



Comments on the Independent Street Checks Review

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Submitted to: Justice Michael H. Tulloch,
Independent Street Checks
Review

Submitted by: Ontario Bar Association



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Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to provide feedback to Justice Michael H. Tulloch, the Independent Reviewer of Ontario’s street checks regulation, O. Reg. 58/16 (“the Regulation”). The current submission builds upon many of the same themes raised in the OBA’s two previous submissions to the Ministry of Community Safety and Correctional Services (“the Ministry” or “MCSCS”) in response to earlier consultative processes regarding street checks, in August 2015 (“the [First Submission](#)”) and in December 2015 (“the [Second Submission](#)”) respectively.

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in Ontario, representing lawyers, judges, law professors, and law students. OBA members are on the frontlines of our justice system in no fewer than 40 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists government with dozens of legislative and policy initiatives each year – in the interest of the public, the administration of justice and the profession.

The OBA’s submission on O. Reg. 58/16 was formulated primarily by members of the OBA Constitutional, Civil Liberties and Human Rights Law Section, whose members represent individuals from a wide range of backgrounds with rights and interests engaged by the street checks regulation. The submission also renews and expands upon many of the comments made in the OBA’s Second Submission to the MCSCS in December 2015, which examined what was then the draft version of the street checks regulations. The Second Submission was prepared by a working group composed of members from the Constitutional, Civil Liberties and Human Rights Law Section, Criminal Justice Section, Privacy and Access to Information Law Section, Child and Youth Section, Aboriginal Law Section and the OBA’s Equality Committee.

Background

O. Reg. 58/16 took effect on January 1, 2017, regulating for the first time in Ontario a range of voluntary police-public interactions where police seek to collect identifying information (more commonly known as “street checks” or “carding”). The primary goals of the Regulation, as described in the MCSCS communications material, are twofold:¹

¹ Ministry of Community Safety and Correctional Services, [Summary of Draft Regulation on Carding and Street Checks](#), October 28, 2015.



- first, to expressly prohibit the random and arbitrary collection of identifying information by police; and
- second, to establish clear new rules for voluntary police-public interactions where identifying information is collected.

In the spring of 2017, the Honourable Justice Michael H. Tulloch was appointed by the Minister of Community Safety and Correctional Services to lead an independent review of O. Reg. 58/16, which has been in effect since January 1, 2017. The Terms of Reference require the review to, among other things,

- examine whether the Regulation appropriately reflects the government's goal of ensuring that police-public interactions are consistent, conducted without bias or discrimination, and conducted in a manner that promotes public confidence and keeps our communities safe;
- examine whether the accountability and oversight mechanisms in the Regulation are appropriate to ensure compliance and, if not, recommend how they could be improved; and
- identify any potential regulatory amendments and policy and/or procedural changes recommended to improve the implementation of the Regulation.

Justice Tulloch will be making recommendations to the government about the Regulation and its implementation by January 2019.

Comments

As indicated in our First and Second Submissions, the OBA supports the creation of effective, constitutionally-compliant tools that promote a better understanding of community concerns, help to solve and prevent crime, keep communities safe, and promote public confidence in the police. We have noted in the past that it is essential for the Ministry to provide an explanation as to how street checks are considered effective and legitimate tools that help solve or prevent crime and understand community concerns, and we continue to believe that guidance on this issue is necessary in order to meaningfully examine the appropriateness and effectiveness of the Regulation.

With respect, we remain unaware of evidence demonstrating that street checks, carding, and the police powers included in the Regulation will meet the Ministry's stated goals. The OBA's concern about the absence of an evidence-based rationale for street checks is heightened when the interests and experiences of racialized, Indigenous, vulnerable and marginalized individuals are taken into account.

The OBA has specifically identified the following as examples of vulnerabilities in O. Reg. 58/16:

- 1. Overly broad definition and application of exceptions.** In the Second Submission, we noted that a number of the exceptions in the draft regulations were so broadly worded as to



provide insufficient guidance to police, and could potentially be interpreted by police to permit the types of police-public interactions that the regulations were intended to proscribe.

In particular, s. 1(2) exempts attempted collections made “for the purpose of investigating an offence the officer reasonably suspects has been or will be committed.” While the wording of the exception has been somewhat refined since its draft form to require a reasonable suspicion on the part of the officer, s. 1(2) still makes no reference to whether the particular offence must be a crime in progress, or whether a connection between the geographic location of the offence and the street check is required. This lack of clarity makes O. Reg. 58/16 susceptible to broad interpretation and, as a result, undermines the stated objective of eliminating random, arbitrary, and discriminatory interactions with the public.

