

**Submission to the Honourable Justice Michael Tulloch, Independent Reviewer**  
**Independent Police Oversight Review**  
**November 30, 2016**

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**Justice for Children and Youth**

**Introduction**

We are pleased to have the opportunity to provide our comments to the Honourable Justice Michael Tulloch and the Independent Police Oversight Review. This submission seeks to provide the Independent Reviewer with comments concerning the unique perspective and experience of youth engaged with police oversight bodies as it relates to the mandate of the Independent Reviewer, established by Order-in-Council of the Government of Ontario.<sup>2</sup>

**About Justice for Children and Youth**

Justice for Children and Youth is a non-profit specialty legal aid clinic that provides legal services, advice, and representation to children and young people under the age of 18 years in Ontario and, through our Street Youth Legal Services program, to unstably housed young people up to the age of 25 years. Our services include advocacy and representation for young people in diverse areas of the law and in various systems, including criminal justice, education, social services, and mental health.

Justice for Children and Youth was founded nearly 40 years ago with the mission of protecting and advancing the legal rights and dignity of children and youth in Canada. Justice for Children and Youth recognizes that children and youth are individual rights-

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<sup>2</sup> OIC 1530/2016, approved and ordered October 19, 2016.

holders and are entitled to equal protection and recognition and strives to assist and empower young people to have their voices heard.

Justice for Children and Youth has since its inception been active in countless matters advancing the rights of children and youth under Canadian legislation, the *Canadian Charter of Rights and Freedoms*, and the United Nations *Convention on the Rights of the Child*. Justice for Children and Youth is a frequent intervenor and party at all levels of court, including nineteen appearances before the Supreme Court of Canada,<sup>3</sup> on issues of importance to our client population.

Drawing on our knowledge as legal practitioners and on the experiences of our clients, Justice for Children and Youth is similarly an active participant in efforts to reform law and policy to better recognize, protect, and promote the rights of children and young people.<sup>4</sup> With respect to criminal justice and policing matters in particular, Justice for Children and Youth has, for example, provided submissions to Parliamentary committees on proposed amendments to the *Youth Criminal Justice Act* and provided numerous submissions to and participated in consultations with police services and police services boards on policing issues – such as carding – regarding the rights and experiences of young people in their interactions with police. Justice for Children and Youth also led a 2011 project, *The Affidavit Project*, and a 2015 project, *Street Youth of*

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<sup>3</sup> *Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61; *Moore v British Columbia (Education)*, 2012 SCC 61, 351 DLR (4<sup>th</sup>) 451; *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 254; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44; *R v JZS*, 2010 SCC 1, [2010] 1 SCR 3; *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181; *R v AM*, 2009 SCC 19, [2008] 1 SCR 569; *R v. SAC*, 2008 SCC 47, [2008] 2 SCR 675; *R v LTH*, 2008 SCC 47, [2008] 2 SCR 675; *R v DB*, 2008 SCC 25, [2008] 2 SCR 3; *R v BWP*; *R v BVN*, 2006 SCC 27, [2006] 1 SCR 941; *R v CD*; *R v CDK*, 2005 SCC 78, [2005] 3 SCR 668; *R v RC*, 2005 SCC 61, [2005] 3 SCR 99; *FN (Re)*, 2000 SCC 35, [2000] 1 SCR 880; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4<sup>th</sup>) 193; *Eaton v Brant County Board of Education*, [1997] 1 SCR 241, 142 DLR (4<sup>th</sup>) 385; *R v O'Connor*, [1995] 4 SCR 411, 130 DLR (4<sup>th</sup>) 235; and *A (LL) v B(A)*, [1995] 4 SCR 536, 130 DLR (4<sup>th</sup>) 422.

<sup>4</sup> See, for example, “Policy & Position Papers” online at [www.jfcy.org/en/online-resources/policy-position-papers](http://www.jfcy.org/en/online-resources/policy-position-papers).

