

On The RECORD

**AN INFORMATION GUIDE ON POLICE
RECORD CHECKS IN ONTARIO FOR
EMPLOYERS, HUMAN RESOURCES
PROFESSIONALS AND VOLUNTEER
MANAGERS**

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JohnHoward
SOCIETY OF ONTARIO

**603 - 111 Peter Street
Toronto, ON
M5V 2H1
416.408.4282**

www.johnhoward.on.ca

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**210 - 215 Spadina Avenue
Toronto, ON
M5T 2C7
416.363.0321**

www.ccla.org

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Please note that this is legal information, not legal advice. If you need advice about your individual circumstances, please consult with a lawyer.

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INTRODUCTION

Police record checks are being required by an increasing number of Ontario organizations for the purposes of screening individuals for employment, volunteering and higher education. Currently in Ontario, there is no comprehensive legal guidance on what type of information should or should not be released on police record checks. Depending on the policies of the specific police service, the information disclosed on record checks may not be limited to records of conviction. In some areas of Ontario, non-conviction records, including mental health apprehensions, unproven allegations that never resulted in charges, and criminal charges that have been withdrawn, dismissed, stayed or acquitted are regularly released on record checks.

If an individual has ever called the police during a mental health crisis or after having been victimized, chances are information about that interaction has been recorded in a police database. Similarly, if a person was surveilled by police as a “person of interest” but never formally arrested or charged, a police record may be created. If someone has been charged, though never convicted, a police record is created. Between 2010 and 2011 in Ontario, approximately 43% of all adult criminal court cases resulted in stayed or withdrawn charges.

That is, in nearly half of all criminal court cases annually, people were not convicted for the charge(s) laid against them. However, they all now have police records. Non-conviction police records are not removed from police databases automatically. Most people are entirely unaware that they have a non-conviction police record until it is too late - when they are rejected for an employment opportunity or turned away at the U.S. Border.

The Centre of Research, Policy & Program Development at the John Howard Society of Ontario recently surveyed Ontario employers in two counties, and found that over half of the employers require police record checks of prospective employees, and 15% of those organizations that asked for record checks have a zero tolerance policy and simply exclude all applicants with records from employment.¹ As the use of police record and background checks as a screening mechanism increases, more people – some of whom have never been found guilty of an offence – are being denied entry to the U.S., employment and volunteer opportunities. Thousands of Ontarians have police records that could be disclosed on police record checks. A recent report by the Canadian Civil Liberties Association puts the number of Canadians with a police record as high as one in three.² The disclosure of non-conviction records results in unwarranted stigma, discrimination and a loss of trust or respect. It places an unfair burden on the individual to explain the incident and risk being denied for employment or other opportunities, such as housing insurance, citizenship, volunteer work, travel, adoption/fostering, travel and so forth.

Employers, volunteer organizations, and academic institutions report facing increasing industry pressures to screen for and minimize potential risk and liability. At the same time, organizations are obliged

1. John Howard Society of Ontario. (2014). [Help Wanted*: Reducing Barriers for Ontario's Youth with Police Records](#)

2. Canadian Civil Liberties Association. (2014). [False Promises, Hidden Costs: The Case for Reframing Employment and Volunteer Police Record Check Practices in Canada](#)

to ensure that their hiring policies and practices comply with relevant human rights, privacy and employment legislation. This guide aims to provide information about police records, police record checks, and whether organizations in Ontario are obligated to request them (or conversely, whether they are prohibited from requesting them), as well as practical suggestions on how to create evidence-based, rights-respecting police record check policies and practices.

WHAT ARE POLICE RECORDS?

What exactly is a police record? Unfortunately, there is no simple answer. Police services collect and retain a vast amount of information about the people they come into contact with. Police records may be created from a variety of interactions with a local police service related to non-criminal and criminal matters, and can include instances where someone:

- Had informal contact with a police officer and provided their name;
- Called 9-1-1, or was present when officers responded to a call;
- Called 9-1-1 for themselves or someone they know was experiencing a mental health crisis;
- Was involved in a police investigation as a witness, victim or suspect;
- Was arrested;
- Was charged with a criminal offence (but not convicted);
- Was found guilty of a criminal offence; or
- Was convicted of a criminal offence.

Generally, we divide police records into four categories: criminal convictions, non-conviction findings of guilt, non-conviction dispositions with no finding of guilt, and police contacts. These categories of police records are detailed below.

Please note: this information is specific to adult police records only. Youth records are governed by a separate legislative framework.

1. Criminal Convictions	2. Non-Conviction Dispositions: Findings of Guilt	3. Non-Conviction Dispositions: No Finding of Guilt	4. Police Contacts
<p>The following sentences result in criminal convictions:</p> <ul style="list-style-type: none"> • Imprisonment Sentence • Intermittent Sentence • Suspended Sentence • Conditional Sentence • Fine or forfeiture 	<ul style="list-style-type: none"> • Absolute Discharge • Conditional Discharge 	<ul style="list-style-type: none"> • Charges withdrawn • Charges withdrawn - 'alternative measures' or diversion • Acquittal at trial • Stay of proceedings 	<ul style="list-style-type: none"> • Police contact and surveillance • Mental health apprehensions • Arrests (but no charge) • Victimization • Witness

1. CRIMINAL CONVICTIONS³

When people think of a criminal record, they usually think of a record of criminal convictions. A person will have a criminal conviction if one is sentenced to:

- Imprisonment;
- Intermittent sentence;
- A fine or forfeiture;
- A conditional sentence (where the sentence is to be served in the community); or

³ A detailed glossary of all of the definitions of the various types of police records and other terms can be found in Appendix A.

- A suspended sentence with probation (rehabilitative supervision in the community through probation).

A criminal conviction will remain on a person's record indefinitely unless it has been sealed by way of a record suspension (formerly called a pardon) under the *Criminal Records Act*. Even if a person received a record suspension, however, some types of criminal convictions can still be revealed on a vulnerable sector search (for more information about this type of record check, see page 15).

2. NON-CONVICTION DISPOSITIONS: FINDINGS OF GUILT

Absolute or conditional discharges are dispositions that can be given if a person is found guilty of a criminal offence, but the judge determines that a conviction is too strong a punishment for the particular crime.⁴ Discharges are considered findings of guilt, but they are not criminal convictions.

The *Criminal Records Act* states that these records should be automatically sealed and removed from the Royal Canadian Mounted Police's (RCMP) databases after one year for an absolute discharge, and three years for a conditional discharge. Although most local police services follow this direction as well, in the past some have decided to keep and disclose this information in their databases for longer.

3. NON-CONVICTION DISPOSITIONS: NO FINDING OF GUILT

Interactions with the police – for example, arrest records or criminal charges that never went to trial – are also recorded in police

4. It may be relevant for employers to know that many people who receive a discharge are told by the courts that they will not have a criminal record of convictions. While this is correct, it is misleading: it does not mean that this information will not appear on a criminal record check.

databases. If an individual is charged with a criminal offence, but is not convicted or found guilty, the outcome or “ruling” is called a non-conviction disposition. Although a person has not been found guilty in court, and they do not have a criminal conviction, depending on local police service policies these records can appear on police record checks.

All of the following police interactions can result in the creation of a non-conviction disposition police record:

- Acquittal at trial
- Stay of proceedings
- Withdrawal - No reasonable prospect of conviction
- Withdrawal - Peace Bond
- Withdrawal - Diversion/Direct accountability program

Depending on the local police service’s policies, non-conviction information like this can be disclosed on a police record check for employment purposes (see pages 15-16 for the discussion of the disclosure of this information).

4. RECORDS OF POLICE CONTACT

If someone has a more informal encounter with the police, their personal information may be gathered and then used to create a police record in the local police service’s database. This is the case even if a person was not a suspect in a crime or was never charged with any criminal offence. There are many different ways people can come into contact with the police – including as a victim, as a person who is having (or appearing to have) a mental health crisis, or as a witness to crime. People who are identified as ‘persons of interest’ or suspects are also recorded in police databases. In some police services it has

been part of their record check policy to reveal records of incidents where someone was accused or suspected of a crime, even if charges were never laid. It has also been common in Ontario to disclose 9-1-1 calls that involve suicide attempts or other mental health incidents when the police believe it is in the public interest to reveal this information.

