CRIMINAL LAWYERS' ASSOCIATION

Submission from the Criminal Lawyers' Association (CLA)

To:
The Office of the Independent Police Review Director

Re:
Review of the Use of Force by the Toronto Police Service (TPS)

March 24, 2014

CRIMINAL LAWYERS' ASSOCIATION, 189 Queen Street East, Suite 1, Toronto, ON M5A 1S2
Tel: 416-214-9875 / Fax: 416-968-6818
www.criminallawyers.ca / anthony@criminallawyers.ca

CRIMINAL LAWYERS' ASSOCIATION

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CRIMINAL LAWYERS' ASSOCIATION, 189 Queen Street East, Suite 1, Toronto, ON M5A 1S2
Tel: 416-214-9875 / Fax: 416-968-6818
www.criminallawyers.ca / anthony@criminallawyers.ca

CRIMINAL LAWYERS' ASSOCIATION, 189 Queen Street East, Suite 1, Toronto, ON M5A 1S2
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The Criminal Lawyers' Association (CLA)

The CLA is the voice of the criminal defence bar in Ontario. With its membership nearing 1200, the Association has concerns about the Toronto Police Service's use of lethal force, particularly in relation to individuals with mental health issues, mental disability, or in crisis. The Association's members represent such vulnerable individuals in criminal courtrooms in relation to charges they incur, but also provide representation to mentally disordered offenders who are unfit or not criminally responsible. The Association, qua Association, has special expertise and interest in mental disorder matters and has intervened in litigation relating to the *Charter* and other legal rights of this client group, including in inquests related to their deaths. The Association is grateful for the opportunity to contribute to this critically important independent review of the TPS' Use of Force in relation to individuals with mental health issues or other disabilities or who are in crisis.

The Perspective of the Association

The Association's submissions are informed by in-depth up-close experience and expertise of some of its members, gained through the historical, recent and ongoing litigation of all of the issues within the scope of this Review. In particular, members of the Association, as counsel to other concerned stake-holder groups, or families of those killed in such encounters, have historically participated in inquests looking into policing practices in respect of use of force in relation to mentally ill individuals. Over the past year and a half, some of our members have been involved with the combined death Inquiry into the police shootings of three individuals, Reyal Jardine-Douglas, Sylvia Klibingaitis, and Michael Eligon, who were known to be in emotional crisis at the time of their death (the JKE Inquest) and a related inquest into the death of a mentally disabled non-verbal man, Charles McGillivary, who died in restraints during an arrest by officers who had misidentified him as a suspect wanted for breach of an alcohol prohibition term in a recognizance (the McGillivary Inquest.) The evidence and recommendations, which emerged from these proceedings, inform the submissions of the Association and are referred to herein without specific citation.

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1) Overview of some broad areas of concern

Public Perception

(a) Of Excessive Use of Force

As this agency must be acutely aware, Toronto citizens are asking whether the TPS' primary response unit (i.e. front line officers) are too quick to fire, particularly at individuals in emotional crises. The shooting of Sammy Yatim was the most recent and perhaps most inflammatory set of facts, highlighted by the civilian video of the death made widely available through social media; however, prior to that incident, public outrage and alarm was already escalating, on the heels of four similar such deaths within 18 months, namely Reyal Jardine-Douglas (August 29, 2010) Charles McGillivary (August 1, 2011), Sylvia Klibingaitis (October 7, 2011), and Michael Eligon (February 3, 2012).

Each of these deaths, to varying degrees, drew community responses ranging from questions being asked to vocal and protracted protests and political action from communities who themselves felt traumatized by simply bearing witness to some of these deaths (as with the Eligon case, for example). These four individuals all died at the hands of police in that year and a half period, albeit that Charles McGillivary's circumstances did not mirror the others'.

(b) Of Emotionally Disturbed Persons (EDPs) and/or Racialized Minorities

Given that those who tend to die at the hands of the police appear, anecdotally in any event, to fall into one or both of these groups: "Emotionally Disturbed Persons" [EDPs] or "Racialized Minorities", the public's perception is that mentally ill or mentally disabled individuals or those in emotional crisis and generally black people, are particularly at high risk of dying in encounters with police. Those who fit both categories are at even greater risk. Toronto citizens worry for the safety and for the lives of young black people, particularly, young black males, who are experiencing a serious mental health issue at the time of coming into contact with police.

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(c) Of Oversight of Policing

The public focuses its anger on the TPS when tragic incidents occur – but does not appear to understand the role of other agencies and government actors in setting policy, defining regulations and standards, training police, and providing oversight. The roles of those involved in these activities are often ill-defined and, certainly to the public, shrouded in mystery.

It seems trite to say that the entire system of policing and its support structure could benefit from a healthy dose of clarity, especially on its public facing fronts.

Lack of Meaningful Data on Who is At Risk

The TPS does not maintain Use of Force data in a way that allows the information to be scrutinized in a meaningful way to verify or rebut the perception of at-higher-risk populations. The explanation to date for the failure to maintain statistics identifying those who die (or are seriously injured) in police interactions, by race or mental disability or crisis, appears to be the concern that data collection in this way might run afoul Human Rights Legislation. In this regard, TPS should be directed to the Ontario Human Rights Commission's "Count me In" educational document[1], which makes it very clear that data collection that does not include personal identifiers like name and address, but that does assist with identifying who is at risk in these interactions, would be not only permissible, but desirable and indeed vitally important.

