SUBMISSIONS OF
JUSTICE FOR CHILDREN & YOUTH
REGARDING THE PROPOSED
YOUTH CRIMINAL JUSTICE ACT

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Justice for Children and Youth is a legal clinic and the operating arm of the Canadian Foundation for Children, Youth and the Law. The clinic provides select legal representation to youth aged 17 and under in the areas of income maintenance, education, criminal law, family law, mental health law, health law, constitutional law and human rights.

The Foundation prepares policy and law reform positions on issues relating to the legal practice of the clinic based on the needs and experience of its clients. The clinic also provides public legal education to youth, youth-serving agencies and interested individuals.

INTRODUCTION

The proposed *Youth Criminal Justice Act* (the "*YCJA*") represents yet another attempt to reconcile concerns about public perception with the legitimate aims of a separate youth justice system.

The government has resisted some pressures to treat children and youth as adults, but the direction under the proposed regime is clear. The boundaries between the adult and the youth systems would be blurred and some instances, obliterated in the proposed *YCJA*.

There are several laudable aspects in the proposed Act. It is preferable that measures be achieved by simple policy directives, accompanied by principled and conditional funding to provinces for programmes. Unfortunately previous policy directives have not been entirely successful, either due to inadequate financial support, or for other reasons.

This brief will address both the positive changes incorporated in the *YCJA* and our concerns about other aspects of the legislation.

Positive Features

The *YCJA* resists political pressure to lower the age of criminal responsibility. We strongly support age 12 as the lowest age at which to impose the sanctions of the criminal justice system on young people, and we agree that child welfare, mental health care and education systems are best suited to deal with criminal behaviour of children under twelve. These systems currently do a thorough job of meeting these tasks in appropriate and functional ways.

Post-trial transfer applications may benefit the young person and the system. They will provide a more factually-based context for the decision, unlike the *Young Offenders Act* ("*YOA")* process which is based on presumptions.

The *YCJA* attempts to reduce reliance on custodial dispositions and to increase the use of diversionary measures. This is particularly important given that Canada has much higher incarceration rates for young people than the United States, New Zealand and Britain, and a much higher rate than for adults.

The *YCJA* creates more sentencing options which may assist courts in fashioning appropriate sentences for individual young people, and thereby promote rehabilitation.

The increased attention to reintegration and discharge planning is laudable. Mandating a principled approach to reintegration, and mandating the appointment of youth workers as discharge planners will enhance the safety of youth and the goals of rehabilitation and reintegration.

Concerns

The Act moves in the direction of an "almost adult" youth justice system. This move is reflected in the language used in the Act, the philosophy underlying the Act, the changes to the transfer and place of detention provisions, the statement provisions and the amendments to the identification and publication provisions, among other changes.

More specifically, the Act cites "public protection" as the primary purpose of the Act. While rehabilitation, the needs of the child, and reintegration to society are cited as means of achieving this objective, this philosophical shift is a move towards an adult criminal justice philosophy.

Lowering the age and broadening the grounds for presumptive transfers are examples of this move towards an adult justice approach.

The erosion of the statement provisions of section 56 of the *YOA*, the importance of which has been recognized and upheld by the Supreme Court, causes serious concern as it fails to protect the rights, unique needs and interests of young persons.

JFCY is concerned about the approach to "low-end" offences. While we recognize that the aim behind the sentencing provisions is to keep low-end offenders from entering the corrections system, we are concerned that the language of the Act will not accomplish this goal, and that even more young people will be incarcerated.

The creation of new dispositions without resources and without ensuring consistent implementation may be a hollow change.

Collapsing the distinct separation between open and secure custody, and the transfer of decision-making power to provincial directors may lead to the warehousing of children and youth, and, without adequate procedural justice, this new process will compromise their rights, safety, and needs.

The *YOA* is careful to avoid incursion into the realm of mental health treatment, which is under the constitutional purview of the provinces. The new provisions allow for very intrusive mental health interventions without consent. While we feel that there is a critical role and an obvious need for treatment programmes and clinically trained and supervised staff for young people in the youth criminal justice system, the issues of consent, ethics and the appropriate setting in which to offer intensive mental health intervention remain as concerns.

One last but very significant concern is the inaccessibility of the legislation in terms of its length, organization and legal language. Communicating the *YCJA* to the public, and especially to young people will be nearly impossible. There should be a commitment to the development of a plain language version and public legal education materials.

Lost Opportunities

There are other concerns that could have been but were not addressed in the *YCJA* or in amendments to the *YOA.* Many of these concerns were highlighted by the Inquest into the death of James L., which spanned 5 months of testimony and one month of deliberations. These include:

- permitting youth to be housed with adult prisoners
- the use of places of adult temporary detention
- the over-use of secure custody as opposed to open (the Bill addresses this to some extent)
- the value and efficacy of using video or telephone remands
- the strengthening of privacy protections for offenders, victims and witnesses.

ANALYSIS

1. Language

The language in the *YCJA* exemplifies the move towards an adult system. The new language may be purely symbolic and effect no practical change but the message is clear: the use of terms employed in the adult justice system means a "get tough" approach to youth. We query the need and the motives behind changing "disposition" to "sentence", "alternative measures" to "extra-judicial measures". The change in language is particularly troubling in legislation that refers to the *United Nations Convention on the Rights of the Child* (the "*UN Convention*").

2. Philosophy: Preamble and Declaration of Principle

The *YCJA* has both a preamble and a declaration of principle. The declaration of principle under the *YOA* was held to have the force of law. Under the new Act, the preamble would have less legal weight than the declaration of principle. Both provisions begin by stating that the primary purpose of the act is to protect the public. What follows in both instances is positive constructive language that focuses on rehabilitation, reintegration and responsibility of youth. The principles embody the concept of a separate youth justice system. The preamble makes reference to the *UN Convention* but does not expressly incorporate it. Nonetheless, the *Preamble* and the *Declaration of Principle* are generally fairly consistent.

The language at first prescribes a punitive model and then includes more youth-oriented rehabilitative language. While including both types of language may authorize judges to choose the appropriate criteria in individual cases, the "protection of society" will always be the dominant language within which any youth-focussed measures will have to be fitted. This is dangerous when public misconceptions may lead to the vilification of youth and an exaggerated

need for protection from them. Where rehabilitative programmes are not available, punitive, custodial warehousing of young people will become the simplest, though not the most effective or the cheapest penalty.

3. Transfer Provisions

The philosophical shift towards treating youth as adults is highlighted in the broadening of the number of offences for which a transfer is presumed and a lowering of the age for presumptive transfers to adult court from 16 to 14 for those offences. Under the *YOA*, a 14- year- old could only be transferred to adult court upon application of one of the parties.

This more punitive approach to 14-year-olds is tempered by the sentencing provisions that permit a youth to serve an adult sentence in a youth facility consistent with the *YOA*.

The practice of transferring persons as young as 14, for more and more offences, to the adult system fails to recognize the developmental differences and needs of youth, and their particular vulnerability. It is a serious derogation from the concept of a separate youth justice system. Furthermore, the legal presumptions in the proposed *YCJA* are unnecessary, since for the most serious offences and the most adult young people, a transfer is currently available under the *YOA*. Currently transfers can be sought on request by the Crown. The Crown is in the best position to know whether it is appropriate to request a transfer for a repeat offender or a person accused of an indictable offence. No presumption is necessary.

One positive aspect of the transfer process is its timing. By providing for post-trial transfers, the court will have a complete factual basis, in respect of the offence, upon which to base its decision. It may also provide greater protection for the rights of the young person in respect of the psychological and/or medical assessments necessary for a full hearing of the transfer issue. It is therefore recommended that:

RECOMMENDATION 1:

THE CONCEPT OF PRESUMPTIVE TRANSFERS SHOULD BE REMOVED FROM THE *YCJA* OR ALTERNATIVELY, IF A PRESUMPTION REMAINS, THE PRESUMPTIVE AGE FOR TRANSFER SHOULD REMAIN AT 16.

4. Place of Custody

A disturbing feature of the *YCJA* is that it continues to allow young people to be incarcerated with adults. It permits the use of adult detention centres for youth in pre-trial custody, presumptively places those aged 20 and up in adult custody, and promotes the use of the adult correctional system, including the penitentiary system, for those aged 18 and up.

Youth are exceptionally vulnerable in the adult corrections system especially where adult inmates and guards are present. Evidence and a study presented at the Inquest into the Death of James L. highlight the risks to youth from peer on peer violence condoned by "adult" guards.[1] It is particularly disturbing that young people in detention, who have not been sentenced and may have no prior experience in custody, may be incarcerated with adults and thus be subject to the increased dangers of being housed with adult accused. Further, a federal penitentiary, with its penal culture, is not an appropriate place for a young person serving a sentence.

