



**Submission by the Ontario Association of Chiefs of Police
on Bill 175, *An Act to Implement Measures with Respect to
Policing, Coroners, and Forensic Laboratories and to Enact,
Amend or Repeal Certain Other Statutes and Revoke a
Regulation***

Submitted to the Standing Committee on Justice Policy

March 1, 2018

About Ontario's Police Leaders, the Ontario Association of Chiefs of Police (OACP)

The Ontario Association of Chiefs of Police (OACP) is the voice of police leaders across the Province of Ontario. The association represents police executives (both sworn and civilian) in provincial, regional, municipal, and First Nations police services in Ontario, as well as police executives within the Royal Canadian Mounted Police's (RCMP) "O" and "A" Divisions. Our 1,500 members include active and retired personnel as well as associate and corporate members who support the mandate and goals of the OACP.

As an association of police leaders, we also speak for our police services and in relation to the community safety and well-being needs of the communities we serve. Because of our commitment to community policing and partnering with the citizens of Ontario, OACP members are often the connection between public policy decision-makers and our communities.

A key goal of the association is to provide expert advice on policing and community safety issues to public policy decision-makers (both elected and members of the civil service), particularly at the provincial level. Our partnership with decision-makers is based on our belief that police leaders have a duty to serve their communities and promote the public good in which flows from good laws effectively and responsibly enforced.

Summary of Recommendations

The following are the fundamental recommendations that will arise from the OACP's submission:

1. A formalized process should be established to allow for draft regulations to be provided to the OACP and other stakeholders for review and comment as soon as possible. The same process should be followed as future regulations are created or amended;
2. The outsourcing of policing functions under section 14 of the *Police Services Act, 2017* needs to be sufficiently constrained by regulation or amendment to ensure *Charter* compliance, maintain the integrity of police investigations and protect legal privileges such as those surrounding confidential informants;
3. Section 115 of the *Police Services Act, 2017* should be amended to clarify that an officer who continues to be incapable of performing or fulfilling the essential duties or requirements of a police officer and who is assigned to a civilian position shall be entitled to the remuneration that is commensurate with that position;
4. The whistleblowing provisions under Part VIII of the *Police Services Act, 2017* should be revised to ensure that police associations and their agents cannot use this Part to file public complaints that they are specifically prohibited from filing under subsections 58(2) and (4) of the *Policing Oversight Act, 2017*;
5. Section 149 of the *Police Services Act, 2017* needs to be clarified as it implies that the Complaints Director can direct the termination of a police officer without a hearing before the Ontario Policing Discipline Tribunal;
6. Suspension without pay should be similar to the provisions that exist in the other provinces. While suspension without pay under section 151 of the *Police Services Act, 2017* does represent a limit expansion of the authority to suspend without pay, it remains unduly restrictive;
7. Chiefs of Police should retain the ability to demote police officers who engage in serious misconduct without having to apply to the Ontario Policing Discipline Tribunal to hold a hearing on the matter;
8. Subsections 156(2) and (3) of the *Police Services Act, 2017* should be revised to allow police service boards to use their police service's own discipline related records to defend themselves in civil proceedings;
9. Section 159(2) of the *Police Services Act, 2017* which excludes the Chief of Police and Deputy Chief of Police from the collective bargaining process, should be broadened to include civilians in executive positions whose membership in a police association creates a conflict of interest. Such positions may include, Chief Administrative Officers and the Directors of Finance, Human Resources and Legal Services;
10. There needs to be further discussion on the issue of including auxiliary members of the police service under the oversight authority of the Ontario Special Investigations Unit and the Ontario Policing Complaints Agency;

11. Members of police services are uniquely qualified to provide advice and information that will assist municipalities and First Nations in the preparation of their community safety and well-being plans. Representatives from police services should be included in all parts of the planning process, including the advisory committee;
12. The OACP supports the government's proposal to adopt the "balance of probabilities" as the new standard of proof for police disciplinary hearings as it is supported in law, less confusing than the current standard of proof and consistent with other professional discipline tribunals in Ontario; and
13. The OACP supports sections 38(5) and 60(5) of the PSA, 2017 as these provisions maintain the long held common law principle of police independence while providing much need clarity in terms of distinguishing the board's or Minister's governance and oversight roles from the Chief of Police's or Commissioner's responsibilities for administering day-to-day police operations.

