



“Street Checks and Balances”

**Submission in response to the Ministry
of Community Safety and Correctional Services’
consultation on proposed Ontario regulation
for street checks**

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August 31, 2015

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Background

- 1 Whatever label you choose – street checks, community contacts, or carding¹ – the practice of police officers arbitrarily stopping individuals on the street, requesting personal identification and information, and maintaining a record of the encounter for possible future use, has increasingly come under scrutiny. Some police officials maintain that street checks may help solve and prevent crime, keeping communities safe and secure. However, critics condemn the practice as unconstitutional, discriminatory (it disproportionately impacts racialized and marginalized individuals), and destructive of community relations with and confidence in police.
- 2 I have always thought the practice of street checking was wrong and illegal and said as much when asked about it on July 28, 2015, during my press conference for the release of my latest Annual Report. In my view, street checking is similar to what citizens experienced during the G20 summit in Toronto in June 2010. I observed, after investigating circumstances relating to that event, that the police detention of thousands of citizens on the streets of Toronto under constitutionally suspect legislation represented a massive compromise of civil rights.²
- 3 The growing demand for reform of street checking practices this summer led the Ministry of Community Safety and Correctional Services to announce on July 30, 2015, that it was launching a public consultation to ensure that police interactions with the public are without bias, consistent, and carried out in a manner that promotes public confidence. According to the Ministry, a draft regulation with guidelines for street checks will be posted after the consultation process is complete.

¹ For the purposes of this submission, I will use the term “street checks,” which the Ministry appears to prefer.

² André Marin, Ombudsman, December 2010, *Caught in the Act*, Investigation into the Ministry of Community Safety and Correctional Services’ conduct in relation to Ontario Regulation 233/10 under the *Public Works Protection Act*, online:

<<https://ombudsman.on.ca/Files/sitemedia/Documents/Investigations/SORT%20Investigations/G20final-EN-web.pdf>> See also: Statement by Ombudsman André Marin, *Arrest, Detention and the G20: There is More to Civil Liberties than Freedom from Arrest*, December 9, 2010, online:

<<http://www.ombudsman.on.ca/Files/sitemedia/Documents/Investigations/SORT%20Investigations/g20statement-en.pdf>>

The Bottom Line

- 4 I met with the Deputy Minister and Senior Officials from the Ministry on August 12, 2015, to provide my perspective as part of this consultation. In my view, this is the bottom line:
 - Stopping citizens without an objective and reasonable basis for believing that they may be implicated in a recent or ongoing criminal offence, or where there are reasonable and probable grounds to arrest them, is unconstitutional – it’s a form of arbitrary detention contrary to section 9 of the *Canadian Charter of Rights and Freedoms*;
 - The purported benefit of street checks – their effectiveness as a policing tool to improve public safety – does not meet the reasonable limits test established by section 1 of the *Charter*; and
 - The detrimental effects of street checks on individuals and the community are simply too great to justify this practice.
- 5 If the government persists in its attempt to permit and regulate street checks, significant safeguards will be required to minimize the infringement on individual civil rights and salvage community confidence in policing in the province.
- 6 In this submission, I review the law on arbitrary detention and how it applies to street checks, and respond to the Ministry’s consultation, including putting forward several recommendations.

The Right Not to Be Arbitrarily Detained: Balancing Crime Prevention and Civil Rights

- 7 It is important to establish upfront that criticism of street checks is not an attempt to undermine policing best practices. Police officers are generally entitled to obtain information from various sources. They are free to gather intelligence and mine the collected information for critical patterns and links, in order to assist in solving and preventing crimes. However, in democratic societies like ours, there are restrictions on how far police can go to get information. While unfettered police access to everyone’s homes and personal information would likely help solve crimes and improve public safety, Canadians recognize that police powers should be subject to reasonable limits. That’s why we have the *Charter of Rights and Freedoms*.
- 8 Under section 9 of the *Charter*, everyone has the right not to be arbitrarily detained and police officers must respect that right when attempting to collect information.

What does it mean to be detained?

- 9** In Canada, individuals enjoy the right to walk down public streets unimpeded.³ Police officers have no legal authority to stop citizens, and anyone asked to stop by a police officer is free to walk away. However, the circumstances change when a detention occurs. Detention means someone's liberty is restricted through compulsion or coercion.⁴ Police officers have the legal authority to detain an individual if they believe, based on reasonable suspicion, that the person may be implicated in a recent or ongoing criminal offence, or where there are reasonable and probable grounds to arrest them.⁵ A police hunch that someone is acting suspiciously does not amount to objective grounds to justify detention.⁶ When people are detained, they have the right to be told why, and the right to legal counsel.⁷

What if the individual agrees to stop?

