Justice for Children and Youth's Submissions re: *Bill C-4: An Act to amend the Youth Criminal Justice Act and to make consequential and related amendments to other Acts (Sebastien's Law – Protecting the Public from Violent Young Offenders)*

Justice for Children and Youth

JFCY is a legal clinic and the operating arm of the Canadian Foundation for Children, Youth and the Law. Since 1978, the clinic has provided select legal representation to Ontario youth aged 17 and under in the areas of criminal law, constitutional law, human rights, education law, family law, mental health law, health law and income maintenance. It has also operated a program of legal services for street involved youth aged 16 to 24 for almost a decade.

JFCY prepares policy positions on issues relating to the legal practice of the clinic based on the needs of and experiences of its clients and the multi-disciplinary expertise of its Board of Directors. JFCY also conducts test case litigation, through interventions and applications, on specific issues relating to the rights of children and youth. The clinic provides public legal education to youth and youth-serving agencies and has created numerous publications for young people.

JFCY supports Canada's implementation of the United Nation's *Convention on the Rights of the Child* and its recognition of children's right to be treated distinctly from adults, including their right to special protections.

Justice for Children and Youth ("JFCY") offers the following submissions regarding Bill C-4 and its proposed amendments to the *Youth Criminal Justice Act* ("*YCJA*") and any proposed review of the *YCJA*.

Bill C-4: History and Overview

On March 16, 2010 the Honourable Rob Nicholson, P.C., Q.C., M.P. for Niagara Falls, Minister of Justice and Attorney General of Canada, announced the introduction of amendments to the *Youth Criminal Justice Act* (*YCJA*) to strengthen its response to violent and repeat young offenders and to address a series of recent decisions of the Supreme Court of Canada.

The proposed amendments to the YCJA would:

- add the protection of society a primary goal of the *Act*;
- include deterrence and denunciation as objectives of youth sentences;
- increase the number of detained youth in custody;
- require the courts to consider adult sentences for youth convicted of the most serious crimes– murder, attempted murder, manslaughter and aggravated assault;
- make it likely that all young people will be given harsher sentences by:
    - using extrajudicial sanctions as an indication of a pattern of criminality,
    - using a pattern of criminality to seek a custodial sentence, and

- expanding the circumstances allowing a custodial sentence by imposing a custodial sentence for reckless behaviour that puts the safety of others at risk.

It is important to note that Bill C-4 includes the essential aspects of the two features of the defeated Bill C-25 (2nd session, 39th Parliament) of 2008.

Overview of JFCY's Position

JFCY believes the proposed amendments in Bill C-4 to be unnecessary, costly, and ill-advised. Without minimizing concerns about youth crime and the youth criminal justice system in Canada, JFCY believes the harshness of this Bill to be a reaction to fear-mongering and not evidence-based leadership, misdirecting significant energy and resources, at a time when the government has indicated the need for restraint and when youth crime continues to decline.

Canadian legislation and common law consistently make distinctions in the treatment and culpability of children versus adults based on capacity and responsibility. The Supreme Court[1] has declared it to be a principle of fundamental justice; accordingly any proposed legislation must comply with this principle. Accordingly, when determining how best to hold young people responsible for their actions, age and developmental state, must be determining factors.

Increasing custodial sentences and pre-trial detention undermines not only Parliament's rehabilitative objectives, but threatens public safety in the long term. In its review of certain provisions of the *YCJA*, and based upon the research of experts, the Nunn Commission found that the most adequate solutions to addressing youth criminal behaviour were prevention and early intervention.[2] This was due to the fact that many youths who engage in criminal behaviour could be described as "multi-problem youth" with histories of victimization, emotional problems, lack of achievement in the regular school system, limited pro-social friends and activities, and no work skills to allow them to succeed in society.[3] Due to the multifaceted aspect of this problem, the Nunn Commission acknowledged that there is no single solution, but instead:

> If we want a safer society free of a large part of youth crime, we have to look to our educational system, our social services system, our health and community services, our youth programs, and our justice system. It is in those Acting together that a safer society, as we shall see, can be achieved.[4]

Jails are not the best institutions for meeting these complex and multi-systemic needs.

[1] *R. v. D.B.* 2008 S.C.C. 25.
[2] Nunn Commission, p.262.
[3] *Ibid*., p. 209.
[4] *Ibid.*, p. 154.

Bill C-4 – Review and Position

What follows is our response to a few of the most significant amendments proposed by Bill C-4. The proposed amendments are discussed in the order that they appear in the *YCJA.* In each section, the amendments are described in detail with reference to the common law and other references. JFCY offers its positions supported by law, social science and neuroscience evidence.

