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Submission to the Standing Committee on Justice  
Policy

*Bill 175: Safer Ontario Act, 2018*

**Canadian Civil Liberties Association**

March 1, 2018

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## **Canadian Civil Liberties Association (CCLA)**

The CCLA fights for the civil liberties, human rights, and democratic freedoms of all people across Canada. Founded in 1964, we are an independent, national, non-profit, non-governmental organization, working in the courts, before legislative committees, in the classrooms, and in the streets, protecting the rights and freedoms cherished by Canadians and entrenched in our Constitution.

### **Introduction**

The Canadian Civil Liberties Association has long advocated for policing reform in Ontario. For decades, policing in the province has been plagued by accountability, oversight, and transparency deficits. A legislative overhaul of Ontario's antiquated *Police Services Act* is a necessary step to begin to remedy these deficits.

Bill 175 primarily attempts to bolster accountability, oversight, and transparency in Ontario by implementing the majority of Justice Tulloch's recommendations in his *Report of the Independent Police Oversight Review*.<sup>1</sup> Bill 175 also includes important additional measures that go beyond the mandate of Justice Tulloch's review, such as the proposed institution of a new oversight agency with audit powers: the Inspector General of Policing. These reforms, however, are no magic solution. Justice Tulloch's recommendations arose out of thorough and expansive public consultations that revealed alarming levels of distrust of Ontario's police services and their oversight and accountability bodies, including a widespread concern regarding systemic discrimination in Ontario policing.<sup>2</sup> While many of the Act's reforms could help tackle this pervasive problem of distrust, substantial efforts will be needed to ensure that any new oversight and accountability bodies are truly independent of the police services which they oversee. Substantial efforts will also be needed to ensure that any new oversight and accountability bodies are adequately funded, and are willing to use the powers they may be given.

For reasons set out below, Bill 175 would be more able to meet the aims of accountability, oversight, and transparency if it receives amendments at several key points.

First, Bill 175 requires amendments to provisions that address how civilian authorities interact with police services. Public officials and oversight boards must play an active, informed role on issues that have a significant impact on residents' *Charter* and *Code*-protected rights, such as the practice of carding or the general issue of racial or social profiling. Despite this responsibility, civilian authorities can be unnecessarily hindered in their oversight and accountability obligations by police services who maintain that attempts to address these issues would amount to a trespass on their operational independence. Accordingly, we recommend several

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<sup>1</sup> Hon. Michael Tulloch, *Report of the Independent Police Oversight Review* (Toronto: Queen's Printer, 2017) [*Tulloch Report*].

<sup>2</sup> See, e.g., *ibid*, ch 1, at paras 18 – 34.

amendments to strengthen and clarify the power and responsibility of civilian authorities to make and implement policing policies and directives.

Second, we recommend several amendments that would require policies and directives to police services to be written and presumptively public. Transparency with respect to policies and directives is a crucial safeguard for police oversight and accountability as it allows the public to know who to hold accountable for policing decisions.

Third, we recommend expanding the mandate of the proposed Complaints Director to include complaints regarding all policing officials with substantial police powers, including auxiliary members of a police service. This change is necessary to ensure that officials who are potentially subject to a Special Investigations Unit (SIU) investigation are not exempted from the Complaints Director's jurisdiction.

Finally, we recommend amendments to require the disclosure of information that would assist the public in assessing whether officers are repeatedly exonerated in SIU investigations. This is required on the democratic principle that the public has the ultimate right to know and weigh evidence regarding the conduct of public officials. These amendments could retain the Bill's current prohibition on disclosing personal identifying information regarding officers who are cleared in an SIU investigation.

## **A. Oversight and Accountability**

### **Recommendation #1**

Amendments are needed to provisions that address how the Executive branch interacts with police services. Police services ought not to operate without accountability to Ontarians through relevant municipal and provincial governments. In particular, Sections 38, 40, 60, and 62 of the proposed *Police Services Act, 2018*, ought to be amended. The power of the government or the appropriate civilian authority to make and implement policing policies, such as policies prohibiting carding, ought to be strengthened and clarified. Any limits on the power of direction should be expressly defined.

- a. Section 38(5) should be revised to read “(5) The police service board shall not make policies with respect to specific investigations.”
- b. Section 38 should be revised to include a subsection stating, “Nothing in this Section should be interpreted as limiting the authority of a police service board to make policies concerning general operational matters.”

