A JOINT RESPONSE TO ONTARIO DRAFT REGULATION "COLLECTION OF IDENTIFYING INFORMATION IN CERTAIN CIRCUMSTANCES – PROHIBITION AND DUTIES" RELEASED ON 28 OCTOBER 2015

The following organizations and individuals are signatories to this Joint Response

(Names are listed in alphabetical order)

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Canadian Civil Liberties Association (CCLA)
Concerned Citizens against Carding (CCAC)
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Background

The signatories to this Joint Statement assembled to respond to arbitrary and discriminatory police practices in Ontario, in particular, the practice known as "carding" or "street checks"; in the context of the announcement by the Ministry of Community Safety and Correctional Services on June 16th, 2015 that it would "standardize police street checks across the province, and will establish rules to ensure these encounters are without bias, consistent, and carried out in a manner that promotes public confidence," and the release of the Ministry's Draft Regulation (the "Draft Regulation" or "Regulation").

Purpose of Joint Statement

The purpose of this Joint Statement is to respond to the Draft Regulation and articulate a rights-based framework for policing aimed at prohibiting those "Community Contacts" that are arbitrary and discriminatory, negatively affecting African Canadian, Aboriginal and other racialized and marginalized people in Ontario. "Community Contacts" are police approaches in non-arrest scenarios that involve and/or are for the purpose of asking for, recording and/or obtaining identification, personal information and/or information about an individual's circumstances.[1]

Response to the Draft Regulation

We share the Minister's view that legitimate policing helps keep our communities safe and promotes public trust and confidence in our police. We welcome and endorse the objectives articulated by Minister Naqvi on October 28, 2015, including prohibiting random and arbitrary stops by police; establishing clear new rules for voluntary police-public interactions where identifying information is collected; and ensuring that interactions are conducted without bias or discrimination (the "Objectives"). These Objectives were also reflected in the Motion passed unanimously by the Ontario Legislative Assembly on October 22, 2015.[i] Unfortunately, however, the Draft Regulation falls short of these important Objectives.

The Draft Regulation seeks to achieve the Objectives by limiting the collection of information in some circumstances; creating duties for police officers when engaged in voluntary interactions; requiring training, data management, reporting and other

[1] For greater clarity, "personal information" and "information about an individual's circumstances" in this Joint Position include information about *another* individual.

measures to strengthen accountability and public confidence in the police. In addition, the Ministry is seeking to amend the Code of Conduct under the *Police Services Act.*

However, in our view, the Draft Regulation will not sufficiently prevent arbitrary or discriminatory police-community contacts, nor will it adequately strengthen accountability, given its narrow scope.

To fully achieve the Minister's and the Legislature's stated Objectives, the Draft Regulation should reflect the Principles and include the Criteria proposed in this Joint Position.

Principles

Sir Robert Peel's Principles are the foundation for policing in the Commonwealth. They include:

- "The police are the public, and the public are the police."[ii] The police are not superior to the public, individually or collectively.
- "The power of the police to fulfil their functions and duties is dependent on public approval of their existence, actions and behaviour, and on their ability to secure and maintain public respect."[iii] Such public approval, or "consent", including its objectives, orientation and limitations, must be determined and communicated by the independent police services board, on behalf of the public, and must be binding on the police.

The *Canadian Charter of Rights and Freedoms* (the *Charter*) guarantees to all people in Canada their fundamental rights and freedoms. Specifically, sections 7, 8, 9, 10, and 15 of the *Charter* guarantee an individual's right to life, liberty and security of the person, the right to be free from unreasonable search or seizure, the right not to be arbitrarily detained or imprisoned, specific legal rights in the event of detention or arrest, and the right to equality. The *Charter* protection from unreasonable search and seizure protects the individual's privacy interests in their person, territory and information. [iv] The unreasonable collection and retention of personal information violates these fundamental principles.

