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The Young Offenders Act

Highlights

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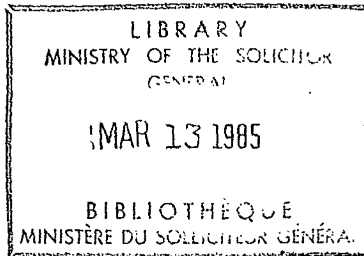

The Young Offenders Act

Highlights

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HIGHLIGHTS OF THE YOUNG OFFENDERS ACT

FOREWORD

It is an awesome challenge which faces legislators who grapple with the task of developing a system of justice for adolescents. They must strike a balance between helping young offenders and protecting society from harmful conduct. They must safeguard the rights of young people in conflict with the law, while discouraging offenders from committing further crimes. The complexity of the challenge is illustrated by the fact that the new Young Offenders Act that I have introduced into the House of Commons has been at least ten years in the making.

Those ten years have not been misspent. During that time there has been extensive consultation with the provinces, which are responsible for administering the law that the federal government enacts. These consultations have produced many changes and modifications in the Act; the federal government recognizes that support of the provinces is vital for the fulfillment of the Act's objectives. Legislation which is so contentious as to make its passage through Parliament impossible or its subsequent administration troubled is of no use to anyone.

I am optimistic that sufficient consensus has now been reached to secure acceptance of the new Young Offenders Act throughout Canada. I am personally very committed to repealing the 73 year old Juvenile Delinquents Act, since it is no longer relevant to the problems presented today by young people who are in trouble with the law.

I believe that the incorporation of several innovative practices into our law is long overdue. The effectiveness of practices such as community service programs and restitution agreements has been demonstrated by those provinces which have developed them. Such practices promote a sense of responsibility in a young offender and give him or her the opportunity to repay society for any damage caused by illegal behaviour. It is time that these advanced practices were implemented throughout Canada.

The juvenile justice system cannot solve all the social problems which young people must cope with today. Factors other than the court — a young person's family, friends, school and community, as well as his or her own personality — influence behaviour. Accordingly a reformed juvenile justice system cannot alone completely wipe out juvenile crime but it can provide a consistent, coherent and balanced process to deal with it, that encourages respect for the law and promotes the well-being of both the young offender and society.

Bob Kaplan, P.C., M.P.,
Solicitor General of Canada

THE YOUNG OFFENDERS ACT

Highlights

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Introduction: The need for reform

Reform of our juvenile justice system is long overdue. The need for such reform has been recognized for several years — years which have seen extensive public discussion, inter-governmental consultation and publication of reports on the topic. The debate has yielded a valuable reappraisal of the principles on which our juvenile justice system operates. The Solicitor General of Canada considers that the time has now come to incorporate the new thinking into law, since there is consensus among professionals in the field on the two major aspects of reform.

First, there is general agreement that the law which underpins today's system is outdated both in theory and practice. At present, young offenders are dealt with under the *Juvenile Delinquents Act*. This Act was passed in 1908 and it has remained substantially unchanged since it was revised in 1929. Up until 1908 a child who broke the law had appeared in the adult courts regardless of his or her age and vulnerability. Children in the early years of this century could expect little benevolence from authority; there were no labour laws to protect child workers, or education acts to ensure minimum schooling.

The 1908 Juvenile Delinquents Act established the state as a kindly parent who would treat a young person in trouble with the law "not as a criminal but as a misdirected child" requiring "help and guidance and proper supervision". This *parens patriae* role was an innovation which was seen as an enlightened break with the practice of the time.

However, Canadian society has changed dramatically since then and so have attitudes towards young people, towards crime and towards how to deal with young offenders. The current Act allows the authorities broad discretionary powers in their efforts to provide a juvenile with "aid, encouragement, help and assistance". This flexibility can permit an infringement of what are today recognized as the basic rights of a citizen of any age — the right to due process of law, for example, and the right to participate in decisions affecting that citizen's future. Moreover, the Juvenile Delinquents Act does not sufficiently emphasize the protection of society or the responsibility of young people for their behaviour — two principles which are accorded more weight today than they were when the Act was introduced. And many of the sentences, or "dispositions" as they are called, provided in the Act are unrealistic today. The maximum fine, for instance, is $25.