Toronto, undertaking numerous in-depth interviews and data collection from homeless young people concerning their first-hand experiences of interactions with police.

### **Comments on the Independent Police Oversight Review**

The purpose of the Independent Police Oversight Review is: to enhance the transparency and accountability of police oversight bodies, while preserving fundamental rights; to ensure that these bodies have clear mandates and are effective; to reduce overlap and inefficiencies between the bodies; and to enhance their cultural competence in relation to their interactions with Indigenous peoples.<sup>5</sup>

The Independent Police Oversight Review's mandate identifies particular priority areas of inquiry for the Independent Reviewer including, with respect to the SIU:

- a. Whether more information than is currently released to the public about an investigation, including the SIU Director's reports, should be released, and, if so, the form this should take;
- b. Whether subject and witness officer names and other witness names should be released;
- c. Whether past reports of the SIU Director should be released and, if so, the form this should take.

With respect to all three oversight bodies, the Independent Review shall also consider:

- a. Whether former police officers should be employed by the police oversight bodies to conduct investigations;
- b. Whether the mandates of the three oversight bodies should be set out in legislation separate and apart from the *Police Services Act*;
- c. Whether any information collected by each police oversight body in relation to investigations, or otherwise, can be shared between them, and if so, how it best can be accomplished;

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<sup>5</sup> OIC 1530/2016, approved and ordered October 19, 2016.

- d. Whether the three police oversight bodies should collect demographic statistics such as race, gender, age, and community membership, whether mental health information ought to be collected a part of this statistical process, and what, if any, parameters ought to guide the collection of such data; and
- e. Any other matter the Independent Reviewer deems advisable in light of the objectives.

When considering these priority areas, it is vital that the unique perspective and experiences of youth be considered. Justice for Children and Youth therefore proposes the following key considerations and recommendations relevant to the mandate of the Independent Reviewer as it affects youth.

### **1. Young people are particularly vulnerable in their interactions with police and police oversight bodies**

Young people are recognized in Canadian and international legal traditions as being inherently vulnerable and are accordingly afforded additional legal protection, for example, under child welfare legislation and the *Youth Criminal Justice Act*<sup>6</sup> (“YCJA”). Young people are recognized as being vulnerable at all stages of their involvement in the criminal justice system, including in their interactions with police officers. This vulnerability is occasioned by their evolving capacities and development, lack of sophistication, relative immaturity, and dependence on adults.<sup>7</sup>

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<sup>6</sup> SC 2002, c.1

<sup>7</sup> *Roper v. Simmons*, 543 US 551 (2005), paras. 569-570; *R v. DB*, 2008 SCC 25, [2008] 2 SCR 3, paras. 62-64; *R. v. H.T.L.*, 2008 SCC 49, 59 CR (6th) 1 (SCC), para. 24 7; *JDB v. North Carolina*, 131 S Ct 2394 at 2404 (2011); *AB (Litigation Guardian of) v. Bragg Communications Inc.*, 2012 SCC 46, at para 17. See also: Jones, B., Birdsell M., & Rhodes, E., “A Call For Enhanced Constitutional Protections for the Special Circumstances of Youth” (2013) 3:2 CR (7th) 350 at 352-359

Indeed, the United Nations *Convention on the Right of the Child* – to which Canada is a signatory and which has been expressly adopted in the *Youth Criminal Justice Act*<sup>8</sup> - requires that special safeguards and care, including legal protection, be afforded to young people by reason of their physical and mental immaturity.<sup>9</sup> Enhanced legal and procedural safeguards are extended to children and young people as a class, not on the basis of their individual temperament, so as not to put already vulnerable young people in the position of having to enforce their rights in any particular situation.

Youth with intersecting identities, including but not limited to race, class, cultural background, sexual identity, and sexual orientation, face even greater vulnerability in their interactions with police. Racialized young people, including Indigenous youth, frequently report experiencing discrimination and violations of their rights on the basis of their race and cultural identity.<sup>10</sup> Street youth are even more likely to experience such discrimination and abuse by virtue of the increased contact with police in public spaces.

