POLICE RECORD CHECKS: PRELIMINARY RESEARCH

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Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on November 15, 1967 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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Table of Abbreviations

AACP Procedures	Alberta Association of Chiefs of Police, *Alberta Police Information Check Disclosure Procedures* (May 2019), online: Alberta Association of Chiefs of Police <aacp.ca/wp-content/uploads/2019/09/Alberta-Provincial-Police-Information-Check-Disclosure-Procedures-AACP-endorsed-May-14-2019.pdf>
CCLA Report	Canadian Civil Liberties Association, *False Promises, Hidden Costs: The case for reframing employment and volunteer police record check practices in Canada* (Toronto: May 2014)
OACP Guide	Ontario Association of Chiefs of Police, *LEARN Companion to the Police Record Checks Reform Act 2015* (June 2019), online: Windsor Police Service <http://www.police.windsor.on.ca/services/info-requests/Documents/LEARN%20COMPANION%20TO%20PRCRA.pdf>
Ontario Act	*Police Record Checks Reform Act, 2015*, SO 2015, c 30
Uniform Act	Uniform Law Conference of Canada, Uniform Police Record Checks Act, 2018ulcc0007 (Quebec City: August 2018)

Types of Police Record Checks

PIC	Police Information Check (Alberta)
VSPIC	Vulnerable Sector Police Information Check (Alberta)
CRC	Criminal Record Check (Ontario)
CRJMC	Criminal Record and Judicial Matters Check (Ontario)
VSC	Vulnerable Sector Check (Ontario)

A. Introduction

[1] To assess their suitability for opportunities, employers and volunteer organizations seek background information on their applicants. One way of obtaining such information is through police record checks. That being so, many employers and volunteer organizations require applicants to request, and share the results of, a police record check. Other organizations, including governments, professional regulatory bodies, post-secondary institutions, and even landlords, also use police record checks as a screening tool.

[2] Determining what information should be disclosed in the results of a police record check involves balancing public safety interests with an applicant's privacy and human rights. Across Canada, police services do this balancing in different ways, with little legislative direction.

[3] There have been several calls for specific legislation to regulate police record checks. Civil liberties organizations, privacy commissioners, the Uniform Law Conference of Canada, the Canadian Bar Association, superior and appellate court justices, and others have advocated for such legislation. The most pressing issues they have raised relate to the disclosure of non-conviction information in police record check results.

[4] Advocates for specific legislation regulating police record checks want to see the disclosure of non-conviction information restricted, or eliminated altogether. They argue that disclosing non-conviction information can unfairly, and unnecessarily, prevent individuals who have not been found guilty of a crime from obtaining work, volunteer and other important opportunities.[1]

[5] The Alberta Law Reform Institute [ALRI] conducted some preliminary research to determine whether it should undertake a police record check law reform project. As part of its research, ALRI reviewed:

- Ontario's *Police Record Checks Reform Act, 2015* [Ontario Act], which came into force in November 2018;[2] and

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[1] Abby Deshman, "New Act protects Ontarians from release of unproven allegations" (13 December 2018), online: *Canadian Civil Liberties Association* <ccla.org/new-act-protects-ontarians-release-unproven-allegations>.

[2] *Police Record Checks Reform Act, 2015*, SO 2015, c 30 [Ontario Act].

- the *Alberta Police Information Check Disclosure Procedures* [AACP Procedures], which were first endorsed by the Alberta Association of Chiefs of Police in May 2018.[3]

[6] The Ontario Act seeks to standardize police record check practices, and limit the disclosure of non-conviction information, in Ontario. It is the first legislation of its kind in Canada, and many have recommended that other Canadian governments should adopt it or a similar statute.

[7] Alberta lacks legislation like the Ontario Act. However, Alberta police services are expected to follow the AACP Procedures, and the contents of those procedures are similar to the contents of the Ontario Act.

[8] After reviewing the Ontario Act and the AACP Procedures, ALRI decided not to undertake a police record check law reform project. As the AACP Procedures were only recently adopted by all Alberta police services and published, and because the AACP seems open to revising the procedures, ALRI believes that time will tell whether Alberta needs specific legislation to regulate police record checks.

[9] ALRI is publishing this paper to share its preliminary research findings and promote discussion about police record check practices in Alberta. The paper:

- examines the federal and provincial statutes that partially regulate the disclosure of information in police record check results;
- reviews the national and provincial calls that have been made for specific legislation to regulate police record checks;
- evaluates the Ontario Act; and
- compares the Ontario Act with the AACP Procedures.

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[3] Alberta Association of Chiefs of Police, *Alberta Police Information Check Disclosure Procedures* (May 2019), online: *Alberta Association of Chiefs of Police* <aacp.ca/wp-content/uploads/2019/09/Alberta-Provincial-Police-Information-Check-Disclosure-Procedures-AACP-endorsed-May-14-2019.pdf> [AACP Procedures].

B. Issues not Addressed in this Paper

[10] Several issues relating to police record checks are not addressed in this paper, including:

- When, if ever, should certain types of information be removed from police databases?
- Are police record checks an effective or useful screening tool?
- When should an organization require an applicant to obtain a police record check for screening purposes?
- If an organization is going to require an applicant to obtain a police record check, which type of police record check should it require?
    - When is it sufficient to require the least intrusive type of police record check (a criminal record check)?
    - When should a more intrusive type of police record check (a police information check) be required?
    - When is it appropriate to require the most intrusive type of police record check (a vulnerable sector check)? This question turns on how section 6.3(3) of the *Criminal Records Act* is interpreted.[4]
- How should organizations interpret and consider police record check results?
- Should employees or volunteers who were required to obtain a police record check be obliged to obtain follow-up police record checks at regular intervals?
- Should Alberta's human rights legislation be amended to prohibit discrimination based on non-conviction or other information disclosed in police record check results?
- Should Alberta establish an administrative body to conduct vulnerable sector checks and provide risk assessments (instead of disclosing police information)?

[4] *Criminal Records Act*, RSC 1985, c C-47 [*Criminal Records Act*].

- Should the AACP Procedures inform the regulations being made under Alberta's *Disclosure to Protect Against Domestic Violence (Clare's Law) Act*?[5]

[11] Many of these are not law reform issues and, therefore, would have been beyond the scope of a potential ALRI police record checks project.

C. Definitions

[12] In this paper, the term "***police record check***" broadly refers to a search of police databases to determine whether they contain any entries (information) relating to an individual.

[13] The terms "***criminal record check***", "***police information check***", and "***vulnerable sector check***" refer to some of the different police record checks available in Canada.

[14] The term "***non-conviction information***" broadly refers to details regarding (i) police interactions that did not result in any criminal charges; and (ii) criminal charges that did not result in any convictions or findings of guilt. Non-conviction information might include details regarding:

- informal police contact;
- 911 calls;
- mental health apprehensions;
- criminal offence allegations;
- interactions (as a witness, victim or suspect) during police investigations;
- alleged offences dealt with by alternative measures (such as community service, an apology or counselling);
- criminal charges that were withdrawn, dismissed or stayed; and
- criminal charges that resulted in a stay of proceedings or an acquittal (not guilty finding).

[5] *Disclosure to Protect Against Domestic Violence (Clare's Law) Act*, SA 2019, c D-13.5 (not yet in force). This Act will allow a person at risk of domestic violence to request and receive information about another person's history of domestic violence from the police.

D. Existing Legislation Limiting the Disclosure of Police Information

[15] Federal and provincial privacy statutes, the *Criminal Records Act*, the *Youth Criminal Justice* Act,[6] and the *Criminal Code*,[7] place some limits on the disclosure of police information and, therefore, partially regulate the disclosure of information in police record check results.

1. PRIVACY STATUTES LIMITING THE DISCLOSURE OF POLICE INFORMATION

[16] Federal and provincial privacy statutes limit how police services can use and disclose "personal information", which includes information about an individual's criminal history or other interactions with the police. For example, Alberta's *Freedom of Information and Protection of Privacy Act* [*FOIP Act*] generally provides that, as a "public body", a police service may only use and disclose personal information "if the individual the information is about has identified the information and consented, in the prescribed manner, to the use" and disclosure.[8] Therefore, to comply with the *FOIP Act*, an Alberta police service must obtain an applicant's consent before it conducts, and discloses the results of, a police record check.[9]

[17] Similar consent requirements are found in:

- the federal *Privacy Act*,[10] which governs the Royal Canadian Mounted Police [RCMP];[11] and
- the provincial and federal privacy statutes that apply to private companies who offer police record check services in Alberta.[12]

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[6] *Youth Criminal Justice Act*, SC 2002, c 1 [*Youth Criminal Justice Act*].

[7] *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

[8] *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, ss 1(n) and (p), 39(1)(b) and 40(1)(d). Also see *Freedom of Information and Protection of Privacy Regulation*, Alta Reg 186/2008, s 7, which prescribes how an individual's consent must be obtained.

[9] *Edmonton (Police Service) v Alberta (Information and Privacy Commissioner)*, 2019 ABQB 587 at paras 17–20, 67, 102–103, 113, 124–127, 170, 179–181, 196, 199–200 and 214 [QB Decision].

[10] *Privacy Act*, RSC 1985, c P-21, ss 3 and 7–8.

[11] See *Royal Canadian Mounted Police (Re)*, 2017 CanLII 76815 (AB OIPC).