While the preamble refers to the *UN Convention*, Canada reserved on subsection 37(c) of the *Convention*. Subsection 37(c) provides:

> 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 his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances… . [emphasis added]

[1] A. Doob, *The Experiences of Phase II Male Offenders in Secure Custody Facilities in The Province of Ontario,* 1999; and see Inquest Recommendations Appendix A.

The *YCJA*'s reference to the *UN Convention* is, thus, meaningless with respect to place of custody for youth in Canada, as the *YCJA* has retained discretion in this regard and does not adhere to the spirit and letter of the *UN Convention*. In order to adequately protect children from the dangers associated with placing them with or near adults, in adult facilities, it is recommended that:

RECOMMENDATION 2:

THE PRACTICE OF HOLDING YOUNG PERSONS WITH ADULTS SHOULD CEASE COMPLETELY AND CANADA SHOULD LIFT ITS RESERVATION UNDER THE *UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD.*

RECOMMENDATION 3:

THE *YCJA* MUST SPECIFICALLY PROHIBIT THE USE OF PENITENTIARIES FOR YOUTH SENTENCES.

5. Statements

The greatest erosion with respect to the recognition of the developmental differences between children and youth and adults comes with the new provisions relating to the admissibility of statements.

The new provisions retain the protections under section 56 of the *YOA*, but give the court the power to find that waiver of the right not make a statement occurred where there has been no formal waiver. Further, the judge may admit a statement even if the police have not

appropriately "cautioned" the youth nor informed him of his right to a parent and counsel, if it "would not bring the administration of justice into disrepute".

A brief prepared by the Canadian Foundation for Children, Youth, and the Law on section 56 of the *YOA* addresses both *Charter* issues and case law with respect to statements, including a review of both empirical and anecdotal evidence that clearly shows that young people are more vulnerable than adults with respect to:

- Understanding the meaning, and legal and functional significance of the cautions and waivers with respect to statements, and the implications of waiving their rights to silence
- Feeling pressure to make a statement (undermining the voluntariness of any communication).

As a result, we submit that the procedural protections of section 56 of the *YOA* are insufficient, and should be strengthened, not weakened as they are in the *YCJA*. We recommend a requirement that all young people speak to duty counsel before deciding whether to make a statement.

The concern for preventing the obtaining of confessions through duress or inducements is an obvious one. This concern is reflected in the law relating to the admissibility of statements made by adults. However, the concern is magnified where there is a power imbalance, such as is the case with young persons in a vulnerable position. Young people faced with those in authority may not truly be in a position to exercise their constitutional rights to counsel and to silence.

Section 56 of the *YOA* offers special protection to young people. Before a statement is admissible in court, the young person must be advised, in understandable language, of the right to remain silent, the right to counsel, and the right to talk to a parent. To reduce the need for subsequent debate about whether the young person understands the rights, but wishes to give them up and provide a statement, the waiving of the rights occurs in writing or on videotape. In our experience, many young people make such voluntary statements to the police with these procedural safeguards in place.

In the case of adults, courts may exclude statements on a case-by-case basis where admission of the evidence would bring the administration of justice into disrepute, taking into account the fairness of the trial, the seriousness of the rights violation, and the effect of exclusion. This case-by-case approach attempts to uphold the administration of justice and can be a protracted complex process; but it cannot and does not attempt to deal with the imbalance of power that is inevitably present in the questioning of a young person by a person in authority. The intrinsic vulnerability and relative weakness of young persons in their interactions with those in authority can be recognized and protected only by a universal statutory protection with respect to their statements.

As the Supreme Court of Canada held in *R. v. J.(J.T.)*, [1990] 2 S.C.R. 755:

> By its enactment of s. 56, Parliament has recognized the problems and difficulties that beset young people when confronted with authority. It may seem unnecessary and frustrating to the police and society that a worldly wise, smug 17-year-old with apparent anti-social tendencies should receive the benefit of this section. Yet it must be remembered that the section is to protect all young people of 17 years or less. A young person is usually far more easily impressed and influenced by authoritarian figures. No matter what the bravado and braggadocio that young people may display, it is unlikely that they will appreciate their legal rights in a general sense or the consequences of oral statements made to persons in authority; certainly they would not appreciate the nature of their rights to the same extent as would most adults. Teenagers may also be more susceptible to subtle threats arising from their surroundings and the presence of persons in authority. A young person may be more inclined to make a statement, even though it is false, in order to please an authoritarian figure. It was no doubt in recognition of the additional pressures and problems faced by young people that led Parliament to enact this code of procedure. [at 767]

Further:

> The Application of s.56
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> Section 56 itself exists to protect all young people, particularly the shy and the frightened, the nervous and the naive. Yet justice demands that the law be applied uniformly in all cases. The requirements of s. 56 must be complied with whether the authorities are dealing with the nervous and naive or the street-smart and worldly-wise. The statutory pre-conditions for the admission of a statement made by a young person, cannot be bent or relaxed because the authorities are convinced on the basis of what they believe to be cogent evidence, of the guilt of the suspect. As soon as the requirements are relaxed because of a belief in the almost certain guilt of a young person, they will next be relaxed in the case of those whom the authorities believe are probably guilty, and thereafter in the

> case of a suspect who might possibly be guilty but whose past conduct, in the opinion of those in authority, is such that he or she should be found guilty of something for the general protection of society. Principles of fairness require that the section be applied uniformly to all without regard to the characteristics of the particular young person.
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> It is just and appropriate that young people be provided with additional safeguards before their statements should be admitted. Subsections 56(2) to (6) inclusive specify the additional protection which must be provided to all young people under the age of eighteen. [at 767, 768]

In addition, in R. *v.* I.(L.R.)[2] the court again recognized that the purpose of s.56 was to provide for special protection for young persons in recognition of their particular vulnerability while being detained. The Court held that where the police initially fail to advise a young person of his or her independent right to counsel under s.11 of the *YOA* and subs.10(b) of the *Charter*, and obtain an involuntary statement from that person, a second statement provided by the young person may be inadmissible, even though the second statement was obtained the next day after the youth had spoken to counsel on two separate occasions. Sopinka J. found that the statement was not admissible as the original inculpatory statement was a substantial factor in inducing the young offender to provide a second statement.

In the course of his judgement, Sopinka J. stated that s.56 constituted a recognition by Parliament of the need to provide particular protection to young persons who are detained by the police (at 301):

> Section 56 sets out strict requirements which must be complied with in order to render a statement made by a young person to a "person in authority" admissible in proceedings against him or her. The rationale for this lies in Parliament's recognition that young persons generally have a lesser understanding of their legal rights than do adults and are less likely to assert and exercise fully those rights when confronted with an authority.

Studies indicate that young people often do not understand their legal or constitutional rights.[3] Furthermore, even if young people do understand their rights, they feel compelled by the circumstances to waive them. Such a compulsion is not reflective of a truly voluntary waiver. "The Young Offenders Act: Principles and Policy-The First Decade in Review", sets out some of

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[2] R. v. I. (L.R.) [sub. nom. T.(E.)) (1993), 86 C.C.C. (3d) 289 (S.C.C.)]

[3] Abramovitch, R; Peterson-Badali, M. and Rohan M.; "Young People's understanding and assertion of their rights to silence and legal counsel". Toronto*: Canadian Journal of Criminology* 37 (Jan 1995) 1-18.

the studies and literature relating to young persons reactions within interrogation settings.[4] For example, one study which tested "predisposition to coercion" was conducted amongst nineteen fourteen year olds. Half of the group consisted of "delinquents", the other half of "non-delinquents". It was found that although most of the subjects consciously knew that they had the right to remain silent, twenty nine percent of the delinquents and forty three percent of the non-delinquents still felt that they *were required* to talk to the authorities if arrested. The report suggested that adolescent's knowledge of their right to silence is subordinate to both their "mental state at the time of arrest" and their "predisposition to talk".[5]

In its submissions to the House of Commons Standing Committee on Justice and Legal Affairs on the Comprehensive Review of the *Young Offenders Act* (Phase II), the Doctor R.G.N. Laidlaw Centre, Institute of Child Study addresses the issue of affording youth formal legal safeguards. The Institute discusses the research which deals with youths' tendency to simply paraphrase their rights as opposed to truly "understanding the function and significance of the rights in the context of police and legal proceedings".[6] While young people might be aware that they have a right to counsel they may not understand the scope and importance of this right in the context of criminal proceedings. In particular, the Institute highlights that true understanding of the right to counsel would include an understanding that a youth is entitled to a lawyer whether the youth is "guilty" or "innocent". Further many youth do not understand the confidentiality of the solicitor/client relationship and do not realize that parents and police will not be privy to discussions with counsel.

In 1993, Professor Rona Abramovitch of the University of Toronto undertook a study on adolescents' comprehension of the section 56 waiver. Of the participants, few understood that once they waived their rights, they would be expected to give a statement.[7] As the Institute

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4 Bolton, J. et al "The Young Offenders Act". Principles and Policy-The First Decade in Review". Montreal: *McGill Law Journa*l 38 (October 1993) #4 940-1052

5 *Ibid*, at 986

6 Submissions of the Doctor R.G.N. Laidlaw Centre, Institute of Child Study to the House of Commons Standing Committee on Justice and Legal Affairs.