The practical inadequacies of the Juvenile Delinquents Act stem from its *parens patriae* approach. Three particular features of the way it works have concerned legislators and administrators:

- The Act establishes the condition of delinquency to cover both offences against federal and provincial laws and status offences such as "sexual immorality or any similar form of vice". During the years since the Act was passed, however, the catch-all term delinquent has become as pejorative as the label "criminal" it replaced. Moreover, the fact that the behaviour covered by the status offences is not regarded as criminal for an adult is regarded today as unfair discrimination against young people.
- The intent of the Act is to deal with juvenile offenders as informally as possible, so as to avoid the slur of criminality. In day-to-day application, however, the Act's flexible welfare approach has created the potential for contradictions and injustices. A young person is provided with insufficient guarantees to his or her right to fair and equal treatment before the law when his or her liberty is at stake. Nor does the law specify every important procedure which should be followed when a young person becomes subject to the juvenile justice system. It does not answer important questions such as when a young person is entitled to legal representation, whether a juvenile can be fingerprinted, what happens to juvenile court records.
- In keeping with the Act's treatment-oriented approach, the dispositions which a juvenile court judge may give are frequently open-ended, on the grounds that when the juvenile is sufficiently "treated" the authorities will terminate the disposition. However, it is the provinces rather than the courts which are responsible for administering the Act, and when a juvenile is committed to custody by the court, he or she ordinarily passes out of the court's jurisdiction and into the charge of the provincial authorities. This means he or she is now subject to administrative rather than judicial decisions regarding the length of the disposition. The Act specifies no legal redress to the juvenile court if the juvenile or the parents want to challenge the administrator's decision.

The fact that the system has not resulted in wholesale injustice is a tribute to the discretion and sense of equity which juvenile court judges have exercised in proceedings under the Juvenile Delinquents Act, and provinces have exercised in its administration. Some provinces have already implemented practices similar to those proposed in the new Act.

The second important point on which there is consensus today is that contemporary attitudes and current practices should now be incorporated into federal legislation, so that uniformity of standards and law is extended throughout the country.

Any changes in laws dealing with young people will necessarily provoke debate between those who regard the law as too lax, and prefer young people to be treated as adults, and those who regard the law as too stringent and argue that adolescents should be treated totally differently from adults. The new Young Offenders Act takes an approach to young people which is quite new in Canadian law. On the one hand it provides the same safe-guards and guarantees of legal rights as are already provided to adults; on the other hand it establishes a system of youth courts, procedures and dispositions which are separate from those established for adults. In addition, it incorporates into its provisions a concern for the safety of the community and the opportunity for parents to get involved in proceedings which involve their children.

POLICY FOR CANADA WITH RESPECT TO YOUNG OFFENDERS

1. What approach to young offenders does the new Act take?

The philosophy of the new Act is expressed in a policy section. This section will serve as a guide to the Act's spirit and intent for everyone concerned with its administration throughout Canada.

The Act's approach blends three principles: that young people should be held more responsible for their behaviour but not wholly accountable since they are not yet fully mature; that society has a right to protection; that young people have the same rights to due process of law and fair and equal treatment as adults, and these rights must be guaranteed by special safeguards. Thus the Act is intended to strike a reasonable and acceptable balance between the needs of youthful individuals and the needs of society.

