BILL C-10: A RUSH TO A STRICTER YOUTH CRIMINAL JUSTICE SYSTEM

Brief submitted by UNICEF Canada to the House of Commons Standing Committee on Justice and Human Rights

25 October 2011

INTRODUCTION

This submission is not intended to provide a comprehensive examination of all aspects of Bill C-10, and will address only Parts 2 and 4, as those are the Parts that are the most likely to have a direct or indirect impact upon the well-being, best interests and rights of young people.

Bill C-10 contains some positive protections for children in Part 2 and sets out some constructive elements in Part 4, but for the most part seems to take Canada's youth criminal justice system in the wrong direction. The treatment of multiple and divergent legislative changes affecting children in an omnibus crime bill is not an appropriate approach to ensure the promotion of their best interests. UNICEF Canada's submission addresses the implications of Parts 2 and 4 of the bill for children, and proposes purposeful measures so parliamentarians can be confident they are legislating in the best interests of children.

POSITION OF UNICEF CANADA

A) INCLUSION OF PROPOSED AMENDMENTS TO THE *YOUTH CRIMINAL JUSTICE ACT* IN OMNIBUS CRIME LEGISLATION (BILL C-10)

It is UNICEF Canada's position that youth justice is different than adult justice and that it is inappropriate to include proposed amendments to the *YCJA*, as set out in Part 4, in one omnibus crime bill, which essentially deals with offences committed by adults. Our concern is that this bundling of provisions will have the effect of treating young people as 'young offenders' or 'mini-criminals', as opposed to youth who have come into conflict with the law and are involved in the youth criminal justice system. This was part of the rationale for changing the name of such legislation from the *Young Offenders Act* to the *Youth Criminal Justice Act* in the first place.

It also appears to be inconsistent with the ordinary rules of statutory interpretation to take a protectionist approach to offences against children in one part (Part 2) and then to treat young people as independent actors who can be severely penalized for their actions in another part (Part 4) of the same legislation (Bill

C-10). Such internal inconsistency within one proposed piece of legislation calls into question the overall legislative intent and coherence of Bill C-10.

Supporting Points

1) Persons under 18 are not yet mature adults, but have special vulnerabilities and require specific protections.
2) This 'bundling' approach to the youth criminal justice system is contrary to the presumption of diminished moral blameworthiness as established by the Supreme Court of Canada.
3) There is the danger of stigmatizing young people rather than treating them as persons who lack full maturity and who sometimes act impulsively and in response to peer pressure.
4) There is the danger of de-emphasizing the importance of reintegration and rehabilitation as important principles that prevent recidivism and promote public security, particularly for young people.

Recommendation 1: That the Parliament of Canada remove Part 4 on youth justice from Bill C-10, the omnibus crime bill.

B) INCLUSION OF INCREASED PENALTIES FOR EXISTING SEXUAL OFFENCES AGAINST CHILDREN AND CREATION OF TWO NEW SEXUAL OFFENCES AGAINST CHILDREN IN PART 2 OF BILL C-10

It is UNICEF Canada's position that Part 2 of Bill C-10 provides additional protections to children, in its proposed amendments to the *Criminal Code*, by increasing penalties for sexual offences against children and by creating two new offences aimed at conduct that could facilitate or enable the commission of a sexual offence against a child. However, it is also our view that section 163.1 of the *Criminal Code*, which deals with the making, possession, dissemination/transmission and accessing of child pornography - and which is one of the provisions in Part 2 subject to increased penalties - should be amended to ensure that young persons do not run afoul of these provisions themselves.

Supporting Points

1) Part 2, if enacted, would:
   a) Increase or impose mandatory minimum penalties, and increase maximum penalties, for certain sexual offences with respect to children;
   b) Create two new offences – of making sexually explicit material available to a child and of agreeing or arranging to commit a sexual offence against a child;
   c) Expand the list of specified conditions that may be added to prohibition and recognizance orders – including prohibitions concerning contact with a person under the age of 16 and use of the Internet or any other digital network; and
   d) Expand the list of enumerated offences that may give rise to such orders and prohibitions.
2) It is important to protect young people reported by Internet service providers or otherwise identified and from being charged criminally for acts that reflect a youthful exploratory instinct or a lack of awareness of the consequences of sending photos, videos and messages with explicit sexual content, called 'sexts', over their mobile phones. The use of the criminal law for some such activity would not be an appropriate response.

Recommendation 2: That a child rights impact assessment process be conducted in respect of Part 2 of Bill C-10 to determine if there are any potential unintended negative impacts upon youth who may inadvertently come into conflict with the law for any of the enumerated offences, and that appropriate mitigating measures be undertaken.

C) ESTABLISHMENT OF A STRICTER YOUTH CRIMINAL JUSTICE SYSTEM IN PART 4 OF BILL C-10 THROUGH A RANGE OF PROPOSED AMENDMENTS TO THE *YOUTH CRIMINAL JUSTICE ACT*

It is UNICEF Canada's position that Part 4 of Bill C-10, which sets out a number of proposed amendments to the 2003 *Youth Criminal Justice Act* (*YCJA*), should not be passed in its present form. There is no compelling case for proceeding with Part 4 at this time, either in law, in principle, or based on empirical experience.

While we acknowledge that the protection of the public is a legitimate and serious consideration in any analysis of the current legislative framework, we see no evidence that shows that these proposed amendments will increase public safety or decrease youth crime. The evidence from a recent cross-country consultation of people in all parts of the justice system, and from international experience, doesn't support the proposed changes. It's clear that youth crime is falling, and further improvements must come from fixing or correcting the system behind the law, not the law itself.

In our view, any amendments to the *YCJA* should be deferred (stayed or suspended) by the Parliament of Canada until such time as there is evidence-based research to demonstrate: a) that proposed solutions will be effective in protecting the public and reducing criminal acts committed by children and youth in the long-term; and b) that the proposed legislative changes are consistent with international standards for the treatment of children in conflict with the law, as stated in the United Nations Convention on the Rights of the Child, and as documented in a child rights impact assessment of Part 4 of the proposed Bill.

In UNICEF Canada's opinion, the most effective steps to further reduce crime committed by children and youth, and the number of children in conflict with the law (both of which have been declining since the current youth justice act came into effect in 2003) involve placing a stronger emphasis on the federal government adopting and applying an 'equity' focus, which means providing services and better coordinated programming to this country's most at-risk children. Most of the children who come into conflict with the law suffer from the effects of poverty, family breakdown, and lack of access to necessary educational and mental health services and support. Researchers have demonstrated that a preventive approach to improve supports for vulnerable children before they offend is more cost-effective and produces better outcomes than increasing the incarceration of these children.

Supporting Points

1) The *YCJA* was only enacted in 2003 and there is early evidence that it has been working successfully in reducing youth crime and violent youth crime, and the rate of youth incarceration.
2) The problems remaining with youth in conflict with the law stem from inadequacies in the system behind the law, not the law itself.

3) A move away from a restorative and rehabilitative justice model is unnecessary, expensive and will not result in a safer society. Some of the proposed amendments may actually decrease public safety, and the long-term protection of Canadian society.
4) The enormous financial resources that would be expended on building a larger penal infrastructure for children should be diverted into providing more effective and better-coordinated prevention, early intervention and community-based services.
5) Laws should not be enacted on the basis of a few exceptional and tragic high profile cases. They should be based on evidence and experience of what works, and what is not working.
6) The cross-country roundtable discussion report was clear that reverting to a youth criminal justice system that incarcerates more children, including for non-violent crimes, is not an effective approach, and the many experts from all parts of the justice system favour placing greater emphasis on preventative and early intervention strategies.
7) Most of the proposed amendments in Part 4 of Bill C-10 are not compliant with the Convention on the Rights of the Child and do not treat the best interests of children as a primary consideration. This is particularly concerning since the Preamble of the *YCJA* makes explicit reference to the Convention.
8) Justice Nunn, whose Commission report is credited for providing the primary justification for this bill, has spoken out publically against an earlier version of this bill.
9) The changes contained in Part 4 of Bill C-10, including a greater emphasis on deterrence and denunciation for sentencing purposes, will have a disproportionate and adverse impact on Aboriginal children, who are already significantly overrepresented in the youth criminal justice system. These changes will bring more children into the justice system than the few whose violent acts are ostensibly the motivation for the proposed reforms.
10) The challenges faced in the development and consideration of Part 4 of Bill C-10 demonstrate major deficiencies in: 1) giving insufficient attention to children's rights and international standards in the development of federal legislation; 2) failing to apply a child rights impact analysis before a bill reaches this stage; and 3) the absence of an independent Children's Commissioner or Advocate for Canada who has the authority to advocate on behalf of young people who will be significantly impacted by federal legislation and who can be a catalyst in ensuring that more effective preventive supports contribute to the continuing reduction of youth in conflict with the law, particularly in such critical areas as social services, child welfare, health and education.

