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CHAPTER 8 - SERIOUS YOUNG OFFENDERS

8.1 INTRODUCTION

What is meant by "serious young offender" is self-evident to most people. Typically, definitions will include violent, chronic and dangerous (or high risk) offenders.

Seriousness is, however, difficult to precisely define in legal and operational terms. Certainly, young offenders who commit offences resulting in death, serious injury, or serious psychological harm (e.g. sexual offences) are, by any definition, serious. Even within this group, however, there are differences in the degree of seriousness, and in the risk of future harm, which can vary according to the circumstances of offences and of offenders. For example, there are obvious differences between a drunken, first time young offender who assaults an abusive parent and a young person with a chronic problem of substance abuse and aggression who robs and beats a stranger. Further, because a young person commits an offence that causes serious harm to a victim does not necessarily mean that that young person - who clearly was dangerous at one point in time, within a given set of circumstances - poses an ongoing risk of serious harm to others. Some may and some may not, depending on differences in individual circumstances and background.

Not all ostensibly violent offences result in serious harm to others. For example, robbery is a violent offence, but this offence can encompass a broad variety of offending behaviour, ranging from a theft of a baseball cap that is accompanied by a shove to an armed robbery of a corner store. Conversely, a non-violent offence may actually involve an offender who poses a risk of serious harm to others, e.g. a young person with sexually deviant impulses who is convicted of trespass by night. Further, some offences, while not causing actual physical harm at the time of the offence, may nonetheless have posed a risk of serious physical harm to others, e.g. arson, trafficking in heroin, dangerous driving.

Chronic or persistent offenders cannot be easily defined on the basis of record alone. For example, there can be great differences between two young persons with the same youth court record: a young person who is apprehended for an uninterrupted string of breaking and enterings and who subsequently desists in the offending behaviour is different from a young person with the same number of breaking and enterings on record but who has been apprehended several times (for single offences) and persists in

offending.[1] Similarly, a first-time property offender who repeatedly breaches curfew conditions, but otherwise does no subsequent harm to others or property, is clearly different from a repeat property offender. A young person who has been apprehended for more than one episode of property offending in past six months is different from a recidivist young offender who has re-emerged after a four year hiatus in offending. As well, factors such as police charging practices, screening and diversionary practices, and plea bargaining - along with undetected offences - affect what may or may not be represented on an official record. Given this, greater frequency of offending indicated on a record does not decide chronicity: this requires an assessment of factors such as frequency of offending episodes over time, the length of intervals between offending episodes, the types of offences and degree of harm incurred, and the individual characteristics of the young person.

In short, serious offending varies considerably in degree. Assessing seriousness involves considerations of the degree of harm done in the past and the risk of harm (re-offence) in the future; each of these requires a consideration of the circumstances of the offence and offence history, and of the characteristics of the offender. Importantly, how one defines serious offending - or where one draws the lines in the varying degrees of seriousness - also turns on the purposes for doing so, i.e. to apply measures such as intensive community-based interventions, custody, treatment, lengthier custodial sentences, or transfer to adult court.

For the purposes of this chapter, "serious young offender" includes young persons who:

- have committed an offence involving death or serious physical or psychological harm; or
- have committed offences which may not have resulted in serious physical or psychological harm, but which involved the potential for serious harm to others, e.g., arson, trafficking in heroin, dangerous driving, etc.; or
- are chronic offenders, persistently committing substantive new criminal offences[2] involving harm to others or property, despite

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[1]Both are multiple offenders, however, the former is a multiple offender only (i.e. not a recidivist) while the latter is a multiple offender and a recidivist.

[2]A substantive new offence refers to the commission of new offences other than offences against the administration of justice such as failure to comply with the terms of a probation order.

repeated police apprehensions and interventions by the youth justice system; or

- have an offence history that is ostensibly less serious but who, on the basis of an assessment of risk factors (e.g. early age of onset, delinquent peers, substance abuse, etc.), indicate a propensity for engaging in escalating offending behaviour; or

- are a high risk to commit serious harm to others, as assessed on the basis of prior conduct (i.e. serious personal injury offence) and actuarial and clinical indicators, i.e., including both prior conduct and assessed risk of similar future conduct.

Each of these types of offenders (and they can overlap), by virtue of seriousness alone, require some sort of special response from the youth justice system. These responses will vary according to degrees of seriousness and assessed future risk to community safety. In this chapter we address various issues and measures that are directly connected to these (more) serious young offenders, including: targeted and coordinated law enforcement efforts, collective youth crime ("gangs"), assessment tools, sentencing structure, rehabilitative and reintegrative programs, placement, transfers to adult court, and dangerous offender provisions.[3] The discussion and recommendations tend to focus on chronic and serious violent young offenders.

[3]School violence is discussed in Chapter 12.

8.2 TARGETING CHRONIC OFFENDERS

Criminological research indicates that a small proportion of young offenders account for a disproportionate amount of the total crime committed by young persons. For example, this research indicates that six to eight percent of young people (or about twenty percent of the delinquent population) account for more than one-half of all youth crimes, including serious violent crimes. These chronic young offenders tend to have an earlier onset of delinquent careers, commit more frequent and serious crimes, can be more sophisticated and organized in their activities, and have a later age of desisting in offending.[4]

Since this small population can account for a large proportion of youth crimes, targeting the resources of the youth justice system and complementary agency resources on this population can be an efficient and effective use of limited resources to better protect the community. Enhanced monitoring of an identified chronic offender population is also consistent with criminological research which indicates that the risk of apprehension - and perception of the same - is associated with the deterrence of crime.[5] A program that simply takes a law enforcement approach of "trail them, nail them, and jail them" would, however, be incomplete and inadequate: criminological research also indicates that structured, well-designed and well-delivered rehabilitative programs, especially community-based programs, that are directed to the criminogenic factors (needs) associated with the offending behaviour of higher risk offenders can be at least comparable to simple custody and very often are more effective.[6]

Programs known as "Serious Habitual Offender Comprehensive Action Programs" (SHOCAP) were initially designed and promoted by the Office of Juvenile Justice and Delinquency Prevention of the United States Department of Justice in the 1980's. The program was adapted to and implemented in Calgary in 1989.

SHOCAP involves a focussed multi-agency approach to identifying serious

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[4]This research is American; see, for example, Wolfgang et.al (1987) and Shannon (1988). Similar comprehensive longitudinal studies of the same nature have not been conducted in Canada, but a Canadian example of how a small group of young people can account for a large volume of crime is found in Baron (1995).

[5]As distinct from the severity of sanction; see, Chapter 3 re: maximum age and deterrence.

[6]See, for example, Andrews et.al. (1989) and Gendreau and Ross (1987).

habitual offenders (SHO's) and coordinating the responses of police, prosecutional, correctional, and youth-serving agency resources, i.e. schools, mental health, addictions treatment, etc. In effect, the program selects out and targets chronic offenders for special treatment. Key elements of the program include: identification and designation of SHO's (according to point rating systems); gathering, recording and maintaining SHO data; prompt dissemination of information among participating agencies; coordinated case planning; specialized and enhanced supervision and monitoring; police investigation and apprehension; dedicated (or "vertical") prosecutions; sentencing; and the delivery of individualized rehabilitative and reintegrative support programs on a multi-agency basis.

The identification and labelling of a young person as a "serious habitual offender" and singling him out for special measures could have significant impacts on a young person's life. Accordingly, there are ethical implications related to mis-identification and over-inclusion in the identification process. It is therefore crucial that identification criteria be based on strict, reliable and objectively defined measures and that the designation (decision-making) process involve appropriate checks and balances.

Evaluation of the Calgary program indicates that the program was able to identify SHO's successfully and that, on the basis of police data and self-report measures, it had some success in containing the criminal activity of SHO's.[7]

The Calgary program is incomplete insofar as it is principally oriented around law enforcement[8]. While youth correctional services are involved in the program, the involvement of schools and other youth-serving agencies is minimal. The evaluation noted that in some cases the program appeared to have undermined social support networks and rehabilitation, possibly encouraging some crime sprees while a youth was on the run. This finding underlines the importance of establishing a comprehensive, multi-agency approach that is able to step in and provide suitable community-based program interventions and alternatives for youth.

Information sharing among agencies is essential to the effective

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[7]Compared to non-SHO's, SHO's had an earlier age of initial police contact, six times the length of delinquent career, nearly five times the rate of offending and a more rapid rate of escalation of offending behaviour. SHO's were involved in a disproportionate amount of all types of offences, i.e. property, violent, weapons, and other. See, Chase et.al. (1993) and Smith et.al. (1995).

[8]Accordingly, the program is described as "SHOP", i.e. leaving out the "comprehensive action" component of SHOCAP. The program has now also been implemented in Edmonton and Medicine Hat.

implementation of SHOCAP. Legal constraints in the Young Offenders Act (YOA) on information sharing proved to be a serious impediment to implementation of the Calgary program.[9] Changes brought about by Bill C-37 will likely assist in removing these impediments, but perhaps not completely resolve the problem.[10]

Implementation of a SHOCAP program can require some re-organization of police and other agency personnel to ensure the dedication of resources to the targeted group.[11] Implementation is only feasible in larger centres where there is a verified and sufficient number of chronic young offenders to justify the dedication of resources.

Brandon, Manitoba has implemented a program known as M.A.P.P. - Multi-Agency Preventative Programming - which involves the identification of three levels of higher risk youth. Like the Calgary program, the Brandon program involves the use of standardized and objectively-derived criteria and selection procedures. Again, information sharing among agencies to develop coordinated planning and interventions is crucial to implementation of the program. Unlike the Calgary program, the Brandon program is not police-based and, consequently, has a much greater emphasis on coordinated, multi-agency social interventions.

Many Canadian municipalities have established some type of formalized or informal programs that attempt to target and coordinate responses to youth at risk. There can be considerable differences in program orientation, agency participation and target population. Local initiatives should be encouraged; there is no single model that is suitable for all communities. Our point is a simple one: a systematized program that objectively identifies and targets serious repeat offenders for a coordinated, multi-agency response is a sensible, efficient and potentially effective means of addressing serious repeat young offenders.

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[9]This was partly surmounted by way of an Order-in-Council made pursuant to s.44.1(1)(h) YOA.

[10]Paragraph 44.1(1)(f) has been amended to permit the disclosure of records to a peace officer "for any other law enforcement purpose". Section 38(1.1) provides that information may be disclosed to any professional or other person engaged in the supervision or care of a young person when the disclosure is necessary to ensure compliance with a court order or to ensure the safety of staff, students or other persons. It is arguable that the latter constraints do not allow disclosure for case planning purposes where compliance or safety are not at issue. Information sharing is discussed in Chapter 9, wherein recommendations are made to clarify and broaden the capacity to share information for inter-agency planning and coordination. See also the discussion of integration and coordination of services in Chapter 2.

[11]In addition to dedicated police staff, special prosecutors and specialized youth workers (probation officers) can be assigned to the program to facilitate information sharing, coordination and planning.

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

> **Federal/provincial/territorial jurisdictions should study the feasibility of establishing SHOCAP - type programs and, if feasible, promote the implementation of programs on a pilot project basis. These pilot projects should be evaluated. It should be emphasized that these pilot projects should not be exclusively law enforcement oriented, but rather should involve a comprehensive, multi-agency approach.**

The role of the federal government in the development of pilot programs would be limited to technical support and research/evaluation assistance, as required and as resources permit.

8.3 COLLECTIVE YOUTH CRIME ("Gangs")

> "10 -12 Vicious Gangs in City: 20 - 30 hoodlums in most groups but some muster 100 members."
> (Vancouver Sun, March 21, 1950, p.1)

Gangs are not a new phenomenon in Canadian society (or internationally). Given this, it would be erroneous to conclude that the (re-)emergence of gangs in major metropolitan centres in the past decade or so is new and dramatic evidence of a generation gone awry or of an ineffective justice system.

How gangs are described can have important implications. A review of Canadian media coverage found that gangs are most commonly characterized as "Asian" and, secondly, as "youth" gangs. If gangs are described as "Asian" then immigration can be erroneously seen as a cause, with its restriction being seen as the solution.[12] Similarly, if gangs are characterized as "youth" gangs, then some may see a "soft" youth justice system as a cause and, consequently, toughening that system as a solution. With respect to youth gangs, young persons can be recruited and used by organized or street gangs to commit crimes or act as drug couriers, sometimes being discarded thereafter - used, in effect, as expendable

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[12]The extent of ethnically or racially specific gangs is not known. Research in British Columbia indicates that gangs in the Vancouver area are multi-ethnic/racial in nature. It is known, however, that some gangs can be predominately (but not exclusively) comprised of members from ethnic/racial groups (e.g. Asian, Hispanic, Aboriginal, etc.), though not necessarily immigrants. In earlier parts of this century, there were also known gangs predominately comprised of persons from ethnic groups, commonly second generation white Europeans.

employees. Nonetheless, reports suggest that the vast majority of organized or criminal gang members are, in fact, young adults.[13]

The very word "gang" is also problematic. "Youth gang" conjures up American media-driven images of formally structured and territorial inner-city groups, with common identifying markers and identifiable leadership, involved in organized and violent criminal enterprises. Gangs of this nature - predominately adult in composition - do exist in Canada, but most experts and practitioners would agree that the Canadian experience, in both scope and in character, bears little resemblance to the American situation.

Youth crime has always been predominately collective in nature, i.e. where two or more young persons are directly or indirectly involved. A group of adolescents with their baseball caps turned backwards who "hang out" in a shopping mall or corner store and who may occasionally commit minor crimes are not a "gang". Collective youth crime - group or gang crime - exists on a continuum, the difference between the various types of collectivities or groups being delineated according to factors such as structure, organization and continuity.[14] At the one end are unstructured, loosely affiliated and often transient youth groups. At the other end, are more structured, organized and ongoing gangs which are predominately comprised of young adults. These latter groups might be better described as "criminal gangs" rather than youth gangs.[15] In between are a range of more and less structured groups, often a hybrid mix of young offenders and young adults; these have been described in different ways, such as"wannabe"[16] and "street" gangs and criminal groups. Where gangs are identified, participation varies: the membership is comprised of leaders, core members, associates, and fringe members or wannabes.

It is, of course, irrelevant to a victim whether he has been robbed by a

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[13]For example, a review of more than 1000 gang members recorded by the Vancouver City Police found that 83 percent were adults, i.e. 18 years and older.

[14]Another dimension is the primary purpose for existence, i.e. where the primary purpose is economic gain (e.g. a criminal gang) versus a gang where the primary purpose is more symbolic, expressive and communal in nature. Such distinctions among types of gangs are not easy to determine without ethnographic studies.

[15]Adult criminal business organizations (organized crime) such as the Mafia and motorcycle gangs would also be included at the far end of the continuum. There are also some specific gang/group types, e.g. neo-fascist youth groups.

[16]Slang, derived from "want-to-be". The term "wannabe" is used in two ways: first, to describe young fringe associates of street gangs and, second, to describe nascent youth groups or pseudo gangs who take on the trappings and behaviour of street gangs but lack real structure, organization and continuity.

member of a "criminal gang" or a "youth group". There are, however, considerable differences in the way a community and the justice system should respond to an organized criminal gang versus an ad hoc and transient delinquent group. There are also obvious differences in the degree of ongoing threat each type may pose to community well being.

How we describe a problem, in part at least, defines that problem and consequently leads us in certain directions. It is, therefore, important that criminal justice agencies develop a common lexicon to more accurately describe group/gang activities - bearing in mind the difficulties associated with defining what is or is not a gang - and employ these in communications amongst themselves and to the public and the media.

A better balance is also needed in how we ascribe importance or meaning to certain gang/group activities. Dramatic group/gang offences such as swarming, curbings, drive-by shootings, and home invasions should not be simply dismissed as rare events that are fodder for a sensationalist media. While these events are indeed rare, usually sensationalized in the media, and very often committed by young adults, they are nonetheless tragic and understandably menacing to the public. On the other hand, dramatic media images tend to result in exaggerated fears and generalizations, with the unfortunate result that some members of the public may regard any group of seemingly unconventional adolescents hanging out in a public place with suspicion and fear.

Responding to group/gang crime also requires striking a delicate balance. On the one hand, denial and minimization of a local problem, in the interest of preserving community image, is unproductive. On the other hand, publicity associated with gang/group activities and interventions - including exaggerated "wars" on gangs - can lead to notoriety and accord "status", thereby inadvertently promoting gang cohesion and the formation of new gangs.[17]

British Columbia has perhaps the most comprehensive program established to address gang/group crime. Social interventions include dedicated gang probation officers, specialized intensive supervision workers, and specialized multi-cultural programs. Prevention activities include: school-based and youth-led educational initiatives such as videos, drama troupes and discussion groups, buddy/mentoring and peer counselling programs; a province-wide network of specially trained youth police officers in 134

[17]For this reason, it is a common law enforcement strategy not to publicly name gangs, especially newly emerging groups.

communities; training and community development/consultation workshops; a comprehensive resource guide to prevention/intervention initiatives; community and provincial inter-agency committees; a youth advisory committee; and a 1-800 telephone line to receive "tips" and also provide information, advice and referral. As well, there is a provincial coordinated law enforcement unit which works in cooperation with (some) dedicated local police gang units and dedicated gang prosecutors.

Manitoba has recently established a gang program which incorporates some elements of the British Columbia program. Several Canadian municipalities have established local programs with varying degrees of emphasis on law enforcement, social interventions and prevention. The Federation of Canadian Municipalities has demonstrated leadership in this area, and in promoting a Safer Communities agenda, by convening a national conference, carrying out research, and producing a "how to" manual with guidelines for communities to develop strategic responses to group/gang criminal activities.

Because each community is different, communities need to develop local strategies appropriate to the nature and scope of the group/gang crime problem (if any) and the unique characteristics of their communities. A simplistic, single program approach - such as enhanced law enforcement alone or enhanced recreational opportunities alone - is unlikely to be successful. Complex phenomena require a collaborative and comprehensive approach incorporating, for example, strategies such as: objective problem identification processes; community and neighbourhood mobilization; inter-agency coordination; educational and prevention initiatives; social interventions that focus on behavioural and values changes, education, training and job placement opportunities; as well as enforcement and suppression.

Accessible information about intervention strategies, program descriptions, "best practice" models, research and program evaluations would be helpful to communities and jurisdictions in developing local initiatives. Although the Canadian experience with gangs is very different from the United States, a body of useful information about community and program initiatives to address gangs is available through the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention. As noted, British Columbia has developed a resource guide and the Canadian Federation of Municipalities has developed a "how to" manual of community initiatives. As well, there is an informal network of persons from different jurisdictions responsible for coordination or developing community program initiatives. There is not, however, an ongoing forum for these officials to share information respecting program initiatives.

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

With respect to young offender involvement with gangs, provincial and territorial Ministers Responsible for Youth Justice and other responsible Ministers should, where gang or youth group problems are evident in their jurisdictions, establish policies which:

(1) focus on education and prevention directed at young persons who may be attracted to, recruited by or beginning to become involved with gangs;

(2) promote locally based community initiatives tailored to the unique circumstances of local communities and, where necessary, facilitate local initiatives by providing developmental assistance from central agencies/personnel with established expertise in the area; and

(3) involve collaborative multi-agency and community development initiatives which, in addition to enforcement and suppression, also include a comprehensive range of prevention, educational and social intervention strategies that are culturally appropriate to the circumstances.

