

We acknowledge the land on which we gather is the unceded territory of the Coast Salish peoples, including the territories of the xwməθkwəyam (Musqueam), Skwxwú7mesh (Squamish), and saíl̓wataʔ/Selilwitulh (Tsleil-Waututh) peoples.

Submissions to the Special Committee to Review the Police Complaint Process

About Pivot Legal Society

Pivot works in partnership with communities affected by poverty and social exclusion to identify priorities and develop solutions to complex human rights issues. Our work is focused in four policy areas: homelessness, drug policy, sex work, and police accountability.

As part of Pivot's police accountability mandate we have been involved in many complaints filed with the Office of the Police Complaint Commissioner ("OPCC"). Over the past 18 years, Pivot has listened to the concerns of our clients, largely individuals living and surviving in the Downtown Eastside, often in circumstances of profound poverty, addiction, trauma, racism, social exclusion, marginalization, and violence. Our clients have conveyed the intense fear that residents have of filing police complaints as individuals, as there is a long history in the neighbourhood of retaliation and threats against individuals who file police complaints. Pivot has also listened to concerns from community members regarding the lack of accountability that has resulted from police complaints previously filed by individuals in the neighbourhood.

Our recommendations

Thank you for the opportunity to make these submissions on potential reforms to the *Police Act*, RSBC 1996, c. 367 (the "*Police Act*" or the "*Act*").

We have three central recommendations for reform of the *Act*. We urge the Committee to endorse the following.

1. A decolonizing and anti-racist mandate for the OPCC, with commensurate funding.
2. Increased accessibility through civilian-led independence and complainant support.
3. Increased transparency and accountability through systemic investigations and methodical data collection.

Pivot also suggests that the Committee recommend that a member of the judiciary conduct a thorough review of the *Act* and develop specific legislative amendments. The Ontario government

recently took this approach with the Honorable Justice Tulloch’s 2017 report on police oversight¹ and in British Columbia, the Honorable Justice Wood (then in private practice) produced a report on the police complaint process in 2007.²

Recommendation 1: A decolonizing and anti-racist mandate for the OPCC, with commensurate funding.

We know that Indigenous people and people of colour, especially Black people, are disproportionately policed. In our experience racialized people, especially those who rely on public space, are excessively involved in police incidents and potential or actual police complaints.

A very recent Supreme Court of Canada decision demonstrates the racialized impact of policing. In *R. v. Le*, 2019 SCC 34, a majority of the Court recognized the disparate impact of policing on people of colour.

[90] Members of racial minorities have disproportionate levels of contact with the police and the criminal justice system in Canada ... In 2003, the Ontario Human Rights Commission (“OHRC”) issued a report titled *Paying the Price: The Human Cost of Racial Profiling* (online). The OHRC summarized then existing research studies, which established that racial minorities are both treated differently by the police and that such differential treatment does not go unnoticed by them. ...

...

[97] We do not hesitate to find that, even without these most recent reports, we have arrived at a place where *the research now shows disproportionate policing of racialized and low-income communities*. ...

[emphasis added]

To combat systemic discrimination in policing, the *Police Act* must require meaningful, on-going community consultation about decolonizing and anti-racist policies and practices. These consultations must be supported by a robust budget and a diverse OPCC staff.

Recommendation 2: Increased accessibility through civilian-led independence and complainant support.

The OPCC system is currently inaccessible to the communities Pivot serves because potential complainants perceive the system to be inherently biased, since it involves police departments investigating themselves or, at best, another police department. Potential complainants also fear retaliation in the context of highly patrolled neighbourhoods, such as the Downtown Eastside,

¹ The Honourable Michael H. Tulloch, *Report of the Independent Police Oversight Review* (2017)

² Josiah Wood QC, *Report on the Review of the Police Complaint Process in British Columbia* (February 2007)

where individuals reasonably expect to continue to be policed by the very officers they are considering complaining against. Additionally, the system entirely lacks funded, independent legal support.

(a) *Real and perceived bias*

The police complaint system must be, and be seen to be, independent as well as impartial and committed to increased police accountability.

In BC, community legal advocacy groups – including Pivot, CLAS, BCCLA and West Coast LEAF – have urged the government to shift misconduct investigations away from police departments and towards a civilian-led OPCC.³ Rollie Woods, who was until very recently the deputy police complaint commissioner, has also advocated for civilian oversight:

“I think it’s natural that former police officers will be biased in favour of police, because it’s hard not to be,” said Rollie Woods, himself a former police officer who last week retired from an 11-year career with B.C.’s civilian-run police watchdog.

...

“When we talk to senior leaders in policing, many of them agree that it’s time for there to be an independent body much like the IIO [Independent Investigations Office of B.C., a civilian-led oversight agency that is called in when police are involved in a death or serious injury],” Woods said. “Now that they’ve experienced the IIO investigating serious harm and death cases, I think they’ve become more comfortable with that independent civilian body conducting the investigations.”⁴

In Ontario, the Honourable Justice Michael Tulloch reviewed that province’s police complaints process and concluded that public conduct complaints should be received, reviewed *and investigated* by their OPCC-equivalent, the Office of the Independent Police Review Director.⁵

We urge the Committee to recommend that the OPCC not just review but perform investigations, in order to restore public confidence in the police oversight system.