The *Ontario Human Rights Code* (the *Human Rights Code* or the *Code*) recognizes the dignity and worth of every person and provides for equal rights and opportunities without discrimination. Citing decisions from the Ontario Court of Appeal and the Ontario Divisional Court, the Ontario Human Rights Tribunal has concluded: "It is and always has been contrary to the *Code* for the police to treat persons differently in any aspect of the police process, because of their race, even if race is *only one factor* in the differential treatment."[v] "If race is *one* of the irrelevant factors in any police action (stop/investigation) even if other, legally relevant factors are also at play, this is a violation of the *Code*."[vi]

Despite the fact that both the *Charter* and the *Human Rights Code* protect individuals from being racially profiled by police officers while performing official duties and providing a public service, racial profiling has persisted across the province through practices such as carding. As such, strong legislation with clearly articulated directions as to individuals' rights, and the roles and responsibilities of all police officers, are required in order to address these issues.

The signatories to this Joint Statement recognize the value of legitimate non-arbitrary and non-discriminatory policing, and call on the Ministry to allow for such policing, while protecting individuals' fundamental rights.

Preamble

The community has a right to receive policing services without discrimination and in a non-arbitrary manner. The *Charter* and the *Human Rights Code* require it. Ontario's *Police Services Act* states, as one of its principles, that policing services shall be provided in a manner consistent with the *Charter* and the *Code*. For these reasons, we remain concerned broadly about arbitrary approaches, unreasonable searches and seizures, and racially discriminatory policing, whether or not personal information is sought or recorded.

However, at this time, our position is restricted to addressing an appropriate prohibition against "the random and arbitrary collection of identifying information by police, referred to as carding or street checks," which is the declared purpose of the Ministry.

In order to address this matter in its full scope and context, we will refer to the relevant interactions as "Community Contacts." These are non-arrest police approaches that involve and/or are for the purpose of asking for, recording and/or obtaining identification, personal information and/or information about an individual's circumstances.[2] Community Contacts may in some circumstances, involve appropriate, voluntary interactions between police and, for example, potential witnesses or bystanders who voluntarily come forward to share information with police officers. At other times, Community Contacts may be arbitrary and/or discriminatory encounters – and it is these that must be prohibited.

Limited Application of the Regulation (Sections 1-3)

The Draft Regulation, which prohibits the collection of information in some circumstances, and provides for certain rights protections and accountability mechanisms, does not apply to a significant proportion of Community Contacts, including when officers are investigating a particular offence. For example, the Regulation does not appear to apply

[2] See Note 1, above.

when police anti-violence units are investigating an incident in a community. This leaves open the possibility that these units will believe they are authorized to ask any number of individuals for their personal information and circumstances without a regulatory prohibition against arbitrary questioning, and without the other rights protections and accountability mechanisms provided for in the Draft Regulation to ensure that the interactions are indeed voluntary, and conducted for a legitimate policing purpose. And based on the restrictive language in the Draft Regulation, it does not appear to apply when officers are gathering information, for criminal intelligence purposes, about individuals who are not known or reasonably suspected to be engaged in illegal activities – in other words, innocent bystanders.

Most significantly, given that the Regulation only applies in those limited circumstances that are specified,[3] it **does not seem to apply generally in the course of an officer's duties, and as such, does not appear to apply to a situation in which an officer stops an individual arbitrarily** – the very situation which the Ministry intended to address. As such if, for no reason, an officer stops a young person on the way home from school, or a group of teenagers in the park, and seeks to record their names or asks for other identifying information about them or their friends, not only is there no regulatory prohibition against this arbitrary interaction, but the other accountability measures in the Regulation do not apply either: there is no required supervision of which data is recorded, no mandatory reporting and no meaningful way of assessing the validity of the encounter.

Moreover, the Draft Regulation merely covers an interaction from the point when an officer attempts to collect identifying information, and only in relation to that person's own identifying information. However much of the harm caused by "street checks" begins from when the officer chooses to approach an individual, and when an individual is asked for his or her personal circumstances (e.g. Where are you coming from? Who are your friends?).

In order to achieve the Objectives of eliminating arbitrary and discriminatory police stops, a right-based framework for policing must apply to Community Contacts, subject to the narrow exceptions listed below. This is especially important with respect to accountability mechanisms such as data collection, oversight and public reporting. Should the Draft Regulation pass in its current form, there may be no accountability mechanisms when police are investigating a specific offence or in the other examples stated above.

[3] These do not include any number of police activities including, for example, officers attempting to "preserve the peace" or raise awareness of police presence in the absence of a program to this effect.