[12] See *Personal Information Protection Act*, SA 2003, c P-6.5, ss 1 and 7–8; and *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, ss 2 and 5–7.

2. CRIMINAL LAW STATUTES LIMITING THE DISCLOSURE OF POLICE INFORMATION

[18] Criminal law statutes also place some limits on the disclosure of police information.

a. *Criminal Records Act*

[19] The *Criminal Records Act* generally prohibits the disclosure of:

- absolute and conditional discharges after one year and three years, respectively;[13] and
- criminal convictions for which a record suspension (pardon) has been granted.[14]

[20] Despite its general prohibition, the *Criminal Records Act* permits the disclosure of certain criminal convictions for which a record suspension (pardon) has been granted, in certain circumstances.[15] Most notably, the Act provides that, even though a record suspension (pardon) has been granted, a criminal conviction for an offence listed in Schedule 2 may be disclosed:[16]

> 6.3(3) At the request of any person or organization responsible for the well-being of a child or vulnerable person and to whom or to which an application is made for a paid or volunteer position, … if
>
> (a) the position is one of trust or authority towards that child or vulnerable person; and
>
> (b) the applicant has consented in writing to the [disclosure].

[21] The offences listed in Schedule 2 to the *Criminal Records Act* are primarily sexual offences. And, for the purposes of the Act, "child" means a person under the age of 18 years;[17] and "vulnerable person" means:[18]

> 6.3(1) … a person who, because of his or her age, a disability or other circumstances, whether temporary or permanent,
>
> (a) is in a position of dependency on others; or

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[13] *Criminal Records Act*, note 4, s 6.1(1).

[14] *Criminal Records* Act, note 4, s 6(2).

[15] *Criminal Records Act*, note 4, s 6.3.

[16] *Criminal Records Act*, note 4, ss 6.3(2)–(7). Also see *Criminal Records Regulations*, SOR/2000-303, ss 2–4.

[17] *Criminal Records Act*, note 4, s 2(1).

[18] *Criminal Records Act*, note 4, s 6.3(1).

> (b) is otherwise at a greater risk than the general population of being harmed by a person in a position of trust or authority towards them.

[22] So, the *Criminal Records Act* permits the disclosure of some, primarily sexual offence, convictions for which a record suspension (pardon) has been granted, to assist employers and volunteer organizations screen applicants for positions of trust or authority towards young or otherwise vulnerable persons.

b. *Youth Criminal Justice Act*

[23] The *Youth Criminal Justice Act* generally restricts access to, and prohibits the disclosure of information in, records created or kept under the Act (youth records).[19] However, certain people can access certain youth records for certain periods of time.[20]

[24] Among the list of persons who may be given access to a youth record are:

- "the young person to whom the record relates;" and
- "a person, for the purpose of carrying out a criminal record check required by the Government of Canada or the government of a province or a municipality for purposes of employment or the performance of services, with or without remuneration."[21]

[25] The period of time during which these persons can access a youth record is called an "access period". The *Youth Criminal Justice Act* provides different access periods for different types of youth records.[22]

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[19] *Youth Criminal Justice Act*, note 6, s 118(1).

[20] *Youth Criminal Justice Act*, note 6, ss 119–128.

[21] *Youth Criminal Justice Act*, note 6, s 119(1)(a) and (o).

[22] *Youth Criminal Justice Act*, note 6, s 119(2)(a)–(h).

Access Periods for Youth Records under the *Youth Criminal Justice Act*

Youth Record	Access Period
Finding of guilt with youth sentence for an indictable offence	5 years after sentence completed
Finding of guilt with youth sentence for a summary conviction offence	3 years after sentence completed
Conditional discharge	3 years after finding of guilt
Extrajudicial sanction	2 years after young person consents to sanction
Absolute discharge	1 year after finding of guilt
Stayed charge	1 year after stay, if no further proceedings taken
Finding of guilt with reprimand	2 months after finding of guilt
Dismissed or withdrawn charge	2 months after the dismissal or withdrawal
Acquittal (except verdict of not criminally responsible on account of mental disorder)	2 months after expiry of appeal period, or 3 months after appeal proceedings are completed

[26] The access period for a finding of guilt with youth sentence will be extended if, during the period, the young person is found guilty of another offence committed while he or she was still a young person.[23] And, a finding of guilt with youth sentence will become an adult record (conviction) if, during the applicable access period, the offender is convicted of an offence committed after he or she reached the age of 18 years.[24] There are also exceptionally long, and even indefinite, access periods for certain findings of guilt, for very serious offences, under the *Youth Criminal Justice Act*.[25]

[27] Unlike other youth records, records regarding a young person's participation in extrajudicial measures (other than extrajudicial sanctions) under the *Youth Criminal Justice Act* can only be accessed by a very restricted list of persons that does not include the young person, nor a person carrying out a government-required criminal record check for screening purposes.[26]

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[23] *Youth Criminal Justice Act*, note 6, s 119(2)(i) and (j).

[24] *Youth Criminal Justice Act*, note 6, s 119(9)(b) and (c).

[25] *Youth Criminal Justice Act*, note 6, ss 115(2)–(3) and 120(1)(a) and (3). Also see Department of Justice, "Youth Records", online: *Government of Canada* <justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/sheets-feuillets/recor-dossi.html>.

[26] *Youth Criminal Justice Act*, note 6, s 119(4).

[28] A person given access to a youth record, or to whom youth record information is disclosed, under the *Youth Criminal Justice Act* is generally prohibited from disclosing the information to any other person.[27]

c. *Criminal Code*

[29] The *Criminal Code* includes provisions regarding the records of persons dealt with by alternative measures.[28] Those provisions allow records relating to alleged offences to be kept, and the information in those records to be disclosed, to certain persons for certain purposes. However, none of the provisions can be taken to permit the disclosure of alleged offences dealt with by alternative measures in police record check results.[29]

d. Summary

[30] In summary, there are criminal law statutes that limit the disclosure of information regarding:

- absolute and conditional discharges,
- criminal convictions for which a record suspension (pardon) has been granted,
- youth records, and
- alternative measures,

in police record check results and otherwise.

E. Calls for Legislation to Regulate Police Record Checks

[31] Because the statutes discussed above only partially regulate the disclosure of information in police record check results, and do not specifically limit the disclosure of non-conviction information, there have been many calls for specific legislation to regulate police record checks. Civil liberties organizations, privacy commissioners, the Uniform Law Conference of Canada, the Canadian Bar

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[27] *Youth Criminal Justice Act*, note 6, s 129.

[28] *Criminal Code,* note 7, ss 717.1–717.4.

[29] Canadian Civil Liberties Association, *False Promises, Hidden Costs: The case for reframing employment and volunteer police record check practices in Canada* (Toronto: May 2014) at 21 [CCLA Report]; Canadian Bar Association, *Collateral Consequences of Criminal Convictions* (Ottawa: February 2017) at 38; and Ontario Association of Chiefs of Police, *LEARN Companion to the Police Record Checks Reform Act 2015* (June 2019) at 23, online: *Windsor Police Service* <police.windsor.on.ca/services/info-requests/Documents/LEARN%20COMPANION%20TO%20PRCRA.pdf> [OACP Guide].

Association, superior and appellate court justices, and others have advocated for such legislation.

1. CIVIL LIBERTIES ORGANIZATIONS

[32] The Canadian Civil Liberties Association [CCLA] has published two reports on police record check practices and the disclosure of non-conviction information in police record check results.[30] In its most recent report, published in 2014, the CCLA demonstrated that:

- "[a]n increasing number of Canadian organizations" were using police record checks as a screening tool;[31]
- police record check practices were only partially regulated by a "patchwork" of legislation;[32]
- because of "legislative gaps", there was "significant variation between the information disclosed by different police forces;"[33]
- non-conviction information was being disclosed in police record check results in many jurisdictions;[34] and
- those disclosures were negatively affecting Canadians by creating barriers to employment, volunteer and other important opportunities.[35]

[33] The CCLA made several recommendations, including a recommendation that Canadian governments should enact legislation to:

- prohibit the disclosure of non-conviction information in the results of criminal record and police information checks (that is, in the results of the first two levels, or narrowest types, of police record checks); and
- establish "centralized bodies [like British Columbia's Criminal Records Review Program] to conduct vulnerable sector screening and evidence-based risk assessments … for all positions that would qualify for a

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[30] Canadian Civil Liberties Association, *Presumption of Guilt? The Disclosure of Non-Conviction Records in Police Background Checks* (Toronto: May 2012); and CCLA Report.

[31] CCLA Report at 5, 33–41 and 66.

[32] CCLA Report at 5, 16, 20–22 and 67–68.

[33] CCLA Report at 10, 16–17 and 68.

[34] CCLA Report at 5, 10 and 14.

[35] CCLA Report at 6, 11, 61–64 and 67.

vulnerable sector check" (that is, for all positions that would qualify for the third level, or most extensive type, of police record check).[36]

[34] Pending such legislation, the CCLA recommended that police services should:

- not disclose non-conviction information in criminal record and police information check results, and
- only disclose non-conviction information in vulnerable sector check results in "exceptional circumstances where there are reasonable grounds to believe that [the] disclosure … will mitigate an identifiable risk to public safety."[37]

[35] The Alberta Civil Liberties Research Centre [ACLRC] has also advocated for legislation regulating police record checks. In a report published in 2019, the ACLRC:

- discussed the negative impact the disclosure of non-conviction information in police record check results can have on an individual; and
- recommended that Alberta should enact legislation, like the Ontario Act, or the Uniform Police Record Checks Act [Uniform Act],[38] to limit the disclosure of non-conviction information in police record check results.[39]

2. PRIVACY COMMISSIONERS

[36] Provincial privacy commissioners have also called for legislation limiting the disclosure of non-conviction information in police record check results.

