

Legalization & Retroactive Relief in Hawaii

Prepared for Hawaii Dual Use of Cannabis Task Force



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LAST
PRISONER
PROJECT

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About Us



The Last Prisoner Project (LPP) is a national nonprofit focused on the intersection of cannabis and criminal justice reform. The LPP policy team provides nonpartisan technical assistance to jurisdictions seeking to redress the harms of the historically unjust prohibition of cannabis. We work to advance evidence-based policies that provide retroactive relief for those criminalized by cannabis, namely automatic record clearance and resentencing.

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Introduction

When a state legalizes adult-use cannabis, it is acknowledging that public interest has shifted on the criminalization of cannabis. The magnitude of this shifting perception is clear in the landscape of national legalization, as adult-use cannabis is legal in 19+ states and territories. However, simply repealing the prohibition of cannabis is not sufficient: millions of individuals still bear the life-long burden of having a cannabis record, and tens of thousands are actively serving carceral sentences for cannabis-related convictions. In order to adequately address the past harms of cannabis criminalization, legalization programs must provide retroactive relief through automatic record clearance and resentencing.

Automatic record clearance is a government-initiated process in which local and state agencies identify and clear eligible records, with no action or payment required by the record holder. Automatic, or state-initiated, record clearance is an evidence-based policy that ensures the intended impact of the policy is not hindered by a process proven not to work. It is also the key to redressing the historically unjust criminalization of cannabis, as cannabis records impose significant and lingering barriers to success. These includes barriers to employment, housing, political participation, public assistance, education, and more. By mitigating the collateral consequences of cannabis records, automatic record clearance provides the necessary pathway towards just cannabis legalization.

Resentencing, a process by which the courts may revise an individual's criminal sentence, is the other cornerstone of comprehensive cannabis policy. By instructing the state to reconsider cannabis-related sentences in light of cannabis prohibition's repeal, this policy provides a pathway to relief for individuals whose continued incarceration is, given legalization, no longer in the interests of justice.

This report provides recommendations as to how Hawaii should include processes for automatic record clearance and resentencing in its development of cannabis legalization. The data-driven policy recommendations are informed by national best practices and research principles, and were developed alongside a comprehensive review of Hawaii's statutes. They are organized in three categories related to the implementation of automatic resentencing and record clearance: process; eligibility; and oversight. Within each of these categories is a description of the policy goal (i.e., the intended outcome of the policy), the policy gaps (i.e., what is missing from Hawaii's criminal code), and the policy recommendation (i.e., what the legislature should adopt to fill the gap and achieve the policy goal).

Explainer:

Record Clearance vs. Resentencing

Record clearance -- which only involves individuals who have served their sentence -- removes a specific event from an individual's criminal record. Resentencing -- which involves individuals still serving their sentence -- can result in a reduction of a criminal sentence.

Record Clearance

- Record clearance is the process of updating an individual's criminal record to remove a specific event, like a violation, arrest, or conviction.
- A record clearance remedy has the effect of restricting viewing access to a criminal record, but does not affect the length of the sentence imposed by the criminal incident.
- Only individuals who have completed the terms of their sentence may receive record clearance. In fact, many states have laws that explicitly bar any individual who is currently incarcerated or serving a sentence of supervision from seeking to clear their record.
- The most common forms of record clearance are expungement and sealing.
- Expungement: an eligible record is completely deleted from an individual's criminal record as well as government agency databases.
- Sealing or set-aside: an eligible record is shielded from public view, but preserved and still accessible for some stakeholders, such as law enforcement agencies and certain employers.