Finally, our UNICEF Canada submission contains 16 recommendations, which are listed in our Appendix of Recommendations.

Recommendation 3: That the Parliament of Canada stay or suspend any further consideration of the proposed amendments to the *Youth Criminal Justice Act*, as set out in Part 4 of Bill C-10, until such time as there is evidence-based research to demonstrate: a) that the proposed solutions will be effective in protecting the public and reducing criminal acts committed by children and youth in the long-term; and b) that the proposed legislative changes are consistent with international standards for the treatment of children in conflict with the law, as stated in the United Nations Convention on the Rights of the Child, and as documented in a child rights impact assessment of Part 4 of Bill 10.

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ABOUT UNICEF

UNICEF is the world's leading child-focused humanitarian and development agency. Through innovative programs and advocacy work, we save children's lives and secure their rights in virtually every country. Our global reach, unparalleled influence on policymakers, and diverse partnerships make us an instrumental force in shaping a world in which no child dies of a preventable cause. UNICEF is entirely supported by voluntary donations and helps all children, regardless of race, religion or politics. For more information about UNICEF, please visit www.unicef.ca.

The only organization named in the United Nations Convention on the Rights of the Child as a source of expertise for governments, UNICEF has exceptional access to those whose decisions impact children's survival and quality of life. We are the world's advocate for children and their rights.

PROFESSIONAL EXPERIENCE

This submission is also being filtered through my lens as a lawyer, child protection professional and child rights advocate, having regard to my 28 years of child welfare experience in the Province of Ontario (3 years as Counsel to the Children's Aid Society of York Region in Newmarket, Ontario; 20 years as Chief Counsel to the Catholic Children's Aid Society of Toronto; 5 years as Director of Policy Development and Legal Support for the Ontario Association of Children's Aid Societies); 5 years as Children's Advocate for the Province of Saskatchewan; and over a year as Chief Advisor, Advocacy for UNICEF Canada.

PART 2 OF BILL C-10 – NEED FOR AMENDMENT TO MITIGATE EXPOSURE OF CHILDREN TO CRIMINAL CHARGES AND PROSECUTION

This part of our submission builds upon UNICEF Canada's earlier submission delivered in writing and orally to the Senate Committee on Legal and Constitutional Affairs on February 16, 2011 in response to Bill C-22 (as it then was). This bill was passed and assented to on March 23, 2011 and is called *An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service*. The thrust of this *Act* is to impose reporting duties on persons who provide an Internet service to the public if they have reasonable grounds to believe that their Internet service is being or has been used to commit a child pornography offence. This enactment makes it an offence to fail to comply with the reporting duties.

While we applaud the laudable purposes of Part 2 of Bill C-10 in promoting the protection and safety of children, consistent with articles 19 (protection from abuse and neglect) and 3 (best interests of the child) of the Convention on the Rights of the Child, these provisions must be read in conjunction with the above-mentioned mandatory reporting of Internet child pornography legislation. In this context, we are concerned about the potential unintended consequence of children and youth being subject to greater exposure to criminal liability and prosecution through the anticipated increased reporting by Internet Service Providers of the digital activity of such young persons, where it involves pornographic/sexual abuse images (i.e., accessing, downloading, or sharing). This heightened exposure to criminal liability may occur even when actions reflect a youthful exploratory instinct or a lack of awareness of the consequences, and have no malicious intent. As such, there are heavy and disproportionate consequences that may accrue to young people for not knowing the legal parameters of the responsible

use of technologies. We see this danger not just in relation to sexual exploitation, but also as extending to privacy considerations.

With children and youth having increasing access to their own computers and mobile phones with embedded cameras, they now have the capability to access, download and share child abuse images and to send photographs, videos and messages that they create themselves, depicting themselves or other children. There has been a great deal of concern raised by the growing tendency of some children and youth to send photos, videos and messages with explicit sexual content, called 'sexts', over their mobile phones.

It is important to be vigilant in the enactment of Part 2 of Bill C-10, so that in our haste to create stiffer sentences and protect children from the possession, transmission and accessing of sexual abuse images that we do not create legislative machinery that may inadvertently hurt them in other ways.

It is also necessary to consider the risks to children and youth whose actions are criminalized, when transmitting sexual images ('sexting'), or otherwise accessing Web site and other digital child pornographic content, as defined in section 163.1 of the *Criminal Code*. Such criminalization could lead to reputational damage; a permanent stigma negatively affecting education and employment opportunities; and potential acts of self-harm, resulting from a sense of embarrassment and humiliation.

Legal Analysis of Criminal Law Parameters in the Context of Child Pornography Offences

It is important to appreciate that the offence sections which could potentially lead to a young person being charged under the *Youth Criminal Justice Act* (or a young adult under the *Criminal Code*) appear in section 163.1 of the *Criminal Code*.

Under Bill C-10, the maximum penalty for the offence of making child pornography, as set out in paragraph 163.1(2)(b) of the *Criminal Code*, is increased, on summary conviction, from 18 months to two years less a day and the minimum punishment is increased from 90 days to six months. Similarly under Bill C-10, the same increased maximum and minimum penalties would apply, upon summary conviction, to the offence of distributing or transmitting child pornography, as set out in paragraph 163.1(3)(b) of the *Criminal Code.*

Under Bill C-10, the minimum penalty for the possession of child pornography, as set out in paragraph 163.1(4)(a) of the *Criminal Code* is increased, on an indictable conviction, from 45 days to six months. In the case of a summary conviction for the same offence, the minimum penalty would be increased from 14 days to 90 days under paragraph 163.1(4)(b). Similarly, under Bill C-10, the same increased minimum penalties would apply for both indictable and summary convictions under paragraphs 163.1(4.1)(a) and 163.1(4.1)(b) of the *Criminal Code* respectively.

In *R. v. Sharpe*, a 2001 decision of the Supreme Court of Canada, the Court read two exceptions into subsection 163.1(4) (possession of child pornography) and subsection 163.1(2) (making child pornography), but not into subsection 163.1(3) (distribution and transmission of child pornography) or subsection 163.1 (4.1) (accessing child pornography):

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> "To assess the appropriateness of reading in as a remedy, we must identify a distinct provision that can be read into the existing legislation to preserve its constitutional balance. In this case, s. 163.1 might be read as incorporating an exception for the possession of:
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> 1. Self-created expressive material: i.e., any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and
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> 2. Private recordings of lawful sexual activity: i.e., any visual recording created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use.
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> The first category would protect written or visual expressions of thought, created through the efforts of a single individual, and held by that person for his or her eyes alone. The teenager's confidential diary would fall within this category, as would any other written work or visual representation confined to a single person in its creation, possession and intended audience.
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> The second category would protect auto-depictions, such as photographs taken by a child or adolescent of himself or herself alone, kept in strict privacy and intended for personal use only. It would also extend to protect the recording of lawful sexual activity, provided certain conditions were met. The person possessing the recording must have personally recorded or participated in the sexual activity in question. That [sexual] activity must not be unlawful, thus ensuring the consent of all parties and precluding the exploitation or abuse of children. All parties must also have consented to the creation of the record. The recording must be kept in strict privacy by the person in possession, and intended exclusively for private use by the creator and the persons depicted therein. Thus, for example, a teenage couple would not fall within the law's purview for creating and keeping sexually explicit pictures featuring each other alone, or together, engaged in lawful sexual activity, provided these pictures were created together and shared only with one another. The burden of proof in relation to these excepted categories would function in the same manner as that of the defences of "artistic merit", "educational, scientific or medical purpose", and "public good". The accused would raise the exception by pointing to facts capable of bringing him or her within its protection, at which point the Crown would bear the burden of disproving its applicability beyond a reasonable doubt.
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> These two exceptions would necessarily apply as well to the offence of "making child pornography" under s. 163.1(2) (but not to printing, publishing or possessing for the purpose of publishing); otherwise an individual, although immune from prosecution for the possession of such materials, would remain vulnerable to prosecution for their creation".

