



## **Detailed 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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<http://www.scaddingcourt.org/specialprojects/police.htm>

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## Introduction

In March 2005 Scadding Court Community Centre, in partnership with over thirty other partner agencies,<sup>1</sup> launched the **Community Education and Access to Police Complaints Demonstration Project (CEAPC)**.<sup>2</sup> The focus of the project is to facilitate and promote accountability, transparency and understanding between the Toronto Police Service and people from all communities in Toronto. In keeping with these central foci, we have watched the recent legislative developments in regards to the police complaints process under Ontario's Police Services Act.<sup>3</sup>

The foremost goals of this two-year demonstration project are “to ensure that the police complaints system is accessible and available to the specific needs of community members...through the development and delivery of support mechanisms that will assist in making the system more transparent, comprehensive and accessible to the diverse communities of the Toronto area. CEAPC will be responsive to and guided by the needs of the community.”<sup>4</sup> In recognition of the fact that the members of marginalized communities who are most vulnerable in their interactions with police are often the least likely to exercise their rights to complain, we are particularly concerned with facilitating access to those who face systemic barriers to the complaints process.

This project is founded on the premise that communities themselves must be actively engaged in negotiating these systemic barriers. In the interest of education and access, we provide opportunities for members of the general public to learn more about their rights when dealing with the police and the justice system. Staff from the various partner agencies provide support in documenting and filing a complaint, information on the

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<sup>1</sup> Our Partner Agencies: African Canadian Social Development Council, Park Community Centre, Alexandra Park Neighbourhood Learning Centre, Atkinson Co-Op, Canadian Race Relations Foundation, Canadian Arab Federation, Co-operative Housing Federation of Toronto, Community Social Planning Council of Toronto, Council of Agencies Serving South Asians, Davenport-Perth Neighbourhood Centre, Delta Family Resource Centre, Eastview Community Neighbourhood Centre, Fort York Food Bank, Hispanic Development Council, Hong Fook Mental Health Association, Jamaican Canadian Association, Jane/Finch Community Legal Services, Jane/Finch Concerned Citizens Organization, Justice For Children and Youth, Kensington-Bellwoods Community Legal Services, Midaynta Association of Somali Serving Agencies, New Experiences for Newcomer Women, Ontario Council Of Agencies Serving Immigrants, Regent Park Neighbourhood Initiative, Schizophrenia Society of Ontario, South Asian Family Support Services, South Asian Legal Clinic of Ontario, South Asian Women's Centre St. Christopher House St. Stephen's Community House, Street Health, The 519 Church Street Community Centre, Toronto Community Housing, Toronto Police Accountability Coalition, Toronto Police Service, YMCA Youth Intervention and Outreach Services.

<sup>2</sup> You can learn more about us at: <http://www.scaddingcourt.org/specialprojects/police.htm>

<sup>3</sup> *Police Services Act*, R.S.O. 1990. Police complaints procedure in the province is governed under Part V of the Act.

Bill 103: *An Act to establish an Independent Police Review Director and create a new public complaints process by amending the Police Services Act*, (hereinafter Bill 103), received 1<sup>st</sup> reading in Parliament on April 19, 2006.

<sup>4</sup> A. Hutchinson, “Community Education and Access to Police Complaints Demonstration Project: 1<sup>st</sup> Interim Project Evaluation,” (2006) at 1.

process and what to expect once the complaint is filed, and language translation where needed.

The CEAPC 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. The current system for police complaints procedure, established by the Harris government, is deeply flawed; in our experience, individuals and communities have very little faith in the process. When a state institution has abused an individual, it is not only patently unfair, but also disingenuous from the perspective of access to justice, to expect that they will seek remedial justice from the same state body.

When an individual has been abused by a police, they should have access to modes of recourse that are situated in their communities, entirely outside of police authority. While we welcome the government's willingness to review the legislation in response to calls for a more legitimate, transparent and accountable police complaints procedure, we believe that the proposed changes are insufficient and do not provide much-needed reforms. We urge the government to attend to the concerns of CEAPC in regard to the proposed changes, and to develop a police complaints model that is responsive, supportive, transparent and truly accessible.

What follows in this brief is a discussion of our concerns about Bill 103. First, we have located our specific concerns regarding the Bill within the framework of accessibility. Following this, we have outlined problems in terms of the relationship of the Bill to the recommendations of the LeSage Commission. We then identify certain broad themes and specific concerns relating to access, along with concrete and practical recommendations for changes to the Bill. Finally, we have summarized our position and included broad guidelines for best practices in police complaints procedure, based on our community access and education model.

## **The Issue of Access to Justice**

The success of a police complaints process is contingent upon its ability to provide meaningful access for all members of society. We submit that Bill 103 does not ultimately provide for an accessible police complaints process in the province. CEAPC would like to see a police complaints model that encourages and welcomes the engagement of individuals and communities who are currently discouraged from bringing forward their complaints and concerns. An accessible police complaints process would therefore not only make the initiation of a complaint accessible, but also institutionalize supports for complainants at every step of the way, from intake through resolution.

We believe that formal supports for complainants, throughout the entire complaints process, are essential. However, formal supports alone are insufficient to guarantee substantive accessibility to the police complaints process. No matter how effective a police complaints regime is, not every issue will be addressed through its procedures. For any number of reasons, some people will never seek resolution through official channels when their rights are violated. As such, the complaints mechanism ought to have deterrent effects outside of its actual internal operation. In order to ensure that the police

complaints mechanism serves as an effective tool for broader change in community-police relations, the new system must seek access to justice through education, transparency, institutional fairness and responsive consultation. In order to ensure meaningful access, the system must not only be fair, it must also appear to be fair. It is our belief that the police complaints regime proposed under Bill 103 will not translate into increased accessibility.

The purpose of the *Police Services Act* is to “increase public confidence in the provision of police services and the investigation of citizen complaints against police”.<sup>5</sup> The power vested in the role of police is such that their legitimacy rests upon effective mechanisms for accountability since, in carrying out their duties, the police have the legal authority to stop, search, detain, arrest, charge, use force and kill.<sup>6</sup> Within the context of a free and democratic society, the police have the power to interfere directly with the most basic liberty interests of civilians. As such, if civilians do not enjoy a sense of effective control over the policies and operations of the police, there is cause for concern. It is essential that our society places checks on this power in order that it not be used capriciously, in bad faith, or in any manner that constitutes abuse. In order to build trust between communities and police, the police must operate according to *popular consent* with concrete and transparent mechanisms for measuring the performance of police work.<sup>7</sup> As Goldsmith notes,

External scrutiny and oversight through the establishment of durable, independent mechanisms that are able to ensure greater answerability and responsiveness by the police over time therefore seems to be an inescapable element of trust-building.<sup>8</sup>

Police powers, their operations and policies ought to be held to a higher standard of scrutiny than those of other professional bodies. The police represent the ultimate power of the state to place coercive limitations on the freedom of its subjects. On a day-to-day level, this power creates inherently disparate power relationships between the police and the rest of society. Meaningful civilian oversight of the police complaints process must take place entirely outside of the influence of police and state authority.

## Relationship to LeSage Report

In June 2004, the Ontario Government commissioned Justice Patrick LeSage to review the provincial police complaints system. His stated mandate was to “advise on the development of a model for resolving public complaints about the police, to ensure that

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<sup>5</sup> *Canadian Civil Liberties Association v. Ontario (Civilian Commission of Police Services)* (2002), 61 O.R. (3d) 649 at para. 26 (C.A.). [hereinafter “*Canadian Civil Liberties Association*”]

<sup>6</sup> I. Ceric, “Organizing for Accountability: Community Legal Clinics and Police Complaints” (1999) Parkdale Community Legal Clinic. at 2.

<sup>7</sup> A. Goldsmith, “Police Reform and the Problem of Trust” (1999) *Theoretical Criminology*, 9(4) 443 at 458.