- 10** If someone voluntarily co-operates with police, there is no detention.⁸ However, the courts have recognized that social dynamics and power imbalances exist, and sometimes an individual may experience psychological detention when stopped and questioned by police.⁹ The courts consider several factors when determining whether a psychological detention has occurred, such as whether the person reasonably perceived that he or she was singled out for focused investigation, the nature of the police conduct (including the language used, location, and duration of the encounter), as well as the age, physical stature, minority status and level of sophistication of the person being questioned.¹⁰
- 11** Unless there is explicit and informed consent to participate in a street check, it is reasonable to assume that many of those stopped and questioned by police experience psychological detention. A recent survey of residents from one area of

³*Dedman v. The Queen*, 1985 CanLII 41 (SCC)[1985] 2 S.C.R. 2 at page 35; *Figueiras v. Toronto (Police Services Board)*, 2015 ONCA 208 (CanLII) at pages 9 and 17.

⁴ *R. v. Therens*, [1985] 1 S.C.R. 613 at 642.

⁵ *R. v. Mann*, 2004 SCC 52 at para. 34.

⁶ *R. v. Grant*, 2009 SCC 32 at para. 50.

⁷ s. 10, *Charter*.

⁸ *R. v. Exposito* (1985), 53 O.R. (2d) 356 (CA).

⁹ *Supra* note 6 at para. 44

¹⁰ *Ibid*.

Toronto, funded by the Toronto Police Services Board, found that 69.5% of survey participants who were subjected to street checks did not feel free to walk away.¹¹

When is detention arbitrary?

- 12** A detention, whether physical or psychological, is arbitrary if there are no criteria, express or implied, which govern its exercise.¹² At present, there are no uniform criteria applying across the province concerning street checks, and individual police practices are often unofficial, unclear, and inconsistent. Although the Toronto Police Services Board's most recent policy on community contacts attempts to instill more controls around the practice, it has still not yet been operationalized.
- 13** In essence, a street check – unless it represents an authorized detention under the current law – is a form of arbitrary and illegal detention.

Conflicting street check examples

- 14** In **Toronto**, where street checks, locally known as “carding,” have been routinely used for years, those stopped are typically asked to show identification, and the information recorded by police includes name, age, gender, race, skin colour, address, physical features and the names of associates.¹³ While the Toronto Police Services Board claims that this practice has resulted in the successful conclusion of at least 110 significant investigations,¹⁴ no substantive evidence or details have so far been offered to support this assertion. It's therefore unsurprising that Toronto's street check practices have recently become the focus of a constitutional challenge.¹⁵

¹¹ Logical Outcomes, “*This Issue Has Been With Us for Ages*”: *A Community-based Assessment of Police Contact Carding in 31 Divisions*, (Nov 2014), online: <<http://capptoronto.ca/wp-content/uploads/2014/07/CAPP-Final-Report-WEB201114.pdf>> [*Community-based Assessment of Police Contact Carding*]. *Community-based Assessment of Police Contact Carding* at page 42.

¹² *R. v. Hufsky*, [1988] 1 S.C.R. 621 at 632.

¹³ Jim Rankin, “Police Stop Blacks More Often Than Whites, Data Shows,” *The Star*, (5 Feb 2010), online: <http://www.thestar.com/news/gta/2010/02/05/police_stop_blacks_more Often Than Whites Data Shows.html>.

¹⁴ PACER Report at 7.

¹⁵ Sean Fine, “Law Student Challenges the Constitutionality of ‘Carding’ by Police,” *The Globe and Mail*, (10 June 2015), online: <<http://www.theglobeandmail.com/news/national/law-student-challenges-the-constitutionality-of-carding-by-police/article24910075/>>.

