

On the Record: Police record checks - recognizing impacts, stigma and establishing best practices

Police Records Check Coalition

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Presentation Overview:

- 1. The human dimension: recognizing impacts**
- 2. How does this happen part 1: definitions and levels of record checks**
- 3. How does this happen part 2: the legal framework**
- 4. What can we do about it: best practices, moving forward**

Part 1: The human dimension

How are individuals being impacted by record checks, and what can a record check tell us?

- **AUDIO**

Breadth of Areas Impacted by Police Records



Education and jobs

- **Disclosure can prejudice employability**
- **Timing is a very big issue - missed opportunities**
- **Generally, employer/agency understanding of non-conviction information is low**

Travel

- Clients that plead guilty to enter diversion/post-charge programming may think they will have no criminal record or that travel to the U.S. will not be affected.
- Since the U.S. and some other countries have access to the CPIC system, border officials use CPIC to determine whether individuals have criminal records.
- Changes to LEARN Guidelines do not impact travel
 - US has direct access to CPIC
- Ongoing IPC court challenge against TPS

Impact on Individuals with NC Records

- Often unaware of existence of record
- Stigma, loss of trust or respect
- Places a burden on the individual to explain the incident to employers and risk being denied for employment, housing, insurance, citizenship, etc.
- With mental health police records specifically, disclosure can negatively impact an individual's wellness and recovery.
 - Such disclosures are discriminatory and contribute to the stigma of mental illnesses.

Impact on individuals with convictions

- **Extend punishment beyond sentence**
- **Stigmatizing, labelling**
- **Barriers to re-entry and reintegration**
- **General impact on individuals' likelihood of success**

What can a record check tell us?

- Why do we ask for this information??
- Convictions - very limited correlation to future reoffending, and no correlation to employment-related offences
- Non-convictions – no evidence found that this information is at all useful
- How are employers, educators, HR professionals, using this information?

Part 2: How does this happen? Definitions and levels of record checks

**What kinds of records do police keep,
what is a criminal record, and what do
different kinds of record checks show?**

What kinds of information do police keep? And where?

- Lots of information
- Convictions - guilty pleas, fines, sentences
- Findings of guilt - absolute or conditional discharges
- Other non-conviction and police contact information
 - Acquittals
 - Withdrawn charges
 - Mental health and community contacts
 - Witness information
 - Etc.
- Police databases are local (individual forces) and national (e.g. Canadian Police Information Center (CPIC))

Non-Conviction Dispositions

Acquittal at Trial

Stay of Proceedings

Withdrawn charges – no prospect of conviction

Withdrawn charges – Peace Bond

Withdrawn Charges - Diversion

Absolute and Conditional Discharges

Records of Contact

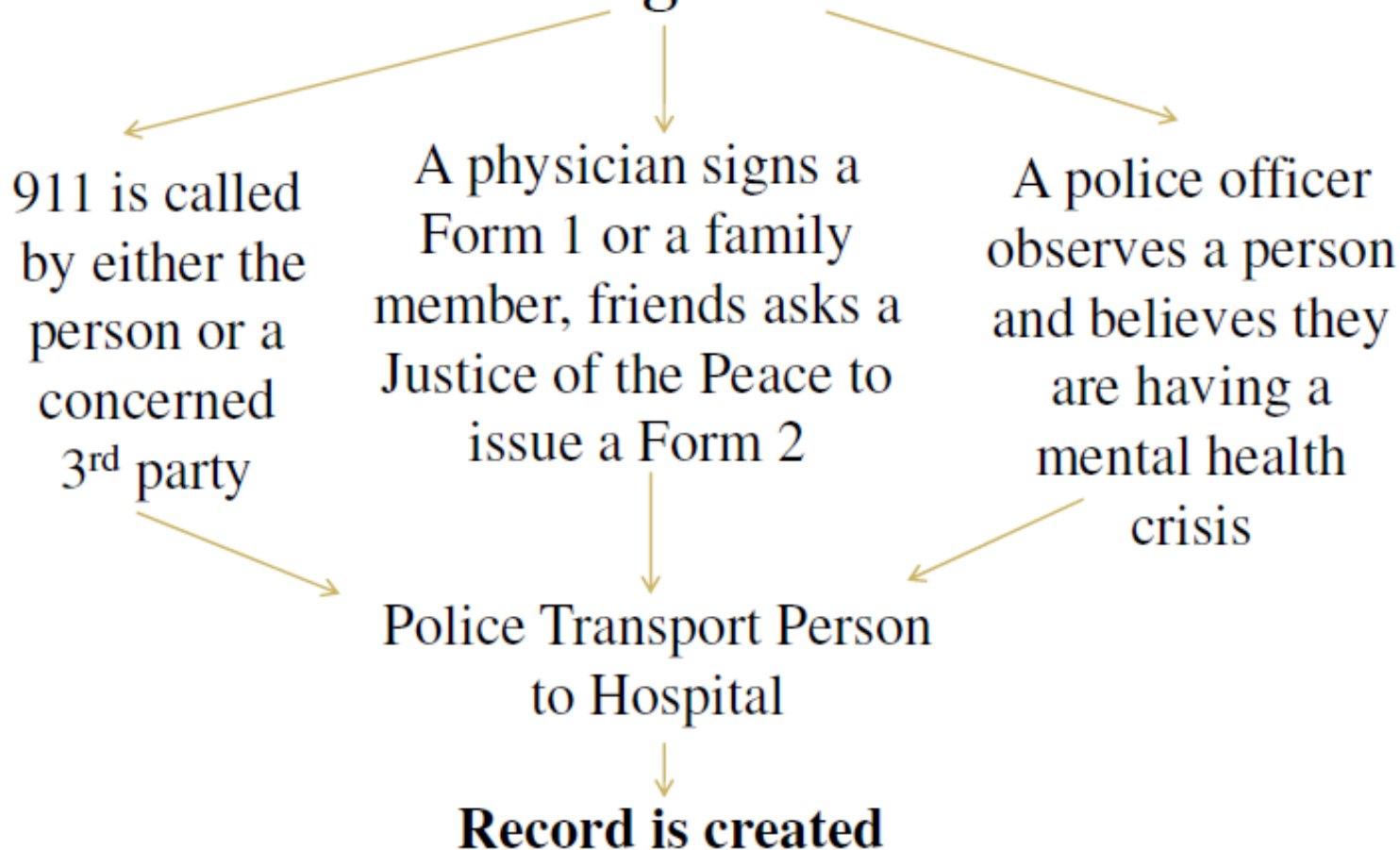
- Persons of interest
- Suspects
- Violent, harmful and threatening behaviour
- Mental health contacts
- Victims, witnesses
- Not all police contact info was necessarily released...
 - “Victim/Complainant/Witness information should not be released unless under exceptional circumstances”