In particular, the policy section states:

- Young people should bear more responsibility for illegal acts they commit, although they will not be held accountable in the same way as adults are.
- In order to protect society from such illegal behaviour, young offenders may require supervision, discipline and control.
- Young offenders have special needs because they are dependents at varying levels of development and maturity. They therefore also require guidance and assistance.
- Alternative measures to the formal court process should be considered for a young offender, as long as such a solution is consistent with the protection of society.
- Young people have rights and freedoms, including those stated in the Canadian Bill of Rights. In particular they have:
  — a right to participate in deliberations which affect them
  — a right to the least interference with their freedom which is compatible with the protection of society, their own needs and their families' interests.
  — a right to be informed of all their rights and freedoms.
- Young offenders should only be removed from their families when continued parental supervision is inappropriate. The Act recognizes the responsibility of parents for the care and supervision of their children. Parents will be encouraged and if necessary required to take an active part in proceedings that involve their children.

JURISDICTION — BY OFFENCE AND AGE

2. To whom does the new Act apply?

The new Act will cover only those young people charged with specific offences against the Criminal Code and other federal statutes and regulations. It will not apply to those charged with offences against provincial laws (which cover such offences as traffic and liquor violations), or municipal bylaws. The catch-all offence of "delinquency", which the 1908 Act created to include all juvenile offences including the status offences of "sexual immorality" and "any similar form of vice", will be abolished.

Under the new Act the age of criminal responsibility will be raised from seven to 12 years.

Children below the age of 12 are not considered criminally responsible, which means accountable under criminal law, for any offence they might commit. If a younger child did perform a harmful act, he or she could be dealt with pursuant to provincial law. The Juvenile Delinquents Act, in conjunction with the Criminal Code, specifies seven as the minimum age for juvenile delinquency proceedings, but it is universally agreed that a child of seven is too young to be considered criminally responsible.

Unfortunately there has been no such agreement on a maximum age. The current Act sets the maximum age for juvenile delinquency at under 16, but allows the federal government to establish a different maximum at the request of a province. Quebec and Manitoba have under 18 years as their maximum: British Columbia (and Newfoundland which has its own statute to deal with young people) opted for under 17: the remaining six provinces and two territories have a maximum age of under 16. The choice of different maximum ages reflects not only different opinions on when an individual is considered sufficiently mature to be held fully responsible and dealt with as an adult, but also the valuable variety of programs and resources which the provinces have developed to meet young offenders' needs.

While the federal government would prefer the establishment of a standard maximum age it is reluctant to impose a maximum age on the provinces, given the variety of services and attitudes they offer.

Therefore, under the new Act the maximum age will be under 18 years but at the request of a province the federal government may set under 16 or under 17 as a maximum in that particular province.

DIVERSION

3. Will every young person who breaks a federal law appear in the youth court?

Not necessarily. One of the underlying principles of the new Act is that, for less serious offences, alternative measures to the formal court process might be used. It has been recognized for some time that many young people are brought to court unnecessarily, when other effective ways to deal with them already exist in some provinces. These programs called *diversion programs* may entail community service, involvement in special education programs, counselling or restitution agreements; their common characteristic is that they are all voluntary.

The Act contains built-in safeguards for the protection of young people who are diverted into these programs. If a young person prefers to make an appearance in court to establish his or her innocence of the charge, he or she can of course do so.

PROCEEDINGS IN THE YOUTH COURT

4. What is the procedure once the authorities have decided to take a young person to court?

The new Act establishes strict guidelines on procedures. For the first time the young person's rights from the moment he or she has been arrested or summoned are made explicit. In particular:

- The young person's parents must be notified of all proceedings, encouraged and if necessary ordered to attend. They would be allowed to make known their views on the court's sentence if and when their child has been found guilty.
- The young person has a right to legal representation at all stages of the proceedings, including when diversion rather than a court appearance is being considered.
- The youth court judge is obliged to remind any young people appearing before the court of their rights under the new Act.
- Before he makes any decision, the judge may ask for a predisposition report. This is an assessment of the young person's circumstances and an appraisal of the programs and facilities available to the court to meet the young person's needs. The judge must ask for such a report if he is considering transferring the young person to an adult court, or sentencing an offender to custody.
- If the judge considers that the young person is suffering from a physical or mental illness or disorder, an emotional disturbance, a learning disability or mental retardation, he can ask for a medical, psychological or psychiatric assessment.