Police contacts can include information like records of contact, allegations and/or mental health apprehensions that are non-criminal or that did not result in a criminal charge. Sometimes an individual may not even know that their information is recorded in a police database – for example if their name came up in another investigation, but they were never directly interviewed or contacted.

The following are examples of police contacts:

- Apprehensions under the *Mental Health Act* as a result of coming into contact with the police during a mental health crisis;
- Being investigated as a “person of interest” or being the subject of surveillance;
- Contacts with police that result from being the victim of a crime or being a witness;
- Being arrested but never charged with a criminal offence.

Depending on the police service, police contact information might be disclosed on a police record check; what will be disclosed, however, depends on the local police service’s policies and the level of record check that is requested.

On pages 15-16, the three basic categories of police record checks available in Ontario, and what information from all of the above categories can be disclosed on a police record check, will be outlined.

WHERE ARE POLICE RECORDS STORED?

Police records are maintained and stored in a variety of databases – and they do not all necessarily contain the same information. For example, national databases, local police databases and border agencies may all have access to different amounts of information.

Local police databases generally contain the majority of information and detail about specific incidents or police interactions. If a criminal charge is laid against someone the local police service creates a file in their database, and they may send a copy of this information to the Canadian Police Information Centre (CPIC), managed by the RCMP. CPIC then creates a temporary file until further action is taken by the courts. If the charge results in a conviction, staff at CPIC enters the information into its computerized database that is accessible by police officers across Canada. Once a conviction has been entered in the CPIC system, police across Canada will have access to the same information that was contained in the temporary file, as well as the record of conviction and sentencing.

Information is uploaded at the discretion of the local police department. The time frame of when information is uploaded, or whether it is uploaded in an ongoing fashion, is decided by each

service and can vary across police departments and provinces. If charges are dropped, stayed, changed or in any way modified, it is the responsibility of the local police agency to adjust the information in their database and ensure that one of the major RCMP databases does not contain inaccurate information.

There are instances where non-criminal contacts with local police can be shared with CPIC. If individuals have had interactions with the police relating to threat of suicide or attempted suicide, this information may be 'flagged' in CPIC, and therefore accessible to all police services and agencies with access to CPIC.

DISCLOSURE OF POLICE RECORDS:

THE TYPES OF RECORD CHECKS IN ONTARIO

There are generally three types of record checks in Ontario, as defined by the Ontario Association of Chiefs of Police (OACP) in its voluntary provincial LEARN Guideline. This Guideline was most recently updated in June 2014, and significantly changed the way that non-conviction records in particular are disclosed. Importantly, in the 2014 version of the LEARN Guideline, records of police contact (including mental health contacts) will not be disclosed on any level of record check, and charges processed by alternative measures through a formal diversion program should also never be disclosed. The OACP LEARN Guideline is voluntary, and not all local police services comply with the Guideline or offer all three levels of record check. Be sure to contact your local police service to find out what levels of record check they offer, whether they comply with the 2014 version of the LEARN Guideline, and if not, what type of information they will disclose on the various record checks they offer. The levels of record check outlined in the LEARN Guideline are: Police Criminal Record Check, Police Information Check and Police Vulnerable Sector Check. Each level of check discloses varying levels of information gathered from CPIC and local police databases.

TYPES OF RECORD CHECKS

POLICE CRIMINAL RECORD CHECK

- A Police Criminal Record Check is typically used for employment opportunities where a basic criminal background check is requested. It is generally the least intrusive level of check.
- Information disclosed on this level of check will include: unpardoned criminal convictions; summary convictions for five years, where identified; and findings of guilt under the *Youth Criminal Justice Act* within the applicable disclosure period.

POLICE INFORMATION CHECK

- The Police Information Check is more comprehensive than a Police Criminal Record Check.
- Information disclosed on this level of check will include: unpardoned criminal convictions, summary convictions, for five years, where identified; absolute and conditional discharges for 1 or 3 years, respectively; findings of guilt under the *Youth Criminal Justice Act* within the applicable disclosure period; and outstanding entries such as warrants, peace bonds or pending charges.

POLICE VULNERABLE SECTOR CHECK

- The Police Vulnerable Sector Check is the third level of check and is the most in-depth. It is used when applicants are seeking employment and/or volunteering directly with vulnerable populations.
- Information disclosed on this level of check will include: unpardoned criminal convictions; summary convictions, for five years, where identified; absolute and conditional discharges for 1 or 3 years, respectively; findings of guilt under the *Youth Criminal Justice Act* within the applicable disclosure period; outstanding entries such as warrants, peace bonds or pending charges; Not Criminally Responsible by reason of Mental Disorder (for five years); in very exceptional circumstances*, non-conviction dispositions, such as withdrawn charges, can be disclosed; and finally, any record suspended (pardoned) sexual offences that are flagged in CPIC can be disclosed in a police vulnerable sector check.**

* The OACP LEARN Guideline outlines an “exceptional disclosure assessment” which identifies under what specific criteria police services can disclose non-conviction dispositions on a police vulnerable sector check. This test can be found on page 33 of the LEARN Guideline.

** For more information on what types of record suspended (pardoned) convictions may be unsealed pursuant to a police PVSC, see the [Criminal Records Act](#).

EVIDENCE ON THE EFFECTIVENESS OF POLICE BACKGROUND CHECKS

A growing number of Ontario-based organizations are turning to police record checks to screen potential employees and volunteers. For example, a recent Ontario-based study (2014) found that over half of employers surveyed in two counties in Ontario require police record checks of new hires as a condition of employment.⁵ Other studies from comparable jurisdictions indicate similar levels of demand, if not higher.

Generally speaking, organizations state that they are using police record checks to manage and mitigate liability and to protect vulnerable persons. For example, in a study of employers by the John Howard Society of Ontario, the top reason employers' cited for requiring police record checks was "Liability/Risk Management." Indeed, there is a general perception that a police record check can be used as an effective risk-mitigation tool – that it will help screen out 'bad' people and keep assets and vulnerable clients safe. Although these are important goals, the available social science evidence does not

5. John Howard Society of Ontario. (2014). Help Wanted*: Reducing Barriers for Ontario's Youth with Police Records. <http://www.johnhoward.on.ca/wp-content/uploads/2014/07/johnhoward-ontario-help-wanted.pdf>

support the assumption that police record checks are an effective way to achieve these goals. In fact, because employment and social ties are so important to people leading stable lives, widespread, unnecessary police record checks can undermine, rather than enhance, community safety.

Given the nature and scope of information released in police background checks for employment and volunteer purposes, releasing this information often results in stigmatizing or prejudicial treatment. These record checks can reveal information far beyond just criminal convictions and findings of guilt. Depending on the jurisdiction and the level of check requested, the results may include records of suicide attempts, mental health apprehensions, alleged incidents where no charges were laid, withdrawn charges and acquittals. When information like this is revealed to a potential employer, school or volunteer placement it can be highly prejudicial and stigmatizing. Some people will be discriminated against. Others will simply decide not to apply for jobs or participate in community activities to avoid having to explain the details of their personal lives or medical history.

The evidence regarding the usefulness of police record checks in employment is as follows:

- There is no compelling evidence to support the assumption that workplace violence is perpetuated more by persons with criminal records than those without one. After a few years, there are no differences in the risk of offending between those with a prior conviction and those without.⁶
- Although criminal justice professionals do sometimes use a criminal record as one factor in a general risk assessment, employers and other agencies that request record checks

6. Megan C. Kurlychek, Robert Brame, Shawn D. Bushway, "Scarlet letters and recidivism: Does an old criminal record predict future offending?" *Criminology and Public Policy*, 5 no. 3 (2006): 483, as well as Megan C. Kurlychek, Robert Brame, Shawn D. Bushway, "Enduring risk? Old criminal records and short-term predictions of criminal involvement," *Crime and Delinquency*, 53, no. 1 (2007): 64. See also A. Blumstein, and K. Nakamura, "Redemption in the presence of widespread criminal background checks," *Criminology* 47, no. 2 (2009): 327.

are not good at predicting risk. Risk factors as interpreted by requesting background checks, namely, the existence or nature of convictions or arrests, “depart markedly from criteria included in commonly accepted and validated assessments of offender risk.”⁷

- Looking at the workplace specifically:
 - There is no compelling evidence to suggest that workplace violence is perpetrated more by persons with criminal records than those without one; indeed, “Considering the problem of workplace crime in the aggregate, an assumption that much employee-perpetrated illegal activity may be due to employees with no prior criminal justice involvement is probably not unreasonable.”⁸
 - Past criminal convictions are not correlated with an increased likelihood to commit a work-related offence in the future: “variables which normally predict subsequent criminal activity made no impact in trying to predict offenses against an employer.”⁹
- Stable employment, as well as income, stable housing and social networks that employment can foster, are significant protective factors against future reoffending.^{10, 11, 12, 13}

It is important to note that all available studies to date focus only on the predictive value of convictions; an enormous range of circumstances may give rise to a non-conviction record, making their utility in employee screening even more questionable.