Discussion

The OACP appreciates that the Government of Ontario has actively listened to the views of Ontario's police leaders and believe that Bill 175, the *Safer Ontario Act, 2017* reflects much of the input that we have offered during our participation in Future of Policing Advisory Committee (FPAC) discussions, *Strategy for a Safer Ontario* consultations, and meetings with Ministers and their senior staff. We have also been a consistent and strong supporter of the recommendations made by Justice Michael Tulloch on police oversight and a strong governance model.

Having carefully reviewed Bill 175, the OACP recommends that the following issues should be addressed as part of the government's ongoing legislative efforts to modernize Ontario's policing framework:

1. Regulations

Bill 175 creates a legislative scheme that will be subject to broad regulation-making powers on the part of both the Lieutenant Governor in Council and the Minister. In particular, section 200 of the *Police Services Act, 2017* (the "PSA, 2017") prescribes the 82 different ways by which the Lieutenant Governor in Council and the 26 ways by which the Minister may make regulations. It is difficult for the OACP to fully assess and for police leadership in general to prepare for this new legislative scheme without seeing the regulatory details, including but not limited to:

- a. Any new adequacy standards that may be set out in accordance with sections 11(1) and 200(1)1. of the *PSA, 2017*;
- b. Prescribed policing functions that must be provided by members of police services as opposed to policing functions that, by regulation, may be outsourced pursuant to sections 13, 14 and 200(1)2. of the *PSA, 2017*;
- c. The manner in which a Chief of Police will be required to investigate and report upon a matter after it has been investigated by the Ontario Special Investigations Unit in accordance with sections 108 and 200(1)37. of the *PSA, 2017*;
- d. Regulations concerning the appointment of auxiliary members of a police service as referenced in sections 118 and 200(1)54. of the *PSA, 2017*; and
- e. The definition of a serious offence for the purpose of suspending a police officer without pay as required under sections 151 and 200(1)62 of *PSA, 2017*.

It is apparent that Bill 175, if passed, will be enacted in segments over time. In turn, we appreciate that extensive regulations will need to be drafted and issued over the same timeframe. We believe it to be incumbent upon the government to establish a formalized process to allow for draft regulations and/or regulatory amendments to be provided to the OACP for its review and comment as soon as possible.

2. Outsourcing of Police Functions

Section 14 of the *PSA, 2017* will allow police service boards to outsource certain policing functions to “prescribed policing providers” in the public sector including: crime prevention; investigative support (i.e. crime scene analysis, forensic identification collision reconstruction, breath analysis, surveillance, interception of private communications, polygraph and behavioral science); explosives disposal; and assistance to victims of crime.

From an efficiency standpoint, we appreciate the potential merit in the outsourcing of non-core policing functions as well as some of the administrative aspects of investigative support, such as using a private sector agency to provide clerical staff for a police service’s private communications interception facility. However, the wholesale privatization of sensitive policing functions such as “wire taps” or physical surveillance may give rise to various concerns including *Charter* issues, maintaining the integrity of investigations and potential confidential informant issues. It is recommended that a board’s ability to outsource investigative support functions should be constrained accordingly either through regulation or an amendment to Bill 175.

Having regard to the impending legalization of cannabis and upcoming amendments to the *Criminal Code* for drug impaired driving, section 14(3)2 of the *PSA, 2017* should be amended to include the ability for police service boards to outsource blood, urine and saliva collection in addition to breath analysis.

