

C.L.A.S.P.
Community and Legal Aid Services Programme

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DEPUTATION TO TORONTO POLICE SERVICES BOARD
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Background on CLASP

Community and Legal Aid Services Programme (CLASP) is a student-based legal aid clinic located at Osgoode Hall Law School. CLASP has been providing services to low-income persons and York Students since 1969.

In 2004, CLASP established the Community Support Division which prioritizes clients with mental health needs. The Community Support Division represents clients with mental health needs in areas where they tend to be particularly affected, namely housing, income support and human rights. We became aware that there was a problem surrounding the retention and disclosure of police records relating to detentions under the *Mental Health Act* from clients and community groups.

Introduction to the Issue

In recent years, it has become common practice for employers and community groups working with vulnerable persons to require potential employees and volunteers to consent to a police reference check. The goal of conducting these background checks is to verify that the individual in question has not been involved in any known activity that may place the agency's client base at risk. Unfortunately, most agencies do not have a clear understanding of the limitations of this program, nor of the type of information maintained on police records that may be disclosed to them.

The *Mental Health Act* authorizes police officers to detain and transport individuals to hospital for examination by a physician in a number of circumstances. We are concerned that when a person is detained under the *Mental Health Act*, that incident becomes part of their police record, which can later be disclosed to potential employers and community agencies. The City of Toronto by-law No. 689-2000 establishes a schedule of retention periods for records, including detentions under the *Mental Health Act*, of the Toronto Police Service. These detentions are not criminal in nature, yet are recorded as arrests under the "occurrence" section of the by-law. These non-criminal detentions are retained for the same period and maintained in the same category as Theft, Break and Enter, Mischief, Assault, Threatening, Driving, and Weapons offences. Most people who find themselves in this situation had no idea that this information might ever be disclosed as part of a police reference check. Our clients' experiences show that at the time of detention, the person is typically not informed that this police contact will remain on their record. Considering that

generally these detentions involve no criminality, it never occurred to those who have had this experience that it would ever be disclosed to a potential employer. Unfortunately, most seem to learn that this is on their police record only when that agency contacts them to discuss the results of the reference check. They are then placed in the unenviable position of either disclosing very personal information or forgoing the opportunity for employment.

Significantly, while individuals who have an actual criminal conviction are able to take various steps to obtain a pardon and have their records of police contact sealed, individuals detained under the *Mental Health Act* have no procedure available to purge this information from a person's record. This is an unusually heavy burden.

CLASP views the Toronto Police's practice of retaining these non-criminal records for an extensive period of time, and then disclosing their existence to potential employers and community agencies, as problematic. It criminalizes people with mental health issues and perpetuates the myth that they are dangerous. It is discriminatory in its practice as it reveals non-criminal records that are related to persons with psychiatric disabilities, but not other non-criminal records. It negatively affects an individual's access to employment and full participation in society. Finally, we consider this practice to be a serious infringement of an individual's privacy.

Issues

Issue #1: Individuals detained under the *Mental Health Act* are not made aware that this will become part of their police record.

Clients have reported that at the time of transportation to hospital they have either been told explicitly that their interaction with the police will not become a police record or they simply haven't been given information on the matter. Because the involvement of the police in such situations is typically limited to an escort to hospital, those who have had this experience do not perceive that the incident would become part of a record that would ever be of importance to a potential employer.

Issue #2: The consent form used for the Police Reference Check Program is overly broad.

It is reasonable that general members of the public would assume that a consent to a police reference check would involve only a check of criminal records. The wording on the consent form does not provide any specific indication that the search may be broader than criminal records. Instead, the wording used refers to a search of "all record databases identified in the Memorandum of Understanding". People cannot be expected to know what that might include and therefore their consent is not informed consent. While we disagree that detentions under the *Mental Health Act* should be included in the search, other Ontario police services specifically identify the various forms of non-criminal records that might be included in the results of a search. In contrast, the consent form used by the Toronto Police is misleading.

