The Advocates' Society

PROMOTING EXCELLENCE IN ADVOCACY

January 24, 2012

The Standing Committee on Legal and Constitutional Affairs
The Senate of Canada
Ottawa, Ontario
K1A OA4

Attention: Shaila Anwar, Clerk of the Committee

Re: Bill C-10, the Safe Streets and Communities Act

Dear Senators:

We write to express our opposition to Bill C-10, the Safe Streets and Communities Act ("the Bill").

The Advocates' Society ("the Society") submits that the Bill in some circumstances fetters judicial discretion in a manner that will negatively impact the administration of justice, particularly with respect to certain mandatory minimum sentences, restrictions on conditional sentences and changes to the *Youth Criminal Justice Act*.

About The Advocates' Society

The Society is a not-for-profit organization of over 4,500 advocates across Canada. We were established in 1963 to ensure the presence of a courageous and independent bar and the maintenance of the role of the advocate in the administration of justice. Our goal is to promote excellence in advocacy. The Society is frequently asked to comment on changes to policy and legislation.

The Society is well-positioned to comment on this issue given the broad composition of its membership. We are comprised of civil litigators, criminal defence counsel, Crown counsel, and judges. Our members represent corporate Canada, professionals and their associations, governments, insurers, businesses and investors, and groups and individuals.

Mandatory Minimum Sentences

While the Society recognizes that there are circumstances in which mandatory minimum sentences are just, we oppose the expanded use of mandatory minimum sentences and the increased length of certain pre-existing mandatory minimum sentences set out in the Bill. It is our view that the mandatory minimum sentences imposed by the Bill will potentially lead to disproportionate sentences, increase the number of trials, create the potential for transferring discretion from judges to prosecutors, and increase the likelihood of compromised guilty pleas, all of which may create injustice. The Society is also concerned about the financial impact that the Bill will have.

Disproportionate Sentences

Mandatory minimum sentences are one tool that Parliament may use to strike a balance between the conflicting interests of victims of crime, offenders, and society at large. However, the English/Canadian system traditionally relies upon judges to impose sentences which reflect a balance between a *variety* of factors including those above, most of which are set out in s. 718 of the *Criminal Code of Canada* (the "*Criminal Code*)[1], and always with a view to local community concerns.

The Society agrees that, as a policy matter, mandatory minimum sentences are justifiable where they are proportionate – where the offence is so serious that the imposition of a uniform minimum sentence is just in all circumstances and for all offenders.[2] For example, the *Criminal Code* currently sets mandatory minimum sentences in exceptional circumstances for offences including treason, first degree murder, and various offences in which a firearm is used such as manslaughter, sexual assault with a weapon, aggravated sexual assault, kidnapping, and hostage taking.

An obvious example of proportionate use of a mandatory minimum sentence is first-degree murder. The fact that someone has led an exemplary life until the commission of that offence is immaterial. All persons who commit first-degree murder will be sentenced to life imprisonment with no eligibility for parole for 25 years. This is just, because of the horrific nature of a planned and deliberate murder.

However, for most offences judicial discretion in sentencing is integral to guard against disproportionate results. Using the production of marijuana plants as an example, the Bill would amend s. 7(2)(a)(b) of the *Controlled Drugs and Substances Act* (the "CDSA")[3] to impose a mandatory jail term on a person convicted of producing six marijuana plants. A person with five plants can avoid jail, but if they had one more plant, jail would be automatic. This is arbitrary and unfair.

