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A REVIEW OF THE YOUNG OFFENDERS ACT

AND THE

YOUTH JUSTICE SYSTEM IN CANADA

Report of the Federal-Provincial-Territorial
Task Force on Youth Justice
August 1996

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CHAPTER 1 - INTRODUCTORY

1.1 TERMS OF REFERENCE

The Task Force, which commenced its work in January, 1995, was established by the federal, provincial and territorial Ministers Responsible for Justice. Although the Young Offenders Act (YOA) had been amended in 1986 (Bill C-106), in 1992 (Bill C-12) and a further amendment Bill (C-37) was introduced in 1994, a comprehensive review of the Act as a whole had not yet been undertaken. Given that the Act had been in place for ten years and that there had been an apparent erosion of public confidence in the youth justice system in most areas of the country, it was felt that a comprehensive review would assist in determining whether substantive changes in direction would be required.

The work of the Task Force, reflected in this report, is part of a larger process known as the "Phase II" review of the youth justice system. "Phase I" focussed on the above-noted aspects of the YOA that were addressed in Bill C-37, which was proclaimed in force on December 1, 1996. The major component of Phase II is a comprehensive review of the youth justice system by the House of Commons Standing Committee on Justice and Legal Affairs. The Committee began its review in November, 1995 and, through public hearings, is considering a wide range of divergent interests and points of view on youth justice.

The federal/provincial/territorial Task Force on Youth Justice includes officials from various ministries and departments of the federal and provincial/territorial governments, reflecting the fact that two levels of government share responsibility for youth justice. In working groups and in meetings of the whole Task Force, the members have examined the youth justice system from their various perspectives and brought considerable experience and expertise to bear on a wide range of issues.

The work of the Task Force is intended to complement the work of the Standing Committee on Justice and Legal Affairs and to assist the Committee and Ministers Responsible for Youth Justice in their efforts to improve the youth justice system.

The Task Force was given a broad mandate to undertake a comprehensive review of the Young Offenders Act and its application by:

- developing a descriptive and statistical profile of the youth justice system in Canada, including information on the administration of justice, program delivery, and cost-sharing;
- identifying problems; and
- developing recommendations, including those respecting the legislation, administration of justice, delivery of programs, and cost-sharing and cost efficiency.

In reviewing this mandate, the Task Force determined that there were six broad priority areas to be addressed:

- Inter-relationships and coordination with other agencies and community resources, including those within and those outside the youth justice system, that deal with youth and their families.
- Matters related to diversion, pre-trial detention, community-based sanctions, and custodial processes, including the potential to deal more efficiently and effectively with young persons by making greater use of diversion from formal court proceedings and community-based alternatives to custody.
- Legislative and program issues related to serious young offenders, such as those who are chronic or violent.
- Matters relating to the costs of administering the youth justice system and the sharing of costs between the federal and provincial/territorial levels of government.
- Matters relating to due process of law, including issues related to obtaining and using as evidence statements made by young persons who are accused of offences, the right of a young person to court-appointed counsel, and various other issues.
- Publication of the identity of young offenders, the sharing of information among various agents both within and outside the youth justice system, and various matters respecting records.

These six broad priority issues were examined in light of several overarching themes, which include the need:

- to restore public confidence in the Act and the youth justice system;

- to examine the objectives of the youth justice system, including an examination of the roles of protection of the public, rehabilitation, restoration and denunciation;
- to focus on serious crimes and serious offenders, and on alternatives to custody and diversion for less serious crimes;
- to be responsive to the needs of various parties, including the state, the public, the accused and victims;
- to consider the particular needs of aboriginal, minority and female youths;
- to consider legislation, programming and costs, including reductions in costs where possible;
- to consider the proper interface between the youth justice system and other relevant systems, including child welfare, health services, and the adult system.

Membership and Recommendations

The Task Force was co-chaired by the federal Department of Justice and British Columbia. All Canadian jurisdictions were represented except Quebec (discussed below). The Task Force was comprised of persons from a variety of youth justice-related professions, including prosecution services, social and correctional services, statistics and research, youth justice/criminal law policy, and law enforcement. A list of members of the Task Force is appended.

Given differing perspectives among its members, the Task Force was not able to reach full consensus on some key issues. Hence some recommendations reflect majority opinions. These are noted in the text, where applicable. Recommendations involving amendments to the Act are stated in conceptual terms, not in legislative draft form.

The content and recommendations in this report do not necessarily reflect the views of participating jurisdictions nor of individual participants.

Quebec's Role

Quebec decided not to participate in the Task Force because it had already very recently commissioned and completed its own comprehensive review of the application of the Act in Quebec - please see the Jasmin Report.

It is important to note that - as is reflected in the Jasmin Report - the attitude toward the Act and the youth justice system is substantially different in Quebec from what is apparent in much of the rest of Canada. This difference applies at all levels: political, administrative, and public. For example, in 1994 the Quebec National Assembly unanimously approved a resolution supporting the Act, something that would be nearly inconceivable in other jurisdictions. Public opinion polls also indicate substantially less public concern about the Act in Quebec than in other parts of the country.

Quebec's approach to youth justice appears to be more in keeping with what is found in western European countries: the over-arching goal is the rehabilitation of young offenders within a framework that respects the rights of young persons. This is also reflected in a social service delivery system which is one of the most integrated in the country, i.e. children and adolescents with "problems" - whether child welfare, youth justice or mental health - are addressed through co-coordinated multi-service agencies which address the rehabilitative needs of these young persons. Hence, in identifying deficiencies in the youth justice system, the focus in Quebec is much less on the reform of the law itself, but rather on the measures taken to administer or apply the law and to protect the public through rehabilitative interventions..

Quebec's approach to youth justice cannot be simply transplanted to the rest of the country. Quebec's approach serves as an important reminder, however, that the apparent "need" to reform the Act is as much or more a function of values, attitudes and perceptions as it is of real (or objectifiable) needs.

Procedure and Sources of Information

The Task Force divided into six working groups, organized according to the six broad priority issues described above. Within these working groups, issues were identified and prioritized. Literature reviews of research, reviews of case law, and available statistics were considered, when applicable. Several up-to-date reviews and discussion papers were either acquired or directly produced by the Task Force. Resource and time limitations precluded carrying out original research.

General speaking, key issues were considered and analyzed in light of: historical background, identification of key concerns, applicable United Nations standards, relevant practices in other countries, experience under the Juvenile Delinquents Act (JDA), relevant statistics and research, jurisdictional practices, and an identification and assessment of options.

Beyond the law itself, the practical application of the law through the development of programs, policies and procedures is obviously critical to the effectiveness of the youth justice system. It was, however, impossible to conduct a comprehensive review of the administration of the youth justice system in eleven jurisdictions. This is properly the responsibility of provincial and territorial governments. Given this, considerations of the administration or application of the law are necessarily limited to an identification of systemic administrative concerns which appear to be common - sometimes to greater or lesser degrees - across several jurisdictions. As well, promising jurisdictional initiatives are sometimes identified, where applicable.

Limitations

There are different approaches to juvenile justice in developed countries around the world. Western European countries, and Scotland, have "welfare model" legislation and services. In contrast, Washington State has a "justice model" approach involving an emphasis on due process and proportionate sanctions, including legislatively mandated sentencing guidelines. Many American states have moved toward toughening juvenile justice legislation, especially by mandating the widespread use of transfer (waiver) to adult court. Moving in a different direction, New Zealand has fairly recently transformed its juvenile justice system to promote family, community and victim involvement and an emphasis on restorative justice.

Canada's legislation reflects a "rights and responsibility" approach, i.e., there is an emphasis on due process considerations and accountability, tempered by consideration of the "special needs" or rehabilitation of young persons. In making the change from the JDA to the YOA, Canada undertook a fairly radical transformation from a welfare-based approach to what has been described as a "modified justice" model.

While the Task Force had a fairly broad mandate and addressed controversial and important issues such as age jurisdiction, publication of identity, parental liability, transfer to adult court, and so on, the fundamental framework and direction of the YOA was not questioned. In short, the Task Force did not attempt to re-think the legislation from scratch.

Descriptive Profile

To provide quantifiable data to support the analysis of issues, the federal Department of Justice on behalf of the Task Force commissioned Moyer and Associates (Toronto) to develop a Descriptive Profile of the Youth Justice System in Canada. The Descriptive Profile is, in effect, a companion document and primary statistical source for this report. The Descriptive Profile involves an analysis of available police, youth court, and correctional statistics as well as some relevant policy and program information on key aspects of the youth justice system such as alternative measures.

Acknowledgments

The Task Force greatly appreciates the assistance of Sharon Moyer and her principal associates, Peter Carrington and Jill Rettinger, who not only developed the Descriptive Profile but also carried out reviews of the literature and provided ongoing support to the work of the Task Force. As well, we would like to thank Elaine Daniel, Marielle Stoodley and Annie Calvo for their administrative support.

1.2 KEY CHALLENGES FACING THE YOUTH JUSTICE SYSTEM

There are a number of significant issues that will be discussed in this report, including age jurisdiction, transfer to adult court, publication, sentencing, treatment and parental liability. While these are important issues, they flow from the broader social, economic, legal and organizational context in which the youth justice system operates. The following is a summary of some of the overarching systemic challenges facing the youth justice system. These challenges shape the response of the system to the narrower issues that will be raised in this report. It should be noted that there are some differences in the degree to which some of these challenges may apply to different jurisdictions. Also, some of these challenges are obviously inter-connected.

Lack of Public Confidence in the Youth Justice System

Many members of the general public and the media are critical of the YOA and the youth justice system. There are perceptions that the Act and the system are ineffective, that youth crime is rapidly increasing (sometimes attributed to the Act), that respect for the law is decreasing and that the system is not doing a good job of addressing the causes of crime, the interests of victims, and the concerns of the community at large.[1]

Many would argue that these views are based on misperceptions of the realities of youth crime and the responses of the youth justice system. These misperceptions can, in part, be prompted by dramatic media portrayals of relatively small numbers of tragic crimes involving serious violence and consequent generalizations about the nature of youth crime. There is little public education about the nature of youth crime or about how the system responds to the vast majority of cases which do not attract media attention.

Connected to this are high and often unrealistic expectations about the capacity of legislation and the youth justice system to protect the public. By definition, the youth justice system reacts after the fact. It must be recognized that the causes of crime are complex and are rooted in social and economic conditions which are often beyond the capacity of the youth justice system to address.[2]

There is also a lack of public confidence in the adult criminal justice system. It seems to be more acute with the youth justice system, perhaps because

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[1]See the next section in this chapter for a more detailed discussion of public opinion.

[2]Crime prevention is discussed later in this chapter (1.4).

there are greater societal expectations about the capacity of the system to prevent, rehabilitate or control offending by immature adolescents.

Lack of a Common Vision for the Youth Justice System

There appears to be no broad social and political consensus about the most appropriate and effective means of addressing youth crime, no "common vision" for the youth justice system. This lack of consensus also applies to practitioners and experts in the field of youth justice. Their views can vary according to their professional training and roles in the system. While almost all would agree that the protection of society and fair process are among the over-arching goals of youth justice, there are differences in view about the best methods to achieve these goals. Some emphasize rehabilitation as the best means of achieving long-term social protection, whereas others place greater weight on protection through deterrence and incapacitation. Similarly, there are greater and lesser degrees of emphasis placed on the due process rights of young persons and the roles and responsibilities of parents.

The lack of a common vision is reflected the Act's Declaration of Principle, which incorporates several competing and unprioritized principles and is, therefore, ambiguous.

There is not, however, a complete lack of common vision. For example, there appears to be a substantial consensus about the need for enhanced crime prevention efforts and alternative means of processing less serious offenders.

Focusing the System on Serious Youth Crime

Serious crime must be dealt with firmly and effectively by the youth justice system. There has been a growing recognition among justice professionals that the youth justice system should be better focused on serious crime by targeting limited resources to serious and persistent offenders, developing alternatives to custody and diverting less serious offences. Targeting resources to better address serious and persistent offenders does not mean that less serious offenders should be ignored - meaningful alternatives to custody, and to the court process, need to be further developed. This refocusing of the system is hampered to some extent by a growing tendency to turn to the youth justice system as a mechanism to address less serious conflicts - such as minor school violence - which could be resolved by other social means.

The response of the youth justice system to high profile incidents of serious violence has considerable substantive and symbolic importance. Public confidence in the youth justice system is largely dependent upon how well the system addresses - and is seen to address - the most serious offenders. Focusing resources to better address these type of offenders will help to mitigate these concerns.

Making Better Use of Limited Resources

Large proportions of youth justice system expenditures are allocated to custodial costs. While custody plays a key role in protecting society, and in rehabilitating serious young offenders, custody has significant financial implications and is notoriously unproductive in many cases, especially with less serious young offenders who might otherwise be dealt with by alternative community programs. In addition, the youth court process is very complex and expensive and should be avoided in less serious cases when more informal diversion alternatives are suitable.

Resources are obviously limited and it is unlikely that additional funding will be made available. Clear priorities must be established about how current resources can be most effectively and efficiently deployed. For example, resources could be better targeted to the diversion of minor offenders, alternatives to custody for less serious offenders, and rehabilitation programs for more serious offenders, thereby avoiding increasing cost demands. Turning around systems and re-deploying expenditures is, however, easier said than done, especially in the context of increasing demand for custody, population growth, and fiscal restraint. The limited availability of resources is exacerbated by the "capping" and reductions to the federal cost-sharing program.

Canada's population is largely concentrated in major urban centres, with the remainder spread across a vast expanse in smaller communities and rural areas. While smaller communities can facilitate greater ease of communication, informal arrangements and easier mobilization of the community, small populations make it economically and operationally difficult to justify and implement a full range of program responses, especially alternative programs and rehabilitative programs to address special needs. At a narrower level, smaller custody populations in less populated jurisdictions make it economically and operationally more difficult to separate populations (e.g. by age) and to develop specialized and varied programs to address the wide array of special needs of all youth in custody.

The Need for More Effective Coordination Within the Youth Justice System and With Other Youth Service Systems

Many young offenders are multi-problem youth who do not fit neatly into compartmentalized, problem-specific models of service delivery. A lack of coordination between the youth justice system and the family and community, as well as with other complementary youth service delivery systems such as child welfare, mental health and special education services, can lead to the multiple needs of these young people not being adequately addressed. Resource constraints and insufficient communication and coordination between the youth justice system and other youth serving agencies can lead to a narrowing of organizational mandates and consequent gaps in service delivery. This, in turn, can lead to the youth justice system being looked to as a vehicle for accessing services, resulting in the complex needs of these youth and their families not being properly addressed. Multi-disciplinary approaches which promote healthier children, families and communities are required.[3]

The youth justice system itself is comprised of a great many elements. The interdependence of various parts of the system must be recognized and coordinated to ensure a cohesive approach to common concerns and an effective use of resources.

Lack of Information About the Effectiveness of Programming

Insufficient research and program evaluation are available to assess the effectiveness and efficiency of different types of program initiatives. For example, although the youth justice system relies to a considerable degree on deterrence through custody, there is little evidence that containment prevents recidivism or reduces youth crime rates. In addition, there is evidence suggesting that less expensive, non-custodial alternatives to custody and community-based treatment programs are at least as effective, or more effective, as custody in protecting society from many offenders. More specific knowledge about the types of programs and responses that are successful (or not successful) in rehabilitating different types of young offenders, thereby better protecting society in the long run, would allow for better investment of the limited public resources available to the youth justice system. Despite the investment of substantial public funds in supporting the youth justice system, there is little investment in research,

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[3] "Multi-disciplinary" approaches refer to bringing together personnel and agencies from different human service sectors - such as mental health, addictions treatment, child welfare, and so on - so that resources and expertise can be coordinated and focussed on the particular needs of the case.

evaluation and planning.

Inconsistencies Across Jurisdictions

There are large differences in police charging, youth court appearance and youth custody rates across jurisdictions. Some degree of variation between regions and locales is to be expected. There are, however, great discrepancies which cannot be explained by differences in crime rates or other discernable objective factors. For example, youth incarceration rates can vary across jurisdictions by more than 100 percent, while there are also considerable differences in the apparent degree to which the police exercise their discretion to charge or not. A reasonable degree of consistency of treatment by the justice system is an expectation that is widely accepted.

Equity

There are unacceptably high levels of over-representation of aboriginal youth in the youth justice system, especially in youth custody. While the justice system cannot be expected to resolve the historical, social and economic conditions that have contributed to this over-representation, it nonetheless must continue in vigorous efforts to involve aboriginal peoples in the youth justice process, provide culturally sensitive programs and training, and reduce over-representation.

Female and visible minority youth comprise only a small proportion of the population addressed by the youth justice system. The practical reality of smaller numbers can lead to the distinctive needs of these minority groups being insufficiently addressed. It is projected that over the next twenty years, the visible minority proportion of the population will roughly double, comprising about one-quarter of the total Canadian population, and will be largely concentrated in urban centres. Given this, the present need to incorporate culturally appropriate programs into the youth justice system will continue to grow.

The Marginalization of Parents and Family

Society treats adolescents in an ambivalent manner - on the one hand, as immature and dependent persons in need of guidance and assistance and, on the other, as persons who are able to independently exercise certain rights, including the full legal rights accorded them in the youth justice process. This ambivalence extends to parents who are expected to care for, supervise and generally be responsible for their dependent children but who are also expected to carry out their roles within a framework that recognizes their

children's independent legal rights. Many parents who want to remain involved with their children feel excluded, intimidated, and/or mystified by the youth justice process. Better efforts are also needed to involve those parents who are less inclined to play an active role in their children's lives.

Lengthy Processing Times

One-half of the cases dealt with by the youth courts in Canada involve more than five months between the date of the offence and the date of disposition. Some cases require a year or more to complete. The time required to process cases had been increasing and many youth courts are backlogged.

Expeditious processing is especially important with young persons so that the consequences of offending are imposed, or rehabilitative measures implemented, as soon as possible after the criminal incident. Expeditious processing is also important to the young person's family and to victims. While delay is inevitable in a system involving due process rights, steps could be taken to reduce court backlogs by enhancing diversionary measures and to expedite pre-court processing delays through administrative measures.

Changing Demographics

During the 1980's, the youth population in Canada declined, but it is projected to increase substantially in several jurisdictions over the next several years. Unlike the non-aboriginal population, there are more aboriginal youth than there are aboriginal adults; as noted previously, substantial increases in visible minority populations are also projected.

Projected population increases suggest that, even if youth crime rates remain constant, there will be substantial increases in the number of youth crimes committed, with a consequent increase in demand for youth justice resources during a time when there are limited fiscal resources to respond to the same.

The Interests of Victims

There has been an increasing awareness in recent years that the interests of victims have not been given adequate recognition and priority. While there have been several legislative and administrative/program measures taken to address these concerns, many victims still feel marginalized by the process. The Jasmin Report found that victims believe that there is an imbalance between the attention paid to the rights and needs of young people in conflict with the law, and that paid to the interests of (direct and indirect)

victims of crime. In order to improve the response to victims, the report recommended that victims be better informed about the outcome of police investigations and what role they would play in court; unnecessary attendances in court should be avoided; and that reconciliation between the victim and offender, reparation and compensation should be used more often. A greater use of some types of diversion programs, which can allow for greater victim participation in a more informal setting, may be another means of facilitating the interests of victims.

1.3 PUBLIC PERCEPTIONS OF YOUTH CRIME AND THE YOUTH COURTS

Several national surveys conducted in the past decade provide ample evidence that the general public views the youth justice system in a negative light. This section describes the findings from opinion polls, the factors that are related to pubic perceptions, and the differences between the images that are portrayed and the realities of youth crime and of the functioning of the youth justice system.

With regard to perceptions of the amount of youth crime, Roberts reports that 47 percent of respondents in 1990 agreed that the behaviour of young persons had changed for the worse in the past five years, with the percentage rising to 64 percent in 1993. In 1994, nine out ten Canadians believed that youth crime is on the increase - despite quite widespread media coverage of police statistics prepared by Statistics Canada that showed a stable trend in overall youth crime for the previous two years.

Similar findings are reported in recent focus group research, conducted by the Angus Reid Group in 1996; participants raised the issues of increases in youth gangs and in other youth criminal activities. The major factors contributing to the perceived increase in crime were lack of discipline, lack of moral values and respect, and socio-economic factors (high unemployment). Interestingly, when presented with information on the stability of overall crime rates in the past few years,[4] focus group participants questioned the validity of the statistics. The public distrust of statistical data may be understandable, because it is not infrequent for readers and viewers of the mass media to be confronted with varying interpretations of the same (or similar) data. Even the "experts" cannot agree on the correct interpretation of statistics on youth crime, such as the extent to which youth violence has changed in recent years.

As should not be surprising, many members of the public have only a vague notion of the way in which the justice system operates and of the details of criminal legislation, including the YOA. Although the majority of the public (two-thirds in Gallup polls in 1985 and 1989) were aware that, in criminal proceedings, persons seventeen years or younger are dealt with as juveniles rather than adults, a 1993 survey by Decima Research found that almost

[4]However, crime rates as a whole, not youth crime rates, were presented to these focus groups. Official police statistics do report substantial increases in the number of young persons charged with offences against persons (violence). There is not, however, agreement among experts as to whether these changes represent "real" changes in youth behaviour.

one-half of respondents said they were "not very" or "not at all" familiar with the Act.

The public appears to have become less supportive of the youth justice system in the past ten years. The 1985 Gallup poll found that just over fifty percent of those surveyed in that year believed that dealing with persons under eighteen years of age as juveniles would lead to an increase in youth crime; in the 1989 survey, the percentage rose to sixty percent.[5] In the 1989 survey, one-half of persons surveyed preferred that young offenders be sentenced in the same way as adults. In 1991, a question with slightly different wording but relating to the same issue -- should young persons between the ages of twelve and seventeen be tried in courts similar to accused adults, or should there be special provisions and sentences for young persons? -- found that 47 percent of the general public believed that youth should be dealt with similarly to adults. Three years later, in 1994, the proportion had increased to 59 percent. A 1993 Decima poll that specifically asked whether respondents supported or opposed the YOA reported that one-half opposed the legislation and thirteen percent were "strongly" opposed. When asked for their reasons for opposition, the most common responses were that tougher legislation is required, young offenders should be treated as adults, and young offenders should be made responsible for their actions.

The attitudes of the public towards the juvenile justice system therefore shifted, in a negative direction, in the latter part of the 1980's and concern continued to grow in the early 1990's.

Several polls report breakdowns of attitudes by demographic characteristics such as age, sex, and place of residence. Although gender does not generally predict opinions on this topic, there is a tendency for younger persons and those with higher levels of education to voice slightly less "punitive" opinions than others. It is notable that Quebec respondents consistently express less concern about youth justice issues than do residents of other jurisdictions. Residents of the Prairie provinces and British Columbia have the most negative views.

Public opinion surveys may overemphasize the "punitiveness" of members of the public. Of necessity, the questions are simply worded and indeed may oversimplify the issues. Three studies have recently attempted to examine

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[5] Of course, young persons have been dealt with differently from adults since the early years of this century, although the minimum age of 12 years and the upper age limit of 17 years were standardized for Canada as a whole only in 1984 and 1985, respectively.

public perceptions of youth justice in somewhat greater depth. A province-wide survey in Alberta looked at factors associated with the system; in this 1993 research, 87 percent of respondents believed that youth courts are too lenient and 83 percent said that second offenders should be tried in adult court[6]. A smaller scale, non-random survey in Toronto examined the relationship among opinions towards youth justice issues; as in Alberta, this survey found that 88 percent of respondents saw the youth court as too lenient or much too lenient.[7] In 1996, qualitative research undertaken by the Angus Reid Group in four Canadian communities used focus groups, made up of a cross-section of Canadian adults, to probe attitudes towards crime, incarceration, and other correctional issues.

The Alberta research found that greater dissatisfaction with the youth courts was expressed by persons who resided outside of the two major cities, and by those who were more fearful of being victimized (as measured by feelings of safety walking home after dark). Despite the high level of agreement with the statement that the courts are lenient, about half of respondents did not believe that imprisonment deterred young offenders. Almost two-thirds thought that rehabilitating a young offender is more important than making the offender pay for the crime.

In the Toronto study, respondents were asked what types of offenders and offences they were thinking of when they evaluated the severity of youth court sentences: those who felt that sentences were too lenient were more likely to be thinking of repeat offenders and violent offences than were those who felt that dispositions were about right. Beliefs and attitudes towards youth justice were related to other aspects of crime and punishment. For example, respondents who believed the youth justice system was too lenient had the same view of the adult system; they were also much more likely to believe that violence had increased in the past five years and vastly overestimated the percentage of crimes that involve violence. Persons who believed that the youth courts are too lenient suggested harsher sentences; even so, the majority of all respondents stated that non-custodial sentences (fine, probation) were appropriate for first time property offenders and for persons convicted of minor assault.

Although in general participants in the eight Angus Reid focus groups held in four Canadian communities thought that sentences were too short, they also felt that prison sentences were used too often. A majority believed that

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[6]See, Hartnagel and Baron (1995).

[7]See, Sprott (1995).

incarceration was not appropriate for many low risk, non-violent offenders. Participants showed strong support for alternatives to custody for non-violent crimes, such as fines, community work, ticketing, and electronic surveillance, especially when the use of alternatives was linked to more severe measures for high risk, violent offenders.[8]

The findings from these surveys indicate that, while lack of confidence in the youth justice system seems to go hand in hand with lack of confidence in the adult system, somewhat paradoxically, members of the public would like more youth dealt with as adults. Similarly, some respondents support rehabilitative goals while simultaneously recommending that young persons should be dealt with more harshly.

Public attitudes towards crime and justice issues are shaped, in large part, by media portrayals of crime, which emphasize the most "sensational, unexpected, and dramatic aspects of youth behaviour" (Hartnagel and Baron, 1995). Family, friends, and acquaintances are a secondary source of information but are often themselves dependent on the mass media for information. Mass communications mean that youth crimes committed in one part of Canada become well known to residents throughout the country, so that the sporadic incidents of serious youth violence may appear more frequent and closer to home than in fact they are. The public is also undoubtedly influenced by the American media and popular culture, and are probably not aware of the very large differences between Canada and the United States in the amount and seriousness of violent youth crime.

