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City Manager's Office, Governance and Corporate Strategy
City of Toronto

March 23, 2021

Dear Mr. Lee,

Thank you for taking the time to meet with us regarding the various proposals for enhancing the oversight of the Toronto Police Service.

I would like to take this opportunity to set out the Canadian Civil Liberties Association's (CCLA's) position with respect to the possible overlap and alignment between the CCLA's approach to enhanced oversight, set out in our letter of October 30, 2020, and the Toronto Ombudsman's suggestion that their jurisdiction may be expanded to include oversight of some police matters. A summary of our key recommendations is provided at the end of this letter.

Background – CCLA's initial proposal

Our initial letter to Mr. Murray encouraged the City of Toronto to pursue enhanced police oversight in Toronto through the establishment of an audit-focused oversight body.

Some of the key features in the CCLA's proposal included:

- Independence – the proposed oversight mechanism should be independent of the police;
- Audit-focused – the mechanism should not duplicate the individual police misconduct or criminal investigation mechanisms already in place through the Office of the Independent Police Review Director and the Special Investigations Unit;
- Self-initiating investigations – the oversight body should be able to initiate audits on its own initiative, independent of whether complaints had been filed;
- Mandate to focus on human rights and constitutional compliance – the audit should focus on the impact that police policies, procedures and actions have on the rights protected under the *Canadian Charter of Rights and Freedoms* and the *Ontario Human Rights Code*; and
- Standing body – the new body should have a standing mandate to oversee police, and should not rely on *ad hoc* requests from the Toronto Police Services Board or other institutions to look into a given issue.

We suggested that this additional police oversight mechanism could be achieved without legislative change, and referenced the establishment of a Memorandum of Understanding between the City and the Toronto Police Services Board.

CCLA supports a role for the Toronto Ombudsman

Since that letter was written we have had the opportunity to read the Toronto Ombudsman's October letter suggesting that her office could play a role in enhancing police oversight. We have also had the opportunity for further discussions with you and your colleagues, Ombudsman Toronto, and the Toronto Police Services Board.

In our view, the Toronto Ombudsman could be well positioned to serve as the independent audit body we had suggested in our October letter. The office is an independent, standing body with significant expertise in conducting audit-type investigations and issuing recommendations and public reports. An appropriately-drafted Memorandum of Understanding between the Toronto Police Services Board and the Toronto Ombudsman could empower the Ombudsman's office to engage in the type of audits and public reporting we had recommended in our October letter.

Essential elements of any Memorandum of Understanding: mandate, powers of the Ombudsman, independence, public reporting

The exact terms of the Memorandum of Understanding will be key to ensuring that the Ombudsman is able to play a meaningful police oversight role.

Any agreement must ensure that the Ombudsman's office has a sufficiently broad mandate, has access to the information necessary to perform its investigations, retains its independence, and has clear public reporting and accountability requirements.

A few of these elements require further comment.

Mandate: the Ombudsman must have the ability to review police policies, practices and the operationalization of policies and practices, including their compliance with constitutional and human rights obligations

The mandate given to the Ombudsman must enable her office to investigate and comment on police policies and practices that are often under-scrutinized and have a significant impact on individuals' rights. Our focus, which we believe to be shared by many Torontonians, is on ensuring police respect for constitutional and human rights. Examples of some policies and practices we think would be important for an audit body to be able to examine include police use of force, a range of search practices, and police detention practices, among others.

The Toronto Ombudsman, in her October letter, suggested that Ombudsman Toronto would "ensure that [TPS] policies and programs provide administrative fairness to all people: a fair process, fair outcomes and fair treatment..." In our view the concept of administrative fairness does encompass the requirements for legality and equality, and therefore the Ombudsman's proposed mandate would encompass reviews for compliance with the constitution and human rights guarantees.

The Toronto Ombudsman also suggested that the office's activities would extend to "TPS administrative policies and programs" and would not include "operational decisions or actions of the TPS or its members."

In our view this would be an unduly restrictive mandate.

Torontonians are calling for additional oversight of police *actions* – not just internal administrative decisions. Although the scope of “administrative policies” is unclear, we are concerned that additional meaningful oversight of the police is not likely to come if an oversight body’s mandate is limited in this manner.

The limit on reviewing operational decisions or actions is also concerning. In order to effectively conduct a rights-based audit, an independent review must be able to extend not only to the contents of a policy, but the level of policy compliance and the operationalization of a policy. We note that currently the Ombudsman does have the ability to look at a wide range of actions taken by the law enforcement bodies currently within her jurisdiction (eg. City of Toronto by-law officers) and that there is no similar restriction on other oversight bodies with similar mandates (eg. systemic investigations of the OIPRD, the provincial Inspector General). It is hard to envision how an audit body focused on the police would assess “fair outcomes and fair treatment” of Torontonians without having the scope to look at the operationalization of police policies and the full range of police practices.

The Memorandum of Agreement needs to provide sufficient legal support for the Ombudsman to fulfill her mandate

In order to be effective, oversight bodies must be given the powers to access the information and documents necessary to achieve their mandate. Usually these powers of investigation and access are enshrined in legislation. Given that the current proposal would be enacted pursuant to a Memorandum of Understanding, those same powers, and the corresponding obligations on the body being overseen, must be clearly incorporated through the MOU itself.

Guarantees of independence, public reporting and accountability

CCLA agrees with the Ombudsman that the office would need to identify review activities on its own initiative, taking into consideration issues that are reported as being of public concern, including issues identified by City Council or the TPS Board.

CCLA also agrees that the Ombudsman should publicly report the results of its enquiries and investigations, and include an annual public report on its general activities to both the City and the Board.

Summary of recommendations

In summary, CCLA makes the following recommendations to the City of Toronto:

1. The City of Toronto should pursue the establishment of a Memorandum of Understanding to allow the Toronto Ombudsman to conduct audits of the Toronto Police Service’s policies and practices;
2. The focus of this additional oversight mechanism should be on whether police policies, processes, outcomes and treatment are fair – a concept that encompasses the requirements of legality and equality;
3. In order to make an effective contribution to police oversight, the Memorandum of Understanding must:

- a. Provide the Ombudsman with a mandate to review a wide range of police policies and procedures, including the level of compliance with and operationalization of police policy and procedure;
- b. Ensure that the Ombudsman has sufficient legal authority to access the necessary information and documents to effectively carry out her mandate;
- c. Maintain the full independence of the Ombudsman; and
- d. Include fulsome public reporting of audit outcomes and recommendations, as well as general activities.

Thank you again for your work on this file, we would be happy to discuss any of these issues further.

Sincerely,



Abby Deshman
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Canadian Civil Liberties Association