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[36] CCLA Report at 7, 15, 60 and 69. The Criminal Records Review Program [CRRP], established by the *Criminal Records Review Act,* RSBC 1996, c 86 [*CRRA*], conducts vulnerable sector screening and evidence-based risk assessments for British Columbia government and government-supported/funded organizations (that is, for organizations covered by the *CRRA*). The CRRP also offers its services to non-profit (volunteer) organizations not covered by the *CRRA*. For-profit organizations not covered by the *CRRA* rely on British Columbia police services to assist them with their vulnerable sector screening: "Criminal Record Check BC", online: *Government of British Columbia* <www2.gov.bc.ca/gov/content/safety/crime-prevention/criminal-record-check>.

[37] CCLA Report at 8 and 70–73.

[38] Uniform Law Conference of Canada, Uniform Police Record Checks Act, 2018ulcc0007 (Quebec City: August 2018) [Uniform Act].

[39] Alberta Civil Liberties Research Centre, *Collection, Storage, and Disclosure of Personal Information by the Police: Recommendations for National Standards* (2019) at 41–45 and 66.

[37] In 2014, Elizabeth Denham, then the Information and Privacy Commissioner for British Columbia, published an investigation report which examined:

- the increasing use of police information checks in British Columbia;
- the potential for those checks to "disclose sensitive personal information including mental health illnesses, suicide attempts, and allegations or investigations that did not result in charges or convictions" (non-conviction information); and
- the significant negative effects such disclosures had on British Columbians.

Ms. Denham's primary recommendation was that the British Columbia government should enact a statute to, among other things, prohibit the disclosure of non-conviction information in the results of police information checks conducted for positions outside the vulnerable sector.[40]

[38] The Office of the Information and Privacy Commissioner of Ontario has also conducted privacy investigations into police record check practices, expressed concerns about non-conviction information disclosures, and advocated for legislation prohibiting or limiting such disclosures. More recently, Ontario's Commissioner, Brian Beamish, offered advice and support to the Ontario government when it was developing the Ontario Act.[41]

[39] Alberta's Information and Privacy Commissioner, Jill Clayton, weighed in on the discussion in late 2019. In a letter to Doug Schweitzer, Alberta's Minister of Justice and Solicitor General, she asked the Alberta government to address the "legislative void" surrounding police information checks in Alberta by enacting legislation similar to the Ontario Act.[42]

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[40] Elizabeth Denham, Information and Privacy Commissioner, *Investigation Report F14-01: Use of Police Information Checks in British Columbia* (15 April 2014) at 3 and 5, online: *Office of the Information & Privacy Commissioner for British Columbia* <oipc.bc.ca/investigation-reports/1631>.

[41] Letter from Brian Beamish, Information and Privacy Commissioner of Ontario to Shafiq Qaadri, Member of Provincial Parliament, Legislative Assembly of Ontario, Chair, Standing Committee on Justice Policy (4 November 2015), online: *Information and Privacy Commissioner of Ontario* <ipc.on.ca/wp-content/uploads/2016/08/2015-11-04-Letter-to-Shafiq-Qaadri-re-Draft-Bill-113-Submission.pdf>. Also see "Police record checks under scrutiny in Ontario" (4 August 2014), online: *CBC News* <cbc.ca/news/canada/sudbury/police-record-checks-under-scrutiny-in-ontario-1.2726935>.

[42] Letter from Jill Clayton, Information and Privacy Commissioner of Alberta to Doug Schweitzer, Minister of Justice and Solicitor General, Government of Alberta (21 October 2019), quoting QB Decision, note 9 at para 213, online: *Office of the Information and Privacy Commissioner of Alberta* <oipc.ab.ca/media/1016898/Letter_Police_Information_Checks_Oct2019.pdf>.

3. UNIFORM LAW CONFERENCE OF CANADA

[40] The Uniform Law Conference of Canada [ULCC] has also recommended that Canadian governments enact legislation like the Ontario Act to regulate police record checks, including their potential to disclose non-conviction information.[43]

[41] In 2016, a ULCC working group was struck to study whether Canadian governments:[44]

> should adopt uniform legislation to restrict the disclosure of "non-conviction" information in police and RCMP databases to third parties, and ... provide a mechanism for individuals to review and correct information contained in those databases.

[42] The ULCC working group considered the reports issued by civil liberties organizations and provincial privacy commissioners, and examined the police record check practices of police services across the country. Its study confirmed that, because of the "patchwork of laws, policies and guidelines" governing police record checks, police services in Canada, and even those within a province (like Alberta), had disparate police record check practices. There were variances in:

- the types of police record checks police services provided,
- the information disclosed in the results of each type of check, and
- the procedures provided for correcting or challenging the information disclosed in police record check results.[45]

[43] The ULCC working group recommended that draft uniform legislation be prepared to regulate police record check practices across Canada, and that the Ontario Act be used as a starting point.[46] Those recommendations were approved at a joint session of the ULCC's Civil and Criminal Sections in 2017.[47]

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[43] Uniform Law Conference of Canada, *Communique* (Fall 2019) at 2.

[44] Uniform Law Conference of Canada, *Resolutions of the Criminal Section (2016)*, 2016ulcc0028 (Fredericton: August 2016) at 8.

[45] Uniform Law Conference of Canada, *Criminal Record Checks – Report of the Working Group (2017)*, 2017ulcc0010 (Regina: August 2017) at paras 10–13, 21–26, 50 and 75.

[46] Uniform Law Conference of Canada, *Criminal Record Checks – Report of the Working Group (2017)*, 2017ulcc0010 (Regina: August 2017) at para 76.

[47] Uniform Law Conference of Canada, *Minutes of the Criminal Section (2017)*, 2017ulcc0016 (Regina: August 2017) at paras 19–21 and *Resolutions of the Joint Sessions (2017)*, 2017ulcc0022 at 2 (Regina: August 2017).

[44] The ULCC working group prepared a final report and a draft uniform statute for the ULCC to consider. The report explained that the statute:

- mirrored the Ontario Act, "with some minor variations [that] the Working Group considered to be improvements"; and
- was "structured to be easily adapted by each [Canadian] jurisdiction."

The report also advised that the working group had liaised with the Ontario government team responsible for the Ontario Act and its regulations; and received useful feedback on its draft uniform statute and supporting commentary from that team.[48]

[45] The ULCC working group's final report was accepted, and the Uniform Act was adopted, at a joint session of the ULCC's Civil and Criminal Sections in 2018.[49]

[46] The Uniform Act is annotated and, therefore, provides some useful analysis of the provisions in the Ontario Act (on which it is based). However, it has yet to be enacted, with or without modifications, by any government in Canada.

4. CANADIAN BAR ASSOCIATION

[47] In keeping with the reports and recommendations of civil liberties organizations, provincial privacy commissioners, and the ULCC, the Canadian Bar Association [CBA] has passed two resolutions in favour of urging Canadian governments to adopt legislation to regulate police record checks. More specifically, the CBA has resolved to advocate for legislation (i) restricting the disclosure of non-conviction information in police record check results, and (ii) providing a means for individuals to challenge the information found in police databases.[50]

[48] Among other things, the CBA's resolutions recognize that:

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[48] Uniform Law Conference of Canada, *Final Report of the Working Group on Criminal Record Checks,* 2018ulcc0005 (Quebec City: August 2018) at paras 8 and 22–25.

[49] Uniform Law Conference of Canada, "ULCC concludes its 100th annual meeting" *Cision* (16 August 2018), online: <newswire.ca/news-releases/ulcc-concludes-its-100th-annual-meeting-691044891.html>.

[50] Canadian Bar Association, *Restricting Disclosure of Non Conviction Records*, Resolution 16-07-A (2016) and *Disclosure of Non-Conviction Records*, Resolution 19-03-A (2019).

- employers, volunteer organizations and other bodies seek the disclosure of personal information held in police databases;
- police databases contain non-conviction information, some of which may be outdated or inaccurate; and
- the disclosure of non-conviction information in police record check results can negatively affect one's ability to secure employment, volunteer, educational and other important opportunities.

The latest resolution acknowledges that Ontario already has the kind of legislation the CBA is calling for.[51]

5. RECENT COURT DECISIONS

[49] Some recent court decisions have also commented on the issues arising from police record check practices in Canada, and suggested provincial legislation is required to regulate police record checks.

a. Manitoba

[50] In *Kalo v Winnipeg (City of) on behalf of Winnipeg Police Service*,[52] Justice Lanchbery of the Manitoba Court of Queen's Bench reviewed a Winnipeg Police Service decision to disclose stayed sexual assault and sexual interference charges in the results of a vulnerable sector check. The applicant, Mr. Kalo, had requested the vulnerable sector check when seeking a school bus driver position.