Increased Number of Trials

The Bill will increase the number of trials, further burdening an already overburdened criminal justice system. Where an accused person's only chance to avoid jail is to have a trial, a trial is what they will seek. This has been the experience in Canada with mandatory minimum sentences in second and third offences for drunk driving.[4]

Mandatory minimum sentencing also has an adverse impact on victims of crime. The proposed amendment to impose a mandatory minimum sentence of one year for sexual assault where the victim is under the age of 16 years is a good example. This provision will capture a wide variety of circumstances that necessarily will proceed by indictment, including historical allegations. Often accused persons in these cases are of advanced age and are often willing to accept responsibility. However, fearing a mandatory jail term the offender will not resolve the case, preferring to go to trial. Of course this will require the victim of the crime to testify twice -- at a preliminary hearing and trial -- which can

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[1] RSC 1985, c C-46.
[2] As for constitutional limits, see *R.* v. *Smith*, [1987] 1 S.C.R. 1045, where the Supreme Court held that the mandatory minimum of seven years on conviction for importing was unconstitutional. As well, see *R.* v. *Ferguson*, [2008] 1 S.C.R. 96, where the Supreme Court held that it was inappropriate to craft a constitutional exemption to avoid the application of a mandatory minimum of four years for manslaughter in which a weapon was used.
[3] S.C. 1996, c. 19.
[4] See s. 255(1)(a)(ii)(iii) of the *Criminal Code*.

be devastating for victims. The lack of incentive to resolve cases due to the absence of flexibility in sentencing will increase the emotional trauma for the victims. This is not to say that persons accused of this offence should never go to jail. Clearly in some circumstances they ought to; however, there is incentive to resolve a case to everyone's benefit if there is a possibility of avoiding jail.[5]

Potential for Transferring Discretion to Prosecutors

The Society is also concerned about the potential of the Bill to transfer discretion from the judiciary to the prosecutor. Going back to the example of an accused with six marijuana plants, s.7(2)(a)(b) of the CDSA currently gives the presiding judge the discretion to impose the sentence he or she deems fit depending on the antecedents of the offender and the circumstances of the offence. Many accused people will forego a trial, demonstrating remorse and contrition, and seek a non-custodial sentence, either with or without the prosecutor's agreement. Counsel will attempt to persuade a judge in open court that this offender, in this circumstance, ought not to go to jail.

The entire process takes place in public. The community has a stake in the proper determination of criminal matters and a judge's decision is subject to public scrutiny. Ultimately, judges are held accountable by an appeal court. The value of our public system should not be underestimated.

The Bill would amend s.7(2)(a)(b) of the CDSA by imposing mandatory jail sentences for this offence,[6] resulting in a process that is more likely to be shielded from public view and scrutiny. Rather than having accountable judges decide whether the accused should go to jail, defence counsel and the prosecutor may enter into negotiations to compromise a case where the defence will offer a plea to a quantity of less than six plants to avoid the mandatory minimum. The prosecutor's decision is not reviewable. Indeed, the judge may never know that there has been an agreement to plead guilty to avoid the mandatory minimum, given that the factual narrative will rely on a reduced quantity of seized plants.

Compromised Guilty Pleas and Systemic Injustice

A related point is that innocent persons may compromise their innocence to avoid a mandatory minimum sentence. The threat of a potential mandatory jail term will compel a person to forego his/her defence and plead guilty to a non-mandatory minimum offence for an increased chance to avoid jail.[7] In this way, innocent people will be pressured into pleading guilty.

These distortions of the criminal law sentencing process are replicated across all offences for which mandatory minimum sentences are imposed by the Bill.

By contrast, flexibility in sentencing creates the conditions necessary for effective resolution of criminal allegations. It allows for judges to fashion just and appropriate sentences in the unique circumstances of each case and, if necessary, avoid the application of a minimum jail term where its imposition is unfair and unjust.

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[5] This is so even where the prosecutor does not join in seeking a non-custodial term as the offender will have the opportunity to attempt to persuade a judge that jail should be avoided.
[6] See s. 7(2) CDSA.
[7] This could only take place with the prosecutor's consent.

As a matter of principle, no two offenders are the same, nor are the circumstances of any given offence, even though the charge may be. Mandatory minimum sentences serve to ignore the offender in favour of a one size fits all approach to sentencing. Instead, we ought to have regard to both the offender and the offence committed.

The American Experience

The closest exemplar we have is the experience in the United States where this has been tried for a number of decades and is now discredited. The American experience, while not a perfect analogy, is instructive and is a cautionary tale.

