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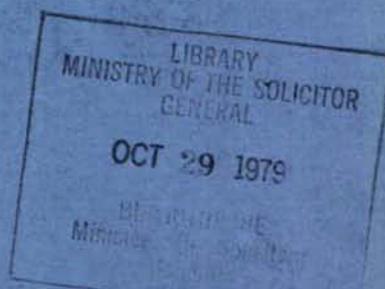


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LEGISLATIVE PROPOSALS
TO REPLACE
THE JUVENILE DELINQUENTS ACT

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LEGISLATIVE PROPOSALS TO REPLACE THE JUVENILE DELINQUENTS ACT

INTRODUCTION

Over the past several years a number of publications and reports have been issued by the federal government addressing the problem of juvenile delinquency in Canada, particularly the inadequacy of the present law for dealing with this problem.

Despite the proliferation of documents citing both the desirability and need to update current juvenile law and recommending various proposals to bring about this long called for reform, such a goal has yet to be achieved.

The Solicitor General of Canada considers the revision of Canadian juvenile law as a matter deserving urgent consideration. It is therefore his intention to introduce new legislation during the current session of Parliament to modernize federal juvenile law, to remedy existing deficiencies, and to reflect prevailing attitudes and practices.

The new legislation to be known as "The Young Offenders Act" is the result of extensive study and consultation by the federal government with the provinces, academics, professionals and practitioners in the juvenile justice field, as well as major associations and groups, private agencies and the general public. This consultation process has had a major impact in formulating the underlying principles and the over-all substance of the proposed legislation. It is probably realistic to conclude that this consultation process has now yielded its maximum benefits. While it has become abundantly clear that unanimity on all aspects of the new legislation was not realized, consensus has been achieved on the need for legislative reform and on the major thrust and provisions of the proposed new legislation.

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Furthermore the reforms in the proposed new legislation are long overdue and necessary for Canadian society as a whole and for our young people in particular.

It is neither desirable nor justifiable to continue to administer juvenile justice in Canada under the outdated legislative prescriptions of the current Juvenile Delinquents Act, a statute enacted in 1908. Delays which continue to deprive our youth and the public of law in keeping with the times and incorporating those universally accepted elements of reform must be eliminated.

PHILOSOPHY AND BASIC PRINCIPLES OF THE NEW LEGISLATION

The proposed legislation represents a shift in basic philosophy from a "parens patriae", social welfare and treatment oriented approach to juvenile delinquency, to a responsibility model whereby young persons will be held accountable for their behaviour. As long as it is consistent with public protection, reliance will be placed on social and community based solutions to the problems of young offenders. Whenever young persons are being dealt with under the law, their right to due process and fair and equal treatment, will be recognized and guaranteed by special safeguards. Accordingly the new legislation has been developed on the basis of the following principles which, when incorporated in the law, will serve as a declaration of its spirit and intent, as well as provide a guide for its proper administration and the realization of its objectives.

Young persons who commit offences should bear responsibility for their contraventions and while young persons should not in all instances be held accountable in the same manner and suffer the same consequences for their behaviour as adults, society must nonetheless be afforded the necessary protection from such illegal behaviour.

In affording society protection from illegal behaviour, it is to be recognized that young persons require supervision, discipline and control, but also, because of their state of dependency and level of development and maturity, young persons have special needs and require guidance and assistance.

Where not inconsistent with the protection of society consideration should be given to using alternative social and legal measures for dealing with young persons who have committed offences which come within the jurisdiction of this Act.

In determining the responsibility of young persons under this Act, it is to be recognized that young persons have rights and freedoms including those stated in the Canadian Bill of Rights; and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them as well as special guarantees of these rights.

In the application of this Act, the rights and freedoms of young persons include a right to the least interference with freedom, having regard to the protection of society, the needs of young persons, and the interests of their families.

Young persons have the right, in every instance where they have rights or freedoms which may be affected by this Act, to be informed as to what those rights and freedoms are.

It is recognized that parents have responsibility for the care and supervision of their children, therefore, young persons should be removed from parental supervision either partly or entirely only when all other measures that provide for continuing parental supervision are inappropriate.

MAJOR SUBSTANTIVE PROVISIONS OF THE PROPOSED NEW LEGISLATION

1. Jurisdiction

(a) Offences

The jurisdiction of the proposed legislation would limit the extent to which criminal legislation would be invoked in dealing with Canadian youth. The legislation would provide for offences against the Criminal Code and other federal statutes and regulations, thus excluding offences against provincial statutes (e.g. traffic and liquor violations, truancy), municipal by-laws and status offences such as incorrigibility, sexual immorality and other forms of vice.