DETENTION AND BAIL

5. What happens to a young person if he or she is detained before the court has given its decision?

The new Act defines a precise procedure which police and court authorities must follow when they are considering the detention of a young person. In particular:

- Young offenders have the same entitlement to bail as adult offenders. The youth court will deal with bail applications for young people, using the rules and criteria that are set out in the Criminal Code.
- The young person's parents must be notified.
- Young people must as a general rule be detained separately from adult offenders.
- The youth court will have the power to release a young person into the care of a responsible adult when it appears that the adult can exercise control and guarantee the young person's subsequent attendance in court.

TRANSFER TO ADULT COURT

6. Will the youth court deal with every offence a young person may commit?

Not necessarily. The new Act is expected to be effective in nearly all cases. However, there will be the rare occasion where the gravity of the offence, the circumstances in which it was committed, the needs of the young person and the protection of society require that the case be dealt with in the adult court. Such cases might include serious indictable offences like rape, manslaughter or armed robbery.

Where an application is made to the court, by the Crown or the young person, a youth court judge can decide at a hearing to transfer such a case to the adult court, provided the offence was committed after the young person's 14th birthday. An application for a transfer as well as a decision with respect thereto must be made before the youth court has made a decision on the guilt or innocence of the young person.

The new Act provides criteria to guide the court's decision, and sets out the factors that the judge must take into account. These factors include the degree of seriousness of the alleged offence, the young person's maturity and character, and whether he or she had committed previous offences. The judge must consider a predisposition report and any representations the parents may wish to make before authorizing a transfer.

In view of its serious consequences, a transfer to adult court is considered to be a measure of last resort. The transfer order is subject to appeal.

DISPOSITIONS

7. What sentences can the youth court give?

The range of dispositions (as youth court sentences are called) provided under the new Act is both wide and flexible. Moreover, none of the dispositions are open-ended, in contrast to those contained in the 1908 Act which allowed for indefinite dispositions. Under the current Act, a young person can be put in custody for an indeterminate period.

The dispositions are designed to meet the special needs of young people, to protect society and where possible to take into consideration the rights of the victims of crime.

The dispositions available are:
— an absolute discharge.
— a fine of up to $1,000.
— a restitution or compensation order for loss of or damage to property, loss of income, or special damages which arose because of personal injury to the victim of the offence. A judge who is considering such an order will take into account the young offender's ability to pay or earn.
— an order of compensation in kind or by way of personal service to the victim of the offence.
— a community service order, which would require the young offender to perform a specified amount of work for the community.
— probation for up to two years.
— committal to intermittent or continuous custody for up to two years.
— additional conditions which the judge considers in the best interests of the young offender or society, such as the surrender of illegal goods, or a prohibition against the possession of firearms.
— any combination of these dispositions, as long as the combination does not exceed two years in duration for any one offence.

It should be noted that in no case would a young person be subject to a greater penalty than the maximum penalty applicable to an adult committing the same offence.

COMMITTAL TO AND RELEASE FROM CUSTODY

8. What does a "committal to custody" involve?

A "committal to custody" means that the young offender will be admitted to a specially designated residential facility from which his or her access to the community is restricted. The purpose of this restraint and containment is twofold: to eliminate the likelihood of the young offender committing any more illegal acts, and to give him or her the chance to participate in programs to meet his or her special needs. The custodial facility might be a group home, community residential training centre, childcare institution, training school, detention centre, correctional institution or wilderness camp.

An important new principle which the Young Offenders Act embodies is that the youth court will retain jurisdiction over the young offender until the custodial disposition (or any other disposition) that it pronounced is completed. Under the current Act once a juvenile court has pronounced a custodial sentence, jurisdiction of the case is usually transferred to the provincial authorities. In theory the provincial authorities can then unilaterally alter the juvenile court's decision in any direction which might offer, in their opinion, more "aid, encouragement, help and assistance" — even if it means the premature release of a juvenile whom the court has sentenced to custody.