A complaint to an oversight body, in particular the Office of the Independent Police Review Director, is often the most accessible complaint mechanism for young people to seek redress. However, young people, particularly those with intersecting identities, face significant obstacles when pursuing these complaints. These barriers include legitimate fears of the police and of retaliation for bringing forward a complaint, a lack of social supports, and the perception that they will not be believed. Moreover, given that complaints received by the OIPRD are frequently referred to police services for investigation and only a small number of complaints lead to disciplinary measures, young people perceive a complaint is unlikely to be effective or satisfactory.<sup>11</sup>

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<sup>8</sup> *Youth Criminal Justice Act*, SC 2002, c. 1, Preamble.

<sup>9</sup> United Nations Convention on the Rights of the Child, Can. T.S. 1992 No. 3, Preamble

<sup>10</sup> 2011 *Affidavit Project*, available online: <http://jfcy.org/wp-content/uploads/2013/10/Affidavit-Project.pdf>

<sup>11</sup> Perspective: Youth, Race and the Police, Personal Experiences of Racialized Youth in their Interactions with Toronto Police Services and the Barriers they face to Obtain Justice, Huys, J. and Chan, E.

Accordingly, enhancing the effectiveness and transparency of police oversight bodies requires consideration of the particular vulnerabilities of young people within that system, including greater procedural safeguards where young people are complainants or witnesses.

**Recommendation:**

Oversight bodies should maintain demographic statistics concerning human rights-based information, including race, gender, sexual identity, cultural identity, community membership, and age in order to provide a metric by which the responsiveness and efficacy of the oversight bodies with respect to young people, particularly those with intersecting identities, can be measured.

**Recommendation:**

The mandates of the oversight bodies should provide for enhanced victim and witness support, particularly for young people, in order to support young people in pursuing complaints and to understand their rights. Such support services should also be prepared to direct young people to other bodies in order to obtain remedies for misconduct, for example, the Ontario Human Rights Tribunal.<sup>12</sup>

**2. Oversight bodies must maintain independence in order to be seen as legitimate by young people**

Young people frequently fear the police and retaliation and harassment for complaining about police conduct. Accordingly, the independence of oversight bodies must be strictly maintained in order to maintain public confidence, particularly the confidence of young people, in the oversight and complaints systems and the fair administration of justice.

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<sup>12</sup> Following the 2013 ruling of the Supreme Court of Canada in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, pursuing a public complaint under the *Police Services Act* is not a bar to pursuing other civil remedies (see para 66).

**Recommendation:**

Former police officers should not investigate complaints. While it is acknowledged that police officers may have important expertise in matters concerning police conduct and procedure, where they perform an advisory role, they should not be involved in investigations concerning officers or divisions with which an officer may have a pre-existing relationship. Bias, and the apprehensions of bias, must be avoided.

**Recommendation:**

Setting out the mandates of the oversight bodies in separate legislation enhances public perception of the independence of these bodies and increases public access to information about them, an important aspect of access to justice.

**Recommendation:**

The mandate of the OIPRD, the oversight body with which youth are most likely to interact, should be enhanced to provide for greater enforcement powers so that more investigations may be retained by the OIPRD itself, rather than referred to police services for investigation and prosecution.

**3. The privacy of young people must be strictly maintained**

The privacy of young people involved in the criminal justice system and legal proceedings has been recognized as being of paramount importance. The United Nations *Convention on the Rights of the Child* requires that a young person's privacy be protected, particularly in their interactions with the criminal justice system.<sup>13</sup>

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<sup>13</sup> United Nations, *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3., Article 16, Article 40, clauses 1 and 2(b)(vii).

