Justice for Children and Youth's Submissions on *Bill C-10: Youth Criminal Justice Act Amendments*

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Justice for Children and Youth

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 more than 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.

INTRODUCTION

JFCY's submissions are limited to the proposals in Bill C-10 that would amend the *Youth Criminal Justice Act ("YCJA")*. Although Bill C-10 contains some positive changes to the *YCJA*; overall, JFCY does not support the Bill in its current form.

The *YCJA* was introduced in 2003 in order to fix significant flaws in the application of the *Young Offenders Act* ("*YOA*") and to respond to public concerns about youth justice. After many years of study and research into best practices, the *YCJA* was enacted. At the time, Canada had the highest rate of youth incarceration in the developed world. Although the *YCJA* has been successful in lowering incarceration rates, Canada still has relatively high rates of youth incarceration. Rates of youth custody in Canada remain much higher than in some countries in Western Europe as well as in New Zealand.[1]

Bill C-10, if enacted, will increase the rate of incarceration of youth, the length of sentences, and the number of adult sentences given to youth. If the *YCJA* is amended in this way it will legislate a fundamental departure from Canada's commitment to implement and uphold the articles of the United Nations' *Convention on the Rights of the Child*[2] *("CRC")* and a departure from what we know to be effective in creating a safer society in which young people who have offended are rehabilitated and become productive integrated members of society.

Because the *YCJA* was significantly different from its predecessor *Young Offenders Act*, a comprehensive review of the legislation was planned for five years after its implementation. The federal government held extensive consultations in every province and territory across the country, the findings of which were reported in the *Comprehensive Review of the Youth Criminal Justice Act: Cross Country Roundtable Report ("Comprehensive Review Report").*[3] The feedback received in 2008 in the federal government's own consultation process, overwhelmingly supported the effectiveness of the current *YCJA*. The *Comprehensive Review Report* made clear that any issues and concerns

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[1] From Professor Nicholas Bala; Brief on Bill C-10, dated Sept. 30, 2011, page 1.

[2] U.N., *Convention on the Rights of the Child*, Can. T.S. 1992 No.3.

[3] Report rreleased under the *Access to Information Act*, dated March 5, 2009. In October 2007 the federal government announced that the *YCJA* would undergo a comprehensive review in 2008. As part of this review, then Minister of Justice, Robert Nicholson, invited provincial and territorial ministers to join him in hosting consultations in each province and territory. These consultations began in Vancouver on May 20th, 2008 and were completed in Whitehorse on August 22nd, 2008. Participants represented the judiciary, prosecutors, defense counsel, legal aid, police, RCMP, academics, non-government organizations, researchers, psychologists, child advocates, children and mental health programs, youth justice programs and municipal and provincial or territorial government officials. The agenda was identical in each jurisdiction. Each participant was given an opportunity to advise the Minister about what works in the *YCJA* and what, if anything, needs to be changed.

identified with respect to the *YCJA* were unique to each jurisdiction and focused primarily on provincial implementation.[4]

All of the provinces and territories gave consistent messages that any flaws perceived by the public or legislators were not in the legislation but with the criminal justice and corrections systems. The *YCJA* was described as developed and implemented through a "…long and thoughtful process that came from evidence-based research. A sensible and defensible Act based on intelligent principles. Any changes should be evidence-based and made following the same thoughtful process."[5]

What emerged from the federal government's *Comprehensive Review Report* is that a strong social safety net is required to support implementation of the *YCJA*. JFCY urges this government to improve the highly successful *YCJA* by providing adequate resources to support children and families, to fulfill Canada's obligations under the *CRC*, and to improve Canada's standing and reputation in the rehabilitation of young people in conflict with the law, instead of legislating unwise, ineffective and unsought changes to the *YCJA* by increasing the number and length of youth custodial sentences at a huge expense to the taxpayer. While provinces may resist the increased costs to needlessly incarcerate more young people (increasing recidivism and being detrimental to public safety), it is our submission that provinces might be more receptive to cost-sharing for real crime prevention and public safety measures.