Most media coverage is of crimes of violence, especially homicide, although the very large majority of youth crime does not involve violence. The Toronto study referred to above included a two month review of the coverage in three daily papers of youth crime. Over ninety percent of the articles focussed on violent offending, and seventy percent mentioned homicide. Property offences were only mentioned in five percent of the articles. The media reports rarely reported dispositions and almost never reported the reasons for a disposition.[9] Rather, the emphasis was on the charges laid, the facts of the crime, and the impact of the crime on others. The contents of the newspaper articles suggest, as the author pointed out, that the public receives little information from print media on youth court

[8] These were general findings and not particular to young offenders.

[9] Of the 88 articles examined, only one sentence from one story offered an explanation for the disposition imposed.

dispositions, their rationale, and the circumstances of the young offender.[10] Previous research has found that when more information is provided (e.g., about the facts of the case, circumstances of the accused, and the court's reasons for the sentence imposed), opinions tend to become less critical and more understanding of the grounds for the sentence.[11]

It should not be unexpected that the media focus on serious violent crime: most youth (and adult) crime is relatively mundane and uninteresting to the public at large. One outcome of the focus on uncommon but dramatic events of serious violence is that the public can over-estimate the extent of serious violent youth crime and also misunderstand how the youth system works in the vast majority of cases.

There are clear differences between public perceptions of youth crime in Canada and the reality. The violent youth crime rate in Canada is, for example, far lower than in the United States and, in Canada (unlike the U.S.), per capita rates of homicides involving youths have not increased in the past few decades. The vast majority of crime involving young offenders is non-violent. In recent years, three out of ten young offenders receive a disposition that includes custody, and about six out of ten are placed on community supervision (probation). The impression of most members of the public seems to be that the adult courts would deal with young offenders more appropriately, perhaps more severely, than the youth courts. The community at large does not apparently know, however, that some studies have found that young offenders receive sentences similar to adults convicted of many of the same offences.

Moreover, references to youth gangs can be misleading: most members of "youth" gangs are young adults, over the age of youth court jurisdiction. It is also not uncommon for the media to refer to "teenage" suspects, some of whom are over seventeen years of age, also beyond the jurisdiction of the youth court.

Another perception is that more severe sentences will reduce youth crime. To many, crime control seen as directly under the control of the courts, although there is little or no empirical evidence that more severe sentences deter young persons from criminal activity. Thus, the facts are greatly at variance with commonly held public perceptions of youth crime and sentencing.

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[10] Sprott (1995).

[11] Doob and Roberts (1983).

In summary, public opinions of youth justice, as expressed in national and other surveys, are unfavourable - youth crime is on the rise; young persons should be dealt with as adults; the youth court is too lenient. It is easy to conclude from survey findings that, in the eyes of the public, the system is deeply flawed. However, because most members of the public rely on media for their information, their judgements are based on incomplete and selective information - sensational incidents of serious youth violence. Judgements of the youth justice system are often derived from sources that present inadequate information, that emphasize unrepresentative cases, or that refer to what occurs in the United States or elsewhere. This situation not unreasonably leads the Canadian public to question our system of youth justice.

None of the above should be taken to suggest that public concerns about youth crime generally, or violent youth crime in particular, are somehow illegitimate. The public has every right to be concerned about crime. Nor can public perceptions be simply dismissed as irrelevant because they are not always fully informed; a different kind of reality is that public opinion to some extent influences the development of youth justice policy.

Nor is it suggested that the media should not pay attention to serious violent crime. It should be recognized that the media will probably always remain the primary source of public information. The degree of attention paid to serious violent crime by the media will probably continue - the media, after all, are in the business of reporting interesting and dramatic events. In many ways, these tragic events - and especially how the justice system responds to them - are important symbols to the public. Given the reality that there will probably always be disproportionate reporting of serious violent crimes, so too will there probably always be some degree of public misunderstanding of the nature of crime and general functioning of the criminal justice system, no matter how much public legal education is undertaken.

It is important that the justice system provide objective information on crime, courts, and corrections to the general public. Clearly, efforts to disseminate factual information to the public - such as through the Youth Justice Education Program, funded by the Department of Justice Canada, and through provincial/territorial departments and agencies - are necessary in order to provide additional sources of information to both young persons and to the community as a whole.

1.4 CRIME PREVENTION

Crime prevention aims to reduce the future risk of crime. There are many kinds of crime prevention strategies, but most fall into two main categories: (1) situational and (2) social development. Situational crime prevention strategies are those aimed at reducing the opportunities for offenders to commit crime, usually through measures such as law enforcement, corrections and increased personal or property security. Situational crime prevention is also commonly referred to as "opportunity reduction" or "target hardening". Social development strategies are those geared toward improving the social circumstances which contribute to the risk of an individual becoming a persistent offender.

Traditionally, community crime prevention favoured the situational approach rather than social development measures. Situational crime prevention has usually been promoted and carried out in cooperation with the police. Some of the more well known community crime prevention efforts encourage public participation in situational prevention activities, such as Crime Watch, Neighbourhood Watch and improved security precautions to protect persons and property. Despite the introduction of more community participation in crime prevention in the last many years, the police, the courts and corrections continue to be viewed as the mainstays of both crime control and crime prevention. For many, crime prevention still means bigger guard dogs, electronic security systems, more police and tougher crime laws. Gaining support for a social development approach involves broadening perceptions to include activities not usually associated with crime prevention, such as effective prenatal care, child abuse and family violence prevention, remedial educational measures, early intervention programs, and so on.

Because the "cops, courts and corrections" approach comes into play once a crime has been committed, it has significant limitations in terms of being preventive. Not all crimes are detected or reported to the police. Many perpetrators of reported crimes are not apprehended, charged, and convicted. Moreover, many offenders who are committed to custody or other correctional measures are not rehabilitated or deterred. Conventional criminal justice responses do not address the longer term, underlying factors associated with crime and criminality. By definition, the formal criminal justice system reacts after the fact and, therefore, does not and cannot address the commission of crime in the first place.

Research into the "risk" factors associated with persistent offending suggest that there are a number of identifiable factors that increase the likelihood of a person becoming involved in crime. Recently, the United States Office of

Juvenile Justice and Delinquency Prevention summarized the considerable body of research into the causes and correlates of juvenile delinquency as falling into five broad categories:

- individual characteristics such as alienation, rebelliousness or impulsivity and lack of bonding to conventional society;
- family influences such as parental conflict, child abuse, and a family history of problem behaviour (e.g., substance abuse, parent criminality, inadequate supervision or inconsistent discipline by parents, etc.);
- school experiences such as early academic failure and lack of commitment to school; and
- neighbourhood and community factors such as economic deprivation, high rates of substance abuse and crime, and low neighbourhood attachment.[12]

Not all youth who are exposed to any one (or even more than one) of these risk factors become delinquent, although multiple risk factors increase the likelihood of offending. There is also research into the "protective factors" which "buffer" or mitigate the effects of exposure to risk factors so that the child or young person does not become involved in crime. The research into these protective factors has been summarized as falling into three basic categories:

- individual characteristics such as a resilient temperament and positive social orientation;
- bonding with prosocial family members, teachers or others; and
- healthy beliefs and clear standards for behaviour.[13]

Criminological research has also found that a small proportion of (male) youth are responsible for a large proportion of crimes.[14]

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[12] OJJDP (1994).

[13] Ibid.

[14] See, Wolfgang et al. (1987) and Shannon (1988). This is American research. See also Graham and Bowling (1995) for British research with similar findings. Similar research has not been conducted in Canada, but a Canadian example of how a small group can be responsible for a high volume of crime is found in Baron

What this research suggests, then, is that measures can and should be taken to avoid or mitigate risk factors and to promote protective factors, and that these measures should be targeted to those at highest risk. Given the early nature of the risk and protective factors, and well-established findings that habituated behaviours and circumstances are less amenable to change, these measures should occur early in order to be effective.

Though not a new concept, crime prevention through social development (CPSD) is the focus of increasing interest among those responsible for crime prevention because it is proactive, long term and guided by the research into the factors associated with criminal behaviour. CPSD concerns itself with preventing a crime from happening in the first place. CPSD is a long term preventive approach which is inextricably bound to the very lives of those at risk because its goal is to address the criminogenic factors associated with offending. To be effective, interventions would need to meet the changing needs which emerge in the life of a youth at risk over a number of years.

CPSD uses targeted long term programs aimed specifically at alleviating the combinations of social problems that can increase the risk of criminal behaviour. CPSD addresses a wide range of risk factors connected with crime through the efforts of various social development policies, programs and services already in place, such as social housing, education, health, income security and social and child welfare services.

Whatever measures are used, initiatives need to be focussed on specific at-risk individuals and must operate in coordination with several other initiatives at the same time. This is because those most at risk of becoming involved in crime are often struggling with several problems. It is not unusual, for instance, to find the life of an at-risk youth characterized by unemployment, poverty, family violence, learning problems in school and substance abuse. The targeted, coordinated approach of CPSD programs is essential to being able to provide multiple solutions to such multiple problems. Long term prevention, and CPSD in particular, are based on partnerships and collaboration among agencies and groups responsible for dealing with the conditions that generate crime. This includes those responsible for planning and development, the family, health, employment and training, housing, social services, leisure activities, schools, the police and other sectors of the justice system.

While crime prevention through social development is not new, what is

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(1995).

emerging is a body of evidence that comprehensive and sustained interventions targeted to at risk children early in life can be effective, especially if interventions are directed to providing support for families and assisting the child in early success at school. A recent review of the research on prevention programs found that successful programs appear to have the following elements:

- a focus on multiple risks (i.e., no single cause);
- broadly based or comprehensive interventions that address family, school and other factors such as poor peer relations (i.e., no single solution);
- a focus on urban, low-income families;
- relatively long lasting interventions of two or more years (i.e., not band-aids or quick fixes); and
- early intervention (e.g. in the first five years of life).[15]

Perhaps one of the most well known studies of an effective and cost-beneficial early intervention program concerned the Perry Preschool Project in Ypsilanti, Michigan, a "Head Start" program directed to 123 African Americans born in poverty and at high risk of failing in school. The high quality, active learning program focused not only on promoting early success at school, but also support to families through home visits and parent group meetings. The children were followed up until they were 27 years old and compared to a (randomly assigned) group that did not benefit from the program. By age 27, only one-fifth as many of the program group (as compared to non-program group) were arrested five or more times (7% vs. 35%) and only one-third as many were arrested for drug dealing (7 percent vs. 25%). There were also wide differences in average monthly income, home ownership, high school graduation, and reliance on welfare assistance or other social services. A cost-benefit estimate found that, over the participants' lifetimes, a ratio of $7.16 returned to the public for every dollar invested in the program. Cost-benefit analyses of this nature do not, of course, take into account other immeasurable human cost savings such as the avoidance of the suffering and fear by victims or the avoidance of the labelling and degradation of offenders being processed through the criminal justice system.[16]

There are many Head Start-type programs in Canada. For example, Edmonton has five such programs in four different locations which serve 130

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[15] Yoshikawa (1994).

[16] Schweinhart and Weikart (1993).

preschoolers. Home visits supplement the preschool program and parents are actively involved in both an advisory and support capacity. Parents also take part in support groups and receive home visits from program staff and volunteers.

These programs are but one of many approaches. Promising approaches include, for example, family support and intervention programs (e.g. parent support groups, parent training, systematic family therapies[17]), early cognitive and social skills training, conflict resolution skills training, values education programs, mentoring programs, and so on.[18] There is, however, no single program that will adequately address the multiple factors associated with delinquency - multiple and multi-disciplinary responses are required.

There have been several local, provincial and national reports which have called for more priority to be given to crime prevention, including a report by the House of Commons Standing Committee on Justice and the Solicitor General in 1993 (Horner Report). The federal government has established the National Crime Prevention Council. Initiatives have been established at provincial levels, such as the British Columbia Coalition for Safer Communities and the Quebec Round Table on Crime Prevention Council. Many initiatives have been undertaken at the local level. As well, Bill C-37 amended the Declaration of Principle (s.3 YOA) to provide that:

> "Crime prevention is essential to the long-term protection of society and requires addressing the underlying causes of crime by young persons and developing multi-disciplinary approaches to identifying and effectively responding to children and young persons at risk of committing offending behaviour in the future ..."

Crime prevention is by no means the sole responsibility of governments; communities and individuals are crucial to success, while the private sector can also play a role. For example, the Access Foundation, a philanthropic organization, provides an intensive summer performing arts program for 250 inner city children in Vancouver and then follows through with a smaller group throughout the school year; the participating children are also provided support through their school career, including to post-secondary education. Communities and neighbourhoods are best positioned to identify their own unique circumstances and needs and, with the assistance of expert advice

[17] See, Kumpfer (1995).

[18] See, also, Chapter 12 re: school violence.

(when required) to mobilize action. The average citizen can make a difference by, for example, taking a disadvantaged and fatherless neighbourhood child under wing and providing guidance and a prosocial role model, volunteering with various social and community organizations, and so on.

Governments and communities are becoming increasingly aware of the need for and benefits of enhanced crime prevention efforts. Since many reports have previously recommended that greater priority be given to crime prevention, the Task Force decided not to make a formal recommendation in this regard. It should be added that not only is there a need for more programs, but also longer term research on what works with whom. Empirical evidence, including Canadian studies, of the effectiveness and benefits of different types of crime prevention approaches would be helpful in focussing efforts more efficiently and effectively, and also in persuading communities and the public at large that a "cops, courts and corrections" approach, while necessary, is an insufficient and incomplete approach to the vexing problem of youth crime.[19]

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[19] A Canadian example of a long term study is found in Tremblay (1992).

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CHAPTER 2 - CONTEXT OF THE OPERATION OF THE YOUTH JUSTICE SYSTEM

The youth justice system does not operate in isolation, but rather in a broader philosophical, organizational and fiscal context which directly or indirectly affects the operations of the system. Accordingly, this chapter addresses three key aspects of this broader context, specifically:

- the Declaration of Principle (s.3 YOA), which sets out the policy for Canada with respect to young offenders or, put another way, the principles and philosophy that guide the interpretation and implementation of the Act.

- the need to coordinate service delivery with other youth and family service agencies, and involve the community in the justice process.

- federal-provincial-territorial financial arrangements for young offender services (cost-sharing).

2.1 DECLARATION OF PRINCIPLE

The Declaration of Principle (s.3) establishes the policy for Canada with respect to young offenders and, as amended by Bill C-37, provides that:

(a) "crime prevention is essential to the long-term protection of society and requires addressing the underlying causes of crime by young persons and developing multi-disciplinary approaches to identifying and effectively responding to children and young persons at risk of committing offending behaviour in the future;

(a.1) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;

(b) society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour;

(c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;

(c.1) the protection of society, which is a primary objective of the criminal law applicable to youth, is best served by rehabilitation, wherever possible, of young persons who commit offences, and rehabilitation is best achieved by addressing the needs and circumstances of a young person that are relevant to the young person's offending behaviour;

(d) where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences;

(e) young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of Rights and Freedoms or in the Canadian Bill of Rights, and in particular a right to be heard in the course of, and to participate in, the processes

that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms;

(f) in the application of the Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families;

(g) young persons have the right, in every instance where they have rights or freedoms that may be affected by this Act, to be informed as to what those rights and freedoms are; and

(h) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate."

As the Supreme Court of Canada has affirmed, the Declaration should not be considered as merely a preamble, but rather should be given the force normally attributed to substantive provisions.[1] The Declaration applies to all proceedings under the Act, including sentencing.[2]

The Declaration has been the source of considerable controversy. Some critics have argued that the Declaration is an amalgamation of principles that are inconsistent with one another, not prioritized, and which reflect competing theories (models) of juvenile justice - in effect, an attempt to be all things to all people.[3] The consequence, it is argued, is that the Declaration offers little in the way of clear guidance as to how to decide cases, especially at disposition.

On the other hand, it has been argued:

"While it may not be inaccurate to suggest that the Declaration of

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[1] R.v.T. (V.) (1992).

[2] See R.v.M. (J.J.) (1993). Section 24(1.1), amended by Bill C-37, also directly affects sentencing to custody.

[3] See, for example, Reid and Reitsma-Street (1984), Young (1989), and Markwart (1992).

> Principle reflects a certain societal ambivalence about young offenders, it is also important to appreciate that it represents an honest attempt to achieve an appropriate balance for dealing with a very complex social problem. The YOA does not have a single, simple underlying philosophy, for there is no single, simple philosophy that can deal with all situations in which young persons violate the criminal law. While the declaration as a whole defines the parameters for juvenile justice in Canada, each principle is not necessarily relevant to every situation. The weight to be attached to a particular principle will be determined in large measure by the nature of the decision being made and the specific provisions of the YOA that govern the situation. There are situations in which there is a need to balance competing principles, but this is a challenge in cases in the adult as well as the juvenile system." (Bala and Kirvan, 1991, p.81)

It appears that the Supreme Court of Canada has endorsed the latter point of view. While acknowledging "a marked ambivalence in its approach", that court, in the context of a discussion of the Declaration, has described the Act as a "courageous attempt to balance concepts and interests that are frequently competing".[4]

It has been suggested that there are two approaches that can be taken in legislating goals and principles - an "integrated" declaration and an "integrative" one. An integrated declaration is fairly narrow, giving clear priority to a single goal and a number of principles that are all compatible. In contrast, an integrative declaration is broader and more comprehensive, including goals and principles that are often incompatible and does not establish priority between them.[5]

Both approaches have disadvantages. An integrated declaration is too narrow to do justice in all cases because there is less flexibility to adapt decisions to the widely varying circumstances of the offence and of the offender. An integrative declaration can lead to disparity in decisions because of the varied range of goals and objectives.[6]

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[4] Supra, note 2.

[5] Brodeur (1988).

[6] Ibid.

The YOA's Declaration of Principle can be described as integrative. In contrast, Bill C-41, which establishes legislative sentencing principles for adults, can be described as an integrated approach because, while setting out varying objectives of sentencing, it establishes a "fundamental" principle (proportionality) and then goes on to identify "other" (presumably subordinate) sentencing principles.

It could be argued, however, that case law has pushed the YOA's Declaration more in the direction of an integrated approach, at least in the sense of identifying an over-arching principle. In this regard, the Supreme Court of Canada, in M. (J.J., supra, has said that the "traditional criminal law approach" should be taken into account in the sentencing of young offenders but traditional principles such as proportionality and general deterrence are less important. Rather, the special needs and requirements for guidance and assistance of young persons are vital considerations: "society is best protected by the reform and rehabilitation of a young offender". This general approach would seem to be affirmed by the addition (Bill C-37) of paragraph 3(1) (c.1) to the Declaration, which provides that the protection of society is "best served" by rehabilitation, whenever possible, and rehabilitation is "best achieved" by addressing the (relevant) needs and circumstances of the young person.

Ideally, a Task Force undertaking a comprehensive review of legislation should begin with first principles - i.e., a review of the Declaration - and then proceed on to a review of substantive provisions, the analysis of which should be informed by these principles. The Task Force did not take that approach, in part because the Declaration is controversial and coming to agreement about potential changes would bog us down. This controversy emerged, for example, during discussions about considerations/principles that should apply to the sentencing/transfer of serious young offenders.

Instead of starting with first principles, the Task Force decided to analyse the substantive provisions of the Act and then consider what the results of the analysis might indicate in terms of potential changes to the Declaration. Several issues arose, which are reflected in the recommendation below. **The Task Force recommends:**

> **There should be a comprehensive review of the Declaration of Principle, including within that review consideration of principles related to:**

- **the particular circumstances of aboriginal young persons;**

- **involving and supporting the family and extended family in responding to young persons who commit offences;**

- **the interests of the victims;**

- **the inter-relationship and need for coordination between the youth justice system and other youth serving systems in responding to young persons who commit offences, including the use of conferencing approaches to facilitate co-ordination; and**

- **sentencing principles, including the applicability of the principles of proportionality and denunciation, especially with respect to offences involving serious violence.**

As well, in the interests of establishing a greater degree of focus in the Declaration, consideration should be given to distinguishing between "fundamental principles" and "other principles".

To explain the final point, there are currently ten statements of principle; the possible inclusion of others would increase that number, potentially leading to confusion. Some of the current principles are more like statements of purpose - for example, those respecting the protection of society and the rehabilitation of young persons. It might be useful to revise the Declaration so as to clearly distinguish three groups of statements: those of purpose, those of principle, and those providing the rationale for special procedures under the Act.

With respect to sentencing principles, there is a discussion of the same in Chapter 8 respecting serious offenders, including a discussion of the principles of proportionality and denunciation. It should be noted that the Task Force did not decide to recommend that the sentencing principles of proportionality and denunciation in relation to serious violent offence should necessarily be expressly set out in the Declaration, but rather that this matter should be considered in any future debate about changes to the Declaration.

2.2 INTEGRATION AND COORDINATION OF SERVICES

The youth justice system cannot address youth crime in isolation, whether on the level of the individual offence or more generally in our society. Many young offenders have multiple needs, and this is more likely the case with respect to youth at a high risk of re-offending or who have committed more serious offences. Research on the causes and correlates of juvenile offending indicates that, along with being young and being male, there are a host of criminogenic factors associated with offending behaviour, including: poverty; family factors such as poor parenting skills, family disruption, child abuse and neglect, and parent criminality; poor school performance; antisocial peer associates; substance abuse; poor thinking, problem solving and social/interpersonal skills; personal factors such as impulsivity, risk taking and aggression; community characteristics related to social organization; and biological factors. Because offending can result from a multiplicity of factors, a multiplicity of responses may be required to address that behaviour. Addressing the multiple needs[7] of a young offender can play a critical role in reintegrating the youth into society, reducing the likelihood of recidivism, and helping him or her to become a contributing member of the community.

Several agencies and systems may have mandates, expertise and resources to respond to the different needs of these youth, including child welfare services, schools and the health system. The degree of multiple needs and inter-agency involvement in young offender cases is evident from research. In a case tracking of 2,339 youth charged under the YOA in Alberta, Thompson found that 47 percent had previously been assigned child welfare status and 18 percent had been on the caseload of mental health services. An internal tracking study in British Columbia found that 79 percent of all youth in custody had current or prior involvement with child welfare services (mostly prior) and, when social assistance was included as a criterion, 90 percent of the families of youth in custody had been involved with the social services ministry. Additionally, educational

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[7]Meeting the "needs" of a young offender is simply another way of saying that the criminogenic factors associated with offending need to be addressed.

needs and services are common to all youth, while there is evidence of high levels of substance abuse.[8]

Aside from professional helping agencies, others may also need to be involved, including the family, extended family, "significant others" and the community. Meeting the full range of needs of a young person requires communication and coordination amongst those able and prepared to assist. Successful coordination will require sensitivity to the limitations of the mandates and resources available to those who can contribute to meeting the youth's needs.

The need for improved communication and coordination among the various agencies and actors involved in addressing youthful offending has already been recognized and often acted upon at both the local and provincial level. The Task Force endorses this work, and in this report examines ways to further encourage coordination of the agencies and individuals best placed to respond to the several needs of young people in trouble with the law.

This paper does not attempt to draw fine distinctions between the concepts of coordination and integration. Generally speaking, the term "coordination" refers to the harmonious combination or workings of various functions or agencies leading to a desired result. It can imply that the various parts are separate or distinct but complementary. The term "integration" means to "make up a whole" by combining various separate parts or elements and can involve a more holistic approach. The focus of integration is on linkages and potential restructuring of policies, programs and services to achieve better outcomes for the people served. Both processes involve overcoming barriers between policies, programs and services and making maximum use of all available resources. There are many different ways to organize services. A structurally integrated system does not necessarily mean that it will be well coordinated, nor is good coordination necessarily predicated on integrated services.

Coordination can be more easily achieved in the immediate future since it does not entail the creation of formal linkages or restructuring. Its goal is to have the existing distinct agencies and services function in a more complementary manner. Integration is a longer-term goal requiring a

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[6]For example, a study in British Columbia found that 57 percent of youth in custody and 28 percent of youth on probation in 1990/91 had a history of substance abuse.

developmental approach since it seeks to create new structures and processes.

A lack of coordination leads to programs and strategies that can be too narrow, fragmented or disassociated. Ultimately, this decreases the efficient and effective use of resources and increases the frustration of clients being served, and of the community. Accountability can also be fragmented, with each system responsible for one part and no one responsible for the whole. This can lead to otherwise avoidable failures of systems. There are too many reported cases of youth who have "fallen through the cracks", sometimes with tragic results to victims or to the young person.

The Juvenile Delinquents Act (JDA), established philosophical and legislative links between the youth justice and child welfare systems. There are a number of provisions in the YOA that refer to the involvement of other helping professions and agencies. However, these are no legislative mechanisms or processes established in the Act that encourage better coordination in meeting the various needs of young persons.

2.2.1 Experience Under the Former Act

The JDA was philosophically grounded in the welfare notion of the parens patriae doctrine, which held that the state could intervene as a "kindly parent" in those cases where the family was unable to provide for the needs of their children. Because the juvenile justice system was governed by the overarching principle of the best interests of the child, due process considerations were minimized in the interests of an informal process and promotion of the welfare of children.

The JDA established a formal legal category of "delinquency", which included youth who committed offences under federal or provincial statutes or status offences such as truancy or incorrigibility, as well as those who were involved in "sexually immoral" behaviour. Dispositions were not linked to the seriousness of the offence, but were tailored to the child's supposed needs. The ultimate sanction of the juvenile law was training school placement, where therapeutic services were to be delivered. In effect, the same institutions could provide for "good" children who were victims, and for "bad" children who were victimizers - on the grounds that the former were delinquents in the making.

The JDA established a legislative bridge to the child welfare system: section 20 authorized the juvenile court to commit a child to the charge of a children's aid society or to the charge of a superintendent or director of child welfare responsible for neglected or delinquent children. Under the JDA, services to delinquent youth were primarily administered by child welfare/social services departments in jurisdictions across the country, but this changed to some degree with the advent of the YOA. Some observers have suggested that removal of the legislative bridge to the child welfare system has contributed to a greater degree of fragmentation of services under the YOA.

2.2.2 Relevant Provisions of the YOA

The YOA is not a mere codification of special procedures for young persons, but also establishes a framework for identifying needs and facilitating services to address those needs. The Declaration of Principle (s.3), for example, speaks to the "special needs" of young persons and their need for "guidance and assistance". In applying the Declaration, the Supreme Court of Canada has held that, while traditional criminal justice sentencing principles such as general deterrence play a (diminished) role in sentencing, these needs are, in effect, overarching considerations in sentencing young offenders.[9] It would appear also the role of rehabilitation, and of the need for multi-disciplinary involvement, has been strengthened by Bill C-37 amendments to the Declaration.[10]

The assessment and servicing of young people's needs are also realized through the substantive provisions of the Act, including for example:

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[9] R.v.M. (J.J.) (1993).

