

Police Record Checks

by Richard Steinecke
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Earlier this month the Canadian Civil Liberties Association (CCLA) released its report on the use of police checks entitled: False Promises, Hidden Costs. While the report was written primarily from the perspective of the use of police background checks by employers and volunteer organizations, it has relevance for regulators in two distinct ways.

The primary relevance is the analysis of the effectiveness of police checks in the assessment of an applicant's good character. The report concluded that there was very limited correlation between criminal convictions and future work behaviour:

The logic supporting the relevance of police record checks as a screening tool has a strong intuitive appeal: if a person committed a certain crime, or had a run-in with the police in the past, it is believed that they will be more likely than others to repeat that behaviour in the future. Unfortunately, social science evidence regarding the connection between past behaviour and future behaviour shows that past behaviour is a useful assessment tool only under specific conditions. For example, past behaviour is most useful as a predictor if:

- the behaviour has been frequently repeated or is habitual,
- a short amount of time has passed,
- the person is fairly behaviourally consistent,

- if the person finds themselves in essentially the same “triggering” context,
- the person is essentially unchanged, and
- the past behaviour has not been corrected by negative feedback.

[Karen Franklin, “‘The best predictor of future behavior is . . . past behavior’: Does the popular maxim hold water?,” *Psychology Today* (January 3, 2013), <http://www.psychologytoday.com/blog/witness/201301/the-best-predictor-future-behavior-is-past-behavior-0>.]

When these conditions are not present – because, for example, the specific situation the person will be in is different, time has passed, the behaviour was infrequent or the person has changed – past behaviour is not a reliable predictive tool.

After discussing a few more studies the report concluded:

The questionable predictive value of criminal records in the employment context is reinforced by some ad hoc observations about the nature of criminal acts in Canadian workplaces. A survey of the perpetrators of fraud in Canadian workplaces found that 88.9% of fraudsters in the survey had “never been charged or convicted of a fraud-related offence,” indicating that “criminal background checks will have limited effectiveness as an anti-fraud measure.”

[Association of Certified Fraud Examiners and Dominic Peltier-Rivest, *Detecting Occupational Fraud in Canada: A Study of Its Victims and Perpetrators* (Austin, TX: Association of Certified Fraud Examiners, 2007), http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/rtnn-canadian.pdf.]

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A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

The report also discussed an interesting investigative journalism article about a regulated profession:

The *Toronto Star's* 2011 investigation into [practitioners] who had sexually assaulted and abused children over a ten-year period, however, showed that “all but one . . . had a clean record before they were finally caught and convicted” and the one who did have a record “simply forged his police check.”

To be fair, however, that article did not explore whether there would have been any additional instances of sexual abuse of children if there had not been systematic police checks (i.e., whether some potential abusers were kept out of the profession because of an existing criminal record).

The second relevant aspect of the report deals with the issue of transparency by regulators. Many recent media reports have criticized regulators for withholding information from the public about its members. For example, the *Toronto Star* has regularly reported on the lack of public access to inspection results and educational resolution of complaints and other investigations by regulators. However, the CCLA expresses the opposite concern about disclosure of “non-conviction records”:

Local and federal police databases, however, store not only a history of criminal convictions but also details about mental health apprehensions, 911 calls, casual police contact, unproven allegations, withdrawn charges and acquittals (“non-conviction records”). In many jurisdictions, these non-conviction records are frequently disclosed on

police record checks. Most employees are not covered by existing privacy legislation. Human rights statutes provide varied levels of protection, at times prohibiting discrimination against pardoned convictions, while leaving those with non-conviction records open to unfair treatment. Because of these and other gaps in Canadian law, depending on where a person lives, receiving an acquittal or having a withdrawn charge can be more personally and professionally damaging than a formal finding of guilt.

Many of the same concerns expressed by the CCLA to public access to non-conviction records (e.g., lack of relevance; information has not been subject to a fair process; inconsistency as to what information is disclosed) apply to disclosure by regulators of “non-finding records”. While the two situations are not identical (e.g., members of professions have a lower reasonable expectation of privacy than members of the public), it is refreshing to see an organization articulate the other side of the issue.

The CCLA report may be found at: <http://ccla.org/recordchecks/doc/Records-check-final-20140516.pdf>.