A. Diminished Moral Blameworthiness and Protection of the Public (*Amendments to section 3)*

The proposed amendments to section 3 of the *YCJA* include the addition of "the protection of the public" as goal of the *YCJA* the "diminished moral blameworthiness or culpability of young persons" as a principle of the *YCJA.*

1. Protection of the Public

The addition of "the protection of the public" as a goal of the *YCJA* is put forth in response to Nova Scotia's Nunn Commission of Inquiry report, which recommended that protection of the public be included among the stated principles behind the *YCJA* .[5]

It is JFCY's position that the public is already adequately protected by the current legislation. This submission is supported by the fact that youth crime continues to diminish generally. Adding this language as a "goal" will have the effect (taken with other amendments) of incarcerating more young people for relatively minor offences while it will have no effect in the case of very serious offences.

The new goal of the *YCJA* – protection of the public - shifts the orientation of the *YCJA* from a rehabilitative model to a punitive model for dealing with young offenders. The movement toward a more punitive youth criminal system results from an exaggerated perception of the seriousness of the threat and the number of offenders, and with a collective hostility toward the offenders, who are perceived as outsiders threatening the community[6] or "public"; rather than an on an informed and comprehensive understanding of the youth criminal justice system and the most effective way to deal with youthful offenders.

Although, youth-oriented rehabilitative language is still preserved in the proposed amendments, the changes would be much more punitive in their approach. While including both types of language may authorize judges to choose the appropriate criteria in individual cases, the emphasis on the "protection of the public" occupies the strategic center of the new scheme within which any youth-focussed measures will have to be fitted. This is dangerous when public misconceptions may lead to the vilification of youth and an exaggerated need for protection from them. Where rehabilitative programmes are not available, punitive, custodial warehousing of young people will become the simplest means of "protecting the public" in the short term, though not the most effective in the long term or the cheapest penalty. In fact, incarceration will put the public at increased risk as more young people are released after incarceration instead of being treated and rehabilitated outside of jails.

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[5] Report of the Nunn Commission of Inquiry, *Spiralling Out of Control: Lessons Learned from a Boy Out of Control*, December 2006, <online: www.nunncommission.ca/media_uploads/pdf/109.pdf>.
[6] Alexia Davis, *Adolescent Development and Its Effect on Juvenile Justice Policy*, (2005)

2. Diminished Moral Blameworthiness

The Supreme Court of Canada, based on undisputed expert evidence, recognized that adolescents, due to cognitive and psycho-social immaturity, make criminal choices that are less culpable than those of adults, and that this diminished responsibility principle is a constitutional imperative. [7]

The principle of diminished moral blameworthiness holds young people accountable for their criminal acts, but requires different treatment then for adults and, to be accepted as fair must be seen as proportional. Moral blameworthiness is founded upon the internal developmental stage in the actor's decision-making capabilities; the reasonableness of the person's actions in the circumstances; and the atypical behaviour of the actor.[8]

JFCY endorses the principle of diminished moral blameworthiness as articulated by the Supreme Court of Canada and supported by this proposed amendment. In particular, JFCY believes the principle incorporates the following widely accepted tenets:

- Children and youth have not developed the problem-solving skills of adults;
- Children and youth have less autonomy than adults due to immature decision-making skills and neurobiological reduced impulse control, thereby making them more susceptible to peer pressure, impulsiveness, and immediate gratification;
- Children and youth do not readily foresee the long-term consequences of their actions;
- Children and youth are much more amenable to rehabilitation and reintegration into society.

Recommendations

- "Protection of the public" should not be added as a goal of the *YCJA*.
- The *YCJA* should be amended to reflect the decision of the Supreme Court Canada incorporate diminished moral blameworthiness as a principle of the *YCJA.*

B. Pre-Trial Detention in the *YCJA* (*Amendments to section 29)*

Presently, a presumption against pre-trial detention exists with three exceptions under the *YCJA*. However, this is a rebutable presumption, and allows the judge or justice to consider pending

[7] *R. v. D.B.* 2008 S.C.C. 25. Note also that on May 17, 2010, the U.S. Supreme Court in *Graham* v. *Florida* - 08-7412 also recognized this principle for the second time when it ruled that life imprisonment for young people was cruel and unusual punishment.

[8] Laurence Steinberg, et al., *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1010 (2003)(

charges or conduct that endangers life when determining whether a young person should be detained.

The proposed amendments of Bill C-4 add additional circumstances in which the presumption against pre-trial detention will not apply, and thereby expand the availability of pre-trial detention as a judicial sanction. Currently it includes circumstances:

- when the young person is charged with a "violent offence";
- when the young person has in the past failed to comply with non-custodial sentences;
- when the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt.

The Bill proposes to double the circumstances in which pre-trial detention may be ordered by adding three additional cases in which a court may order pre-trial detention:

1. when the young person is charged with committing an offence that endangered the public by creating a substantial likelihood of serious bodily harm to another person;
2. when the young person has been found guilty of failing to comply with conditions of release;
3. when there is a substantial likelihood that the young person will, if released from custody, commit a violent offence or an offence that otherwise endangers the public by creating a substantial likelihood of serious bodily harm to another person.

