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Presentation to the Standing Committee on Justice and Human Rights

C-75 - An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts

Remarks by: Deputy Chief Constable Howard Chow, CACP Law Amendments Committee / Vancouver Police Department & Ms. Rachel Huntsman, QC, legal counsel with the Royal Newfoundland Constabulary

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September 24, 2018

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Distinguished members of this Committee, on behalf of Chief Constable Adam Palmer, President of the Canadian Association of Chiefs of Police, I am pleased to be given the opportunity to meet with each of you today.

In addition to my role as Deputy Chief Constable with the Vancouver Police Department, I am a member of the CACP Law Amendments Committee who I represent here today. I am joined by Rachel Huntsman, QC, legal counsel with the Royal Newfoundland Constabulary.

The mandate of the CACP is "safety & security for all Canadians through innovative police leadership". This mandate is accomplished through the activities and special projects of some 20 CACP committees and through active liaison with various levels of government. Ensuring the safety of our citizens and our communities is central to the mission of our membership and their police services.

Introduction

Overall, the CACP supports Bill C-75 and the clear intention by Parliament to modernize the criminal justice system and reduce court delays in judicial proceedings. The CACP believes that the proposed amendments will increase efficiencies while balancing the protection of the public and the protection of the accused person whose liberty is at risk.

This submission will focus on amendments that the CACP views as having a direct impact on police powers and operations. Of these amendments, the CACP fully supports:

- the simplification of the police officer's forms of release;
- the principle of restraint by having police officers give primary consideration to the release of the accused at the earliest

opportunity and on the least onerous conditions that are appropriate in the circumstances;

- the removal of the "officer in charge" in the release decisions made by the police including the police officer's undertaking;
- the more onerous interim release requirements for offences involving violence against an intimate partner;
- the limitation of preliminary inquiries to only those adults who are charged with an offence that carries the potential of a life sentence;
- the modernization of the criminal justice system through the use of technology, and;
- the removal of the requirement for judicial endorsement of certain out-of-province warrants

The CACP is largely supportive of Bill C-75's amendments to section 657.01 (routine police evidence) and sections 496 – 497 (principle of restraint and judicial referral hearings) but proposes that some clarification to these sections is required. These will be addressed in Part One of this submission.

In Part Two of this submission, the CACP will speak to those amendments with unintended consequences that are believed will adversely affect police operations and public safety.

Part One – Amendments supported by the CACP but requiring clarification

Routine Police Evidence – Section 657.01

Bill C – 75 will amend the Criminal Code by adding the following to the end of s. 657:

"657.01 (1) In any proceedings, the court may allow routine police evidence, if otherwise admissible through testimony, to be received in evidence by affidavit or solemn declaration of a police officer and may, on its own motion at the request of any party, require the attendance of that police officer for the purposes of examination or cross-examination, as the case may be."

This proposed change will eliminate the necessity of having a police officer being required to attend court by allowing the Crown to submit an affidavit of the officer's testimony. This amendment will increase efficiencies by decreasing the number of court appearances required by police; thereby saving police and court costs**.**

This provision is limited to "routine police evidence". However, "routine police evidence" in this context means evidence of a police officer related to: gathering evidence or making observations; analyzing, preserving, or otherwise handling evidence; identifying or arresting an accused or otherwise interacting with an accused; other similar routine activities that the police officer undertook in the course of their duties.

The concern of the CACP is that this definition of "routine police evidence" appears to capture the entire spectrum of evidence that a police officer can expect to testify to in a criminal trial. It is unclear as to what evidence is not included within this definition. While the CACP supports this amendment, it submits that a clarification to the definition of "routine police evidence" is required. This will reduce unnecessary pre-trial motions by the Crown and defence and provide for greater efficiency to the court's time.

Appearance Notice for Judicial Referral Hearings – Sections 496-497

While the CACP supports the development of a process that will give the police the option of diverting an accused away from bail court for administration of justice offences, it is anticipated that the proposed "judicial referral hearing" will result in a lack of documentation of these offences into CPIC. The result of this lack of documentation will be that police officers from other jurisdictions will be unable to access the full criminal history of an offender. This is vital information for law enforcement when deciding whether to release that person and under which conditions.

An additional concern of the CACP is that the administration of justice offence of "failure to appear" under section 145 of the Criminal Code was added to the list of secondary designated offences in the 2008

amendments to the Criminal Code. To date, the National DNA Data Bank (NDDB) has received upwards of 36,220 submissions under section 145 of the Criminal Code. These submissions have yielded 1,157 matches to a DNA profile in a criminal index including 55 homicides and 107 sexual assaults. If a police officer decides to refer an offender to a judicial referral hearing for a "failure to appear" instead of laying a charge, there will be no submission of the offender's DNA to the Convicted Offender Index of the NDDB and matches being made for this offence will no longer be possible.

The Principle of Restraint and Indigenous Accused and Vulnerable Populations

Section 493.2- A police officer shall give particular attention to the circumstances of arrested individuals who are either Indigenous or belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release.

The CACP supports this principle of restraint, however, section 493.2 places considerable onus on a police officer at the time of arrest to identify who falls within this classification of offender. A reality of policing is that arrests are frequently made in the middle of the night with little known about this person's history and background. This amendment would place an onus upon an officer to make the assessment on whether an offender is an Indigenous or vulnerable person. The CACP recommends amending this section to require that the police officer give particular attention to the circumstances of accused persons who appear to be Indigenous and/or belonging to a vulnerable population.