In the result, it is critical that the Draft Regulation be applicable to all Community Contacts as defined above, except when an officer is engaged in a covert operation, executing a warrant or court order, or the individual from whom the officer attempts to collect information is employed in the administration of justice or is carrying out duties or providing services that are otherwise relevant to the carrying out of the officer's duties. And several of the accountability measures should apply with respect even to these exceptions. Thus, for example, reporting and oversight measures should be applied in the case of covert operations – operations that frequently target racialized, high-crime neighbourhoods.

Prohibition against carding (Section 4)

General

In those circumstances in which the Draft Regulation applies, it provides certain prohibitions against attempting to collect information in a manner that will likely help prevent some arbitrary stops, racial profiling and unnecessary data collection. Specifically, the Draft Regulation does not permit attempts at collecting personal information for the sole purpose of:

a) conducting a general investigation into offences that might be committed in the future if there are no specifics regarding those offences; or

b) implementing programs to raise awareness of the presence of police in the community.

These restrictions will likely help prevent some racial profiling and arbitrary officer attempts at collecting personal information.

In other respects, the Draft Regulation does offer some direction with respect to preventing racial profiling and arbitrary attempts at collecting personal information when the individual is perceived to be within a particular racialized group, or in relation to certain policing purposes – however this direction is overly broad and permissive.

Race

The Draft Regulation attempts to address race and prevent discrimination on this basis by not permitting a person's perceived race to be used as a reason for an attempted collection. However this provision includes a broad exception and as such does not meet these goals. The exception in this provision of the Draft Regulation allows for race to be used when police are dealing with a vague suspect description.

The inappropriate use of race in suspect selection is a significant equality and human rights concern. We have heard concerns from Black community members in Toronto

that they are frequently told that they match the description of a suspect during carding incidents.

The *Human Rights Code* has been held to prohibit the police from casting their investigative net widely on racialized individuals when dealing with a vague suspect description involving race. In *Maynard*, the officer was investigating a gun-related incident involving a Black male suspect driving a black sports car, and decided to follow the man because he was a young Black man driving alone in a black BMW. The HRTO noted that the officer had no indication of the suspect's age, and stated that the most reasonable explanation for the officer's decision was that the claimant was a "black man, and specifically a young black man, driving a black vehicle…and as a result, he was stereotyped as a person with some probability of being involved in a gun-related incident." The HRTO explained that it was consistent with a finding of racial profiling that all Black men driving alone in the area in a black car became possible suspects. The HRTO found that if the suspect had been a Caucasian man in the same circumstances, with no other defining characteristics, and with as little information available about the car and direction of travel, the officer would probably not have chosen to investigate the first Caucasian man he saw driving a Black car somewhere in the vicinity of the Malvern Town Centre.[vii]

We recognize that the non-discriminatory use of race in suspect selection is context specific. We recommend that, barring exigent circumstances, police be prohibited from using race in suspect (or victim or witness) selection unless the police have a specific description that incorporates additional descriptive elements that go beyond gender and general age category. In other words, a vague description such as "young black man" cannot justify a Community Contact or attempted collection of identifying information. For additional guidance in this area, we encourage the Ministry to review the Ottawa Police Service's *Racial Profiling Policy*, which states the following[viii]:

> A police officer shall not, in the absence of a reasonable and racially neutral explanation, maintain that a racialized individual matches the description of a known suspect where:
>
> a) there are clearly distinguishing features between the two individuals; or
> b) the officer cannot articulate what other parts of the description he or she was relying on (e.g. height, weight, age, location, or other features).

Belief in relevance

The Draft Regulation also attempts to create a restriction around when officers may and may not attempt a collection. The Regulation requires that when officers are:

a) gathering information, for criminal intelligence purposes, about individuals known or reasonably suspected to be engaged in illegal activities; or

b) inquiring into suspicious activities for the purposes of detecting illegal activities,

the officer must have an articulable reason that includes details about the individual that **cause the officer to believe that identifying the individual may be relevant** to these purposes. The reason cannot include that the individual is present in a high-crime neighbourhood as the sole basis for the attempted collection.

