



## **Bill C-10 and Canada's Obligations under the Convention on the Rights of the Child:**

A Submission to the Senate Legal Affairs Committee

Prepared by the Canadian Coalition for the Rights of Children

### **Introduction**

Public safety is served by helping persons under the age of 18 become rights-respecting citizens. That starts with setting an example of respect for the law, including laws that protect the rights of young persons. When young people come into conflict with the law, the primary focus needs to be corrective measures that teach them how to be rights-respecting and law-abiding participants in Canada.

The Canadian Coalition for the Rights of Children asks the Senate to give sober second thought to the relationship between public safety, teaching young people to be rights-respecting citizens, and Bill C-10. In 2007 the Senate unanimously adopted the results of a three-year study on children's rights and pledged to follow up that report, so that Canada would fulfill its obligations under the Convention on the Rights of the Child.

Following are recommendations based on the Convention on the Rights of the Child. By adopting them, the Senate would put into practice what it unanimously adopted in 2007.

### **I. Separate Consideration of Youth Justice**

**Recommendation: Remove Section 4, the part that deals with youth justice, from Bill C-10 and recommend that parliament deal with it separately.**

Reasons:

1. The youth justice system needs to be different than the adult justice system. Changes to each should be considered separately.
2. Substantive issues raised during consideration of the earlier Bill C-4 have not been addressed. These included evidence about good practices in youth justice, the findings of a cross-country evaluation of the current Youth Criminal Justice Act (YCJA), and unintended consequences of adopting the provisions now in Bill C-10.
3. No assessment has been done to show how Bill C-10 fulfills or violates Canada's obligations under the Convention on the Rights of the Child. Every Senator should be informed of that before passing this bill.

If the Senate does not live up to its commitment to respect the rights of children, how can it expect others in Canada, including its young people, to take their obligations to respect the rights of others seriously?

## **II. Canada's Obligations under the Convention on the Rights of the Child**

**Recommendation: The Senate should request that a thorough child rights impact assessment of Bill C-10 be done and distributed to every Member of Parliament and Senator before they consider a final vote on Bill C-10.**

Reasons:

In response to the 2007 Senate report on children's rights, the government stated that it does assess proposed legislation for compliance with the Convention. Both Members of Parliament and witnesses on the earlier Bill C-4 have asked for such an assessment of the proposed changes to the youth justice system. None has been tabled.

Proceeding without such an assessment runs counter to the obligation of Senators to protect the rights of the most vulnerable members of society and it contradicts the Senate's own report in 2007. .

There are good reasons for concern about compliance with Canada's obligations under the Convention. Following are specific provisions in the Convention for youth justice systems and general principles that directly relate to matters in Bill C-10.

### **A. Article 37 and Detention of Persons under Age 18**

Among other provisions for detention of persons under the age of 18, Article 37 states that:

- Detention "*shall be used only as a measure of last resort and for the shortest appropriate period of time.*"
- "*Every child deprived of liberty shall be treated ...in a manner which takes into account the needs of persons of his or her age. In particular, every child shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.*"

(For complete text of Article 37 see Appendix A)

Bill C-10 requires separate detention for young persons, and, in so doing, would allow Canada to remove one of its current reservations to the Convention.

The principle of "detention as a last resort," however, is not reflected in Bill C-10's proposed amendments to the Youth Criminal Justice Act. This bill, if passed, will result in more frequent use of detention and for a broader range of cases. Nor are there any provisions to ensure that detention will be in close proximity to the child's home, to

maintain contact with the family, as required in Article 37. One of the benefits of the YCJA has been a reduction in the use of detention and an increase in the use of alternative corrective measures with young people. Bill C-10 will reverse what the evaluation of the YCJA found to be effective for public safety and crime prevention.

## **B. Article 40 and Treatment of Young Persons in Conflict with the Law**

Article 40 obligates the state to treat children in conflict with the law in the following ways:

- *“in a manner consistent with the promotion of the child’s sense of dignity and worth;”*
  - *“reinforce(s) the child’s respect for the human rights and fundamental freedoms of others;”*
  - *“takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society;”*
  - Use, *“wherever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.”*
  - *“A variety of dispositions and alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence;”* and
  - *“Have his or her privacy fully respected at all stages of the proceedings.”*
- (For complete text of Article 40, see Appendix B)

Bill C-10 adds deterrence and denunciation as primary objectives for sentencing young persons; in doing so it weakens the primary focus on reintegration and rehabilitation. Bill C-10 requires prosecutors to consider adult sentences for a wider range of offences as the preferred option and provide reasons when they do not pursue adult sentences, rather than considering adult sentences as the exception. Bill C-10 violates the privacy provisions of the Convention by expanding public release of the names of young offenders.

Significant changes to the youth justice provisions of Bill C-10 are needed to ensure compliance with Article 40 of the Convention on the Rights of the Child.

## **C. Article 39 on Treatment of child victims of any form of abuse**

Article 39 requires states to

*“take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect. ... Such recovery and reintegration shall take place in an environment which fosters the health, self-respect, and dignity of the child.”*

(For complete text of Article 39, see Appendix C)

A large percentage of young people in trouble with the law have experienced some form of neglect. In a 2009 BC study, for example, the BC Children’s Advocate found that

more than 50% of the young people in the criminal justice system had been in the child welfare system. The over-representation of aboriginal children and young people with mental health issues in the youth criminal justice system is also well-documented.