[51] Justice Lanchbery was critical of the guidelines the Winnipeg police had developed for police record checks. He determined that the guidelines' tool for assessing whether non-conviction information should be exceptionally disclosed in vulnerable sector check results, and the process the guidelines provided for challenging the disclosure of non-conviction information, were flawed and unfair. After ordering the Winnipeg police to provide Mr. Kalo an opportunity to challenge their disclosure decision at an in-person hearing, Justice Lanchbery said:[53]

> [49] The issues raised in Mr. Kalo's motion are of significant importance to the public at large. If individual police departments were permitted to create their own separate guidelines for [the]

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[51] Canadian Bar Association, *Restricting Disclosure of Non Conviction Records*, Resolution 16-07-A (2016) and *Disclosure of Non-Conviction Records*, Resolution 19-03-A (2019).

[52] *Kalo v Winnipeg (City of) on behalf of Winnipeg Police Service*, 2018 MBQB 68.

[53] *Kalo v Winnipeg (City of) on behalf of Winnipeg Police Service*, 2018 MBQB 68 at paras 49 and 53.

> "exceptional" disclosure [of non-conviction information] or different hearing processes, the resulting and potentially inconsistent multi-jurisdictional approach has the potential to create mass confusion. There should be certainty and predictability in outcomes no matter which police agency is considering exceptional disclosure.
>
> …
>
> [53] … The problems I have identified may be avoided in the future if legislation [regulating police record check processes] existed at the provincial level.

[52] The City of Winnipeg appealed from Justice Lanchbery's decision, and succeeded in getting Mr. Kalo's matter referred back to the Court of Queen's Bench for a fresh hearing, before a different judge, on a proper record. However, like Justice Lanchbery, the Manitoba Court of Appeal expressed concerns about the police record check practices of the Winnipeg police (including the disclosure of non-conviction information in some police record check results), and the fact that there is no specific legislation authorizing or regulating those practices.[54]

[53] After the Court of Appeal's decision, Mr. Kalo and the Winnipeg police settled their dispute. So, the matter is no longer before the Manitoba courts.[55]

b. Alberta

[54] In Alberta, Justice Graesser of the Court of Queen's Bench considered the police record check practices of the Edmonton Police Service in *Edmonton (Police Service) v Alberta (Information and Privacy Commissioner)*.[56] Justice Graesser's judicial review decision upheld the decision of an adjudicator from the Office of the Information and Privacy Commissioner.

[55] The adjudicator's decision considered police information and vulnerable sector checks the Edmonton police conducted for AB, a man employed as a child and youth care worker. Together, the results of those checks disclosed:

- a youth sexual assault finding of guilt that resulted in an absolute discharge;

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[54] *Kalo v Winnipeg (City of)*, 2019 MBCA 46 at paras 46 and 54–55.

[55] Jacques Marcoux, "Police, defence lawyers, child protection group support creation of criminal record check legislation" *CBC News* (18 October 2019), online: <cbc.ca/news/canada/manitoba/kalo-record-check-legislation-1.5325246>.

[56] QB Decision, note 9.

- a common assault charge that resulted in an acquittal (not guilty finding); and
- three sexual assault allegations that did not result in any charges, including one dating back to when AB was a youth, and one AB was previously unaware of.[57]

[56] When AB provided the police information and vulnerable sector check results to his employer, his "employment of some eleven years was terminated."[58] AB responded by filing a complaint against the Edmonton police with the Office of the Information and Privacy Commissioner.

[57] An adjudicator determined that the Edmonton police had violated AB's privacy rights. Among other things, she found that AB "did not consent to the [Edmonton police's] use of his personal information to create the [police information and vulnerable sector check results] within the terms of section 39(1)(b) of the *FOIP Act* or section 7 of the [*FOIP*] *Regulation*."[59] In reaching that conclusion, the adjudicator held that the consent forms AB completed for the police information and vulnerable sector checks did not detail the kinds of non-conviction information that might be located during the checks; nor address the use the Edmonton police might make of any non-conviction information it located. Consequently, AB could not have known that the Edmonton police would (i) search for various kinds of non-conviction information and (ii) include such information in the results of his checks if it was considered relevant. Therefore, AB did not provide the required consent.[60]

[58] In upholding the adjudicator's decision as reasonable, Justice Graesser (among other things):

- reviewed the relevant provisions of Alberta's *FOIP Act* and *FOIP Regulation*;
- criticized the use of the catch-all term "police files" in the Edmonton police consent forms, stating that: [61]

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[57] QB Decision, note 9 at paras 21–22, 26, 29, 52–55, 85, 182 and 210.

[58] QB Decision, note 9 at para 59.

[59] *Edmonton (Police Service) (Re)*, 2017 CanLII 88263 (AB OIPC) at para 63.

[60] *Edmonton (Police Service) (Re)*, 2017 CanLII 88263 (AB OIPC) at paras 48–63.

[61] QB Decision, note 9 at paras 144–146. Also see paras 157, 159 and 164.

> no individual [applying for a police information or vulnerable sector check] would intuitively understand that "police files" would include information about unsubstantiated complaints to the police, matters that have been investigated by police for which no action was taken, or matters where charges were laid but the accused was acquitted;

- expressed concern about non-conviction information in police databases being disclosed in police record check results and used to inform employment-related decisions;[62]
- criticized the disclosure of non-conviction information in AB's police information and vulnerable sector check results, and how that information was disclosed (that is, that unsubstantiated complaints against AB were "reported as virtual fact");[63]
- strongly suggested that Alberta needs specific legislation to regulate police record checks;[64] and
- encouraged ALRI "to consider the potential for legislation in Alberta similar to that in Ontario."[65]

[59] The Edmonton police did not appeal from Justice Graesser's decision.

c. Ontario

[60] Most recently, in *CM v York Regional Police*,[66] the Ontario Superior Court of Justice's Divisional Court set aside a York Regional Police decision to disclose a withdrawn sexual interference charge in the results of a vulnerable sector check. The applicant, CM, had requested the vulnerable sector check when seeking a volunteer position at a theatre. He was seeking the volunteer position to qualify for admission to a college course he wanted to take.

[61] The York police conducted CM's vulnerable sector check under guidelines the Ontario Association of Chiefs of Police had developed for police record checks (the OACP guidelines), as the Ontario Act was not in force when the check was requested. After receiving the vulnerable sector check results, CM asked the York police to reconsider their decision to disclose the withdrawn sexual interference charge.

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[62] QB Decision, note 9 at paras 147–148.

[63] QB Decision, note 9 at paras 209–210.

[64] QB Decision, note 9 at paras 198–203, 212–214 and 216.

[65] QB Decision, note 9 at para 215.

[66] *CM v York Regional Police*, 2019 ONSC 7220 [ON Decision].

[62] The York police processed CM's reconsideration application under the OACP guidelines and issued a decision upholding their initial disclosure decision. The Ontario Act became effective after CM applied for reconsideration but before the York police issued their reconsideration decision. CM sought judicial review of the reconsideration decision.

[63] Justice Myers (writing for a unanimous panel of three justices) determined that the process the York police used to make the reconsideration decision was unfair to CM. More specifically, he concluded that CM "was entitled to know all the information that the decision-makers had before them and to make submissions on that information."[67]

[64] In discussing the importance of having a fair process for determining whether non-conviction information should be disclosed in police record check results, Justice Myers observed that:[68]

> [53] … [A]s visible minorities and vulnerable people are at risk of having more contacts with the police, it follows that they are at risk of having more non-conviction information about them in police databases.
>
> [54] … This increases the risk that those who already face discriminatory barriers to full participation in our society will also be more at risk of adverse outcomes in [vulnerable sector checks] …
>
> [55] … [D]isadvantaged groups face a double whammy as one potentially prejudicial outcome is layered upon another to further increase existing discriminatory barriers. …

[65] Justice Myers also determined that the York police's reconsideration decision was unreasonable because it failed to "meet the requirements of intelligibility, transparency, and justifiability set out in *Dunsmuir*."[69] Finally, he determined that the reconsideration decision should have been made under the new Ontario Act, rather than under the OACP guidelines.[70]

[66] The Divisional Court set the York police's reconsideration decision aside and remitted CM's reconsideration application to a "police record check

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[67] ON Decision, note 66 at para 52.

[68] ON Decision, note 66 at paras 53–55.

[69] ON Decision, note 66 at para 57, referencing *Dunsmuir v New Brunswick*, 2008 SCC 9.

[70] ON Decision, note 66 at para 67.

provider" under the Ontario Act to make a decision under that statute.[71] In arriving at this remedy, Justice Myers noted that CM's matter raised these issues:

- What information can a police record check provider (under the Ontario Act) consider when deciding whether non-conviction information should be disclosed in the results of a vulnerable sector check? More specifically, can the provider consider "untested information in … undisclosed occurrence reports [and/or] information provided by [an] investigating officer"?[72]
- Can the Ontario Act be interpreted to permit the disclosure of a withdrawn sexual interference charge when the *Criminal Records Act* prohibits the disclosure of a related sexual assault charge (arising out of the same incident) that resulted in a conditional discharge? Or, would such an interpretation be absurd?[73]

[67] The Divisional Court decision in *CM v York Regional Police* suggests that provincial legislation regulating police record checks, and interpretations of such legislation, are needed to ensure that the processes used to determine whether non-conviction information should be disclosed in police record check results are fair.