It is submitted that 'sexting' may technically in all cases, or at least in the case of transmissions to third parties without consent, contravene subsection 163.1(3) of the *Criminal Code*. In this context, it has been suggested by Professor Mark Carter, a law professor at the University of Saskatchewan, that apart from the possession offence, "since cell phone cameras weren't around in 1993 [at the time of the enactment of section 163.1 of the *Criminal Code*], … the reference to 'transmission', under the section 163.1(3) 'distribution' offence, might need the kind of attention that the Court gave to the 'possession' offence." Another law professor at the University of Toronto, Hamish Stewart, was interviewed by a newspaper

journalist in connection with a newspaper account of a London, Ontario police probe into a possible child pornography case involving 'sexting' that could bring charges against high school teens. In that case, it was alleged that a teenage girl sent an explicit photograph of herself taken on a cell phone to an eighteen year old male, who sent it to other persons. Professor Stewart is reported to have stated to the journalist that "a Supreme Court of Canada decision in 2001 recognized exceptions for 'privately-created and privately-held images that do not depict unlawful activity'… [and these exceptions] would probably apply to the original photograph as long as it remained only in the possession of the two young people in question, but it does not apply to distribution of the image."

In the United States, child pornography criminal charges have been laid against teenagers who have transmitted sexually explicit photographs to others. However, states such as Vermont have taken the position that a more proportionate response is required in the case of children and youth. As a result, they have taken steps to prevent such charges from being laid by introducing a bill to legalize the consensual exchange of graphic issues between two individuals aged thirteen to eighteen years old. Nonetheless, transmitting such images to others would remain a crime.

Law professor Anne McGillivray of the University of Manitoba has communicated the following observations in relation to the exercise of charging and prosecutorial discretion:

> "[Charging and prosecutorial] discretion may be exercised on the basis of consent. Images may be posted by the child whose image it is, or with that child's consent by a peer close in age, who is a friend or acquaintance of the child. While there are very real concerns about the reality or reliability of consent in this context…, a common sense approach sensitive to the expressive rights and capacities of the child and to the nature and intent of the posting would make a lot of sense. The hard-line position taken by the Supreme Court is not a workable standard.
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> An amendment to s. 163.1 could recognize these factors. Close in age exceptions to criminal responsibility are found in other Criminal Code provisions regarding sexual activity involving children. A workable distinction based on the nature of the image has been adopted elsewhere…"

Similarly, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse provides the authority to signatory Parties to reserve the right not to criminalize the production and possession of pornographic material "involving children who have reached the age of consent [to sexual activities] where these images are produced and possessed by them with their consent and solely for their own private use." It is important to recognize that this mitigation of exposure to criminal responsibility appears in a Convention, which requires European Union states to act in compliance in terms of national or domestic law.

Article 16 (3) of that Council of Europe Convention speaks to the provision of intervention programs and measures for children who sexually offend:

> "Each party shall ensure, in accordance with its internal law, that intervention programmes or measures are developed or adapted to meet the developmental needs of children who sexually offend, including those who are below the age of criminal responsibility, with the aim of addressing their sexual behavioural problems".

A proposal for a directive of the European Parliament and of the Council on combating sexual abuse, sexual exploitation of children and child pornography sets out, among other considerations, the following provision:

> "Member states shall ensure that where offences concerning child pornography…are committed by a child, they shall be subject to appropriate alternative measures adapted to specific re-educational needs under national law, having due regard to the age of the offender, the need to avoid criminalization and the objective of social reintegration of the child".

Justification for Proposed Amendment to Section 163.1 of the *Criminal Code*

UNICEF Canada supports the proposed changes in Part 2, targeting the actions of adults who abuse and exploit children. However, our legal analysis suggests that children and youth may be charged or prosecuted for technical breaches of section 163.1 of the *Criminal Code* and may not be able to rely upon considerations of consent or private possession or use, particularly where there has been the distribution or transmission of child pornography under subsection 163.1 (3) or the accessing or receipt of child pornography under subsection 163.1 (4.1) of the *Criminal Code*. Accordingly, a reasonable response to this risk of criminalization would be the consideration of an amendment to section 163.1 of the *Criminal Code* to mitigate the risk of criminal culpability for young persons who access explicit sexual images out of exploratory curiosity or transmit or receive 'sexts' upon mutual consent. We also wish to emphasize that as legal sanctions for such activity increase, it becomes even more imperative to ensure that Canada's children and youth receive effective, age-appropriate and accessible information and education about the responsible use of digital technologies.

Recommendation 4: That consideration be given to enacting an amendment to section 163.1 of the *Criminal Code*, to mitigate the risk of criminal responsibility for young persons between the ages of 13 and 18 who transmit or receive sexual images ('sexting') upon mutual consent, or otherwise access or explore Web site and other digital child pornographic content, as defined in section 163.1(1) of the *Criminal Code*.

A CHILDREN'S RIGHTS PERSPECTIVE – PART 4 OF BILL C-10

UNICEF Canada's concerns with respect to Part 4 of Bill C-10 are rooted in the recognition that Canada has assumed international obligations to respect and promote the rights of all children in Canada. Canada ratified the Convention on the Rights of the Child on December 13, 1991. Due to the nature of treaty obligations and customary law, there is a general duty to bring internal law into conformity with obligations under international law.

The Convention on the Rights of the Child affirms the status of all children as equal holders of human rights and it is explicitly referenced, among other considerations, in the Preamble to the *YCJA*:

> "Whereas Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, and have special guarantees of their rights and Freedoms".

It is, therefore, of fundamental importance that many of the proposed amendments to the *YCJA* in Bill C-10 are inconsistent with the Convention on the Rights of the Child; the recommendations to Canada in 2003 by the United Nations Committee on the Rights of the Child (in relation to its review of Canada's second report on the implementation of the Convention), and General Comment No. 10 issued by the Committee on the Rights of the Child in 2007 concerning children's rights in juvenile justice.

We also agree with the March 2011 submission of the Canadian Council of Child and Youth Advocates in response to the former Bill C-4, where the observation is made that the proposed legislation erodes the original intent of the *YCJA* and undermines the spirit of the Convention on the Rights of the Child:

> "The *YCJA* was introduced in 2003 in order to fix procedural flaws resulting from the application of the *Young Offenders Act (YOA)*. The new Act, prompted and strongly influenced by Canada's commitment to implement and uphold the articles of the United Nations Convention on the Rights of the Child (CRC), was proclaimed at a time when Canada had the highest youth incarceration rate in the world. The proposed amendments allow for an increase in the incarceration rate and adult sentences. If the *Act* is amended in this way, Canada is in effect pulling away from some fundamental provisions of the CRC.
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> The proposed amendments erode the original intent of the *YCJA* and undermine the spirit of the CRC, by losing sight of the best interests of the child as an integral part of our societal values, focusing on deterrence and denunciation, and allowing easier access to detention and imprisonment, the most intrusive actions available."

In its Concluding Observations to Canada in 2003 with respect to juvenile justice, the United Nations Committee on the Rights of the Child noted:

> "The Committee is encouraged by the enactment of new legislation in April 2003. The Committee welcomes crime prevention initiatives and alternatives to judicial procedures. However, the Committee is concerned at the expanded use of adult sentences for children as young as 14; that the number of youths in custody is among the highest in the industrialized world; that keeping juvenile and adult offenders together in detention facilities continues to be legal; that public access to juvenile records is permitted and that the identity of young offenders can be made public. In addition, the public perceptions about youth crime are said to be inaccurate and based on media stereotypes".

In the same document, the Committee made the following recommendation to Canada:

> "…that the State party continue its efforts to establish a system of juvenile justice that fully integrates into its legislation, policies and practice the provisions and principles of the Convention, in particular articles 3, 37, 40 and 39, and other relevant international standards in this area, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty and the Vienna Guidelines for Action on Children in the Criminal Justice System. In particular, the Committee urges the State party:

a) To ensure that no person under 18 is tried as an adult, irrespective of the circumstances or the gravity of his/her offence;
b) To ensure that the views of the children concerned are adequately heard and respected in all court cases;
c) To ensure that the privacy of all children in conflict with the law is fully protected in line with article 40, paragraph 2 (b) (vii) of the Convention; [and]
d) To take the necessary measures (e.g., non-custodial alternatives and conditional release) to reduce considerably the number of children in detention and ensure that detention is only used as a measure of last resort and for the shortest possible period of time, and that children are always separated from adults in detention".

Articles 3, 37 (b) and (c), and 40 in particular are relevant to our analysis of the proposed amendments to the *YCJA* and are set out for ease of reference:

Article 3 of the Convention on the Rights of the Child provides:

> "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
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> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
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> 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision".

Article 37 (b) and (c) of the Convention on the Rights of the Child stipulates:

> "States Parties shall ensure that:
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> (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;
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> (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 interests 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."