- c. Section 40(4) should be revised to read “The police service board may direct the chief of police on operational matters, except with respect to specific investigations, arrests, and prosecutions in individual cases.”
- d. Section 40 should be revised to include a subsection stating, “Nothing in this Section should be interpreted as limiting the authority of a police service board to direct the chief of police with respect to general operational matters.”
- e. Section 60(5) should be revised to read “(5) The Minister shall not make policies with respect to specific investigations.”
- f. Section 62(3) should be revised to read “The Minister may direct the Commissioner on operational matters, except with respect to specific investigations, arrests, and prosecutions in individual cases.”

### **Analysis**

In a democratic society, no one can be above the law. Ensuring that those who have the power to make or enforce the law are also subject to that law often presents a challenge, but this principle, often referred to as the “rule of law,” is a critical protection in a democracy. As stated by the Supreme Court of Canada, the rule of law ensures a stable society and acts as a shield against arbitrary state action and abuse of power.<sup>3</sup> The principle requires that all government agents – including police services – exercise their authority in accordance with well-established and clearly written rules, regulations, and legal principles that are publicly administered in the courts. This principle also ensures that when public authority is abused, powerful individuals and institutions can be brought before the courts for judgment and sanction. As a result, police accountability and oversight plays a critical role in promoting lawfulness and legitimacy in the exercise of state power.

For the reasons we set out below, Bill 175 should be amended at several points to better reflect the principle of the rule of law. Specifically, Bill 175 threatens to undermine police accountability and oversight by providing police services with too much independence from civilian institutions.

There is, of course, a longstanding convention in Canada that holds that while it is appropriate for the government or civilian oversight bodies to issue general policy directives to the police, police are and must be independent with respect to specific operations. Ontario’s current *Police Services Act* reflects this traditional understanding by prohibiting police services boards from directing “the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force.”<sup>4</sup> The Supreme Court of Canada has also found that in the specific context of criminal investigations, police independence from the executive is an

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<sup>3</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217, para 70.

<sup>4</sup> S. 31(4), *Police Services Act*, 1990, RSO 1990, c P-15.

unwritten constitutional principle rooted in the rule of law.<sup>5</sup> Ministerial or civilian directives to the police on operational decisions, it is argued, would inevitably politicize the police – an institution that should be insulated from political influence so that it can best exercise its powers in an independent and non-biased manner. Specifically, protections for police operational independence are usually intended to play a role in safeguarding the rule of law by ensuring that when public authority is abused, powerful individuals and institutions can be brought before the courts for judgment and sanction.

However, the argument for a broad view of police independence from direction rests on the unjustified assumption that the dangers of inappropriate political interference are weightier than the dangers of inappropriate police behavior – including the dangers that police behavior might itself be shaped by political motivations or by other prejudices. Such unjustified assumptions are particularly pernicious as they encourage public Ministers and civilian oversight boards to shirk their political responsibilities, particularly in those instances of public controversy where political leadership is most in demand.<sup>6</sup>

As Justice Morden argued in his review of the Toronto Police Services Board’s role in overseeing matters related to the G20 Summit – wherein he found that the Board’s poor performance was in part attributable to it wrongly limiting its mandate, viewing “it as improper to ask questions about, comment on, or make recommendations concerning operational matters” – in order to play an effective and meaningful oversight role, police services boards can and must provide detailed guidance to police forces on issues affecting the community.<sup>7</sup>

On this point, Professor Kent Roach has persuasively argued that the tendency to view police oversight and accountability through the lens of high profile incidents can emphasize the need for after the fact legal regulations designed to hold police legally accountable, while having the unfortunate effect of diminishing our collective attention with respect to the “*ex ante* forms of political regulation and direction that might prevent or minimize the misconduct in the first place.”<sup>8</sup> This argument has ample support. Most notably, greater stress on the possibility of, and democratic responsibility for, direction of the police, prior to public controversy, would reflect the recommendations of the Ipperwash and Arar Commissions.<sup>9</sup>

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<sup>5</sup>*R v Campbell*, [1999]1 SCR 565. This principle cannot be understood to be absolute. For instance, several criminal offences suggest that the principle of independence is not so wide as to foreclose government interference with respect to criminal investigations. Specifically, the *Criminal Code* requires the consent of the Attorney General to bring forth proceedings in several contexts, including with respect to terrorism offences (s. 83.24) and hate propaganda offences (ss. 318-320).

<sup>6</sup> See, e.g., Andrew Sancton, “Democratic Policing’: Lessons from Ipperwash and Caledonia” (2012), 55 *Canadian Public Administration* 365.