6. WHAT ARE THE PROBLEMS POSED BY POLICE RECORD CHECK PRACTICES AND WHY IS SPECIFIC LEGISLATION THE PROPOSED SOLUTION?

[68] Combined, the many calls for specific legislation to regulate police record checks demonstrate that there are inconsistencies in:

- the types of police record checks that individual police services in Canada offer,
- the types of information that might be disclosed in the results of each type of check,

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[71] ON Decision, note 66 at paras 4 and 73.

[72] ON Decision, note 66 at para 69–70.

[73] ON Decision, note 66 at para 70. CM was charged with sexual assault and sexual interference. The charges related to a single incident between CM and a child under his supervision. Pursuant to a plea bargain reached by the Crown and CM's defence counsel, the sexual interference charge was withdrawn and, rather than pleading guilty to the sexual assault charge, CM pleaded guilty to the lesser and included charge of common assault. Following a joint submission on sentence, CM received a conditional discharge, which could not be disclosed after three years (under the *Criminal Records Act*). The conditional discharge was intended "to protect C.M. from the negative effects of a criminal record on his future employment prospects": para 9.

- the processes used to determine whether non-conviction information should be disclosed, and
- the processes provided for correcting or challenging the information disclosed.

[69] They also demonstrate that the disclosure of non-conviction information in police record check results is particularly problematic, as it:

- can unfairly, and unnecessarily, hinder individuals who have not been found guilty of a crime from securing employment, volunteer, educational and other important opportunities; and
- may have disproportionate negative effects on visible minorities and other vulnerable individuals who tend to have more contact with the police.

[70] Specific legislation regulating police record checks is the proposed solution because (among other things) such legislation could:

- standardize the police record check practices adopted by police services in a Canadian jurisdiction (like Alberta);
- provide clarity as to the types of information that might be disclosed in different police record check results;
- set out a fair and transparent process for determining whether non-conviction information should be disclosed (which would increase the predictability of disclosure outcomes); and
- provide fair and transparent processes for correcting or challenging disclosed information.

F. Ontario's *Police Record Checks Reform Act, 2015*

[71] The Ontario Act came into force in November 2018. It is the first legislation of its kind in Canada and, as discussed above, many have called on other Canadian governments to adopt it or a similar statute (like the Uniform Act).

[72] The Ontario Act references, and indicates it complies with, Ontario's privacy statutes, the *Criminal Records Act*, the *Youth Criminal Justice Act*, and the

Criminal Code.[74] It fills the gaps left by those statutes by standardizing police record check practices in Ontario. Among other things, the Ontario Act:

- specifies the types of police record checks that can be conducted in Ontario;
- lists the types of information that will be disclosed in the results of each type of check;
- defines "non-conviction information" for police record check purposes;
- restricts the disclosure of non-conviction information to the results of vulnerable sector checks;
- provides a test to determine when non-conviction information should be disclosed in vulnerable sector check results;
- dictates how certain types of information must be disclosed, and who disclosure can be made to; and
- provides processes for correcting or challenging the information disclosed.

1. TYPES OF POLICE RECORD CHECKS AND THE INFORMATION THEY DISCLOSE

[73] Three types of police record checks can be conducted under the Ontario Act: criminal record checks, criminal record and judicial matters checks, and vulnerable sector checks.[75] Each type of check discloses a different amount, or level, of information.[76]

[74] A criminal record check [CRC] discloses:

- criminal convictions for which no record suspension (pardon) has been granted;[77] and
- findings of guilt under the *Youth Criminal Justice Act*, during the applicable access period under that Act.

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[74] Ontario Act, s 4.

[75] Ontario Act, s 8.

[76] Ontario Act, s 9 and Schedule.

[77] However, a summary conviction will not be disclosed if the police record check "request is made more than five years after the date of the summary conviction": Table of Authorized Disclosure in the Schedule.

[75] A criminal record and judicial matters check [CRJMC] discloses everything a CRC discloses, plus:

- absolute and conditional discharges for one and three years, respectively;
- outstanding criminal charges and arrest warrants; and
- court orders.[78]

[76] And, a vulnerable sector check [VSC] discloses everything a CRJMC discloses, plus:

- findings of not criminally responsible on account of mental disorder [NCR-MD];[79]
- criminal convictions for which a record suspension (pardon) has been granted, if disclosure is authorized under the *Criminal Records Act*; and
- non-conviction information, if strict exceptional disclosure criteria are met.

[77] Accordingly, in Ontario, only VSC results have the potential to disclose non-conviction (and some other) information. VSC results have the potential to disclose the most police information because they are intended to assist employers and volunteer organizations screen applicants for positions of trust or authority towards young or otherwise vulnerable persons.

2. POTENTIAL DISCLOSURE OF NON-CONVICTION INFORMATION IN VULNERABLE SECTOR CHECK RESULTS

[78] For the purposes of the Ontario Act, "non-conviction information" means "information concerning the fact that an individual was charged with a criminal offence if the charge, (a) was dismissed, withdrawn or stayed, or (b) resulted in a stay of proceedings or an acquittal."[80] Information that forms "part of a record that may be kept under section 717.2 or 717.3 of the *Criminal Code*" (regarding

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[78] However, these court orders will not be disclosed: court orders made under Ontario's *Mental Health Act* or Part XX.1 of the *Criminal Code* (dealing with mental disorder); court orders made in relation to a charge that has been withdrawn; and restraining orders made under Ontario's *Family Law Act*, *Children's Law Reform Act* or *Child, Youth and Family Services Act, 2017*: Table of Authorized Disclosure in the Schedule.

[79] However, a NCR-MD finding will not be disclosed if the police record check "request is made more than five years after the date of the finding or if the individual received an absolute discharge": Table of Authorized Disclosure in the Schedule.

[80] Ontario Act, s 1(1).

alternative measures) is specifically excluded from the Act's definition of "non-conviction information."[81]

[79] The relatively narrow definition of "non-conviction information" in the Ontario Act ensures that details regarding an individual's:

- participation in alternative measures, and
- interactions with the police that did not result in any criminal charges

will never be disclosed under the Act. Such details do not fall within the Act's definition of "non-conviction information", and there is nothing else in the Act authorizing their disclosure.[82]

[80] Details that fall within the Ontario Act's definition of "non-conviction information" will only be disclosed in the results of a VSC if all these exceptional disclosure criteria are met:[83]

> 1. The criminal charge to which the information relates is for an offence specified in the regulations …
> 2. The alleged victim was a child or a vulnerable person.
> 3. After reviewing entries in respect of the individual, the police record check provider has reasonable grounds to believe that the individual has been engaged in a pattern of predation indicating that the individual presents a risk of harm to a child or a vulnerable person, having regard to the following:
>
> i. Whether the individual appears to have targeted a child or a vulnerable person.
>
> ii. Whether the individual's behaviour was repeated and was directed to more than one child or vulnerable person.
>
> iii. When the incident or behaviour occurred.
>
> iv. The number of incidents.

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[81] Ontario Act, s 1(4).

[82] Uniform Act, note 38 at 3 (Comments under the definition of "non-conviction information" in s 1(1)); and "Police Record Checks", online: *Ontario Ministry of the Solicitor General* <mcscs.jus.gov.on.ca/english/police_serv/PoliceRecordsChecks/PS_records_checks.html>.

[83] Ontario Act, s 10(2). See *Specified Offences – Exceptional Disclosure of Non-Conviction Information*, O Reg 350/18 for the lengthy list of offences that have been specified for the purpose of paragraph 1 of s 10(2) of the Act.

> v. The reason the incident or behaviour did not lead to a conviction.
>
> vi. Any other prescribed considerations.

[81] The exceptional disclosure "criteria are designed to limit the disclosure of non-conviction information to situations where the information may be considered truly relevant [to the public's safety], such that it outweighs society's interest in protecting [the applicant's] privacy."[84] It is up to a "police record check provider" under the Ontario Act to determine if the criteria are met.[85] Accordingly, Ontario police services still have some discretion to decide whether the results of a VSC will disclose criminal charges that were withdrawn, dismissed or stayed; or that resulted in a stay of proceedings or an acquittal (that is, "non-conviction information" under the Act).

[82] A guide developed to assist Ontario police services understand and apply the Ontario Act and other relevant legislation [OACP Guide] includes this advice:[86]

> It is recommended that the decision to release non-conviction information should not be made by the member processing the [vulnerable sector] check. When applicable, the member will forward the information to a decision maker who is another member in a supervisory or managerial position, in order to determine if [the] exceptional disclosure [criteria have] been met.

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[84] Uniform Act, note 38 at 11 (Comments under s 10).

[85] A "police record check provider" might be a chief of police, a police service member, an entity the Royal Canadian Mounted Police [RCMP] has permitted to access the Canadian Police Information Centre [CPIC] databases, an authorized body under the *Criminal Records Act*, or a third party entity (that is, an entity that has an agreement with a police service to provide services related to conducting a police record check): s 1(1). Also see s 8.

[86] OACP Guide at 37.

3. DISCLOSURE TABLE

Disclosure under the Ontario Act:

Type of information	Criminal record check [CRC]	Criminal record and judicial matters check [CRJMC]	Vulnerable sector check [VSC]
Criminal convictions, with no record suspension (pardon)	✓	✓	✓
Findings of guilt under *YCJA*	✓	✓	✓
Absolute and conditional discharges	✗	✓	✓
Outstanding criminal charges and arrest warrants	✗	✓	✓
Court orders	✗	✓	✓
NCR-MD findings	✗	✗	✓
Certain criminal convictions, with record suspension (pardon)	✗	✗	✓
Criminal charges that were dismissed, withdrawn or stayed; or that resulted in a stay of proceedings or an acquittal ("non-conviction information" under the Act)	✗	✗	?

