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Canada

PROPOSALS FOR AMENDMENTS TO THE

YOUNG OFFENDERS ACT

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Ministry of the
Solicitor General Canada

February 11, 1986

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NOTE

Substantive revisions have been highlighted by marginal lines.

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PROPOSALS FOR AMENDMENTS TO THE YOUNG OFFENDERS ACT

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MINISTÈRE DU SOLLICITEUR GÉNÉRAL

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INTRODUCTION

In June 1985, the Federal-Provincial Conference of Deputy Ministers Responsible for Juvenile Justice considered a wide range of proposals for amendments to the Young Offenders Act. Of the amendments considered, those respecting Sections 7, 33, 38 and 40 through 46 were identified as priority matters. The Conference of Provincial Attorneys General in September 1985, confirmed the priority status of these issues.

Ongoing discussions with provincial officials and consultations in Toronto, Montreal, Regina, Vancouver, and Moncton with representatives of police departments, youth courts, private sector agencies dealing with young offenders, and other groups involved in youth justice have sought to refine the problems that have been encountered in the implementation of the Act and devise appropriate solutions. This document outlines a series of proposals respecting amendments. The positions identified here represent the intentions of the Ministry of the Solicitor General for amendments to the Young Offenders Act, subject to the Federal Provincial Conference of Ministers Responsible for Juvenile Justice in February 1986, other consultations and final legal and related research.

PART ONE: PRIORITY ITEMS

In discussions at the June 1985 Federal-Provincial Meeting of Deputy Ministers Responsible for Juvenile Justice, in general consultations, and in a meeting of Provincial Attorneys General, four areas of the Young Offenders Act have been identified as matters of "priority". Part One of this document reviews each of these four areas and presents proposals for resolution of the identified issues. In each case the proposals call for modification in the substantive policy of the legislation, modifications prompted by experience accumulated since implementation of the Act in April 1984 and reconsideration of the basis for the existing provisions.

DETENTION PRIOR TO DISPOSITION

The separation of adults and young people who have been ordered held in custody for any reason is a fundamental feature of juvenile justice. The application of this principle with respect to pre-dispositional detention is set out in section 7 of the Young Offenders Act, which generally requires that young people be held in specially designated facilities and in places other than those where adults are detained. The Act does, however, provide for exceptions to these general standards. The exceptions modify the principle of separation in recognition of both the normal circumstances encountered in the course of arrest and in the special factors that may arise in a given case.

In implementing the Act, a number of problems relating to section 7 have been isolated. These problems are of such magnitude that they have been identified as matters of priority in the consideration of amendments to the Act.

A. Subsection 7(3): Separate Detention

The principle of separation is defined in subsection (3) by the following wording: "No young person...shall be detained...in any part of a place in which an adult...is detained or held in custody...". This language varies from that used in subsection 24(10) to define the application of the principle of separation in the case of custodial dispositions: "a young person who is committed to custody... shall be held separate and apart from any adult...". The different language leads to the conclusion that the characteristics of detention facilities and custodial facilities must be significantly different in some fashion. The provisions themselves do not, however, give any clear direction as to the nature of the difference and opinions vary as to whether subsection 7(3) is more or less onerous than subsection 24(10).

OPTIONS

The language employed in subsection 7(3) to define the principle of separateness may have been intended to provide a less rigorous standard in the case of detention, however, this has not been clearly accomplished. The Act could, therefore, be amended in one of two ways: a) to establish objective measures that make actual distinctions between detention and custody facilities; or b) to apply the same language in subsection 7(3) and subsection 24(10).

The latter option, which is generally favored, eliminates the necessity of comparing and contrasting the two situations and avoids the inevitable uncertainty that arise when different standards are applied. The second option also recognizes that the same facility may often serve both functions.

B. Subsection 7(2): Temporary Restraint

The Act recognizes the need to accommodate the normal processes of arrest and police investigation during which an absolute separation of young and adult offenders is frequently not realistic. Subsection 7(2), therefore, provides for an exception from the general requirement that young people detained following their arrest be held in facilities designated pursuant to subsection 7(1). Specifically, the exception applies "...in respect to the arrest of a young person or in respect of any temporary restraint of a young person in the hands of a peace officer after the arrest of the young person but prior to his detention in custody". It is generally held that this requires that a young accused be delivered to a designated facility as soon as the police have determined that he will not be released, but held for a hearing by a justice or youth court in accordance with section 452, 453 or 453.1 of the Code. This "timing" has been found to be impractical and unduly burdensome in many cases.

The requirement that a young person be transferred to a designated facility prior to appearance before a justice or youth court is especially problematic where a designated facility is not immediately available. The result may be significant resource demands to carry out sporadic and time consuming transfers. Not only do such situations aggravate police and detention resource problems, they may result in removal of the young person from his community and his support system at a time when these supports may be particularly needed.

OPTIONS

The principle that young people should, wherever possible, be held separately from adults is broadly supported. This standard is modified by the current provisions to deal with the practicality of police investigations and the circumstances that face the young person following arrest. Consultations have revealed that these provisions lack the needed flexibility. Two proposals have been advanced for amendments to resolve the too rigorous requirement for the timing of a transfer to a designated facility presently found in subsection 7(2):

i) modify subsection 7(3) to provide for an absolute exemption from the requirement for separate detention until such time as the young person appears before a justice or youth court judge pursuant to section 454 of the Criminal Code, or

ii) retain the current provision with the modification that the period of "temporary restraint" apply for whatever period is reasonable, but in no case beyond the first opportunity to deliver a young person to a designated facility following an appearance before a youth court or justice.

C. Subsection 7(4): Care of a Responsible Adult

The Young Offenders Act, at subsection 7(4), has authorized the youth court to substitute custody in the "care of a responsible adult" for custody in a designated detention facility. The Act, however, makes no provisions for enforcement of such custody, nor does it establish any guidelines for the court as to its application. In practice, the provision is difficult to distinguish from the conditional interim release provisions available under section 457 of the Criminal Code.

As a consequence, the courts tend to avoid orders pursuant to subsection 7(4) and are concerned with the absence of a remedy in the event of a breach. It has been suggested, therefore, that provision be made for enforcement through an offence applicable to the young person and, possibly, the "responsible adult" and that guidelines be elaborated to assist in the application of the provision.

OPTIONS

The capacity to substitute care of a responsible adult for detention was intended to provide options where the grounds for detention have been met but the court is satisfied that this form of detention is a suitable alternative to detention in a designated facility. Owing to the degree of care and control over the young person required by the responsible adult, it was not expected that this provision would be widely used.

One reason for its limited application to date may be that it is difficult to determine why an offer of care by a responsible adult would be sufficient in the case of subsection 7(4) of the Young Offenders Act, but would be insufficient to warrant release pursuant to section 457 of the Criminal Code. This perceived overlap contributes to

confusion, suggesting a need for guidelines to provide direction to the courts. The situation is further confused by the absence of sanctions against the young person, while specific sanctions and procedures are available to deal with those released in accordance with section 457 of the Code.

Three proposals are available for consideration in dealing with these issues:

i) repeal subsection 7(4) leaving the courts to rely upon the conditional interim release provisions found in section 457 of the Criminal Code;

ii) modify subsection 7(7) to apply to subsection 7(4) thus making an explicit enforcement mechanism available and specify in the Act that the option of the "care of a responsible person" is to be considered only after the court has determined that there is cause to detain and where the young person undertakes in writing to remain in that care and abide by any conditions directed by the court;

iii) retain the current provisions and allow for experience and case law to resolve the issues.

D. Subsection 7(5): Authorization to Detain

This subsection empowers the province to implement a procedure whereby the police, wishing to detain a young person pending appearance before a justice or youth court, must obtain the authorization of a designated person or agency. This provision serves both as an additional check on detention and as an opportunity for child care or similar authorities to intervene, if necessary. The subsection does not, however, distinguish between arrest with and arrest without warrant. As a consequence, the "authorization" must be sought even when the court has already ordered the arrest and detention of the individual. The inability to separate these may impose unnecessary administrative and procedural burdens.

OPTIONS

It has been proposed that subsection 7(5) make a distinction between arrest with and without warrant, either restricting the requirement to arrest without warrant or providing for the province to make such a distinction.

FEDERAL RESPONSE

That section 7 of the Young Offenders Act be amended as follows:

a) subsection 7(3) be modified to provide that young people be held "separate and apart" from adults detained or serving a sentence for an offence against federal or provincial legislation and that the language of subsection 7(3) and subsection 24(10) conform exactly;

b) subsection 7(2) be modified to provide that a young person be transferred from the temporary restraint of a peace officer to a facility designated under subsection 7(1) as soon as is reasonably possible, but in no case later than the first opportunity following appearance before a justice or youth court judge pursuant to section 454 of the Criminal Code;

c) subsection 7(4) be amended to provide that the custody in the care of a responsible adult option be considered only after cause to detain has been shown, and the young person, as well as the adult make suitable undertakings in writing that may specify reasonable conditions;

d) subsection 7(5) be modified to provide that, at the discretion of the province, "authorization" may be required when a young person is not released pursuant to sections 452, 453 and/or 453.1;

e) section 7 be amended to create an offence for breach of an undertaking made pursuant to subsection 7(4).

COMMENT

The proposed modifications to section 7 seek to clarify several points of ambiguity and uncertainty that have proven problematic to police, court and correctional authorities. The changes under consideration here seek to balance the requirements of the system for some measure of flexibility, while continuing to emphasize the principle that young people and adults should be detained separately. Thus, the amendment with respect to subsection 7(2) - Temporary Restraint - extends and gives clarity to the "timeframes" involved in transferring an individual from police custody to a detention facility, but emphasizes that such a transfer should occur at an earlier time whenever reasonably possible. The greater flexibility may, however, be confined by the province implementing the provisions of subsection 7(5), which would require that authorization to detain be obtained early in the process. Similarly, the provision for placement in the "care of a responsible person" is retained in the interests of maximum flexibility, while seeking to give greater certainty to the procedures involved.

SECTION 33 - NON COMPLIANCE

Section 33 establishes a review mechanism to deal with young persons who fail to comply with a disposition previously imposed by the youth court. Where the court is satisfied, beyond a reasonable doubt that the young person has wilfully failed or refused to comply with a non-custodial disposition, or has escaped or attempted to escape custody, the youth court may vary the disposition or make any new disposition listed in section 20 with a maximum penalty of six months custody. No new conviction is registered against the young person upon this review. Section 33 is intended to be exhaustive in respect of non-custodial dispositions, and is an option to prosecution under sections 132 or 133 of the Criminal Code, in respect of custodial dispositions.

The review mechanism has been found to be procedurally cumbersome in a number of respects, raising the following issues:

- the young person may be subjected to an additional penalty although no new offence was charged, which may offend section 11(h) of the Charter;
- there is no means for the police to intervene absent the issuance of a summons or warrant by the youth court where there has been breach of probation and other non-custodial disposition;
- there is no provision for the manner by which pre-dispositional custody or release is to be effected where a review is initiated under section 33;
- the evidentiary burden upon the Crown is believed to be too onerous, in that proof of "non-compliance" is difficult to obtain;
- the requirement that the provincial director prepare a "progress report" for every review under section 33 is administratively burdensome.

OPTIONS

It is believed that these problems cannot be addressed within the present methodological and philosophical framework of section 33, the root of the problems being the fact that the young person is not charged with an offence of non-compliance. There are, therefore, two available options.

a) Establish specific offences for non-compliance in the Young Offenders Act

This option would require the creation of two specific offenses. Section 21 establishes the mechanism for the imposition of a disposition under section 20(1)(b) - fine, (c) - compensation, (d) - restitution, (e) - compensation to a third party purchaser, (f) - personal service, and (g) - community service. A subsection could be added to section 21 making it an offence to fail to comply with a disposition under subsection 20(1)(b) to (g).

Similarly, section 23 establishes the mechanism for the imposition of a probation order under section 20(1)(j). A subsection could be added to section 23 making it an offence to fail to comply with the terms of a probation order.