<sup>8</sup> *Ibid*, at 461.

the system is fair, effective and transparent.”<sup>9</sup> During the following year, Justice LeSage conducted extensive consultation with interested parties throughout the province. In addition to holding public meetings and hearing over 50 presentations, LeSage met privately with over 200 individuals from more than 85 groups and organizations, and received more than 100 written submissions. The entire process occurred in a broadly participatory framework.<sup>10</sup> In April 2005, Justice LeSage released a final report on the police complaints system in Ontario. The report provided a thorough review of the current complaints regime and contained a series of 27 recommendations for reform.

CEAPC submits that the LeSage report, while providing an important series of recommendations, does not go far enough in many areas towards ensuring meaningful access to the police complaints procedure for the most marginalized groups and people in society. As a result, there are certain components of the LeSage report that CEAPC cannot wholly endorse. In our submission, the LeSage report represents an attempted compromise between the interests of those who seek to hold the police accountable and those of the police themselves. Given the role of police in our society, it is inappropriate for police officials and associations to dictate the terms of legislative accountability mechanisms. Notwithstanding these concerns, we are concerned that the government has ignored and overlooked some of the most progressive and important components of Justice LeSage’s recommendations. The gap between the current draft of Bill 103 and many of the recommendations does not follow the spirit or the intent of the mandate that Justice LeSage was provided with.

We have identified a series of key areas in which Bill 103 fails to incorporate the recommendations of Justice LeSage. Bill 103 fails to:

- **Establish an independent civilian body to administer complaints in a manner that is open and public.**<sup>11</sup> Rather the Bill invests the authority of civilian review with one individual Office, that of the proposed Independent Police Review Director (IPRD).
- **Establish regional advisory representatives mandated to discuss systemic concerns with independent civilian body.**<sup>12</sup> Instead, it seems that under the legislation systemic issues will be addressed only at the whim of the IPRD.
- **Provide for meaningful public education on the new complaints system. It also fails to provide diverse, appropriate and accessible intake procedures.**<sup>13</sup> Rather, the Bill offers insufficient attention to education and outreach, fails to address linguistic, geographic and cultural diversity, and allows no new modes of intake.
- **Place a positive onus on police services to promote public education on the complaints process, nor does it provide a clear process for the police to engage with concerns raised by those who do not wish to make formal complaints.**<sup>14</sup>

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<sup>9</sup> The Honourable P. J. LeSage, Q.C. “Report on the Police Complaints System in Ontario” April 22, 2005, at 3.

<sup>10</sup> *Ibid*, at 4-5.

<sup>11</sup> *Ibid*, (Recommendation 1) at 66.

<sup>12</sup> *Ibid*, (Recommendation 2).

<sup>13</sup> *Ibid*, (Recommendation 3).

<sup>14</sup> *Ibid*, (Recommendation 4) at 67.

- **Allow third party complaints based on the “cogent” evidence recommended by Justice LeSage.<sup>15</sup> Rather, the Bill requires the standard of “compelling” evidence, which may place a higher burden of proof on complainants.**
- **Address the exceptions concerning limitation periods for filing a complaint in instances where criminal charges are pending, where the complainant is a minor, is facing any type of systemic barrier, or is “incapable” or where it is in the public interest.<sup>16</sup>**
- **Provide provincial standards for officer nametags.<sup>17</sup>**
- **Ensure that, upon disposition, complainants are provided with sufficient information to allow them to understand how the complaint was handled.<sup>18</sup> While the Bill provides that complainants will receive notification regarding disposition, there is no positive obligation for the IPRD to provide information sufficient for complainants to achieve subjective “understanding” of the process and result.**
- **Provide to account for contextual factors in the determination of whether a complaint should be handled through informal resolution. It also fails to ensure neutral and independent informal resolution.<sup>19</sup>**
- **Provide statistical records of informal resolution,<sup>20</sup> or provide that these be publicly available.<sup>21</sup>**
- **Enumerate the relevant factors in the IPRD determination for streaming complaints at the front end of the process. The Bill does not refer to LeSage’s list of factors for determinations, which included but were not limited to: nature of the complaint, circumstances surrounding the complaint, the public interest, the size of the police service, the rank of officer.<sup>22</sup>**
- **Guarantee that police officers investigating complaints be disconnected from the incident in question and removed from the persons involved in the incident.<sup>23</sup>**
- **Ensure that a maximum of 50% of investigators in new administrative body be former police officers.<sup>24</sup>**
- **Ensure that IPRD reviews of interlocutory decisions are made publicly accessible via the internet.<sup>25</sup> While the Bill does transfer this power of review for decisions that are deemed to be, “not of a serious nature” or “unsubstantiated” from the Ontario Civilian Commission on Police Services to the new Office, the IPRD is not required to publish the results of such reviews.**
- **Ensure that hearings be held where there has been no resolution but there remain reasonable grounds to believe misconduct or unsatisfactory work performance has occurred.<sup>26</sup> The Bill**

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<sup>15</sup> *Ibid*, (Recommendation 6).

<sup>16</sup> *Ibid*, (Recommendation 7).

<sup>17</sup> *Ibid*, (Recommendation 8) at 68.

<sup>18</sup> *Ibid*, (Recommendation 10)

<sup>19</sup> *Ibid*, (Recommendation 12) 70-71.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid*, (Recommendation 18) at 79.

<sup>22</sup> *Ibid*, (Recommendation 13) at 72.

<sup>23</sup> *Ibid*, (Recommendation 14) at 73.

<sup>24</sup> *Ibid*, (Recommendation 16)

<sup>25</sup> *Ibid*, (Recommendation 17) at 79.

<sup>26</sup> *Ibid*, (Recommendation 19) at 80.

allows for hearings in such cases only where a police officer rejects the disposition, not in cases where the complainant rejects the disposition.

- Provide for the appointment of a body of independent adjudicators to preside over hearings carried out under the *Police Services Act*.<sup>27</sup>
- Require the IPRD to publish sufficient detail in regard to the dates and locations of hearings.<sup>28</sup>
- Provide final rights of appeal to the Divisional Court at the outcome of all Commission hearings.<sup>29</sup> The Bill provides rights of appeal to Divisional Court only for decisions in complaints about Deputy/Chief conduct.
- Provide for bi-annual audits. Instead, under the Bill the IPRD has the authority to order audits performed by boards or by the IPRD according to their discretion. Contrary to the intent of the recommendation<sup>30</sup>, there is no requirement to publish board audits.
- Address Aboriginal issues in any way, contrary to the intent of LeSage's recommendations in regard to consultation and access to complaints in Aboriginal policing jurisdictions.<sup>31</sup>
- Guarantee appropriate funding for the effective functioning of the new body.<sup>32</sup>

## General Problems with Bill 103

### I) Civilian Oversight

While police sometimes complain of over-regulation, a well-functioning police complaints process would actually serve to heighten both the efficacy and the legitimacy of police work in Ontario. According to a Toronto Police Service audit of complaints procedure:

The objectives of a properly administered complaints process should extend beyond the punitive component of identifying office misconduct and disciplining individual officers. An effective public complaints process can help identify problem areas, foster accountability and ultimately contribute to effecting organizational change.<sup>33</sup>

Clearly, independent civilian oversight is a key component of a police complaints model that is transparent, accountable and accessible. While there is no perfect model for civilian review, given the inherent exclusion of certain individuals and communities from an institutionalized complaints process, effective accountability regimes operate according to the preventative principle. Over time, we hope that a functional complaints

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<sup>27</sup> *Ibid*, (Recommendation 20).

<sup>28</sup> *Ibid*, (Recommendation 21).

<sup>29</sup> *Ibid*, (Recommendation 23). at 82.

<sup>30</sup> *Ibid*, (Recommendation 24). at 83.

<sup>31</sup> *Ibid*, (Recommendations 25 and 26). at 84.

<sup>32</sup> *Ibid*, (Recommendation 27) at 85.