[4] *Ibid.*, at page 1
[5] *Ibid.*, at page 2

AMENDMENTS PROPOSED BY BILL C-10 SUPPORTED BY JFCY

1. Presumption of diminished moral blameworthiness: s.3(1)(b) YCJA

Bill C-10 amends section 3(1)(b) of the *YCJA* to add the principle of "diminished moral blameworthiness or culpability" of young people. This amendment implements the decision of the Supreme Court of Canada in the case of *R. v. B(D)*[6] where the Court held that the principle of the diminished responsibility of young people is a principle of fundamental justice pursuant to section 7 of the *Charter of Rights and Freedoms.*

The Supreme Court specifically held that young people are entitled to a presumption of diminished moral blameworthiness or culpability flowing from the fact that because of their age, they have heightened vulnerability, less maturity and a reduced capacity for moral judgment and this is why a separate legal and sentencing regime must exist for them.

Recommendation 1: s. 3(1(b) should be enacted as proposed in s. 168(2)(b) of Bill C-10.

2. Order for an Adult Sentence: s.72 YCJA

The proposed amendments to section 72 of the *YCJA* again implement the Supreme Court of Canada's decision in the case of *R. v. D.B.*[7] The Court held that the reverse onus provisions in respect of adult sentences which provided that accused youth must demonstrate why they should not receive adult sentences were an unconstitutional violation of section 7 of the *Charter* and were not justified under section 1.

The Supreme Court held that the onus to demonstrate the need for an adult sentence rests with the Crown. An adult sentence can only be imposed if the principle of fundamental justice that young people have diminished moral blameworthiness or culpability is successfully rebutted in the specific case, and if the judge who has weighed and balanced the other enumerated factors in the section, decides that a youth sentence is not sufficiently long to hold a young person accountable for his or her offending behaviors.

[6] [2008] 2 S.C.R. 3, 2008 SCC 25, at paras. 47 -69.
[7] *Ibid.*

Importantly the government's predecessor Bill C-4 required a youth court judge to be satisfied beyond a reasonable doubt of the matters referred to in 72(1) in order to impose a youth sentence.

Recommendation 2: Section 72(1) of the YCJA should be enacted as proposed in s. 183(1) of Bill C-10 with the following amendment:

> **"The youth justice court shall order that an adult sentence be imposed if it is satisfied <u>beyond a reasonable doubt</u> that …"**

3. Definition of Serious Violent Offence: s. 2(1) YCJA

Bill C-10 specifically defines "serious violent offence" in section 2(1) of the *YCJA* to include the five designated offences of first and second degree murder, attempted murder, manslaughter and aggravated sexual assault. This is a welcome clarification of the law on the subject.

Recommendation 3: the new definition of "serious violent offence" should be enacted as proposed in s. 167(2) of Bill C-10.

4. Prohibition Against Young People Serving Time in Adult Prisons: s. 76(2) YCJA

Bill C-10 would amend section 76(2) of the *YCJA* to provide that no young person under the age of 18 shall serve any portion of a custodial sentence in an adult facility. This welcome change is necessary given:

a) the risk of abuse youth face when housed with adult inmates;

b) the jeopardy that time in adult prisons can pose to the rehabilitation of young people given the lack of youth focused programming;

c) Canada's international law obligations pursuant to the *CRC*, and;

d) the need for the long term protection of society which is best achieved through successful rehabilitation of young offenders.

We understand however, that in some parts of Canada youth custody facilities are not available. This may be especially true in the north and remote parts of the provinces. If youth facilities are not available and young people are sent far away from their communities to serve custodial sentences, they are then at risk

of negative effects on their rehabilitation and reintegration. The government must ensure that there are local youth facilities across Canada to ensure that family visits are always practical and offender reintegration and rehabilitation are supported.

Recommendation 4: Section 76(2) should be enacted if the government provides support for locally accessible youth custody facilities.

AMENDMENTS PROPOSED BY BILLC-10 NOT SUPPORTED BY JFCY

5. Protection of the Public: s. 3(1)(a) YCJA

A significant change is proposed to the declaration of principle contained in section 3(1) of the *YCJA*. That section currently reads that "the youth criminal justice system is intended to prevent crime by addressing the circumstances underlying a young person's offending behaviour … in order to promote long term protection of the public."

