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Ministry of Community Safety and Correctional Services
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Submitted via E-mail: mavis.fung@ontario.ca afra.khan@ontario.ca

Re: SUBMISSIONS: POLICE RECORDS CHECKS – PROPOSED LEGISLATION

The CLA is pleased to be invited to make submissions on this issue of great importance to our members and are in absolute agreement that legislation in this area is long overdue. We understand that the Canadian Civil Liberties Association (CCLA) has been involved for some time on this issue, and we have reviewed their recent submissions to you. Generally speaking we are in agreement with the content of the CCLA's submissions and are grateful for their ability to conduct research on this important issue.

The CLA strongly takes the position that disclosure of non-conviction information should be exceptional, and should never be included in any regular criminal record check. The CLA also acknowledges that exceptional circumstances can arise, and that there may be some circumstances in which disclosure of non-conviction information would be warranted. Those circumstances can, and should be, strictly and tightly circumscribed, and must contain an avenue of appeal or reconsideration.

The LEARN guidelines glossary correctly defines "Non-Conviction" as "criminal charges that did not result in a conviction in court". This is accurate and accords with the proper understanding of the term in the context of the criminal justice system. The CLA strongly takes

the position that anything that does not result in a conviction in court is not disclosable absent exceptional circumstances.

Response to Discussion Questions:

1a. Does the CLA agree with mandatory standards being proposed in the four areas?

Absolutely.

1b. Does the CLA think there are other areas related to record checks in which mandatory standards should be proposed?

It is the submissions of the CLA that the legislation should also set out a universal scheme with respect to the destruction of the fingerprints, photographs and record of arrest for individuals for whom there is a non-conviction result. To our knowledge, there is currently no province-wide legislation or regulations that address this issue and, as a result, the destruction of this information is not consistent among the province given that the municipal bylaws and policies of individual police departments varies widely with respect to the granting of these requests and, if they are granted, the timeliness of the destruction. While the destruction of this material is mandated in all but exceptional cases by the Charter of Rights and Freedoms as well as the decision of the Court of Appeal for Ontario in the case of *R. v. Dore*, [2002] O.J. No. 2845, the destruction is only processed upon the request of the individual person. It is the submission of the CLA that destruction of this information should be mandated in all cases after an appropriate waiting period without the need of the individual to make the request. The CLA proposes the following time periods, which, to our knowledge, are consistent with the Federal standards:

i. The records relating to withdrawn charges should be immediately destroyed.
ii. The records relating to stayed charges should be destroyed after 1 year.
iii. The records relating to a peace bond or other judicial order should be destroyed immediately upon the completion of the order.
iv. The records relating to an absolute discharge should be destroyed 1 year after the imposition of the discharge.
v. The records relating to a conditional discharge should be destroyed 3 years after the completion of the sentence.

2. Does the CLA have any concerns with the disclosure of any of this information in general, or at any particular level of check?

The CLA takes the position that disclosure of non-convictions is only warranted in exceptional circumstances. There are 4 categories of information listed in the discussion guide, items 4 through 7,[1] which are not convictions and should not be disclosed except in exceptional circumstances.

[1] These are (i) absolute and conditional discharges; (ii) outstanding entries for which a court disposition has taken place, including judicial orders; (iii) outstanding entries for which a court disposition has not yet taken place, including charges and warrants; and (iv) cases of not criminally responsible for reason of mental disorder.

As correctly defined in the LEARN Guideline's glossary, a discharge is a court disposition where the accused is **not convicted** but found guilty of an offence and is discharged either with (conditionally) or without (absolutely) conditions. There is no conviction registered against the person.

Any category of information that does not include a conviction, including discharges, judicial orders such as peace bonds, which do not follow a conviction, ought not to be disclosed absent exceptional circumstances as contemplated in the Exceptional Disclosure Assessment (EDA).

When an individual has been sentenced to an absolute or conditional discharge the Judge or Justice of the Peace has engaged in a specific weighing process that has determined that the individual does not pose a risk to society. The Court is mandated to consider, and has accepted, that a discharge is in the best interests of the offender and is not contrary to the public interest. The purpose of a discharge is to protect the offender from having the stigma associated with a criminal record and conviction and to encourage their reintegration into society. This purpose will be superseded if discharges are routinely disclosed on record checks in circumstances that do not meet the EDA criteria, which will, in turn, prevent the individual from obtaining employment and/or volunteer positions in the community.

Likewise, in situations where judicial orders such as peace bonds have been imposed, or charges are outstanding, there has been no admission of criminal conduct and no finding of guilt has been made by the Court. The presumption of innocence in relation to the charges is maintained. To routinely disclose this information on PICs or PVSCs would also result in prejudice to the individual without any finding against them having being made.

The CLA agrees with, and adopts, the CCLA's position with respect to disclosure of youth records.

The CLA agrees with the CCLA's position with respect to Not Criminally Responsible [NCR] dispositions and additionally has the following comments.

Absolute and conditional discharges, as dispositions following an NCR finding ought to be treated the same way as discharges following a finding of guilt and ought not to be disclosed. Section 672.37 of the *Criminal Code* forbids any application for federal employment from asking any question that requires the applicant to disclose any charge or finding that the applicant committed an offence that resulted in a finding of NCR and for which the applicant was discharged absolutely, or conditionally if the applicant is no longer subject to the disposition, i.e. if the conditional discharge has been completed.