Mental Health Police Records

A mental health police record can be created if:

- 911 call for help due to a mental health crisis
- Concerned family member intervenes and calls 911 or contacts a Justice of the Peace
- A police officer believes a person is having a serious mental health crisis and transports the person to the hospital for assessment
- A doctor requires a person to be taken to the hospital for assessment or treatment

Person is having a mental health crisis



- A mental health police record is generated regardless of whether the person is admitted to hospital.

How do they disclose this information?

- No comprehensive legal framework governing police record checks
- Widespread misconceptions – what is a criminal record?
- Many believe a criminal record is only criminal offences which resulted in a conviction and have not been subject to a record suspension (pardon).
- Most broadly speaking, a criminal record is a transcript of one's criminal interactions with law enforcement.
- In practice, answer varies

Disclosure (cont.)

- There have been some attempts to systematize this process
- Provincial LEARN Guidelines (Ontario Association of Chiefs of Police)
 - First edition several years ago
 - Voluntary – not all services use
 - Updated in June/July 2014 – not all services have adopted/implemented the most recent version
- http://www.oacp.on.ca/Userfiles/Files/NewAndEvents/PublicResourceDocuments/GUIDELINES%20FOR%20POLICE%20RECORD%20CHECKS%20%20%20June%202014_FINAL.pdf

Levels of Record Checks in LEARN Guideline

Criminal Record Check



Police Information Check



Police Vulnerable Sector Check

Level 1: Police Criminal Record Check (PCRC)

- Prior to June 2014
 - Criminal convictions (summary and indictable) from CPIC and/or local databases
- Revised Guidelines
 - Criminal convictions from CPIC and/or local databases.
 - Summary convictions, for five years, when identified.
 - Findings of Guilt under the Youth Criminal Justice Act within the applicable disclosure period
- *Note – youth findings of guilt – new guidelines increase clarity but not actually a substantive change*

Level 2 - Police Information Check (PIC)

- Prior to June 2014
 - Criminal convictions
 - Absolute and conditional discharges for 1 or 3 years
 - Outstanding entries (active arrest warrants, peace bonds, pending charges, etc.)
 - Family court restraining orders
 - Many non-conviction and non-criminal contacts with local police services
- After June 2014
 - Criminal convictions, discharges, outstanding entries (same as previously)
 - Not criminally responsible findings (5 years)
 - Will NOT disclose any police contact and other non-conviction dispositions

Level 3: Police Vulnerable Sector Check (PVSC)

- Vulnerable sector - children, elderly, disabled, etc.
- Prior to June 2014 – very similar to Level 2 (PIC), with addition of some convictions subject to a record suspension
- After June 2014
 - Everything on less detailed levels of checks (convictions, discharges, outstanding orders, etc.)
 - Certain offences with a record suspension
 - No police contact
 - Under exceptional circumstances can disclose non-conviction records ...

Exceptional disclosure assessment (June 2014 LEARN)

- Only for PVSC, and should be rare
- “Recent non-conviction records that show a clear, evidenced pattern of alleged predation of vulnerable persons, sexually or financially, may meet the threshold for disclosure”
- Mandatory requirements:
 - Charge is one on list of relevant offences
 - More than one incident
 - Alleged victims meet definition of a vulnerable person
- If these are met, further factors considered
- There is a reconsideration process

Record checks: the quick summary

- **Prior to June 2014 or for non-compliant police services**
 - Wide range of non-conviction and police contact regularly released on at least 2 levels of checks
 - Some statutory limits – absolute/conditional discharges, formal diversion, YCJA, record suspensions
- **After June 2014 for compliant police services**
 - Police contact never released
 - Non-conviction only released on PVSC under very limited circumstances, once meet test and subject to discretion
- **Ongoing issues –non-compliance, youth records, NCR, retention, etc.**

Ways forward for clients?