- 15** The Toronto Police Services Board’s community contacts policy was amended after vocal criticism of police street check practices. The new policy provides that individuals may be stopped and questioned only if this would serve a “valid public safety purpose,” including investigating a specific offence or series of offences, preventing a specific offence, and ensuring the community member who is the subject of the contact is not at risk.¹⁶ Full implementation of the policy is awaiting procedures, which are the responsibility of the Chief of the Toronto Police Service. However, the policy provides some guidance for this task, for instance, the procedures must ensure that community members know as much as possible in the circumstances about their right to leave and the reason for the contact.¹⁷
- 16** In **Ottawa**, the unofficial procedure is to only conduct street checks when there is suspected criminal activity. In contrast to the view of Toronto police, the Ottawa Police Service sees no value in random street checks. In a recent review, it was noted:
- Random Street Checks are not acceptable and the OPS believes they lead to the collection of information not useful in solving or preventing crime.¹⁸
- 17** The Regional Municipality of **Peel** Police Services Board is currently undertaking a full public review of the practice of street checks. It has been reported in the media that the Peel police follow a directive allowing for street checks relating to:
- The search for a suspect(s) as a result of an offence in which a street interview may assist in identifying culprits;
 - An area identified for activity in contravention of a criminal, provincial or municipal statute;
 - A check of individuals under strict conditions as a result of any legal order;
 - Information provided to officers at the start of their shift in relation to wanted persons, major incidents and investigations, and crime analyst alert information on crime trends;
 - Temporary detention of a driver of a vehicle to investigate a possible crime or contravention of a provincial or federal statute; and
 - Suspicious behaviour that can be categorized as unusual or out of place.¹⁹ [SEP]

¹⁶ Toronto Police Services Board, *Community Contacts*, amended June 18, 2015 at section 4 page 3.

¹⁷ Ibid at s. 5 page 4.

¹⁸ Mark Patterson, *Ottawa Police Service Plan for Participation in Provincial Street Check Review*, Ottawa Police Service, (27 July 2015) at 3.

¹⁹ Pam Douglas, Peel Police Chief Welcomes Standardized Rules for ‘Street Checks,’ ”*Brampton Guardian*, (16 June 2015), online: <<http://www.bramptonguardian.com/news-story/5679586-peel-police-chief-welcomes-standardized-rules-for-street-checks-/>>.

- 18** The Peel Regional Police Chief has stated publicly that the service’s street checks aren’t random, don’t target individual groups, and that all officers must follow policy.²⁰ She has also observed that the purpose of street checks is “[t]o record police interactions with individuals who are seen in circumstances that are suspicious.”²¹
- 19** Interestingly, all three policies contemplate street checks occurring in contravention of the legal requirements for authorized detention. They permit officers to conduct street checks without the need for reasonable suspicion that the individual stopped might be implicated in a recent or ongoing criminal offence.

Can detention be authorized through regulation?

- 20** According to section 1 of the *Charter*, the right to be free from arbitrary detention is subject only to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”²² At present, street checking is not a legislated limit on a *Charter* right, but it will be if the province issues a regulation prescribing the circumstances in which street checks can be authorized. Even then, the regulation will still have to pass constitutional muster. Given the evidence so far, it is questionable whether it will be salvageable as a demonstrably justified restriction on civil liberties.
- 21** In assessing the constitutionality of an infringement of *Charter* rights, the courts review:
1. The importance of the objective;
 2. The rational connection between the proposed limit and the objective;
 3. Whether the least drastic means has been employed to accomplish the objective; and
 4. Proportionality: the effects of the limit must be proportional to the objective of the restriction on the right.²³
- 22** Applying these considerations, street checking does not measure up to constitutional standards.

²⁰ Ibid.

²¹ Kristy Hoffman et al, “Carding Across Canada: Data Show Practice of ‘Street Checks’ Lacks Mandated Set of Procedures”, *The Globe and Mail*, (17 August 2015), online: <http://www.theglobeandmail.com/news/national/does-carding-occur-across-canada/article25832607/>.

²² S. 1, *Charter*.

²³ *R. v. Oakes*, [1986] 1 SCR 103 at pages 138-139.

No rational connection

- 23** Although street checks might fulfill an important social objective – ensuring public safety – it’s unclear how arbitrarily detaining citizens is rationally connected to this goal. Courts typically require statistical analysis and independent studies to establish a rational connection between a legislative objective and an infringement of a *Charter* right.²⁴ So far, the available information about the public safety potential of street checks has been purely subjective and anecdotal. There are no independent studies or statistical analyses confirming that this police tool has been of significant benefit in solving or preventing crimes. In addition, as noted earlier, two major police services, in Ottawa and Toronto, hold conflicting views on the effectiveness of random street checks in improving public safety.

Too drastic a measure

- 24** Street checking is more than a minor inconvenience. For instance, in Toronto, it can take 10 minutes or more to ask questions and record the personal information that is usually collected. Police have various methods at their disposal to obtain information in less intrusive ways, including the ability to engage in fully consensual and voluntary exchanges.

