



Submissions regarding the Regulatory Exemptions Proposal under the  
*Police Record Checks Reform Act, 2015*

March 12, 2020

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Thank you for the opportunity to provide submissions on the proposed regulatory amendments under the *Police Records Check Reform Act* (“the Act” or “*PRCRA*”).

The Canadian Civil Liberties Association (“CCLA”) is an independent, national, nongovernmental organization, that was founded in 1964 with a mandate to defend and foster the civil liberties, human rights, and democratic freedoms of all people across Canada.

The CCLA has a long track record of research, litigation, and policy work concerning police record checks.<sup>1</sup> Notably, in 2013 and 2014 we collaborated with the Ontario Association of Chiefs of Police (OACP) to revise the OACP’s LEARN Guidelines, which removed the vast majority of non-conviction records from public-facing police record checks in Ontario. These guidelines, and the research and reflection that informed their approach to disclosing information on police record checks, formed the basis for many of the provisions that were subsequently enacted into law through the *PRCRA*. Our reports regarding police record checks were cited extensively during the legislative debates that led up to the passage of the *PRCRA* and since that time we have continued to be involved in numerous related policy discussions and court cases across the country.

The over-use of police record checks disproportionately harms over-policed communities, including persons experiencing mental illness or addictions, Black and other racialized community members, and Indigenous people. The limits on disclosing police contact information and non-conviction information in the *PRCRA* was based on social science evidence that these records were not reliable indicators of future behaviour or risk to particular groups, and were being widely mis-used resulting in unnecessary barriers to housing, education and employment. Since the legislation has passed, more studies have been released reinforcing this evidentiary base.

Relaxing safeguards on the release of police records in an overly broad manner will result in discrimination and unnecessary adverse impacts to individuals, families and communities. CCLA therefore appreciates and supports the government’s intention to move away from granting numerous temporary exemptions, and the conceptual starting point for these consultations – that any proposed exemptions must be fully justified before they are made permanent. We also have noted the attempts made throughout the proposed exemptions to narrow the types of records that would be disclosed in various exempted processes.

CCLA has carefully reviewed the proposed exemptions and justifications in light of the social science evidence on the utility of police record checks and the *PRCRA*’s legislative goals and structure. We support exemptions for a number of screening processes that we do not believe can be adequately accommodated within the *PRCRA* framework. In particular, the CCLA supports targeted exemptions with accompanying safeguards for the following purposes:

- Record checks to support screening processes intended to mitigate against infiltration by organized crime;
- Record checks to support screening processes for national security purposes; and
- Records checks required as part of a screening process that is mandated by a third party justice partner that is not subject to Ontario law and that cannot be accommodated within the scope of the *PRCRA*.

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<sup>1</sup> To view our main reports and research on this topic please visit [www.ccla.org/recordchecks](http://www.ccla.org/recordchecks).

As further outlined below, in each of these categories CCLA believes that additional regulatory provisions addressing the exempted check's purpose, scope, and procedural fairness safeguards must accompany the regulatory exemption.

A number of the exemptions proposed in the consultation document, however, go beyond the purposes listed above. In many instances the supporting rationales replicate the intended function of the primary record check processes outlined in the *PRCRA*. The following are examples of risks that are present in many workplaces and should not, on their own, justify exemptions from the legislation:

- access to highly sensitive or private documents;
- access to organizational assets;
- general risks to safety due to workplace equipment; and
- positions involving significant trust with or authority over vulnerable persons.

Providing exemptions for screening processes that are already contemplated within the main body of the legislative framework would significantly undermine the integrity of the legislative scheme and unnecessarily subject individuals to discrimination and exclusion. CCLA strongly objects to exemptions in these areas.

In order to provide some context for our submissions we will first set out some of the background policy work and research that helped to inform both the LEARN Guideline revisions as well as the *PRCRA*. We then provide a more in-depth overview of CCLA's suggested approach to regulatory exemptions under the *PRCRA*, followed by specific commentary on the specific regulatory proposals in the consultation document. A high-level summary of our recommendations is included at the end of our submissions.

