Introduction

The Canadian Centre for Child Protection Inc. appreciates the opportunity to make this submission to the House of Commons Standing Committee on Justice and Human Rights (the "Committee") regarding Bill 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* ("Bill C-75").

About the Canadian Centre for Child Protection

The Canadian Centre for Child Protection ("C3P") is a national charity dedicated to the personal safety of all children. Its mission is to reduce the incidence of missing and sexually exploited children, educate the public on child personal safety and sexual exploitation, assist in the location of missing children, and advocate for and increase awareness about issues related to missing and sexually exploited children. To further its mission, C3P operates a number of programs and services[1] and has worked tirelessly with all levels of government during its 30+ years of protecting Canadian children.

One of the programs operated by C3P is Cybertip.ca – Canada's tipline for reporting the sexual abuse and exploitation of children on the internet. As a central part of the Government of Canada's *National Strategy for the Protection of Children from Sexual Exploitation on the Internet* (NSPCSEI), Cybertip.ca receives and processes tips from the public about potentially illegal material online, such as child sexual abuse images and videos, child trafficking, shared intimate images, online luring, and other areas of child exploitation. The tipline then refers any potentially actionable reports to the appropriate child exploitation units and/or child welfare agency. Cybertip.ca responds to approximately 10,000 reports a month regarding child sexual exploitation concerns and since its inception in 2002, the tipline has processed just under 700,000 reports[2]. C3P is also significantly involved in research projects of its own initiative, including a Canadian study on Abducted then Murdered Children, which will be discussed later in this submission.

Bill C-75 – Areas of Concerns

We recognize that the goal of Bill C-75 is to modernize the criminal justice system in Canada and to reduce delays in criminal proceedings. While we are supportive of that goal and recognize that delays impact victims as well as the accused, we are concerned about certain proposed amendments that we believe have the potential to negatively impact children and youth in Canada who are victims of crime. Moreover, while we applaud the numerous changes in relation to intimate partner violence, we are troubled that the changes are limited to the intimate partner and do not include the additional class of persons who are often also victimized by violence in the home, namely the children of the accused or the intimate partner.

[1] Detailed information on the Canadian Centre's programs and services is available online at: https://www.protectchildren.ca/en/programs-and-initiatives/
[2] The total number of reports is 699,648 as of August 30, 2018.

With respect to the proposed amendments to the *Criminal Code*, our submission will focus on the reclassification of certain offences as well as the proposed changes to the way in which administration of justice offences are handled. With respect to the proposed amendments to the *Youth Criminal Justice Act*, our submission will focus on the changes that mandate the use of extrajudicial measures in cases of administration of justice offences, as well as publication bans.

1. Amendments to the Criminal Code

A. Reclassification of Certain Offences

For the most part, C3P takes no position in relation to the reclassification of offences within Bill C-75. There are, however, certain offences that we would like to comment on:

First, C3P supports the reclassification of **section 172(1)**(Corrupting Children) [clause 59 in Bill C-75] as a hybrid offence. The "sexual immorality" portion of the offence of corrupting children has the potential to be utilized to cover situations that do not fit within other Criminal Code offences but that are nonetheless harmful to children. A concrete example would be sexual activity that involves animals. In 2016, the Supreme Court of Canada released its decision in *R. v. D.L.W.*[3] At issue in the case was the meaning of the term "bestiality" in the context of section 160 of the Criminal Code. The court clarified that the meaning of the term was limited to *penetrative* sexual activity between a human and an animal. Amid concerns that this interpretation would make it more difficult to address activity that involved a child but was not penetrative, the Court specifically listed section 172 (along with sections 151, 153 and 173), as being provisions in the *Criminal Code* which "may serve to protect children (and others) from sexual activity that does not necessarily involve penetration".[4] However, we note that the retention of the requirement in section 172(4) that proceedings under the section cannot be brought without the consent of the Attorney General (or other named parties) is likely to limit the use of this section.