In September 2004, The American College of Trial Lawyers published a paper entitled "United States Sentencing Guidelines 2004: An Experiment That Has Failed", which contains a number of interesting observations about the utility of mandatory minimum sentences including the following:

> "Efforts to eliminate disparity in sentencing have resulted in an incursion on the independence of the federal judiciary, a transfer of power from the judiciary to prosecutors and a proliferation of unjustifiably harsh individual sentences. They have not, as was the hope when these efforts began more than twenty years ago, eliminated disparity in sentencing. Fairness in sentencing, which is essential to our criminal justice system, requires judicial discretion."
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> "Judges throughout the country have had no choice but to impose unfair and unwarranted sentences in particular cases that offend the most basic sense of justice."
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> "Prosecutors are able to and do use mandatory minimums as a 'bargaining chip,' a practice that results in disparities and injustices in sentencing ... Prosecutors often threaten to seek mandatory minimums in order to obtain guilty pleas and cooperation from defendants...."
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> "…mandatory minimums have not been applied uniformly and have resulted in unjust sentences ... The Commission concluded that mandatory minimums compromise proportionality, a fundamental premise for just punishment and a primary goal of the Sentencing Reform Act."

None of this is to say that those who commit crime and are deserving of jail should be permitted to avoid it. Rather, the Society argues that we should not be jailing persons for whom jail is inappropriate. That assessment cannot be made except in court by a judge apprised of all the facts and applying the law correctly.

Conclusion re: Mandatory Minimums

In conclusion, the Advocates' Society urges this committee to reconsider the expansion of mandatory minimum sentences. The Society is opposed to the expanded use of mandatory minimum sentencing as it removes judicial discretion in sentencing, will result in more and longer criminal trials, will not benefit the victims of crime and will likely result in improvident guilty pleas.

Conditional Sentences

Clause 34 of the Bill proposes to restrict judicial discretion to impose conditional sentences. Specifically, the Bill amends s. 742.1 of the *Criminal Code*, which addresses conditional sentencing, in several respects:

- A person convicted of an offence prosecuted by way of indictment for which the maximum term of imprisonment is 14 years of life is no longer eligible for a conditional sentence. This includes offences such as use of a forged passport (s. 57), perjury (s. 132), drawing document without authority (s. 374), fraud over $5,000 (s. 380), and possession of counterfeit money (s. 450).

- A conditional sentence will also not be available for offences prosecuted by way of indictment for which the maximum term of imprisonment is 10 years, that results in bodily harm, involves the import, export, trafficking or production of drugs, or involves the use of a weapon.

- A conditional sentence will also no longer be available for specified indictable offences, including criminal harassment (s. 264), sexual assault (s. 271), motor vehicle theft (s. 333.1) and theft over $5,000 (s. 334(a).)[8]

The Society opposes these restrictions on conditional sentences because they may lead to disproportionate sentences and do not allow judges to take rehabilitation and other societal impacts into consideration when sentencing an offender.

Historical Context

Conditional sentences were first introduced in September 1996. They are correctly described as "a midway point between incarcerations and sanctions such as probation and fines".[9] The original pre-conditions to imposing a conditional sentence included that the sentencing judge had to be satisfied that: (a) the offence for which the offender was to be sentenced was not subject to a minimum period of incarceration; (b) the appropriate sentence, in all of the circumstances, was a period of incarceration of less than two years; (c) a conditional sentence would not endanger the community; and (d) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 and 718.2 of the *Criminal Code*. In 2007, further amendments were made to eliminate the availability of conditional sentences for "serious personal injury" offences.

There are certainly offences for which a conditional sentence is not appropriate. However, Parliament has not pointed to evidence suggesting that judges are failing to appropriately exercise their discretion in crafting sentences. In addition, where a judge is presented with a submission of a conditional sentence, he or she may and often does reject the proposed penalty where it would be contrary to the public interest and/or the general principles of sentencing under s. 718 of the *Criminal Code*. Finally, any improperly imposed sentence, including a conditional sentence, is reviewable on appeal.