Bill C-10 proposes to amend this to state that the youth criminal justice system is "intended to protect the public" by "holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person." JFCY submits that these changes are in effect redundant as s. 3(1) already includes the aims of "crime prevention" and "accountability".

Although, youth-oriented, rehabilitative language is preserved in the declaration of principle in Bill C-10, a change in emphasis away from prevention of crime and the promotion of the "long term protection of public" toward a focus on "protection of the public" through accountability, shifts the orientation of the *YCJA* from a rehabilitative crime prevention model to a punitive model of dealing with young offenders and will likely reduce the long term protection of the public. It proposes an abdication of our responsibility to support the pro-social development of children in order to ensure a truly safer society. The proposed changes are especially indefensible when youth crime is decreasing and public money could better enhance public safety in both the short and long term if it were spent to support the positive development of our young people rather than to increase punishment.

Recommendation 5: s. 3(1)(a) should not be amended as proposed by s. 168(1) of Bill C-10.

6. Denunciation and Deterrence as Sentencing Principles: s.38 (2) YCJA

Bill C-10 seeks to amend the sentencing provisions of the *YCJA* by allowing youth court 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."

Denunciation: s. 38(2)(f)(i)

Canada denounces conduct by making it a crime. It denounces the misconduct of a specific young person when the police lay charges and when a court makes a finding of guilt. Courts have the powers to impose appropriate sentences ranging from a reprimand to life imprisonment. It is unnecessary to add denunciation as a sentencing objective as it is implicit in the criminal justice process. The only legislative purpose can be to make all sentences harsher.

Deterrence: s. 38(2)(f)(ii)

Deterrence theory assumes that in considering whether to commit an offence, individual people estimate their likelihood of being caught and the expected punishment they would receive if this happens. As the Supreme Court of Canada noted in *R. v. B.W.P.; R. v. B.V.N.,* the omission of deterrence from the *YCJA* to date is not a mere oversight but rather an intentional recognition of the fact that it is a controversial theory.[8]

When specifically asked in the *Comprehensive Review Report* of the *YCJA*, fewer than 1% of participants in the cross country consultation supported the concept of deterrence for sentencing.[9] Academics advised that there has been no evidence in the last 40 years that deterrence as a sentencing principle affects adult behaviour and it is even less likely to be in any way effective for young people.

As was noted in the Cross Country Roundtable Report, "Deterrence assumes that a person has planned and considered the consequences. Adolescent brains are not fully developed and are less able to control impulses and more driven by the thrill of rewards. They are characteristically more short-sighted, oriented towards immediate gratification and less able to resist peer pressure than adults which is reflected in 3(c)(iii) of the Declaration of Principle."[10]

[8] [2006] 1 S.C.R. 941, 2006 SCC 27.
[9] *Supra* note 2 at page 5.
[10] *Supra* note 2 at page 5

To amend s. 38(2)(f) by adding deterrence as a sentencing principle is to attempt to legislate the neuroscience relating to adolescent brain development.[11] The proposal 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 whether or not to commit an offence.[12] This assumption does not have any evidentiary basis, and in fact runs contrary to social science evidence[13] and neuroscience. It substitutes wishful thinking for effective youth justice policy. If deterrence is added as a sentencing principle, the greatest impact will be on judges[14] who will be encouraged to impose longer, harsher sentences. Longer harsher sentences do not improve rehabilitation. As noted by Professor Bala in his submissions on Bill C-10, "for immature offenders [who are] unable to anticipate or appreciate consequences in the same way that adults do, it is particularly troubling that this principle would be grafted onto an otherwise progressive sentencing regime."[15]

Increasing levels of incarceration of young people will have a disproportionate effect on those who are most disadvantaged in our society. Aboriginal youth are already greatly overrepresented in custody and are incarcerated 2 times more often for administration of justice offences than their peers. They will be the most affected by introducing the principal of deterrence.[16]

Recommendation 6: Section 38(2)(f)(i) and (ii) should not be enacted as proposed by s.172 of Bill C-10.

