Justice for Children and Youth Submissions to the
Standing Committee on Social Policy on **Bill 103,**
An Act to amend the Child and Family Services Act and to make amendments to other Acts,
December 1, 2008

Justice for Children and Youth (JFCY) is a Legal Aid Ontario 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 child welfare, criminal law, family law, constitutional law, human rights, education law, mental health law, health law and income maintenance. .

JFCY prepares policy positions on issues relating to the legal practice of the clinic based on the needs of and experiences of its clients. 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 applauds legislation which brings all children under the 18 years of age who are in custodial and detention facilities under the Ministry of Children. However, we do believe there are areas of serious concern in the Bill where issues have overlooked, or there may be unintended consequences. Accordingly, we caution that if changes are not made, the *CFSA* as amended by *Bill 103* will be open to constitutional challenges.

In making our recommendations, we were guided by the following principles:

All children and youth have the right to be valued and to be treated with respect and dignity. Under the *Convention on the Rights of the* Child which Canada ratified and Ontario signed on to, States Parties must recognize

> ***It is the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*** **[Article 40, UN *Convention on the Rights of the Child*]**
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> ***Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.*** **[Article 37, UN *Convention on the Rights of the Child*]**

These principles are repeated in many other international instruments pertaining to youth justice. Rules and guidelines adopted by the United Nations General Assembly state that the best

interests of a young person should be of paramount importance,[1] that juveniles (defined as every person under the age of 18) should be detained separately from adults,[2]and most comprehensively, that nations develop a juvenile justice system that emphasizes the well-being of the juvenile and that conducts proceedings in a manner "conducive to the best interests of the juvenile" and in "an atmosphere of understanding".[3]

Our overarching concern is that the Ministry of Children has in some areas substantively incorporated principles from the adult system, rather than ensuring distinct and separate treatment for children and youth. Canadian legislation, common law and international law consistently make distinctions in the treatment and culpability of children versus adults based on capacity and responsibility. The *United Nations Convention on the Rights of the Child (UNCRC)*, together with domestic legislation, the *Charter*, and the decision of the Supreme Court of Canada in *R. v. D.B.* constitute legal recognition of the principle of separation of young persons and adults in the criminal justice system from a human rights and constitutional perspective. Further, under the proposed amendments young people have not only lost rights, but also protections.

Specific Concerns

1. First of all a simple drafting issue, Section 1, 5 - references need to be to *Youth Criminal Justice Act*, the *Young Offenders Act* was replaced on April 1, 2003.

2. **Section 2 (3.1) (a)-Appointing Peace Officers** the Minister with a stroke of the pen could make any employee of the Ministry, whether in a group home or a custody facility or a child serving agency, a peace officer. This would give wide sweeping powers to staff- (see Annex A Powers of Police Officers under Criminal code) Further, it sends the wrong message to those who work with youth, incorporating the mentality of an adult correctional worker rather than ensuring that all residential placements for children and youth, including those within the youth justice system, be staffed by well-trained personnel who are committed to children and youth and the principles of respecting the independent voice of youth and acting in their best interests. This section could, if not now, then by some future government lead to any and perhaps all youth workers, in any facility regardless of training, having the widespread powers of peace officers.

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[1] *United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)*, adopted and proclaimed 14 December, 1990, art. 46.
[2] *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, adopted 14 December 1990, arts. 11(a) and 29.
[3] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, adopted 29 November 1985, arts. 1.4 and 14.2 [*The Beijing Rules*].

The powers of a peace officer are extremely broad and include the power to arrest and carry restricted arms. There is already a concern that young people in group homes are overcharged; this concern is shared by judges, lawyers and youth serving agencies. Often disputes between young persons ends in charges when a group home worker calls police in circumstances where a youth not in care would not otherwise be charged. This is also a problem in youth custody, and in secure treatment facilities. Many young people, in particular those with mental health issues, are charged for the very behaviours for which they are receiving treatment. While widely increasing the powers of those who work with young people, the Bill fails to address the need to ensure that young people in group homes and custody facilities are appropriately assessed and treated.

Recommendation: The Ministry should ensure that all staff working with young people, including casual part-time workers be dedicated exclusively to working in youth facilities, receive training in accordance with the Meffe Jury Recommendations, and should not be given expanded powers of peace officers.

3. **Section 5 (1) Conditions for Secure Detention** amending section 93(2) is great cause for concern. It incorporates language from the adult system and runs contrary to both the general principals the principals for detention of the *Youth Criminal Justice Act* and treats youthful offenders like adults, which has already been declared unconstitutional by the Supreme Court of Canada. ***R. v. D.B.*, 2008 SCC 25 (2008).** This amendment removes the criteria that it be **necessary ….to ensure the young person's attendance in court or for public safety and only need be necessary on one of the following grounds.** Further, Sections 5(3) iii is an unnecessary and too vague category. Who and what does "for the safety or security within a place of temporary detention refer to?