Disproportionate Sentences

The proposed amendments in the Bill fundamentally misunderstand the role of the sentencing judge and erode the discretion necessary to impose a sentence that is "proportionate to the gravity of the offence and the degree of responsibility of the offender" as required by s. 718.1 of the *Criminal Code.*

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[8] Publication No. 41-1-C10-E Legislative Summary of Bill C-10: 5 Amendments to the *Criminal Code* (Conditional Sentencing) [Bill C-10, Part 2, Clauses 34 and 51 (Formerly Bill C-16)].
[9] *Ibid.*, Legislative Summary of Bill C-10: 5 Amendments to the *Criminal Code.*

The sentencing judge is uniquely positioned to assess the individual offender: his background, prospects of rehabilitation, the particulars of the offence, and the prevalence of that particular crime in the community.[10]

There are a variety of circumstances in which one can foresee an unjust outcome as a result of the proposed changes. For instance, there will be cases where jail is unnecessary and a suspended sentence inappropriate for an individual convicted of perjury, or one who commits a fraud over $5,000 under a haze of mental illness, gambling addiction, or desperation. Moreover, the focus on indictable offences fails to consider that the Crown may be required to proceed by indictment solely by virtue of the passage of time, which could result in substantial unfairness. For example, a conditional sentence would no longer be able to be imposed for a historic sexual assault, no matter how minor, (i.e. a touching outside clothing).

Rehabilitation and Societal Impacts

The proposed changes restrict the judge's ability to consider rehabilitation, an important consideration given that most offenders will eventually be released from custody. In some cases, a conditional sentence with individually crafted terms can allow an offender to receive necessary counseling and medical treatment in a supervised fashion that is simply unavailable in the institutional setting. This may be of particular value where the offender struggles with addiction or mental health issues. However, the proposed changes would unnecessarily prohibit an emphasis on rehabilitation.[11]

In addition, the restriction on conditional sentences fails to consider the societal impact of unnecessary incarceration. Families may be broken up where the breadwinner or single parent is required to serve a sentence in custody. The offender may lose his/her employment and will emerge from custody unemployed. In addition, individuals in northern, remote and rural communities will be forced to serve his/her sentence far from home, where the costs necessary for visits from family may be prohibitive.[12] The individual may become alienated from his/her family and have a difficult time adjusting upon his return. He or she may also have developed new relationships in custody that may negatively impact on his or her future prospects of criminality.

Potential for Transferring Discretion to Prosecutors

The proposed restrictions on judicial discretion transfer some of this discretion to the Crown's office. Where the Crown elects to proceed summarily, the judge may still impose a conditional sentence. Crowns may be canvassed to make elections on the basis of sentencing restrictions. However, in the absence of bad faith, the Crown's election is not reviewable, despite the significant consequences to the accused.

At the end of the day, the proposed amendments may encourage judges to impose lesser penalties such as a suspended sentence and probation to avoid the necessity of incarceration, where a conditional sentence would be appropriate. By removing the "middle road" in a variety of cases, Bill C-10 may increase the risk that sentences will not be proportionate, just and appropriate in all of the circumstances. Rather than improving public perception of the justice system, the proposed amendments may do just the opposite.

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[10] Canadian Bar Association, *Submission on Bill C-10 Safe Streets and Communities Act*, October 2011, pp. 18-19.
[11] *Ibid.,* p. 17.
[12] Canadian Bar Association, *10 Reasons to Oppose Bill C-10*, November 17, 2011.

Youth Criminal Justice Act ("YCJA")[13]

The Bill proposes several amendments to the YCJA. Taken together, these amendments reveal a legislative focus that will prioritize the use of incarceration and punitive sentencing approaches to youth who come into contact with the law. It will constrain judicial discretion such that harsher responses to young people become preferred, even when other responses may be more appropriate in the particular circumstances. For reasons not understood, this shift in focus comes at a time when youth crime, including violent crime, is down across Canada.