7 Abramovitch, R; Higgins Biss, K and S. "Young persons comprehension of waivers in criminal proceedings". Toronto: *Canadian Journal of Criminology* (July 1993) 309-322.

points out, while children may be aware of certain rights at the age of ten, young people have difficulty understanding their rights in a meaningful way. Youth are motivated by "immediate negative consequences (for example spending a night in custody)", and when faced with a coercive atmosphere will "waive" their rights in order to avoid the consequence.[8] Therefore, the right to counsel and the right to silence are meaningless if not fully explained to a young person in a manner consistent with their level of understanding. Section 56 provides a minimum protection. In fact, as our experience indicates, to achieve full understanding by youth, it may be necessary to do more than is mandated by section 56 of the *YOA*.

There is substantial anecdotal evidence, both from lawyers representing young people and emerging out of the studies cited, that an alarming number of young people are not aware that they have waived their rights and that they have, in fact, given formal statements. Specifically, Justice For Children & Youth represents many young people in the criminal justice system each year. We also speak at high schools and youth facilities to thousands of students per year. One of the common concerns raised by youth at speaking engagements and in our practice is the lack of understanding of the legal rights/waiver in section 56 of the *YOA*. We are frequently faced with youth who advise us that they are frightened and intimidated at the police station. Youth are often told of their right to counsel but then this right is not translated into action (i.e. they are not given a telephone, or they are left to wait for some considerable time). Often, there are youth who sign the waivers and don't know why they are doing so or cannot recall whether or not they signed anything. Many youth have a vague recollection of being told their rights but do not truly understand what their rights entail. Youth are often left in the interrogation room for long periods of time and separated from the other youth that they were charged with. We are even aware of youth left in the interrogation room without any clothes on. Many of our clients advise that they were advised of their right to counsel and that they did sign a waivered statement; however, when asked to articulate what the waiver means, they are unable to do so. We have represented a young person who had been advised not to make a statement, and the lawyer asked the police to stop all questioning - yet after midnight the officer cajoled the young person into making a 25-page statement before court the next day because the young person thought "they would go easy on him".

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[8] *Supra*, note 3, at 9.

JFCY has also seen several instances in which the "spontaneous statement" exception to section 56 has been relied upon inappropriately. This legal exception is designed to render admissible statements that are "blurted out" by youth when they first encounter the police. It is clear that once the police start questioning a youth, any statements are not spontaneous. Our staff lawyers have spoken to youth who were searched, questioned or detained, then made a statement and have been faced with the assertion that the statement was spontaneous.

In our experience, fear, apprehension and the belief that the police will "give them a break", encourage young people to make statements that they may not otherwise have made. At the time of arrest and detention, young persons are in an extremely vulnerable position. Often they are afraid of the police and of the reaction of their parents. Thus it is not surprising that few youth want to speak to their parents or have their parents present when making a statement. Yet youth are not encouraged to speak to counsel. Often, youth are cajoled or persistently questioned even after requesting counsel. This practice has led to the exclusion of statements of adults and youth are even more susceptible to such tactics.[9] The police do not feel obliged to look up a phone number or dial the phone for a young person. On numerous occasions we have heard from youth: "Well, I thought of calling a lawyer but I didn't know one".

This speaks to a failure by the police to comply with the spirit of section 56 and the *Charter*. In *Bartle* and *Pozniak*, the Supreme Court of Canada made it clear that the right to counsel included the right to sufficient information about what services are available such as 24 hour duty counsel.[10] Despite the fact that police are obliged to tell young persons about duty counsel, the concept of contacting a lawyer (usually a stranger) is itself intimidating for youth. For youth, the level of explanation about the right to counsel must be very detailed in order to ensure comprehension. In fact, the most expeditious route following such an explanation would be for the police to call duty counsel and get them on the line for the youth. Some officers have adopted this practice.

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9 *R.* v. *Burlingham*, [1995] 2 S.C.R. 206

10 *R.* v. *Pozniak; R.* v. *Bartle* (1994), 92 C.C.C. (3d) 289 (S.C.C.)

Subsection 145(5) of the *YCJA* basically negates the subsection 145(4) requirement that waivers of rights be made in writing or recorded on video or audio tape. Permitting the admissibility of statements even if the procedural requirements of subs.145(4) are not met is likely to erode the formal procedures now in place and will place young people in an even more vulnerable position with respect to feelings of pressure and coercion, and with respect to their understanding of the consequences of their decisions.

Subsection 145(6) of the proposed *YCJA* goes even further by allowing judicial discretion to admit statements even if the young person has not been read the standard rights, cautions and warnings, or been given the opportunity to consult with a lawyer or parent. If young people are to be held criminally responsible for their actions, they *must* be afforded due process protections at least as through as those available to adults. This subsection would authorize statements to be admitted into evidence in the absence of two of the most fundamental of these protections. It would make the test for admissibility even lower than the test for adult statements, in spite of the fact that voluntariness is harder to ensure for young people.

Furthermore, placing the debate about the admissibility of specific statements before the courts will add to the expense and length of trials. In the long run, the test for admissibility proposed in the *YCJA* will be more cumbersome and more uncertain than the current test. It will consume valuable court time and resources.

As a result, consistent with our previous recommendations relating to section 56 of the *YOA*, it is recommended that:

RECOMMENDATION 4:

THE POLICE SHOULD NOT BE PERMITTED TO TAKE STATEMENTS FROM YOUNG PERSONS IMMEDIATELY UPON ARREST OR DETENTION. THE PRE-REQUISITES SET OUT IN SECTION 56 OF THE *YOUNG OFFENDERS ACT* MUST BE MANDATORY, FULLY PRESERVED IN THE *YOUTH CRIMINAL JUSTICE ACT*, AND COMPLIED WITH.

RECOMMENDATION 5:

THE POLICE SHOULD BE REQUIRED TO TELEPHONE DUTY COUNSEL AND TO ALLOW THE YOUNG PERSON THE OPPORTUNITY TO SPEAK TO DUTY COUNSEL IN PRIVATE BEFORE ANY DECISION WITH RESPECT TO MAKING A STATEMENT IS MADE.

RECOMMENDATION 6:

THE FEDERAL GOVERNMENT, THE POLICE, AND COMMUNITY EDUCATORS SHOULD:

- DEVELOP APPROPRIATE LITERATURE CLEARLY STATING THE RIGHTS OF YOUNG PERSONS, TO BE USED BY THE POLICE WHEN ADVISING YOUNG PERSONS OF THEIR RIGHTS.

- DEVELOP COMPREHENSIVE PUBLIC LEGAL EDUCATION MATERIALS FOR YOUTH WITH RESPECT TO RIGHTS REGARDING STATEMENTS.

- DEVELOP COMPREHENSIVE TRAINING AND “RIGHTS CARDS” FOR POLICE OFFICERS WITH RESPECT TO MANDATORY STEPS ON TAKING STATEMENTS FROM YOUNG PERSONS.

6. Publication and Privacy

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

The section which bans publication of identifying information suffers from two ambiguities. First, it is insufficiently clear whether or when it applies to young persons who may be subject to an adult sentence. At what point in time is a young person subject to an adult sentence? Do youth who are presumptively transferred have the benefit of a ban on identification, or must they wait until they seek a transfer back to youth court - by which time the damage will be done. Certainly, youth who are the subject of adult dispositions will not garner the same protection with respect to access to their records as will other youth. There should be continued privacy protection until the appeal period has lapsed or an appeal is decided.

Second, the definition section (subs.2(1)) includes a definition of “publication” which appears to relate to various forms of media which generally disseminate information. Section 109 does not use the word “publication”, but instead uses the word “publish” which has been judicially interpreted more broadly. The broader definition better suits the rehabilitative purposes of the *YCJA* by including communication of information by means beyond the commercial media.

Victims of all young offenders - regardless of the nature of the offence or the validity of the purpose of the request, will have a right to access records, which include highly confidential and detailed "pre-sentence reports". Many offences committed by young people result from previous altercations in which the “victim” and the “aggressor” trade roles from time to time. It is particularly inappropriate to shift so much of the balance of power to a victim who can use confidential, personal information in a punitive way that interferes with the possibilities of rehabilitation. In a practical sense, there are no enforceable constraints on the power of a victim

to pass on information obtained, thus interfering with the young person's ability to make a fresh start, to gain re-admission to school, or to obtain employment. There should at least be a judicial determination required for such access to records.

Victims are also given the power to publish information that would identify themselves, either automatically at age 18 or with a judge's order at an earlier time. However, no consideration has been given to whether this publication would or could tend to identify the young offender. The judge should be required to consider this factor in making any order.

