

May 12, 2006

Dirk Ryneveld, Q.C.
B.C. Police Complaint Commissioner
PO Box 9895, Stn Prov Govt
Victoria, BC
V8W 9T8

Dear Mr. Ryneveld:

RE: BCCLA Response to White Paper

Further to our meeting last week, I am writing on behalf of the B.C. Civil Liberties Association (BCCLA) to confirm our response to your White Paper on proposed reforms to the police complaint process.

Before doing so, I would like to thank you for undertaking this important initiative. As the British Columbia Police Complaint Commissioner, we believe that you and your office have an integral role to play in promoting continual dialogue among stakeholders regarding reform of the complaint process. Your knowledge and experience gained over the last several years provide critical insights into the working of the current model.

We also hope that your initiative will motivate the government to introduce legislation to reform the current system. The Special Committee of the Legislature's recommendations to reform Part 9 the *Police Act* have languished for almost four years. Reforms are long overdue.

Our comments below are separated into two sections. First, we comment on major issues that we believe are in need of reform. Second, we provide specific comments with respect to your draft "*Police Complaint Act*".

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Major Issues

BCCLA Recommendation:

The Police Complaint Commissioner should have the legal authority and resources to conduct its own investigations of police complaints.

The BCCLA recommends that the Office of the Police Complaint Commissioner (OPCC) should have the legal authority and sufficient resources to undertake its own investigations of police complaints. In the case of death or serious injury of a civilian in police custody or who is being pursued by police, we believe that there should always be an independent civilian-led investigation.

The extent of the OPCC's authority to conduct complaint investigations will depend in large part upon the results of Joe Wood, Q.C.'s review of internal investigations. We are hopeful that his team's audit of past investigations will provide important empirical data to assess the current model. If his review reveals that there are significant problems with police internal investigations, it will be imperative that the Office of the Police Complaint Commission take a lead role in investigating complaints. Even if the Wood review reveals relatively few problems with the current model over and above problems already identified (e.g. your PIVOT report), the BCCLA believes that the time has come for the OPCC to have the discretionary authority and capacity to undertake its own investigations when the Commissioner finds that there is good reason to do so. In such a case, we do not expect that the OPCC would require a tremendous increase in resources to enable the office to have the capacity to fulfill this new authority. The addition of three to five new staff or investigators under contract should enable your office to have the capacity to satisfactorily investigate complaints. We would also expect that some of those investigators would include civilians who have never worked before for a police agency. The legislation must also ensure that you have adequate residual authority to search and seize documents and compel disclosure of information from human sources to ensure that investigations can be effective.

Subject to our caveat about the results of the Wood review, we make this recommendation for several reasons.

First, public confidence in the police complaint process and in the police would be significantly enhanced if the Office of the Police Complaint Commissioner had the discretionary authority to conduct investigations when he determined he needed to

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and in fact did so. Given the inherent conflict in the police investigating one of its own, police internal and even external investigations can never be universally perceived as truly independent. Indeed, we believe that the public generally perceives bias when the police investigate their own members.

Second, if the police retain authority to conduct investigations, the OPCC's ability to conduct complaint investigations will provide a significant incentive for the police to ensure that their own internal/external investigations are conducted with integrity and thoroughness. Knowing that the OPCC has the authority and capacity to conduct its own independent investigations should, we expect, further the resolve of the police to conduct very thorough complaint investigations when they are called upon to do so.

Third, the current legislation provides limited options for the Police Complaint Commissioner when he is not satisfied that an internal investigation of a complaint will be thorough or fair. Though he can order an external police agency to conduct an investigation, the Commissioner may not have confidence that he can appoint an external agency that will be perceived by the public to provide a truly independent investigation. Alternatively, the Commissioner may find that he is dissatisfied with the conduct of the external investigation. Furthermore, it will not be appropriate in many circumstances to order a public hearing to remedy a defect in an investigation process. Prior experience demonstrates that public hearings are expensive, complicated and time consuming. They have been used only in the most serious of complaints.

