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Summary Analysis of Bill 103:

An Act to establish an Independent Police Review Director and create a new public complaints process by amending the Police Services Act

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Community Education and Access to Police Complaints (CEAPC) Demonstration Project
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Introduction

In March 2005, Scadding Court Community Centre, along with our partner agencies, launched the **Community Education and Access to Police Complaints Demonstration Project (CEAPC)** to make the police complaints system more transparent and accessible to marginalized communities and to facilitate accountability and understanding between the Toronto Police Service and Toronto's communities. To meet our goals of community-based education and access, we focused on the development of support mechanisms in the police complaints process. The project originated from the recognition that people who have had negative experiences with police were fearful, reluctant, and/or did not know how to access the police complaints system. Under the current system, we have seen that individuals and communities have little faith in the process. We submit that Bill 103 is an insufficient reform effort and will not create a more effective police complaints process for the province. What follows is a brief summary of our concerns. For a more detailed analysis, please see our full submission (available online: http://www.scaddingcourt.org/publication/pdflibrary/bill_103_analysis_january_2007.pdf)

Access to Justice and Civilian Oversight

In order to improve community-police relations, the new system must promote access to justice through education, transparency, institutional fairness and responsive consultation. The purpose of the complaints procedure under the *Police Services Act* is to remedy experiences of injustice and can only legitimately occur extra-governmentally. Bill 103 would shift control of the process from the police themselves to the Office of Attorney General, through the powers given to the Independent Police Review Director (IPRD). This direct link between the "independent" oversight mechanism and the highest levels of provincial government diminishes possibilities for a transparent process. An IPRD must be answerable to independent and representative civilian review boards.

Bill 103 and the LeSage Report

In June 2004, the province asked Justice LeSage to review the complaints system and provide advice in the development of a fair, effective and transparent model. In April 2005, after much consultation, Justice LeSage released a comprehensive review of the current regime, including a series of recommendations for reform. We are concerned that some of the most progressive aspects of the recommendations are not found in Bill 103.

Vagueness

Bill 103 does not clearly outline the details of the new process and as a result invests the IPRD with nearly unlimited decision-making authority. Given the uncertainty regarding the new system, this creates both legal and practical problems. For instance, while CEAPC approves of the power of the IPRD to investigate complaints relating to systemic issues under Bill 103, it is unclear whether the IPRD can make binding recommendations. The powers of the IPRD are highly discretionary (for instance, her ability to define such terms as "frivolous" and "vexatious" under s. 24, or her power at s. 60(4), to refuse 3rd party policy or service complaints, without specific criteria). The unclear mandate of the IPRD is troubling considering the fact that the legitimacy of the proposed complaints regime rests upon the extent to which the IPRD can administer it consistently and responsibly.

Specific Concerns Relating to Access

Outreach to Diverse Communities / Public Education

While Bill 103 requires public education and assistance generally, there is no guarantee of substantive accessibility. While Justice LeSage notes the importance of outreach and public education, under Bill 103 barriers will still exist for those living in under-serviced or marginalized communities. Amendments to the complaints system must address these realities. Community-based organizations are uniquely positioned to facilitate and undertake outreach and educate the public, particularly in diverse communities. The Community Education and Access to Police Complaints demonstration project could be used as a model for public education and assistance with complaints.

Geographic Barriers

In Toronto, where the civilian police oversight body is located, making a complaint can be intimidating. The particular geographical difficulties for people in smaller rural and northern communities add another layer of concern for accessibility to the complaints process. Under Bill 103 the IPRD will be permitted, but not required, to establish regional offices to carry out the administration of police complaints work. As per LeSage, Bill 103 should divide the province into regions, with advisory groups formed in each region. The advisory groups should have the opportunity to meet with the new body, so that citizens have a mechanism and the opportunity to bring forward regionally specific concerns.

Accessibility for Aboriginal Communities

Bill 103 makes no mention of Aboriginal Peoples and fails entirely to recognize Aboriginal sovereignty and self-governance issues or address the problematic relationship between Aboriginal Peoples and police in Canada. We support Justice LeSage's finding that Aboriginal peoples warrant special consideration in the regard to the complaints procedure.

Identifying the Police

The CEAPC project has encountered many instances where persons have had negative experiences with police but have been unable to identify the officers involved. Bill 103 fails to impose a positive obligation on the police to identify themselves to civilians with whom they interact. Police should ensure that civilians can identify them, even in "low-visibility" interactions, which may leave no official record.

