Justice for Children and Youth's Position re:
Bill C-25: An Act to Amend the Youth Criminal Justice Act
and on the Review of the *YCJA*

Justice for Children and Youth ("JFCY") offers the following position and recommendations regarding Bill C-25 and its proposed amendments to the sentencing and pre-trial detention provisions of the *Youth Criminal Justice Act* ("*YCJA*") and any proposed review of the *YCJA*.

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 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. 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.

Bill C-25: History and Overview

On November 19, 2007 the Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada, introduced Bill C-25, an *Act to Amend the Youth Criminal Justice Act (YCJA).* The two main provisions in the Bill will amend the *YCJA* to: (1) allow courts to consider deterrence and denunciation as objectives of youth sentences: and (2) make it easier to detain youth in custody prior to trials if a judge or justice believes they potentially pose a risk to public safety. The latter proposal was put forth in response to Nova Scotia's Nunn Commission of Inquiry report, which expressed concern that pre-trial detention restrictions in the *YCJA* were too onerous.[1]

On October 2007, Minister Rob Nicholson announced a review of the *YCJA* would be conducted in 2008.

[1] 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>.

Overview of JFCY's Position

JFCY believes the proposed amendments in Bill C-25 to be unnecessary and ill-advised. Without minimizing the underlying concern about youth crime and the youth criminal justice system in Canada, JFCY believes this legislation to be reactive and not evidence based, misdirecting energy and resources away from developing effective services for marginalized and troubled youth which have been shown to be the most effective means to reduce youth crime, and therefore protect the public. Increasing custodial sentences may undermine not only Parliament's rehabilitative objectives, but threatens public safety in the long term. Custodial sentences are 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.[2] These disruptions also decrease the abilities of young people to finish school and obtain useful employment.

Studies also suggest incarceration may actually increases rates of recidivism rather than deterring future criminal activity. Even for the most serious offenders, late 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.[3] 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.

Furthermore, the core penal principle of proportionality mandates that young people are treated separately from adults. Proportionality mandates that fair criminal punishment must not only be measured by the amount of harm caused, but also the blameworthiness of the offender. The *YCJA* holds young people accountable for their criminal acts, but requires mitigation for the young person based on the principle of proportionality. Mitigation is founded upon the internal impairments in the actor's decision-making capabilities; the reasonableness of the person's actions in the circumstances; and the atypical behaviour of the actor.[4] For young people mitigation incorporates the following widely accepted tenets:

- Children and youth children 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 coercive circumstances;

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[2] 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.

[3] 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.*

[4] 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)(

- 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.

A youth criminal system that encompasses the concept of mitigation is more consistent with the overall criminal law structure. 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[5]; 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.

Any proposed changes to the legislation must be based on evidence that considers the nature and circumstances of young people, and the demonstrated effectiveness of a proposed change, rather than uninformed fears. The Canadian Supreme Court and the United States Supreme Court, based on undisputed expert evidence, have both recognized that adolescents, due to cognitive and psycho-social immaturity, make criminal choices that are less culpable than those of adults, and that this principle is a constitutional imperative. Therefore, any regime must be based on mitigation by reason of youth to be compatible with the bedrock principle of proportionality.

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. [6] The *Charter,* through the "*Oakes"*[7] 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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[5] Alexia Davis, *Adolescent Development and Its Effect on Juvenile Justice Policy,* (2005)

[6] *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..,

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

Recommendations

1. There is no need for a comprehensive review of the *YCJA.* There is wide-ranging support from well informed parties including legal professionals, experts and community members that the *YCJA* is working well.

2. 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.

3. In all circumstances and for all purposes there must be a separate youth criminal justice system which recognizes their developmental stage. In no circumstance should young people have fewer protections than adults.

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

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

6. 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,

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

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

Denunciation and Deterrence as Sentencing Objectives

The primary objective of the *YCJA* is the rehabilitation of youthful offenders in order to ensure the long-term protection of the public. The *YCJA* is not simply an amendment to the *YOA*, but is a replacement significantly different from the *YOA*. Specifically, there has been an express shift from previous considerations of deterrence and denunciation to 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.