Ministers Responsible for Youth Justice should also establish an ongoing mechanism for inter-jurisdictional information sharing among affected jurisdictions about effective or promising program initiatives which address the involvement of young persons in gangs.

8.4 ASSESSMENT

The disposition of serious young offenders and the administrative actions that flow from those dispositions (e.g. program placement) involve decision-making. In order for these decisions to result in suitable and effective measures, reliable assessment information is required.

Section 13 YOA enables the youth court to order a medical, psychological or psychiatric report for the purpose of making or reviewing a disposition, as well as for making other decisions[18] required under the Act. A report may be ordered where the young person and the prosecutor consent or where the court has reasonable grounds to believe that the young person may be suffering from one of an enumerated list of medical or psychological conditions.[19]

Bill C-37 expanded these grounds for assessment to include "a pattern of repeated findings of guilt under this Act" and an allegation that the young person has committed an offence involving serious personal injury.[20] This change should overcome obstacles that have arisen in some cases involving chronic or violent offending where consent to an assessment has not been forthcoming or where the presence of a medical or psychological disorder is not readily apparent.[21] On the other hand, the capacity to order an assessment in the absence of indicators of a disorder, or in the absence of consent, could be considered intrusive and could result in an over-use of assessments, with attendant additional costs and potential rights violations.

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[18]These include: considering applications to transfer to adult court or to extend custody into the conditional supervision period; setting conditions for conditional supervision or considering a review of a suspension of conditional supervision order; or for considering an application for disclosure under s.38 (1.5).

[19]These include: a physical or mental disorder, a psychological disorder, an emotional disturbance, a learning disability, or a mental disability.

[20]"Serious personal injury" offence is not defined in the Act. Section 51 YOA states that the provisions of the Criminal Code apply to young persons, with such modifications as the circumstances require, except to the extent that they are inconsistent with or excluded by the YOA. Given this, it could be argued that the definition of serious personal injury offence found in section 752 C.C. applies to the Act. One problem with this is that s.752 expressly excludes first and second degree murder from the definition of serious personal injury offence. If this definition applies to the YOA, it is possible that argument could be raised that an assessment could be ordered in, for example, a case of aggravated assault, but not murder. On the other hand, cogent argument could be presented that murder should be considered a serious personal injury offence. Given this lack of clarity, it is recommended that the Act be amended to define serious personal injury offence - see Chapter 13, Miscellaneous Issues.

[21]A defence strategy employed in some cases has been to attempt to avoid an assessment because the assessment could uncover underlying conditions that could lead to a more intrusive disposition.

These changes seem to indicate that, in effect, the interest of better addressing violence and chronic offending outweighs these potential drawbacks. The effects of these changes should be monitored.

Given the expertise required and costs associated with medical and psychological reports, it would not be feasible to have a clinical assessment conducted in every case, nor would it be necessary to do so in fairly routine cases. More accessible and economical assessment instruments that can be applied on a routine basis are, however, available.

Instruments known as "risk assessment" and "risk/needs" assessment were initially developed in the United States for adult offenders. There has been some Canadian research about the reliability and validity of these instruments, which have been adapted to apply to young offenders and have been implemented in a few jurisdictions in Canada.[22]

The "risk" aspect of these instruments involves an assessment of the likelihood of re-offending, based on ratings of a number of criminogenic factors. These factors are derived from the considerable body of research into the causes and correlates of delinquent behaviour and recidivism, including: age of first offence, number of prior convictions, poor school performance, anti-social peer group, substance abuse, parenting practices, etc. On the basis of the assessed risk of re-offending, young offenders can be assigned to different levels of intensity of community supervision (e.g. high, medium, low) or, if in custody, to higher or lower levels of security.[23]

The criminogenic factors identified are either static (i.e. unchangeable) or dynamic (changeable), e.g., the number of prior convictions versus substance abuse. The dynamic factors form the "needs" aspects of these instruments. By identifying the factors or needs that are directly related to offending behaviours, appropriate interventions can be identified for each case, e.g. substance abuse counselling, parent training, etc. Assuming these interventions are available and applied, the risk of re-offending can therefore be reduced.

Risk/needs assessments can be applied on a routine basis by probation

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[22]Manitoba, Ontario and the Yukon have implemented these instruments. British Columbia and, to a more limited extent, Newfoundland are in the process of implementation. See Rettinger (1995b) for a discussion of these instruments.

[23]Assignment to different levels of intensity of intervention is based on a numeric scale, but this is not a completely rigid process sincein exceptional cases, professional judgement can, be used to over-ride the numeric findings.

officers and custodial staff who are trained in their application.

There are a number of advantages to these instruments. Most important, by (more) objectively identifying young persons who pose a higher risk of re-offending and the program interventions they require, assessments allow for a potentially more efficient and effective use (targeting) of resources. It is a poor use of limited resources - and sometimes harmful - to subject a low risk/low need young offender, whose behaviour is temporary and situational, to sophisticated program interventions that are unnecessary. It is also a poor use of resources to subject higher risk young offenders to program interventions that do not relate to the factors that are associated with their offending behaviour. By identifying young persons who pose a higher risk of re-offence and providing program interventions that are related to the offending behaviour, resources can be deployed accordingly and the risk of re-offence potentially reduced.

Other advantages include: more objective and consistent decision-making; establishing an objective baseline for monitoring a young offender's progress; periodic re-assessment of treatment effectiveness; and establishment of a data base on the need for different types of program interventions.

The prediction of human behaviour is hardly an exact science. Research on adult risk assessment instruments indicate that there is a high degree of reliability and an acceptable degree of accuracy (predictive validity), ranging from 60 to 80 percent. However, both "false positive" and "false negative" predictions are possibilities, i.e., when a person is assessed at a higher risk of re-offence but does not re-offend, and vice-versa. Because young offender risk assessment instruments are at an earlier stage of development, research on reliability and validity is more limited. Importantly, these instruments do not assess dangerousness, but rather only the likelihood of the commission of a further offence.

The prediction of violent offending is an uncertain enterprise, in part because violent offences are much less common than non-violent offences: it is much more difficult to predict a relatively unusual occurrence. Research in criminal careers indicates that there are not well-defined patterns of types of offences (e.g. "specialists") in offending careers. Most non-violent offenders do not escalate into violent offences, but some do. Many serious violent young offenders have no history of prior convictions;[24] few of the young persons

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[24]Based on the youth court histories of 1911 young persons brought before the youth courts between 1986/87 and 1993/94 for the offences of murder, manslaughter, attempt murder, aggravated sexual assault, sexual assault with a weapon, aggravated assault and rape. Of these, 49 percent did not have a prior finding

appearing in youth court for violent offences have a prior finding of guilt for a violent offence.[25]

Psychopathic criminals commit a large number of crimes in general and a disproportionate number of violent crimes in particular. Psychopathy is not a diagnosis that is applied to young persons. Rather, conduct disorder, which is considered a precursor to psychopathy, may be diagnosed. Not all young persons who are diagnosed as conduct disordered will go on to be diagnosed as psychopaths; some "mature out" and only the most severely antisocial children will go on to receive such a diagnosis.

Canadian researchers have led the way in developing an assessment instrument - known as the Psychopathy Checklist Revised (PCL-R) - to diagnose psychopathy among adults. This diagnostic instrument is, in effect, a risk scale (i.e., excluding needs) only. In applying this instrument to adults, research has indicated an acceptable degree of reliability and some success in identifying recidivists.

A modified version of the PCL-R has been developed for young offenders. While this instrument appears to hold some promise, at present the research on its reliability and validity is very sparse - it is considered developmental and should only be used for research purposes.

Early identification of antisocial personality disorder could be advantageous because earlier interventions could reduce the chances of a young person carrying on to develop a persistent and sometimes violent criminal career. Antisocial personality disorder (psychopathy) is generally assumed to be intractable among adults. This may be less the case with young offenders: research indicates that interventions such as parent management training and cognitive-behavioural techniques can have some success in modifying the behaviour of youth diagnosed with conduct disorder.[26]

Even if developed to the point where reliability and validity are sufficient to justify practical application, the PCL-R could not be applied on a routine basis, given the training and expertise required of personnel and time required for administration. This might be able to be addressed by developing routine

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of guilt in youth court.

[25]Based on hybrid/indictable violent offences. For example, the Youth Court Survey indicates that only 15 percent of 16 and 17 year olds appearing in youth court on a principle charge involving a hybrid or indictable violent offence had a prior disposition for a hybrid or indictable violent offence.

[26]See, Rettinger (1995a).

screening protocols by, for example, employing risk/needs assessment instruments as primary assessments, to be followed by an instrument such as the PCL-R, or specially designed risk assessment instruments (e.g. for sex offenders, mentally disorders) as secondary risk assessments.

The Federal/Provincial/Territorial Task Force on High Risk Violent Offenders suggested that:

> "to define the criminal and health system's ability to assess risk, the federal and provincial governments should undertake collaborative research into risk prediction methods and tools, including consideration of establishing a centre of excellence in the science of risk prediction."

We endorse this suggestion. Since there is considerable overlap in risk prediction factors for young and adult offenders, some efficiencies in research might be able to be achieved by including young offenders in research designs.

The Task Force therefore recommends that:

With respect to assessment:

(1) **With technical and developmental support from the federal government, jurisdictions should consider implementing risk/needs assessment instruments to assist in the identification of young offenders with a higher risk of recidivism and to identify program interventions that can reduce that risk.**

(2) **The federal government and provincial/territorial jurisdictions should support further research into the reliability, validity and refinement of risk/needs assessment and risk prediction instruments, including their cultural appropriateness.**

8.5 REHABILITATION AND REINTEGRATION PROGRAMS

The nature and purpose of rehabilitation (and treatment) are often poorly understood because public perceptions tend to be coloured by popular stereotypes and misconceptions. The word "treatment" tends to conjure images of either psychiatric wards and medication, or of psychodynamic therapies wherein clients learn to identify the inner anguish and conflicts arising from early childhood experiences and therefore gain insight into their behaviour. Accordingly, rehabilitation tends to be seen as soft, fuzzy, and somewhat mysterious, and also unduly focused on the interests ("needs") of the offender, with little apparent regard to societal and victim interests.

Although proponents of rehabilitation are sometimes cast as being "soft" on crime, they pursue a widely accepted goal of the justice system: the protection of society by reducing the likelihood of re-offending. While rehabilitative interventions may be directed to the "needs" of young offenders - or, perhaps better put, the criminogenic factors associated with offending behaviour - these measures serve a broader societal purpose.

While pharmacological treatment and psychodynamic therapies may have a role to play in some cases, these types of interventions do not typify correctional rehabilitation, nor what works in most cases. Correctional rehabilitation is much broader than this and, generally speaking, is principally directed to the development of skills (or "competencies") which address criminogenic factors associated with offending. These include, for example: cognitive skills which address criminogenic (anti-social) thinking; values training; social skills training; life skills; educational, pre-employment and job training; and psycho-educational counselling and training programs which address specific issues such as anger management, conflict resolution and substance abuse.

Rehabilitation can and should also address the social context in which the young person operates by, for example, addressing the family situation (e.g. parent training, alternate placement), educational setting (e.g., specialized school placement), employment circumstances (e.g., job placement), and social relations (e.g., prosocial role models, leisure time activities).

In short, a distinction should be made between rehabilitation and treatment. Rehabilitation can include clinical treatment interventions in some cases, but usually involves a much broader array of measures which might be described as generically including:

- developing bonds to conventional values, activities and persons;

- o developing skills required to function in socially constructive ways in conventional society;
- o providing access to meaningful opportunities to exercise newly acquired skills; and
- o reducing the influence of delinquent peers as a socializing force.

Rehabilitation is not incompatible with responsibility and accountability (or consequences): while a young person may hurt another person because he has suffered from and modelled abusive relationships at home, this does not mean that the young offender's behaviour should be excused because of his background. At the same time, it would be poor social policy to ignore the contributing factors to his offending behaviour.

During the 1970's, there was pessimism about the effectiveness of rehabilitation as a result of well publicized reviews of research which appeared to suggest that "nothing works". Since that time, there has been a considerable amount of research - in part, led by Canadians - which indicates that rehabilitative interventions can have a significant effect in reducing recidivism rates. Much of this research involves the effectiveness of rehabilitation with recidivist and chronic offenders. In effect, the simple question of "What works?" in correctional rehabilitation has evolved to the more sophisticated question of "What works with whom, and under what conditions?" Many programs do work, provided that relevant and appropriate interventions are targeted to suitable individuals.

The research respecting the effectiveness of rehabilitation for young offenders involved in serious violent offences (other than sex offenders)[27] is, however, very sparse. This paucity of research on serious violent young offenders is likely due to the very small number of these offenders in youth correctional systems and/or the lack of dedicated rehabilitation programs for this population.

While not unequivocal, the research indicates that some of the more promising interventions with recidivist and chronic young offenders includes programs involving: psycho- educational interventions which address social and personal competencies (e.g. cognitive, social skills); residential therapeutic milieu (e.g. token economy); group counselling (e.g., substance abuse); intensive, family-based training and counselling; and intensive community supervision coupled with non-custodial rehabilitative interventions such as specialized educational placement, substance abuse counselling, and

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[27]The rehabilitation of sex offenders is a controversial issue. It is beyond the scope of this report to review the literature and issues relating to the effectiveness of these interventions with sex offenders.

so on. Several studies indicate that gains apparently achieved by residential or custodial rehabilitative programs wane upon release to the community, a finding which underlines the need for structured community programs to monitor and reinforce new skills learned after release. Several evaluations indicate that intensive, community-based programs coupled with rehabilitative interventions can be as or sometimes more effective than custodial programs for chronic offenders.

The research also indicates that the effectiveness of rehabilitative measures is dependent upon a number of factors related to program implementation, including, for example: appropriately targeting program interventions to address the criminogenic factors associated with offending (assessment and individualized planning); the use of appropriate modes of intervention (e.g., based on social learning principles); a multiplicity of available interventions to address differing individual needs; consistent application of interventions (program integrity); the quality of program, including the training and characteristics of staff; and a sound theoretical basis to the program. Satisfying these conditions is a tall order for youth correctional systems that are overloaded (high caseloads, overcrowding), have a high turnover of clientele often serving relatively short dispositions, and are under-resourced. Sometimes there are difficulties attracting well-qualified staff and establishing a range of programs, especially in rural areas or to address small numbers of "high need" young offenders.

There is a considerable emphasis in the literature on the need for "phased" programs involving individualized case management, graduated consequences, and structured re-entry into the community. Moreover, research on recidivism which employs "survival analysis" - i.e., the length of time before relapse (recidivism) - indicates that the first several months after release from custody is the period of highest incidence of re-offending. These findings suggest that, in order to reduce the likelihood of recidivism, it is important to focus on transitional and follow-up community-based programs after release from custody.

While the effectiveness of rehabilitation should not be under-estimated, it should not be over-estimated either. Rehabilitative measures are not a guarantee that a particular offender will not commit future offences. It is difficult to predict, with confidence, that a rehabilitative measure will work in an individual case. Rehabilitative measures are associated with reducing overall levels of recidivism but, by no means, the elimination of recidivism.

There are many impressive custodial and community-based rehabilitation programs in Canada. The availability of a suitable range of rehabilitation programs of high quality does not, however, match the need. In earlier chapters, we have discussed means by which the youth justice system can be re-oriented by increasing levels of diversion, encouraging coordinated multi-disciplinary responses, and enhancing alternatives to custody. As well, the federal government has proposed a re-profiling of the cost-sharing agreement to target certain programs that satisfy certain social policy objectives, including custodial rehabilitation programs and community-based transitional programs directed to serious young offenders. In theory, a re-orientation of the system and re-profiling of the cost-sharing agreement could lead to enhancement of rehabilitation and re-integration programs directed at serious offenders, but whether this can be accomplished will, in part, depend on financing and the resolution of cost-sharing issues (see Chapter 2).

Although there are many impressive programs in Canada, few have been subject to systematic evaluation. A lack of evaluation does not allow administrators to determine whether programs are working or to fine tune them so that they are more effective. As well, it leads to an absence of evidence which might otherwise be useful in assuaging the concerns of a skeptical public.

There are also, aside from specialized sex offender treatment programs, few specialized custodial programs dedicated to the rehabilitation of young offenders who have committed serious violent offences such as homicide, attempted murder, aggravated assault, armed robbery, and so on. Rather, these serious violent young offenders tend to be slotted into program components that are generally available to other (recidivist and chronic) young offenders in custody, which may be supplemented by additional interventions provided on an individualized basis. There is nothing wrong with this approach but, given the seriousness of these offenders and the social risk they may present, more intensive and specialized programs would be beneficial.

The lack of specialized programs for the rehabilitation of serious violent young offenders in most jurisdictions is largely a function of numbers: there are relatively few serious violent young offenders in youth custody to justify specialized programs. Moreover, the individual characteristics and needs of those that are in custody may be quite different or they may be in different stages of processing in the system (e.g. open versus secure custody or near the end rather than near the beginning of a custodial disposition). All serious violent young offenders cannot be simply lumped together into one common

program: the only common characteristic they may share is having committed a serious violent offence. In short, small numbers, individual differences, and the dynamics of system processing often make it infeasible to establish dedicated programs for these young offenders in most Canadian jurisdictions. Most of this population in youth custody falls into the sixteen to nineteen year old range.

A similar problem arises with young adults in custody in the provincial and federal correctional systems. For example, there are eighteen and nineteen year olds serving fairly lengthy custodial terms for serious violent offences in both of these systems. There are few, if any, dedicated programs for this population in provincial adult systems due to small numbers and limited resources. While there are some dedicated violent offender treatment programs in the federal system (e.g., at Regional Psychiatric Centres), these are geared to an older adult population. Again, small numbers of older adolescent serious violent offenders preclude the establishment of dedicated programs.

In effect, the same problem of small numbers afflicts all three correctional systems. It could be said that the somewhat artificial jurisdictional boundaries of separating young and adult offenders (even though they may be the same or very similar ages) and of separate provincial and federal responsibility for offenders stand in the way of more effective programming. If these jurisdictional boundaries were able to be overcome, it might be possible to establish a dedicated violent offenders treatment program for adolescents in a large province or region if that program was able to draw upon older adolescents in the sixteen to twenty year old age range from all three correctional systems.

To determine whether cooperative, dedicated programs for older adolescent serious violent offenders from all three correctional systems are feasible, further study is required. A preliminary review of older adolescents serving longer custodial terms in all three custodial systems in Ontario suggests there may be sufficient numbers to warrant the development of a dedicated program, but a much closer examination of case characteristics and program needs in Ontario and other large provinces or regions is required before any conclusions can be drawn.

If these programs prove to be feasible, they should be implemented. If implemented, it may be necessary for jurisdictions with smaller populations - for example, the territories and possibly the Atlantic provinces - to be provided access to other regional or provincial programs, if programs are not feasible in these smaller populated jurisdictions. Amendment of the Act to

allow for the mixing of young offenders and young adults in a special rehabilitation program for "youthful offenders" would also be required. This is discussed later in this chapter under Custodial Placement of Young Persons Not Transferred (8.9). The major disadvantages of this proposal are that these programs would have to be centralized to some degree and that the mixing of adolescents who are subject to different regimes of sentence administration (e.g. judicial review versus parole) would be problematic. It should be emphasized that we are not recommending the establishment of new facilities, but rather new programs within existing facilities (e.g., a separate unit).