[10] Section 3 is amended to provide that:

- "crime prevention is essential to the long-term protection of society and requires addressing the underlying causes of crime by young persons and developing multi-disciplinary approaches to identifying and effectively responding to children and young persons at risk of committing offending behaviour in the future."

- "the protection of society, which is a primary objective of the criminal law ... is best served by rehabilitation, whenever possible ... and rehabilitation is best served by addressing the needs and circumstances of a young person that are relevant to his offending behaviour."

Note, however, that the reference to the need for multi-disciplinary approaches is limited to "at risk" youth in the context of crime prevention.

- the capacity of the youth court to order a medical or psychological report (s.13) at various stages of the proceedings where there are reasonable grounds to believe the young person may be suffering from a psychological disorder, an emotional disturbance, a learning disability or mental disability, or where the young person is alleged to have committed an offence involving serious personal injury or the young person's history indicates a pattern of repeated findings of guilt.

- the capacity of the youth court to order for (dispositional and transfer purposes) a predisposition report (s.14), the contents of which, among other things, include the availability and appropriateness of community services and facilities and the willingness of the young person to avail himself of these services, as well as family (and extended family) relationships.

- the requirement of the court, in determining whether to transfer to adult court (s.16) and in determining placement after transfer (s.16.2), to take into account the availability of treatment or correctional resources.

- the capacity of the court to order as a condition of probation (or conditional supervision) that the young person attend school or other place of learning, training or recreation, if the court is satisfied that a suitable program is available, as well as orders respecting residence (s.23).

- the requirement that in determining placement in open or secure custody, the youth court (or provincial director) take into account, among other things, the needs and circumstances of the young person - including proximity to family, school, employment and support services - as well as taking into account that the level of custody should allow for the best possible match of programs to the young person's needs and behaviour, having regard to the findings of any assessment (s.24.1).

- that a custodial disposition may be reviewed on the ground that new services or programs are available that were not available at the time of disposition or on the ground that the opportunities for rehabilitation are now greater in the community (s.28).

- the capacity of the provincial director to authorize temporary releases from custody for the purposes or rehabilitation or reintegration, or to attend an out-patient treatment program or other program that provides services suitable to addressing the young person's needs or an educational or training program (s.35).

While Bill C-37 repealed the former provisions for detention for treatment (with the consent of the young person), it is not expected that this will stand in the way of facilitating treatment. Rather, this change reflects the view that treatment placement and consent is best governed by provincial law and medical ethics.

Bill C-37 also provides that in determining whether to impose a custodial disposition, the youth court shall take into account that an order for custody shall not be used as a substitute for appropriate child protection, health or other social measures. This amendment has potentially important implications: it assumes that the youth justice system cannot and should not "do it all" and that complementary social services should step in, where the need is indicated.

In sum, the Act, through the Declaration and substantive provisions, envisions that the needs of young people will be assessed and appropriate services will be provided, including services from a variety of agencies that have the mandate and expertise to meet these assessed needs. The social policy question is whether there are legislative and administrative means to better ensure that these expectations are satisfied.

2.2.3 Policy Considerations

As noted, the Act provides for various types of assessments, rehabilitative and support programs. Some needs, however, are unmet which could play an important role in helping to reintegrate the young person into society, including:

- the interventions of the YOA are limited to the period of the disposition, without a provision ensuring that the youth receives appropriate post-dispositional services to respond to his or her needs, where this need is indicated;

- interventions under the YOA are focused largely on the youth's criminal conduct, while other needs may go unmet; and

- the Act does not address the means by which interventions under the Act can be coordinated with other services and support which could assist the young person (i.e., various social services, the community and the family).

Similarly, other services, family members and the community may improve their response to the needs of a young person by better communication and cooperation amongst themselves.

There is a tendency to reduce to one dimension our view of a young person who has been found guilty of an offence. We often see him as simply an offender, when in fact there may well be a variety of factors (needs) that have contributed to his criminal behaviour and acted to keep him from functioning as a positive member of society. The offending behaviour must be situated and understood in the context of the entirety of the young person's life, and a means must be found to coordinate the range of responses to the offender's needs. A young person with a learning disability has no less need for an appropriate educational response simply because he has committed an offence. A teenager from an abusive family still requires child welfare interventions, even if he has also broken the law. A youth, molested as a child, is still a victim in need of treatment even if he has, in turn, sexually assaulted another.

Unfortunately, the youth justice system functions in a way that monopolizes society's response to the young person. Processing through the system and the disposition tend to take priority over all other services and interventions for the youth. Indeed, it is reported that in some jurisdictions, child welfare agencies sometimes close their file as soon as a young person is charged under the Act.

Given the significance of criminal behaviour, the priority given to the youth justice system is inevitable to some extent, but must be tempered with the realization that criminal conduct does not remove a young person from society, or, if so, usually only for relatively short periods. It is in the interest of everyone that ways be found to encourage the involvement of agencies, the community and the family in responding to the full range of the young person's needs.

How can the YOA and the youth justice system work with the other relevant services and agencies to accomplish this? To answer this question, it first should be recognized that the process by which this

coordination and cooperation would take place must engage other players on a voluntary basis and be tailored to the individual circumstances and needs of the youth. Services and other interventions required by one youth will not be relevant to another. For one youth, the involvement of the school system may be important to his long term reintegration, perhaps through identifying and responding to a learning disorder. For another, the involvement of the community may play an important role in helping the youth to realize the nature and seriousness of his conduct. Numerous other examples could be given, which point to the need for a mechanism that is flexible in nature.

Similarly, as noted, the mechanism must be voluntary. It is tempting to think that criminal behaviour on the part of a young person reflects a failure of social agencies in dealing (or not dealing) earlier in life with the youth. In some instances this is undoubtedly the case, but an honest assessment of the limitations of social interventions tells us that this is not always so.

Child protection agencies in Canada have the mandate to intervene where children require protection. Services to address identified risks are provided by agreement with the parents, if at all possible. Such agreements may include out-of-home placement, if services in-home will not suffice. The authority of the family court may be requested if risk factors cannot be addressed by voluntary means. The court can then order services in-home or in-care as the circumstances require, once the child's need for protection has been established to the court's satisfaction. A successful outcome to these measures requires the cooperation of parents. The court may terminate parental rights in exceptional cases where the level of abuse or neglect and the parents' inability to change require that decision.

This limitation exists for several reasons, including respect for the privacy and integrity of the family and the realization that most interventions are really only effective if participation is voluntary and enjoy the active support of the family members. Further, while a great deal has been learned about how to assist at-risk children, we still do not know how to solve many of the problems of development and social integration with which we are faced. Ongoing budgetary limitations and the consequent need to set priorities also serve to limit the ability of child welfare services to intervene to assist children.

This has a relevance to the development of a model for better coordination and integration of responses to the needs of young offenders. In short, not only must the model be flexible in allowing tailored responses to each youth, it must respect the mandates and resources of the agencies and engage them on a cooperative and voluntary basis. The process should encourage the involvement of those agencies and individuals that might be able to assist, but not require it. Agencies and individuals themselves are best placed to determine if they are able to assist the young person in question.

As a last element, it must also be effective. There must exist a means by which the coordination can reliably occur. Someone must have the responsibility to encourage this coordination where it would be useful.

2.2.4 Barriers to Integration and Coordination

There are a number of barriers which can impede greater coordination and integration among various youth serving agencies, including:

- legislative distinctions between youth justice and social service systems;
- different policies, objectives and strategies among agencies or departments;
- insufficient communication due to the limits of technology and physical separation of staff;
- isolationist attitudes (unwillingness to share decision-making powers);
- insufficient leadership and training;
- differing professional roles and perspectives;
- organizational barriers which separate information and work against joint processes, e.g., inflexibility in budgeting and financial management systems, personnel classification systems, program and service boundaries, and funding mechanisms;

- lack of knowledge about the advantages of integration and tools for an integrative approach;
- time and resource limitations.

In attempting to address these barriers, it is critical to take a developmental approach, creating new approaches, structures and strategies. Tools which can be developed to overcome these barriers include:

- team approaches and new processes for participation;
- new structures and processes to support coordination and integration;
- legislative linkages;
- commonly developed and shared objectives, policies and strategies;
- processes to share information and accountability, identify problems and plan services;
- operational protocols and joint planning;
- multidisciplinary case management;
- joint administration of services and co-location of staff;
- shared mandates and resources; and
- cooperative, multidisciplinary training and information about the benefits of coordinated approaches.

Quebec has developed a number of strategies which have resulted in a coordinated and more integrated approach to youth justice and child protection matters. There is a uniform youth policy which is reflected in the implementation of both the YOA and that jurisdiction's Youth Protection Act. The philosophy that underlies both systems is that of rehabilitation and education. There is deemed to be little difference between the needs of young offenders and the needs of children in need of care and protection. The Quebec youth protection system is geared to

dealing early with youth at risk whose offending behaviour is a manifestation of other problems which require intervention.

The directors of youth protection in Quebec are designated as provincial directors under the YOA. This dual designation formally recognizes that young offenders require services similar in nature to children in need of care and protection and that a number of youth have joint status. The joint designation allows for a greater coordination of services, particularly in the area of psychosocial evaluations as well as treatment and other intervention services.

The Youth Protection Act (YPA)provides a legislative link with the YOA. The YPA applies to any child under the age of eighteen whose security or development may be considered to be in danger. Paragraph 38(h) of that Act states that the security or development of a child is considered to be in danger where the child has serious behavioural disturbances and the parents fail to take the measures necessary to remedy the situation or the remedial measures taken by them fail. The term "serious behavioural disturbances" is interpreted to include offending behaviour.

A child with offending behaviour is assessed at intake by the director of youth protection (or his delegate). This individual decides which system - youth protection or youth justice - can best meet the needs of the child and ensure public safety at the same time. The two streams are distinct but complementary. The administrative infrastructure is integrated. Youth protection and youth justice staff and services are co-located in youth service centers. A number of rehabilitation centres used for the enforcement of the YPA are also used as places of detention for purposes of the YOA.

The Yukon has attempted to reduce administrative barriers by co-ordinating services in Whitehorse and by integrating services in rural communities. In Whitehorse, where more than two-thirds of the population live, all youth justice and child welfare services are managed within the Family and Children's Services Branch by staff who specialize in various services. The management structure and formal processes within the branch require coordination of all services. Outside of Whitehorse, all social services are delivered by the department's Regional Services Branch, whose front-line staff include one social work staff for each community. These individuals, of necessity, integrate all YOA and children's services within their daily work.

2.2.5 Examples of Mechanisms Which Encourage Coordination

1. Family Group Conferences in New Zealand

The family group conference was developed in New Zealand as a new method for making decisions about the way in which the state becomes involved in the lives of children and young people.[11] This mechanism was developed in the context of integrated child protection and youth justice services. It is used to ensure a coordinated response to the whole of the young person's needs and to encourage a reintegrative and restorative approach to youth justice, actively involving the parties (e.g. family, victim, agencies) in a process that is also culturally appropriate to indigenous peoples.

In 1989, the passage of the Children, Young Persons and their Families Act established procedures for family group conferences in cases where the care and protection of young persons was an issue and in youth justice matters. There have been subsequent proposals to extend the procedure to decisions involving young adults who have offended and to access arrangements when parents have separated.

The development of the new Act was influenced by Maori cultural values. The new approach emphasizes accountability, diversion and decarceration, reparation and reconciliation, and active involvement by the victim, family and community members as well as inter-agency cooperation. Two of the principles enshrined in the legislation are:

- the principle that criminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the child...

- the principle that any measures for dealing with offending by children...should be designed....to foster the ability of families, whanau, hapu, iwi, and family groups to develop their own means of dealing with offending by their children and young persons.[12]

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[11] Some Australian jurisdictions have established (non-statutory) police-based family group conferencing.

[12] Whanau, hapu, and iwi are Maori terms meaning, respectively, extended family, clan and tribe.

The family group conference (FGC) has a number of functions and can intervene at various stages before and after judicial proceedings are formally initiated. Section 244 of the Act sets out the basic principle that proceedings are not to be instituted against young persons unless the matter has been considered by a FGC. Where a charge has been proved before a youth court, the court cannot impose sentence unless a FGC has been held. Cases involving murder or manslaughter are not referred to a Conference.[13]

The specific functions of the Conference are outlined in section 257 and include:

- where the Conference is convened in relation to an alleged offence in respect of which proceedings have not been commenced, to consider whether the young person should be prosecuted for the offence or whether the matter can be dealt with in some other way;
- where the young person is detained in custody pending the determination of the charge, to make a recommendation to the court in relation to the custody;
- where the Conference has been convened in relation to an offence in respect of which proceedings have been commenced, to consider whether the young person should be dealt with by the Court or in some other way; and
- where the charge against the young person is admitted or proved, to consider how the young person should be dealt with for that offence.[14]

Section 257 also empowers the FGC to consider whether the young person is in need of care or protection. This type of conference is

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[13]Murder and manslaughter are legislatively excluded from the New Zealand Legislation (except for preliminary hearings) and are dealt with in adult court. The maximum age jurisdiction is seventeen, at which age all charges are processed by the adult courts.

[14]The Act stipulates that a FGC is not required in certain cases. This includes the case where the child is already subject to a full-time custodial sentence or community-based sentence and where the Youth Justice Coordinator and members of the family or family group of the child agree that the Conference would serve no useful purpose. However, these exceptions do not apply if the holding of the Conference is necessary for the purpose of considering whether a child should be required to make reparation for any offence.

initiated under section 13 of the Act, which defines a child who is in need of care and protection as including a child between the ages of ten and fourteen years who has committed an offence, the number, nature, or magnitude of which give serious concern for the wellbeing of the child. With the prior agreement of a Care and Protection Coordinator, the FGC can formulate recommendations and plans in relation to the care or protection of the child.

Several persons are entitled to attend the FGC, including: the young person and members of his family, extended family or community; the Youth Justice Coordinator (employee of the Department of Social Welfare); the police or other informant; the victim; lawyer for the young person; social worker and probation officer; and any other person requested by the family or family group of the young person.

The FGC process involves:

- the Youth Justice Coordinator (YJC) consults with the child's family or family group to decide who will participate and what the procedures will be;
- the YJC is responsible for ensuring that all information and advice required by the Conference are made available to the participants;
- the YJC prepares a written record of the details of the recommendations and plans formulated by the Conference;
- the YJC communicates the recommendations and plans to the police and to every person who will be directly involved in the implementation of the plan. Where the Conference is held in regard to a youth in detention, the plan is communicated to the court;
- where agreement by all parties and agencies have been secured, it is the duty of the enforcement agencies and the Director General of Social Welfare to give effect to the Conference recommendations unless they are clearly impractical or clearly inconsistent with the principles of the Act; and
- where members of the FGC are unable to agree on recommendations or when the YJC is unable to secure agreement

with the agencies involved, the YJC reports the matter to the enforcement agency or to the court.

The court must consider the recommendations of the FGC. Although the court usually accepts the recommendations, it may refer a case back for reconsideration or decline to accept the recommendation. In cases where a child is in need of care or protection, the court may refer the matter to a Care and Protection Coordinator and adjourn the proceedings pending the outcome of the reference. The court may, at any time, discharge the information, if the charge is in relation to a summary offence or an indictable offence (other than a purely indictable offence).[15]

2. Conferencing Approaches in Canada

In several jurisdictions in Canada, conferencing occurs on a more informal manner than in New Zealand. In using the more generic term "conferencing", we mean various types of processes by which affected or interested parties come together to formulate plans and methods to best address the circumstances and needs of young offender cases. These can, for example, include family group conferencing, youth justice committees, community accountability panels, sentencing circles, inter-agency case conferences of professionals or, at a somewhat narrower level, victim-offender reconciliation/mediation programs. In some jurisdictions, the process is more formalized with operational protocols among the various agencies involved and regularly scheduled meetings to develop case plans and review progress. These arrangements do not always work well in practice; it is often difficult to secure commitments from agencies that are coping with a scarcity of human and financial resources.

Sentencing Circles

A sentencing circle is a process whereby community members recommend a sentence to the court in cases involving other members of

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[15]Assessment of FGC's in New Zealand indicates very marked reductions in youth court appearance and custody rates; high levels of youth and family involvement in making decisions for themselves; victim involvement in about one-half of cases; and high levels of consensus decision-making. However, making available services that will assist the young person and family has proved problematic, principally because of a lack of services. While nearly 60 percent of victims who attend FGC's found them helpful, positive and rewarding, about one-quarter of victims felt worse (Maxwell and Morris, 1995).

the same community. Circles are characteristically made up of the accused and victim, their families, interested community members as well as the presiding judge, defence counsel, prosecutor and probation and police officers. The circle is designed to explore and develop viable sentencing options, drawing upon community based resources, whenever possible. This initiative obviously requires judicial support and acceptance.

Circle sentencing has its roots in the traditions and cultures of many of Canada's aboriginal peoples. Also known as healing circles, these are two fundamental premises to circles. First, the wrongful act is a breach of the relationship between the wrongdoer and the victim, and a breach of the relationship between the wrongdoer and the community. Second, the well being of the community and victim generally depend not upon retribution or punishment of the wrongdoer, but upon "healing" the breaches of the two relationships. The emphasis is primarily upon a restorative or healing approach as distinct from a punitive or retributive approach. Inherent in the restorative approach is the willing participation of the wrongdoer, the victim and the community in the exercise. Circles, therefore, attempt to engage meaningful community and victim participation in the justice process, with the objective of restoring harmony in the community. Because circles are based on traditional aboriginal concepts of conflict resolution, healing and reintegration, they bear some resemblance to family group conferencing in New Zealand.

In R.v.Morin (1995), the Saskatchewan Court of Appeal held that sentencing circles are now part of the fabric of our system of justice and a recognized and accepted procedure. The very purposes of sentencing circles is to fashion sentences that will differ in some way from those the courts have imposed in order to take into account aboriginal culture and traditions and in order to both permit and take into account direct community participation in both the imposition and administration of the sentences. Sentencing circles are certainly not appropriate for all cases. The court went on to establish several guidelines and limitations respecting their use.

Generally speaking, the procedure is as follows: participants sit in a circle and the facts of the offence are presented by the Crown, defence, judge, probation officer or police. There may be a facilitator, often an elder. The judge usually sets out the allowable range of sentences. Community members then speak in turn. The discussion can involve a variety of

subjects, including the underlying causes of crime in the community, the impact of crime on the victim and community, the personal history of the offender and input from other family members. Victims may participate; the willing participation of the victim is often essential for the success of the restorative justice approach. This information is the basis for determining specific sentencing plans. The offender is also invited to assist in constructing the sentence.

The role of sentencing circles in coordinating post-conviction services is less clear. While communities are called upon to mobilize their resources and to provide ongoing rehabilitative and treatment programs for the offender, their ability to do so is often limited. Many aboriginal communities lack the human and financial resources to properly implement the sentencing plans. Indeed, a number of communities have decided to refrain from using the circles until the proper resources have been put in place.

Probation officers can also play a role in supporting sentencing circles. As officers of the court, they have the official stature as well as knowledge of the local community to enable them to support and maintain effective community participation. They can serve as liaison between the community and the outside justice and social service systems. Probation officers can also be instrumental in coordinating the various players and monitoring the implementation of the sentencing plans.

Court reviews can also be held in the circle to monitor the sentencing plan and to provide further support that may be required.

Conferencing in the Yukon

In the Yukon, case management teams made up of representatives of all relevant child-serving agencies are used for multi-need and high risk children and youth. The teams meet at regularly-scheduled intervals to develop case plans and review progress. The identified case manager is usually either a youth probation officer or a child welfare social worker. Parents, caregivers, representatives from the child's First Nation, and school personnel generally complete the team. The process is reinforced both by the organizational structure of services in the Yukon and by protocols among participating groups.

The case management process is complemented by the use of a single committee that reviews all applications for admission to residential care funded by the Director of Family and Children's Services. The review committee consists of child welfare and young offenders' supervisory staff, representatives of the Department of Education and the Yukon First Nations. Young people, parents and representatives of the child or young person's First Nation are invited to participate as well.

Youth Justice Committees

Pursuant to section 69 YOA, the provincial Attorney General may establish youth justice committees (YJC's) to assist, without remuneration, in the administration of the Act or in any programs or services for young offenders.

The following operating principles provide guidance to YJC's in their deliberations:

- young persons should be held accountable for their criminal wrongdoing;
- there must be regard for the rights and freedoms of young persons and victims;
- the least intrusive alternatives and restrictions of a young person's freedom must be sought while still maintaining the protection of the community; and
- the community has a right and responsibility to participate in the youth justice system, which includes reconciling differences among the young offender, victims and community members as well as modelling community norms, expectations and support.

Youth justice committees may assist in any aspect of the administration of the YOA. There are, therefore, a wide range of roles which a committee can assume, including:

- operating as an alternative to the formal court process by receiving and administering referrals to alternative measures programs;

- o supporting victims of youth crime by soliciting their concerns and arranging for victim/offender reconciliation;
- o providing community support to offenders by ensuring that community resources are available and utilized and by providing community sponsors for short-term supervision and mentorship;
- o providing recommendations on sentencing alternatives to the youth court judge, when requested;
- o advising on policies and procedures of the youth justice system;
- o serving as a coordinating link between the formal youth justice system and other community agencies.

Youth justice committees (YJC's) are operating in a number of jurisdictions in Canada. The Northwest Territories has 38 active youth justice committees. Many of these committees have expanded their mandate to include adult offenders. In some areas, YJC's administer the alternative measures program; others take on a sentence advisory role and most provide ongoing supervision of offenders.

Newfoundland saw its first YJC established in the late 1970's with the introduction of the St. John's Youth Diversion Program. Presently, there are 25 formally designated committees administering alternative measures programs.

Saskatchewan is in the process of developing guidelines and information packages on YJC's in an attempt to increase interest by communities.

Ontario does not have formally designated YJCs. There is a YJC in Cornwall which administers an alternative measures program.

In British Columbia, designated youth justice committees only act as local advisory boards with respect to family and youth court and youth correctional policies; they do not have direct involvement in working with young offenders. However, there are several "community accountability panels" that are used for alternative measures referrals, which serve a similar function.

Youth justice committees are used quite extensively in the provinces of Manitoba and Alberta. In Manitoba, these committees began to develop as early as 1975 and represented the first significant application of the concept of citizen participation in the formal justice process. Currently, there are 73 YJC's operating in rural, urban and aboriginal communities in Manitoba, with about 600 volunteers.

YJC's in Manitoba have evolved as a grass-roots initiative over the past several years, but with support and assistance from the provincial government. As a result, they vary considerably in form and practice. The Youth and Community Corrections Division of Manitoba Justice is currently preparing a set of guidelines and an operational manual for use by the committees.

In Alberta, the first youth justice committees were established in two aboriginal communities in 1990 with the assistance of the Native Counselling Services of Alberta (NCSA). There are 29 committees in operation, twenty of which are based in aboriginal communities, with an additional thirty committees that are not officially designated by the Alberta Department of Justice.

It is noteworthy that committees established in aboriginal communities in Alberta have primarily taken on a sentence advisory role while those operating in non-aboriginal communities have focused on alternative measures programs. The Slave Lake committee deals solely with youth referred by the courts after a finding of guilt. Members of this committee act as mentors to the young offender, provide ongoing counselling, and support the youth through various treatment programs.

In some aboriginal communities, YJC's operate as a sentencing circle. In certain parts of Manitoba, committees function in a manner similar to family group conferences in New Zealand and Australia. These committees deal mainly with pre-charge diversion, although there has been a recent movement to post-charge alternative measures as well.

The membership of the committees often reflect the cultural make-up of the community. Committee size varies, as does the degree of formality. In smaller aboriginal communities in Alberta and Manitoba, YJC's are composed largely of elders. In the larger rural and urban centres, there is a greater mixture of elders and other adults who have the respect and trust of the community.

Although practices vary widely in the various communities, a typical process can be described as follows:

- o with the consent of the young person and his parents, the case is referred to the YJC either from the police as a diversion process or from the court following a finding of guilt. In the latter case, the young person is placed on probation, which includes the obligation to respect the terms of the disposition as recommended by the YJC.

- o the chairperson of the YJC invites the young person, the parents, the victim, police and other interested persons to a meeting where the offender's actions are discussed. In most cases, committee members are familiar with the young person and his family background. The meeting often becomes a counselling session in itself.

- o all participants contribute to the sentencing process and the solution is reached by consensus. The chairperson of the committee may adjourn the meeting at this point in order to consult with school officials, social workers, substance abuse counsellors and other agencies instrumental in carrying out the proposed plan.

- o the chairperson of the committee informs the court of the recommended disposition. In most cases, the judge accepts the recommendation of the YJC.

- o committee members often monitor the progress of the young person and the family to ensure that the disposition is followed. This may be done by an individual member or by a probation officer. Smaller communities sometimes lack the personnel to ensure proper follow-up. If so, the young person may sometimes not be held accountable for breaching the disposition.

- o in cases of non-compliance, the young person is charged with breach of probation (s.26) and is brought back before the youth court.

- o in some cases, the YJC will continue to support the young person and monitor his progress after completion of the disposition. This usually occurs on a very informal basis by a committee member

when a special bond or connection has been made with the young person.

As in circle sentencing, probation officers can be a key link between YJC's and outside agencies. This is often the case in urban areas where probation officers are more available. In Manitoba, probation officers are responsible for providing on-going coordination with other components of the justice and social service systems. They monitor the workings of the committees and provide members with advice, direction and training. In aboriginal communities in Alberta, this role is often carried out by a native courtworker.

Although, as noted above, YJC's can be involved at various stages of proceedings, section 69 YOA permits these committees to assist "in any aspect of the administration of this Act or in any programs or services for young offenders". The latter limits the scope of YJC's to programs or services related to adjudicated young persons, therefore excluding post-dispositional services, police diversion (as distinguished from alternative measures) and crime prevention, and, arguably, alternative measures. This could and should be clarified by substituting the words "young persons" for "young offenders".

Sentencing circles and youth justice committees are examples of "restorative" justice initiatives which provide new approaches for settling disputes, rehabilitating and reintegrating offenders, and addressing the concerns of victims and communities. The formal justice process, agencies and the community are linked for the purpose of early intervention, crime prevention and rehabilitation. This network can lead to improved access to resources, including community support, and more coordinated services for youth. With all the appropriate parties working together, a more holistic approach can be taken in addressing the issues which lead to offending behaviour.