While this requirement may prevent some attempts at collecting personal information, it will likely not provide sufficient guidance to prevent racial profiling and arbitrary Community Contacts in many circumstances. For example, if an officer is investigating suspected gang or drug activity in an apartment building or school that are in a high-crime neighbourhood, the regulation may not prevent an officer from attempting to collect personal information from any or all residents in the building or students in the school. Simply living in or visiting the building or attending the school could be interpreted as providing enough "relevance" to satisfy the Draft Regulation.

The low standard in this requirement of the Draft Regulation falls needlessly short of the "reasonable suspicion" standard required by the *Charter*. And overbroad police powers to approach, question, detain and search would likely have a disproportionate impact on African Canadians and other racialized and marginalized communities that live, work or attend school in high crime areas.

Suspicious activities

As stated, one of the categories of officer conduct in which attempted collections may be permitted under the Draft Regulation is "inquiring into suspicious activities for the purposes of detecting illegal activities," The category of "suspicious activities" does not sufficiently guide officer discretion to prevent racial profiling and arbitrary attempts at collecting personal information. In the region of Peel, for example, African Canadians are over-represented in street checks of the Peel Regional Police that similarly fail to guide officer discretion and are indicative of racial profiling. Chief Evans' September 23, 2015 Report to the Peel Police Services Board entitled "Street Checks Process" states that street checks shall be conducted for "suspicious behaviour". The directive defines "suspicious behaviour" as "behaviour that can be categorized as unusual or out of place". Although the representation of racial groups in streets checks is not broken down by type of street check, the report indicates that 18% of street checks performed between 2009 and 2014 were because of "suspicious behaviour" and African Canadians were the target of 21% of street checks.[ix] Based on the over-representation of African Canadians in street checks generally in Peel, we may expect a similar over-representation of African

Canadian in street checks in Ontario for "suspicious behaviour". There are, additionally, marginalized individuals in Ontario who for reasons of mental illness, cognitive impairment, or poverty and homelessness, may behave in an "unusual" or "out of place" manner that could be viewed as "suspicious." Here too, this should not justify an attempted collection of identifying information or Community Contact. And here too, the *Charter* standard of reasonable suspicion is a more appropriate standard that while not onerous, does require the suspicion to be grounded in objective circumstances.

Non-discriminatory, non-arbitrary legitimate policing activity

In order to permit non-discriminatory, non-arbitrary legitimate policing activity, whilst sufficiently guiding officer discretion to prevent arbitrary and discriminatory Community Contacts, we recommend that the Draft Regulation be amended to adopt the following criteria as its prohibition against arbitrary and discriminatory Community Contacts:

1. A police officer may not approach an individual in a non-arrest scenario that involves and/or is for the purpose of asking for and/or obtaining identification, personal information and/or information about an individual's circumstances,[4] except for legitimate non-arbitrary non-discriminatory policing activities as set out in clause 2 below ("Clause 2").

2. A police officer may only approach an individual in a non-arrest scenario that involves and/or is for the purpose of asking for and/or obtaining identification, personal information and/or information about an individual's circumstances[5] if:

    a. The approach is solely for the purpose of investigating a specific criminal offence or series of specific criminal offences and the officer has reasonable suspicion that the individual is implicated in the criminal activity under investigation and/or the officer has reasonable belief that the individual is connected to the offence as a victim and/or witness; or,

    b. The approach is solely for the purpose of preventing a specific type of offence from occurring and the officer has reasonable suspicion that the individual is implicated in the criminal activity under investigation and/or the officer has reasonable belief that the individual is connected to the offence as a victim and/or witness;

    c. The officer believes that the approach and request for identification, personal information or an individual's circumstances is necessary to prevent an imminent or apparent risk or harm to the individual or another identified person;

[4] See Note 1, above.
[5] See Note 1, above.

d. The officer is aware that the approach is necessary because the individual is under a statutory obligation to provide a license or identification, such as when an individual is operating a motor vehicle;

e. The officer is aware that the approach is necessary for the enforcement of a provincial statute or municipal by-law; or,

f. The officer is securing a potential crime scene, participating in a security detail or acting in an emergency, and requests identification from an individual in a restricted area or seeking to enter a restricted area in order to determine whether the individual should have access to the area and under what conditions.