Another problem in establishing suitable custodial rehabilitation programs for some serious offenders again concerns small numbers: the cases which only come along once in a while but which have a high need for treatment/ management of specialized problems such as persistent fire setting, brain injury, fetal alcohol syndrome (see Chapter 12) and so on. Since these cases are very uncommon, it is usually infeasible to establish specialized programs to address their special needs, especially in jurisdictions with smaller populations. Accordingly, they must be fit into available programs, but often it is not a neat fit. Again, an identification of these types of youth on a cross-jurisdictional basis may be helpful in identifying whether a regional or even national program may be feasible. As well, there may already be small, dedicated programs or more suitable programs available in some larger jurisdictions, but other jurisdictions may be unaware of their availability. This is an area where the federal government could play a coordinating role.

Implementing effective rehabilitation and reintegration programs for serious young offenders is primarily an administrative and fiscal issue, not a legal one. The role of rehabilitation under the Act has been the subject of considerable controversy. Some critics have argued that the Act has shifted the focus of system efforts away from rehabilitation of young persons toward responsibility and accountability for the offence. Although the Act speaks to the "special needs" of young persons (e.g. section 3) and occasionally to "treatment" (e.g. s.13), in the first iteration of the Act, the word rehabilitation was referenced only once (s.35). As well, the former provisions for consent to treatment orders provoked considerable controversy in Ontario. The treatment order provisions, which were rarely used, have now been repealed. Bill C-37 also appears to have strengthened the role of rehabilitation by, for example, amending the Declaration of Principle to state that the "protection of society ... is best served by rehabilitation, whenever

possible ..." and by other changes.[28]

While rehabilitation may have a diminished role under the Act, as compared to the JDA,[29] the case law nonetheless indicates that rehabilitation and the special needs of young persons are still over-arching considerations in youth court decisions.

The repeal of the treatment order provisions does not mean that treatment will not be undertaken nor that consent to treatment no longer applies to young persons. In this regard, a distinction should be made between "treatment" which includes intrusive medical and psychiatric interventions, and rehabilitative interventions which include less intrusive psycho-educational measures such as social and cognitive skills training, counselling, and so on. Treatment and rehabilitative measures can still be ordered as a condition of community supervision, incorporated as program elements in custodial programs and accessed through provincial mental health legislation. Consent to medical or clinical treatment will still be governed by provincial mental health and other legislation which addresses the legal capacity of a minor to consent to medical treatment, and by medical and professional ethics. The repeal of the treatment order and accompanying consent provisions simply avoids dual jurisdiction in this area.

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

With respect to rehabilitation and reintegration programs for serious young offenders:

(1) The federal government, in collaboration with participating jurisdictions, should take the lead in undertaking feasibility studies in at least two or more largely populated provinces or regions to determine whether there are sufficient numbers of serious violent older adolescents (between the ages of 16 and 20 years) in custody in the youth, provincial adult, and federal correctional systems to establish small, specialized violent offender treatment programs which would

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[28]For example, broadening the grounds for a medical or psychological report and broadening the grounds for release to include opportunities for rehabilitation in the community. As well, Bill C-12 (1992) amended the test for transfer to adult court to include the rehabilitation of the young person, along with protection to society as a principle objective.

[29]Under the JDA, the theory underpinning indeterminate dispositions was that the length and nature of the intervention was determined by the rehabilitative needs of the young person, rather than the seriousness of the offence and the culpability of the offender. Rehabilitation under the YOA must be considered within the framework of the rest of the principles set out in section 3 of the Act.

address these similarly-aged offenders from all three systems. If feasible, cooperatively funded pilot programs should be established and evaluated. It should be emphasized that we are not recommending the establishment of new custodial facilities, but rather specialized, cooperative programs within existing space (e.g., special units).

(2) Priority should be given to the evaluation of programs directed to the rehabilitation and reintegration of chronic and serious violent young offenders.

(3) Federal/Provincial/Territorial Senior Officials Responsible for Youth Justice should examine the feasibility of establishing a mechanism to identify cases across jurisdictions involving chronic and serious violent young offenders who have unique special needs which require highly specialized rehabilitation services, with a view to determining whether specialized regional or national programs are required and feasible.

8.6 TRANSFER TO ORDINARY COURT

> "The transfer provision to adult court...provides the system with a safety valve mechanism for such difficult cases as the mature criminal who is under eighteen or the offender who has committed an extremely serious offence."
>
> (Robert Kaplan, Solicitor General, House of Commons, 1982)

Transfer to ordinary (adult) court has been described as the most serious decision available in the youth justice system. A decision to transfer means, in effect, that a young person is not suitable for the more protective and rehabilitative measures available in the youth justice system. Accordingly, the young person must be dealt with as an adult under the ordinary criminal law, with the attendant implications of longer available sentence length, probable placement in an adult correctional facility, publication of identity and an adult criminal record. Because these decisions have such consequences and because societal views on the degree of responsibility a young person should bear for serious offences are so divergent, transfer is perhaps the most controversial issue in juvenile justice.

For some, transfer is a repugnant mechanism that should, if not be eliminated altogether, only applied in rare and extraordinary cases involving the most intractable and dangerous young offenders.[30] From this perspective, transfer is regarded as an indicator of the failure of the youth justice system's ability to acquire and deliver suitable treatment resources to address even the most serious cases, a capitulation to pressures to punish rather than rehabilitate, and inappropriate because it imposes on adolescents a system of accountability designed for adults.

For others, transfer is regarded as an essential component of a youth justice system that cannot realistically be expected to be able to rehabilitate every serious young offender or to provide an adequate degree of incapacitation, deterrence, or denunciation in the most serious cases. Transfer, it is argued, is not the draconian kind of measure that the critics of transfer typically portray, especially because, by virtue of the placement provisions of s.16.2 YOA, transfer need not automatically result in the immediate placement of immature and vulnerable youth in adult correctional facilities.

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[30]For example, the Manitoba Aboriginal Justice Inquiry recommended the elimination of transfer altogether and the federal Liberal Party justice policy (prior to the 1993 election) stated that "our eventual goal is the formation of a totally separate juvenile justice system", i.e., implicitly, one in which every serious case could be addressed within the youth justice system.

For still others, transfer should be much more commonly used, especially in cases involving violence, and is considered justified on the grounds of deterrence and public protection.

In short, there is a spectrum of opinion about transfer that goes to the heart of the debate about the purposes and effectiveness of the youth justice system. Most professionals involved in the youth justice system agree that the system is suitable and adequate to address the vast majority of cases, including most violent offences, and that transfer should be infrequently used. Despite this, there are divergent opinions about the criteria and factors that should be considered in transfer decisions which reflect different views about the goals to be achieved by transfer. There are divergent opinions about what constitutes an "appropriate" case for transfer and, as a result, what is meant by "infrequent" use of transfer.

Several interest groups have advocated changes that would substantially increase the frequency of transfer. Proposals have been made which would provide for automatic transfer in cases involving a second offence, a second violent offence, or in every case of a serious violent offence such as homicide, aggravated assault, and armed robbery.

The key arguments commonly advanced by those who support more frequent use of transfer include:

- If prospective repeat or violent young offenders knew they would be transferred to adult court, they would be less likely to commit offences, i.e. general deterrence.

- The longer sentences available in the adult system would provide a greater degree of individual deterrence.

- The longer sentences available in the adult system would provide greater protection of the public by means of incapacitation and restraint.

- The shorter dispositional lengths available in the youth system are insufficient to denounce heinous crimes and to adequately reflect the gravity of these offences.

- Because of individual differences in maturation, the maximum age is arbitrary. Transfer provides a means of adjusting for this, allowing more mature and criminally sophisticated youth to be removed from the youth system. Transfer benefits others in the youth system who

are detrimentally influenced by these more sophisticated young offenders when they are kept in the youth system.

- Transfer allows for publication of identity and an adult record, thereby affording greater public protection by facilitating public and employer awareness of the identity of recidivist and violent offenders.

- Transfer enables the youth justice system to focus its efforts and limited resources more effectively on the much larger group of less chronic and less violent young people who are not transferred and who can benefit from the youth system.

In short, most of these arguments are grounded in the belief that there will be greater protection of the public - through general and specific deterrence, and incapacitation - afforded by the lengthier sentences that would be imposed in adult court. The extent to which changes to the transfer provisions and youth court dispositions for murder brought about by Bill C-37 may have mitigated the concerns of these interest groups is not known.

Conversely, other interest groups advocate a restrictive approach to transfer (such as the present law or an even more restrictive approach). The key arguments advanced by those who support a restrictive approach are rooted in the protective and rehabilitative role of the youth justice system, including:

- The youth system offers a much greater degree of rehabilitative services that are also more age appropriate. In the long term, rehabilitation would offer better protection to society. Rehabilitative prospects are also enhanced by the protection of the young person's privacy, thereby avoiding the damaging effects of labelling.

- Retention in the youth system reflects the principle of diminished accountability due to immaturity; the youth court can take varying degrees of maturity into account in imposing disposition.

- Placement in the adult correctional system with sophisticated criminals would have detrimental effects on transferred young persons, including possible abuse, thereby increasing the likelihood of re-offending upon release.

- There is little foundation to the belief that transfer will result in longer sentences. After considering the unavailability of remission (or statutory release) and parole in the youth system, young offenders often receive sentences that are comparable to and sometimes greater

than adults.

- There is no evidence that an increased use of transfer results in lower youth crime rates.

- Transfer may have a disproportionate impact on aboriginal youth, who are over-represented in the youth/criminal justice systems, thereby further disadvantaging a disadvantaged group.

- Potential cost savings from an increased use of transfer would probably be fairly marginal; cost savings and a re-focusing of the resources of the youth justice system is better accomplished by, for example, a greater use of diversion and alternatives to custody.

In this section, we will examine the merits of these arguments, provide an historical and international perspective on transfer, and examine incidence rates, strategic directions and other closely connected issues such as the transfer process and placement.

8.6.1 Historical Perspective

Under the Juvenile Delinquents Act (JDA), a transfer could only occur if the young person was fourteen years of age,[31] the allegation involved an indictable offence and the court was of the opinion that the "good of the child and the interest of the community demand(ed) it."[32] As well, the JDA expressly provided that a juvenile must be treated, not as a criminal, but as a "misdirected and misguided child, and one needing aid, encouragement, help and assistance". Although it would seem that transfer would be difficult to justify as being for the child's own good, transfers were nonetheless approved, albeit relatively infrequently.[33] Case law dictated that transfer should be an exceptional procedure reserved for only the most serious of cases.[34]

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[31]There was no requirement that the offence be committed while the child was fourteen years or more.

[32]Transfer applications were usually made by Crown Attorneys, but juvenile court judges occasionally exercised their prerogative to order transfer on their own motion. There were no provisions allowing the young person to apply for transfer. A transfer order could also be made before or after adjudication, though the latter rarely occurred.

[33]For example, in 1983 there were 1333 charges (not persons or cases) transferred, comprising 1.5 percent of the criminal charges heard by the juvenile courts in Canada.

[34]See, for example, R. v. Merc (1976) 30 C.C.C. (2d) 497.

The 1965 Department of Justice Committee report on Juvenile Delinquency in Canada affirmed the need for a transfer procedure and recommended that the test for transfer be clarified and narrowed, but also that summary offence allegations be eligible for transfers.[35]

The 1975 Solicitor General's Committee report on Young Persons in Conflict with the Law affirmed the need for a transfer procedure but, in stating a general intent to restrict transfer as much as possible, recommended that age eligibility be set at sixteen years and that offence eligibility be limited to an allegation of an indictable offence other than an offence referred to in section 553 of the Criminal Code. Several other related recommendations in this report were eventually reflected in the transfer provisions established under the Young Offenders Act (YOA).[36]

During the debates about Bill C-61 in the House of Commons in 1982, transfer to adult court was often connected to the issue of the uniform maximum age, specifically to concerns that the maximum age would result in the incorporation of more mature (i.e., 16 and 17 year old) repeat or violent offenders into the youth justice system. The Solicitor General of the day gave repeated assurances that transfer to adult court would act as a "safety valve" to address the more serious offenders among this population. However, the dispositional maxima established in the Act also contemplated that the most serious offences could be addressed by a youth court disposition - the three year maximum custody disposition was expressly included to address offences for which an adult would be liable to life imprisonment.[37]

In its first iteration (1984 - 92), section 16 YOA provided that transfer "should" be ordered if the youth court was of the opinion that transfer was in the "interest of society and having regard to the needs of the young person".[38] The change in the transfer test appears to have been intended to

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[35]For example, the recommended test included unsuitability for treatment in a youth facility or where the safety of the community requires that the offender continue under restraint, for a period longer than the juvenile court is authorized to order. There were several other related recommendations.

[36]For example: mandatory pre-disposition reports, factors to be considered, and allowing a young person to apply for transfer in order to obtain the benefit of a jury trial. The Committee did not discuss the test for transfer, although the recommended draft legislation appeared to provide for broad judicial discretion.

[37]At first Reading, the Bill provided for a maximum two year custody disposition.

[38]In addition to changing the test for transfer, the YOA: established that a young person must have been fourteen years or more at the time of the commission of offence; required that the alleged offence be indictable other than indictable offences set out in s.553 C.C.; provided that transfer can only be ordered prior

reflect the reality that transfer was rarely, if ever, in the best interests of the young person. Before proclamation of the YOA, some scholars speculated that this new test might lead to more frequent transfers than under the JDA because it appeared to subordinate the needs of the young person to the interests of society and because the test - "should" as opposed to "demand" under the JDA - was less stringent. After proclamation, divergent case law emerged among different provincial appellate courts, with narrower and broader interpretations being adopted. These differences appear to have been related, to some extent, to variations in rates of transfer among some provinces.[39] Regardless of whether a broad or narrow interpretation of the new YOA transfer test was adopted in particular jurisdictions, there were substantial decreases in transfers under the YOA when compared to rates under the JDA.[40]

In 1992, the section 16 test for transfer was amended by Bill C-12 to state that the youth court shall:

> "consider the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person, and if the court is of the opinion that those objectives cannot be so reconciled, protection of the public shall be paramount and the court shall order that the young person be proceeded against in ordinary court..."

Transfer to adult court and the issue of the disposition of murder cases have

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to adjudication; removed the capacity for the court to initiate transfer on its own motion; provided the opportunity for the young person to apply for transfer; set out a statutory list of factors to be considered; mandatorily required a pre-disposition report; and provided a statutory right of review.

[39]For example, the Manitoba and Alberta Courts of Appeal adopted less restrictive interpretations of the transfer test. These two jurisdictions had higher than average rates of transfer.

[40]Under the YOA, the Manitoba Court of Appeal adopted a broader interpretation (i.e., more permissive of transfer) while the Quebec Court of Appeal adopted a narrower interpretation. Both of these provinces were unaffected by the uniform maximum age; accordingly, comparisons of the frequency of transfer before and after the YOA can be made. In Quebec, the annual average number of young persons transferred between 1980 - 83 (JDA) was 53, compared to 18 in the YOA period between 1985/86 and 1991/92. The corresponding figures for Manitoba were 79 and 14. FY 1991/92 is the final year considered because the transfer test was amended in May, 1992; FY 84/85 is omitted because it was a transition year. These data reflect persons, rather than cases or charges transferred.

It should be noted, however, that other factors could have affected the frequency of transfer. For example, it has been speculated that the determinate sentencing structure of the YOA, along with judicial determination of early release, afforded the judiciary greater assurances that young offenders would, if kept in the youth court system, serve a custodial disposition commensurate with the seriousness of their offending. (Under the JDA, there were indeterminate committals to training schools, with release being determined administratively.)

been closely connected. Accordingly, Bill C-12 also changed the penalties for murder. The youth court disposition for first and second degree murder was increased to five years less one day[41] and, if transferred to adult court and convicted, the parole ineligibility periods associated with the mandatory penalty of life imprisonment for first or second degree murder were mitigated.[42] These changes were intended to narrow the extreme options formerly available to the youth court in deciding whether to transfer a young person charged with murder.[43] The lengthened youth court disposition for murder was intended to provide additional time for rehabilitation and protection of the community - either through conditional supervision in the community or continuation of custody into the conditional supervision period - while mitigated parole ineligibility periods were seen as consistent with the principle of diminished accountability due to immaturity.

Bill C-12 also provided the adult court the discretion to place a transferred and sentenced young person in a youth custody facility, a provincial correctional facility for adults or, where the sentence is two years or more, in a penitentiary.[44] These changes provided the court greater flexibility, potentially assuaging concerns about the placement of vulnerable young persons in correctional facilities with more criminally sophisticated adults.[45] The new placement provisions may serve to focus the decision about transfer more on the issue of disposition/sentence length required, and less on concerns about placement and the availability and suitability of facilities and programs.

Since Bill C-12 was proclaimed in force in May, 1992, the case law indicates that, as with the previous test, divergent interpretations of the new transfer

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[41]Five years less one day (rather than five years) was chosen, in part, to avoid the need for jury trials.

[42]Parole eligibility was to be set by the court at between five and ten years.

[43]For example, a decision to transfer or not on a charge of first degree murder involved a choice between a maximum of three years in youth court or a minimum of 25 years before parole eligibility in adult court.

[44]See 16.2 YOA. The determination of placement is mandatory and is, upon application, reviewable by the court. Placement can be "blended", e.g. where the first portion of the custodial sentence is spent in a youth custody facility with subsequent placement in an adult facility for the latter portion of the sentence. Section 16.1 YOA also permits the court to place a transferred young person who is awaiting trial or sentence to be placed by the court in a place of temporary detention for young persons. Section 16.1 establishes a presumption of placement of young persons under the age of eighteen in youth custody; section 16.2 does not have a similar presumption.

[45]The placement of transferred young persons in youth custody centres was, before these new provisions were enacted, able to be accomplished administratively (s.733 C.C.), but this was rarely applied.

test have emerged among different Courts of Appeal.[46] In general, these appellate cases have adopted broader and narrower interpretations of the new test which are more[47] and less permissive of transfer, i.e., the interpretation and application of the new test is not yet settled.[48]

In response to stated party policy, as well as interest group lobbying and growing public concerns about serious young offenders, the new Liberal government again amended the provisions for transfer to adult court and the penalties for murder in 1995. Bill C-37 establishes that young persons who are sixteen or seventeen years old at the time of the offence and charged with first or second degree murder, attempt murder, manslaughter or aggravated sexual assault shall be proceeded against in ordinary court unless, on application, the youth court decides that the young person should be proceeded against in youth court. The onus is on the applicant, usually the young person,[49] to satisfy the court that the young person should be proceeded against in youth court. The test for transfer continues to involve the interest of society, including the objectives of the rehabilitation of young persons and the protection of the public, and the paramountcy of the protection of the public when those objectives cannot be reconciled.[50]

Ostensibly, the policy intent of these changes to the transfer provisions is not necessarily to increase the frequency of transfer for these offences, although a reading of the new provisions suggests this is not clear.[51] The

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[46]Bill C-12 also streamlined the review (appeal) of youth court transfer decisions by providing for direct review by Courts of Appeal.

[47]It was not a stated objective of the federal government to increase the frequency of transfers.

[48]These divergent interpretations largely turn on whether the "interest of society" includes only the objectives of protection of the public and rehabilitation or whether it leaves room for the consideration of other objectives such as deterrence, denunciation, and accountability in a public forum. See, Bala (1995).

[49]There are also provisions which allow the Attorney General or agent of the Attorney General to, in effect, consent to keeping the case in youth court by not opposing a young person's application.