To ensure that young people seek appropriate treatment and co-operate with assessments and treatment recommendations, it is critical that neither victims nor the public generally have access to psychiatric assessments and reports, or to any other information that would be protected by the common law rules of confidentiality and privilege. It would be inconsistent with a youth justice system which recognizes the particular vulnerabilities of young people to allow greater access to personal information than the common law would allow.

Finally, it is inappropriate to loosen the confidentiality provisions of the *YOA* at a time when school boards and the media assume they do not need to follow existing privacy provisions to which they object. In St. John's, Newfoundland, local school boards currently receive the youth court dockets and use the information to transfer students or to exclude them from school.[11] In Hamilton, members of the media have been charged for publishing a *YOA* record. The public response by the publisher to the charges was a defiant criticism of the *YOA*. It is difficult to persuade young people to respect the criminal justice system when adults express their pride in defying it. The current provisions protect the privacy of witnesses, victims and young offenders alike. The *YOA* protection for victims and witnesses is ignored much more often than it is upheld.

While there may be a broader public interest that, in an individual case, may justify access to or publication of young offender records and intimate personal information about a young offender, publication and access decisions ought to be made by a judge on a case-by-case basis and, in the

[11] *F.N.* v. *The Queen et al*, Supreme Court of Canada Court File No. 26805

public interest in rehabilitation and long-term improvements to public safety, ought to be expressed as exceptions, rather than the general rule.

Privacy is the right of the person concerned; therefore it ought to be in the power of the affected individual to waive the right to confidentiality and privacy. The *YCJA* proposes a positive reform in permitting a young person who has been dealt with in the youth criminal justice system, to say so publicly in order to pursue accountability. This proposed change does not detract from the distinction between the adult and youth systems, as the proposed exception relates to those aged 18 and over. However, this right of privacy has been ignored in subsection 118(1)(a) of the *YCJA* where the Attorney General, without notice to the young person, can release information to an accused person in another proceeding.

Given the paramountcy of the privacy interests of young people and the importance of the twin goals of rehabilitation and reintegration, it is recommended that:

RECOMMENDATION 7:

THE CONFIDENTIALITY PROVISIONS OF THE *YOUNG OFFENDERS ACT* MUST BE STRENGTHENED IN THE *YOUTH CRIMINAL JUSTICE ACT* BY MAKING IT CLEAR THAT ALL INFORMATION RELATED TO A YOUTH CRIMINAL JUSTICE SYSTEM MATTER IS INCLUDED IN THE DEFINITION OF A “RECORD”.

RECOMMENDATION 8:

DISCLOSURE AND/OR PUBLICATION OF YOUNG OFFENDER INFORMATION MUST BE AUTHORIZED ONLY BY A COURT, ON A CASE-BY-CASE BASIS, BEARING IN MIND THE REHABILITATIVE PURPOSES OF THE ACT, AND CONSTITUTIONAL AND PRIVACY VALUES.

RECOMMENDATION 9:

THE PROVISIONS OF THE *YOA* REGARDING PRIVACY, PRODUCTION OF RECORDS, AND IDENTIFICATION OF YOUNG PERSONS SHOULD REMAIN INTACT, SUBJECT TO THE EXCEPTION ENABLING A PERSON AGED 18 OR OVER TO IDENTIFY HIM- OR HERSELF AS HAVING BEEN DEALT WITH UNDER THE ACT.

RECOMMENDATION 10:

THE PRIVACY OF A YOUNG PERSON SUBJECT TO AN ADULT DISPOSITION SHOULD BE PRESERVED PENDING ANY APPEAL OR UNTIL THE APPEAL PERIOD HAS LAPSED.

7. Extra-Judicial Measures

The use of extra-judicial measures is not new. Police have always had the power to "warn" young people, just as they have often exercised their discretion to “warn” adults, and informal encounters with the police are frequently documented. When the *YOA* was introduced, so was the concept of formalized alternative measures. Some provinces such as Nova Scotia, instituted both pre- and post-charge alternative measures while others, such as Ontario, instituted first, no measures, then post-charge measures and more recently, some pre-charge measures. The risk with respect to formalizing pre-charge diversionary measures is that it will "widen the net" and actually result in increased criminalization of youth.

JFCY supports the use of police discretion and of pre-charge diversion - provided it relates to behaviour that would otherwise be "criminal". JFCY has been instrumental in implementing a

diversionary peer mediation model which is used on both a pre- and post-charge basis to divert matters in schools from the criminal process.

With respect to the *YCJA*, we question the need to tamper with the provisions of the *YOA* which clearly allowed for the use of discretion and for innovative alternatives. However, where the police in a particular area need guidance in terms of their charging practices, criteria for mandatory consideration should be developed.

Unfortunately, as is the case with the *YOA*, the *YCJA* language of diversion remains permissive. The provinces are not obliged to create programmes or to otherwise divert youth. If the language were mandatory, with built-in screening mechanisms, the goal of diverting "low end offenders" might be more readily achieved. We have found the practice in some courts, of mandatory pre-trial meetings before a trial date is set, very useful in terms of having matters diverted from the court process into peer mediation or restorative justice programmes, peace bonds and the like. This avoids unnecessary delays and the last minute resolution at trial - having already expended considerable time and resources on both ends.

Further, we submit that first-time non-violent offenders should be diverted. In our experience some crown attorneys have screening "rules" such that, for example, anyone who steals a bicycle will not be diverted, or anyone whose actions take place within 100 metres of a school will not be diverted. A legal presumption favouring diversion of first time, non-violent offenders would go a long way to discourage such practices. The onus should be on the Crown to establish before a court at a judicial pre-trial or set date appearance that diversion is not appropriate.

Furthermore, any diversion policy that automatically eliminates the possibility of diversion based on the nature of the charges may have negative effects. Police officers who do not believe in alternative measures may over-charge in order to preclude the possibility.[12] We have represented young people who have been charged with violent offences, but for whom diversion is the most

[12] Note the speech of the incoming Chief of Police in Toronto on February 12, 2000. The "True Blue" campaign of the Police Association in Toronto is also an indication of a willingness of some officers and associations to substitute their judgement of the appropriateness of our laws for those of the elected lawmakers.

appropriate and effective response. For example, we have represented a 12-year-old who mildly punched a fellow student and was charged with assault with a weapon - the weapon was a pencil he had in his hand when he reacted instinctively to being called a cheater during a school test. Where a mental health problem is the underlying cause of the offending behaviour, but treatment has been sought, diversion may be the appropriate response. We have represented a young person charged with arson who set a fire in her bedroom wastepaper basket "to kill the flu germs in the air". Diversion may be not only appropriate, but more specifically tailored to produce effective consequences where, for instance, it is not clear who is the victim and who the aggressor, or where the provocation has been significant. These examples demonstrate that diversion should not be available only for defined offences, since the behaviours that are included in any specific offence are so diverse that legal characterization of the offence and the charges is not the best predictor of the appropriateness of diversion. Rather, it is important to consider each set of individual circumstances to determine the appropriate consequences, and not to rely on an arbitrary list of offences.

The Canadian history of the use of alternative measures falls significantly short of the record in other jurisdictions. In New Zealand, 67% of youth cases are diverted. In Canada, only 25% are diverted. New Zealand has accomplished an 89% drop in the use of custody without an increase in violent crime.
It is therefore recommended that:

RECOMMENDATION 11:

THE PROVINCES MUST IMPLEMENT AND PROMOTE THE USE OF ALTERNATIVE MEASURES PROGRAMMES. THE *YCJA* SHOULD REQUIRE THE CREATION OF DIVERSIONARY PROGRAMMES AND SHOULD MANDATE ATTEMPTS AT PRE-TRIAL DIVERSION.

RECOMMENDATION 12:

THE FEDERAL GOVERNMENT SHOULD COLLECT AND SHARE BEST PRACTICES REGARDING EXTRA-JUDICIAL MEASURES, INCLUDING POLICE CHARGING AND WARNING PROTOCOLS.

RECOMMENDATION 13:

THE *YCJA* SHOULD REQUIRE THE MANDATORY CONSIDERATION OF ALTERNATIVE MEASURES AND DIVERSION.

8. Pre-Sentence Detention

We applaud the direction of the detention before sentencing provisions. It is important to specify that detention shall not be used as a substitute for child protection, mental health or other social measures in order to ensure that young people are not punished for social or other disadvantages they may be suffering. In our view the *YCJA* must include the statement that the unavailability of such other measures shall not justify detention if this provision is to have substance. Without such a statement young people will be seriously further disadvantaged by lack of services, and the notion that young people ought not to be punished for child welfare, mental health or other social disadvantages will be easily overridden.

