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Submissions to The Ministry of Community Safety and Correctional Services (MCSCS) on draft regulations on the arbitrary collection of identifying information by police, referred to as carding or street checks.

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CLA submissions on the draft regulation on carding/street checks

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Introduction

1. The Criminal Lawyers' Association (CLA) represents more than 1500 members. Our membership consists primarily of criminal defence lawyers in Ontario.

2. Among our considerable contributions to the justice system, a large portion of our efforts relate to ensuring access to justice in the criminal law context and protecting the civil liberties of Canadians. the majority of our members' clients are part of vulnerable groups in one way or another. Both our organization and our members routinely assist individuals with mental health issues, marginalized racial groups, the impoverished, and the uneducated.

3. Ontario Regulation 268/10 (the "draft regulation") was drafted in response to concerns arising from discriminatory and other illegal police practices across the province known as "carding" or "street checks". Unregulated carding raises a myriad of concerns, most significantly the disproportionate targeting of minority groups. In addition, unregulated carding involves the police seeking to gain advantage from an individual who does not know his rights. An individual may not know that he is not obligated to provide any information. A person may think they are detained when they are actually free to walk away.

4. If detained and under the control of the police, an individual is protected by a host of protections under the *Canadian Charter of Rights and Freedoms* (the *"Charter"*). A person has a right to counsel without delay and the right to know the reasons for detention. Any warrantless seizure of information from a person in detention is presumed to be unlawful. Conversely, a person who is free to walk away enjoys no such *Charter* protections, even if they are unaware of their right to walk away. This is the zone in which the draft regulation may have its greatest potential impact, and it is where the vast majority of carding interactions take place.

5. The CLA is pleased to see that the draft regulation employs a rights-based approach in seeking to regulate carding. Unfortunately, the regulation includes exceptions which will in reality leave the vast majority of police interactions unregulated and unprotected. Many individuals will continue to interact with police officers without knowing their rights.

6. The draft regulation seeks to govern the retention of collected information as well as the use to which collected information may be put. While there is a rigorous method in place to ensure that information gained through racial profiling is restricted, it is not expunged. Police chiefs

possess a broad general discretion to allow such information to be used in active police investigations. Allowing the police to access such tainted information not only creates perverse incentives, it effectively sacrifices equality at the altar of police investigations. It sends the wrong message to racialized groups. Ultimately, this approach is contrary to a rights-based approach and undermines the overall spirit of the regulation.

7. The CLA proposes a number of ways in which the regulation can be altered or amended to ensure a truly rights-based approach to this issue.

The Exceptions

The Blanket Exception in ss. 1(2)

8. Carding is defined in section 1 of the draft regulation as:

> [A]n attempt by a police officer to collect identifying information about in individual from the individual, if the attempt is done in the course of:
>
> a) conducting a general investigation into offences that might be committed in the future if there are no specifics regarding those offences;
> b) gathering information, for criminal intelligence purposes, about individuals known or reasonably suspected to be engaged in illegal activities;
> c) implementing programs to raise awareness of the presence of police in the community; or
> d) inquiring into suspicious activities for the purpose of detecting illegal activities

9. Section 5 of the draft regulation obligates a police officer in the course of such interactions to advise the individual in question that they are "not required to remain in the presence of the officer", and a reason must be provided for the officer's attempt to collect information. This appropriately addresses the overarching concern that carding potentially exploits an individuals' ignorance of the law.

10. Section 1(2) of the proposed regulations enumerates a list of circumstances in which the Regulation does not apply. Based on the enumerated exceptions, carding will not be regulated in any way where:

a) The individual is legally required to provide the information;
b) The individual is under arrest or being detained;
c) The officer is engaged in a covert operation;
d) The officer is investigating a particular offence;
e) The officer is executing a warrant, acting pursuant to a court order or performing related duties;
f) The attempted collection is made in an informal or casual interaction and the officer has no intention, at the time of the attempted collection, of recording the information; or
g) The individual from whom the officer attempts to collect information is employed in the administration of justice or is carrying out duties or providing services that are otherwise relevant to the carrying out of the officer's duties.

As a result of the broad scope of these exceptions, the vast majority of police-civilian contacts will simply be exempt from the protections created in the draft regulation and will continue to be completely unregulated.

11. Beginning with ss. 2(a), by definition an individual who is legally obligated to provide information to the police is detained and is not free to leave. The rights under ss. 7 to 10 of the *Charter* apply, including the right to be free from unreasonable search and seizure, the right to counsel, and the right to know the reasons for detention. This scenario is already regulated and the target is entitled to legal protection under the high standards of the *Charter.* The draft regulation does not change the legal framework for such police-civilian interactions.

12. The exception in ss. 2(b) is for obvious reasons similarly insignificant. Similarly, officers engaged in duties described in ss. 2(e) are also under separate obligations to provide information to individuals with whom they are dealing.