<sup>7</sup> Hon. John Morden, *Independent Civilian Review into Matters Relating to the G20 Summit* (June 2012), at page 6 [*Morden Report*].

<sup>8</sup> Kent Roach, “Models of Civilian Police Review: The Objectives and Mechanisms of Legal and Political Regulation of the Police” (2014), 61 *CLQ* 30, at page 71.

<sup>9</sup> *Ibid* at page 72; see also Andrew Sancton, “Democratic Policing’: Lessons from Ipperwash and Caledonia” (2012), 55 *Canadian Public Administration* 365.

For the above reasons, CCLA believes that Bill 175 defines the sphere of “police independence” too broadly, and otherwise relies too heavily on a conceptual distinction between policy and operations. For instance, Section 38(5) of the Act prohibits municipal boards from making “policies with respect to specific investigations, the conduct of specific operations, the deployment of members of the police service, the management or discipline of specific police officers or other prescribed matters.” Section 40(4) of the Act prohibits a police services board from directing the “chief of police with respect to specific investigations, the conduct of specific operations, the discipline of specific police officers, the routine administration of the police service or other prescribed matters.” At Sections 60 and 62, similar language prohibits the Minister from directing the Commissioner of the OPP.

On its face, this is broad language. It prohibits municipal boards from making general policies that might be viewed as directing the deployment of police officers. It insulates both the conduct of specific operations and routine administration from direction. While these latter concepts can be narrowed and better defined via regulation, the statute also expressly allows for additional prohibitions on direction to be prescribed.

Could not the proposed language be used to frustrate a police service board or Minister concerned about the over policing of certain communities? Or concerned about the practice of carding? After all, attempts to address racial biases in policing cannot help but be concerned with operational matters such as strategies of deployment – i.e., do racial communities have a disproportionate number of police officers deployed to them? – or how any operations in racialized communities might be conducted. Armed with the above provisions, police services will have no shortage of arguments by which to frustrate or chill direction from civilian oversight institutions. Conversely, civilian authorities who wish to avoid the difficult questions surrounding policing in Ontario will continue to be able to avoid them under the guise of respecting “police independence”.

Our concerns are not hypothetical. In the past, the CCLA has, for instance, urged police services boards in Ontario to address concerns about “carding” and racial profiling. The CCLA has maintained that police services boards have a positive obligation to address systemic rights issues in order to fulfill their statutory mandate. Indeed, this positive obligation would now be better recognized in Bill 175 through its definition of “adequate and effective policing” and through numerous other proposals, including the implementation of strategic plans, local action plans, and community safety and well-being plans. Yet, despite the need for boards to play an active, informed role on issues that have a significant impact on residents’ *Charter* and *Code*-protected rights, boards have often been crippled or hindered by police services who maintained that attempts to address the issue would amount to a trespass on their operational independence.

For these reasons, we recommend that Bill 175 be amended to strengthen and clarify the power of civilian authorities to make and implement policing policies and directives.

## ***B. Improving Transparency***

### **Recommendations #2 and #3**

Written and presumptively public policies and directives would enhance transparency and would enhance accountability by allowing the public to know who to hold responsible for police action or inaction.

**Recommendation #2:** Policies and directions from civilian authorities to the police should be expressed in writing.

**Recommendation #3:** Policies and directions from public authorities should be public unless confidentiality can be justified on the basis of criteria set forth in statute or regulation.

- Section 38 should add the following subsection: “The police service board shall publish policies under this Section in accordance with the regulations.”
- Section 40 should add the following subsection: “The police service board shall publish directives under subsection 40(4) of this Act in accordance with the regulations.”
- Section 60 should add the following subsection: “The Minister shall publish policies under this Section in accordance with the regulations.”
- Section 62 should add the following subsection: “The Minister shall publish directives under subsection 62(3) of this Act in accordance with the regulations.”

### **Analysis**

As indicated above, the principle of the rule of law requires that government agents exercise authority in accordance with well-established and clearly written rules, regulations, and legal principles. Written and presumptively public policies and directives can further this requirement by ensuring that any conflicts between civilian oversight institutions and police services will be done transparently. Transparency with respect to policies and directives is a crucial safeguard for police oversight and accountability as it allows the public to know who to hold accountable for police action or inaction.