Additionally, we urge the Committee to recommend amendments to the *Police Act* to ensure the OPCC is substantively civilian-led. Currently, the *Act* is silent on the question of civilian leadership (see ss. 47 and 51). The real and perceived bias of the current complaint process will not be resolved if the OPCC is largely staffed by former police officers. The *Act* should include a definition of “civilian” which ensures those hired as “civilians” are not career police officers who happen to have a few years’ gap between active police duty and their service at the OPCC. As a starting point, we suggest the Committee look to the Honorable Justice Tulloch’s

³ *Justice Reform for BC* (2017), Pivot, CLAS, BCCLA, and West Coast LEAF at para 4(a)(vi)

⁴ *Times Colonist* (June 9, 2019) “Departing deputy watchdog wants end to police investigating police”

⁵ The Honourable Michael H. Tulloch, *Report of the Independent Police Oversight Review* (2017) at s. 7.341

recommendation that no more than 25% of police oversight investigators be former police officers.⁶

(b) Lack of funded support for complainants

Individuals wronged by the police may seek accountability through the civil justice system and/or through the OPCC, but for the communities that Pivot serves, both paths are entirely inaccessible due to the complete lack of legal aid funding for representation, combined with the tiny number of community organizations and lawyers in private practice who will represent people wronged by the police.

Those most vulnerable to police misconduct – people who are poor, racialized, and rely on public space – are the least able to find professional representation to support them through an inaccessible legal process.

Pivot suggests that a legal aid clinic, or system of legal advocates, be established to support complainants through the complex and legalistic OPCC process. A similar model of publicly-funded advocacy support exists in the *Workers Compensation Act* which mandates funding for workers' and employers' advisers.⁷

(c) Protections for Complainants in Highly Patrolled Neighbourhoods

The *Police Act* as it is currently drafted does not consider the circumstances of potential complainants who live and survive in highly patrolled communities such as the Downtown Eastside. Both the *Act* and its implementation - as it has been reported to us - require highly marginalized complainants to file complaints against officers who will continue to police them on a near daily basis and they fear retaliation from police if they file a complaint. This is an untenable arrangement virtually guaranteed to suppress complaints from being filed in the first place.

In response to the community's concern, we have recently filed a group complaint in which 16 individuals living in the Downtown Eastside community brought forward complaints regarding two Vancouver Police Department Officers. Complainants only felt comfortable acting as group instead of as individuals.

Given the structural imbalances of power and resources between complainants and police, and complainants' widespread fear of retaliation, we recommend the following.

- The OPCC be expressly mandated to receive and consider group complaints from two or more individuals concerning the same officer, notwithstanding the complaints concern different incidents; and that all necessary legislative amendments be made to ensure group complaints can be accommodated procedurally.

⁶ The Honourable Michael H. Tulloch, *Report of the Independent Police Oversight Review* (2017) at s. 4.726

⁷ *Workers Compensation Act*, RSBC 1996 c. 492 at s. 94

- The Act must contain mechanisms whereby complainants are protected from daily interaction with the officers they are complaining about. While these powers possibly reside under s.110 of the Act, they need to be clearly and definitively articulated. These powers should make explicit reference to the circumstances of group complaints as well as individual complainants who live in or rely on highly-patrolled neighbourhoods. If requested, the officer(s) in question should be reassigned, transferred, or suspended, to avoid possible retaliation or the fear of retaliation.
- The power to remove respondent officers needs to be exercisable prior to officers being notified of the complainant(s) identity, in order to ensure that complainants are not subject to real or perceived retaliation - an option which is not readily available under the current wording of s. 83(3) of the Act.

Recommendation 3: Increased transparency and accountability through systemic investigations and methodical data collection.

The OPCC’s mandate is to oversee police and ensure they are held accountable. For there to be public trust in the police and the OPCC, this oversight must be thorough and transparent.

(a) Systemic investigations

The OPCC’s role is to oversee police action. Currently this is individualized to complaints involving one complainant and one police officer. Issues of race, colonization, and stigma against drug users and people who rely on public space are all structural and systemic matters that are far broader than a personal interaction between two individuals. In order for the OPCC to address system-wide policing issues, it must have the power to initiate systemic investigations and hearings.⁸

(b) Data collection

Data collection is a crucial way to measure and address discrimination and disproportionate policing. Canada, and particularly BC, lags behind in collecting data about the race and economic status of those who are over-policed. Over a decade ago, legal scholars recognized that “Canada currently stands alone in its failure to address claims of racial profiling through data collection.”⁹ The OPCC should collect and analyze data about complainants in order to identify and address systemic trends.

⁸ In their *Justice Reform for BC* report (2017), Pivot, CLAS, BCCLA, and West Coast LEAF recommended “[e]nhanc[ing] the accountability of law enforcement in British Columbia through amendments to the *Police Act* ... allowing the Office of the Police Complaint Commissioner to initiate its own systemic investigations and/or hearings.” (para 4(a)(i))

⁹ David M. Tanovich, *The Colour of Justice* (Irwin Law: Toronto, 2006) at page 174

Summary of Pivot's Recommendations

Pivot recommends that the Committee endorse the following over-arching themes of a renewed OPCC system and that a judge be retained to review the *Police Act* and propose specific amendments.

1. A decolonizing and anti-racist mandate for the OPCC, with commensurate funding.
2. Increased accessibility through civilian-led independence and complainant support.
3. Increased transparency and accountability through systemic investigations and methodical data collection.