It is JFCY's position that the proposed amendments respecting pre-trial detentions will not have their desired effect and are unnecessary. Further, despite public perception and statements to the media, pre-trial detention has not been reduced proportionally to the reduction in custody as expected under the *YCJA.* [9]

A report commissioned by the Department of Justice in 2004 entitled *Pre-trial Detention Under the Young Offenders Act: A Study of Urban Courts* (the "Pre-Trial Detention Report"), shows that pre-trial detention is not an appropriate tool to reduce recidivism rates among young offenders.[10] The Report confirms that pre-trial detention does nothing to reduce recidivism rates in young offenders and may even serve to increase the likelihood of further encounters with the justice system.

Pre-trial detention constitutes a taking of liberty which inflicts punishment on un-convicted defendants and can also lead to other perversions of justice. For example, it creates incentives for false guilty pleas, in particular where young people are more likely to plead guilty in pre-trial

[9] Statistics Canada, "Youth Correction Services Admissions to Provincial & Territorial Programs" Remand 2000-2005.
[10]. Moyer, S., *Pre-trial Detention under the Young Offenders Act: A Study of Urban Courts* (Department of Justice Canada, 2005).

detention than adults. Many young people plead guilty to a lesser charge or for any charge in which the sentence is likely to be time served. This is usually without the benefit of counsel beyond a brief discussion with duty counsel in order to gain release from pre-trial detention.

Part of any analysis of a case involves assessing evidence of a defendant's conduct, and comparing that evidence with the resulting criminal charges. Expanding pre-trial detention undermines the notion of true accountability, as well as the criminal justice system itself.

Additional grounds for detention based on "substantial likelihood" are particularly problematic because courts are not good at assessing such risks. Grounds based on "failure to comply" are problematic because they are often based on illegal conditions or on conduct that is not itself criminal.

Expanded Grounds for Pre-trial Detention:

1. Endangers or is likely to endanger the life or safety of another person

Affecting the changes to pre-trial detention criteria, the federal government proposes to amend the definition of "violent offence" in section 39(1) (a) of the *YCJA* to include conduct that endangers or is likely to endanger the life or safety of another person. The Supreme Court of Canada has already rejected a broadening of the definition of "violent offence" to include the "creation of a risk of harm to others,"[11] in part on the basis that including an overly-broad definition of whether an offence is likely to result in bodily harm is a question of whether the offence is dangerous, rather than whether it is violent. Since the *Criminal Code* differentiates violent conduct from dangerous conduct. The *YCJA* must provide at least as much protection for young people.

This proposed amendment runs contrary to the fundamental presumption of innocence by punishing young people for acts they are not proved to have done. It also requires the court to engage in a fact finding mission to explore the hypothetical (see full discussion of "violent offence" below).

2. Failing to Appear in Court

Under the *Young Offenders Act,* Canada was imposing detention on youth at four times the rate it was being applied to adults, since broadly worded conditions - such as those which require young people to obey all the rules of the house which parents set (including curfews and chores) - are more common with young people than adults. There is widespread criticism of making conduct which is not otherwise criminal, an offence because of a condition and incarcerating someone for that conduct.

It is JFCY's position that if failing to comply is added to the grounds for pre-trial conditions there will be a large increase in the numbers of young persons facing pre-trial conditions where

[11] *R. v. C.D.; R. v. C.D.K.*, [2005] 3 S.C.R. 668, 2005 SCC 78.

public safety is not an issue and where those young people would not face custody for the underlying offence.

Furthermore, young people may agree to conditions – including police conditions - that they know they cannot obey simply to avoid detention and because they feel they have no choice. Thus they may agree to come home straight from school even if they know they have an after school job or must pick up a sibling from another school. Many of these conditions are imposed without lawful authority. If this amendment is passed we can expect a return to much higher rates of detention at a great taxpayer cost but with increased public safety.

3. Will Commit a Serious Offence

It is JFCY's position that this amendment would presumably not stand up to scrutiny under the *Charter*. This section runs counter to the fundamental principle that we cannot detain those who have not been convicted, or even accused of a serious offence, on the mere belief that they are **likely** to commit an act which is **likely** to cause bodily harm if they are released. This would set a very dangerous precedent in criminal law.

The proposed arbitrary deprivation of liberty of a child is not only in violation of the *Charter,* but also contrary to Canada's international obligations. Under the current legislation only pre-trial or actual behaviour of the accused may be taken into account when determining the necessity of pre-trial custody. The federal government is now proposing we accept an American approach which has seen a shift in many states to requiring judges to make pre-trial decisions on the basis of danger predictions.