3. Accommodation of Disability Needs

It is the duty of all police employers to accommodate the needs of any member who becomes disabled and, as a result, becomes incapable of performing the essential duties of his or her position in accordance with the *Human Rights Code*. This duty is codified under section 47 of the current *Police Services Act* and will continue to be codified under section 115 of the *PSA, 2017*. Unfortunately, circumstances may arise where the needs of a disabled member cannot be accommodated without undue hardship on the board.

Under the current *Act*, a police employer may only discharge or retire, where eligible, a member who cannot perform their essential duties as a result of a disability after holding a hearing at which two legally qualified medical practitioners must provide evidence that the member is incapable of performing the essential duties of the position and that he or she cannot be accommodated without undue hardship. A section 47 hearing imposes a rigorous statutory framework which is unique in employment law. From the standpoint of police employers, this framework has proven to be unworkable.

On the other hand, section 115 of the *PSA, 2017* allows police employers to be treated in a manner that is similar to the common law treatment of most other employers in the province without eroding the rights of police employees under the *Human Rights Code*. Section 115 also creates the additional opportunity for police employers to accommodate police officers who continue to be incapable of performing essential policing duties by assigning them to a civilian position. For the sake of clarity, the OACP recommends that this provision to be amended to

clarify that a police officer who is assigned a civilian position in accordance with section 115(2)(a) of the *PSA, 2017* will be entitled to the remuneration that is commensurate with the civilian position in accordance with any relevant civilian working agreement.

4. Inspector General and Whistleblowing

In addition to many of the oversight, audit, and inspection functions that are currently performed by either the Ontario Civilian Police Commission or the Ministry, the new Inspector General of Policing, as appointed under section 79 of the *PSA, 2017*, will also be responsible for overseeing the new whistleblowing provisions under Part VIII of the proposed *Act*. We appreciate that this provision addresses Recommendation 7.9 in Justice Tulloch's Review¹ where the Ministry is called upon to review the process for making internal complaints to ensure there are effective whistleblower protections so that complaints can be made within the chain of command without fear of reprisal.

In Recommendation 7.8, Justice Tulloch notes that police associations should be prohibited from making complaints regarding a police service or member of a police service within the jurisdiction of the police association. This recommendation would appear to be addressed by subsections 58(2) and (6) of the *Policing Oversight Act, 2017* (the "*POA, 2017*"). However, the OACP respectfully suggests that the whistleblowing provisions under Part VIII of the *PSA, 2017* should be amended or a regulation should clarify that a police association may not file a complaint against a member of its own police service via the Inspector General.

5. Implementation of Informal Resolution Agreements

According to section 149 of the *PSA, 2017*, if the Complaints Director directs a Chief of Police, a board or the Minister to terminate a police officer, this is to be imposed without a hearing before the Tribunal. Presumably, since section 149 is under the heading "Implementation of informal resolution agreement", it is only meant to apply as a result of a public complaint that has been informally resolved with, *inter alia*, the consent of the police officer, in accordance with section 80 of the *POA, 2017*. We trust that the Complaints Director will not have the authority to unilaterally cause the termination of a police officer. Therefore, section 149 should be amended to specifically reference its connection to section 80 of the *POA, 2017*.

6. Suspension without Pay

In accordance with section 151 of the *PSA, 2017*, a Chief of Police will be able to suspend without pay if a police officer is:

- Convicted of a criminal offence and sentenced to jail;
- In custody or subject to conditions that prevent him or her from performing policing duties;

¹ Hon. M. Tulloch, *Report of the Independent Police Oversight Review* (Toronto: Queen's Printer, 2017).

- Charged with a serious offence, as defined in the regulation, and
 - It's not in relation to the performance of the officer's duties;
 - The Chief is seeking or intends to seek termination;
 - Termination is the likely outcome; and
 - Failure to suspend without pay would bring discredit to the reputation of the police service.