In assessing the breadth of the exception provisions, it may be helpful to review the annual reports required by s. 14 of the Regulation to be compiled by the municipal police chief detailing, among other things, the number of attempted collections, the number of attempted collections in which identifying information was collected, and the number of individuals from whom information was collected. In a number of locations, the incidence of street checks appears to have shrunk dramatically in 2017 from previous years. For example:

- Between March and December 2017, the Ottawa police reported stopping seven individuals, which, per media reports, is down from 7,000 in 2015 and 4,000 in 2016.²
- The Peel Regional Police reported two attempts in 2017, down from over 26,000 annually between 2009 and 2011.³
- In London, police recorded six attempts in 2017, down from 8,400 in 2014.⁴

Though one explanation for these low numbers has been that the Regulation has unduly restricted the use of street checks as a policing tool,⁵ we note that attempted collections exempted from the Regulation under s. 1(2) (and, indeed, any of the grounds set out s. 1(3))

² Report to Ottawa Police Services Board, [Collections of Identifying Information – Duties & Prohibitions Policy: Annual Report](#), January 29, 2018; Marc-André Cossette, “[Critics doubt new police stats on street checks](#),” *CBC News*, January 29, 2018.

³ Pam Douglas, “[Peel police street checks plummet from 26,000 a year to just two in 2017](#),” *Toronto Star*, March 22, 2018.

⁴ Jake Jeffrey, “[New regulations keep street checks by London police in check](#),” *Global News*, February 16, 2018.

⁵ Shaamini Yogaretnam, “[Gun violence a result of understaffed force, loss of street checks: police union](#),” *Ottawa Citizen*, January 29, 2018.



would not be reportable in a s. 14 report. As described below, this gap has implications regarding the oversight and accountability of the street checks regime.

Further, the operation of ss. 1(1)(a) and 1(2) together suggest that a collection attempt can be made under the Regulation where the officer has less than a reasonable suspicion that an offence has been, or will be, committed. In our view, there should be some justification for this power to establish why it is desirable and necessary.

- 2. Need for meaningful consent.** As noted in our Second Submission, the principle of consent is fundamental to the Ministry's stated objective of establishing rules for voluntary police-public interactions for information collection, recording, retention, and use. Consent is a challenging concept in the context of any relationship characterized by an inherent power differential, as between a requesting police officer and a member of the public. While it may not be possible to fully eliminate the effects of the power differential, steps could be mandated to ensure that consent is as meaningful as possible. For example, the Regulation could be amended to include a definition of "voluntary" in the street checks context, or some other test for determining whether an individual has provided their informed consent.

The Regulation does not currently make any attempt to mandate any such steps. It also does not appear to recognize contextual differences between individuals based not only on legal capacity but also factors such as age, developmental/cognitive ability, mental health, or membership of a vulnerable community that may be estranged from the justice system.

Moreover, the law (and, indeed, privacy protocols of social media sites) include special considerations and provisions that recognize the unique vulnerability of children and youth. As noted in the Second Submission, the Regulation fails to recognize the different ways in which children and youth perceive authority, understand and exercise their rights, and benefit from the advice and presence of a parent or trusted adult.

While the steps suggested above may not fully address these issues, they would assist in mitigating the concerns.

- 3. Need for clear privacy and information management standards.** As noted in our Second Submission, the Supreme Court of Canada has on several occasions underlined the constitutional status of privacy rights.⁶ Significant shortcomings are identified in the Regulation under four key privacy principles that at a minimum are required for fair privacy practices:

⁶ *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2000] 214 D.L.R. (4th); *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, *R. v. Spencer*, [2014] S.C.J. No. 43.



- a) Collecting the least amount of information necessary to achieve the proposal's objective;
- b) Retaining personal information only as long as necessary;
- c) Ensuring that personal information is used only for the purpose for which it was collected, and that it is not improperly shared; and
- d) Disposing of personal information in a secure manner.

The Ministry's objective in promulgating this Regulation is in part to manage and oversee the collection of information by police. As drafted, police chiefs and police services boards have discretion over the information collected, its storage, its management, its use and access to collected information.⁷

The Regulation should be amended to add clear terms for how long information will be retained, accessed, used and by whom, when it will be purged, and a prohibition on sharing the information. In our view, the public interest in each of these warrants uniform practice across the province, as opposed to delegating the power to local police boards or chiefs. If there are legitimate reasons not to limit retention or sharing of information, then disclosing these reasons would encourage transparency and public confidence in this new regime.

In addition, the OBA would recommend an amendment to s. 6(1) of the Regulations to add a duty to inform individuals of how their information may be used, who may access it, how long their information will be retained and with whom it may be shared.