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.[8]

When introduced five years ago, one of the main objectives of the *YCJA* was to recognize that youth should not be treated the same as adults within the criminal justice system, and that harsher penalties do not reduce recidivism or help to rehabilitate youth. To that end, the *YCJA* specifically states in section 38(2) (d) that "all reasonable alternatives to custody should be considered […]" and that a sentence should "be the least restrictive sentence that is consistent with the overall goal of youth sentencing." Bill C-25 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." In so doing, sentences would inevitably be harsher and not proportional to the circumstances of the actual offence.

Canadian legislation and common law consistently make distinctions in the treatment and culpability of children versus adults based on capacity and responsibility. . Most recently the Supreme Court[9] 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.

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. It 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.[10] This assumption does not have any evidentiary basis, and in fact runs contrary to prevailing social science evidence and the role of impulse control.[11]

At 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.

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

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[8] *YCJA*. Preamble.
[9] *R. v. D.B.* 2008 S.C.C. 25.
[10] 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.
[11] For a full discussion see United States Supreme Court decision *Roper v. Simmons* 543 U.S. 551 (2005).

sentences, and s. 39(1)(c) where a young person has complied with sentences but has demonstrated that rehabilitation is not being achieved by continuing to commit serious offences.

This statutory reluctance to impose custody for young people charged with non-violent, non-exceptional offences who may benefit from rehabilitation in the community reflects the evidence that custodial dispositions impede rather than further rehabilitation. Research has shown that imposing short periods of custody (a "short sharp shock") on offenders who had never been sentenced by the court before resulted in an increase in recidivism rates compared with those who had not been incarcerated and offered community service[12]. Further, while there is little data on the long-term psychological consequences of incarceration, there is evidence of the negative long-term developmental effects, in particular dropping out of school, job instability in adulthood and marital instability.[13]

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."[14] 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.[15] 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, which involves self-control and reasoning.[16] While such a cognitive shortcoming should not excuse antisocial and criminal behaviour amongst youth, it does become clear that the principles of sentencing when dealing with young offenders should be different than those dealing with adult offenders.

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 are rarely met; thus, using deterrence and denunciation to increase the level of punishment as a deterrent to criminal behaviour is at best ineffective, and likely counter-productive.

Further, 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

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[12] Killias, Aebi, & Ribeaud (2000). *Does community service rehabilitate better than short-term imprisonment? Results of a Controlled Experiment*. Howard Journal of Criminal Justice, 39(1), 40-57.
[13] Anthony N. Doob & Carla Cessaroni, *Responding to Youth Crime in Canada*, (Toronto: University of Toronto Press, 2004) at 44-45, 228-229 and at 236-239.
[14] 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>.
[15] 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.
[16] Nunn Commission, p. 155.

offence"[17]. The legal principle of proportionality mandates that the State's response to an offender's crime must be measured. Proportionality is of particular importance when responding to youthful offenders many of whom have complex needs. It allows the state to respond in a meaningful and effective manner.

Proposed Amendments to Pre-Trial Detention in the *YCJA*

It is JFCY's position that the proposed amendments respecting pre-trial detentions will not have their desired effect, and that the impetus for such an initiative is ill-informed and unnecessary. Further, despite public perception and statements to the media, pre-trial detention has not been reduced as expected under the *YCJA*. [18]

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. Part of any analysis of a case involves assessing evidence of a defendant's conduct, and comparing that evidence with the resulting criminal charges. Many young people will plead guilty to a lesser charge or for any charge in which the sentence is likely to be time served, without the benefit of counsel beyond a brief discussion with duty counsel in order to gain release from pre-trial detention. This practice undermines the notion of true accountability, as well as the criminal justice system itself. Furthermore, it is not uncommon for police to "over-charge" a young person thus creating, intentionally or not, leverage for a guilty plea to a lesser charge. Studies have also shown that detained defendants are more likely to be convicted and sentenced to confinement upon conviction than their released counterparts. [19]

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.[20] 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.

Presently, a presumption against pre-trial detention exists, with three exceptions under the *YCJA*. However, this is a rebuttable presumption, and allows the judge or justice to consider pending charges or conduct that endangers life when determining whether a young person should be detained.

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[17] *Section 38 2(c)t,*

[18] Statistics Canada, "Youth Correction Services Admissions to Provincial & Territorial Programs" Remand 2000-2005.