Fourth, the BCCLA has long had concerns that many prospective complainants who have serious concerns do not lodge a formal complaint because of a lack of faith/confidence in the complaint system because of the fact that only the police can investigate complaints. We have first hand knowledge of such situations due to the assistance we provide to complainants and prospective complainants. We believe that an independent investigation authority of the Commissioner would go a long way to increasing public confidence in the police as well as the complaint process.

Fifth and finally, the BCCLA believes that the competency and fairness of current police internal investigations is still too dependent on personalities who occupy pivotal positions such as the Inspector in charge of internal affairs. By this, we mean that where a particular police department has demonstrated an ability to conduct professional, fair and competent investigations of internal complaints, this is often dependent on the leadership within the internal affairs section of the police department. A change in the leadership could result in a negative change in the thoroughness of investigations. We are concerned that all municipal police

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departments' ethic of transparency and accountability remains tenuous and inconsistent in the eyes of the public. The OPCC's authority to investigate will provide an important safeguard against this inconsistency.

In your White Paper, you comment that you do not believe that you need a residual authority and capacity to investigate if police officers have a legal duty to cooperate with investigations and external police agencies have a legal duty to investigate another agency when so ordered by the Commissioner. With respect, for the reasons cited above, we urge you to reconsider your proposal and revise your proposals to include authority for the OPCC to conduct its own investigations. We also note that the Oppal Commission recommended that the OPCC have this authority. Furthermore, as you know, Bill 103, the *Independent Police Review Act*, an Ontario bill drafted as a result of the Lesage Report, contains provisions empowering the new Independent Police Review Director to conduct his or her own investigations with respect to complaints.

BCCLA Recommendation:

The BCCLA recommends that the Police Complaint Commissioner have the authority to substitute a Disciplinary Authority's finding with respect to conduct or with respect to appropriate corrective measure/discipline.

In the almost eight years since the creation of the current Part 9 of the *Police Act* governing the police complaint process, there have been approximately 12 public hearings ordered by the Commissioner. If the BCCLA had been asked in 1998 whether we would be satisfied with twelve public hearings in eight years, we would have responded with an emphatic "No."

Public hearings have become complicated, time consuming and expensive procedures. Unsurprisingly, respondent officers are almost always represented by legal counsel, a right the BCCLA would argue to protect. The Commissioner is unlikely to order a public hearing in the public interest except in only the most serious of allegations of misconduct due to the cost and time required to undertake a public hearing. Yet, he may believe that a Discipline Authority has erred with respect to the conclusion regarding conduct or in the sanctions imposed against an officer who has committed misconduct.

The BCCLA does not perceive a simple remedy to make public hearings more efficient, less time consuming and inexpensive. Partly due to their very public nature

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and the degree of media attention these hearings attract, we would expect them to continue to be expensive and time consuming.

Instead, we believe that the Commissioner should have a new authority to substitute his own decision for a decision of a Discipline Authority both with respect to a conclusion as to whether an officer has breached professional standards and the appropriateness of discipline/corrective measures. Such authority should only be exercised when a public hearing is not appropriate in the circumstances and:

- (a) the Discipline Authority's decision with respect to conduct or discipline/corrective measures is not reasonable based on the evidence in the record after a satisfactory investigation and that a substituted decision is in the public interest, or
- (b) the Discipline Authority has made an error with respect to the proper interpretation of the *Code of Professional Conduct* or other regulation or guideline.

With respect to investigative powers and substitution authority, the BCCLA views the OPCC's authority to investigate as a priority over the power to substitute decisions.

In sum, the current model incorporated into the *Police Act*, though an important development in a system for accountability of the police, has proven to be limited in ensuring that the Police Complaint Commissioner has the adequate tools and authority to ensure public confidence in the complaint system and the police. These new powers are now necessary to ensure greater public confidence in the system.

BCCLA Recommendation:

The BCCLA recommends that legislation be amended to ensure that the Police Complaint Commissioner have the legal obligation to engage in outreach to educate the public about the police complaint process and to provide adequate information and assistance to complainants.

In the experience of the BCCLA, there are too many individuals who have serious concerns about the police who do not lodge formal police complaints. The reasons for this can include inadequate English language capacity, illiteracy, fear of reprisals, cultural inhibitions against trusting the police and lack of confidence in the process. Again, the BCCLA's own experience in providing assistance to prospective complainants informs our opinion that major efforts need to be taken to ensure more citizens are prepared to lodge complaints when they have legitimate concerns that should be investigated.