It would be necessary to enact specific offences under the Young Offenders Act in respect of a failure to comply with the above dispositions in that the Criminal Code offences which could address such conduct are either procedurally incompatible or expressly excluded under the Young Offenders Act. However, this is not the case in respect of an escape or attempt to escape custody for which a charge could be laid under sections 132 or 133 of the Code. No new offence would be required.

With respect to a disposition made under section 20(1)(h) (an order of prohibition, seizure or forfeiture), the enabling legislation under which the order may be made, where necessary, prescribes an offence for non-compliance. No new offence would be required.

b) Incorporate the offence provisions of the Criminal Code into the Young Offenders Act

As noted under option a), the Criminal Code and other federal legislation presently make it an offence for "non-compliance" with a disposition made under section 20(1)(h) - prohibition - or (k) - custody, assuming the repeal of section 33. To establish a specific offence for the remaining types of dispositions, two amendments would be required. Section 20(8) of the Young Offenders Act would be amended to include the applicability of section 666(1) of the Criminal Code to proceedings under the Young Offenders Act.

Section 666(1) An accused who is bound by a probation order and who wilfully fails or refuses to comply with that order is guilty of an offence punishable on summary conviction.

The second amendment would require prescribing in the Young Offenders Act that a disposition made under section 20(1)(b) to (g) would be deemed to be a probation order for the purposes of wilful failure or default. In respect of section 20(1)(j) (probation order) the offence provision (section 666) would naturally apply. With respect to a prohibition order made under section 20(1)(h), the option exists to make it a term of probation, or simply to rely on the specific offence provision in the enabling legislation under which the order is made.

This scheme is consistent with the practice in adult court except with regard to a fine. The Criminal Code permits the court, in default of payment of a fine, to commit a defendant automatically to a term of imprisonment (section 722(2)). It would not be consistent with the objectives of the Young Offenders Act to incorporate such a provision. This can be avoided by making a fine, for the purposes of a young offender disposition, a term of probation. A matter requiring further study is the effect which this scheme would have on fines imposed for federal regulatory offences.

The problems associated with section 33 are of such a wide range that the section is beyond repair. Either option a) or b) would serve to remedy a substantial majority of the problems in that "non-compliance" would be treated like any other offence under the Young Offenders Act and the "double jeopardy" issue would be resolved. The police and courts could proceed in the traditional manner prescribed by law for those suspected of committing an offence. Moreover, the young person would be assured the traditional protections which that procedure affords.

FEDERAL RESPONSE

That section 33 be repealed; section 20(8) be amended to include section 666 of the Criminal Code to permit enforcement of probation orders and, a provision be enacted in the Young Offenders Act prescribing that a disposition made under section 20(1)(b) to (g), (i) and (l) be treated as a term of probation for purposes of wilful failure or default.

COMMENT

The preferred option is reliance upon the Criminal Code for the reason that it most effectively addresses the problem of young offenders who, after turning 18 years, fail to comply with a young offenders disposition. By establishing

continuity in the form of a youth court disposition with that of the Criminal Code, (except for fines) non-compliance by an "adult" can be dealt with in the adult court. If the offences are specifically prescribed in the Young Offenders Act (as with option a)), the jurisdiction of the youth court or the adult court to proceed against an adult for non-compliance may be suspect.

The adoption of Criminal Code sanctions would establish that young persons were subject to the same offences as adults and that the Crown bears the same burden of proof in respect of these offences. There are, however, two exceptions to this. The first exception concerns fines ordered pursuant to paragraph 20(1)(b) and the second, treatment orders under paragraph 20(1)(i).

The Criminal Code permits the court to impose a period of incarceration "in default" of the payment of a fine, however, such automatic custodial penalties would conflict with the principles of the Act. The proposed amendments would require a trial and dispositional hearing where a pre-dispositional report would be required if custody was to be considered in response to a fine default. Such procedures are, however, entirely consistent with the principles of the Act and are more accessible and timely than the existing provisions under section 33.

There is no comparable provisions in the Criminal Code to the treatment order which is provided for in sections 20(1)(i) and 22 of the Young Offenders Act. These sections authorize a judge to order a young person to "be detained... in a hospital or other place where treatment is available" where a report has been made by a qualified person who recommends that a young person undergo treatment for one or more of the conditions specified in the Act. Further, the Act provides that such treatment be ordered only upon the consent of the young person, involved parents and the treatment facility.

While resort to the treatment disposition has been limited to date, concerns have been expressed with the situation in which a young person is placed in treatment and subsequently withdraws the consent. In several of these incidents, judges have ruled that they lacked the authority to bring the young

person back before the court. While recognizing the uncertainty surrounding this provision, it is considered reasonable to deal with treatment orders in the same way as other youth court disposition and, under an amendment, make them subject to a charge of breach. In the addition, other avenues exist to ensure that the youth court has the necessary latitude where there appears to be non-compliance. Where treatment has been made a condition of probation, review for wilful default of same could be achieved by the proposals for amendment set out above. Where a young person has been convicted of a serious offence, a judge, under the present provision in section 20, has the option of combining a custodial order with a treatment order to protect against a situation where a youth withdraws consent and a court is of a view that it has lost jurisdiction.

SECTION 38 - PROHIBITION ON PUBLICATION

Section 38 imposes an absolute ban on the publishing of any report of an offence committed or alleged to have been committed by a young person in which the name of the accused young person, or of a child or young person who is the victim or witness, is revealed. A contravention of this section constitutes an offence which may be proceeded with by way of indictment or summary conviction.

Subsection 12(3) of the previous Juvenile Delinquents Act contained a prohibition against publication of the name or identity of a child who had been charged with or found delinquent except with special leave of the court. Rarely was leave sought. Subsection 12(1) of the same Act provided for trials to be "without publicity", which, until 1983, was interpreted as "in camera". The result was that youth courts were closed to the public and the media.

Sections 38 and 39 of the Young Offenders Act were intended to allow for the benefits of open court in terms of accountability to the public, the merits of non-publication, and exclusion of the public in exceptional cases. Thus, open court was intended to maintain public confidence and to promote community awareness and involvement in juvenile justice. The limited ban on publication of the identity of a child or young person was intended to protect against any negative impact which may result from broad identification and denounciation before, during and after proceedings in youth court. This latter objective is intentionally broader in scope than other statutory bans on publication whose aim is essentially to ensure fairness at trial.

While the constitutionality of the absolute ban on publication was at issue in the case of Southam Inc. vs. The Queen, the Ontario Supreme Court upheld the constitutionality of this section and declared it to be a reasonable limit on the right of freedom of expression. This decision has, however, been appealed and will be heard on February 6, 1986.

Independent of the issue raised in Southam Inc. vs. The Queen, provincial governments and others have expressed concern with this section. The two key issues are as follows:

A) whether the wording in section 38(1), with respect to the term publish, is sufficiently clear in law to avoid attaching liability for the release/communication of information necessary to the administration of justice; and

B) Whether section 38 should be amended to allow for publication in exceptional cases.

Other concerns may be summarized as follows:

- The relationship between section 38 (absolute prohibition on publication) and sections 40 to 46 (records) is not clear. For example, is information which is permitted to be disclosed under sections 40 to 46 subject to the prohibition on publication in section 38?

- That the Criminal Code be amended to ensure the protection of a child or young person who is a victim or witness to an offence alleged to have been or committed by an adult.

These latter concerns, it is suggested, are secondary and their resolution should await the outcome of the two key issues: adequacy of the wording in section 38 and whether section 38 should allow for publication in exceptional cases. These have been dealt with separately below.

A) Adequacy of the wording

1. Concerns has been expressed that the term, "publish by any means", lacks certainty and thereby subjects personnel, particularly court and law enforcement, to the possibility of prosecution. For example, is the calling of a youth's name from a court docket in a general waiting area outside the court in violation of section 38? Secondly, where a peace officer discloses the identify of a suspect to citizens in the vicinity where the crime occurred, is the disclosure lawful?

In this regard, it should be noted that other prohibitions with respect to publication reference "published in any newspaper or broadcast". (e.g., section 246.6 re hearings involving sexual offence). Newspaper is defined for these purposes in section 261 of the Criminal Code as follows:

> "Any paper, magazine or periodical containing public news, intelligence or reports of events, or any remarks or observations thereon, printed for sale and published periodically or in parts or numbers, at intervals not exceeding 31 days between the publication of any two such papers, parts or numbers, and any paper, magazine or periodical printed in order to be dispersed and made public, weekly or more often, or at intervals not exceeding 31 days, that contains advertisements, exclusively or principally.

Notably, it does not extend to include books, pamphlets or similar non-periodical publications. It should also be noted that subsection 17(1) of the Young Offenders Act which concerns publication during a transfer hearing, prohibits "publishing in any newspaper or broadcast".

2. It is suggested that the reference to "child or young person aggrieved by the offence" does not provide certainty to the media as to whom the ban extends. Moreover, this provision potentially extends the ban to individuals beyond the immediate "victime de l'infraction" in the French version of subsection 38(1).

3. Finally, it is suggested that clarification is required as to whether deceased victims are covered by the provisions and, if so, whether the prohibition is necessary in such circumstances. One situation has arisen in which the deceased victims' names were published on the legal advice that they "were no longer persons" and that the privacy offered by section 38 was no longer required.

OPTIONS

1. <u>Re the meaning of "published by any means"</u>

i) Retain the present wording.

The term "publish" has been interpreted as making publically or generally known. The phrase "publish by any means a report" in section 38 is broad and would appear to encompass any medium through which information is disseminated.

It is arguable that the meaning of "publish a report" would require more than the printing of a name on a court docket which may or may not identify the specific charges. While it has been suggested that the court is public and therefore the calling of a youth may constitute "publish", clearly, this act is intended to achieve an administrative purpose and would fall short of making this information <u>publicly</u> or <u>generally</u> known.

A concern has also been noted that law enforcement officers are precluded, by virtue of section 38, from showing a picture of a suspect to a citizen in the area where a crime occurred. For a contravention of section 38 to occur, however, a number of elements have to be satisfied. In the above example, the mere revealing of a picture would not fall into the definition of "publish", nor would such action constitute a "report". Further, depending on the circumstances, the officer may have made no link between the person, whose photograph was being shown, and a particular offence. In short, had the officer merely asked "Have you seen this individual?", it would seem to fall far short of the concern addressed by section 38. With respect to law enforcement practices, it would appear that these concerns would be addressed by clarification of the access and disclosure provisions in sections 40 to 46, rather than by modification of section 38.

ii) Amend to include specific forms of publishing that are prohibited, similar to present prohibitions in section 17 of the Young Offenders Act and section 246.6 of the Criminal Code.

Such an amendment could specify the forms of communication which would be included in the prohibition. For example, the section could read "no one shall publish in a newspaper or broadcast". Alternatively, this clause could be extended to include the all encompassing phrase of "by any means" presently contained in section 38(1).

2. **Re ambiguity with respect to the term "aggrieve".**

Amend the English version of subsection 38(1) from a "child or young person aggrieved by the offence" to a "child or young person who is the victim of the offence".

3. **Re deceased victims**

i) Retain present wording
ii) Specify that deceased persons are not covered by the prohibition.

B) **WHETHER SECTION 38 SHOULD BE AMENDED TO ALLOW FOR PUBLICATION**

1. Apprehension

The provision of an absolute ban on publication may impede the proper administration of justice. In this regard, section 38 has been viewed by some as an impediment to the apprehension of escapees and notification to the public of dangerous suspects.

OPTIONS

i) Amend subsection 38(1) to allow for a youth court judge to grant leave to publish identifying information of the accused or convicted young person on an ex-parte application by a law enforcement officer.

This proposal would provide for an exception from the general restriction on publicity where leave of a youth court is obtained. A similar clause was contained in the Juvenile Delinquents Act, subsection 12(3). This option would not limit the discretion of a youth court judge by stipulating grounds upon which leave could be granted.

ii) Amend subsection 38(1) to require a youth court judge to grant leave to publish the name or other identifying information of the accused or convicted young person on an ex-parte application by a law enforcement officer upon specific grounds being satisfied.