<sup>33</sup> J. Griffiths, "Performance Audit, The Police Complaints Process, Toronto Police Service" (2002) Toronto Audit Services. at 1. available online:

[http://www.toronto.ca/audit/2002/public\\_complaints\\_process\\_aug\\_2002\\_final.pdf](http://www.toronto.ca/audit/2002/public_complaints_process_aug_2002_final.pdf)

model will work remedially to restructure the relationship between police and those who are most vulnerable to police misconduct.

## **II) No Significant Departure from the Current System**

The proposed legislation offers little meaningful departure from the current complaints regime, which has been ineffective and inefficient since its inception. Under the proposed legislation, we would see one deeply flawed system being substituted for another, equally problematic complaints procedure. Based on observations by both CEAPC and our partner agencies, there is a widespread perception among those who have had negative interactions with the police that the current complaints system is an ineffective instrument of accountability. Bill 103 does not mitigate this distrust in the system, which we have observed to be pervasive among complainants at every stage of the current process. As other criticisms of the proposed amendments have explained, the chain of command created under Bill 103 means that the oversight mechanism is “independent” in name only and is actually ensconced in provincial government.<sup>34</sup>

In response to calls for civilian oversight, Bill 103 establishes the Independent Police Review Director, charged with the administration of police complaints in the province. Unfortunately, the legitimacy of this office is compromised by the fact that the IPRD is ultimately subordinate to the Attorney General where resolution of complaints is concerned.<sup>35</sup> This direct linkage between the purportedly “independent” oversight mechanism and the highest levels of provincial government belies any pretense of democratic process and accountability. Under Bill 103, control over the police complaints process has shifted from the direct hands of the police themselves and into the hands of the Office of Attorney General, through the powers given to the Office of the IPRD.

In the process outlined by Bill 103, definitive power is concentrated in a few high-level decision-making authorities. While an Director position may be a necessary component of the complaints process to ensure a functional and efficient reporting relationship, CEAPC and its partner agencies believe that true public accountability will only result if the IPRD is itself accountable to fully independent civilian boards from across the province. Such civilian review boards should be representative of the diverse makeup of the province.

Under Bill 103, the current system of complaints investigation is not substantively altered. At present, police are charged with the investigation of complaints that are levied against them. This is a clear conflict of interest and is consistently viewed by both complainants and scholars as an inherently unjust and ineffective arrangement.<sup>36</sup> As noted above, complainants will only access a system that appears to be just and that they believe has the capacity to give them what they want, which is a transparent and trustworthy process and a fair and just outcome. Under the process outlined in Bill 103,

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<sup>34</sup> A. Balakrishna, South Asian Legal Clinic of Ontario, Bill 103 Draft Analysis (2006) at 1-2.

<sup>35</sup> Bill 103, s. 79(4)

<sup>36</sup> T. Landau. “When Police Investigate Police: A View From Complainants” (1996) Canadian Journal of Criminology. 291 at 308-10.

there remains a clear lack of legitimacy due to failure to establish an entirely external investigatory procedure.

### **III) Vagueness**

The copious use of certain undefined terminology within Bill 103 means that there is little certainty as to how the new complaints process will actually work. The language in the Bill leaves enormous power within the hands of policy makers. For instance, under s. 60(4), the IPRD has the discretionary power to refuse third party complaints concerning policy or service issues, without specific criteria. The lack of clarity within the Bill leaves it subject to the changeability of the political climate, and to the pressures of powerful interest groups, such as Police Associations. The Bill must be amended so that the meaning behind the statutory powers of the IPRD is discernable, clearly articulated and fleshed out.

Bill 103 does not guard against the possibility of arbitrariness in its application. We are concerned that this vagueness will result in capricious and inconsistently applied practices that actually frustrate the ability of complainants to access the system, or once within the system, to access justice.

Given the uncertainty about how the system will actually work, the legislation has problems from both legal and practical standpoints. It is a basic tenet of our democratic system that individuals should be able to rely on the rule of law to protect them against arbitrary or uncertain governmental action.<sup>37</sup> Not only should individuals know what they can expect from the laws that govern the society in which they live, they are also entitled to protection against the discretionary power of government actors. This is particularly true in the context of remedial public interest legislation such as the *Police Services Act*, which mandates the responsibilities of state actors directly. Complainants should be able to rely on the meaning of the law in order to predict and understand its application. However, the vague language used throughout the bill is vulnerable to the contingencies of administrative and political discretion.

### **IV) Breadth of the IPRD's Mandate**

It is clear that the powers of the IPRD are highly discretionary (for instance, her ability to define such terms as “frivolous” and “vexatious” under s. 24). As such, the mandate of the IPRD will be conditional, subject to factors such as political context and personal ideological stance.

While CEAPC approves of the power of the IPRD to investigate complaints relating to systemic issues under Bill 103, it is unclear what real power the IPRD has to make binding recommendations. As the analysis prepared by one of our partner agencies has noted:

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<sup>37</sup> *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

At first blush, the IPRD discretionary authority over the complaint system is short of unlimited...Yet, under section 56(3) we are told that rules or guidelines – such as procedural rules related to the powers, duties or functions of the IPRD – are not binding.<sup>38</sup>

This lack of clarity concerning the mandate of the IPRD is troubling considering the fact that the entire legitimacy of the complaints regime under Bill 103 rests upon the extent to which the IPRD can administer it in a manner that is consistent and responsible. It is troubling that the exercise of oversight will occur indeterminately on an ongoing basis by one government appointee, who will answer not to the public but to the government of the day.

## **Specific Concerns Relating to Access**

### **1. Outreach to Diverse Communities / Public Education**

Ontario's population is diverse along dimensions of culture, language, ability, literacy level, socioeconomic class, gender, sexual orientation and much more. This complexity is a reality that requires explicit address by a public mechanism that aims to provide an equitable and just complaints system that increases public confidence in the provision of police services.

Currently, the OCCPS website is available only in English and French - including the pages displaying the police complaint form and accompanying instructions. Parts of the website, including complaints statistics and previous OCCPS decisions are provided only in English. ([www.occps.ca](http://www.occps.ca))

The website of the Toronto Police Service contains information on topics such as 'what to expect when stopped by police', and 'a citizen's guide for filing complaints'. Again, however, the documents are in English only, unless otherwise specifically requested.<sup>39</sup> We believe that police in the province have a positive obligation to take measures that effectively inform *all* communities of their rights concerning the complaints procedure.

In his review of Ontario's police complaints system, Justice Patrick LeSage stated that:

Outreach and public education are critical to fostering understanding and public confidence, and the lack of efforts in this area has no doubt been partly responsible for the current problems.<sup>40</sup>

The barriers caused by a lack of outreach and public education to the general public are magnified for many people, such as those whose first language is other than English, who face literacy challenges, who are deaf, who have a disability, who are isolated in their

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<sup>38</sup> *Supra*, note 34 at 2-3.

<sup>39</sup> Pamphlet available online at: [www.torontopolice.ca](http://www.torontopolice.ca)

<sup>40</sup> *Supra*, note 9 at 61.

respective communities for one reason or another, or who live in under-served communities. Amendments to the complaints system must address these realities.

Policing scholars have argued that it is crucial component of accessibility that complainants be provided with a wide variety of intake mechanisms, with the method of reporting left up to the complainant.<sup>41</sup> There are examples of these types of flexibility in practice, both in other jurisdictions (such as Victoria, Australia where complaints may be given orally and interpreters are provided),<sup>42</sup> and in the public complaints context of the provincial Ombudsman, where intake is possible via phone, email, internet form, fax or mail.<sup>43</sup>

Justice LeSage made the general recommendation that the new civilian review body should ensure access to the system, “recognizing the linguistic, cultural and geographic diversity of the province”.<sup>44</sup> However, despite a provision in Bill 103 that requires public education and assistance generally, there is no guarantee of substantive accessibility. Section 58(4) of the Act would require the IPRD to “provide publicly accessible information about the public complaints system... and shall arrange for the provision of assistance to members of the public in making a complaint.” However, Bill 103 does not address issues of diversity, and it does not require the IPRD to accommodate people who face additional barriers in accessing the complaints system.