The Evolution of Canada's Approach to Youth Justice: A Deliberate Movement to the Principles Codified in the YCJA

The Bill does not exist in a vacuum. Rather, the proposed amendments to the YCJA arise in a legislative context that has spanned over 100 years. In order to properly contextualize the Society's submissions regarding the YCJA amendments, it is useful to briefly review the evolution of Canada's approach to youth justice over the last century.

Canada's legislative approach to youth crime has evolved since the introduction of the *Juvenile Delinquents Act* (the "JDA") in 1908, Canada's first statute to directly address youth crime. The JDA was anchored in a social welfare philosophy that emphasized a young person's environment as the reason for their delinquency.

The *Young Offenders Act* (the "YOA") replaced the JDA in 1984, and aimed to balance accountability with the protection of the young person. However, the YOA drew criticism for its over-reliance on courts and custodial sentences, as well as its lack of enunciation of clear guiding principles. The majority of custodial sentences under the YOA were for non-violent offences.[14] Unfortunately, under the YOA, Canada's rate of youth incarceration became higher than any other country in the Western world.[15]

The legislative framework of the YCJA, which took effect in 2003, emphasizes alternative measures outside the formal justice system as a response to youth crime, and features a greater focus on assisting the reintroduction of the young person back into the community following incarceration.[16] This focus allows youth courts to fashion rehabilitative and restorative options, such as community-based responses, that better address the specific issues that may have led the young person to make a bad choice in the first place. Since the introduction of the YCJA, the rate of youth incarceration has decreased and the youth crime rate has seen an overall decline across the country.[17]

The introduction of the YCJA was a deliberate legislative choice to move away from relying on the harshest punitive options to respond to Canada's youth. The proposed amendments in Bill C-10 are a departure from the legislative progression towards responsive and flexible approaches to managing youth crime and signal a regression to a punitive model that has proven, in Canada and around the world, to be unsuccessful.

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[13] S. C. 2002, c. 1.
[14] Library of Parliament, *Legislative Summary, Bill C-10* at 130, online: www.parl.gc.ca/Content/LOP/LegislativeSummaries/41/1/c10-e.pdf.
[15] Department of Justice, *Youth Criminal Justice Act: Background and Summary*, online: http://www.justice.gc.ca/eng/pi/yj-jj/ycja-lsjpa/back-hist.html.
[16] Department of Justice, *The Evolution of Youth Justice in Canada* at 27, online: http://www.justice.gc.ca/eng/pi/icg-gci/jj2-jm2/jj2-jm2.pdf
[17] Library of Parliament, *Legislative Summary, Bill C-10* at 130, online: www.parl.gc.ca/Content/LOP/LegislativeSummaries/41/1/c10-e.pdf.

Bill C-10's Proposed Amendments to the YCJA

The Bill's amendments to the YCJA include the following:[18]

- *Adding "Deterrence" and "Denunciation" as principles to consider when sentencing a youth*:[19] will encourage youth court judges to impose a sentence that has the objectives of deterrence and denunciation – the only purpose of which would be to create a harsher sentence – although experts have recognized that deterrence is a controversial theory in youth sentencing;

- *Adding to the circumstances in which a judge can order a custodial sentence for a youth*:[20] youth may now be subject to a custodial sentence if they are charged with an indictable offence for which an adult could be sentenced to more than two years and the youth has had a number of extrajudicial sanctions – but not findings of guilt – imposed previously;

- *Broadening the definitions of "serious" and "violent" offences*:[21] will increase the possibility of pre-trial detention and custodial sentences for even relatively minor offences, such as public mischief and possession of a stolen credit card;[22]

- *Expanding offences for which pre-trial detention is available*:[23] youth charged with either a "serious offence" (under the new, broader definition) or a non-serious offence (if there is a history of outstanding charges or findings of guilt), may be placed in pre-trial detention;

- *Mandatory Crown consideration of adult sentences*:[24] will require Crowns to consider requesting an adult sentence in any case of a "violent offence" (which will now be defined by virtue of whether the bodily harm was intended, rather than actually attempted), and to specifically advise the court where an adult sentence is not being sought;