Custody, whether pre or post sentencing is highly disruptive and traumatic in the lives of young people. In custody they suffer not only disruptions in education and family life, but also social exclusion, high rates of depression, and peer on peer violence.[4] These disruptions also decrease the abilities of young people to finish school and ultimately obtain useful employment. Pre-trial detention constitutes a taking of liberty which inflicts punishment on unconvicted defendants and can also lead to other perversions of justice. For example, it creates incentives for false guilty pleas, in particular with young people who are more likely to plead guilty in pre-trial detention than adults.

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 "Report"), shows that pre-trial detention is not an appropriate tool to reduce recidivism rates among young offenders.[5] The Report confirms that pre-trial detention does nothing to reduce recidivism

[4] Petrosino, Turpin-Petrosino, & Finkenauer 2000. *Well meaning programs can be harmful! Lessons from Scared Straight. Crime & Juvenile Delinquency,* 46(3), 354-79. ; Ontario Office of the Child & Family Advocate, 1998. p.9 ; Peterson-Badali & Koegl, 2001 *Juvenile's Experience of Incarceration: The Role of Correctional Staff in Peer Violence. Journal of Criminal Justice,* 29(1), 1-9.

[5]. Moyer, S., *Pre-trial Detention under the Young Offenders Act: A Study of Urban Courts* (Department of Justice Canada, 2005).

rates in young offenders and may even serve to increase the likelihood of further encounters with the justice system.

The *Youth Criminal Justice ss. 29 (2); 38(e) & 39* requires **the least restrictive means** when detaining young people**.** No detention, then open detention, must first be considered before secure detention. These principles hold true for sentences where a young person has been found guilty, as well as detention where there has been no finding of guilt. This is consistent with international law which requires the placement of a juvenile in an institution shall always be a disposition of last resort, in the least restrictive conditions possible while ensuring safety, and for the minimum necessary period.[6]

Recommendation: The grounds for secure detention must be consistent with the principles of the YCJA which requires the least restrictive means balanced with public safety and to ensure the young person attends at court.

4. **Section 8- Privacy.** Young people's right to privacy with respect to communications are seriously violated under the proposed amendments. Furthermore, the violations with respect to privacy extend not only to young people in custody, but also to those in care. This Bill would give the right to any service provider to open the mail of the child regardless of whether they have cause to do so, and not necessarily in the presence of, or with the knowledge of the child or young person. This violation of privacy is not consistent with the promotion of the child's sense of dignity and worth, nor does it reinforce the child or young person's respect for the basic rights and fundamental freedoms of our country.

   Further, the exemptions for solicitor client privilege allows the mail to be opened but not "examined or read". This is not sufficient protection for solicitor client privilege. **Any communication by a lawyer to a client is not only protected under common law, but is a constituent part of section 7 rights under the *Charter of Rights and Freedom,*[7] according to the Supreme Court of Canada.** Further 8 (c) of the Bill sates that the service provider can view the mail from a solicitor, and then make a determination as to whether the communication from the solicitor is protected by solicitor/client privilege. **Service providers are not in a legal or professional position to make this determination, only a court can make this determination. The solicitor client relationship is the only fully protected privilege in this country. This section is in violation of International law as well as the *Charter*.** Further, absolute privacy should also apply to any communication from and to the Child Advocate in order to ensure that

[6] *Ibid*. at rule 19.1. . 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

[7] In R. v. McClure [2001] 1 S.C.R. 445, the Court found that solicitor-client privilege was a principle of fundamental justice and so is protected under section 7 of the Charter.

young people can freely and without concerns of retribution by staff, avail themselves of the services of the Child Advocate.

Recommendation: When staff opens mail, the young people should have a right to know why their privacy is being violated; there must be a justifiable reason to violate privacy; and the young person should be present when written communications are being opened. Any communication from a lawyer to a client or vice versa must not be opened or observed. The right to solicitor client privilege is an absolute right. No service provider is in a position to determine solicitor/client privilege. The communication between the child and the Child Advocate should also be subject to absolute privacy.

5. **Section 9-Limitations on Rights-103.1(1)** we have concerns that it is too vague with respect to what constitutes an emergency and as to whether the child still maintains the right to communicate with their lawyer, and the Child Advocate.