Community members themselves have a vested interest in the rehabilitation of the young offender. They often have an intimate knowledge of the youth and his family background. This allows for creativity in constructing diversionary or dispositional plans as well as long-term commitment in terms of supporting the young person. The real key to success appears to be the creation of a bond or "connectedness" between the young person and members active in the circle or the YJC.

This, in turn, allows for a greater "connectedness" between the youth and the larger community, however that may be defined.

The Task Force supports the various initiatives described above. We believe there is a need to further develop "conferencing", broadly defined, in order to assist all players in coordinating their responses to a young person. We must avoid the situation whereby society's response to youth is always monopolized by the formal players in the youth justice system. As noted earlier, the coordinating mechanism must be flexible, voluntary, and respect the mandates and resources of the various services and agencies involved.

It is recognized that there are limitations to what other youth serving agencies may be able to contribute, especially during periods of fiscal restraint and limited resources. During these periods, there is a natural tendency for agencies to limit the scope of their mandates to those most in need, thereby inadvertently creating wider gaps in service delivery. Perhaps this is all the more reason to promote conferencing approaches, in order to militate against these exigencies and to maximize the effective use of limited resources.

2.2.6 Conferencing Model

As noted, the purpose of the conference is to provide a flexible and voluntary means by which a variety of agencies and individuals can come together to discuss the youth, his needs and possible responses to them on an on-going and as-needed basis. It provides a process and a forum for multi-lateral communication and coordination, thereby promoting collective analysis and consensus decision-making. It enables the canvassing of all possible and suitable alternatives to address the circumstances of the case.

The conference does not accord in any participant a mandate or responsibility it does not already have. Agencies will participate in the conference and provide services and other interventions within their agency mandate and pursuant to their priorities and resources.

Conferences should have one or more of the following objectives, as appropriate to the circumstances of the case:

- minimize the involvement of young people in the youth justice system and foster the complementary involvement of other youth serving agencies;

- hold the young person accountable for his or her actions;

- foster the ability of families and community members to develop their own means of dealing with offending by their children and young persons;

- involve the victim in the determination of the sanction, seek restitution and reparation for the victim and encourage reconciliation with the young person;

- ensure that meaningful, equitable and proportionate sanctions are imposed;

- promote communication among youth serving agencies and coordination of services and support programs for young persons; and

- enable culturally appropriate processes and values to be recognized.

The objectives indicate that a conference can have a number of possible functions and can be involved at different decision points, for a variety of purposes. Six major functions within the youth justice system can be identified:

- advice on alternative measures;

- recommending other responses as an alternative to continuing proceedings under the Act (such as referral to other youth serving agencies);

- recommending alternatives to pretrial detention;

- advising the youth court on disposition;

- coordinating services and support during the disposition phase; and

- coordinating services and support at the post-dispositional or post-release stage.

It is important that the conference be viewed and utilized as part of an over-all strategy to minimize the involvement of young persons in the youth justice system, to develop alternatives to custodial dispositions, and to facilitate the involvement of other agencies and parties. It must work in conjunction with other alternative processes such as formal and informal police cautioning and pre-charge alternative measures (see Chapter 4). This mechanism is part of a graduated response to youthful offending; it can occur as part of the formal justice processing or as an alternative intervention.

Conferencing is an optional tool. It is not necessary in all instances. Its use will depend largely on the circumstances of the case and of the young person. In its capacity as advisor on alternative measures, the conference may be used for a large number of young persons not involved in serious offences. Its use for the coordination of services and support during the disposition phase or post disposition phase will be largely reserved for more serious or high risk youth who have a number of needs requiring the involvement of various agencies.

Agencies and individuals who may be invited to participate in the conference could, depending on the circumstances and needs of the case, include:

- the young person;
- the young person's family or other person chosen by him; in the case of an aboriginal youth, members of the extended family or of the aboriginal community such as an elder;
- the victim, his lawyer or support person;
- the lawyer for the young person;
- Crown Counsel;
- social worker or mental health worker;
- police officer;

- o school representative;

- o Youth Justice Committee member (indeed, in some localities and for some purposes, the YJC could be the conference or form its core, drawing on other resources as need be. This possibility needs to be examined in each jurisdiction); and

- o other relevant parties such as representatives from addictions treatment, community recreation, clergyman, etc.

In the case of pre-charge or post-charge alternative measures, it is recommended that the discretion to convene a conference should lie with the Crown, the provincial director, or any other party designated for that purpose. Where the Crown and the provincial director are the key players, they can jointly determine the need for and relevance of a conference, depending on the nature of the offending behaviour and the circumstances of the young person. The provincial director would be responsible for coordinating the development of the plan; the Crown would make the final decision as to whether to accept the plan or proceed with the charge. However, there needs to be flexibility to permit other parties to take the lead role in convening conferences. For example, it is conceivable that the police (as in Australia) could assume a primary role, whether as part of a formal alternative measures process or as part of a police diversion program.

Where a conference is used in the context of formal judicial proceedings, particular attention needs to be paid to the role of the youth court judge in a conference. Ultimately, the judge decides the outcomes of the case; in many instances judges may want to have a conference convened to help meet the needs of the youth and to help the court carry out its function. However, this must be balanced by the need to preserve the administrative nature of the conference, its flexibility and the voluntary basis for participation. This can be accomplished by according the youth court judge the capacity to recommend that the provincial director consider the applicability of a conference, subject to provincial regulations or guidelines that have been established respecting conferencing.

Each level of government has a role to play in promoting conferencing. At the federal level, the YOA should be amended to enable and encourage conferencing, but not to require its use. Enshrining the process in legislation would promote and support the concept on a national level and

give it greater credibility. The optional and voluntary nature of the process must be clearly reflected. It is not recommended that criteria and rules regarding the design and use of conferencing be incorporated into the YOA. This would likely hamper the flexibility and creativity required to establish successful conferencing and would be best left as a matter for provincial regulation.

Options with respect to amendments to the Act that would promote conferencing are to:

- include in the Declaration of Principle statements emphasizing the role of other youth serving agencies, and encouraging provincial directors to conference with other service providers and to support the involvement of other agencies in assisting the youth;
- define conferencing, but in broad terms so as to encompass sentencing circles, family group conferencing, and youth justice committees as well as case conferences of professionals from youth justice and other youth service agencies;
- authorize the provincial director, or any other party designated by the province, to convene a conference and make recommendations to the youth court where an assessment, predisposition or progress report is ordered by the court and for the purposes of alternative measures and case management;
- include a clause to the effect that the youth court "shall consider" recommendations arising out of a conference;
- amend section 37 to include conferencing within the mandate of the youth worker;
- amend various sections to state that the recommendations of a conference may be included in any report required by the court, including sections 14, 28, 26.1(4), and 26.2.

Provinces and territories should promote conferencing among their respective systems and services, especially including the child welfare, education, health and the youth justice systems. Guidelines should include determining when conferencing is appropriate, how to proceed and how to implement the recommendations of the conference. These issues

should be developed on a multi-disciplinary basis and could be incorporated into protocols and guidelines. Issues for the jurisdictions to consider include:

- o the target population;
- o at which decision points conferencing should be used, both within and outside the youth justice system;
- o who/what services should be involved; and
- o how to assure accountability and follow-up to the recommendations of a conference.

Conferencing is intended to be a low-cost process of consultation and decision making, with each participant normally bearing their own costs of participation and of any service they provide to the young person. However, to the extent that there are direct administrative costs associated with conferencing, these should be considered for inclusion as a cost-shareable item in the federal/provincial/territorial Young Offenders Cost-Sharing Agreement.

For conferences to succeed, there must be an open exchange of information amongst participants. Accordingly, the Act should be amended to provide that the restrictions on the exchange of information respecting young persons should not apply to conference participants. The issue of information sharing is discussed in Chapter 9 of this report.

2.2.7 Decision Points Where Conferencing Could Be Used

Coordination should be encouraged at a number of crucial decision or access points in the youth justice process. Conferencing is a technique that can help to achieve this. Depending on the point in the process and the needs of the youth, the parties involved in conferences will vary.

Alternative Measures

One of the goals of conferencing is to minimize the involvement of a young person in the youth justice system, in appropriate cases. As noted earlier, in the case of a pre-charge or post-charge alternative measure, the

discretion to hold a conference will lie with the Crown, the provincial director, or other designated party.

Alternative measures programs already in place in jurisdictions will determine the eligibility criteria and the specific procedures to be followed.

The role of the conference would be to collectively design a relevant and effective alternative measure for the youth. The victim, family members of the young person and the young person himself could play key roles in developing these responses. Where appropriate, the measure would focus on compensating the victim and seeking reconciliation between the two parties.

Family members, community or Youth Justice Committee members, or agency workers could assume the responsibility for monitoring and supervising the youth and ensuring that the measure is properly carried out.

As noted, it is also conceivable that conferencing could be employed as part of, for example, a police-based diversion process.

Alternative Responses

Where a charge has been laid and the matter has proceeded to youth court, the conference should have the authority to recommend an alternative response to continuing proceedings or to imposing an intrusive disposition under the Act. This could be developed through conferencing with social service agencies and others to construct an alternative response for the young person, including a (post-charge) alternative measures program or a referral to other services or agencies. Conferencing could be used to recommend to the court that it refer the youth to alternative services such as child welfare or a relevant training, education or treatment program. Youth Justice Committees are ideally suited to play a key role in this regard.

If the Crown and the judge are in accordance with this recommendation, the Crown would stay the proceedings. The Crown has the right to direct a stay any time after proceedings have been commenced (i.e., after an information has been laid) and before a finding of guilt, but proceedings can be recommenced within specified time periods. If the young person

has been found guilty, the court, knowing a feasible alternative plan has been developed, could impose a non-intrusive disposition such as an absolute or conditional discharge.

A regular review or follow up would be required to ensure that the young person is respecting his obligations under the training, education or treatment program. The young person and parents must be made aware that the proceedings can recommence if the case plan is not respected (or, if there is a post-charge alternative measures agreement, the provisions of section 4(4) YOA).

Referral to a child welfare agency may be an appropriate response in cases where the young person has committed an offence or offences, the number, nature or magnitude of which raise a serious concern for the wellbeing of the youth. The maximum age at which a youth could be referred could be set at a specific age or be based on the maximum age limit set out in provincial child welfare acts.

Pretrial Detention

When a youth court judge is required to decide whether a young person should be detained prior to disposition, a conference could, if recommended by the court and considered appropriate by the provincial director, be convened to formulate a recommendation respecting alternatives to detention. The role of the conference would be to develop proposed bail conditions and ensure that the youth is properly supervised and monitored.

This procedure may meet a particular need with respect to aboriginal youth. Some research indicates that aboriginal youth are frequently denied bail and are held in pretrial detention at disproportionately high rates (see Chapter 12). Where there is no responsible person who is willing and able to take care of and exercise control over the youth, the conference could be instrumental in identifying a responsible person and arranging necessary supervision and support.

Advising the Youth Court at Disposition

Where a young person is found guilty of an offence, a conference could be called for the purpose of advising the court on an appropriate

disposition. The conference would have the authority to suggest any of the dispositions in the Act and specific terms and conditions thereof. Section 20 allows for a wide variety of dispositions to be rendered, including fines, compensation or personal service to the victim, restitution of property, community service, probation, and custody, as well as orders of prohibition, seizure or forfeiture.

Conference participants would also have the option of developing a dispositional plan for the case. The recommendations would form part of an assessment report (s.13) or pre-disposition report (s.14), procedures that already exist in the current Act. The court would consider the conference's recommendations in the same way it considers the recommendations of these reports today. The conference could also take the form of a sentencing circle in appropriate cases.

Agency officials, the victim, the offender's family, as well as the young offender himself, would have the opportunity to play a very active role in the development of a sentencing plan.

The judge may decline to accept the disposition proposal or refer the matter back to the conference for reconsideration. When the plan is accepted by the court, the conference recommendations that form the basis of the court order should be treated as commitments by the agencies and individuals involved. It would be advisable that written agreements be signed by the various parties to facilitate a clear understanding by all and to better assure accountability and compliance.

It would fall within the mandate of the provincial director to report the conference recommendations back to the court. In most cases, the probation officer would be the person to make the report and ensure follow-up. In some cases, the provincial director may not agree with the recommendations of the other conference participants or the various agencies may fail to reach an agreement. If so, the lack of consensus would be reported to the court.

Where appropriate, the terms of the disposition plan would be incorporated as conditions prescribed in a probation order pursuant to a conditional discharge or a regular probation order. Section 23 YOA provides a great deal of flexibility regarding the conditions that can be imposed under a probation order, including that the young person must comply with "such other reasonable conditions set out in the order as the

court considers desirable..." Therefore, a variety of disposition plans can be accommodated in the order.

Disposition Phase

Family and community members may be directly involved in assisting the young person in carrying out specific elements of the disposition plan as well as monitoring and supervising the youth. Social welfare agencies and community based services can become involved by providing the youth and other family members with the required resources and support.

Regular review by the conference participants would allow the progress of the young offender to be assessed on an ongoing basis and ensure that the disposition is being carried out. It will also ensure that the disposition remains current and appropriate to the needs of the youth.

Post Disposition and Release

Planning for release is especially critical for young persons who have received custodial dispositions. Conferencing can be used to establish a risk management plan that allows for effective intervention during the community portion of the disposition. This approach can allow for the effective supervision of the young person and establish links to community services.

A conference can provide structure for the release rather than a reactive response. Where a supervision component exists as part of the case plan, case workers or local police may have a role to play, as may other community professionals. Conferencing for released offenders can assist in breaking down barriers which may impede the young person's access to programs.

As noted above, the use of the conference at the post-dispositional stage is largely intended for more serious or higher risk offenders who have a number of needs requiring the involvement of various agencies. It is often crucial that the youth is supported and his progress monitored after completion of disposition. This may occur on an informal basis with conference participants acting as mentors to the young person, providing ongoing counselling and supporting through various treatment programs.

Before the end of the disposition, the conference could identify and coordinate any required post disposition interventions, and identify an individual or agency that would take on the role of conference coordinator at the end of the provincial director's mandate. This could, for example, be a social worker, or a community-based service provider.

2.2.8 Recommendation

In light of the above, **the Task Force recommends that:**

- **the Act should be amended so as to enable and encourage conferencing, but not to require its use, by:**

  (1) defining "conference" in a broad manner, but which should expressly include reference to family group conferences, youth justice committees, sentencing circles, and inter-agency case conferences.

  (2) authorizing the provincial director, or other party designated by the province, to convene a conference for the purposes of alternative measures or case management and at specified points in the youth court process - including any report required by the court and to permit the provincial director or other designated party to make recommendations arising from these conferences to the youth court.

  (3) amending sections 14 and 28, and other relevant sections, to permit the recommendations arising from a conference to be included in a predisposition or progress report, or other report ordered by the court.

  (4) including a clause to the effect that the youth court "shall consider" the recommendations of a conference.

  (5) authorizing the youth court to recommend that the provincial director, or other party designated by the province, consider the applicability of a conference to an individual case, subject to provincial regulations or guidelines that may be established in this regard.

  (6) amending section 37 to include conferencing within the mandate of a youth worker.

  (7) establishing an enabling clause so that provinces are able to establish regulations or guidelines respecting conferencing.

(8) broadening the scope of youth justice committees by changing section 69 so that the words "young offenders" are replaced with the words "young persons".

- Conferences should have one or more of the following objectives, as appropriate to the circumstances of the case:

  (1) minimize the involvement of the young person in the youth justice system;
  (2) promote communication among youth serving agencies and the coordination of services and support programs for young persons;
  (3) hold the young person accountable for his or her actions;
  (4) foster the ability of families, extended families and the community to develop their own means of dealing with offending by their children and young persons;
  (5) involve the victim in the determination of the sanction, seek restitution and reparation for the victim and encourage reconciliation with the young person;
  (6) ensure that meaningful, equitable and proportionate sanctions are imposed; and
  (7) enable culturally appropriate processes and values to be recognized.

- Conferences should be utilized for six functions, including:

  (1) advice on the use of alternative measures or other forms of diversion;
  (2) recommending other responses to continuing proceedings under the Act or to an intrusive disposition;
  (3) recommending alternatives to pretrial detention;
  (4) advising the youth court at disposition or review;
  (5) coordinating services and support during the administration of a disposition; and
  (6) coordinating services and support at the post-release and post-disposition stages.

- Provinces and territories should promote conferencing within their jurisdictions - including representation from other youth serving agencies - and should establish protocols/guidelines or regulations respecting conferences, including with respect to:

(1) the objectives of conferences;
(2) target population;
(3) at which decision points conferencing should be used, both within and outside the youth justice system;
(4) which youth justice agency representatives, other agency representatives, and other individuals with a legitimate interest may be involved in conferencing; and
(5) accountability and follow-up to the recommendations of conferences.

- **To the extent that there are direct administrative costs associated with conferencing, that these be considered for inclusion as a cost shareable expenditure under the federal-provincial territorial Young Offenders Cost Sharing Agreement.**

It should be noted that additional recommendations respecting conferencing are included in other parts of this report. First, there is a recommendation earlier in this Chapter (2.1) to undertake a comprehensive review of the Declaration of Principle and include within that review consideration of statements respecting the role of other youth serving agencies and to encourage conferencing. Second, in Chapter 9, there are recommendations to amend the information sharing provisions of the Act so that participants in a conference may be provided and share information respecting young persons and, more generally, to facilitate necessary information sharing among youth serving agencies.

2.2.9 Improving Inter-Agency Coordination

There are several parties who should be involved in a coordinated approach to dealing with young offenders. Provincial directors, Crown attorneys, school representatives and health care and child welfare workers are obvious examples. Police forces also play an important role. Police officers disseminate information, undertake crime prevention work, act as liaison with schools and refer young people to child welfare and community agency services. Police are actively involved in front line diversion procedures such as informal warnings and police diversion programs.

In many jurisdictions, coordination occurs both informally and through formal mechanisms. This occurs at provincial, regional and local levels.

Jurisdictions should consider measures to improve coordination. One method could be to provide a forum where various groups and agencies can come together on a regular basis to coordinate their respective policies and services. Jurisdictions should examine the need for inter-agency committees at local or regional levels with the mandate to promote coordinated planning and policy respecting the delivery of services to children and youth.

Coordination and integration can be developed by way of operational protocols among the various players. For example, protocols between police forces and child welfare agencies could deal with the appropriate response to offending behaviour by children under the age of twelve (see Chapter 3), while protocols with mental health agencies and the police could address high risk young offenders whose dispositional supervision has expired (see Chapter 8).

It is not recommended that the concept of coordinating committees be entrenched in the Act. Doing so would give the wrong message that the committees are "justice driven". The committees must be seen, and act, as a multidisciplinary initiative, bringing together various parties on an equal and voluntary basis. Jurisdictions may wish to establish operating guidelines for the committees, but it is not necessary to have them sanctioned by way of legislation.

The Youth Justice Education Partnership (YJEP) is a resource which can assist coordinating committees in meeting the educational needs of the agencies involved. YJEP is an educational program being developed by the federal Department of Justice, in cooperation with other partners, to educate the general public and those working in the youth justice system about the YOA and the workings of the youth justice system. The goal of YJEP is to promote a nation-wide, comprehensive and integrated approach to youth justice issues. It is premised on the principle that effective educational programs can help integrate the knowledge of a variety of disciplines and the experiences of agencies working directly with youth.

Finally, there are many examples of innovative inter-agency programs and processes across the country and, no doubt, new initiatives will be developed in future. Different jurisdictions can benefit from hearing from others about what works and what does not work. Given this, provinces and territories could benefit from participation in an inter-jurisdictional

forum to exchange information on best practices for coordination and multidisciplinary involvement in youth services.

In light of the above, the **Task Force recommends that:**

- o **Provincial and Territorial Ministers Responsible for Youth Justice, in conjunction with Ministers responsible for other relevant youth serving departments within their jurisdictions should:**

  (1) take steps to identify and remove barriers to coordination and encourage improvements in the coordination of the delivery of services; and

  (2) consider the need for the establishment of local or regional inter-agency committees with a mandate to promote the coordination of policy, program development and service delivery to children and youth.

- o **Federal-provincial-territorial Senior Officials Responsible for Youth Justice should establish a forum to exchange information on best practices respecting the coordination and integration of multi-disciplinary services to children and youth.**

2.3 FEDERAL-PROVINCIAL-TERRITORIAL FINANCIAL ARRANGEMENTS FOR YOUNG OFFENDER PROGRAMS

This section addresses the third fundamental contextual issue dealt with in this chapter, that being cost-sharing agreements for the financing of services to young offenders, which principally address youth correctional services. There are separate arrangements for the costs of court-appointed counsel; these are addressed in Chapter 11 (Due Process Issues) in the section on court-appointed counsel.

2.3.1 Historical Perspective

Federal contributions to the provinces and territories prior to the proclamation of the Young Offenders Act (YOA) were made under different mechanisms, depending on the jurisdiction. The Canada Assistance Plan (CAP), which was administered by Health and Welfare Canada, funded custodial services for juvenile delinquents in those jurisdictions that elected to administer delinquency services to adjudicated delinquents through child welfare services.[16] These services were therefore eligible for federal financial assistance through the Canada Assistance Plan. Child welfare services relating to "care" and "after-care" of delinquents committed to custody (training school) were cost-shared on a 50 percent basis. There was no cost-sharing of non-custodial dispositions under the Juvenile Delinquents Act (JDA).

The federal government also entered into Special Young Offenders Agreements to cost-share expenditures for juveniles placed in custodial settings with those jurisdictions that did not choose to administer services to delinquents by means of the child welfare system. The Special Agreements parallelled the funding provided by the CAP. Like CAP, these Agreements were administered by Health and Welfare Canada.

In addition, the federal government contributed to the costs of custody of status Indian offenders who were transferred to the care of child welfare authorities under the JDA: 50 percent of the costs of aboriginal youth were paid for by this department if the young person was a status Indian who lived off-reserve, while 100 percent of costs were paid if the youth

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[16]Section 21 of the JDA permitted the transfer of juvenile delinquents to the care of the child welfare authorities.

lived on-reserve. This arrangement affected the western provinces and the two territories considerably more than other jurisdictions.

The proclamation of the YOA eliminated cost-sharing under the Canada Assistance Plan because the new Act did not allow committal to the child welfare system and because the Canada Assistance Plan agreement had a clause excluding cost-sharing of correctional costs. At the request of the provinces and territories - many of which were concerned about the impact of the new legislation on custody use - new agreements were negotiated with the proclamation of the YOA. The jurisdictions wanted to limit costs associated with the new legislation and maintain the historical 50-50 split for custodial services. In several jurisdictions, officials projected large increases in youth custody, especially where the uniform maximum age brought sixteen and/or seventeen year olds under the jurisdiction of the youth court.

Federal contributions from the Department of Indian and Northern Affairs for status Indian young offenders were terminated.

2.3.2 The New Young Offenders Arrangements

The Young Offenders Cost-sharing Agreement began in April 1984. The Agreement[17] provided for:

- 50 percent cost-sharing of custodial services, post-adjudication detention, alternative measures, and judicial interim release (bail) supervision programs; and,
- 50 percent cost-sharing, less a "base year" deduction,[18] of pre-disposition reports, medical and psychological assessments, screening services (related to diversion/alternative measures),

[17]Other funding was also provided by the federal government during the implementation of the legislation: implementation grants ($25 million); and implementation support funds for program development ($5.6 million), systems development ($10 million), and research ($2 million).

[18]The base year deduction was designed to permit a demarcation between pre- and post-YOA expenditures. Services previously borne entirely by the provinces and territories, such as probation, would not be fully cost-shared. The federal rationale for the deduction was to ensure that federal funding was directed towards incremental costs incurred for programming beyond that which existed in the base year of FY 1982-3, the last full year of the JDA. The restriction to incremental costs was intended to limit federal contributions to new costs arising from the YOA.

review boards, and post-dispositional community-based supervision services.

The federal government agreed to "share the risk" of the costs of custodial dispositions under the YOA. The costs of open and secure custody and post-adjudication detention were to be shared on a 50-50 basis.

The original objectives of the cost-sharing program were:

- o to promote and implement programs and services consistent with the philosophy and provisions of the Act; and,
- o to achieve more consistent processing, availability, and application of YOA programs and services in the provinces and territories.

At the end of the original agreement time frame, in 1989, as a fiscal restraint measure the federal Cabinet froze the financial commitment to the cost-sharing program at FY 1988-89 contribution levels. Since that time, the Department of Justice has contributed about $156 million annually to the provinces and territories. The current agreement expired on March 31, 1996. New financial arrangements, with federal contributions not to exceed $150 million annually (an additional 4 percent reduction due to further fiscal restraints), are in the initial stages of negotiation.

In the first ten years of cost-sharing (to FY 1993-94, inclusive), the federal government contributed approximately $1,363 million to the provinces and territories. The total (known) shareable costs of the YOA in the same ten years - the costs reported to the federal government as falling under the terms of the agreement - are $3,561 million. The majority of shareable costs, 70 percent, was allocated to custody, 25 percent was for shareable costs relating to services other than custody, and five percent was for administration.

2.3.3 Evaluation of the Cost-sharing Program

The 1993 evaluation of the Program[19] found that, despite the intentions of its designers, the objectives of the cost-sharing program were

[19]Programme Evaluation Section, Bureau of Review, Department of Justice Canada, The Evaluation of the Young Offenders Federal-Provincial/Territorial Cost Sharing Program, January 1994.

compromised by the terms of the agreement; that is, there was virtually "open ended" funding for custodial services, at the 50 percent rate, whereas community-based dispositional programs were subject to the "base year" deduction. This created an anomalous situation: federal funding could be viewed as fostering the use of custody rather than providing an incentive to develop non-custodial alternatives.[20] Depending on the jurisdiction, from 65 to 90 percent of federal contributions were directed towards post-adjudication detention and open and secure custody. The situation was not in keeping with the apparent emphasis in the Act on the use of community-based alternatives to incarceration.

The evaluation concluded that the cost-sharing program had a marginal to moderate impact on the development of services and facilities required to implement the Act. In smaller and less well resourced jurisdictions, the impact was greatest because of the limited services available under the JDA. The evaluation concluded that all provinces and territories developed non-custodial programs required by the YOA, such as community service order and compensation/restitution programs. Open and secure custody facilities are, of course, available in all jurisdictions, although their characteristics - e.g., degree of security and programming available - vary considerably. The cost-sharing program provided concrete financial support for such programs and, to that extent, the objective of "to provide support for programs and services" was achieved.