- *Emphasis on "protection of the public" as youth justice priority*:[25] suggests a move away from a long-term view of protection of the public by a deliberately chosen and proven rehabilitative model of youth justice, to a punitive model of responding in the short-term to youth crime;

- *Expanding opportunities to lift publication bans*:[26] will require courts to decide, in every case of a "violent offence," whether it is appropriate to lift a publication ban to reveal the identity of the young offender; and

- *Requiring police record-keeping of extra-judicial measures ("EJMs") and court record-keeping of extra-judicial sanctions ("EJS")*:[27] records will need to be kept each time the police use an EJM (which will likely reduce their use) and a record will also need to be kept each time a Crown refers a youth to an extra-judicial sanction (the EJS will then be available to be read together with the youth record for purposes of sentencing).

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[18] Bill C-10, Part 4, Clauses 67- 204.
[19] Bill C-10, s. 172, amending s. 38(2) of the YCJA.
[20] Bill C-10, s. 173, amending s. 39(1)(c) of the YCJA.
[21] Bill C-10, s. 167, amending s. 2(1) of the YCJA, and s. 169, amending s. 29(2) of the YCJA.
[22] Canadian Bar Association, Submissions on Bill C-10 before the House of Commons Standing Committee on Justice and Human Rights at 81.
[23] Bill C-10, s. 169, amending s. 29(2) of the YCJA.
[24] Bill C-10, s. 172, amending s. 64(1) and (2) of the YCJA.
[25] Bill C-10, s. 168, amending s. 3(1)(1) of the YCJA.
[26] Bill C-10, s. 185, amending s. 75 of the YCJA.
[27] Bill C-10, s. 190, amending s. 115 of the YCJA.

TAS' Position Concerning the Bill C-10 Amendments to the YCJA

For the reasons that follow, the Society does not support the provisions contained in the bill which seek to amend the YCJA.

a. Bill C-10 adopts an approach that runs contrary to established evidence about what works in youth justice

The most severe responses available in the justice system should be reserved for the most serious offenders. However, the Bill articulates a clear legislative preference for the more frequent use of custodial and harsh sentencing options in dealing with young people. The proposed amendments will re-frame judicial discretion in favour of punitive choices that may not be in the young person's best interests. This re-framing of judicial discretion will result in increased levels of youth incarceration in Canada. Under the Bill, Canada will become yet another example of what happens when legislators ignore established evidence concerning the best practices to youth justice.

Quite simply, the use of incarceration as a criminal sanction does not have a deterrent effect on recidivism.[28] On the contrary:

- *Imprisonment is actually associated with an increase in recidivism:* based on a review of 111 studies involving over 442,000 offenders, harsher criminal justice sanctions were found to create a 3% increase in the rate of recidivism, and longer sentences were associated with even higher recidivism rates. These findings were consistent across subgroups, including youth.[29]

- *What most influences deterrence is certainty of apprehension rather than the severity of the potential punishment:* Increasing the consequences of being apprehended appears to have no impact on the rate of crime. Offenders do not rationally weigh the consequences of criminal activity in advance to decide whether committing an offence is "worthwhile." It is the risk of actually being caught in the first place that has a correlation to a reduction in crime.[30] As Professor Bala put it, "there should be no expectation that social protection can be increased by imposing more severe punishment on young offenders."[31]

The lengthy incarceration of youth may incapacitate those who are deemed dangerous and unacceptable to society in the short run, but may also contribute to creating angry and dysfunctional adults who represent a life-long threat to public safety.[32]

b. Bill C-10 marks a return to a failed past

Contrary to public perception, incarceration can actually lead to an increase in crime. As the "revolving door" of the criminal justice system spins around, young people may become more deeply entrenched in the types of criminal activity that put them in contact with the justice system in the first place. In the face of this evidence, the Bill will increase both the frequency and severity of young people's interactions with the justice system. What this means is a return to the past, where Canada again