The statistical analyses that *have* been brought to bear on TPS' Use of Force have been impeded by insufficient details of the interaction collected on the Use of Force and Injury forms themselves, as well as the failure to have a provincial Use of Force Data Repository which would permit the TPS to evaluate its own Use of Force statistics against provincial outcomes in an electronically searchable fashion. There is certainly room for improvement for more particulars of each interaction to be accurately recorded and used for statistical metrics analysis, without personal identifiers. This could only help to implement strategies going forward, with a view toward minimizing risk of fatal outcomes.

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[1] Available online at http://www.ohrc.on.ca/en/count-me-collecting-human-rights-based-data

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The Politicization of the TPS and the Chief's Office specifically in the Aftermath of Fatal Use of Force Incidents

The TPS and the Chief, depending on who the Chief is at any given time, has historically seemed to align itself/himself, to a greater or lesser extent, with either the public interest/civil servant mandate of the Toronto Police Services Board (TPSB) or the self-protective attitude of the Toronto Police Association (TPA), which protects the rights of and advocates in the interest of police officers themselves. The latter, when it goes too far, can only serve to impede the prevention of future deaths in similar circumstances to the ones described above.

In the event there is a future proceeding (criminal, civil, or inquest) into a TPS caused death, it will not assist in arriving at a positive outcome for preventing future deaths if the Chief or the TPS itself are actively involved in protecting or advocating the position of individual officers involved in lethal outcome scenarios. The Chief and the Service should keep an appropriate legal distance from the involved officers during legal proceedings examining their conduct in any public forum, and allow the TPA to take on the role of advocating for individual officers and providing them with legal assistance. Failure to do so also undermines public confidence.

The TPS, and the Chief specifically, would ultimately be better served by improving their working relationships with the Toronto Police Service Board. These comments apply with equal force to the TPS/Chief's relationship with other organizations such as the Special Investigations Unit (SIU), the Ministry of Community Safety and Corrections, and the OIPRD itself.

Transparency and Accountability

The TPS, not unlike the RCMP some years back, is currently experiencing a significant loss of public confidence. Incidents like the Yatim shooting have brought to the forefront the need for transparency and accountability for the role of the TPS in training and resources devoted to avoiding such lethal outcomes.

Fortunately, the TPS has taken steps to make interaction with EDPs a priority and has devoted resources to working with the community of consumers and survivors (individuals with former or current involvement with Ontario's mental health system.) TPS has placed the mental health portfolio in the capable hands

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of Deputy Chief Mike Federico who personally takes on the task of liaising with the affected communities and has two decades of experience under his belt in this regard.

The TPS also endeavours to take seriously recommendations arising from Inquests related to police interaction with EDPs, by and large. The current training respecting contact with EDPs is relatively solid, informed by the perspective of the consumer/survivor community, which has been given a voice by way of participation on the Toronto Police Services Board's (TPSB's) Mental Health Sub-Committee. To its credit, the TPS has taken these progressive and inclusive steps, implementing the very recommendations as they arose from previous inquests into deaths of individuals in emotional/mental health crises, at the hands of police.

However, at the same time, there are issues surrounding accountability in respect of negative outcomes and the TPS generally does not enjoy a stellar reputation for transparency or accountability. G20 obviously had a major role in the public's diminishing trust in our police force's interactions with the public, as the OIPRD must be acutely aware, having conducting the G20 review. Ongoing concerns and controversies over other troubling over practices such as carding, inappropriate use of Conducted Energy Weapons (CEWs) on vulnerable individuals or in circumstances where verbal de-escalation ought to have been used, and officers turning off their In-Car-Cameras during interactions with the public where force is being used[2], only serve to further highlight the need for transparency and accountability.

There are organizations devoted to this issue, which should receive greater respect; for example, the Toronto Police Accountability Coalition (TPAC), founded and operated by former Mayor John Sewell. The TPAC has tremendous institutional and historical wisdom and insight and has already made thoughtful written submissions[3] on the issue of police interactions with EDPs. It is possible that its contributions are dismissed or not paid enough attention because it is perceived as an activist organization with its own political, perhaps anti-policing

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[2] See, for example, *R v Costain* [2013] O.J. No. 2289

[3] Dated March 28, 2012, in anticipation of the TPSB's April 19, 2012 meeting where the TPAC also made oral submissions – it should be noted that many of the recommendations the TPAC made in those submissions were ultimately echoed by the JKE Inquest Jury's recommendations released February 12, 2014

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agenda. This approach to the analysis and recommendations of the TPAC is misguided and short-sighted.

Police Culture

Without overgeneralizing, the culture of policing and the mentality of police officers often involves asserting and maintaining control over (perceived) emergent/dangerous situations, scenes, and subjects, quickly, efficiently, and definitively. A focus on this alone leaves little room for the guiding principles that have been established to work best in interactions with individuals in emotional crisis or experiencing acute mental health issues. Such individuals need time and space; they need a softer, gentler, quieter, calmer approach than what officers are generally taught about gaining control by being loud, aggressive, dominant, and authoritative. The basic paramilitary "force on force" approach to dealing with situations and people is simply not appropriate for dealing with people experiencing mental health issues. This approach increases the risk for a lethal outcome.