13. Subsection 2(c) is necessary and appropriate. It protects undercover officers from revealing their identity in the course of the investigation. Ss. 2(f) and 2(g) are also sensible because they do not involve circumstances where the police may be engaging in arbitrary or otherwise unlawful interactions.

14. The CLA has are significant concerns with respect to ss. 2(d) which provides that the new limits on carding do not apply if an officer is "investigating a particular offence." The problem is that a vast majority of police-civilian interactions can be characterized as relating to the investigation of

a "particular offence". It is difficult to conceive of a situation where the police stop an individual and is not, in his or her mind, investigating a particular offence. The phrase "a particular offence" can be construed very broadly, and could encompass meritless, unsubstantiated investigations into drug trafficking activity, arbitrary bail compliance checks and other similar "fishing expeditions", so long as the officer in question articulates a particular criminal offence. In addition, it is not limited to criminal offences so could include, potential violations of the *Trespass to Property Act*, the *Highway Traffic Act*, and the *Liquor Control Act*.

15. Individuals found in a "high crime" area will undoubtedly feel the full scope of this exception, and this may raise other concerns related to discrimination. Many communities experience over-policing where the police use provincial legislation as a ruse to engage in an investigation. Likewise, some police officers rely on "compliance checks" regarding breaches of bail conditions as the reason to stop people in "high crime" areas. The exception under ss. 2(d) establishes far too low a threshold for exempting police-civilian interactions from regulation, restrictions and oversight. If this exception remains in the regulations, most police-civilian interactions will continue to be entirely unregulated and these problems will persist.

16. A plain reading of ss. 1(2) gives rise to the interpretation that the entire regulation does not apply where the interaction can fit within any of the exceptions from ss. 1(2)(a) to (g). This means that where the conduct fits within one of those exceptions, it is not just the obligation to inform which is dispensed with, but also the requirement to record reasons for the stop under s. 7 and to provide documentation to the individual stopped under s. 6.

17. Even more troublingly, this also means that the prohibition on racial profiling found in s. 4 would also not apply if the exceptions in ss. 1(2)(a) to (g) are met. This undercuts one of the main purposes of the regulation, to respond to data suggesting that racialized groups where overwhelmingly targeted for carding. While the intent may not have been so, a plain reading of ss. 1(2) provides that the entire regulation would simply not apply in the circumstances, which includes s. 4.

18. While seemingly intended to apply to the entire regulation, the broad exceptions in ss. 1(2) lead to absurd results. For example it could not have been intended that officers be permitted to engage in racial profiling where they can characterize their attempt to gather information under the guise of "investigating a particular offence" pursuant to ss. 1(2)(f). This would undercut a significant purpose of the regulation—to address concerns arising from the overrepresentation of racialized groups as targets of carding.

Exceptions to the Duty to Inform

19. The draft regulation creates a further exception to the obligation to inform in s. 5(2). An officer would not be required to advise an individual if they are detained pursuant to ss.5(1)(a) if the officer

> "has a reason, which he or she can articulate and that includes details relating to the particular circumstances, to believe that informing the individual under that clause…***would likely compromise a police investigation of a particular offence***." (emphasis added)

20. There are two problems with this exception. First, it is unclear whether there is any objective measure of an officer's belief under the subsection. A "belief" on the part of the officer offers a very low standard of proof. Other standards in the common law relating to police powers of investigative detention and arrest such as "reasonable suspicion" and "reasonable and probable grounds" offer a more stringent requirement rooted in objectivity. The standard proposed in the draft regulation would appear to be lower than either of these standards. It would allow for any reason to believe that an investigation "would likely" be compromised, including reasons based on stereotypes, or otherwise in the absence of any evidence. In the context of detention and arrest, the Ontario Court of Appeal stated in *R v. Simpson*[1] that a hunch which turns out to be correct cannot retroactively justify the arbitrary exercise of police powers. Similar logic should apply to the draft regulation.

21. Second, the wording of the exception is overbroad and therefore subject to liberal interpretations and after the fact justifications. If left to the subjective whim of individual officers, what may "compromise" a police investigation will surely include anything that may make the officer's job more difficult. This sets a meaningless standard that is vulnerable to abuse. Inherent in any respect for rights is the understanding that adhering to individual rights will often render police officers' jobs more difficult.

22. It should be noted that while this exception has problems, one of the strengths of the draft regulation is that s. 7 imposes an obligation on the officer to record the reasons why he felt the exception in s. 5(2) applied. This provides some measure of accountability for an officer who exercises a broad power to decline to inform an individual of his rights.

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[1] *R v. Simpson,* [1993] OJ No 308.