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[28] P. Smith, C. Goggin and P. Gendreau, "The effects of prison sentences and intermediate sanctions on recidivism: General effects and individual differences," 7(3), May 2002 (Ottawa: Solicitor General of Canada).
[29] P. Smith, C. Goggin and P. Gendreau, "The effects of prison sentences and intermediate sanctions on recidivism: General effects and individual differences," 7(3), May 2002 (Ottawa: Solicitor General of Canada).
[30] N. Bala, Youth Criminal Justice Law (Toronto: Irwin Law, 2003) at 4.
[31] N. Bala, Youth Criminal Justice Law (Toronto: Irwin Law, 2003) at 4.
[32] Executive Director of the Child Welfare League of Canada Peter Dudding's contention in respect of Bill C-4 (as per his testimony before the Standing Committee on Justice and Human Rights, May 27, 2010).

becomes known for trying to imprison its way out of young offending. Why return to an approach that has already failed?

The policy of sentencing young people on the basis of deterrence and denunciation – principles that the Bill seeks to have added to the YCJA – has proven ineffective. One need only look to the United States to see the effects of this misguided approach to youth justice. Following the Bill's logic of emphasizing deterrence and denunciation when sentencing youth, the United States should be the safest country in the world. Obviously, this is not the case. "Three-strikes" laws, perhaps the best-known example of a sentencing regime based on principles of deterrence and denunciation, are a case in point. Various studies have concluded that in states where "three-strikes" laws exist, there is no corresponding reduction in violent crime or crime generally.[33] In fact, one study found states *without* these laws witnessed a three-times greater reduction in violent crime. More troubling are studies that have shown that "three-strikes" laws are actually tied to an *increase* in homicides.[34]

c. Re-framing and constraining judicial discretion is a mistake

In a study conducted of 238 youth court judges across Canada, the majority was of the view that about half to most of the cases before them could be dealt with adequately *outside* the courts. Other judges have said that, in many cases, young people are set up to fail by being sentenced to conditions that are excessive and not connected to the offence with which they have been charged.[35] The result is a proliferation of breach of bail charges that put youth through the "'revolving door" of the court system more frequently.

Some of the Bill's proposed amendments to the YCJA will influence the lens through which a youth court case is evaluated by the judiciary. The introduction of deterrence and denunciation as sentencing principles, the increased frequency of considering adult sentences for youth, requiring judges to consider lifting publication bans in violent offence cases, and permitting consideration of past EJMs and EJS' when determining whether to impose a custodial sanction, all send a troubling signal to the judiciary that discretion should be exercised in favour of choosing harsher options when dealing with Canadian youth. Courts have already acknowledged the potential negative, permanent impact that labeling a young person as a "criminal" has on them.[36] We should be looking for opportunities to de-criminalize youth rather than to affix this label to more of our young people.

d. Judicial discretion is a vital component of doing justice for youth and society

Alternatives to custodial sentences can provide meaningful consequences for youth crime. Sentences that require young people to repay victims and society for the harm they create not only teach responsibility and respect for others, but also reinforce social values. This is why diversion, which has a positive effect on lowering rates of recidivism, plays an important role in the youth justice system.[37]

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[33] E. Y. Chen, "Impacts of 'Three Strikes and You're Out' on Crime Trends in California and Throughout the United States, Journal of Contemporary Criminal Justice, November 2008, 24(4), 345-370; V. Schiraldi, J. Colburn and E. Lotke, "Three Strikes and You're Out: An Examination of the Impact of 3-Strikes Laws 10 Years After their Enactment," A Policy Brief from the Justice Policy Institute (September 2004).

[34] See extensive research on this subject by the Justice Policy Institute, available at http://www.justicepolicy.org/research/2074, http://www.justicepolicy.org/research/2024 and http://www.justicepolicy.org/research/2028.

[35] A. Doob, "Youth Court Judges' Views of the Youth Justice System: The results of a survey" (Toronto: Centre for Criminology, University of Toronto, 2001) at 6, prepared for the Department of Justice.

[36] *Quebec (Minister of Justice) v. Canada (Minister of Justice)* (2003), 175 C.C.C. (3d) 321 at para. 203 (Que. C.A.).