Although Bill C-10 is intended for application only to a small percentage of young offenders, the over-broad provisions are likely to be applied to young persons who should be treated under the provisions of Article 39 rather than in prisons.

Prisons are more likely to be schools of crime for young people than places where they learn to respect the rights of others and contribute to building a safe society.

#### **D. Article 3 and Primary Focus on the Best Interests of the Child**

Under Article 3 of the Convention, the best interests of the child are to be the primary consideration in any decisions involving children.

While Bill C-10 requires judges to consider a wider range of principles in sentencing, such as deterrence and denunciation, it does not specifically require them to determine and give priority to what is in the best interests of the child involved.

#### **E. Article 19: Protection from Violence and Exploitation**

Article 19 obligates Canada to take all appropriate measures to protect children from violence and abuse, including sexual abuse. In paragraph two, it adds that such measures should include social programmes to support the child and prevention programs. (For the full text of Article 19, see appendix D.)

Part 2 of Bill C-10 provides more severe sentences for persons convicted of various forms of sexual exploitation of children. To complement Bill C-10's focus on increased penalties, the Senate may wish to remind the government of its 2007 recommendation that Canada implement a comprehensive strategy to prevent sexual exploitation.

#### **Need for comprehensive child rights assessment**

Other sections of Bill C-10 have also raised concerns with regard to their impact for young persons. For this reason, a thorough assessment of how Bill C-10 fulfills or violates Canada's obligations should be provided to all members of parliament and senators prior to final passage of this bill.

### **III. Essential Amendments for Youth Justice**

**Recommendation: Amend the overly-broad definitions in paragraph 167 to ensure that detention is only used as a last resort.**

The proposed definition of “serious offences” opens the possibility of using detention for a broad range of offences, such as break and enter, for which other forms of treatment better meet the objective of rehabilitating young persons. Broadening the definition of violent offences to include actions that create “a substantial likelihood of causing bodily harm” is too vague to ensure that detention will only be used as a last resort. Deleting “serious offences” and deleting ( c ) under the definition of “violent offence” would help to ensure compliance with the standard of using detention only as a last resort.

**Recommendation: Clearly establish that the best interests of the child will be given primary consideration in all cases under the YCJA by amending the provisions in paragraph 168 (1).**

To ensure that giving priority to “protecting the public” is understood in keeping with the Convention, paragraph 3 (1) (a) (i) should be amended to add the highlighted text:

“holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person, **giving primary consideration to the best interests of the young person.**”

**Recommendation: Ensure that rehabilitation remains the focus for youth justice by deleting paragraph 172 which adds deterrence and denunciation as sentencing principles.**

Evidence presented during the hearing on the earlier Bill C-4 showed that deterrence and denunciation are not effective to prevent youth crime, but they do lead to more young people spending longer times in prisons; prisons have been shown to be schools for learning crime more than effective ways to correct risky youth behaviour. Public safety is advanced more by ensuring rehabilitation is the primary focus for youth justice.

**Recommendation: Allow the prosecution, who are closest to each case, to make the determination whether to seek an adult sentence for an exceptional case, rather than obligating consideration of an adult sentence for all violent offences. Delete paragraph 176 (1,1) that obligates an Attorney General to consider an adult sentence for a broad range of cases under the YJCA.**

To comply with the Convention, adult sentences should clearly be an exception, not required as a first consideration. The provisions under the current YJCA are adequate, as interpreted by the Supreme Court of Canada in *R v B(D)*, [2008] 2 SCR 3, which held that the presumption of adult sentences was unconstitutional.

**Recommendation: Comply with Convention Article 40.2 and good practice in youth justice by protecting privacy at all stages. Delete paragraph 185 regarding publication of the names of young offenders.**

There is substantial evidence that publication of the names of young offenders hinders rehabilitation, which should be the primary focus for the youth justice system.

**Recommendation: To continue the expanding, good results from the use of extrajudicial measures, delete paragraphs 190 and 191 that would require police to keep records of such measures.**

The national evaluation of the current YCJA found that the expanding use of extrajudicial measures is proving to be effective in helping young people change patterns of behaviour that are likely to lead to greater conflict with the law. One of the benefits for young people is avoiding a criminal record. If such measures are going to be recorded, young people who think they have a reasonable chance of not being convicted may be less likely to choose extra-judicial measures instead of going through court. Extra-judicial measures can be a prompt and timely response, while significant delays are involved in taking cases through the courts. As stated in the Convention, prompt adjudication and corrective intervention is preferable for the purposes of rehabilitation.

### **Conclusion**

Public safety is enhanced, not sacrificed, by complying with the Convention on the Rights of the Child. Ignoring Canada's obligations sets a poor example for young people. On the other hand, good practices in youth justice confirm what the Convention requires.

In addition, complying with the Convention will allow resources to be directed to programs that prevent young people from engagement in criminal activity rather than expensive detention centers that have not been effective for crime prevention.

## Appendix A

### **Article 37, Convention on the Rights of the Child**

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

## Appendix B

### **Article 40, Convention on the Rights of the Child**

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
  - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence



## Appendix C

### **Article 39, Convention on the Rights of the Child**

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

## Appendix D

### **Article 19, Convention on the Rights of the Child**

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement