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Submission to Toronto Police Service Board

Re: The CAPP Report on Police Carding

December 15, 2014

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TABLE OF CONTENTS

Law Union of Ontario
Submission to Toronto Police Service Board
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1. Background

"Carding," which is now euphemistically referred to as "community contacts" is part of a general intelligence-gathering scheme in which the constitutional and privacy rights of members of the public (disproportionately racialized youth) are systematically violated for the purpose of amassing their personal information in a police database. It has been suggested by the police service that carding is intended to preserve public safety and prevent crime. However, the practice is divisive and antithetical to building public trust. Carding has systematically violated the rights of people in our communities, and especially of racialized youth, and it has undermined the public's trust and confidence in the police service and thereby impaired public safety.

For many years, the Toronto Police Service had undertaken the practice of carding without any accountability to, oversight by, or policy direction from the Toronto Police Services Board. Following the publication of a series of articles in the Toronto Star concerning the practice of carding and how it disproportionately affected racialized youth (the "Known to Police" series), the Board set about to take measures to rein in the practice.

Ultimately, in April 2014, the Board adopted a "Community Contacts" policy which sought to take a rights-based approach to how police interact with members of the public. The Board directed the Chief to develop carding procedures that complied with the policy, and also directed him to report back about the disposition of pre-policy carding data within three months. The Board prudently also commissioned an independent evaluation with respect to the implementation of the policy, resulting in the report by LogicalOutcomes entitled *A Community-Based Assessment of Police Contact Carding in 31 Division – Final Report – November 2014* (the "CAPP report"), which is now before the Board for consideration.

In previous submissions filed with the Board by the Law Union, it was submitted that the Board should exercise its responsibility to protect the public and:

> ***(a) direct that the practice of stopping and questioning law-abiding persons for general intelligence-gathering purposes cease immediately; and***
>
> ***(b) direct that all of the data that has been collected under this program for general investigation purposes be immediately purged.***

The Community Contacts policy adopted by the Board was supposed to address the first point. It is apparent from the CAPP Report, however, that law-abiding community members are still being improperly stopped and questioned by the police.

The second recommendation is echoed in the CAPP Report, and is discussed further below.

The CAPP Report substantiates the numerous concerns about "carding" raised by the Law Union in its previous submissions to the Board. Even with the Policy in place, it appears that the practice continues to generate violations of ss. 7, 8, 9 of 15 the *Charter of Rights and Freedoms*, and the *Ontario Human Rights Code*, and to risk derogation from Canada's international obligations under the International Convention on the Elimination of all Forms of Racial Discrimination (“ICERD”) and the Convention on the Rights of the Child ("CRC"). The effects are still being borne disproportionately by racialized communities, and especially by racialized youth

The Law Union understands that the Chief is supposed to deliver a response to the CAPP Report, but as of the date of this submission, the Law Union of Ontario has not yet seen the Chief’s response.

2. The Law Union’s response to the CAPP Report

The findings of the CAPP Report raise grave concerns for the Law Union of Ontario. It appears that notwithstanding the Board’s implementation of the “Community Contacts” policy, community members perceive that they continue to be arbitrarily stopped by the police. This presents problems for effective law enforcement and community relations. It raises many questions about what is going on with policing in our communities.

The CAPP Report makes 10 recommendations. The Law Union accepts that these recommendations are valuable and reasonable and should be implemented. However, these recommendations are not comprehensive. More is required. Also, interim measures are necessary to prevent any further violation of the rights of the members of our communities while the procedures necessary to implement the Community Contacts policy are being finalized.

3. Recommendations

In addition to the recommendations set out in the CAPP Report, the Law Union of Ontario recommends the following:

Recommendation No. 1: Moratorium on carding

As an immediate measure, it is recommended that the Board place a moratorium on all further carding until such time as the Chief finalizes carding procedures that are acceptable to the Board.

It appears that the Board's carding policy is not yet being consistently followed or implemented by the members of the Toronto Police Service. Given that there is no empirical evidence whatsoever that the practice of carding is necessary or effective in making our communities safer, any further carding activity should cease. This would not restrict the police from exercising their legitimate law enforcement functions and from collecting data in the context of specific criminal investigations.

Arbitrary stops and carding interactions do not accord with the Community Contacts policy and violate of the *Charter of Rights and Freedoms* and the *Ontario Human Rights Code*, as well as s.1(2) of the *Police Services Act*. Thus, until such time as the Police Service is capable of fully complying with the policy and implements satisfactory and constitutional carding procedures, it is necessary to direct Chief Blair to suspend the practice of carding. Otherwise, the Board would be condoning the continuation of practices that it knows to be unlawful.

The illegal nature of carding is discussed further below.

Recommendation No. 2: Non-disclosure of carding data

As an immediate measure, it is recommended that the Board direct the Toronto Police Service to not disclose to any third party: (a) any information gathered during the course of a carding stop; or (b) the fact that a person has been carded, including in response to reference checks.

We have heard from members of the community who have been turned down from jobs or placements because carding information is included in disclosure provided in response to some police reference checks. The fact that someone has been carded does not mean that they have done anything wrong, but even so, the fact that a person has been in contact with the police can be enough to create apprehension among employers or agencies who will be more inclined to give a job or a placement to somebody who has no carding stops on their record. This can cause irreparable harm to innocent members of our communities.

The Board has already directed the Chief to report back by July 2014 on the disposition of pre-policy contact card data and also report on the implementation of a retention and destruction protocol. The Chief has not obeyed that direction.

The CAPP Report also recommends the purging of pre-policy contact card data. The Law Union strongly supports that recommendation. Until that recommendation is implemented, however, it is necessary for the Board to take interim measures to ensure that the carding data that is in the database is not disclosed in a manner that may unfairly affect members of the public.

Recommendation No. 3: Purge carding data

It is recommended that the Board direct the Chief to purge all carding data collected prior to the adoption of the "Community Contacts" policy, and to confirm within three months that the data has been purged.

As noted, the Chief has already failed to comply with the Board's direction to report back by July 2014 on the disposition of carding data. There is also no information on the public record that indicates that any such report is forthcoming.

The CAPP report recommends that pre-carding data be purged.

Unless the Chief can demonstrate why it is legitimate and necessary to retain any pre-policy carding data, all such data should be purged as soon as possible.

The Board should also direct the Chief to advise whether any carding information was provided to any external entity, and if so to whom, under what circumstances, and whether any of those entities shared the information with any other entity, so that steps could then be taken to ensure that any third party also purges the carding information.

Recommendation No. 4: Track police stops

It is recommended that the Board direct that all police stops of members of the community be tracked and recorded.

The CAPP Report found that 62 out of some 400 or so survey respondents reported that they had been carded since June 2014. However, Chief Blair indicated that only 83 contact cards had been submitted during the same period for the entire division where thousands of people reside. What accounts for that difference?

Even if we accept that some people's recollection is imperfect, it is inconceivable that that alone would account for the difference between the CAPP Report findings and Chief Blair's data.

This raises the prospect that community members are continuing to be stopped by police, often for arbitrary reasons, just the same as before – but that the police are no longer entering details of those interactions into the carding database. In other words, while it may be true that the number of cards entered into the database may be down, that does not necessarily mean that the frequency of arbitrary stops of community members is down by the same amount.

If police have reason to stop a person, a record of that stop and the reason for that stop must be entered into a database that can track such things, as well as into an officer's notebook. This, however, is not for the purpose of general intelligence collection (which is what the carding program was essentially designed for), but rather for the purpose of helping to monitor police activity and whether it complies with Board policies.

Recommendation No. 5: Policy amendment re: contacts in the context of a specific investigation

It is recommended that Articles 4(a)(i) and 4(a)(ii) of the Community Contacts Policy be amended to read as follows:

(i) Investigating a specific offence or a series of offences, where the officer has an honest belief that the person approached has some connection to the offence(s) whether as a suspect or as someone who has helpful information with respect to the offence(s); and

(ii) Preventing a specific offence or a series of offences, where the officer has an honest belief that the person approached has some connection to the offence(s) whether as a suspect or as someone who has helpful information with respect to the offence(s);

Articles 4(a)(i) and 4(a)(ii) of the proposed Community Contacts policy justify the initiation or recording of contacts for the purposes of: (i) investigating a specific offence, or (ii) preventing a specific offence.

