

Submission to the Standing Committee on Justice and Human Rights

Study: Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts

Submitted by

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As the Acting Child and Youth Advocate for the province of New Brunswick I would like to take the opportunity to provide the Standing Committee on Justice and Human Rights with my concerns regarding Bill C-10, and specifically the changes proposed therein to the *Youth Criminal Justice Act (YCJA)*. In many respects this submission repeats the concerns shared with parliamentarians regarding the *YCJA* amendments proposed in Bill C-4 in the last Parliament but also makes new submissions based on the emphasis Parliament should give to the role of families and communities in keeping our streets safe and keeping our children free from criminal influences.

Background: The Office of the Child and Youth Advocate (New Brunswick) on youth justice data

The Province of New Brunswick has had a Child and Youth Advocate since October 26, 2006. The mandate of the Advocate is outlined in section 5 of the *Child and Youth Advocate Act*:

2. There is established the Office of the Child and Youth Advocate, which office is charged with the following duties and responsibilities:
 - (a) ensuring that the rights and interests of children and youths are protected;
 - (b) ensuring that the views of children and youths are heard and considered in appropriate forums where those views might not otherwise be advanced;
 - (c) ensuring that children and youths have access to services and that complaints that children and youths might have about those services receive appropriate attention;
 - (d) providing information and advice to the government, government agencies and communities about the availability, effectiveness, responsiveness, and relevance of services to children and youths; and
 - (e) acting as an advocate for the rights and interests of children and youths generally.

As the Acting Child and Youth Advocate for the Province of New Brunswick, I respond to requests for advocacy from and advocate proactively on behalf of all children and youth within the province, including those who reside within a provincial public institution. This includes young persons who fall under the application of the *YCJA*, and particularly those who are under some form of custodial sentence, with whom we visit regularly.

During the five years since the first Child and Youth Advocate was appointed, the Office has published several reports following systemic investigations and our findings point to a system that incarcerates youth not because of public safety concerns but because there is no other safe place for them. This is particularly true for those young persons who struggle with mental health issues or severe behaviour disorders. The overwhelming challenges that many of these youths face in New Brunswick have been documented in two systemic reports published in 2008: *Connecting the Dots: A Report on the condition of youth-at-risk and youth with very complex needs in New Brunswick (January 2008)* and *Ashley Smith: A Report of the New*

Brunswick Ombudsman and Child and Youth Advocate on the services provided to a youth involved in the youth criminal justice system (June 2008). The investigations that led to these reports, as well as the numerous files handled by our office involving youth subject to the provisions of the *YCJA*, inform our submissions to Parliament.

I also wish to call to Parliament's attention to the forthcoming release of our 4th annual State of the Child report in New Brunswick and the publication of our first ever Children's Rights and Wellbeing Framework, jointly with the New Brunswick Health Council. In this Report we document efforts made by Canada and New Brunswick to implement our promises made to children under the UN *Convention on the Rights of the Child*. In particular, under Articles 37 and 40 of the *Convention* which establish the international law obligations of signatory states such as Canada governing the application of criminal law provisions and procedures to children, we have sought to measure our success and outcomes in the implementation and enjoyment of these rights by New Brunswick children. The data shows a troubling patchwork of approaches across Canadian provinces and territories.

Looking at the data from Statistics Canada's national reporting on youth crime and youth custody between 2005 and 2009 we can see that rates of youth incarceration per population count vary widely between jurisdictions. Some provinces such as BC and Quebec have rates of incarceration of 4.3 or 3.7 youth per 10,000 which are almost half the rate of incarceration as we see in Ontario, three times lower than in New Brunswick or 6 to 8 times lower than in Saskatchewan and Manitoba, and nine times lower than in the Northwest Territories. What is more troubling is that while some provinces such as Newfoundland and Ontario have seen a steady decline in the rates of youth incarceration over this period, provinces such as New Brunswick have seen no progress in reduced rates, while others still like Manitoba have seen a steady increase in rates of youth incarceration over the same period. While the overall trend in Canada is decreasing thanks to the progress made in more populous provinces such as Ontario, Quebec and Alberta, Members of Parliament should be concerned with the lack of progress under the *YCJA* in provinces such as Manitoba and New Brunswick.