7. 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.

8. *Ibid.*

9. 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.

10. Christa A. Gillis & D. A. Andrews. (2005). Predicting Community Employment for Federal Offenders on Conditional Release. Correctional Service of Canada.

11. Curt T. Griffiths, Yvon Dandurand and Danielle Murdoch, *The Social Reintegration of Offenders and Crime Prevention* (Ottawa: National Crime Prevention Centre, 2007), <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/scl-rntgrtn/scl-rntgrtn-eng.pdf>.

12. 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), http://tamarackcommunity.ca/downloads/vc/When_Work_Not_Enough.pdf

13. 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.

EMPLOYER REQUESTS FOR POLICE RECORD CHECKS IN ONTARIO: THE LAW

Employers often feel that conducting a police record check is necessary for legal reasons.¹⁴ However, the information released within police record checks arguably provide a wide array of information that is irrelevant to the position sought after, and many companies do not have processes or policies in place to inform how record check information will inform hiring decisions. Many employers request a police record check from prospective employees as a condition of employment, and thus individuals feel compelled to provide the information in fear that they may be denied the position forcing them to either reveal highly personal information or self-select out of the recruitment process.¹⁵

AS AN EMPLOYER IN ONTARIO, WHAT DO YOU HAVE AN OBLIGATION TO ASK FOR?

Is my organization legally obligated to get a police record check from a prospective volunteer or employee?

The vast majority of organizations in Ontario are not legally obliged to conduct police record checks on their employees or volunteers.

14. John Swaigen, "Police Background Checks - Balancing Public Safety, Security and Privacy" (August 2007), 8(1) The OBA Privacy Law Review: Eye on Privacy at page. 2, para. 4.

15. Swaigen, 2007.

STATUTORY OBLIGATIONS

Some categories of organizations are statutorily required to obtain police record checks on their employees and volunteers. There are some statutes and regulations in Ontario that require police record checks to be conducted on employees. *The Education Act*, for example, requires that school boards collect a “personal criminal history” from board employees and on-site school service providers.¹⁶ There are specific instructions regarding when and how this information should be collected; once hired, employees are required to provide an “offence declaration” on an annual basis. Many government-funded organizations that provide services and support to persons with developmental disabilities are legislatively required to obtain a police record check for new staff, volunteers and board members, where they will have direct contact with organizational clients who have developmental disabilities.¹⁷ Licensed long-term care homes and retirement homes also must institute staff and volunteer screening measures that include criminal reference checks for individuals 18 and over.¹⁸ See Appendix B for a list of statutes that mention record checks and pertain to employers in Ontario.

WORKPLACE HEALTH AND SAFETY

Some organizations may think that statutory workplace health and safety obligations impose a duty on employers to conduct police record checks to identify potentially violent employees. This particularly appears to be the case in Ontario, where there are relatively new statutory provisions contained in the *Occupational Health and Safety Act* (commonly referred to as “Bill 168”) requiring employers to

16. Education Act: Ont. Reg. 521/01, ss. 1, 2.

17. Services and Supports to Promote the Social Inclusion of Persons with Development Disabilities Act: Quality Assurance Measures, O. Reg. 299/10, ss. 13, 34.

18. Long-Term Care Homes Act, 2007, c. 8, s. 75; Retirement Homes Act, 2010, R.S.O. 2010, c. 11, s. 64.

address violence and harassment in the workplace.¹⁹ As explained by the Ontario government, however, an employer's duty to proactively identify workplace risks focuses on dangers inherent to the nature and characteristics of the workplace setting and the job duties: high stress levels, extended periods alone, workers transporting large amounts of cash, etc. The Ontario government's guide to understanding the law on workplace violence and harassment specifically states that "the *Occupational Health and Safety Act* does not require employers or supervisors to do criminal background checks or to otherwise seek out information on workers or other people who are likely to be in the workplace".²⁰

COMMON LAW OBLIGATIONS

Organizations often have a legal obligation to take reasonable measure to avoid actions that would expose their clients to an unreasonable risk of harm. When an organization is under a legal duty of care towards its clients, organizational actions like hiring and supervising volunteers and employees must be performed at an appropriate level or standard. Organizations may be concerned, therefore, that they are not meeting their legal obligations to protect vulnerable clients if they accept volunteers or employees without conducting a criminal record check.

In Canada, there are very few reported cases where an organization has been held liable for failing to conduct sufficient pre-hire screening. There is one appellate case on negligent hiring, but it sets out a narrow doctrine that does not support widespread police record checks as a standard part of employee or volunteer screening. This is not to suggest that record checks should never be used as screening measures: jobs in high-security sites and those with unsupervised

19. Ontario Bill 168, Occupational Health & Safety Amendment Act (Violence & Harassment in the workplace 2009, came into force on June 15, 2010).

20. Occupational Health & Safety Branch, Ministry of Labour, Workplace Violence and Harassment: Understanding the law. (Toronto: Occupational Health & Safety Branch, Ministry of Labour, 2010).

positions of trust in relation to vulnerable populations will justify more in-depth employee screening, of which a record check is one justifiable component. To date, we are not aware of any Canadian cases where an employer has been found liable for failing to conduct a criminal record check, and in many workplaces, asking for a police record check will violate privacy and human rights legislation. It is important to keep in mind that, in addition to negligent hiring, an employer may also be liable if it is negligent in its training or supervision of employees or volunteers.

Employers can also be vicariously liable for the criminal acts of their employees, meaning that the organization will be responsible for the wrongful acts of the employee even if the employer has done nothing wrong. Normally, vicarious liability will be imposed if the employee's wrongful act falls within the scope of the employment duties. Most criminal acts will not be sufficiently connected to the legitimate job-related functions for employers to be held directly liable.

Vicarious liability may also apply where there is a "strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act".²¹ This only applies to select workplace harms and to select employees within those workplaces. A court must analyze whether the specific "job-created power and duties" given to an employee increased the risk of the employee's wrongdoing.²² Simply creating a situation that gave an employee the opportunity to commit wrongful acts by employing them in a workplace where vulnerable persons were present is not sufficient: "[i]t must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks".²³ Simply because a person was employed in a school or another setting with passing or regular contact with the vulnerable sector will not be a sufficient basis for imposing vicarious liability.

21. *Bazley v. Curry*, [1999] 2 SCR 534, para. 42.

22. *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, [2–5] 3 SCR 45 at 28-29.

23. *Bazley v. Curry*, [1999] 2 SCR 534.

Some legal summaries appear to suggest that an employer can minimize the risk of having vicarious liability imposed by conducting police record checks on prospective employees. However, performing police record checks will not prevent an organization from being held vicariously liable, as this form of liability is unrelated to whether the employer was at fault in the hiring or supervision of employees. These suggestions, therefore, are not strategies to minimize an employer's exposure to liability but, rather, aim to prevent a criminal act from occurring during the course of employment. Unfortunately, however, there is no evidence showing that police record checks are an effective tool to prevent work-related crimes.

ARE THERE LEGAL LIMITS ON WHEN I CAN ASK FOR A RECORD CHECK, AND THE TYPE OF INFORMATION I SHOULD BE ASKING FOR?

YES!

Many employers' ability to request police record checks from applicants, employees and volunteers will also be limited by human rights, privacy and employment law. In Ontario, federal privacy law can prevent some employers from collecting unnecessary or unreasonably privacy-invasive information from applicants.