Courts have a very low accuracy rate with respect to predicting future dangerous behaviour. It is widely accepted that predications have about a 33% degree of accuracy which means that over 2/3 of those detained may be unfairly deprived of liberty.[12] The probability that risk predictions are not accurate clearly points to caution when detaining on the basis of risk. In deciding pretrial release at the first judicial stage, the problem faced by the judge, or a justice of the peace is challenging under the best of circumstances. It seemingly requires talents of judicial prognostication. The judge must "predict" the likelihood that a defendant will commit a particular type of crime by guess or at best an experienced hunch. The result will be disrespect for the justice system in those who would not have committed a violent offence or risky conduct. These young people will feel stigmatized and alienated.

The grounds for making a risk determination are highly subjective. Most disturbingly, the government's own research paper shows that when making a risk determination Canadian judges currently consider such factors as whether or not the young person is Aboriginal, and the young person's current living conditions[13]. With no consensus on what are relevant factors to consider in making this determination, factors such as race and family status will have even a greater impact under the proposed legislation, leading to higher rates of detention for youth in care, and other vulnerable youth.

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[12] *Prediction and Classification: Legal and Ethical Issues***.** Michael Tonry, *Crime and Justice*, Vol. 9, Prediction and Classification: Criminal Justice Decision Making (1987), pp. 367-413

[13] *Pre-Trial Detention Under The Youth Criminal Justice Act: A Consultation Paper.* Department of Justice, June 1, 2007.

Not only is the basis for the determination unclear, the amendment is impermissibly vague in its definition - the more vague the description of the likelihood of a potential harm, the more difficult for a defendant to show that he or she would avoid "it." Conditions which deprive a person of their liberty must both clearly defined and foreseeable in application.

Recommendations

- Abandon the proposed amendments respecting pre-trial detentions as they will not have their desired effect and are unnecessary.

C. Deterrence and Denunciation as Sentencing Objectives *(Amendments to section 38*)

Bill C-4 seeks to amend the sentencing provision of the *YCJA* by allowing youth judges to impose a sentence on a youth that "may have the following objectives: (i) to denounce unlawful conduct; and (ii) to deter the young person and other young persons from committing offences."

1. Denunciation

Denunciation of youthful misconduct occurs when charges are laid and a young person is convicted. Canada denounces the misconduct of a young person when the police law charges and when a court makes a finding of guilt. Courts have the power to impose appropriate sentences ranging from a reprimand to life imprisonment. It is unnecessary to add denunciation as a sentencing objective; denunciation is implicit in the criminal justice process. The sole intent of this proposed amendment is to make sentences generally harsher, with no benefit but a great cost to Canadian Society.

2. Deterrence

The sentencing principle of deterrence is based upon the belief that the more severe the penalty is for engaging in a particular criminal conduct, the less often that offence would be committed. Nothing can be added by this proposed amendment except harsher sentences in a regime which has been shown currently to work very well.[14]

As it now stands, each of the four subsections of s. 39 reference precise and separate circumstances where custody may be considered. Subsections (a) and (d) concern offences, specifically violent and exceptional offences, while ss. (b) and (c) address recidivism.

By introducing deterrence and denunciation as sentencing principles it will not be possible for a young person to receive a sentence which is "proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence"[15]. The legal principle of proportionality mandates that the State's response to an offender's crime must be measured.

[14] See National Consultations 2008-09 conducted by the Minister of Justice, the Honourable Rob Nicholson, P.C., Q.C., M.P..
[15] *Section 38 2(c)t,*

Proportionality is of particular importance when responding to youthful offenders who must believe their sentences are fair if they are to reintegrate into society.

For non-violent and non-exceptional offences, courts are to impose sentences that provide a young person with opportunities to be rehabilitated in the community before resorting to the most restrictive sentence. Section 39(1)(b) permits a custodial sentence as a last resort where a young person has failed to comply with non-custodial sentences, and s. 39(1)(c) where a young person has complied with sentences but, in continuing to commit serious offences has demonstrated that rehabilitation is not being achieved.

As articulated in the Preamble of the *YCJA* the goal of restricting and reducing the use of custodial sentences was a response to Canada's significant over-incarceration of young people under the *YOA*. The Preamble also emphasizes an individualized approach that responds to the young person's needs and developmental challenges, addresses underlying circumstances of offending behaviour, focuses on meaningful consequences, effective rehabilitation and reintegration, reserves the most serious intervention for the most serious crimes and reduces over reliance on incarceration for non-violent young persons.[16]

