Legislative Assembly of Ontario

Assemblée législative de l'Ontario

Office of the Provincial Advocate for Children and Youth
401 Bay Street
Suite 2200, PO Box 2
Toronto, Ontario M5H 2Y4

Tel.: (416) 325-5669
Toll Free: 1 800 263-2841
Fax: (416) 325-5681
TTY: (416) 325-2648

Bureau de l'intervenant provincial en faveur des enfants et des jeunes
401 rue Bay
Bureau 2200, Boîte Postale 2
Toronto (Ontario) M5H 2Y4

Tél.: (416) 325-5669
Sans frais: 1 800 263-2841
Téléc.: (416) 325-5681
ATS: (416) 325-2648

January 26th 2012

Senator John D. Wallace
Chair – Legal and Constitutional Affairs
Senate of Canada

Ottawa, Ontario
K1A 0A6

Re Bill C-10 Safe Streets and Communities Act

Dear Senator Wallace,

I am writing to you with respect to Bill C-10, Safe Streets and Communities Act, which was referred to your committee on December 16th 2011.

I am the Provincial Advocate for Children and Youth in Ontario and my mandate is to raise the voice of children and youth in government care, or on the fringe of government care. Youth in the youth justice system are part of my mandate and today I am speaking out for them.

Bill C-10, in particular the proposed amendments to the Youth Criminal Justice Act (YCJA), is taking a step backwards on the progress that has been made over the past six years with the introduction of the YCJA. The national crime rate has been falling steadily for the past 20 years and is at its lowest level since 1973[1].

In June 2010, I appeared before the Standing Committee on Justice and Human Rights to present my concerns about the Bill and Statistics Canada was presenting evidence of the declining crime rates and

[1] Police reported crime statistics: Statistics Canada, July 21, 2011

the potential for the Bill to increase incarceration rates for young people. It appears all of the evidence has been ignored in pushing this Bill forward.

Bill C-10 combines nine former bills that seek to deal with crime in Canada into one bill. Eight of the nine bills address adult offenders while one bill proposes amendments for youth offenders. Legislation for adult offenders assumes that adults are capable of making adult decisions and focuses on punishment. Whereas Bill C-10 has recognized the diminished moral culpability of youth. It is not appropriate to group youth justice legislation in the same bill with eight pieces of adult legislation because there are very distinct purposes and approaches in adult and youth legislation.

Just as the Principles of the Youth Criminal Justice Act state; "the criminal justice system for young persons must be separate from that of adults" and consideration, debate and discussion of any changes to legislation for youth must be separated from adult legislation.

Removing the presumptive offences from the Act and placing the onus on the Attorney General to satisfy the courts for pre-trial detention and adult sentences are improvements to the Act. My office and many others also support clarifying that a young person under the age of 18 cannot serve any time in an adult facility and, the inclusion of diminished moral blameworthiness in the Declaration of Principles and in the test for an adult sentence. These are positive changes to the YCJA.

I realize you have received many submissions with respect to this Act so I will limit my comments on only a few of the significant concerns.

Declaration of Principles

The Declaration of Principle applies to the entire Act and by deleting the 'long term protection' of society from the principles and changing the primary goal to protection of the public to address a small group of violent and repeat offenders has changed the original intention which was to prevent crime, rehabilitate and reintegrate young persons and ensure meaningful consequences.

This is a huge shift in philosophy and it will affect every decision being made at every stage in the process and will likely result in more young people being incarcerated. It blatantly ignores Article 3 of the UN CRC where "the best interests of children must be the primary concern in making decisions that may affect them".

Serious Violent/Violent Offences

Legislating the definition of serious violent offence gives clarity and is a positive change however; the definition of violent offence could be interpreted very broadly. Many of the young people who contact my office are involved in several systems and I could see a young person with mental health issues or family or behavioural problems engage in a power struggle with his/her parent or worker and threaten to harm them, perhaps using an object as a threat. Under this definition they would be committing a violent offence and they would likely be placed in detention yet, their actions are a part of their mental health or behavioural issues and their behaviour has no real criminal intent. Also the phrase "likelihood of causing bodily harm" requires a determination of perceived risk which leaves youth vulnerable to subjective interpretation of what they might do next.

Replacing section 29(2) of the pre-trial detention provisions removes the presumption that detention is not necessary if the young person could not, on being found guilty, be committed to custody as per section 39(1)(a)(b)(c). This change could dramatically increase the number of youth placed in detention.

Deterrence and Denunciation as Sentencing Principles

This change to the YCJA is particularly concerning. Deterrence might work if all youth were rational thinkers and believed they would get caught. Research has shown that 91% of youth charged don't believe they will get caught. Research has proven that deterrence and denunciation are ineffective for adults but even more ineffective when it concerns young people. There is an extensive body of social science research on the negative effects of deterrence that cautions against any belief in the ability of legal sanctions to deter criminal behaviour.[2] Increasing penalties or increasing rates of incarceration are not associated with reductions in crime rates, nor are lengthier custodial penalties associated with reductions in recidivism rates among individual offenders. A federal/provincial/territorial review of the Young Offenders Act (1996) found that changing the degree of punishment available will not change youth crime levels. Young persons do not, generally speaking, rationally consider and weigh the risks of being apprehended for their crimes. They may be aware of the risk of being apprehended but in typical adolescence, they believe that others, not them, will be caught.[3] This change will increase the number of youth incarcerated which contradicts one of the key objectives of the Youth Criminal Justice Act which is to reserve custody for those youth who are serious, violent, or repeat offenders.

Extrajudicial Sanctions or Findings of Guilt

Adding extrajudicial sanctions or findings of guilt or both to the criteria for committal to custody will widen the net for pre-trial detention and custody and change the profile of incarcerated youth. The purpose of the YCJA was to reserve custody for serious violent offences. Typically, extrajudicial sanctions are given for summary offences and other less serious offences and offenders. With this proposed amendment a young person who has been given extrajudicial sanctions for stealing food on three occasions could be incarcerated with serious offenders. It could also penalize youth who allegedly commit a minor offence and opt for extrajudicial sanctions because a trial would be costly.

Lifting the Publication Ban

The provisions enabling the court to lift the ban on publication are also affected by the change in the Declaration of Principles in section 3. The publication ban could be lifted at anytime to 'protect the public.' This undermines the young person's ability for rehabilitation and reintegration and violates a child's right to privacy in all stages of the proceedings as declared in Article 16 and 40 of the United Nations Convention on the Rights of Children.

---

[2] Canadian Sentencing Commission, 1987
[3] Cohen and Canela-Cacho, 1994

Protection of the public is served through preventing crime by addressing the circumstances underlying the criminal behaviour. Public safety is served by rehabilitating our young people and reintegrating them into our communities. Public safety is served by ensuring that young people receive meaningful consequences for their behaviour in order to learn from their mistakes. All of this is already incorporated in the YCJA. Before we can recommend any changes to a 'sound' legislation we need to evaluate the status of the implementation across the country.

Canada, as a signatory to the United (UNCRC), acknowledges Article 3 which states "the best interests of children must be the primary concern in making decisions that may affect them" and Article 12 emphasizes children and youth who have experience in the juvenile justice system "should be consulted at all levels of policy making and proposals for law reform in matters that affect them." The Canadian government should not ignore this.

Changes to youth legislation should be given consideration separate and apart from adults.

Respectfully,

Irwin Elman
Provincial Advocate for Children and Youth