### **Context: Academic research on the utility and impact of police record checks**

Over the past few decades there has been a growing body of research demonstrating the harms of police record checks and the discriminatory impacts of over-reliance on police records. Some important findings include:

- Police record checks can constitute significant barriers to individuals seeking employment, volunteer opportunities, education, housing, and other support services.<sup>2</sup>
- The populations that are disproportionately policed and criminalized – including Indigenous persons, Black and other racialized community members, those experiencing mental illness or addictions, and individuals with precarious housing – will also disproportionately be documented in police databases. For example, studies on policing show Black people were six times as likely as white people to be stopped by police in Halifax in 2019 and 3.25 times more likely to experience a street check than White people in Toronto between 2008 and 2013.<sup>3</sup> The

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<sup>2</sup> Maurutto, P., Quirouette, M. & Hannah-Moffat, K. (forthcoming) "Unintended Consequences of Police Background Check for the 'Non-convicted,'""; Maurutto, P. (2017). *Pre-punishment and Police Records*. Manuscript presented at the Criminology, Law and Society Faculty Research Talks, University of Toronto Mississauga.

<sup>3</sup> Scot Wortley, Halifax NS: [Street Checks Report](#) (Halifax, NS: Researched and Written for the Nova Scotia Human Rights Commission, 2019), available online: [Street Checks Report](#); Scot Wortley, Akwasi Owusu-Bempah and Huibin Lin, "Race and Criminal Injustice: An Examination of Public Perceptions of, and Experiences with, the Criminal Justice System among Residents of the Greater Toronto Area" (2020) Canadian Association of Black Lawyers (see Table 1).

racial differences in policing stops and charges remain after taking into account a wide range of other potentially relevant factors, including general activity at the time, neighbourhood of the stop, and criminal record.<sup>4</sup> Black people have also been over-represented in cases where the charges were withdrawn and are less likely than White people to be convicted of their charges.<sup>5</sup>

- Stable employment, as well as income, stable housing and social networks that employment can foster, are significant protective factors against future involvement in the criminal justice system.<sup>6</sup>

There has also been a growing body of academic work showing that police record checks are not reliable predictors of future behaviour. The following points and research findings are the most salient:

- A record of previous convictions has a very limited correlation to future contact with the justice system. After a few years, people with a prior criminal record of convictions are no more likely to come into contact with the justice system than those without a record of convictions. Even within that time period of heightened risk, the nature of the conviction does not predict the *type* of contact a person is more likely to have. So, for example, a person convicted of a violent crime is no more likely to come into contact with the justice system for an allegation of a violent act.<sup>7</sup>

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<sup>4</sup> Scot Wortley, Akwasi Owusu-Bempah and Huibin Lin, "Race and Criminal Injustice: An Examination of Public Perceptions of, and Experiences with, the Criminal Justice System among Residents of the Greater Toronto Area" (2020) Canadian Association of Black Lawyers at 63.

<sup>5</sup> Ontario Human Rights Commission, "[A Disparate Impact: Second Interim Report: Inquiry on Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service](#)" (Toronto, ON: Ontario Human Rights Commission, 2020).

<sup>6</sup> Christa A. Gillis & D. A. Andrews. (2005). Predicting Community Employment for Federal Offenders on Conditional Release. Correctional Service of Canada; 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 (working paper, 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.

<sup>7</sup> 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; Beck, A. J., & Shipley, B. E. (1997). *Recidivism of prisoners released in 1983*. US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics; Soothill, K., & Francis, B. (2009). When do ex-offenders become like non-offenders?. *The Howard Journal of Criminal Justice*, 48(4), 373-387; Blumstein, A., & Nakamura, K. (2009). Redemption in the presence of widespread criminal background checks. *Criminology*, 47(2), 327-359; Blumstein, A., & Nakamura, K. (2012). Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences. *A Final Report to the National Institute of Justice*.

- Previous convictions have no correlation to employment performance, employment-related crimes, or workplace violence.<sup>8</sup> In fact, “variables which normally predict subsequent criminal activity made no impact in trying to predict offenses against an employer.”<sup>9</sup> One study revealed that those with criminal records are more likely to have longer tenure in their employment and are no more likely than people without a criminal record to be terminated involuntarily.<sup>10</sup>
- Employers and other agencies that request record checks are not good at predicting risk on the basis of a criminal record check. Although trained criminal justice professionals do sometimes use a criminal record as one factor in a general risk assessment, these risk assessments take into account a wide range of information points to inform overall risk predictions. Risk factors as interpreted by individuals that request standard police background checks and conduct hiring and screening processes – namely, the existence or nature of convictions or arrests – “depart markedly from criteria included in commonly accepted and validated assessments of offender risk.”<sup>11</sup>

All available studies to date focus only on the predictive value of criminal convictions. Because a wide range of circumstances may give rise to a non-conviction record, their utility in employee and other types of standard personnel screening is even more questionable.

The research demonstrating that police records do not accurately predict an applicant’s future behaviour or the risk they pose to vulnerable groups directly informed the structure of the Ontario Association of Chiefs of Police *LEARN Guidelines* and the *Police Record Check Reform Act*.