When we compare the approaches to dealing with youth crime to the incidences of youth crime the data is also revealing. In 2010, police data shows that the incidence of youth crime declined 7% in Canada in comparison to 2009. Violent youth crime was particularly on the decline led by a 29% decrease in the rate of youth charges for homicide between 2009 and 2010. Canadian Police reports indicate that the youth crime severity index was down for all provinces and territories without exception in 2010, with Quebec, British Columbia and Prince Edward Island leading the country with the lowest youth crime severity indexes. Interestingly, the provinces with the lowest incarceration rates also have the lowest youth crime severity indexes. It is for this reason that so many experts in this area are urging Parliament to "not fix what ain't broken".

Analysing the situation in New Brunswick and considering our own province's failure to make the gains Parliament intended in 2003 when the *YCJA* was introduced, we are concerned to note that New Brunswick has not established any of the Community Youth Justice Committees

called for under section 18 of the *YCJA*; New Brunswick has not provided adequate training to judges and Crown prosecutors or defence counsel on the *YCJA* provisions since 2003; the Province has a policy directing the use of section 19 conferences as a sentencing tool rather than as a means for trial diversion as anticipated under section 19; we do not have clear guidelines on the Crown's role in pre-charge screening under section 23 of the *YCJA*; and we do not adequately distinguish in our policing practices or in our Alternative Measures Programs, community based interventions for youth from adult crime diversion programs and practices. The result is that New Brunswick children are far more likely to end up behind bars than many of their peers nationally, particularly in Atlantic Canada, and in fact this incidence of incarceration bears no relation to the provincial crime severity indices (New Brunswick ranks comparatively well by such measures – 7th out of 13 jurisdictions). The fact is, in New Brunswick we place many youths behind bars when there is no other safe place for them. Their offending behavior is generally not severe and is often best explained by their mental health condition. Many of the youth we visit regularly in our closed custody detention centre need clinical intervention, not incarceration. The data in our Children's Rights and Wellbeing Framework in relation to hospital admissions rates in New Brunswick, which are often to three times the national averages for a variety of youth mental health diagnoses, also speaks volumes regarding our province's inability to meet the needs of youth with complex needs through appropriate clinical interventions within the family and within communities.

I understand the demands of victims of crime which have moved the federal government to put forward many of the changes in Bill C-10. I applaud in particular the focus on facilitating law enforcement in relation to child pornography crimes which are dramatically on the rise and which currently outpace our efforts in law enforcement. However, my obligation lies in reminding all Parliamentarians that the needs of Canadian children are diverse and that the needs of New Brunswick children like those in many other smaller towns and rural regions of Canada are not the same as those of offending youth in larger urban centres in Vancouver, Calgary, Winnipeg or Toronto. The greater risk to Canadian youth lies not in the stories of tragic victims of criminal violence like Sébastien Lacasse, but in the stories of young persons with mental health issues who become victims of the criminal justice system like Ashley Smith. When we legislate to allow more youth to be sentenced to more time in jail, we have to be sure of our reasons for doing so, and certain also of the intended impacts and the likely consequences for children.

Parliamentarians must consider the bill before them carefully. It would be reasonable and responsible to do so on the basis of an independent Child Impact Assessment of the proposed changes to the *YCJA* under Bill C-10. The UN Committee on the Rights of the Child has frequently urged State Parties like Canada to adopt thorough, independent and transparent methodologies such as Child Impact Assessments whenever significant policy changes are being considered which may impact the rights of children under the *Convention*. Canadian law requires this sort of due diligence when environmental policy is under review, or when the privacy of Canadians is at stake. Surely Canadian children deserve the same due diligence from Parliament.

The concerns I raise below were set out previously in our Office's submission to this Committee in the last session of the 40th Parliament in relation to Bill C-4. I raise them again succinctly before making two new suggestions to reinforce under Bill C-10 the important role of families and communities in keeping our streets and communities safe.