Further, concerning the gendered implications of the proposed changes, CEAPC submits that the current failure of the Bill to address the concerns of outreach and access for diverse communities will adversely affect women. Women in general and women from historically marginalized communities in particular, experience policing in ways that are markedly different from the experiences of both men and differently located women. Moreover, women also experience gender-specific barriers in accessing justice through police complaints regimes.

Justice LeSage acknowledged the important, if not entirely satisfactory, role that community groups already play in the complaints process.

...the existing system places all most all the burden on local entities to build relationships and operate the complaints machinery. In many communities, these efforts have not been made, are difficult to organize, or have not met with as much success.<sup>45</sup>

Community-based organizations are uniquely positioned to facilitate and undertake outreach and educate the public, particularly in Ontario’s diverse communities. The efforts of community groups would be much more effective if their role in the complaints

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<sup>41</sup> S. Wortley, “Civilian Governance and Policing in a Multicultural Society: A Discussion Paper” (2003) Prepared for The Multiculturalism Directorate Canadian Heritage. at 23.

<sup>42</sup> Toronto Police Services Board. Special Meeting Draft Minutes, June 16, 2004. *Appendix B*.

<sup>43</sup> See Ombudsman Ontario: <http://www.ombudsman.on.ca>

<sup>44</sup> *Supra*, note 9 at 66.

<sup>45</sup> *Ibid*, at 61.

process were formalized within the legislation. The Community Education and Access to Police Complaints demonstration project at the Scadding Court Community Centre could be used as a model for public education and assistance with complaints.

***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**

Even for people in Toronto, where the civilian police oversight body is located, making a complaint can be intimidating and inconvenient. The particular geographical difficulties for people in smaller rural and northern communities obviously 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. Section 26.1(7) stipulates that the IPRD “*may* establish regional offices” according to her discretion.

As recommended by Justice LeSage, Bill 103 should divide the province into regions, and advisory groups should be formed in each region. The advisory groups should have the opportunity to meet formally and on a regular basis with the new body, so that citizens have a mechanism and the opportunity to bring forward systemic and regionally specific concerns.

***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**

Bill 103 makes no mention of any particular consideration to Aboriginal Peoples and fails entirely to recognize Aboriginal sovereignty and self-governance issues. Therefore, the Bill does nothing to improve the deeply problematic relationship between Aboriginal Peoples and the police in Canada.<sup>46</sup> This is a shocking omission considering the ongoing existence of well-publicized and systemic police misconduct and violence against Aboriginal Peoples in the province on both a day-to-day basis<sup>47</sup> and in the context of political action,<sup>48</sup> and the explicit reference to the needs of Aboriginal Peoples in Justice Lesage's report.

Statistics show that Aboriginal Peoples in Canada are grossly overrepresented in the criminal justice system. While Aboriginal Peoples make up less than 2% of Canada's population, their arrest rate is nearly double that of the national average, and they are four times as likely to be incarcerated.<sup>49</sup> Organizations such as the Native Women's Association of Canada and Amnesty International have noted that just as Aboriginal People are over-policed, they are also under-protected.<sup>50</sup> Aboriginal victims of crime are often revictimized through their contact with police. As Justice LeSage noted - euphemistically - Aboriginal people have had "a long and difficult relationship with government authorities and police."<sup>51</sup> The history of inequality that Aboriginal Peoples have experienced before the Canadian criminal justice system has unsurprisingly translated into a mistrust of police, which evidence suggests is founded on discriminatory

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<sup>46</sup> For an overview of the relationship between Aboriginal Peoples and the Canadian criminal justice system see: J. Rudin, "Aboriginal Peoples and the Criminal Justice System: A Background Paper Prepared for the Ipperwash Inquiry" (2005) available online:

[http://www.ipperwashinquiry.ca/policy\\_part/research/pdf/Rudin.pdf](http://www.ipperwashinquiry.ca/policy_part/research/pdf/Rudin.pdf)

<sup>47</sup> Ontario Human Rights Commission. "Paying the Price: the Human Cost of Racial Profiling Inquiry Report" 2003. at 54-66. available online:

<http://www.ohrc.on.ca/english/consultations/racial-profiling-report.pdf>

<sup>48</sup> See submissions to the Ipperwash Inquiry including "Under Siege: How the People of the Chippewas of Nawash Unceded First Nations Asserted their Rights and Claims and Dealt with the Backlash" (2005) by the Chippewas of Nawash Unceded First Nation. Available online:

[http://www.ipperwashinquiry.ca/closing\\_submissions/pdf/ChippewasofNawash\\_ClosingSubmissions.pdf](http://www.ipperwashinquiry.ca/closing_submissions/pdf/ChippewasofNawash_ClosingSubmissions.pdf)

<sup>49</sup> Canadian Department of Justice, Background Paper. (2003) prepared for Expert Seminar on Indigenous Peoples and the Administration of Justice. Office of the United Nations High Commissioner for Human Rights in cooperation with the Universidad Nacional de Educación a Distancia, Madrid. at 2. available online:

<http://www.unhchr.ch/indigenous/bp21.doc>

<sup>50</sup> Native Women's Association of Canada, "Policing and Aboriginal Women" (1996) available online:

[http://www.nwac-hq.org/\\_includes/pdf\\_file.php?id=45](http://www.nwac-hq.org/_includes/pdf_file.php?id=45);

Amnesty International, "Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada" (2003) available online:

<http://www.amnesty.ca/campaigns/resources/amr2000304.pdf>

<sup>51</sup> *Supra*, note 9 at 54.

police contact. Research has shown in general that the more likely any individual is to come into contact with police, the less likely they will believe that the police are doing a good job, and statistics show that less than half of Aboriginal People in Canada believe that the police succeed in treating people fairly.<sup>52</sup>

During his consultations, Aboriginal groups informed Justice LeSage that problems of geographic, language, and cultural barriers, can converge in the case of Ontario's Aboriginal population. In the submissions of Aboriginal groups,

Access to the system was one of the concerns that was most emphasized. It was stressed that many Aboriginal persons, particularly those from Northern Ontario do not have an understanding of the current systems in place and that many do not speak English. Information and services should be made available in a number of Aboriginal languages.<sup>53</sup>

The LeSage report recommended that, apart from accessibility for diverse communities as discussed above, Aboriginal communities will require special attention when designing the police complaints process. Justice LeSage's *Recommendation 25* states: "The new body should make special efforts at outreach to the Aboriginal communities in Ontario."

***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**

The CEAPC project and our partners have encountered many instances where persons have had negative experiences with the police but have been unable to identify the officers with whom they have had bad experiences. Bill 103 fails to impose a positive

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<sup>52</sup> J. Brzozowski, A. Taylor-Butts and S. Johnson, "Victimization and offending among the Aboriginal population in Canada" (2006) Canadian Centre for Justice Statistics, Statistics Canada 85-002-XIE, 26(3). at 12.

<sup>53</sup> *Supra*, note 9 at 84.

obligation on the police to identify themselves to the civilians they interact with. This creates the potential for the police to act anonymously and in so doing, to avoid accountability mechanisms. In order to complain effectively about police abuse or misconduct, individuals must be able to identify those individual police officers with whom they have had a negative interaction.

LeSage recommended that provincial standards should ensure that all officers are readily identifiable by way of a sufficiently large name patch on their uniforms in order to facilitate identification.<sup>54</sup> We at CEAPC would like to see these types of efforts at identification coupled with public education efforts including of information about complaints processes made available and distributed by police themselves at all points of civilian police contact. Experts tell us that the majority of civilian-police interactions are actually about order maintenance rather than about the policing of crime.<sup>55</sup> Police should have a positive obligation to ensure that civilians understand that they have a right to complain about police conduct even in these “low-visibility” interactions, which often leave no official record.