Resentencing

- Resentencing, or sentence review/modification, is the process of adjusting a criminal sentence due to an issue or error with the original punishment. State laws vary on what grounds an individual may be resentenced, such as a factual innocence claim, or if there has been a change in law such that an individual is incarcerated for an offense that no longer carries a period of incarceration.
- Generally, only individuals who are currently incarcerated or serving a sentence of probation or parole are eligible for resentencing.
- Individuals who are serving a term of incarceration or supervision may have the opportunity to ask the court to reevaluate the length of their sentence, or the state may identify such individuals and initiate a resentencing process.
- Unlike parole hearings, in which the individual may be approved to serve the remainder of their sentence in a community setting with conditions of supervision, sentence reviews assess whether the length of the sentence should be shortened altogether.
- If the court of jurisdiction agrees that there is good cause for an individual's length of sentence to be changed, the court may modify the punishment by shortening or effectively ending the sentence.

Recommendations at a Glance

RESENTENCING

AUTOMATIC PROCESS

Government agencies identify eligible cases and initiate their review.

BROAD ELIGIBILITY SCHEME

All cases involving cannabis, not just now-legal offenses, are included for varying levels of relief.

PRESUMPTION FOR RELEASE

Downward modifications, to time served or reduced terms in appropriate cases, are presumed.

CLEAR GUIDANCE

Guidance for judicial decisions is clear, and influence from other stakeholders on those decisions is limited.

ENFORCABLE TIMELINES

Deadlines for the review, decision, and potential release are enforced.

OVERSIGHT & REPORTING

The process is monitored for compliance, with transparent data reporting to ensure intended impact.

RECORD CLEARANCE

AUTOMATIC PROCESS

Government agencies identify eligible records and clear them, with no action or fees from the record holder.

BROAD ELIGIBILITY SCHEME

Criteria is clearly defined, retroactively applied, and has broad impact on cannabis records.

NO WAITING PERIOD

The process begins immediately upon the state's identification of the eligible records.

NO DISCRETIONARY REVIEW

The discretionary review of individual eligible records is limited to maximize the impact of automation.

OVERSIGHT & NOTIFICATION

The process is monitored for compliance, with transparent data reporting to ensure intended impact. Public advocacy campaigns ensure affected individuals are aware they received relief.

Resentencing Recommendations

- Process
- Eligibility
- Oversight





Process

Resentencing Recommendations

Policy Goal

Sentence reviews are provided to all individuals serving periods of incarceration or community supervision related to cannabis. The process is initiated by the state, not the individual who is incarcerated or under supervision.

Policy Gap

Hawaii does not have a comprehensive resentencing process. There are very few resentencing options for an individual, outside of a court modifying conditions of probation on a case by case basis¹ or an individual going through the state's appeals process.² These resentencing options rely on the individual identifying themselves as being eligible to have their sentence reconsidered. This limited structure will be insufficient in providing sentence reconsideration for individuals serving sentences for behavior that may cease to be criminalized: such a process necessitates initiation by the state, rather than the petitioner.

Policy Recommendation

Establish a state-initiated process that charges appropriate government agencies with identifying eligible individuals and initiating the resentencing process. Individuals serving sentences involving cannabis should be automatically scheduled for hearings in front of the court of appropriate jurisdiction for reconsideration of their sentence. Create a petition process to allow individuals not identified by the state-initiated process to petition the court to determine whether their cannabis-related case is eligible for resentencing.

1. HRS § 706-625

2. HRS § 641-11 – 641-18



Process

Resentencing Recommendations

Policy Goal

Fair sentence reviews are provided for eligible individuals and deliberated over with limited discretion from stakeholders other than the judge (e.g. prosecutors, victims).

Policy Gap

Although Hawaii does not have a robust resentencing process, its courts do have the power to modify conditions of probation. However, the court process outlined in statute for modifying probation conditions involves a high degree of influence from multiple stakeholders (i.e. prosecutor and probation officer).¹ A probation officer and the prosecuting attorney have the ability to appear at a hearing, where the court is considering the modification of an individual's conditions of probation, and submit evidence in opposition to any reduction to a person's sentence of probation.²

Policy Recommendation

Establish clear judicial guidance for cannabis sentence reviews with narrowly-rebuttable presumptions of relief. Non-judicial stakeholder discretion should be limited in affecting review decisions, unless an individual is statutorily ineligible for relief.