The policy should also require that there be an honest belief on the part of officers initiating contacts that there is some nexus or connection between the person contacted and the specific offence, in order to reduce the potential for misinterpretation or abuse of the policy

Under the present practise of carding, officers have often falsely advised persons that they are investigating a break-and-enter or some other offence in the community, as a pretense for stopping and carding a person. Some officers expand on this ruse by advising a reluctant individual that they "fit the description "of the perpetrator. The use of this kind of tactic (and other tactics) can psychologically compel the person, particularly a young or marginalized person, to comply with the carding process, even if they are aware they have the right not to do so and do not wish to participate.

Recommendation No. 6: Policy amendment re: contacts in the context of ensuring a community member is not at risk

It is recommended that Article 4(a)(iii) be deleted from the Community Contacts Policy.

Article 4(a)(iii) states that the initiation or recording of Contacts is justified for the purpose of "ensuring the community member who is the subject of the Contact is not at risk".

This additional provision is both unnecessary and overbroad, and may allow the continuation of practices that are inconsistent with the *Charter* and the *Human Rights Code*.

Article 4(a)(iii) creates an overbroad category of individuals who may be subject to such stops and does not provide appropriate guidance to police officers as to what level of risk is needed to approach an individual for the purposes of initiating and recording his or her personal information. The Law Union does not question the Toronto Police Service's duty to share information with community residents who might be at risk and/or targeted as victims of crime. Indeed, the Law Union believes that it is the duty of the police to share information with community residents about their activities, in particular to individual community members who might be potential victims of criminal activity.

The Law Union, however, questions the need to collect and retain personal information related to such interactions when they are not related to the prevention of or investigation into a specific offence. This kind of provision could allow such stops to be used as a pretext for carding, and may discourage actual persons at risk from seeking the assistance of the police.

Paragraphs 4(a)(i) and (ii), with the modifications recommended above, already allow police officers to continue to approach individuals who may be at risk as victims of criminal activity. Additionally, individual police officers may disseminate information related to specific investigations to individuals in community without recording and retaining individual personal information through a number of methods that do not infringe upon individual human rights and fundamental freedoms, including community meetings.

Recommendation No. 7: Policy amendment re: informing community members of their rights

It is recommended that Article 5(c) of the Community Contacts Policy be reworded to state:

> **Community members know as much as possible in the circumstances about their right to leave and the reason for the Contact, including by requiring that service members advise every subject of a Contact: (a) that they have the right to refuse to answer questions; (b) that they are free to leave the Contact at any time; and (c) that any personal information that they provide to the service**

member could be retained in a police intelligence database; and by requiring the service member to ensure the subject's informed and voluntary consent before proceeding with the Contact.

Paragraph 5(c) provides that the Chief shall establish procedures to ensure that:

> (c) Community members know as much as possible in the circumstances about their right to leave and the reason for the Contact

This provision requires further clarity and specificity to ensure that persons approached are aware of their rights as guaranteed by the *Charter of Rights,* and of the consequences of agreeing to answer an officer's questions or not. It should also require affirmation of informed and voluntary consent. This is particularly so given the findings of the CAPP Report.

The police are the representatives of the state in the community. Persons approached will continue to include many who are young, racialized and marginalized. The power imbalance between a mature, uniformed and armed officers and such persons is enormous. The policy must recognize this power imbalance and aim to mitigate it in circumstances where the subjects of the Contacts are not legitimately suspected of actual wrongdoing.

Notwithstanding the establishment of the existing Policy, it is apparent from the CAPP Report that citizens do not feel free to leave such interactions: 41% of those carded since June 2014 indicated that they did not feel they had the right to leave during their stop (page 42), and only 7% of respondents were even aware of the Policy's existence. These responses illustrate that "carding" continues to elicit information from the community involuntarily and without grounds. These findings warrant amendments to the policy that provide further clarity about the information that must be given citizens if police officers wish to approach them for carding purposes.