This option raises a number of issues, most notably upon what grounds being satisfied should a judge order leave to publish. Conditions that could be required prior to any considerations by a judge to grant leave to publish could include the following:

- o that the young person is alleged to have committed or has been convicted of an indictable offence which is the subject of the present action;
- o that there are reasonable and probable grounds to believe that the young person is considered dangerous to himself or others; and
- o that the need to apprehend the young person warrants publication.

The amendment could also specify the extent or the conditions upon which publication is granted. Thus, while publication may be warranted for specific purposes such as apprehension, there appears to be no justification for precluding the benefits of non-publication to a young person indefinitely. In this regard, other provisions of the Young Offenders Act similarly shape the discretion granted the youth court judge. For example, section 39 authorizes a court to exclude "any person from all or part of the proceedings..."

An issue arises as to the best means to inform any "publishers" of the cessation of the order granting leave once the objective of apprehension has been met. One suggestion is that the court provide a time-limited authority to publish, for example 24 or 48 hours, which would have to be subsequently renewed should a further period be required.

2. Publication at the request of a Child or Young Person

While the concerns with an absolute ban have focused on the merits of publishing the name of the accused or convicted young person, it should be noted that the ban extends to child and adolescent victims and witnesses. In assessing the extent of any exception to the ban, consideration should also be given to those circumstances where publication of the name of a witness or victim as well as that of a young person who has been accused or convicted of an offence may be desirable.

While no case has arisen to date (to the knowledge of the Ministry of the Solicitor General) in which a child or young person wished to exercise his rights to freedom of expression or perhaps to pursue a specific aspect related to criminal justice such as the establishment of an alibi, it is conceivable that such an issue may arise.

OPTIONS

i) Retain the status quo

ii) Permit court-ordered leave to publish the name of any child or young person involved in the process as a witness, victim or accused/convicted young person

This proposal would provide for an exception from the general restriction on publicity where leave of a youth court, after a hearing, is obtained. A similar clause was contained in the Juvenile Delinquents Act, subsection 12(3). It should be noted that such an amendment would permit, where leave was granted, publication of the name of a child or young person who was a witness to or a victim of the offence, as well as the accused or convicted young person. This option would not limit the discretion of a youth court judge by stipulating grounds upon which leave would be granted.

iii) Permit court-ordered leave to publish the name of any child or young person involved in the process as a witness, victim or accused/convicted young person upon the Court being satisfied that publication was not contrary to the best interests of the applicant.

The ground of "not contrary to the best interests of the applicant" permits a youth court to consider the level of maturity of the applicant and to be satisfied that the applicant is well-informed as to the possible consequences of publication. While the ground of "in the best interests" was considered, it was rejected on the basis that it implies a certain degree of predictability as to the future effects of publication and thereby imposes too high an onus on a youth court judge.

FEDERAL RESPONSE

That the English version of subsection 38(1) be amended from "a child or young person aggrieved by the offence" to "a child or young person who is the victim of the offence".

That the words in subsection 38(1) "publish by any means" be modified to ensure that internal communications of the justice system are not impeded.

That subsection 38(1) be amended to require a youth court judge to grant leave to publish on an exparte application by a law enforcement officer where the court is satisfied that:

- **the young person is alleged to have committed or has been convicted of an indictable offence which is the subject of the present action;**
- **the young person is considered dangerous to himself or others; and**
- **the need to apprehend the young person warrants publication.**

That subsection 38(1) be amended to provide for court-ordered leave to publish the name or other identifying information of the child or young person applying to the court upon the court being satisfied that publication would not be contrary to the best interests of the applicant.

COMMENT

While a number of concerns have been expressed with respect to section 38, the two key issues are adequacy of the wording and whether publication of the identify is desirable.

While it has been suggested, in the interests of greater certainty, that the phrase "by any means" be removed, it is not clear that this would accomplish the stated intent. In any event, the intent is to modify subsection 38(1) to ensure that internal justice communications are not impeded.

It does appear desirable to amend the section to provide for leave to publish, in exceptional circumstances, upon the grounds set out above. The need to inform the public is justifiable only to the extent that it assists the police in apprehending the young person and, accordingly, the conditions to be set should only be directed towards that end.

While a concern has been expressed that the process may be unduly impeded by the requirement that leave be granted by a youth court judge as opposed to a justice, it would appear that the gravity of the situation from a law enforcement perspective and from the perspective of the young person warrants this provision.

RECORDS MAINTENANCE AND DESTRUCTION

The Young Offenders Act has introduced comprehensive provisions respecting the creation, maintenance, use and destruction of records and documents generated in the juvenile justice process. The records scheme now required by the Act has met with extensive criticism arising from the administrative need to track and destroy all manner of documents, omissions in the provisions and other concerns.

The problems associated with sections 40 to 46 have been well documented in a series of consultation meetings. The major areas are:

1. The Requirements to Track

   The lack of an exhaustive definition of "record" and other requirements mandates extensive tracking systems to control the flow of documents arising from both indictable and summary offences.

2. The Access to Records

   The existing provisions are unduly restrictive and impede the orderly administration of juvenile justice (e.g., provincial regulatory agencies, archivists, victims, and insurance agencies, are all having difficulties). Similarly, records in cases where an accused is "acquitted" by reason of insanity are subject to destruction and the records of superior and appeal courts are not adequately dealt with.

3. The Destruction Requirements

   It is extremely difficult to ensure that all documents are physically destroyed at the specific time required. Moreover, ensuring that appropriate summary offence records are destroyed is impossible due to the limitations of identification technology. The lack of discretion in areas of keeping records alive for medical personnel in insanity acquittals, for individuals in civil matters or provincial regulatory matters has proven very problematic.

4. The Offence Section

   The present wording is unsatisfactory as it has the potential of turning those who administer juvenile justice in good faith, into potential lawbreakers.

OPTIONS

The Federal-Provincial Officials Working Group on Records has examined the problems identified through implementation, experience and consultations, and has proposed options for amendments to resolve the problems within the broad policy of the Act. The options are as follows:

A short-term solution would require the following amendments, introduced in the expectation that further revisions would be considered:

a) permit early destruction of court records by amending section 40(1) to read "may" instead of "shall";

b) increase access to records by appropriate regulatory and administrative tribunals (e.g., motor vehicle authorities, victims, Criminal Injuries Compensation Board, police) in subsections 40(2) and 40(3);

c) increase discretion of Attorney General to add classes of persons for access demanded by provincial programs;

d) recognize the Appeal Court as holding Youth Court Records;

e) exempt acquittal by reason of insanity from an immediate destruction requirement; and

f) require only the Central Repository to have mandatory destruction with all others being "deemed to be destroyed".

The second option seeks to define longer term solutions by introducing the following amendments:

a) Section 40(1): substitute "may" for "shall" to provide for early destruction if desired by record keeper;

b) Section 40(2) and (3) be expanded to include persons and classes of person already identified as requiring access, as in b) and c) above;

c) Section 45 amended to "deem records destroyed" after an appropriate time period rather than actual physical destruction;

d) A non-disclosure section be added providing for an offence to disclose after deemed destruction date unless authorized by court;

e) Section 40(2) and (3) be clarified as to the authority a record holder has to disclose "pre-destruction";

f) Eliminate need to track summary conviction offences by providing for simple deemed destruction five years after the date of conviction regardless of any subsequent offences;

g) Provide for records of indictable offences to be maintained until a specified period, free of indictable convictions, is achieved. The central repository would facilitate this process;

h) Clarify section 46 offence sections to provide for offences:

   (a) disclosing wilfully to unauthorized person prior to deemed destruction;

   (b) disclosing to anyone outside of the record holding agency without judicial authority after deemed destruction.

The options identified in the discussions of the Working Group on Records had not been exhaustively examined at the time of this report. Consequently, the proposals outlined above cannot be taken as recommendations of that group or any of its members' governments. The Working Group is scheduled to meet on January 10, 1986 and will report to Deputy Ministers following that meeting.

FEDERAL RESPONSE

- That section 40 be amended to remove the legislative requirement for the youth court to keep a complete record.

- That section 40(3) be modified so that police have adequate access to records for ongoing investigations; the Attorney General may approve access to records for the purposes of the Act and, as necessary, the proper administration of provincial statutes and regulations; youth and ordinary courts for the purposes of bail hearings and the Canada Evidence Act; victims and insurance companies dealing with claims; motor vehicle and licencing authorities; and data collection by Statistics Canada.

- That section 42 and 44, respecting police records, be modified to permit police, in investigating an offence, to disclose records kept according to the Act, where such disclosure is necessary to that investigation.

- That section 45 be amended to permit the retention of records relating to an "acquittal by reason of insanity".

- That section 45 be amended so that the requirement for destruction of records be limited to the central repository and, after a specified time that the disclosure or use of all other records be prohibited. Records which are subject to non-disclosure may be destroyed.

- That section 45 provide that records related to offences dealt with by way of summary conviction be destroyed or their use prohibited five years after the date of conviction.

- That section 45 provide that records relating to an offence dealt with by way of indictment be destroyed or their use prohibited provided the individual has remained free of any indictable convictions for a period of five years following the satisfaction of all dispositions imposed in respect of that offence.

- That provision be made that a youth court, having given the person affected an opportunity to be heard, may authorize the disclosure of a record otherwise subject to a prohibition from disclosure and that the disclosure and use be for the limited purpose specified by the court as necessary to the proper administration of justice.

- That section 46 be amended to provide for an electable offence where records are knowingly disclosed or used where such is prohibited by this Act. For clarity, this provision will include a "definition" of a record as a document or other information which identifies that a specific person was charged or convicted of an offence.

- That the Act make specific reference to records created as a result of alternative measures and specify that the use of such records would be prohibited two years from the date of the individual's admission to the alternative measure.

- That the Act limit access to a narrow range of records in those cases (e.g., the Highway Traffic agencies have neither an interest or a need for anything but confirmation of a conviction) when total access is not necessary and that the victim, etc. have access only to such information as may be necessary to his/her pursuit of legal remedies under this Act or through civil a action.

COMMENT

The proposals outlined above seek to resolve the problems that have been isolated in efforts to implement the records provisions and determine an appropriate policy direction for such provisions. Their presentation here is not intended to preclude the consideration of proposals that may be advanced by the Working Group on Records. It must also be recognized, however, that consultations are ongoing and these may result in modifications to the proposals for amendments that will be considered by Ministers in February 1986. In the absence of a final working group report and comprehensive proposals, this presentation provides a focus for discussion and examination of policy options concerning records maintenance/utilization and the impact of those policies for young people and the justice system.

The current provisions of the Young Offenders Act envisage a comprehensive scheme of records maintenance that seeks to accomplish three objectives:

1. To ensure that the justice system has complete and timely records available to inform the police, courts, and correctional authorities at all decision-making points;

2. To limit access to such records to those agencies and persons who have a legitimate, essentially justice-oriented, need for the information; and,

3. To ensure that young people, who have earned the benefit by virtue of crime-free status over a specified time period, are protected from all adverse consequences flowing from a criminal record.

The proposed amendments reflect a change in the policy direction that would be incorporated in the Act. The modified policy would have the following objectives:

1. To authorize the creation and maintenance of young offenders records in accordance with the requirements and capabilities of the justice system;

2. To provide basic guidelines respecting access to and appropriate use of records, recognizing the need for exceptional access in the interests of the proper administration of justice; and,

3. To prohibit the disclosure and use of records where the continuing disadvantage of such records to those who have been convicted as young persons exceeds the general benefits enjoyed by the criminal justice process in maintaining such records.

In broad terms, the proposals seek to provide minimum standards respecting the use of records created as a consequence of federal criminal law in a manner that balances the societal interest for effective justice administration and the prejudicial effect of those records for convicted young persons.

PART TWO: OTHER MAJOR ISSUES

Representations to the Ministry of the Solicitor General have raised issues that, while not among those identified as priorities, are of major importance and touch directly on the policy of the legislation. These issues are set out in Part Two together with the proposals advanced by the Ministry of the Solicitor General. The issues are:

- The Minimum Age of Criminality
- Contributing to Offences
- Open/Secure Custody

MINIMUM AGE OF CRIMINAL RESPONSIBILITY

Section 2 of the Young Offenders Act defines a young person as "a person who is or, in the absence of evidence to the contrary, appears to be (a) twelve years of age or more, but (b) under eighteen years of age..."