The *PRCRA* prohibited the disclosure of all police contact and the vast majority of non-conviction records because there was a recognition that this information was not useful for determining a person’s general ‘character’. Disclosing this information was not increasing public safety; to the contrary, by placing unnecessary barriers to education, employment and services on already-marginalized communities it was undermining stabilizing elements in individuals’ lives and further entrenching patterns of systemic discrimination. The narrow exemption to the prohibition on the disclosure of non-conviction records permitted by the *Act* was intended to identify instances of potentially predatory behaviour: times when a person may intentionally be seeking out a position with or authority over a vulnerable population in order to take advantage of that position to commit criminal acts.

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<sup>8</sup> Minor, D., Persico, N., & Weiss, D. M. (2018). Criminal background and job performance. *IZA Journal of Labor Policy*, 7(1), 8. 1-49; Lundquist, J. H., Pager, D., & Strader, E. (2018). Does a criminal past predict worker performance? Evidence from one of America’s largest employers. *Social Forces*, 96(3), 1039-1068.

<sup>9</sup> 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.

<sup>10</sup> Minor, D., Persico, N., & Weiss, D. M. (2018). Criminal background and job performance. *IZA Journal of Labor Policy*, 7(1), 8. 1-49.

<sup>11</sup> 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; Maurutto, P., Quirouette, M. & Hannah-Moffat, K. (forthcoming) “Unintended Consequences of Police Background Check for the ‘Non-convicted,’”.

### CCLA's general approach to exemptions under the *PRCRA*

CCLA has established a number of principles to assist in identifying when a request for a specific sector or process to be exempt from *PRCRA* might be justifiable:

1. The starting presumption should be that all records checks are fully governed by the legislative framework.
2. If specific entities or sectors come forward to request an exemption for a particular process that cannot be carried out while abiding by the safeguards within the *PRCRA*, the government should carefully scrutinize the legitimacy of the underlying justification to ensure the rationale for exemption is logical and evidence-based.
3. As a general rule, regulatory exemptions should not be given for a check where the purpose of the check is already contemplated and dealt with within the main *PRCRA* scheme itself. Providing exemptions for record check processes where the purpose of the check is substantially similar to the purpose of record checks typically performed by using one of the three levels of check in the *Act* would result in inconsistency, seriously compromise the integrity of the legislative scheme, and unnecessarily eliminate the protections afforded in the *Act*.

If there are justifiable exemptions, a tailored approach should be taken to ensure that the exemptions are as narrow as possible.

Currently, the proposed categories of exemption are outlined on a sector-by-sector basis. The blanket approach to exempting an entire sector, without providing a clear purpose to the exemption within the regulation, raises the risk that a particular exempt entity will claim an exemption to access a broad range of police information in the context of a screening process that was not contemplated when the regulation was drafted. The sector-by-sector approach also makes it more difficult to draft narrowly crafted regulatory exemptions because many sectors have listed a wide range of justifications in support of their request for an exemption and the regulation does not distinguish between these rationales.

Rather than blanket exemptions for entire sectors, as currently proposed, CCLA suggests that the regulatory exemptions be tied to the specific purpose of the exempted screening process. This would allow the regulation to clearly identify the purpose of the exempted search, and regulatory language could be crafted to ensure that access to the exempted search, the records that may be disclosed pursuant to an exempted search, and the procedural fairness guarantees that accompany an exempt process all align with the purpose of the screening. It would also ensure consistency when the same type of screening takes place across different sectors.

It is hard to overstate the importance of ensuring that any exemptions are accompanied by tightly drafted provisions regarding their specific purpose and accompanying substantive and procedural safeguards. CCLA has been involved in instances where racialized community members have been unjustifiably denied jobs in policing and associated sectors due to in-depth background checks. In one case, a racialized youth was, unbeknownst to him, flagged by one officer as “gang affiliated” in a police database. He grew up in social housing and could only assume that he had been seen walking to school with someone the police were surveilling. He himself had no other record of police contact. He had no effective recourse to challenge the results of the background check, was denied a career in law enforcement, and had to move out of the province. Other racialized community members have been excluded from positions due to police records concerning friends or family members. In all these

situations the applicants had no due process and the actual risk that the police were screening for or had identified was unclear.

The impacts of such wide-ranging background checks are highly discriminatory. A targeted search for a concrete risk of infiltration due to sophisticated organized crime operations should not be able to revert to a general check aimed at identifying friends or family members that have had police contact. There are also clear lines that should be drawn. For example, mental health information, in and of itself, should never be disclosed as it is never relevant. The regulation should make these limits clear whenever possible, and have a clear relevancy threshold where firm lines cannot be drawn.