4. Legal dimensions of carding

The Law Union of Ontario maintains that the practise of stopping and questioning law abiding individuals for general intelligence-gathering purposes violates the right to life, liberty and security of the person; the right to be free from arbitrary detention; the right to be secure against unreasonable search and seizure; and the right to equality before and under the law and the equal protection and equal benefit of the law without

discrimination guaranteed by the *Charter*. The practice also violates the prohibition of discrimination under the Ontario *Human Rights Code* ("*Code*"), Canada's commitments under *the International Convention on the Elimination of all Forms of Racial Discrimination* ("ICERD") and its obligations under the *Convention on the Rights of the Child ("CRC")*.

The practice of carding and street checks disproportionately singles out Black and Brown children and youth. This is a form of racial profiling that violates the *Code*'s prohibition of discrimination in the delivery of a service, and it violates a child's right not to be subjected to arbitrary or unlawful interference with his or her privacy under the *CRC*. Racial discrimination by law enforcement officers causes significant individual and societal damage. It disproportionately criminalizes certain demographic groups, engenders public mistrust of societal institutions, and generates feelings of humiliation, vulnerability, and loss of dignity, confidence, and self-esteem.

"Community policing" has as its philosophy and rationale the embodiment of police building ties with communities and working closely and in a shared endeavour with members of the communities that they have sworn to serve and protect. Racial profiling, monitoring, over-scrutinizing, and arbitrarily stopping and questioning people and treating them like potential criminals because of the way they look – no matter how politely it is done – not only harms community members but serves to strain community/police relations.

The Law Union is not satisfied that the Community Contacts policy, as presently worded, fully satisfies the Toronto Police Service's obligations flowing from the operation of the *Charter* and the *Code*, and recommendations aimed at improving the policy are set out above. However, the existing policy is still a significant improvement over the previous situation in which there was no policy at all.

Put simply, any scheme whereby the police stop and question members of the public outside the context of an actual police investigation in order to obtain and retain so-called "police intelligence" information of a personal nature is unlawful. The Community Contacts Policy was intended to put an end to such practices in most circumstances. It is thus of significant concern to the Law Union that the CAPP Report indicates that the policy is not being consistently complied with.

4.A. *Charter* Section 9: Right To Be Free From Arbitrary Detention

Section 9 *Charter* protection is violated whenever the police detain a person absent a police power to do so. Detention under the *Charter* occurs whenever a person is

stopped and for any reason believes that he or she is being detained physically or by psychological restraint leading to a belief or concern that they are not free to leave or to continue what they had been doing.

In examining whether such a belief or concern exists, Courts have stressed the power imbalance between a person and the police and differences in age or maturity. In addition, factors such as marginalization and the frequency with which a person has been stopped play a role in determining whether detention exists in any particular situation.

The practise of “carding” or “street checks,” especially when done in contravention of the Community Contacts Policy, is likely to violate Section 9 of the *Charter* and cannot be saved by Section 1.

The CAPP report demonstrates arbitrary detentions are happening in the context of "carding". Not only did a significant portion of respondents feel they did not have the right to leave, but 38.7% of those who had ever been "carded" agreed with the statement, "I was surrounded and intimidated by police" (page 35). These responses should cause the Board grave concern and prompt it to revisit the assertion, in the December 2013 legal opinion obtained by the Board, that the question of physical detentions "is not engaged by so-called carding or the Board’s draft policy” (page 52).

4.B. *Charter* Section 8: Arbitrary Search and Seizure

Further, the eliciting of answers to questions asked during a “street check” or proposed “contact” and the retention of any personal information obtained through such questioning violates Section 8 of the *Charter*: the right to be secure against unreasonable search and seizure and cannot be saved by Section 1.

As noted above, the information in the CAPP Report illustrates that "carding" continues to elicit information from the community involuntarily and without grounds.