Ontario's human rights legislation, the *Ontario Human Rights Code*, prohibits discrimination on the grounds of a disability, including a mental illness. Where police record checks disclose police contact, 9-1-1 calls or mental health apprehensions, asking for and making decisions based on a police record check may constitute prohibited discrimination on the ground of disability. Organizations should not ask for a record check that includes mental health information unless the information they might receive is related to an actual requirement of the job. The *Ontario Human Rights Code* also protects people from discrimination if they have a "record of offences" which is narrowly

defined as a pardoned criminal conviction (now known as a record suspension) or a conviction for any provincial offence. Unfortunately, however, there is no clear human rights protection in Ontario for individuals with non-conviction records that are not related to mental health. Non-conviction information is frequently equated with guilt (especially in instances of stayed, withdrawn and acquitted charges), resulting in discrimination and stigmatization.²⁴ Despite the adverse and discriminatory impacts non-conviction police records can have on Ontarians, there are no explicit human rights protections for non-conviction records under Ontario's human rights legislation.

If record checks are not specifically mentioned in employment agreements, employers may not be able to unilaterally impose this requirement on existing employees without renegotiating the contract.

There are clear legal limits on when you can request a vulnerable sector check. A vulnerable sector check can only be legally provided if:

- the request is made by a person or organization responsible for the well-being of a child or vulnerable person;
- the request is made in the context of a specific application for a paid or volunteer position;
- the position being applied for is one of trust or authority towards a child or vulnerable person; and
- the applicant has given his or her consent in writing.

A vulnerable person is a person who, because of his or her age, a disability or other circumstances is in a position of dependency on others, or is at a greater risk than the general population of being harmed by a person in a position of trust or authority towards them. Not every position that involves contact with a vulnerable person will meet the requirements for a vulnerable sector search. The position

24. Naylor, B., Paterson, M., and Pittard, M. (2008). In the shadow of a criminal record: Proposing a just model of criminal record employment checks. *Melbourne University Law Review*, 32, 171.

must be one that creates either authority (power) over, or special trust with, a vulnerable person.

In general, however, the precise legal limits that apply will vary depending on the jurisdiction, the type of workplace, and the specific employment contracts in place. In most Ontario work places, the applicable human rights and privacy laws do not provide comprehensive protection for employees or volunteers. It is, nevertheless, good employment practice to respect the privacy and human rights of your employees – and in many other provinces these practices are legally required. Some types of record checks are more privacy-invasive than others: the more sensitive the information you are requesting, the higher the burden is on you, the employer, to justify why you need the information. The best practice tips for employment and volunteer record checks outlined below will help you establish rights-respecting screening and employment practices, regardless of what specific statutes apply to your workplace.

ARE THERE LIMITS ON THE TYPE OF INFORMATION I CAN RECEIVE ON A RECORD CHECK?

In general you cannot receive any information from the police without the full, informed and voluntary consent of the volunteer or employee. While there are times when the police can release information without a person's consent, police record check services generally operate based on the consent of the applicant. You should make sure that your consent forms are detailed enough to let a person know exactly what kind of check will be run. You should also make sure that a person has enough time and space to read and understand the forms, think about their decision, and provide truly voluntary consent.

Even with someone's consent, there are many laws and policies that restrict the information you will receive from the police on a record check:

- The *Criminal Code* prohibits the disclosure of any information about diverted charges.
- The *Criminal Records Act* prohibits the disclosure of conditional and absolute discharges after certain periods of time. It also sets out a process whereby certain convictions can get a record suspension (formerly called pardon). These records are not to be disclosed on standard police record checks. A small selection of convictions that have been sealed by a record suspension can be disclosed on a vulnerable sector check.
- The *Youth Criminal Justice Act* has complex rules about who can access certain youth records. In many cases, while a young person can request his or her own record, it is illegal for the youth to pass that information on to an employer or volunteer organization. Employers should not ask youth to provide these records.
- Police services will have policies about what records they will and will not release. Some services will not release police contact or non-conviction records. Even where police services will release non-conviction information, they will frequently have policies allowing them to refuse to release records that could prejudice ongoing investigations.

ARE THERE LEGAL LIMITS ON WHAT I CAN DO WITH THE INFORMATION I RECEIVE FROM AN APPLICANT'S RECORD CHECK?

The results of a police record check can disclose sensitive personal information and must be treated as confidential. If it is justifiable to request a record check as part of the hiring process, it should only be used for the hiring decision and other consistent employment uses. The results of the record check should only be disclosed to those in the

organization who absolutely need to know for approved employment purposes.

It is best practice for organizations to receive the record check after the applicant has had the opportunity to review the results and consent to their disclosure. Ideally the record check should be reviewed by one person in the human resources department – not the individual's direct manager or supervisor. Personal information should not be kept for longer than necessary; in many organizations, it will be enough to simply review the check provided by the applicant, return the original to the applicant and note on a form that the record check has been received and reviewed.

Employers are prohibited from discriminating against applicants based on mental health-associated police contacts. In Ontario, it is also illegal to discriminate against a potential or existing employee on the basis of a conviction that has received a record suspension (pardon) and a provincial offence record.

In several jurisdictions, human rights legislation also prohibits discrimination on the basis of a general police record – including non-conviction records or contact records and convictions. Although Ontario does not yet have such comprehensive protection, best employment practices should also avoid discrimination on this ground. In such situations, the onus is on the employer to establish that the existence of the criminal conviction is related to the job, and what consequences might follow if an individual has a relevant record. Human rights commissions and tribunals have outlined a number of questions that are relevant to determining whether a record is related to a job requirement:

- i. Does the behaviour for which the charge was laid, if repeated, pose any threat to the employer's ability to carry on its business safely and efficiently?

- ii. What were the circumstances of the charge and the particulars of the offence involved – e.g., how old was the individual when the events in question occurred, and were there any extenuating circumstances?
- iii. How much time has elapsed between the charge and the employment decision? What has the individual done during that period of time? Have they shown any tendencies to repeat the kind of behaviour for which they were charged? Has the individual shown a firm intention to rehabilitate themselves?
- iv. Has a pardon or record suspension been secured, or has a conditional discharge been successfully received?
- v. Having considered all the above, was the severity of the particular action taken against the potential employee warranted by the nature and circumstances of the charge or conviction?
- vi. Where discrimination is based on a criminal charge, the evidentiary onus on an employer will be greater; the employer must clearly demonstrate that the risk to the public, co-workers or the employer's business is so severe that the mere possibility of a conviction warrants the discriminatory employment decision.

When deciding whether a past conviction is relevant, employers should keep in mind that studies have shown that after a few years a person with a criminal conviction is at no greater risk of reoffending than any other member of the population. In the work context specifically studies have shown no correlation between a past conviction and the likelihood to commit a work-related offence. We have found no evidence that a non-conviction record is relevant to an employee's conduct or likelihood to commit a criminal offence.

BEST PRACTICES AND POLICIES AROUND HIRING AND SCREENING

ESTABLISHING BEST PRACTICES

Even though Ontario does not have specific human rights and privacy laws surrounding non-conviction information released within police records, it is good employment practice to respect the privacy and human rights of your employees. The best practice tips for employment and volunteer record checks outlined below will help you to establish rights-respecting screening and employment practices, regardless of what specific statutes apply to your workplace.

- a. Assess each job or volunteer position individually:
what level of screening is required for this position?

First, you will need to know exactly what the job is that you want a person to do. What will the job involve? What will the duties be? What kinds of skills will you need? What kind of person are you looking for?

In order to try to find the right person for a position, you should make sure you have at hand all the standard screening tools. This includes asking for a resume and cover letter, reference checks, an interview, orientation sessions, job shadowing periods, follow-up reviews, feedback from clients, etc. There may be some other position-specific checks you can get. If a person will be driving as part of their job

description, for example, you may want to ask them to provide a driving abstract to make sure they are a good driver.

Given the human rights and privacy concerns, however, a police record check should not be considered a ‘standard’ part of the hiring process. For most jobs, a police record check is unnecessary. It is not a particularly good screening tool: having a past police record doesn’t tell you much about what a person will do in the future, and in any event there will be many people who have committed illegal acts but simply were not caught. One study that specifically studied the work context found no correlation between a past conviction and the likelihood to commit a future employment-related offence. Instead of relying on record checks, most workplaces should try to be as safe as possible by putting in place policies and procedures that apply to all employees, regardless of whether they have a criminal record or not.