6. **S. 103.1 12 (9)-Secure Isolation.** It is unfathomable that 16 & 17 year olds are exempted from safeguards and protections allotted those up to the age of 15 years with respect with secure isolation. If the Bill is not amended those over 15 years will not be continuously monitored by a responsible person when in isolation, nor are there limits on the amount of time in isolation. This is deeply concerning with respect to the safety of young persons in care and custody many of whom have mental health problems. As the David Meffe and James Lonnee tragedies have shown young people in isolation have an increased risk of suicide. David Meffe who was 16 when he hanged himself while in isolation, was not adequately observed. There is no justification in setting up circumstances where this is more likely to occur. This amendment contradicts the Meffe Inquest recommendations, where under recommendation #17 the jury stated noting that the standards under the current *Child and Family Services Act* only applied to children under the age of 16 noted:

> **Polices and procedures for the Secure Observation rooms are to be based on the standards for the use of secure isolation as contained in the Child and Family Services Act. This should apply to ALL youth in detention or custody regardless of age. (**emphasis NOT added…it appears as under the recommendations.)

The safety of children and youth must be ensured: injury or death should not occur in a system accountable to and for children and youth. All children and youth have a right to a safe physical and emotional environment under International law.

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardians(s) or an other person who has the care of the child. **[Article 19, UN *Convention on the Rights of the Child*]**

Children of all ages need to be closely monitored and other means of less restrictive restraint must be used when possible. This Bill sets up two classes of young people with different rights in the same institutions. This amendment is open to a constitutional challenge, and also leaves the government very vulnerable to civil suits should another tragedy occur while a young person is in secure isolation without adequate protections.

Recommendation: All children and youth under 18 years must have the same protections, safeguards and rights with respect to Secure Isolation.

We urge the Minister to take into account our submissions, and to ensure all children in the province of Ontario are afforded the rights and protections guaranteed under domestic and international law.

Annex A

POWERS, AUTHORITY, PROTECTION AND PRIVILEGES OF PEACE OFFICERS

The following summary is intended as information for the Service personnel whom the Commissioner has designated as peace officers under section 10 of the Corrections and Conditional Release Act. It is not an exhaustive enumeration of the Criminal Code provisions dealing with peace officers, but rather focuses on those elements that would have particular relevance to the correctional setting. Furthermore, the aim has been to provide an "overview" and not an extensive legal analysis of the provisions in question.

Use of Force

- A peace officer is allowed to use force when carrying out an arrest, with or without warrant, to prevent someone from escaping. [subs. 25(4) of the Criminal Code]
- A peace officer may use as much force as he believes necessary in suppressing a riot. [s. 32 of the Criminal Code]
- A general power is given to peace officers to use the necessary force in doing what they are required or authorized to do; the possibility of using force is therefore open to a peace officer performing his duties, even if the particular provision of the Code under which he is acting does not give him such power. [subs. 25(1)b) of the Criminal Code]

The power of arrest

- The Code allows any person to arrest without a warrant a person whom he finds committing an indictable offence, or a person who he believes to have committed such offence and to be escaping from lawful arrest. However, a peace officer, in addition to someone he finds committing and indictable offence, may arrest someone who he believes that a warrant of committal or arrest is in force in the territorial jurisdiction where he finds the person. His general powers respecting arrests are therefore much

greater than those of ordinary citizens even though such powers are subject to certain exceptions. [s. 495 of the Criminal Code]
- A peace officer may also arrest without warrant an accused who he believes has violated or is about to violate a summons, appearance notice promise to appear, or who has committed an indictable offence after the coming into force of any such order or promise. [subs. 524(2) of the Criminal Code]
- A peace officer is justified in arresting any person whom he finds committing a breach of the peace or who is about to join or renew the breach of the peace. He is also justified in receiving into custody any person given into his charge as having been involved in a breach of the peace. [s. 31 of the Criminal Code]

The Criminal Code provides for the arresting powers of peace officers in many other situations; however, the above-mentioned are those which would more likely be of use in the present context.

Firearms, restricted and prohibited weapons, ammunitions

- Section 92 of the Criminal Code provides that designated classes of peace officers are not guilty of any Criminal Code offence regarding restricted and prohibited weapons by reason only that they have such weapons in their possession for the purpose of their duties or employment. As subsection 17(a) of the Restricted Weapons and Firearms Regulations designates prison officers as a "class" for these purposes, they benefit from the Criminal Code protection in this respect. [s. 92 of the Criminal Code]
- If a peace officer believes that an offence respecting firearms, restricted or prohibited weapons, or ammunitions is or has been committed, he may search without warrant a person, vehicle or place (except a dwelling house) and seize such objects in relation to which such offence has been or is being committed. [s. 101 of the Criminal Code]
- A peace officer may further seize without warrant a prohibited weapon found in the possession of someone not authorized to have such weapon, a restricted weapon if the person having it cannot produce a registration or permit for the possession of such weapon, or any firearm found in the possession of someone under sixteen years old who cannot produce the permit under which he may lawfully possess a firearm. [s. 102 of the Criminal Code]