Article 40 of the Convention on the Rights of the Child states that:

“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 interests 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".

In its Concluding Observations of 2003 directed to Canada with respect to the implementation of the best interests of the child as a primary consideration, the United Nations Committee on the Rights of the Child noted:

> "The Committee values the fact that the State party holds the principle of the best interests of the child to be of vital importance in the development of all legislation, programmes and policies concerning children and is aware of the progress made in this respect. However, the Committee remains concerned that the principle that primary consideration should be given to the best interests of the child is still not adequately defined and reflected in some legislation, court decisions and policies affecting certain children, especially those facing situations of divorce, custody and deportation, as well as Aboriginal children. Furthermore, the Committee is concerned that there is insufficient research and training for professionals in this respect"

In the same document, the Committee made the following recommendation to Canada:

> "The Committee recommends that the principle of 'best interests of the child' contained in article 3 be appropriately analysed and objectively implemented with regard to individual and groups of children in various situations (e.g. Aboriginal children) and integrated in all reviews of legislation concerning children, legal procedures in courts, as well as in judicial and administrative decisions and in projects, programmes and services that have an impact on children. The Committee encourages the State party to ensure that research and educational programmes for professionals dealing with children are reinforced and that article 3 of the Convention is fully understood, and that this principle is effectively implemented".

In its 2007 General Comment No. 10, the Committee on the Rights of the Child issued guidelines and recommendations to all States Parties to ensure that their juvenile justice system was consistent with the Convention.

In its written submission in response to the former Bill C-4, the Canadian Coalition for the Rights of Children asked the Committee to consider the recommendations for youth justice that Canada received from the Committee on the Rights of the Child in 2003, after its second review of implementation of the Convention. In particular, that submission provided the following historical context:

> "In a 2007 response to a Senate report on children's rights, the government stated that all proposed laws are reviewed for consistency with Canada's obligations under international law. The CCRC suggests that the committee ask to see the analysis that was done of Bill C-4, with reference to Canada's obligations under the Convention on the Rights of the Child, before sending the bill back to the House."

When this point was raised by Kathy Vandergrift, Chairperson, Board of Directors, Canadian Coalition for the Rights of Children, in her testimony before the Standing Committee on Justice and Human Rights on June 10, 2010, there was a statement of intent by the Committee to check on this point and to get back to

Ms. Vandergrift, but this evidently never occurred – a point I made when I appeared and gave testimony before the Standing Committee on Justice and Human Rights on March 23, 2011.

The Canadian Council of Child and Youth Advocates also advanced the following recommendation in its written submission in response to the predecessor bill:

> "That the federal government ensures that any future proposed changes to the youth criminal justice system comply with the provisions and the spirit of the UN Convention on the Rights of the Child."

While we support that recommendation in principle, we respectfully suggest that any proposed amendments to the *YCJA* should also undergo a valid child rights impact assessment and that any such assessment report be made public. In committing to the provisions of the Convention, particularly articles 3(2) and 4, governments are obligated to establish the processes and mechanisms by which to make good, defensible decisions in children's best interests.

Article 4 of the Convention stipulates:

> "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of the available resources, and where needed, within the framework of international co-operation."

The Committee on the Rights of the Child recommends that governments at all levels conduct early child impact assessments on potential decisions that could have an impact on children, so that positive impacts can be augmented and negative impacts can be mitigated or eliminated as part of the design and implementation process.

As the former Children's Advocate in Saskatchewan, I had some direct experience in this area when I introduced eight *Children and Youth First Principles* for the provincial government's consideration – which were ultimately adopted by the Premier in February 2009. This was motivated by our concern that there were too many situations where financial, political and jurisdictional considerations were overtaking the best interests and well being of children in the province.

Recommendation 5: That the proposed amendments to the *Youth Criminal Justice Act*, as set out in Part 4 of Bill C-10, be evaluated for compliance with the Convention on the Rights of the Child, with particular emphasis on articles 3, 37, 40 and 39; and with the recommendations for youth justice (paragraphs 56, 57) and the best interests of the child (paragraphs 24, 25) that Canada received from the United Nations Committee on the Rights of the Child in 2003. There should be a transparent public reporting and due consideration of any such existing evaluation of the proposed amendments to the *Youth Criminal Justice Act*, as set out in Part 4 of Bill C-10.

Roundtable Discussions Report – Consistent Cross-Jurisdictional Themes

In 2008, consultations took place in every Canadian province and territory with respect to Bill C-25, the predecessor bill to Bill C-4 and Part 4 of Bill C-10, which proposed amendments to the *YCJA*.

As the Provincial Children's Advocate for Saskatchewan at that time, I participated in the roundtable consultation that took place in Regina, Saskatchewan. While there was some minority support for former Bill C-25, the vast majority of responses pointed to concerns in the rush to impose harsher sentences upon youth and the ensuing disproportionate response to a few high profile cases, rather than expanding on the successes of restorative justice and the provision of early community supports.

At that roundtable discussion, I raised the social science research that demonstrated that the principle of deterrence was ineffective in the case of young persons, who often act impulsively and in response to peer pressure. I also expressed my opinion that the proposed amendments were contrary to the human rights principles set out in both the Convention on the Rights of the Child and the *Canadian Charter of Rights and Freedoms*, as well as the overarching principles enumerated in the *YCJA*. Among other observations, I referred to many of the underlying systemic concerns that contributed to these vulnerable young persons becoming involved in the youth criminal justice system and the wisdom of investing in prevention and early intervention strategies.

This roundtable report, which was only made public after the passage of about two years, is worthy of serious consideration and identifies a number of consistent messages from all provinces and territories. The key themes are as follows:

1. **Little support for changes to the *YCJA* at this time**

Under this theme, it was noted that:

> "Legislation cannot prevent crime, reduce crime or protect the public. Changing legislation will not change behaviour. The *YCJA* should not be changed just for the sake of change. There was an overwhelming consensus that the perceived flaws are not in the legislation; the flaws are in the system. The development of the *YCJA* was described as a long and thoughtful process that came from evidence based research. A sensible and defensible *Act* based on intelligent principles. Any changes should be evidence-based and made following the same thoughtful process.
>
> …The *YCJA* itself is not the challenge; it is the dialogue that happens in the public. The public perception of public safety, whether real or perceived, will not change with amendments to the *YCJA*. Changing the *YCJA* will not change behaviour. If changes must be made to the *YCJA*, they should only be made slowly and as a result of a more comprehensive review."

2. **Need [for] a strong social safety net to support implementation of the *YCJA***

Under this theme, it was noted that:

> "The absence of an adequately resourced social safety net was the foundation of a number of related issues that dominated the roundtable discussions in every province and territory. There was national consensus that prevention and early intervention programs and services need to be in place. The need for partnerships and collaboration of systems surfaced quickly into each discussion of the *YCJA*. Participants identified the need for systems to work together, not in silos, and to be better resourced to support children and families before they enter the youth justice

system. Systems need to communicate and link with each other and ultimately to the justice system.

Provinces and territories all identified a lack of resources, or sustainable resources, to implement the programs and services necessary to fully embrace the *YCJA*. There needs to be equal allocation of resources to address the problems in communities. Participants expressed a need for provincial/territorial governments and the Government of Canada to continue discussions similar to the Roundtable forum to work together to address *YCJA* funding issues and develop multi-system strategies, partnerships and collaborations."

3. **No support for introducing deterrence as a sentencing principle**

Under this theme, it was observed:

> "Less than 1 percent of the participants supported the concept of deterrence for sentencing. Academics advised that this is a principle for middle-class adults and there is no evidence in the last 40 years that it works for adults, so why would it work for young people? Deterrence assumes that a person has planned and considered the consequences. Adolescent brains are not fully developed and they are less able to control impulses and more driven by the thrill of rewards. They are characteristically more short-sighted, oriented towards immediate gratification and less able to resist peer pressure than adults, which is reflected in section 3(c)(iii) of the *Declaration of Principle*.
>
> …It was noted that deterrence will have the most effect on judges as they would impose harsher sentences, which will take valuable resources from community programs and violates the principle of proportionality. Aboriginal youth who are already over-represented in custody and are incarcerated two times more for administration of justice offences will be the most affected by introducing the principle of deterrence."

4. **Programming is critical to *YCJA*'s effectiveness and key to public protection**

Under this theme, it was noted:

> "Every roundtable highlighted the need for evidence-based, culturally-sensitive programming at all stages. All jurisdictions identified the need for more resources and/or to redirect resources in order to provide early intervention and prevention programs and services. There is an inequity of programs from community to community and Aboriginal communities are significantly under-resourced. Provincial/territorial governments, the Government of Canada and communities need to work together to fund and invest in programs and develop a multi-system strategy with partnerships and collaboration."