Second, C3P is not supportive of the following offences being reclassified as hybrid offences:

- Clause 108 – **Section 280(1)** – Abduction of person under the age of 16
- Clause 109 – **Section 281** – Abduction of person under the age of 14
- Clause 117 – **Section 293.2** – Marriage under age of 16 years

Currently, the above-listed offences are indictable only. While we recognize that indictable offences generally take up more court time, it must be kept in mind that indictable offences are also those that Parliament has traditionally signaled are among the most serious. As an organization that has worked directly with families dealing with the trauma of abduction, and with children scarred by such an experience, we are concerned about the message that reclassification will send. These offences involve the most vulnerable members of our

[3] *R. v. D.L.W.*, 2016 SCC 22.
[4] *R. v. D.L.W.*, 2016 SCC 22 at para 116

society. Reclassification sends the message to Canadian courts, as well as the Canadian public, that these offences may not be as serious as they once were. It also sends the message that these offences are comparable in gravity to the other newly-reclassified offences. It is our view that offences against children are clearly more serious due to the potential for long-lasting harms they can cause to children and families.

Finally, it is not clear why Bill C-75 adjusts the maximum penalty available under **section 173(1)(b)** (Indecent Acts) [clause 60 of Bill C-75] but not under section 173(2)(b) (Indecent Act against a person under 16). This will mean that the maximum punishment on summary conviction when an indecent act is committed against a child being **18 months less** than when an indecent act is committed against an adult. This discrepancy should be rectified. Also, we note that this change will mean that the maximum punishment for an offence under section 173(1), whether proceeded with as a summary conviction offence or an indictable offence, will be exactly the same, which does not seem to be an appropriate outcome.

B. Administration of Justice Offences

The Legislative Summary of Bill C-75 prepared by the Parliamentary Information and Research Service, in describing "administration of justice" offences, states:

> "These offences largely concern the proper administration of the justice system, **rather than involving some form of harm to any particular victim.** They generally are also committed subsequent to another offence having been, or alleged to have been, committed. Many were created as mechanisms to help permit accused persons to maintain their liberty, **while ensuring that they keep the peace by abiding to certain conditions** and by appearing in court to respond to the charges against them."[5] [emphasis ours]

C3P understands that administration of justice offences account for a significant number of the cases completed in adult criminal courts and acknowledges the view that the current way of dealing with these offences is contributing to the issue of court delays. However, we are concerned about the narrow scope of the factors listed for the exercise of discretion within some of the provisions of Bill C-75, namely whether there was "physical or emotional harm" to the victim caused by the breach of the condition or order [e.g., clause 214, peace officer considerations for issuing an appearance notice to a judicial referral hearing; clause 236 adjusting section 524(3) of the Code – power of judge when there has been a failure to comply]. A breach of a condition can still be very serious even if it does not result in actual harm. Conditions imposed are often meant to prevent harm, and if they are breached, that is a signal that the individual may not be willing to comply with those conditions. Even if harm did not result from a breach, the fact that a breach occurred is not something to be taken lightly. For example, if an accused person breaches a condition that has been imposed at the time of judicial interim release, probation, or upon sentencing (such as orders made pursuant to section 161), and that condition was specifically put in place to protect society's most vulnerable citizens, children, the

[5] Library of Parliament, Legislative Summary Pre-Release Unedited, "Bill 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*", Publication No. 42-1-C-75-E, 7 May 2018, p. 13.

fact that no one was harmed is beside the point. In our view, the factors to consider when exercising discretion in the handling of administration of justice offences ought to also include a consideration of whether the condition breached was one that was put in place to protect a victim or a vulnerable group, such as children. If so, that is the type of breach that should be handled as it always has been, i.e., as a separate charge.

We believe that any amendments to the way in which administration of justice offences are handled must not be the subject of change without carefully considering the impact on the protection of children as a vulnerable group worthy of protection. Our general position can be summarized by the following two points:

1. **Just because an offence qualifies as an "administration of justice" offence does not mean it is not an offence to be taken seriously.** For example, when an individual commits a sexual offence against a child, certain conditions placed on them are purposeful and intended to mitigate risk and reduce opportunities for re-offence not just against that child, but against all children. **Breaches that demonstrate a risk to children should be dealt with as a formal charge, whether or not actual harm to a child resulted from the breach.** It is important not to co-mingle cases involving sympathetic offenders who slip up and pose relatively limited risk to the public with individuals who deliberately or recklessly breach conditions that were put in place to prevent them from harming others.