1. HRS § 706-625
2. Ibid.



Eligibility

Resentencing Recommendations

Policy Goal

All individuals who are serving cannabis-related sentences receive sentence review hearings.

Policy Gap

Hawaii does not have a comprehensive resentencing process; therefore a new structure must be established in statute upon legalization.

Policy Recommendation

Establish a broad eligibility scheme for cannabis resentencing, encompassing all individuals serving terms related to cannabis. Use a tiered scheme based on the severity of the conviction, previous offenses, and whether the conviction was part of a cannabis-related enhancement. Individuals serving sentences solely for a cannabis conviction should be prioritized for sentence reviews, with a strong presumption for downward modification. Individuals serving sentences for a cannabis conviction as well as another type of conviction, or sentences that were enhanced due to a prior cannabis conviction, should also receive consideration for some level of relief.



Oversight

Resentencing Recommendations

Policy Goal

Eligible individuals receive resentencing hearings and decisions in a timely manner.

Policy Gap

For the narrow resentencing options that do exist in Hawaiian law, there is little to no guidance in statute related to the process and timing within which the court and other actors must act.¹ For example, the process for modifying probation operates on a case by case basis, and the timing of that process is left completely up to the discretion of the court.²

Policy Recommendation

Establish enforceable timelines for each stage of the resentencing process. This should include identifying and notifying eligible candidates; providing counsel, when appropriate; scheduling hearings; issuing decisions; and facilitating approved releases.

1. HRS § 706-625
2. Ibid.



Oversight

Resentencing Recommendations

Policy Goal

The resentencing process is transparently monitored, to ensure that individuals with eligible cannabis-related sentences receive reconsideration of their terms in a timely manner and that the intended relief is delivered.

Policy Gap

The narrow resentencing options that do exist in Hawaii have little to no oversight, at least within statute.¹ An individual seeking resentencing is beholden to the court of appropriate jurisdiction, which has ultimate discretion in deciding whether to hear a case and modify the sentence, and it is unclear whether the court's decisions are monitored in a transparent way.²

Policy Recommendation

Establish new transparency requirements that allow citizens to monitor the state's progress towards implementation. For example, vest oversight authority with an existing agency (or independent entity) to monitor the cannabis resentencing procedures and outcomes, with required reporting to the legislature and public. Or mandate that, in instances where the court of appropriate jurisdiction denies a motion for resentencing, that court must file their reason for denial as a part of the court record, and that information must be reported regularly to the legislature and public.

1. Note: court rules may provide additional guidance, but were not reviewed for purposes of this document.

2. HRS § 706-625.

Record Clearance Recommendations

- Process
- Eligibility
- Oversight & Notification





Process

Record Clearance Recommendations

Policy Goal

An automatic record clearance process for eligible cannabis records, that is initiated by the state rather than by the individual with the record.

Policy Gap

Hawaii's existing record clearance process is petition-based, meaning the burden is on the individual with the record to request relief. It involves a case-by-case approach that can bog down both the individual and the court system with bureaucratic red tape and paperwork. Even individuals with a criminal record for a non-conviction (e.g., an arrest that did not result in a criminal charge, or a dismissal) are required to file paperwork with the Attorney General's Office to request their record be cleared!

Policy Recommendation

Establish an automatic record clearance process that shifts the responsibility away from the individual and is instead initiated by the state. Task the appropriate government agencies with performing each component of the automatic record clearance process. For example, 1) the state's criminal record repository queries its database to determine the universe of eligible cannabis criminal records; 2) the Hawaii Department of Public Safety verifies the eligibility of each record identified by the criminal record repository; 3) the Department of Public Safety transmits the list of verified records to the Administrative Office of the Courts to ensure each eligible criminal record is distributed to the appropriate court of jurisdiction; 4) each appropriate court of jurisdiction grants a motion for expungement for all the verified records in one mass order.