While it is acknowledged that EDP training by TPS makes this distinction clear, that training itself is insufficiently integrated into the sum total of police training and fades in officers' minds over time, unless regularly reinforced.

It is *not* an overgeneralization to point out that policing culture involves a "code of silence", sometimes colloquially referred to as "the blue wall". While we are not suggesting that this code is absolute, it does exist and it can present an obstacle to learning from lethal force encounters if officers are unwilling or unable to be forthcoming and candid in the aftermath of the incident, including at a subsequent inquest. Officers should be reminded that there is no finding of fault or legal liability of any sort attaching at a coroner's inquest.

Impediments to Preventing Future Incidents

There is no way to prevent a lethal force outcome once it has already occurred; however, there are always opportunities for lessons learned about what was done well and what not to repeat. Unfortunately, there seems to be some institutional resistance to even entertaining the possibility that these incidents could or should have been prevented and may be prevented in future.

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We infer that the cause of this is that TPS is nervous that any acknowledgement of the possibility of error will result in a host of adverse consequences for the involved officers or the Service; for example, the SIU may lay criminal charges, families might sue, or the inquest process may cast criticism or censure on the Service or on individual officers. The institutional anxiety of the TPS is manifest through all of its communications publicly on such issues, from the press statements on the immediate heels of such tragedies all the way through to the manner in which surviving families of those killed in such events are often treated – without acknowledgement of loss, expressions of condolences or support services for them as victims traumatized by these losses. Ideally the TPS should not concern itself with these potential negative future ramifications when turning its mind to how to immediately begin taking away lessons in the aftermath of a lethal use of force incident.

While the TPS also voices its readiness to accept and even implement Recommendations from inquests into lethal interactions with police, the Service appear to basically wait for these inquests to really unpack what happened and what can be done to prevent future death in similar circumstances. There should be a regularized process of de-briefing – beyond providing emotional support to subject or witness officers through therapeutic counselling. With quality assurance measures, and with some assurance that these feedback mechanisms would operate confidentially from SIU investigations or Police Services Act proceedings, officers still on the road could have the benefit of constructive feedback respecting such incidents.

In addition, there should be education, training, and critical incident debriefing delivered to Divisions where these incidents unfold, and more broadly, to all front line officers, in the aftermath of the incident and not years later after an inquest concludes.

Pervasive Stigma and Stereotyped Thinking About the Mentally Ill

Despite what are clear and obvious best efforts of both the Ontario Police College (OPC) and the TPS to counter stereotyped notions of individuals with serious mental health issues as “dangerous”, it is apparent that many officers maintain these ideas. The general public, as lay persons, tend to hold these erroneous blanket beliefs as well.

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We believe that the reason this type of stigma is pervasive among police officers, in particular, is based in the nature of their routine interactions with those in crisis. Outside of their initial training at the TPS C.O. Bick College where they come into direct contact with consumer/survivors *not* in crisis at the time of the interaction, front line officers see this population only at the very lowest points in their life, when they are, by definition, experiencing an acute mental health crisis. More often than not, this is in the context of some outstanding Form under the *Mental Health Act* (requiring police to take the individual into custody and transport them to a psychiatric facility), which signals to officers (not entirely accurately) that there is some imminent danger inherent in the interaction. This fuels the existing fear and stigma.

The counter-measure for the fear in these interactions is routinely exposing officers to consumer/survivors in *non*-crisis situations. The added benefit of such engagement is allowing consumer/survivors to have positive interactions with police officers where the officer is not trying to apprehend or arrest them and where handcuffs do not make an appearance. Our collective experience and wisdom as an association is that the handcuffing procedure of *Mental Health Act* apprehensions is one of the greatest contributors to bad feelings and fear of police by those with serious mental health issues.

Volume of Interactions with the Mentally Ill

Further contributing to the pervasive stigma of the "dangerous mentally ill individual" is the sheer volume of crisis interactions police have with this population at times when they (the mentally ill) have the least control over themselves or their situation. They are often afraid, panicked, and may have lost touch with reality.

People with mental health histories often report an acute fear of police and this is only exacerbated each time officers arrest them or handcuff them and forcibly take them to the hospital for involuntary admission or arrested. These incidents can leave a lasting impression with police of unpredictability and fear of violence if not put into their proper context and understood.

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To its credit, the TPS handles close to 20,000 EDP calls[4], with very few adverse or lethal outcomes, annually; however, there are other alarming statistics. Approximately 8600 of 19,000 such calls in 2011 alone resulted in *Mental Health Act* apprehensions – a very high percentage for coercive outcomes. This highlights the need for greater community service resources for the client population, housing, supports, outpatient teams, non-medical intervention, social work, peer support, Gerstein Centre type mobile crisis, and community diversion rather than hospitalization.

The question of what account for this high level of forced hospitalization and custodial management of individuals in crisis calls for further study. We would also suggest that there should also be an increase in the use of community resources rather than the use of court or hospital facilities and that officers be made aware of these resources and options and be given the time and tools to implement them.

It is our position that the high volume of interactions police have with the mentally ill is a direct by-product of changes in civil mental health legislation in 2000 (Brian's Law) which expanded committal criteria and leaves it to police to enforce Community Treatment Orders (CTOs.) The number of occasions on which police are enlisted to enforce these orders has skyrocketed with the changes in the legislation.

