

***Response to the OHRC Draft Policy on Release of MHA Apprehension Information by
Police Services***

***From
Mental Health and the Law Advisory Committee
Mental Health Commission of Canada***

The premise of the OHRC Draft Policy is admirable. As is acknowledged, the stigma surrounding mental illness can be significant and reference to any mental health-related encounter with the police can have a significant adverse affect on the opportunities for a person with a mental illness to obtain either employment or volunteer opportunities. However, the draft policy assumes:

- that there are circumstances in which information about MHA apprehensions should be reported and
- that there are a number of steps that can be taken to ensure that this done in a non- discriminatory manner (e.g. that before information about an MHA apprehension is released by police, it should be ascertained that the information constitutes a bona fide job requirement, that only information that speaks directly to this question should be reported, that police services should assume responsibility for assessing these criteria and that employers should use this information with careful consideration of the rights of the person who was apprehended).

We would argue that the assumptions about the relevance of MHA information are not likely valid and that there is really no compelling reason for MHA apprehensions to ever appear on a police record check. In addition, the policy is likely not practicable or implementable. We have considered several questions that arise from the OHRC draft policy.

1. The draft policy seems to entertain the notion that there would be times when the existence of an MHA apprehension would be a legitimate barrier to employment. Are there any job or volunteer positions that appropriately require that the individual in question actually has no history of MHA apprehensions?

We would argue that the answer to this question is no. The notion that some jobs require some generic “mental fitness” or “good mental health” is antiquated and discriminatory. While there may be positions that require certain psychological characteristics (for example, an air traffic controller should not have an attention problem), this type of information is certainly not captured in a “police record check.” If any aspect of “psychological fitness” is a legitimate job criterion, there are better ways to address the question (see # 3). Therefore, it is hard to imagine any legitimate use of a “police record check” that would provide bona fide information about a person’s employment suitability.

2. The draft policy speaks to the need for employers to act in a manner free from bias when considering a disclosure that a person has been apprehended under the MHA in the past. Is it reasonable to assume that individuals and organizations who are hiring would necessarily use appropriate discretion when presented with a police record check that includes an MHA apprehension?

The stigma and resultant discrimination that accompanies mental illness is enormous. The mere fact that the information is made available to an employer will almost assuredly have a negative impact on the hiring process. As the OHRC obviously knows, bias is subtle and often difficult to prove; it is unrealistic to expect employers to use this information without bias.

3 Is it in fact appropriate in any instance for police to be providing an employer with health care information?

Information about mental health is health care information. It should not be the purview of the police to be offering information about a person's health status. Consider, for example, a somewhat parallel situation in which the police might take a person to the hospital after a serious MVA. Perhaps the person suffered a back injury. A year later, this person is applying for a job that involves heavy lifting and also requires a "police check" because he will be loading and unloading trucks for a school board. Would police consider it appropriate to mention the accident and to raise doubts about his ability to lift heavy boxes off the truck? This seems unlikely. Would the school board expect to obtain this information from the police? Again, it is unlikely. The fact that we would accept mental health information from the police but not physical health information speaks to society's ideas and assumptions about mental illness and the accompanying stigma.

If specific aspects of psychological function can be established by the employer to be a legitimate job requirement then the employer has two ways of getting this information: (1) they can ask that the individual undergo an assessment from a qualified health care professional that s/he meets the standard (as they would for jobs that require that a person be able to lift a certain weight or perform a specific physical activity that is essential to a job), or (2) as is the case with police services, they can conduct their own job-related assessments of psychological factors, specific to the job requirements. In this way the assessment of psychological "fitness" would be carried out in the same fashion as assessment of physical "fitness" for a job.

4. Is it reasonable to expect police services to be able to adopt and implement this policy with any degree of reliability?

The draft policy outlines a series of criteria that a police service would have to consider before releasing MHA information. However, the level of human resources and mental health knowledge that a person would have to have in order to act on these criteria is far beyond the level of knowledge that the person actually handling record checks would be likely to have. In most police services, this person who provides the "record checks" is

either a front line officer or a clerk. These individuals do not have the skill set to carry out tasks such as understanding the nature and circumstances of the position applied for, the nature and probability of the risk, the meaning and predictive ability of the pattern of encounters with the police etc. A clerk cannot ascertain bona fide job requirements, the details of the position and its duties etc. A clerk or an officer cannot ascertain the degree of current risk-if any- posed by, for example, a person who threatened suicide two years ago. The criteria as put forth in the document are unrealistic and simply not implementable.

5. Would the OHRC draft policy actually result in a uniform improvement for people with mental illness by decreasing the likelihood that MHA information would be released by police organizations?

Curiously, while the policy may have the effect of reducing the frequency with which MHA information is disclosed by some police services, it would actually have the opposite effect in other jurisdictions. Some police services never release such information. This policy would cause them to reconsider and begin releasing the information in some cases. This would obviously not be the desired effect.

6. What policies currently direct police services to release MHA information?

Generally the release of such information is not a result of policy but rather a side effect of record keeping systems that categorize MHA apprehensions as 'warrants,' and as a result of the colloquial use of terms such as an "arrest" under the MHA (rather than "apprehension") and because of stigmatizing lay assumptions about mental illness and dangerousness. We are unaware of policies that state that this information SHOULD be released. In essence, historically, the disclosure of this information has been a result not of an active decision or policy to include it but rather a failure to have policy that excludes it. Thus again, by articulating a policy that suggests that sometimes it IS appropriate to release this information, the proposed draft policy may have the effect of making disclosure more rather than less likely, as it entertains the possibility that there are circumstances in which the disclosure is indeed appropriate.

7. So what is the solution?

Police services should simply never report MHA apprehensions on "police record checks"—and the report that they provide should state this, making it clear to the potential employer that if some particular aspect of mental health or psychological functioning is a bona fide job requirement, then the employer needs to obtain that information through legitimate channels as described in item #3 above. Many police services already state on their record checks what is and is not reported. It might state that only CPIC information is included or only CPIC and information from the local police etc. It is easy enough to simply state. "Apprehensions under the Mental Health Act are not reported on a police record check." By declining to pass on information that might be erroneous, misleading and discriminatory, the rights of the person with the mental illness

are protected. In this manner, properly qualified individuals who have a history of MHA apprehensions would not be arbitrarily disqualified.

This submission has been prepared by the Mental Health and the Law Advisory Committee of the Mental Health Commission of Canada (MHCC), on behalf of the MHCC (subject to ratification at the MHCC board meeting in May, 2008). For further information or comments in regard to this submission, please contact:

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