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HUMAN RIGHTS COMMISSION'S DRAFT POLICY SEEKS TO PROHIBIT EMPLOYERS FROM ACCESSING MENTAL HEALTH INFORMATION CONTAINED IN CRIMINAL RECORD AND POLICE RECORD CHECKS

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The Ontario Human Rights Commission has recently issued a draft Policy on Mental Health Discrimination and Police Record Checks ("Policy"). The draft Policy, for which the Commission is seeking the public's consultation, sets out the Commission's position regarding when and under what circumstances employers should be permitted to access information concerning non-criminal contact with police that may be found in police and criminal record checks. All employers should be aware of this potential change to their ability to request and rely upon police record checks.

The draft Policy was issued as a result of a number of human rights complaints alleging that police record checks can contain information about non-criminal contact with police as a result of a mental health episode. Under the *Mental Health Act*, the police are authorized to apprehend a person and take him or her to a hospital for examination in circumstances where the person appears to have a mental disorder that will likely result in serious bodily harm to themselves or to others, or serious physical impairment of the person, and the person engages in certain behaviour such as, for example, behaving violently towards someone else. Police contact in these circumstances is recorded in police databases. If a criminal record check or police record check is provided to a prospective employer, these records may disclose such non-criminal contact with police. The Commission's position is that these record checks can be a barrier when the person applies for a job because the employer may discover that the applicant suffered from a mental health episode.

Note:

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The Commission has expressed a concern that until recently, police services routinely provided criminal records checks and police record checks without editing the information contained therein. This could lead employers to make hiring decisions based on assumptions relating to protected grounds, including mental disability.

To understand the Commission's position, it is important to know the difference between a criminal record check and police record check and the information contained within each. Criminal record checks include information about criminal records, records of having been judged not criminally responsible by reason of mental disorder, pending criminal charges and matters for which someone is on probation. No one, except law enforcement agencies, can access a person's criminal record without that person's consent.

Police record checks are much broader than criminal record checks since they include a criminal record check and a search of the local database maintained by the police service where the person lives. The local police force may also contact other local police departments in Canada and the United States to obtain information from their databases. The database maintained by local police forces includes information related to any involvement or contact with the police including: incident reports, charges, convictions, information about the person as a complainant, victim, suspect or witness to an occurrence, including allegations where charges were not laid. Contacts between police and individuals pursuant to the *Mental Health Act* are also recorded. An employer or organization requires an individual's consent to obtain a police record check.

The Policy acknowledges that employers are permitted under the Code to request criminal record checks. Under the Code, however, a person cannot be discriminated against in employment because of pardoned criminal offences under federal law or for violations of provincial laws such as the *Highway Traffic Act*, subject to some exceptions. The Code does not protect persons from discrimination due to unpardoned convictions.

In some circumstances, however, the Code allows an employer to ask if an applicant or employee has been convicted of a provincial offence or a pardoned federal offence if the employer can demonstrate that the nature of the job is such that the essential qualification or requirements of the job cannot be changed, or the individual cannot be accommodated without creating excessive costs or unreasonable health or safety risks. One example where a pardoned offence may be relevant could include serious driving convictions for a commercial or school bus driver, or a conviction for child sexual abuse of a daycare worker who may be alone with children.

The Commission's draft Policy states that because of the potential for an adverse human rights impact, police record checks (as opposed to criminal record checks) should only be requested in exceptional circumstances. The Policy further states that if an organization wants to obtain a police records check, it must consider whether, on a balance of probabilities, the record check requirement is reasonable and bona fide and:

1. was adopted for a purpose or goal that is rationally connected to the function being performed;
2. was adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

While the circumstances surrounding each case must be considered separately, some circumstances where a police record check may be warranted include situations where:

- the position involves working directly with vulnerable persons, such as children, the frail elderly, or persons with severe developmental disabilities
- there is little or no supervision or the applicant would be working alone with vulnerable persons
- the applicant would be charged with significant responsibility for the health and safety of such persons; for example, driving them in a vehicle.

The Policy also states that if the organization can demonstrate a legitimate need for conducting a police record check, the check should only be requested after it has made a decision that the candidate is otherwise suitable for the position and has extended an offer of employment that is conditional on a satisfactory record check.

When the police records check is obtained, the Policy advises employers that they are obliged to deal with the information in a manner that is consistent with the Code by, for example, "not relying on stereotypical assumptions about persons based on the information revealed or automatically assuming that the person would be unfit for the position. Instead, the Commission states that employers must "require" a job applicant to provide context for the information, after which the employer should conduct an individualized assessment as to whether it would be undue hardship to employ the person. The Policy warns employers that "rejecting the person because of a stereotypical perception that he or she will "become a problem" down the road, will have issues with absenteeism or will require accommodation because of his or her mental disability would be a contravention of the Code".

In the Policy, the Commission also instructs police services on how to respond to requests for police records checks and warns that the “disclosure of information by a police force may be a violation of the Code if it goes beyond the bona fide criminal record of the individual or what is reasonably required to assess the safety risk an individual could pose in the circumstances.” In order to comply with the Code, the police are instructed to “undertake an individualized assessment of the results of each record check and should only reveal information that is found to be relevant to health and safety concerns.”

In order to be able to carry out the individualized assessment, the Policy states that the police will need to know the following for every police records check received:

- the nature of the position being screened;
- the nature and degree of contact with vulnerable persons that the applicant would have in the position;
- the nature of the vulnerability; and
- any other relevant information about the nature and duties of the position (e.g., whether the person would be working alone or with others).

The above information would be provided by the applicant, the prospective employer or both.

After the individualized assessment is conducted by the police, the Policy states that the police should not automatically reveal to the prospective employer that there has been police contact relating to the *Mental Health Act*. Rather, the police are instructed to simply state to the prospective applicant that there is “information of concern”. At this time, the applicant can then decide to learn from the police the nature of the concern and decide whether to withdraw the application prior to disclosure to the employer, or to share the results of the record check and explain the circumstances and context to the organization requesting the search.

The Policy concludes by providing “tips” to police services and employers on how to respect the Code’s provisions while at the same time requesting police and criminal record checks. To obtain a copy of the Policy, please visit the Commission’s website at <<www.ohrc.on.ca>>.

While Commission policies are not given equal weight as the law, they are given great deference if the Policy is consistent with *Human Rights Code* values. Until the Policy is ultimately approved by the Commission, an employer’s practice of requesting police record checks may need to be reviewed. If approved in the current draft form, the above Policy will severely restrict an employer’s current ability to obtain and consider the information contained in police record checks for the purpose of assessing a candidates’ suitability for employment.

Miller Thomson LLP will keep you apprised of the status of the Policy.

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Our Labour and Employment Practice Group is dedicated to providing comprehensive and integrated legal services, and advises management in all aspects of labour relations and employment law. For more information about our Group, visit our website at www.millerthomson.com.

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