In its decision in *R. v. B.W.P.; R.v. B.V.N.*[17] the Supreme Court of Canada held that deterrence does not constitute a sentencing principle for young offenders under the current *YCJA*. The primary objective of the *YCJA* is the rehabilitation of youthful offenders in order to ensure the long-term protection of the public. There is a focus on the principles of rehabilitation and reintegration as the mechanisms which best serves the needs of young people as well as providing for the long-term safety of the public. These principles establish an individual youth-focused approach that is corrective rather than punitive. This approach is not only consistent with the language of the YCJA, it is consistent with the development, brain functioning and capacities of young people. Deterrence does not work for young people. Adding deterrence and denunciation as sentencing objectives contradicts the requirement that sentences be proportionate and undermines rehabilitation.[18]

Evidence-based studies have shown, and the Canadian government has acknowledged, that young people "may not fully understand the nature and consequences of their acts for themselves and others."[19] One study found that when the young offenders were asked to state what influenced their involvement in committing their crime, not one of these youths mentioned that they thought about the penalty of the crime committed.[20] One reason for this lack of foresight in young people is a result of the fact that the last area of the brain to develop is the frontal cortex,

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[16] *YCJA*. Preamble.
[17] [2006] 1 S.C.R. 941, para 4.
[18] That deterrence is not an appropriate sentencing principle for youth is supported by both social science and medical research. See Daniel P. Keating, PH.D. (2010), Developmental Science and Youth Justice, Prepare for the Department of Justice Canada and presented at the Roundtable on Youth Developmental Science and Youth Justice.
[19] Department of Justice Canada (2006). Why did the Government introduce New Youth Justice Legislation? <online: www.canada-justice.net/en/ps/yj/*YCJA*/why.html>.
[20] Ruck, Martin, Christopher Koegl, and M. Peterson-Badali (2001), "Youth Court Dispositions: Perceptions of Canadian Juvenile Offenders". *International Journal of Offender Therapy and Comparative Criminology*, 45(5) 593 at p. 605.

which involves self-control and reasoning.[21] Deterrence in sentencing was uniformly rejected in the national consultations reviewing the YCJA.[22]

Social science research indicates that punishment for young people will only be effective as a deterrent to behaviour only when it: (a) immediately follows the behaviour; (b) is proportionate to the behaviour and not so punitive as to be counterproductive; and (c) is consistently applied and is seen as fair and legitimate by the offender. Within the justice system, these criteria cannot be met; thus, using deterrence and denunciation to increase the level of punishment as a deterrent to criminal behaviour is at best ineffective, and worst costly and counter-productive.[23]

It is JFCY's position that the adding sentencing principle of deterrence erroneously assumes that young persons are aware of the penalties assigned to criminal acts and that young persons will engage in a cost-benefit thought process when contemplating on whether or not to commit a particular act.[24] This assumption does not have any evidentiary basis, and in fact runs contrary to prevailing social science evidence[25] and neuroscience research and the role of impulse control.

Recommendation

- The *YCJA* should not be amended to include denunciation and deterrence as sentencing objectives.

D. Proposed Definition of Violent Offence *(Amendments to section 39)*

The *YCJA* does not define what constitutes a "violent offence." However, the Supreme Court of Canada defined it in 2005 as "an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm."[26] This definition excluded offences during

[21] Nunn Commission, p. 155.
[22] See National Consultations 2008-09 conducted by the Minister of Justice, the Honourable Rob Nicholson, P.C., Q.C., M.P..
[23] The field of developmental neuroscience, growing tremendously in the past decade as a result of increased use of brain imaging technology, has increasingly supported the views that have long been articulated in the social science research. In his paper, "Developmental Science and Youth Justice". Prepared for the Department of Justice Canada, Dr. Keating finds that neuroscience evidence points clearly toward two systems of adolescent neurological development that develop at different rates: the appetitive/reward system that develops rapidly, and the executive function system responsible for judgment and regulation of risk behaviour, that develops gradually, over a long period of time.[23] Structural and functional neuoroimaging has shown that the areas of the brain that are responsible for an increase in voluntary inhibition of behavioural tendencies, including the ability to counteract impulsivity takes at least a decade to fully develop, starting in mid-adolescence and not completing until early adulthood.[23] The imbalance creates a "window of vulnerability for adolescent risk behaviours." See Daniel P. Keating, PH.D. (2010), Developmental Science and Youth Justice, Prepare for the Department of Justice Canada and presented at the Roundtable on Youth Developmental Science and Youth Justice, at 5.
[24] Bailey, William and Ruth Peterson (1999), "Capital Punishment, Homicide and Deterrence" in M. Smith, Dwayne Zahn and Margaret Zahn (Eds.), *Studying and Preventing Homicides: Issues and Challenges.* Thousand Oakes: Sage 223.
[25] For a full discussion see United States Supreme Court decision *Roper v. Simmons* 543 U.S. 551 (2005).
[26] *R. v. C.D.; R. v. C.D.K.*, [2005] 3 S.C.R. 668, 2005 SCC 78.

which bodily harm is only reasonable foreseeable.[27] Bill C-4 would expand this definition by adding reckless behaviour that endangers the safety of the public. Specifically, Bill C-4 defines violent offence as:

- an offence causing bodily harm;
- an attempt or a threat to cause bodily harm; and,
- an offence that endangers the life and safety of another person by creating a substantial likelihood of causing bodily harm.