***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**

While Justice LeSage recommended the inclusion of third party complaints, it is unclear whether the Bill allows for third party complaints in instances where the IPRD deems the issues to concern police policies or services. As noted above, s. 60(4) leaves the Director the choice of whether to refuse these complaints without any guidelines for criteria.

The language in the Bill 103 departs from the current standard, which states unequivocally that complaints lacking a complainant who is “directly affected” shall not be dealt with.<sup>56</sup> However, CEAPC is concerned that this change does not necessarily amount to increased access to the complaints process for community groups and agencies per se. S. 60(5)4 of 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 bring a complaint. However, the broad definitional powers prescribed to the IPRD within s. 4.1 of the *PSA* may invest the Director with the task of defining who is a “person” under the

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<sup>54</sup> *Ibid*, at 68.

<sup>55</sup> R. Neugebauer, "Kids, Cops, and Colour: The Social Organization of Police-Minority Youth Relations" in R. Neugebauer (ed.), *Criminal Injustice: Racism in the Criminal Justice System*, (Toronto: Candian Scholars Press, 2000).

<sup>56</sup> *Police Services Act*. R.S.O. 1990. s. 59(5).

meaning of the *Act*. Subject to narrow interpretation, it is possible that the meaning of s.60(5) will not allow community agencies to launch complaints about incidents where they are not acting on direct behalf of a directly affected party as “agent.”

***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**

Bill 103 does not allow for the investigation of anonymous complaints. CEAPC is concerned that persons who are afraid of retaliation by the police will be discouraged from accessing the IPRD. Further, Wortley has noted that many instances of police misconduct occur in illicit circumstances, where the civilians involved are engaged in criminalized activities.<sup>57</sup> In these circumstances, officers who have committed misconduct are advantaged by a complaints system that does not allow for anonymity.

Further, we submit that even ‘minor’ complaints in which parties might not wish to go through the process of formally complaining should be accepted and recorded. Research tells us that even instances of seemingly minor discourtesy on the part of police are predictors of future misconduct of a more serious nature, including improper use of force.<sup>58</sup> Given the difficulties of proof faced by complainants, coupled with the tendency within the system to dismiss ‘minor’ complaints as “frivolous” or worse, it is essential that instances of police misconduct are recordable, no matter how ‘minor’.

***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**

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<sup>57</sup> *Supra*, note 41 at 24.

<sup>58</sup> J. D. McCluskey and W. Terrill, “Departmental and citizen complaints as predictors of police coercion” (2005) *Policing: An International Journal of Police Strategies and Management*, 28(3) 513 at 525.

The limitation period for bringing a complaint under Bill 103 is vaguely defined. S. 60(2) sets a standard six month limitations period, subject to the qualification that the IPRD “may, decide not to deal with a complaint made by a member of the public if the complaint is made more than six months after the facts on which it is based occurred.”

The legislation offers no further guidance as to what determining factors will inform the Director’s decision to enforce the six-month limitation. This creates a lack of certainty and clarity at the outset for those who are attempting to access the complaints process. LeSage argued that the new oversight body should have:

...broad discretion to extend the limitation period of cases where the complainant is a minor or is a person incapable of bringing forward the complaint and in cases where it is of the opinion that it is in the public interest.<sup>59</sup>

While LeSage recommended the maintenance of the currently proposed six-month period, he suggested that when a complaint relates to circumstances upon which the complainant was charged criminally, the limitation period should begin only when the charges are disposed of.

We agree that the limitation period should be extended as a matter of course in the above instances. In any case, the limitation period of six months from the date of incident is too short. This is a major problem given the systemic barriers to accessing the system and the current failures in outreach and education. It does also not account for the time it may take individuals to recover from emotional or physiological trauma they may have sustained, which may keep them from being able to move forward with a complaint.

CEAPC submits that the limitation period in which to bring a complaint under the *PSA* should be set at the current civil standard of two years. The six month proposal will be particularly onerous for the most marginalized complainants, particularly in light of the systemic barriers which a particular to the lodging of a police complaint, including feelings of intimidation and fears of reprisal. We pose the two year minimum limitation period as an ideal in consideration of accessibility concerns. However, we submit that failing an amendment to the Bill which would change the limitation from six to twenty-four months, the minimum acceptable period would be twelve months.

The Ombudsman of Ontario currently requires that complaints be brought within a year of the facts at issue. We submit that the limitation period under the *PSA* should be at least as long as that under the *Ombudsman Act*, R.S.O., 1990, because complainants in the policing context are often fearful to come forward and lack trust in the system.

The provincial government has recently amended Bill 107, the *Human Rights Code Amendment Act, 2006*, and its proposed amendments to the Ontario *Human Rights Code*,

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<sup>59</sup> *Supra*, note 5 at 67.

R.S.O., 1990, to extend the limitation period from six months to one year.<sup>60</sup> We submit that, at a minimum, Bill 103 should be brought into line with other such remedial legislative standards and that any limitation period that falls short of the minimal baseline of twelve months would be inconsistent with the goal of access to justice.

Outside the province, there are models of civilian oversight which are responsive to the concerns we raise concerning the limitation period. For instance, in New York City the Civilian Complaints Review Board may investigate and mete out discipline to officers within an eighteen-month period from the date of incident.

***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**

CEAPC submits that a major shortcoming of the Bill is its failure to consider the importance of complaint outcome. The provision within the Bill that pertains to public education and assistance is specific to the initial making of a complaint. The Bill should provide sufficient support and education through the entire complaints process, including follow-up upon resolution to ensure complainant satisfaction.

The importance of consistency of outcomes cannot be overstated. With appropriate auditing and reporting mechanisms, the process will be much more likely to achieve consistent resolution of complaints across the province. Further, as Community Legal Aid Services Programme noted in submissions to LeSage, the *PSA* should mandate an annual report in order to provide the public with an understanding of the disposition of complaints in the province.<sup>61</sup> Such a report could follow the Ombudsman model, providing useful details without violating confidentiality.

One useful model in this area comes from the Australian context in New South Wales, where the *Police Act, 1990, 47.*, which explicitly provides for the possibility of a post-resolution interview process where complainant satisfaction is assessed and recorded.

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<sup>60</sup> Ontario Ministry of Attorney General, “Proposed Amendments to Bill 107” Background, November 15, 2006.

<sup>61</sup> M. Wojcik, “Community and Legal Aid Services Programme: Submissions to the LeSage Review of the System for Complaints by the Public Regarding the Police” (2004) at 26.

Further, the legislation provides that this information be attached to the reasons when they are forwarded to the Ombudsman.<sup>62</sup>

In addition to the regular and responsive internal auditing mechanisms, which CEAPC submits are essential for the democratic implementation of police complaints reform, we submit that there must also be a regular external auditing process, which focuses on complaint outcomes. This external audit should take place after the first three years in which a new complaints regime is operating and should be performed by the Provincial Ombudsman.

While sections 91 and 92 of Bill 103 do invest the IPRD with the power to audit “any aspect of the administration of police complaints,”<sup>63</sup> CEAPC submits that the legislation does not go far enough to ensure a reliable system for measuring efficacy. Rather than providing regular auditing within the new system, Bill 103 allows auditing “from time to time”, and at the complete discretion of the IPRD.

Justice LeSage noted that audits “allow the public to know how a system is performing” and are “an invaluable tool that should be applied to the police complaints system.”<sup>64</sup> However, s. 91(1) of Bill 103 provides no positive obligation for public disclosure of the results of audits conducted by boards. While s. 92 requires that IPRD audits be made publicly available, there is neither clear indication as to the meaning of this obligation nor any direction on mode, format or frequency of availability of this information to the public.

Regular audits are essential both in order to test the efficacy of any new complaints process and to ensure public confidence in a transparent process. As recommended in the LeSage report, we support that idea that “police services boards should be required to order independent, bi-annual audits of complaints handling.”<sup>65</sup> CEAPC disagrees however with a qualification Justice LeSage added to this recommendation, whereby police services board audits could occur less frequently subject to IPRD discretion.<sup>66</sup> Rather, we see the bi-annual recommendation as the minimum standard for the timing of such audits.