The consultative process leading to the development of new juvenile justice legislation resulted in the adoption of a minimum age of twelve years with almost complete unanimity among the provinces, special interest groups, and the Federal Government in arriving at that position. During that process, the Federal Government had put forward minimum ages of ten and fourteen years, both of which were strongly opposed, with the consensus settling on twelve.

Under the Juvenile Delinquents Act, the minimum age of criminal responsibility was seven years old (section 12 of the Criminal Code). However, section 13 of the Code stated that a child under the age of fourteen could not be convicted unless the Crown was able to prove criminal capacity (presumption of incapacity), i.e., that the child appreciated the nature and consequences of his act, and knew that it was wrong. Section 12 has now been modified to refer to a child under twelve and section 13 has been repealed. Thus, it can be argued that the Young Offenders Act has lowered the minimum age inasmuch as the new minimum is absolutely set at twelve.

From the outset of the consultative process on legislative proposals to replace the Juvenile Delinquents Act, it was agreed that age seven was too young and that the minimum age needed to be raised. Furthermore, this was seen to accord with the usual practice whereby young children were rarely brought to court, but instead dealt with by child welfare procedures. Further, even when brought before the juvenile court, the courts most frequently invoked welfare procedures to deal with them.

Many thought that criminal responsibility should begin with adolescence; sociological, criminological, pedagogical, and legal arguments were put forward as support for that position. To be criminally responsible was to be accountable under criminal law. Mens rea or criminal intent is a fundamental principle of Canadian law based on common law traditions. It was argued that, generally speaking, young children under twelve could not have the knowledge, experience, or the information to fully appreciate the nature and consequences of some of their actions. Further, the Young Offenders Act assumes that young persons must be able to understand their legal rights, to instruct counsel and to

fully participate in proceedings against them. Just as the criminal capacity of children is questioned, their capacity to fully participate in a criminal proceeding is doubled.

In adopting the Act, it was never Parliament's intention or expectation that children younger than twelve would be immune from intervention, but that child welfare procedures would be more appropriate and effective for all concerned.

Nature of the Problems Arising from the New Law

Some arguments have been advanced on legal/procedural problems arising with the age twelve minimum, although no statistics or other empirical evidence have been provided to indicate the extent of these problems. The following identifies the concerns:

- There is the possibility that a child under twelve could appear as a witness in a hearing for a young person twelve or older and claim responsibility for committing an offence. This could cast doubt on the prosecution's case, plus the child could not be prosecuted for perjury.

- Young persons or adults could use children to commit criminal acts knowing that the children would not be liable to criminal prosecution and intending to avoid prosecution themselves.

- It is inappropriate, and perhaps, unconstitutional, for provincial child welfare legislation to be offence-oriented. It would also dilute/distort the true purpose of such legislation. Some children under twelve, who commit offences, are not in need of protection, but of prosecution (for society's interests as well).

- Victims of crimes by children under twelve have no recourse to a court for restitution, compensation, or a voice in some other disposition.

- Children under twelve, apprehended for a crime, but taken under child welfare proceedings, are denied their rights of due process. (In fact, this varies, depending on the provincial legislation).

Some other general concerns have also been raised. These include:

- There are instances when a group of children commit an offence, some of whom are under twelve, and therefore immune from prosecution. This is not seen to be beneficial to the course of justice or to the children concerned;

- A small number of children may have the capacity to be responsible and accountable for their actions and thus could be dealt with by criminal law; they are beyond the abilities of social service agencies;

- Some contend that criminal behaviour among children under twelve has increased because they know nothing can happen to them; and

- Police are perceived to be powerless to act because they cannot charge children, and child welfare legislation is inadequate, thus causing concern for members of the public.

Extent of the Problem

Statistics are scarce, and frequently arguments are mounted based on anecdotal evidence or theoretical possibilities. It appears to be universally agreed and acknowledged that under the Juvenile Delinquents Act very few children under the age of twelve were actually brought to court, although many were picked up by the police who would handle the case in some other manner, usually by taking the child home to his parents.

At a workshop held in November, 1985, the Metro Toronto Police spokesman provided the following statistics and comments:

Metro Toronto 1985 (year to date, i.e., November): 1607 cases of under twelves, which included:

- 782 thefts,
- 84 break and enter
- 83 assault and sexual assault
- 190 mischief
- 49 arson
- 24 weapons
- 1 wounding
- 132 provincial offences (note: these would not be covered by the Young Offenders Act)
- 262 other offence types

It was observed that of this number only about 50 children might need to go to court - the rest would be taken home and there were "very few cases" of children under twelve being exploited by adults.

Under the Juvenile Delinquents Act, very few children under the age of twelve years were dealt with through the juvenile courts, although a much larger number would have been involved in behaviour that could have lead to prosecution. Of approximately 49,000 persons appearing before the juvenile courts in 1983, only 1040 were under twelve. Furthermore, it was exceedingly rare that these children

were dealt with by means other than adjournment "sine die", or referral to child welfare resources. Not only were the numbers appearing in court small, the pratices concerning charging appear to have varied from jurisdiction to jurisdiction as Table I reveals.

TABLE I

1983	# of Individuals under twelve	% of juveniles charged
Newfoundland	57	
Prince Edward Island	10	
Nova Scotia	71	
New Brunswick	28	
Quebec	1	
Ontario	625	
Manitoba	46	
Saskatchewan	41	
Alberta	78	
British Columbia	73	
Yukon	4	
Northwest Territorie	6	
Canada	1040	

There is no indication in the statistics that a process existed under the JDA through which especially serious offenders under 12 year were concentrated in the courts. Were that the case, it would be expected that a significantly higher proportion of the children dealt with would have been involved in violent offences than was the case for older juveniles or that each child was charged with a larger number of offences. The 1983 statistics, however, indicate that 6.3% of the charges laid against 10 and 11 year olds involved violent offences (assault, sexual assault, arson, robbery, offensive weapons and disorderly conduct) while 6.8% of charges against 12 and 13 year olds and 7.8% of those against 14 and 15 year olds involved violent offences. Similarly, the average number of charges per child age 10 or 11 was 1.66 while the average for the 12 and 13 year olds was 1.85 and 1.96 for 13 and 14 year olds.

Statistical data is unable to reveal the relative seriousness of the offences brought before the courts or the merits of alleged criminal charges. They simply inform us that there was, in 1983, no statistical evidence that the children under 12 dealt with by juvenile courts were exceptionally serious offenders. If any thing, that data suggests the converse was more likely.

The expectation when the minimum age was modified was not that provincial governments implement quasi-criminal law to permit the prosecution of children. The policy embodied in the Young Offenders Act is simply this: The issue is not children's criminal behaviour, but the personal, familial and environmental conditions and circumstances behind that behaviour, conditions and circumstances that are properly dealt with in the family or through child welfare intervention.

This concern for the factors leading to criminal behaviour is always present in comtemporary criminal courts. It is, however, a secondary consideration simply because of the nature of the court and as persons become older and more independent, it becomes increasingly necessary to focus on personal accountability and immediate social protection. Children, however, are not independent, their capacity to form criminal intent is in doubt, as is their ability to understand and participate in a criminal proceeding. The child welfare process on the other hand is designed to deal with the needs of children who are inadequately cared for, unsupervised, unnurtured, victimized and abused or suffer some form of disturbance. The criminal procedure is designed to prosecute and punish those who knowingly violate the rights and safety of others.

Status of Provincial Child Welfare Legislation

Every province has child welfare legislation affording authorities the power to intervene in cases of children needing protection or suffering neglect, as it can be variously defined. With the passage of the Young Offenders Act, the Federal Government left it to provincial governments to handle cases of children under twelve involved in behaviour which would, if committed by a young person/adult constitute an offence, which previously could have been handled by the Juvenile Delinquents Act, via their child welfare, mental health, and/or education legislation.

The provinces and territories have handled this situation in different ways. In some instances, entirely new child welfare legislation was drafted, which included the procedures to cover this "new" category of children. In other jurisdictions, existing legislation was amended so as to include within the class of children needing protection those who commit offences. For example, in New Brunswick, The Child and Family Services and Family Relations Act was amended so as to include within the definition of a child whose "security or development" may be in danger, a child "who has committed an offence".

Other jurisdictions did not have to modify their legislation as it was already capable of covering such cases. For example, in Prince Edward Island, The Family and Child Services Act defines a child in need of protection as a child: "whose behaviour, condition, environment or associations is injurious or threatens to be injurious to himself or others" or "who is beyond the control of the person caring for him". It was concluded there that these definitions of a child in need of protection were sufficiently broad to include children who have committed offences.

OPTIONS

a) Lowering the Minimum Age to Ten

i) with Presumption of incapacity for Ages 10-13 (revival of section 13 C.C.) and

ii) prosecution only with consent of Attorney General

This option would involve an amendment to both the Young Offenders Act (section 2, definition of a child) and to the Criminal Code (section 12), so as to set the minimum age of criminal responsibility at ten years. To ensure that this would not set an absolute age of criminal responsibility, there are two types of limits that could be legislated. The first would involve a revival of the old section 13 of the Criminal Code that provided the presumption of incapacity. That is, a child could not be prosecuted unless the prosecutor was able to prove that the child was competent to know the nature and consequences of his conduct and to appreciate that it was wrong (based on the common law tradition of doli incapax). Whereas Section 13 used to refer to children aged seven to under fourteen years, it is suggested that a reconstituted version should refer to children aged ten to under fourteen years. There is substantial agreement that children under ten ought not to be involved in the criminal justice system. On the other hand, there is still some debate as to whether children twelve and thirteen are absolutely capable of criminal conduct, as the Young Offenders Act presumes.

A second means of limiting the number of children under twelve being brought to court would be to require the consent of the provincial Attorney General before any prosecution could be launched, a decision that would be based presumably on a review of the best interests of the child versus society's interests.

This is a reasonably uncomplicated option which provides limitations on the use of the criminal law power for children of younger years. It also clearly respects the

federal authority to regulate criminal law and procedure relative to young persons in that it does not involve any cross-over with child welfare legislation or proceedings. In terms of disadvantages, this option re-opens the debate on minimum age, even though it contains limitations. It also raises questions as to how the due process procedure specified in the Young Offenders Act could be legally respected. For example, would police have to give the usual warnings to all ten year olds they deal with, in case they decide to lay charges? Would legal aid be available from the earliest point to assist these children? Are they capable in their own right of instructing counsel when the very purpose of the first court hearings would be to determine their legal competence to commit crime? Would such children be eligible for alternative measures programs?

b) Retaining the Status Quo

Under this option, no change to the present provisions is proposed. It can be argued that there is unsufficient information now available to reliably assess the validity of the criticisms and concerns expressed to date. Furthermore, it would appear that most provinces and other concerned juvenile justice agents are indifferent to, or would oppose, such a fundamental change in the Act. It is also suggested that it is not criminal proceedings, but certain provincial child welfare proceedings that may be in need of review.

The disadvantage is that the option does not deal with the perceived problems, be they real or symbolic in nature. However, a compromise solution might be to set up a Federal-Provincial Working Group to further study the issue.

c) Transfer to the Young Offenders Act

Some organizations have suggested that there be the possibility of a "transfer to youth court" of children under twelve in certain exceptional circumstances. No details of how this could be accomplished have been provided. Close examination of this idea reveals many legal difficulties, some of which may be insurmountable. Legal advice on the constitutionality of some aspects should be sought.

To start with, the use of the phrase "transfer" implies movement from one system/court to another. A child under twelve cannot be "transferred" from the "street" to the jurisdiction of the Young Offenders Act and the youth court; such action, in effect, could be accomplished under Option (a), a reduction in minimum age. Thus, a transfer must imply a movement from child welfare practices/authority to juvenile justice authority. Then the question can be raised

as to whether the Federal Government has sole legal authority to authorize these transfers within the Young Offenders Act legislation, or whether both levels of government must amend their legislation to accommodate such an action, (inasmuch as a cross-over from child welfare to criminal procedure would be involved). Pending further advice on the constitutionality of this aspect, the option described below assumes the necessary amendments by both levels of government.