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To remedy this problem, the BCCLA recommends that the legislation be amended to create a legal obligation on the OPCC to conduct appropriate outreach programs to diverse communities to educate the public about the complaint process.

Furthermore, the legislation must mandate the OPCC and other agencies to provide information and assistance to prospective complainants.

The legislation should also state that the OPCC must create internal policies and programs that will further outreach, education and assistance. The legislation should also mandate the OPCC to report on these efforts in its Annual Report.

We are mindful that education requires specific financial and human resources. To that end, the legislation should state that the government has an obligation to provide adequate funding for the OPCC to achieve its outreach, education and assistance responsibilities.

Finally, we note that our recommendations with respect to education and assistance are reflected in the new proposed legislation in Ontario.

BCCLA Recommendation

The BCCLA recommends that the Police Complaint Commissioner's jurisdiction extend to all state regulated agents who engage in policing-like functions including detention/arrest, search/seizure and use of force.

The BCCLA continues to be very concerned about the lack of an adequate civilian oversight/review mechanism for many government regulated agents who engage in intrusive practices including detentions/arrest, search/seizure and use of force in the exercise of their responsibilities. This group includes special constables, BC Corrections officers, Sheriffs and provincially licensed private security guards. For example, we have learned recently that the Vancouver Police Department are employing civilians in its jail who will engage in routine police responsibilities including strip searches when authorized and use of force when necessary. The Victoria Police Department designates their civilian jail staff as special municipal constables. Even so, the Victoria constables are not subject to your jurisdiction. The complaint system for special constables is a poor cousin to the current system for municipal officers. We have been seeking to have special constables fall under your jurisdiction for years. At the Vancouver jail, even as the VPD take back responsibilities for administering the jail, BC Corrections officers and Sheriffs will continue to have a role to play but without the same measures of accountability that

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municipal police officers are subject to.

We acknowledge that the proposals in your White Paper address the issue of jurisdiction and classification of officers who functionally perform policing activities. However, we believe that your proposals are limited to clarifying legislative language to permit the enabling of designation of more officers to fall under the jurisdiction of the OPCC. While this is good as far as it goes, it does not go nearly far enough. We therefore recommend that your jurisdiction is defined functionally to include all provincially regulated agents engaged in detentions/arrests, search/seizures and use of force in the exercise of their responsibilities. Further clarification could include a definition of officers that we know should be included including licensed security agents, special constables, BC Corrections officers and Sheriffs.

BCCLA Recommendation

The BCCLA recommends that complaints with respect to members of the RCMP fall within the jurisdiction of the Office of the Police Complaint Commissioner.

The BCCLA takes the view that a citizen in Richmond, Surrey or North Vancouver should have the same rights within a police complaint process as a citizen residing in Vancouver. Regrettably, this is not the case as complaints respecting members of the RCMP fall under the authority of the *RCMP Act* which has significantly different provisions than the *Police Act*.

Well over ten years ago, Wally Oppal recommended as part of his Commission of Inquiry into Policing in B.C. that the two systems should be joined. The BCCLA believes the time has come to make this a reality.

Draft Police Complaint Act

Before providing specific comments on your draft *Police Complaint Act*, we wish to endorse the approach to have stand alone legislation for police complaints that is the responsibility of the Attorney General of British Columbia. We believe that separate legislation would prevent problems like the current delay in amending the legislation that has occurred since the report of the Special Committee of the Legislature made recommendations to amend the *Police Act*. Unfortunately, Part 9, the police complaint process, must compete with other priorities identified by the Solicitor General. With limited time when the legislature is sitting, the police complaint process is likely to get less attention than it deserves because it is part of “policing”

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generally. A statute whose sole focus is the police complaint process would enhance the credibility of the process and the Commissioner.

We also believe that it is anomalous for the Police Complaint Commissioner, an independent Officer of the Legislature, to have to persuade the Solicitor General to amend the legislation. Given the inherent tensions that may exist between the OPCC and the Ministry of the Solicitor General, who has responsibilities for policing generally, we believe that the stand alone statute should be the responsibility of the Attorney General who generally has a more independent status than other ministries.