Recommendation 6: That due consideration be given to all the themes emerging from the cross-country roundtable discussions, which clearly do not support many of the approaches to the youth criminal justice system reflected in the proposed amendments to Part 4 of Bill C-10.

Demographics of Youth Involved in the Youth Criminal Justice System

On the basis of my experience in the child protection system and as a former Provincial Children's Advocate, I have come to appreciate that the vast majority of children and youth involved in conflict with the law are not individuals bent on wreaking havoc, but rather are vulnerable young persons, who have often been subjected to neglect, abuse and/or exposed to domestic violence. They often are young people who have been involved in the child protection system and have undergone multiple placements without any sense of ongoing stability and permanence. Many have multiple needs relating to mental health, addictions or developmental disabilities resulting from circumstances beyond their control, such as fetal alcohol spectrum disorder. They are disproportionately from Aboriginal communities, particularly in Western Canada. In my experience in Saskatchewan, approximately 80 per cent of the children in child welfare care were Aboriginal, which is a staggering number. Such Aboriginal young people living on reserve are further disadvantaged by not having access to the same supports and community services and often have to leave their families and home communities to obtain the counseling and treatment that they require. It is important that we not punish, stigmatize and vilify these young people, who are often victims of maltreatment and unresponsive and underfunded service sectors.

It has been shown that the child welfare system is often the gateway to the youth criminal justice system and that these young people can be viewed as 'Crossover Kids' who often have problems in multiple service systems, including children's mental health, health and education. For example, the British Columbia Representative for Children and Youth's report, *Kids, Crime and Care*, documents that children in care constituted nearly half of the youth charged with administration of justice offences in British Columbia. The fact that so many of these youth cross over multiple service systems means that there is a need for a collaborative, multi-disciplinary and integrated strategy among the federal government and the provinces and territories that will result in the provision of a wide range of supports and services.

Recommendation 7: That any changes to the youth criminal justice system recognize that the vast majority of young people involved in offending behaviours are vulnerable young persons, who have often been subjected to neglect, abuse and/or exposed to domestic violence themselves, who can benefit from prevention, early intervention and community-based programming, rather than being placed in detention or given custodial sentences.

Need to Invest in the Children Left Behind

Many of the witnesses who testified before the committee in respect of the former Bill C-4 identified the danger of reverting to the development of a penal and custodial infrastructure that would divert funds away from emerging preventative and early intervention strategies and programming. In his written submission, Bernard Richard, the former New Brunswick Child and Youth Advocate, noted:

> "The *YCJA*'s great merit has been to favour extrajudicial measures and community-based/non-custodial sentencing options instead of always relying on secure custody as a way to prevent youth crimes and recidivism. The danger with putting more kids in jail is that in an environment of limited resources, we will be using up resources that might otherwise support programs and focus on diverting youth from a life of crime. More resources should in fact be allocated to bolstering preventive measures and ensuring that funds are redirected for the purposes of treatment and rehabilitative options. Precious dollars should also be going to help kids address addiction, mental health problems and social inclusion challenges. Investing in secure custody programs is

> much more costly than youth intervention programs and incarceration bears an associated risk of developing hardened criminals who are much more inclined to escalate their acts of violence."

In UNICEF's 2010 report, *Narrowing the Gaps to Meet the Goals*, researchers found that providing services to a country's poorest children in the most impoverished communities is not only just, but is also more cost-effective than most traditional approaches, which focus on helping the less poor in areas that are easier to reach. This report concludes that applying an 'equity' focus – approaches in health, education and child welfare aimed at those children most deprived and left behind – will benefit more children and produce better outcomes per dollar than other traditional approaches. The report is clear that the implementation of an 'equity' focus does not mean abandoning other children and ensuring that their needs and human rights are being met as well.

When we talk about the children left behind in Canada, Aboriginal children are amongst the largest demographic group represented. For example, the Senate Standing Committee on Human Rights report *Children: the Silenced Citizens* observed that Aboriginal children are disproportionately:

- Living in poverty;
- Involved in the youth criminal justice and child protection systems; and
- Facing significant health problems in comparison with other children in Canada, such as higher rates of malnutrition, disabilities, drug and alcohol abuse, and suicide.

In the Canadian Council of Child and Youth Advocates' Position Document, *Aboriginal Children and Youth in Canada: Canada Must Do Better*, tabled on June 23, 2010, the extent of the disproportionate overrepresentation of Aboriginal children involved in the youth criminal justice system was graphically outlined:

> "In the area of criminogenic risk, which is related closely to safety, education and well-being, Aboriginal youth are grossly over-represented in the youth criminal justice system beginning at age 12 years. In Manitoba for example, Aboriginal youth represented 23 per cent of the provincial population aged 12 to 17 in 2006, but 84 per cent of youth in Sentenced Custody.
>
> For Aboriginal children and youth in Canada, there is a greater likelihood of involvement in the criminal justice system, including detention in a youth custody facility, than there is for high school graduation. This is a staggeringly negative outcome and appears to have increased, particularly in some provinces, over the past decade, even while youth criminal involvement has declined nationally.
>
> In 2007/2008, over 4,700 Aboriginal youth were admitted to some form of custody and over 2,700 were admitted to probation. In fact statistics indicate that since the implementation of the *Youth Criminal Justice Act*, this figure is increasing. Aboriginal youth are overrepresented at various stages including remand, admissions to secure and open custody, and admissions to probation. When policies and changes in criminal law move the system in the direction of greater emphasis on detention, [this has] a more immediate negative impact on Aboriginal children and youth than on any other group in Canadian society.

> Social supports and improved education are central to lowering criminogenic risk factors early in life. However, no adequate and coordinated strategies are in place in Canada across jurisdictions, or in most places, within provincial or territorial jurisdictions for an effective social policy response to the elevated criminogenic risk to Aboriginal children and youth".

In the written submission of the Canadian Council of Child and Youth Advocates with respect to the predecessor bill, the following cautions are provided in the context of Aboriginal children:

> "Bill C-4 runs the risk of increasing the rate of a different kind of victim, vulnerable minority youth who prematurely receive punitive sentences rather than benefiting from pro-social treatment or rehabilitative measures. It further stands to fuel an increase in the incarceration of racial minorities who are already over-represented in custodial facilities."

Recommendation 8: That the federal government give full effect to the principles of rehabilitation and reintegration by adequately funding non-custodial options and extrajudicial measures and equitably directing funding to provincial and territorial governments for purposes of administering the *Youth Criminal Justice Act*.

Recommendation 9: That the federal government adopt and apply an 'equity focus' by investing more heavily in its outreach to the poorest and most vulnerable children in Canada and by refocusing its energies on alleviating the barriers that exclude them. The implementation of a stronger 'equity focus' by the federal government should include working collaboratively with the provinces/territories, with a special emphasis on establishing culturally appropriate and geographically accessible programming for Aboriginal children, to reduce the serious disparities in outcomes between Aboriginal and non-Aboriginal children. This stronger 'equity focus' should also respond to the unique needs of young people who do not fit easily within the structure of the youth criminal justice system, such as young people with mental illnesses, disabilities, or severe behavioural and developmental disorders, such as Fetal Alcohol Spectrum Disorder.

Technical Analysis (In Case Part 4 of Bill C-10 is not Stayed or Suspended)

While there are some laudable changes contained in Bill C-10 in the principle of diminished moral blameworthiness or culpability (proposed amendment to section 3(1)(b) of the *YCJA*) and the prohibition against youth serving time in adult prisons (proposed amendment to section 76(2) of the *YCJA*), the majority and most impactful proposed amendments to the *YCJA* present serious problems. They would, in our view, jeopardize emerging successes in rehabilitating children in conflict with the law and reducing youth crime, and fail to advance the rights of children under the Convention on the Rights of the Child or to address their best interests as "a primary consideration", as required under article 3 of the Convention. The most likely outcome would be the unintended consequence of a reduction in public safety.

This part of our submission will deal with a technical analysis of some of the more concerning proposed amendments to the *YCJA*.

1) **Primacy of the Protection of the Public: Proposed Amendment to Section 3(1)(a) of the *YCJA***

Where the current *YCJA* sets out three equal objectives of the youth criminal justice system (prevent crime; rehabilitate young persons; and ensure meaningful consequences), which all work in concert to "promote the long-term protection of the public", the proposed amendment in Part 4 of Bill C-10 deletes the reference to "the long-term protection of the public" and places "protect[ing] the public" as the primary purpose of the youth criminal justice system, thereby qualifying everything that comes afterwards.