4.C. *Charter* Section 15: Equality Rights

People of colour are vastly overrepresented among those who have been carded by the TPS. For them, carding curtails a right others can take almost completely for granted: to be left alone. This differential treatment is an affront to their dignity, clearly contravening s. 15(1) of the *Charter*. It undermines the merits, capabilities, and worth of people from these communities, both drawing on and reinforcing hurtful racial stereotypes about

criminality. It stigmatizes them and undermines their self-image—particularly that of young people—by sending a message that the State expects them, their friends, or their family to engage in criminal activity. Any response that they can simply choose whether to participate in these encounters would utterly fail to address the breach, for two reasons. First, it ignores the racialized power relationships that can make choosing to walk away difficult or impossible. Second, it does nothing to address the disproportionate number of approaches to people of colour, which in themselves constitute a *Charter* breach.

The CAPP Report notes that the substantial majority of respondents who were recently carded identified as Black, at 71% (page 40), in a context where 51% of the survey respondents were Black (page 33). They were more likely to have particularly negative experiences during their encounter:

> "Black respondents were the most likely to report negative experiences with police during their last carding encounter. Over half of respondents who identified as Black (53%) reported being spoken to disrespectfully; 48 percent reported being surrounded and intimidated and 38 percent reported being told that they fit a description. Comparatively, 10 percent of respondents who identified as White reported being surrounded and intimidated and being told that they fit a description during their last encounter. The survey analysis also found that over 30 percent of respondents from racialized and White groups reported being spoken to disrespectfully during the prior carding encounter with police." (page 40)

The CAPP results suggest that the problem of racial profiling, documented in detail in the Toronto Star's "Known to Police" series, persists. Such adverse treatment on the prohibited ground of race undermines the dignity of a protected group and would violate s. 15 of the Charter, as well as ss. 1 and 9 of the Ontario Human Rights Code and international law obligations to "pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms."

The rights violations that characterize carding are also exacerbated for youth: "Youth were significantly more likely to cite being spoken to disrespectfully by police, being surrounded and intimidated during the encounter and being told that they 'fit a description' than were adults" (page 36).

As with race, the adverse treatment of youth undermines their dignity and would violate s. 15 of the Charter and ss. 1 and 9 of the Ontario Human Rights Code. The effect on their employment prospects is also of grave concern, as are the implications for their

relations with the police as adult community members, given this kind of experience in their formative years.

While the Law Union continues to call for a complete end to the practice of carding, an immediate and permanent moratorium on the carding of youth as set out in Recommendation #1 of the CAPP Report is of enhanced importance, given the Board's obligations under domestic law and international human rights instruments.

4.D. *Charter* Section 7: Life, Liberty and Security of the Person

In *R v Clay*, [2003] 3 SCR 735 the Supreme Court of Canada held that the right to liberty is at the core of what it means to be an autonomous human being blessed with dignity and independence in matters that that can properly be characterized as fundamentally or inherently personal.

Carding by its very nature of the pursuit of personal information for intelligence purposes and retention, clearly violate these rights and is not in accordance with the principles of fundamental justice.

4.E. Violations of Ontario's *Human Rights Code*

As discussed above in the context of the *Charter* s. 15, racial profiling is discrimination, and carding is a police practice that is largely driven by racial profiling. Discriminatory policies and practices, such as racial profiling or carding, are illegal under the *Ontario Human Rights Code*, contrary to the public interest, and cannot be tolerated in a democratic society such as Canada. It is irrelevant whether the intention is to engage in racial profiling, it is the effect that matters and the data is clear that racialized youth are primarily targeted and adversely affected by the practice. Carding, as a form of racial profiling, is offensive to fundamental principles of Canadian society including justice, fairness, and equity.

Section 1 of the *Code* prohibits discrimination during the delivery of a service based on the prohibited grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, disability or the receipt of public assistance. Section 9 of the *Code* contains a prohibition on direct or indirect infringements of *Code*-protected rights.

As stated in the *Police Services* Act, the police are legally obligated to deliver policing services in a manner that safeguards the fundamental rights guaranteed by the *Code* as well as the *Charter*.

The delivery of policing is considered a service under the *Code.* Carding that disproportionately targets racialized communities, and other forms of racial profiling, are prohibited discrimination under ss. 1 and 9 of the *Code*.