However, several jurisdictions had not completed their service delivery infrastructure at the time of "capping". The capping decision affected jurisdictions differently — largely because their young offender services were at various stages of development when the federal government decision was announced. In the view of a number of provincial/territorial officials, five years was insufficient time to develop and finalize young offender programs. Many correctional systems were still in a period of flux at the time of capping. For example, in some jurisdictions the costs of new facilities and of major renovations of older custodial facilities that occurred after the capping decision were not cost-shared because these [21]costs were incurred after the capping decision, but in other jurisdictions new facilities and renovations were completed before the decision to cap and were cost-shared. In some jurisdictions, there were increases in the

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[20]Because of the base year deduction the federal contributions to non-custodial programs were somewhat less than 50 percent.

number of young persons sentenced to custody in the late 1980's and facilities had to be expanded to meet the demand. Jurisdictions most affected by the federal decision to cap contributions at FY 1988-89 levels felt that they had been penalized by their policy of "wait and see" (the effect of the legislation on custody levels), and regarded the freezing of federal contributions as a betrayal of earlier commitments by the federal government. As well, this led to inequitable treatment of jurisdictions vis-a-vis cost contributions from the federal government.

After the 1989 capping decision, federal contributions to young offender services, as a proportion of total provincial and territorial expenditures on these services, diminished.

The second objective of the cost-sharing program - more consistent processing of young offenders, and more consistency in the availability and application of programs — had less success. There are large variations by jurisdiction in the rates at which young persons are charged by police, in the use of pre-court screening, and in the length of custodial sentences. Decisions by the youth court do not reduce the variations introduced at the charging and screening stages, with the result that the proportion of the youth court-eligible population placed in custody varies greatly by jurisdiction. The differences were not explained by jurisdictional differences in offence profiles and other indicators of the seriousness of the case that were available to the evaluation.

The evaluation attempted to determine if the cost-sharing program inadvertently contributed to the heavy reliance on custody experienced by some provinces since the YOA. One possible explanation for the growth in custody use in these jurisdictions is that cost-sharing encouraged the over-development of custodial facilities. The evaluation did not bear this out. For example, higher custodial caseloads in some jurisdictions have occasioned overcrowding, and in some jurisdictions overcrowding is persistent. Jurisdictional variations in custody rates are most influenced by jurisdictional variations in police charging practices — the number of young persons entering the youth justice system.

The evaluation concluded that the original cost-sharing program did not greatly reduce inconsistencies in the processing of young offenders. However, a different type of financial arrangement, with terms more closely related to the policy objectives to be achieved, may produce a more positive result.

2.3.4 The Changing Environment

The environment has changed since the mid-1980's when the original arrangements were finalized. In addition to the ongoing and difficult reality of fiscal restraint at all levels of government, the legislation is being reviewed by Parliament as well as by the Task Force. Penalties in the legislation have been made more severe, at least with respect to murder offences, and there is continuing pressure in some quarters to make them more severe for murderers as well as other serious offenders. As a consequence, possible changes to the Act may have considerable cost implications that can only be fully appreciated when the specifics of changes are known.

Of concern to the provinces and territories is that the costs of administering the Act continue to increase, both because of inflation and other factors. In most jurisdictions, the use of detention and custody has risen since the "capping" of federal contributions at FY 1988-89 levels. Further, population projections of the young offender age group indicate that the costs of service delivery in Ontario, Alberta, British Columbia, and the territories will increase because of the growth in numbers of this age group; based on these projections, costs will grow even if there is no increase in the involvement of young persons in the youth justice system. Consequently, federal contributions, as a proportion of total provincial and territorial expenditures, have diminished since 1989 and will continue to do so.

Generally, the policy directions recommended elsewhere in this report are not based on financial considerations. However, a number of the recommendations that respond initially to pure policy considerations are strongly reinforced by consideration of their potential financial implications. Arguably, some other recommendations do present a risk of increasing service delivery costs, but even these would further emphasize the need for taking advantage of any opportunity there is, within the finite resources available, to implement all policies which would optimize cost-efficiency and cost-effectiveness.

When the costs of administering the Act are examined, one area that stands out is custody. The costs associated with the use of custody are great: over $350 million a year overall. There are considerable

differences across the country in the use of custody - these variations appear to have little to do with differences in the relative seriousness of cases brought to court across jurisdictions. As noted above, the evaluation of the cost-sharing program concluded that jurisdictional differences in the use of custody are most influenced by variations in police charging practices. Decisions made at subsequent stages in the process do not appear to alter these differences.

Another area that stands out is the cost associated with formal youth court processing, including prosecution, defence counsel, and court administration costs. Again, there are considerable differences in youth court appearance rates across jurisdictions, which cannot be adequately explained by differences in the relative seriousness of cases brought before the courts.

These findings suggest that in order to ensure that the youth courts and custody, with their high costs, are used as measures of last resort, a concerted effort must be made first and foremost to reduce the volume of cases that are brought to court. A number of recommendations are submitted elsewhere in this report that seek means to achieve this goal (see Chapter 4).

Secondly, with respect to the cases that still require the attention of the courts, we must try to develop a wide range of credible community-based options which could be considered alternatives to pretrial detention and dispositional custody, so that young persons are not committed to custody for a lack of alternatives. Chapter 5 and 6 of this report present several recommendations designed to enhance both the number and quality of "lower-end" and "upper-end" community dispositions and programs, while Chapter 8 recommends means to more routinely assess the risk and needs of young persons and thereby more effectively target resources.

Finally, concerns have been expressed that the youth justice and correctional systems are sometimes called on to fill a role that, in principle, would belong, at least in part, to another youth serving system. Earlier in this Chapter (2.2) there are recommendations respecting ways to ensure a better coordination of these different systems so that a cooperative approach, respectful of each system's roles and responsibilities, can be taken in appropriate cases.

Although it is difficult to estimate with any accuracy the financial impact of these recommendations if they were implemented either selectively or collectively, there is general agreement among the members of the Task Force that these should eventually contribute to a more effective and cost-efficient youth justice system.

The challenge of making the youth justice/correctional system more cost-efficient is further complicated by the issue of how to appropriately address the most serious cases of offenders or offences. Certainly, there will always remain a small percentage cases where moderate to long term custody is necessary. There is a real dilemma in trying to provide for an adequate response to serious youth crime while at the same time attempting to limit the degree of intervention with less serious crime.

For example, the 1992 and 1995 amendments to the Act increased the maximum youth court penalties for murder. Although it is too early to determine the actual impacts of these new measures, it is clear that, everything else being equal, they will contribute to a direct increase in costs. It is also possible that these measures, despite their focus on murder, may indirectly increase overall costs by provoking an increase in the unwritten "tariff" applicable to all other offences. Of course, it is virtually impossible to quantify the indirect financial implications of these measures. The concern is real and legitimate, however, that these changes could offset, to an unknown degree, the cost efficiencies that could be realized by reducing either the use of the youth court system or, ultimately, reliance on custody. Furthermore, there is still some scepticism concerning the possible effect of the recent amendments, introduced by Bill C-37, which set out additional restrictions on the use of custody.

To some extent, the various recommendations contained in this report, which are designed to promote the use of more cost effective "front end" measures, are affected by similar doubts about the extent of their impact on costs. These doubts, however, do not diminish the strength of the case for such measures. They actually emphasize the need for this type of reform to be undertaken in order to contain, if not reduce, the overall costs of the system.

The issue of how to deal with serious young offenders goes well beyond the question of changing maximum penalties and determining the impacts of these changes on the overall use of custody. Elsewhere in this report,

the Task Force stresses the need for effective rehabilitative programs to deal with young offenders in custody and those reintegrating into the community after a period in custody (see Chapter 8). This aspect of the youth correctional system has been identified as needing improvement. If custody is to be more than just a temporary measure of incapacitation for the young offenders who require it, the focus should be on providing appropriate programming to prepare them for successful reintegration into the community. The costs associated with developing and implementing these programs, over and above the cost of housing these offenders in a custodial environment, should not be underestimated and although this necessary investment should pay some dividends in the longer term, one would not expect the social and economic benefits to be felt immediately.

2.3.5 Future Financial Arrangements

The Task Force acknowledges that there were "historical inequities" in the original financial arrangements; e.g., the base year deduction, the perceived penalizing of some provinces because of their pre-existing programs and services under the JDA, and - especially - the 1989 capping of contributions. It is also acknowledged that the freezing of federal contributions, along with increasing costs and numbers of young persons being referred to youth corrections, have placed added constraints on the development of young offender programs, particularly given that the shrinking of available program dollars is not confined to the federal scene.

To redress these inequities it would be necessary to adjust the present fixed maxima received by each jurisdiction. The Task Force considered a variety of factors on which redistribution of federal contributions could be based (e.g., levels of youth crime, youth population size, provincial/territorial expenditures, and the amount of current contributions) but decided that such recommendations were beyond the scope of this report and best left to future negotiations.

There are different ways in which future financial arrangements could be structured. The Task Force considered and then rejected options that involve block funding, including block funding that in some way targets specific programs. While this approach would at first glance appear to offer the greatest degree of flexibility to the provinces, there are problems associated with such an arrangement. It is possible that the young offender component would be merged with much larger federal transfers (i.e., the Canada Health and Social Transfer), making the young offender

component more vulnerable to funding cuts. Block funding could mean that federal young offender contributions may be placed in direct competition with other social and health services — a situation that could also result in a reduction of funds allocated to young offender services. Therefore, the probability that block funding would allow the new cost-sharing arrangements to meet historical or new policy objectives appears very low. As well, the basis for federal cost-sharing of young offender services is different from federal transfer payments for social and health services - unlike social and health services, the criminal law is an area of shared jurisdiction between the federal government and provincial and territorial governments. While the federal government has jurisdiction over criminal law and procedure, with the provinces and territories having jurisdiction over the administration of justice, these cross-jurisdictional roles are inextricably linked.

Apart from a consensus among Task Force representatives about the undesirability of block funding, two perspectives on future financial arrangements emerged - a federal perspective and a provincial and territorial one. From the federal perspective, there is no realistic prospect of an increase in federal contributions and there is a need to re-structure and target federal financial contributions to better satisfy shared social policy objectives. From the provincial and territorial perspective, the desirability of re-structuring the youth justice system to make it more efficient and effective is not questioned, but doing so by way of re-profiling cost-sharing arrangements is not realistic unless there is a federal commitment to "share the risk". These different perspectives are set out below.

2.3.6 Federal Concerns and Limitations

The federal government understands the concerns that the 1989 capping of federal contributions, and further reductions in 1996, may have reduced the capacity of jurisdictions to finance young offender services. Nonetheless, the present fiscal reality is such that it is highly improbable that these decisions can be reversed - simply maintaining present levels of financial contributions should be recognized as something of an achievement. Provincial and territorial governments are well aware of the need for fiscal restraint - the federal government is not alone in having to reduce expenditures in several areas of government services. Hence any requests by provincial and territorial governments for additional federal financing are not realistic.

Given these fiscal realities, what is really at issue is the most effective use of federal contributions. The rationale for federal financial contributions in the area of juvenile justice is the joint federal - provincial - territorial responsibility for youth justice. The constitutional basis for federal contributions to young offender programs and services derives from its jurisdiction over criminal law and procedure, and is further recognized in the Act (s.70). However, if financial arrangements cannot be reasonably demonstrated to support the federal legislation and federal youth justice policy, the justification for their continued existence will be questioned at the federal level. The total federal contribution - $150 million annually - is, after all, a substantial sum and must be rationalized on the basis of sound policy objectives.

The federal government has been and continues to be concerned that seventy percent of its financial contributions are directed toward custody. Future financial arrangements must be in keeping with the policy directions suggested elsewhere in this report, such as re-targeting the resources of the youth justice system to better ensure that serious young offenders in custody are provided comprehensive and effective rehabilitation and reintegration programs and, also, to enhance the diversion of less serious cases from the youth court system and from custody. Ultimately, a re-focusing of federal funds will serve provincial and territorial interests by reducing the volume of youth court cases and the volume of less serious youth in custody, thereby focusing the use of expensive court and custodial resources on the more serious cases that require these interventions.

Because of the current limitations on federal contributions - $150 million annually, with no reasonable prospect of an increase - any change to the agreement will of necessity require a reduction in the amount of federal funds directed to custody. This is unavoidable: financial arrangements which continue to dedicate a substantial proportion of contributions to general custody services (e.g. basic staffing; capital costs) are unsupportable as a wise or efficient expenditure of federal funds over the long term.

It is recognized that the development of renewed financial arrangements for young offender services should take into account certain provincial/ territorial imperatives: the need for stability of funding over several years, for incremental implementation of changes to the funding arrangements in a manner that does not disrupt service delivery, and the need for flexibility

so that jurisdictions can develop programs consistent with their own needs and priorities but within the framework of agreed-upon social policy objectives.

It is recognized that the development of new financial arrangements will require a reasonable degree of certainty with respect to the stability of future federal funding. The provinces and territories cannot be expected to plan modifications to their services if they cannot determine in advance the level of federal funding they can rely on to implement these changes. Federal representatives on the Task Force acknowledge the problems associated with a lack of predictability in federal funding and agree that, to the extent possible, jurisdictions should be provided with indications that enable them to predict the level of federal funding over the next several years.

The sound planning and implementation of change, in an area as complex as the juvenile justice system, cannot be achieved overnight. In order for re-structured financial arrangements to have the opportunity to meet intended objectives, there is the necessity to proceed gradually. Too rapid a change may well lead to disorganization, and unforeseen negative consequences. The re-targeting of federal contributions should be incremental so that no untoward disruption in service delivery occurs.

With a gradual process by which funds are re-directed to new programs, it is hoped that youth correctional agencies could be able to document cost savings or cost avoidance that will assist in convincing their own treasury boards that the new programs are effective.

With regard to flexibility, even though the same general principles and parameters must apply to all jurisdictions, it is acknowledged that the federal government must recognize the jurisdiction of the provinces and territories over the administration of justice. In practice, this has translated into the provinces and territories adopting different infrastructures and service delivery modes for the same generic programs and services. Jurisdictions should be encouraged to implement the required changes in ways that, given specific jurisdictional priorities, are most likely to diminish inconsistencies in youth justice systems across Canada and to further the directions being proposed by the Task Force. The new financial arrangements have to recognize that jurisdictions are in different stages of development of their services. For example, some jurisdictions have placed more emphasis on alternatives to custody

whereas others have focused on screening services and pre-trial diversion. Consequently, the funding arrangements have to be flexible so that jurisdictions are able to focus on their areas of greatest need. The allocation of federal contributions within the "envelope" of available funds should be flexible enough to accommodate the very different contexts in which provincial/territorial youth correctional systems operate.

Another area where flexibility is required is in the definition of custody, for cost-sharing purposes. One of the primary objectives of re-profiling is the promotion of community-based alternatives to custody. It is acknowledged that a simple "custody/not custody" dichotomy would not accurately reflect the realities of youth correctional programming. For example, most jurisdictions have established foster-type "community homes" and group homes as part of (or most of) their open custody systems. Although a form of custody from a purely legal point of view, these are clearly community-based programs. As well, in small rural (and aboriginal) communities, community homes may, due to small numbers, be the only viable alternative. Reducing funding for these types of programs, simply because they happen to be legally defined as custody, could prove counter-productive and inconsistent with the objective of promoting community based programs. In short, there should be enough flexibility in the new arrangements so that "community-based" programming is programmatically defined, rather than legally defined, for cost-sharing purposes.

In light of these considerations:

Federal representatives recommend that:

(1) New federal-provincial-territorial financial arrangements for young offender services be structured to meet the following overall goals:

- **(a) to promote and implement programs in keeping with the philosophy and provisions of the Young Offenders Act;**
- **(b) to achieve greater consistency among jurisdictions in the availability and application of young offender programs; and,**
- **(c) to target federal funding towards specific programs and services that are consistent with the social policy objectives of minimizing intervention in cases where the protection of society from serious harm is not a principal concern (e.g., the expansion of alternatives to formal justice system**

intervention and of alternatives to custody) and of providing rehabilitative and reintegrative programs directed towards serious and/or chronic offenders.

(2) The specific policy objectives of financial arrangements should be to target federal contributions:

- **(a) to increase the use of alternatives to the formal court system for less serious offences (e.g., by means of enhanced screening and alternative measures);**
- **(b) to reduce the use of custody for less serious offenders who do not pose a risk of serious harm to society;**
- **(c) to better ensure that serious, chronic and high risk offenders are provided with comprehensive rehabilitative programs while in custody, and that there are appropriate community support/reintegrative programs for these offenders upon release from custody, such as intensive supervision and aftercare programs; and**
- **(d) to undertake research and program evaluation on the effectiveness of correctional programs, and other programs such as crime prevention, in order to maximize efficiency and effectiveness of service delivery.**

(3) The new financial arrangements shift federal funding from custody to the above-noted types of programs in a manner which will, to the extent possible:

- **(a) provide stability of funding to the provinces and territories at current levels;**
- **(b) be introduced gradually so that service delivery is not disrupted; and,**
- **(c) be sufficiently flexible so that jurisdictions can develop programs consistent with their own needs and priorities but within the framework of the above-noted social policy objectives, and also flexible in the definition of eligible services so that community-based services are programmatically defined.**

The implication of this last recommendation is that there will be incremental (annual) reductions in the federal share of custodial costs and a corresponding increase in the monies available for new programs and services that meet the policy objectives outlined above. The rate at which federal contributions to custody are made will decline annually, and

the ultimate proportion of federal contributions to custody will be the subject of negotiations. The costs of new programs to provinces and territories can be minimized by structuring federal contributions in a manner that initially absorbs a substantial proportion of these costs. If the new programs are successful in diverting youth from court and custody - or, in the case of serious offenders, successful in reducing recidivism - the provinces and territories will eventually experience cost savings/avoidance.

It is understood that before the new programs and services that are targeted for federal funding could have an impact on the use of custody, there will be a period of time during which the provinces and territories will have to assume responsibility for filling the gap left by reduced federal funding for custody. It is acknowledged that this will place an increased strain on provincial and territorial budgets to provide for the required services and programs during that period of time. However, it is submitted that, within the context of finite federal funding, the best way to ensure that the targeted alternative services and programs recommended elsewhere in this report are indeed developed is to use federal funding to do it. Although provinces and territories will have to temporarily fill the gap for reduced federal funding of custody, they will have little additional funding to provide for the development of these services and programs, which are likely to save them money down the road. If the federal government were not to insist on the development of these alternatives, it is submitted that provinces and territories might find themselves in a much worse situation whereby they could not find the necessary funding to develop more cost-effective programming and, as a consequence, would have to assume the considerable increases in costs associated with an ever-growing custody population.

2.3.7 Provincial and Territorial Perspective

Provincial and territorial representatives fully agree that, to the extent feasible, the resources of the youth justice system should be better focused so that the diversion of less serious cases from the youth courts and from custody is maximized and there is a strengthening of rehabilitative and aftercare programs for serious offenders in custody. What is at issue is not these desirable objectives, but whether they can be realistically achieved within the context of federal financial cutbacks, proposed re-structuring and other considerations - and without a commensurate commitment from the federal government to assume a share of the fiscal responsibility for re-structuring.

The 1989 capping decision and 1996 reduction in federal contributions represent a betrayal of federal commitments made to jurisdictions at proclamation of the YOA and an erosion of the federal responsibility that goes along with the constitutionally shared federal-provincial-territorial jurisdiction for young offenders. In effect, the federal government has, since 1989, compromised any role it could have played in the development in the same types of programs it now wants to encourage.

Since the 1989 capping decision, the costs of young offender services have increased - substantially so in many jurisdictions. Because of capping, these additional costs have been fully absorbed by provincial and territorial governments, thereby significantly impairing the capacity of provincial and territorial governments to enhance - or, in some cases, even maintain - programs involving diversion, alternatives to custody and rehabilitation programs for serious offenders. Changes in federal legislation - such as the increased youth court dispositional maxima for murder and the judicial placement of transferred young persons in youth custody or provincial adult correctional centres - have, in part, contributed to these increased costs.

The costs of young offender services are expected to increase as a result of inflation, significant youth population increases in several jurisdictions, and the costs of legislative changes such as the seven and ten year youth court dispositions for murder (Bill C-37) and the placement of transferred young persons in youth custody centres (Bill C-12). The federal government has committed itself to provide stability of funding, to the extent possible, in new financial arrangements. "Stability of funding" translates into fixed federal contributions ($150 million) in an environment of escalating costs. As such, this amounts to a commitment to a diminishing federal responsibility in area of shared jurisdiction.

Provincial and territorial representatives agree that, if there is to be a re-structuring of financial arrangements, there needs to be flexibility in arrangements to address unique jurisdictional needs, programmatic definition of what constitutes community based programs, gradual change, and stability of federal contributions. The history of unilateral capping and reductions in federal contributions - along with federal reluctance to resolve cost issues related to serious offenders (see below) - cast doubt on the reliability of the last assurance. As this report was being finalized, the new federal budget provided that, commencing in 1998/99, there would be a further 3.5 percent reduction in the overall

budget of the federal Department of Justice. Whether this overall departmental reduction will lead to further reductions in federal young offender cost-sharing contributions - which comprise about one-third of the departmental budget - is not known at this time. It is noted that the federal commitment to stability of funding is only "to the extent possible".

On the face of it, proposals for re-structuring appear reasonable and desirable. As with many proposals, however, the issue is the ability to translate good intentions into workable solutions. It is "stability of federal funding" - i.e. fixed federal contributions in the reduced amount of $150 million - that is crucial to this issue. **Stability of federal funding in the context of proposed re-structuring will inevitably lead to instability in provincial/territorial funding of young offender services.**

To explain, let us take the example of $1 million of federal contributions currently dedicated to custody in one jurisdiction, being re-targeted to new alternatives to custody programs in the first year of incremental implementation of re-structured financial arrangements. If the $1 million are re-allocated to these new programs, it has to be drawn from somewhere. This leaves the jurisdiction with one of two unacceptable choices. First, provincial funding for other young offender services may have to be withdrawn - such as stripping youth custody centres of teachers and psychologists, or eliminating probation officer positions. Alternatively, the provincial government would have to maintain current services and fill in the gap of "re-allocated" federal contributions with new provincial funding. If so, the costs of re-structuring would be fully borne by provincial and territorial governments. In effect, then, re-structuring would become a mechanism which foists full responsibility for new program funding onto the provinces and territories, with the federal government - given fixed contribution levels - assuming no responsibility in the area, nor "sharing the risk".

Provincial and territorial governments are not in a position to finance such re-structured arrangements, given federal capping and cutbacks, federal cutbacks in the financing of other social programs, general fiscal restraint, and projected cost increases. Despite efforts, Task Force representatives have been unable to identify means by which the above-described pitfalls could be reasonably avoided under the terms of re-structured financial arrangements.

Some jurisdictions have calculated the impact of re-structured financial arrangements and have concluded that this could lead to substantial reductions in federal contributions.

It is suggested that re-structured financial arrangements to support new, targeted programs will lead to cost savings and/or cost avoidance. While every effort must be made to reduce or avoid costs, the potential impact of new programs should not be over-estimated. For example, a significant program initiative involving alternatives to custody might reduce admissions to custody by fifteen percent in a jurisdiction or area. A fifteen percent reduction in admissions to youth custody would not, however, translate into a fifteen percent reduction in custody costs because the cases most likely to be siphoned off from custody are the "softer" end cases serving shorter dispositions. Because this population is serving shorter dispositions, they would represent a much smaller proportion of the total youth custody population on any given day, e.g. five percent, rather than fifteen percent. Such small changes may only lead to some relief from overcrowding, but no appreciable cost-savings. While this would be beneficial, social and operational benefits should not be confused with cost savings. As well, the costs of the well-known phenomenon of "net widening" must be factored in, i.e., where programs intended as alternatives to custody, in practice, become "add-ons" to cases that would not be committed to custody.

Another concern is the implicit assumption that, because large proportions of young persons are committed to custody for non-violent offences, very large numbers could and should be dealt with by non-custodial alternatives. While there is certainly a need for more non-custodial alternatives - and many jurisdictions have been moving in that direction - simple descriptive statistics of this nature tend to paint an unrepresentative portrait of youth in custody on any given day because they fail to, for example, take into account: differences between admissions and count; prior history of violence; prior history of other offences; the number of current offences and nature and pattern of prior offences; and previous non-custodial (justice and non-justice) interventions tried. When these factors are considered, the portrait of youth in custody changes considerably.[22] Moreover, it must be recognized that in most

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[22]For example, in British Columbia in 1994-95, 24 percent of admissions to custody were for offences against persons, but 33 percent of the "count" - i.e., the average daily population - were in custody for violent offences. When prior history of violence is included as a criterion, nearly one-half of admissions to custody had a current or prior history of violence, and more than one-half of the count would have a current or prior history of

jurisdictions, substantial proportions of young persons in custody are in fact in programs which, although legally defined as (open) "custody", are community-based, e.g. group homes and foster homes.

In short, more in-depth, quantitive and qualitative research is required before firm conclusions can be drawn about the apparent inter-jurisdictional variations in rates of custody, the appropriateness (or otherwise) of those who are in custody, and the degree to which enhanced non-custodial alternatives may reduce custody populations and costs.

The only way to achieve appreciable cost savings of custody is to substantially reduce total daily custody populations so that whole centres, or at least units within centres, are able to be closed. Even if substantial initiatives in new programs do eventually result in the closure of custody units, a considerable period of transition time is required to realize savings, i.e., to plan and implement these new programs, for them to gain credibility with the judiciary, and for the gradual reduction in custody admissions to eventually result in a reduction in average daily custody populations. Changing systems is a complex and long term process requiring a considerable investment of time and resources in, for example, education and training and in organizational and community development. There is little in the way of information about the "technology" of systemic change.

A similar situation arises with programs to divert more cases from youth court. A reduction in the volume of youth court cases may lead to reduced court backlog and delay. These would be welcome changes, but again should not be confused with cost savings - court and prosecution costs are largely fixed. Some savings would likely be realized in the costs of legal aid/court-appointed counsel, but there have been federal reductions in the financing of these services as well.