Third Party and Anonymous Complaints

While Bill 103 departs from the current standard, which states unequivocally that complaints lacking a complainant who is "directly affected" shall not be dealt with, CEAPC is concerned that this change may not amount to increased access for community groups and agencies per se. Bill 103 allows that "a person who has knowledge of the conduct," and has compelling evidence to support it under the opinion of the IPRD, may complain. Ultimately, the broad definitional powers of the IPRD within s. 4.1 of the *PSA* may invest the Director with the task of defining a "person" under the *Act*. Strictly construed, it is possible that the Bill will not allow third parties to bring complaints about incidents where they are not acting on behalf of a party as "agent." Bill 103 does not allow for the investigation of anonymous complaints. CEAPC is concerned that persons afraid of

retaliation by the police will be discouraged from accessing the IPRD. In instances where police misconduct occurs in illicit circumstances, officers who have committed misconduct are advantaged by a complaints system that does not allow for anonymity. Even ‘minor’ complaints, that parties may not wish to lodge formally should be accepted and recorded, due to the fact that even instances of seemingly minor discourtesy on the part of police can indicate patterns and/or be predictors of future misconduct of a more serious nature.

Limitation Periods

The Bill sets a standard six-month limitations period, subject to the discretion of the IPRD to allow an extension, but fails to impose any criteria to guide this determination. Justice LeSage’s specific advice concerning this exercise of discretion appears to have been ignored, including his recommendation that limitation periods begin upon disposition of any related criminal charges. The limitation period is too short, considering the current lack of outreach and education, and does not account for time needed to recover from emotional or physiological trauma sustained. CEAPC submits that the limitation period under the *PSA* should be set at a minimum of 12 months, in keeping with other remedial legislation.

Lack of Emphasis on Complaint Outcomes

A major shortcoming of the Bill is its failure to focus on complaint outcome, including follow-up upon resolution to ensure complainant satisfaction. Appropriate internal auditing and reporting mechanisms would facilitate consistent resolution of complaints. In addition, there is a need for regular external auditing. While Bill 103 gives the IPRD auditing power, it provides only for auditing “from time to time”, at total discretion of the IPRD. While LeSage noted that audits are invaluable sources of information for the public, Bill 103 provides no framework for public disclosure of the results of board audits. While s. 92 requires that IPRD audits be publicly available, the practical meaning of this obligation is unclear. The Bill should set minimum standard for the frequency of audits. Further, we support imposition of both ‘sting audit’ models and integrity testing as additional layers of auditing practice.

Informal Resolution

Informal, mediation-style resolutions are an important option for complainants and often result in higher levels of satisfaction than outcomes achieved formally. The Bill does not provide a clear guideline for the actual structure of informal negotiation processes. This is of concern due to the potential for rights abuses in less official settings, where complainants are subject to more subtle forms of pressure than in a public hearing. Complainants must not feel pressured to opt for restorative models, and once entered into informal resolution, should have a sense of control and be able to opt out.

Process

Under Bill 103, the new IPRD must stream individual complaints according to whether they are deemed policy or conduct-related. Where complaints are determined as relating to policies or services, rather than to conduct, they will be both reviewed and/or investigated by the police themselves. We are concerned about what we see as a fundamental disconnect between policy-based or systemic issues and individual complaints within the

process as proposed. Individual complaints, rather than being evidence of isolated incidents, often reflect policy/systemic problems within the police service. Accordingly, both ‘types’ of complaints ought to be treated in the same way procedurally, if with distinct remedial processes. We submit that Chiefs of Police and Detachment Commanders may lack the necessary objectivity to investigate or review their policies and services in a fair and transparent manner. The policy/conduct distinction is rarely straightforward in practical terms, given the extent to which policies and services inform day-to-day police conduct. While Bill 103 establishes the important procedure of having all police complaints reviewed by the IPRD rather than by the police, this initial streaming process is problematic since the decision of the IPRD to refuse or to accept a complaint is not subject to clear criteria or to review. The Bill does not permit a specific contextual analysis where it comes to issues of individual police conduct. Rather, it mandates the IPRD to consider the “public interest” alongside the more nebulous “nature of the complaint” in determining whether to investigate a complaint.

Lack of objective standards for Complaint Acceptance and Dismissal

The broad terminology and vague legal tests that guide IPRD power to refuse complaints not in the “public interest” is in fact highly subjective and potentially exclusionary. In keeping with the standards of the current legislation, the IPRD may choose not to deal with complaints that she classifies as being “vexatious or frivolous or made in bad faith.” Notwithstanding their entrenchment in administrative law, these categories are highly problematic and may seem to indicate bias against complainants. Complainants are entitled to a presumption of legitimacy and these terms should be replaced with more neutral language. Further, we are concerned that these terms have been used, and will continue to be used as discretionary catch-alls to screen out a high percentage of complaints.