7. Publication Bans: s. 75 YCJA

At present publication of a young person's identity is only allowed:

(a) when an adult sentence is imposed
(b) under section 110 which allows the judge to order publication temporarily (for example if a dangerous youth escapes and must be captured); or
(c) the young person asks for his or her identity to be published, under section 100(6)

[11] See e.g., Daniel P. Keating, "Cognitive and Brain Development" in Richard M. Learner and Laurence D. Steinberg, eds., Handbook of Adolescent Psychology, 2d ed. (New Jersey and Canada: John Wiley & Sons, 2004 at c. 3.
[12] 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.
[13] See United States Supreme Court decision *Roper v. Simmons*, 543 U.S. 551 (2005).
[14] Cesaroni & Bala, "Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges" (2008) 34 *Queens L.J.* 447-481.
[15] *Supra* note 1
[16] *Supra* note 3, at page 5.

Bill C-10 would expand these provisions to require that in the case of "violent offences" the *"court shall decide whether it is appropriate to make an order lifting the ban."* This amendment imposes an obligation on the court and counsel to visit the issue every time there is a finding of guilt for these types of offences.

In effect, this amendment would encourage a judge to consider publication of a young person's identity in relation to any and all "violent offences". Given the proposed breadth of that category, (as discussed below) this change would make publication possible for a very broad range of offences, including common assault between siblings and schoolyard fights. In our experience many young people are charged with proposed "violent offences", the substance of which are in the range of normal adolescent behaviour – for instance poking someone with a pencil in school (assault with a weapon), school yard fights (assault), pinching other kids rear ends (sexual assault). Further, it would not limit publication to repeat or habitual offenders. It would capture young people who made a foolish mistake and will never do so again – exactly the young people who are most easily rehabilitated, and for whom public humiliation most jeopardises that rehabilitation. Lifting the ban on the publication of young people's identities in this way undermines the original, evidence based purpose, which was to guard the identity and privacy of young people in order to support rehabilitation and reduce recidivism by avoiding the stigmatization that leads to repeat offending as a self-fulfilling prophecy. The benefit and significance of not publishing young people's identities is well established in the social science research in Canada and internationally. Further, non-publication of young people's identity is required to fulfill Canada's international obligations.

The youth justice principles of non-disclosure and rehabilitation are basic tenets of Canada's international law obligations. The CRC requires Canada to guarantee the child's right to have his or her privacy fully respected at all stages of the proceedings.[17] The United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* – the "*Beijing Rules*"[18] link this right to the harm caused by publicity and the process of labeling, as follows:

> 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 labeling.
> 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 labeling processes has provided evidence of the detrimental effects (of different kinds) resulting from the

[17] *CRC, supra*, note 2, at Article 40.
[18] U.N., G.A.. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, A/RES/40/33, November 29,1985.

> 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).[19]

This proposed amendment also ignores the Supreme Court of Canada's comments in relation to the effect of stigmatization and labelling of youth as discussed in the case of *R. v. B.D*[20]*.* The proposed amendment would increase the risk to public safety. There is no evidence of any positive or rehabilitative effect of publication. In fact, the evidence supports maintaining privacy in order to promote rehabilitation and public safety.

Recommendation 7: Section 75 of the *YCJA* should not be amended as proposed by s.185

Definition of "Serious" and "Violent" Offences: s. 2(1) YCJA

Bill C-10 proposes definitions for two new offence designations: "serious offences" and "violent offences" These new definitions expose too many youth to the risk of pre-trial detention and custodial sentences.

8. Serious Offence to be defined in YCJA

A "serious offence" is defined as an indictable offence for which the maximum punishment for an adult offender is five years or more. This proposed amendment would re-define an extensive list of offences in the *Criminal Code* as "serious" and would exclude only very few, minor offences.

For example this would include:

- fraud over $5000 (section 380(1)(a)) ;
- common assault (section 266(a), such as a school yard fight where both young people get charged);
- uttering threats (section 264.1);
- obstruct justice (section 139, such as lying to the police about one's age);
- theft over $5000 (section 334(a), such as taking the family car without permission);
- uttering a forged document (section 366-368, such as forging a parental note to a teacher);

[19] *Ibid*.
[20] *Supra* note 7, at paras 84-87.