It would be inconsistent with the *Criminal Code* provisions on Mental Disorder, to allow for disclosure of NCR findings which result in a disposition of either an absolute or a conditional discharge.

3. Does the CLA have any concerns with prohibiting the disclosure of any of this information, i.e. the information excluded from checks as per the guidelines?

The CLA strongly agrees that this information should be excluded from disclosure.

4. Should police services be required to offer all three levels of records checks identified in the 2014 LEARN Guideline?

No. The CLA takes the position that there should be only two levels of checks. There should be a standard criminal records check for which only convictions, properly defined, may be disclosed. In recognising that there are exceptional circumstances in which disclosure beyond convictions may be appropriate, the CLA takes the position that the Exceptional Disclosure Assessment is the appropriate tool to assess and deal with those situations.

The middle level of check, the Police Information Check, does not serve any purpose beyond creating an avenue to disclose non-conviction information in circumstances which not only do not meet the EDA, but do not even involve the vulnerable sector. There does not appear to be any restraint with respect to who may ask for such a check and why. As a result this level of check simply allows employers to gain access to non-conviction information without cause or justification. Offering this invasive and widely available non-conviction check will leave employers in a situation where they have to consciously choose not to ask for information which would appear to be otherwise available to them. As pointed out by the CCLA, many, if not most, employers feel obligated to request the highest level of check available to them.

5. What is the CLA's position on the appropriateness of the EDA and its parameters?

The CLA takes the position that the EDA is an appropriate tool to determine where circumstances may exist that may warrant disclosure of a non-conviction record. The CLA takes the position that non-conviction information should only be disclosed when the parameters of the EDA are met.

6. Does the CLA have any concerns with the reconsideration process for disclosure of non-conviction information?

The CLA agrees with the submissions of the CCLA on this point. In addition, it is the position of the CLA that the reasons provided by the police when including non-conviction disposition information on a Police Vulnerable Sector Check pursuant to the EDA tool must be sufficient to provide for appropriate appellant review.

It is also the position of the CLA that the public must be made aware of the information about them that has the potential to be disclosed. In order to ensure that individuals are advised that non-conviction information is maintained by the police, and that there is the potential for it to be disclosed on a Police Vulnerable Sector Check in appropriate circumstances, it is important for individuals to be provided with notice of this information at the onset of their involvement with the criminal justice system. The CLA recommends that notice of this be provided to every accused person. This can easily and routinely be done in the same manner in which notice of the availability of Legal Aid and requirements for ordering a second copy of disclosure from the Crown's office are provided to every accused charged with a criminal offence in most Ontario court houses.

7. Does the CLA support the standards for disclosing record check results described in the LEARN guidelines?

As does the CCLA, the CLA takes the position that the subject person must either receive the record check results directly or, alternatively, have the opportunity to review the results before consenting to their being forwarded to employers or the requesting organisation. Additionally, the CLA takes the position that there ought to be a mechanism to allow individuals to request their own checks, without the request being from an organisation, so as to avoid the situation of having an employer alerted to the fact that the individual has not consented to disclosure of the record check.

8. What is the CLA's position on applying the standards set out in the 2014 LEARN Guideline to requesting organisations from all sectors/professions? Should exemptions from certain standards be provided to some organisations?

The CLA agrees with the CCLA that there would have to be some exception for criminal court processes. Beyond the criminal court process, the CLA cannot foresee any other situations requiring exception.

9. What is the CLA's position on the use of third party service providers in the record check process?

The CLA acknowledges that third party service providers may be necessary for administrative purposes only, and not for decision or re-consideration processes. If the use of third party service providers is permitted, those third parties must also be subject to the legislation.

10. Is the CLA aware of any stakeholder concerns with the Ministry's proposal to mandate the standards set out in the LEARN Guideline?

Not at this time.

11. Please identify any additional information or challenges that the Ministry should be aware of as it moves forward with this initiative?

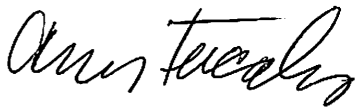
As the CLA has tried to set out in the above submissions, there appears to be inconsistency within the Guideline. The definition of non-conviction is clearly and correctly set out in the glossary, and the Guideline. And as the CCLA has pointed out, the Guideline also explains that cases of disclosure of non-conviction records should rarely arise and that the vast majority of record checks should be processed in line with the prohibition on disclosing non-conviction records. However, the Guideline does permit disclosure of non-conviction records on two levels of check which do not meet the EDA criteria, i.e. the PIC and the PVSC. This is of grave concern to the CLA who take the very strong position that non-conviction information should only be disclosed exceptionally and in exceptionally sensitive circumstances.

Additionally the glossary in the Guidelines incorrectly defines diversion. Most jurisdictions do not require any admission of guilt in order for diversion to be available. Generally all that is required is some acceptance of responsibility that can fall far short of an admission of guilt to a

criminal offence as would be required for a judge to make a finding of guilt. Diversion is not a "lighter disposition"; it is a withdrawal or stay of charges following the completion of a recommended process, such as community service.

Lastly, the CLA suggests that consideration should be given to including in the legislation protection for the police from civil liability when they act in accordance with the legislation.

Sincerely,



Anthony Moustacalis
President.