Documenting the Interaction with Police

23. Section 6 of the draft regulation states that in whenever a police officer is attempting to obtain "identifying information" about an individual, the officer is required to provide a document to the individual advising him of:
    a. The officer's name and officer identification number and the date, time and location of the attempted collection.
    b. Information about how to contact the Independent Police Review Director.
    c. An explanation that the individual can request access to information about himself or herself that is in the custody or under the control of a police force, under the Municipal Freedom of Information and Protection of Privacy Act in the case of a municipal police force, or under the Freedom of Information and Protection of Privacy Act in the case of the Ontario Provincial Police, and information about how to contact persons to whom such a request may be given.

24. Section 6 also sets out that an officer will not be required to provide such documentation when it would be "unreasonable in the circumstances" to do so. Presumably the intent of this exception is to allow police officers to effectively respond to rapidly unfolding events during an investigation. Nevertheless, a standard of "unreasonable in the circumstances" is quite vague and not anchored to concerns such as public safety or other exigent circumstances. It would be up to the courts to interpret this standard and such vagueness will lead to unpredictable results.

25. Interestingly, the requirement on an officer to provide documentation of a stop is triggered whenever the officer is attempting to obtain "identifying information". Yet when read together with the blanket exceptions in ss. 1(2), sections 1 and 6 may be incoherent or at best unclear. On one interpretation, it does not matter whether the inquiry can be defined as "carding" or not, but rather the obligation to provide documentation exists wherever an officer attempts to obtain identifying information. In contrast, as noted above, it may be that section 1 is viewed as qualifying the entirety of the regulation in such a way that the exceptions in ss. 1(2) apply to every other section.

Including Identifying Information in the Police Database

26. Section 8 purports to prohibit the collection of information which runs afoul of the racial profiling prohibitions found in s. 4. It does so by mandating that within 30 days of including identifying information in the database, a designate of the chief of police must conduct a review for complete compliance with s. 4. For those 30 days, such information is broadly available. If upon review it is determined that the information was collected in a manner which violated s. 4, the information is retained for future use, rather than expunged from the database entirely.

27. While retained, information obtained from racial profiling is restricted pursuant to ss. 8(7). The restriction places the discretion entirely in the hands of the chief of police, who must provide permission for any use of such information. The chief of police must be satisfied that access is required

    i. ***for the purpose of an active police investigation***
    ii. in connection with legal proceedings or anticipated legal proceedings,
    iii. in order to prepare a report relating to the provision of police services, which will not identify the individuals from whom the information was collected,
    iv. for the purpose of complying with a legal requirement, or
    v. for the purpose of evaluating a police officer's performance.

28. Retaining information gathered from racial profiling is highly problematic. It creates perverse incentives for police officers to gather information whether appropriate or not. It sends a message to racialized groups that their rights will inevitably give way to police interests in gathering as much information as possible. Naturally, those racialized groups will have more identifying information collected by the police and retained in the police database.

29. Subsection 8(7)(2)(i) presents an easily surmountable hurdle for a chief of police to give officers access. It runs contrary to the spirit of the draft regulation to allow information collected through racial profiling to be included in a database provided that it may be of use in an "active police investigation." If such tainted information is to be retained at all, there should be specific and highly exceptional factors governing its use. Examples may include that the information may be used if it can be shown that public safety is implicated, or that there are exigent circumstances. In its stead, the subsection places virtually unfettered discretion in the hands of the chief of police.

30. Given the offensive nature in which such information would be obtained, and the clear intent of the regulation as a whole, allowing police officers to access tainted information is inappropriate

and the information should instead be permanently expunged. Such a measure would truly reflect the rights-based approach heralded by this government in drafting the regulation. Otherwise, racialized groups would receive an unequivocal message that their rights are secondary.

Police Training

31. One of the strengths of the draft regulation is that it places a focus on police training vis-a-vis the rights of individuals during an interaction with the police. The training should also include input from members of the community. This would provide a different perspective on policing and encourage a rights-based approach. Section 10 mandates that police officers who engage in carding be trained on racial profiling and discrimination. Further, officers are to be trained on the right of individuals to decline to provide information to the police and also to disengage from an interaction. These goals would be strengthened with the input of individuals who are not police officers.

Conclusion

32. The CLA is concerned with unregulated carding. The exceptions laid out in s.1 create a large loophole which would allow the majority of carding interactions to be entirely unaffected. The CLA submits that the exception in 1(2)(d) should be removed. When the police are investigating a particular offence, there is no reason to preclude an individual stopped by the police from knowing his rights.

33. The draft regulation would also permit police officers to not inform an individual where doing so could "compromise" a police investigation. The CLA submits that this standard is vulnerable to abuse and after-the-fact justifications. If such an exception is to exist at all, it should be tied to exigent circumstances concerning public safety.

34. While the provisions regarding racial profiling are laudable, the retention of tainted information permitted by the regulations is inappropriate. There is far too much discretion placed at the hands of the chief of police. The CLA submits that information collected through racial profiling should never be entered into a database. To do so would sanction the very actions which the

community at large found to be abhorrent. It would send the wrong message to racialized communities and undercut the rights-based approach of the draft regulations.