Process

Record Clearance Recommendations

Policy Goal

An automatic record clearance process with broad eligibility for cannabis records, that is retroactively applied and clearly defined.

Policy Gap

At least two different record clearing mechanisms for individuals with first-time drug offenses currently exist. The distinguishing factor between these two mechanisms is whether the individual was sentenced before¹ or after 2004.² While eligibility criteria for each of these mechanisms differ, both statutes include language that bars an individual from obtaining criminal record clearance from both of these mechanisms. This effectively limits an individual to a single instance of criminal record clearance, regardless of when the offense was committed.

Policy Recommendation

Create a single eligibility scheme for automatic record clearance that is inclusive of all non-conviction and conviction records with offense codes involving cannabis regardless of when the offense was committed. This should include offenses such as possession, paraphernalia, and distribution charges. Establishing broad, clearly defined eligibility requirements for cannabis records is the foundational step in creating a state-initiated record clearance process.

1. HRS § 706-622.8
2. HRS § 706-622.5



Process

Record Clearance Recommendations

Policy Goal

The process to clear an eligible cannabis criminal record begins immediately upon the state's identification of the record.

Policy Gap

There are numerous statutes that have mandated waiting periods for individuals before they can apply to receive criminal record relief. When coupled with legalization, record clearance for cannabis offenses is necessarily different from general criminal record clearance efforts, the latter of which provide record clearance for offenses that remain illegal. Through legalization, the state will remove from or downgrade cannabis offenses in its criminal code. Thus, individuals with cannabis criminal records should not have to meet additional thresholds for eligibility, other than having an eligible record.

Policy Recommendation

Do not include a waiting period for automatic cannabis record clearance eligibility upon legalization.



Process

Record Clearance Recommendations

Policy Goal

All records and documentation related to a cannabis criminal record are completely shielded from public access and the offense is treated as though it never happened.

Policy Gap

According to current Hawaii law, upon the issuance of an “expungement certificate,” an individual shall be treated as not having been arrested;¹ upon the issuance of an “expungement order,” all arrest records maintained by the state related to that specific arrest are placed in a confidential file.² Further, all individuals from whom an expungement order has been granted may also request that the court of appropriate jurisdiction seal all judiciary files.³ These mechanisms are currently separate and distinct from each other. This means an individual may have their conviction information removed from the state criminal record repository (the “expungement certificate”), but the record could still be retained and made available by the arresting agency (the “expungement order”) and/or the courts (sealing).

Policy Recommendation

For cannabis criminal records, adopt a record clearance process that has the effect of combining the relief granted by an expungement certificate, expungement order, and sealing into one mechanism.

1. HRS § 831-3.2(b)

2. HRS § 831-3.2(c)

3. HRS § 831-3.2(f)



Eligibility

Record Clearance Recommendations

Policy Goal

Potential criteria for ineligibility should be limited, discrete, and terminal. In instances where information related to the cannabis criminal record is missing or otherwise not available, the state should presume the record is eligible.

Policy Gap

Under current Hawaii law there are various ways an individual may potentially qualify for criminal record clearance with varying types of eligibility criteria. For instance, in order for an individual to have their record expunged and sealed, they must apply to the court of appropriate jurisdiction, which is in turn responsible for making a “good faith” effort to seal the individual’s “applicable files and information within a reasonable time.”¹ There are, however, no parameters defined in statute for what cases are eligible to be processed, what may make cases ineligible, nor what is an acceptable turnaround time. Further, a requirement of eligibility for individuals with criminal records for first-time property offenses stipulates that the individual may not have previously been convicted of a felony offense in “this or another jurisdiction.”² These types of open-ended criteria, however well-meaning, can present significant challenges to automation, because there are no time-bound limits that compel a state agency to make an actionable decision on a request for criminal record clearance. Similarly, missing information related to a cannabis criminal record may result in an indefinite suspension of consideration, because the criminal record lacks information sufficient to determine eligibility. These scenarios will result in a break in automation, because a state agency may get stuck indefinitely searching other jurisdictions in order to determine if the individual has been previously convicted of a felony offense, or trying to determine the weight/amount of cannabis that led to an arrest.

