



# Black Legal Action Centre

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

THE BLACK LEGAL ACTION CENTRE (BLAC)

March 12, 2021

### **Introduction**

The Black Legal Action Centre (hereinafter referred to as ‘BLAC’) is a not-for-profit corporation incorporated under the laws of Ontario, Canada. BLAC delivers legal aid services to low and no-income Black Ontarians. BLAC works to combat individual and systemic anti-Black racism by: providing legal representation, summary legal advice and brief services to individual clients; engaging in test case litigation, law reform and community development to improve the laws that affect low-income people; and giving public legal information sessions to members of the public and other community agencies.

### **Background**

A perusal of the *Hansard* which documented the legislative debates that preceded the passing of *Bill 113, Police Record Checks Reform Act, 2015*, reveals that its introduction was viewed as a significant development to residents of Ontario. These are people who have suffered from the discriminatory and often debilitating effects of police record searches. Much of the discussion revolved around issues such as protecting individual’s civil liberties, privacy, and the removal of barriers for individuals seeking to better their lives and secure their livelihood.

Notable excerpts from the debates include the submission of MPP Jennifer K. French who stated that:

This is a bill that is in response to many personal and very public cases of unfair use of police non-conviction records that have had devastating effects on the lives of individuals across the province...This bill was born out of public concern for the unfair disclosure of non-conviction records. Many people have been needlessly denied opportunities in their adult lives as an unfair result of police record checks that turned up a record of something that did not result in a conviction, and that information would end up in a police check. People who have sought housing, employment, volunteer opportunities or opportunities of self-improvement have actually been denied those opportunities because of a negative and unfair surprise on a police record check.<sup>1</sup>

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<sup>1</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 1st Sess, No 111 (26 October 2015) at 1330 (Jennifer K. French).

MPP Rick Nicholls added that:

With Ontarians finding it difficult to find meaningful and well-paying work, this legislation will in fact ensure that honest, hard-working and peaceful citizens will be able to succeed without judicial prejudice in their preferred field of employment. And as more and more Ontarians are finding it increasingly difficult to secure meaningful employment, Speaker, I'm confident that this bill will mobilize more Ontarians who are able to work but have faced discrimination due to a past circumstance or situation.<sup>2</sup>

With that brief reminder of the sentiment that surrounded the introduction and eventual passing of the Bill, it must be articulated that ongoing attempts at reversing the effects of this heralded legislation, may appear on its face as an abrogation of the rights of the individuals it affects. If approved, these reforms have the potential to re-implement many of the negative elements of the process that the initial legislation sought to alleviate.

### **Proposed Exemptions - Detail**

#### ***1. Correctional institutions, parole services***

The proposal is for this category to be fully exempted from the provisions of the Police Record Check Reform Act (PRCRA).

While the importance of organized crime is indisputable, the justification given for addressing it through these means is questionable. With the inclusion of volunteers, a broad category of individuals with "lived experience" who themselves could play a potentially significant role in the services provided could be eliminated. More generally, this broad-based approach puts in place substantial barriers for those individuals who may be willing to make a positive contribution to society.

A full exemption contemplates the potential release of non-conviction records. With the occurrence of street checks, and over policing, the reality is that individuals who live in communities in which there is a higher incidence of this and within a system, in which there is Anti-Black Racism, may be more likely to have such a record. Acknowledgement of these realities are evident in the Supreme Court judgement of *R v Le*, 2019 SCC 34.

In paragraph 90, there is acknowledgment that:

Members of racial minorities have disproportionate levels of contact with the police and the criminal justice system in Canada (R. T. Fitzgerald and P. J. Carrington, "Disproportionate Minority Contact in Canada: Police and Visible Minority Youth" (2011) 53 *Can. J. Crimin. & Crim. Just.* 449, at p. 450).

In paragraph 97, it was stated that:

We do not hesitate to find that, even without these most recent reports, we have arrived at a place where the research now shows disproportionate policing of racialized and low-income communities (see D. M. Tanovich, "Applying the Racial Profiling Correspondence Test" (2017), 64 *C.L.Q.* 359).

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<sup>2</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 1st Sess, Vol A, No 127 (30 November 2015) at 1350 (Rick Nicholls).

With increased access to personal records, individuals who fall into certain categories will be disproportionately inhibited from participation in certain types of potentially positive activities.