✓ = disclosed, ✗ = not disclosed, ? = potentially disclosed (if exceptional disclosure test is met)

4. HOW CERTAIN INFORMATION IS DISCLOSED AND WHO DISCLOSURE IS MADE TO

[83] The Ontario Act and its regulations also dictate how certain information must be disclosed in police record check results, and who police record check results can be disclosed to.

[84] Findings of guilt under the *Youth Criminal Justice Act* must be disclosed separately from other information disclosed in police record check results.[87] The numbering of the results page disclosing the youth findings of guilt (that is, the separate youth record) cannot "be sequential to pages containing other [disclosed] information", nor "suggest in some other way that other information

[87] Ontario Act, s 11.

was disclosed."[88] And, this notice to the applicant must accompany the separate youth record: [89]

> 2(2) … This record contains information about your findings of guilt under the *Youth Criminal Justice Act*. The *Youth Criminal Justice Act* restricts you from sharing this information, and no one may require you to provide it. Remove this record before sharing your police record check with anyone else, including a potential employer or organization with which you seek to volunteer or enter into a contract.

[85] It may have been an oversight that these rules only specifically reference youth findings of guilt, when the Ontario Act contemplates that information in other records under the *Youth Criminal Justice Act* (like absolute and conditional discharges) might be disclosed. It seems that the rules should apply to all potentially disclosable youth record information.

[86] Notwithstanding the Ontario Act's rules regarding the disclosure of youth record information, the OACP Guide says youth record information should only be disclosed in police record check results pursuant to section 119(1)(o) of the *Youth Criminal Justice Act*.[90] In other words, it says youth record information should only be disclosed "for the purpose of carrying out a criminal record check required by the Government of Canada or the government of a province or a municipality for purposes of employment or the performance of services, with or without remuneration."[91] Consequently, if the OACP Guide is followed, the police record check results of Ontario applicants seeking non-government positions will never disclose any youth record information (separately or otherwise). Moreover, when youth record information is disclosed in the police record check results of Ontario applicants seeking government positions, it will be disclosed directly to the relevant government (with a copy going to the applicant), despite the Ontario Act's rules regarding who police record check results may be given to (discussed below).[92]

[87] The Ontario Act and its regulations also provide that, when non-conviction information is disclosed in VSC results, it must be:

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[88] *Disclosure of Youth Records*, O Reg 349/18, s 1.

[89] *Disclosure of Youth Records*, O Reg 349/18, s 2.

[90] OACP Guide at 38-39.

[91] *Youth Criminal Justice Act*, note 6, s 119(1)(o).

[92] OACP Guide at 38-39.

- "clearly identified as such"; and
- accompanied by:
  - the Act's definition of "non conviction information", and
  - information about the Act's reconsideration process (discussed below).[93]

[88] The Minister of Community Safety and Correctional Services may make regulations under the Act to require the use of approved disclosure forms.[94] However, no such regulations have been made yet.

[89] Regarding who police record check results may be given to, the Ontario Act says a police record check provider can only disclose the results to the applicant.[95] However, once the applicant has received the results, the police record check provider can share them with the person or organization who required the police record check, as long as the applicant provides written consent.[96]

[90] A police record check provider is exempt from the provisions restricting who police record check results may be given to in certain, well-defined, circumstances.[97]

5. PROCESSES FOR CORRECTING OR CHALLENGING DISCLOSED INFORMATION

[91] Finally, the Ontario Act and its regulations provide processes for challenging and correcting the information disclosed in police record check results.

[92] When non-conviction information is disclosed in the results of a VSC, the applicant must be given an opportunity to ask the police record check provider to reconsider its decision to disclose the information. An applicant has 45 days after receiving his or her VSC results to make such a request. The police record check provider then has 30 days to provide the applicant with a written

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[93] Ontario Act, s 10(3); and *Reconsideration Notice and Process – Exceptional Disclosure of Non-Conviction Information*, O Reg 348/18, s 1.

[94] Ontario Act, ss 1(1), 14 and 22(2)(a).

[95] Ontario Act, s 12(1).

[96] Ontario Act, s 12(2).

[97] *Exemptions*, O Reg 347/18, ss 20–21.1.

reconsideration decision. In making that decision, the police record check provider must:

- consider the police database entries relating to the applicant and the applicant's written submissions; and
- apply the exceptional disclosure criteria.

When "the police record check provider is a member of a police force designated by a chief of police for the purposes of the Act", he or she must also "consult with at least three other members of the police force, including … one [more senior] member."[98]

[93] In addition to the prescribed reconsideration process, the Ontario Act requires every police record check provider to have a process for responding to applicants' requests to correct the information disclosed in their police record check results.[99]

G. Alberta's Police Information Check Disclosure Procedures: How Do They Compare to the Ontario Act?

[94] Alberta lacks a statute like the Ontario Act. There is no Alberta legislation that:

- specifies the types of police record checks that can be conducted in Alberta;
- lists the types of information that will be disclosed in the results of each type of check;
- defines "non-conviction information" for police record check purposes;
- restricts the disclosure of non-conviction information to the results of a certain type of police record check;
- provides a test for determining when non-conviction information should be disclosed in police record check results;

[98] Ontario Act, s 10; and *Reconsideration Notice and Process – Exceptional Disclosure of Non-Conviction Information*, ss 2–4.

[99] Ontario Act, s 15.

- dictates how certain types of information must be disclosed, and who disclosure can be made to; or
- provides processes for correcting or challenging disclosed information.

[95] However, Alberta police services are expected to follow the AACP Procedures, and the contents of those procedures are similar to the contents of the Ontario Act.

[96] The AACP Procedures seek to standardize police record check practices in Alberta, and achieve the right balance "between preserving public safety and protecting the privacy and human rights of [police record check] applicants."[100] The procedures were developed by a working committee of the AACP. The committee consisted of representatives from nine of Alberta's eleven police services, an Alberta Ministry of Justice and Solicitor General representative, and a legal counsel. While developing the AACP Procedures, the committee consulted with various stakeholders, including the Office of the Information and Privacy Commissioner of Alberta, the Mental Health Commission of Canada, the Alberta Human Rights Commission, and the Alberta Ministry of Justice and Solicitor General.[101]

[97] The AACP Procedures were several years in the making. The AACP first endorsed them in May 2018. The latest version of the procedures was endorsed by the AACP in May 2019, and is published on the AACP's website.

[98] Like the Ontario Act, the AACP Procedures reference, and indicate they comply with, privacy and criminal law statutes that place some limits on the disclosure of police information. The AACP Procedures specifically mention Alberta's *FOIP Act* and *Personal Information Protection Act*; the federal *Privacy Act*, *Access to Information Act*,[102] and *Personal Information Protection and Electronic Documents Act*; the *Criminal Records Act*; the *Youth Criminal Justice Act*; and the *Criminal Code*.[103]

1. TYPES OF POLICE RECORD CHECKS AND THE INFORMATION THEY DISCLOSE

[99] The AACP Procedures state that Alberta police services only offer two types of police record checks: police information checks and vulnerable sector

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[100] AACP Procedures at 3.

[101] Summary received from the AACP.

[102] *Access to Information Act*, RSC 1985, c A-1.

[103] AACP Procedures at 3–4, and 6–12.

police information checks.[104] They explain that a third type of police record check – a criminal record check – "may be obtained through an accredited RCMP third party company or by obtaining a Certified Criminal Records Check from the RCMP."[105]

a. Criminal record checks (not covered by the AACP Procedures)

[100] A RCMP website confirms that:

- private companies offer "name-based criminal record checks of the RCMP's Canadian Police Information Centre (CPIC) system", which typically include "a check of the National Repository of Criminal Records … and may include checks of other national databanks;" and
- "[a]ccredited fingerprinting companies … submit fingerprints to the RCMP's Canadian Criminal Real Time Identification Services (CCRTIS) for searches of the National Repository of Criminal Records" only (that is, to obtain certified criminal record checks).[106]

[101] Another RCMP website explains that criminal record checks only disclose whether "a person has been charged or convicted of a crime", and differ from the much more in-depth police information and vulnerable sector police information checks that can be obtained from local police services.[107]

b. Police information and vulnerable sector police information checks (under the AACP Procedures)

[102] The AACP Procedures describe a police information check [PIC] as a check for "offence information, including convictions, non-convictions and other police information [in] police record management systems, and provincial court records."[108] A vulnerable sector police information check [VSPIC] is described as a PIC, plus a check to determine whether the applicant has received a record

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[104] AACP Procedures at 3–4.

[105] AACP Procedures at 4.

[106] "Where do I get a criminal record check?", online: *Royal Canadian Mounted Police* <rcmp-grc.gc.ca/en/where-do-get-a-criminal-record-check>.

Commissionaires is an example of a private company in Alberta that offers name-based criminal record checks and submits fingerprints for certified criminal records checks: "Electronic Criminal Record Checks", online: *Commissionaires* <commissionaires.ca/en/south-alberta/service/individual/electronic-criminal-record-checks>.