Having reviewed the proposed exemptions and justifications with the above framework in mind, CCLA has identified three classes of proposed exemptions that we believe may be justifiable so long as they are accompanied by strict regulatory safeguards:

- Record checks to support screening processes intended to mitigate against infiltration by organized crime;
- Record checks to support screening processes for national security purposes; and
- Records checks required by justice partners that are not subject to the *Police Record Check Reform Act* and that cannot be accommodated within the scope of the *PRCRA*.

Crafting safeguards for the first two categories of screening can be approached in a similar fashion. The regulation should specify that searches conducted for the purpose of screening for organized crime or national security are exempted from the *PRCRA* so long as they comply with the outlined regulatory process. Positions eligible to access these exempted processes must fall within an enumerated list of sectors or entities (eg. corrections, probation and parole, administration of justice, etc.) and the nature of the particular position must be such that there is a demonstrated risk to public safety or the administration of justice due to national security concerns or infiltration by organized crime. The records accessed and released as part of the record check must be limited to those that are relevant to screening for the applicable risk, and the regulation should outline that some classes of information are never relevant (eg. mental health information) and should never be disclosed. Procedural fairness must attach to the process. At a minimum any exempted process must provide a framework for some disclosure to the applicant, the opportunity to provide submissions, the requirement to give reasons, and a procedurally fair review mechanism.

The third category of exemption acknowledges that some justice entities that are not governed by the *PRCRA* have police record check screening requirements that cannot be accommodated under the *Act*. In these situations, the exemption should be limited to only those portions of the *Act* that cannot be complied with in order to complete the screening for the third party justice partner. To the extent that the screening can be completed while respecting the legislative protections in the *Act*, those provisions should still apply. This exemption should not be available to accommodate internal processes set by justice partners that are subject to the *PRCRA*, as this would allow an Ontario police service (for example) to set an internal process that did not comply with the *PRCRA* to claim an exemption from the legislation by virtue of its own non-compliant policy.

Finally, the regulations should include general language to clarify that an exemption from any portion of the *PRCRA* does not impact other statutory and common law restrictions on access to and release of records, including those contained in the *Freedom of Information and Protection of Privacy Act*, the *Municipal Freedom of Information and Protection of Privacy Act*, the *Human Rights Code*, the *Criminal Records Act*, and the *Youth Criminal Justice Act*.

## CCLA submissions on specific proposals for regulatory exemption

We have analyzed each of the proposed exemptions, and the rationale given for the proposed exemption, based on the above framework. Our response to each category of proposed exemption is provided below.

### **1. Correctional Institutions, Parole Services**

The consultation document proposes that staff and contractors working in correctional institutions and youth facilities and youth probation receive a full exemption from all provisions of the *PRCRA*.

CCLA agrees that an exemption for the screening of some staff and contractors where there are concerns about infiltration by organized crime may be justifiable, as outlined in our general framework above.

The rationales provided for this proposed category of exemption, however, suggest that an exemption is also needed to mitigate other risks such as the general misuse of sensitive information or the potential for abuse of vulnerable clients. These are risks that are present in many different sectors and in many different settings, and were intended to be addressed through one of the three levels of record checks outlined in the *PRCRA*.

The following rationales outlined in the consultation document raised concerns:

- “Personnel, including volunteers, have access to ministry assets and highly sensitive information.”

CCLA notes that personnel in many sectors have access to organizational assets and highly sensitive information. This alone should not be a reason to be exempted from the *Act*.

- “Correctional services have heightened needs to identify if an applicant has any associations with organized crime and there are significant safety risks at the facility (e.g. weapons, lethal drugs, planned violent attacks), and thus thorough screening of employees, volunteers and contractors is necessary.”

CCLA agrees that screening for associations with organized crime is justifiable. There are, however, many workplaces with a range of “significant safety risks”. Non-conviction records are not useful for determining whether an applicant generally presents a safety risk to other individuals.

- “In a Youth Justice context, employees and contractors work with children and youth that are uniquely vulnerable and staff have a high degree to control and authority including close personal contact. The unique vulnerabilities of these children require additional screening beyond what is permitted under a Vulnerable Sector Check.”

There are many workplaces where staff and volunteers are in positions of trust with or authority over highly vulnerable individuals. In some of these circumstances there will be close personal contact and a high degree of control. The appropriate level of check for these situations is the Vulnerable Sector Check, which is designed to address precisely these concerns.