3. The following are not a basis for Community Contacts and shall not satisfy Clause 2 of this Position:

a. An unspecified future offence or criminal investigation, or a "general investigation";

b. Profiling or stereotyping based on race, gender identity, gender expression, sexuality, mental health, socioeconomic status, and/or other prohibited grounds of discrimination under the *Charter* or the *Human Rights Code*;

c. A person's exercise of his or her right to remain silent, right to object to being approached, or right to walk away;

d. A "hunch" or unsupported suspicion or belief, whether based on intuition gained by experience or otherwise;

e. Mere presence in a particular neighbourhood, high-crime neighbourhood or "hot spot";

f. A suspect, victim or witness description that lacks sufficient detail other than race;

g. Meeting a quota or performance target for number of Community Contacts; and,

h. Raising awareness of police presence in the community.

4. For greater certainty:

a. An approach in the absence of reasonable suspicion or reasonable belief as set out in 2(a) or 2(b), for the purpose of eventually acquiring such reasonable suspicion or belief, shall not satisfy 2(a) or 2(b).

b. Prolonging any interaction with the intent of acquiring reasonable suspicion or belief as set out in 2(a) or 2(b) shall not satisfy 2(a) or 2(b).

Rights Notification, Individual Empowerment, and Accountability

The Draft Regulation establishes some important provisions for rights notification, individual empowerment and accountability. These do require some amendments – in particular with respect to the accountability measures proposed, as detailed below.

Rights Notification (Section 5)

When an individual is approached by a police officer in a Community Contact and/or in an attempt to collect identifying information, knowing that he or she is not required to stay or answer questions is only helpful if information about this right is provided at the very start of the approach. The Draft Regulation omits to provide for this important detail. As such, the Draft Regulation should be amended to clarify that the officer's duty to inform the individual of their right to walk away applies forthwith.

In addition, the Draft Regulation should amend this provision to include an officer's duty not only to inform the individual of their right not to remain in the presence of the officer, but also of their right to not answer any questions, provide personal information or identification, and that anything they say can be used in evidence. Furthermore, if the individual is under the age of 18, they shall be told that they have the right to contact a parent or guardian and to have that parent or guardian be present during the encounter and while any statement is being made.

Copy of Record and written rights notification (Section 6)

The Draft Regulation provides a helpful requirement that officers who attempt to collect identifying information must provide a document with certain key information to the subjects of these stops.

The Draft Regulation should be amended to eliminate the broad exemption for this requirement in the case of "unreasonable" circumstances, and instead should limit the exemption to circumstances in which the individual has walked away, does not wish to receive the document, or with respect to information that is sensitive or classified.

In addition, the document should include the reason for the approach – as set out in Clause 2 above – and with sufficient particularity about why that specific individual was selected for a Community Contact. Moreover, the document should include the contact information of the Human Rights Tribunal of Ontario, and describe the roles of the Office of the Independent Police Review Director and Human Rights Tribunal of Ontario.

Data Collection, Recording and Retention (Sections 7 and 8)

The Draft Regulation provides few privacy protections with respect to the retention and use of data collected through Community Contacts, and in particular, allows for the indefinite retention of individuals' personal information in police records – whether collected before or following the coming into force of the Regulation. This is a significant violation of subjects' privacy rights under s. 8 of the *Charter.*

Collecting, recording and/or retaining data invades individuals' privacy, dignity and liberty. As such, any data recorded in police records should comply with fundamental privacy principles including those relating to necessity, use (and secondary uses), storage and retention, dissemination, accuracy and access, and destruction.

Collection and Storage

The Draft Regulation should be amended to include the following key principles:

Police officers should not be required to collect personal information during Community Contacts and indeed may not do so except as set out below.

Only personal information or information about an individual's circumstances that is necessary for a specific purpose in Clause 2 may be asked for and/or recorded in police memobooks, databases or other police records (collectively "police records") in a given Community Contact. "Necessity" in this context cannot be interpreted in reference to a possible future requirement, but rather should relate to a specific current reason and need.