From a Federal perspective, Canada's Throne speech delivered on September 23, 2020 has identified systemic racism as an existing issue within Canada. The Government has explicitly pledged to address systemic racism and has stated that it is committed to doing so in a manner that is informed by the lived experiences of racialized communities and Indigenous Peoples. The reality of systemic racism and the existence of Anti-Black Racism specifically suggests that the passing of proposals of this nature would indicate steps away from these commitments.

The reasons for exemptions state that "personnel, including volunteers, have access to ministry assets and highly sensitive information." The access that an individual within an organization may have is not a sufficient reason to justify a full exemption from the *Act*. Internal processes can be developed with established levels of clearance that prevents/prohibits certain levels of staff from having access to certain types of information. The reasons provided also state that "*correction services have heightened needs to identify if an applicant has any associations...*" This leads us to ask, how is association being defined/understood? The existence of a non-conviction record does not automatically validate inferences of association. Proximity does not necessarily equal participation. Such broad-based generalizations suggest discriminatory elements in the assessment of potential volunteers and employees.

## **2. Police services**

BLAC does not support the proposed exemption for this particular category.

The risks alluded to in the "reason for exemption(s)" speak to risks that are guarded against through the legislative framework that is already in place through the provisions of the PRCRA.

The potential access to information is not a justifiable reason for the proposed exemption. Internal processes can be developed with established levels of clearance that prevent/prohibit certain levels of staff from having access to certain types of information.

BLAC does acknowledge that there may be circumstances in which police conduct may be relevant to certain legal proceedings. In those circumstances BLAC may support a limited exemption from the PRCRA "to allow for the disclosure of police disciplinary records" if it is established that it is specifically in relation to those proceedings.

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

BLAC is not in support of the full exemption for this category given the generalized nature of the rationale used for the proposal.

The accessibility of information and the potential for misuse are, again, not sufficient bases on which an exemption from the *Act* should be justified.

## **4-6. Criminal Intelligence Service Ontario, Major Case Management & Office of the Provincial Security Advisor**

BLAC is not in support of the proposal to provide full exemptions to Screening Category #4 (Criminal Intelligence Service Ontario), Screening Category #5 (Major Case Management) and Screening

Category #6 (Office of the Provincial Security Advisor) given the inadequate reasons for exemptions that have been provided. The rationale put forth provide broad based overviews of the role and function of each category. Much has not been said as to what would justify having none of the provisions of the PRCRA be applicable in each case.

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

The explanations put forth have not substantively addressed why exemptions are required for the Special Investigations Unit. While BLAC will not challenge the notion that “legal cases can be jeopardized when an investigators historical background (e.g. misconduct) results in a loss of credibility before the courts,” justification for the exemptions as it relates to this point, do not appear to justify the proposal.

The inclusion of ‘volunteers’ who would presumably not be placed in circumstances in which they would either have access to sensitive information, or could impede the functions of a project, is particularly curious.

### **8. *Independent Police Review Director***

BLAC does not support the proposed exemption for this particular category.

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

BLAC supports a *partial* exemption given the reason provided. It is articulated that the exemption would be required to ensure that persons seeking registration will meet the statutory conditions of registration. We maintain, however, that non-conviction history does not accurately indicate the totality of an individual’s competence or character.

### **10. *Office of the Children’s Lawyer***

BLAC does not support the proposed exemption for this particular category.

The legislative framework currently in place by the already implemented vulnerable sector check deals directly with the issues raised. If there is a belief that additional child welfare screening is required, these concerns should be the subject of a separate consultation.

### **11. *Child and Parent resource Institute***

BLAC does not support the proposed exemption for this particular category.

We are of the opinion that the already implemented vulnerable sector check is appropriate. The rationale provided does not sufficiently articulate why there is a need to go beyond this.

### **12. *Financial services***

BLAC does not support the proposed exemption for this particular category.

### **13. *Inspectors, Investigators, etc.***

BLAC does concede that there may be instances in which record checks are required by entities that are not themselves subject to the *Police Record Check Reform Act*. Because of this, they may not be

able to fall within the scope of the PRCRA. In these circumstances, a limited exemption may be permissible.

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

BLAC does not support the proposed exemption for this particular category.

The nature of the proposals as they are is such that they will only apply to some of the vulnerable searches involving children. This will lend itself to inconsistency as it relates to police record checks. If there is a belief that additional child welfare screening processes are required, then this should be the subject of its own consultation.