- possession of a stolen credit card (section 342) and;
- public mischief (section 140);

all of which have a maximum penalty of five or ten years. When read with the proposed change to section 29 of the *YCJA* (pre-trial detention), young people charged with any of those offences would also be eligible for pre-trial detention, regardless of whether they had been in trouble before.

Recommendation 8: The new offence designation of a "serious offence" should not be enacted as proposed by s.167(3) of Bill C-10.

9. Violent Offence to be defined in YCJA

A "violent offence" would be defined as an offence which results in "bodily harm" and includes threats or attempts to commit such offences. "Bodily harm" is defined in the *Criminal Code* as harm or injury which is more than "merely transient or trifling in nature." [21]

Bill C-10 would codify the definition provided by the Supreme Court in the case of *R. v. C.D.; R. v. C.D.K.*[22] where the Court held that a "violent offence" is any offence where the youth "causes, attempts to cause, or threatens to cause bodily harm." This is laudable.

Bill C-10, however, further expands the definition of "violent offences" to include acts which "endangers the life or safety of another person by creating a substantial likelihood of causing bodily harm". This is an approach that was expressly rejected by the Supreme Court of Canada in the same case. If the conduct itself is not violent and does not result in bodily harm, conduct which causes a risk of bodily harm or endangerment would none the less be characterized as a "violent offence" under the Bill. An impulsive young person with a youthful, less developed brain who has no intent or awareness of the potential for bodily harm could be found guilty of a "violent offence" because the activity contained an inherent risk which the young person may have been incapable of seeing.

The Supreme Court specifically rejected such a broad definition of "violent offence" partially because 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

[21] Section 2 of the *Criminal Code of Canada.*
[22] [2005] 3 S.C.R. 668, 2005 SCC 78.

> *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.[23] [Emphasis added]

The Court found that to impose criminal sanctions for such "dangerous" conduct would have been a violation of section 11(d) of the *Charter*. This would be even more true where the young person's act, while dangerous, had no intention of harming anyone. Legislating this expanded definition of "violent" offence would demonstrate a reckless disregard for the guidance provided by the Supreme Court of Canada and invites costly *Charter* litigation.

Recommendation 9: the definition of "violent offence" should not be included in s.2(1) of the YCJA as proposed by s.167(3) of Bill C-10.

10. Mandatory Police Records for Extra Judicial Measures: s.115(1.1) YCJA

Bill C-10 proposes to amend section 115 of the *YCJA* to require police forces to keep a record of any extrajudicial measures that they use to deal with a young person.

The use of extra-judicial measures is not new. Police have always had the power to "warn" young and old people alike and documentation of such informal encounters with the police have always been in their professional discretion.

Under section 115 police have the ability to keep records of EJM, should they decide that it is appropriate. These records are subject to the privacy principles of the *YCJA* as well as provincial privacy legislation and records provisions.

This proposal may have a chilling effect on the police if it is necessary to keep a record of each and every time EJM is considered appropriate. It assumes that police do not know how to exercise their discretion properly. Further, records of EJM are records of mere allegations that have never been tested in Court and for which a young person has not accepted responsibility.

While JFCY is opposed to an amendment of section 115, if this takes place, section 119 must also be amended to include an appropriate period of access for

[23] *Ibid*., at para 75.

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. The access period for a record of EJM should be less than two months, which is the access period for a judicial reprimand which includes a finding of guilt.

Recommendation 10: Section 115(1.1) should not be enacted as proposed by s.190 of Bill C-10. Should the proposed amendment be enacted, section 119 should also be amended to include a mandatory sealing of all EJM records, no later than two months after the completion of EJM.

11. Custodial Sentences for Youth: s. 39(1)(c) YCJA

The proposed amendments to section 39(1)(c) expand the circumstances in which a judge can order a custodial sentence by allowing a judge to impose a custodial sentence 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 either extrajudicial sanctions ("EJS") or of findings of guilt or of both …".