Under this option, children ten years to under twelve, could be transferred to the authority of the Young Offenders Act from child welfare proceedings if certain criteria were met. The federal legislation, the Young Offenders Act, would have to enunciate the minimum criteria under which children of that age could be transferred to its jurisdiction, e.g., minimum age repealed in certain circumstances, such as seriousness of offence, best interests of child, interests or protection of society, presumption of incapacity, consent of provincial Attorney General, etc. In addition, but not necessarily, the province could impose further criteria in its child welfare legislation that would serve to specify when such a move would be appropriate. At a minimum, provinces would have to modify their legislation so as to allow for the possibility of such a transfer from their jurisdiction to the Young Offenders Act, and to end their authority over the child once such a transfer has been affected. In effect, this would be an "opting in" procedure for provinces that so desired, as the Federal Government has no legal authority to force such a move. However, the Federal Government could choose not to create such a transfer provision unless all provinces agreed to amend their legislation. This would, at least, ensure nominal equality of procedure nationally and avoid any possible Charter challenges based on equality provisions.

Although this is a complicated option, involving cross-over between federal and provincial legislative arenas, it has certain advantages. It has a number of checks and balances to ensure that such a procedure would not be frequently used. It does not complicate the enforcement of the law for police as all children under twelve apprehended by police would be presumed to fall under child welfare proceedings, until family court determines otherwise, and therefore the legal rights afforded under the Young Offenders Act need not be immediately invoked. From a policy point of view, this latter aspect may not be desirable; as only the most serious cases would be eligible for transfer, it can be argued that these are the very cases where it is most important to ensure that legal rights are respected, and legal advice made available from the earliest stages, e.g., especially as regards the admissibility of statements or other evidence.

FEDERAL PROPOSAL

That the current provisions affecting the minimum age of responsibility be maintained.

COMMENT

There is no doubt that children under twelve commit offences, although not nearly in the same volume as older children. A very few of these children may commit serious or violent crime, or are repetitively criminal. The vast majority of children have traditionally been handled by the police in an informal manner, such as bringing them home to their parents or through formal or informal child welfare referrals. Even critics of the current regime acknowledge that these patterns of behaviour have not changed, nor would they be likely to.

Concerns have been raised in some quarters that this is a problem; most notably, by some police representatives. It is difficult to assess how widespread the concern is, as consultations revealed no consensus on the extent of the problem or the need for or nature of possible solutions.

The nature of the dissatisfaction expressed largely relates to the absence of authority to charge for those rare cases that may warrant it an inability to warn children of criminal sanctions, and a perception that the law is a mockery if some children under twelve are not being held accountable for their actions. In some real sense, the concerns relate to the symbolic effects of the previous law. There is also some fear that such children are being incited to commit offences (by young persons or adults) because of their immunity to prosecution; this latter concern is entwined with the concern regarding the lack of a contributing to delinquency offence per se.

In general, the transition to the new regime does not appear to have been too difficult. Child welfare legislation has been re-drafted or amended as perceived necessary in order to handle such cases. Although the constitutional appropriateness of child welfare proceedings, and Charter implications re the due process rights for such children have been (mildly) questioned, there have been no legal challenges of either aspect.

CONTRIBUTING TO DELINQUENCY

The Juvenile Delinquents Act (section 33) provided for the prosecution of adults who contributed to the delinquency of a child. Section 33 created two offences. Section 33(1) made it an offence for an adult to knowingly do something which would contribute to the child being delinquent; section 33(2) made it an offence for the parent or guardian of a child to knowingly fail to do something to prevent the child from becoming a delinquent. Both offences were summary conviction liable to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding two years, or to both. An adult's potential liability under section 33 was very broad because it depended on the definition of delinquency in section 2 of the Juvenile Delinquents Act, which included violations of the Criminal Code, or any other federal statute, provincial statute, or municipal by-law, or "sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under any federal or provincial statutes".

The Young Offenders Act repealed section 33 and did not create a new provision by which an adult could be held criminally liable for the criminal conduct of a young offender or a child. Since the Young Offenders Act limited criminal offences for juveniles to violations of the Criminal Code or other federal statutes, a contributing offence became somewhat redundant in that certain existing sections of the Criminal Code could handle such situations.

The validity of old section 33 from both a policy and legal perspective was considered by the Department of Justice Committee on Juvenile Delinquency in their 1965 report, Juvenile Delinquency in Canada. The Committee offered several reasons to support the abolition of the contributing offence:

1) The vagueness in definition of the offence category leading to the administration of a form of subjective justice.

2) The deprivation to the accused (charging an adult with "contributing" in circumstances where he could have been charged under the Criminal Code), the accused is deprived as a result of (of an opportunity to elect trial by judge and jury, or trial by a higher judicial tribunal).

3) A charge of contributing was often laid because it was easier to get a conviction against an adult in juvenile court than in ordinary court, and because the juvenile court tended to impose heavier sentences upon conviction.

4) Prejudice would result to the accused because the juvenile court's attitude towards the accused adult tended to be influenced by the protective feeling towards the child.

5) The accused was prejudiced because in some cases he would be denied defences that would have otherwise been available to him had he been charged in respect of the same conduct under the Criminal Code (e.g., the "more to blame" defence for sexual intercourse with a youth 14 years but under 16 years, section 146(2) and (3)).

6) The accused adult would be prejudiced because of the laxity of proceedings in some juvenile courts (arguably, this criticism could not be sustained under the Young Offenders Act).

The Committee further suggested that should there be situations not covered by existing provisions, these should be created as required within the Criminal Code.

A review of the case law surrounding the actual use of section 33 also illustrates the problems and the contradictions with this offence. It was common to resort to such a charge for status offence delinquencies such as when an adult had engaged in consensual sexual intercourse with a juvenile (14 or over), the premise being that such juveniles were guilty of sexual immorality and the adults, of contributing to this state of delinquency. An adjudication of guilt, therefore, very much depended on whether the judge thought that the juvenile was sexually immoral or likely to become so as a result of this behaviour. In other words, a conviction might depend on the prediction of the impact on the future behaviour of the juvenile rather than on the constituent elements of the act committed by the accused.

It appears that little opposition to the decision to repeal the contributing offence was voiced during the course of the consultations leading to the enactment of the Young Offenders Act. Given the abolition of the status offences, it was thought that any involvement by adults in the commission of offences by young persons could be covered by the Criminal Code.

It was intended that sections 21 to 24, "Parties to Offences", could adequately cover situations, in addition to those specific offences which expressly involve the conduct of a young person. These sections cover:

(a) Section 21 - parties to an offence;

(b) Section 22 - counselling or procuring another person to be a party to an offence;

(c) Section 23 - acessory after the fact to an offence; and

(d) Section 24 - attempts to commit an offence.

In addition, Part IV of the Code sets out specific sexual, public morals and disorderly conduct offences, many of which either expressly, or as a matter of practice, criminalize the conduct of adults in respect of young persons and children. e.g.,

- section 146(1), sexual intercourse with a female under fourteen years;

- section 166, parent or guardian procuring defilement of female person (e.g., living off the avails of her prostitution);

- section 168, corrupting a child, defined as a "person under eighteen years", by participating in adultery, sexual immorality, habitual drunkenness or other form of vice, in the home of the child.

Finally, there are also several provisions of the Code specifically related to prostitution and sexual assaults, e.g.,

- section 194, transporting a person to a common bawdy-house;

- section 195(1)(a), procuring a person to have illicit sexual intercourse;

- section 246.1(1) - sexual assault.

Both the Badgley and Fraser Reports reviewed the provisions relating to sexual offences against children, pornography, and prostitution, and made sweeping recommendations for change. The Department of Justice is now examining possible legislation in response to those proposals.

Nature of the Problems Arising from the New Law

1. It is argued that there has been an increase in the number of young persons and adults who use children under twelve to commit crimes (fagins).

2. This situation is not adequately dealt with by relying on the present provisions in the Criminal Code that deal with parties to offences. It is suggested that it is not clear that a child involved in what would normally be a Criminal Code offence is in fact involved in committing any type of offence because if the offender is under twelve, there may be no offence (due to the definition of minimum age of criminal responsibility). As the child cannot be charged, then the adult or young person cannot be charged under the Criminal Code for inducing the child to commit the crime. This not only frustrates police and other law enforcement agents, but brings the administration of justice into disrepute.

3. The contributing provision was a handy tool for police to have for investigating possible instances of sexual immorality or sexual offences such as pimping. For example, if a police officer observed an adult out very late at night with a young girl, he would have the authority to stop the person for questioning, and possibly arrest the adult for contributing to delinquency (i.e., the sexual immorality).

Extent of the Problem

Statistics are not available, and arguments are usually based on anecdotal evidence or theoretical possibilities.

At a workshop held in November 1985, a Metro Toronto Police spokesman said there were "very few cases" of children under twelve being exploited by adults.

Under the Juvenile Delinquents Act, very few persons were dealt with in the juvenile courts for contributing to delinquency. The following table summarizes data contained in the Statistics Canada Juvenile Delinquents report for 1983.

NUMBER OF CHARGES LAID FOR CONTRIBUTING TO DELINQUENCY, AND COURT ADJUDICATION

1983

Province	Grand Total	Adjudication		
		Not Delinquent	Other Adjudication	Found Delinquent
Nfld	8	5	-	3
P.E.I.	-	-	-	-
N.S.	5	-	-	5
N.B.	4	4	-	-
Quebec	535	210	2	323
Ontario	59	20	5	34
Manitoba	17	15	1	1
Sask.	-	-	-	-
Alberta	-	-	-	-
B.C.	3	3	-	-
Yukon	-	-	-	-
NWT	-	-	-	-
CANADA	631	257	8	366

As can be seen from the table, the bulk of the charges were laid in Quebec. For Canada as a whole, over one-third of the charges did not result in a conviction.

OPTIONS

a) Retaining the Status Quo

There were many problems associated with "contributing" prosecutions under the Juvenile Delinquents Act. Creating a new offence under the Code or Young Offenders Act would not likely resolve many of those problems. The current sections on "parties to offences" would seem to adequately cover the situations that any new offence would have to cover, yet provide for due process and respect the principles of criminal law. As well, it may be advantageous to await the proposals in response to Badgley and Fraser, and to see the effect of the new soliciting laws, before deciding what further measures may be required.

b) Clarification of the Criminal Code - "Parties to Offences"

Under this option, an amendment would be introduced in the Criminal Code to specify that sections 21 to 24, "Parties to Offences" would be applicable to situations involving children under twelve. Such an amendment would clarify the present uncertainty regarding these provisions, and thus provide law enforcement with the necessary powers to deal with "fagin-like" activity.

FEDERAL RESPONSE

The recommended federal position is to clarify the Criminal Code sections on "parties to offences".

COMMENT

Since the repeal of the contributing offence, police and prosecutors have had to rely upon relevant Criminal Code sections to deal with adults who induce young persons to commit violations of the Code or other federal statutes. There is some debate as to whether these sections may be invoked when an adult or young person induces a child under twelve to commit an offence because a child of that age cannot legally commit an offence given the minimum age of criminal responsibility specified within the Young Offenders Act. This then is a situation requiring clarification, and possibly amendment.

An adult (or young person) who induces a young person or child under twelve to commit a violation of a provincial statute (e.g., liquor laws, school attendance laws) or a municipal by-law cannot be prosecuted under the Code or the Young Offenders Act. Such situations must now be covered by the relevant provincial statute or through provincial child welfare legislation. The appropriateness of creating an offence within the federal law power to cover such situations is open to question; it would appear to be "ultra vires" the Criminal Code power to create offences relating to the provincial legislative domain, yet in effect that is exactly what the Juvenile Delinquents Act did.

The third problematic area is how to deal with situations previously covered as "sexual immorality or similar form of vice". Unless one of the specific offences as listed in the Code is involved, police have no recourse within criminal law powers for handling these matters e.g., clients of juvenile prostitutes. The proposals recently adopted by Parliament on soliciting and prostitution will handle some aspects such as providing powers to charge clients, and more severe soliciting laws enable the apprehension of juvenile prostitutes. As well, it is expected that the legislative proposals shortly to be introduced in response to the Badgley and Fraser reports will go a long way to broadening the scope of illegal sexual conduct by adults with children and young persons.

