SUBMISSION

MCSCS *Police Record Checks Reform Act* Regulations Consultation

April 8 2016

CENTRE OF RESEARCH, POLICY & PROGRAM DEVELOPMENT

John Howard SOCIETY OF ONTARIO

About the John Howard Society of Ontario

The John Howard Society of Ontario (JHSO) is dedicated to creating genuinely safer communities by helping to foster a truly effective criminal justice system. We help achieve this goal in a variety of ways and with a suite of programs and services that we offer through our 19 local offices across Ontario. We provide over 80 different programs and services that help over 100,000 individuals across Ontario annually. Services range from prevention programs for high risk youth through to housing and reintegration services for those who have been released from prison back into our communities. Founded in 2003, the Centre of Research, Policy & Program Development (the Centre) is the research and policy arm of JHSO, and is the only organization of its kind in Ontario. It facilitates interdisciplinary innovation by combining partnerships with front-line service providers and creative and academically qualified researchers and analysts. This results in research that helps people. The Centre is a leader in non-partisan research, evidence based programming, and policy development in the justice sector.

The John Howard Society of Ontario is pleased to have the opportunity to make written submissions on the development of regulations for Bill 113 – the *Police Records Checks Reform Act*, 2015. As the demand for police record checks escalates across sectors, a growing number of Ontarians with non-conviction police records have faced undue exclusion and discrimination, resulting in lost jobs or job opportunities. The research is clear that stable employment, as well as the income, housing and social networks that employment can foster, are significant protective factors against criminal offending. The heightened demand for police record checks in recent years has been fueled in large part by a desire to protect vulnerable populations from harm and to minimize organizational risk and exposure to liability. The *Police Records Checks Reform Act* passed in 2015 is commendable for its focus on limiting the types of information that can be released for various categories of records checks, enhancing the privacy concerns of individuals with youth records, detailing the process for disclosing non-conviction information in a vulnerable sector check, and creating the mechanism for reconsideration of an individual's non-conviction disclosure. We are encouraged that the regulations are aimed at providing important guidance on these processes and mechanisms.

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Our submission follows the template provided in the "Regulatory Development Discussion Guide," though we have also provided additional feedback that falls outside of the Discussion Guide.

The format is as follows:

A. Disclosure of Youth Records
B. Disclosure of Non-Conviction Records
C. Reconsideration Process
D. Additional Feedback

Police Record Checks Reform Act, 2015
Regulatory Development
Discussion Guide

A. Disclosure of Youth Records

Questions:

1. Do you support the proposed requirements?
Overall, the requirement of a "separate record" seems to conform to the John Howard Society of Ontario's intentions on giving the individual the ability to separate all youth record information from the results of the record check. We do have concern as to why the youth record information will be automatically disclosed to the individual who requests the police records check. When the individual is requesting the police records check or consents to the record check, they should have the option to receive their youth records in the first place, for example, a tick box "Do you want Youth Records results included?" If the concern of the PRCRA is to prevent the youth records from ending up in the hands of persons who are not legally allowed to have that information (employers), one way to mitigate the risk is to limit the disclosure of the records to the individual.
2. Can you identify any issues with operationalizing the proposed requirements?
There are two related concerns related to operationalizing the proposed requirement of the "separate record." The first concern is that the PRC provider merges the results into a single document. This concern is partly alleviated by the requirement that the pages not be numbered sequentially. However, we believe that additional safeguards can be included in the regulations to prevent the youth record from ending up in the hands of the employer. We list these below in part 3. A second concern is that it may be unclear to the individual that they are not required to disclose their youth records alongside their records check results. We support the requirement that PRC providers **shall** (ie no discretion) include a notice to individuals about the legal restrictions related to disclosure of the information to a third party, but have suggestions as to what this "notice" actually contains.

Both concerns are driven by the underlying possibility that despite having a "separate record," the individual may feel pressured to deliver his or her youth records into the hands of employers who are not, by law, allowed to have access to that information.

3. Do you think additional requirements are needed? If so, what requirements and why?

If the youth record is disclosed to individual, there are some steps that can be taken to help ensure that the youth record is not disclosed to the employer.

First, there are some common sense ways to ensure that the separate record is indeed separate (physically) from the records check results:

- The separate record should not be stapled to the records check results
- The records check results should not make reference to the separate record
- The youth information and notice can be mailed/enclosed in an envelope separate from the adult records check results
- If electronically sent, there should be two separate emails

Second, the regulation should specify that the contents of the "notice" must be in plain, and very clear language (not legalese) and should actually list the restrictions, rather than directing the individual to a website or legislation. In other words, the contents of the notice should act as a complete guide for the individual.