Unfortunately, front line officers seem to believe that the fact of an outstanding form requiring their involvement means the person poses a serious risk of bodily harm to themselves or others. However, CTO enforcement means that the officer may be asked to collect someone who is only in breach of an Order, for example, requiring them to take their medication, and is being brought in for assessment simply because they have missed a single dose. In other words, there is frequently not the slightest safety concern in the context of these apprehensions; police are simply involved as a mechanism to assist the individual to comply with treatment prescribed as a purely therapeutic intervention.

There is certainly room for more comprehensive education on the operation of Ontario's civil mental health system to front line officers. They currently receive this education from other officers and occasionally from mental health

[4] As with other related data referenced in this submission, this was the evidence heard at the JKE Inquest

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professionals, like psychiatrists; whereas it should be provided by lawyers expert in the area, who have a real understanding of the legislation.

Mobile Crisis Teams

The TPS has expressed its intent to increase the use of Mobile Crisis Teams and, while this is a laudable objective, it should be clearly understood that this will *not* prevent future lethal force outcomes – at least not with the model the TPS currently uses.

The reason for this is that these Mobile Crisis Teams are not deployed in any situation where an actual crisis is unfolding that involves either the potential for violence or an EDP armed with a weapon; yet these are the very situations where a lethal outcome is most likely. The reason for this is the perceived risk to the civilian nurse or other mental health professional member of the team, who cannot function as first responders to the law enforcement aspect of the crisis. These teams only attend where the "crisis" is limited to potential self-harm or an emotional crisis. Their function in these situations is to determine if hospitalization is necessary or appropriate or, alternatively, link the person to community resources.

This is not to say that it would not be worthwhile indeed to increase the hours of operation and geographical availability of Mobile Crisis Teams; although alternatives to the particular model adopted in Toronto are also worth exploring[5]. The reality is simply that by the very terms of their existing mandate, TPS mobile crisis teams will do nothing to head off lethal outcomes in violent scenarios and/or those involving weapons.

Conducted Energy Weapons (Tasers)

The public would obviously have little reservation about the use of Tasers in in lieu of lethal force, but the reality is that Tasers are another tool that is *un*likely actually prevent a lethal force outcome. While it does seem eminently reasonable to use a Taser on an individual experiencing a mental health crisis,

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[5] The JKE Jury identified other models to be explored: CIT, the Memphis model (no civilian nurse, just especially trained officers), the Gerstein Model, and peer-support (non-clinicial, non-policing crisis workers).

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especially if that person is armed with a weapon, this is not the use the TPS intends to make, or has made, of Tasers, except in a very few extraordinary circumstances, under particular conditions, and mostly in the context of the attendance of the Emergency Task Force (ETF), who already carry the devices.

The ETF utilizes Tasers only with "lethal cover" or "lethal support". One officer deploys the Taser while another officer stands ready to shoot and kill the subject in case the Taser does not work. Front line officers, however, are *not* instructed to use the Taser as an alternative to lethal force and the current Use of Force model does not contemplate it being used in that manner; rather, the Taser is an intermediate force option, in the same category as batons or pepper spray. Its deployment is authorized in response to assaultive behaviour; whereas the response to a threat of serious bodily harm or death is the firearm or other lethal force option.

This is a lower threshold for use of CEWs than the Braidwood Inquiry ultimately recommended. With the threshold for use of CEW this low, the public maintains a fear of the devices, which themselves can pose a potentially lethal risk. These concerns are compounded by the potential for abuse of the device as a substitute for tactical communication (talking) or attempts to de-escalate and ultimately as a tool to compel compliance.

Too many Reviews, Not Enough Commission of Public Inquiry

The comments in this section are not intended, in any way, to take away from the importance of this review. This review is closest to the preferred model of receiving public input from a broad range of stake-holders and it is hoped that its findings will be made public once it is complete.

That being said, one must pause to consider that overlapping with this review, Ombudsman Andre Marin is conducting essentially the same review, as is former Supreme Court Justice Frank Iacobucci on behalf of the TPS itself. In addition, in May 2012 the Ministry of Community Safety and Corrections (MCSC) announced a provincial internal broad-scope review of the same issues and related Regulations. There has been no public consultation in relation to that review and its progress and results have never been made public; although in 2013 the Ministry announced a legislative amendment to permit local police services to expand distribution of CEWs/Tasers to front line officers. The

CRIMINAL LAWYERS' ASSOCIATION, 189 Queen Street East, Suite 1, Toronto, ON M5A 1S2
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Ministry has never made public the process it employed to arrive at that conclusion, nor any consideration it may have given to what the appropriate threshold for deployment of the devices ought to be.

At the same time, several high profile inquests into these very issues have been under way, as set out above. The TPSB has also conducted public consultations on the interaction of Toronto's police officers with EDPs (April 25, 2013) and on the use of CEWs in particular (September of 2013). The Goudge Report on the Health Risks of CEWs was released in October of 2013.

There is nothing wrong with any of these ongoing efforts and all are to be commended; however, there is significant overlap in the areas being canvassed and there is a real risk of contradictory recommendations emanating from different review mechanisms, which is likely to cause confusion and further erosion of public confidence. Furthermore, the problems giving rise to the need for review are not limited to Toronto, though many of the reviews have been Toronto-centric.