This is not to say that a record check will never be a prudent screening measure. There may be some high-security jobs where enhanced screening - including through a police record check - is reasonable. Positions where it may be more justifiable to use a criminal record check include those where:

- Legislation requires your organization to conduct a record check for this position;
- Having a criminal record would directly interfere with core job requirements (e.g. a person needs to access a correctional institution regularly for their job and would not be able to get clearance with a criminal record);
- The position involves control over large amount of organizational or client assets, and supervision, safeguards or auditing procedures are not feasible because of the nature of the work;
- The position is one where access will be given to a high-security environment (nuclear facility, airport, law enforcement, corrections, etc.); or

- The position involves unsupervised and ongoing contact with individuals in the vulnerable sector.

b. So you think the position warrants not only standard employment screening, but also a criminal record check. What level of check should you ask for?

There are several different levels of police record checks, and what is available to you will depend in part on what your local police provide. In general, if you need a record check, a basic criminal record check that discloses criminal convictions will be enough (in fact, even that will probably be asking for too much information, since it will search for information about offences that are not relevant for the job the person will do). It is generally not be justifiable to ask for a police record check that will include non-conviction records, like withdrawn charges or police contact. As explained by the BC Privacy Commissioner, “[b]ecause it is at best highly doubtful that such record checks are at all effective for the employer’s purposes, there is no justifiable reason to include this information in checks for any [non-vulnerable sector] types of employment.”²⁵

WHAT ABOUT MENTAL HEALTH-RELATED POLICE RECORDS?

You should avoid police checks that would disclose a person’s mental health history. The BC Privacy Commissioner has found that it is never justifiable to ask for a record check that may reveal prior suicide attempts. The Ontario Human Rights Commission has said that you should not ask for these types of records unless there is a *bona fide*²⁶ occupational requirement for the information – i.e. knowing about a person’s mental health history it is actually related to the requirements

25. Office of the Information and Privacy Commissioner for British Columbia, Investigation Report F14-01: Use of Police Information Checks in British Columbia, 2014 BCIPC No. 14, 36.

26. If a job applicant is prevented from meeting job requirements for a reason that is related to a protected ground in the *Ontario Human Rights Code*, employers must be able to demonstrate whether these requirements are reasonable, essential to the position, and made in good faith (“*bona fide*”).

of the job the person will do. It is hard to imagine a circumstance where this would be true. One way of thinking about this is to ask yourself whether this is a question you would ask a person in an interview, or if you would ask a person to get clearance from a mental health professional before starting the job. If you would not do this, you should not be asking for this information from the police either.

WHAT IF THE PERSON WILL BE WORKING WITH THE VULNERABLE SECTOR?

There are very few jobs which do not have any contact with children, the elderly, or other vulnerable populations. It does not make sense to require everyone who could come into contact with a vulnerable person to get a vulnerable sector check. In fact, doing that would contravene the legal limits on when organizations can ask for a vulnerable sector check. Although it is hard to draw the line, we suggest that organizations consider asking for a vulnerable sector check if the position will involve unsupervised and ongoing contact with individuals in the vulnerable sector.

c. When should you ask for the check?

You should only ask the applicant to provide the record check once you are sure that this is the person you want to hire – i.e. after you have done all your other screening steps.

d. How should you ask for the check?

You need to get the applicant's consent for the record check – and that consent must be free, knowledgeable and voluntary. Particularly in the employment context the idea of 'voluntary' consent is problematic: people are often desperate for jobs, and will feel they have no real choice but to agree to hand over the information. This means that

you must do all you can to make sure the process is as voluntary as possible. Make sure that:

- You have a written consent form that clearly states the type of check being requested and what information might come back;
- You take the time to explain the type of check being requested, as well as the reason you are asking for the information, what kinds of records you consider relevant to the job and what might happen if something comes back on the check;
- They are given the time and space to read the consent form and consider whether they want to sign it; and
- The results of the check are sent first to the applicant, who can then decide whether or not to give it to you.

Wherever possible, the organization should pay for the record checks if there is a fee. It is not fair to ask job and volunteer applicants to pay for your human resource screening processes.

e. Who should look at the results of the check?

The information that is disclosed on a record check can be deeply personal and stigmatizing if it is shared in a workplace. This is personal information that ideally should be reviewed only by select people in the human resources department – not the individual's direct manager or supervisor. If your organization is not large enough to have a separate human resources department, only the people directly involved in the hiring should have access to the results of a record check. The information on a record check should not be shared with anyone else in the organization unless it is necessary for the employment process.

f. How do you make a decision based on the results of the check?

You should have a clear written policy establishing what types of offences are relevant to the specific position, and what other factors that you will consider if a relevant offence is disclosed on a record check. In order to determine whether a particular entry on a person's record should prevent that individual from being hired, you should speak to the candidate to get more information. Zero tolerance policies, rejecting a person who has any notation on a criminal record – including non-conviction records – regardless of what it is, are unfair and discriminatory. The questions highlighted in the above section [Are there legal limits on what I can do with the information I receive from an applicant's record check?](#) are also useful to work through for the purposes of determining whether a record is related to a job requirement.

When deciding whether a past conviction is relevant to a person's suitability for a job, employers should keep in mind that after a few years a person with a criminal record is at no greater risk of committing an offence than any other member of the population, and there is no correlation between a past conviction and the likelihood to commit a future employment-related offence.

Even if you decide that a person is not suitable for the position as it was advertised because of their police record, you should try to accommodate that person – perhaps by finding them a different position in your organization, or by modifying some specific duties or oversight procedures to allow the person to do the original job.

No matter what, you should always treat people with respect and dignity.

g. After the decision: what should happen to the information?

Personal information should not be kept for longer than necessary. In many organizations, it will be enough to simply review the check provided by the applicant, return the original to the applicant and note on a form that the record check has been received and reviewed. If you do need to keep a copy of the record check for employment purposes, you should keep it in a secure, locked area that is not generally accessible to others in the workplace. Make sure you have a policy on when and how you will destroy this information.

APPENDIX A

UNDERSTANDING NON-CONVICTION POLICE RECORDS

1. Criminal Convictions	2. Non-Conviction Dispositions: Findings of Guilt	3. Non-Conviction Dispositions: No Finding of Guilt	4. Police Contacts
<p>The following sentences result in criminal convictions:</p> <ul style="list-style-type: none"> • Imprisonment Sentence • Intermittent Sentence • Suspended Sentence • Conditional Sentence • Fine or forfeiture 	<ul style="list-style-type: none"> • Absolute Discharge • Conditional Discharge 	<ul style="list-style-type: none"> • Charges withdrawn • Charges withdrawn - 'alternative measures' or diversion • Acquittal at trial • Stay of proceedings 	<ul style="list-style-type: none"> • Police contact and surveillance • Mental health apprehensions • Arrests (but no charge) • Victimization • Witness

1. CRIMINAL CONVICTIONS

When an accused person is convicted of a charge (or charges), they can receive the following sentences:

CUSTODIAL SENTENCE. (Imprisonment). A person has been convicted of a crime and sentenced to a term of imprisonment either in a provincial jail/correctional centre or a federal prison.

SUSPENDED SENTENCE. (Rehabilitative supervision in the community through probation). A suspended sentence under the *Criminal Code* allows a judge to suspend a passing of sentence, and instead place a convicted person on a period of probation.

CONDITIONAL SENTENCE. A conditional sentence is a sentence of custody (imprisonment) that is served in the community, generally under what is commonly referred to as “house arrest” and other conditions. If the person is found in breach of their conditions they can be made to serve the balance of their conditional sentence in jail.

FINE OR FORFEITURE. A person is convicted and sentenced to pay a specified amount of money to the court.

2. NON-CONVICTION DISPOSITIONS: FINDINGS OF GUILT

If you plead or have been found guilty of a criminal offence you may also receive an absolute discharge or conditional discharge. These are findings of guilt, but they are not criminal convictions.