Issue #3: The search of records in the Police Reference Check Program is overly broad and inclusive.

The goal of the Police Reference Check Program is identify any known past behaviour of employees or volunteers that may place vulnerable persons at risk. When conducting the search in question, the Toronto Police are not taking any consideration of whether or not there is a relation between the requirements of the position at issue and the nature of the record.

By including detentions under the *Mental Health Act*, the Toronto Police have effectively determined that the fact that someone was transported to hospital for *perceived (not diagnosed)* mental health concerns within the past six years makes them a danger to vulnerable persons. This, of course, is not an accurate understanding of mental health issues and is discriminatory.

Issue #4: The letters provided to employers are different for a clear reference check and a reference check with police contact.

Upon completion of a reference check where there is no record of police contact, a letter is sent to the employer stating that the record is clean. In contrast, when there is a record of police contact, the letter that is sent to the employer indicates that the existence of a record and that the results have been sent to the applicant. Employers and community agencies who regularly seek police reference checks are very familiar with the difference in letters and what it infers. Unfortunately for people detained under the *Mental Health Act*, the assumption is typically that there is a criminal history.

Issue #5: Applicants are effectively forced to either disclose information about their private health needs or forego the potential employment.

Because the employer or community agency is told that a police record exists, the applicant must choose whether to disclose information about the state of their mental health and attempt to make the employer understand that it is not relevant to the position or they must simply forego the opportunity. Our clients have chosen both routes, but all have described this experience as humiliating and degrading. There is no reason that people who have previously detained under the *Mental Health Act* should be put in this difficult position.

Issue #6: There is no process in place for someone to request the purging or sealing of records of detentions under the *Mental Health Act*.

There is no procedure in place to purge or segregate this information from a person's record. Individuals who have an actual criminal conviction are able to take various steps to obtain a pardon and have their records of police contact sealed. These individuals are also able to request the destruction of photographs and fingerprints (as can persons with discharges and withdrawals). None of these options are available to persons who are detained under the *Mental Health Act*, despite the fact that the record is unrelated to any criminal activity. This is an unusually heavy burden.

Issue #7: Other non-criminal police records are not included in the Police Reference Check.

Detentions under the *Mental Health Act* are non-criminal in nature. While the Toronto Police keep records of a variety of interactions of a non-criminal nature, they do not include these in the police reference check. For example, victims of a crime do not end up with a mark on their police reference check. Further, while detentions under the *Mental Health Act* are the result of a *perceived* medical problem, police involvement with other medical emergencies such as a heart attack, is not included in the reference check. This is a discriminatory practice against people with perceived psychiatric disabilities.

Issue #8: Detentions under the *Mental Health Act* are often the result of an assessment made by a police officer.

Police have the authority under the *Mental Health Act* to transport individuals to hospital if they are of the belief that the person is a risk to his or herself and/or a risk to others. This assessment is being made by officers who have no qualifications to do so. Our clients are having their career paths negatively affected for six years due to an assessment made by a police officer with no medical qualifications.

Issue #9: This practice has the potential to disproportionately affect individuals with mental health issues who are also affected by poverty.

People with mental health issues are more likely to obtain early assistance when they have financial resources and family support. These individuals are less likely to reach the point where police intervention is required as they will be able to afford services before that becomes necessary. However, those who are living in poverty do not have the means to seek that intervention and are often only able to receive it once they reach a state where they are more likely to come to the attention of the police.

Recommendation:

The current practice in relation to the treatment of records of detentions under the *Mental Health Act* by the Toronto Police Service breaches the Charter, human rights law and privacy laws. It has a significant impact on the ability of those affected to participate actively in society. There is significant concern about this practice among groups composed of and/or working with Psychiatric Survivors. CLASP recommends that the Toronto Police Services Board examine the issue in detail by bringing stakeholders together and providing them the opportunity to provide crucial input into the analysis.