- 4. Need for uniformity regarding "receipts".** As noted in our Second Submission, the document police officers are required to give individuals pursuant to s. 7 of the Regulation is critically important to constitutional, privacy and human rights. In the OBA's view, the document should be uniform across Ontario. The delegation of the responsibility for developing the document to individual police boards, rather than the Ministry, puts the Ministry's goal of establishing clear new rules at risk. The adoption of a standardized document would also make public education more effective, given that the likeness of the form could be publicized.

The province has, in the past, employed single standards for application across Ontario in respect of police powers, including in O. Reg. 266/10 (Suspect Apprehension Pursuits) and R.R.O. 1990, Reg. 926 (Equipment and Use of Force). This uniform approach ought to be adopted for this initiative as well.

⁷ Sections 9(3), 9(10), and 12(1)4.



- 5. Need for enhanced training mechanisms.** Appropriate and meaningful training is essential to the elimination of systemic racism within the street checks regime. As drafted, s. 11 of O. Reg. 58/16 requires that officers complete training every 36 months based on a curriculum approved by the Director of the Ontario Police College (“OPC”), delivered either at the OPC or by a trainer trained at the OPC, on topics including bias awareness, discrimination, and racism.

In our view, there is a need to ensure that the training provided under s. 11 be delivered in a way that protects and promotes a mindset of police accountability within the organization and amongst individual police officers. For that reason, it is recommended that the training be provided by two individuals: one individual affiliated with the OPC, and one individual having education and experience working directly in the human rights field (this could include, but is not limited to, an academic, a former member or vice-chair of a human rights tribunal, or a human resources consultant).

In addition, we understand that the development of the curriculum has received some input from a roundtable of individuals with knowledge of human rights, community needs, issues affecting youth, privacy laws, curriculum development, policing and other relevant fields.⁸ Given the dynamic nature of human rights law and the constant evolution of its scope and concepts, s. 11(4) should include a requirement that the curriculum reference and incorporate, on a regular basis, the most current material from the Ontario Human Rights Commission’s policies. Finally, in our view, training should be provided more frequently than currently contemplated – more in the order of at least every 18 months – in order to maximize its effectiveness.

Steps, such as testing, should be taken to measure the retention level of information provided for in the training.

- 6. Need for accountability mechanisms.** As noted in our Second Submission, accountability for individual contraventions of the duties to inform and unauthorized use or sharing of collected information is also of critical importance. As drafted, the Regulation does not provide a process for initiating and resolving complaints or disputes, including with respect to whether an interaction has been properly documented/receipted.

Moreover, enhanced accountability to support ongoing monitoring of the street checks regime is required on a systemic level. The reality is that it will be exceptionally difficult for an individual to prove in any given case why they have been targeted. For example, s. 5(4)3

⁸ Ministry of Community Safety and Correctional Services, [Background: Final Regulation Regarding Police Street Checks](#), March 22, 2016.



of O. Reg. 58/16 prohibits an attempted collection where the sole reason is that the individual is present in a “high crime location,” and yet some racialized individuals subject to street checks have indicated that it was their presence in a high income area that appeared to attract attention. This has been reflected in the case law.

In addition to prohibiting the collection of data in a situation where an individual is present in a “high crime location”, thought should be given to whether the prohibition should be extended to other situations where a number of individuals may reside or frequent who share characteristics protected by the Ontario *Human Rights Code*. For example, attempting to collect information from an individual on the sole basis that they happen to be in an area with a high number of residential care facilities would be inappropriate.

Given the difficulty in making out individual cases of suspected misconduct, it is important to ensure accountability of the street checks regime on a systemic level, which will fundamentally require ongoing assessment of data to determine whether certain groups have been disproportionately affected based on sex, age, race, or combination thereof, as required by s. 14 of the Regulation. In our view, however, a comprehensive systemic picture will be difficult to obtain given the broad exceptions under s. 1(2) and (3), which could potentially exclude a broad range of police-public interaction from being reported under s. 14.

Conclusion

Once again, the OBA appreciates the opportunity to participate in the review of O. Reg. 58/16 to help ensure that the police interact with members of the public in a manner that is compliant with the *Charter* and with constitutional, human rights, and privacy law.

We continue to recommend that the street checks regime include clear provisions aimed at diminishing existing discriminatory patterns in police practices, by restricting street checks to limited and clearly defined purposes, and by enhancing accountability mechanisms that enable individuals and others to identify and redress activities that fall outside the Regulation. We look forward to the release of Justice Tulloch’s report and recommendations regarding the Regulation in the months to come.