There is no substitute for the comprehensive Inquiry of a Royal Commission or Public Inquiry, which hears *viva voce* testimony from involved individuals and experts and permits that testimony to be tested by directly concerned individuals and groups, advocacy organizations, and subject matter experts. There is authority to call such a Public Inquiry in the *Provincial Inquiries Act*. Ontario should exercise that authority so that the Province is able to arrive at a standardized approach at least consistent across the province.

2) Lessons Learned from Prior Inquests

The Verdict and Recommendations in both the JKE and McGillivary Inquests have now been rendered, which gives this review the be benefit of the wisdom of two lay Juries, who will have heard, in total, the evidence of more than 100 witnesses over a period of more than four months. Over the next short while, the Presiding Coroners (Dr. David Eden and Dr. Dan Cass respectively) will promulgate the Coroner's Explanation of the Verdict and Recommendation, which will chronicle the background facts, the relevant evidence and explain the rationale behind the recommendations the Jury made.

With this available to the OIPRD to review itself, there is little point in us setting out more than a cursory summary of the background and results of those

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inquests here. Our comments below on these inquests are not meant to revisit what these Juries have already said; they are simply our perspective on the discussion. While the combination of these two proceedings still falls short of what a Public Inquiry would accomplish, there has been a very full and fair examination, through testing of the evidence presented.

JKE Inquest

The JKE Inquest reviewed the deaths of three individuals with histories of serious mental health issues. In each case the police were aware prior to attending the scene that the individuals carrying edged weapons and were experiencing an emotional crisis at the time of the incident.

The 74 Recommendations made by the Jury are geared in some measure toward those particular circumstances which were common to these three deaths; however, they also address broader issues of police interaction with EDPs. One of the key recommendations the JKE Jury made was for the Office of the Chief Coroner to keep a proper database of Inquest Jury's Recommendations in related cases that is searchable and readily available. The JKE Inquest was perhaps the 16th or 17th Inquest (going back to the early 90's or even the late 80's with the inquest into the death of Lester Donald) to examine issues of Use of Force by the TPS in interactions with EDPs. Clearly, a critical analysis of what recommendations remain outstanding and why they have not been implemented is a project that needs immediate attention. There is little point to recreating the wheel with each inquest, only to have pivotal recommendations disappear into the ether, with no enforcement mechanism to compel even a response from those to whom the recommendations are directed.

McGillivary Inquest

The McGillivary Inquest reviewed the sudden death of a man who was being restrained during a struggle with police officers who were attempting to arrest him after he had been misidentified as a man with a warrant for a minor breach of probation violation (violating an alcohol prohibition).

Mr. McGillivary's tragic death shone light on the particular problem of identifying those with invisible disabilities and cognitive impairments. It also highlighted, once again, the dangers associated with particular grounding techniques and

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positional asphyxia. Perhaps surprisingly, this inquest demonstrated a glaring lack of knowledge among front line officers in assessing emergency medical conditions and being able to perform CPR in a timely and effective manner. It also showed, in this case, a lack of any constructive analysis or debrief of the incident, with no steps taken to critically examine it until the inquest process and then only with the participation of public interest interveners. Finally, the critical importance of having Automatic External Defibrillators (AEDs) in every scout car was again made plain.

Many of these recommendations had been made before but some clearly remain to be implemented. The Manon Inquest Jury in 2012, for example, came to many of the same conclusions, only some of which had been implemented by the time of this tragic incident.

3) Our Specific Recommendations/Submissions

For ease of reference, we have presented our specific recommendations/submissions as bullet points under the relevant headings. These recommendations are not meant to replace the Recommendations of the Juries in the recent JKE or McGillivary Inquests which some of our members were involved in; they are simply meant to add/augment to those. This is why there are obvious areas which we do not discuss; because we feel the Juries have dealt with them adequately and thoroughly. Some of the following recommendations/submissions are deliberately broad, because our organization does not claim to have a clear and simple answer to the issues they address.

Accessibility of TPS Policies, Procedures, and Written Directives

- TPS policies/procedures/directives publicly available unless it would compromise officer safety or investigational techniques to do so.
- Ideally, policies/procedures/directives would be posted to the TPS website in a searchable and downloadable format.
- Minimally, they should all be readily available to and shared among other policing interests, such as the SIU and the OIPRD.

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- The TPS Board should most definitely have access to *all* policies/procedures/directives. During the JKE inquest it became obvious that this was not the case.
- More broadly, these recommendations should also apply to documents from the Ministry of Community Safety and Corrections.

Consistency and Clarity in TPS Policies Procedures, and Written Directives

- There are too many documents and insufficient protocols in place for efficient and accurate management of these documents.
- The current version of any particular document regarding a policy/procedure/directive is often difficult to identify and locate, even by TPS' own lawyers or their own staff who are tasked with document management.
- Internal inconsistencies and overlap among these documents were identified in the course of the JKE and McGillivary Inquests. As an example, some referred to Mental Health Act "apprehensions" as "arrests"; and sometimes both were used in the same document. This has resulted in confusion around the practice of handcuffing during such apprehensions, which the JKE Recommendations discussed.
- There should be regularized and frequent reviews of all these documents to ensure consistency and clarity.
- Content of the documents should be reviewed by stake-holder groups and, in the case of any dealing with mental health, the the Mental Health Subcommittee of the TPS Board specifically. They should also be available for public input, where appropriate.
- The Language of certain controversial concepts should be reviewed with input from stake-holders. For example, "neutralizing the threat", "engaging with lethal force", "engaging with handcuffs", "deployment" of weapons, etc.