Indeed, it is recognized that where young people are identified in the course of legal proceedings, particularly where they are the victim, there is a substantial risk that the young person may be revictimized upon publication of their identity.<sup>14</sup>

Moreover, the publication or disclosure of information concerning a young person's youth criminal justice involvement is recognized as being inimical to their rehabilitation, reintegration, and respect for their dignity. Accordingly, the *YCJA* sets out a comprehensive statutory code for access to and use of youth records.<sup>15</sup>

Currently, an Order-in-Council permits the OIPRD to be given access to youth records kept under the *Youth Criminal Justice Act* on request and on consent of the young person or, where the record concerns only contact information for young person, without consent.<sup>16</sup> This allows the OIPRD access to a wide range of youth records – which may include very personal information concerning a young person, including not only occurrence reports and records of dispositions, but also family background, school and education, mental health information and more.

While the Order-in-Council may allow the OIPRD to efficiently access information necessary for the investigation of a complaint, it does not permit the further disclosure of this information. Indeed, further disclosure, for example to a subject officer or investigating police service, without a youth court order is a contravention of the *YCJA*.

Given the heightened vulnerability and legitimate fears experienced by young people in their interactions with police, access to this information may produce a deterrent effect for young people who might otherwise bring forward complaints. This information might furthermore be used by subject officers to refute complaints against them on irrelevant grounds, revictimizing and stigmatizing a young person in the process.

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<sup>14</sup> *AB (Litigation Guardian of) v. Bragg Communications Inc.*, 2012 SCC 46, at para 27

<sup>15</sup> *Youth Criminal Justice Act*, SC 2002, c. 1, Part VI

<sup>16</sup> OIC 651/2016, approved and ordered May 4, 2016.



Oversight bodies must strictly adhere to the privacy protections set out in the *YCJA* to avoid improper disclosure and impermissible use of youth records.

For example, Justice for Children and Youth intervened in appeal of a youth records application, *Chief of Police v. Mignardi*.<sup>17</sup> In that case, the OIPRD had obtained police records concerning a young person, L.D., who had been the victim of an alleged assault by an officer, in the absence of a youth court order and had furthermore disclosed them to the subject officer, in violation of the *YCJA*.<sup>18</sup> The records revealed significant personal information, including the young person's entire history of youth criminal justice involvement. The officer is now seeking to use the entirety of the disclosed information, to which he would otherwise have no entitlement, to discredit the young person, contrary to the purpose and principles of the *YCJA* and with the effect of significantly delaying the resolution of the complaint. This matter is currently on appeal to the Court of Appeal for Ontario.

This case underscores the need for strict oversight of the youth court concerning the disclosure and use of youth records, as provided for in the *YCJA*.<sup>19</sup>

**Recommendation:**

Where information concerning a young person is released – whether in a Director's report or otherwise – that information should presumptively be anonymized to prevent identification of youthful complainants and witnesses. Only the minimum necessary information concerning a youthful witness or complainant should be sought and shared in the course of investigating or prosecuting a complaint.

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<sup>17</sup> 2016 ONSC 5500

<sup>18</sup> *Toronto Police Service v. L.D.*, 2015 ONCJ 430 at para 8

<sup>19</sup> See for discussion: *S.L. v. N.B.*, [2005] OJ No 1411, 252 DLR (4<sup>th</sup>) 508 at para 54

**Recommendation:**

Where oversight bodies seek to obtain information concerning a person's youth criminal justice involvement, they must adhere to the procedures and requirements of the YCJA.

**Recommendation:**

The OIPRD should, on a priority basis, retain complaints where youth records have been accessed in order to obviate the need for further disclosure of youth records.

Where an oversight body seek to disclose information concerning youth records, for example, to another body, police service, or subject officer, they must do so in accordance with the YCJA and obtain the authorization of the youth court.

**Conclusion**

The key considerations and recommendations in this submission form an important lens through which the Independent Reviewer may view the priority areas for inquiry and reform. It is the hope of Justice for Children and Youth that these comments may be useful in enhancing the transparency of police oversight bodies, and increasing their efficacy and responsiveness for young people in Ontario.