

Non-lawyers 'more than capable' in similar roles elsewhere, says report

Better racial diversity for SIU if head is non-lawyer?

BY ALEX ROBINSON
Law Times

Some lawyers are calling on the provincial government to look beyond the ranks of its Crown attorneys when searching for the next head of the Special Investigations Unit.

In a recent report setting out recommendations to make police oversight more transparent, Ontario Court of Appeal Justice Michael Tulloch suggested the director of the SIU does not need to be a prosecutor or even a lawyer.

The provincial government has committed to a number of the recommendations of the non-binding report, Independent Police Oversight Review, but has not said whether it will consider non-lawyers for the top SIU post.

"It is true that the SIU director must have an understanding of criminal investigations. And the director should appreciate the importance of conducting fair, impartial investigations in accordance with the law," Tulloch said in his report.

"But there is no reason why the director has to be a lawyer."

The SIU has faced criticism in recent years after a number of high-profile police incidents that involved people dying. As SIU reports were not released publicly, little was known about the investigations conducted by the provincial police watchdog.



Anthony Morgan says considering non-lawyers for the next head of the province's Special Investigations Unit could help bring more racial diversity.

prompting questions about the body's accountability and spurring Tulloch's report.

Following its release, the provincial government announced it will release past and future SIU reports and follow other recommendations, but it did not follow up on Tulloch's suggestion that non-lawyers could oversee a police oversight agency.

The Police Services Act bars the province from appointing current or former police officers to be head of the SIU. There has been no requirement that the head of the SIU is a lawyer, but of the 13 directors the body has had over the years, all were lawyers and 12 were former prosecutors. Only two were women.

Tulloch noted that the SIU directorship has "displayed a lack of diversity over the years," both racially and professionally, despite the fact that the only people barred from serving in the position are current or former police officers.

Toronto lawyer Anthony Morgan says considering non-lawyers for the position could help bring more racial diversity to the SIU.

Morgan says the chance of having police oversight bodies represent the diversity of Ontario's population severely diminishes as soon as the qualifications for the position are restricted to being a lawyer.

"By removing the requirement that the person be a lawyer, you open up the opportunity for racialized people to enter the fray, because we know there is an underrepresentation of racialized people within the legal profession," says Morgan, of Falconers LLP.

Last year, the Law Society of Upper Canada approved a number of initiatives to battle systemic racism in the legal profession, after a report recognized racialized lawyers face widespread barriers.

In Tulloch's report, the judge pointed to the fact that non-lawyers have been "more than capable" of running such bodies in other provinces and jurisdictions, such as B.C., England and Wales. He also noted that most leaders of law enforcement

agencies are not lawyers but have access to advice from legal counsel.

Morgan says considering non-lawyers would not lower standards, they would still need to have expertise in investigations.

Morgan also pointed to the fact that police officers have the ability to file charges against civilians without a law degree.

to "bring teeth to SIU investigations that the public is calling for."

He added that candidates should not be required to be lawyers, but they should have experience in the criminal justice system.

Scott says Crown attorneys who feel a particularly strong allegiance to the police would not be the type of prosecutors to

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Michael Tulloch

So why should those policing the police require legal training, he asks.

"If you can have a 22- [or] 23-year-old person who on day one of the job can lay any kind of criminal charge, it shows that there are certain supports that we can have to make it such that we don't require legal training or an actual lawyer to be responsible for this," he says.

Ian Scott, a former director of the SIU who is now in private practice, however, says the position needs someone with a background in criminal law, as the SIU director needs to have experience in criminal law.

"They're criminal investigations," he says.

"You're applying provisions of the Criminal Code to the results of the investigation to decide whether there is reasonable grounds to believe a criminal offence took place. It's very helpful to understand the rules of criminal evidence [and] understand what would be admissible in court and what wouldn't be."

In his report, Tulloch said appointing former Crown attorneys to serve as SIU director can also raise "concerns about bias since they could have spent their entire careers working with police officers."

Critics say this perception comes from the fact that Crown attorneys work closely with police officers and often defend police actions in court.

"Crown attorneys can be impartial, can act in the public good and can do a good job in these positions; however, when there is a crisis of confidence with the SIU and the job that it's able to do, there might be a problem of perception by having the position virtually exclusively filled by Crown attorneys," says Ottawa criminal defence lawyer Michael Spratt. Spratt says Crown attorneys are over-represented in most government appointments and that this would be an ideal time to break with that tradition

apply for the job.

"To some degree, there is a bit of a winnowing effect that takes place," he says.

Before he became the head of the SIU, Scott was a Crown counsel who had prosecuted police officers.

Scott says that while he understands why the public might have a higher degree of confidence in having a former defence lawyer serve in the role, the problem with picking one is that they have different obligations to prosecutors.

"An experienced prosecutor knows those obligations very well," Scott says. "It may take a defence lawyer or somebody who is not a prosecutor some time to understand all those considerations."

Emilie Smith, a spokeswoman for the Ministry of the Attorney General, said the government has already started working on some of the recommendations, but she did not say whether the government will commit to consider non-lawyer candidates for SIU director. In addition to releasing SIU reports concerning incidents when death occurs, the government is looking to mandate police oversight bodies to start collecting race-based data and working with those bodies to increase "cultural competency."

It will also look to introduce stand-alone legislation, separate from the Police Services Act, to set out the mandate of oversight bodies.

"Our next steps will be reviewing the recommendations in depth as we move forward with drafting legislation," Smith said in an email.

"Ontario was the first jurisdiction in Canada to require every serious injury or death caused by police to be fully investigated by an independent organization. We are confident that these changes we will make Ontario a leader in this area again."



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