The Use of Force Model

- The utility of the diagrammatical aid known as the "Use of Force Model" should be reviewed.
- While it is made painstakingly clear by Use of Force trainers in the JKE Inquest that the model is not meant to "justify" use of force, it *is* used in

CRIMINAL LAWYERS' ASSOCIATION, 189 Queen Street East, Suite 1, Toronto, ON M5A 1S2
Tel: 416-214-9875 / Fax: 416-968-6818
www.criminallawyers.ca / anthony@criminallawyers.ca

hind-sight to "explain" a particular use of force incident. This gives the impression of the model being a mechanism created and utilized to guard and defend against liability for the use of force.

- The model is meant to be a "sphere" rather than a "circle" or "wheel"; but, if it was too difficult for 30 lawyers to grasp over several days of explanation at the JKE Inquest by those who teach it to police, it is perhaps a bit too complex for new recruits to internalize in a couple of hours of training.
- The model makes simple points that should be put more simply to officers.
- The model should emphasize to a much greater degree the need to de-escalate at every step.
- The model should be modified to incorporate specific training respecting EDPs.

The List of Signs Identifying "Potentially Aggressive Behaviour"

- In one particular policy document, TPS provides its officers with a list of behaviours that may be seen as indicative of "potentially aggressive behaviour" or a sign the suspect may be about to attack.
- TPS needs to seriously reconsider the utility of a list of this nature, since EDPs have a propensity to engage in almost all of the behaviours listed, such as pacing, moving toward or away from officers, shouting, not responding, hiding, etc. These are all hallmarks of behaviour of EDPs simply frightened or confused or experiencing an altered state of reality.
- While the list is obviously intended to alert officers to potential risks and danger, the list leaves virtually no behaviour a subject (whether emotionally disturbed or not) could exhibit, other than complying with the command given him, that could not be viewed as a pre-attack cue.

Signs of an Individual Who May Be About to Flee

- It appears, at least from the McGillivary Inquest, that officers believe that an individual who is unresponsive to their (assumed) name being called out is necessarily uncooperative and intending to flee arrest.

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Tel: 416-214-9875 / Fax: 416-968-6818
www.criminallawyers.ca / anthony@criminallawyers.ca

- It simply must be reinforced for officers that if someone does not respond to "their" name being called, that behaviour could be equally consistent with the fact that the person is not the person whose name was called out.
- Furthermore, the idea that once an officer decides to effect an arrest, they *must* follow through, despite information coming to their attention that they may have the wrong person, should be corrected. This was also made apparent during the McGillivary Inquest.

The Reasonableness of the Force Used in Effecting an Arest

- The level of force brought to bear during an arrest situation should *not* include all options where the suspected offence for which the arrest process has commenced is an extremely minor, such as the breach of an alcohol condition on a probation order, as in McGillivary.
- There must be sufficient discretion in the use of force, even if it means permitting a suspect in the process of being arrested to escape custody, in situations where the foreseeable harm that the suspect will cause is minimal.
- In other words, the use of force must, at all times, be objectively reasonable and commensurate with the actual risk posed to the safety of the officer and the public and no more. This is not unlike the Suspect Apprehension Pursuit Regulations which forbid pursuits for non-criminal (i.e. Highway Traffic Act) offences because the risk is not commensurate with the seriousness of the offence.

Who should respond to EDP calls

- There are some policies/procedures/directives in place within the TPS that suggest that the ETF and/or a mobile crisis team should be notified in the case of every EDP call and in those cases where a psychiatric patient goes AWOL from a facility; however, there is little to no clarity on what dispatchers/call-takers roles are in identifying the appropriate policing response to a given situation.
- Clearly situations flagged as potentially violent or involving a weapon and an EDP are appropriate calls for ETF to attend and not appropriate for a

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www.criminallawyers.ca / anthony@criminallawyers.ca

mobile crisis team, at least not the current incarnation of the mobile crisis team.

- Involving mobile crisis teams in returning AWOL patients to psychiatric facilities is something that should be encouraged.
- TPS should explore having front-line officers available on every shift in each Division who are specifically trained in dealing with EDP calls; this is essentially the U.S. Crisis Intervention Team (CIT) model – a mobile crisis team of specially trained officers, minus the civilian nurse, that can respond to emergency situations.

Mental Health Act Apprehension Procedures

- The TPS policies/procedures/directives on use of handcuffs during all arrests is interpreted by officers as requiring the application of handcuffs during all *MHA* apprehensions; this ought not to be the case.
- It should be clear in a specific policy/procedure/directive that no handcuffs are to be used during such interactions, unless there is a demonstrable need for them based on the behaviour exhibited by the EDP a reasonable concern for officer/public safety.

In-Car Cameras

- There appears to be some confusion in the current policy on the use of in-car-camera video recording devices about when officers may exercise their discretion to turn the device off.
- There appears to be a distinction drawn between "officer-initiated calls", such as motor vehicle stops versus calls for service initiated by a 911 call from the public.
- Ultimately, the only consistent approach should be that officers have *no* discretion to turn off the device off during interactions with the public, particularly not where it was turned on by operation of lights and sirens.

Body-Worn Cameras

- TPS should implement the use of body-worn cameras service wide, at minimum by all front line officers during all interactions with the public.