The new Act recognizes that the youth court is the authority that should decide the extent to which custody and other dispositions are used to ensure the safety of Canada's communities and people. It would therefore be inconsistent if such decisions could be unilaterally altered by provincial authorities without reference back to the youth court.

However, the new Act also recognizes that there must be some built-in flexibility to allow the director of the provincial services to plan and implement effective programs. Therefore, once the youth court has made a custody order, it leaves to the provincial director the administrative decision on the place and level of custody appropriate for the young offender.

The provincial director could move offenders between institutions and programs on his or her own initiative, and could also authorize temporary releases to the community. The new Act allows for two types of temporary release:

- a temporary *leave of absence* up to a maximum of 15 days for medical or humanitarian reasons, or to assist in the re-integration of the young offender into the community.
- a *day release* so the young person could attend school or training, continue employment or take part in a self-improvement program.

The new Act outlines the procedure which the provincial director must follow if he or she decides to initiate the release of a young offender from custody before the full disposition has been served. The director must serve notice of his or her intention to the prosecutor, the young person and the parents. If none of these people asks to have the case reviewed, the youth court judge would formalize the release by placing the young person on probation for the remaining period of his or her disposition.

Custodial dispositions will only be given after very careful consideration, since they represent a radical restriction of the young person's freedom. A youth court judge who is considering custody for an offender must request a predisposition report. If he decides on a custodial disposition, he must then give written reasons for his decision.

REVIEW OF DISPOSITIONS

9. Can a sentence be changed once it has been given?

Yes, but only by the youth court. The new Act contains an innovative and thorough review procedure to make sure that each disposition is monitored continuously. The procedure has three main objectives:

- to keep the dispositions relevant and geared to the circumstances and progress of young offenders.
- to give everyone involved — the offender, the parents, the provincial director and the Attorney General — the opportunity not only to initiate a review, but also to attend and be heard.
- to protect both the rights of the young person and the interest of society while retaining jurisdiction within the youth court.

The review procedure under the Juvenile Delinquents Act has come under severe criticism for its inadequacies and arbitrary nature. Under the current Act a young person is exposed to double jeopardy — even after young offenders have appeared in the juvenile court, they may be brought back any time before their 21st birthday and given a new disposition or even be transferred to the jurisdiction of the adult court. In practice, the present review system tends to be used only in cases where the young offender has failed to comply with the court's disposition, and therefore the system has come to have a rather negative purpose.

The new review procedure is intended to be a much more positive process. A young offender who has been given a period in custody will have a mandatory review (at least every year, or more frequently by application of any of those involved in the case). The review will be conducted either by the youth court or, at the option of the province, by a provincially appointed review board. The length and basic nature of the custodial disposition could only be changed by the youth court. However, as explained in the previous answer, the provincial director can decide the level of security, the custodial programs and the facility best suited for an individual.

All other types of dispositions would be reviewed by the youth court judge. These reviews would occur from time to time at the request of the provincial director, the young offender, his or her parents, or the Crown prosecutor.

During a review, the judge (or review board in cases of custody) may confirm the original disposition, release the young offender from custody and put him or her on probation, or amend the terms of any other disposition so as to decrease the level of intervention by the authorities. Unless the young offender has deliberately failed to comply with the original disposition, the youth court cannot increase the length or severity of the disposition. However, when he or she *has* failed to comply with the disposition, only the court can impose a stronger sentence.

APPEALS

10. Can a young person appeal against the youth court's decision?

Yes. Young people would have similar rights of appeal from decisions affecting them as adults have under the Criminal Code. The automatic right to appeal is specifically denied to young people under the current Act, which states that juveniles must seek special leave to appeal.