2. **An administration of justice offence can be much more than just a failure to respect the justice system – they can be an early warning sign of increasing risk and should therefore be taken seriously and be addressed in a manner that is effective in managing the risk.** For example, some accused persons make a deliberate choice to put the public or a vulnerable group at risk. An example would be an individual charged with the luring offence under section 172.1, who breaches of an order of judicial interim release that restricts the use of a computer to communicate with a child. In that context, the focus should not be only on whether a child was harmed by the breach, but what such a breach may signify about that person's future risk to all children. Keeping in mind that conditions are imposed to allow the accused person to retain their liberty, if the accused person refuses to abide by them, and that refusal puts children at risk, then that is a problem and it is not appropriate to minimize the behaviour. A concrete example is the criminal history of the offender Peter Whitmore, who committed multiple contact offences in the early 1990s, and then a series of breach offences over the next two decades, culminating in a final act committed just after a recognizance had expired wherein he kidnapped and sexually assaulted two young boys. *At a minimum, it is imperative that breaches of conditions designed to keep the accused away from children are dealt with in a formal manner.*

In 2015, C3P undertook a study related to abducted then murdered children in Canada.[6] The project involved an environmental scan and examination of instances involving the abduction and subsequent murder of a child by a stranger or an acquaintance. The goal of the study was to better understand the backgrounds of the children who had been victims and gain insights into the methods of operation and histories of the offenders –

[6] Canadian Centre for Child Protection Inc., "Abducted then Murdered Children: A Canadian Study (Preliminary Results)" (2016), available online at: https://protectchildren.ca/en/resources-research/abducted-then-murdered-children-report/.

all in an effort to help identify additional prevention and intervention strategies in the area of abducted and murdered children. **Among the preliminary results of the study, we found that over 22% of the offenders were either on parole, probation or out on bail at the time of abducting and murdering their victim(s).** Of that subset of offenders, 52% had been arrested or imprisoned for a sexual offence at some point in the past. We are not suggesting that all who commit breaches are at risk of going on to commit such a heinous crime, but we do believe that this data underscores the importance of addressing any breach that potentially puts children at risk in a formal manner.

In addition, as part of its monitoring of reported Canadian case law, C3P comes across reported cases[7] in which an offender breached a technology-related prohibition (s. 161, bail, probation, etc.). These cases serve as examples of the need to continue to pursue charges against those who are subject to such prohibitions:

- ***R. v. Campbell***, [2017] N.J. No. 1: possessed a device contrary to bail terms put in place to limit his ability to communicate electronically with children
- ***R. v. Gardner***, 2017 BCPC 85: repeatedly breached bail term around Internet usage
- ***R. v. King***, 2016 ABCA 364: breached condition not to access the Internet/have a device capable of accessing the Internet
- ***United States v. Viscomi***, 2016 ONCA 980: refers to earlier breach of bail by possessing a device capable of accessing the Internet
- ***United States of America v. Lane***, 2017 ONCA 396: refers to breach in relation to Canadian offences/proceedings, had a homemade computer with thousands of images of "child pornography" while on bail
- ***R. v. McIntyre***, 2016 BCCA 465: offender committed second "child pornography" offence while on bail.

C. Bail Reform

While C3P recognizes the need to address intimate partner violence more directly in the *Criminal Code*, we believe that such reforms should not be limited to the intimate partner but include the children of the accused or the intimate partner. It is well recognized that when there is violence in the home it does not only involve the partner but often also includes the children. More specifically, in clause 227(3) of Bill C-75, which amends section 515 of the *Code*, it lists relevant factors that the judge should consider, which includes if violence was used or threatened against an intimate partner. We believe the words “or a child of the accused or the intimate partner” should be added to the end of section 515(3)(a). Similar changes are needed in clause 227(6) of Bill C-75, which amends section 515(6)(c) of the Act.