This provision is in keeping with the recommendation of the Law Reform Commission of Canada of excluding less serious conduct from the application of the criminal law, conduct that could be better dealt with through other social or legal means. Thus, it would remain for the provinces to amend existing child welfare and youth protection legislation if necessary, to deal with less serious status behaviour and to establish the process by which provincial and municipal offences would be dealt with in future.

In addition it would remove one of the more discriminatory and highly criticized features of the Juvenile Delinquents Act, whereby certain types of behaviour by young persons are criminalized, although the same behaviour for an adult would not constitute an offence.

(b) Ages of Applicability

(i) Minimum Age

Under the proposed new legislation the age of criminal responsibility would be raised from seven to twelve years. It was universally agreed that under the current Juvenile Delinquents Act the age of seven years was too young for criminal proceedings. Fourteen years of age was suggested by two provinces, the remaining provinces and the majority of other persons consulted favoured twelve years. Furthermore statistics indicate that a significant number of youth aged twelve and thirteen are in conflict with the law.

(ii) Maximum Age

While the federal government recognizes the desirability of standardizing a maximum age across the country, the consultations, while also favouring a uniform age, have failed to achieve agreement as to what that age should be. The Solicitor General recommends that the new legislation provide for a uniform maximum age of under sixteen years. This would appear to be in accord with the preferred view of the majority of provinces as well as most groups and persons consulted. Nevertheless, the Solicitor General is prepared to consider the establishment of a uniform maximum age, at a level of under either seventeen or eighteen years, in the event that agreement among the provinces can be achieved.

It should be noted that under the Juvenile Delinquents Act the maximum age is set at under sixteen years with provision for the establishment of a level of seventeen or eighteen years in any given province. Currently the age level in the various provinces and territories is as follows:

- under 18 years - Québec and Manitoba,
- under 17 years - British Columbia,
- under 16 years - all remaining provinces and territories.

In Newfoundland, where the Juvenile Delinquents Act does not apply, the age under provincial legislation is seventeen years.

2. Involvement of Parents

The new Act will recognize the primary responsibility of parents for the care and supervision of their children and the necessity for their involvement in the judicial process. Parents would be notified of proceedings, encouraged and, where necessary, ordered to attend. As well, parents would be allowed to make representations to the court regarding a disposition, an application for a transfer to adult court or a review of any disposition.

3. Legal Representation

In contrast to the Juvenile Delinquents Act, which is silent on the rights of young persons, the new legislation would expressly articulate the rights afforded them. The right to retain and instruct counsel at any stage of proceedings, including when diversion measures are considered, would be recognized and protected by special provisions (e.g., parents would be notified of any arrest or detention and proceedings against the young

person; all summons or warrants directed to a young person would contain a notification of the right to counsel; youth court judges would be required to advise a young person appearing before the youth court of his rights). In cases of conflict of interest the young person would have counsel independent of his parents.

4. Predisposition Reports and Assessments

The legislation will permit greater use of assessments and predisposition reports. In appropriate cases where one or more of the following conditions are present, namely physical or mental illness or disorder, learning disability or mental retardation, medical examinations and psychological or psychiatric assessments will be undertaken when ordered by the youth court.

Predisposition reports will be mandatory when an application for transfer to adult court is being considered and prior to the imposition of any custodial sentence.

5. Screening and Diversion

It has been recognized for some time that the criminal law need not be invoked in all instances and that many young persons are being unnecessarily brought before the juvenile court when there are adequate alternatives for dealing with them. One objective of the proposed legislation is that in appropriate cases alternative social and legal measures be used, especially in those cases which involve less serious offences. In order to achieve this, the new law will formally recognize and sanction screening and diversion practices.

The proposals do not contain provisions for the establishment of a formal screening mechanism to employ the diversion process but, rather, contain provisions encouraging and guiding the development of the practice of screening and diversion, including the provision of basic standards and safeguards which should be considered when screening and diversion are contemplated or practiced in order to ensure that young persons are properly protected and dealt with equitably.