- Finding out what's on a record – access to info, record check
- Suppression request
 - LEARN guideline – reconsideration process
 - Benefits – certainty re a particular record check, tailored to desired outcome
 - Drawbacks – timing (esp. VSC), no guarantee for future
- Purge requests
 - Benefits – final decision, timing
 - Drawbacks – not tailored for record checks, does not necessarily resolve record check issue(!)
- Both are difficult – timing and practicalities - neither are perfect
- Further redress – complaints (Office of the Independent Police Review Director (OIPRD)/police service boards), judicial reviews...
- Resources for clients – www.ccla.org/recordchecks

Part 3: How does this happen?

The legal framework

Privacy, human rights, employment law

Legal framework

- **Points of legal intersection**
 - What can be collected?
 - What can be retained?
 - What can be requested?
 - What can be disclosed, when and to whom?
 - How can the information be used?
- **Many overlapping laws**
 - *Criminal Code; Youth Criminal Justice Act; Criminal Records Act; Municipal Freedom of Information and Protection of Privacy Act and Freedom of Information and Protection of Privacy Act (Ontario); Privacy Act (Federal); Police Services Act; Ontario Human Rights Code*

Police: Collection and retention

- Collection of information for law enforcement purposes - generally broad authority
- Retention – governed by various laws
 - Privacy statutes
 - For municipal services, municipal bylaws can mandate retention
 - *Criminal Records Act* (discharges, record suspension)

Police: Disclosure

- **Some statutory limits**
 - *Criminal Records Act* (discharges, record suspensions)
 - *Criminal Code* (diversion)
 - *Youth Criminal Justice Act* – various
 - *Ontario Human Rights Code*
- **Under privacy laws, more limits on disclosure**
 - **Compelling circumstances affecting the health or safety of an individual - eg. disclosure is necessary to prevent a significant injury**
 - **Consent**
- **Police must rely on consent for standard record checks**
 - **Question - is consent meaningful in this context?**
- **Police discretion is still required**

Employers, agencies, etc.:

Collection and retention

- Consent necessary - prior, informed, voluntary...
- Existing employees – contractual obligations
- Government workplaces - *Charter*
- Human rights legislation
- Vulnerable sector searches – specific limits in the *Criminal Records Act*
- Youth records – it is an offence for youth to communicate a sealed record...
- Ontario – poor privacy protection in the workplace

Is an employer ever *obligated* to request a record check?

- **Some clear statutory obligations in Ontario:**
- **Retirement Homes Act**
- **Long Term Care Homes Act and Regulations**
 - **Screening for *some* staff and volunteers who are 18+ must include criminal reference checks**
- **Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008, and Regulations**

Other statutory obligations?

- *Occupational Health and Safety Act* (Bill 168) does *not* oblige a record check of current or prospective employees
- Charities: *Income Tax Act* does *not* oblige a record check of current or prospective employees
- Negligent hiring: general liability?
 - Complex – depends on the type of employee, the job, the client, etc. etc. etc.
 - Bottom line - we have not found any Canadian cases where an employer was found to be liable for not running a reference check

An Overview of Provincially Mandated Police Records Checks: A Resource for Ontario's Not-for-Profit Sector



An Overview of Provincially Mandated Police Records Checks:
A Resource for Ontario's Not-for-Profit Sector



- http://www.citizenship.gov.on.ca/english/pp/police_records_checks/police_records_checks_en.pdf

Employers, agencies, etc.: Using a record

- Human rights legislation
- Employment law
- Privacy laws?

Part 4: Best practices, moving forward

LEARN Guideline

- In 2011 the (optional) LEARN Guideline was released by an OACP Subcommittee
 - No mental health terminology
- Recent updates on non-conviction information
 - Sept 2013 – diversion no longer disclosed
 - Feb 2014 OACP Resolution:
 - Presumption against disclosure of non-conviction records; and
 - Narrow public safety exception to protect the most vulnerable people in our communities.
 - June 2014 – revised guidelines

Education, best practices for employers and volunteer orgs

- Education
- Best practice guides – www.ccla.org/recordchecks
- Ontario-specific Information Guides by CCLA & JHSO – **Coming soon!**

Further advocacy goals

- Need to rationalize this process from all sides
- Regulate: retention, request, disclosure, use
- Consistent, predictable, fair, rational
 - Protect via legislation or mandatory policy
 - Presumption – do not disclose non-conviction info
 - In exceptional circumstances, government must prove this is relevant information
 - Centralized decision making body for VSC
 - Give a fair, transparent, independent appeal process
 - Changes to the human rights code, privacy laws to limit what employers etc. can ask for and use

Thank You!
Questions?

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