Further, the CACP recommends that a definition of "vulnerable population" should be included in Bill C-75. Factors such as a person's ethnicity, economic status, drug dependency, age, mental disability, or overall health are difficult to measure and assess for a police officer in an operational capacity. While the CACP acknowledges that creating a definition for a vulnerable person that will fit the objectives of this section could be challenging, it should be recognized that various federal and provincial statutes widely differ in their definition of a

vulnerable person/population. For example, the Criminal Records Act defines a vulnerable person as "a person who, because of his or her age…or is otherwise at a greater risk than the general population of being harmed by a person in a position of trust or authority towards them". Manitoba's Vulnerable Persons Living with a Mental Disability Act defines a vulnerable person as "an adult living with a mental disability who is in need of assistance to meet his/her basic needs with regard to personal care or the management of his or her property". The BC Criminal Records Review Act defines a vulnerable adult as "an individual 19 years or older who receives health services, other than acute care, from a hospital, facility, unit, society, service, holder…" A clarification on what defines a "vulnerable person" would assist the police in meeting the requirements of this section

The CACP recognizes that Indigenous peoples and the vulnerable sector are vastly overrepresented in the Canadian criminal justice system and that there are a number of socio-economic factors and historical generational factors that contribute to this problem. The policing sector supports providing relief and considering appropriate alternatives to address the serious social issues experienced by these groups. The CACP recommends that community support and resources needs to accompany this conversation, and this includes but is not limited to housing, drug and alcohol treatment facilities, and mental health support.

Part Two - Amendments of Concern to the CACP

Reclassification of Indictable Offences

A significant concern for the CACP is the proposal to hybridize the indictable offences that are punishable by a maximum penalty of ten years or less. This will affect 85 Criminal Code offences including: Disguise with Intent, Possession of Property Obtained by Crime, Criminal Negligence causing Bodily Harm and Theft over $5000.00.

These 85 indictable offences are classified as "secondary offences" under the Criminal Code. If the Crown proceeds by indictment and the offender is convicted of one of these 85 offences, the Crown can request

that the offender provide a DNA sample for submission to the National DNA Data Bank (NDDB).

If these 85 offences are hybridized, as is proposed under Bill C-75 and the Crown elects to proceed by summary conviction, the offence will no longer be deemed a "secondary offence" and a DNA Order cannot be obtained. The consequence of this will be fewer submissions being made to the NDDB. The submission of DNA samples to the NDDB is used by law enforcement to link crime scenes and to match offenders to crime scenes. Removing these 85 indictable offences from potential inclusion into the NDDB will have a direct and negative impact on police investigations.

The following numbers demonstrate how submissions made to the NDDB for these 85 indictable offences have assisted in matches to profiles for primary and secondary offences: Between June 30, 2000 and February 21, 2018, the NDDB received submissions for 52 of these 85 secondary offences, which resulted in 9,677 submissions to the NDDB. Of these 52 indictable offences, 22 led to 588 matches being made to a DNA profile in a criminal index: 221 matches to primary offences, which include 19 homicides and 24 sexual assaults, and 367 matches to secondary offences.

A recommended solution to this significant unintended consequence to Bill C-75's hybridization of Indictable offences would be to list these 85 indictable offences as secondary or primary offences under section 487.04 of the Criminal Code, which will permit a DNA Order to be made regardless of the Crown's election.

Identification of Criminals Act

Section 2(1) of the Identification of Criminals Act provides that fingerprints and photographs may be taken from a person who is in lawful custody charged with or convicted of an indictable offence.

While under Bill C-75 the accused can still be compelled to appear under the terms of an appearance notice or undertaking for Identification of Criminals Act (ICA) purposes, the case law has

established that the appearance notice has to be confirmed by a judge or justice before the person is considered to be formally "charged" with the offence.

This is an important concern for provinces with a charge approval process (Quebec, British Columbia, and New Brunswick), given the delay that exists, once the accused is released on an appearance notice but before a charge is laid and the appearance notice is confirmed. The problem created is that a significant number of offenders fail to attend for identification under the ICA.

Furthermore, a person who is under arrest and in lawful custody of the police cannot be fingerprinted and photographed until the charge is laid. The hybridization of indictable offences and measures taken to promote the summary conviction procedure, such as raising the limitation period to twelve months (clause 318) and the maximum sentence to two years less a day (clause 319) in summary matters may very well exacerbate this predicament. This is because, once the Crown has elected to proceed by way of summary conviction, the offence is no longer deemed an indictable offence and the accused cannot be identified under the ICA.

This situation, which continues under Bill C-75, means that a significant number of charges will not be entered on CPIC, resulting in out-of-province police officers/Crowns/justices and judges not knowing if the arrestee or accused has a pending case or a previous conviction.

The CACP is recommending that the Identification of Criminals Act be amended to allow for fingerprinting on arrest, with proper safeguards in place to protect the integrity of the process. The CACP is also recommending that the ICA should be amended to allow fingerprinting for all Criminal Code offences or, at the very least, to allow fingerprinting notwithstanding the Crown's election.

Conclusion

The CACP would like to thank those who have contributed to the modernization and increased efficiencies to the criminal justice system,

as proposed in Bill C-75. Overall, we are very pleased with the improvements recommended. We support amendments that pertain to the leveraging of technology for the police community, however would encourage that there be strong leadership and guidance on establishing appropriate standards as it relates to the introduction and implementation of technology. In addition, we also welcome any amendments that provides additional latitude for judges to manage overburdened caseloads. This includes administrative mechanisms to dismiss court processes that are insignificant or frivolous.

We are encouraged by the recommended amendments proposed by Bill C-75; however acknowledge that this will involve considerable training for frontline police officers. We are hopeful that the areas of concern as described in this document will be given consideration to minimize the adverse effect on policing and public safety.