The only way to avoid the significant problems associated with the proposed re-structuring of financial arrangements is for the federal government to provide transitional or "bridge" funding for a time-limited period. These transitional funds could be dedicated to the types of

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violence. These youth had also been subject to different alternative interventions: almost 80 percent had current or prior child welfare involvement and there are many correctional alternatives to custody available in that province. Less than 3 percent of the count had no prior offence history and nearly two-thirds had previously been sentenced to custody.

programs proposed and would complement a re-structuring of current allocations. The initiative could then be evaluated at the end of the five year period.

The most serious young offender cases are the most costly, precisely because they attract lengthy custodial dispositions. Amendments in 1992 (Bill C-12) respecting the placement in youth custody centres (or in adult provincial correctional centres) of young persons who are transferred to adult court and imprisoned has resulted in additional custodial costs for provinces and territories.[23] The new ten and seven year youth court dispositions for murder (Bill C-37) raise significant issues for provincial and territorial governments vis-a-vis costs, cost-sharing, and placement. These issues remain unresolved. As well, the costs associated with proposals discussed in this report to either increase the dispositional maxima for the most serious offenders or to increase the frequency of transfer to adult court are also unresolved. This is not a comment on the merits of these legislative measures and proposals - there are different views on that - but rather to point out that the most serious offenders absorb considerable resources and that federal legislative changes have cost impacts which affect the capacity of youth correctional systems to initiate or maintain programs for other young offenders.

While the federal Department of Justice is only responsible for cost sharing of young offender services, financial arrangements for these services cannot be completely divorced from federal reductions in transfer payments for other social and health programs. These reductions have and will affect the capacity of provincial and territorial governments to maintain all forms of social and health programs for children and young persons, including services to young offenders. Should general services need to be reduced, this may indirectly contribute to increased youth crime rates in the future. Moreover, a wide-range of complementary services are - given the multi-problem nature of many young persons in the youth justice system - provided to young offenders by other child-serving systems such as child welfare and children's mental health agencies. If the services of these other child-serving systems are not able

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[23]These costs are fully borne by provincial and territorial governments because, even though there may be a federal sentence of imprisonment (two years or more), placement is accomplished by way of judicial order. Therefore, the young person is not admitted to a federal penitentiary and is not, for example, transferred to provincial or territorial jurisdiction under Exchange of Services Agreements.

to be sustained, there likely will be - contrary to the directions recommended in this report - increasing pressures to address the presenting problems of these young persons through the youth justice system, including custody. Carrying this further, if services for young offenders now provided by other child-serving systems are reduced, new alternative programs developed under the auspices of re-structured financial arrangements for young offenders may not be "new" at all, but only replacements for services formerly provided by other child-serving systems - with no net gain.

There is a common interest among representatives from all jurisdictions in enhancing diversion and alternatives to custody, and focusing expensive youth justice resources on more serious young offenders. These directions are set out in this report, including proposals for new programs and initiatives. In several cases, funding will be required, but most jurisdictions are, given fiscal restraint, not in a position to fund new initiatives. Given this, it should be recognized that the implementation of some of the general directions and of some specific recommendations in this report will, in part, depend on the satisfactory resolution of cost-sharing issues.

In light of the above:

Provincial and territorial representatives recommend that:

(1) **The 1989 "capping" of federal contributions to young offender services, and the 1996 reduction to the same, be lifted.**

(2) **Proposals to re-structure federal contributions to young offender services should only be supported if the federal government commits itself to sharing responsibility in this area of shared jurisdiction by providing sufficient "bridge" funding to support and enhance the "re-profiling" of federal contributions. If the federal cap is lifted, this could be accomplished by dedicating the difference between the capped and uncapped contributions to bridge funding. If the cap is not lifted, this will require additional financial contributions from the federal government.**

(3) **The federal government should:**

(a) clarify that the federal government will assume full financial responsibility for young persons who have been transferred to adult court and sentenced to federal imprisonment (two years or more), including those who are judicially placed (s.16.2 YOA) in youth custody or in an adult provincial correctional facility for adults;

(b) enter into special financial arrangements respecting the costs of custodial and community services to young persons who are subject to a youth court disposition of more than three years; and

(c) recognize that the degree to which custodial dispositions absorb the resources of youth correctional systems is affected not only by administrative and cost-sharing considerations, but also by legislation which is the sole responsibility of the federal government.

(4) Ministers Responsible for Youth Justice should be aware that the implementation of some of the general directions and of some specific recommendations in this report will, in part, depend on the satisfactory resolution of cost-sharing issues.

2.3.8 Next Steps

Given the current fiscal climate, it is very unlikely that the federal government will be able to satisfy provincial and territorial requests for a lifting of the cap or for bridge funding to support re-profiling. It is also recognized that it is the prerogative of the federal government to decide on its own to proceed with re-profiling, notwithstanding the concerns of the provinces and territories. If so, then it would serve the interests of all parties to proceed forthwith with the negotiation of new financial arrangements. As well, it is agreed by provincial and territorial representatives that these new financial arrangements should address the key principles of stability of funding, gradual implementation of re-profiling, flexible arrangements which address unique jurisdictional needs, and suitable (programmatic) definition of what constitutes "community-based" programs.

Given this,

The Task Force recommends that, if the federal government is unable to satisfy the aforementioned requests by the provinces and

territories and decides on its own to proceed with re-profiling, negotiations of new financial arrangements should proceed forthwith. It is also agreed that these new arrangements should include recognition of the needs for stability of funding, gradual implementation of change, flexibility to accommodate unique jurisdictional needs, and suitable programmatic definition of which types of programs are eligible for cost-sharing as community based programs.

2.3.9 Other Federal Funding

Specific federal funds for aboriginal youth correctional programs ceased with proclamation of the YOA, although there has been funding for some other types of programs.[24] Funding for aboriginal youth was, in part, absorbed into the terms of the new cost sharing agreement but, because 100 percent of the costs of services to (on-reserve) status Indian youth was no longer provided, there was an overall decrease in federal financial support for aboriginal youth. At the time of the original cost-sharing negotiations, it was decided to defer discussion of special federal cost-sharing provisions for aboriginal youth until later, after major parameters of federal-provincial-territorial cost-sharing had been determined. Despite requests from jurisdictions to address this issue, new financial arrangements were never realized in the ensuing twelve years.

In several jurisdictions, young persons of aboriginal origin make up substantial proportions of the caseloads of youth courts and youth correctional services, especially detention and custody. This representation is greatly disproportionate to the representation of aboriginal persons in the general population. It is widely agreed that every effort should be made to reduce the disproportionate reliance on

[24]For the past 25 years, the Department of Justice Canada has had cost-sharing agreements with most provinces and territories to support Native Courtworker Programs. The purpose of this program is to assist aboriginal peoples in conflict with the law. Courtworkers provide counselling (other than legal advice), help aboriginal people understand the nature of the criminal charges against them, and refer them to legal or other resources. In 1988, the mandate of the program was expanded to include services to aboriginal youth.

As well, the Department of Justice Canada has, under the Aboriginal Justice Initiative, allocated $10 million in project funding to aboriginal communities since 1991. A number of projects (eg. The St. Theresa Point Court Project) have targeted youth and young offenders. Workshops and conferences dealing with youth justice issues have also been held. The Aboriginal Justice Directorate has recently been renewed for another five year term. The amount of grants and contributions to be allocated to aboriginal communities has not yet been determined, however, youth justice is often identified as a priority issue by aboriginal organizations and communities.

detention and custody of aboriginal youth and to ensure that culturally appropriate programs are available.

Another area of concern is the relationship between and coordination of different federal cost-sharing programs. Earlier in this Chapter (2.2), we discussed the need to improve the coordination of youth justice and complementary youth serving agencies that fall within provincial and territorial jurisdiction. This same need is evident at the federal level where, at times, policies of different federal departments present obstacles to coordination of services. As an example in point - and without getting into the complex details of financial arrangements - the terms of the Canada Assistance Plan (CAP) does not, due to a "correctional exclusion" clause, allow for flexible cost-shared arrangements where a young person is receiving child welfare services and is also subject to a youth court order.[25]

The Task Force recommends that the Federal Minister of Justice take steps to:

(1) develop special funding arrangements for aboriginal youth, with a view to enhancing federal financial support and services to this population; and

(2) ensure that, in consultation with other responsible federal Ministers, different federal social program funding arrangements are complementary and encourage the coordination and delivery of suitable services to young persons.

[25]While the CAP has been replaced by the Canada Health and Social Transfer, the terms and conditions of the former agreement still affect the amounts each jurisdiction receives in federal contributions.

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CHAPTER 3 - AGE JURISDICTION

3.1 MINIMUM AGE

> "... we emphasize that there is not any one age that can be said to be the 'right' minimum age of criminal responsibility, apart from a balancing of the various considerations that must be taken into account ..." (Report of the Department of Justice Committee on Juvenile Delinquency in Canada, 1965, p.44).

While the Juvenile Delinquents Act (JDA) did not establish a minimum age of criminal responsibility, the Criminal Code set seven years as a minimum age and also incorporated the common law rule of doli incapax for children. Under these provisions, there was a presumption of incapacity for children under the age of fourteen years - a child could not be convicted unless the court determined the child was "competent to know the nature and consequences of his conduct and to appreciate it was wrong".[1] If a child under twelve years was found delinquent, the JDA also established restrictions on committals to industrial or training schools (custody).[2]

In the twenty year process leading to the passage of the (YOA), there was a broad consensus that the minimum age of seven years should be increased, although there was some debate about which age should be selected.

The 1965 Report of the Department of Justice Committee on Juvenile Delinquency in Canada recommended raising the age to ten years or at most twelve years of age. The 1975 federal Solicitor General's Report on Young Persons in Conflict with the Law recommended a minimum age of fourteen years, but this proposal was opposed by most provinces and territories.[3] By 1977, the federal Department of Solicitor General had settled on a proposed minimum age of twelve years, which was then publicly announced and

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[1]Section 13 Criminal Code. While the YOA raised the minimum age of criminal responsibility from seven to twelve years of age, it also lowered the minimum age of presumed capacity from fourteen to twelve years.

[2]A committal of a child under 14 years to an industrial school was not lawful: "... unless and until an attempt has been made to reform the child in his own home or in a foster home or in the charge of a children's aid society, or of a superintendent, and unless the court finds that the best interests of the child and the welfare of the community require such commitment" (s.25 JDA).

[3]Quebec, however, supported a minimum age of fourteen years. In 1977, Quebec's new Youth Protection Act precluded the criminal prosecution of children under the age of fourteen years, but this was later struck down by appellate courts as ultra vires provincial jurisdiction. After this, restrictions on the prosecution of children under fourteen years continued as a matter of policy in Quebec.

remained unchanged throughout the debates about Bill C-61 and its subsequent proclamation as the Young Offenders Act (YOA) in 1984. Submissions to the Standing Committee on Justice and Legal Affairs concerning Bill C-61 indicate broad support at that time for a minimum age of twelve years from jurisdictions and interest groups, except for police associations and British Columbia, the latter of which urged a means to prosecute children under twelve in exceptional cases. Unlike the proposed new uniform maximum age of eighteen years, the proposed new minimum age prompted little debate.

While many reasons were advanced for raising the minimum age and selecting twelve years, which appeared to be a compromise choice, the key arguments in favour of this proposal included:

- Age twelve roughly corresponds with the onset of adolescence, a stage of development and social maturation set between childhood and adulthood.
- While some or many children under twelve years may have the capacity to commit a criminal act, there was doubt about the capacity of children this young to meaningfully participate in the criminal justice process, especially the more formalized and rigorous due process orientation of the proposed new Act.
- The small number of criminal offences committed by children under twelve.
- The stigmatization and labelling associated with the criminal justice process, along with the possibility of the confinement of children of tender years with more criminally sophisticated older adolescents in custody, could be detrimental to the interests of these children and, ultimately, the community.
- Child welfare and/or children's mental health systems are a more appropriate means of addressing the needs and circumstances of these children and their families insofar as these systems are non-criminal and have services which are more age-appropriate, family-oriented, and therapeutic in nature. Since these systems, which can be fairly intrusive, can and do respond to child offending in some cases, perceptions that offending children will not be dealt with are not accurate.

- o A philosophical belief that the application of the criminal law should be limited as much as is reasonable.

These remain the key arguments in support of the status quo.

Since the YOA came into force, several concerns have been raised about the minimum age, many of which are related to the perceived inadequacies of alternative social interventions (principally child welfare systems) that may or may not be applied to offending children. These concerns include:

- o A lack of clear provincial legislative authority to intervene in some cases, in some jurisdictions, as well as inconsistencies in provincial legislative authority across jurisdictions.

- o Inadequate child welfare responses to serious and/or persistent child offenders, whether due to inadequate resources or otherwise.

- o Unlike the criminal justice system, child welfare systems are founded on the protection and best interests of children. It is inappropriate to expect these systems to fulfil justice functions, such as the protection of society from criminal behaviour, the responsibility and accountability of offending children, or responding to the interests of victims. Given this, it is not simply a matter of the adequacy of these alternative systems to respond; they may in fact be the wrong systems to respond since they cannot be expected to fulfil justice functions.

- o Some children under twelve are aware of their immunity under the criminal law and consequently continue committing criminal acts, or may commit very serious offences, with relative impunity. This erodes respect for the law and compromises public safety.

Given the above, it is argued that the child welfare and children's mental health systems are inappropriate or inadequate to deal with some very serious or persistent cases of child offending, which therefore requires a general lowering of the minimum age or a capacity to prosecute serious or persistent offenders under the age of twelve in exceptional cases. A lowering of the minimum age to ten years is most commonly suggested, although some have suggested a return to seven years or no minimum age at all.

In 1986, Bill C-106 added section 23.1 to the Criminal Code to clarify that an adult or young person who, for example, aids or abets a child under twelve (or other person who cannot be convicted of an offence) may be criminally charged.

In 1991, a steering committee of the federal/provincial/territorial Senior Officials Responsible for Juvenile Justice carried out a comprehensive review of the minimum age and (with British Columbia dissenting) recommended that the present minimum age of twelve years not be lowered, but that provisions of some existing provincial/territorial child welfare legislation be referred to the Uniform Law Conference for study and recommendation.[4] Since that time, some jurisdictions have amended their child welfare legislation to strengthen or clarify the authority to respond in these cases.

Responses to the federal Department of Justice's 1993 public consultation document on young offenders - Toward Safer Communities - indicate divided opinion about lowering the minimum age. Generally speaking, academics, child serving professional groups, child advocacy and prisoner advocacy groups, Bar Associations and civil liberties groups did not support a lowering of the minimum age. However, police groups, victim advocacy groups, some private and public organizations such as the Canadian Chamber of Commerce and the Canadian School Boards Association, and many private Canadian citizens did support either a general lowering of the minimum age or a limited capacity to prosecute children under twelve in more serious cases.

3.1.1 The International Context

While the United Nations Convention on the Rights of the Child requires member countries to establish a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law, it does not require or recommend a specific minimum age of criminal responsibility.[5] The Convention does, however, require that measures be taken with children without resorting to criminal proceedings, whenever appropriate and desirable.[6] Similarly, other United Nations instruments which set standards

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[4] The Uniform Law Conference has not yet considered this issue.

[5] Article 40(3)(a). This Convention has been ratified by more than 100 countries and came into force in Canada on January 12, 1992. While the Convention does not have the force of law in this country, Canada has made a commitment to the Convention in an international forum and a failure to abide by its terms could be a source of embarrassment and criticism.

[6] Article 40(3)(b).

for the administration of juvenile justice and for juveniles held in custody or detention require that a minimum age jurisdiction be established, but do not specify a particular age.[7]

Minimum age jurisdictions vary in other Western industrialized countries, essentially splitting along European and non-European lines. In Western and Eastern Europe, only Switzerland and Greece have minimum ages lower than twelve, while the Netherlands has a minimum age of twelve. All others have higher ages, including thirteen (e.g. France), fourteen (e.g. Germany, Italy), fifteen (e.g. Denmark, Sweden), and even sixteen (e.g., Spain) years. This does not mean that child offenders below these ages are immune to state intervention in these countries; rather, they may be subject to child welfare measures or other non-criminal social interventions.[8]

In English speaking Western industrialized countries, however, the minimum age is typically lower. In England and Wales, children between ten and thirteen years may be convicted of criminal offences if the prosecution can prove that the child knew that what he or she did was wrong.[9] Similar provisions are in effect in Northern Ireland for children between ten and fourteen years. In Scotland and New Zealand the minimum ages are eight and ten years respectively. In the eight Australian jurisdictions, six have a minimum age of ten years, with the two remaining setting a minimum of seven and eight years. In the United States, twelve years is the most common minimum age (16 states), while thirteen years is the minimum in three states. The remaining states, however, have lower ages than twelve, either ten or eleven years (16 states), seven to nine years (6 states), or no minimum age at all (7 states).

Given the above, it can be concluded that a lowering of the minimum age, either generally or for specific types of offences or offenders, would not infringe upon international law or standards, nor be inconsistent with the practices of many other non-European Western industrialized countries.

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[7]See, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) and United Nations Rules for the Protection of Juveniles Deprived of Their Liberty.

[8]For a description of European juvenile justice systems, see McCarney (1996).

[9]Amendments in 1969 that would prohibit the prosecution of children under the age of fourteen, except in cases of homicide, have not been proclaimed in force.

3.1.2 Experience Under the Former Act

While the law and, to some extent, attitudes and practices have changed since proclamation of the YOA, available information about practices under the former JDA can nonetheless be useful in assessing some of the implications of a possible lowering of the minimum age.

A sample study of twelve Canadian police departments in 1976 found that the police exercised considerable restraint in formally charging young children: only 12 percent of children seven to eleven years of age allegedly involved in offences were formally charged by the police as compared to, for example, 80 percent of sixteen and seventeen year olds. Children seven to eleven years of age comprised only 3.3 percent of the total juveniles charged.[10]

Court statistics from the final year (1983) of the JDA indicate that 1090 children under twelve, or 2.2 percent of the total, were brought before the juvenile courts for alleged involvement in 1860 delinquencies. Of these, 85 percent were ten or eleven years old at the time of the offence. Of the few delinquencies involving violence by children under twelve, 92 percent (107) involved ten and eleven year olds.[11]

While the above statistics, on the face of it, suggest considerable restraint in the criminal processing of children at that time, a breakdown of types of delinquencies prosecuted suggests otherwise: 94 percent of the alleged delinquencies were non-violent, with 38 percent involving theft under $200 and 8 percent provincial statute offences. As well, there was great variation in practices across jurisdictions: for example, Ontario accounted for 60 percent of the children under twelve prosecuted, whereas Quebec[12] accounted for 0.2 percent and British Columbia 7 percent.

Only 1.1 percent of adjudicated delinquencies involving children under twelve resulted in court committals to training schools, but an additional 10

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[10]See Conly (1978).

[11]These included sexual assaults (10), other assaults (54), robbery (10), and weapons offences (13). As well, there were 26 delinquencies involving arson.

[12]Supra, note 3.

percent resulted in a court committal to the care of child welfare agencies.[13] This low rate of committals to training schools may have been the result of legal constraints on such committals under the JDA.[14]

The above information suggests that, if consideration is to be given to lowering the minimum age, special constraints on prosecution and sentencing to custody could be considered in order to avoid: an addition of relatively minor cases to already overburdened youth court systems; disparate treatment across jurisdictions; and unnecessary or inappropriate resort to custody.

3.1.3 The Incidence of Child Offending

Canada-wide police statistics on apprehended children under twelve allegedly involved in criminal offences are not available, but statistics are available from a relatively new survey (the Revised UCR) that is completed by police forces which police more than one-third of the Canadian population. In 1992 and 1993 (combined) 5823 children under twelve, or only 1.1 percent of the total persons apprehended[15], were apprehended for criminal offences. Of these children, 61 percent were ten or eleven years old and 86 percent were male.

The vast majority (87 percent) of children under twelve were apprehended for non-violent offences, principally theft under $1000 (27 percent) and other property offences (44 percent) such as mischief. These children accounted for only 2.2 percent of the total persons apprehended for property offences. Only 772 of these children were apprehended for violent ("person") offences, which represents 0.8 percent of the total persons apprehended for violent offences. Most (56 percent) of the children involved in violent offences were involved in less serious common assaults. Some more serious violent offences involved children under twelve but these represented minuscule proportions of the total persons apprehended for these offences, including: 3 aggravated sexual assaults/sexual assault with a weapon (0.8 percent), 126 aggravated assault/assault with a weapon (0.8 percent), 38 robberies (0.4 percent), and 106 sexual assaults (1.7

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[13]The latter could result in a residential placement and, in some jurisdictions, an institutional placement.

[14]Supra, note 2.

[15]That is, 513,449 adults, young persons, and children.

percent). Ten and eleven year olds accounted for a substantial majority (68 percent) of children under twelve apprehended for these more serious violent offences. Children under twelve accounted for a relatively large proportion (19 percent) of the total persons apprehended for arson.

The above statistics should be interpreted with considerable caution since they only describe children apprehended by the police for involvement in an apparently criminal act. They do not describe whether these children would, if prosecuted, be held criminally liable for these alleged acts. For example, playing with matches, throwing rocks, and bullying or fighting are common amongst children and could amount to arson, mischief or common assault, but whether criminal intent was involved, or could be established in a court of law, is not known.

Systematic statistics regarding children under twelve who are persistently involved in criminal offences are not available. Nonetheless, anecdotal case examples (albeit rare) of children persistently involved in offences such as breaking and enterings, car thefts, acting as drug couriers, and robberies are known and almost invariably involve ten and eleven year olds.

Police-reported long-term statistics respecting children under twelve involved in homicide are available. In the ten year period after the YOA was proclaimed (1984 to 1993), there were 14 children under twelve apprehended by the police for homicide. Only four of these involved ten and eleven year old children. It is likely that many of these cases were unintentional rather than culpable homicide (murder or manslaughter): five of these fourteen children were under seven years old (as young as four) and an additional three were seven years old. The circumstances of the seven most recent children involved with homicide indicate: there were four victims, all of whom were also children under twelve and either friends or relatives of the child perpetrators; two deaths resulted from circumstances where children had access to their parents' handguns and two deaths resulted from circumstances involving fighting between children; and one case involved multiple perpetrators (4). The immunity to criminal prosecution of children under twelve brought about by the YOA did not prompt an increase in child homicide: in the decade preceding the new Act (1974 - 1983) there were a larger number (17) of children under twelve apprehended by the police for homicide.

With the growing awareness and concern about the sexual abuse of children in recent years, there has been an accompanying increasing awareness of sexual abuse of children by child offenders. A 1994 study by the Department of Justice involving 2470 persons apprehended by the police for

sexual assaults in five locations found that while children under twelve comprised only 2.1 percent (53 persons) of the total persons (i.e. including young persons and adults) apprehended, these children accounted for 10.3 percent of the persons under eighteen years old who were apprehended. Physical force was used in 40 percent of these child offending cases. A very few cases involved highly intrusive behaviour such as oral sex and vaginal penetration.[16]

Some professionals who work with children (amongst others) have suggested that child offending behaviour has increased in recent years. Some reports on school violence, suggesting apparent increases in violence among elementary school children, appear to support these assertions. It should be noted, however, that these reports typically present evidence which amounts to little more than opinion or anecdotes, or comparisons of crude measures over very short time periods. There are no known longer term systematic studies which confirm that there has in fact been a substantial increase in violence among children in recent years.

These above-noted statistics indicate that children under twelve are involved in crimes generally, and in violent offences, to only a very minor degree in Canada. Nonetheless, some children, albeit very few, are involved in very serious offences or are persistently involved in less serious offences. Clearly the state has a social interest in intervening in these cases, but these statistics do not answer the question about whether that state intervention should be in the form of criminal prosecution or other non-criminal social interventions.

These statistics also indicate that a general lowering of the age to ten years would provide the youth courts with jurisdiction over the majority (56 percent) of child offenders. Similarly, if the law were changed to allow for prosecution of only certain offences or offender types, a lowering of the age of ten years of age would provide jurisdiction over a substantial majority (70 percent) of child offenders involved in violent offences and of chronic child offenders. A return to the common law rule of age seven would, of course, provide jurisdiction over virtually all cases (although the child's capacity to form criminal intent and/or to instruct counsel would still remain an issue).

3.1.4 Provincial/Territorial Legislation and Services

Given that the majority of child offenders are involved in less serious

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[16]See Hornick et.al. (1994).

offences such as shoplifting, mischief and minor assaults, it is widely agreed that the vast majority of the less serious cases which do not involve repeat offending can be adequately addressed by parents or by voluntary referrals to community agencies, i.e. without formal state intervention.

In cases of more serious child offenders or repeat child offenders, the principal means of state intervention is through child welfare legislation. In this regard, there are different approaches to child offending in provincial and territorial child welfare legislation:

- Four jurisdictions have legislation which provides for child welfare intervention on the basis of a child's offending behaviour alone.

- Legislation in three other jurisdictions makes explicit reference to offending behaviour as a criteria for intervention but such intervention can only be authorized if there is also a finding that the child's parent or guardian is unable or unwilling to provide an appropriate response to the child's behaviour.

- In five jurisdictions, there is no explicit reference to child offending behaviour as a criterion for child welfare intervention .[17] Rather, there must be a more generalized finding that a child offender is in "need of protection" on grounds (which vary) such as abuse, neglect, being beyond the care and control of a parent or guardian, etc.

There are no longer offences of "unmanageability" or "incorrigibility" in any jurisdiction.[18]

In every jurisdiction, child welfare legislation is founded on the over-riding principles of the protection of children and the best interests of children.

There is no systematic evidence available on the volume of referrals of child offenders to child welfare authorities, the nature of interventions undertaken or their effectiveness. In several jurisdictions, consistent policy or protocols which systematize the procedures for police referral of repeat or serious child offenders to the child welfare system are not in place, especially if there is no apparent evidence of child abuse or neglect or other family dysfunction in

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[17]Three of these jurisdictions actually have provisions which enable the police to apprehend and refer to child welfare authorities, but this is not a ground for (voluntary or involuntary) child welfare apprehension.

[18]Some child welfare statutes, however, provide for the civil equivalent of unmanageability, e.g. "beyond the control" of parents or some similar variant.

individual cases.[19]

If intervention is required, child welfare authorities attempt to proceed by way of voluntary agreement for services with the parent or guardian rather than through involuntary apprehension (removal from parents) and subsequent state wardship arrangements, though the latter does occur. There are very few services dedicated to child offenders.[20] Rather, a child offender could receive a range of services that are generally available to non-offending children in the child welfare system, such as family or individual counselling, child care or family support workers, or foster, group home or other special care placements. It is generally agreed that these are appropriate interventions in most cases since child offending is often associated with family dysfunction and accompanying emotional and personal difficulties experienced by the child. It cannot be said, however, that every case of serious or persistent child offending involves abuse, neglect, or other apparent (or detectable) family dysfunction.