[19] http://law.jrank.org/pages/558/Bail-Liberty-decisions-based-on-prediction-due-process-issues.html">Bail - Liberty Decisions Based On Prediction: Due Process Issues

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

With the introduction of Bill C-25, the federal government proposes to 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 new Bill would 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.

Expanded Grounds for Pre-trial Detention:

1. A substantial Likelihood of Serious Bodily Harm

Amongst 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,"[21] 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, so too must the *YCJA*.

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

> "…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.[22]

This proposed amendment not only runs contrary to the fundamental principle of innocence by holding young people accountable for acts they have not done. It would also require the court to engage in a fact finding mission to explore the hypothetical.

2. Failing to Comply with Conditions of Release

Under the previous *Young Offenders Act,* almost 60 percent of accused youth who had judicial interim release hearings were released on bail, almost always with conditions. Among those released on bail, 40 percent were charged with fail to comply (FTC) with a release condition.[23] A 2003 study found that failing to keep the peace was the most common FTC followed by failure to "obey the rules and discipline of the home or approved facility" ,followed by "reside at an address approved by a youth worker" and "report to a youth worker as required by the court".[24] It can be expected that adding this condition will increase the number of youth in pre-trial detention to the levels that existed under the *YOA* for "administration of justice" offences. At that time 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, much less incarcerating someone for that conduct.

Further, 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 public safety is not an issue, and where those young people would not face custody for the underlying offence. Those most likely to not comply are youth in care, and those in unstable and abusive homes where following the rules engages more complex underlying social issues. Furthermore, young people may agree to 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. If this

[22] *Ibid*, at para. 74,75.
[23] *Pre-Trial Detention Under the Young Offenders Act: A Study of Urban Courts.* Department of Justice.
[24] Pulis, J. (2003). *A critical analysis of probation for young offenders in Canada*. Unpublished MA thesis, University of Guelph. Guelph, Ontario, Canada.

amendment is passed we can expect a return to much higher rates of detention and we may also expect the corresponding increase in suicides of children behind bars, and increasing pressure on the youth justice system.

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.

This section runs counter to the fundamental principle that we cannot detain 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, and would presumably not stand up to scrutiny under the *Charter.*

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.[25] 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[26]. 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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[25] *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

[26] *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.

Separate Youth Criminal Justice System

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.

in declaring s. 72(2) unconstitutional to the extent that placed the onus on the young person to convince the youth justice court that he or she should be exempted from the presumptive adult sentence, the Supreme Court found it was not in accordance with the *Charter* principle of fundamental justice, and it could not be justified under s.1. Similarly, the *Charter* requires that the Crown must bear the burden of establishing those factors that yield the publication of identity and a more severe penalty for an offender. Stigmatizing and labelling of a young person that can result from publicizing his or her identity compromises the psychological security of that young person, and impedes rehabilitation.

Once 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."[27] We look to international law as evidence of the principles of fundamental justice.[28] In considering the content of the phrase "in accordance with principles of fundamental justice" in *Re B.C. Motor Vehicle Act*, Lamer J. wrote at p. 512:

> ... they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice...[29]

As signatory to and proponent of the *UNCRC*, Canada has undertaken to provide special protective treatment of children based on their vulnerability. The Preamble to the

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[27] *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.
[28] *Suresh v.Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 60.
[29] *Re B.C. Motor Vehicle Reference* [1985] 2 S.C.R. at 512.

UNCRC states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection." Article 3 provides that in all actions concerning children by courts of law, the "best interests of the child shall be a primary consideration**."** *This is the only consideration that is characterized as primary.*

Article 40 of the *UNCRC* requires State Parties to treat children who have infringed the penal law in a manner consistent with the child's age and the desirability of promoting the child's reintegration and assumption of a constructive role in society, in respect of dispositions or sentencing. In other words, rehabilitation is at the "heart of the legislative and judicial intervention with young persons."[30]

States Parties recognize 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.[31]

Canada is also a signatory to the United Nations *International Covenant on Civil and Political Rights* (the "*ICCPR*"). Article 10 of the *ICCPR* requires juvenile offenders to be accorded treatment appropriate to their age and Article 14 requires that procedures take into account their age and the desirability of promoting their rehabilitation.

