of other reasons, which can inhibit their ability to pay fines, surcharges, restitution or compensation, it is important not to lose sight of the issue of accountability to victims. Court-ordered payments are part of an offender's sentence. The purpose and principles of sentencing, as laid out in the *Criminal Code of Canada*, include reparation for harm done to victims and promotion of a sense of responsibility in offenders as well as acknowledgment of the harm done to victims.

Financial reparation also plays an important role in addressing criminal victimization. For example, of the estimated costs pertaining to the Canadian criminal justice system in 2008, approximately 83 percent were borne by victims.[13] This estimate includes both tangible costs such as the cost of damaged property and intangible costs such as pain, suffering and reduced quality of life.[14]

Restitution

Restitution can help diminish some of the financial burden and associated issues victim of crime face.

[11] Restitution is a sentence that may be ordered by a judge when an offender is a convicted of a crime, in order to help the victim to recover his or her financial losses due to, for example, physical injury, psychological harm, or damaged or lost property as a result of the crime.
[12] The federal victim surcharge is a monetary penalty that is collected from offenders, with the aim to help fund provincial/territorial programs and services for victims of crime.
[13] Zhang, T. (2013). *Cost of Crime in Canada, 2008*. Ottawa: Department of Justice Canada.
[14] *Ibid.*

The CVBR provides victims with a statutory right to have the court consider making a restitution order against the offender. Furthermore, every victim with a restitution order has the right, if he or she is not paid the amount owed, to have the order entered as a civil court judgment that is enforceable against the offender.

The problem is that, currently, victims who do not receive the restitution owed them are forced to pursue the matter in civil court. For victims of crime who have already experienced loss and trauma, the additional legal and financial burden of having to track down money owed to them as a result of a crime committed against them can simply be overwhelming and re-victimizing. This is a burden that should not fall to victims.

Instead, the federal government should explore options to ensure that federal offenders are taking reasonable steps to satisfy their restitution orders, such as by setting out conditions to ensure payment and by deducting reasonable amounts from an offender's earnings or institutional accounts to satisfy outstanding restitution orders. The federal government could also explore the possibility of deducting unpaid restitution awards from federal government payments, such as income tax refunds and Employment Insurance payments.

At the provincial/territorial level, the Government of Saskatchewan administers a Restitution Civil Enforcement Program (RCEP), which removes the onus and cost from the victim to civilly enforce unpaid restitution orders. It addresses both stand-alone orders which are not a condition of an offender's probation order ("pay direct to victim" restitution) and supervised probation and conditional sentence orders that have expired without full payment. The RCEP provides free assistance to victims to enforce unpaid orders and assists offenders in paying outstanding restitution, including through use of civil enforcement mechanisms, when necessary. The RCEP helped victims collect $197,084 in restitution in 2014-15.[15] The Government of Saskatchewan also administers an Adult Restitution Program (ARP) which provides victims with information about restitution and works with offenders, probation officers and prosecutors to enforce restitution orders. The program monitored 968 new restitution files on behalf of 1,141 victims in 2014-15, either directly through its Restitution Coordinator or in conjunction with Probation

[15] Government of Saskatchewan, Ministry of Justice. Annual Report for 2014-15. Accessed September 8, 2016 from http://www.finance.gov.sk.ca/PlanningAndReporting/2014-15/2014-15JusticeAnnualReport.pdf.

Services.[16] ARP collection rates have been at or above 70 percent in recent fiscal years.[17] Models such as these could be explored by the Government of Canada.

Finding efficiencies in the criminal justice system

The payment of fines is also critical to ensuring that offenders are not experiencing unnecessary delays in the application process. For example, offenders may begin the record suspension application process, only to learn that they have an outstanding federal victim surcharge or restitution order. Given that the five– or ten year waiting period begins only after payment, this may add significant delay to the process. Had offenders been reminded of these fines earlier on and made payment, their application for record suspension could have been processed at the end of the waiting period. This speaks to the need for the federal government to provide more and earlier, awareness building with offenders to ensure that they are fully informed about all aspects of their sentences, including fines, as well as the need to have in place case management strategies that include plans towards payment of outstanding fines.

To that end, I recommend that the Government of Canada explore options aimed at helping to ensure fulfillment of payments in relation to victims amongst record suspension applicants. The PBC's Online Self-Assessment Tool and Record Suspension Application Guide both alert prospective record suspension applicants to the requirement to have paid all fines, surcharges, restitutions, compensation orders and other costs in full for each offence. However, a prompt at that stage comes too late in the process—and may not come at all for those who are unaware of these resources. Clear and early post-sentencing education about the requirement to fulfil all fines is warranted, along with sustained awareness efforts thereafter.

[16] *Ibid*.
[17] *Saskatchewan programs successful at getting victims' money*. Pacholik, B, Regina Leader-Post. (May 5, 2012).

Decision-making process

Recommendation 3: The Parole Board of Canada should continue to include safeguards that mitigate against the potential for victimization and risks to public safety through a careful screening process. Decisions should continue to take into consideration factors such as the nature, gravity and duration of the offence; whether the record suspension applicant has taken responsibility for the offence; whether the applicant has taken steps to address the risk of recidivism and whether the applicant has a lifestyle that is no longer associated with criminal behaviour.

It is my view that the PBC should continue to include safeguards such as eligibility criteria and a careful screening process to ensure that only persons who do not pose risks to the public receive the benefit of a record suspension.

We are cognizant that a record suspension is intended to ensure that a person's criminal record no longer adversely affects them, thereby aiding them to live a law-abiding lifestyle and contribute productively to the broader goal of public safety. However, I would encourage the PBC to continue to process record suspension applications using legislated eligibility criteria and waiting periods developed through evidence-based data centred on risk and recidivism.

Although implemented in some European countries, we feel that systems that allow for the automatic non-disclosure of criminal records after a fixed period of conviction-free behaviour, may not adequately take victims' issues and public safety into consideration. As such, I would recommend that Canada not pursue programs aligned with those types of models.

Conclusion

Throughout the development of criminal justice policy, programs, and laws, it is essential that the Government of Canada consider victims' needs and concerns. Many victims are supportive of programs, such as the record suspension program, which assist offenders in becoming law-abiding, productive members of society.

However, it is essential in developing these to balance the rights of offenders with those of victims and to ensure that criminal justice amendments apply a victim-centred approach.

In relation to record suspensions, a victim-centred perspective would necessarily include the use of appropriate language that is respectful to victims, ensure accountability to victims and payment of all restitution orders and fines, consider public safety and help to avoid unnecessary delays along the criminal justice continuum.