- “In some cases, specific references to organized crime association may be captured in street checks and specific child protection concerns (e.g. violent thoughts about harming children) may be captured in police records for a (mental health) crisis call. This non-criminal information

would be considered important for screening in these sectors. Personnel, including volunteers, have access to ministry assets and highly sensitive information.”

- “In some cases, specific child protection concerns (e.g. violent thoughts about harming children) may be captured in police records for a (mental health) crisis call. This non-criminal information would be considered important for screening in these sectors.”

As set out above, we agree that screening for organized crime affiliations is warranted. Intelligence on affiliations with organized crime may arise from a wide range of police contacts. Police records of mental health apprehensions, however, do not assist in identifying who may present a risk to children. Using mental health records in this way is likely to result in prohibited discrimination under the *Ontario Human Rights Code*. If concerns regarding mental fitness are truly relevant to assessing job candidates, employers should research and deploy a hiring process that includes an up-to-date, evidence-based and legal psychological assessment process.

As noted above, access to organizational assets and highly sensitive information should not justify an exemption from the *Act*.

## **2. Police services**

The consultation document proposes that employees, volunteers, and contractors of police services receive a full exemption from all provisions of the *PRCRA*.

CCLA agrees that an exemption for the screening of some employees and contractors where there are justifiable concerns about infiltration by organized crime or national security threats to critical infrastructure may be justifiable. We question, however, whether volunteers would actually be in positions where they would have access to information or the decision-making authority that would justify a similar screening process.

As with the first exemption category, however, many of the rationales provided for this sector suggest that an exemption is also needed to mitigate other risks, including:

- A general risk of undermining the administration of justice or confidence in the police;
- Access to confidential or highly sensitive information; and
- Abuse of a position of trust/authority over vulnerable persons.

These types of organizational risks are fulfilled within the first three levels of checks in the *PRCRA* and are not sufficient to justify an exemption from the *Act*.

The consultation document also suggests that an exemption is necessary because “criminal prosecutions and other proceedings can be jeopardized when a police officer’s historical background (e.g. misconduct, historical criminal behavior) results in a loss of credibility before the courts.”

CCLA agrees that previous allegations and findings of police misconduct may be relevant and therefore disclosable in criminal proceedings. If there is no other mechanism to obtain this information, we support a limited exemption from the *PRCRA* to allow for the disclosure of police disciplinary records.

CCLA, however, has been unable to find any cases in which a police officer’s pre-employment police contacts or non-conviction records have been found to be relevant to a criminal case or an assessment

of officer credibility. Proactive police disclosure obligations under the *McNeil* framework,<sup>12</sup> which governs the disclosure of potentially relevant police criminal records and misconduct matters, does not extend to records of police contacts or non-conviction records. In fact, the Toronto Police Service takes the position that even absolute and conditional discharges – which are findings of guilt – should not be disclosed under the *McNeil* framework. The criminal record information that might impact a police officer’s credibility is all readily available in the standard record checks available under the *PRCRA*; no exemption is required to screen on this basis.

The consultation document also states that an exemption should be provided to screen Police Service Board members because they “have access to highly sensitive information.” Access to highly sensitive information is not a sufficient rationale for an exemption. Furthermore, as we raised in our in-person consultation, giving police the authority to screen – and potentially disqualify – members of an independent police oversight and governance body calls into question the independence of the Board and gives rise to the appearance of a conflict of interest.

### **3. Administration of Justice Sector**

The consultation document proposes that Crown Attorneys and support staff receive a full exemption where there is a “demonstrated public safety need”, and that other positions be partially exempted (street check and mental health information would not be disclosed on these checks).

CCLA agrees that a partial exemption for the screening of some staff where there is a demonstrated public safety concern due to the risk of organized crime infiltration may be justifiable in this sector.

As with the previous categories, however, several of the rationales provided reflect more general organizational concerns that are indistinguishable from similar risks present in other workplaces. These rationales include:

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<sup>12</sup> In *R v McNeil*, 2009 SCC 3, the Supreme Court of Canada examined the extent of police disclosure obligations in criminal cases. Police do have a proactive obligation to disclose records of police misconduct that are “obviously relevant to the accused’s case”, and gave the example of an officer who was involved in a drug investigation him or herself coming under disciplinary investigation for serious drug-related misconduct. The Supreme Court also suggested that police that possess the following records should consult with Crown counsel to determine their relevance in a given case:

- a. Any conviction or finding of guilt[t] under the *Canadian Criminal Code* or under the *Controlled Drugs and Substances Act* [for which a pardon has not been granted].
- b. Any outstanding charges under the *Canadian Criminal Code* or the *Controlled Drugs and Substances Act*.
- c. Any conviction or finding of guilt under any other federal or provincial statute.
- d. Any finding of guilt for misconduct after a hearing under the *Police Services Act* or its predecessor *Act*.
- e. Any current charge of misconduct under the *Police Services Act* for which a Notice of Hearing has been issued.