Bill C-10 Changes to the Youth Criminal Justice Act- General Comments

Bill C-10 proposes several changes to the *Youth Criminal Justice Act*, some of which are positive, such as the addition of the presumption of diminished moral blameworthiness, the clarification of some of the terminology, and ensuring that no young person who is under the age of 18 is to serve any portion of the imprisonment in a provincial correctional facility for adults or a penitentiary. However, some of the proposed changes seem to be contrary to the original intention of the *YCJA*. This raises serious concerns given that statistical data indicates that there has been a decline in the number of admissions to youth custody and community correction services since the introduction of the *YCJA*¹.

Any new amendments brought forward should build on the successes of the *YCJA* and focus on innovating in the fields of prevention, rehabilitation and reintegration, rather than resorting to increased detention. The *YCJA* was introduced at a time in which Canada had the highest rate of youth incarceration in the world and we do not want to return to that position. I am concerned that some of the amendments may tip the scales back in that direction.

The proposed changes to the *YCJA* would facilitate pre-trial detention for youth, establish an extra-judicial measures registry, remove the focus of long-term protection of the public, include the concepts of denunciation and deterrence into sentencing provisions, include a wider group of crimes as 'serious' and 'violent' offenses and make it easier to allow for the publication of the names of youth who are convicted of a violent offence. While these changes are motivated by a strong will to punish offenders and hold young persons to account for violent offences, in particular by denouncing and hopefully deterring such behavior, the evidence world-wide suggests that these approaches will in fact lead to higher rates of incarceration and higher rates of youth crime, making our streets less safe. They also run a real risk of net-widening, resulting in more closed custody sentences for youth who would benefit from alternative interventions.

Pre-Trial Detention

The proposed amendments include changes to subsection 29(2) of the *Act* that will alter the process for determining when a youth will be detained. Of concern is the inclusion of subparagraph 29(2)(a)(ii) which opens the door for increased detention to offences 'other than a serious offence, if they have a history that indicates a pattern of either outstanding charges or findings of guilt'. I am concerned that the changes to this section will increase the pre-trial detention of youth, which will in turn further stigmatize them.

Being exposed to custodial experiences at a young age, in my opinion, will only enhance the chance of recidivism. It must be noted that closed custody poses many more challenges for a young person than merely 're-offending'. Individuals who become incarcerated may acquire behaviours, emotions and perspectives that become detrimental to their health and well-being

even though they are not legally documented as recidivating (such as drug use, depression, anger, etc). Every time that law-makers raise the argument of general deterrence in the name of public safety, they should be reminded of each individual life ruined, lost or diminished not only to a life of crime but those also prevented by our intervention from achieving their full potential as contributing members of society. Increasing pre-trial detention increases the risk of young persons entering the criminal justice system under the guise of public safety law enforcement concerns when in fact the real need may be for a place of safety and adequate social supports and mental health intervention.

Extra-judicial Measures Registry

The proposed changes include the addition of subsection 115(1.1) 'The police force shall keep a record of any extrajudicial measures that they use to deal with young persons'. One of the merits in the *YCJA* is the concept of extrajudicial measures and community-based/non-custodial sentencing options. Extrajudicial measures are measures that are taken outside the formal judicial process and allow a young person to be accountable without subjecting him or her to a sentence or a criminal record. The *YCJA* presently encourages the use of extrajudicial measures and underscores their effectiveness in terms of rehabilitation. Requiring the police to keep a record of all extrajudicial measures runs counter to the very purpose of such measures. It blurs the line between an extrajudicial measure and a criminal record, to the detriment of the youth. The fact that the content of the registry could subsequently be used to favour a more intrusive method of punishment for a young person is contrary to the intent of those measures. This proposed change also raises serious concerns in relation to the young person's right to be presumed innocent and their right to privacy under Articles 16 and 40.2.b)vii of the *UN Convention on the Rights of the Child* and under the *Canadian Charter of Rights and Freedoms*. Parliament's infringement of the privacy rights of young persons may be unjustified in the absence of compelling evidence that urgent public safety objectives will be materially advanced through this type of data collection.