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,[32] that juveniles (defined as every person under the age of 18) should be detained separately from adults,[33]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".[34]

Furthermore, international human rights instruments raise concerns about the risks of longer periods of incarceration for youth as opposed to adults 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:

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[30] *Reference re: Bill C-7 respecting the criminal justice system for young persons,* [2003] Q.J. No. 2850, (C.A.); 175 C.C.C. (3d) 321 (Que. C.A.) at para. 215 [*Reference re: Bill C-7*].
[31] *Convention on the Rights of the Child,* Can. T.S. 1992 No. 3, Art. 40 [*UNCRC*].
[32] *United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines),* adopted and proclaimed 14 December, 1990, art. 46.
[33] *United Nations Rules for the Protection of Juveniles Deprived of their Liberty,* adopted 14 December 1990, arts. 11(a) and 29.
[34] *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 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.[35]

The youth justice principles of non-disclosure and rehabilitation are 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.[36] *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."[37]

> Section 8 of The *Beijing* Rules also provide for the protection of privacy of young people because of the long term risks of labelling.
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> 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.
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> 8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.
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> 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).[38]

The principal that young people under 18 years of age cannot be held to the same standard of accountability is also reflected in international human rights treaties with

[35] *Ibid*. at rule 19.1.
[36] *UNCRC, supra* note 11 at Art. 40.
[37] *The Beijing Rules, supra* note 14 at rules 8.1 and 8.2
[38] *Ibid*.

respect to capital punishment which prohibit the pronouncement of death penalties against anyone who was under 18 years at the time of the offence. [39]

Canada's international obligations to all children who have committed offences support a *presumption* that juvenile offenders are not to be treated like adults. A presumption of an adult sentence, regardless of parole eligibility, is anathema to this fundamental principle of international juvenile justice. Similarly, a *presumption* of public disclosure of a young person's identifying information is not consistent with the international obligation to protect the privacy and promote the rehabilitation of the young person.

The principle that young people are to be treated separately from adults has been long established as part of Canadian law. Further, the international law is consistent with the general approach taken in Canada toward youth criminal justice. The *YCJA* is the culmination of various pieces of legislation dealing with youth criminal justice. Young people were first treated differently in 1894 when those under age 16 years were subject to separate trials. [40] Since the enactment of the *Juvenile Delinquents Act* in 1908, Parliament has made a definitive choice to treat youth differently from adults in a more comprehensive youth justice regime, offences by young people were seen as evidence of the condition of delinquency, which could be treated by the state who stood in the position of the parent, and the primary goal was rehabilitation. [41] With the enactment of the *Young Offenders Act* in 1985, and consistent with the *UNCRC*, young people include all minors under 18. International law supports the principle that children need special protections within the youth justice system. The *YCJA* is premised on this as a fundamental requirement. In addition, the empirical evidence suggests that these supports for young people are an essential component of a fair justice system. Doob states:

> *Looking at this research as a whole, it is clear that we cannot assume that young people have sufficient knowledge of the legal system and the criminal law provisions that govern proceedings in the youth justice system to fully and freely participate in criminal proceedings against them*.[42]

The criminal law is a force which can dramatically alter the face of society, by redefining rights and responsibilities, either in support or in defiance of accepted human rights standards. Justice for Children and Youth urges the government to support its commitments under ratified human rights law. The separate treatment of young people and that the recognition of a presumption of diminished moral culpability is a long-standing legal principle that finds expression in Canada's international commitments and international human rights law and acknowledged as a principle of fundamental justice. These are values which all Canadians have embraced through signing and

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[39] See for example: *UNCRC, supra* note 11 at arts. 37 & 40; *International Covenant on Political & Civil Rights, Dec 1966*, art 6(5) & 14, 999 U.N.T. S. 171; *Geneva Convention Relative to the Protection of Civilians in the Time of War, Aug. 12, 1948*, art. 68, 75 U.N.T.S. 3.

[40] *R. v. M.(S.H.)[S.H.M.]*, [1989] 2 S.C.R. 446, L'Heureux-Dubé, J., dissenting at paras. 470-71.

[41] Nicholas Bala, *Youth Criminal Justice Law* (Toronto: Irwin Law, 2003) at 7.