It is recognized, however, that cases have arisen in several jurisdictions where there has been an inadequate or ineffective child welfare response. These cases can be attributable to either a lack of clear legislative authority to intervene, or to inadequate resources, or quite simply because the resources that are applied to the case prove to be ineffective. Caution should be exercised about drawing conclusions about the overall effectiveness of systems on the basis of an apparently very small number of cases.

Child welfare systems have evolved since the time of the formulation of the minimum age of twelve years. These systems now attempt to minimize the involuntary removal of children from the care of parents, emphasize voluntary care and family support services, and, consistent with trends in de-institutionalization, have substantially reduced reliance on institutional services. As well, the increased social awareness of child sexual abuse has led to substantial increases in the reporting of child sexual abuse, thereby placing increasing demands on overburdened child welfare systems. These changes may limit the capacity of child welfare systems to respond to child offenders in some jurisdictions.

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[19]British Columbia's recently proclaimed Child, Family and Community Service Act requires the police to report a child to child welfare authorities if the child has killed, assaulted or endangered the life of another person; the police may report the circumstances in other cases of child offending.

[20]Ontario, British Columbia and Quebec have some dedicated services but these are not available province-wide nor do they address all types of child offending.

Less commonly, child offenders may also be addressed through mental health legislation and services, which vary by jurisdiction. Services may be provided on a voluntary basis or through an involuntary committal process, the latter typically requiring a medical finding of mental disorder and that the person is a danger to him/herself or others. Services may be community-based or residential, including secure treatment facilities in some jurisdictions. Offending behaviour by children can be - but most often is not - the result of "mental disorder" as defined by provincial and territorial mental health legislation. It is often difficult to satisfy threshold requirements for a finding of involuntary committal with children of tender years, given the developmental stages of these children and that mental disorders typically become more clinically manifested (and therefore diagnosable) in later adolescent years.

3.1.5 Child Development and Capacity

There is not any one single chronological age at which it can be said that children acquire sufficient moral and legal knowledge and understanding to be held criminally liable for their acts. This knowledge and understanding increases with age but, importantly, maturation among individual children can vary considerably.

The considerable body of social science theory and research on the cognitive, moral and social development of children suggests that by the age of ten years or earlier most (but not necessarily all) children have the ability to understand the nature and consequences of their actions. Perhaps more importantly, the experience in Canada with a lower minimum age prior to the YOA, and the experience of other countries with a lower minimum age, indicate that the courts have found that many children under twelve can be held criminally responsible.

Nonetheless, it cannot be said that all children under (or even over) twelve can or should be arbitrarily presumed to have capacity, given the considerable individual differences in rates of maturation among children. This is confirmed by reported cases (albeit few) prior to the YOA, in which the defence of doli incapax was successfully raised. Given this, consideration should be given to making this defence available to accused children, if a decision is made to lower the minimum age. While this defence was apparently infrequently raised under the JDA, it is likely that it would be raised more often, given the more rigorous due process and right to counsel provisions of the YOA.

While obviously inter-related, the issue of a child's capacity to meaningfully

participate in legal proceedings is somewhat different from the broader issue of capacity to form criminal intent since the former requires a more sophisticated knowledge and understanding of more complex legal issues, including such critical issues as the meaning of a plea, instructing counsel, and exercising or waiving rights respecting statement evidence.[21] In this regard, section 3 of the Act accords all young persons: "...in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them."

Social science research into how well children and adolescents understand legal concepts, while limited by testing under artificial circumstances, suggests: many children and adolescents in all age groups have a basic understanding of key legal concepts; the level of understanding generally increases with age; and there is, nonetheless, a substantial degree of ignorance or misunderstanding of key legal concepts among all age groups, but especially with certain legal concepts among younger children.[22] The latter finding is an important consideration which suggests that, should a decision be made to lower the minimum age, special procedural protections may be required to ensure that the rights and interests of the accused child are not compromised because of a diminished capacity to appreciate and effectively participate in legal proceedings under the Act. It could be argued, however, that the Act - through the right to counsel provisions, the Declaration of Principle, and certain substantive provisions - already provides sufficient safeguards to address these concerns.[23] This issue is discussed in more detail later (3.1.7).

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[21]If the minimum age were lowered, these children could also be required to understand and/or participate in: entering into alternative measures agreements (or requesting the charge be dealt with in youth court); receiving and responding to appearance notices; consenting to placement in the care of a responsible person; endorsing and acknowledging recognizances, probation orders, and other court orders; consenting to a medical and psychological assessment; consenting to dispensing with a pre-disposition report required; applying for or consenting to a transfer of disposition; applying for a review of a disposition or consenting to a more onerous non-custodial disposition; applying for publication of identity; and requesting access to records. As well, these children could also be accorded the right to personally retain and instruct counsel independent of the child's parent.

[22]See, for example, Dalby (1985), Peterson (1988) and Peterson-Badali and Abramovitch (1992).

[23]As examples: section 56 provides that a young person's rights must be "...clearly explained...in language appropriate to his age and understanding..." and section 19 provides that when a young person pleads guilty but the youth court is not satisfied that the facts support a change, a trial shall be held. In addition, effective representation by counsel should, in practice, enhance the child's understanding of legal concepts.

3.1.6 Discussion and Recommendations

Most offenders under the age of twelve are involved in less serious, non-violent offences and can be adequately addressed by parents and the community without formal state intervention. While more serious or persistent child offenders are uncommon, society clearly has an interest in ensuring that appropriate social measures are taken to intervene, control and rehabilitate these children.

To a large extent, the debate about whether serious child offenders should be held criminally responsible for their actions turns on the (actual and perceived) adequacy of child welfare and mental health legislation, the resources and services available to these alternate systems, how these services are applied, and how effective these services are in addressing the child's behaviour.

When state intervention is required with these children, reliance on child welfare systems is, it is argued, the preferred approach. While these systems are founded on the protection and best interests of children, these principles generally serve the interests of society and do not necessarily conflict with the principle of the protection of society. Child welfare systems are much larger than youth correctional systems and therefore have access to a wider array of services that are also more age appropriate, family-oriented and therapeutic in nature.

It can also be argued that lowering the minimum age and thereby allowing resort to youth correctional systems could exacerbate the problem, i.e., with the "safety valve" of criminal law intervention available, child welfare systems may be less obliged than they presently are to intervene in these cases. The youth justice system is looked to as a solution to this problem, yet there are no Task Forces or similar reviewing bodies within child welfare systems charged with the responsibility of examining how those systems might better respond to offending children.

As well, lowering the minimum age assumes that, once prosecuted and convicted, the youth correctional services that may be ordered by the court will be as or more effective than child welfare services. However, if committed to custody, these young children could be congregated with older, more criminally sophisticated young offenders, thereby potentially further criminalizing this immature and more impressionable population. It has been suggested that this concern could be overcome by providing for the separation of younger (e.g. age ten to thirteen years) and older (e.g. fourteen

years or more) young offenders in custody.[24] In this regard, twelve and thirteen year olds presently comprise only a very small proportion of cases committed to secure custody (3.7 percent) and open custody (8.5 percent); youth custody systems are overwhelmingly dominated (nearly 80 percent) by youth who are fifteen and older. Given this, and the need for youth correctional authorities to separate different young offender populations in other ways, separation of younger and older youth custody populations would, in practical terms, be extremely difficult if not impossible to implement, especially in secure custody facilities and in jurisdictions with smaller custody populations.[25]

Further, the lengthy time typically involved in criminal justice processing of cases may be inappropriate with younger children who, it is argued, require more timely (and therefore effective) intervention. Developing a process for the "transfer" of offending children into the youth justice system would add further complexity of process and new costs to an already complex and costly system.

If a limited capacity is established to prosecute children under twelve, the result would be a more complicated and somewhat artificial age - and offence-based system, including: a limited capacity to prosecute ten and eleven year old children; prosecution of twelve and thirteen year olds for all offences, but with no availability of transfer to adult court; the availability of transfer to adult court for youth who are fourteen and older; and special provisions for transfer to adult court (as per Bill C-37) for certain offences with sixteen and seventeen year olds.

If there are difficulties with a small number of cases in some jurisdictions, the argument goes, then the logical approach is to strengthen provincial legislation and services, where required. The application of the criminal law should be limited as much as possible. To resort to the criminal law in these circumstances is unnecessary and would amount to transferring a jurisdictional and resource issue from child welfare systems to the youth justice system.

On the other hand, it is argued that even if child welfare legislation and

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[24]Bala and Mahoney (1994).

[25]For example, youth custody populations may be organized and separated according to: detention/sentenced status, open and secure custody status, male/female, protective custody status, treatment program needs (e.g. substance abuse, sex offenders, etc.) and geographical proximity to the young person's home community.

services were strengthened (where required), a total reliance on these systems assumes that child welfare systems will be effective in every case. If, for example, a child already involved with child welfare services persists in offending there may be a social interest - indeed an obligation - to take additional measures to better protect society. Total reliance on child welfare systems also assumes that how society should respond to serious child offenders amounts to a simple "either/or" choice between the child welfare and youth justice systems. An alternate approach is to look upon these two systems as potentially complementary in addressing the interests of both the child and of society. For example, a probation order applied to a persistent child offender receiving child welfare services may assist in ensuring that the child participates in and therefore benefits from these services. As well, even though alternative measures agreements are typically short term and reserved for less serious cases, exceptions could be made to employ these agreements in more serious cases involving children under twelve. In the event of non-compliance with an agreement, the matter could be referred to the youth court.

Furthermore, while the principles of the protection and best interests of the child that underlie child welfare systems are very often compatible with the protection of the public, this is not necessarily always the case. Nor can it always be assumed that the protection of the public will be a primary concern of child welfare service providers. The youth courts would provide greater assurances that the principle of the protection of the public is given due consideration. Many of the concerns that are raised about lowering the minimum age - i.e. unnecessary processing of minor cases, potential jurisdictional variations, ability to meaningfully participate in legal proceedings, linkages with the child welfare system, and potential inappropriate resort to custody - all could be addressed by constraints and criteria that would allow for a limited capacity to prosecute only violent and persistent child offenders.

The Task Force agreed that, regardless of whether a decision is made to allow for the prosecution of children under twelve, the child welfare and children's mental health systems are preferred methods of social interventions. A review of the adequacy of these systems to respond to child offending should be undertaken in each jurisdiction and, if as a result of the review there are identified inadequacies, then steps should be taken to address these. Therefore, **the Task Force recommends that:**

> **Provincial and Territorial Ministers Responsible for Youth Justice, in collaboration with other responsible Ministers within their jurisdictions, take steps to:**

(1) **review the adequacy of child welfare and mental health legislation and services respecting child offenders and, where required, take measures to strengthen both formal and informal systems of responding to child offenders;**

(2) **where applicable, consider child welfare legislation which includes, at minimum, provisions addressing police intervention and referral and that criminal offending, in particular persistent offending or involvement in serious personal injury offences, may be grounds for intervention; and**

(3) **establish protocols between police forces, child welfare agencies and other relevant child-serving agencies respecting information sharing, referrals and services for child offenders.**

Along with an agreement in principle that child welfare and other alternate social systems of intervention are the preferred course, the Task Force agreed that there is no need for a general lowering of the minimum age of criminal responsibility which would allow for the prosecution of children under twelve for all criminal offences. The Task Force was not, however, able to achieve full consensus about whether there should be a limited capacity to prosecute violent and persistent child offenders. A minority of jurisdictions - including Ontario, Alberta and Manitoba - indicated support for this option. In light of this, **the Task Force recommends that:**

> **There should not be a general lowering of the age of criminal responsibility which would allow for the prosecution of children under twelve for all criminal offences. A substantial majority of representatives also recommend that there should not be amendments which would allow for the prosecution of exceptional cases of serious or persistent offending by children under twelve. Instead, these cases should be addressed by alternative social interventions which can be strengthened, if required.**

It is recognized, however, that a decision may still be made to allow for prosecution of children under twelve in exceptional cases of serious or persistent offending. If so, the following constraints and considerations could apply:

- limiting the minimum age to ten years;

- prosecution to proceed only with the consent of the Attorney General;
- prosecution be limited to only a scheduled list of serious offences;
- prosecution be limited to only those cases where intervention by child welfare measures, or other social or health measures, have been exhausted or would be inadequate (alone) to satisfy society's need for protection from criminal acts;
- the use of conferences between youth justice agencies, other child serving agencies and other relevant parties to determine whether youth court proceedings should be commenced/proceed and whether alternative interventions can be implemented (see, Chapter 2);
- allowing the child to raise the defence of incapacity;
- safeguards which address potential diminished capacity to effectively participate in proceedings under the Act (see below);
- allowing for the youth court to refer or commit the child to the care of child welfare authorities; and
- special considerations to be taken into account before imposing a custodial disposition such as the safety of the child, detrimental influences on the child, the child's level of maturity, and the availability and suitability of treatment, educational and other resources that would be provided.

3.1.7 Capacity of Children to Instruct Counsel

If a decision is made to allow for the prosecution of children under twelve, then one of the practical problems that will surface is the capacity of children to instruct counsel.

The right of persons to be represented by counsel is recognized in Canadian law and in international instruments pertaining to juvenile justice. The rights accorded under the Charter, including the right to retain and instruct counsel, apply to all Canadians. Discrimination on the basis of age is only acceptable if it has as its object "the amelioration of conditions of disadvantaged individuals" (s.15), including those disadvantage by age, or if the restriction of rights is justifiable in a free and democratic society (s.1).

Beyond these Charter rights, the YOA accords young persons "special

guarantees" of their rights (s.3), which are realized (in part) through the provisions respecting the right to counsel (s.11). Importantly, section 11 accords young persons the right to retain and instruct counsel "personally". Presumably, this would also apply to children under twelve if a decision was made to allow for prosecution of this population.

The United Nations Declaration on the Rights of the Child requires that States Parties:

> "assure to the child **who is capable of forming his or her own views** the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." (Article 12; emphasis added).

The effective exercise of the right to instruct counsel is important, given the serious consequences, such as loss of liberty, that may result for a child who fails to appreciate or fully exercise his or her legal rights.

In Chapter 9 we discuss the issue of capacity to instruct counsel more generally and suggest that concerns about capacity can be ameliorated by means of effective training of and practice by defence counsel. However, with children under twelve, it seems more likely that defence counsel efforts to communicate and educate the child about his legal rights may not have the intended result. This raises the question of what should be done if the child is not competent to instruct counsel.

Aside from active measures taken by defence counsel to communicate with and educate the child client, the youth courts would have to take an active role in monitoring the ability of children to instruct counsel. Thus the court on its own initiative or following a representation from the parents or Crown, where there is a reasonable concern about the child's ability to provide even a limited mandate to counsel, may require defence counsel to satisfy it that the child has provided them with an informed mandate. This may include outlining what steps have been taken to familiarize the client with an understanding of the process.

Where the child is not competent to provide a mandate to counsel, a process to authorize a substitute mandate could be developed akin to the process of appointing counsel as amicus curiae or guardian ad litem in the civil courts. A hearing process, including an opportunity for the child to make his or her views known would seem to be required as part of this process. This type of approach is seen as appropriate for child protection proceedings, but raises greater concerns when dealing with issues of criminal liability. On the basis

of the international standards and the law (s.11 YOA), it seems clear that the child must be able to personally instruct counsel. It is unlikely that a process of substitute decision-making would constitute a reasonable limitation on the rights of the child under section 1 of the Charter. This is particularly true since the infirmity is one which a not unreasonable delay, accompanied by suitable instruction on legal process, may be capable of curing. If either a process of substitute decision-making or delay for "fitness" to develop was adopted, a new fitness hearing would be required.

A fitness process could allow proceedings against the child to be delayed until the child was considered sufficiently mature to provide a basic mandate to counsel. Section 672.22 of the Criminal Code provides a model, which requires a finding, on the balance of probabilities, of unfitness to stand trial and allows the court to order assessments. An argument could be advanced that by adjourning the proceedings until the child is sufficiently able to instruct counsel, his or her Charter right to a trial within a reasonable time would be violated. On the other hand, because the adjournment was undertaken precisely so that the child could exercise his or her right to instruct counsel, and if the procedure for conducting such a hearing and appropriate review process were included in the YOA, a section 1 Charter argument may be able to be made. This is an area that requires further study.

The issue of capacity to instruct counsel illustrates some of the complexities that would arise from a decision to allow for the prosecution of children. (Determination of capacity to form criminal intent is another example.) The issue of the capacity of some twelve and thirteen year olds to instruct counsel may also be questioned but is rarely, if ever, raised as an issue during the course of youth court proceedings.

3.2 MAXIMUM AGE

> "We are again concerned with factors involving levels of maturity and development of individuals in their formative years, as well as the perceptions of society about characteristics of adulthood and ages regarding the attribution of civil responsibility." (Solicitor General's Committee, Young Persons in Conflict With the Law, 1975)

The JDA established a maximum age of (under) eighteen years, but also allowed provinces and territories to establish a maximum age as low as (under) sixteen years.[26] This resulted in different applications of the law across the country: only two provinces (Quebec and Manitoba) established a maximum age of eighteen years, two provinces (Newfoundland and British Columbia) set a maximum of seventeen years, with sixteen being the maximum in the remaining jurisdictions. This variable age was the subject of considerable criticism because of the resulting inequitable treatment of young persons under the law across different jurisdictions. Generally speaking, there was a consensus before the advent of the YOA that a uniform maximum age would be desirable. This became a matter of constitutional necessity with the Equality Rights provisions of the Charter of Rights and Freedoms coming into force on April 17, 1985.[27]

While there was general agreement that there should be a uniform maximum age, the particular age that should be selected was the subject of considerable debate and disagreement. The 1965 Report of the Department of Justice Committee on Juvenile Delinquency in Canada recommended, as a compromise, establishing a uniform maximum age of seventeen years. The 1975 federal Solicitor General's Report on Young Persons in Conflict with the Law recommended a maximum age of eighteen years. The maximum age of eighteen years probably prompted more controversy than any other single issue in the debates about Bill C-61 and was opposed by the majority of provinces and territories. It appears that this opposition was as much or more related to the costs associated with the implementation of the new increased maximum age (for most jurisdictions) as it was to philosophical or

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[26]Maximum ages are described in different ways, i.e. some refer to the current YOA maximum as "seventeen years", meaning any person between twelve and seventeen (inclusive) falls within youth court jurisdiction. Others refer to this same maximum age as "eighteen years", meaning that at age eighteen a person becomes subject to full adult responsibility under the Criminal Code. The latter description (i.e. "eighteen years") is used throughout this report.

[27]While the YOA was proclaimed in force on April 2, 1984, the uniform maximum age provision did not come into force until the following year to allow affected jurisdictions time to develop and adjust services.

other objections.

At that time, the key arguments advanced for selecting the uniform maximum age of eighteen years included:

- o Growth into full psychological and social maturity is delayed for young persons in contemporary society because of the prolonged period of dependency that is required of them.

- o Sixteen and seventeen year olds are not fully adults economically or socially and are legally denied many of the rights and privileges of adulthood. Accordingly, a higher age limit for criminal law purposes is more consistent with other social standards.

- o Due to their lack of maturity and understanding, and consequent vulnerability, this population requires special protections of their rights and due consideration of their special needs.

- o It is desirable to protect impressionable young persons from the potentially contaminating effects of exposure to older and more criminally sophisticated offenders in adult jails. This serves the public interest by avoiding the further criminalization of these young persons.

- o These youth are more likely to be rehabilitated in the youth system than in the adult system because the youth system is more richly resourced and more age appropriate.

- o The provisions for transfer to adult court would be available as a "safety valve" to address very serious offenders who are unsuitable for the youth system.

These remain the key arguments in favour of the status quo.

Opposition to the maximum age of eighteen years from most affected jurisdictions largely related to the significant costs associated with the increased age, but also concerned the potential detrimental effects of mixing older, more sophisticated young offenders with less sophisticated delinquents under sixteen years of age. Since implementation of the new uniform maximum age, however, jurisdictional concerns about the maximum age have largely dissipated because youth systems have adjusted, the new programs and services required have been developed, and additional costs have been absorbed. Some concerns do, however, still remain among youth correctional administrators in several jurisdictions about the suitability of

placing "older" serious young offenders in youth custody facilities, a matter which is discussed in Chapter 8 (Placement).[28]

Although jurisdictional concerns about the maximum age are no longer apparent, some victim advocacy and police groups (such as the Canadian Police Association), among others, have advocated a lowering of the age. Sixteen years is the most commonly recommended limit. Typically, the concerns about the maximum age are related to the perceived "softness" of the YOA and reflect the views that:

- Youths who are sixteen are physically and psychologically mature, capable of fully appreciating the consequences of their actions, and therefore should be held fully accountable.

- The adult system would provide a greater degree of individual deterrence and incapacitation through more frequent and longer periods of custody. It also allows the publication of identity. Accordingly, the application of these measures would offer better protection to the public.

- Youth would commit fewer crimes if they knew they would be tried in adult court, i.e., general deterrence.

- The behaviour problems of sixteen and seventeen year olds are more fixed and therefore more difficult to modify.

- The additional costs of servicing sixteen and seventeen year olds would be better applied to enriching services to younger offenders.

Responses to the federal Department of Justice's 1993 public consultation document on young offenders - Toward Safer Communities - indicate divided opinion about lowering the maximum age. Generally speaking, academics, child serving professional groups, child advocacy and prisoner advocacy groups, Bar Associations, and civil liberties groups did not support a lowering of the maximum age. However, some police associations, victim advocacy groups, several public and private organizations or groups, and many private Canadian citizens did support a lowering of the maximum age.

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[28] There are, in effect, two kinds of maximum age jurisdiction under the Act. The first involves the ages at which the young person allegedly committed the offence, i.e. presently, ages 12 to 17 years inclusive. This is discussed in this Chapter. There is also a dispositional jurisdiction under the Act which can extend well past seventeen years in many cases. For example, a young person who is seventeen when the alleged offence occurred may be eighteen by the time of a guilty finding and disposition, and twenty years or older by the time the young offender disposition expires.

3.2.1 The International Context

The United Nations Convention on the Rights of the Child, and other United Nations instruments which set standards applicable to juvenile justice, define a child as a person under eighteen years of age.[29] They do not expressly require that the maximum age of youth court jurisdiction be set at (under) eighteen years, but they do so indirectly. For example, Article 37(c) of the Convention, requires that "...every child deprived of liberty shall be separated from adults".[30] When Canada ratified this Convention it filed a "reservation" about this requirement, endorsing the general principle, but reserving the right to detain children under eighteen years in the same place as adults when it is not appropriate or feasible to keep them separate. The intent of this reservation was only to allow for the possibility of transfer to adult court, which can result in a young person under eighteen years being imprisoned with adults, and to allow for the narrow exceptions to separate detention permitted by section 7(2) YOA.

It could be argued that, since these United Nations instruments only require the separation of young persons and adults for the purposes of detention or imprisonment, it still may be possible, for example, to allow for the prosecution of sixteen and seventeen year olds as adults under the Criminal Code and, if imprisoned, to detain them separately from persons eighteen years or older. While theoretically possible, such a system would be administratively infeasible and very costly to implement in most jurisdictions.

With few exceptions, the international standard among Western industrialized countries for the maximum age jurisdiction of juvenile justice legislation is eighteen years or older. England and Wales fairly recently increased the maximum age from seventeen to eighteen years. Every Western and Eastern European country, and Ireland and Northern Ireland, has a maximum age of eighteen years or older.

In Scotland, however, the maximum age is sixteen, while in New Zealand it is seventeen. In the eight Australian jurisdictions, four have a maximum age of eighteen years and four have seventeen years.

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[29] Article 1. The Convention qualifies this age definition in stating that the age is eighteen "...unless, under the law applicable to the child, majority is attained earlier." In Canada, ages of criminal responsibility are established by the federal government, but ages of civil majority are established by provincial governments (usually 18 or 19).

[30] See also, the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty which defines a juvenile as "every person under age of 18" and requires juveniles in detention facilities to be separated from adults.

In the United States, which has witnessed a trend of "getting tough" on youth crime in recent years, the typical maximum age is eighteen years or older: in 1992, only eleven states had a maximum age lower than eighteen. No American state has lowered its maximum age jurisdiction since 1978. Rather than generally lowering maximum ages, many American states have lowered ages respecting eligibility for transfer to adult court, removed certain serious offences from the jurisdiction of juvenile courts or otherwise changed procedures respecting transfer to adult court.

Given the above, it can be concluded that a general lowering of the maximum age in Canada would be inconsistent with United Nations standards and the practices of a substantial majority of Western industrialized countries.

3.2.2 Adolescent Development and Civil Responsibility

As in the discussion of the minimum age of criminal responsibility, there is similarly no one single chronological age at which it can be said that adolescents acquire sufficient maturity to be regarded as fully "adult" and therefore liable to adult criminal procedures and sanctions. Maturation is a process which varies considerably amongst individuals. There are, of course, some mature, knowledgeable and independent seventeen year olds, but there are also some immature, dependent, and less knowledgeable nineteen year olds. To establish a system of individualized court assessments of maturity according to vague notions of what constitutes adulthood would be completely infeasible: a line, which to some extent will be arbitrary, must be drawn.

The present minimum and maximum ages under the YOA roughly correspond to the period of development known as adolescence, during which there are significant changes in physical, psychological and social maturation. It is a period of development set between childhood, during which there is full dependency on adults, and adulthood in which there is full social and economic independence. It is the transitional nature of this period of development which contributes to uncertainties about whether and how responsibilities should be attributed to adolescents, as is reflected in society's inconsistent approaches to the rights and privileges accorded adolescents.

There is a close connection between the notions of full criminal responsibility and accountability and other social rights and responsibilities. Sixteen and seventeen year olds are accorded some rights and privileges normally granted adults. They may, for example, leave school, work, drive a motor vehicle

(with parental consent),[31] and (generally) consent to medical treatment. Indeed, the YOA itself accords (not to just sixteen and seventeen year olds but all young persons) certain rights and therefore attributes capacity and responsibility to make key decisions such as personally retaining and instructing counsel, waiving rights to consult with parents or counsel, consenting to medical or psychological reports, and so on.