Long-term Protection of the Public

It is proposed that paragraph 3(1)(a) be amended and as part of this amendment, the words 'in order to promote the long-term protection of the public' be replaced with 'to protect the public by'. While to some this may not seem a consequential change, it is concerning that the wording proposed in Bill C-10 appears to lack a focus on long-term impacts. It could be argued that incarcerating a youth would protect the public in the short-term; however, we must be more forward thinking than that and turn our minds to ensuring long-term protection of the public by rehabilitating these youth, addressing the underlying root causes in order to ensure that the public is protected not just in the short-term but in the long-term. To only look at the immediate situation is detrimental to public safety and fails to recognize the child's specificity as a human being with a long life ahead of him or her. Bill C-10 would be more impactful and might better reflect Parliament's current intent if paragraph 3(1) a) were left untouched.

Denunciation and Deterrence

The proposed amendments add the concept of deterrence and denunciation to the sentencing principles. In particular subsection 38(2) will be changed to include the following - 'subject to

paragraph (c), the sentence may have the following objectives: (i) to denounce unlawful conduct, and (ii) to deter the young person from committing offences'. There is scant evidence to suggest that the addition of these concepts will increase public safety, but the experience the world over suggests that it will almost certainly increase the numbers of youth in custody as well as the length of their sentences.

As has been mentioned by our Office and by other Child and Youth Advocates across the country on previous occasions, including deterrence and denunciation as a sentencing principle runs counter to one of the pillars of the *YCJA*, which is to ensure that the sentence serves the 'interest of the young person'. This proposed amendment is contrary to the legislation's aim of achieving crime prevention through focusing on root causes, working towards a successful reintegration, and providing young persons with meaningful consequences.

Justice Abella in *R. v. D.B.*ⁱⁱ makes the compelling point that a child has a right under Canadian and international law to a criminal process that looks to the child's potential as much as to his or her misdeeds. This phrase captures the true sense of Article 40.1 of the *UN Convention on the Rights of the Child*. Including the concepts of denunciation and deterrence diminishes Canada's implementation of the *Convention* and this fundamental right of the child.

Serious and Violent Offenses

The proposed new definitions of 'serious offence' and 'violent offence' will likely have the result of incarcerating more youth. While clarification of definitions is generally of benefit to any piece of legislation, the risk with the proposed definitions is that they may have consequences that should not be encouraged. I agree with the submissions made by Professor Nicholas Bala and the Canadian Bar Association, which were endorsed by Mary-Ellen Turpel-Lafond, the Representative for Children and Youth in British Columbia, that the definition should include a mental element of intent or recklessness.

Lifting the Publication Ban

The importance of preserving the anonymity of a young person for the purpose of achieving a successful rehabilitation and reintegration cannot be overstated. Subparagraph 3(1)(b)(iii) of the *YCJA* is the principle by which the protection of a young person's identity is and remains protected throughout the judicial process. Under the proposed amendments it is foreseeable that the instances of publication of a young person's name will increase, therefore interfering with their chances to have a successful rehabilitation and reintegration. It has been pointed out by the Supreme Court of Canada in *R v. D.B.*ⁱⁱⁱ that labeling and identifying youth can create stigmatization that is not beneficial. The publication may prevent a young person from being able to fully benefit from the rehabilitation services in the community. Additionally, I have not seen any research that suggests there is a link between lifting the publication ban and the protection of society. Canadian children expect law-makers to act judiciously where their rights are in play. Already there seems to be a disconcerting divide between the perception of youth crime as reflected in public polling on this issue in Canada and the facts and reality reflected in our police data, prosecutions and corrections data. A selective piercing of the veil allowing for

the lifting of publication bans in serious or violent offences will only exacerbate the gulf between perception and reality.

Conclusion

Almost a hundred years ago Polish author and pediatrician Janusz Korczak, a man often regarded as the father of Children's Rights, wrote compellingly on the subject of young offenders as follows:

The delinquent child is still a child. He is a child who has not given up yet, but does not know who he is. A punitive sentence could adversely influence his future sense of himself and his behavior. Because it is society that has failed him and made him behave this way, the court should condemn not the criminal but the social structure.