ABSOLUTE DISCHARGE. If you plead guilty early or are found guilty by a judge or jury following a trial, a Judge may, instead of imposing sentence that results in a conviction, grant a “discharge.” Under the *Criminal Code* of Canada, if an accused person accepts responsibility for a charge, or have been found guilty, they may be granted an absolute discharge, which is not a criminal conviction. An absolute discharge is immediate and there is no probation order – it is a registration of guilt. There is a record that results from an absolute discharge. The record of the absolute discharge is supposed to be removed from CPIC databases after a period of one year.

CONDITIONAL DISCHARGE. A conditional discharge usually contains certain probation requirements that must be fulfilled before the

discharge becomes Absolute. These requirements may or may not include requirements such as reporting conditions, a repayment of money to the victim, or the completion of programming. While someone with a conditional discharge does not end up with a criminal conviction, it is a registration of guilt, it will take at minimum three years from the date of the discharge for the record of discharge to be removed from CPIC databases.

You cannot receive a record suspension for a discharge. The *Criminal Records Act* states that these records be automatically sealed and removed from RCMP databases after one year for an absolute discharge, and three years for a conditional discharge.

Many people who are discharged are frequently told that they will not have a criminal record of convictions. While this is correct, it is misleading: the fact that someone received a discharge is widely disclosed on a basic “criminal record check”, at least within the one and three- year retention time frames.

3. NON-CONVICTION DISPOSITIONS: NO FINDING OF GUILT

Although a person has not been found guilty in court, and they do not have a criminal conviction, these records frequently appear on police record checks. All of the following can result in the creation of a police record.

WITHDRAWAL – *NO REASONABLE PROSPECT OF CONVICTION.*

Sometimes the Crown will withdraw a person’s charges before trial. This will likely happen if the Crown believes there is no reasonable prospect of conviction, or if pursuing the charges are not in the public’s interest.

WITHDRAWAL – *PEACE BOND.* For certain charges, duty/defence counsel may negotiate with the Crown Attorney to “drop” or withdraw

the charges against an accused person in exchange for the person to enter into a Peace Bond. A Peace Bond is a promise an accused makes to the court in writing to keep the peace and be of good behavior, and if deemed necessary, to stay away from the complainant for a given period of time, usually up to a year. The original charge is usually withdrawn.

WITHDRAWAL – DIVERSION. For certain charges that involve minor and/or first-time offences, the Crown may agree to ‘drop’ or withdraw charges if a person completes ‘diversion’. Someone who is sentenced to diversion may be told they have to make a charitable donation, perform community service, and/or enter into and complete a specific program.

ACQUITTAL AT TRIAL. If the matter was taken to trial and the person is found not guilty by a judge or jury, then one is said to have been “acquitted” of the charges laid against him/her.

STAY OF PROCEEDINGS. This is a stoppage of the case against an accused person without a finding of guilty or not guilty. A stay is usually granted because of some form of procedural unfairness, such as a violation of certain Charter rights, to the accused person. A stay of proceedings is different from a suspended sentence. A suspended sentence IS a criminal conviction.

4. RECORDS OF POLICE CONTACT

MENTAL HEALTH APPREHENSION

Under certain circumstances the police have the power to detain people under provincial mental health legislation and it can often result in the person being taken to a hospital.

OTHER KEY TERMS:

FORM 1: A document that authorizes a physician to detain an individual, for a maximum of 72 hours, who is believed to be a threat to themselves or someone else.

FORM 2: A document that anyone can apply for and submit to a Justice of the Peace to demand that a person be assessed by a physician, if an individual has sufficient information to suspect the individual in question may be suffering a mental health crisis.

VULNERABLE PERSON/POPULATION: According to the *Criminal Records Act*, a vulnerable person is a person who, because of age, a disability, or other circumstances, whether temporary or permanent are (a) in a position of dependence on others or (b) are otherwise at a greater risk than the general population of being harmed by a person in a position of authority or trust relative to them.

APPENDIX B

The following table is a partial list of the statutory provisions that mention criminal records checks in connection with licensing, permitting or hiring. Many of these provisions do not require criminal records checks, but rather give a designated organization or individual the authority to request the information for specific purposes. There may also be associated provisions that limit to whom these provisions apply – for example several statutes specifically define which staff, volunteers or placement students are subject to the statutory requirements.



Relevant legal provision	General description
<i>Marijuana for Medical Purposes Regulations</i> , SOR/2013-119, s. 90(1)(J)	A variety of individuals, including individual applicants seeking a medical marijuana producer's licence and each director and officer of a corporation seeking a producer's licence, may submit an application for a security clearance to the Minister. An application for a security clearance must include the applicant's fingerprints for the purpose of a criminal record check. Upon receipt of a completed application, the Minister <u>must</u> determine whether an applicant poses a risk to the integrity of the control of production and distribution of cannabis by conducting a criminal record check on the applicant and a check of all the relevant files of law enforcement agencies, including intelligence gathered for law enforcement purposes.
<i>Nuclear Security Regulations</i> , SOR/2000-209, s. 42	Before a person is granted security clearance to access a nuclear facility, a licensee <u>shall</u> verify, among other things, a record from the Canadian Police Information Centre or a police service where the nuclear facility is located showing the results of a criminal record name check on the person.
<i>Customs Act : Presentation of Persons (2003) Regulations</i> SOR/2003-323, s. 6.1, 6.2	The Minister may authorize a person for the Nexus program (expedited non-commercial air, land, and marine travel between the United States and Canada) or the FAST program (expedited commercial land travel between the US and Canada) if an individual provides, among other things, a copy of their fingerprints and consents to their use to perform background and criminal record checks.
<i>Defence Production Act: Controlled Goods Regulations</i> , Can. Reg. 2001-32, s 15.	This regulation addresses the registration requirements for non-government individuals who wish to possess, inspect or transfer controlled goods related to national defence. The Minister or a designated official shall, for the purpose of determining honesty, reliability and trustworthiness of a person and the extent to which the person poses a risk of transferring a controlled good to a person who is not registered or exempt from registration, conduct a security assessment that takes into account criminal history, among other factors. The person who is subject to this security assessment must provide evidence of criminal history regarding the previous five years.
<i>Marine Transportation Security Regulations</i> , SOR/2004-144, s. 508	This regulation deals in part with the screening requirements for individuals who require marine transportation security clearance (eg. those with security responsibility at certain marine facilities and port administrations, individuals with access to certain restricted areas, etc.). On receipt of a fully completed application for a security clearance, the Minister <u>shall</u> conduct, among other things, a criminal record check for the purpose of assessing whether an applicant poses a risk to the security of marine transportation.

	Relevant legal provision	General description
Ontario	<p><i>Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act: Quality Assurance Measures</i>, O. Reg. 299/10, ss. 13, 34</p>	<p>These provisions apply to a corporation or other prescribed entity that provides services and supports to, or for the benefit of, persons with developmental disabilities and that has entered into a funding agreement with the Minister of Community and Social Services under s. 10 of the <i>Act</i>.</p> <p>Each service agency shall require a police records check for all new staff members. A police records check shall also be required for volunteers and board members if they will have direct contact with the persons with developmental disabilities who receive services and supports from the service agency.</p> <p>Police records check means a record of a person's involvement with the police obtained through a search of police data bases and shall include a review of the vulnerable sector screen.</p> <p>A service agency shall have written protocols with their local police services to ensure the type of information provided through a police records check is appropriate to the position being applied for.</p> <p>The service agency shall ensure that the personal reference check and police records check are completed as soon as possible for the new staff member, volunteer or board member before or after they assume their responsibilities with the agency. Until the completion of their reference check, their police records check and their orientation and initial training, a staff member, volunteer or board member shall have direct contact with persons with developmental disabilities only when being supervised.</p>
	<p><i>Long-Term Care Homes Act, 2007</i>, c. 8, s. 75; <i>General</i>, O. Reg. 79/10, s. 215</p>	<p>Every licensee of a long-term care home shall ensure that screening measures are conducted before hiring staff and accepting volunteers. The police record check requirements described below do not apply to:</p> <ul style="list-style-type: none"> • staff or volunteers under 18 years old; • Medical Directors; • certain physicians or registered nurses; and • staff who are contractors, will only provide occasional maintenance or repair services to the home, are not to provide direct care to the residents and will be monitored and supervised in accordance with a written policy. <p>For all other staff and volunteers, screening must include a police record check upon hire or entry. The record check must be conducted by a police force within six months before the staff member is hired or the volunteer is accepted by the licensee. It must include a vulnerable sector screen.</p>

After a staff member or volunteer is aware that he or she has been charged, convicted, or a charge has otherwise been disposed of, he or she must provide a signed declaration disclosing the following with respect to the period since the date of the person's last criminal reference check was conducted:

- Every offence with which the person has been charged under the *Criminal Code*, the *Controlled Drugs and Substances Act* or the *Food and Drugs Act* and the outcome of the charge.
- Every order of a judge or justice of the peace made against the person in respect of an offence under the *Criminal Code*, the *Controlled Drugs and Substances Act* or the *Food and Drugs Act*, including a peace bond, probation order, prohibition order or warrant.
- Every restraining order made against the person under the *Family Law Act* or the *Children's Law Reform Act*.
- Every offence of which the person has been convicted under the *Criminal Code*, the *Controlled Drugs and Substances Act* or the *Food and Drugs Act*.