OPEN/SECURE CUSTODY

Through very different processes, the adult criminal process still provides and Canada's previous juvenile justice system provided for the determination of the majority of "correctional decisions" by administrative or quasi-judicial authorities rather than the courts that imposed the sentence. The Young Offenders Act has introduced a fundamental change in this area, in that the youth court is charged with reviewing or making the major correctional decisions. The creation of two levels of custody is a major feature of this innovation and has been the source of some general concern.

Traditional practices have seen the courts exclusively concerned with the issue of whether custody was required and, in the adult system, determining an appropriate sentence length. Under the Young Offenders Act, the courts now determine not only the fact and duration of a custody order, but the type of custody and questions related to transfer from secure to open custody and release to community supervision. These procedures have been identified as problematic in some cases and have been the subject of deliberations by a working group of officials.

The Custody Working Group discussions have focused on four broad areas of concern: the legal and operational definition of custody, particularly, the distinctions between "open" and "secure" custody, probation residential attendance, and traditional child welfare-type residential programs; the impact of the open/secure provisions and other Young Offenders Act provisions, generally, on rates of use of custody dispositions; judicial versus administrative control in the initial placement in and movement between levels of custody; and, the review and enforcement of custody orders.

Both practice and concern about the present open/secure provisions vary markedly across jurisdictions. Some jurisdictions have encountered serious problems with the current provisions, others no apparent outstanding problems, and others only some lesser degree of difficulty. As a result, general positions around prospective amendments also vary: some jurisdictions favour substantive change in the form of a return to a single custody approach, with accompanying administrative control; others are agreeable to only minor technical change at this time; while others tend to favour a compromise approach.

OPTIONS

Three options for change, related to the broad issues of the definition of custody and judicial versus administrative control, have been idenfitied by the Working Group.

1. A return to a single custody approach with custody being simply defined as a place of containment or restraint, with accompanying administrative rather than judicial control over placement in and movement between levels of custody. In this approach, the provinces would have the discretion to, by provincial legislation or regulation, formally establish legal definitions of custody and legal mechanisms for the placement and movement of youths.

2. In this approach, the concept of open/secure custody would be retained, but placement in and movement between levels of custody would rest with the provincial director, subject to specified legal criteria and to a provision wherein the youth would have recourse to the court to redress alleged inappropriate use of a placement in secure custody.

3. This option would retain the current open/secure provisions, but address technical amendments to redress problems which have arisen to date. In this option substantial consensus (not unanimity) has been reached on the following: to introduce legal criteria limiting the use of open custody; not to change the current definitions of custody; to clarify and simplify the section 24(7) court procedure for transfer to open custody by incorporating it into section 29; to specify that an administrative transfer to secure custody under section 24(9) is not a bar to further proceedings under the Act and not a proceeding within the meaning of the Act; not to provide greater administrative discretion for movement from secure to open; and not to provide for a judicial review of an open custody order so that a secure order could be substituted.

FEDERAL RESPONSE

That section 24 be amended as follows:

i) subsection 24(5) be modified to refer to custody alone rather than secure custody. Consideration might also be given to inserting this modified version as subsection (2) to emphasize the importance of the consideration;

ii) subsection 24(3) and 24(4) be modified to permit a custodial order in any conviction for breach of a disposition;

iii) subsection 24(7), providing for transfer from secure to open custody be repealed and provision made in section 29 for such a transfer through the review mechanism established there;

iv) subsection 24(9) be modified to clarify that a transfer to secure custody for a 15-day period is a matter dealt with at the discretion of the provincial director and further modified to clarify that the justification for such a transfer is the safety of all affected or the good order of the facility;

v) subsection 24(10) be modified to clarify that young persons must be kept separate and apart from adults who are detained or held in custody following charges or convictions;

vi) subsection 24(15) be modified to clarify that the "provincial director" determines the nature of the facility in which concurrent sentences will be served and the subsection make reference to "adult custodial" facilities rather than "provincial adult" facilities.

vii) a provision be added clarifying that young people who have been ordered to serve a term of custody may be held in a facility designated pursuant to s. 7(1) when necessary to permit transfer from the court to a custodial facility or back to the court.

viii) a provision be added to the effect that secure orders be satisfied before open orders where consecutive dispositions are made and that secure orders have presidences when there are concurrent orders.

COMMENT

The proposed modifications seek to resolve procedural difficulties that have been identified through implementation of the Act and to reinforce that open custody is as serious a consideration as is secure custody. The modifications do not, however, alter the basic concept of two types of custody, nor the principle of judicial review. At the time of this report, these fundamental questions remained before the Working Group on Custody. Its discussions on January 15 and 16, 1986 may suggest that new or altered options for amendments should be considered.

PART THREE

This section identifies proposals for amendments to the Young Offenders Act which do not bear on the fundamental policy of the Act, but directly affect administrative and procedural matters. The proposals are presented in order of the sections of the legislation for ease of reference.

DEFINITION OF PARENT

The definition of "parent" contained in subsection 2(1) has been found to be somewhat ambiguous and has the potential of including persons who would be inappropriately identified as a "parent": personnel of custodial or detention facilities, police officers, etc. This results in the possibility that justice officials are inappropriately given notice and the appropriate "parent" ignored. It also raises the possibility of justice officials being compelled to attend court in an unintended capacity.

FEDERAL RESPONSE

That the definition of "parent" in subsection 2(1) be modified to ensure that no person would be defined as a "parent" when he or she has the care or custody of a young person solely as a consequence of proceedings under this Act.

COMMENT

The modification seeks to ensure that those who are carrying out their responsibilities in respect of procedures under the Young Offenders Act are excluded from the definition, without risking an overly narrow definition of parent. At the same time, the amendment should not negate the possibility that a "dual role" may exist. For example, a natural parent who stands as a responsible adult under subsection 7(4) should not be exempted from the provisions of section 9. Similarly, the agency that is charged with the wardship of a child under provincial law should not be exempted because the same agency operates an open custody facility.

DEFINITION OF PROVINCIAL DIRECTOR

The Act assigns a wide variety of functions to the "Provincial Director", as defined in subsection 2(1), specifying in most cases that the particular responsibility may be discharged by a "delegate", "agent" or "designate". There are, however, eleven functions for which no authority to delegate is specified. There are, moreover, no significant distinctions between the functions that may be delegated and those that, apparently, cannot.

It has been proposed that the Act be amended so that the Provincial Director has a clear capacity to delegate his/her functions and responsibilities in all instances.

FEDERAL RESPONSE

That the Act clearly authorize the Provincial Director to delegate responsibilities and that references in the Act to the "Provincial Director or his delegate/agent/designate" be modified to refer to the "Provincial Director" alone: sections 7(6); 23(1)(c); 23(2)(a); 23(2)(f); 24(6); 24(7); 24(9); 24(13); 24(14); 28(17); 35(1); 35(3); 37; and, 39(2)(c).

COMMENT

The definition of "Provincial Director" in section 2 states

> "provincial director" means a person, a group or class of persons or a body appointed or designated by or pursuant to an Act of the legislature of a province or by the Lieutenant Governor in Council of a province or his delegate to perform in that province, either generally or in a specific case, any of the duties or functions of a provincial director under this Act;"

In removing the reference to agents, delegates and designates, there would be no uncertainty concerning the authority to delegate: that authority would be found in the statutes, orders-in-council or directives of the provincial government. The amendment would, therefore, remove the need for circumventive administrative procedures and the distinction without a difference now present in the Act.

JURISDICTION OF THE YOUTH COURT

By virtue of section 5, the youth court has exclusive jurisdiction in respect of any offence alleged to have been committed by a person while he was a young person, subject to the exceptions of the National Defence Act and section 16 of the Young Offenders Act. The jurisdiction of the youth court, by virtue of the definition of "young person" and the provisions affecting the administration and review of dispositions, continues beyond a person's eighteenth birthday until all dispositions are satisfied. As a result, situations have arisen and will continue to arise, in which a person is simultaneously under the jurisdiction of the youth court, because of a disposition, and the ordinary courts because of offences committed after his eighteenth birthday.

In cases of simultaneous jurisdiction, problems arise in respect of sentence calculation and management, competing procedures for modification of dispositions made by the two courts and other matters. It is proposed that this complexity be resolved by providing, through the Young Offenders Act, that any outstanding youth court disposition or portion thereof be transferred to the jurisdiction of ordinary courts when the person affected is convicted in ordinary court of an offence committed after his eighteenth birthday.

The old juvenile justice process, in large part because of its welfare orientation, was not often faced with problems of simultaneous jurisdiction. Where possible conflicts did arise, it was simple enough for the juvenile or family court issues to be dropped. Under the principles and provisions of the Young Offenders Act, this expeditious solution is neither available nor desirable. For this reason, mechanisms or procedures for managing simultaneous jurisdiction must be considered. The problem only arises when a young offender under a disposition becomes an adult and is involved in new criminal behaviour; therefore, any mechanism that is developed need deal only with this set of circumstances.

One option would be to provide legislative guidelines for the management of such situations without affecting jurisdiction. Such guidelines would likely have to prescribe the rank order of youth and ordinary court sentences, procedures for resolving instances where the requirements of the sentences contradicted or confounded one another. A second approach would be to give jurisdiction over review procedures under the Young Offenders Act to the court having jurisdiction to try any new charges against the now adult offender. The third option is to provide a discretionary authority to substitute a sentence in the ordinary courts for the young offender disposition.

The choice of any mechanism will have different consequences for the ordinary courts and the person affected. It would appear, however, that any of the options would be preferable to leaving the situation to be resolved by trial and error through administrative and judicial initiatives.

FEDERAL RESPONSE

That provision be made in the Young Offenders Act, possibly at subsection 20(5), to the effect that, upon application by the Attorney General or his agent, any portion of a disposition made by a youth court that remains unsatisfied at the time that a person is convicted of an offence committed after his eighteenth birthday, may, at the direction of the ordinary court, be dealt with and administered as if they had been a sentence of the ordinary courts.

COMMENT

The creation of a specific provision to resolve simultaneous jurisdiction would ensure that the administration of juvenile and adult dispositions was not unnecessarily encumbered by two competing systems while allowing for some discretion in each case to avoid injustices or other unintended consequences.

JUDICIAL INTERIM RELEASE

The Young Offenders Act, at section 8, requires tht a youth court judge rather than a justice determine whether a young person will be released or detained pursuant to section 457 of the Criminal Code, unless the youth court judge is "not reasonably available." It has been observed that this provision creats difficulties where the community is served by only one youth court judge.

FEDERAL RESPONSE

That section 8 be amended to allow justices or youth court judges to hear cases under section 457.

COMMENT

The modification would provide full flexibility to provincial systems to determine whether justices or youth court judges should hear cases under section 457 of the Code.

DURATION OF DISPOSITIONS

The Young Offenders Act establishes a comprehensive justice process applicable to those twelve to seventeen years inclusive. In recognition of the historic sentencing practices, the "special needs" of young people and the practical limitations of the juvenile justice system, the Act provides for the maximum duration of dispositions to be two years for a single offence and three years for multiple offences or offences punishable by life imprisonment. Subsection 20(4) has been interpreted by courts to require that the maximum length of the combined disposition in effect at any time cannot exceed three years. As a consequence, the possibility exists that the youth court would be unable to order an appropriate sanction in certain circumstances. By way of example, a young person who escapes one month after the imposition of a thirty-month custodial order and is subsequently convicted of the escape and a series of armed robberies committed while he was at large, would be liable to an additional disposition not exceeding seven months. In the absence of the limitation imposed by subsection 20(4), a significantly longer disposition would be expected.

There is also some concern that the legislation does not adequately provide for the authority of the Youth Court to impose consecutive custodial dispositions either where the young person is convicted of two or more offences at the same time or at different times.

FEDERAL RESPONSE

That subsection 20(4) be modified to permit the court:

- to order consecutive custodial dispositions up to a maximum of three years where a young person is convicted of different offences at the same time;
- to order a subsequent disposition of up to a maximum of three years to be served consecutively to the unexpired portion of any prior disposition.