Data recorded in police records must identify the specific purpose of the Community Contact, referring to one of the purposes listed in Clause 2 above, and how this purpose is applicable on the facts of that stop. Police officers should not collect or retain information in police records unless such collection or retention is legitimate, necessary and proportional, in relation to the specific purpose for which it was collected. The intrusiveness of collection should be proportional to the benefit of the collection.
General information sweeps are impermissible and unconstitutional.

The Draft Regulation provides for a review of data that is collected by a designate of the Chief within 30 days of its entry into an unrestricted police database. This is an unacceptable standard. Supervising officers should review data before it is entered into an accessible police database, and ensure that it meets the requirements and principles enunciated above.

With respect to data collected by an officer that does not appear to have had a legitimate reason, the Draft Regulation nonetheless provides for the possible indefinite retention of the information in a restricted police database. This is a violation of section 8 of the *Charter* and of individual privacy. The Draft Regulation should, in contrast, require that

information that does not satisfy the above criteria is not recorded and/or retained in a police database or police record, and is destroyed. In addition, the Regulation should create a notification requirement with respect to such situations, that the supervising officers of the officer who collected the data should be notified, in order to monitor officer compliance with this Regulation and *Charter* and *Code* requirements.

The Draft Regulation should include provisions providing that information collected is sufficiently accurate, complete and up-to-date with safeguards against mistakes that might harm individuals. And there must be provisions requiring openness about the policies and practices relating to personal information.

Once reviewed and stored, information in the database should be subject to strict protocols that place firm and appropriate limits on access and dissemination or sharing; prevent secondary uses unrelated to the specific purpose for which information was collected; and specify clear limits on retention.

Retention

The Draft Regulation allows for indefinite retention of data in police records. The indeterminate storage and retention of personal information procured from Community Contacts is presumptively prohibited – whether stored in police memobooks, a restricted or an unrestricted database. Information can only be collected, retained and used for legitimate law enforcement purposes until the specific and limited purpose for which it was collected has been fulfilled.

In addition, information from Community Contacts, excluding legitimate non-arbitrary non-discriminatory policing activities as set out in Clause 2, may be retained for the shortest period possible, and not to exceed one year, to account for the need of individuals to have access to their own information in the case of a complaint. However, once these purposes have been accounted for, personal information can and should be destroyed.

The Draft Regulation should ensure that compliance with an appropriate retention and destruction policy should be subject to audit.

Historical data

Police services should not be permitted to retain information from Community Contacts if they were not entitled to collect it in the first place. It is not enough to say such legacy data may be relevant at some point in the future. The Supreme Court has directed that decisions as to whether or not section 8 is engaged must be made from an *ex ante* perspective, without regard to the fact that evidence of illegal activity was discovered as a result of the search.[x] Indeed, the Supreme Court of Canada has "repeatedly cautioned against the use of *ex post facto* reasoning in evaluating constitutional claims under section 8 of the *Charter*.[xi] According to the Supreme Court, this approach is "inherent in the notion of being secure against unreasonable searches and seizures".[xii]

As such, any existing (i.e. historical) Community Contact data that lacks a credible non-discriminatory reason (for example, Community Contacts that do not meet the criteria in Clause 2 above) should be purged within the shortest period possible, and not to exceed one year.

Public notice of the destruction should be widely circulated and should clearly indicate that, after a narrowly defined period of time, the data will be securely destroyed.

Database for Purpose of Police Accountability ("Accountability Database")

The Draft Regulation requires that data be collected for accountability purposes on officer attempted collections of identifying information that are within the scope of the Draft Regulation. Data to be collected about individuals includes the following, and are to be collected based on officer perception:

a) Sex
b) Age group
c) Racialized group

We are concerned that the Draft Regulation does not ensure comparability and accountability such that trends can be observed across Ontario and data may be probative of racial profiling. There needs to be greater standardization.

Thus we recommend the following:

a) Individual police services, at a minimum, be required to collect the data based on the following racial categories[xiii]:

    1. Indigenous Peoples
    2. White
    3. Black
    4. East Asian, Southeast Asian
    5. South Asian
    6. Middle Easterner
    7. Other Racialized Group

b) Specific tabulations of the data that may be probative of racial profiling be required in the annual report (for example, the representation of young Black males in attempted collections of identifying information broken down by reason).

c) Information collected include: the date, time, location, reason for and outcome of the attempted collection of identifying information.