This proposed amendment to give primacy to the protection of the public in the Declaration of Principle (Policy for Canada with respect to young persons) would have the effect of superseding the principles of "effective rehabilitation and reintegration", as stated in the Preamble and in the Declaration of Principle. Specifically, the Preamble provides in part:

> "AND WHEREAS Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons".

Additionally, the Committee on the Rights of the Child has acknowledged in its General Comment No. 10 that:

> "…the preservation of public safety is a legitimate aim of the justice system. However…this aim is best served by a full respect for and implementation of the leading and overarching principles of juvenile justice as enshrined in [the] CRC."

The intent of this proposed amendment is ostensibly to increase the emphasis on short-term protection of the public, as suggested by Justice Nunn in his report. However, this could easily lead to a greater incidence of youth incarceration, which should only occur in the most serious cases. Rather than taking a short-sighted outlook and locking more young people up for substantial periods of time, it is submitted that the public will be better protected in the long-term by focusing on the young person's rehabilitation and future reintegration into his or her community, thereby preventing the recurrence of similar behaviours in the future.

Recommendation 10: That Section 3(1)(a) of the *Youth Criminal Justice Act* should not be amended to give primacy to the protection of the public and to de-emphasize the concept of long-term protection of the public in the Declaration of Principle.

2) Adding Deterrence and Denunciation as Sentencing Principles: Proposed Amendment to Section 38(2) of the *YCJA*

In amending the *YCJA*, Part 4 of Bill C-10 adds two further objectives to the operative sentencing principles: "to denounce unlawful conduct" and "to deter the young person from committing offences." While these two principles are already included in the framework for sentencing adults, it is our view that these sentencing principles are not appropriate in the case of children and youth.

In an article by Cesaroni and Bala, the authors conclude that young people's behaviours are often triggered by factors that are very different from those which motivate adults, and that the principle of 'deterrence' affects the sentencing practices of judges, more so than the offending behaviours of youth:

> "…There are a number of factors which negate the possibility of achieving a reduction in youth crime by increasing the severity of sanctions. The biggest limitation to achieving a deterrent effect from youth sentencing is that youths who commit offences are generally not considering the likelihood of being caught and punished. Adolescence, especially for youth who are likely to engage in serious or repeat offending, is a stage of life when many have a sense of invulnerability and a significant likelihood of engaging in various types of risk behaviour. The reality is that youth who are prone to committing offences are not thinking about the consequences of their acts, and so increasing the severity of the consequences if they are apprehended will not have an effect on their behaviour. Adolescents are not only more impulsive than adults but are also less future-oriented. For adolescents, the short term excitement and the perceived psychological, social or monetary rewards of offending are likely to outweigh potential long term penal consequences, which youth are likely to view as a remote possibility. For many youth, gaining acceptance with peers who are also offending is much more salient than any possible future criminal justice sanction".
>
> …Adding deterrence as a principle of youth sentencing…may be good politics, but it is not good public policy and will not increase public safety. It may, however, have an effect on some youth court judges, who may impose more severe sentences and increase the use of custodial sentences for youth offenders."

It also noteworthy, as previously mentioned, that only less than one per cent of the participants in the cross-country roundtable discussions supported the concept of deterrence for sentencing.

The introduction of the principle of 'deterrence' in Bill C-10 is also contrary to the decision of the Supreme Court of Canada in *R. v. B.W.P.*, where the Court concluded that the omission of 'deterrence' reflected a deliberate and legitimate recognition that it should not be part of the new sentencing regime under the *YCJA*:

> "The *YCJA* introduced a new sentencing regime…it sets out a detailed and complete code for sentencing young persons under which terms it is not open to the youth sentencing judge to impose a punishment for the purpose of warning, not the young person, but others against engaging in criminal conduct. Hence, general deterrence is not a principle of youth sentencing under the present regime. The *YCJA* also does not speak of specific deterrence. Rather, Parliament has sought to promote the long-term protection of the public by addressing the circumstances underlying the offending behaviour, by rehabilitating and reintegrating young persons into society and by holding young persons accountable through the imposition of meaningful sanctions related to the harm done. Undoubtedly, the sentence may have the effect of deterring the young person and others from committing crimes. But by policy choice, I conclude that parliament has not included deterrence as a basis for imposing a sanction under the *YCJA*."

Recommendation 11: That Section 38((2) of the *Youth Criminal Justice Act* should not be amended to include deterrence and denunciation as new sentencing principles.

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3) New Definitions of "Serious" and "Violent" Offences: Proposed Amendments to Section 2(1) of the *YCJA*.

Part 4 of Bill C-10 proposes definitions for two new offences - "serious offences" and "violent offences". The Canadian Bar Association has indicated in its written submission of October 2011 that:

> "…both definitions would expose too many youths to pre-trial detention and custodial sentences, when the focus of the *Act* has always been on meaningful consequences for the *most violent and habitual* offenders. The proposed designations cast too wide a net".

It appears that a considerable impetus for Part 4 of Bill C-10 is to address the small proportion of violent crime committed by a small proportion of the children who come in contact with the law. But the intent to create these two new definitions and then apply them as criteria at different stages of the proceedings does not effectively address that concern. These two definitions also go far beyond the ostensible aim to control the most violent offenders who pose a risk to themselves or others, by including offences that have not traditionally justified young people being placed in detention or receiving custodial sentences.

In particular, the charging of a young person with a "serious offence" would become the basis for a young person being ordered into pre-trial detention under the new amended section 29(2) of the *YCJA*. Additionally, the new definition of "violent offence" would apply to that presently undefined phrase, which appears in section 39(1) of the *YCJA*, and would then be one of the criteria for committing a young person to a custodial sentence under section 42 of the *YCJA*. It would also become the triggering mechanism for the Court's mandatory consideration of the appropriateness of lifting a publication ban for a youth found guilty of any 'violent offence' under an amendment to section 75 of the *YCJA*, which is discussed later in this submission.

"Serious offence" would be defined as "an indictable offence under an Act of Parliament for which the maximum punishment is imprisonment for five years or more." Examples of 'serious offences' that would all have a maximum penalty of at least five years, but would not appear to present a severe threat to public safety, would include: fraud over $5000; uttering a forged document; possession of a stolen credit card; obstructing justice; and public mischief.

"Violent offence" would be defined as an offence which includes: the causing of bodily harm; an attempt or threat to cause bodily harm; or the endangerment of the life or safety of another person by creating a substantial likelihood of causing bodily harm. "Bodily harm" is defined in the *Criminal Code* as harm or an injury which is more than "merely transient or trifling in nature."

In the case of a "violent offence", a definition had previously been provided by the Supreme Court of Canada in *R. v. C.D.,* where it stated that a 'violent offence' is any offence where the youth "causes, attempts to cause or threatens to cause" bodily harm. However, Bill C-10 would expand the definition of 'violent offences' to include 'dangerous' acts, an approach expressly rejected by the Supreme Court of Canada in the same decision. Even if the conduct itself is not violent or does not result in bodily harm, conduct which results in a risk of bodily harm or endangerment would still be classified as a 'violent offence' under Bill C-10. This broadened definition, which could lead to a young person's incarceration, would, as the Canadian Bar Association suggests:

> "…capture various situations with no intent or awareness of harm. The fact of endangerment/harm would be adequate. It is easy to imagine scenarios that would result in unfair outcomes for youths."

Since the definition of 'serious offence' will be a requirement for a pretrial or presentencing detention order, there is a concern, then, that too many young people will be placed in detention in circumstances where they do not present a risk to public safety. In this regard, it should be noted that the proposed definition of 'serious offence' includes offences against both property and the person. As a result, Part 4 of Bill C-10 extends the potential application of pre-trial detention to young persons charged with offences against property that may result in maximum terms of imprisonment for at least five years.

Another concern triggered by the 'serious offence' definition relates to the lack of attention to the universal rights of children who are detained, as stipulated in the Convention on the Rights of the Child. It is submitted that the proposed amendments to sections 2(1) and section 29(2) of the *YCJA* are overly broad and run contrary to the principles set out in article 37 (b) of the Convention, which stipulate that:

> "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest period of time".

As well, the Committee on the Rights of the Child states unequivocally in its General Comment No. 10 that:

> "…the juvenile justice system should provide for ample opportunities to deal with children in conflict with the law by using social and/or educational measures, and to strictly limit the use of deprivation of liberty, and in particular pretrial detention, as a measure of last resort."