The Supreme Court of Canada rejected a broadening of the definition of "violent offence" in part on the basis that including an overly-broad definition of whether an offence is likely to result in bodily harm is a question of whether the offence is dangerous, rather than whether it is violent.

> "…this definition of "violent offence" would capture offences where bodily harm is merely *intended* rather than actually *attempted*. In other words, as observed by the appellants in their written submissions, the Alberta Court of Appeal's definition of "violent offence" would open the gate to custody simply when the young person has guilty thoughts (i.e. about causing bodily harm) and has not taken the extra step to do or omit to do anything for the purpose of giving effect to them, as is required for an "attempt" at criminal law: This runs counter to the well-established criminal law principle that requires something more than a guilty mind before punishment is imposed.[28]

It is JFCY's position that the proposed amendment not only runs contrary to the fundamental principle of innocence by holding young people accountable for acts they have not done and, in fact, simply for being young – as recklessness is an inherent part of youth. It would also require the court to engage in a fact-finding mission to explore the hypothetical. It is JFCY's position that the government should not override the careful reasoning of our highest court where consensus was reached based on undisputed expert evidence.

Recommendation

- The definition of violent offence should not be expanded.

E. Custodial Sentences for Youth (*Amendments to section 39*)

The proposed amendments of Bill C-4 add additional circumstances in which a court can choose incarceration. Currently it includes circumstances:

- when the young person is charged with a violent offence;

- when the young person has in the past failed to comply with non-custodial sentences;

[27] *R. v. C.D.; R. v. C.D.K.*, [2005] 3 S.C.R. 668, 2005 SCC 74-75.
[28] *R. v. C.D.; R. v. C.D.K.*, [2005] 3 S.C.R. 668, 2005 SCC 74-75.

- when the case is an exceptional one;

- when the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt.

The new Bill would expand these circumstances by adding:

- when the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has had a number of extrajudicial sanctions.

Bill C-4 would allow the court to consider a pattern of extrajudicial sanctions as evidence that rehabilitation is not being achieved for a young offender. As noted above, for non-violent and non-exceptional offences, courts are to impose sentences that provide a young person with opportunities to be rehabilitated in the community before resorting to the most restrictive sentence. Section 39(1)(b) permits a custodial sentence as a last resort where a young person has failed to comply with non-custodial sentences, and s. 39(1)(c) where a young person has complied with sentences but, in continuing to commit serious offences, has demonstrated that rehabilitation is not being achieved. Bill C-4 adds "a pattern of extrajudicial sanctions" to the language of 39(1)(c), equating a pattern of EJS with a pattern of findings of guilt.

Incarceration may actually increase rates of recidivism rather than deterring future criminal activity. Even for the most serious offenders, interventions such as incarceration are only effective if they are multi-modal, thus addressing the problems of law breaking, any mental health issues, substance abuse and academic problems.[29] Any intervention must be tailored to the specific needs young people, as distinct from adults, and their unique placement in society, as well as their developmental and social needs.

There is a further legal necessity to justify an increase in deprivation of liberty, the most punitive measure allowable under the law. Canada has ratified international conventions and rules requiring justification and minimization of intrusive measures.[30] The *Charter,* through the "*Oakes"* [31] test, also requires the government to present evidence to support claims of justified intrusions. The objective of the legislation or government action must be **shown** to be sufficiently "pressing and substantial" to warrant overriding a *Charter* right. Also, the means adopted to attain that objective must be reasonable and demonstrably justified. This step entails a proportionality test in which the courts are required to balance the interests of society with those of individuals or groups. It is the position of JFCY that at this time there is no clear evidentiary reason to increase incarceration rates of young people through legislative reform, nor is the government's response proportional.

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[29] Loeber & Farrington (1998). *Never Too Early, never too late: Risk factors and successful intervention for serious and violent juvenile offenders. Studies on Crime Prevention, 7(1), 7-30.*

[30] *Convention on the Rights of the Child,* Can T.S. 1992 No. 3 ; UN Standard Minimum Rules for the Administration of Juvenile Justice (*The Bejing Rules),* UN GAOR, 40th Session.; UN Guidelines for the Prevention of Juvenile Delinquency (*The Riyadh Guidelines),* UN GAOR, 45th Sess..,

[31] *R. v. Oakes* [1986] 1 S.C.R. 103.