The officer will not receive salary, wages or other remuneration but will continue to receive benefits.

This represents a minimal expansion of the current ability to suspend officers without pay in Ontario and remains far more restrictive than the suspension provisions that exist in most other provinces. By way of example, the following police discipline matters would not qualify for a suspension without pay under section 151 of the new *Act*.

Markham and Waterloo Regional Police Service, 2015 ONCPC 4

Constable Craig Markham was found guilty of two counts of Insubordination, two counts of Discreditable Conduct, and one count of Breach of Confidence. He was also found guilty of Breach of Trust in criminal court and conditionally discharged.

PC Markham accessed police records and CPIC to obtain information about an acquaintance who had just been arrested on serious drug related charges. He then forwarded police records to another acquaintance. It was subsequently determined that the officer had improperly queried other individuals on the police records management system. During the professional standards investigation, PC Markham disobeyed an order to submit to an interview.

Perhaps most notably, PC Markham sent a mocking email to the police service thanking them for a three-year paid suspension, which he said allowed him to play golf, travel and take a firefighter course.²

Venables v. York Regional Police Service, 2008 ONCPC 8

Constable Ryan Venables was found guilty of two counts of Discreditable Conduct and Unlawful or Unnecessary Exercise of Authority. He also received a suspended sentence and probation in criminal court after pleading guilty to assault. PC Venables approached a man who has handcuffed and sitting in the back of another officer's police cruiser and punched him in the head. He then stated to another officer at the scene that he hated Russians.

Suspension without pay in Ontario should be similar to the provisions that exist in many other provinces. For example, in Alberta, the Chief of Police may suspend a police officer without pay for up to seven days and, if not charged within the seven days, the officer is returned to work. Where the Chief of Police is of the opinion that exceptional circumstances exist respecting the alleged misconduct, the police officer may be relieved from duty without pay pending the outcome of the disciplinary process. In British Columbia, the discretion to suspend without pay is vested in the police services board. A police services board may, at any time, discontinue the pay and allowances of a police officer if the allegations against the individual, if proved, would constitute a criminal offence. In New Brunswick, a Chief of Police may suspend a police officer without pay if the officer is convicted of an offence under a provincial or federal statute, even if the conviction

² <http://nationalpost.com/news/canada/ex-police-officer-who-wrote-mocking-email-about-paid-suspension-says-hes-a-scapegoat>

is under appeal. In Quebec, the *Police Act* allows for the suspension of a police officer without pay where the Director General investigates alleged misconduct and has reasonable grounds to believe that the officer's conduct may compromise the exercise of his or her police functions. In each of these examples, the legislation provides the suspended officer with an avenue for seeking an independent review of the decision to suspend him or her without pay.

While suspension without pay under section 151 of the *PSA, 2017* does represent a limited expansion of the authority to suspend a police officer in Ontario without pay, it remains unduly restrictive.

7. Demotion by the Chief of Police

During the Independent Police Oversight Review, the OACP took the position that the police discipline process under Part V of the *Police Services Act* had outlived its usefulness. The evolution of police discipline and the police public complaint process in Ontario has involved the grafting of civilian oversight onto an existing internal complaint and discipline process. While maintaining its military tribunal roots, Part V hearings have imported elements of criminal law while operating within a robust labour relations environment.

As Justice Tulloch notes in his report, at paragraph 58, a number of stakeholders, including police associations, Chiefs of Police, and police services boards expressed frustration with the current police disciplinary hearing model. They noted that the quasi-judicial hearings under Part V have become too formal, complex, and adversarial.

Indeed, it was the submission of the OACP to Justice Tulloch that the government should consider repealing Part V of the *PSA* and replacing it with a new system for public complaints along the lines of other professional regulatory bodies such as the Law Society or the College of Teachers. Meanwhile, internal discipline would continue to be the duty of the Chief of Police or Commissioner with decisions on discipline being subject to appropriate labour laws, collective agreements and grievance arbitration.