Change of Name Act,
R.S.O. 1990, c. C.7, ss.
6.3(3.1), 7.1, 8

An individual who wishes to change his or her name must provide an application that includes, among other things, the particulars of:

- Every criminal conviction for which pardon has not been granted;
- Every finding of guilt for a criminal offence that resulted in a discharge that has not been purged as required by the *Criminal Records Act*;
- Every offence of which the person has been found guilty and for which an adult sentence has been imposed under the *Youth Criminal Justice Act*;
- Every outstanding law enforcement order against the person, including a warrant, prohibition order, restraining order, driver's licence suspension, probation order and parole order of which he or she is aware; and
- Every pending criminal charge against the person of which he or she is aware.

An application shall be accompanied by a police records check that is prepared and certified by an employee of an Ontario police force if the application discloses any of the above particulars. The police records check shall contain information about every category listed above.

Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 21.1; *Custody Claims by Non-Parents*, O. Reg. 24/10, s. 1.

Individuals who apply for custody of a child and who is not a parent of that child shall file with the court a recent criminal record check. The record check must be written, prepared by a police force or service and based on the available information regarding:

- Every criminal conviction that has not received a pardon (ie. record suspension);
- Every criminal offence that has been discharged, except those which the *Criminal Records Act* has required to be purged;
- Every unpardoned offence for which an adult sentence has been imposed under the *Youth Criminal Justice Act*;
- Every outstanding order of a judge or justice of the peace made against the person in respect of a criminal matter, including a probation order, prohibition order or warrant;
- Every outstanding restraining order made against the person under various provisions in the *Children's Law Reform Act*, the *Family Law Act* or the *Child and Family Services Act*;
- Every outstanding criminal charge against the person;
- Every criminal charge against the person that resulted in a finding of not criminally responsible, a stay of proceedings, was dismissed or withdrawn; and
- Every contact between the person and a police force or service in relation to actions taken against the person under the *Mental Health Act* because of a determination under that *Act* that the person was suffering or apparently suffering from a mental disorder of a nature or quality that would likely result in serious bodily harm to the person or to another person or in serious physical impairment of the person.

The record check must also disclose every contact between the person and a police force or service for which the police force or service has a written record, unless:

- Disclosing this information would interfere with a law enforcement matter;
- a police force or service has not made the person aware of the contact;
- the person was a minor at the time of the contact; or
- the information is not relevant to an application for custody of a child.

Juries Act, R.S.O. 1990, c. J.3, s. 18.2

States that sheriffs may request that a criminal record check, prepared from national data on the Canadian Police Information Centre database, be conducted in order to determine whether someone is ineligible to serve as a juror.

Dental Hygiene Act, 1991: General, Ont. Reg. 218/94, s. 29

Applicants for certificates of registration must provide a police record check that is dated no earlier than a year before the application submission date.

Retirement Homes Act, 2010, R.S.O. 2010, c. 11, s. 64; General, Ont. Reg. 166/11, s. 13.

A licensee of a retirement home shall ensure that, before hiring staff and accepting volunteers to work in the home, screening measures are conducted. The police record check requirements described below do not apply to:

- Staff or volunteers under 18 years old;
- A member of the College of Physicians and Surgeons of Ontario, a member of the College of Nurses of Ontario or a member of the Ontario College of Pharmacists; and
- Staff who are contractors, will only provide occasional maintenance or repair services to the home, are not to provide direct care to the residents and will be monitored and supervised in accordance with a written policy.

For all other staff and volunteers, screening must include a police record check upon hire or entry. The record check must be conducted by a police force within six months before the staff member is hired or the volunteer is accepted by the licensee. It must include a vulnerable sector screen.

After a staff member or volunteer is aware that he or she has been charged, convicted, or a charge has otherwise been disposed of, he or she must provide a signed declaration disclosing the following with respect to the period since the date of the person's last criminal reference check was conducted:

- Every offence with which the person has been charged under the *Criminal Code*, the *Controlled Drugs and Substances Act* or the *Food and Drugs Act* and the outcome of the charge.
- Every order of a judge or justice of the peace made against the person in respect of an offence under the *Criminal Code*, the *Controlled Drugs and Substances Act* or the *Food and Drugs Act*, including a peace bond, probation order, prohibition order or warrant.
- Every restraining order made against the person under the *Family Law Act* or the *Children's Law Reform Act*.
- Every offence of which the person has been convicted under the *Criminal Code*, the *Controlled Drugs and Substances Act* or the *Food and Drugs Act*.

Private Security and Investigative Services Act, S.O. 2005, c. 34, s. 11

Specifies the requirements for an application for an individual or entity to be licensed in the areas of private investigation and security services. No person is eligible to hold a licence unless, among other things, the person possesses a clean criminal record. A person who applies for the issuance or renewal of a licence shall provide, among other things, a declaration of:

- All convictions or findings of guilt for any offences under a law of Canada for which a pardon (record suspension) has not been issued or granted;
- All convictions and findings of guilt for any offence under any provincial or territorial law;
- All convictions from criminal offences in other countries for which a pardon has not been issued or granted; and
- All unresolved charges for offences allegedly committed against a law of Canada or another jurisdiction.

The licence applicant must also provide consent or the Registrar to collect information on any of these matters. If a business is being licenced, every officer, director or partner of the business must provide this information as well.

The Registrar may require an individual applicant or any officer, director or partner of an applicant business entity to provide fingerprints and consent for local police to conduct a background check, including information regarding convictions and findings of guilt.

Ontario Labour Mobility Act, 2009, s 9(5)

Specifies that when someone's profession or occupation is regulated from an out of province regulatory authority, various Ontario Regulatory Authorities (eg. Association of Architectural Technologists of Ontario, Association of Ontario Road Supervisors, Ontario Association of Home Inspectors, Ontario Professional Planners Institute, etc.) may conduct a criminal record check.

Regulated Health Professions Act, S.O. 1991, c. 18, Sched. 2, s. 22.18(5)

If an individual applying to the College of a health profession or group of health professions established under a health profession Act holds an out-of-province certificate that is equivalent to the certificate of registration being applied for in Ontario, the College may require the applicant to undergo a criminal background check.

Audiology and Speech-Language Pathology Act, 1991: *Registration*, Ont. Reg. 21/12, s 3.

An applicant for registration must provide details regarding any conviction for a criminal offence.

Education Act: Collection of Personal Information, Ont. Reg. 521/01, ss. 1, 2, 22.1

The school board shall collect a criminal background check on every employee of the board or service provider at a school before an individual starts employment or becomes a service provider. An offence declaration shall be provided by September 1 of each year that the individual is an employee or service provider. If an employee or service provider transfers to a different school site of the board, the board shall collect an offence declaration before the transfer.

A criminal background check means a document concerning an individual that was prepared by a police force or service from the national data on the Canadian Police Information Centre database within six months before the day the board collects the document and that contains information concerning the individual's personal criminal history.

An offence declaration means a written declaration signed by an individual listing all the individual's unpardoned convictions for offences under the Criminal Code up to the date of declaration that are not included in the last criminal background check or a check collected by the Ontario College of Teachers.

In order to ensure the safety of pupils, the Minister may collect the personal criminal history of an individual who is an employee of the Ministry who works at a school under the jurisdiction of the Minister or a service provider at a school under the jurisdiction of the Minister.

Traditional Chinese Medicine Act, 2006: Registration, Ont. Reg. 27/13, s 4.