With the possible exception of *Police Services Act* matters, police would not need an exemption from the *PRCRA* to access any of the above categories of records during the hiring process.

- “Individuals working in the administration of justice sector may have control over evidence and high-risk exhibits prior to and after submission to the court. Inappropriate use of this information could have a significant impact on the protection of the public/administration of justice.”
- “Court staff are responsible for the care and maintenance of court files and documents, which may contain highly sensitive or confidential information protected by a statutory provision, common law rule or court order. Inappropriate release or use of this information could significantly impact the safety of individuals and undermine the administration of justice.”
- “Additional screening is required to mitigate public safety risks and safeguard the administration of justice.”
- “IT individuals have access to computer accounts/servers/systems/applications/databases with highly sensitive intelligence (e.g. police databases, judiciary etc.)...”

General concerns about misuse of private or sensitive information should not be sufficient to justify an exemption from the *Act*.

We also note that the consultation document states that there are “police service requirements (e.g. OPP), which have additional screening requirements to access their systems/servers.” This proposed justification for an exemption is particularly concerning. The internal policies of a particular police service that is subject to the *PRCRA* cannot, in and of itself, be a sufficient rationale for exempting another sector from the requirements of the legislation. Unless there is an independently valid reason for exemption (eg. screening for organized crime), internal police policies that establish a process that is prohibited by law should be amended to bring them into compliance with legal requirements.

#### **4. Criminal Intelligence Service Ontario**

CCLA agrees that screening to mitigate the risk of organized crime infiltration may be justifiable; the screening should be accompanied by the safeguards outlined in our introductory framework.

#### **5. Major case management**

CCLA agrees that screening to mitigate the risk of organized crime infiltration may be justifiable; the screening should be accompanied by the safeguards outlined in our introductory framework.

#### **6. Office of the Provincial Security Advisor**

CCLA agrees that screening to mitigate the risk of organized crime infiltration and national security threats may be justifiable; the screening should be accompanied by the safeguards outlined in our introductory framework.

#### **7. Special Investigations Unit**

The consultation document proposes that Special Investigations Unit staff, investigators and volunteers receive a partial exemption from the *PRCRA*, although non-criminal/police contact information would be limited (e.g. no street check and mental health information).

The justifications for the proposed exemption refer to the need to screen employees for organized crime affiliations. Based on our knowledge of the SIU’s functions, the basis for this concern is not

immediately apparent. Volunteers in particular should not be in positions of authority or able to access highly sensitive information.

The other rationales for the proposed exemption are not compelling. The submissions provided above regarding the scope of *McNeil* disclosure (see section 2 on policing) apply equally in this context. It is also not clear why there is a particular need for this office to access police contact and non-conviction records in order to screen for “past criminal activity.”

#### **8. Office of the Independent Police Review Director**

CCLA does not support this proposed exemption.

The consultation document proposes that the Independent Police Review Director, staff and investigators would be exempt from the *PRCRA*, but that no street check or mental health information would be included in their background checks. Organized crime concerns are mentioned, but it is unclear what concrete risk organized crime infiltration would present at this office. General concerns about “past criminal activity” and access to sensitive information should not justify exemptions from the *Act*.

#### **9. Alcohol and Gaming Commission of Ontario (AGCO)**

Based on the explanations provided, a limited exemption for the purpose of screening appointees for involvement with organized crime may be justifiable.

The consultation document proposes that AGCO staff, casino operators, and cannabis shop owners would have a partial exemption from the *PRCRA*, but no mental health information would be included in the record check. The reasons for exemption are:

- Licensees and Registrants: Licensees and registrants must meet regulatory screening requirements set out by provincial legislation. An exemption is required to ensure that persons seeking registration will meet the statutory conditions of registration (e.g. investigations into the character, financial history and competence of an applicant).
- Appointees: Appointees may have access to sensitive police intelligence information and are in a position of authority over policing, or licensing/registration matters.

There are many regulatory licencing processes that require a regulatory body to assess an applicant’s good character and competence. The regulations setting out the screening process for AGCO licensees and registrants do not specifically require that the applicant provide a police record check product that includes police contact and non-conviction information.<sup>13</sup> Police contact information and non-conviction records do not provide reliable insight into an individual’s character or competence, and should not be included on a record check product for these purposes.