Not proportionate

- 25** The detrimental effects of street checks are also disproportional to any purported benefits that can be derived from them. Street checks can have real and lasting negative impact on the lives of those whose information has been collected. Individuals who have been subjected to this process have convincingly described the loss of dignity and the fear associated with these encounters with police.²⁵ The same Toronto survey cited earlier also found that 48.2% of those who had been carded reported that the police officer spoke to them disrespectfully,²⁶ and 38.7% of the same group reported that they were “surrounded and intimidated by

²⁴ *R. v. Thomsen*, [1988] 1 SCR 640 at para. 21.

²⁵ Desmond Cole, “The Skin I’m In: I’ve Been Interrogated by Police More Than 50 Times – All Because I’m Black”, *Toronto Life*, (May 2015), online: http://www.torontolife.com/informer/features/2015/04/21/skin-im-ive-interrogated-police-50-times-im-black/?page=all#tlb_multipage_anchor_2.

²⁶ *Community-based Assessment of Police Contact Carding*, supra note 7 at 35.

police.”²⁷ Many also experienced other negative emotions, such as anxiety and depression, after being carded.²⁸

- 26** In Toronto, routine background checks can reveal that a person was the subject of a street check, even if the circumstances surrounding the interaction were entirely benign.²⁹ For instance, it has been suggested that a parent could be prohibited from volunteering at a school or obtaining a job if a background check reveals that a community safety note was entered against his or her name.³⁰ The Toronto Police Service also admits that it has used information obtained through street checks to “screen out” its own job applicants.³¹ Although the government’s proposed Bill 113, the *Police Record Checks Reform Act, 2015*, if passed, will place some controls on disclosure of information obtained from street checks, the benefits of collecting and retaining this information remain highly questionable.

Threat to Community Confidence in Policing

- 27** Unfortunately, the value of street checking as a policing tool pales in comparison to the reputational harm that inevitably accompanies it. The Toronto Police Service recently recognized that it risks erosion of public confidence when its operational practices result, intentionally or unintentionally, in the alienation of individuals or groups within society.³² Stakeholder groups, the media and affected individuals have argued passionately and persuasively that the practice creates more problems than it solves and presents a major obstacle to building community trust in police and encouraging co-operation with criminal investigations.³³ Toronto survey results also support that individuals who have been subjected to

²⁷ Ibid.

²⁸ Ibid.

²⁹ Community-based Assessment of Police Contact Carding, supra note 7 at 19.

³⁰ Ibid.

³¹ Toronto Police Service, *The Police and Community Engagement Review: Phase II – Internal Report and Recommendations*, Toronto, 2013, [“PACER Report”] at 14.

³² Toronto Police Service, *The Police and Community Engagement Review: Phase II – Internal Report and Recommendations*, Toronto, 2013, [“PACER Report”] at 14.

³³ See for example: Howard Morton, *The Law Union of Ontario*, Letter to the Toronto Police Services Board dated June 20, 2013, online: <<http://www.lawunion.a/wp-content/uploads/2013/10/carding-June-20-2013.pdf>> at 2; Leo Russomanno, “Carding, Not Just a Toronto Problem” (8 June 2015), online: <<http://www.agpllp.ca/carding-not-just-a-toronto-problem/>> and “City Councillor Calls on London Police to Suspend Carding Program”, AM980, (18 June 2015), online: <<http://www.am980.ca/2015/06/18/city-councillor-calls-on-london-police-to-suspend-carding-program/>>.

street checks are less likely to call the police when problems arise, and more likely to distrust them.³⁴

Answering the Ministry's Questions on Street Checks

General approach: Identify the benefit first

- 28** In framing the issues for discussion around street checks, the Ministry has adopted the premise that “street checks done properly are a necessary and valuable tool for police in their efforts to help communities remain safe and secure.”³⁵ The goal of its consultation exercise is to arrive at a single, clear regulatory standard that permits the practice while respecting fundamental rights and freedoms. The Ministry intends for street checks to continue, but hopes to avoid the criticisms of randomness, discrimination and victimization that they currently attract.
- 29** I believe that this starting point is flawed. Prior to putting pen to paper in drafting a regulation, the Ministry should first satisfy itself that there is independent, objective, evidence-based data to support that street checks do achieve concrete and significant results in solving and preventing crimes. It should not simply accept the subjective and anecdotal protestations of its policing partners. Any future regulation will only survive constitutional scrutiny if the government can clearly establish that there is sufficient evidentiary support for the use of this policing tool as an important public safety measure. That evidentiary base does not currently exist.
- 30** If the Ministry does discover independent, objective evidence to support the use of street checks, it should publicize the results of its research and explain why it is so critical to continue to support them. Justifying the practice in this open and transparent manner should encourage public confidence in this approach. However, failure to articulate clear, objective and evidence-based reasons for promoting street checks will continue to erode public trust in this practice.
- 31** The Ministry should also consult independent experts in privacy, human rights and constitutional law to ensure any street check regulation is drafted in accordance with the law, and properly balances law enforcement efficiency and civil rights.