[50]Technically, these changes could be described as amounting to a kind of mandatory transfer in the event the young person (or Crown) does not apply to have the case heard in youth court, i.e., in these circumstances, the young person must be proceeded against in ordinary court. It is expected, however, that these circumstances will not commonly occur; the Crown must determine, on a case by case basis, whether the public interest requires that the young person be proceeded against in youth court. This revised transfer procedure does not quite amount to presumptive transfer because the test for transfer is not changed. Instead of characterizing this new procedure as a quasi-mandatory hearing involving a reverse onus, it will, for the sake of brevity, sometimes be characterized as "presumptive transfer" and "mandatory hearings" in this chapter.

[51]A news release about the Bill characterized these changes as part of a "crackdown" on serious violent young offenders.

transfer test is the same. Accordingly, the decision to transfer must still satisfy this test, which determination is based on the merits of the individual case. The apparent intent of placing the onus on the young person is that, given the seriousness of these offences and the potential public protection issues at stake, the onus should be on the young person (rather than the Crown) to establish that transfer is not necessary for public protection. The apparent intent of "mandatory" hearings is to provide stronger assurances that consideration is given to transfer in cases involving these very serious offences allegedly committed by sixteen and seventeen year olds, bearing in mind that these hearings are not, in fact, "mandatory" because they may be dispensed with when the Crown and young person agree not to proceed to a hearing. Where there is such agreement, there is still the assurance that the Crown has carefully considered transfer as an option.[52]

Bill C-37 also extended the disposition length available to the youth court for murder if a young person is not transferred. The disposition for first degree murder is increased to a maximum of ten years, comprised of a maximum of six years in custody and four years on conditional supervision. The disposition for second degree murder is increased to a maximum seven years, comprised of a maximum of four years in custody and three years on conditional supervision.[53] The intent of these new, longer dispositions is to better reflect the seriousness of the offence of murder and to give the youth court added flexibility in addressing this offence. Since the penalty available in youth court for these offences is greater than five years, young persons may elect a trial by judge and jury[54] which must, by virtue of section 96 of the Constitution Act, be heard by a federally appointed judge. This use of superior courts as youth courts effectively creates "two-tiered" youth court systems.

Bill C-37 also amended the parole ineligibility periods for young persons transferred to adult court and convicted of murder such that ten and seven years are statutorily fixed as the minimum periods to be served before parole eligibility for sixteen and seventeen years olds convicted of first and second degree murder respectively. The parole ineligibility period for transferred

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[52]On the other hand, it is probably safe to say that, before Bill C-37, Crown Counsel routinely considered whether to make applications in cases involving serious violent offences.

[53]Custody can be extended beyond the six and four year maximums and into the specified conditional supervision period if, upon application by a Crown Attorney, the court is satisfied that there are reasonable grounds to believe that the young person is likely to commit an offence causing the death of or serious harm to another person prior to the expiration of the disposition (s.26.1 YOA).

[54]Section 11, Charter of Rights and Freedoms.

young persons under the age of sixteen who are convicted of first or second degree murder is to be fixed by the court at between five and seven years.

Bill C-37 was enacted before there was sufficient time series data available to assess the impacts of the changes brought about by Bill C-12 in 1992.

While the changes brought about by Bill C-37 would appear, at first blush, to encourage a substantial increase in the frequency of transfers this may not prove to be the case, because:

- the enumerated offences, limited to sixteen and seventeen year olds, occur very infrequently.

- although the onus is on the young person to satisfy the court that the case should be heard in youth court, this may not be difficult; for example, defence counsel commonly adduce evidence of amenability to treatment in transfer hearings.

- the test for transfer is not changed.

- amendment to the Declaration of Principle, which states that the protection of society is best achieved by rehabilitation, whenever possible, may affect the interpretation of the transfer test, possibly tipping the balance more in favour of rehabilitation and retention in the youth system.

- in cases involving murder, the longer disposition available to the youth court will likely militate against transfer in cases involving young persons under sixteen and, in cases involving sixteen and seventeen year olds, may offset the reverse onus. That is, a transfer may be considered unnecessary because a longer youth court disposition may be seen as affording a more adequate period for rehabilitation or to deter or denounce these crimes.

Alternatively, the courts may interpret the reverse onus applicable to sixteen and seventeen years charged with enumerated offences as a reflection of Parliamentary intention to increase the frequency of transfer in these cases. Given that there is uncertainty about the effects of these changes, it is probable that divergent interpretations of these new provisions will emerge among different appellate courts.

8.6.2 International Context

International Instruments

The United Nations Convention on the Rights of the Child and other United Nations standards respecting the administration of juvenile justice[55] require that adult and juvenile offenders be separated. Article 37(c) of the Convention requires that every child - defined as a person under eighteen years - shall be separated from adults unless it is considered in the child's best interests not to do so. Moreover, these international instruments place considerable emphasis on the care, protection, well being and age appropriate treatment of juvenile offenders. For example, the Convention provides that:

- "In all actions concerning children, ... the best interests of the child shall be a primary consideration." (Article 3)

- "The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." (Article 37(b)).

Although it is conceivable that a transfer to adult court and consequent placement in an adult facility could be in a young person's best interests in unusual cases[56], transfers that occur in Canada are usually approved on the grounds that they serve the public interest (protection of society) rather than the young person's best interest. While these United Nations instruments seem to suggest that transfer to adult court should not occur except where it is beneficial to a young person, this is not the case. A distinction should be made between transfer to adult court and the placement of young persons. These instruments only require that young persons under the age of eighteen years be separated from adult offenders. They do allow a young person to be transferred to adult court and to be placed in an adult facility once he or she has attained the age of eighteen years. This is what usually occurs in

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[55]See Article 10(3) of the International Covenant on Civil and Political Rights; Article 29 of the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty; and Article 26.3 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. These international standards do not have the force of law but, in ratifying the Convention in an international forum, Canada made a commitment and a failure to abide by its terms could be a source of embarrassment and criticism.

[56]Examples indicated in these international instruments include: where a child and parent are incarcerated together or where a young person is able to access a special program for adults that is beneficial to him or her. Another example might be where a young person applies for transfer in order to obtain the benefit of a jury trial.

Canada: most of the (few) young persons who are transferred to adult court are, by the time proceedings and trials are completed, eighteen years old (or more) when they are sentenced: between 1989-90 and 1993-94 there was an annual average of less than five young persons under the age of eighteen placed in federal penitentiaries.[57]

When Canada ratified the United Nations Convention on the Rights of the Child, it entered a reservation respecting Article 37(c); this reservation allows for a breach of the "under eighteen" rule in cases where a young person is transferred and subsequently placed in an adult facility. As well, amendments to the YOA in 1992 (Bill C-12) allow for the placement of young persons who have been transferred to adult court, and who have been remanded or sentenced to custody, to be placed in youth correctional facilities.[58] These new placement provisions bring the Act closer to the spirit of the Convention.

United Nations instruments affecting juvenile justice also place considerable emphasis on employing custody or imprisonment as a measure of last resort and, when applied, limiting the length of deprivation of liberty to the minimum period necessary. For example, Article 3 of the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty states: "Deprivation of liberty of a juvenile should be a disposition of last resort and for the minimum period and should be limited to exceptional cases."

Nonetheless, these international instruments do not preclude the possibility of lengthy custodial dispositions. For example, Article 37(a) of the Convention provides that neither capital punishment nor life imprisonment

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[57]In 1994-95, there was an anomalous increase to 21 admissions, but this change was entirely attributable to an increase in transfers in Manitoba. The Manitoba increase was reportedly attributable to young persons requesting transfers themselves (i.e., in effect, by consent) in order to access placement in adult correctional facilities or to attract a less onerous sentence in the adult system. Data regarding sentenced admissions of young persons under the age of eighteen to provincial adult correctional facilities are not uniformly available. On the basis of available statistics, it appears that this is a rare occurrence. For example, in FY 1993-94, there were no sentenced admissions of young persons under eighteen to Ontario adult provincial correctional facilities even though Ontario accounted for 25 percent of all the Canadian transfers to adult court in that year.

Further, a study by the Department of Justice of young persons charged with serious violent offences between 1986-87 and 1993-94 found 99 cases that were transferred. In 77 percent of these cases, the young person was 17 or 18 years old at the time of transfer (40 percent were 17 years old). Considering the additional (and considerable) processing time required for appeal of the transfer decision and for trial and sentencing, it is very likely that most of the 17 year olds - and perhaps some of those under 17 years (23 percent) - were 18 years or more by the time of sentencing in adult court. See, Lee and Leonard (1995).

[58]Sections 16.1 and 16.2 YOA.

without possibility of parole shall be imposed for offences committed by a person under eighteen years of age. Implicitly, a lengthy disposition or sentence such as life imprisonment with the possibility of parole falls within the outer limits of an acceptable range of sanctions. As well, while the Convention requires that the best interests of the child shall be "a" primary consideration in decisions, this does not mean that best interests must be "the" primary or exclusive consideration in decisions.

International Experiences

Internationally, most Western democratic societies have provisions for transfer to adult court. Every American state has legislation permitting or requiring transfer. Broadly speaking, there are three approaches to transfer (waiver) in the United States:

- judicial waiver, wherein applications are usually made by a prosecutor and the juvenile court decides whether transfer is required or not on the basis of criteria such as amenability to treatment. Judicial waiver procedures are available in 49 American jurisdictions.

- prosecutorial waiver, wherein the prosecutor, by virtue of "concurrent jurisdiction" statutes, has the discretion to proceed with statutorily defined types of serious offences and/or repeat offenders in either juvenile or adult court. Thirteen American states have concurrent jurisdiction statutes.

- legislative exclusion, wherein specified serious offences are excluded from juvenile court jurisdiction altogether and therefore automatically dealt with in adult court.[59] One-half of the states have offence-based legislative exclusion provisions.[60]

In some states that employ legislative exclusion, there is a kind of reverse waiver wherein the adult court may, after a hearing, remit the youth to the

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[59]A fourth approach - or a different type of legislative exclusion - involves a maximum age jurisdiction lower than age eighteen. Eleven American states, Scotland, New Zealand, and four Australian jurisdictions have maximum ages lower than age eighteen. See Chapter 3.

[60]The number of states having concurrent jurisdiction and legislative exclusion provisions is based on a 1994 review. Since that time, juvenile justice reform legislation respecting transfer has been introduced in a number of states: a May 1996 report in the New York Times indicated that, in the previous two years, 35 states had changed or were debating changes in their legislatures respecting transfer. This included "three strikes" laws in Florida and Texas, i.e., three strikes and the youth is dealt with as an adult. It is, therefore, probable that the number of states employing concurrent jurisdiction and legislative exclusion approaches, for example, has increased.

juvenile court for disposition.

In several American states, more than one of these transfer mechanisms are available, e.g. certain serious offences may be legislatively excluded and other offences (or types of offenders[61]) may be transferred judicially and/or prosecutorially. In the past decade or more, many American states have adopted a "get tough" approach to juvenile offenders, this largely being accomplished by enacting concurrent jurisdiction and legislative exclusion provisions or by amending transfer criteria to encourage more frequent judicial waiver. In some states, the death penalty can apply to transferred juveniles, although very few have been executed.[62] Transfer is used to a vastly greater extent in the United States than it is in Canada.[63]

Among Commonwealth countries, there are considerable differences in the provisions for transfer. In Australia, most states exclude homicide from the jurisdiction of the juvenile court, but there are mixed practices which include legislative exclusion, judicial transfer or, alternatively, lengthy sentences in youth court. For example, in New South Wales, homicide and other serious indictable offences are excluded from juvenile court jurisdiction and young persons so charged may be sentenced in the same manner as adults (although they may still be placed in a juvenile facility). In Victoria, there is a combination of provisions: homicide is excluded from juvenile court jurisdiction while other offences may be transferred upon application by the prosecutor and determination by the court (i.e., judicial discretion). In contrast, there is no provision for transfer to adult court in the Northern Territory; instead, the juvenile court has full jurisdiction over all offences and,

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[61]For example, second time felony offenders.

[62]Seventeen states expressly set the minimum age for the death penalty at an age below eighteen and eight states have no minimum age. Between 1973 and 1993, 121 death sentences were handed down to youth who were under 18 at the time of offence, but 66 percent were reversed on appeal, 7 percent resulted in executions, with the remainder still in force. The U.S. Supreme Court has ruled that the execution of a person who was under the age of 16 at the time of the offence is cruel and unusual punishment.

[63]In 1992, there were 11,700 youth court cases judicially transferred in American juvenile courts. These statistics exclude transfers accomplished by means of legislative exclusion or prosecutorial discretion, which are believed to be much more frequent than judicial transfers. It has been estimated that the three types of American transfer procedures, along with a lower maximum age than 18 in some states, result in as many as 200,000 cases per year being dealt with in adult courts. In Canada, there are less than 60 cases per year transferred. Bearing in mind that the United States has roughly ten times the Canadian population, the rate of young persons under 18 dealt with by adult courts in the United States is, on a per capita basis, more than 300 times greater than in Canada. This estimate does not, however, consider differences in per capita rates of serious violent juvenile offences: the American rate is roughly double that of Canada; the juvenile homicide rate is estimated to be six times greater. As well, in 1993 there were 5,159 juveniles under age eighteen admitted to state prisons in only 29 reporting states (i.e., incomplete data); in the same year, there were 8 admissions of juveniles under 18 to Canadian federal penitentiaries.

if the young person is more than fifteen years old, the court may impose a sentence up to the same maximum available for adults.

In New Zealand, the preliminary hearing for a young person accused of murder or manslaughter is heard by the youth court, but, if committed for trial, the matter automatically proceeds to the adult court for trial and sentencing. Otherwise, a youth court that has found a young person, who is fifteen years of age or more, guilty of a purely indictable offence has the discretion to enter a conviction and order that the young person be brought before a District (adult) Court for sentence. This judicial transfer procedure may only be imposed if: the nature and circumstances of the offence would be eligible for a full-time custodial sentence if the young person was an adult; a non-custodial order would be inadequate; and the court is satisfied that all other alternatives available to the youth court are inappropriate in the circumstances of the particular case. Because there is a lower maximum age jurisdiction in New Zealand, all seventeen year olds are prosecuted in adult court.

In England and Wales, all homicides are tried in Crown (adult) Court. Instead of the mandatory penalty of life imprisonment imposed on adults for murder, the mandatory penalty for a person under age eighteen is an indeterminate sentence. Other statutorily defined violent and sexual offences - known as "grave" offences - that involve a young person who is fourteen years or more and that are subject to fourteen years or more imprisonment for an adult (e.g., grievous bodily harm, indecent assault) are also automatically dealt with by the Crown Court. The youth court can also deem other offences "grave" offences and commit the young person to Crown Court if the circumstances are particularly brutal and aggravated. The Crown Court may impose a sentence up to the maximum available for adults (except life imprisonment). In practice, the sentences imposed are often mitigated. Although sentenced in adult court for homicide or other grave offences, placement in a children's secure treatment centre, a young offender facility or an adult prison[64] is decided administratively, as is parole. Further, there is a presumption of non-publication of identity, although the Crown Court has the discretion to dispense with the ban on publication if the court considers it in the public interest to do so.

Therefore, homicides and other serious violent and sexual offences are

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[64]In England and Wales there are "young offender" facilities which house persons between the ages of 16 and 21 years, regardless of whether an offender was sentenced in youth or adult court.

automatically dealt with by the adult courts in England and Wales.[65] Notwithstanding this, elements of traditional juvenile justice - mitigated sentences, placement in youth facilities, and a presumptive ban on publication of identity - are applied to these young people by the adult system.

Because there is a lower maximum age jurisdiction in Scotland, all sixteen and seventeen year olds are dealt with in Sheriff (adult) court. The prosecutor may also elect to have a young person under sixteen who is charged with murder to be tried in Sheriff court. Regardless of the different age jurisdiction and transfer, however, a youth who is under eighteen and found guilty of murder is subject to a different penalty - an indeterminate sentence - than is an adult, with detention placement and release being administratively determined. An indeterminate sentence is served in a penitentiary centre for young people between the ages of sixteen and twenty-one; they may be held until age 21 or, in exceptional cases, until age 23. Otherwise, certain serious offences may, for adjudicative purposes, be heard in Sheriff court. The Sheriff court may then remit the young person to a Children's Panel for disposition. If not, the Sheriff Court may order custody (secure treatment).

Generally speaking, Western European countries have a very restrictive approach to transfer, but longer sentences are available for very serious offences. In Sweden, which does not have a separate juvenile court system,[66] a person under the age of fifteen cannot be prosecuted for any offence (including murder) and there is no provision for transfer to adult court. A person between fifteen and seventeen can only be sentenced to imprisonment in exceptional circumstances, including murder, for which the maximum penalty is twelve to fifteen years. If so sentenced, the youth can serve this custodial time in a special institution for youth or in a separate section of an adult prison.

In Finland, a "young criminal" between the ages of fifteen and eighteen may be sentenced to a maximum of three-quarters of the maximum sentence available for adults, or twelve years, whichever is less. A separate "jail court" determines whether a young criminal will be placed in a separate

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[65]In 1994, 2700 of the 102,000 juveniles prosecuted were tried in adult court, i.e. 2.6 percent.

[66]Not all European countries have distinctive juvenile court systems; even so, they still have special considerations for young persons. For example, Sweden and Finland do not have separate juvenile court systems and young persons are subject to adult trial procedures, but are afforded mitigated sentences and placement in separate youth facilities.

youth facility or an adult jail.

In Germany, a serious crime such as murder can result in a maximum penalty of ten years in a youth custody facility. There is a mechanism to transfer young people who are seventeen years or more to the adult court if the crime is very serious and professional assessments indicate the person was clearly cognizant of the offence and the consequences thereof.

In France, there is no transfer to adult court per se. Prison sentences are, however, available for young persons under eighteen charged with serious offences. Sentences for juveniles under sixteen must not exceed one-half the maximum available for an adult found guilty of the same offence. If the juvenile is sixteen or more the sentence may also be mitigated by one-half, but this can be waived and, if so, the juvenile is subject to the same maximum as an adult. Where the offence is punishable by life imprisonment for an adult, a juvenile sentence may not exceed twenty years. This type of "mitigation model" - wherein juveniles are subject to mitigated adult penalties - is the predominate approach in Europe. In Austria, for example, life sentences are commuted to a maximum of ten years for a minor under sixteen years old and to a maximum of fifteen years for a young person who is sixteen or older. In Greece, the most serious offences can attract a (quasi-indeterminate) sentence of five-to-twenty years.

In Italy, there is also no transfer to adult court because the Penal Code sentencing rules apply equally to adults and young persons. While judges may, in theory, impose a sentence up to the maximum of thirty years, severe sentences are rare in practice.

In Denmark, the maximum period of imprisonment for a juvenile is eight years. In the Netherlands, sixteen and seventeen year olds can be transferred to adult court if this seems appropriate with respect to the seriousness of the offence and the personality of the offender. In Holland as well, juveniles may be subject to the adult criminal law in exceptional circumstances.

While some European countries appear to have relatively severe maximum penalties, this should be interpreted with caution. The maximum that is available in law may not mirror what is imposed in practice. As noted in Chapter 6, the imprisonment rates of juveniles in Europe appear to be very low (as is the case for adults).[67]

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

In Japan, a young person who is between sixteen and eighteen years may be transferred to adult court but, if so, is subject to mitigated penalties, e.g. a death sentence is reduced to life imprisonment, while a mandatory life sentence applicable to an adult is reduced to ten to fifteen years for a juvenile. Transfer, however, is reportedly rare.