To the extent that concerns regarding appointees’ access to “sensitive police intelligence” and “authority over policing” relate to the risk of organized crime infiltration, exemptions for screening

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<sup>13</sup> See, for example: [Cannabis Licence Act](#), 2018; [O Reg 468/18](#): General; [Gaming Control Act](#), 1992; [Liquor Licence Act](#), 1990; [Horse Racing Licence Act](#), 2015; [O Reg 61/16](#): General.

should specifically target that risk. Other concerns about inappropriate use of confidential information or authority over important matters are similar to concerns that exist in other sectors and should not justify exemptions from the *Act*.

#### **10. Office of the Children’s Lawyer (“OCL”)**

CCLA does not support this proposed exemption.

The consultation document indicates that employees of the Office of the Children’s Lawyer and contracted services (eg. lawyers, social workers, mental health experts) would be exempted from the *PRCRA*. Although the government’s summary chart indicates there would be no conditions on this exemption, the more detailed explanation states that the exemption is limited to specific child protection concerns (e.g. family court matters with no criminal charges laid).

Most of the reasons for exemption revolve around the fact that the clients are uniquely vulnerable, and that employees and contracted service providers are in positions of trust and have direct contact with children. The vulnerable sector screening set out in the main legislative framework is intended for exactly this scenario – screening employees and contractors who are in a position of trust with or authority over a vulnerable person.

The reasons for exemption also mention that employees have “access to extensive personal information about children”. Access to sensitive personal information should not be sufficient to ground a claim for exemption from the *Act*.

To the extent that the government believes there should be an additional child welfare screening process encompassing, for example, family court matters with no criminal charges laid or charges under the *Child and Family Services Act*, that screening process should be outlined in separate legislation. These are entirely different records, and disclosure of these court records should be the subject of their own dedicated consultation and assessment process to ascertain their utility, relevancy, and the possible privacy and equality impacts of disclosure. In addition, we understand that police do not have reliable access to this information, and that the records police do have are often incomplete or inaccurate. Records that cannot be provided reliably or accurately should not form part of a police check, and the regulations should not suggest that these records will be disclosed when in practice they will not be available through this process.

#### **11. Child and Parent Resource Institute (“CPRI”)**

CCLA does not support this proposed exemption.

The consultation document proposes that employees, volunteers and student placements and the CPRI would receive a Vulnerable Sector Check plus information related to any child protection concerns (e.g. family court matters with no criminal charged laid).

As with the previous proposed exemption, the majority of the rationales for exempting this office revolve around the vulnerability of children and the fact that personnel are in positions of trust/authority. There are many organizations and workplaces that meet these criteria. The appropriate level of check for these positions is the Vulnerable Sector Check.

The consultation document also mentions that “personnel, including students, have access to ministry assets and highly sensitive information.” Access to organizational assets and sensitive information alone is not sufficient to justify an exemption from the *Act*.

As set out in our response to exemption category 10, to the extent that the government believes there should be an additional child welfare screening process encompassing, for example, charges under the *Child and Family Services Act*, that screening process should be outlined in separate legislation.

## **12. Financial services**

CCLA opposes this proposed exemption.

The proposed exemption would permit disclosure of a police record to the Financial Services Regulatory Authority (FSRA) without requiring the applicant’s second consent, allowing the police to disclose a record directly to the FSRA.

The FSRA currently has direct access to CPIC. It is unclear why this statutory, independent regulatory agency has direct CPIC access, while other similarly placed organizations (eg. regulatory bodies for health professionals, College of Teachers, etc.) require their applicants to go through the normal record check process. So far as we are aware, the FSRA back-end access to CPIC was a historical agreement that predated the *PRCRA*. All other regulatory bodies must cope with the “logistical challenges” that accompany the procedural protections in a standard police record check process. We are unaware of any logical rationale for exempting this particular regulatory agency from the procedural and substantive safeguards in the *PRCRA*.

## **13. Inspectors and investigators**

CCLA agrees that, if carefully drafted, this exemption is partially justifiable.

First, exemptions allowing for organized crime screening may be justified for those positions that have access to information on confidential informants or highly sensitive intelligence.

CCLA also agrees that some third party justice partners that are not subject to Ontario law may require individuals to submit to a screening process that does not comply with the *PRCRA*. Where passing this screening is a *bona fide* job occupational requirement, police record checks conducted for these purposes may be exempt only to the extent required to comply with the third party’s requirements.