In addition to regular audits, CEAPC would like to see the institution an additional layer of auditing practice following the Los Angeles ‘sting audit’ model described in the LeSage report, whereby auditors pose as complainants, attempt to lodge complaints and record the extent to which the complaints procedures are properly adhered to.<sup>67</sup> We believe that this would offer a means through which the IPRD could gain an understanding of the ways in which individual complainants experience the new system.

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<sup>62</sup> *Supra*, note 9 at 107.

<sup>63</sup> Bill 103, s. 62.

<sup>64</sup> *Supra*, note 9 at 82.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Supra*, note 9 at 112.

Effective complaints processes will ideally act as a deterrent to police misconduct. If individual police believe themselves to be subject to an effective complaints regime, they are more likely to behave responsibly. Mechanisms such as integrity testing are one way in which the day-to-day actions of police may be measured. According to a report on police oversight prepared by Vancouver's Pivot Legal Society, the use of integrity testing among officers in New York City since 1994 has produced instructive and useful empirical evidence concerning police misconduct.<sup>68</sup>

***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**

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<sup>68</sup>D. Eby *et al*, "Towards More Effective Police Oversight" (2004) Pivot Legal Society. Presented to the City of Vancouver Peace and Justice Committee. at 21-2.

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**

Informal, mediation-style resolutions are an important option for complainants and often result in higher levels of satisfaction than outcomes achieved formally.<sup>69</sup> It is important for complainants to have a range of possible processes and to be able to engage in restorative, as opposed to adversarial justice models. However, we are troubled by the poorly conceived emphasis on informal resolution in Bill 103. We fear that without safeguards, substantive access to justice gives way administrative efficiency. This overarching policy concern is not confined to this procedural context; these concerns are especially significant in the context of police complaints procedure where the power dynamics between complainants and the police are likely to be particularly uneven.

The problems with informal resolution in the British context, which has institutionalized a form of informal or “local” resolution under the Independent Police Complaints Commission (IPCC), have been summarized as follows:

Within restorative justice based proposals there is the very real possibility complainants will be shoehorned into a police managed, quasi-privatized process where they will be required to: sit and listen to an officer’s version

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<sup>69</sup> The John Howard Society of Alberta. “An Examination of Citizen Involvement in Complaints Regarding Police” (2005) available online: [www.johnhoward.ab.ca/docs/police/police.pdf](http://www.johnhoward.ab.ca/docs/police/police.pdf)

of events; agree to consensual ground rules for subsequent discussion; and have to acknowledge mutual responsibility for ‘the incident’ . . . In many important respects the requirement to manufacture consent in such settings runs the risk of undermining the rights of complainants that campaign groups have been championing for decades: the right to the uncontaminated status of a ‘wronged citizen’; the right to insist that the accused officer be defined and treated as an ‘offender’; the right to a transparent mode of adjudication; and the right to decisive disciplinary action.<sup>70</sup>

In order to ensure that the “local resolution” process mitigates these risks, the IPCC has instituted auditing mechanisms to ensure that informal resolution results are satisfying to complainants. We submit that this is a key component of any informal resolution scheme for police complaints.

We are also concerned that, in the absence of details for funding for complaints processes under the new regime, decisions to resort to informal resolution will be informed by budgetary concerns rather than those of substantive access to justice. This absence of details for funding has been echoed in other recently introduced bills, such as Bill 107, which proposes fundamental human rights reform. We are concerned with what appears to be a pattern that the government is not showing commitment to appropriately safeguarding human rights procedures in Ontario.

We are particularly concerned with s. 66 of the Bill, which dictates that, even in situations where the burden of proving police misconduct or unsatisfactory work performance is met, individual chiefs of police may choose to define officer conduct as “not serious”. In so doing, they may elect to resolve the matter informally without a hearing and the chief must notify the complainant and the individual police officer of the decision. At this stage, complainants may personally request an IPRD review of the decision to pursue informal resolution within a 30-day period. This time limit is excessively short, particularly for those who face systemic barriers in exercising their procedural rights.

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 coercion than in a public hearing. It is important to the principle of due process that complainants not feel pressured to opt for restorative models. Once entered into informal resolution, complainants ought to have a sense of control and should be able to opt out if the process is not to their satisfaction.

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<sup>70</sup> E. McLaughlin and A. Johansen, “A Force for Change: The Prospects for Applying Restorative Justice to Citizen Complaints Against the Police in England and Wales” (2002) *British Journal of Criminology* 42(3) 635 in Richard Young *et. al.* “Informal Resolution of Complaints Against the Police: A quasi-experimental test of restorative justice” (2005) *Criminal Justice* 5(3) 279 at 284.

Justice LeSage recommended that a neutral party conduct any informal mediation of complaints.<sup>71</sup> However, the legislation lacks a clear articulation of who would qualify to act as mediator in an informal resolution process and there is nothing in the Bill that addresses the inevitable conflicts of interest that arise when police or former police act as mediators.

***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**

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. CEAPC submits that individual complaints, rather than being evidence of isolated incidents within the context of policing are actually a reflection of policy/systemic problems within the police service. Accordingly, both ‘types’ of complaints ought to be treated in the same way procedurally, even if with different remedies to the complaint.

Under Bill 103, s. 61, the new IPRD must review individual complaints and then stream them according to whether they are deemed to relate to policing policy or to police conduct. The IPRD will be responsible for addressing complaints that are founded in the day-to-day or operational context of policing. 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. As Martin noted, such distinctions between policy and operation may well lead to an “overly bureaucratic and opaque management structure.”<sup>72</sup>

There is no provision in the legislation for review of the IPRD’s determination of whether a complaint relates strictly to policy or to conduct. As such, complaints may be denied independent review from the outset. Most worrisome about this distinction is the fact 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. Further,

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<sup>71</sup> *Supra*, note 9 at 71.

<sup>72</sup> D. Martin. “Legal Sites of Executive-Police Relations: Core Principles in a Canadian Context” (2004) Review Draft at 4.

the policy/conduct distinction is rarely straightforward in practical terms, given the extent to which policies and services inform day-to-day police conduct.

Another major procedural concern is in regards to the heavy reliance on procedural streaming in the Bill 103. While the Bill establishes the important procedure of having all police complaints reviewed by the IPRD rather than by the police, this initial streaming process is problematic insofar as the decision of the IPRD to refuse or to accept a complaint is not subject to review. While Justice LeSage recommends that a civilian oversight body should carefully consider the context and nature of each complaint, turning its mind also to:

...the public interest, the size of the police service, the rank of officer and any other relevant factors” in determining whether each individual complaint would be investigated by the independent body, by the police service affected, or by another police service.<sup>73</sup>

The Bill does not permit such a specific contextual analysis where it comes to issues of individual police conduct. Rather, s.61(6) mandates the IPRD to consider the “public interest” alongside the more nebulous “nature of the complaint” in determining whether to subject the complaint to investigation by her office.

#### ***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. Agent**

In providing under s. 58(3) that a complainant may act through an “agent”, Bill 103 allows parties to act through community agencies if they themselves do not want to engage directly with the process. CEAPC endorses this move to allow third party complaints but submits that the wording of the Bill should explicitly protect complainants.

The lack of definition under the Bill leaves room for the development of problematic arrangements between complainants and those “agents” who may act with “mercenary

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<sup>73</sup> *Supra*, note 9 at 74.

qualifications or interpretations.”<sup>74</sup> In the interest of providing protections to ensure substantive access to the system, we at CEAPC are concerned with the use of the inadequately defined “agent” terminology, which may create potential problems for vulnerable complainants. At the same time, CEAPC recognizes that the term “agent” may also be interpreted too narrowly, creating barriers for complainants wishing to access modes of advocacy that are not founded in western legal frameworks.

