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Hospitals' ability to conduct 'Vulnerable Sector Checks' will be impacted by Bill 113

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Bill 113, An Act respecting police record checks, received Royal Assent on December 3, 2015 and, once proclaimed, will become the *Police Record Checks Reform Act* (the Act). The Act sets out a process governing requests for searches of the Canadian Police Information Centre (CPIC) databases, or other police databases, in connection with screening an individual for certain purposes, including employment or membership.

The Act authorizes police forces to conduct three types of police record checks: (a) criminal record checks, (b) criminal record and judicial matters checks, and (c) vulnerable sector checks. Non-conviction information (i.e., charges) is authorized for disclosure only in a vulnerable sector check and only if it meets the test for exceptional disclosure set out in section 10 of the Act.

The Act has significant implications for hospitals and other health institutions, including in particular, long-term care and retirement homes. Vulnerable sector checks are mandatory under both *Long-Term Care Homes Act* and the *Retirement Homes Act*. Although not mandatory under the *Public Hospitals Act* (the PHA) most if not all hospitals in Ontario also routinely conduct vulnerable sector checks prior to hiring staff, accepting volunteers or appointing professional staff.

The Act makes consequential amendments to this and other legislation to make clear that all "criminal reference checks" required by statute are now "police record checks" under the Act.

Under section 10 of the Act, information regarding charges against an individual that did not result in a conviction, regardless of the reason for non-conviction, is not authorized for "exceptional disclosure" unless the information satisfies all of the following criteria:

a. The criminal charge to which the information relates is for an offence specified in the regulations made under the Act
b. The alleged victim was a child or a vulnerable person
c. 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
v. The reason the incident or behaviour did not lead to a conviction
vi. Any other prescribed considerations

Under the Act, a "vulnerable person" means a person who, because of age, disability or other circumstances, whether temporary or permanent: (a) is in a position of dependency on others or (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. Clearly, hospital patients fall within this definition.

These new preconditions to disclosure of "non-conviction information" raise significant hurdles for hospitals to obtain accurate information about an applicant for employment or for appointment to a hospital's professional staff. Perhaps the most significant hurdle is that, where previously an individual could simply consent to a vulnerable sector check, consent is no longer a basis for disclosure under the Act. If a request for a vulnerable sector check is refused by the police record check provider, the individual must submit a formal request for reconsideration. The provider must, within 30 days after receiving the reconsideration request, reconsider its determination. Non-conviction information will not be disclosed if, after a reconsideration, the provider determines the information does not meet the criteria listed above.

Absent voluntary disclosure by an applicant of non-conviction information, hospitals may have no way of knowing whether an applicant has been charged, or even repeatedly charged, with crimes that may be relevant to their suitability to work around hospital patients and staff. This could hamper a hospital's ability to ensure patient safety under the PHA, and to protect staff from workplace violence and harassment under the Occupational Health and Safety Act.

If and when the Act is proclaimed, hospitals and other health institutions will lose the ability to officially verify non-conviction information unless the narrow test for exceptional disclosure is met. They will have to rely on voluntary disclosure of this information, while also anticipating that some applicants may now challenge requests for voluntary disclosure of criminal charges.

In mitigating the impact of the Act, hospitals and other health institutions should reinforce and recommunicate their expectations that physicians will still discharge their disclosure obligations regarding criminal charges in a "candid, honest, thorough and accurate manner." This is the standard that the Health Professions Appeal and Review Board (HPARB) applies when reviewing physician conduct during the credentialing process (see Rosenhek v. Windsor Regional Hospital, 2009 CanLII 88685 (ON HPARB) at para 18).

Importantly, the failure to do so (particularly in circumstances where an applicant has attempted to rely on the Act to shield such information from disclosure), can constitute reasonable grounds to refuse an application for appointment or reappointment.

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