COMMENT

The proposed modification would have the effect of clarifying the court's authority to impose consecutive custodial dispositions for different offences dealt with at the same time. It would also permit the court to impose a consecutive custodial disposition of up to three years for offences dealt with subsequent to the original disposition.

For example, a yougn person convicted of break and enter and robbery at the same time, could receive three months for the break and enter and twelve months for the robbery. The court, in its descretion could order that these dispositions be consecutive resulting in a custodial order of fifteen months.

If the young person, three months into the prior disposition escapes custody and commits further offences while unlawfully at large, the court could impose a custodial disposition of up to a maximum of three years, to be served consecutively to the unexpired portion of the previous disposition (i.e., one year).

The modification could, undoubtedly, result in some rare dispositions imposed for offences committed at age seventeen which would then continue in force until the individual reached age twenty-three or twenty-four. This consequence would have some implications for the administration of juvenile corrections and would, undoubtedly, encourage the use of provisions in section 24 allowing for persons who remain in custody beyond their eighteenth birthday to be held in adult facilities.

TRANSFER TO ORDINARY COURTS

The jurisdiction of the youth court to try young persons is absolute, although section 16 does provide for a procedure whereby the jurisdiction can be transferred to the ordinary courts. This transfer provision recognizes that situations arise where the young offenders' scheme is not appropriate and the full force of criminal law should be brought to bear. The ultimate determination of the transfer is made by a youth court, albeit, the process must be initiated by the young person or the Crown.

There is a general consensus that an individual convicted of first degree murder should be transferred to the ordinary courts, however, an initial charge of first degree murder is often reduced as the facts of the case are clarified. The tranfer hearing provides a mechanism whereby these facts can be clarified and other factors considered. Through this hearing, the courts are able to determine whether trial in the ordinary courts is necessary or the procedures of the youth court are adequate. The fact that some serious criminal behaviour is not automatically tried in ordinary courts has been criticized, particularly in media and public commentary. Such a provision would, however, conflict with the policy of the Act and expose some individuals to the ordinary courts unnecessarily.

FEDERAL RESPONSE

That section 16 be amended to provide that a transfer hearing occur in all cases where a young person is charged with an offence pursuant to charges of first and second degree murder and upon application of the Crown or young person in all other cases.

COMMENT

This amendment would reinforce the importance of the transfer question in serious cases without excluding the judicial discretion that has been effectively employed under both the Young Offenders Act and the previous Juvenile Delinquents Act.

TRANSFER OF TWELVE AND THIRTEEN YEAR OLDS

Since the creation of a distinct juvenile justice system in Canada in 1908 by the passage of the Juvenile Delinquents Act, it has been recognized that the interests of society at large may require that certain adolescents, in rare and exceptional cases, be dealt with in adult court. The Young Offenders Act retains this procedure.

The current Act, as did its predecessor, provides for the transfer of a young person's case to ordinary court under the following circumstances: the youth was fourteen years or older at the date of the alleged commission of the offence and the offence is indictable. The age requirement under the Juvenile Delinquents Act coincided with the presumption that all children between the minimum age of 7 and 14 years were deemed incompetent to know the nature and consequences of their conduct and to appreciate that it was wrong, unless the Crown was successful in rebutting this presumption. The choice of 14 also reflected the belief, carried forward into the Young Offenders Act, that transfer was a measure of last resort to be used after the resources of the juvenile system have been exhausted.

While the court under the former Act had to be satisfied that the "good of the child and the interest of the community demanded it", section 16 of the Young Offenders Act requires the court to consider "the interests of society ...having regard to the needs of the young person". It should be noted that various decisions have held that the "interests of society" are not necessarily coincident with "protection of society", and that the concept of protection includes the objective of long-term rehabilitation.

It has been questioned whether 12 and 13 year olds should be made eligible for transfer where they have been charged with an indictable offence. The benefits of making the transfer option available would arguably be as follows: to vest youth courts with the responsibility of assessing the relative appropriateness of juvenile and adult justice systems for dealing with 12 and 13 year-old youth on a case-by-case basis rather than providing for the legislated exclusion of this age range; and to provide for greater latitude in sentencing than the three year maximum presently contained in the Act. The combined effect may be to promote public confidence in the juvenile justice system by the presence of a "safety valve" for the most 'heinous' of cases.

OPTIONS

I. Retain the present provisions

The central issue is whether there are adequate criminal and non-criminal responses to serious conduct by youth under the age of 14. This issue requires examination whithin the Young Offenders Act, the provincial mental health systems, and the provincial child welfare/youth protection systems.

Where a 12 or 13 year old is proceeded against pursuant to the Young Offenders Act, and the youth is found not guilty by reason of insanity or unfit to stand trial, he/she would be automatically detained "until the pleasure of the Lieutenant Governor is known". In practice, a youth so found would be ordered to indeterminate custody by the Lieutenant Governor. The youth would then become subject to the review provisions set out in the Code. In summary, the Code provides for mandatory reviews at set intervals and a review board is mandated to give its opinion to the Lieutenant Governor as to the recovery of the person and, if so recovered, whether the youth's discharge is in the interests of the public.

Where a 12 or 13 year old youth is convicted of a very serious crime under the Young Offenders Act, the youth may be sentenced to a maximum of three years in secure custody. Alternatively, or in combination with a custodial order, the youth could be detained for treatment provided the criteria for consent have been met.

Independent of, or concurrently with, the Young Offenders Act, provincial health legislation could be operable for young persons who fall short of the standards of unfit to stand or not guilty by reason of insanity as such a youth may qualify for voluntary/involuntary committal. Similarly, child welfare/youth protection legislation does provide for the containment and treatment of young persons.

II. Raise the Maximum Sentence Length

As the primary motive in making 12 and 13 year olds eligible for transfer is the belief that greater latitude in sentencing is required, this objective could be achieved directly through an amendment which would increase the maximum disposition from 3 years to some greater period. Such and amendment would, of cours, apply to all youth between the ages of 12 and 18, who are prosecuted pursuant to the Young Offenders Act.

The Act recognizes, in its declaration of principle, that young persons have special needs, owing to their state of development and level of maturity. Where the youth are 12

and 13 years of age, this principle will undoubtedly carry great weight. Mindful of this principle and of the recognition within the Young Offenders Act of the rights and safeguards held by young persons who come into conflict with the criminal law, this option preserves these rights of the accused while at the same time acknowledging the need for protection of the public which may not be met by the present limitations on dispositions.

Bearing in mind the needs and intellectual limitations of 12 and 13 year old youth, the above option would permit these youth to continue to retain the following rights and safeguards which would be lost upon a successful transfer application: the right to be detained separate and apart prior to trial; the right to the protection of privacy afforded under sections 38 and 39; the provisins in sections 56 to 63 respecting evidentiary matters; the limits on disposition; the right to serve a custodial sentence separate and apart from adults in youth facilities with educational, recreational, and social programs better suited to their levels of maturity - in short, in a milieu which would be more conducive to a 12 or 13 year old's rehabilitation.

III. Provide for Transfer of 12 and 13 year olds to Ordinary Court

It is acknowledged that the need for such a transfer would be rare and for offences such as murder. In cases where 12 or 13 year olds are transferred and convicted of first or second degree murder, the youth would be sentenced to imprisonment for life without eligibility for parole until 25 years have been served where the offence was first degree and life without eligibility for parole for 10 years where the offence was second degree. Without amendments to the Criminal Code, no discretion would rest with the court to order anything short of these sentences.

While the Young Offenders Act provides, in section 75, by virtue of an amendment to the Criminal Code, that such a youth could serve a portion of his adult sentence in a youth facility until the age of 20, a number of difficulties would flow from the extreme disparity in sentence length between such a youth and all of the other residents in the youth facility.

This option may be viewed as desirable for the following reasons: serious crime by youth of any age would be seen to be subject to the full rigours of the criminal law; the decision to transfer would rest with the courts, and would be determined on a case-by-case basis, rather than by the absolut exclusion of 12 and 13 year olds presently provided for in the Act; and the protecion of the public would be

achieved in the more limited sense by virtue of a youth's lengthy incarceration. The elimination of an age barrier, which may be viewed by some as artifical, may also be considered a positive step.

FEDERAL RESPONSE

That the provisions of section 16 be amended to apply to all young persons ages twelve through seventeen years inclusive.

COMMENT

This amendment would expose a small number of younger adolescents to transfer to adult court, while ensuring that the courts have some flexibility in responding to the most heinous offences.

EXTENSION OF TIME

Section 32 of the Act provides for the review of non-custodial dispositions where wilful failure is not alleged. One of the options available to the youth court in modifying a disposition concerns the extension of time to comply with an order of personal or community service. This option, found at subsection 32(9), does not apply to fines or compensation orders made pursuant to subsection 20(1)(b) or (c). As a consequence, a young person who, for good and valid reason, has not complied with the order cannot be directly held accountable: the individual has not wilfully failed to comply, therefore, section 33 does not apply, yet under a section 32 review, a disposition cannot be made more onerous, pursuant to subsection 32(8). Were a young offender to refuse an extension of time under subsection 32(8), such a refusal would appear to be a refusal to comply, however, there is no provision that allows the court to so find. Although such a situation would not be common, it does risk the credibility of justice overall.

OPTIONS

Two options for resolving this problem are available. The first would be to amend subsection 32(9) to make a specific reference to subsections 20(1)(b) - fines, 20(1)(c) - compensation orders, 20(1)(f) - personal service, and 20(1)(9) - community work. The second option is to repeal subsection 32(9) and introduce in section 23 a general provision authorizing the court to grant extensions of time for purposes of these dispositions.

FEDERAL RESPONSE

That section 23 be amended to provide that the youth court may, at any time before the expiration of the time originally provided for completion of the disposition and at the request of the young person, allow further time for the young person to comply with dispositions made under paragraphs 20(1)(b) - (g).

COMMENT

In order to ensure that both the young offender and the youth court have a reasonable opportunity to deal with unforeseen changes in circumstances, provision must be made for the court to grant extensions. Separating this from the formal review process and simplifying the procedure provides the necessary flexibility and ensures timeliness of the process as well, particularly where payment of fines is an issue. The modification should, if at all possible, provide that an onus rests with the offender to seek such an extention if he/she is unable to satisfy the disposition within the time specified.

ADJUDICATION

Section 19 provides for the acceptance of a guilty plea where the court is satisfied that the facts warrant such a finding. The section fails to recognize the possibility of an application for transfer to adult court, a measure that is only available prior to adjudication. Given the importance of the transfer provision, it is reasonable that the court be directed to inquire after the possibility of such an application prior to seeking a plea from the accused.

FEDERAL RESPONSE

That section 19 provide that the youth court confirm that no transfer application is being considered before seeking a plea of guilty or not guilty from the accused, where such an application can be made.

COMMENT

The proposed amendment serves to reinforce the place of transfer hearings in the youth court process and ensure that the matter is not neglected or that a plea of guilty to quickly precludes the option of an application.

NOTIFICATION OF CHANGE OF ADDRESS

Section 23 requires that every probation order contain the following conditions:

> "23(1) The following conditions shall be included in a probation order made under paragraph 20(1)(j):
>
> (a) that the young person bound by the probation order shall keep the peace and be of good behaviour;
>
> (b) that the young person appear before the youth court when required by the court to do so; and
>
> (c) that the young person notify the provincial director or the youth worker assigned to his case of any change of address or any change in his place of employment, education or training.

Provincial juvenile corrections officials have noted that the requirement for reporting found in paragrah 23(1)(c) has been difficult to administer and enforce. While a probation order that contains only the mandatory conditions is generally considered to be an unsupervized order, the condition that requires reporting of changes in address, employment or training envisages some degree of supervision so that breaches may be identified. In practice, this requirement appears to create difficulties either because the youth worker has not routinely been informed of the order or the young person has not been adequately informed of his responsibility given the otherwise "routine" nature of the order.

FEDERAL RESPONSE

That paragraph 23(1)(c) be deleted and the requirement for reporting changes of addresses and places of employment, training and education be included under section 23(2).