Part IX of the *PSA, 2017* adopts the submission of the OACP, in part, by empowering Chiefs of Police and the Commissioner to directly impose different disciplinary measures on a police officer for misconduct subject to the officer's right to request a hearing before the Ontario Policing Discipline Tribunal. However, termination or demotion cannot be imposed directly as the Chief of Police or Commissioner must apply to the Tribunal to hold a hearing on the matter.

The OACP appreciates that termination is an extraordinary remedy that is reserved for circumstances where an officer has demonstrated that he or she is not fit to remain an employee of the police service. Given the significance of a termination, we accept the rationale for requiring a hearing before the Tribunal as opposed to simply giving the officer an ability to request a hearing to dispute the chief or Commissioner's decision to terminate. However, the OACP takes the position that Chiefs of Police and the OPP Commissioner should have the ability to demote police officers who engage in serious misconduct without having to apply to the Tribunal to hold a hearing on the matter. To require all potential demotions to come before the Tribunal may simply result in the replacing of one overly formal, complex, and adversarial process for another.

8. Use of Discipline Records to Defend Against Civil Litigation

Any documents prepared as a result of a disciplinary complaint under Part V of the current *Police Services Act* are neither subject to production nor admissible in a civil proceeding.³ Although this type of a provision is commonly referred to as a statutory privilege, the courts have characterized them as an "absolute bar" to admissibility. Similar provisions have been included in subsections 156(2) and (3) of the *PSA, 2017*.

These provisions have been generally designed to protect police services from having their own disciplinary records used against them in subsequent civil litigation. However, the police service may need these records to defend against a civil claim and, in some circumstances, they may serve as the only information in the police service's possession that pertains to the incident giving rise to the lawsuit. Therefore, subsections 156(2) and (3) of the *PSA, 2017* should be revised to allow police service boards to use their police service's own discipline related records to defend themselves in civil proceedings.

9. Excluding Senior Police Executives (Civilian) from Police Associations

Section 159(2) of the *PSA, 2017* will exclude the Chief of Police and Deputy Chief of Police from the collective bargaining process for obvious reasons. However, during the course of collective bargaining as well as the day-to-day administration of the collective agreement, the police service board will need to rely upon the advice and expertise of certain senior police executives, including, for example, the police service's Chief Administrative Officers and the Directors of Finance, Human Resources and Legal Services. As the law currently stands, these executives must be members of a senior officers' association. It is recommended that section 159(2) of the *PSA, 2017* should be expanded to include these senior police executives and exempt them from having to join a collective bargaining unit.

10. Oversight of Auxiliary Members

The *POA, 2017* and the *Ontario Special Investigations Unit Act, 2017* extend the Ontario Special Investigations Unit's mandate to include auxiliary members of police services. Presumably, this is due to the fact that an auxiliary member of a police service may have the authority of a police officer in prescribed circumstances. However, there appears to have been little analysis in terms of the impact this may have on police services' auxiliary programs. Will police services be able to recruit volunteers when the position may expose them to potential criminal investigations? Moreover, what role will police service boards and police associations play in the legal indemnification of auxiliary when they are neither employees of the police service nor dues paying members of the association?

There also appears to have been little consideration as to how auxiliary are utilized in modern policing as well as whether their actual day to day duties warrant increased civilian oversight. As such, there needs to be further discussion on the issue of including auxiliary members of the police service under the oversight authority of the Ontario Special Investigations Unit.

11. Community Safety and Well-Being Plans

We appreciate that the Ministry of Community Safety and Correctional Services has been working with government partners, local community, and policing stakeholders (including the OACP) to

³ *Andrushko v. Ontario*, 2011 ONSC 1107 (Ont. Div. Ct.).

develop the Provincial Approach to Community Safety and Well-Being. As noted in the Ministry's *Community Safety and Well-Being Planning Framework, Booklet 3*, the provincial strategy focuses on collaborative partnerships that include police and other sectors such as education, health, and social services.⁴

The Ministry's efforts appear to have been codified under Part XIII of the *PSA, 2017*. Municipal councils will be required to prepare and adopt a community safety and well-being plan. First Nations will also have the option to do so. These plans will, among other things, identify public safety risk factors to the community and identify strategies to reduce prioritized public safety risk factors.