[107] "Types of criminal background checks", online: *Royal Canadian Mounted Police* <rcmp-grc.gc.ca/en/types-criminal-background-checks>.

[108] AACP Procedures at 3. The police databases searched include the RCMP's CPIC system, the Alberta courts' Justice Online Information Network, and local police service databases: AACP Procedures at 6.

suspension (pardon) for any sexual offences under the *Criminal Records Act*.[109] The procedures explain that an organization should only require a VSPIC when the applicant is seeking a position of trust or authority towards young or otherwise vulnerable persons.[110]

[103] A PIC under the AACP Procedures will disclose:

- criminal convictions for which no record suspension (pardon) has been granted;
- findings of guilt under the *Youth Criminal Justice Act*, during the applicable access period under that Act;[111]
- absolute and conditional discharges for one and three years, respectively;
- outstanding criminal charges and arrest warrants;
- court orders;[112]
- NCR-MD findings;[113]
- alternative measures;[114]
- youth extrajudicial sanctions;[115]

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[109] AACP Procedures at 4.

[110] AACP Procedures at 4.

[111] However, youth findings of guilt with reprimand will only be disclosed in exceptional circumstances: AACP Procedures at 11.

[112] These types of court orders will be disclosed while they are current: firearm prohibition orders, probation orders and peace bonds: AACP Procedures at 8. Non-criminal driving suspensions and family court restraining orders will not be disclosed: AACP Procedures at 9 and 13.

[113] A NCR-MD finding is a finding that a person is exempt from criminal responsibility "for an act committed or an omission made" because he or she was "suffering from a mental disorder that rendered [him or her] incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong": *Criminal Code*, note 7, s 16. A person found NCR-MD might receive an absolute discharge, a conditional discharge or detention in custody in a hospital: *Criminal Code*, note 7, s 672.54.

NCR-MD findings will "be disclosed for an **indefinite period of time**": AACP Procedures at 10.

[114] Alternative measures will be disclosed "for **one year** from the date of the completion of the program." However, "[d]isclosure may not occur for youths place on the Alternative Measures Program for the first time if no public safety concern exists." See AACP Procedures at 11.

[115] "Extrajudicial sanctions can be disclosed for a period of **two years** from the disposition date": AACP Procedures at 11, with a reference with the *Youth Criminal Justice Act*. However, youth extrajudicial measures "must **not be disclosed**": AACP Procedures at 10.

- stays of proceedings;[116]
- other non-conviction information, in exceptional circumstances; and
- provincial and federal (non-criminal) offences,[117] if there is a public safety concern.[118]

[104] A VSPIC under the AACP Procedures will disclose everything a PIC discloses, plus criminal convictions for which a record suspension (pardon) has been granted, if disclosure is authorized under the *Criminal Records Act*.[119]

[105] Accordingly, both types of police record checks offered by Alberta police services:

- are in-depth, disclosing many types of information;
- routinely disclose NCR-MD findings, which are only routinely disclosed in VSC results in Ontario;
- routinely disclose alternative measures, which are not permitted to be disclosed by the *Criminal Code* and, consequently, are never disclosed in any police record check results in Ontario;[120]
- routinely disclose youth extrajudicial sanctions and stays of proceedings, which should be categorized as non-conviction information and, consequently, are only disclosed in VSC check results in Ontario when the exceptional disclosure criteria are met;[121]
- have the potential to disclose information that falls within the relevant definition of "non-conviction information", whereas only VSCs have that potential in Ontario; and
- have the potential to disclose regulatory (non-criminal) offences, which are never disclosed in any police record check results in Ontario.

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[116] "Stays of Proceedings will be disclosed for a period of **one year** from the disposition date": AACP Procedures at 10, with a reference to the *Youth Criminal Justice Act*.

[117] An offence under the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 is provided as an example of a provincial offence that might raise a public safety concern if the applicant is seeking a position that involves caring for children: AACP Procedures at 12.

[118] AACP Procedures at 6–13 and Appendix 1 – Police Information Check Disclosure Procedures – Reference Chart.

[119] AACP Procedures at 6–13.

[120] See *Criminal Code*, note 7, ss 717.1–717.4. Moreover, alternative measures should be categorized as non-conviction information.

[121] OACP Guide at 22–23.

2. POTENTIAL DISCLOSURE OF NON-CONVICTION INFORMATION IN POLICE INFORMATION CHECK AND VULNERABLE SECTOR POLICE INFORMATION CHECK RESULTS

[106] For the purposes of the AACP Procedures, "non-conviction information" means: [122]

> [i]nformation in a police record that did not result in a conviction and may include information about dismissed or withdrawn charges, police interactions that did not result in charges, mental health related occurrences or any other interactions of any type involving the police.

Adult, but not youth, acquittals (not guilty findings) are excluded from this definition, as the AACP Procedures expressly prohibit the disclosure of adult acquittals.[123]

[107] Although it excludes adult acquittals, the AACP Procedures' definition of "non-conviction information" is much broader than the definition in the Ontario Act. Consequently, Alberta's PICs and VSPICs have the potential to disclose more types of non-conviction information than Ontario's VSCs. Unlike an Ontario VSC, an Alberta PIC or VSPIC might disclose details regarding:

- informal police contact,[124]
- 911 calls,
- mental health apprehensions,[125]
- criminal offence allegations, and
- suspect information.[126]

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[122] AACP Procedures, Appendix 2 – Glossary.

[123] AACP Procedures at 11. Youth acquittals may be disclosed, during the applicable access period under the *Youth Criminal Justice Act*, in exceptional circumstances (that is, as non-conviction information): AACP Procedures at 12.

[124] However, information not contained in police occurrence reports (like information in Street Check Reports) will not be disclosed: AACP Procedures at 4.

[125] However, mental health related occurrences, like suicide attempts, that did not involve "any act or threat of violence towards others [will] not be disclosed": AACP Procedures at 14.

[126] However, suspect information that would hinder or compromise an ongoing investigation will not be disclosed. Victim, complainant and/or witness information will not be disclosed either. See AACP Procedures at 4.

[108] Fortunately, like the Ontario Act, the AACP Procedures provide a test for the disclosure of "non-conviction information" (as defined in the procedures) in the results of a PIC or VSPIC. This is the test:[127]

> Non-conviction police information should not be disclosed … absent exceptional circumstances. In order for an exception to apply, the non-conviction information must be directly relevant to the position being sought by the applicant. In making that determination, the following factors should be considered:
>
> - The nature and responsibilities of the position
> - The individuals with whom the applicant will be interacting (i.e. vulnerable sector)
> - The frequency and recency of the occurrences:
>   - 10 years for sexual and violent related occurrences
>   - 5 years for all non-violent occurrences where there exists a demonstrated pattern of behaviour involving the same category of individuals with whom the applicant would be interacting
> - Any demonstrated pattern of behaviour resulting in a substantial risk to those with whom the applicant would be interacting
> - The reliability of the information contained within the non-conviction records.

[109] The exceptional circumstances test in the AACP Procedures is less stringent than the exceptional disclosure criteria in the Ontario Act. Unlike the criteria in Ontario's statute, the test in Alberta's procedures does not require that the non-conviction information relate to a criminal charge for one of several specified offences, nor that the alleged victim was a child or vulnerable person. Moreover, Alberta's requirement that "the non-conviction information … be directly relevant to the position … sought by the applicant" seems less onerous, or more flexible, than Ontario's requirement of "reasonable grounds to believe that the [applicant] has been engaged in a pattern of predation indicating that [he or she] presents a risk of harm to a child or a vulnerable person."[128]

[110] Although they contain a less stringent test for the disclosure of non-conviction information than the Ontario Act, the AACP Procedures suggest it is

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[127] AACP Procedures at 13–14.

[128] Ontario Act, s 10(2).

unusual for non-conviction information to be disclosed in Alberta PIC and VSPIC results.[129] Statistics the AACP provided to ALRI support that suggestion.

[111] The AACP statistics demonstrate that only a tiny fraction of the PICs and VSPICs conducted in Alberta between 2016 and 2019 resulted in the disclosure of non-conviction information.[130] For example, between January and November 2019, non-conviction information was only disclosed in:

- 84 (0.072%) of 117,317 PICs and VSPICs by the Calgary Police Service;
- 3 (0.003%) of 90,680 PICs and VSPICs by the Edmonton Police Service;
- 0 of 7,678 PICs and VSPICs by the Lethbridge Police Service; and
- 1 (0.019%) of 5,183 PICs and VSPICs by the Medicine Hat Police Service.[131]

[112] While these statistics demonstrate that it is rare for non-conviction information to be disclosed in Alberta PIC and VSPIC results, they do not indicate how often the AACP Procedures' exceptional circumstances test is met. This is because the statistics do not show how many of the PICs and VSPICs conducted by Alberta police services located non-conviction information. The AACP provided that number for the Calgary Police Service. Of the 117,317 PICs and VSPICs the Calgary Police Service conducted between January and November 2019, only 148 located non-conviction information. Non-conviction information was disclosed in the results of 84 (57%) of those 148 checks. So, it appears that, at least in Calgary, the exceptional circumstances test is met more often than not.[132]

[113] It is up to the Alberta police service providing a PIC or VSPIC to determine whether the AACP Procedures' exceptional circumstances test is met. Accordingly, each police service in Alberta has some discretion to decide

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[129] AACP Procedures at 3.