6. Detention of Young Persons Prior to a Court Disposition

The Young Offenders Act would set out a precise procedure to be applied when detention of a young person is being considered. In this regard, it proposes that the rules and criteria regarding bail as set out in the Criminal Code apply, with some modifications to meet the special circumstances of young persons. Legislation would also require that parents be notified, and would provide that, as a general rule, young persons who are held in detention be kept separate and apart from adult offenders. The youth court would have jurisdiction to hear all bail applications concerning any offence involving a young person and would have the power to release the young person in the care of a responsible adult in lieu of detaining him in custody, where it appears that adequate control can be exercised and the attendance of the young person can be guaranteed in this manner.

7. Transfer to Adult Court

There will be exceptional cases where the proposed legislation for dealing with young persons must be overridden because the gravity of the case demands an exception to the philosophy and practices of the youth court. In such cases, new legislation

would provide explicit guidelines and procedures for the transfer of cases to adult court. As such, the proposed transfer provisions would apply only to young persons age fourteen and above (as is the case under the Juvenile Delinquents Act) and in addition, would set out detailed factors for consideration by the youth court judge, in arriving at a decision whether to transfer the case to the adult court. Consideration of a pre-disposition report would be mandatory prior to making a transfer order.

8. Dispositions

The proposed legislation would make available to the youth court a wide and flexible range of sentencing dispositions geared to meet the needs of young persons, to protect society and to take into consideration in appropriate cases the rights of the victims of crime. The dispositions available are:

- an absolute discharge,
- a fine to a maximum of \$1,000.00,
- a restitution or compensation order for actual loss or damage to property, loss of income or special damages arising as a result of personal injury,
- order for compensation in kind or by way of personal service,
- community service order,
- probation to a maximum of two years,
- committal to intermittent or continuous custody (not to exceed two years),
- provision for ancillary conditions (e.g. order of forfeiture of illegally possessed goods, prohibition of firearms, etc.).

It is worthy of special note that all dispositions would be of a determinate nature and that the youth court would retain

exclusive jurisdiction over the case of a young person. It would not be possible to transfer jurisdiction of the case to provincial law and authorities, as is now the practice in some cases under Section 21 of the Juvenile Delinquents Act. In such cases, a young person does not remain subject to the jurisdiction of the juvenile court but is further dealt with solely pursuant to provincial law.

As criminal legislation, the proposed Act acknowledges that this practice should be discontinued, as the judiciary is seen as that body which should decide the extent to which custodial and other measures depriving a young person of his liberty and freedom should be utilized to ensure the safety of communities and its citizens. Once a judicial sentence is pronounced it is inconsistent that such decisions be unilaterally altered by provincial social service or correctional authorities. Furthermore, a young person should have ongoing access to the court for purposes of review.

On the other hand, in order to afford provinces sufficient flexibility to plan and implement effective programming for young persons serving custodial sentences, the provincial director would, following committal to custody by the court, have the authority to determine the level and place of custody in which the young person should be held. Custody would be broadly defined to mean containment or restraint in a variety of places or facilities ranging from group homes, community training residences, wilderness camps and child care or correctional institutions. The meaning of custody is intended to be flexible so as to allow movement within programs and facilities, as well as temporary releases to the community, without judicial approval.

In addition, the new legislation would provide a procedure for the release of a young person from custody on supervised probation in the community for the balance of his sentence.

9. Administrative Release from Custody

The Young Offenders Act will empower the provincial director to initiate the release of young persons from custody, after they have served a portion of their sentence and, where he is satisfied that the best interests of society and the offender would be better served by placing the young person on probation. The director would be required to serve a notice of his intention in this regard on the prosecutor, the young person and his parents. Any of the parties could have the matter reviewed and decided by the youth court or a provincially appointed review board. Where no review is called for, the youth court judge may formalize the release by endorsing an appropriate probation order.

The Act would also authorize two types of temporary and part-time releases, namely:

- a temporary leave of absence up to a maximum of 15 day for medical treatment, compassionate or humanitarian reasons, or to assist in the rehabilitation or re-integration of the young person in the community;
- a day release for the purposes of attending school or training, employment or participating in any other rehabilitative or self-improvement program.

10. Review of Dispositions

The review procedure under the present Juvenile Delinquents Act, whereby a young person may be brought back before the court at any time before he reaches 21 years of age, and which authorizes the court to make any new disposition, or transfer the case to adult court, has been severely criticized as being too arbitrary and exposing the young person to double jeopardy. The new legislation would provide a more extensive and accessible review process which would give all parties the opportunity not only to initiate a review, but to attend and be heard.