We are also concerned about access to the accountability data, the purpose of which is not to gather intelligence, but to identify, monitor and address racial profiling. Thus, the

accountability data must be housed separately from intelligence or investigative data and not be accessed for these purposes. Data should be collected in a manner consistent with the human rights principles outlined in *Count me in!*, the OHRC's guide to collecting human rights-based data.[xiv]

Training (Section 10)

The Draft Regulation provides for training of officers on certain rights of individuals, bias awareness, discrimination and racism, rights of individuals to access information about themselves, and the initiation of interactions with members of the public.

This training is mandatory for every officer who attempts to collect identifying information. And it requires the successful completion of such training within the 36 months prior to this activity.

What is missing from this provision is a requirement that such training be mandatory for all municipal and OPP officers, including new recruits, civilian members, special constables, supervisors, senior officers, Chiefs of Police and the Commissioner. The appropriate training may be helpful to senior officers who are required to monitor officers for compliance, who may be required to supervise the retention of data with sensitivity.

In addition, the Draft Regulation should spell out in greater detail and with more stringent requirements the content and parameters of the training, to include the following:

Training on fundamental principles, rights and issues with respect to racial profiling

Anti-Racial profiling training should:

- Be designed and delivered by trainers with racial profiling expertise.
- Involve local racialized and marginalized communities in design, delivery and evaluation, including identifying relevant racial profiling scenarios.
- Include comprehensive anti-racism training including, but not limited to simulations.
- Convey the importance of good community relations, the current status of those relations, and the impact of community contacts on those relations.
- Describe the systemic nature of racism and racial profiling, including its particular impact on Black and Aboriginal individuals and communities.
- Explain the emotional and psychological impact on individuals of an encounter with police in which the individual feels compelled to participate, in particular when the individual is young and/or racialized and/or marginalized.
- Explain that racial profiling violates the *Charter*, the *Code* and the *Police Services Act* with references to relevant case law.
- Explain principles that apply when identifying racial profiling, and how intent is not required to establish racial profiling.

Training on the Regulation

Training on the Regulation should:

- Train officers in detail on the requirements of this Regulation. Such training should include instruction on officers' responsibilities to ensure proper conduct, which includes a detailed review of guiding elements on officer discretion to stop and question individuals; officer obligations with respect to rights including rights notification, the provision of reasons and a written record of the interaction.
- Incorporate role-play and scenario-driven learning modules to improve its "street-level application and articulation", including scenarios dealing with Community Contacts.
- Address how people who think they are being racially profiled and/or stopped arbitrarily might become angry or upset, and that such reaction must not form the basis of further adverse treatment.
- Communicate that arbitrary stops and racial profiling are unacceptable and will result in disciplinary penalties, up to and including dismissal .
- The nature of unconscious bias and its influence on police decision making.

Training on Privacy

Privacy training should:

- Train officers on privacy rights, including: the duty to protect personal privacy; the meaning and definition of personal information; the difference between collecting personal information and recording it; the authority and purpose for the collection, use and disclosure of personal information; and privacy best practices as discussed above, including: necessity and identifying purpose, data minimization and proportionality; accuracy and completeness, openness and access, retention and destruction.

Evaluation

Officers should be required to demonstrate attitudinal and behavioural competence in the training components above.

Accountability (Sections 10-16)

Supervision

Effective accountability depends on clear standards, common understanding of those standards, and verification that the standards are being met. Accountability of this Regulation should begin with front-line supervisors, who must have a clear and consistent understanding of the Regulation (through recent training), and who must regularly and consistently mentor their officers, and verify the appropriateness of all Community Contacts, the issuance of documents and the full completion of records.

In addition, additional oversight measures are needed in order to provide for public scrutiny and confidence in our police.

Discipline

If officer behaviour in Community Contacts, or Community Contacts supervision, is found to be contrary to this Regulation, or otherwise racially discriminating, officers and supervisors should be subject to counselling, remedial training and/or disciplinary action up to and including dismissal.