³⁴ Community-based Assessment of Police Contact Carding, supra note 7 at 44.

³⁵ Ministry of Community Safety and Correctional Services: Public Consultations Ontario Proposed Regulation for Street Checks Consultation Discussion Document, online:

<http://www.mcscs.jus.gov.on.ca/english/PublicConsultations/mcscs_pc.aspx> at page 1.

- 32** The Ministry should also ensure that street checks are not permitted on a speculative basis, purely to collect data that might be helpful at some future date. Street checks should generally be limited to situations in which they are linked to a clear and specific investigative purpose.
- 33** As well, rather than have individual officers enter street check information directly into police service databases, a supervisory officer should be responsible for vetting the information to confirm that there was a reason for the street check that was consistent with the regulatory requirements.
- 34** I have several recommendations in response to the Ministry’s questions, beginning with its general approach to any proposed regulation:

Recommendation 1

The Ministry of Community Safety and Correctional Services should conduct thorough research to confirm that street checks are an effective policing tool based on independent, objective statistical analysis and evidence-based studies, prior to drafting a regulation on the practice.

Recommendation 2

The Ministry of Community Safety and Correctional Services should report publicly on any independent research and studies confirming that street checks are an effective policing tool in solving and preventing crimes.

Recommendation 3

The Ministry of Community Safety and Correctional Services should consult independent experts in privacy, human rights and constitutional law to ensure that any regulation governing street checks is supportable in law and appropriately balances law enforcement interests and civil rights.

Recommendation 4

Any regulation on street checks should restrict their use to situations in which the information is collected for an identifiable and specific investigative purpose.

Recommendation 5

Any regulation on street checks should provide that a supervisory officer should be designated by each police service to review information gathered through street checks and confirm that the street check complied with the regulatory requirements, prior to entering the information into the relevant police service database.

What is a street check?

- 35** When people talk about street checks, they commonly discuss situations where police have stopped and questioned racialized youth and adults, frequently male, who happen to be out in either high crime areas or seem out of place in other neighbourhoods. Typically, there is no suggestion that the street check is connected with a specific criminal investigation or even a valid investigative purpose.
- 36** Given all this, I was surprised to see the example that the Ministry provided to illustrate when a street check might take place:

Street checks are used by police to engage and record interactions with individuals whose activities and/or presence within the broader context (e.g., location, time, behaviour, *etc.*) seem out of the ordinary. For example, if a police officer comes across an individual apparently loitering, late at night, in an area that has been experiencing an increased number of break-ins, the officer should be able to ask the individual what they are doing there, and ask for their name and other information to identify them. That information could be entered into a police database so that other officers are aware of the suspicious activity and can monitor it.³⁶

- 37** I find this scenario somewhat misleading. Leaving aside the fact that loitering is itself a criminal offence, one can imagine that this fact situation, in certain circumstances, might rise to the level of reasonable and objective suspicion that the individual is implicated in a recent or ongoing criminal offence justifying detention. Clearly, the example cited by the Ministry does not reflect the experience reported by many individuals who have been stopped by police and subjected to a street check.
- 38** Similarly, the Police Association of Ontario recently released the results of an online survey of 1,350 people relating to street checks.³⁷ It found that the percentage of participants who supported street checks increased from 24% to 40% when specific examples were provided. However, the sensational examples proffered hardly reflect the reality of the practices that have garnered criticism. For instance, the examination of the car tires of convicted murderer Russell Williams is characterized as a street check. It is also suggested that street check information

³⁶ Supra 33 at page 2.

³⁷ Police Association of Ontario, “Support For Street Checks/Carding Jumps 39% When Defined: Survey”, online: <<http://www.newswire.ca/news-releases/support-for-street-checkscarding-jumps-39-when-defined-survey-522385871.html>>.

also led to the arrest of serial murderer and sex offender Paul Bernardo in 1993. The argument that notorious criminals would escape notice without street checks is disingenuous and reflective of fearmongering. It is telling that even with these exaggerated examples, the majority of those surveyed either did not support or had no view on the practice of street checks.

- 39 These examples, if accurate, bear little resemblance to the real-life experiences that have been publicly shared by victims of street checks, in which they have described being intimidated and coerced, often in the neighbourhoods where they live, for no discernible reason.
- 40 In considering the concerns expressed by stakeholders about street checking practices, I trust the Ministry will bear in mind the evidence of individuals who have recently experienced them firsthand.