It is the intent of the new Act that the progress and welfare of young persons who receive custodial or other types of dispositions should be subject to continuing attention during the term of the disposition. In order to meet this objective it is proposed that mandatory (in the case of custodial dispositions), and periodic reviews be provided for. The review of a case involving a custodial disposition would be conducted by the youth court or at the option of a province, a provincially appointed review board. All other types of dispositions would be reviewed solely by the youth court judge. In addition to mandatory reviews at predetermined intervals, access to the court or review board would be provided at the instance of the prosecutor, the provincial director, the young person or his parents.

The youth court judge or review board, as the case may be, upon reviewing the case, could confirm the original disposition, release the young person from custody pursuant to stipulated terms and conditions of probation, or amend the terms or

conditions of any other type of disposition. Under no circumstances would the youth court be empowered to increase the length of the disposition or assess a more onerous disposition except in cases of wilful failure to comply with a disposition.

11. Appeals

It is recognized that young persons should have the same rights of appeal from decisions affecting them as are provided to adults under the Criminal Code. In so doing, special leave to appeal would not be required as is the case under the Juvenile Delinquents Act, but would be granted as a right for young persons in the same manner as would avail in the case of an adult.

12. Privacy of Youth Court Proceedings

Unlike current legislation which provides that trials of young persons be held "in camera", new legislation would contain provisions allowing for increased public scrutiny of youth court proceedings.

Publication of any information that would reveal the identity of any young person involved in the proceedings would, however, be prohibited.

13. Fingerprinting and Photographing

While the Juvenile Delinquents Act is silent in respect to the authority to take the fingerprints and photographs of juveniles, this issue has been the subject of conflicting judicial determination in recent months. In order to clarify the issue and to serve the public interest by assisting in the detection

and investigation of crime, the new legislation would permit the police to fingerprint and photograph a young person as is the practice under the Identification of Criminals Act. The legislation would provide that if the young person is acquitted or proceedings against him are discontinued, any prints and photographs would be destroyed. It would establish special procedures for the storage, control and access to such information, and make it an offence for anyone to misuse such information.

14. Youth Court Records and Effects Thereof

Contrary to the Juvenile Delinquents Act which is non-committal with regard to the matter of juvenile records, the Young Offenders Act would set out a precisely defined set of procedures dealing with the creation, maintenance and dissemination of the youth court records. The legislation would, as well, contain separate provisions for the expungement of a young person's record whereby the record would be sealed after a qualifying period of crime-free behaviour (two years in the case of summary conviction offences only; five years in the case of indictable or mixed offences). Once a record is sealed it could not be used for any purpose whatever (exception is made for study, general research or planning purposes).

While seeking to hold young persons responsible for illegal behaviour under the criminal law, the intent of the proposed legislation is that young persons not be subject to consequences that are as severe as those applied to adults in the ordinary courts. Accordingly when a young person has completed his disposition he would be deemed not to have been found guilty of the offence as is the case when a discharge is granted to an

adult under the Criminal Code. However, until the record is expunged, it will be used for the purposes of bail applications and a subsequent sentencing in both the youth court and adult court.

15. Contributing to Juvenile Delinquency

Under the new legislation, the offence of contributing to juvenile delinquency would be abolished. Not only are the present Juvenile Delinquents Act provisions infrequently used but it is felt that in view of the proposed abolition of the status offence of delinquency, a contributing offence would become largely irrelevant. Furthermore, while existing provisions in the Criminal Code (e.g. counselling, aiding and abetting, party to offences) appear sufficient to cover any involvement by adults in the commission of offences by young persons, amendments are proposed, to strengthen the Criminal Code provisions concerning adult behaviour as it affects children.

16. Vicarious Liability

The Juvenile Delinquents Act makes provision for the imposition of a fine, damages or costs against parents, if the court is satisfied that parents themselves have conduced to the commission of an offence by their child. The use of this procedure is discouraged and it is seldom used in practice. The new legislation would not retain such a provision, particularly as the Act is designed to hold young persons themselves responsible for the commission of illegal acts.

In recommending that parents be held liable for the illegal acts of their children, particularly children who are deemed under the law to be criminally responsible for such acts, individual responsibility would be undermined. In order to impress upon juveniles that legal consequences exist for their criminal acts, liability and responsibility should rest with juveniles themselves.

Furthermore the concept of vicarious liability runs contrary to civil rights and is really an unwarranted extension of the criminal law. Where the parent is involved in the commission of an offence, he will be dealt with by the existing provisions of the Criminal Code, otherwise it is felt that the matter is better relegated to the civil law where it more properly belongs.

October, 1979