On the other hand, sixteen and seventeen year olds are, in keeping with their perceived immaturity, denied many of the legal rights and privileges of adults. They are not, for example, able to vote, drink alcohol, marry or enlist in the armed forces (without parental consent), enter into contractual relations that are binding against them, engage in otherwise legal gaming or betting, attend restricted movies or allowed to be sold or supplied tobacco products. As well, this population is typically not economically independent, unable to obtain social assistance benefits in the same manner and degree as adults, and in some jurisdictions (but not all) are legally defined as children for child welfare purposes. Further, since this age range corresponds with secondary school age, they are entitled to public school educational services.

While the YOA accords young persons many independent rights, it also recognizes their state of dependency and level of development, special needs, requirements for guidance and assistance, and their connections to their parents. There is no question that older adolescents have the capacity to understand the nature and consequences of their actions and therefore can be held criminally liable. Social science research into how well children and adolescents understand legal concepts indicates that as age increases there is a general trend toward greater understanding. Notwithstanding this, this same research indicates that there is a substantial degree of misunderstanding of legal concepts among all age groups, including older adolescents.[32]

3.2.3 Experience Under the Former Act

Since most jurisdictions established ages lower than eighteen before proclamation of the uniform maximum age in 1985, the majority (56 percent) of sixteen and seventeen year olds in Canada were subject to adult criminal proceedings and sanctions. In the five years before proclamation of the new Act, there was an average of 85 persons per year under the age of eighteen admitted to federal penitentiaries, nearly one-half being sentenced for violent

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[31] Some provinces have also introduced graduated (restricted) licensing systems for older adolescents.

[32] See, for example, Peterson-Badali and Abramovitch (1992).

offences.[33] In contrast, there was an average of only five persons per year under eighteen admitted to federal penitentiaries between 1987-88 and 1992-93, which could only have resulted from transfers to adult court.[34] Three-quarters of these admissions were for violent offences. Specialized facilities or programs for older adolescents in the penitentiary system were not established at that time (nor are they now), i.e. this young population was classified to facilities and programs that were generally available to older penitentiary inmates.

The vast majority of sixteen and seventeen year olds who were remanded or sentenced to imprisonment were detained in provincial adult jail systems. While some larger jurisdictions had some specialized programs or facilities in their adult systems for older adolescent or young adult offenders, this was not generally the case, i.e. again, the vast majority of this population was integrated into facilities and programs generally available to older adult offenders.

Sixteen and seventeen year olds were not only incarcerated in facilities generally available for older adult offenders, they were also typically incarcerated in secure detention centre facilities in both the penitentiary and adult provincial jail systems. While many jurisdictions had developed adult open custody facilities such as community residential centres or forest camps, the preponderance of adult facilities were then (and remain) secure jails. In contrast, when sixteen and seventeen year olds are committed to custody under the YOA, more than one-half are committed to open custody and, of those initially committed to secure custody some are eventually transferred to open custody. Open custody facilities can include group homes, community residential centres, forest camps, child care institutions, and, in some jurisdictions, foster-type homes.[35] In short, the YOA not only brought about a separation of sixteen and seventeen year olds from adults in custodial situations, but also changed (ameliorated) the type or conditions of custody.

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[33]Some of these admissions would have been the result of transfers to adult court, but the vast majority would have originated from jurisdictions with a lower maximum age.

[34]These figures underestimate the number of young persons admitted to federal penitentiaries who were under eighteen years at the time of the commission of the offence because correctional authorities record age at the time of admission to custody, not age at the time of the offence. Given this, some eighteen and nineteen year olds admitted to federal penitentiaries may have been under the age of eighteen at the time of the commission of the offence. In these same time periods, the number of eighteen and nineteen year old admissions to federal penitentiaries also halved, from an average of 441 to 218 per year.

[35]The nature of open custody facilities and programs varies from jurisdiction to jurisdiction.

At the same time, the incorporation of this older population into most youth correctional systems significantly expanded the size of these systems and altered the age composition of youth correctional facilities and programs, e.g. more than one-half of all young persons sentenced to custody are sixteen or seventeen years old at the time of the commission of the offence. In jurisdictions where the former maximum age was (under) sixteen, the size of the (newly defined) youth custody population doubled or more. Given the need to establish new youth facilities which were separate from adults, there were significant increases in costs because youth custody facilities are typically smaller and more richly resourced than adult jails.

There is no evidence that the incorporation of sixteen and seventeen year olds into the youth justice system resulted in lower levels of incarceration when compared to how they were dealt with as young adults under the Criminal Code before 1985[36]. In fact, the limited available evidence suggests that this population may be committed to custody at a higher rate under the YOA than they were when they were dealt with as adults under the Criminal Code.[37]

3.2.4 Incidence of Offending

It is well established in world-wide criminological research that criminal activity is predominately the domain of young males and that, as maturation and social connections (e.g. work, relationships) take greater hold, the rate of criminal involvement diminishes with increasing age. Put another way, young males account for a disproportionately high amount of crimes relative to their representation in the general population. This is, of course, also the case in Canada.

As discussed in more detail in the Descriptive Profile report, the per capita rates of persons charged by the police with all types of criminal offences increase through the early adolescent years, peak among persons aged

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[36]This considers only the degree of use of custody or imprisonment, not the type of custody. As noted above, the open custody provisions changed (ameliorated) the type or conditions of custody.

[37]Comparisons of 16 and 17 year olds admitted to adult jail/youth custody (open and secure) in Ontario indicate similar rates of committal before and after 1985, but they received considerably shorter sentences when dealt with as adults (and also were eligible for earned remission). A comparison of incarcerated 17 year old populations in British Columbia indicated a substantial increase (44 percent) in the average daily population after 1985. These differences are likely due to repeat offenders among these age groups, rather than appearing as first-time adult offenders in adult court and hence receiving a mitigated sentence, appearing as recidivists in youth court and hence receiving a more onerous sentence. The differences in population in B.C. could also be attributable to differences in the availability of earned remission for adults and young offenders.

sixteen to nineteen years old (inclusive), and then decline among persons in their twenties and older.[38] Hence while sixteen and seventeen year olds, who are subject to youth court sanctions, have very high rates of offending, so too do eighteen and nineteen year olds who are subject to adult sanctions.

While the per capita rates of offending are high, the actual volume of criminal activity accounted for by sixteen and seventeen year olds is relatively small, precisely because they comprise a small proportion of the population: this group accounts for less than six percent of all persons charged (i.e., both adults and young persons) with violent offences[39], less than twelve percent of property offences charged, and less than eight percent of persons charged with all types of criminal offences. Moreover, 85 percent of the sixteen and seventeen year olds were charged with non-violent (mostly property) offences.

Longer term statistics respecting homicide indicate that, since implementation of the uniform maximum age (1986-93), sixteen and seventeen year olds accounted for six percent of all persons apprehended for homicide, a proportion which is unchanged from the decade preceding implementation of the Act (1974-83). Further, the per capita rate of homicide by sixteen and seventeen year olds did not increase during these periods.

Within the youth justice system itself, sixteen and seventeen year olds do account for a large proportion of young persons (12 to 17) processed: they comprise roughly one-half of the young persons charged, brought to youth court for all types of offences and of those committed to custody. Of the sixteen and seventeen year olds appearing in youth court, more than eighty percent of the most serious charges involve non-violent (mostly property) offences. Of those charged with violent offences, more than forty percent involve less serious common assaults. Of all sixteen and seventeen year olds found guilty in youth court, 58 percent have previously been found guilty in youth court. Of those appearing for offences against persons (violence), only

[38] These age-specific statistics are based on the Revised Uniform Crime Reports, which are generated by police forces which police about one-third of the Canadian population. The police also report the number of young persons not charged but do not have a comparable reporting category for adults. Not all adults are, of course, charged either, i.e. the police exercise their discretion to charge or not for both young persons and adults. Importantly, age-specific offence rates are very similar for serious violent offences such as robberies and assaults causing harm and in which cases the police charge the vast majority. Criminal traffic offences are excluded.

[39] More specifically, 16 and 17 year olds accounted for 5.8 percent of persons charged with attempted murder, 6.0 percent of more serious sexual assaults (levels 2 and 3), 4.9 percent of sexual assaults, 7.7 percent of assaults causing harm, 12.2 percent of robberies, and 4.3 percent of common (level 1) assaults.

13 percent have been previously found guilty of a violent offence.

These statistics suggest that a general lowering of the age to sixteen years would result in the jurisdiction of the adult criminal courts being extended to address a population that is responsible for only a small proportion of all criminal offences, the vast majority of whom would be non-violent property offenders and a substantial proportion of which would be appearing in court for the first time.

3.2.5 Deterrence and Incapacitation

One of the key arguments advanced for lowering the maximum age to sixteen years is that, since sixteen and seventeen year olds would be routinely processed as adults in ordinary court, there would be greater deterrence and therefore a reduction in youth crime rates. There are two types of deterrence: general and specific. General deterrence is founded on the theory that the punishment of individuals will become known to other potential offenders and therefore cause them to refrain from offending. Specific deterrence refers to the theory that the punishment of an offender will cause that individual to desist from offending in future.

Deterrence is based on the assumptions that offenders:

- rationally consider and weigh the risks of being apprehended;
- rationally consider and weigh the potential consequences for themselves (i.e. punishment) before committing an offence; and
- know what the consequences may be.

There is little doubt that these considerations do apply to some young offenders, e.g. the youth who is well-entrenched in a criminal lifestyle and who, through experience, is well aware of the operations of the youth justice system and therefore may fully appreciate and consider the risks and penalties associated with his actions. These youth, however, comprise a very small proportion of young offenders.

There is an extensive body of social science research on the effects of deterrence which, as the Canadian Sentencing Commission noted in 1987 (for adults): "...are either negative or caution against any dogmatic belief in the ability of legal sanctions to deter" (p.136). Increasing penalties or increasing rates of incarceration are not associated with reductions in crime rates, nor are lengthier custodial penalties associated with reductions in

recidivism rates among individual offenders.

A sophisticated analysis by the National Academy of Sciences in 1994 concluded that changes in American sentencing policy for adult offenders, which resulted in a tripling of the adult incarceration rate in the United States between 1975 and 1989 - at great financial cost - prevented ten to fifteen percent of potential violent crimes through incapacitation and also prevented additional violent crimes through deterrence to others in the community, but the magnitude of the latter effect could not be estimated. Nonetheless, these potential violent crimes must have been "replaced" by others, because the actual number of serious violent crimes remained about the same, suggesting that, by itself, the criminal justice response to violence could accomplish no more than "running in place".[40]

Young offenders do not, generally speaking, rationally consider and weigh the risks of being apprehended for their crimes. Rather, while they are obviously aware of a risk of being apprehended, they - in keeping with the sense of personal invulnerability that is so typical of adolescence - tend to believe that others, but not them, will be caught. They are typically impulsive, motivated by hedonism and the adventure of risk-taking, and tend to consider only the immediate circumstances and rewards, rather than the longer term consequences for themselves (or others).

There are three elements to deterrence: the probability of apprehension (certainty of punishment), the swiftness (celerity) of punishment, and the severity of punishment. There is some evidence from social science research that supports the proposition that the probability of apprehension - and, in particular, the perception of the personal risk of apprehension - can have some effect on whether or not young people (and adults) will commit some types of offences. There is also some evidence that "informal deterrence", rather than strictly legal sanctions, has an effect on behaviour. Informal deterrence means actual or anticipated social sanctions such as the disapproval of family and friends or one's own conscience and moral commitments.[41] However, since severity of punishment is not associated with appreciable changes in crime rates, changing the degree of punishment available will not change levels of youth crime. Nor is it reasonable to assume that lowering the maximum age to sixteen will somehow increase the actual or perceived probability of apprehension, nor the informal deterrence, of sixteen and seventeen year olds.

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[40]See, Cohen and Canela-Cacho (1994) and Reiss and Roth (1993).

[41]See, for example, Paternoster (1988) and Paternoster et.al. (1983).

If the fear of being dealt with as adults under the Criminal Code deterred young people from committing crimes one would expect, according to this theory, that there would be a reduction in criminal activity among older adolescents who are dealt with as adults, as compared to older adolescents dealt with under the YOA. A comparison of the per capita charge rates of two very similar populations - seventeen and eighteen year olds - indicates that, notwithstanding being dealt with under the Criminal Code, eighteen year olds have an eleven percent higher crime rate overall and higher rates across all offence categories (indictable property, other property, victimless crimes, other person), except for indictable person offences for which there are no really appreciable differences (three percent) in rates.[42] As well, eighteen and nineteen year olds and young adults have substantially higher per capita homicide rates than seventeen year olds.

There are some who would submit that the inclusion of sixteen and seventeen year olds in the youth justice system is, due to reduced deterrence in the youth system, responsible for increases in youth crime rates since 1985. The facts do not support this argument. As discussed in the Descriptive Profile, youth crime rates overall, and youth property crime rates, have increased only modestly and no more so than for the corresponding adult rates. Official youth violent crime rates have, however, increased substantially and more than adult violent crime rates. If the changes in youth violent crime rates were attributable to the uniform maximum age, one would expect these rates to increase after 1985 in the jurisdictions affected by the new maximum age, but not in Quebec and Manitoba, which already had established a maximum age of eighteen. This is not the case: violent youth crime rates increased substantially in Manitoba and somewhat in Quebec, just as they did in other jurisdictions. As well, a comparison of youth homicide rates before (1974-1983) and after (1986-1993) the implementation of the new maximum age indicates no change in the per capita homicide rates of sixteen and seventeen year olds in those jurisdictions affected by the new age limits.

We are not aware of any other countries where the maximum age jurisdiction has been lowered and then studied to determine whether there was an effect on youth crime rates. Several American states have, however, introduced "legislative waiver" provisions in which certain serious crimes such as homicide, robbery, serious assaults and sexual assaults are legislatively removed from the jurisdiction of juvenile courts and automatically dealt with by adult courts. This amounts to an offence - specific (or partial) lowering of

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[42]Criminal traffic offences are excluded. These statistics are based on the Revised Uniform Crime Reports. See the Descriptive Profile report for detailed rates.

the maximum age jurisdiction in these states. Long-term empirical studies have been conducted in two states to assess the impact of these legislative changes on the incidence of the offences affected. In New York there was no reduction in crime rates, while in Idaho there were significant increases.[43] Overall, there have been marked increases in serious violent crime by juveniles in the United States despite most states taking measures to toughen juvenile justice legislation.[44]

A recent study of comparable groups of young offenders transferred and not transferred to adult court in Florida indicates that those processed in the adult court system had significantly higher recidivism rates than those not transferred.[45] In short, adult court sanctions did not have a greater specific deterrent effect.

This research should not be misinterpreted as meaning that there is nothing at all to deterrence. Police strikes and simple common sense tell us that circumstances which allow persons to conduct themselves with relative impunity are likely to result in increased levels of misconduct among some persons. The issue is not whether there should or should not be deterrent penalties, but rather whether increasing levels of penalties ("marginal deterrence") will have an appreciable effect on levels of crime.

A lowering of the maximum age also assumes that, if dealt with as adults in ordinary court, sixteen and seventeen year olds will in fact receive harsher (more deterrent) penalties than in youth court, i.e., there is an assumption that the sanctions in youth court are "softer". As noted previously, there is no evidence that the inclusion of sixteen and seventeen year olds in the youth justice system has resulted in lower rates of incarceration as compared to when this group was dealt with as adults. In fact, available evidence suggests the opposite is the case, although there has been a mitigation of

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[43]See, Singer and McDowell (1988) and Jensen and Metsger (1994). Note, however, that Singer and McDowell say that the "most prudent conclusion is that the data are not inconsistent with the idea that the law prevented robberies from rising", i.e. it may have had a deterrent effect on this offence, but not other offences (homicides, assaults, rapes, and arsons). The New York law was well publicized, but the Idaho law was not.

[44]FBI Uniform Crime Reports indicate that between 1983 and 1992 arrests of juveniles for serious violent crimes increased, including murder (128 percent increase), forcible rape (25 percent), robbery (22 percent), and aggravated assault (95 percent).

[45]See, Bishop et.al. (1996). The sample involved 3151 youth transferred by prosecutorial discretion in 1987, more than one-half of which were for misdemeanour offences and the vast majority for non-violent offences. Recidivism follow-up was only one year and compared transferred and non-transferred youth who were subject to short sentences. Youths transferred for capital and life felonies (i.e. the most serious offences) were not included in comparisons.

the conditions of custody (i.e. open custody) for many sixteen and seventeen year olds in several jurisdictions.

There are often misunderstandings about the relative severity of youth and adult custodial sentences; these arise because of differences in early release mechanisms and the administration of sentences. Remission or "good time" - or statutory release for adult federal sentences - is virtually automatically applied to adult jail sentences and results in a reduction of one-third in time served in custody. Remission is not available for youth custody dispositions. Adults are also (usually) eligible for full parole after one-third of sentence (and day parole at an earlier time), with decisions being made by a quasi-judicial tribunal.[46] Young offenders are also eligible for early release from custody but only by way of a decision by the youth court which follows a complex set of procedures. Early releases from custody approved by the youth court are relatively infrequent. Both the adult and youth systems also allow for administratively authorized temporary absences from custody.

Given these differences in sentence administration, a youth custody sentence of, for example, one year can be the equivalent of an adult sentence of between eighteen months and three years in terms of actual time served, depending on the application of parole release and judicially approved early release in the respective systems. Put another way, there is a greater degree of "truth in sentencing" in the youth system.

Several comparisons of the length of adult jail and youth custody sentences are available. First, a comparison of adult and youth custodial sentence lengths in three jurisdictions for ten different offences indicates that average youth custodial sentences were longer than adult jail sentences for four offences, shorter for three offences, and the same for three offences.[47] However, when remission is taken into consideration for the adult sentences, the youth custody sentences were longer in eight out of ten offences and twenty-two percent longer overall.[48] Second, a comparison of youth and adult custody sentences for four broad categories of offences in Nova Scotia

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[46]An exception to this arises in murder and when the court makes an order under section 741.2 Criminal Code which allows the court to direct, for certain specified offences, that one-half of the sentence be served before eligibility for full parole. The latter occur very infrequently.

[47]Derived from the Youth Court Survey and Adult Court Survey. The jurisdictions were Quebec, Nova Scotia and the Yukon. Adult criminal court data do not include the superior courts or, in Quebec, municipal courts.

[48]Using this latter measure, youth sentences were shorter for robbery and breaking and entering, but longer for sexual assault, common assault, assault causing bodily harm, theft over $1000, theft under $1000, fraud, mischief, and possession of narcotics.

indicate that average youth custody sentences were the same or longer than adult jail sentences (including penitentiary committals) in all four categories and longer in total. Taking into account remission for adults, average youth custody sentences were longer than the adult sentences in all four categories and nearly twice as long in total, although youth sentence lengths for robbery were substantially less.[49] Third, comparisons of actual custody time served in British Columbia indicate somewhat different and mixed findings: adults served substantially longer periods in time for breaking and entering, common assault and drug offences, but young offenders and adults served fairly similar periods for thefts, other property offences, offences against the administration of justice and violent offences (other than common assault).

Available statistics from Ontario are especially pertinent since they compare custodial dispositions imposed on sixteen and seventeen year olds in youth court with all adult sentences of imprisonment, including provincial and federal sentences. A comparison of average custodial sentence lengths for twenty different offence categories indicates that: adult sentences were longer for ten offence categories, lengths were very similar for five categories, and youth sentences were longer in five categories. However, after taking into account remission or statutory release, youth custody sentence lengths were longer for eleven categories of offences, very similar for three, and shorter for six categories.[50]

These are somewhat crude comparisons subject to several limitations.[51]

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[49]See, Bell and Smith (1994). These same patterns applied to offenders who had previously been committed to custody/imprisonment and those who had not. The four broad categories of offences were: property, person (violent), public order and offences against the administration of justice. For offenders with no previous history of custody, youth sentences were 8 percent longer overall but 62 percent longer when remission was taken into account. For those with a prior custody committal, average youth sentences were 42 percent greater than the adult in total and 113 percent greater after taking into account remission for adults.

[50]"Very similar" means within plus or minus ten percent. Taking into account remission or statutory release, the offence categories involving longer sentences for youth included weapons, assault and related offences, miscellaneous offences against persons, breaking and entering, fraud, thefts and possession of stolen property, wilful damage, drug possession, drinking and driving, offences against the administration of justice, and mischief/public order offences. Youth and adult sentences were very similar for serious violent offences, less violent sexual offences, and criminal traffic offences. Adult sentences were longer for homicide and related offences, violent sexual offences, drug trafficking, morals offences, obstructing justice, and other federal statute offences.

[51]Comparisons of youth court and adult court data are limited by the exclusion of sentences rendered in adult superior court, which are more likely to involve more serious offences, and the inclusion of 12 to 15 year olds in the youth court data. Correctional admissions data do not account for the proportion of young persons and adults committed to custody/imprisonment by the youth and adult courts. All data are limited by failing to account for prior offence history (e.g. youth may have less substantial court histories) and the circumstances of offences (e.g. youth use firearms in robberies less frequently than do adults).

Nonetheless, they do suggest that young offenders are committed to custody for as long or longer than adults for many types of offences, especially non-violent offences but also including many offences involving less serious violence. There are, however, some exceptions to this general finding in cases of some very serious violent offences.

Incapacitation refers to measures which protect the public by rendering an offender incapable of committing further offences, principally through custody or imprisonment. The vast majority of adult and youth sentences are short-term and therefore can only incapacitate for short periods. These short sentences are typically meted out for different purposes, such as deterrence or denunciation. While youth custody dispositions may be as long or longer than adult sentences of imprisonment for many offences, it is clear that the adult court system offers a greater degree of incapacitation than is available in the youth courts for a small number of very serious offences such as murder, multiple violent offences, or especially heinous crimes that fall short of homicide. This results, of course, from the longer sentence lengths available in the adult court system. Moreover, while in some serious cases the amount of time served by a young person in custody may be similar to the time served by an adult committed to (an ostensibly) longer period of imprisonment, the adult sentence will often provide for a longer period of restraint through community supervision and control, e.g. statutory release.[52] As well, parole applications can be denied and, in cases of violent offenders where there is a risk of serious harm to others, statutory release can be denied.

3.2.6 Discussion and Recommendations

A general lowering of the uniform maximum age would not be consistent with the United Nations Convention on the Rights of the Child, other United Nations standards, nor with the standards and practices of the vast majority of Western industrialized countries.

While there are some inconsistencies in Canadian society respecting the age at which young people are deemed to acquire full adult civil rights and responsibilities, most civil standards - and certainly key rights such as the capacity to vote and to enter into binding contractual relationships - establish

[52]For example, a young person sentenced to two years custody followed by one year probation may be released to probation early by the court after eighteen months and therefore be subject to eighteen months custody and eighteen months probation. An adult sentenced to four and one-half years imprisonment may be paroled after one-third - i.e., eighteen months, or the same length as the young person - but the adult would be subject to a much longer period of community supervision and control (i.e. 36 months).

age eighteen or nineteen as the onset of adulthood. Arguably, if the maximum age was to be generally lowered to sixteen on the grounds that sixteen and seventeen year olds are sufficiently mature to be dealt with as full adults in the criminal courts, then this age group should also be sufficiently mature to be able to vote, enter into contracts, drink alcohol, and so on.

A departure from international standards and other Canadian civil standards might perhaps be able to be justified if it could be clearly demonstrated that a general lowering of the maximum age would achieve a greater social good, for example, greater societal protection. There is, however, no evidence to support the proposition that a lowering of the maximum age would reduce youth crime rates. This is not surprising: it is well-established in criminological research that crime rates will vary, not according to changes in the applicable law, but rather according to changes in much broader social, economic and cultural factors.

There is also little reason to believe that a lowering of the maximum age would in fact result in appreciably harsher or more deterrent sanctions for most sixteen and seventeen year old offenders in adult court. Exceptions to this would, however, arise in cases of murder, other cases of heinous offences, multiple violent offences, and perhaps some chronic offenders where longer, more incapacitative sentences would likely be imposed by the adult courts. Such cases make up only a very small proportion of all youth court cases. In effect, a general lowering of the maximum age in order to maximize specific deterrence and incapacitation for this small group of very serious and chronic offenders would amount to an over-reaching solution: the vast majority of sixteen and seventeen year olds appearing in youth court are non-violent offenders and a substantial proportion are not recidivists. As well, the present maximum age is not entirely inflexible - serious young offenders who are fourteen years or older may, of course, be transferred to adult court, albeit infrequently.

The concerns raised about the maximum age typically involve issues such as deterrence, incapacitation and publication of identity. Rather than addressing these concerns through a general lowering of the age, an alternative approach is to examine and, as necessary, address more specific provisions of the Act such as transfers to adult court, sentencing, and publication.

The Task Force, with the exception of Ontario, recommends that:

> **The maximum age jurisdiction of the Act should be retained.**

There are several reasons why Ontario supports a lowering of the maximum age jurisdiction of the Act so that sixteen and seventeen year olds would be dealt with in the ordinary courts. This would reflect the maximum age that was formerly in place for most Canadian jurisdictions under the JDA; a lower maximum age is also used in other jurisdictions, such as Scotland, New Zealand, and several American and Australian states. Ontario believes that this age more appropriately reflects society's disapproval of criminal behaviour by young persons and is more consistent with the public's attitudes toward adult responsibility, the capacity of sixteen and seventeen year olds to understand the consequences of their wrongdoing, and the need to hold them accountable for their actions. This position is also influenced by the fact that, since the new uniform maximum age came into force, there has been a more than doubling of the rate of young persons charged with violence and weapons offences, including serious offences such as robberies and assaults causing harm. Stronger measures are, therefore, necessary to demonstrate society's disapproval of this type of offending behaviour.

It is also Ontario's view that comparisons of adult and youth custodial sentences - which indicate that the youth and adults receive similar sentences for many of the same offences, but that adults receive longer sentences for more serious violent offences - are, in fact, evidence that the ordinary courts will not be unduly harsh on most sixteen and seventeen year olds. At the same time, there would be greater assurances of public protection through the longer sentences that would be imposed for serious violent offences if sixteen and seventeen year olds were dealt with in ordinary courts. This would avoid the costly and uncertain process of transfer to adult court that is presently in place (Bill C-37) or contemplated in other options (Chapter 8). As well, a lowering of the maximum age would result in considerable cost savings to the youth justice system, which would enable resources to be dedicated to younger adolescents who may better benefit from them.

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