B. Disclosure of Non-Conviction Records

Questions:

4. Are there any offences that should be:
    a) Added to the list? If so, which offences and why?

We hope that if and when the Minister does decide to update the list of offences, there will be the opportunity for consultation with community organizations.

The John Howard Society of Ontario understands that some consultation members are interested in expanding the list of offences, and that the LEARN Committee may be interested in expanding the list of offences to include more violent offences. We are concerned that continually adding new offences (which, as per the legislation, the Minister will be able to do) will deviate from the spirit of the LEARN Guidelines. The argument justifying the addition of new offences seems to be that there is the *potential* for a particular offence to involve a vulnerable person. Taken to its conclusion, this logic would arguably justify updating the schedule of offences with any offence in the *Criminal Code*. In other words, we are concerned that list of offences will continue to grow away from the intent and spirit of the LEARN Guidelines, potentially capturing more and more individuals.

The original intent in the LEARN Guidelines distinguished between (1) sexual offences that are relevant to all positions with the vulnerable sector; (2) theft/fraud offences for positions

involving adult vulnerable persons (pg 34). In this way, the Guidelines created some sort of connection between the offence and the position being applied for. While we understand that the exceptional disclosure tool in subsection 10(2)2 requires there to be a vulnerable victim, and that this operates as a limiting mechanism to having non-conviction records disclosed, our concern is that the legislation does not currently require there to be any connection ('nexus") between the specified offence and the position being applied for. This is especially concerning as some categories of offences (theft, fraud, breaking and entering, assault) have the potential to capture a lot of individuals. As the legislation reads, an individual who has two or more non-conviction records for fraud from a senior's residence may have this non-conviction information disclosed even if the individual is applying for a volunteer position to work in a day care facility. This is because the exceptional disclosure assessment in the legislation does not specify that there be a nexus between non-conviction offence/victim and the position being applied for. We believe that similar language should be built into the regulation.

The "Assessment Tool" in the LEARN Guidelines (see page 34 of the Guidelines) states, as part of the assessment, "Based on the **agency and position description**, determine which schedule(s) of offences to use." We believe that this limiting language should be built into the exceptional disclosure process, specifically, that the offence in the schedule must be relevant to the position being applied for. The exceptional disclosure tool in the legislation mandates the VSC provider to "have regard" to five enumerated criteria. Our position is that a sixth criteria could relate to the agency description, the position being applied for, and the persons with whom the individual may reasonably interact, or similar language.

Last, while the exceptional disclosure tool in subsection 10(2) obliges the VSC provider to establish whether there is a "pattern of predation," the legislation does not define "pattern." We understand that the enumerated criteria provide indicia of what may, reasonably, constitute a "pattern." We only wish to stress that what constitutes a "pattern" should be determined on the totality of the information, and not just the number of events. Our concern is that seeing more than one incident may weigh heavily in the decision maker's assessment as to whether there is a "pattern." In short, we submit that the assessment must be contextual, based on all the available information, using all of the criteria in determining whether there are "reasonable grounds" to believe that the individual has engaged in a "pattern."

b) Removed from the list? If so, what offences and why?

C. Reconsideration Process.

Questions:

5. Are there any regulatory requirements that should be:
   a) Amended? If so, what requirement(s), how and why?

"Reconsideration process must be made by panel of police." The reconsideration should be considered by individuals not involved in the original application and senior to the person

involved in the original application. This is a point of procedural fairness towards the applicant and allows for a set of "fresh eyes" on the applicant's file. It supports the assumption that this review should actually be a full review of all the information, rather than a review of the decision-maker's decision.

Second, we submit that the ideally the reconsideration panel would not be comprised of police. The British Columbia legislation (*Criminal Records Review Act*) vests authority in the Registrar to conduct the reconsideration process. Having a designated, non-police panel would ensure consistency in decision-making and instill a greater degree of confidence in the process.

If the panel is to include police, we support the submission made by the Ontario Provincial Police at the stakeholder consultations that the composition of the panel include **non-police** representatives. This would give the appearance of neutral decision-making and promotes confidence in the process.

b) Removed? If so, what requirement(s) and why?

c) Added? If so, what requirement(s) and why?

The John Howard Society of Ontario believes that in order to make a meaningful and fully informed reconsideration request, the individual should have sufficient information. We believe this is a matter of procedural fairness and suggest two complementary ways that this can be achieved. (1) The individual should get all the reasons that supported the original decision-maker's decision to include a non-conviction record. (2) The individual should have some notice about what will be considered by the reconsideration panel.