Recommendation 6

The Ministry of Community Safety and Correctional Services should carefully consider the evidence of victims of improper street checking in order to ensure that it understands the real scope of current street checking practices in Ontario.

Voluntary street checks

- 41 In its consultation paper, the Ministry has suggested that street checks could be defined as:

A voluntary interaction between a police officer and a member of the public where the police officer requests information about the person, and the information is recorded in a police database.

- 42 If an interaction with police is entirely voluntary, it does not constitute an arbitrary detention. However, given the right to be free from arbitrary detention and the possibility that individuals will believe themselves to be psychologically detained when approached by police, if the practice of street checks is permitted, its use must be clearly circumscribed. Any regulation should only authorize street checks in limited and specifically defined circumstances, consistent with a clear, constitutionally supportable and well-articulated public safety purpose.
- 43 Voluntary street checks are only voluntary to the extent that the individuals subjected to them thoroughly understand their rights and the implications of cooperating with police requests. The Ministry should ensure under any regulation that police officers are responsible for obtaining and recording informed consent to

street checks. This means that before starting to question people, police officers must be required to caution them in clear language that they are not obligated to stop and answer questions, and that they have the right to walk away at any time and to decline to respond to some or all questions asked. Police should also explain what information will be recorded and the use to which it might be put. These exchanges should be recorded, preferably in real time through the use of body-worn cameras.

- 44 In order to minimize the potential negative impacts of street checks, they should be brief, objective and non-confrontational, with officers using open-ended, exploratory questions.
- 45 There should also be clear regulatory guidance about what information can be obtained during a street check. The information collected should be related to an identifiable investigative purpose. In appropriate circumstances, this might include gathering personal information (name, date of birth, address). Collection of racial and demographic information might also assist in ensuring the integrity of street checks, as this information could be monitored to ensure that they are not improperly used to target racial or other identifiable groups.
- 46 To combat the current inconsistency in the practices across the province and criticism about the scope of information gathered during street checks, the Ministry should also create a mandatory street check form setting out the permissible areas of inquiry. Police officers should also be required to record the reasons for conducting a street check.
- 47 I therefore recommend the following, with respect to how any regulation on street checks should proscribe the practice:

Recommendation 7

The regulation on street checking should set out the legal authority and public safety purpose for street checks, the standards applying to them, and detailed descriptions of the limited circumstances in which they can be conducted.

Recommendation 8

Any regulation on street checks should ensure that police are required to caution individuals in clear language that they are not obligated to stop or answer questions, and if they do agree to cooperate what will be recorded and what use will be made of the information.

Recommendation 9

Any regulation on street checks should address communication with street check subjects, including directing that street checks should be brief, non-confrontational exchanges using open-ended, exploratory questions.

Recommendation 10

Any regulation on street checks should specifically set out the information that can be obtained during a street check and require police officers to document the reason for collecting the information from the subject of the street check.

Recommendation 11

The Ministry of Community Safety and Correctional Services should develop a mandatory form for use during street checks that identifies the permissible areas of inquiry.

Street checks of minors

- 48** Minors are particularly vulnerable in interactions with police, and are entitled to extra protections. The *Youth Criminal Justice Act* states that young persons in the criminal justice system require “enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected.”³⁸ A young person who is detained by police has the right to consult their parents, a trusted adult and/or a lawyer.³⁹ Police officials are certainly entitled to detain and arrest young persons in accordance with the existing law. However, the street checks regulation should expressly exempt individuals under the age of 18 years from this additional method of information gathering.

Recommendation 12

Any regulation on street checks should prohibit street checks of individuals under the age of 18 years.

³⁸ Section 3(b)(iii).

³⁹ Statements provided by a youth may not otherwise be admissible see section 146.

Training

- 49 To ensure proper application of the regulatory guidelines, the Ministry should oversee development of a street check training program at the Ontario Police College that includes emphasis on the importance of respecting individual rights and freedoms, human rights, as well as the voluntary nature and requirements associated with this practice. As the Ministry has noted, training on bias identification and respectful interpersonal communication skills could also be included.
- 50 The training should also be regularly updated to reflect best practices and legal developments. Officials from all levels of policing, including senior officers, should be required by legislation to undergo regular training on street checks, and no officer should be permitted to conduct street checks without being fully trained.

Recommendation 13

Any regulation on street checks should require that the Ministry of Community Safety and Correctional Services prepare a comprehensive street check training program at the Ontario Police College, and revise the program as appropriate in accordance with best practice and legal developments.