CRIMINAL LAWYERS' ASSOCIATION, 189 Queen Street East, Suite 1, Toronto, ON M5A 1S2
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www.criminallawyers.ca / anthony@criminallawyers.ca

- As with in-car-cameras, officers should not have discretion to turn the recording devices off.
- While the cost associated with implementing body-worn cameras for officers in a service the size of TPS is significant, once all competing considerations are factored in, we believe the benefits would easily outweigh the costs in the long run.
- Data storage costs can be kept to a minimum by sensible policies and timelines on retention/destruction of video.
- Privacy concerns can be addressed and resolved with consultation on the issue and with Regulations and guidelines.
- Body-worn cameras implemented in other jurisdictions have resulted in an 80% reduction of complaints against officers[6] – an obvious side-benefit of the use of the technology, which should make it very attractive to explore.
- A reduction of complaints and litigation surrounding them would also contribute to overall cost savings, making the technology not as expensive as it would initially appear.
- Having video of a lethal force encounter with a mentally ill person would be the best way to dissect an incident with a view to learning form any mistakes that were made and preventing similar outcomes in the future.

Defining who is a "Person in Crisis"

- In an apparent effort to distinguish between individuals with a diagnosed or chronic major mental disorder who are experiencing an acute flare-up of their symptoms and someone who may just be situationally depressed or anxious, the TPS has adopted a bizarre definition of "crisis", which needs to be revisited. This definition, and how it is interpreted, is important, as it determines, among other things, what calls may be appropriate for mobile crisis teams to attend.
- The specific definition is something like: "A person in crisis is help-seeking and in this way has demonstrated that they remain in touch with reality."
- Obviously, persons who are "help-seeking" and "in touch with reality" are the lowest risk group among those who may benefit from a policing response, including mobile crisis and ought to be linked to community based resources.

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[6] Self-Awareness To Being Watched And Socially-Desirable Behavior: A Field Experiment On The Effect Of Body-Worn Cameras On Police Use-Of-Force: http://www.bwvsg.com/wp-content/uploads/2013/07/The-Effect-of-Body-Worn-Cameras-on-Police-Use-of-Force.pdf

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- In, in fact, a person is "help-seeking", then mobile crisis services should be available to them.
- Mobile crisis services should be advertised so the public is aware of it and the public should be able to access it directly.

Police Training in General

- While EDP training is generally good and improving all the time at both the Ontario Police College (OPC) and TPS' C.O. Bick College, it remains a distinct module and thus is not sufficiently integrated within the rest of police training, particularly use of force training, and, even more specifically, training on edged-weapons.
- Use of force training should allow front line officers to use common sense and good judgment and not be obsessing with the application of what are perceived as rigid "Rules" such as the "21-foot Rule" which is really not a rule, or even a true Guideline. The 21-foot Rule says that within 21 feet a person with an edged weapon is more dangerous than a person with a holstered gun because they can cover the 21 feet in less than the space of time it takes a person to unholster a firearm, get it on target, and fire the first shot.
- The rule is meant to impress on officers, particularly new recruits, the very real danger of edged weapons, but the reality is that a person with an edged weapon is only dangerous when they are within arms-reach! Any more expansive interpretation of this rule may lead to officers perceiving a threat of serious bodily harm or death when a person is outside of arms reach and, consequently, resorting to lethal force – as occurred in the Michael Eligon shooting.
- Neither OPC nor CO Bick College appears to have any regular training to new recruits about invisible disabilities, such as cognitive impairment or learning disabilities.
- There is a good model for such training in a lecture by Cst. Molyneaux, a training officer, but it was given only once to all front line officers in 2012.
- This lecture ought to form part of new recruit training at the OPC and refresher training at C.O. Bick or at the divisional level.
- Both colleges need to add materials on how to communicate and safely handle interactions with those with communications challenges like hearing impaired, who are non-verbal, or who have autism.

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- CPR training, though frequent, appears to be needed even more frequently, as was made clear in the McGillivary Inquest. Officers should be tested randomly and routinely.

Ontario Police College

- The 12 weeks of training at OPC is the shortest in North America
- As the JKE Inquest heard, they "don't have time to teach them to shoot and drive".
- This training needs to be extended, particularly because for many services the EDP training provided by OPC may be the only such training that new recruits get.
- The EDP training at OPC in already excellent in some ways.
- It teaches officers about "the power of the uniform" in a way that is readily understood as 'negative' for EDPs.
- Unfortunately, this particular messaging is undone once new recruits are back within the TPS, which communicates the opposite message at C.O.Bick and uses uniformed officers as members of mobile crisis teams.
- The materials OPC uses on EDP training are generally thoughtful and comprehensive.
- One problem with it, however, is the document "Not Just Another Call", which places tremendous emphasis on specific psychiatric diagnosis and symptoms. It invites the suggestion that front line officers should and need to be able to diagnose specific mental illnesses. It also over-emphasizes the medical model based theory of mental illness over social factors and stressors. This document should be reviewed with community partners, with input from mental health consumer/survivors.
- Some training videos on EDPs include post-production music which is loud, scary, and dramatic, and, together with actors who overplay their EDP roles, this can have the effect of demonizing those with serious mental health issues. These videos should be reviewed, again with input from mental health consumers/survivors for what theme and message they are conveying.
- Mental health consumers/survivors should have input into providing direct training at the OPC level to begin the process of sensitizing new recruits to individuals with histories of serious mental health issues, in situations other than during crises.