An applicant for registration must at the time of application provide the Registrar with the results of a criminal background check.



OTHER RESOURCES ON POLICE RECORD CHECKS:

CANADIAN CIVIL LIBERTIES ASSOCIATION

- General information: www.ccla.org/recordchecks
- False Promises, Hidden Costs: The Case For Reframing Employment and Volunteer Police Record Check Practices In Canada: <http://www.ccla.org/recordchecks/falsepromises>
- Presumption of Guilt: The Human Cost: <http://ccla.org/recordchecks/humancost/>
- Presumption of Guilt? The Disclosure of Non-Conviction Records in Police Background Checks: <http://ccla.org/wordpress/wp-content/uploads/2012/09/CCLA-NCD-Report.pdf>
- Know your rights guides and FAQs – national overview: <http://ccla.org/recordchecks/resources/>

JOHN HOWARD SOCIETY OF ONTARIO

- Help Wanted*: Reducing Barriers for Ontario's Youth with Police Records: <http://www.johnhoward.on.ca/help-wanted/johnhoward-ontario-help-wanted.pdf>
- Police Records and Stigma: Challenging Stereotypes: <http://www.johnhoward.on.ca/wp-content/uploads/2014/09/counter-point-6-police-records-and-stigma-challenging-stereotypes.pdf>
- Record Suspensions (Pardons) and Waivers Information Brochure: <http://www.johnhoward.on.ca/resources/record-suspensions-pardons/>

ONTARIO HUMAN RIGHTS COMMISSION

- www.ohrc.on.ca
 - i) Test for *bona fide* requirement; and,
 - ii) Taking a proactive approach to *bona fide* requirements
- <http://www.ohrc.on.ca/en/iv-human-rights-issues-all-stages-employment/2-setting-job-requirements>

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER FOR B.C.

- Use of Police Information Checks in British Columbia:
<http://www.oipc.bc.ca/investigation-reports/1631>
- Use of Employment-Related Criminal Record Checks: Government Of British Columbia: <http://www.oipc.bc.ca/investigation-reports/1247>

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER FOR ONTARIO

- What is involved if you are asked to provide a Police Background Check?: <http://www.ipc.on.ca/images/resources/up-1policebkg.pdf>
- Crossing the Line: The Indiscriminate Disclosure of Attempted Suicide Information to U.S. Border Officials via CPIC: http://www.ipc.on.ca/images/Resources/indiscriminate_disclosure.pdf

OFFICE OF THE PRIVACY COMMISSIONER OF CANADA

- https://www.priv.gc.ca/index_e.asp
- Workplace privacy FAQ: https://cippic.ca/en/FAQ/workplace_privacy#FAQwork

- Workplace Privacy - What information about me can my employer gather?: https://cippic.ca/FAQ/workplace_privacy/gather#credit_check_on_me

CANADIAN POLICE INFORMATION CENTRE

- <http://www.cpic-cipc.ca/faq/index-eng.htm>

PROVINCIAL ORGANIZATIONS

- Information and Privacy Commissioner of Ontario www.ipc.on.ca
- Justice for Children and Youth (for Youth Record issues) www.jfcy.org
- Ontario Human Rights Commission www.ohrc.on.ca

FEDERAL ORGANIZATIONS

- Office of the Privacy Commissioner of Canada www.priv.gc.ca

USEFUL RESOURCES

- *Canadian Human Rights Act* <http://laws.justice.gc.ca/en/H-g/index.html>
- *Criminal Records Act* <http://laws.justice.gc.ca/en/c-47>
- *Ontario Human Rights Code* http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm

- Occupational Health & Safety Branch, Ministry of Labour, Workplace Violence and Harassment: Understanding the law. (Toronto: Occupational Health & Safety Branch, Ministry of Labour, 2010). http://www.labour.gov.on.ca/english/hs/pdf/wpvh_gl.pdf
- Ontario Association of Chiefs of Police. (2014). LEARN Guideline for police record checks: http://www.oacp.on.ca/Userfiles/Files/NewAndEvents/PublicResourceDocuments/GUIDELINES%20FOR%20POLICE%20RECORD%20CHECKS%20%20_%20June%202014_FINAL.pdf
- Ministry of Community Safety and Correctional Services and Ministry of Citizenship and Immigration. An Overview of Provincially Mandated Police Records Checks: A Resource for Ontario's Not-for-Profit Sector http://www.citizenship.gov.on.ca/english/pp/police_records_checks/police_records_checks_en.pdf

REFERENCES

Bazley v. Curry, [1999] 2 SCR 534

Blumstein, and K. Nakamura, “Redemption in the presence of widespread criminal background checks,” *Criminology* 47, no. 2 (2009): 327.

Bushway, “Enduring risk? Old criminal records and short-term predictions of criminal involvement,” *Crime and Delinquency*, 53, no. 1 (2007): 64.

Canadian Civil Liberties Association (2014). [False Promises, Hidden Costs: The Case for Reframing Employment and Volunteer Police Record Check Practices in Canada](#)

Canadian Civil Liberties Association. (2012). Presumption of Guilt?: The disclosure of non-conviction records in police background checks: <http://ccla.org/wordpress/wp-content/uploads/2012/09/CCLA-NCD-Report.pdf>

E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia, [2—5] 3 SCR 45 at 28-29.

Education Act: Ont. Reg. 521/01, ss. 1, 2.

Gillis C.A & Andrews, D. A. (2005). Predicting Community Employment for Federal Offenders on Conditional Release. Correctional Service of Canada

Griffiths, C.T., Dandurand, Y., and Murdoch, D. The Social Reintegration of Offenders and Crime Prevention (Ottawa: National Crime Prevention Centre, 2007), <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/scl-rntgrtn/scl-rntgrtn-eng.pdf>

Fleury, D., and Fortin, M. “When working is not enough to escape poverty: An analysis of Canada’s working poor,” Human Resources and Social Development Canada (working paper, 2006), http://tamarackcommunity.ca/downloads/vc/When_Work_Not_Enough.pdf

Harris, P., and Keller, K., (2005) “Ex-offenders need not apply: the criminal background check in hiring decisions,” *Journal of Contemporary Criminal Justice* 21, no. 1

Kurlychek, M.C., Brame, R., Bushway, S.D. "Scarlet letters and recidivism: Does an old criminal record predict future offending?" *Criminology and Public Policy*, 5 no. 3 (2006): 483, as well as Megan C. Kurlychek, Robert Brame, Shawn D.

John Howard Society of Ontario. (2014). Help Wanted*: Reducing Barriers for Ontario's Youth with Police Records. <http://www.johnhoward.on.ca/help-wanted/johnhoward-ontario-help-wanted.pdf>

Long-Term Care Homes Act, 2007, c. 8, s. 75; Retirement Homes Act, 2010, R.S.O. 2010, c. 11, s. 64.

Naylor, B., Paterson, M., and Pittard, M. (2008). In the shadow of a criminal record: Proposing a just model of criminal record employment checks. *Melbourne University Law Review*, 32, 171.

Ontario Bill 168, Occupational Health & Safety Amendment Act (Violence & Harassment in the workplace 2009, came into force on June 15, 2010).

Occupational Health & Safety Branch, Ministry of Labour, Workplace Violence and Harassment: Understanding the law. (Toronto: Occupational Health & Safety Branch, Ministry of Labour, 2010). http://www.labour.gov.on.ca/english/hs/pdf/wpvh_gl.pdf

Services and Supports to Promote the Social Inclusion of Persons with Development Disabilities Act: Quality Assurance Measures, O. Reg. 299/10, ss. 13, 34.

Soothill, Keith., Les Humphreys, Les., and Francis, Brian. (2013) "Middle-class offenders as employees – Assessing the risk: A 35-year follow-up," *Journal of Offender Rehabilitation*, 52, no. 6: 407.

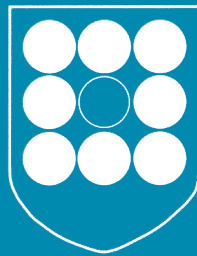
Swaigen, John. "Police Background Checks - Balancing Public Safety, Security and Privacy" (August 2007), 8(1) *The OBA Privacy Law Review: Eye on Privacy*

Uggen, Christopher. "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.

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