Policy Recommendation

Implement clear guardrails that limit the ability of courts, prosecutors, or other state actors involved in the record clearance process to object to record clearance only on the grounds that the record is statutorily ineligible. For example, a criminal record is deemed ineligible for automatic record clearance only if the individual is found to be currently incarcerated. Where information related to the cannabis criminal record is indeterminate, the state should presume eligibility for that record. For instance, if an individual’s criminal record for cannabis possession does not contain the specific weight or amount of cannabis associated with that charge, the state should presume the record is eligible for criminal record clearance.

1. HRS § 831-3.2(f)
2. HRS § 706-622.9



Eligibility

Record Clearance Recommendations

Policy Goal

No unnecessary hurdles to cannabis record clearance, such as statutory limits on numbers of eligible records, or required fees.

Policy Gap

Under current Hawaiian law, there are several ways an individual may be needlessly deemed ineligible to have their criminal record cleared. For example, individuals convicted of a first- or second-time offense for possession or use of drug paraphernalia may petition to have their criminal record for that offense expunged.¹ However, that same statute also contains a provision that stipulates individuals who have been sentenced to probation are only eligible for an expungement for their first offense, thereby rendering additional offenses ineligible for record relief.²

Policy Recommendation

Codify that individuals with cannabis convictions remain eligible for automatic record clearance regardless of whether or not they have been granted a prior expungement for a different offense. An individual should be entitled to a record relief mechanism in light of legalization, and cannabis offenses eligible for automatic record clearance should not count against the statutory limit for obtaining record clearance.

Fees like the \$10 non-refundable administrative fee³ for an expungement petition should be waived for all individuals with cannabis convictions to ensure access to relief is not cost-prohibitive.

1. HRS §706-622.5

2. HRS §706-622.5(4)

3. <http://ag.hawaii.gov/hcjdc/expungement-frequently-asked-questions/#notqualify>



Oversight and Notification

Record Clearance Recommendations

Policy Goal

The automatic record clearance process for qualifying cannabis offenses is implemented with fidelity and in accordance with the law (i.e., deadlines are met, agencies complete their responsibilities, appropriate individuals receive relief).

Policy Gap

There is nothing in Hawaii statute that requires reporting or data collection on the amount of petitions filed for clearance (expungement certificate, expungement order, or sealing), or on the ultimate outcomes of those petitions. There appears to be no agency currently responsible for monitoring the petition-based record clearance process and ensuring it has its intended impact.

Policy Recommendation

Include a provision that requires the state's lead actor in the record clearance process to issue a report on a regular basis (yearly, quarterly, etc.) on key metrics related to the fulfillment of automatic record clearance for qualifying cannabis offenses. In shifting the process of record clearance away from the individual to the agencies that hold the criminal record, the state should establish new transparency requirements that allow citizens to monitor the state's progress towards implementation.



Oversight and Notification

Record Clearance Recommendations

Policy Goal

Individuals who receive automatic record clearance have awareness that their cannabis record has been cleared, so that they may respond accordingly when questioned about their criminal record history (e.g., on job or housing applications).

Policy Gap

Since Hawaii's existing record clearance process is petition-based, the outcome of each petition is naturally known to the petitioner at the conclusion of the court process. Creating an automatic record clearance process removes the petitioner, thereby necessitating a notification process to ensure that the record holder is aware they have received relief.

Policy Recommendation

Mandate and adequately fund a government-sponsored public advocacy campaign to ensure that all individuals who received a relief are aware that their cannabis-related offense has been removed from their criminal record.

Thank You



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