D. Witness Provisions

Within the bail reform provisions, the principle of restraint is repeatedly emphasized throughout, yet that same principle does not appear to be equally reflected in the provisions that address the detention of a

[7] It is recognized that most cases are not "reported" and that decisions are made daily in court rooms across the country that no one but the judge, prosecutor, defence lawyer, accused and witnesses in the case are aware of. Still, reporting cases offer a lens into the criminal justice system and the types of cases before it.

witness [clause 290 and 291, amending sections 706 and 707(3) of the *Code*]. In both instances, a person's liberty is at issue. If the will of Parliament is to place emphasis on the principle of restraint in the bail context, it seems highly inconsistent not to do the same in the witness context. This is especially so when one considers the accounts that have come to light from witnesses who have been detained to secure their testimony – witnesses who (based on the stories we have heard about) tend to be female, and sometimes even under 18. See for example, the following news articles by CBC News: 'Great unfairness': 2 more sex assault cases where victims were jailed to ensure their court testimony", Janice Johnston, July 28, 2017[8], 'I'm the victim and I'm in shackles: Alberta justice minister apologizes for 'appalling' treatment of sex assault victim', Janice Johnston, June 5, 2017, [9] and 'Question of race in sex assault victim's jailing 'keeps me up at night,' Alberta justice minister says' Michelle Bellefontaine, June 5, 2017.[10]

2. Amendments to the Youth Criminal Justice Act

Bill C-75 includes amendments to the *Youth Criminal Justice Act* in clauses 364 to 387. The amendments relate to administration of justice offences; factors to be considered when imposing conditions; adult sentences; and the publication of the names of young persons. For the most part, C3P is supportive of the amendments, and would like to offer the following comments.

The issue of *self/peer exploitation*, often described in the media as "sexting", has become a growing concern for parents, school personnel and police. This behaviour is generally defined as youth creating, sending or sharing sexual images and/or videos with peers via the Internet and/or electronic devices. It usually involves exchanging images/videos through cell phone picture/video messaging, messaging apps (on iPhones, Blackberries, Androids), social networking sites, etc. In the 2017/18 year alone, Cybertip.ca received over 300 reports under the reporting category of 'Non-Consensual Distribution of Intimate Images' (NCDII).

C3P was recently involved in the use of extrajudicial measures for youth in the context of a *self/peer exploitation* incident. In spring 2017, C3P participated in a NCDII Youth Diversion pilot project which involved members of the Winnipeg Police Service and the Manitoba Justice Department. The pilot involved a number of youth (under and over 18 at the time of the offence) who had been charged with child pornography offences related to an image of a 17-year-old peer. C3P worked closely with police and the Crown to structure an education-based half-day session for the youth which focused on specific issues of sexual consent and victim impact arising from recorded content. The aim of the pilot was to address the criminal nature of the activity with youth who had been charged with NCDII offences through a targeted education session instead of proceeding with a criminal court charge. C3P believes that such measures can be carried out in a manner that

[8] Available online at: https://www.cbc.ca/news/canada/edmonton/edmonton-victims-sexual-assault-custody-alberta-1.4226601
[9] Available online at: https://www.cbc.ca/news/canada/edmonton/sex-assault-victim-jailed-judge-edmonton-1.4140533
[10] Available online at: https://www.cbc.ca/news/canada/edmonton/sex-assault-victim-jailed-ganley-1.4146682

is respectful to all involved and hold great promise for effectively addressing *self/peer exploitation* incidents that are not malicious in nature.[11]

The diversion pilot project in which C3P participated was done in a specific set of circumstances and clearly not all cases involving *self/peer exploitation* would be effectively addressed in the same manner. For example, instances that are repetitive or malicious in nature, or where the harm to the victim is significant, may not be good candidates for such a process. Moreover, when weighing factors to determine if extrajudicial measures are appropriate, there is a potential for biases to become part of the weighing and that potential must be avoided. Racial bias and class bias, for example, have the potential to influence the choice of young offender cases that will be dealt with through extrajudicial measures such as diversion projects. In addition, because girls are commonly the victims in cases of *self/peer exploitation* it is important not to minimize their trauma by increasingly reliance on extrajudicial measures that may not adequately address their need for recovery and reintegration (rights guaranteed to child victims through the United Nations Convention on the Right of the Child). There will be situations where the circumstances warrant a more serious sanction that is possible through extrajudicial measures. Finally, it will be important to continually reassess whether the extrajudicial measures used are effective and to adapt them as needed to reflect the changing needs of youth and victims.