Further, we applaud the presumption against detention where the young person could not be committed to custody if found guilty. There is, however, an exception found within the presumption section that effectively dilutes the presumption back to making it equal to the standard release considerations under section 515 of the *Criminal Code.* The exception essentially restates the reasons for which a person may be held in detention, and as such is unnecessary. The current wording of subsection 29(2) of the *YCJA* will not further the goal of

keeping young people out of pre-trial custody where there would not be a custodial sentence if there were a finding of guilt. This principle is extremely important; it recognises that where young persons would not be sentenced to custody if they were found guilty, they should not have to endure the particular hardship of detention awaiting trial - being arrested ought not to result in greater punishment than would accompany a finding of guilt. There are many difficulties with pre-trial detention – in Ontario young people in pre-trial detention are typically housed in provincial facilities for adults. The Jury at the Coroner's Inquest into the Death of James L. was very concerned about this fact because young people may be housed with adults, are supervised by guards who are not trained to deal with young people, are moved frequently from facility to facility, there is almost a complete lack of programming and treatment, and important personal information about young people (necessary for their safe supervision) is not passes from one institution to the next.

Further, young people may be particularly vulnerable to the non-legal opinions of the people on whom they are dependant. We have represented young people where the Crown Attorney is prepared to release the young person on bail but parents will not sign because they think their child should "sit in jail for a few days to teach them a lesson" - this where there would not be a custodial sentence even if the person were found guilty.
It is recommended that:

RECOMMENDATION 14:

SUBSECTION 29(1) WHICH PROHIBITS THE USE OF CUSTODY AS A SUBSTITUTE FOR CHILD PROTECTION, MENTAL HEALTH, OR OTHER SOCIAL MEASURES MUST ALSO SPECIFY THAT THE UNAVAIABILITY OF SUCH OTHER MEASURES SHALL NOT BE A REASON TO HOLD A YOUNG PERSON IN PRE-TRIAL DETENTION.

RECOMMENDATION 15:

SUBSECTION 29(2), THE PRESUMPTION AGAINST PRE-TRIAL DETENTION MUST NOT CONTAIN AN EXCEPTION THAT EFFECTIVELY NEGATES THE PRESUMPTION. THE WORDS "UNLESS THERE IS A SUBSTANTIAL LIKELIHOOD THAT THE YOUNG PERSON WILL, IF RELEASED FROM CUSTODY, COMMIT A CRIMINAL OFFENCE OR INTERFERE WITH THE ADMINISTRATION OF JUSTICE" MUST BE DELETED.

9. Sentencing

The new sentencing provisions contain their own statement of purpose in subsection 37(1). The language in this subsection focusses on punishment in its reference to "just sanctions" and "meaningful consequences". However other subsections focus on "least restrictive sentences" (subs.37(2)(d)) and prohibit the imposition of custody as a substitute for appropriate child protection, mental health or other social measures (subs.37(5)).

Perhaps as a result of these contrasting principles, the proposed *YCJA* increases the available sentencing options. This change is desirable because the governing principle in sentencing is proportionality. It is fundamental to a legislative scheme of legal accountability that more serious offences be subject to a more serious penalty and the converse. We recommend that even more options be created, particularly for low-end offences.

Where a judge is of the view that a young person should have been diverted from the court process by either the police or the crown, the judge should be able to order alternative measures in place of a finding of guilt. Judges should also have the option of imposing a reprimand in place of a finding of guilt in cases where the mere fact of being charged, fingerprinted, and participating in the court process is a more than sufficient deterrent and punishment. Judges should be able to order that records and fingerprints be destroyed on an appropriate, judicially-ordered date. The availability of a reprimand in conjunction with a finding of guilt is an

improvement over the limited sentencing options of the *YOA*, as is the deferred sentence, currently available only to adults known as a suspended sentence.

However, conditional discharges under the *YCJA* would necessarily be supervised by the Provincial Director. Community service orders would include a mandatory supervision requirement. Judges should be authorized to consider ordering appropriate supervision outside of the probation system.

The mandatory attachment of supervision to community service orders is of particular concern to JFCY if the supervision is to be provided by probation. We frequently negotiate community service orders which do not contain any contact with probation and request such orders from the courts. These orders give the youth responsibility in the community without being cumbersome for the justice system. It is also important that there are in many cases delays before there is any acceptable community service available for a young person. Since delay undermines the meaning and effect of the consequence, it would be detrimental to further encumber this system. A judge should have the option to order community service attached to or detached from supervision.

The new, higher end "sentences" under the *YCJA* are:

- intensive support and supervision
- attendance at a facility offering a programme
- custody and supervision order
- deferred custody and supervision
- intensive rehabilitative custody and supervision.

Bearing in mind both the fundamental principle of sentencing proportionality, and subsection 37(5) of the proposed *YCJA*, it is inappropriate to lengthen sentences in order to provide for the possibility of extended treatment. Such an approach is particularly inadvisable since treatment programmes are not consistently available across Canada. If the offence is the same, a young person should experience the same consequence in each province. There is no greater rationale for extending sentences for treatment than there is for shortening the sentence for an offender

who has no treatment needs, but freely chooses to commit serious offences. The credibility of the youth justice system requires that sentences be proportional to the offence.

Intensive support and supervision and attendance at a facility can only be ordered with the agreement of the provincial director. Similarly, an intensive rehabilitative custody and supervision order is subject to certain pre-requisites including the consent of the provincial director. These orders are very much an attempt to legislate programming and case management - laudable elements of any system. The appropriateness of forced treatment orders aside, these sentencing options will be available only if provinces facilitate them and create appropriate programmes. This will lead to two tiers of justice and youth will have access to programming depending on the whim of the province and will not achieve the desired objectives of the Act. Instead, the federal government must commit resources to programmes in general, clearly define terms of funding if they are to truly affect rehabilitation and reintegration for the hard to serve youth.

Intermittent sentences are also available under the *YCJA* but are subject to the availability of a programme. In Ontario, for example, there are no facilities where young women can serve intermittent sentences. Appropriateness of disposition, proportionality and fairness all militate for a requirement that all sentencing options be available in all provinces.
Therefore it is recommended that:

RECOMMENDATION 16:

THE GREATER RANGE OF SENTENCING OPTIONS IN THE *YCJA* AND ADDITIONAL OPTIONS INCLUDING REPRIMANDS, AND DIVERSION WITHOUT A FINDING OF GUILT, AND JUDICIAL ORDERS AS TO THE RETENTION OF RECORDS, SHOULD BE IMPLEMENTED.

RECOMMENDATION 17:

THE *YCJA* SHOULD MANDATE THE PROVISION OF EACH SENTENCING OPTION IN EACH PROVINCE.

RECOMMENDATION 18:

THE MANDATORY LINK BETWEEN COMMUNITY SERVICE AND PROBATION, AND BETWEEN CONDITIONAL DISCHARGES AND SUPERVISION BY PROBATION IN THE *YCJA* SHOULD BE SEVERED. THE PROVISION SHOULD MAKE IT CLEAR THAT COMMUNITY SERVICE ORDERS AND CONDITIONAL DISCHARGES DO NOT REQUIRE PROBATION OR SUPERVISION ORDERS.

RECOMMENDATION 19:

THE FEDERAL GOVERNMENT MUST COMMIT RESOURCES TO SUPPORTIVE PROGRAMMES WITH CLEARLY DEFINED REHABILITATIVE AND REINTEGRATIVE TERMS OF FUNDING.

10. Custody and Supervision Treatment Orders

While the "attendance at a facility" and "intensive rehabilitative custody" sentences require the consent of the provincial director, they do not require the consent of the youth. Both are obviously treatment orders - one in the community and one in a secure setting. Treatment issues fall within the constitutional jurisdiction of the provinces. In all provinces, a child can be committed to involuntary treatment under mental health and child welfare legislation. It is submitted that the mental health system is the appropriate forum for dealing with children's

mental health issues and that caution should be exercised when looking to solve mental health issues in the criminal justice stream as is suggested in subsection 37(5) of the *YCJA*, but is not consistently expressed throughout the proposed Act.

JFCY is strongly in favour of creating resources and offering treatment in the justice context. We supported recommendations at the Inquest into the Death of James L. that called for a clinical milieu and the use of personnel trained in child development, and access to treatment at youth facilities.[13] What must be incorporated into the legislation is a requirement for consent of the young person, consistent with provincial mental health legislation, section 7 of the *Charter*, and the common law. Further, sufficient funds must be directed to these programmes to ensure their success and staffing must be directed to be in line with the recommendations at the James L. Inquest.
It is therefore recommended that:

RECOMMENDATION 20:

RESOURCES MUST BE DIRECTED TO THE CHILDREN'S MENTAL HEALTH AND CHILD WELFARE SYSTEMS WHICH ARE THE APPROPRIATE MILIEUX FOR DEALING WITH YOUNG PEOPLE WITH SPECIAL NEEDS.

RECOMMENDATION 21:

TO THE EXTENT THAT TREATMENT OPTIONS ARE CREATED UNDER THE *YCJA*, RESOURCES MUST BE COMMITTED ACROSS CANADA AND STANDARDS SET AND ENFORCED.