Discrimination has been consistently defined by the Human Rights Tribunal and the Courts to mean adverse treatment, or a distinction which creates a disadvantage, on the basis of a prohibited ground. Racial profiling has been defined by the Ontario Court of Appeal, in *R v Brown*, as "criminal profiling based on race [...] whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group." It is clear from the data that the decisions that officers make about who to stop and question for "general investigation" purposes are invariably driven by assumptions about the criminal propensity of the group to which the subject belongs, and thus constitute racial profiling.

Carding and other forms of racial profiling are rooted in racial stereotypes and may be the result of consciously or unconsciously held beliefs, biases and prejudices. The prohibited discrimination under the *Code* linked to carding and other forms of racial profiling occurs not just in the initial decision to question or detain, but also occurs in the general phenomenon of the heightened scrutiny applied during interactions between the TPS and racialized persons.

The phenomenon of racial stereotyping, racial profiling, and the prohibited discrimination under the *Code* manifests itself in the Officer's use of their discretion to engage in conversation, question, stop, detain, or arrest, in whole or part, because a citizen is racialized. Furthermore, the stereotyping and discrimination can manifest itself through greater suspicion, scrutiny, investigation, in whole or part, because a citizen is racialized.

4.F. Violations of International Human Rights Instruments

The practice of carding, being a form of racial profiling, violates Canada's commitments under international law. The practice infringes the International Convention on the Elimination of all Forms of Racial Discrimination ("ICERD"), to which Canada is a signatory. Article 2 of the ICERD mandates that all State Parties undertake to pursue by

all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.

The Committee on the Elimination of Racial Discrimination, the body of independent experts that monitors the implementation of ICERD, has repeatedly recommended that State Parties take necessary steps to prevent identity checks, questioning, arrests, searches and interrogations that are based on physical appearance, colour or membership of a racial or ethnic group.[1] It has expressed concerns about reports that African Canadians, in particular in Toronto, are being subjected to racial profiling and harsher treatment by police and judicial officers with respect to arrests, stops, searches, releases, investigations, and rates of incarceration than the rest of the population.[2]

To the extent that the practice of carding is directed against individuals who are under the age of 18, it may violate Canada's obligations under the Convention on the Rights of the Child ("CRC"). This includes a child's right not to be subjected to arbitrary or unlawful interference with his or her privacy.[3] The CRC mandates that States Parties take all appropriate measures to ensure that the child is protected against all forms of discrimination.[4]

It should be noted that the enjoyment of a number of other international human rights may also be interfered with by the practice of carding, including a person's right to freedom of movement. The practice may also curtail people from exercising their right to engage in freedom of association and peaceful assembly given the impact that carding has on community members.

Finally, it bears noting that the international prohibition against racial discrimination is both peremptory and non-derogable. Article 4 of the International Covenant on Civil and Political Rights permits State Parties to derogate from their obligations during times of emergency except where that derogation would result in discrimination.

[1] Concluding Observations of the Committee on the Elimination of Racial Discrimination: Russian Federation, CERD/C/RUS/CO/19, 20 August 2008, para. 12, http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD.C.RUS.CO.19.pdf; Concluding Observations of CERD: Russian Federation, CERD/C/RUS/CO/20-22, March 1, 2013, para. 14 a).
[2] CERD/C/CAN/CO/19-20, 9 March 2012, www2.ohchr.org/english/bodies/cerd/docs/CERD.C.CAN.CO.19-20.pdf
[3] Article 16.
[4] Article 2.

5. Conclusion

The Board has prudently taken recent measures to curtail the arbitrary stopping and carding of members of our communities, including by adopting the Community Contacts Policy. The Law Union submits that some further amendments to the policy are warranted, as recommended in the CAPP Report and in these submissions.

However, even with the recommended changes, the Policy is meaningless if it is not being respected and implemented by the police. It is apparent from the CAPP Report, however, that the Policy is not yet being fully implemented by the police. Therefore, it is incumbent on the Board to take interim measures to stop carding and the disclosure of carding data until there are protocols in place that will ensure compliance with the *Charter of Rights,* the *Human Rights Code*, international human rights law, and the Community Contacts Policy.

All of which is respectfully submitted,

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on behalf of the Law Union of Ontario, Policing Committee