In 1936 Dr. Henryk Goldzmit (Korczak was his pen-name) was forced to give up his consulting post at the juvenile courts in Warsaw. Four years later he was forced into the Warsaw ghetto along with 200 young orphans in his care, most of whom died with him in 1942 in the gas chambers at Treblinka.

Korczak's vision of a world where children were equal subjects of law, equal in dignity to the adults who cared for them, would find expression after the war in the 1959 Declaration on the Rights of the Child and eventually in the UN *Convention* itself. In closing, I would urge Committee members to ensure that when reviewing these proposed amendments consideration be given to the *Convention on the Rights of the Child*, to which Canada is a signatory. When deciding whether these changes should go forward, Members of Parliament should consider the following principles found in the *Convention*:

- The best interests of the child is a primary consideration when courts of law, administrative authorities or legislative bodies consider actions to be taken regarding children (Article 3(1));
- Unless necessary to ensure the best interests of the child, the latter will not be separated from his or her parents against their will (Article 9(1));
- No child shall be subjected to arbitrary interference with his or her privacy, nor to unlawful attacks on his or her honour and reputation (Article 16(1));
- A child struggling with a mental health issue has the right to enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community (Article 23(1));
- No child shall be deprived unlawfully or arbitrarily of his or her liberty (Article 37(b));
- Arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time (Article 37(b));
- Every child deprived of his or her liberty will be treated in a manner that takes into account the needs of a person of his or her age (Article 37(c));
- Every child deprived of his or her liberty shall be separated from adults (Article 37(c));
- Where it is alleged that a child has committed a criminal offence or where the child is formally charged with such an offence, he or she will be treated in a manner guided by

the child's sense of dignity and worth, taking into account the child's age and the objective of successfully reintegrating the child in society (Article 40(1));

- Throughout this process, the child has the right to have his or her privacy fully respected at all stages of the proceedings (Article 40(2)(vii));
- Extrajudicial measures will be the preferred option whenever possible (Article 40(3)).

I have had the opportunity to review the submissions made by UNICEF Canada, the Representative for Children and Youth for the Province of British Columbia, the Canadian Bar Association and Professor Nicholas Bala and I urge the Committee to take the necessary time to carefully review the concerns outlined by those individuals and groups.

I respectfully submit that some of the proposed amendments in Bill C-10 are contrary to the intent of the *YCJA*, they risk jeopardizing Canada's commitments under the *Convention on the Rights of the Child* and do not appear to be based on empirical evidence. I echo the recommendation of UNICEF Canada that Parliament suspend any further consideration of the proposed amendments to the *Youth Criminal Justice Act* until there is **evidence-based research** to demonstrate that the proposed solutions are effective at protecting the public and reducing criminal acts committed by children and youth in the long-term; and that the amendments are consistent with international standards set out in the UN *Convention on the Rights of the Child*.

In my respectful view the most appropriate course of action at this time would be to postpone further consideration of changes to the *YCJA* under Bill C-10 until proper research can be carried out pointing to the advantage or necessity in proceeding with the changes proposed. In the alternative, should Government wish to proceed more expeditiously in this manner they should at the very least conduct a thorough and independent Child Impact Assessment on the proposed changes before resuming deliberations in Parliamentary Committee. This process would also allow time for Parliament and the Provinces to resolve the nascent problem arising with respect to the financial cost and burden of these reforms and who should bear them.

In the final alternative, if Parliament is intent in proceeding with all the changes proposed without further study or assessment at this time I would recommend that further consideration be given to strengthening the role of families and communities under the *YCJA* in keeping our streets and communities safe. The *YCJA* was premised in large part on the history of youth criminal law in New Zealand over the past twenty five years. In the 1980s, New Zealand, like Canada, had a very high youth crime rate and a very high rate of youth incarceration. Today their rates on both scores are among the lowest in the developed world. They did this in large part by placing ownership and responsibility for addressing problems of youth violence and delinquency where it squarely belongs: with parents and families.