Canada has internationally promised to ensure the protection of certain fundamental freedoms within its borders, it should generally be presumed that the *Charter* provides "protection at least as great as that afforded by similar provisions in those international human rights documents which Canada has ratified."[32] We look to international law as evidence of the principles of fundamental justice.[33]

International human rights instruments raise concerns about the risks of incarcerating youth because of their early stage of development and their vulnerability to negative influences. Rule 19.1 of the *Beijing Rules*, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, provides:

> The placement of a juvenile in an institution **shall always be a disposition of last resort and for the minimum necessary period**. Commentary: The many adverse influences on an individual that seem unavoidable within any institutional setting evidently cannot be outbalanced by treatment efforts. This is especially the case for juveniles who are vulnerable to negative influences. Moreover, the negative effects, not only of loss of liberty but also of separation from the usual social environment, are certainly more acute for juveniles than for adults because of their early stage of development.[34]

Recommendation

- There should not be additional grounds for incarceration.

F. Adult Sentences for Youth *(Amendments to section 64 and 72)*

1. *R. v. D.B.*

Bill C-4 repeals the presumption that a court should impose an adult sentence where a young person of 14 or older at least is found guilty of murder, attempted murder, manslaughter, aggravated assault or the third in a serious series of offences involving violence. This amendment is consistent with the decision of the Supreme Court of Canada in *R. v. D.B.*[35], Canada's international treaty obligations and our own *Charter* which all require that young people, as a principle of fundamental justice, be treated differently from adults. As a result, the government should not attempt to broaden the circumstances in which youth receive adult consequences.

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[32] *Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 349-50. See also *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056.
[33] *Suresh v.Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 60.
[34] *Ibid*. at rule 19.1.
[35] [2008] 2 S.C.R. 3.

The current *YCJA* forbids the possibility of referring young persons to adult courts. All proceedings involving young persons have been conducted in youth court, which may impose an adult sentence in more serious cases.

Recommendation

- These amendments are beneficial and should be enacted.

G. Publication of Names (Amendments to section 75)

The privacy principle of the *YCJA* prohibits the publication of information revealing the identity of young offenders. Previously, the *YCJA* provided for a rebuttable presumption that the publication ban should be lifted where a court dismissed an application that a young person receive an adult sentence for certain listed offences. The Supreme Court held that the presumption violated section 7 of the *Charter.*

The proposed amendments enshrine the Supreme Court of Canada's judgment in *R.v. D.B*[36] into law:

> Losing the protection of a publication ban renders the sentence more severe. The onus should therefore be, as with the imposition of an adult sentence, on the Crown to justify the enhanced severity, rather than on the youth to justify retaining the protection to which he or she is otherwise presumed to be entitled.

Bill C-4 provides that the burden would be on the Crown prosecutor to convince the court to authorize publication. Bill C-4 replaces the presumption with the possibility of publishing information on the identity of a young person where the court has dismissed an application that was filed to impose an adult sentence on a young person and has instead imposed a young offender sentence for a "violent offence" within the meaning of the bill. It is important to know that the broadened definition of "violent offence" proposed by Bill C-4 includes many more types of criminal behaviour than the offences giving rise to the current publication presumption.

JFCY applauds Bill C-4 for respecting the decision of the Supreme Court. It is trite to saw that the privacy of young persons has been held to be a value of superordinate importance - so much so that it overrides the constitutional freedom of expression. The privacy provisions of the *YOA* were designed to prevent the stigmatization and labelling that adversely affect a youth in terms of rehabilitation, second chance, self-image and treatment by others. The goals of rehabilitation and reintegration of youth (as distinct from the adult system) are served by offering the highest level of protection of privacy to young persons

[36] [2008] 2 S.C.R. 3, para 97.

The youth justice principles of non-disclosure and rehabilitation are as inextricably linked in the international law as they are in Canadian domestic law. The *UNCRC* requires Canada to guarantee the child's right to have his or her privacy fully respected at all stages of the proceedings.[37] *The Beijing Rules* link this right to the harm caused by publicity and the process of labeling, and further states that "no information that may lead to the identification of a juvenile offender shall be published."[38]

> Section 8 of The *Beijing* Rules also provide for the protection of privacy of young people because of the long term risks of labelling.
>
> 8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.
>
> 8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.
>
> Commentary: Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal". Rule 8 stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted).[39]

Recommendation

- These amendments implement the Supreme Court of Canada's decision in *R. v. D.B.* and should be enacted.

H. Police Records of EJM *(Amendments to section 115)*

The use of extra-judicial measures is not new. Police have always had the power to "warn" young people and informal encounters with the police are frequently documented. Under section 115 police have the ability to keep records of EJM, should they elect to do so. These records are subject to the privacy principle, provincial privacy legislation and records provisions' of the *YCJA.*

[37] *UNCRC, supra* note 11 at Art. 40.
[38] *The Beijing Rules, supra* note 14 at rules 8.1 and 8.2
[39] *Ibid.*

JFCY supports the use of police discretion and of pre-charge diversion - provided it relates to behaviour that would otherwise be criminal. We question the need to tamper with the provisions of the *YCJA*. However, where the police in a particular area need guidance in terms of their charging practices, mandated record keeping practices should be developed. However, when the record of an extra-judicial measure is kept, its retention period should be not longer than the period that a court record of a judicial reprimand is accessible.