Rights of Statutory Appeal / Lack of Judicial Review

The Bill provides insufficient rights of review. There is no provision in the legislation for a right to review at the Divisional Court level for any complaints other than those regarding officials such as deputy chiefs and chiefs of police. Complainants lack rights of review for many decisions concerning classification and processing. The lack of statutory appeal and judicial review rights, coupled with the broadly discretionary powers of decision makers, limits accessible and accountable justice for complainants.

Standard of Proof

CEAPC submits that the civil “balance of probabilities” standard should replace the slightly higher “clear and convincing evidence” standard in s. 84(1) as the required standard of proof for misconduct at a hearing under the Police Services Act. Given the remedial purpose of the legislative regime in question, the standard of proof imposed on complainants by Bill 103 is inappropriately onerous.

Processing Delays

In order to develop a fair and responsive process, it is essential that the Bill appropriately balance the dual goals of expediency and overall efficacy of the system. The Bill risks sacrificing one goal for another. For example, complaints about chiefs shall be disposed of within 60 days, but this may be extended, seemingly indefinitely, at the discretion of the

chief with no requirement to provide reasons and without review. CEAPC submits that the process should involve clear, reasonable and well-defined timeframes.

Funding Commitment and Sources

Given the disparity between the resources of the police and many marginalized complainants, the new system should allocate funding to support complainants at all stages in the process. It is well documented that without the commitment of sufficient and secure funding, civilian review of police complaints is ineffective. The Bill provides no guarantees around funding to assist complainants in navigating the system and is silent on the matter of funding for education.

No Guarantee of Independent Investigation or Adjudication

Under the proposed changes, the conflict of interest that arises when police investigate complaints is not addressed. While former police officers may not be appointed to the Office of IPRD, there is no such restriction concerning IPRD employees. This is troubling since the Bill allows the IPRD discretion to delegate her statutory duties and powers to employees. None of the IPRD investigators should be former police officers. CEAPC also supports the recommendation by Justice LeSage that an impartial adjudicative body be appointed pursuant to the *PSA*, in order to preside over hearings.

Insufficient Protections for Complainants and Witnesses

The Bill provides insufficient protections to complainants and witnesses. Many individuals feel targeted or threatened by the police after they have made a complaint under the *PSA*. We would like to see legislative recognition of the fact that even subtly persuasive action by police officers, falling short of the range of explicitly proscribed conduct in the Bill, may constitute improper interference with the complaints process. The legislation should also provide employment protection and personal security where necessary for whistleblowers. Additionally, the Bill should allow complaints by police officers and staff, who are well positioned to act as credible witnesses to police wrongdoing.

Implementation

CEAPC contends that substantive access to police complaints procedures requires a deep commitment to a model that is community-based, responsive, equitable, and appropriately funded. Consultation at the legislative stage is only the first stage in terms of accessing the process; community groups must be present and substantively involved in the development and implementation of policies and procedures. The Bill must be subject to ongoing review in order to monitor its effectiveness.

The proposed changes to the current police complaints regime in Ontario will not rectify the public lack of faith in the system. Under the framework provided in Bill 103, communities and individuals who have had negative experiences will feel no more welcome to lodge complaints than they do now. While we applaud the government's willingness to respond to the need for change to the current process and see some signs of positive change, we believe that the Bill does not provide many much-needed reforms. We urge the government to attend to the concerns of CEAPC, and develop a police complaints model that is responsive, supportive, transparent and truly accessible.

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**APPENDIX: CEAPC RECOMMENDATIONS
BILL 103 SUBMISSIONS**

1. Outreach to Diverse Communities / Public Education

Recommendation 1.1

The Bill should specifically state that the IPRD must take into account linguistic, cultural, disability and additional diversity considerations in providing information and assistance. The Bill should require the IPRD to provide public information in multiple languages, and through various methods of delivery, including toll free numbers and web access. The Bill should require the IPRD to engage community-based organizations in outreach and public education to diverse communities.

Recommendation 1.2

The Bill should provide mandate community-based and gender-specific intake and outreach procedures in order to respond to the particular needs of diverse communities of women.

Recommendation 1.3

The Bill should mandate the availability of community-based complaints intake to be provided by community-based organizations that are trained and funded to do so.

2. Geographic Barriers

Recommendation 2.1

The Bill should require the IPRD to establish regional offices, which are empowered to provide public education and to receive and process complaints.