8.6.3 The Incidence of Transfer

Transfers to adult court occur very infrequently in Canada. For example, in 1993-94 only 0.07 percent of all cases appearing before the youth courts in Canada were transferred. In the seven year period between 1987-88[68] and 1993-94, there were 370 transfer cases reported to the Youth Court Survey, but this is an underestimate because Ontario did not begin reporting to the Youth Court Survey until 1991-92. In the most recent three years, there was, including Ontario, an annual average of 54 transfers per year in the country.

There were, compared to rates under the JDA, substantial decreases in the volumes of transfers under the YOA in Manitoba and Quebec, both of which were unaffected by the uniform maximum age. Under the YOA, these two provinces have reported the highest volumes of cases transferred and the highest proportions of youth court cases transferred.[69]

While transfers are very uncommon, there are still considerable differences in the rates of transfer across jurisdictions. For example, between 1987-88 and 1993-94, Manitoba, Quebec and Alberta accounted for 81 percent of the total cases transferred (excluding Ontario), but these three provinces accounted for only 57 percent of the cases brought before the youth courts. As another example, Manitoba and Saskatchewan have very similar populations, youth crime rates and youth court processing rates, but between 1987-88 and 1993-94 there were 85 transfers in Manitoba and only five in Saskatchewan.

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[68]Statistics prior to 1987-88 are omitted because of the implementation of the uniform maximum age (UMA) in 1985. FY 1986-87 is also omitted because there was an anomalously high volume of transfers (93) in that year, which could possibly be related to residual transitional effects of the UMA. The volumes reported in this section are derived from the Descriptive Profile Report. These volumes differ from (are less than) those reported in the annual reports of the Youth Court Survey because different definitions of a "case" are employed.

[69]However, in 1992-93 and 1993-94, the volume of transferred cases in Quebec decreased to less than one-half of the annual average of the preceding five years. The Jasmin Report recommended that: "while remaining infrequent, transfers to ordinary court could occur more frequently than they do now (to complement transfers to adult custodial facilities)".

Transfer rates can also vary considerably within the same jurisdiction from year to year. For example, the annual number of transfers in Manitoba has ranged from 5 to 22 cases, while in Quebec the range has been from 5 to 25 cases.

There are insufficient time series data to assess the effects, if any, of changes to the test for transfer and related amendments arising from Bill C-12 in 1992. In the first two years after proclamation of these changes, the average annual volume of transfers decreased.[70]

Transfers overwhelmingly involve males (98 percent) and young persons who were sixteen or seventeen years old at the time of the offence (91 percent). In the most recent three years (including Ontario), there has been an average of about six cases per year involving young persons under the age of sixteen at the time of the offence. Of all the transfer cases (37) between 1987-88 and 1993-94 involving young persons under sixteen at the time of the offence, an estimated 16 percent involved "historical" cases, wherein the young person was in fact an adult appearing before the youth court on a dated offence (often sexual).[71] As well, 22 percent of the cases of youth under sixteen transferred involved murder or manslaughter charges, and 70 percent involved an offence against persons.

In 1993-94, 55 percent of all transferred cases involved serious offences against persons; a substantial proportion of transfer cases involve non-violent offences such as indictable property offences (23 percent). There has been some change in the offence distribution of transfer cases over the years: for example, between 1987-88 and 1990-91 only 36 percent of the cases involved serious offences against the person, compared to 52 percent in the most recent three years.

The above statistics should be considered in light of the following:

o In 1992/93 and 1993/94, nearly ten percent[72] of all transfer cases

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[70]A decrease from an annual average of 56 transfers per year between 1987-88 and 1991-92 to 37 for 1992-93 and 1993-94. It is also noted that in 1993-94 transfers increased sharply in Manitoba (comprising 61 percent of the Canadian total); this was apparently related, in part at least, to applications made by young persons (rather than by Crown Attorneys). Ontario is omitted from this analysis because Ontario did not report data to the Youth Court Survey between 1987-88 and 1990-91.

[71]Historical offences are identified by there being more than five years between the date of the offence and the date of the youth court transfer decision.

[72]Other cases, (estimated at five percent), where there was between three and five years elapsed time, could be construed as being possibly historical.

involved adults who appeared before the youth courts for historical offences.[73]

- Some transfer cases involve persons who are appearing before both the youth and adult courts on charges arising before and after the person's eighteenth birthday.[74]

- Some cases involve applications by the young person (rather than by the Crown Attorney) in order, for example, to access a possibly less onerous sentence in adult court or a placement in an adult facility,[75] or, much less commonly, a jury trial. Such cases tend to be pro forma in nature and, in effect, are consensual transfers.

- The data reported only reflect youth court decisions rather than appellate court decisions. Transfer decisions are commonly reviewed (appealed). A review of appellate court decisions suggests that successful defence appeals are more common than successful prosecution appeals.

- The data reported include an estimated eleven percent of transfer cases[76] which are not eligible for transfer (e.g. breach of probation, theft under), which suggests that there are either unlawful transfers or, much more likely, some degree of misreporting of information to the Youth Court Survey.[77]

These considerations may partly explain some of the differences in transfer

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[73]An alternative approach to transfer proceedings in historical cases is to proceed with the charge in the youth court and, if custody is imposed, proceed thereafter with an application under s.24.5 YOA for placement in an adult provincial correctional facility.

[74]The number of such cases are not documented; there are anecdotal reports of this occurring in Quebec in some cases. An alternative approach is to let the cases proceed independently in the youth and adult courts and, upon sentence, proceed with a conversion of the youth disposition under s.741.1 C.C. or adult placement under s.24.5 YOA.

[75]This occurs fairly commonly in Manitoba and contributes to that province's high transfer rate.

[76]This is based on 1992-93 and 1993-94 data and is a minimum estimate.

[77]As well, in 1992-93 and 1993-94, ten percent of the transfer cases involved persons who were eighteen years or more at the time of the commission of the offence, i.e., these cases are beyond the jurisdiction of the youth court. Nearly half of these involved offences against the administration of justice (e.g. breach, escape). These anomalous cases may result from mis-reporting of dates of birth or offence. It is just as plausible, however, that these cases are mis-reported as s.16 transfers (e.g. where s.24.5 applications are made) or mis-reported as youth court cases (especially in respect of administration of justice offences).

rates among jurisdictions as well as account for some of the transfer cases involving non-violent offences. Further, transfer statistics are typically interpreted as being a reflection of the incidence of involuntary transfers of persons under the age of eighteen. The above considerations suggest that these transfer statistics probably over-estimate the actual volume of such transfers.

The statistics on transfer reported by the Youth Court Survey only include transfer applications that were approved by the youth court; there are no data available respecting the number of cases where applications for transfer have been made by the Crown (or young person) and those applications have been denied.

Another way to look at transfer is to take a cross-section of serious offences and determine what proportion are transferred. A 1995 study by the Department of Justice examined the youth court outcomes of all young persons charged with murder, manslaughter, attempted murder, aggravated sexual assault, sexual assault with weapon and aggravated assault between 1986-87 and 1993-94. Overall, 4.5 percent of the individuals charged with these serious violent offences were transferred, with the proportion transferred varying by charge type: 36 percent of murder charges were transferred, 4 percent of manslaughter, 20 percent of attempted murder, and 1.4 percent of aggravated sexual assault, sexual assault with a weapon and aggravated assault.[78] In short, very small proportions of cases involving the most serious offences are transferred.

8.6.4 What is Transfer?

In assessing the advantages and disadvantages of transfer it is necessary to identify the key differences that flow from a decision to transfer or not. In effect, the question is: what purposes are served, or outcomes accomplished, by a decision to transfer? The principal effects[79] of an order

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[78]The data set involved a total of 1911 individuals, 85 of whom were transferred. Of those transferred, most were transferred for charges less serious than those enumerated. The proportions of charges transferred exclude charges where charges were stayed or withdrawn because these data are of uncertain reliability. If stays and withdrawals are included, the transfer proportions reduce to 25 percent for murder, 3 percent for manslaughter, 8 percent for attempted murder, and 1 percent for aggravated sexual assault, sexual assault with a weapon and aggravated assault.

[79]A decision to transfer has no practical effect on statement evidence requirements or the right to counsel. Even though transferred, case law indicates that the special protections respecting statement evidence given by young persons continue to apply, e.g., see R. v. John Thomas J. (1987) 37 C.C.C.(3d) 239 (Man. C.A.). The absolute right to counsel accorded by section 11 YOA applies to transfer proceedings ("proceedings under this Act") but may not apply to trial in adult court. Nonetheless, legal aid plans would,

to transfer include:

- the young person is subject to the longer sentences available in the adult system, including a different regime of sentence administration and early release (i.e., remission/statutory release and parole versus judicial review);

- although placement in an adult correctional facility is not automatic nor necessarily immediate, the young person will almost inevitably be placed in an adult correctional facility if there is a long term sentence;[80]

- the young person is subject to different trial procedures (preliminary hearing, jury trial) if the maximum penalty is five years or more imprisonment;[81]

- the identity of the young person (and family) may be published;[82] and

- the young person, upon conviction, acquires an adult criminal record.

The first three differences are really one and the same, i.e., different trial procedures and probable placement in an adult correctional facility[83] are the consequence of longer available sentence lengths in the adult system.

An adult criminal record that follows from transfer to and conviction in adult court is somewhat different from a youth court record. While the elapsed times required for non-disclosure of a summary or indictable record under the YOA and for an adult pardon under the Criminal Records Act are virtually

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given the seriousness of the charges and implications for the young person, invariably provide counsel to a young person who is unable to retain counsel.

[80]Subject to placement decisions made by the court pursuant to sections 16.1 and 16.2 YOA. Note also that placement in an adult correctional facility can be accomplished at age eighteen or older without transfer to adult court by way of an application under s.24.5 YOA.

[81]The ten and seven year youth court dispositions for first and second degree murder respectively (Bill C-37), however, require jury trials in the youth court system.

[82]Also, the identity of victims and witnesses who are children or young persons may be published.

[83]Even though transferred and sentenced in adult court, a young person may (but not necessarily will) be placed in a youth custody facility by way of s.16.2 YOA. It is, however, virtually inevitable that, if a lengthy adult sentence is imposed, placement in an adult correctional facility will result once the young person is, for example, twenty years old or more. As noted earlier, the placement of transferred youth under the age of eighteen in adult facilities is rare.

identical, a pardon does not provide a guarantee of non-disclosure of an adult record.[84] Further, an adult record is accessible to the general public and to private employers.[85]

Publication of the identity of young offenders is discussed in Chapter 9, wherein the Task Force concludes that there are no sound reasons to believe that publication would lead to lower youth crime rates. The youth courts are open to the public and the press, which can report on matters relating to the case, except identity or information serving to identify the young person. Nonetheless, freedom of the press and the associated public "right to know" are fundamental social values which assume greater importance in cases involving serious offences/offenders. Consequently, the inability to publish identity can, it is argued, contribute to an erosion of public confidence in the justice system. There are two approaches to allowing the publication of the identity of the most serious young offenders: by transfer or by way of exceptional provisions within the Act.

At the most fundamental level, a decision to transfer or not (principally) amounts to a choice between sentencing options, i.e., the more limited sentence lengths available in youth court or the longer available periods in the adult system. In this regard, the broad options available are the same as for publication, i.e., addressing the most serious young offenders by way of exceptional provisions within the Act or by transfer to adult court, a matter which we will discuss later. Since transfer is regarded as principally a sentencing issue, the following discussion - which addresses matters such as transfer procedure and sentencing considerations - examines transfer in that context.

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[84]While non-disclosure of a youth record involving an indictable offence is automatic after five "clean" years (subject to court authorized disclosure under s.45.1), a pardon for an adult record of an indictable offence requires application to and review by the National Parole Board. Bill C-37 permits the longer retention - for criminal justice purposes - of youth records of murder and a scheduled list of serious offences in a special records repository. Records related to murder, manslaughter, attempt murder and aggravated sexual assault may be kept indefinitely in a special records repository; other serious offences which are scheduled may be kept an additional five years beyond the five year clean period for indictable offences set out in s.45(1). As well, a subsequent offence as an adult effectively results in the "conversion" of a youth record to an adult record (s.45.01 and 45.02).

[85]A youth court record may be disclosed for security clearances related to employment where this is required by a government in Canada, s.44.1 YOA.

8.6.5 Transfer Procedure[86]

The current transfer process is very complex and long.

Although a young person can apply for transfer, applications are usually made by the Crown. As a result of Bill C-37, sixteen and seventeen year olds charged with murder, manslaughter, attempt murder, and aggravated sexual assault must be proceeded against in ordinary court unless the young person or Crown apply to have the matter proceeded against in youth court, in which case the onus is on the applicant to satisfy the court that the matter should be dealt with in youth court.[87] Once application is made, a hearing is conducted in youth court. A pre-disposition report is mandatory; medical or psychological reports are also commonly ordered. Evidence as to the nature and circumstances of the alleged offence is heard, but this is summary and hearsay in nature. Witnesses from the youth, adult provincial and federal correctional systems are also usually called to give evidence about the availability and nature of facilities and services in those systems.

Once a transfer decision is made, reviews (appeals) are often heard by Courts of Appeal. If the transfer is affirmed, the matter proceeds to trial in the ordinary court. Once again, evidence is heard regarding the offence, but this time in vastly greater detail in an adversarial forum where proof beyond a reasonable doubt is required. If there is a conviction, a pre-sentence report is usually ordered and a psychological assessment may also be ordered. Once sentence is imposed, a hearing is held to determine whether the young person should be placed in a youth centre, adult provincial correctional facility or, if the sentence is two years or more, in a penitentiary. Again, reports are presented and evidence heard from the three correctional systems as to resources available.[88]

Obviously, there is a considerable degree of duplication of process and evidence in this complex procedure. This contributes to delay, costs, and additional court time being consumed in overburdened court systems. As well, the lengthy nature of the transfer, trial, and placement process contributes to anxiety for the victim, young person and parents.

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[86]Transfer procedure can be construed as a due process issue (Chapter 11) but is dealt with in this chapter because of its relevance to a discussion of transfer.

[87]If the youth person applies to have the case heard in youth court and the Crown does not file a notice of application within 21 days, the case will automatically be heard in youth court. There is no statutory remedy for administrative inadvertence by the Crown in the event of a failure to file application.

[88]In some cases, sentencing and placement hearings can be held at the same time.

At a more fundamental level, the transfer process is an anomalous process. A decision to transfer is essentially a sentencing decision[89], but the decision to transfer is made before a finding of guilt.

At a transfer hearing, facts need not be proven but only alleged; while the court hears the alleged details of the offence, this is to ascertain the alleged circumstances and seriousness of the offence, not to assess the merits of the evidence. A pre-adjudicative transfer process, therefore, involves what Judge Lucien Beaulieu of the Ontario Court of Justice described as a "presumed innocent but assumed guilty" approach, i.e., it is assumed the prosecution will be able to prove its case.[90] There are, however, many cases where a young person may be acquitted, found guilty of a lesser offence or, if found guilty of the original charge, the evidence indicates that the young person's role in the offence was not as great as originally alleged (e.g. where there are co-accused) or perhaps committed in mitigating circumstances. A 1995 study by the Department of Justice of young persons charged with serious violent crimes found that a substantial proportion were found guilty in youth court of offences that were less serious than the original charge, and some cases were acquitted or dismissed. While similar data respecting the outcomes of cases transferred to ordinary court are not available, it seems likely that similar outcomes would be found respecting cases dealt with in those courts.

A pre-adjudicative transfer process also does not allow for full consideration of the young person's remorse or lack thereof, the young person's willingness to participate in programs, or the impact of the offence on the victim. After assuming that the young person will be found guilty, the youth court must then attempt to assess what the disposition would be, if found guilty in youth court, and what the sentence would be if found guilty in ordinary court. Further, the court is required to consider the young person's maturity and suitability for various types of programs, the availability of which may change after the lengthy processes of appellate court review of the transfer decision and trial in the ordinary courts are complete.

In a scathing critique of this process, the Alberta Court of Appeal has said:

> "So, unhappily, the youth court and its appellate followers must assume maximum guilt, devise a probable sentence, anticipate parole

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[89]Except, for example, where the young person applies for transfer in order to obtain the benefit of a jury trial.

[90]Beaulieu (1994).

> (in the adult system), the impact of the young person's release on the public protection and weigh all avenues available for his interim rehabilitation - all of this on partisan and incomplete facts ... We outline these expectations, ones found by the judges in these cases, simply to reassure them that we are mindful of the lonely and thankless task given them by the statute. Such an inquiry - one commencing with sentence to be followed by judgement - is no longer the private precinct of Alice and the Queen of Hearts." (R.v.G.J.M.)

If the primary purpose of transfer is to determine whether the interests of society would be served by an adult or youth court sentence, then that decision should be based on the most complete, proven and current information that can be made available, i.e., after a finding of guilt. If transfer decisions were made after a finding of guilt, then undue delay, duplication and costs could be reduced while better respecting the fundamental principles of justice.

A post-adjudicative transfer process would require the Attorney General or the Attorney General's agent to serve notice of intention to seek an adult sentence, after which the matter would proceed to trial.[91] Another way of putting this is that the Crown would, in effect, be seeking a greater penalty than is available under the YOA. This would trigger the accused's right to elect to be tried in youth (provincial) court, by a superior court judge alone or by a judge and jury. The special provisions applicable to young persons - such as a ban on publication of identity (s.38), assessments (s.13) and statement evidence (s.56) - would continue to apply through the trial process. Preliminary hearings would be conducted in youth court. The Crown could abandon the application at the preliminary hearing stage (or any later stage) if transfer does not appear to be warranted by the evidence. Bail and detention would generally be addressed in the same manner as for adults who have the opportunity to elect the forum for trial; careful analysis of the relevant provisions of the Criminal Code and YOA would have to be undertaken in this connection.

If found guilty, the decision to transfer (i.e., to impose a sentence available

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[91]Filing a notice of intention to seek an adult sentence would be the equivalent of the Crown applying for transfer. This could be easily adapted to the new procedures established by Bill C-37 respecting enumerated serious violent offences allegedly committed by sixteen and seventeen year olds, if a decision is made to retain these new procedures. For example, a sixteen or seventeen year old found guilty of one of the enumerated offences would automatically be subject to the adult sentence for that offence, unless the young person or Crown applied to seek a youth court disposition. Assuming, for example, that the young person applied for a youth disposition and the Crown filed a notice of opposition, the decision would be made by the court after a finding of guilt.

to the ordinary court) would be made. If not transferred, a disposition available to the youth court would be imposed by the court that adjudicated the case. If the accused had elected trial in a superior court, this would mean that a superior court judge would impose the disposition. In effect, the present procedure of conducting separate transfer, sentencing, and placement hearings would be rolled into one hearing in this new approach. As well, instead of the separate hearings which currently apply, appeals respecting conviction, transfer and sentence could be dealt at the same time.

One concern for both prosecutors and defence counsel is the question of how situations involving adult co-accused would be dealt with. This could be addressed by amendments which would authorize the Crown to file a joint indictment and which would enable the Attorney General to require that the co-accused be tried together, similar to the authority established under section 568 C.C.

A chart appended to this chapter outlines the procedure contemplated.

To establish a post-adjudicative transfer process, amendments to the Act and the Criminal Code will be required:

- amendments to the Act establishing a process for the Attorney General or agent of the Attorney General to give notice that the Crown is seeking greater penalty (adult sentence), which would then trigger election by the accused as to the mode and forum for trial.