The *YCJA* was inspired by New Zealand models. Both the Canadian and New Zealand frameworks speak of the roles of family and of community. But whereas New Zealand's practice focuses almost exclusively on families, Canada's has emphasized the particular role of local communities. In New Brunswick we have recently seen significant social and fiscal benefits from an increased investment in Family Group Conferencing in our Child Protection system. By

following New Zealand's model and placing families in charge of the solutions to child protection concerns, we have been able to reduce our rate of placement of children in guardianship and foster care by 18% year over year, realizing comparable saving in public expenditure on these services. Millions of dollars in savings have been redirected from foster care and guardianship services to other more proactive services to families in need.

We see a huge potential benefit from applying these same family-based solutions to our youth corrections system, the very service in which this Family Group Conferencing model that we have borrowed was originally developed (in New Zealand the family-based process is referred to as the Family Court, and its decisions are enforceable before the courts just as any other judicial process). Very often young persons in Canada run into conflict with the law because of poor choices, bad influences and improper oversight or control by parents who should be watching over them. Family Group Conferencing is a process which allows parents and extended family members to step up to the plate and hold the young persons closest to them accountable for any of their misdeeds, and enforce reparations for victims. This process reinforces relationships that matter and achieves true accountability with lasting impacts in cases where traditional criminal justice approaches have been proven to fail. This approach is consistent with traditional Aboriginal justice processes in use in Canada and may prove particularly beneficial in reducing Canada's high rate of incarceration of Aboriginal youth. Family Group Conferencing is possible now under the aegis of section 19 conferences in the *YCJA*. However, more explicit reference to the role of families and extended families in developing an alternative measures program, in implementing it, and in achieving meaningful victim-offender reconciliation would be welcome.

Secondly in my respectful submission these family-based processes should be given a clear priority over other extrajudicial measures and sanctions that might be offered at the community level through Youth Justice Committees established under section 18 of the *YCJA*. Finally, while the administration of the criminal law remains a matter of provincial jurisdiction, Parliament should be concerned with the unequal and fragmented implementation of the *Youth Criminal Justice Act* across Canada's several provincial and territorial jurisdictions. Children should not be at greater risk of incarceration or harsh treatment before the law based upon their province of birth or residence. They should receive the equal benefit and protection of the law wherever they reside in Canada. Therefore, Parliament should take pains in reviewing Bill C-10 to include provisions which will help ensure the equal application of processes such as Community Youth Justice Committees and "Family Court" conferencing in all jurisdictions. Federal financing of such programs could help accomplish this goal and would reduce the strain on youth custodial facilities which provinces seem to be concerned about.

As I make these submissions I am very much aware of the impasse which seems to exist in Parliament. Government members seem intent on supporting the bill as drafted and opposition members seem defeated by their inability to make any changes that allow for their support. I remain hopeful, however, that Parliament can and will find a way to reach a consensus solution to which all sides can agree. In dealing with the fundamental rights of children in Canada consensus solutions should be the norm. Protection and promotion of those rights are certainly

our common aspiration. There is not any fundamental contradiction between the majority will in Parliament to see violent young offenders held accountable and the majority view of experts in the field that the *YCJA* is good legislation that is working well and achieving its goals of reducing youth crime while reducing costly prosecutions and custodial services. There is a win-win solution within reach whereby violent young offenders can be made accountable with punishments that fit their crimes while maintaining and improving the *YCJA*'s track record in diverting more youth from traditional court processes and putting parents squarely in charge of the accountability piece. In fact, these kinds of solutions need Parliament's urgent consideration if only because of their obvious fiscal advantage.

We have a law which is reaching intended results. Our streets and our communities are being made safer. There is a real risk that with the amendments now before Parliament we may be throwing the baby out with the bath water. What is needed to determine the proper course of action is good science, good deliberations and wisdom. I would urge Parliamentarians on all sides to cast aside partisan political interests and to give Canadian children the benefit of time and their due diligence on this issue. Reach a consensus opinion in Parliament and Canadian children and youth will win with all of you.

Respectfully submitted,

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ⁱ Statistics Canada, *The Daily*, March 14, 2007

ⁱⁱ [2008] 2 S.C.R. 3, 2008 SCC 26

ⁱⁱⁱ (2008) S.C.C. 31460