Recommendation 14

Any regulation on street checks should require that police officials from all organizational levels regularly undergo street check training, and no officer should conduct a street check without receiving the proper training.

Ensuring transparency and accuracy of information collected

- 51 Anyone who has been the subject of a street check should be provided with a record of the interaction, including the date, time and names of those present (including badge numbers of the involved officers), the information recorded, and an explanation about how the information may be used as well as the conditions for its retention. Ideally, this information should be provided on the spot, using technology similar to that used for issuing parking tickets in some municipalities.
- 52 Subjects of street checks should also have the opportunity to quickly correct any errors in the information that is recorded about them.

Recommendation 15

Any regulation on street checks should require police officials to provide street check subjects with a record of the interaction, including the date, times, names of those present, the badge numbers of involved officers, the information recorded, and an explanation of how it may be used, as well as the conditions for its retention.

Recommendation 16

Any regulation on street checks should provide that subjects of street checks have a right to request that a police service correct errors, and require police services to establish and publicize an expeditious procedure for correcting street check records.

Record retention

- 53** At present, police services retain street check information for indeterminate periods, with the anticipation that it might prove useful at some point – subject to various local record-keeping procedures. In order to respect rights to privacy and the integrity of the information gathering process, as well as to ensure consistency in retaining personal information obtained through street checks, street check records should be destroyed within a short period of time – i.e., about seven days. The only exceptions should be situations in which there is a continuing, specific and valid investigative reason that justifies retaining the information – in such circumstances, the reasons should be formally documented.
- 54** When information is retained for a valid investigative reason, it must also be subject to regular reviews in order to ensure that its retention continues to be justified – or it must be destroyed. These record retention provisions should override any local by-laws, procedures or practices relating to records management.
- 55** Police services should also be required to destroy, by a limited date, data obtained by street checks that do not meet the regulatory standards.

Recommendation 17

Any regulation on street checks should address information retention and provide that street check records should be destroyed, regardless of local records retention requirements, within a set period, unless there is a documented and continuing specific investigative reason justifying their retention.

Recommendation 18

Any regulation on street checks should direct that if information is retained for a valid investigative reason, it must be subject to regular review to ensure that its retention continues to be justified, and if not, that it is destroyed.

Recommendation 19

Any regulation on street checks should require that data obtained prior to the regulation coming into force that do not meet legislated retention requirements should be destroyed by a set date.

Oversight

- 56** Street checks raise legal, human rights and personal privacy concerns, and the practice should be closely monitored to prevent abuse. Police services should be required to maintain statistics on the number of street checks, the circumstances prompting them, and identifying personal characteristics of subjects, particularly those that could give rise to concerns about improper targeting of groups protected under Ontario's *Human Rights Code*.
- 57** Statistics should also be kept on the retention of information from street checks and charges flowing from such information, so that the investigative effectiveness of this police tool can be evaluated in the future. The statistics should be submitted annually to the Ministry and analyzed for trends, and this information should be reported publicly.
- 58** An external and independent oversight body should also be established, separate from the Office of the Independent Police Review Director, with specialized expertise to address the various constitutional, human rights, law enforcement and privacy interests associated with street checking practices. This body should be given the responsibility and powers to conduct formal audits and reviews of police services, to ensure regulatory street check standards, training, and record management requirements are observed. It should also have the authority to respond to individual and systemic complaints about street checks, and to issue public reports on its findings.
- 59** Contravention of the street check requirements under the regulation should be subject to discipline. The oversight body should have authority to make findings of misconduct and recommend discipline of police officials found to have violated the street check rules.
- 60** Creating a separate oversight body independent from the Ministry and existing police complaint procedures will assist in maintaining public confidence in the credibility of the oversight process and in policing generally. As an additional check and balance, this new body should be subject to the jurisdiction of the Ombudsman's Office – just as the Special Investigations Unit is now.

- 61 Several legislative schemes provide for a five-year review, such as the proposed *Police Record Checks Reform Act, 2015*, to ensure that the legislation is effectively achieving its purposes. It would be valuable for the street check regulation to be revisited and reviewed in order to assess whether amendments are warranted, based on experience with its implementation.
- 62 Accordingly, my recommendations with respect to oversight in this area are as follows:

Recommendation 20

Any regulation on street checks should direct that police services maintain statistics relating to:

- **The number of street checks;**
- **Circumstances prompting them;**
- **Identifying personal characteristics, particularly where they may give rise to concerns about improper targeting of groups protected under Ontario’s *Human Rights Code*;**
- **Retention of information from street checks; and**
- **Charges flowing from street check information, to evaluate their investigative effectiveness.**

Recommendation 21

Any regulation on street checks should require police services to submit prescribed statistical information to the Ministry of Community Safety and Correctional Services annually, which should be analyzed for trends and reported publicly.