It is important to remember that offences under s.39(1)(c) are by definition non-violent and non-exceptional. Currently, 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 of custody. Section 39(1)(b) permits a custodial sentence only as a last resort where a young person has failed to comply with non-custodial sentences, and in the current version of 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.
The phrase "a pattern of extrajudicial sanctions" is added to the language of 39(1)(c), equating a pattern of EJS with a pattern of findings of guilt.
The *Beijing Rules* provide:

> Rule 19.1 The placement of a juvenile in an institution <u>shall always be a disposition of last resort and for the minimum necessary period. [Emphasis added]</u>
> 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.[24]

Changing section 39(1)(c) to make further specific reference to extrajudicial sanctions is contrary to the intent of EJS programs, and is inappropriate since youth may agree to participate in EJS without having had meaningful access to legal advice. This is particularly dangerous for young people who do not understand the significant consequences of having a youth record and would not understand the possible future consequences of accepting EJS. They may accept responsibility for their actions (as required in order to participate in an EJS) for reasons other than their own legal culpability: to protect a friend or get the matter over with. The concern is heightened since EJS is seen by young people as an attractive alternative to a trial with evidentiary issues, challenges to police conduct, cross-examinations of vulnerable witnesses etc. The current promise of EJS is that it takes the matter out of the criminal court process; the proposed amendment resiles from that promise.

Recommendation 11: Section 39(1)(c) should not be amended as proposed by s.173 of Bill C-10.

12. Pre-Trial Detention, Serious Offences & Pattern of Offences: s. 29(2) YCJA

Pre-trial detention is the incarceration of people who are presumed to be innocent and who may never be found guilty. In addition, delays in our justice system can result in young people spending more time in custody prior to trial than they would spend following a sentence. For example, it can take months for disclosure to be provided by the police and crown attorney's office in Toronto. The result is that young people in detention may plead guilty to offences for which they are not or could never be found guilty. Increasing pre-trial detention is likely to cause miscarriages of justice.

It is, therefore, a positive proposal to reduce the use of pre-trial detention for administration of justice offences such as breach of curfew or skipping school or speaking to a co-accused. However, as has been noted, Bill C-10 proposes to vastly expand the offences for which pretrial detention is available.

Bill C-10 amends section 29 of the *YCJA* to limit pre-trial detention to cases where a youth is charged with

- a "serious offence"
- an offence other than a serious offence, if there is a history that indicates a pattern of either outstanding charges or findings of guilt.

[24] *Supra*, note 18, at Rule 19.1.

A "serious offence" is defined as an indictable offence for which the maximum punishment for an adult is five years or more and can include offences which do not have the air of seriousness to them, such as taking the family car without permission. This definition does limit circumstances in which pre-trial detention can occur, and in particular limits detention in the case of administrative offences such as breach of recognizance or breach of probation. However, this limit on the use of pre-trial detention may be lost if the young person is facing a number of administration of justice charges that are seen as a pattern.

It is also of concern that this s. 29(1)(a)(ii) allows for the pre-trial detention of youth who may be facing a number of minor charges, who do not pose a risk to the community, and who would not receive a custodial sentence if found guilty.

Despite the hope that the YCJA would reduce pre-trial detention, in fact it has not diminished in proportion to the reduction in custodial sentences[25]. If the intent of the proposed amendment is to reduce pre-trial custody, it will not have the desired effect (because of the definition of serious offence) and is unnecessary. A report commissioned by the Department of Justice in 2004 entitled *Pre-trial Detention Under the Young Offenders Act: A Study of Urban Courts* ("Pre-Trial Detention Report"), shows that pre-trial detention is not a useful tool to reduce recidivism rates among young offenders.[26] 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 defendants who have not been found guilty 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 detention than adults. Many young people plead guilty to a lesser charge or to any charge in which the sentence is likely to be time served. This may be without the benefit of counsel beyond a brief discussion with duty counsel in order to gain release from pre-trial detention.

Recommendation 12: The proposed changes to section 29 should not be enacted as proposed by s.169 of Bill C-10.

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

13. Mandatory Crown Consideration of Adult Sentences: s. 64(1.1) YCJA

Bill C-10 adds the new section 64(1.1) to the *YCJA* requiring Crown attorneys to consider whether it would be appropriate to apply for an adult sentence in any case where there has been the commission of a "violent offence", which, as has been described above, is defined too broadly.