Reporting and Oversight

The Draft Regulation provides some important direction to Police Chiefs, but fails to account properly for the authority and responsibility of Police Services Boards to hold their Services to account. In order for local governance to work, the Draft Regulation must stipulate that Chiefs are accountable to the Boards, that Boards must be accountable to the province, and that everyone is accountable to the public. As such, Section 11of the Draft Regulation should stipulate that policies developed under this section, like all Board and Ministry policies, shall be binding on the applicable Chief of Police or Commissioner. In addition, Section 14 should require that the Boards, and the Minister for the OPP, must monitor, audit and evaluate police service compliance with both this Regulation and its associated board policy(s), direct corrective action where appropriate, and publically report both the evaluation results and corrective action to be taken.

And the Draft Regulation must require an independent audit of compliance with this Regulation by each Board and the Ministry, to be undertaken by the Attorney General or their agent, at least once every five (5) years.

In addition, the Draft Regulation must provide for an independent Monitor, to be appointed through agreement (or arbitration) by the Minister and the Ontario Human Rights Commission, who will be responsible for overseeing compliance with this Regulation by Police Services and Police Service Boards in Ontario, including periodic audits and specifically targeted and random inspections of policies and procedures, training, and reports under this Regulation, as well as police databases and records in relation to compliance with this Regulation.

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[i] LEGISLATIVE ASSEMBLY OF ONTARIO (Official Records for 22 October 2015): Private Members' Public Business
Mr. Jagmeet Singh: "I move that, in the opinion of this House, the government of Ontario should instruct all police services in Ontario that while the law allows them to stop, detain, investigate and search individuals where there are reasonable grounds to do so, arbitrary and/or discriminatory street checks/carding violate the Canadian *Charter of Rights and Freedoms* and the Ontario *Human Rights Code*, have no place in Ontario, and that such practices should be immediately stopped."
[ii] Sir Robert Peel's Principles of Policing
[iii] *Ibid*
[iv] *R v Dyment*, [1988] 2 SCR 417 at para 19*; R v Tessling*, [2004] 3 SCR 432, 2004 SCC 67 at paras 21-24; *R v Spencer*, 2014 SCC 43 at para 35.
[v] *Nassiah v. Peel Regional Police Services Board*, 2007 HRTO 14 para. 112

[vi] *Ibid,* at para.197; See also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 33

[vii] *Maynard v. Toronto Police Services Board*, 2012 HRTO 1220 (CanLII).

[viii] Ottawa Police Service *Policy on Racial Profiling* (Policy No. 5.39, June 27, 2011) http://www.ottawapolice.ca/en/news-and-community/resources/Racial_Profiling_Policy27Jun11_FINALpdf.pdf

[ix] Report of Chief Evans to Peel Police Services Board re *Street Checks Process* (September 23, 2015).

[x] *R v Feeney*, [1997] 2 SCR 13 at paras 45,49,52 115 CCC (3d) 129.

[xi] See *Hunter v Southam Inc*, [1984] 2 SCR 145 at 160, 14 CCC (3d) 97; *R v Wong*, [1990] 3 SCR 36 at 49-50, 60 CCC (3d) 460; *R v Greffe*, [1990] 1 SCR 755 at 775, 790, 55 CCC (3d) 161; *R v Dyment*, [1988] 2 SCR 417 at 430, 45 CCC (3d) 244; *R v Kokesch*, [1990] 3 SCR 3 at 29, 61 CCC (3d) 207; *R v Feeney*, [1997] 2 SCR 13 at paras 45, 49, 52 115 CCC (3d) 129; *R v Buhay*, 2003 SCC 30 at para 19, [2003] 1 SCR 63; *R v A.M.*, 2008 SCC 19 at paras 5, 70, [2008] 1 SCR 569) explaining that the purpose of the guarantee "is to prevent unreasonable intrusions on privacy, not to sort them out from reasonable intrusion on an *ex post facto* analysis".

[xii] *R. v Dyment*, [1988] 2 CCR 417 note 4 at 430.

[xiii] See, for example, the racial categories of the Ottawa Police Service Traffic Stop Race Data Collection Project: http://www.ottawapolice.ca/en/news-and-community/resources/Racial_Categories_1.pdf

[xiv] Ontario Human Rights Commission, *Count me In! Collecting human rights-based data* (2009), online: Ontario Human Rights Commission http://www.ohrc.on.ca/en/count-me-collecting-human-rights-based-data