Recommendation 22

Any regulation on street checks should establish an independent oversight body with the authority to:

- **Monitor and audit police services practices and records to ensure compliance;**
- **Investigate individual and systemic complaints relating to street checks;**
- **Make findings of misconduct against those contravening the regulatory rules and recommend discipline; and**
- **Issue public reports.**

Recommendation 23

Any regulation on street checks should create an independent oversight body for police street checks, similar to the Special Investigations Unit, which should be subject to the jurisdiction of the Ontario Ombudsman’s Office.

Recommendation 24

Any regulation on street checks should include a requirement for review of the regulation within a set period of time.

Conclusion

- 63** Given the serious implications for civil rights in Ontario relating to street checks, and the lack of empirical evidence supporting its use, the Ministry should exercise the utmost caution in drafting any regulation of the practice. I remain unconvinced, based on the available information, that there is a public interest purpose sufficient to override the infringement of the right to be free from the arbitrary detention that street checks represent.

Appendix: List of recommendations

Recommendation 1

The Ministry of Community Safety and Correctional Services should conduct thorough research to confirm that street checks are an effective policing tool based on independent, objective statistical analysis and evidence-based studies, prior to drafting a regulation on the practice.

Recommendation 2

The Ministry of Community Safety and Correctional Services should report publicly on any independent research and studies confirming that street checks are an effective policing tool in solving and preventing crimes.

Recommendation 3

The Ministry of Community Safety and Correctional Services should consult independent experts in privacy, human rights and constitutional law to ensure that any regulation governing street checks is supportable in law and appropriately balances law enforcement interests and civil rights.

Recommendation 4

Any regulation on street checks should restrict their use to situations in which the information is collected for an identifiable and specific investigative purpose.

Recommendation 5

Any regulation on street checks should provide that a supervisory officer should be designated by each police service to review information gathered through street checks and confirm that the street check complied with the regulatory requirements, prior to entering the information into the relevant police service database.

Recommendation 6

The Ministry of Community Safety and Correctional Services should carefully consider the evidence of victims of improper street checking in order to ensure that it understands the real scope of current street checking practices in Ontario.

Recommendation 7

The regulation on street checking should set out the legal authority and public safety purpose for street checks, the standards applying to them, and detailed descriptions of the limited circumstances in which they can be conducted.

Recommendation 8

Any regulation on street checks should ensure that police are required to caution individuals in clear language that they are not obligated to stop or answer questions, and if they do agree to cooperate what will be recorded and what use will be made of the information.

Recommendation 9

Any regulation on street checks should address communication with street check subjects, including directing that street checks should be brief, non-confrontational exchanges using open-ended, exploratory questions.

Recommendation 10

Any regulation on street checks should specifically set out the information that can be obtained during a street check and require police officers to document the reason for collecting the information from the subject of the street check.

Recommendation 11

The Ministry of Community Safety and Correctional Services should develop a mandatory form for use during street checks that identifies the permissible areas of inquiry.

Recommendation 12

Any regulation on street checks should prohibit street checks of individuals under the age of 18 years.

Recommendation 13

Any regulation on street checks should require that the Ministry of Community Safety and Correctional Services prepare a comprehensive street check training program at the Ontario Police College, and revise the program as appropriate in accordance with best practice and legal developments.

Recommendation 14

Any regulation on street checks should require that police officials from all organizational levels regularly undergo street check training, and no officer should conduct a street check without receiving the proper training.

Recommendation 15

Any regulation on street checks should require police officials to provide street check subjects with a record of the interaction, including the date, times, names of those present, the badge numbers of involved officers, the information recorded, and an explanation of how it may be used, as well as the conditions for its retention.

Recommendation 16

Any regulation on street checks should provide that subjects of street checks have a right to request that a police service correct errors, and require police services to establish and publicize an expeditious procedure for correcting street check records.

Recommendation 17

Any regulation on street checks should address information retention and provide that street check records should be destroyed, regardless of local records retention requirements, within a set period, unless there is a documented and continuing specific investigative reason justifying their retention.

Recommendation 18

Any regulation on street checks should direct that if information is retained for a valid investigative reason, it must be subject to regular review to ensure that its retention continues to be justified, and if not, that it is destroyed.

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