A further concern in the case of both detention and custodial sentences is the negative socialization of young people within those facilities directed at detention and incarceration. It is conceivable that young people placed in such facilities may acquire attitudes and skills that could encourage or aid them in the commission of future crimes.

Recommendation 12: That section 2(1) of the *Youth Criminal Justice Act* should not be amended to include the proposed new definitions of "serious offence" and "violent offence", which are overly broad and will likely cause too many youth to end up in detention or incarceration.

4) Mandatory Judicial Consideration of the Lifting of Publication Bans of Identifying Information for Youth Found Guilty of a 'Violent Offence': Proposed Amendment to Section 75 of the *YCJA*

Bill C-10 proposes to amend section 75 of the *YCJA* to provide that the court "shall decide whether it is appropriate to make an order lifting the ban" on the publication of identifying information for a youth found guilty of any 'violent offence'. This amendment would represent a radical change from the current situation where publication of a young person's identity is restricted to circumstances where an adult sentence is imposed; to temporary circumstances, where, for example, a dangerous youth escapes and

must be captured; or a situation where the young person requests publication of his or her own identity. In opposing this amendment, the Canadian Bar Association has stated in its written submission:

> "This change would make publication possible for a conviction for anything from sexual offences, dangerous driving, a flight from police, impaired driving, threats, common assault and harassment. Further, there is no requirement that a publication can or should be limited to repeat or habitual offenders.
>
> …In contrast, Bill [C-10] would encourage a judge to consider publication in relation to any and all 'violent offences'. Given the proposed breadth of that category…the change would represent a huge expansion of the publication power. The underlying purpose of the publication ban is to minimize stigma and instead focus on rehabilitation of the young person. This amendment would steer judges away from that focus to more punitive considerations…[T]his amendment is contrary to the spirit and substance of the SCC's comments in *R. v. B. (D.)* concerning the effect of stigmatization and labeling on youth]."

Professor Nicholas Bala has also made the point that the potential for publication of identifying information in more cases could ironically be a motivating factor for youth to engage in offending behaviours in order to gain public attention, which may be seen as a badge of distinction.

Article 40, paragraph 2 (b) (vii) of the Convention on the Rights of the Child stipulates that:

> "Every child alleged as, or accused of having infringed the penal law has … [the right] to have his or her privacy fully respected at all stages of the proceedings."

In 2003, the UN Committee on the Rights of the Child recommended, in its Concluding Observations, that

> "[Canada] ensure that the privacy of all children in conflict with the law is fully protected in line with article 40, paragraph 2 (b) (vii) of the Convention."

As stated by the Committee on the Rights of the Child in its General Comment No. 10, this protection of privacy safeguard is intended to prevent stigmatization and labelling, which can set off many negative repercussions for the young person who has come into conflict with the law:

> "The right of a child to have his/her privacy fully respected during all stages of the proceedings reflects the right to protection of privacy enshrined in article 16 of CRC. 'All stages of the proceedings' includes from the initial contact with law enforcement (e.g., a request for information and identification) up until the final decision by a competent authority, or release from supervision, custody or deprivation of liberty. In this particular context, it is meant to avoid harm caused by undue publicity or by the process of labelling. No information shall be published that may lead to the identification of a child offender because of its effect of stigmatization, and possible impact on his/her ability to have access to education, work, housing or to be safe."

In terms of my own professional experience – both within the child protection system in Ontario for 28 years and as the former Provincial Children's Advocate for Saskatchewan for five years - it has always

been a vital concern in both those systems that the identities of children and youth not be reported publicly. The kind of stigma and reputation impairment generated by lifting a publication ban of identifying information, as proposed in Bill C-10, could lead to the identified youth being adversely affected in terms of future living conditions, education and employment opportunities. It could also contribute to that young person's depression, self-destructive behaviour and/or reversion to anti-social behaviours and expose other family members to public ridicule. None of this supports the long-term protection of the public, as rehabilitation and reintegration back into one's home community are made more difficult.

Recommendation 13: That Section 75 of the *YCJA* should not be amended to make the lifting of a publication ban of identifying information a mandatory judicial consideration for all youth found guilty of a 'violent offence'.

5) Mandatory Police Record Keeping for Extrajudicial Measures and the Use of Extrajudicial Sanctions to Justify a Custodial Sentence: Proposed Amendments to Sections 115(1.1) and 39(1)(c) of the *YCJA*

Part 4 of Bill C-10 would amend section 115(1.1) of the *YCJA*, which will make it mandatory for the police to "keep a record of any extrajudicial measures that they use to deal with young persons". This would represent a significant change from the existing situation where the police exercise discretion in making that determination. In raising concerns, Professor Bala makes the following insightful observations in his written submission of September 30, 2011, in response to Bill C-10:

> "…In my view, this amendment [and the relaxed proposal to amend section s. 39(1)(c)] undermine the integrity and intent of the extrajudicial measures provisions and will send a mixed message to police forces.
>
> Section 115(1.1) suggests a lack of confidence in how police forces are exercising their discretion to keep records of matters that do not result in charges. Further, it may suggest to individual officers that these measures are being used too frequently, and result in less use. This would be very unfortunate."

Bill C-10 would similarly amend section 39(1) of the *YCJA* to add an additional category where a custodial sentence may be imposed in the case of an offending young person – that is, where "the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions or findings of guilt or both under [the *Youth Criminal Justice Act*] or the *Young Offenders Act*…"

Under this proposed amendment, a court could thus impose a custodial sentence on a young person taking into account previous extrajudicial sanctions, whereas at present it can take into consideration only previous convictions. This change would seem to be incompatible with the intent of these programs, which is to give youth a 'second chance,' and contrary to a directive on the subject issued by the Committee on the Rights of the Child, in its General Comment No. 10. The Committee defined 'diversion' as "measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings" and stressed that an admission by a child in a diversion context will not be "used against him/her in any subsequent legal proceeding". It then added:

> "The completion of the diversion by the child should result in a definite and final closure of the case. Although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as 'criminal records' and a child who has been previously diverted must not be seen as having a previous conviction. If any registration takes place of this event, access to that information should be given exclusively and for a limited period of time, e.g. for a maximum of one year, to the competent authorities authorized to deal with children in conflict with the law."

Recommendation 14: That Sections 115(1.1) and 39(1)(c) of the *Youth Criminal Justice Act* should not be amended to establish mandatory police record keeping for extrajudicial measures and to allow the use of extrajudicial sanctions to justify a youth custodial sentence.

THE NEED FOR A NATIONAL CHILDREN'S COMMISSIONER/ADVOCATE

Within Canada, both the federal and provincial/territorial governments have responsibility for compliance with the Convention on the Rights of the Child. However, because Canada has a 'dualist' legal system, with both distinctive federal and provincial/territorial domains of jurisdiction, many of the matters covered by the Convention such as child welfare, education and health are largely under provincial/territorial jurisdiction, although criminal law and youth criminal justice fall under federal jurisdiction. In both levels of government, legislation, policy and services affecting children are spread across departments, with the effect that it is challenging to coordinate legislation and policy that reflects a comprehensive view of children and their rights.

As previously mentioned, many of the youth who enter the youth criminal justice system have multiple needs and cross-over different service sectors. If there is more effective prevention and early intervention programming within social services, child welfare, education and health within the provinces and territories, it is less likely that those youth will enter the youth criminal justice system in the first place. As well, Aboriginal children who live on reserve rely on federal funding to support the provision of particular services and these may be funded at a lesser level than for those children living off-reserve.

As a child welfare professional in Ontario and a former Provincial Children's Advocate in Saskatchewan, I have observed that there is a clear disparity in the way these services are funded, staffed and provided to young persons from one province to another. It has been my assessment that the rights and benefits that accrue to children across this country are not consistently provided according to uniform, baseline norms. For example, at the provincial/territorial level, there are different maximum ages for protection intervention; different formulations of protection grounds; different levels of child participation both within and outside of the court process; and different budgetary allocations provided to child protection services, with child protection caseloads showing marked provincial deviation. At the federal level, legislation is sometimes enacted to address one aspect of children's lives, but fails to effectively consider other aspects.

One step forward to resolve these inter-jurisdictional disparities is to establish a national Children's Commissioner or Advocate. In the written submission of the Canadian Council of Child and Youth Advocates in response to the former Bill C-4, the Council recommends "[t]hat all parliamentarians work towards consensus in order to ensure that that an independent Children's Commissioner for Canada be established that respects the distribution of legislative powers." We support this recommendation.