If the Crown decides not to apply for an adult sentence, then the Crown must advise the Court that it is not doing so. This suggests a mistrust of Crown attorneys and their ability to properly exercise prosecutorial discretion in cases of violent offences. It also suggests that violence takes away the presumption of reduced blameworthiness. Parents of biting toddlers know that reduced moral blameworthiness and the effect of immaturity on behavior is not limited to non-violent acts. Section 64(1.1) may lead to questioning Crown attorneys for the reasons for their decisions, again undermining the constitutionally protected notion of prosecutorial discretion.

Recommendation 13: Section 64(1.1) proposed amendments should not be enacted as proposed by s.176(1) of Bill C-10.

CONCLUSION

The government committed tremendous resources and time to consult with Canadians who work with the *Youth Criminal Justice Act* (YCJA) across the country, and produced the *Comprehensive Review of the Youth Criminal Justice Act: Cross Country Roundtable Report*. The government selected the participants who included police officers (the largest group), prosecutors and defense counsel, probation officers, criminologists, academics and NGOs such as the John Howard Society and Elizabeth Fry Society. The government was advised that the legislation is working exceptionally well. Those who have experience and research-based knowledge of the criminal justice system and young people seek no changes to the YCJA other than to legislate the decisions of the Supreme Court of Canada. They urged reductions in systemic delays and more support for diversionary and rehabilitative youth programs. They saw implementation improvements that could benefit all Canadians. But overwhelmingly, even when asked repeatedly, they did not seek increased incarceration or detention for more young people. Those invited by the government to provide it with the best available information about the effect of the YCJA and possible amendments to improve Canadian safety did not ask for the amendments now proposed by the same government. Relying on their expertise and experience with the legislation, those with knowledge asked the government to address the lack of programs in parts of the country, and to remedy the increase in child poverty and unemployment. Based on solid research and evidence, expert stakeholders asked Canada to invest in the long term protection of the public. They advised the government that harsher sentences would likely increase recidivism, and therefore, reduce public safety.

Justice for Children and Youth submits that public money be spent to improve outcomes for Canada's young people, not to increase incarceration for youth who will inevitably be released to live among us. We ask that tax dollars be spent in ways that evidence shows are effective. We ask that government accountability ensure that public money is not spent on pandering to fear-mongers. True governmental leadership includes educating the public about the continuing reduction in youth crime and the effectiveness of the YCJA. Justice for Children and Youth asks its legislators to lead with truth, not cater to the needlessly fearful.

SUMMARY OF RECOMMENDATIONS

Recommendation 1: s. 3(1(b) should be enacted as proposed in s. 168(2)(b) of Bill C-10.

Recommendation 2: Section 72(1) of the YCJA should be enacted as proposed in s. 183(1) of Bill C-10 with the following amendment:

"The youth justice court shall order that an adult sentence be imposed if it is satisfied beyond a reasonable doubt that …"

Recommendation 3: the new definition of "serious violent offence" should be enacted as proposed in s. 167(2) of Bill C-10.

Recommendation 4: Section 76(2) should be enacted if the government provides support for locally accessible youth custody facilities.

Recommendation 5: s. 3(1)(a) should not be amended as proposed by s. 168(1) of Bill C-10.

Recommendation 6: Section 38(2)(f)(i) and (ii) should not be enacted as proposed by s.172 of Bill C-10.

Recommendation 7: Section 75 of the *YCJA* should not be amended as proposed by s.185

Recommendation 8: The new offence designation of a "serious offence" should not be enacted as proposed by s.167(3) of Bill C-10.

Recommendation 9: the definition of "violent offence" should not be included in s.2(1) of the YCJA as proposed by s.167(3) of Bill C-10.

Recommendation 10: Section 115(1.1) should not be enacted as proposed by s.190 of Bill C-10. Should the proposed amendment be enacted, section 119 should also be amended to include a mandatory sealing of all EJM records, no later than two months after the completion of EJM.

Recommendation 11: Section 39(1)(c) should not be amended as proposed by s.173 of Bill C-10.

Recommendation 12: The proposed changes to section 29 should not be enacted as proposed by s.169 of Bill C-10.

Recommendation 13: Section 64(1.1) proposed amendments should not be enacted as proposed by s.176(1) of Bill C-10.