### ***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**

Systemic delays in processing complainants’ issues are likely to have a chilling effect on the numbers of individuals who access the complaints system. The Bill does not put effective safeguards in place to ensure that complaints move expeditiously through the system. Processing delays are a major issue from an accessibility perspective and lend to complainants’ feelings that the system is non-responsive. It is essential that the Bill appropriately balance the dual goals of expediency and overall efficacy of the system from a justice perspective. At present, the Bill does not achieve this crucial balance and risks sacrificing one goal for another.

Sections 63 and 64 of the Bill address delay and disposition of complaints that are deemed to be about Policy. Under the proposed system, complaints about the Chief of Police shall be disposed of within 60 days. However, this may be extended, seemingly indefinitely, according to the discretion of the chief with no requirement to provide reasons and no mechanism for review. Complaints about policies may thus be confounded by unchecked administrative delay. CEAPC submits that the complaints process should be guided by clear, reasonable and well-defined timeframes applied equally to both policy/systemic and individual complaints, in the interest of engendering public faith in the system.

### ***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**

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<sup>74</sup> South Asian Legal Clinic of Ontario, *supra* note 34.

**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**

Under s. 60 of the proposed legislation, the power to refuse complaints is articulated under vague legal tests, which purport to measure whether any individual complaint is of sufficient “public interest” to merit investigation. This broad terminology is in fact highly subjective and demonstrates a potential for more marginally located complainants, whose experiences are least likely to be validated by to prevalent standards, to be excluded at an initial stage of the process.

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.” As Justice LeSage notes,

...these three terms were viewed with considerable distaste by many community groups and by many police and were seen by some to be evidence of police hostility toward complainants.<sup>75</sup>

CEAPC contends that the inclusion of these categories of dismissal, notwithstanding their entrenchment in Administrative Law, is highly problematic in the context of police complaints procedure. The maintenance of these standards within the legislation may be perceived as indicative of an inherent bias against complainants and could alienate people from coming forward with their legitimate issues. We submit that complainants have the right to a presumption of legitimacy and would suggest that these terms be removed altogether from the legislation. We are concerned that these terms have been used, and will continue to be used as discretionary catch-alls to screen out a troublingly high percentage of complaints at the outset.<sup>76</sup> In particular, we submit that any standards for dismissal ought to be more neutrally defined in order to ensure they are not exclusionary. Even purportedly “objective” standards in the dismissal procedure, may give rise to systemic discrimination and function in opposition to the principle of procedural fairness and the goal of consistent, measurable outcomes.

#### ***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**

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<sup>75</sup> *Supra*, note 9 at 64.

<sup>76</sup> Toronto Audit Services, *supra* note 33 at 15.

Given the extent to which the legitimacy of governance in the province relies on the public perception of responsible and accountable decision-making processes, the Bill offers a startling omission in regard to complainants' rights to judicial 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 as allowed under s. 88.

Complainants are without rights of review when it comes to many of the decisions that are made under the authority of the *PSA* concerning the classification and processing of complaints. This includes complaints that have been refused by the IPRD under the imprecise grounds provided in s. 60. The lack of statutory right of review also applies to decisions by boards under s. 63(5) and s. 64(5), where boards have responsibility for review of decisions regarding complaints about policies or services. If boards find that complaints about Deputy or Chief conduct that have been referred to them by the IPRD are "unsubstantiated" or "not serious" complainants are denied access to any review. The Bill's deficiencies in terms of statutory appeal and judicial review rights, coupled with the broadly discretionary powers proffered to decision makers, effectively diminish access to the police complaints process.

The Bill must be amended to guarantee procedural justice for complainants. The Bill has not succeeded in creating a user-friendly system, and in terms of substantive accessibility, even securing a true right of appeal is not enough if individuals are not able to access this right. In order to avoid the creation of a right of appeal that is ultimately hollow for under-resourced persons and communities, CEAPC submits that community-based appeals funds ought to be established.

***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**

Individuals are far more likely to access the police complaints system if they are confident that it functions as a transparent and accountable governance apparatus. As

such, it is essential that the outcomes of misconduct hearings be made publicly available. The Bill at present does not go far enough towards ensuring this end.

While the Bill allows that hearing decisions are to be made publicly available, the legislation places a curious amount of discretion with individual chiefs in this regard. Under 86(1), a chief of police is only obligated to ensure that decisions are “made available to the public in the manner that he or she considers appropriate in the circumstances”. This unnecessary qualification to the duty imposed by statute brings broad discretion into the provision and allows chiefs of police to act as gatekeepers to citizens with respect to the outcomes of public hearings.

Under sections 63(1), 64(1) and 65(1) of Bill 103, when complaints that are deemed to be of a strictly ‘policy’ nature are referred to by the IPRD to police, they must only be ‘reviewed’ and there is no positive obligation on the part of any individual chief or detachment commander to take any action whatsoever. As such, complaints are particularly vulnerable to suppression at this stage, left to the unchecked discretion of individual police authorities. This is particularly problematic considering the fact that under the broad tests laid out in s. 60, the Director will only refer those policy complaints that she has deemed to be sufficiently meritorious at the outset.

***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**

As LeSage notes, the current “clear and convincing evidence” standard of proof for use in hearings ordered under the *Police Services Act* is problematic in terms of the perception of fairness (or lack of fairness) that is concerned:

...it is troubling to many groups...that a police officer could be found in a civil proceeding to have engaged in misconduct (and a police service ordered to pay significant damages) while the complaint against the officer has been found to be unsubstantiated in a PSA hearing in relation to the same incident.<sup>77</sup>

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<sup>77</sup> *Supra*, note 9 at 76.

Despite this concern, LeSage concludes that the civil “balance of probabilities” standard should not replace the slightly higher standard in s. 84(1) as the required standard of proof for misconduct at a hearing under the Police Services Act.<sup>78</sup>

CEAPC disagrees with the recommendation of Justice LeSage and submits that the “clear and convincing evidence” standard, which is the accepted standard by which many professional bodies measure misconduct, is too high a standard of proof in the context of police misconduct. This is concern is especially relevant in instances where serious misconduct is at issue and/or where complaints are brought by historically marginalized groups who face systemic discrimination within the legal system. Other jurisdictions have embraced the civil standard regime; in Australia, it is the norm to apply a civil standard of proof to police complaints adjudications.<sup>79</sup> Given the remedial purpose of the legislative regime in question,<sup>80</sup> the standard of proof imposed on complainants by Bill 103 is inappropriately onerous.

### ***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**

Given the disparity between the resources enjoyed by the police and the resources that are available to those persons and communities who are most likely to be vulnerable to police misconduct, the new system should allocate funding in order to support complainants at all stages in the process under the *PSA*. Such funding would demonstrate a substantive commitment on the part of the government to guarantee equitable access. We know from the experience of other jurisdictions that where sufficient and secure funding is not allocated, civilian review of police complaints cannot operate effectively.<sup>81</sup>

Currently, the legislation provides no guarantees around funding for models that follow the type of work undertaken by the CEAPC demonstration project, so that complainants are assisted in navigating the system from intake through resolution. The Bill is also silent on the matter of funding for outreach, education and training in regard to complaints procedure.

We submit that the responsibility for advocating on behalf of complainants should not fall solely on the shoulders of community groups and agencies, which already find themselves chronically under-funded. CEAPC and our partner agencies are deeply concerned with what we see as an overall retrenchment on the part of the government as

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<sup>78</sup> *Ibid*, at 77.

<sup>79</sup> C. Lewis and T. Prenzler, “Civilian Oversight of Police in Australia” (Australian Institute of Criminology, 1999) *Trends and Issues in Australian Criminal Justice*, v. 141 at 3. available online: <http://www.aic.gov.au/publications/tandi/ti141.pdf>

<sup>80</sup> *Canadian Civil Liberties Association*, *supra* note 5.