[130] Table received from the AACP.

[131] A much tinier fraction of the police record checks conducted in Ontario in 2019 resulted in the disclosure of non-conviction information (as defined in the Ontario Act). Statistics the OACP provided ALRI indicate that, of the 644,140 police record checks that 28 Ontario police services conducted in 2019, only 15 disclosed non-conviction information. (Recall that, under the Ontario Act, only VSCs have the potential to disclose non-conviction information. 430,513 of the 644,140 police record checks the Ontario police services conducted were VSCs.)

[132] The AACP statistics also show that, of the 1,316 PICs and VSPICs the Lacombe Police Service conducted between January and November 2019, only 24 located non-conviction information, and non-conviction information was only disclosed in the results of 2 (8%) of those 24 checks.

The AACP statistics do not show how many of the PICs and VSPICs conducted by other Alberta police services located non-conviction information.

whether the results of a PIC or VSPIC will disclose many types of non-conviction information. Unlike the OACP Guide, the AACP Procedures do not provide any recommendations regarding the type of Alberta police service member (like someone in a supervisory position) that should be responsible for deciding whether non-conviction information should be disclosed.

3. DISCLOSURE COMPARISON TABLE: ONTARIO VERSUS ALBERTA

Comparing Disclosure under the Ontario Act (except basic CRC disclosure) with Disclosure under the AACP Procedures

Type of information	CRJMC (ON)	PIC (AB)	VSC (ON)	VSPIC (AB)
Criminal convictions, with no record suspension (pardon); findings of guilt under *YCJA*; absolute and conditional discharges; outstanding criminal charges and arrest warrants; and court orders	✓	✓	✓	✓
NCR-MD findings	✗	✓	✓	✓
Certain criminal convictions, with record suspension (pardon)	✗	✗	✓	✓
Alternative measures	✗	✓	✗	✓
Youth extrajudicial sanctions	✗	✓	?	✓
Stays of proceedings	✗	✓	?	✓
Criminal charges that were dismissed, withdrawn or stayed; or that resulted in a youth acquittal	✗	?	?	?
Criminal charges that resulted in an adult acquittal	✗	✗	?	✗
Details regarding police interactions that did not result in any criminal charges (like informal police contact, 911 calls, mental health apprehensions, criminal offence allegations, and suspect information)	✗	?	✗	?
Regulatory offences	✗	?	✗	?

✓ = disclosed, ✗ = not disclosed, ? = potentially disclosed (if exceptional disclosure [ON] or exceptional circumstances [AB] test is met; or, in the case of regulatory offences, if there is a public safety concern [AB])

4. HOW CERTAIN INFORMATION IS DISCLOSED AND WHO DISCLOSURE IS MADE TO

[114] The AACP Procedures say PIC and VSPIC results shall only disclose information in youth records in accordance with the *Youth Criminal Justice Act*.[133] However, they do not address how youth record information should be disclosed. Unlike the Ontario Act, the AACP Procedures do not require youth record information to be disclosed separately from other information in PIC or VSPIC results, nor with a notice warning the applicant against sharing the youth record information with others. In other words, they do nothing to help ensure that youth record information is only disclosed to "the young person to whom the record relates."[134] And, unlike the OACP Guide, the AACP Procedures do not limit the disclosure of youth record information to the results of police record checks (PICs or VSPICs) required by a Canadian government "for purposes of employment or the performance of services."[135]

[115] The AACP Procedures provide some instructions on how to disclose different types of non-conviction information. They state:[136]

> If the decision is made to disclose non-conviction information, in the case of an investigation that resulted in charges but not a conviction, the disposition of the matter, the disposition date, the location, and the occurrence type will be disclosed. In matters where charges were not laid, the occurrence date, the location, the police service occurrence number, and the occurrence type will be disclosed.
>
> ...
>
> If a determination is made to disclose mental health related occurrences, only the occurrence number, the occurrence date, and the location shall be disclosed ... The applicant will be listed as a "Subject of Occurrence" and the occurrence will be listed as "Behaviour Resulting in a Concern for Public Safety" as opposed to providing the occurrence type. There will be no reference to mental health or mental health descriptors.

[116] However, unlike the Ontario Act, the AACP Procedures do not require disclosed non-conviction information to be:

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[133] AACP Procedures at 6.

[134] *Youth Criminal Justice Act*, note 6, s 119(1)(a).

[135] *Youth Criminal Justice Act*, note 6, s 119(1)(o).

[136] AACP Procedures at 14.

- clearly identified as such; nor
- accompanied by:
  - the procedures' definition of "non-conviction information", and
  - information about the procedures' appeal process (discussed below).

[117] The AACP has indicated to ALRI that standard PIC and VSPIC consent and disclosure forms for Alberta police services to use are in the works.[137] However, no such forms have been produced yet.

[118] Regarding who PIC and VSPIC results may be given to, the AACP Procedures provide that, when the results do "not contain any adverse information", they can be released (i) directly to the applicant or (ii) to the "requesting organization when the applicant has provided written consent for the results to be disclosed to a third party."[138] However, results that contain adverse information "will **only** be provided directly to the applicant and never to a third party."[139] Like the relevant provisions of the Ontario Act, these rules ensure that it is up to the applicant, and not the police service providing the police record check (PIC or VSPIC), to decide if the check results will be shared with others, including the organization who required the check.

5. PROCESSES FOR CORRECTING OR CHALLENGING DISCLOSED INFORMATION

[119] Finally, the AACP Procedures provide an appeal process for applicants who wish to challenge any (not just non-conviction) information disclosed in their PIC or VSPIC results. They say:

- an appeal must be made "in writing within **30 days** of the completion of the check;"
- it "will be reviewed by unit management … responsible for the preparation of the [check];"
- "[a] written decision will be provided within **90 days** of receipt of the appeal;" and

[137] Letter received from the AACP at 3.

[138] AACP Procedures at 5–6.

[139] AACP Procedures at 6.

- "[a]ll decisions regarding the appeal … will be made in accordance with [the AACP Procedures] and will ensure that all procedures have been appropriately followed."[140]

The time limits in this appeal process are less generous to applicants, and more generous to police services, than the time limits in the reconsideration process under the Ontario Act.

[120] Unlike the Ontario Act, the AACP Procedures do not provide a separate process for those simply wishing to request the correction of information disclosed in their police record check (PIC or VSPIC) results.

H. Conclusion

[121] This paper has examined the similarities and differences between the Ontario Act and the AACP Procedures.

[122] Those who have advocated for specific Alberta legislation to regulate police record checks, and others interested in seeing changes made to Alberta's police record check practices, could call on the AACP to strengthen and improve the AACP Procedures (as ALRI has done). Judicial review applications and privacy complaints might also be used to challenge decisions made under the AACP Procedures and promote changes in police record check practices.

[123] Although the AACP Procedures accomplish many of the same things as the Ontario Act, there is still room for their improvement. Most obviously, Alberta's procedures could be brought more in line with the Ontario Act. For example, the AACP Procedures could be amended to:

- cover the narrowest type of police record check – criminal record checks – as well as PICs and VSPICs;
- reduce the types of information that can be disclosed in PIC results, so an Alberta PIC would be more like an Ontario CRJMC;
- restrict the disclosure of NCR-MD findings to VSPIC results;
- prohibit the disclosure of alternative measures;

[140] AACP Procedures at 15.

- properly categorize youth extrajudicial sanctions and stays of proceedings as non-conviction information;
- exclude police interactions that did not result in any criminal charges from the definition of "non-conviction information", making such interactions non-disclosable;
- restrict the disclosure of non-conviction information to VSPIC results;
- prohibit the disclosure of regulatory (non-criminal) offences;
- include a more stringent test for the exceptional disclosure of non-conviction information;
- provide further instructions on how certain types of information, like youth records and non-conviction information, should be disclosed in PIC and VSPIC results; and
- provide a separate process for those seeking to correct the information disclosed in their PIC or VSPIC results.

[124] The AACP Procedures might also be improved if they provided a more thorough explanation of the appeal process for those seeking to challenge the information disclosed in their PIC or VSPIC results. Among other things, the explanation could respond to some of the procedural fairness concerns raised in the recent court decisions discussed in this paper.

[125] Although the AACP Procedures lack the force of provincial legislation or policing standards (which have compliance mechanisms),[141] the AACP has advised ALRI that the procedures have been adopted by all of Alberta's police services, and have the support of the Law Enforcement Standards and Audits program within Alberta's Ministry of Justice and Solicitor General.[142]

[126] Moreover, the AACP Procedures are considered a living document that will be updated "in response to changes to the PIC environment." To that end, the AACP working committee that developed the procedures has been reconstituted as an AACP standing committee, and charged with (among other things) regularly reviewing and amending the procedures. The AACP standing

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[141] See *Alberta Provincial Policing Standards* (April 2018), online: *Government of Alberta* <open.alberta.ca/dataset/65be10e5-1d1a-4fa8-a807-d68af51965a3/resource/872e08e4-e6d0-4d43-ad4b-db8fb689e338/download/policing-standards-2.1-april-30-2018.pdf>.

[142] Letter received from the AACP at 2 and 4.

committee includes representatives from all of Alberta's police services, an Alberta Ministry of Justice and Solicitor General representative, and a privacy counsel.[143]

[143] Letter received from the AACP at 1.