COMMENT

The requirement to report changes in address may, in some instances, be an appropriate condition of probation, however, it is ineffective to impose a condition which cannot or will not be reasonably enforced. It would seem reasonable, therefore, to move the reporting requirement to section 23(2) where it is optional and imposed only as necessary and appropriate and with reasonable likelihood of monitoring and enforcement. The modification would also allow for full recognition of the concept of "unsupervised" probation, while permitting orders that require either "minimal" or "full" supervision.

COMMUNITY SERVICE ORDERS

The use of community service orders has gained broad acceptance as a dispositional alternative, such that the Young Offenders Act has made specific provision for these orders at paragraph 20(1)(g) and section 21. The establishment and maintenance of community service orders has, and may continue, to rely upon the active cooperation of the justice system and the community. This cooperation has often been achieved through the establishment of programs charged with the responsibility of placing offenders in appropriate settings, reassigning offenders as necessary, reporting to the courts and fulfilling related functions.

The Young Offenders Act, at subsection 21(9), has provided for assurance that persons or organizations providing work placements are willing to accept individual offenders. Specifically, the provision states:

> 21(9) No order may be made under paragraph 20(1)(g) unless the youth court is satisfied that the person or organization for whom the community service is to be performed has agreed to its performance.

To the extent that subsection 21(9) imposes upon the youth court an obligation to make a direct inquiry of the person or organization providing the work placement, even where a program is in place, the Act fails to recognize the legitimate role of those programs. The consequences of this failure include unnecessary delays in the making of dispositions and, potentially, duplication of effort to no benefit.

FEDERAL RESPONSE

That subsection 21(9) be modified to provide that no community service order be made unless a program providing for the administration of such orders, authorized by the provincial director, is available or, in the absence of an approved program, the court is satisfied that the person or organization has agreed to the order.

COMMENT

The proposed amendment recognizes that specifically designed programs can effectively administer community service orders made by the youth court to the general benefit of those affected. The benefits include expeditious placements and reassignments, appropriate information exchange, supervision and minimal delays in making dispositions. At the same time, the retention of the existing requirement as an alternative where no approved program exists, ensures that inappropriate placements are not ordered by the court.

REVIEW OF CUSTODIAL DISPOSITIONS

Section 28 of the Act provides for the automatic review of any custodial order after one year and the earlier review of such dispositions upon application and with leave of the court. The review process in section 28 may be initiated by the young person, the provincial director, the young person's parents or the Attorney General or his agent. Reviews under this section call for hearings, progress reports and other procedures that have the effect of requiring a considerable expenditure of time and resources for each case.

Section 29, by contrast, is intended to be a relatively expeditious review process initiated by the provincial director only. It is apparently structured to facilitate the horrectional process leading to community supervision. The procedures of section 29 have not, however, been consistently effective and proposals have been advanced for amendments that would ensure timely decision-making.

FEDERAL RESPONSE

That section 29 be modified to achieve the following:

a) to include the issue of transfer from secure to open custody, now found at subsection 24(7), in section 29, thus consolidating all aspects of the correctional process leading to release in one section;

b) to modify the provisions of section 29 to clarify that a hearing is required only if the young person, his parents, the Attorney General or his agent, or the youth court itself objects to the proposed course of action and where such objection is raised, the youth court shall proceed to forthwith give notice of a review hearing.

COMMENT

The modifications to section 29 are intended to facilitate the review process where, in the assessment of the correctional authority, a reduced level of intervention/ supervision is appropriate. This process must be direct and timely if a correctional program is to be effective in seeking to re-establish young people in the community. This is especially true of dispositions shorter than six months where procedural complexity and delay can eliminate opportunities for programming in the interests of all concerned.

The modifications to section 29, and the maintenance of section 28, serve to focus attention on the "administrative" option without limiting the ability of the young person or his parents to initiate a review process.

SECTION 39 - EXCLUSION FROM THE COURT

The Young Offenders Act provides, as a general rule, that a young person is entitled to receive a copy of a section 13 (medical/psychological assessment) report, and further, that the young person or his counsel is entitled to cross-examine the author of the report (subsections 13(4) and 13(5)). Under specified and narrow circumstances, a youth court may, however, withold such a report from the young person where disclosure would likely be detrimental to the treatment or recovery of the young person (subsection 13(6)). The intent of any order of non-disclosure can only be met by exclusion of the young person during any testimony concerning the potentially damaging information. Subsections 39(2) and (3) provide, however, that a court may not exclude the young person from the proceedings. The provisions for non-disclosure in subsections 13(6) are therefore inconsistent with the provisions in section 39.

OPTIONS

It is proposed that the provisions in subsections 39(2) and (3) with respect to exclusion of the young person be made subject to any order of non-disclosure made pursuant to subsections 13(6).

FEDERAL RESPONSE

That subsections 39(2) and (3) with respect to the exclusion of the young person be made subject to subsection 13(6).

COMMENT

The provision for non-disclosure of information is a controversial one and could be the subject of a Charter challenge under particular circumstances. These facts, notwithstanding, it appears desirable to remedy the present legislative inconsistency and to allow experience and more monitoring of the non-disclosure provision for potential abuses to be a longer-term study.

ADMISSIBILITY OF STATEMENTS

Section 56 of the Act sets out requirements determining the admissibility of statements made by an accused. The provisions, in part, codify established case law concerning the statements made by children and young people.

In addition to the general criticism that the Act should not have sought to codify these matters, two specific issues have been raised as problematic. The first touches upon the requirement that any waiver of the right to consult must be given in writing, pursuant to subsection 56(4), and the second, that the person consulted by the young accused may be automatically found to be a person who, in law, is a person in authority.

The requirement for a written waiver of the right to consult was intended to ensure that the young accused had been properly informed of his rights and had knowingly waived those rights. Police and prosecution representatives have reported, however, that evidence is lost when young people who are prepared to make an oral statement refuse to sign any documentation. As a result, although a statement is given, it is automatically rendered inadmissible by virtue of subsection 56(4).

Paragraph 56(2)(c) provides that a young accused may exercise a right to consult with a parent or other person before giving a statement and paragraph 56(2)(d) provides that that person may be present when the statement is given. The standing given to the parent or other person consulted has been interpreted in such a fashion that he or she is found to be a person in authority. For this reason, their evidence, given in voir dire, of advice or inducements offered to the young person may affect the admissibility of statements. While it is reasonable to expect and require that police and other criminal justice personnel will discipline their actions in the course of investigations, it may not be reasonable to impose a similar requirement on parents or other adults personally involved with the young accused. At the same time, it must be recognized that parents can and do exercise a considerable influence in the lives of their children and that that influence may, in some instances, be sufficient to call into question the admissibility of the statement.

FEDERAL RESPONSE

That subsection 56(4) be modified so that a statement may be admitted where the young person has orally waived his right to consult, but has refused, or for another good reason, has not signed a written waiver; and that

subsection 56(5) be modified to identify that the parent, adult relative or other appropriate adult consulted pursuant to 56(2)(c) is, in the first instance, not a person who, in law, is a person in authority.

COMMENT

The proposed modifications seek to eliminate narrow technical difficulties associated with written waivers of the right to consult and to clarify that parents and others are not, by virtue of this Act alone, persons who, in law, are persons in authority. The changes do not, however, eliminate defences respecting the voluntariness of statements that are now available. For example, where a written waiver was not introduced, the Crown would bear the onus of satisfying the court that the young person did understand hif rights and the implications of waiving the right to consult. While the burden of this onus will be significant, the proposed amendment will ensure that the opportunity to introduce such evidence is available.

MUNICIPAL COSTS

In negotiations leading to the establishment of the federal-provincial-territorial cost-sharing agreements, it was agreed that the costs of the provinces and the municipalities would be shared. The wording of section 70, however, specifies only provincial costs and as a result the Federal Government has been unable to honour the commitment made earlier. The provincial governments have requested that municipal costs be treated, in the Young Offenders Act, just as they have been in the Canada Assistance Plan. Such an amendment would not affect the extent of cost-sharing but could reduce a provincial and municipal administrative burden in those circumstances where municipalities provide young offender services.

FEDERAL RESPONSE

That section 70 be amended to permit Canada to make payment to the province in respect of both municipal and provincial costs.

ADMISSIONS

The proposed Evidence Bill would provide as follows:

15 (1) A party to a proceeding may admit a fact or matter in issue, including a fact or matter that involves a question of mixed law and fact, for the purpose of dispensing with proof thereof.

(2) In a criminal proceeding, no admission shall be received under subsection (1) unless it is accepted by the opposing party.

FEDERAL RESPONSE

That the Young Offenders Act be brought into conformity with the Evidence Act by means of consequential amendment contained in the Evidence Bill.

EVIDENCE OF A CHILD

The draft Evidence Bill would require a judge to satisfy himself, where a proposed witness is under fourteen years of age, that first, the person understands the nature of either an oath or an affirmation, and second, that the person is sufficiently intelligent to justify reception of the evidence. This proposal would result in two significant alterations to the present provisions of the Young Offenders Act: first, it would increase the age at which evidentiary capacity is presumed from 12 to 14 years of age; and second, the oath would be reintroduced. These proposed changes raise a number of issues.

With respect to age, the presumption in the Young Offenders Act of evidentiary capacity at age 12 is consistent with the assumptions made with respect to age and responsibility i.e., capable of forming the necessary criminal intent, or instructing counsel, of being held accountable if convicted, etc. In recognition, however, of the varying levels of maturity and understanding, the present provision grants discretion to a youth court judge to instruct any young person between the ages of 12 and 18 as to the duty to speak the truth and the consequences of failure to do so.

With respect to the issue of evidence under oath or by affirmation, the proposal would allow for a choice to be made by a proposed witness with no one form to be given any priority. The principal reason for moving from an oath to an affirmation in the Young Offenders Act was to clarify the jurisprudence relating to the test of capacity. (For a summary of the conflicting jurisprudence, see Bala and Lilles "The Young Offenders Act Annotated", page 395)

FEDERAL RESPONSE

That the Young Offenders Act and Evidence Act conform with respect to age and evidentiary capacity.

CORROBORATION OF EVIDENCE

Section 61 is already addressed, in very similar language, by the provisions of section 16 (Canada Evidence Act) and hence is redundant. There is no need to create a special and slightly different rule for young offenders when the current provisions are adequate for both young persons and adults.

FEDERAL RESPONSE

That the Young Offenders Act be amended to delete the requirement of corroboration of a child's evidence.

COMMENT

This amendment would eliminate unwarranted distinctions between juvenile and adult court proceedings and conform with existing and proposed statute law. The amendment would also ensure that children who are victims do not find that their age alone denies them the benefits of criminal law.

PART FOUR

This part identifies those amendments of a purely technical/non-substantive nature that are proposed. These would not affect the interpretation or impact of any provision modified.

1) Sub-section 9(1)	The marginal note should be amended to read notice to parent in case of arrest and detention.
2) Sub-paragraph 14(2)(c)(iii)	This section presently reads as follows: "the history of previous findings of delinquency under the Young Offenders Act or any other act of Parliament or under a provincial statute..." (emphasis added). The underlined words in the present version would be replaced by "under an Act of a legislature of a province..." to make the references to provincial and federal statutes comparable.
3) Section 39(2)	The phrase ...salle "d'audiences" should read ...salle d'audience"
4) Section 46(5)	The phrase "d'infraction" should read l'infraction.
5) Section 49(1)(b)	The phrase ... "à chacun des cautionnés et cautions" should read ...aux cautionnés et à chacune des cautions"
6) Section 56(2)	The phrase "tout" autre personne should read toute autre personne.
7) Section 65(a)	The word "solennels" should read "solennelles".

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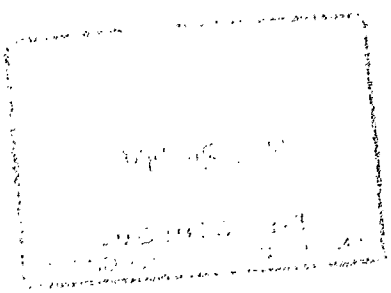

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Proposals for amendments to the Young Offenders Act.