[13] See *Recommendations of the Inquest into the Death of James L.*, Appendix A

RECOMMENDATION 22:

CONSISTENT WITH THE RECOMMENDATIONS IN THE INQUEST INTO THE DEATH OF JAMES L., CLINICALLY TRAINED STAFF MUST PLAY AN ACTIVE ROLE IN ALL YOUTH FACILITIES. THE FEDERAL GOVERNMENT SHOULD LEGISLATE STANDARDS CONSISTENT WITH THE RECOMMENDATIONS OF THE INQUEST.

RECOMMENDATION 23:

CONSISTENT WITH HEALTH-CARE PROVISION LAW & ETHICS, THE CONSENT OF THE YOUNG PERSON MUST BE A PRE-CONDITION OF ANY MANDATORY TREATMENT DISPOSITION.

11. Custody As A Last Resort?

Section 38 of the *YCJA* appears to prohibit incarceration except for violent offences. The *YCJA* seems to be an attempt to keep first-time offenders and youth charged with non-violent offences out of custody. This is an important and laudable goal, since Canada now incarcerates an excessive number of young people, based primarily on whether or not they have offended before.[14] However, "zero tolerance" policies and increasing reliance on the police to control domestic disputes, schoolyard fights, and shoving matches have led to charges for violent (but not particularly serious) offences where custody would be a harsh and disproportional penalty. Many offences which can be characterized as "violent" do not require a custodial disposition. For example, assaults between siblings which result in minor or no injury may be better dealt with through counselling. A punch while inadvertently holding a pencil[15] does not warrant

[14] Doob and Sprott, Bad, Sad and Rejected: The Lives of Aggressive Children

[15] *See* Extra-Judicial Measures, **pp21-22**.

incarceration. The proposed *YCJA* should prohibit custodial sentences except for "serious violent offences".

Under the *YCJA*, a simple assault could lead to a custodial sentence. "Failure to comply" with a previous non-custodial disposition could lead to such a disposition. (Thus a breach of curfew on probation could result in a custodial disposition.[16]) The nature of the offence combined with a "pattern" of offending could also lead to custody. The *YCJA* also contains a "basket" provision in subsection 38(1)(d), giving a judge broad discretion to order custody if a non-custodial disposition is "inconsistent with the purpose and principle set out in section 37" (primarily, the "protection of society"). Before ordering a custodial disposition, the court must, as under the *YOA*, consider non-custodial alternatives and, as under the *YOA*, must not use custody as an alternative for child protection, mental health or other social measures.

We are concerned that unfortunately not much will change under this "new" set of provisions. Indeed it is possible that more young people will receive custodial dispositions. In our experience, youth generally do not now receive custodial dispositions for the first simple assault. "Repeat" offenders and offenders who breach conditions are likely to receive custody by their third disposition. Judges retain a great degree of discretion under the catch-all provision, a consideration of the "protection of society" all too often leads to custodial dispositions that reflect public acceptability of sentences, rather than a genuine protection of society or safety issue. Young people are also disproportionately incarcerated for administration of justice offences.[17] It is not proportional to impose a custodial disposition for a single "fail to appear" in a lengthy court process. There is no loud public demand for a custodial response to a small breach of curfew. Yet the language of the *YCJA* may encourage an increase in this type of disposition. The wording of subsection 38(d) is over-broad and defeats the object of keeping

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16 Justice for Children and Youth has had clients who have been charged with breaching curfew for getting home five minutes late. We have had clients charged with assaulting a parent, where the parent had initiated the physical confrontation but had a *Criminal Code* section 43 defence. We have had clients charged with breach of probation for going to a shopping mall to help a parent at the parent's request. The original offence had been theft.

17 Doob and Brodeur, *Youth Crime and the Youth Justice System in Canada: a Research Perspective*, Centre of Criminology: Toronto, 1995

more young people out of custody. In fact, it may have the opposite effect. Despite the best of intentions, we suspect that the legislation re-enforces or worsens the status quo.
It is therefore recommended that:

RECOMMENDATION 24:

JUDICIAL TRAINING SHOULD BE INSTITUTED AND ENCOURAGED TO EMPHASIZE THE IMPORTANCE AND DESIRABILITY OF NON-CUSTODIAL DISPOSITIONS.

RECOMMENDATION 25:

PARAGRAPH 38(1)(a) OF THE *YCJA* SHOULD BE AMENDED TO PROVIDE THAT A YOUNG PERSON SHALL NOT BE COMMITTED TO CUSTODY UNDER SECTION 41 UNLESS THE YOUNG PERSON HAS COMMITTED A SERIOUS VIOLENT OFFENCE. THE *YCJA* SHOULD CREATE A PRESUMPTION AGAINST CUSTODIAL DISPOSITIONS FOR ADMINISTRATION OF JUSTICE OFFENCES.

RECOMMENDATION 26:

PARAGRAPH 38(1)(d) OF THE *YCJA* SHOULD BE DELETED IN ORDER TO ENSURE THAT THE *YCJA* ACHIEVES ITS OBJECTIVE OF REDUCING CANADA'S RELIANCE ON CUSTODIAL DISPOSITIONS. THE *YCJA* SHOULD CONTAIN AN EXPRESS STATEMENT THAT ITS AIM IS TO REDUCE CANADA'S RELIANCE ON CUSTODIAL DISPOSITIONS.

12. Delayed Sentences

Subsection 41(11) of the proposed *YCJA* authorizes a judge to order that a sentence commence "at any future date". The delay of dispositions poses a particular constitutional conundrum for legislators. Delayed sentences may be beneficial and may assist an offender in finishing a school year or being admitted to or completing a desired programme. Indefinite delay raises constitutional questions and undermines the link between offences and consequences. The problem with subs. 41(11) is that dispositions can be delayed indefinitely, for any reason. We recommend that:

RECOMMENDATION 27:

SUBSECTION 41 (11) OF THE *YCJA* SHOULD BE AMENDED TO LIMIT DELAYED SENTENCES TO A MAXIMUM THREE-MONTH DELAY, AND TO RESTRICT THEIR USE TO BENEFICIAL EDUCATION OR PROGRAMME REASONS AND WITH THE YOUNG PERSON'S CONSENT.

13. Level of Custody

Open/Closed Distinction

One of the most troubling aspects of the *YCJA* is its delegation of custodial placement decisions to the provincial level. The collapsing of the clear distinction between open and secure custody and the mandating of at least two levels of custody (distinguished by level of restraint) may have been proposed for the administrative convenience of the provinces. Several provinces have attempted to create co-located facilities or to blend open with secure custody. This has not met with the approval of the courts. By collapsing the levels of custody, we may be minimizing rather than maximizing the use of open custody facilities. Currently, an open custody disposition is served in a distinctive environment which can be highly conducive to reintegration. It does not blend well with a secure facility as it has a different correctional culture. The differences are

a necessary part of successful reintegration in society. Under these provisions of the *YCJA*, we may even be faced with disparate treatment of youth at various facilities, including the use of mechanical restraints to achieve differing levels of "restraint".

Process Concerns

The level of custody has an enormous impact. It is always more difficult to review and change an original decision than to “get it right” the first time. Under the *YOA*, courts make decisions as to level of custody based on the representations of counsel and on pre-disposition reports that are available to the parties. At a minimum, the right to counsel and to disclosure must be maintained in any administrative process which so significantly affects liberty interests.

The right to counsel for administrative decisions must be clearly provided for in the *YCJA*. A decision as to which level of custody a youth will be committed fundamentally affects his or her liberty interests.

It is recommended that:

RECOMMENDATION 28:

THE *YCJA* SHOULD SPECIFICALLY ENSHRINE THE RIGHT TO COUNSEL WITH RESPECT TO LEVEL OF CUSTODY, INITIAL PLACEMENT DECISION AND REVIEWS OF DECISIONS OF PROVINCIAL DIRECTORS AND THEIR DELEGATES.

14. Decision-Making Shift

Judges are trained to understand sentencing and legislative principles; level of custody is a fundamental aspect of the disposition - such a decision cannot be left to persons who are not

legally trained. If judges are over-using secure custody, then they must be re-educated. Such efforts should be undertaken immediately.

Provincial directors are typically persons who have risen in the ranks of the corrections or child welfare institutional systems. The "Provincial Director" has power under the *YCJA* to delegate his or her powers to anyone. In Ontario these powers are typically delegated to the superintendents or managers of facilities. Currently, the provincial director has power to decide whether a youth will spend his time in temporary detention in an open or a secure facility and to move young people from one facility to another. In our experience, much of such decision-making is done on an arbitrary basis or for administrative convenience, rather than to meet the needs of the young person. Considerations such as the number of beds; whether the youth is liked by staff; whether the youth has high or special needs; the behaviour of parents; whether the youth has an advocate, have all been brought to bear on the future placement of a youth in. These considerations do not reflect a proportional response to an offence; rather, they demonstrate an arbitrariness that is beyond the control of the young person and they interfere with the development of trust in institutions and trust that institutional response to behaviour will be consistent. This type of decision-making is far from "fair" and while the legislation mandates fair decision-making and allows for a review, it is inadequate to ensure the least-restrictive placement which is most consistent with the goals of the youth justice system and the needs of the young person.