<sup>81</sup> Human Rights Watch, “Shielded from Justice: Police Brutality and Accountability in the United States” (1998) available online: <http://www.hrw.org/reports98/police/download.htm>

concerns access to justice. We assert that there can be no equitable, efficient, and effective system for dealing with police complaints in the absence of sufficient financial commitment from provincial government 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**

In order to protect the most vulnerable members of our society it is necessary that every instance of potential police misconduct or abuse is reviewed, investigated and adjudicated by an independent oversight body.<sup>82</sup> Under the Bill, the police will be investigating themselves, a conflict of interest that is not substantively addressed within the Bill.

Further, there is no provision prohibiting former police officers from working as employees of the IPRD. This is of grave concern given the fact that s. 26(6) of the Bill allows the Director broad and unchecked discretion to delegate any of her statutory duties and powers to employees.

Bill 103 does not guarantee that the IPRD will conduct bias-free investigations. While s. 26.1(2) restricts former police officers from appointment to the Office of IPRD, there is no such restriction concerning IPRD employees. Under the legislation, it is possible that the entire IPRD investigatory body could be staffed by former police. Given the well-documented “informal code”<sup>83</sup> of police occupational culture, IPRD investigators who are former officers are likely to be subject not only to actual coercive pressure on the part of former colleagues, they are also more likely to identify with and display unconscious bias and sympathy for the interests of police officers than they are for the interests of complainants.

While LeSage recommended that no more than 50% of the IPRD investigators should be former police officers, CEAPC submits that none of the investigators should be former police officers.

***Recommendation 18.1***

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<sup>82</sup> “In Search of Police Accountability: Report of the Community Coalition Concerned about Civilian Oversight of Police” (1997) available online:

[http://www.aclc.net/submissions/police\\_accountability.html](http://www.aclc.net/submissions/police_accountability.html)

<sup>83</sup> S. Wortley, *supra* note 41 at 27-8.

**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**

CEAPC supports the recommendation by Justice LeSage that an adjudicative body be appointed pursuant to the *PSA*, in order to preside over hearings. As LeSage noted, this lack of an independent adjudicative body is unacceptable to the public.<sup>84</sup>

***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**

S. 79 of Bill 103 provides for Offences under the *Police Services Act* in relation to complaints procedures. CEAPC submits that this section provides insufficient protections to complainants and witnesses, and as such, ultimately confounds access to the system for those who are most in need of protection from harassment, coercion or intimidation. The reality of police power in relation to civilians translates into fear on the part of many complainants when it comes to decisions to report negative experiences they have had with the police.

It has been our observation that individuals often feel targeted or threatened by the police after they have made a complaint under the *PSA*. The Offences section of Bill 103 does not properly respond to the power differential that exists between police and civilians. In addition to the provisions at s. 79(1) and (2), 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 this section, may constitute improper interference with the complaints process.

As Wortley has noted, “aggressive police unions have recently begun to file civil suits against those who have brought allegations of police misconduct to the attention of the public.”<sup>85</sup> In a provincial context, a Toronto Police Association presidential hopeful has recently invoked the threat of civil liability for complainants under the *PSA*.<sup>86</sup> This would clearly have a chilling effect on would-be complainants and amounts to an intimidation tactic. While an analysis of the legality of protecting complainants from civil liability is both complex and beyond the scope of our submissions, we submit that this issue is of great concern to CEAPC and our members.

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<sup>84</sup> *Supra*, note 9 at 78.

<sup>85</sup> *Supra*, note 41 at 29.

<sup>86</sup> N. Pron, “Police accusers could face lawsuits” (September 18, 2006) *Toronto Star*. B1

As noted by Community Legal Aid Services Programme, it is important that the legislation provide employment protection and personal security where necessary for whistleblowers.<sup>87</sup> However, the prohibition in s. 58(2)4 should be eliminated from the Bill, allowing police officers and staff, who are obviously able to act as credible witnesses to police wrongdoing, to act as members of the “public.”

***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.**

## **Implementation**

Implementation of the Bill should put into practice the expanded definition of access outlined as in this analysis. 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. The new complaints process must be communicated to diverse constituencies effectively across the province.

The police themselves and the provincial government owe a positive obligation to engage in community-based outreach and education in partnership with communities. Police must take part in education and training regarding the new complaints process together with a broad range of community-based organizations so that police and community advocacy groups are able to disseminate information cooperatively to the public.

At present, there is no commitment to resources to support the process of implementing a new police complaints process. Without appropriate funding to provide complainants with substantive access to a system of supports throughout the process outlined in Bill 103, the new system will be subject to the same concerns in terms of barriers to access as is the current system. The government must allocate resources sufficient to support access to the proposed system.

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<sup>87</sup> *Supra*, note 58 at 17.

CEAPC submits that our community-based education and intake system should be integrated into the implementation model. Both CEAPC and our partner agencies have seen that there is a clear need for ongoing support for the informal, personal consequences that can accompany filing a complaint. At present, the CEAPC model offers these types of informal support mechanisms and we submit that this provision of enhanced access and supports to complainants should be formally incorporated into the implementation model.

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.

After a two-year period, the Bill must be subject to review in order to monitor its effectiveness. This review should occur in addition to the ongoing audits we have proposed and must assess both resource commitment levels and whether there is a need for further recommendations to improve the legislation.

## **Summary**

The proposed changes to the current police complaints regime in Ontario do not resolve the existing crises of legitimacy and will not rectify the general public's 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. The Community Education and Access to Police Complaints Demonstration Project urges the provincial government to adopt the following best practices:

### **Civilian Oversight**

- Civilian oversight is a crucial component of a police complaints regime that is not only fair, but that also appears to be fair. Given both the relative power of the police, it is essential that complainants believe that they will be dealt with fairly. Indeed, the purpose of the complaints procedure under the *Police Services Act* is to remedy experiences of injustice in the face of coercive state-founded authority. As such, police complaints processes must occur outside of the purview and direct supervision of that very same authority.

### **Accessibility**

- CEAPC believes that the question of a police complaints mechanism is fundamental to the issue of access to justice. Substantive access requires that any proposed changes to the current regime are structured and implemented equitably with a demonstrable commitment to ensuring that the most vulnerable and marginalized people in the province are better able to exercise their rights and entitlements in regard to police services. Further, complainants must be able to engage with the process without fear of reprisal or unfair dismissal. As such,

specific efforts must be in place to ensure complainants and prospective complainants experience the system as accessible.

### **Community-Based Education and Outreach**

- In keeping with the goal of access to justice, changes to the current system ought to impose a positive obligation on the police and any civilian review mechanism to ensure that cooperative community based education and outreach models are put into place. Further, these models must be tailored to the communities that they are serve according to communities' articulated needs.

### **Transparency and Procedural Fairness**

- A well-functioning complaints mechanism must operate to balance concerns around access to justice and overall fairness with the importance of providing an efficient system, which is not marked by undue administrative delay. Neither should the procedural aspect of the police complaints process be compromised by the unbridled exercise of administrative discretion. The procedural functioning of the police complaints regime should be both transparent and fair.

### **Responsiveness and Accountability**

- The complaints process must be reviewed and tested for effectiveness on a regular and ongoing basis. Audits and reviews must be mandated by statute and should occur without discretion at set intervals. Further, communities throughout the province must be meaningfully included in consultation of both the implementation and review of any new process.

### **Focus on Complaint Outcomes**

- Obviously, actual complaint outcomes are key to the gauging the success of any police complaints reform measures. As such, CEAPC asserts the importance of focusing on the entire complaints process, from intake through disposition, including mandatory complainant follow-up. Beyond this support mechanism, the outcomes of complaints must be publicly accessible in the form of annual reporting.

### **Adequate Funding**

- As noted throughout this report, the rights that are protected within police complaints processes are ultimately hollow unless they are backed up by formal commitments to funding and resources. It is the responsibility of the government to ensure that sufficient funds are dedicated to recognizing and remedying the human rights violations that are intrinsically linked to so many negative experiences of policing.