- amendment to the Criminal Code to ensure that superior courts have jurisdiction to use youth court procedures.

- amendment to the Criminal Code to allow the Crown, in cases involving adult co-accused, to require that the youth and adult co-accused be tried similarly (as under s.568 C.C.) and to file a joint indictment.

- amendment to section 13 YOA to permit a pre-adjudicative medical or psychological report to be ordered where the Crown files notice. While not necessary, this would be desirable in some cases where there may be some uncertainty as to the young person's degree of dangerousness, amenability to treatment and need for a longer sentence. An assessment favourable to the accused, for example, might lead the Crown to abandon the application.

- amendment to section 743.1 C.C. vis-a-vis jury recommendations

about parole eligibility in cases involving young persons under the age of age of sixteen found guilty of murder.[92] Since the determination of whether an adult or youth sentence should be imposed would not yet be made at the time of jury deliberation, the jury would not be able to recommend to the court after bringing in a guilty verdict. This could be resolved by amending the section such that the jury would be asked for its recommendation, assuming the young person would be subject to an adult sentence.

The **advantages** of a post-adjudicative transfer procedure include:

- Greater fairness to the young person and more in accord with the principles of justice because the transfer decision is based on proven facts, rather than allegations. While this advantage is applicable to all cases, it is especially pertinent to the enumerated serious violent offences (Bill C-37) because the reverse onus in these cases applies on the assumption that the allegation will be proven. If the facts proven at trial fall short of those that have been alleged, the Crown would have the option to withdraw the transfer application.

- More accurately reflects the true nature of transfer - as primarily a sentencing matter, rather than as a determination of the forum for trial.

- Streamlining and expediting the process by avoiding multiple and sometimes redundant reports, evidence, hearings and appeals. The present transfer process causes considerable delay, which does not serve the interests of young persons or victims, nor promotes confidence in the criminal justice system.

- Unnecessary transfer hearings can be avoided in situations where the facts proven at trial are less serious than originally alleged and, consequently, the Crown decides to withdraw the transfer application. This also applies in circumstances where the young person is acquitted or the charge is dismissed.

- The parents of the young person would have the benefit of their rights and obligations under the Act; under the current process, parents

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[92]Section 743.1 requires that the court instruct the jury to consider making a recommendation respecting parole eligibility (at between five and seven years) where a transferred young person under the age of sixteen at the time of the commission of the offence is convicted in ordinary court of first or second degree murder.

largely lose recognition of their status once transfer is ordered.

- Potential cost-savings to the justice system through the avoidance of multiple hearings, reports, etc.

- Defence counsel may have greater opportunity to develop full answer and defence through increased access to preliminary hearings.

- Until found guilty and an order for transfer is made, the young person retains the benefit of all the special protections for young persons in the Act. This, for example, avoids the present anomaly where the identity of a transferred youth can be published, even though the young person may be subsequently acquitted or the charge dismissed.

- The decision to transfer would not only be based on proven facts, but also on considerations of current assessments and resources and facilities that are available at the time of transfer decision/sentence, as well as the current maturity of the young person. Further, the attitude of the young person toward the offence would be more readily ascertainable, given that he or she has now been found guilty.

- Potential for better public understanding of transfer decisions, given that the decision is based on proven facts.

The key **disadvantages** of a post-adjudicative transfer process would be an increase in preliminary hearings and jury trials for young persons. Currently, preliminary hearing and jury trials (depending on plea and election) only apply where a young person is charged with murder or a transfer order is made. In the proposed process, preliminary hearings and jury trials would also apply to cases where, after conclusion of the trial, the court decides that transfer is not appropriate. The associated costs would, to an unknown extent, offset the savings that would result from the streamlined process.[93]

As well, there would be an increase in the degree to which youth court trials, transfer decisions and, in the event of a decision not to transfer, dispositions are heard and decided by superior court judges who are probably less familiar than youth court judges with the procedural/evidentiary and transfer/dispositional aspects of the youth court system. Understandably, superior court judges may also be less familiar with the correctional and treatment resources available to the youth court system.

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[93]Note, however, that consideration is currently being given to changes to the Criminal Code that would reduce the use of or access to preliminary hearings.

Some might argue that a post-adjudicative process could lead to Crown Attorneys making more frequent application for transfer because an immediate transfer hearing is not required. This is possible, but seems doubtful. The frequency of Crown applications for transfer are, aside from "mandatory" hearings for enumerated serious violent offences (Bill C-37), directly influenced by the eligible offences for transfer, the test for transfer and case law interpretation of the test.[94] The Crown currently has potentially great latitude to apply for transfer. For example, the Crown could, in theory, apply for transfer in every breaking and entering case involving a young person who is fourteen years or older. Yet, transfer applications in breaking and entering cases are very uncommon and rarely approved, precisely because the test for transfer, and appellate court interpretation at the same, require that certain fairly stringent criteria be satisfied before transfer will be approved. Accordingly, changes in the frequency of applications and approvals will depend upon whether there are changes in criteria and the test, a matter that is discussed in later sections of this chapter.

Some have also expressed concerns that a post-adjudicative process would lead to delay in the public identification of the most serious young offenders (or, in the event of an acquittal or dismissal, the absence of public identification). Under the current pre-adjudicative process, the identity of a young person becomes publicly known once the decision to transfer is made and therefore is known throughout the trial process. Under a post-adjudicative process, the youth's identity would not become known until after trial and at the sentencing/transfer phase of proceedings. This change, it is argued, could undermine confidence in the youth justice system and erode, to some extent, the denunciatory aspect of transfer decisions.

While publication of identity (or identifying information) would not be able to take place until after trial (if found guilty and if transferred), all information relevant to the trial, except identity, would still be public and the trial would be carried out in a public forum. Public identification would be merely delayed somewhat, which consideration should be weighed against the even greater delay vis-a-vis adjudication and sentence that occurs in a pre-adjudicative process. Denunciation is primarily an aspect of sentencing and arguably should not be a key consideration with persons who are accused,

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[94]Under Bill C-37 enumerated serious violent offences must be proceeded against in adult court, unless the young person or Crown apply for the young person to be proceeded against in youth court. A transfer hearing is not required. Conversely, if the Crown and young person (in effect) consent, a transfer hearing is also avoided. Therefore, the provisions do not require mandatory hearings but, for the sake of brevity, will be denoted "mandatory" in this chapter.

but rather only with persons who are found guilty. Indeed, many would argue that it is unfair to permit the publication of the identity of a young person who may eventually be found not guilty.

A post-adjudicative transfer process would more accurately reflect the true nature of transfer as a sentencing decision, as distinct from a decision about the forum (and procedure) for trial. This raises the question about whether a young person should continue to be accorded a right to apply for transfer. Originally, the intent of giving a young person the right to apply for transfer was to accord the young person the benefit of access to a jury trial, if he or she chooses. This rarely, if ever, occurs in practice.[95] While young persons sometimes do make application (especially in Manitoba) for transfer, the motivation is either to access a potentially less onerous sentence in adult court, given the applicability of remission/statutory release and parole to adult sentences, or to facilitate placement in an adult correctional facility. Placement is discussed later in this chapter; it should be regarded as an issue that is somewhat separate from transfer (sentence) itself. It seems anomalous - and difficult to reconcile with the public interest - that a young person should be able to expose himself to a potentially more onerous penalty in adult court, or avoid a more onerous one in youth court, by being able to apply for transfer.[96] There likely would not be a Charter issue if the capacity of the young person to apply was removed since it would be analogous to circumstances where the Crown elects in hybrid offences. As well, it could be argued that the removal of the capacity to apply for transfer would not be discriminatory because transfer does not confer a benefit, but rather involves potential harm to the young person, i.e., a longer sentence and placement in an adult correctional facility.

In light of the above, **the Task Force, with the exception of Ontario, recommends:**

The current lengthy, complex and duplicative process for determining transfer to adult court - which involves deciding about transfer before a finding of guilt - should be streamlined and reformed to better accord with the principles of justice by requiring that a transfer decision be made after a finding of guilt. To bring this into effect, amendments to

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[95]Under Bill C-37, a sixteen or seventeen year charged with one of the enumerated offences can achieve this end, in effect, by default, i.e., by failing to apply to have the case proceeded against in youth court. (But the Crown could apply for same.) As well, the new youth court penalties for murder enable a young person to elect to be tried by judge and jury in the youth court system.

[96]For these reasons, the Crown might actively oppose applications by young persons.

the Act and to the Criminal Code, including those indicated in this report, will be required.

Ontario representatives did not support this recommendation because of concerns that there is potential for a considerable increase in preliminary hearings and jury trials, thereby negating any potential benefits of a post-adjudicative process or even resulting in increased costs and delay.

Notwithstanding that young persons rarely, if ever, apply for transfer for the purposes of seeking a jury trial, the removal of this capacity is a potentially controversial matter that could be the subject of further study and consultation. This issue should not divert attention from the fundamental issue at hand - the benefits of a post-adjudicative transfer process. Accordingly, the Task Force did not take a position on whether young persons should retain the capacity to apply for transfer themselves, but it is a matter that could be the subject of further study and consideration.

8.6.6 Sentencing Considerations

In this section we discuss sentencing principles as they apply to serious young offenders. Because transfer is basically a sentencing decision, these principles can also apply to the determination of whether to transfer or not (i.e., to impose a youth or adult court sentence). It should be noted from the outset that, because the focus is on sentencing serious offenders, the generalizability of the following discussion to the sentencing of all young offenders is limited. For example, most would agree that an over-arching emphasis on rehabilitative and/or restorative justice principles is the best course for less serious offenders, who comprise a substantial majority of the cases heard by the youth courts.

The principal goals of sentencing for adults are conventionally described as including: protection of the public, general deterrence, specific deterrence, and rehabilitation.[97] This characterization represents a confusion of goals and means: it would be better to say that protection of the public is a key sentencing goal, which may be accomplished by means of general

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[97]This is based on case law. Bill C-41 will amend the Criminal Code respecting the sentencing of adults to state that the "fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions ..." The objectives of these sanctions involve: denunciation, deterrence (general and specific), "to separate offenders from society, where necessary"; rehabilitation, reparation, and promoting a sense of responsibility in offenders and acknowledgement of harm done to victims and the community. The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Additional sentencing principles (e.g., equity) are also set out.

deterrence, specific deterrence, rehabilitation and/or incapacitation and restraint. Additional (non-utilitarian) goals[98] of sentencing include denunciation, the maintenance of the integrity of the criminal law, and proportionality.

For young offenders, there has been an over-arching emphasis on rehabilitation[99] and, in consideration of immaturity, a diminished degree of accountability[100] (mitigated sentencing). The goal of rehabilitation and the principle of diminished accountability are, to some extent, inter-connected: in assessing the nature and length of sentence, greater weight is placed on the rehabilitative needs of the offender; as a result, a mitigated sentence ought to be imposed. The goals of rehabilitation and protection of the public are also inter-connected: in effect, the rehabilitation of young persons is a means by which the protection of the public can be accomplished.[101]

The arguments advanced by some proponents of an expanded use of transfer are often grounded in the assumption that the (assumed) longer sentences that would be imposed in the adult courts will result in greater societal protection by enhancing general and specific deterrence. The extensive body of research on the effectiveness of deterrence is discussed in Chapter 3. In brief, the empirical evidence indicates that increasing the severity of sanctions is not associated with reductions in crime rates. Many American states have toughened sanctions for delinquents, principally by means of substantial increases in the transfer of serious offences/offenders to adult court. Despite these measures, there have been marked increases in serious violent juvenile crime in that country. More specifically, long term empirical studies have assessed the general deterrent effects of legislation in two states which removed certain serious crimes such as homicide, robbery, more serious assaults and some sexual offences from juvenile court jurisdiction, resulting in these offences being automatically dealt with by

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[98]Another utilitarian goal is reparation to the victim.

[99]For example, in R. v. M.(J.J.) (1993) the Supreme Court of Canada affirmed that "a traditional criminal law approach" (including general deterrence) should be taken into account in the sentencing of young offenders, but dispositions must be imposed on young offenders differently because of the "needs and requirements" of the young. The court also asserted that proportionality has greater significance in the sentencing of adults and general deterrence should not be unduly emphasized: "in the long run society is best served by the reformation and rehabilitation of a young offender."

[100]Section 3(1)(a) YOA, however, states that "young persons should not in all instances be held accountable in the same manner or suffer the same consequences ... as adults." The implication is they may be held as accountable in some instances.

[101]Bill C-37 amended the Declaration of Principle to state: "the protection of society, which is a primary objective of the criminal law, is best served by rehabilitation, whenever possible ..."

adult courts after these changes: in New York, there was no reduction in youth crime rates, while in Utah there were significant increases.[102]

With respect to specific deterrence, another American study compared the severity and effectiveness of juvenile and adult court sanctions for 1200 sixteen and seventeen year old felony offenders accused of burglary and robbery in matched counties from New York and New Jersey where the youth were processed in the juvenile and adult justice systems, respectively, because of differences in legislation in those states. Sanctions were more certain and about as severe in the juvenile court; recidivism rates were lower for the adolescents sanctioned in the juvenile courts.[103] A study in Florida compared large (matched) groups of youths who were either (prosecutorially) waived to and sentenced in adult court or retained in the juvenile system. Short-term recidivism follow-up indicated that re-offending was more frequent, more serious and occurred sooner after release among the transferred youth than among those not transferred.[104]

The arguments advanced by some proponents of a broader use of transfer are also often predicated on the assumption that, if transferred, young persons will receive sentences in adult court that are longer than would be imposed in youth court. As discussed in more detail in Chapter 3, comparisons of youth and adult sentence lengths indicate that youth court custodial dispositions are, on average, as long or longer than adult sentences of imprisonment for many of the same type of offences (including some offences against persons) once the provisions for remission/statutory release that are applicable to adult sentences are taken into account. This can even apply in some cases involving very serious offences: for example, a youth court disposition of three years custody for manslaughter can, depending on the outcome of judicial early release (youth) and parole (adult) applications, result in a young person serving a very similar period of time in custody

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[102]It does not seem plausible that the increased frequency of transfers caused increased youth crime rates in Utah. See, Singer and McDowall (1988) and Jensen and Metsger (1994). Jensen and Metsger found that the new juvenile law in New York may have suppressed potential increases in robbery (but not other offence) rates. Robbery rates did not increase in the study area, but did increase in other areas used as a comparison.

[103]See Fagan et.al. (1991). New York has a lower maximum age (16) than New Jersey (18).

[104]See, Bishop et. al. (1996). Recidivism follow-up was for one year. About one-half of the offenders were transferred for misdemeanours and the vast majority for non-violent offences. Only those who were subject to short custody/jail sentences were compared; youths who were accused of the most serious violent offences (e.g., capital offences) or who received lengthier periods of imprisonment/custody were not able to be compared. Youth charged with serious violent offences were not able to be compared because they are automatically transferred in Florida. The focus of the research was on transfer per se as a deterrent - not on the transfer of the most serious offenders.

when compared to the time served by an adult sentenced to six years imprisonment for the same offence. [105]

Therefore, proposals to substantially increase the frequency of transfer as a general strategy to promote greater public safety by enhancing sanction severity do not seem to be justifiable on the basis of empirical evidence. To clarify: a distinction should be made between saying that increased sanction severity - known as "marginal deterrence" - is not associated with reduced crime rates/recidivism and saying that there is nothing at all to deterrence. If custody was abolished, for example, there is no doubt that crime rates would increase.[106] Understanding this distinction can lead to at least some degree of reconciliation between the findings of empirical research respecting marginal deterrence and the traditional reliance of the courts, including (to a lesser extent) the youth courts, on deterrence as a principle in sentencing.[107]

Deterrence is not, however, the only possible rationale for transfer. Notwithstanding the comments made above, sentences in adult court can result in longer periods of incapacitation and restraint of an offender. First and second degree murder are the most obvious examples because conviction in adult court results in the mandatory imposition of life imprisonment, including for transferred young persons (albeit with mitigated parole ineligibility periods).[108]

While comparisons of youth and adult sentences indicate that young persons are subject to as long or sometimes longer custodial sentences than adults for several non-violent offences and for some less serious violent offences (e.g., common assault), this is not the case in respect of more serious offences against the person. For example, comparisons of sentences for young persons and adults found guilty of robbery or aggravated assault indicate that adults are much more likely to be committed to custody and, in

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[105]Between 1986/87 and 1993-94, 78 percent of the young persons found guilty of manslaughter in youth court were committed to custody for an average (mean) duration of 23 months.

[106]Reiss and Roth (1993).

[107]In R. v. M. (J.J.), the Supreme Court of Canada ruled that the principle of general deterrence does have application to young offenders, but to a lesser extent than with adults.

[108]Between 1986/87 and 1993/94, the average (mean) custodial disposition length for young persons found guilty of murder in youth court was 32 months. Until 1992, the maximum youth court penalty for murder was 36 months. Maximum youth court disposition lengths for murder were increased in 1992 (Bill C-12) to a maximum of three years custody and two years less a day conditional supervision. This change would have no direct effect on the average custodial disposition imposed, which remained at 36 months (subject to later application for continuation of custody under s.26.1 YOA).

the case of robbery, for substantially longer periods than young persons (even after considering the applicability of remission to adult sentences).[109]

Even when the lengths of custodial time served for the same offences by young persons and adults are similar, the total length of sentence, and therefore of restraint, is greater in the adult system. In the manslaughter example noted above, an offender sentenced as an adult would, at minimum, be subject to a substantially longer period of conditional supervision (restraint) in the community. As well, parole release can be denied, as can statutory release in certain specified circumstances.[110] In addition, the adult system affords a far wider range of sentence lengths to take into account especially aggravating circumstances of the offence, e.g., life imprisonment for manslaughter. There are a small number of young offenders who have committed very serious offences and who pose an ongoing risk of serious harm. An adult sentence can afford a greater degree of public protection from these offenders by means of longer periods of incapacitation and restraint.

The adult system also has a greater capacity for denunciation. This greater capacity arises not only from a longer sentence which may (or may not) be imposed, but also from the availability of a longer sentence: there may be a symbolic or denunciatory aspect to the greater maxima in the adult system.

Denunciation is the expression of social and moral condemnation which serves a normative function, i.e., the affirmation of social values and promotion of respect for the law. Denunciation is commonly supported as a rationale for sentencing,[111] especially in cases involving heinous offences.

Denunciation is distinguishable from retribution[112] and is connected to broad notions of just desserts or proportionality - that the penalty adequately

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[109]These comparisons (and comparisons of sentences for less serious offences) are quite crude because they do not take into account prior record or the particular circumstances of the same offence types (e.g. degree of injury).

[110]Statutory release is usually granted at two-thirds of an adult sentence of imprisonment of two years or more. Under the Corrections and Conditional Release Act, a federal prisoner committed for certain violent or sexual crimes may be detained beyond the statutory release date if it is established that the offender continues to pose a risk of death or serious harm to others prior to warrant expiry date.

[111]Both the Law Reform Commission of Canada and the Canadian Sentencing Commission regard denunciation as a key consideration in sentencing; denunciation is explicitly reflected in sentencing reforms for adults in Bill C-41.