PUBLIC HEARINGS

11. Are youth court hearings open to the public?

Yes. The youth court hearings have been opened up under the new Act, so that justice will not only be done but also will be seen to be done. The current Act specifies that "the trials of children shall take place without publicity and separately and apart from the trials of other accused persons", but over the years experience has shown that such *in camera* hearings are inevitably viewed with suspicion and are more susceptible to potential abuse.

Open hearings ensure public scrutiny and monitoring of the youth court system. This in turn should provide an added guarantee for the protection of young people's rights. However, the judge will have the authority to exclude anyone:

- when the exclusion is, in the judge's opinion, in the interests of public morals, the maintenance of order or the proper administration of justice.
- when information being presented to the court would be "seriously prejudicial or injurious" to any young person present, whether he or she is the accused, the victim or a witness.

Coverage by the press would have to respect the anonymity of any young person involved, whether he or she is the accused, the victim or a witness.

FINGERPRINTS AND PHOTOGRAPHS

12. Can the police fingerprint young people?

Yes, but only with certain safeguards and when serious cases like breaking and entering or theft are being investigated. However, a young person may be fingerprinted or photographed only in the circumstances in which an adult could be subjected to such procedures.

The question of whether the police may fingerprint and photograph young people has never been clearly answered in law. The Juvenile Delinquents Act is silent on the issue, and in recent months the courts have delivered conflicting decisions. In recognition of the need for this information in the detection and investigation of crime, the new Act permits the practice — but specifies that use of the information be limited primarily for criminal justice purposes.

In particular, the Act states:

- the police must destroy any prints and photographs if the young person is acquitted or proceedings against him or her are discontinued.
- there must be special procedures for the storage, control of and access to such information.
- misuse of any fingerprints or photographs is an offence.

YOUTH COURT RECORDS

13. What happens to the records of a young person who has appeared in the youth court?

Although young offenders are intended to take responsibility for their illegal behaviour, the consequences for them are not intended to be as severe as those applied to adults in the ordinary courts. Therefore, when a young offender has completed his or her sentence and committed no further offence for a qualifying period, the record will be destroyed. The young person will thus be given a fresh start when he or she has shown it is deserved. The effect of this provision is that there would "in law" be no conviction against the young person; he or she would not face all the disabilities that flow from having a criminal record.

The Juvenile Delinquents Act contains no such provision, nor does it specify any regulations on the creation, maintenance, confidentiality or accessibility of juvenile court records. Under the present legislation, it is possible for an individual to carry the label "delinquent" for life.

The qualifying crime-free period specified by the new Act will be two years for those who receive summary convictions (offences which ordinarily carry a maximum of six months imprisonment under the Criminal Code) and five years for those who commit the more serious offences known as indictable. During this period the youth court records can be used for bail or parole applications or subsequent sentencing in either youth or adult courts. If there is a further conviction during this period, the offender would of course not qualify for destruction of the record of his or her original offence until he or she has completed an uninterrupted crime-free period.

The new Act lists those people allowed access to the records before they are destroyed. Unauthorized disclosure would be an offence.

CONCLUSION: The role of the federal and provincial governments

The Government of Canada is responsible for creating criminal law. It is also responsible within the juvenile justice system for assuring the same opportunities for justice and legal rights to young people wherever they live and for promoting national standards for the measures and programs developed to meet young offenders' needs. It supports the provinces' commitment to provide an equal level of positive social programs.

The provincial governments have an equal role within the juvenile justice system, particularly since they are responsible for administering the law which the federal government enacts. It is the various professionals, such as family and youth court judges, lawyers, police officers, welfare officers and social workers who are responsible to make the system work. The fact that it is the provinces which administer juvenile justice allows the system to reflect regional and cultural differences, for example in the range of services and programs offered and in the variation of maximum age of young offenders which provinces may select.

Young people are our future. They should, as other Canadians, be guaranteed the same right to justice and given every opportunity to feel that they are members of their communities. The Young Offenders Act represents a significant step in the attainment of this objective.