[37] J. Bonta, S. Wallace-Capretta, J. Rooney, J. & K. McAnoy, "An outcome evaluation of a restorative justice alternative to incarceration. *Contemporary Justice Review*," 8(1) (January 2003) pp. 319-338. Based on 46 studies with nearly 23,000

Given the success of personalized rehabilitative approaches, the maintenance of judicial discretion in youth justice is of paramount importance. Legislative choices that seek to constrain judicial discretion should at least be questioned, and where the policy basis for those choices runs contrary to established evidence, resisted.

The freedom for judges to have the discretion to examine the case before them, and craft a sentence appropriate to the offender and the offence, is valuable not only to the young person, but to society as a whole. Judicial discretion ensures that the crafted sentence will truly and accurately reflect the facts of each individual case. The proposed amendments to the YCJA in the Bill would limit a judge's ability to fulfill their function in the justice system. The expansion of options to sentence a young person to prison, or publish their name to label them a criminal, articulates a clear legislative preference to deal with our youth through punitive measures. The Bill's proposed changes to the YCJA would re-frame judicial discretion by asking judges to prefer harsh criminal sanctions over personalized rehabilitative approaches, where the latter could ultimately have a more positive impact on the offender in question, which will benefit society as a whole.

e. The YCJA already emphasizes principles that are effective in youth justice

Of course, young offenders should face "meaningful consequences" and be held "accountable for an offence." But these words are found in the *current* YCJA, and espouse principles that are more relatable to young people.

Youth crime is an unfortunate reality that cannot be legislated out of existence. However, offenders can be held accountable, and even more importantly, government can help prevent crime by choosing to tackle its root causes. Rather than resurrecting an approach to youth justice that Canada has already tried, and failed, Parliament should be guided by the evidence of what actually works in developing approaches that deliver to future generations the type of society Canadians deserve. The YCJA was created on the basis of lessons learned, domestically and internationally, concerning the most effective approaches to youth crime. Canada's current youth justice legislation strikes a balance that reserves the harshest of responses for the harshest of circumstances, and permits the use of other options to minimize the likelihood that a young person will appear before the courts again. This balance has worked, and we should not turn away from it.

Conclusion on YCJA

The YCJA, a deliberate legislative choice to not rely on the harshest punitive options to respond to Canada's youth, was instrumental in Canada's successful reduction of youth crime. Under the YCJA, judges have the ability to fashion rehabilitative and restorative options to address the specific issues that may have led a young person to make a bad choice in the first place. This personalized, rehabilitative approach to young people has lowered the rate of reoffending, resulting in less youth crime, proving to Canadians the positive impact the YCJA has had in the last several years.

The YCJA amendments in Bill C-10 will undo years of progress, taking Canada back to a time in which it had the highest rate of youth incarceration in the Western world. A "lock them up and throw away the key" approach to youth justice is a serious mistake, the effects of which will be felt for generations to

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participants, diversion programs were associated with a decrease of 3% in the rate of recidivism. The report also made note of a restorative justice program in Winnipeg, where program participants were compared to a group of probationers with similar offence and criminal history characteristics. The offenders who participated in the diversion program had lower initial rates of recidivism, and with each year of follow-up, the differences in recidivism rates for the two groups widened. After one year, diversion program offenders had a recidivism rate of 15%, compared to 38% for the probation group. By the third year, the rates were 35% and 66%, respectively.

come. The youth justice system should not become a weapon we turn against our young people. Instead, it should remain a vehicle through which young people can be rehabilitated and reintegrated into society as productive members.

Canada must learn from its history and experience in the area of youth justice. The types of amendments proposed in Bill C-10 is a road we have been down before – and the YCJA was an express choice to travel in the opposite direction. Canada can, and must, do better.

Conclusion

The Advocates' Society would like to extend its thanks for your consideration in reviewing our submissions on Bill C-10. It is our view that Bill C-10 negatively impacts the administration of justice and that the provisions with respect to mandatory minimum sentences, conditional sentences and the YCJA ought to be revisited.

Yours truly,

Mark D. Lerner,
President
The Advocates' Society