[112]Retribution is the purposeful infliction of pain or suffering. A denunciatory sanction is necessarily directed at the offender, but it serves a broader social purpose.

reflects both the gravity of the offence and the degree of responsibility of the offender for the offence. Perhaps the best example involves murder, an issue which has provoked a storm of controversy about the sentencing and transfer provisions of the YOA. Simply put, the sanctity of life is a universally shared social value in Canadian society; the intentional taking of a life, therefore, requires condemnation. If the penalty imposed departs too far from commonly held values respecting what constitutes an adequate standard, then the value of the life taken can be seen to be diminished. The consequences of such a "penalty gap" can be inadequate affirmation of a fundamental social value, an erosion of public confidence in and respect for law, and, sometimes, public outcry.[113]

The perceived inadequacy of the penalties for murder has been a major contributor to the erosion of public confidence in the Act. Parliament has recognized this by (twice) increasing the length of youth court dispositions for murder and by amending the transfer provisions in respect of sixteen and seventeen year olds who have allegedly committed murder or manslaughter.

Many would argue that denunciation and proportionality should be key considerations in the sentencing (or transfer) of young offenders, especially for homicide and other heinous offences. If so, this raises questions about the relationship between these goals and the goal of rehabilitation, as well as with the principle of the mitigated accountability of young persons.

Others would argue that denunciation and proportionality should not be considered as primary principles where youth are involved because these considerations run counter to the goals of rehabilitation and reduced accountability, and are not pertinent to what is seen as the fundamental purpose of transfer - protection from youth whose dangerousness requires the longer periods of incapacitation and restraint available in the adult system. From this perspective, denunciation and proportionality are seen as counterproductive to other key goals, such as rehabilitation and the protection of the public.

Proportionality and the principle of mitigated accountability are not necessarily incompatible because proportionality requires consideration of, not only the gravity of the offence, but also of the degree of responsibility of the offender. Proportionality, as applied to young offenders, implicitly involves some consideration of the immaturity and consequent diminished degree of responsibility of young persons. In the same vein, applying the

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[113]A similar problem arises when the inverse occurs, i.e., where the penalty is seen to be grossly disproportionate (too harsh) to the nature and circumstances of the offence.

goal of denunciation to young offenders could also take into account the principle of mitigated accountability: denunciation could be a consideration in the sentencing (or transfer) of young offenders but, because of their immaturity and degree of responsibility, could apply to a lesser degree than it does to adults. This approach is already reflected to some extent in the present law: when a young person is transferred to adult court and convicted of murder, the young person is subject to a mandatory sentence of life imprisonment - i.e., a denunciatory and proportionate sentence - but, in consideration of immaturity at the time of the offence, is also subject to mitigated periods of parole ineligibility.

In any event, the principle of mitigated accountability, while obviously important, is nonetheless only a general principle and not an absolute one: paragraph 3(1)(a) of the Declaration of Principle provides that young persons "should not in all instances" be held accountable in the same manner or suffer the same consequences for their behaviour as adults; the implication is that, in some instances, they can be held as accountable.

Relationships between the goals of denunciation and proportionality and the goal of rehabilitation are more problematic. Denunciation and proportionality necessarily focus on the seriousness of the offence. In contrast, where rehabilitation is the governing principle, the focus is on the needs and circumstances of the offender. An approach that focuses on denunciation and proportionality may result in greater consistency in sentencing, whereas the primacy of rehabilitation leads to a highly individualized sentencing (or transfer) framework.

These different goals will inevitably collide at times. For example, should a young person who has committed homicide, but who is clearly amenable to available treatment resources, have a longer sentence imposed (or be transferred) on the grounds of denunciation or proportionality, even though the protection of society may not require it? How this question is answered depends on how one weighs these competing values and interests. Implicit in an affirmative answer is the assumption that the public good realized by a denunciatory sentence is more important than the social benefit that would be realized by the rehabilitation of the young person within a shorter time frame. As well, denunciation and proportionality <u>per se</u> do not suggest sentences of any particular length - the degree to which these goals may be satisfied by a sentence of X length will, in part, depend upon commonly held values of the community at large and the values of individual observers. Some would argue, for example, that a seven year youth court disposition for murder, with a maximum of four years custody (subject to extension of custody), is insufficient to denounce the crime of second degree murder and

is not proportionate to the gravity of the crime. Others would argue that, notwithstanding mitigated periods of parole ineligibility for young persons, the mandatory life sentence that results from transfer for second degree murder is disproportionately excessive.

In the adult criminal justice system, it is clear that Parliament has, by way of mandatory sentencing applicable to some serious offences, implicitly concluded that in some instances the nature of the offence outweighs all other considerations. For example, it cannot be said that a mandatory life sentence is required for public protection purposes in every case of an adult convicted of murder; a mandatory life sentence is deemed to be required to adequately denounce the intentional taking of a life. The fact that Parliament has identified murder as an offence requiring the most severe sanction for adults (mandatory life imprisonment), at least in part for denunciatory purposes, raises the question about whether similar exceptional measures (e.g., automatic transfer) should also be applied to young persons charged with murder. The offence and the values at stake are, after all, the same, bearing in mind the mitigated accountability of young persons.

If denunciation and proportionality should apply in respect sentencing (or transferring) young persons who have committed very serious offences, this leads to questions about whether they should be primary or governing considerations, or should be subordinate to other objectives such as rehabilitation. Again, this depends on how one weighs competing values. The degree of weight accorded these factors could vary according to the seriousness of the offence since denunciation, for example, assumes greater importance in cases involving heinous offences. On the scale of seriousness of offences then, denunciation could be: a governing consideration in respect of the most serious offences (e.g., homicide); a consideration which needs to be balanced or at least considered along with other principles such as rehabilitation and public protection in cases involving other heinous offences (e.g., aggravated sexual assault); and a subordinate consideration in respect of less serious (e.g., non-violent) offences. Again, however, some would argue that these factors should have no application in the youth justice system.

Proportionality is a principle that can apply regardless of the nature of the offence: this principle not only ensures that a sentence adequately reflects the gravity of the offence but also, especially in respect of young offenders, requires that a sentence not be disproportionately excessive. The principle of limited accountability of young persons is, it could be argued, partly derived from the principle of proportionality. That is, the sentences imposed on young persons should be mitigated due to their immaturity and consequent

diminished degree of responsibility for the offence. The social policy question is the degree to which the other half of the proportionality equation - the gravity of the offence - should apply as a factor in determining sentences/transfer for young persons.

It is typically argued that transfer should only be necessary in very exceptional cases for public protection purposes because the youth system offers a much greater degree of rehabilitative services, which are also more age appropriate, than the adult system. Rehabilitation, it is argued, better protects society in the long run; therefore, transfer should only be employed in rare cases. There is considerable justification to these arguments. Youth correctional programs are typically more richly staffed and programmed than are adult correctional programs.[114] Moreover, empirical research on the effectiveness of rehabilitative interventions indicates that well-delivered programs directed to the factors associated with offending behaviour can reduce recidivism rates. What this suggests is that transfer, and longer custodial sentences, can be avoided in most cases, including cases involving serious offenders.

Empirical research does not, however, indicate that rehabilitative interventions eliminate recidivism but rather only that they can reduce (aggregate) recidivism rates. Further, research on the effectiveness of rehabilitative interventions with serious violent young offenders is very sparse.

To some extent, the provision of effective rehabilitative resources is connected to the question of whether incapacitative measures need to be imposed. If rehabilitative interventions are demonstrably effective, then the need to rely on measures involving long term incapacitation and restraint is consequently diminished. It would be naive to suggest that all that is needed is more and better rehabilitative resources: there are, and undoubtedly always will be, some serious young offenders who are unresponsive or not amenable to treatment, no matter how intensive and sophisticated rehabilitative resources are. A blind faith in the effectiveness of rehabilitation in every case is not justified by the empirical evidence. Rehabilitation is a means of achieving the goal of protecting the public. Where rehabilitation cannot be realistically achieved in an individual case and the young person is assessed as presenting a serious risk of harm to others, then longer term

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[114]There are some exceptions to this. For example, Regional Psychiatric Centre programs operated by Correctional Services Canada can offer staffing and program resources which match or exceed the resources available in several youth correctional systems (bearing in mind that these adult programs are less age appropriate).

incapacitation and restraint becomes the necessary means of achieving the utilitarian goal of public protection.

The "suitability" of a young offender for placement in a youth custody facility could also be a rationale for transfer. In this regard, there are a small number of young offenders who: are very mature and criminally sophisticated; refuse to engage in rehabilitative programs within youth custody or have exhausted available programs; pose a very high risk of escape; are dangerous or abusive to others in youth custody; are exceptionally and persistently disruptive; or who, because of one or more of these characteristics, have detrimental effects on other young persons in custody. Keeping these young offenders in the youth custody system does not serve the public interest nor the interests of other young offenders in custody. There is a capacity to place, by way of an application under section 24.5 YOA, young offenders who are eighteen years or older in adult provincial correctional facilities. There is, however, no similar capacity to place very difficult youth who are under eighteen years of age in adult correctional facilities.[115] While such young offenders could be candidates for transfer, an alternate approach, discussed later in this chapter is to consider this a placement issue rather one related to transfer to adult court.[116]

How the considerations of public protection (incapacitation and restraint), rehabilitation, diminished accountability, proportionality and denunciation should apply to serious young offenders cannot be resolved by scientific or legal argument. Protection of the public is a utilitarian goal which can be accomplished by rehabilitation or, in exceptional cases, longer term incapacitation and restraint. In contrast, denunciation and proportionality are more symbolic aspects of the justice system. No one questions the principle of public protection. What is at issue is whether, and the degree to which, the principles of denunciation and proportionality should apply to serious young offenders. Ultimately, the "answer" will turn on what weight is given

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[115]After disposition. There is a limited capacity to place a detained person under eighteen in an adult remand facility by way of subsection 7(4) YOA.

[116]Another way of characterizing this population is young people who are not "suitable" to receive (or continue to receive) the benefits of the youth justice system because they have exhausted available resources, are not amenable to treatment, have detrimental effects on other young persons in custody, and so on. If this population is addressed by transfer, instead of by way of placement, the purposes and grounds for transfer - as well as the types of youth transferred - can change considerably. For example, the availability and suitability of resources in the youth and adult systems, as well as the personal characteristics of the youth (e.g. maturity, amenability) would tend to assume greater importance. Moreover, it could be expected that there would be a greater likelihood of transferring non-violent offenders, such as chronic property offenders, who would not necessarily receive lengthy adult sentences because a primary consideration would be the suitability of the young person rather than available sentence lengths in the respective systems.

to different social values.

In summary, transfer to adult court is principally (but not exclusively) a sentencing decision to determine whether the longer sentences available in the adult system are required or should be considered. Key considerations in deciding whether a longer sentence/disposition should be imposed on a young offender who has committed a serious offence could include: incapacitation and restraint where there is a significant risk of subsequent commission of a serious offence; where a lengthy period of rehabilitation is required to avoid the subsequent commission of a serious offence; denunciation of heinous offences; and the imposition of a penalty that is proportionate to the gravity of the offence and the degree of responsibility of the offender. An additional consideration in respect of transfer could be, in the case of very serious offences, accountability within a (fully) public forum (see chapter 9).

Transfer is not the only means by which these objectives can be accomplished. Proportionality, denunciation and public protection are directly related to available disposition length. To the extent that the available disposition length is adequate to accomplish these objectives, then transfer is unnecessary. For example, the longer sentences available to the youth courts for first and second degree murder (Bill C-37) provide for longer periods of incapacitation and restraint and a greater degree of denunciation. Therefore, the issue, in part, is one of strategic direction: whether these objectives can and should be accomplished within the youth justice system or by way of transfer to adult court, bearing in mind that there is not a clear line of demarcation at which it can be said that a maximum available disposition of X length is not "suitable" for the youth system and anything that is required beyond that length necessarily becomes a matter to be dealt with in the adult system.

8.6.7 Strategic Directions

When Bill C-61 was before Parliament in 1982, the provisions for transfer to adult court were repeatedly described as a "safety valve". The analogy is apt: very serious young offenders place considerable pressures on the youth justice system to respond in an appropriate and effective manner. Indeed, it could be said that the very credibility of the youth justice system largely rests on how well it responds - and is seen to respond - to these pressures. One way to relieve this pressure is to employ a safety valve like transfer. Another way is to absorb the pressure by increasing the capacity of the youth justice system to respond.

If it is accepted that longer available sentence lengths are required in a relatively small number of cases to facilitate objectives such as greater incapacitation/restraint and denunciation, then one means of accomplishing this is by increasing the lengths of dispositions available under the Act, rather than relying on transfer. This approach is, in part, reflected in Bill C-37 and the attendant increase in available disposition lengths for first and second degree murder, which, it is argued, better reflect the gravity of the offence while preserving the goal of rehabilitation, the principle of limited accountability and an individualized sentencing framework. It is possible to build on this approach by extending the available youth court disposition lengths for other serious violent offences such as manslaughter, attempt murder, and aggravated sexual assault and to provide for a kind of "second tier" of longer dispositional options for especially aggravating and brutal circumstances. The Canadian Sentencing Commission recommended establishing provisions for "enhanced sentences", wherein a Crown Attorney could, subject to specified criteria, seek a longer penalty in a narrow range of cases involving especially aggravating circumstances. Such an approach could be adapted to young offender dispositions. As well, publication of identity could be allowed in exceptional cases, thereby allowing for full public scrutiny of the most serious cases. By doing all this (or similar measures), the youth justice system would have a greater capacity to deal with all but the rarest of cases, thereby almost eliminating the need for transfer.

The alternative approach is the traditional reliance on transfer as a safety valve. Some would argue that a key problem with the approach taken to murder and transfer in Bill C-37 is that both of these strategic directions are adopted: on the one hand, the available lengths of youth court dispositions for murder are increased (i.e., expanded capacity) while, on the other hand, a reverse onus vis-a-vis transfer is established when a sixteen or seventeen year old is charged with murder or other specified serious violent offences (albeit with no change in the transfer test). Therefore, the new youth court penalties for murder and the presumptive transfer provisions is seen by some as philosophically and strategically inconsistent. In their practical application, the possible outcomes are uncertainty and inconsistent treatment. For example, the reverse onus applicable to sixteen and seventeen year olds in murder cases may tend to "push" the court more in the direction of favouring transfer. Conversely, the availability of longer youth court dispositions for murder may - given the greater capacity to protect, rehabilitate, and denounce - "pull" the court in the direction of retention of the young person in the youth court system.

Expanding the capacity of the youth justice system and thereby further limiting the reliance on transfer would, some would argue, provide for a more

autonomous and separate youth court system. It would no longer be a "junior" court in that it would be much less dependent on the adult court to address the most serious cases. The youth court would be able to mete out appropriate sanctions for the most serious cases, while at the same time preserving the traditional juvenile justice principles of mitigated accountability of young persons and rehabilitative treatment.

Others would argue that expanding the capacity of the youth justice system to respond to the most serious offenders does not lead to a more autonomous youth court, but rather to a compromised system that is still dependent upon adult criminal justice features. In order to expand its capacity, the youth system would have to absorb elements of the adult system - such as longer sentences and publication - thereby forming a kind of hybridized and less distinct youth court system. This accommodation process has, some critics have noted, been reflected in the history of amendments to the YOA, especially in respect of progressively increasing lengths of dispositions[117]. One of the key problems associated with this approach is that the new elements which are imported from the adult system may inadvertently impact other young persons for whom the changes were not intended. For example, increasing dispositional lengths for certain offences may increase the sentencing "tariff" for other offences.

It is likely that few of the young persons who are committed to lengthy periods of custody in youth court will remain within youth correctional systems over the long-term. The ten and seven year dispositions available for first and second degree murder will mean, after taking into account the lengthy court processing times before disposition is imposed, that these young persons could remain in the youth correctional system until their mid- to late twenties.[118] In practice, these young persons will likely "grow out"

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[117]In its first iteration in 1982, Bill C-61 proposed a maximum youth custody disposition of two years but, in response to concerns about the assumed inadequacy of this disposition to address more mature and serious offenders, the maximum was increased to three years at Third Reading. Bill C-12 subsequently increased the maximum available youth court disposition length for murder in 1992, as did Bill C-37 in 1995.

[118]To illustrate, a study by the Department of Justice of young persons charged with serious violent offences found that, at the time of being committed to custody, 20 percent were 18 years or older and a further 34 percent were seventeen. In the context of murder cases, however, this does not take into account the additional processing time brought about by the introduction of preliminary hearings and jury trials in murder cases. This same study found that, of those transferred for murder, 72 percent were seventeen or older, but this does not take into account the processing time required for review of the transfer decision or trial and sentence. (Lee and Leonard, 1995).

It should be noted, however, that the new dispositions for first and second degree murder involve maximum periods of six and four years custody respectively (subject to an application for continuation of custody under s.26.1 YOA). As well, the actual time spent in custody can be affected by annual reviews of

of youth correctional systems and many will probably be transferred, via applications under s.24.5 YOA, to complete their dispositions in provincial adult correctional centres.[119] If so, the implicit assumption that these young persons will benefit from long-term rehabilitative measures in youth correctional systems is questionable. Some are of the view that the movement of (now adult) persons to adult correctional centres because they are no longer age appropriate for youth correctional systems seems to be a reasonable thing to do in light of the potential "contamination" and abuse of other youth and the infeasibility of adjusting youth custody programs to accommodate an older population serving lengthy terms.

Concerns about "contamination" are a consistent theme across several juvenile justice issues. For example, one argument advanced against proposals to prosecute children under twelve is that they may be exposed to and detrimentally influenced by older and more criminally sophisticated young offenders. Similarly, custody imposed on young persons should be avoided for the same reasons and transfer to adult court should be avoided because it potentially exposes immature young persons to criminally sophisticated adults in prisons. Contamination can also occur if very serious young offenders are not transferred and, instead, subjected to lengthy youth court dispositions. If they are retained in youth correctional systems, mature over time, and build up in numbers, the result is increasing numbers of (now adult) very serious offenders potentially exacting detrimental influences on younger, less serious offenders in custody.[120]

The vast majority of youth court custodial dispositions are relatively short. Youth correctional systems are geared to the administration of short to medium length custodial dispositions. Few, if any, youth correctional systems have the capacity to provide the long-term rehabilitative programs implicitly contemplated by the increased dispositional lengths for murder in Bill C-37. Nor would it be feasible in most, if not all, jurisdictions to develop specialized programs to retain these offenders in youth custody systems, given their eventual maturity and consequently different program needs, relatively small numbers, and the need to separate youth correctional

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the disposition and the prospect of release on conditional supervision.

[119]Section 24.5 YOA only permits placement of a young person is who eighteen years or more, on specified grounds, in a provincial adult correctional centre. However, these centres are generally geared to the administration of short-term jail sentences and are generally ill-equipped to provide long term programming for very serious offenders.

[120]This may conflict with the intent of international instruments requiring the separation of young persons under the age of eighteen from older offenders.

populations in different ways.[121]

In contrast to the problems posed in accommodating long term dispositions in youth custody systems, the use of transfer raises the spectre of immature young offenders under eighteen being placed in adult correctional facilities. This rarely occurs in practice. Nonetheless, adult correctional facilities do not have dedicated programs for the small number of transferred young persons who are placed in those facilities.

The increase in dispositional lengths for murder introduce a further element of complexity into an already complex legal process by introducing preliminary hearings and jury trials into the youth system and requiring the establishment of, in effect, a "two-tiered" court system for youth. This will probably lengthen an already long youth court process in these cases, as well as increase court costs. On the other hand, an increased use of transfer produces the same result of preliminary hearings and jury trials, except this occurs in the adult system rather than the youth system.