If section 115 is amended, section 119 must also be amended to include an appropriate period of access for records of EJM. The access period under section 119(c) for a judicial reprimand is 2 months. For pre-charge diversion to remain effective, it must include consequences that are lesser than the consequences of the youth going through the court system. Therefore, the access period for an EJM record should not exceed the access period to a court record. It is only logical that the access period to an EJM be for a less than two months, the access period of a judicial reprimand.

Recommendation

- Any requirement for written records of EJM must be accompanied by a mandatory sealing of such record, no later than two months after the completion of EJM.

Conclusion

As Justice Nunn suggests in his report, we can bolster existing systems by increasing their effectiveness. To that end, the report suggests increasing the efficiency of the system, and increasing the availability of supports, services, and resources in the community for young people that are provided outside the purview of the juvenile justice system, such as within the child and adolescent mental health system, educational system, social service system, and health system.

Principles respecting proportionality among youth sentences are already incorporated in the *YCJA*, including the requirement that sentencing be proportionate to the seriousness of the offence and the degree of responsibility of the young person for it.[40] JFCY submits that the goals of the *YCJA*, including sentencing principles that focus on rehabilitation and reintegration of young people through an individualized approach to imposing meaningful consequences while restricting and reducing the use of custodial sentences must be preserved, and has been demonstrated to be the most effective means of ensuring public safety.

[40] Section 38(2)(c).

Legislative amendments should not be based on baseless fears and media hype that violent offences are not and cannot be dealt with appropriately in the current youth justice system. [41] The *YCJA* requires the government to demonstrate true leadership by providing the public with accurate and complete information on which to base their opinions. Public opinion based on misinformation and fear-mongering must not form the basis for legislative change. Not only will introducing "deterrence" or "denunciation" in to the *YCJA* work against the requirement of proportionality and a separate youth criminal system, but it will be ineffective when applied to young people. Similarly, increasing the number of youth in pre-trial custody has not been shown to be beneficial with respect to safety, and has led to increases in depression and suicide[42], as well as increases in drop out rates in school.

Rather than introducing legislation that will increase numbers of youth in pre-trial detention and custody, extra resources need to be found for children with severe social and mental health problems.

The *YCJA* as a whole does not need significant change. The government in its consultation with experts and stakeholders across the country has been told this repeatedly. What is necessary is a comprehensive review of the *Act's* implementation so that Parliament and provincial governments can best assess how they can ensure equitable access to justice, programs and services across Canada for all young people.

Recommendations

1. "Protection of the public" should not be added as a goal of the *YCJA*.

2. The *YCJA* should be amended to reflect the decision of the Supreme Court Canada and should incorporate diminished moral blameworthiness as a principle.

3. Abandon the proposed amendments respecting pre-trial detentions as they will not have their desired effect and are unnecessary.

4. The *YCJA* should not be amended to include denunciation and deterrence as sentencing objectives.

5. The definition of violent offence should not be expanded.

6. There should not be additional grounds for incarceration.

7. Release the results of the comprehensive review of the *YCJA* conducted in 2008. It is believed that the results of the review showed a wide-ranging support from well

[41] In fact, the 17-year-old aggressor of Sebastien Lacasse was given an adult sentence and was adequately dealt with under the existing legislation.

[42] Hayes, L. M. (2000). *Suicide Prevention in Juvenile Facilities*. *Juvenile Justice*, 7(1). (Flaherty, 1980) reflected a problematic calculation of suicide rates. Reanalysis of suicide rates in that study found that youth suicide in juvenile detention and correctional facilities was more than four times greater than youth suicide in the general population (Memory, 1989).

informed parties including legal professionals, experts and community members that the *YCJA* is working well.

8. Undertake a comprehensive review of the *Act's* implementation so that Parliament and provincial governments can best assess how they can ensure equitable access to justice, programs and services across Canada for all young people. This should address the concerns that already marginalized communities are over-represented in the youth criminal justice system.

9. Ensure that any and all proposed amendments are based on evidence, rather than ideology and/or uninformed public opinion.

10. Develop and sustain ongoing mechanisms for monitoring and evaluating effectiveness of *YCJA*, including data collection by Stats Canada.

11. Ensure meaningful, complete and accurate information is effectively disseminated to the public on the overall effectiveness of the *YCJA* as required in the Preamble of the *YCJA.*

12. Identify further opportunities and provide long-term support for the prevention of violence and the rehabilitation of youth.

13. Seek solutions from all interested parties including all levels of government, NGO's and communities.