Recommendation 2.2

The Bill should mandate the creation of regional advisory groups with guaranteed access to the policy table. These advisory groups should be representative of diverse civilian constituencies in each region throughout the province.

3. Accessibility for Aboriginal Communities

Recommendation 3.1

The Bill should recognize, acknowledge and address the unique issues that Aboriginal Peoples face in their interactions with the police. Special Aboriginal advisory bodies should be created, both on and off reserve, in order to guarantee supportive frameworks and meaningful access to effective complaints processes for Aboriginal communities and individuals throughout the province who choose to access the process outlined.

Recommendation 3.2

Funding should be available for Aboriginal communities throughout the province to develop and maintain local police complaints regimes if they wish to. In instances where Aboriginal communities or individuals wish to access the provincial complaints mechanism, they should be able to access community-based intake and outreach

procedures which are developed in recognition of the unique issues they face in their relationship to police.

4. Identifying the Police

Recommendation 4.1

The Bill should impose a positive duty on the police to ensure that detailed information about complaints procedures is accessible at points of contact with civilians - including on the street, in squad cars, and at police stations.

Recommendation 4.2:

The Bill should impose a provincial standard for identification (as suggested by LeSage) so that individuals feel better able to bring forward complaints.

5. Third Party Complaints

Recommendation 5.1

The Bill should require the Director to review all third party complaints that pertain to policy and services.

Recommendation 5.2

The Bill should explicitly define ‘person’ under the *Act* as including community agencies and groups.

6. Anonymous Complaints

Recommendation 6.1

The Bill should allow anonymous complaints as long as these are supported by sufficient evidence. Complaints will be documented, even where there is not sufficient supporting evidence.

Recommendation 6.2

The Bill should allow for anonymous reporting of complaints in which officers are not identified or in which those who are reporting do not wish to launch an official complaints. This data should be recorded and used as an ‘early warning system’ concerning problematic patterns of police behaviour.

7. Limitation Periods

Recommendation 7.1

In instances where persons wish to apply for an extension of the standard limitation period, they may do so directly to the office of the IPRD. In determining whether to approve an extension of the limitation period, the IPRD will consider the subjective context of the complainant and take into account any systemic barriers that he or she faced in bringing forward a complaint.

Recommendation 7.2

The Bill should require review of every complaint made within two years of the facts at issue, subject to automatic extensions for pending criminal proceedings based on the facts at hand, and the age and capacity of the complainant.

8. Lack of Emphasis on Complaint Outcomes

Recommendation 8.1

There should be a positive obligation on the part of the IPRD and the police to work with community-based organizations as equal partners in a new model of providing community-based access, public education and assistance to complainants, not only throughout the intake and processing, but also throughout the resolution of their complaints.

Recommendation 8.2

The annual report of the IPRD should be required to provide details on the number of complaints received and the nature and grounds of their disposition.

Recommendation 8.3

After an initial three-year period of implementation, the new police complaints regime must be subject to an extensive review that focuses on complaint outcomes and complainant satisfaction.

Recommendation 8.4

The IPRD should be required to conduct performance audits on any aspect of the administration of complaints under the PSA at the recommendation of regional civilian advisory boards, based on consultation with community groups and agencies.

Recommendation 8.5

The findings of all audits that are undertaken in authority of the *Police Services Act* in regard to police complaints procedure should be made publicly available and posted on the Internet in multiple languages.

Recommendation 8.6

The IPRD should have the authority to issue guidelines and set public complaints administration standards for particular police services. Such guidelines and standards shall be developed in consultation with community groups and agencies who act in support of complainants.

Recommendation 8.7

The IPRD should have the power of inquiry available to it to identify systemic problems that may underlie complaints and make recommendations to their recurrence in broad consultation with those communities who have been historically disadvantaged by such systemic problems.

Recommendation 8.8

Police services boards should be required to order bi-annual audits of complaints procedures in their jurisdiction, subject to the discretion of the new body for more frequent audits.

Recommendation 8.9

We recommend the institution of ‘sting audits’ where civilian investigators measure the proper handling of complaints under the new system by posing as complainants and giving public reports of their findings.

Recommendation 8.10

In recognition of the systemic barriers that are likely to be a part of any police complaints process, audits should place strong emphasis on the particular experiences of marginalized complainants.

Recommendation 8.11

The Police Services Act should provide for mandated integrity testing or ‘sting audits’ on the police in order to measure and monitor the efficacy of the complaints procedure as a deterrent to police misconduct.

9. Informal Resolution

Recommendation 9.1

Any informal mediation shall be vetted by the director, shall be undertaken only at the request of the complainant and shall be conducted by a neutral mediator who has been approved by local civilian advisory boards in consultation with the IPRD.