Written and public policies and directives serve an important additional purpose. They provide a transparent procedural mechanism by which to resolve the ambiguities and conceptual difficulties that are inherent in any attempt to divide the powers of the police and the powers of civilian oversight institutions. As argued by Justice Linden in the *Report of the Ipperwash Inquiry* (an inquiry focused on Ministerial oversight of the OPP):

The model of democratic policing I recommend recognizes that the precise ambit and content of police operational responsibilities and governmental policy responsibilities will evolve over time. I am persuaded that the best way to approach the difficulties of distinguishing policy from operations is not through attempts at a static or legalistic definition, but rather by providing a process to resolve difficulties in defining policy and operations which will promote transparency and accountability and will be consistent with ministerial responsibility.

It may well be that the responsible minister will agree with the way the police discharge their operational responsibilities in most cases. Nevertheless, it is important, as the McDonald Commission recognized, for the responsible minister to have the option of intervening. I would add, however, that it is absolutely crucial that such intervention be in the form of a written ministerial directive which, perhaps with restrictions necessary to protect ongoing investigations and confidential information, will be made public.<sup>10</sup>

Unfortunately, Bill 175's aforementioned provisions which authorize Ministerial and board directions do not codify the Ipperwash Report's recommendation that any directions be written and generally be made public.

This lack of transparency is exacerbated by the Minister's and Inspector General's powers to advise boards, police services, and several additional institutions without any apparent requirement that the advice be written or public (ss. 3(1)(c) and 79(2)(b)). It is also exacerbated by the multiplication of oversight and accountability mechanisms in Ontario, which diffuses responsibility for oversight and accountability and which is likely to cause confusion among individuals wondering who to hold accountable for policing policies and decisions. Increased transparency with respect to directives and policies is not a cure all for these difficulties, but it would go significant lengths to ensuring that civilian authorities can and will be made responsible for interventions – or failures to intervene – in Ontario policing.

Accordingly, we share the view of Kent Roach, Mathew Estabrooks, Martha Shaffer, and the Honourable Gilles Renaud that "Bill 175 is disappointing in its implicit rejection of the recommendations of the Ipperwash Inquiry that favoured codifying a more limited definition of police independence and providing a more transparent structure to government relations by requiring directions be written and presumptively public."<sup>11</sup> As they argue, "[t]ransparency rather than overbroad definitions of police independence is the best guarantee against unwarranted or unwise political direction of the police."<sup>12</sup>

Bill 175 should be amended to require written and presumptively public directives and policies.

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<sup>10</sup>Hon. Sidney B. Linden, Commissioner, Report of the Ipperwash Inquiry, (Toronto: Publications Ontario, 2007), Vol 2, at page 344 [Ipperwash Report].

<sup>11</sup> Kent W. Roach, Matthew S. Estabrooks, Martha Shaffer, Gilles Renaud, "Ontario's Bill 175 on Policing: Improved Accountability but Lagging Governance" (Dec 2017), 65 CLQ 1, page 4.

<sup>12</sup> *Ibid.*



## **C. Expand the Mandate of the Complaints Director**

### **Recommendation #4**

Section 58 of the proposed *Policing Oversight Act, 2018* should be revised so that “any person may make a complaint to the Complaints Director about the conduct of a police officer, special constable, auxiliary members of a police service, or any other prescribed person, subject to subsection (2).”

### **Analysis**

At present, the proposed Complaints Director’s jurisdiction would be restricted to the conduct of police officers and special constables. This omits officials with substantial police powers, including auxiliary members of a police service and other prescribed persons who can be subject to SIU investigations as per s. 16(2) of the *Policing Oversight Act, 2018*.

We see no principled reason for immunizing officials who are potentially subject to SIU investigations from the Complaints Director’s mandate. Notably, the Complaints Director is charged with notifying the SIU Director if a matter being reviewed by the Complaints Director may require investigation by the SIU Director. Officials who are not police officers or special constables will be insulated from this additional layer of review and oversight.

We therefore recommend expanding the Complaints Director’s mandate to extend to “officials” as referenced in s. 16(2) of the *Policing Oversight Act, 2018* and as defined in s. 4(1) of the *Policing Oversight Act, 2018*.

If there are concerns that an increase in mandate with respect to individual complaints might undermine the Complaints Director’s ability to conduct systemic reviews under s. 45 of the Act, the legislation should clarify that the Complaints Director retains discretion to prioritize systemic reviews.

## **D. Clarify the SIU’s Disclosure Obligations**

### **Recommendation #5**

At present, Section 36 of the proposed *Policing Oversight Act, 2018*, and Section 35 of the proposed *Ontario Special Investigations Unit Act, 2018*, requires disclosure if an SIU investigation does not lead to charges, and excludes the publication of a subject official’s name or any information identifying the official.