This exemption, however, should not extend to facilitate processes put in place by third party justice partners such as the Ontario Provincial Police (OPP), which are subject to the *PRCRA*. Absent an independently justifiable reason reflected in a regulatory exemption, Ontario police services should be expected to establish screening processes that comply with the *PRCRA*. Providing a general exemption to the *PRCRA* to permit a non-compliant screening process required by an entity that is governed by the *PRCRA* is circular. This would permit Ontario police services to establish, by policy, a screening process that was not in compliance with the legislation, and by doing so obtain an exemption from binding legislative requirements.

## **14. Publicly Funded District School Boards, Provincial and Demonstration Schools, School Authorities, and Licensed Child Care Settings**

CCLA does not support this proposed exemption.

The consultation document proposes extending the information provided on a vulnerable sector check to include:

- Outstanding restraining orders, including family court restraining orders, under the *Child Youth and Family Services Act, 2017* (CYFSA);
- Provincial charges and convictions under the CYFSA;
- Provincial charges under the *Child Care and Early Years Act, 2014*; and
- Provincial charges and convictions under the *Highway Traffic Act, 1990*.

These exemptions would apply to a wide range of settings involved in the care of children, including:

- School board and school authority employees.
- Individuals who provide goods or services at a school site and who come into direct contact with pupils on a regular basis.
- Licensed child care program staff.
- Licensed home child care providers.
- In-home service providers.
- Individuals who are ordinarily a resident of a premise where home child care is provided.
- Individuals who are regularly at a premise where home child care is provided.
- Home child care visitors and other home child care agency staff who may interact with children.
- Volunteers and students in schools and childcare settings.

As explained in our response to proposed exemption category 10, adding an exemption in the *PRCRA* for these records, which would apply to some but not all vulnerable sector searches involving children, will add uncertainty, inaccuracy and inconsistency to police record checks. To the extent that the government believes there should be an additional child welfare screening process encompassing, for example, charges under the *Child and Family Services Act*, that screening process should be the subject of a separate consultation and outlined in separate legislation. Driving abstracts are already available via other means, and, where relevant, are often requested as part of the job application process.

### **Summary of recommendations**

1. The government should carefully scrutinize the legitimacy of the rationales attached to the proposed exemptions to ensure they are rational and evidence-based.
2. As a general rule, regulatory exemptions should not be given for a screening process where the purpose of the record check is already contemplated and dealt with within the main *PRCRA* scheme. The following are examples of risks that are present in many workplaces and should not, on their own, justify exemptions from the legislation: access to highly sensitive or private documents; access to organizational assets; general risks to safety due to workplace equipment; and positions involving significant trust with or authority over vulnerable persons.
3. Where there are justifiable exemptions, a tailored approach should be taken. Rather than blanket exemptions for entire sectors, as currently proposed, the regulatory exemptions should be tied to the specific legitimate purpose of the check that cannot be accommodated within the *PRCRA*. The three specific categories of exempt screening processes that CCLA supports are:

- a. Screening to mitigate the risk of organized crime infiltration;
  - b. Screening to mitigate national security risks; and
  - c. Screening to satisfy mandatory processes put in place by justice partners that are not subject to Ontario law.
4. Safeguards to ensure exempted processes are narrowly tailored should include:
- a. Explicitly linking the exemption to the purpose of the check – both in terms of what position(s) it is applicable to, and what records are relevant;
  - b. Clearly identifying any classes of information that should never be released as they will never be relevant to the purpose of the check (eg. mental health information); and
  - c. Outlining the procedural fairness elements that must accompany an exempted screening process.
5. General language should be included to clarify that exemption from any portion of the *PRCRA* does not impact other restrictions on access to and release of records, including those in *FIPPA*, *MFIPPA*, the *Human Rights Code*, the *CRA* and *YCJA*.
6. We have analyzed the proposed exemptions in the consultation document according to the above framework:
- a. CCLA supports limited exemptions for the purpose of screening for the risk of organized crime infiltration in certain positions within the following sectors: corrections; probation and parole; policing; the Criminal Intelligence Service Ontario; Major case management; the Office of the Provincial Security Advisor; the Special Investigations Unit; certain positions involved in the administration of justice; certain inspectors and investigators; and appointees to the Alcohol and Gaming Commission.
  - b. CCLA supports a limited exemption to allow for national security screening in certain positions within policing and the Office of the Provincial Security Advisor.
  - c. CCLA supports a limited exemption to permit screening as required by a third party justice partner that is not subject to Ontario law.
  - d. CCLA does not support exemptions for any of the following entities:
    - Office of the Independent Police Review Director;
    - Office of the Children’s Lawyer;
    - Child and Parent Resource Institute;
    - Financial services; and
    - Publicly Funded District School Boards, Provincial and Demonstration Schools, School Authorities, and Licensed Child Care Settings.