The provisions do provide for basic procedural fairness, but the scope of the right to be heard is not defined, nor is the right to counsel specifically enshrined for level of custody hearings. Level of custody has an enormous impact on the young person and on his or her liberty interests. For this reason, the rules of administrative law require the highest level of natural justice and procedural fairness.

Instead, the review mechanism itself is weak and left entirely up to the provinces. While the board must be "independent" there are no guidelines for selecting members, no minimum number of members and no terms of reference in the *YCJA*. A decision of the review board is stated to be "final". Under the new scheme, JFCY anticipates an expensive and cumbersome

number of judicial reviews and potential constitutional challenges, because the liberty and security interests of the youth involved are not guaranteed sufficient procedural fairness in the *YCJA*. Level of custody, like other aspects of sentence, should be appealable.

A province can choose to retain the power of courts to decide level of custody. Again, we will see inconsistency across the provinces which, although possibly constitutional, may not be in the best interest of children and youth and undermines faith in the fairness of the system. Youth in one province may benefit from an independent decision-making scheme while youth in another will be subject to the abuses and variability that come when decisions are made within the system affected by the placement.

Because of our concerns relating to the decision-makers and the impact on the young person of the decision in question, it is recommended that:

RECOMMENDATION 29:

DECISION-MAKING POWER REGARDING LEVEL OF CUSTODY SHOULD REMAIN IN THE HANDS OF YOUTH COURT JUDGES.

RECOMMENDATION 30:

RESEARCH BE UNDERTAKEN TO REVIEW THE FAIRNESS OF DECISIONS CURRENTLY MADE BY PROVINCIAL DIRECTORS BEFORE REMOVING DECISION-MAKING POWER IN THE *YOA* IS CHANGED.

RECOMMENDATION 31:

CONCERNS ABOUT JUDICIAL DECISION-MAKING SHOULD BE ADDRESSED THROUGH CONSULTATION WITH AND TRAINING OF THE JUDICIARY.

15. Right To Counsel

The right to counsel and to legally aided counsel is retained in the *YCJA*. Given a recent decision of the Ontario Court of Appeal[18] as compared to the original legislative intent of the *YOA*, amendments are needed to subsection 11(4) to clear up any uncertainties and to enshrine a right to court appointed counsel without an inquiry into parental means.

The provinces are permitted under the *YCJA* to attempt to recover the costs of legal aid from children or from parents. This possibility is problematic for several reasons. Parents, concerned with the issue of recovery, may prevent young people from obtaining counsel, or may insist that a family friend, unfamiliar with the young offender system represent the young person. To save money, parents who may ultimately be responsible for legal costs may also interfere with the solicitor-client instruction relationship, insisting on certain pleas or conditions. Insofar as reimbursement may be sought from young adults, many of whom are struggling to obtain an education (with all the debt burden that that entails) or to earn a living at an entry level JOB, reimbursement will diminish the means of the young adult, thus adversely affecting his or her reintegration into society.
It is recommended that:

[18] *R. v. J.H.*, [1999] O.J. No. 3894

RECOMMENDATION 32:

THE *YCJA* SHOULD PROVIDE THAT THE COURT-ENFORCED RIGHT TO COUNSEL SHALL NOT INCLUDE AN INQUIRY INTO PARENTAL MEANS.

RECOMMENDATION 33:

THE *YCJA* SHOULD NOT PROVIDE FOR THE POSSIBLE COLLECTION OF LEGAL FEES FROM PARENTS OR YOUNG PERSONS.

16. Reintegration

The emphasis on reintegration is a positive and much needed proposal. Reintegration leaves should be mandatory, and a youth who is denied a leave should have a right of review. JFCY has worked with many young people who have left secure custody with nothing but a bus ticket home. One not atypical young person was released with no reintegration experience. His workers advised us that he did not know how to cross the street or order fast food. Not surprisingly, he was back in custody within several months.

A discharge plan is critical to successful reintegration. Consistent with the James L. Inquest recommendations, a discharge planner should be in place within 72 hours of a young persons arrival in custody.
We recommend that:

RECOMMENDATION 34:

REINTEGRATION LEAVES AND DISCHARGE PLANNING SHOULD BE IMPLEMENTED AS SOON AS POSSIBLE.

CONCLUSION

There are further difficulties with and improvements in the *YCJA*, which will be explored in our final submissions to the Committee. However, our concern, as we highlighted in our response to *A Strategy for the Renewal of Youth Justice*, is that the proposed *YCJA* is media-driven and is unnecessary to meet the legitimate goals of a separate youth justice system or to meet the laudable goals of reducing Canada's reliance on custody, diverting low end offenders out of the criminal justice system and of requiring discharge plans and extended reintegration leaves to enhance aftercare and rehabilitation.

We reiterate our recommendations in response to *A Strategy for the Renewal of Youth Justice* and urge the Committee to consider seriously that response and this, our preliminary submission in response to the proposed *Youth Criminal Justice Act.*

SUMMARY OF RECOMMENDATIONS:

RECOMMENDATION 1: (Transfer Provisions)

THE CONCEPT OF PRESUMPTIVE TRANSFERS SHOULD BE REMOVED FROM THE *YCJA* OR ALTERNATIVELY, IF A PRESUMPTION REMAINS, THE PRESUMPTIVE AGE FOR TRANSFER SHOULD REMAIN AT 16.

RECOMMENDATION 2: (Place of Custody)

THE PRACTICE OF HOLDING YOUNG PERSONS WITH ADULTS SHOULD CEASE COMPLELTELY AND CANADA SHOULD LIFT ITS RESERVATION UNDER THE *UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD.*

RECOMMENDATION 3: (Place of Custody)

THE *YCJA* MUST SPECIFICALLY PROHIBIT THE USE OF PENITENTIARIES FOR YOUTH SENTENCES.

RECOMMENDATION 4: (Statements)

THE POLICE SHOULD NOT BE PERMITTED TO TAKE STATEMENTS FROM YOUNG PERSONS IMMEDIATELY UPON ARREST OR DETENTION. THE PRE-REQUISITES SET OUT IN SECTION 56 OF THE *YOUNG OFFENDERS ACT* MUST BE MANDATORY, FULLY PRESERVED IN THE *YOUTH CRIMINAL JUSTICE ACT* AND COMPLIED WITH.

RECOMMENDATION 5: (Statements)

THE POLICE SHOULD BE REQUIRED TO TELEPHONE DUTY COUNSEL AND TO ALLOW THE YOUNG PERSON THE OPPORTUNITY TO SPEAK TO DUTY COUNSEL IN PRIVATE BEFORE ANY DECISION WITH RESPECT TO MAKING A STATEMENT IS MADE.

RECOMMENDATION 6: (Statements)

THE FEDERAL GOVERNMENT, THE POLICE, AND COMMUNITY EDUCATORS SHOULD:

- DEVELOP APPROPRIATE LITERATURE CLEARLY STATING THE RIGHTS OF YOUNG PERSONS TO BE USED BY THE POLICE WHEN ADVISING YOUNG PERSONS OF THEIR RIGHTS.

- DEVELOP COMPREHENSIVE PUBLIC LEGAL EDUCATION MATERIALS FOR YOUTH WITH RESPECT TO RIGHTS REGARDING STATEMENTS.

- DEVELOP COMPREHENSIVE TRAINING AND “RIGHTS CARDS” FOR POLICE OFFICERS WITH RESPECT TO MANDATORY STEPS ON TAKING STATEMENTS FROM YOUNG PERSONS.

RECOMMENDATION 7: (Publication and Privacy)

THE CONFIDENTIALITY PROVISIONS OF THE *YOUNG OFFENDERS ACT* BE STRENGTHENED IN THE *YOUTH CRIMINAL JUSTICE ACT* BY MAKING IT CLEAR THAT ALL INFORMATION RELATED TO A YOUTH CRIMINAL JUSTICE SYSTEM MATTER IS INCLUDED IN THE DEFINITION OF A "RECORD".

RECOMMENDATION 8: (Publication and Privacy)

DISCLOSURE AND/OR PUBLICATION OF YOUNG OFFENDER INFORMATION MUST BE AUTHORIZED ONLY BY A COURT, ON A CASE-BY-CASE BASIS, BEARING IN MIND THE REHABILITATIVE PURPOSES OF THE ACT AND CONSTITUTIONAL AND PRIVACY VALUES.

RECOMMENDATION 9: (Publication and Privacy)

THE PROVISIONS OF THE *YOA* REGARDING PRIVACY, PRODUCTION OF RECORDS, AND IDENTIFICATION OF YOUNG PERSONS SHOULD REMAIN INTACT, SUBJECT TO THE EXCEPTION ENABLING A PERSON AGED 18 OR OVER TO IDENTIFY HIM- OR HERSELF AS HAVING BEEN DEALT WITH UNDER THE ACT.