With respect to the specific details of your proposed *Police Complaint Act*, if we do not provide written comment in this letter nor did we provide oral comments to you during our meeting, you may assume that we generally agree with your proposals. We especially endorse the provisions with respect to the duty on police officers to cooperate with investigations and the provisions with respect to compellability during public hearings. Given that the issue before us is professional responsibility, not criminal responsibility, we see no reason for police officers not to cooperate or refuse to testify at a public hearing.

Aside from these general comments, the following are our specific comments on your draft statute.

Third Party Complaints (Sections 19 and 20)

We recommend that third parties have the same rights (subject to privacy exceptions) as first party complainants including the right to file a complaint, the right to be informed of the disposition of a complaint with adequate reasons, the right to request a public hearing and the right to participate in a public hearing.

Given that the primary objective of a complaint process is to identify and correct/discipline police misconduct more than to compensate complainants injuries (which is more the domain of civil litigation), we believe that third parties have as equal a role to play in ensuring police accountability as first party complainants. If they are material witnesses to an incident (rather than TV armchair complainants), third parties should be able to pursue their concerns as vigorously as first party complainants.

Informal Resolution (Sections 23 and 24)

Informal resolution should only be done with the consent of the parties. To the extent that there is a desire to diverge from this principle, it should only be conducted by a

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trained, independent mediator. Complainants should always be advised that an informally resolved complaint will not be recorded into the service discipline record of an officer. There must be a cooling off period that permits either party to change their mind. Finally, all informally resolved complaints should be reviewed by the OPCC.

Disposition Reasons (Section 31)

It is critically important that, when a complaint has been determined to be unfounded, the letter of disposition contains adequate detail regarding the evidence obtained and relied upon, the professional standards applied and the justification for the findings. This information is important because complainants who wish to request a public hearing need this detail of information to make an informed request. Also note that given that there are so few public hearings, for most complainants under the current system, the letter of disposition is the end of the line in the process.

Service and Policy Complaints (Section 43)

The Police Services Division of the Ministry of the Solicitor General has a legal responsibility to approve all policies of municipal police departments. As such, it should be copied on all correspondence, including the recommendations of the Police Complaint Commissioner with respect to policies, regarding all policy complaints.

Whistleblower Protection (Section 48 and 49)

We query whether there is adequate protection in the draft Act for the protection of whistleblowers from within a police department. Given that the standards for recruitment into police services and the competition to obtain employment as a police officer are substantially higher now than prior decades, the BCCLA hopes that there will be a greater possibility to develop an ethic of professionalism and accountability *within* police rank and file. Police officers who come forward to complain about alleged misconduct of their fellow officers can be very vulnerable, especially if the respondent officer is senior in rank. Such complaints are typically treated with more credibility than civilian complaints. But the opportunity and possibility for retribution for whistleblowing is great with corresponding harm to the complaining officer.

We are concerned that the draft statute may not provide adequate protection for whistleblowers. Though we do not have a specific recommendation to make with respect to language, we urge further study and consultation with experts in this area to ensure that officers that demonstrate the integrity and courage needed to come forward are adequately protected.

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Service Record of Discipline (Section 50)

This is a difficult issue. Fairness may demand some effort to permit past errors to have less of an impact on a police officer's career. However, it is important that past misconduct and corresponding discipline/corrective measures that are relevant to a current issue be available for consideration. The devil is certainly in the details in this proposal. If a regulation is developed, we recommend full consultation with stakeholders before it is presented to Cabinet for approval.

Statutory Review

We recommend that a comprehensive review by an all-party committee of the Legislature commence four years after the creation of new legislation.

In closing, we thank you for this opportunity to comment on your White Paper and draft *Police Complaint Act*. While we may not agree on all matters, we believe that the effectiveness and reputation of the Office of the Police Complaint Commissioner has been significantly enhanced under your leadership and guidance. Our continued best wishes in your responsibilities as Police Complaint Commissioner.

Yours sincerely,

Murray Mollard,
Executive Director