There are two aspect of the proposed changes that we found troubling, the first being the new section 4.1 [added by clause 364] which states that extrajudicial measures are adequate unless the failure caused harm or risk of harm to the safety of the public. We believe the words "or the victim" should be added at the end of this section as the public may be too broad a concept for certain crimes. The second concern relates to the provisions restricting the conditions that can be imposed, namely clause 371, related to release conditions, and clause 374, related to sentencing conditions. Both provisions require the judge to only order a condition if they are satisfied that the young person will *reasonably be able to comply* with the conditions. While we can readily see that this provision will curtail the imposition of conditions that do not adequately respect the circumstances of the defendant, we are concerned that this wording may end up being too restrictive when applied to actual cases before the court. The imposition of conditions is an essential part of attempting to manage risk while a person is free in the community. If the judge is not satisfied the young person can reasonably comply with a condition but imposing the condition is the only way the judge can even try to prevent others from being hurt, the judge is going to be left with no avenue to address the concern. That does not seem to be in the best interest of the accused or society.

Overall, in terms of the changes proposed to the Youth Criminal Justice Act, while we fully appreciate that the youth criminal justice system must account for the reduced moral culpability of young people, we must not neglect to consider and plan for what may needed in order to ensure the safety of children who are not the accused person. The security and safety interests of those children will, in certain circumstances, also be

[11] The Canadian Centre has developed a number of resources related to the issue of self/peer exploitation, including resource guides for families and schools. Information on those resources can be found online at https://www.cybertip.ca/app/en/internet_safety-self_peer_exploitation. The Canadian Centre has also developed a website on self/peer exploitation that is geared towards youth – visit NeedHelpNow.ca.

impacted by the proposed changes. All children deserve equal consideration within the systems that have the power to protect them. An appropriate balance must be struck in respect of these changes to ensure that the interests of all children are considered.

B. Publication of the Names of Young Persons

In 2012, the *Safe Streets and Communities Act* reversed the burden of proof (from the young person to the Attorney General) to be able to publish a young person's name when there has been an application made to have that young person liable to an adult sentence for certain offences. Clauses 380 and 382 of Bill C-75 remove the option of lifting the publication ban in those circumstances.

We are not generally in favour of having names of young offenders published but recognize that there are situations where a young offender has carried out acts of violence that may warrant publication. Thus, to ensure the safety of children, and of the public more generally, there will be instances in which the ordinary rules of non-publication need to be adjusted to manage the risk posed by the subset of young offenders that pose a heightened and substantial risk to the public.

The importance of maintaining judicial discretion is considered a cornerstone of Canada's values and section 75 of the *Youth Criminal Justice Act* currently allows for that essential judicial discretion and oversight. It is our view that section 75 as currently written strikes the appropriate balance, and that the wholesale abolishment of section 75 is not in the best interests of children or the public.

Conclusion

While we recognize that many of the proposed amendments have the potential to modernize and streamline the criminal justice system, hopefully resulting in fewer delays in criminal proceedings, some of the proposed amendments are concerning, especially those that we believe have the potential to negatively impact vulnerable children and youth in Canada. In our submission, we have focused on highlighting the proposed amendments to the *Criminal Code* and to the *Youth Criminal Justice Act* that we like or that we find concerning; these include the reclassification of certain offences, attempts to deal more efficiently with administration of justice offences, the use of extrajudicial measures for young persons in cases involving administration of justice offences and the publication of the names of young persons. As a charity dedicated to the personal safety and well-being of all children, our aim of this submission is to highlight areas that may have an impact on children. It is our hope that the interests of all children are given careful consideration and protection while Parliament is undertaking the significant challenge of improving the Canadian criminal justice system.

We welcome the opportunity to further discuss with the Committee the issues outlined in this submission, and to assist the Committee in its review of Bill C-75 in any other manner requested.