RECOMMENDATION 10: (Publication and Privacy)

THE PRIVACY OF A YOUNG PERSON SUBJECT TO AN ADULT DISPOSITION SHOULD BE PRESERVED PENDING ANY APPEAL AND UNTIL THE APPEAL PERIOD HAS LAPSED.

RECOMMENDATION 11: (Extra-Judicial Measures)

THE PROVINCES MUST IMPLEMENT AND PROMOTE THE USE OF ALTERNATIVE MEASURES PROGRAMMES. THE *YCJA* SHOULD REQUIRE THE CREATION OF DIVERSIONARY PROGRAMMES AND SHOULD MANDATE ATTEMPTS AT PRE-TRIAL DIVERSION.

RECOMMENDATION 12: (Extra-Judicial Measures)

THE FEDERAL GOVERNMENT SHOULD COLLECT AND SHARE BEST PRACTICES REGARDING EXTRA-JUDICIAL MEASURES, INCLUDING POLICE CHARGING AND WARNING PROTOCOLS.

RECOMMENDATION 13: (Extra-Judicial Measures)

THE *YCJA* SHOULD REQUIRE THE MANDATORY CONSIDERATION OF ALTERNATIVE MEASURES AND DIVERSION.

RECOMMENDATION 14: (Pre-Trial Detention)

SUBSECTION 29(1) PROHIBITS THE USE OF CUSTODY AS A SUBSTITUTE FOR CHILD PROTECTION, MENTAL HEALTH, OR OTHER SOCIAL MEASURES MUST ALSO SPECIFY THAT THE UNAVAILABILITY OF SUCH OTHER MEASURES SHALL NOT BE A REASON TO HOLD A YOUNG PERSON IN PRE-TRIAL DETENTION.

RECOMMENDATION 15: (Pre-Trial Detention)

SUBSECTION 29(2), THE PRESUMPTION AGAINST PRE-TRIAL DETENTION MUST NOT CONTAIN AN EXCEPTION THAT EFFECTIVELY NEGATES THE PRESUMPTION. THE WORDS "UNLESS THERE IS A SUBSTANTIAL LIKELIHOOD THAT THE YOUNG PERSON WILL, IF RELEASED FROM CUSTODY, COMMIT A CRIMINAL OFFENCE OR INTERFERE WITH THE ADMINISTRATION OF JUSTICE." MUST BE DELETED.

RECOMMENDATION 16: (Sentencing)

THE GREATER RANGE OF SENTENCING OPTIONS IN THE *YCJA* AND ADDITIONAL OPTIONS INCLUDING REPRIMANDS, AND DIVERSION WITHOUT A FINDING OF GUILT, AND JUDICIAL ORDERS AS TO THE RETENTION OF RECORDS, SHOULD BE IMPLEMENTED.

RECOMMENDATION 17: (Sentencing)

THE *YCJA* SHOULD MANDATE THE PROVISION OF EACH SENTENCING OPTION IN EACH PROVINCE.

RECOMMENDATION 18: (Sentencing)

THE MANDATORY LINK BETWEEN COMMUNITY SERVICE AND PROBATION, AND BETWEEN CONDITIONAL DISCHARGES AND SUPERVISION BY PROBATION IN THE *YCJA* SHOULD BE SEVERED. THE PROVISIONS SHOULD MAKE IT CLEAR THAT COMMUNITY SERVICE ORDERS AND CONDITIONAL DISCHARGES DO NOT REQUIRE PROBATION OR SUPERVISION ORDERS.

RECOMMENDATION 19: (Sentencing)

THE FEDERAL GOVERNMENT MUST COMMIT RESOURCES TO SUPPORTIVE PROGRAMMES WITH CLEARLY DEFINED REHABILITATIVE AND REINTEGRATIVE TERMS OF FUNDING.

RECOMMENDATION 20: (Custody and Supervision Treatment Orders)

RESOURCES MUST BE DIRECTED TO THE CHILDREN'S MENTAL HEALTH AND CHILD WELFARE SYSTEMS WHICH ARE THE APPROPRIATE MILIEUX FOR DEALING WITH YOUNG PEOPLE WITH SPECIAL NEEDS.

RECOMMENDATION 21: (Custody and Supervision Treatment Orders)

TO THE EXTENT THAT TREATMENT OPTIONS ARE CREATED UNDER THE *YCJA*, RESOURCES MUST BE COMMITTED ACROSS CANADA AND STANDARDS SET AND ENFORCED.

RECOMMENDATION 22: (Custody and Supervision Treatment Orders)

CONSISTENT WITH THE RECOMMENDATIONS IN THE INQUEST INTO THE DEATH OF JAMES L., CLINICALLY TRAINED STAFF MUST PLAY AN ACTIVE ROLE IN ALL YOUTH FACILITIES. THE FEDERAL GOVERNMENT SHOULD LEGISLATE STANDARDS CONSISTENT WITH THE RECOMMENDATIONS OF THE INQUEST.

RECOMMENDATION 23: (Custody and Supervision Treatment Orders)

CONSISTENT WITH HEALTH-CARE PROVISION LAW & ETHICS, THE CONSENT OF THE YOUNG PERSON MUST BE A PRE-CONDITION OF ANY NEW TREATMENT-ORIENTED DISPOSITION.

RECOMMENDATION 24: (Custody as a Last Resort)

JUDICIAL TRAINING SHOULD BE INSTITUTED AND ENCOURAGED TO EMPHASIZE THE IMPORTANCE AND DESIRABILITY OF NON-CUSTODIAL DISPOSITIONS.

RECOMMENDATION 25: (Custody as a Last Resort)

PARAGRAPH 38(1)(a) OF THE *YCJA* SHOULD BE AMENDED TO PROVIDE THAT A YOUNG PERSON SHALL NOT BE COMMITTED TO CUSTODY UNDER SECTION 41 UNLESS THE YOUNG PERSON HAS COMMITTED A SERIOUS VIOLENT OFFENCE. THE *YCJA* SHOULD CREATE A PRESUMPTION AGAINST CUSTODIAL DISPOSITIONS FOR ADMINISTRATION OF JUSTICE OFFENCES.

RECOMMENDATION 26: (Custody as a Last Resort)

PARAGRAPH 38(1)(d) OF THE *YCJA* SHOULD BE DELETED IN ORDER TO ENSURE THAT THE *YCJA* ACHIEVES ITS OBJECTIVE OF REDUCING CANADA'S RELIANCE ON CUSTODIAL DISPOSITIONS. THE *YCJA* SHOULD CONTAIN AN EXPRESS STATEMENT THAT ITS AIM IS TO REDUCE CANADA'S RELIANCE ON CUSTODIAL DISPOSITIONS.

RECOMMENDATION 27: (Delayed Sentences)

SUBSECTION 41(11) OF THE *YCJA* SHOULD BE AMENDED TO LIMIT DELAYED SENTENCES TO A MAXIMUM THREE-MONTH DELAY, AND TO RESTRICT THEIR USE TO BENEFICIAL EDUCATION OR PROGRAMME REASONS AND WITH THE YOUNG PERSON'S CONSENT.

RECOMMENDATION 28: (Right to Counsel)

THE *YCJA* SHOULD SPECIFICALLY ENSHRINE THE RIGHT TO COUNSEL WITH RESPECT TO LEVEL OF CUSTODY, INITIAL PLACEMENT DECISIONS AND REVIEWS OF DECISIONS OF PROVINCIAL DIRECTORS AND THEIR DELEGATES.

RECOMMENDATION 29: (Decision-Making Shift)

DECISION-MAKING POWER REGARDING LEVEL OF CUSTODY SHOULD REMAIN IN THE HANDS OF YOUTH COURT JUDGES.

RECOMMENDATION 30: (Decision-Making Shift)

RESEARCH SHOULD BE UNDERTAKEN TO REVIEW THE FAIRNESS OF DECISIONS CURRENTLY MADE BY PROVINCIAL DIRECTORS BEFORE THE CURRENT SCHEME OF DECISION-MAKING IN THE *YOA* IS CHANGED**.**

RECOMMENDATION 31: (Decision-Making Shift)

CONCERNS ABOUT JUDICIAL DECISION-MAKING SHOULD BE ADDRESSED THROUGH CONSULTATION WITH AND TRAINING OF THE JUDICIARY.

RECOMMENDATION 32: (Right to Counsel)

THE *YCJA* SHOULD PROVIDE THAT THE COURT-ENFORCED RIGHT TO COUNSEL SHALL NOT INCLUDE AN INQUIRY INTO PARENTAL MEANS.

RECOMMENDATION 33: (Right to Counsel)

THE *YCJA* SHOULD NOT PROVIDE FOR THE POSSIBLE COLLECTION OF LEGAL FEES FROM PARENTS OR YOUNG PERSONS.

RECOMMENDATION 34: (Reintegration)

REINTEGRATION LEAVES AND DISCHARGE PLANNING SHOULD BE IMPLEMENTED AS SOON AS POSSIBLE.