Currently, no office in the federal government has the clear legal and jurisdictional responsibility to hear children's views and call attention to their best interests. No individual is accountable for ensuring that our federal legislation, regulations and programs are viewed through the lens of children's basic rights.

Provincial and territorial independent advocates or ombudspersons for children are an important mechanism to promote the best interests of children. However, they require a federal counterpart in Ottawa to complement the important work they are doing at the provincial and territorial levels. A national Children's Commissioner or Advocate would help co-ordinate the substantial work being done by all levels of government and by children's advocates, and work to eliminate gaps in service between federal and provincial/territorial governments that are widely recognized as a major barrier to the equal protection and provision of children's rights in Canada. When I was the Children's Advocate in Saskatchewan, I encountered many jurisdictional conflicts that impacted negatively upon children in receipt of government services and it would have been extremely helpful to have had a counterpart in Ottawa who could have collaborated with me in navigating these inter-jurisdictional disputes.

As well, the national Children's Commissioner or Advocate would have a role in ensuring that there are baseline standards consistent with the Convention that are being met in legislation, policy and practice from one end of this country to the other. In this connection, it is worth noting that, at present, there are no uniform universal and normative rights-based child protection standards that apply across the country.

The idea of an independent national office focusing on children is neither radical nor new. More than 30 countries have specialized national offices for children. If Canada were to appoint a national Children's Commissioner or Advocate, it could draw upon the experiences and best practices within these various Offices.

Following the lead of the Committee on the Rights of the Child, the Standing Senate Committee on Human Rights, in its 2007 Report, *Children: the Silenced Citizens*, recommended that:

> "Parliament enact legislation to establish an independent Children's Commissioner to monitor implementation of the Convention on the Rights of the Child, and protection of children's rights in Canada. The Children's Commissioner should report annually to Parliament".

Unfortunately, in the Federal Government's response to the Senate Committee Report, no mention was made of a national Children's Commissioner or Advocate.

Recommendation 15: That federal, provincial and territorial authorities and their respective oversight agencies establish more effective coordinating mechanisms to work collaboratively towards ensuring that children in all parts of Canada receive a fair and equitable allocation of supports and services that will meet their full range of needs and prevent them from coming into conflict with the youth criminal justice system.

Recommendation 16: That all parliamentarians work towards consensus to ensure that an independent Children's Commissioner or Advocate for Canada is established that respects the distribution of legislative powers.

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SUMMARY

These are very difficult, multi-layered issues and there are no quick fixes or magic solutions to correct the problems of the youth criminal justice system. While there may be no quick fixes, there are, nevertheless, clear and achievable steps that can be taken to better support the continuing reduction of crime committed by children and youth and to divert them from offending behaviours. Most of these steps have little to do with altering the *YCJA*.

UNICEF Canada urges the Standing Committee on Justice and Human Rights to be guided by principles that have emerged from global human rights law and by experience with modern, evidence-based youth criminal justice systems internationally, and across the country. These principles and this experience support the effective use of non-custodial rehabilitation and reintegration over a regime that elevates pre-trial detention and incarceration. We should not deconstruct an entire system in response to a few exceptional high profile cases.

Let's not rush into a stricter youth criminal justice system and unleash a slew of unintended negative consequences for the children and youth of this country. This is a time to pause and step back from any further consideration of Part 4 of Bill C-10 until there is more evidence-based research and greater efforts taken to fix or correct the system operating behind the legislation.

Similarly, applying a child rights lens to the legislative amendments proposed in Part 2 of Bill C-10 would identify some additional measures to ensure that adults who exploit children are the sole target of the changes, and that appropriate steps are undertaken to mitigate the risk of inadvertently bringing more children and young people into conflict with the law.

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APPENDIX OF RECOMMENDATIONS

Recommendation 1: That the Parliament of Canada remove Part 4 on youth justice from Bill C-10, the omnibus crime bill.

Recommendation 2: That a child rights impact assessment process be conducted in respect of Part 2 of Bill C-10 to determine if there are any potential unintended negative impacts upon youth who may inadvertently come into conflict with the law for any of the enumerated offences, and that appropriate mitigating measures be undertaken.

Recommendation 3: That the Parliament of Canada stay or suspend any further consideration of the proposed amendments to the *Youth Criminal Justice Act*, as set out in Part 4 of Bill C-10, until such time as there is evidence-based research to demonstrate: a) that the proposed solutions will be effective in protecting the public and reducing criminal acts committed by children and youth in the long-term; and b) that the proposed legislative changes are consistent with international standards for the treatment of children in conflict with the law, as stated in the United Nations Convention on the Rights of the Child, and as documented in a child rights impact assessment of Part 4 of Bill 10.

Recommendation 4: That consideration be given to enacting an amendment to section 163.1 of the *Criminal Code*, to mitigate the risk of criminal responsibility for young persons between the ages of 13 and 18 who transmit or receive sexual images ('sexting') upon mutual consent, or otherwise access or explore Web site and other digital child pornographic content, as defined in section 163.1(1) of the *Criminal Code*.

Recommendation 5: That the proposed amendments to the *Youth Criminal Justice Act*, as set out in Part 4 of Bill C-10, be evaluated for compliance with the Convention on the Rights of the Child, with particular emphasis on articles 3, 37, 40 and 39; and with the recommendations for youth justice (paragraphs 56, 57) and the best interests of the child (paragraphs 24, 25) that Canada received from the United Nations Committee on the Rights of the Child in 2003. There should be a transparent public reporting and due consideration of any such existing evaluation of the proposed amendments to the *Youth Criminal Justice Act*, as set out in Part 4 of Bill C-10.

Recommendation 6: That due consideration be given to all the themes emerging from the cross-country roundtable discussions, which clearly do not support many of the approaches to the youth criminal justice system reflected in the proposed amendments to Part 4 of Bill C-10.

Recommendation 7: That any changes to the youth criminal justice system recognize that the vast majority of young people involved in offending behaviours are vulnerable young persons, who have often been subjected to neglect, abuse and/or exposed to domestic violence themselves, who can benefit from prevention, early intervention and community-based programming, rather than being placed in detention or given custodial sentences.

Recommendation 8: That the federal government give full effect to the principles of rehabilitation and reintegration by adequately funding non-custodial options and extrajudicial measures and equitably directing funding to provincial and territorial governments for purposes of administering the *Youth Criminal Justice Act*.

Recommendation 9: That the federal government adopt and apply an 'equity focus' by investing more heavily in its outreach to the poorest and most vulnerable children in Canada and by refocusing its energies on alleviating the barriers that exclude them. The implementation of a stronger 'equity focus' by the federal government should include working collaboratively with the provinces/territories, with a special emphasis on establishing culturally appropriate and geographically accessible programming for Aboriginal children, to reduce the serious disparities in outcomes between Aboriginal and non-Aboriginal children. This stronger 'equity focus' should also respond to the unique needs of young people who do not fit easily within the structure of the youth criminal justice system, such as young people with mental illnesses, disabilities, or severe behavioural and developmental disorders, such as Fetal Alcohol Spectrum Disorder.

Recommendation 10: That Section 3(1)(a) of the *Youth Criminal Justice Act* should not be amended to give primacy to the protection of the public and to de-emphasize the concept of long-term protection of the public in the Declaration of Principle.

Recommendation 11: That Section 38((2) of the *Youth Criminal Justice Act* should not be amended to include deterrence and denunciation as new sentencing principles.

Recommendation 12: That section 2(1) of the *Youth Criminal Justice Act* should not be amended to include the proposed new definitions of "serious offence" and "violent offence", which are overly broad and will likely cause too many youth to end up in detention or incarceration.

Recommendation 13: That Section 75 of the *YCJA* should not be amended to make the lifting of a publication ban of identifying information a mandatory judicial consideration for all youth found guilty of a 'violent offence'.

Recommendation 14: That Sections 115(1.1) and 39(1)(c) of the *Youth Criminal Justice Act* should not be amended to establish mandatory police record keeping for extrajudicial measures and to allow the use of extrajudicial sanctions to justify a youth custodial sentence.

Recommendation 15: That federal, provincial and territorial authorities and their respective oversight agencies establish more effective coordinating mechanisms to work collaboratively towards ensuring that children in all parts of Canada receive a fair and equitable allocation of supports and services that will meet their full range of needs and prevent them from coming into conflict with the youth criminal justice system.

Recommendation 16: That all parliamentarians work towards consensus to ensure that an independent Children's Commissioner or Advocate for Canada is established that respects the distribution of legislative powers.

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