CRIMINAL LAWYERS' ASSOCIATION, 189 Queen Street East, Suite 1, Toronto, ON M5A 1S2
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www.criminallawyers.ca / anthony@criminallawyers.ca

C.O. Bick College

- Subject to the caveat about stand-alone modules rather than fully integrating into Use of Force / edged-weapons training, TPS' EDP training is excellent and fully informed by the perspective of consumers / survivors including video-taped materials produced by that community.
- The problem is the extent to which this training is retained over time in the field.
- To this end, consideration should be given to pilot projects in Divisions where EDP contacts are highest, such as 14 Division and 51 Division to direct training by way of refresher in-service training, to be provided by consumer / survivors who have experience in providing such training to police officers.

Equipment Used by Police

- Batons are potentially lethal weapons[7], but they can play a role in the use of force continuum, if properly used.
- Tactical/ballistic shields should be available in scout cars to use defensively and offensively where a suspect is armed with an edged weapon.
- The Presiding Coroner in the JKE Inquest ruled that that the Jury could not make recommendations on the threshold of use for CEWs or on the its distribution among officers; however, it appears clear from the recommendations they did make that, had they been permitted to do so, they would have recommended raising the threshold for use to at least the Braidwood standard, if not to be used only as an alternative to lethal force.
- Before putting more CEWs into the hands of front-line officers, the threshold for their use should be revisited, as the JKE recommendations suggest, through a very public and transparent consultation process.
- The particular health risks associated with the use of CEWs should be studied.
- If CEWs are to be used, body-worn cameras should be implemented.
- All Tasers should be equipped with the video recording option.

[7] Otto Vass died in 2000 while being beaten officers with batons– although the Inquest into his death (held in 2006) did not determine a cause of death

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- AEDs and equipment associated with performing CPR (gloves and mouth shields) should be in all scout cars.

Psychological Testing for Police Officers

- Psychological testing for police officers should screen out:

  (a) Those with anger-management issues
  (b) Those who would be too quick to use force
  (c) Those who would not be bothered by using their firearm to kill another human being.
- Ideally the kind of person the public should want carrying a gun is the one who would be most loathe to ever use it.
- Officers should have confidence in their own ability to address situations which may present with some prospect of violence, without resort to lethal force.
- Officers should have exceptional communication skills and be good listeners and have naturally good judgment and ability to communicate calmly to restore trust and confidence.
- Psychological testing should be ongoing.
- During particular periods of stress unrelated to the job, officers should be given duties less likely to put them in the path of situations where lethal outcomes might result and this should be able to be done without prejudicing an officers career or the way they are perceived amongst fellow officers (i.e. as weak).

Mobile Crisis Teams

- A permanent advisory board with significant representation by mental health consumers/survivors needs to be established to advise on the issue.
- There needs to be maximal use made of the expertise and experience of those officers who have been involved with mobile crisis to make them leaders on EDP issues after their 2 year rotation with a mobile crisis team.
- Those interested in becoming mobile crisis team officers should receive additional training and mentorship from those who have already done it.

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www.criminallawyers.ca / anthony@criminallawyers.ca

- Self-selection for these positions will work best as officers who are note not fearful of or prejudiced against EDPs will be most likely to apply.

ETF

- ETF works great when they can get to an EDP call, owing particularly to their extra training and extra non-lethal use of force options
- There need to be more ETF teams, perhaps in smaller incarnations.
- Consideration should be given to returning to a practice where the first responder was not expected to enter a scene until ETF got there, in situations where EDPs with weapons presented a real risk of lethal outcomes.
- Front line officers at a scene should be continually updated on the estimated time of arrival of ETF.

Lessons That Can Be Learned From Other Jurisdictions

- TPS should pay particularly close attention to lessons learned after public inquiries into high profile tragedies; for example, the shooting of Oscar Grant III by transit police in San Francisco in 2011 or the shooting of James Chasse by police in Portland, Oregon in 2006.
- Recommendations for body-worn cameras came out of public inquiries into many of these deaths and were implemented in some.
- Canada's own Six Senators' Report into the RCMP's accountability made similar recommendations regarding implementation of body-worn cameras.

In Conclusion

Dozens of mentally ill individuals have died in recent decades in confrontations with or during interactions with Toronto Police officers. There have been inquiries into these deaths conducted on each occasion, going as far back as the late 1980s with the death of Lester Donaldson. There is sufficient public concern voiced currently that a concerted effort to address the use of lethal force in interactions with EDPs in Toronto is critically important and urgent. There are many reviews ongoing. There is great expertise in the various stake-holder

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www.criminallawyers.ca / anthony@criminallawyers.ca

organizations and among individuals who have followed the issue closely over the years. The CLA believes that a Public Inquiry during which evidence of factual and policy witnesses could be tested by interested and expert stake-holders, would ultimately address the issue most effectively, maximizing the chance of success in preventing future death in similar circumstances. However, the CLA recognizes the great benefit of independent review mechanisms, such as this one, and is grateful to have had the opportunity to comment. We would be honoured to follow up, if appropriate, with a meeting in person, should that opportunity arise.

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www.criminallawyers.ca / anthony@criminallawyers.ca