For (1) the individual who receives a non-conviction record should also receive **the following information**, in writing, with the results of their record check:

1. The charge that resulted in the non-conviction record and that it is for an offence specified in the regulations
2. That the alleged victim of the charge was a child or vulnerable person
3. The factors that provided the decision maker with the "reasonable grounds" to believe that the individual has "engaged in a pattern" and thus presents a risk of harm to a child or vulnerable person.
4. Reference to any records upon which the decision was based
5. Clear language that the individual can provide additional submissions (documents) to challenge the inclusion of the non-conviction information.

For (2): the regulation should oblige police to provide information on what will be considered in the reconsideration process, either included with the records check results (preferable) or a brochure posted to police website (ie information on the reconsideration process should accessible and published). This will ensure that the individual has all the information they need to

make a meaningful reconsideration request. It will also promote consistency and efficiency in the reconsideration process.

A second additional reconsideration requirement that should be added is the authority of the panel to request any additional information from the individual during the reconsideration process, similar to the BC model. This would improve procedural fairness to the individual, consistency in decision-making, and allow the panel to come to a fully informed decision, based on the available facts and information.

A third additional requirement that should be added is that any written reasons provided to the individual (at the initial records check stage and at the reconsideration stage) should include all of the information the decision maker/panel relied upon in coming to a decision. For example, if during the initial records check process or the reconsideration process the decision maker assessed documents not provided by the individual, those documents should be referenced in the written reasons provided to the individual. This would provide procedural fairness to the individual, including enhancing their ability to make a meaningful reconsideration or appeal process.

A fourth additional requirement that should be considered is to provide the individual to reapply or appeal if the individual's reconsideration is denied. Some police services (Toronto, London) currently allow for an appeal from the reconsideration panel, but do not provide details on the appeal process. The individual should be allowed to appeal immediately – there should be no waiting period for appeal, as the individual's need to work or gain work experience are important for income, reintegration, or overall stability.

Last, the John Howard Society of Ontario supports that the reconsideration process is a reconsideration of all the information, rather than a reconsideration of the VSC decision-maker's decision. In other words, the reconsideration should not be treated like a reasonableness review of the VSC decision maker's decision. Rather, the reconsideration should be a fresh consideration of all the information, documents, and records, so that a full re-assessment of whether to include the non-conviction information takes place by the panel. This means that the panel will conclude their own assessment under section 10(2) of the PRCRA legislation. This will provide a very high level of fairness to the individual and promote consistency in the decision-making by the panel.

D. Additional Submissions

NCR
The John Howard Society of Ontario agrees with the submissions by other consultation stakeholders that charges where an individual was found NCR be subjected to the same exceptional assessment test as non-conviction information. In other words, where an individual has any NCR finding on a charge, which according to the PRCRA Table can be disclosed under a VSC, that information should not be authorized for disclosure unless it satisfies the all of the

criteria of the PRCRA subsection10(2) test. The purpose is to reflect that findings of NCR are not treated as criminal matters, but rather mental health matters. There is still considerable stigma around people with mental issues, and our concern is that employers who see NCR charges on an applicant's record check will exclude the applicant because they appear to have a mental health issue. Limiting the NCR information that shows up on a VSC promotes fairness, privacy, and prevents stereotyping individuals with mental health issues as dangerous.

Vulnerable Sector Check provider

The John Howard Society of Ontario submits, in agreement with other stakeholders in the consultation, that Vulnerable Sector Checks should only be conducted by an individual with experience in these types of checks, or in a supervisory/managerial position. The LEARN Guidelines suggest that the Vulnerable Sector Check not be performed by the person conducting the police records check, and instead the decision to release non-conviction records should be made by someone in a managerial or supervisory position. This will help to ensure some measure of transparency in disclosure, as well as efficiency.

Costs of Reconsideration Process

The John Howard Society of Ontario's position is that cost of records checks can be a barrier to an individual who wants to apply for a position. Gaining employment or other work experience is crucial to individuals either recently released from custodial facilities or otherwise marginalized populations who lack housing, social support networks, and sources of income. There is cost not only for the initial records check, but that is also a cost, in some cases, for the reconsideration process. According to the London Police website, there is a $96 dollar charge for the reconsideration process; Barrie Police Service charges $40.00 police; some police forces (Toronto, York) appear to offer the reconsideration for free. These costs, in addition to the initial records check fee, will act as a significant deterrent to individuals seeking a check and reconsideration. There should be no cost for the reconsideration process. There should be no cost for an initial records check. If there is a cost for the initial check, the regulation should cap it at a low amount and should provide an exception making the records check free for volunteer positions.

When Bill 113 is proclaimed in force, the current volume of requests for reconsideration received by police services who already have reconsideration processes in place should drop dramatically given that the amount of non-conviction records being disclosed (for non-LEARN compliant police services) would be significantly reduced.

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