[42] Anthony N. Doob & Carla Cesaroni, *Responding to Youth Crime in Canada*, (Toronto: University of Toronto Press, 2004) at 39-40.

ratification by all ten provinces and the Federal government; those values must be maintained not only through our words, but also through our legislation.

Prevention and Early Intervention

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.

In its review of certain provisions of the *YCJA*, based upon corroboration of the research of experts who presented at the inquiry, the Nunn Commission found that the most adequate solutions to addressing youth criminal behaviour were prevention and early intervention.[43] This was due to the f*act* 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 *Act*ivities, and no work skills to allow them to succeed in society.[44] 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 *Act*ing together that a safer society, as we shall see, can be achieved.[45]

According to the Nunn Commission, there is a strong relationship between repeat young offenders and mental health disorders. Studies have consistently shown that approximately 80% of repeat young offenders are living with disabilities, including mental health disabilities.[46] Therefore, the first recommendation from the Commission is that there should be additional and appropriate training and adequate funding for assessment and early intervention in the education system for children and youth with learning disabilities and other mental and psychological disabilities that may increase the likelihood of children coming into conflict with the law.[47]

Other studies have found high correlation of Foetal Alcohol Spectrum Disorder and youth crime. In the only study of its kind in one Canadian province, nearly one quarter of young offenders were found to have some form of permanent foetal alcohol syndrome.

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[43] Nunn Commission, p.262.
[44] *Ibid*., p. 209.
[45] *Ibid*., p. 154.
[46] *Ibid*., p. 269.
[47] *Ibid*., p. 272.

[48] FASD brain damage may compromise a person's ability to understand or control their behaviour. While it equally affects all races and classes, a disproportionate representation of aboriginal youth in custody may be due to FASD. In the case of FASD youth, the development of effective programming will often require the collaboration with social services offered by the province or territory. In order to tailor sentences to individual accused persons, dispositions must remain tethered to the principle of proportionality. [49]

The Nunn Commission also found that there should be initiatives to develop and sustain programs and supports at school. The Commission recommended that encouraging "school attachment" is essential for youths at risk, meaning a greater likelihood that such students will engage in their education and find success.[50] For example, the Commission discusses the creation of "junior high support teachers." Such teachers would have a flexibility and responsible role in that they may *Act* as part coach, part encourager while also providing some accountability and consistently to the students.[51] In addition, it was recommended that schools should find in-school alternatives to out-of-school suspensions as a disciplinary measure.[52] This is to ensure that students do not engage in criminal activity due to lack of supervision.

Conclusion

The *YCJA* is a complex and comprehensive piece of legislation. All those involved in the administration of justice need to be fully informed with respect to the current sentencing and pre-trial custody principles, and ensure they are fairly applied. 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.[53] . 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.

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. The YCJA requires the government to demonstrate true leadership by

[48] D.K. Fast, J. Conry, & C.A. Loock, "Identifying Fetal Alcohol Syndrome Among Youth in the Criminal Justice System". (1999) 20 Developmental and Behavioural Pediatrics 370..
[49] Fetal Alcohol Spectrum Disorder and the Youth Criminal Justice System: A Discussion Paper. Paul Verbugge, October 2003. Department of Justice, http://section15.gc.ca/eng/pi/rs/rep-rap/2003/rr03_yj6-rr03_jj6/p4.html#4.5.
[50] Nunn Commission, p. 273.
[51] *Ibid*., p. 274.
[52] *Ibid*., p. 282.
[53] Section 38(2)(c).

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 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[54], as well as increases in drop out rates in school.

There are some excellent recommendations in the Nunn Commission report that are sensitive to the cognitive differences in young people and involve improving the existing systems for marginalized youth. This Government should pay attention to and act upon those recommendations before considering amending the *YCJA*. 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.

Bill C 52, if enacted would defeat the bedrock principle that sentences should be proportional. It would unfairly and ineffectively punish certain young people for what other young people might do in the future and would lock up increasing numbers of young people who have not been found guilty of an offence, without evidence that would meet the criminal law standard that doing so would have prevented a violent crime. Justice for Children and Youth recommends against the enactment.

The *YCJA* as a whole does not need a comprehensive review. 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.

[54]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).