Recommendation 9.2

Only neutral and qualified parties, who are not and have never been employed as police officers, should mediate informal resolution.

Recommendation 9.3

The Bill should require that the results of informal resolution be recorded, publicly available and audited.

10. Process

Recommendation 10.1

The distinction between policy and conduct should be rationalized on a case-by-case basis to regional advisory bodies, and the complaint documented by the IPRD, so that every complaint is dealt with according to the principle of civilian oversight.

Recommendation 10.2

All complaints that are refused review by the IPRD under s. 60 should be forwarded, along with reasons to a local civilian advisory body. At this point, the advisory body may refer a complaint back to IPRD for another review. Reasons for refusal must be

forwarded to complainants, with every effort made to guarantee subjective understanding.

11. the Role of Agents

Recommendation 11.1

In the interest of balancing equitable access to diverse representation with fair protection from opportunistic or incompetent “agents”, CEAPC recommends that IPRD regulations should define who might act as an “agent” within the meaning of the *Act* and further, under which circumstances such an “agent” may accept payment for services.

Recommendation 11.2

The new model must provide access to representation for under-resourced complainants in order to ensure equitable access to the system. This funding must be directed at all stages of the complaints process, from intake through resolution.

12. Processing Delays

Recommendation 12.1

Complaints that have referred to chiefs of police by IPRD should be required to be disposed of within 60 days. In instances where extensions of this period are necessary, police chiefs must provide written requests for time extensions to local civilian advisory boards. In consultation with individual complainants, advisory boards may or may not accept requests for extension on a case-by-case basis.

13. Lack of objective standards for Complaint Acceptance and Dismissal

Recommendation 13.1

The Bill should provide clear criteria under which the IPRD may deem complaints either “sufficient” or “insufficient” to merit investigation.

Recommendation 13.2

The Bill should require the IPRD to both specify and make public her definitions and criteria under the *Act*.

14. Rights of Statutory Appeal / Lack of Judicial Review

Recommendation 14.1

All parties to a police complaint should be granted the right to apply for leave to appeal decisions made pursuant to the powers of the IPRD or otherwise under the *Act* at the divisional court level.

Recommendation 14.2

Any decision that is made in regard to a complaint reviewed by the IPRD, including the decision to refuse a complaint based on grounds provided in s. 60, should be reviewable by both internal and external administrative appeals processes.

Recommendation 14.3

If complainants are given the right to ask for leave to, or are allowed an appeal to divisional court, a fund should be established to allow appellants to retain legal counsel.

15. Fairness and Transparency

Recommendation 15.1

The decision made after a hearing into police officer misconduct shall be made publicly available by posting it on the Internet within 30 days of the date of decision.

Recommendation 15.2

Complaints that pertain to policy issues and have been referred to individual chiefs of police, detachment commanders or commissioners by the IPRD shall be investigated and disposed of. Resolution of these matters will be documented and reports will be made both to the IPRD and to the general public via the Internet.

16. Standard of Proof

Recommendation 16.1

The standard of proof in hearings under Bill 103 should be based on a “balance of probabilities” in order to ensure fair outcomes.

17. Funding Commitment and Sources

Recommendation 17.1

Those community-based agencies that assist individuals and groups in accessing the complaints processes should be allocated resources sufficient to both provide education on the complaints process and to assist complainants in navigating the system from intake through resolution.

Recommendation 17.2

The Bill should explicitly provide dictate that funding levels sufficient to ensure the efficient and effective functioning of procedures be put into place.

18. No Guarantee of Independent Investigation

Recommendation 18.1

All complaints of police misconduct should be investigated by a wholly independent civilian review body.

Recommendation 18.2

The Bill should prohibit the IPRD from hiring former police officers as employees.

19. Police Services Act Adjudicators

Recommendation 19.1

The Bill should mandate the creation of a new adjudicative body, with members appointed in consultation with regional advisory boards. No adjudicators shall be present or former police officers or staff.

20. Insufficient Protections for Complainants and Witnesses

Recommendation 20.1

Officers shall to be discouraged from having any contact with those individuals who have lodged complaints in which they are personally implicated. In cases of emergency, where police interaction with complainants is necessary, there shall be a positive obligation on the officer in question to document and provide a rationale for this contact.

Recommendation 20.2

The Bill should allow police officers, auxiliary officers and staff to be “members of the public,” with entitlement to complain under the *PSA*.

Recommendation 20.3

The Bill should specifically provide employment protection and personal security where necessary for whistleblowers.