The plan will be prepared in conjunction with an advisory committee that will include representatives from: the local health integration network and other health officials; the school boards; social services; the Children's Aid Society; municipal council; the police service board; and any other prescribed persons. Also, while preparing the plan, the municipal council will be required to consult with the advisory committee, members of the public including racialized groups and First Nation communities and comply with prescribed consultation requirements. Unfortunately, the list does not presently include representatives from police services.

In our opinion, members of police services are uniquely qualified to provide advice and information that will assist municipalities and First Nations in the preparation of their community safety and well-being plans. As such, representatives from police services should be included in all parts of the planning process, including the advisory committee.

12. The "Balance of Probabilities"

The OACP supports the government's proposal to adopt the "balance of probabilities" as the new standard of proof for police disciplinary hearings.⁵ Under section 84 of the current *Police Services Act*, the burden of proof in a police disciplinary hearing is "clear and convincing evidence". "Clear and convincing evidence" is a standard of proof that lies somewhere between a balance of probabilities and proof beyond a reasonable doubt.

It is within the authority of the legislature to create a standard of proof specific to a particular statute.⁶ However, while decision makers generally understand the difference between the civil balance of probabilities and the criminal proof beyond a reasonable doubt, requiring a decision to be made based on some intermediate standard is problematic. As the Supreme Court of Canada notes in *F.H. v. McDougall*,⁷ evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. As such, the current "clear and convincing" standard of proof is both confusing and redundant.

Moreover, since the release of the *McDougall* decision, professional discipline tribunals in Ontario, including the Law Society of Ontario⁸ and the College of Physicians and Surgeons of Ontario,⁹ have adopted the "balance of probabilities" as the standard of proof in their disciplinary hearings.

⁴<https://www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/Booklet%203%20English%20accessible%20Final.pdf>

⁵ *PSA, 2017*, s.145(10) and s.146(5); *POA, 2017*, ss. 87(1).

⁶ *Jacobs v. Ottawa (Police Service)*, 2016 ONCA 345 at 7.

⁷ 2008 SCC 53.

⁸ *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193.

⁹ *Ontario (College of Physicians and Surgeons of Ontario) v. Dr. D*, 2017 ONCPSD 27.

13. Maintaining Police Independence

Sections 38(5) and 60(5) of the *PSA, 2017* will prohibit police service boards or the Minister, as the case may be, from making policies with respect to specific investigations, the conduct of specific operations, the deployment of members of the police service, the management or discipline of specific police officers or other prescribed matters. This provision will play an important role in maintaining the long held common law principle relating to police independence from political and other interference with its law enforcement responsibilities.¹⁰ They will also provide much needed clarity in terms of distinguishing the board's or Minister's governance and oversight roles from the Chief of Police's or Commissioner's responsibilities for administering day-to-day police operations.

The OACP is concerned with a proposed change to sections 38(5) and 60(5) of the *PSA, 2017* that would strike out the prohibition against a board or the Minister making policies with respect to "the deployment of members of the police service". In our opinion, the deployment of police officers is an essential element of the Chief of Police's or Commissioner's duties and responsibilities. Permitting a board or the Minister to dictate the deployment of police officers would result in a significant erosion of the common law principle of police independence.

We appreciate the opportunity to offer these recommendations to the Legislative Committee on Justice and members of the Provincial Parliament.

Respectfully submitted,

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¹⁰ *R. v. Campbell*, [1999] 1 S.C.R. 565 at para 33; *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.) at 769.