These Sections should be revised to require the disclosure of information that would assist the public in assessing whether subject officers are repeatedly exonerated in SIU investigations. Such a provision could retain the prohibition on disclosing personal identifying information regarding subject officers who are cleared in an SIU investigation.

- Subsection 36(1) of the *Policing Oversight Act, 2018* should be amended to include the following paragraph: “[The SIU Director shall publish:] A summary of the de-identified subject official’s previous history of charges.”
- Section 36 should be amended to include the following subsection: “The SIU Director may omit from the report any information required to be provided under paragraph [x] of subsection (1), if the SIU Director is of the opinion that disclosure would risk contravening subsection 36(4) of this Act.
- The same amendments should apply to Section 35 of the *Ontario Special Investigations Unit Act, 2018*.

### **Analysis**

Under Section 36(4) of the proposed *Policing Oversight Act, 2018* (and Section 35(4) of the proposed *Ontario Special Investigations Unit Act, 2018*) the SIU Director is statutorily prohibited from disclosing the name of, and any information identifying, a subject official when an SIU investigation does not lead to charges.

This prohibition on disclosure reflects Recommendations 6.9 and 6.10 of the Tulloch Report. Justice Tulloch noted that the police with which he consulted strongly opposed disclosure of subject officers names when the SIU determines that there has been no criminal wrongdoing on three distinct grounds: first, “police do not generally release the names of citizens who are the subject of investigations unless and until charges are laid,” and “it would be unfair to impose a different standard on police officers” than civilians; second, police were “concerned about protecting the privacy interests of subject officers of their families,” and feared being “publicly stigmatized, particularly when they live in small communities”; and, finally, they argued that such disclosure might lead to retaliation against them or their families when persons do not accept the SIU’s decision.<sup>13</sup>

Justice Tulloch’s recommendation to prohibit disclosure of the subject officer’s name was rooted in the belief that disclosing subject officer’s names would not improve the quality of SIU investigations or of SIU transparency, and that it is the SIU – not the public – who should be tasked with investigating an officer’s history.

With respect, Justice Tulloch’s reasoning is unpersuasive. Any democratic system of oversight and accountability must rest on the bedrock principle that the public has the ultimate right to know and weigh evidence regarding the conduct of public officials. Limits on disclosure should therefore meet the most stringent of justifications.

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<sup>13</sup> Tulloch Report, ch. 6, at paras 42-44.

While we recognize the concern that individuals who are under investigation by the police or other government actors should not be unnecessarily stigmatized or harmed through disclosure, the prohibition is silent on, and potentially frustrates, a solution to this issue that would maintain anonymity while facilitating public oversight of police conduct. Specifically, police officers undergoing SIU investigations can be assigned a unique number that does not disclose their identity to the public. The de-identified unique number can then be published so as to allow the public to know whether officers are – or are not – repeatedly exonerated in SIU investigations, without unfairly infringing upon the privacy interests of subject officers, and without unfairly allowing subject officers to face stigmatization and potential retaliation for investigations that do not lead to criminal charges.

We recommend amending Bill 175 to require the disclosure of information that would assist the public in assessing whether subject officers are repeatedly exonerated in SIU investigations.

## **Appendix: Summary of Recommendations**

### **Recommendation #1**

Amendments are needed to provisions that address how the Executive branch interacts with police services. Police services ought not to operate without accountability to Ontarians through relevant municipal and provincial governments. In particular, Sections 38, 40, 60, and 62 of the proposed *Police Services Act, 2018*, ought to be amended. The power of the government or the appropriate civilian authority to make and implement policing policies, such as policies prohibiting, ought to be strengthened and clarified. Any limits on the power of direction should be expressly defined.

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- d. Section 40 should be revised to include a subsection stating, “Nothing in this Section should be interpreted as limiting the authority of a police service board to direct the chief of police with respect to general operational matters.”
- e. Section 60(5) should be revised to read “(5) The Minister shall not make policies with respect to specific investigations.”
- f. Section 62(3) should be revised to read “The Minister may direct the Commissioner on operational matters, except with respect to specific investigations, arrests, and prosecutions in individual cases.”

### **Recommendations #2 and #3**

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#### **Recommendation #4**

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#### **Recommendation #5**

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- The same amendments should apply to Section 35 of the *Ontario Special Investigations Unit Act, 2018*.