Transfer to adult court has disadvantages. As suggested by the statistics discussed earlier, many transfers involve non-violent offences.[122] Moreover, it can be argued that the existence of a safety valve relieves the very pressure that should be brought to bear on youth correctional systems to develop the necessary rehabilitative resources that might better address the needs of these serious young offenders.[123] Transfer removes young people from a sentencing regime designed exclusively for young persons - with express statutory recognition of their limited accountability and developmental needs - and transplants them into a sentencing regime primarily designed for adults (albeit with mitigated parole ineligibility periods for murder), with the loss of the attendant benefits of a ban on the public identification of the young person (and family) and a statutory right to annual reviews of dispositions.

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[121]For example: remand and sentenced, open and secure custody, male and female, protective custody, treatment needs, as well as maturity and sophistication.

[122]Bearing in mind that applications by young persons themselves, cases involving persons appearing in both youth and adult court, some historical cases and some misreported data may account for some of these non-violent offences. See 8.6.3.

[123]Conversely, it could be argued that adult correctional systems should develop age appropriate programs for young adult and transferred young offenders. Earlier in this chapter, we recommended studies to determine whether it is feasible to establish specialized correctional programs for the treatment of violent offenders who are in late adolescence by drawing upon and combining populations from the youth, adult provincial and federal correctional systems.

Essentially, this issue boils down to whether the youth justice system should accommodate very serious young offenders by expanding its capacity and importing elements of the adult system, or whether there should be a safety valve and the export of youth justice considerations to the adult system once a transfer is effected. Youth justice considerations are, to some extent, already exported to the adult system in transfer cases: there is mitigated sentencing[124], the capacity for the court to place a transferred young person in a youth custody setting for a portion of the adult sentence, and continuation of the special safeguards for young persons respecting statement evidence. Given this, the adult system operates, in part, as an extension of the juvenile justice system in transfer cases. Put another way, transfer does not necessarily mean that a young person will lose all of the benefits of consideration of immaturity at the time of the offence. It is usually assumed that transfer is a "bad" thing to impose on a young person; the continued application of some of these benefits to transferred young persons questions this assumption.

8.6.8 Options

While there are considerable differences in approach, and some differences in the degree to which transfer to adult court would be permitted, all of the options set out below assume that the youth court is the most appropriate forum for sentencing the vast majority of young offenders, i.e., that transfer to adult court should remain an exceptional procedure. In all options, transfer is seen as a necessary mechanism to address cases where the protection of the public from dangerous young persons requires the longer term incapacitation and restraint available in the adult system. The primary differences are not about whether the safety valve of transfer should be available, but rather about what criteria and considerations should be taken into account in transfer decisions, especially in regard to the applicability of considerations such as the symbolic justice principles of denunciation and proportionality to serious violent offences committed by young persons. Another key difference turns on the desirability of having longer term dispositions available in the youth justice system, as opposed to longer sentences being accessed by way of transfer. Decisions about these considerations affect the degree to which transfer will be relied upon.

The first option discusses the status quo (as per Bill C-37), with the

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[124]For example, there are much less severe parole ineligibility periods in cases of murder. As well, youthfulness and immaturity are case law considerations which often lead to mitigated sentences in other cases, although immaturity is not statutorily set out as an express consideration in the sentencing of adults (nor in Bill C-41).

following two options discussing possible changes to the same. The last two options discuss more significant changes to the system. While the specifics of these options are discussed, these should be viewed as directions that could be taken. Advantages and disadvantages are identified, bearing in mind that what is an advantage or disadvantage to some extent depends upon one's perspective on these issues.

Option 1: Status Quo

The status quo involves the retention of the following key provisions:

- the current test for transfer; i.e., the objectives of rehabilitation and protection of the public and, where these objectives cannot be reconciled, the paramountcy of protection of the public;

- "mandatory" transfer hearings and a reverse onus in cases involving sixteen and seventeen year olds charged with murder, manslaughter, attempt murder or aggravated sexual assault;

- ten and seven year maximum youth court penalties for first and second degree murder respectively; and

- the capacity for adult courts to place transferred young persons in youth custody, where required, and life imprisonment with mitigated periods of parole ineligibility for transferred young persons convicted in adult court of first or second degree murder.

The "status quo" (and other options) could be combined with other proposals in this report, such as conferencing and a post-adjudicative transfer process.

The status quo is based on the premise that the vast majority of young persons, including those who have engaged in very serious criminal behaviour, can and should be dealt with in the youth justice system, which has the capacity to hold them accountable in effective ways and which holds out a better promise of preventing re-offending. The present system recognizes, however, that some exceptional cases cannot be dealt within the youth system because the best evidence suggests that protection of the public, in the context of dangerousness, requires longer sentences available in the adult justice system.

The advantages and considerations that apply to the status quo include:

- The ten and seven year youth court penalties allow for a greater

degree of public protection (incapacitation/restraint), denunciation and imposition of a sanction proportionate to the gravity of the offence in cases where transfer is unavailable (i.e., under fourteen years), or where the youth court orders the case to be proceeded against in youth court. There is the flexibility to keep a young person beyond the maximum custodial portion of the disposition if there is a proven risk of serious harm to others and a capacity to re-incarcerate in the event of a breach of conditional supervision, thereby enhancing public safety. There is also the flexibility to mitigate the disposition through annual reviews, thereby avoiding the potentially harmful effects of prolonged custody.

- This is possibly the least disruptive option in the short term insofar as there is an established body of case law respecting the (1992) test for transfer, which has not been changed. While differences in the interpretation of this test have emerged from different appellate courts, thereby leading to some inconsistencies in the treatment of cases between jurisdictions, this will likely be eventually resolved by a case being brought before the Supreme Court of Canada. (Bearing in mind that this could take several years and Bill C-37 amendments could possibly affect the interpretation of the test.)

- Notwithstanding the problems that may be posed to youth custody systems by older adolescents serving long term youth court dispositions for murder (e.g., age appropriateness, contamination), this is less of a concern in respect of younger adolescents (e.g. under fifteen) found guilty of murder in youth court. Moreover, concerns about the placement of these adolescents are recognized and can be resolved by changes to the placement provisions of the Act.

- The ten and seven year youth court dispositions available for murder, and changes to the transfer provisions, could assist in restoring public confidence in the youth justice system. The impact of these changes will be communicated to the public through their application. Since the degree of public confidence in the Act has some influence on considerations to change legislation, further changes should not be made until the effects on public confidence are known.

- While the current regime acknowledges that adult sentences may be required for some youth, longer youth court dispositions for murder avoid the potential ill effects of the mandatory life sentence and less flexible regime for young persons convicted in the adult system.

- The "mandatory" hearings and reverse onus applicable to sixteen and seventeen year olds charged with certain enumerated offences will provide for greater consistency of treatment across jurisdictions, at least in respect of ensuring that there is consideration of transfer in these cases by the youth court and could possibly lead to more consistent decision-making in these cases. Unnecessary costs and delays can be avoided in the event that the parties agree that the matter should proceed in a particular forum (either youth or ordinary court).

- The status quo retains a focus on the rehabilitation of young persons in the broader context of the protection of the public, thereby allowing for an individualized approach which takes into account the circumstances and prospects of young persons within a regime designed exclusively for young persons. As such, it least diverges from the United Nations Convention on the Rights of the Child.

- In light of the recent proclamation of Bill C-37, this option has not been tried and evaluated. Criticisms of this option are, to some extent, based on assumed disadvantages; it is not yet proven that these disadvantages will be realized. Accordingly, the prudent course would not be to change key provisions respecting serious offenders again, but rather to closely monitor and evaluate the impact of the 1992 (C-12) and 1995 (C-37) changes vis-a-vis jurisprudence, placement and programming issues, etc., then determining the need for and direction of changes on the basis of more objective information.

With respect to the last issue, concerning evaluation, the federal Department of Justice intends to develop a research database to monitor the substantive and procedural aspects of cases in which young persons are charged with very serious offences and all cases in which transfer to adult court is an issue. All relevant cases from the passage of Bill C-12 (1992) onward would be included, and data on key decisions at all levels of court would be captured. Ultimately, each case would be followed to the completion of the youth court disposition or ordinary court sentence.

The initial steps in the project have been completed, but much work remains that depends upon the availability of resources and the cooperation of federal, provincial and territorial officials. The comprehensive database will be an important tool for informing future policy development respecting serious young offenders and transfer to ordinary court.

The **disadvantages** and related considerations that apply to the status quo include:

- There are conflicting strategic directions embodied in the status quo, i.e., longer youth court dispositions for murder militate against transfer, whereas a reverse onus in the case of sixteen and seventeen year olds charged with murder may increase the likelihood of transfer. The possible consequence is further uncertainty and inconsistencies between jurisdictions.

- Lengthened youth court dispositions for murder will probably diminish the likelihood of transfer being ordered for young persons accused of murder who are under sixteen years of age. This may, notwithstanding longer youth court dispositions for murder, erode public confidence in the Act.

- Because the transfer test is not changed, the "mandatory" transfer hearings and reverse onus for enumerated offences may make little difference to the results of transfer decisions. There will be more transfer hearings - with attendant increases in cost, complexity and length of the youth court process - but possibly no appreciable difference in decision-making in these cases.

- The introduction of jury trials requires the establishment of a two-tiered youth court system for youth, increasing the length and complexity of the process.

- "Mandatory" transfer hearings for enumerated offences and longer youth court dispositions increase costs to the youth justice system, thereby diminishing the capacity to target resources to other social objectives such as enhanced treatment programs or alternatives to custody.

- Youth custody systems could be adversely affected because: they do not have suitable programs available to address such long term dispositions; the costs of accommodation and developing programs; and the placement of older offenders serving lengthy dispositions in youth custody may detrimentally affect other young persons in custody.

- Longer youth court dispositions for murder seem to implicitly assume that these young people will be retained in youth custody systems and therefore continue to receive the rehabilitative benefits of the same. It

is likely, however, that many of these youth will eventually mature out of youth custody systems and be transferred to provincial adult correctional centres, which are also ill equipped to administer lengthy dispositions.

- o An age and charge-specific presumption of transfer is artificial and potentially vulnerable to Charter challenges, and adds complexity to the process.

- o Longer youth court dispositions for murder may, it is argued, unnecessarily increase the dispositional "tariff" for other offences or lead to pressures to increase dispositional lengths for other offences.

Option 2: Status Quo with Clarification of the Test/Modification of Procedures

Some of the disadvantages of the status quo could be addressed by amendments to the current provisions, in particular, the test for transfer and the reverse onus for enumerated offences. (The placement of older adolescents serving lengthy youth court dispositions for murder is discussed later in this chapter.)

With respect to the test for transfer, there have been two divergent streams of interpretation that have emerged from appellate courts and which have contributed to some inconsistencies in the treatment of cases between jurisdictions. These divergent interpretations turn on the meaning of the words: "consider the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person ..." At issue is whether the "interest of society" involves only the two objectives of protection to society and rehabilitation or whether the use of the word "includes" contemplates consideration of other objectives such as denunciation, accountability within a public forum, and general deterrence. The latter interpretation is more permissive of transfer.[125]

The former interpretation may, however, be bolstered by the Bill C-37 amendment to the Declaration of Principle - paragraph 3(1)(c.l) YOA - which states:

> "the protection of society, which is a primary objective of the criminal law applicable to youth, is best served by rehabilitation, wherever

[125]See Bala (1995) for a summary and discussion of the case law.

possible, of young persons ..."

For those who would agree that there is merit to the court at least considering other objectives such as denunciation in transfer decisions, the test for transfer could be clarified by stating that the "interest of society":

- o includes the "primary" objectives of protection to society and rehabilitation, or

- o "includes but is not limited to" protection to society and rehabilitation.

Both of the variants of the test for transfer would clarify that objectives other than only protection to society and rehabilitation could be considered by the court in transfer decisions. The first option would, for example, clearly indicate that these other considerations were subordinate to the primary objectives. There could, however, still be uncertainty about how the modified test would relate to the above-noted change in the Declaration of Principle. The second option would not necessarily subordinate considerations such as denunciation and accountability in a public forum to the objectives of protection to society and rehabilitation. There is the potential for more flexibility to this modified test, but also more uncertainty as to how to apply and weigh these considerations in individual cases.

It could be argued that modification of the transfer test may be unnecessary or premature. Given different interpretations of the test by appellate courts, it is likely that a case will eventually be heard by the Supreme Court of Canada, thereby resolving the matter one way or another. It is possible that a case could be decided before completion of the lengthy legislative process required to amend the Act. It might be preferable to wait for a case to be decided by the Supreme Court of Canada because a review of that case would provide better guidance as to precisely what amendment, if any, was required. Moreover, if one of the objectives of this change is to ensure greater consistency of interpretation and application of the test across jurisdictions, this objective could be accomplished by an amendment in the opposite direction, i.e., clarifying the test so that objectives other than rehabilitation and protection of the public are not considered in transfer decisions.

With respect to the reverse onus applicable to sixteen and seventeen year olds charged with certain enumerated offences, the "mandatory" hearing and reverse onus could be removed altogether or, alternatively, limited only to murder and manslaughter. The latter would, in effect, "carve out" culpable homicide as the most serious offences, which deserve special treatment (at

least for sixteen and seventeen year olds). These changes would assume that the reverse onus will not make appreciable differences in transfer decisions and, therefore, avoids the complexity and costs associated with "mandatory" hearings. The countervailing view is that the effect of the reverse onus is not yet known and to repeal it may well amount to giving up a transfer advantage to the Crown in the most serious cases. If the provisions for "mandatory" transfer hearings were repealed, the Crown would likely apply for transfer in most of these serious cases in any event. Moreover, these "mandatory" transfer hearings can be avoided, if the Crown does not consider transfer to be in the public interest, by the Crown applying to have the case proceeded against in youth court (assuming the young person will not oppose the application).[126]

Option 3: Status Quo with Some Increase in Disposition Length

The changes brought about by Bill C-37 respecting serious young offenders were not intended to be the "final word" on the matter, but rather as initial and necessary steps that would be subject to more comprehensive review by the House of Commons Committee on Justice and Legal Affairs and by this Task Force. In this context, the increases in the maximum youth court disposition lengths for first and second degree murder were principally intended to facilitate rehabilitation and public protection by extending the maximum available periods of custody and by allowing for fairly lengthy periods of conditional supervision in the community. In the event of a likelihood of serious harm to others, the conditional supervision period (or portion thereof) can be continued as custody (s.26.1) or, if the young person is released from custody, can be readily enforced in the event of an actual or pending breach of a condition (s.26.3).

The enactment of longer youth court dispositions for murder beg the question about whether there is a need to increase the maximum available disposition length for other serious offences/offenders in the interest of facilitating similar objectives, i.e., enhanced rehabilitation and public protection. Some experts have suggested the three year maximum disposition for serious offences (other than murder) is, in a narrow range of cases, not sufficient to allow for the combination of custodial treatment and community reintegration and control that is required to better protect the public. This concern has, for example, been raised in the context of young

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[126]If the C-37 procedures are retained, consideration could be given to clarifying some aspects of the procedures, such as where bail hearings are to be held, time limits vis-a-vis the young person making application to have the case proceeded against in youth court, and so on.

sex offenders where, in some cases, there may be a need for not only a fairly lengthy period of custody but also a fairly lengthy period of close community supervision and control employing community-based treatment and relapse prevention approaches.

While sexual offences are an area of particular concern, there are other types of cases involving serious harm to others where a lengthier disposition involving a combination of custody and community supervision might be necessary - for example, a case of aggravated assault where clinical assessment indicates the need for a longer period of custodial and community intervention to facilitate the treatment of deep-seated and multiple problems such as prior abuse, anger management, and substance abuse.

Under the present dispositional structure, offences such as aggravated assault and sexual assault with a weapon can result in a maximum of two years custody (because they are not "life" offences for adults) followed by one year probation. In these cases, community supervision involving probation is less enforceable and responsive than, for example, conditional supervision. "Life" offences (for adults) such as aggravated sexual assault carry a maximum of three years custody for young persons and, where that maximum is imposed, potentially no community supervision following custody (unless the young person is released early to conditional supervision or probation via section 28 or 29 YOA).

Given the above, one option is to retain the present provisions respecting serious offenders (as amended by Bill C-37), with the following change:

- an increase in the maximum available disposition to five years less a day for specified serious violent and sexual offences;

- the new maximum disposition would involve a combination of custody and conditional supervision, the custodial portion of the disposition being limited to a maximum of three years;

- the conditional supervision portion of the disposition would be subject to a hearing (upon application) for continuation of custody (s.26.3) and the same enforcement procedures already set out in the Act.

In effect, this new disposition would amount to applying the former disposition available for murder (Bill C-12) to specified serious violent and sexual offences. Decisions would have to be made about which serious offences would be eligible, bearing in mind that this would be limited to

serious offences against persons and could, for example, include manslaughter, attempt murder, aggravated assault and all three levels of sexual assault.

A 1995 study by the federal Department of Justice of young persons charged with serious violent offences between 1986/87 and 1993/94 found that substantial proportions young persons found guilty of these offences are not committed to custody and, of those committed to custody, the custodial portion of the disposition was less than one year in many cases.[127] Given this, some would argue that there is no need to increase the maximum available length of dispositions for serious violent offences because the courts are not generally employing the currently available maximums. These arguments misconstrue the nature of the proposal to increase maximum dispositional lengths and the data. This same study found that some (albeit few) of the young persons found guilty of serious violent offences did receive the maximum available custodial disposition.[128] A potential increase in the maximum available disposition for certain serious offences does not mean that most young persons would require these maxima, but rather only that a small proportion might. Increased lengths would accord the youth court the flexibility to better address the wide range of circumstances of offences, special needs and the degree of assessed risk that can arise in these cases. In effect, it would be intended and expected that the new, longer dispositions would only be employed infrequently in "higher end" cases involving greater seriousness, risk to public safety and assessed need for longer intervention. Perhaps most importantly, there should not be a preoccupation with maximum periods of custody since a critical consideration in this option is the maximum duration of disposition, which involves both custody and conditional supervision in the community.

A complication with this proposal arises from the offence-based limitations

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[127]For example, of those found guilty of attempt murder, aggravated assault, and sexual assault with a weapon, 83 percent, 54 percent and 63 percent were committed to custody, respectively. Of those committed to custody for these offences, the length of the custody committal was less than one year in, respectively, 56 percent, 43 percent, and 72 percent of the custody cases. It should be noted that these data do not account for time spent in predispositional detention, nor fully account for aggregate sentences where there was more than one offence, (e.g., consecutive dispositions). Nearly one-half of the cases involved dispositions for more than one offence. See Lee and Leonard (1995).

[128]For example, of those committed to custody for aggravated assault and sexual assault with a weapon, an estimated two percent and five percent respectively received the maximum custody disposition (Lee and Leonard, 1995).

on the maximum period of custody set out in paragraph 20(1)(k) YOA and how this would interact with the proposed new maximum youth court disposition. Presently, a three year period of custody may only be imposed (except for murder) where a young person is found guilty of an offence for which an adult would be liable to imprisonment for life, which includes offences such as manslaughter, attempt murder and aggravated sexual assault. There are, however, several serious violent and sexual offences - for example, sexual assault with a weapon, sexual assault, aggravated assault and wounding with intent - that are not "life" offences for adults, and therefore, are subject to a maximum youth court disposition of two years custody. There are two ways to address this:

- retain the present maxima of three years and two years custody, respectively, for a scheduled list of "life" and "non-life" indictable offences involving violence. Therefore, under a new five year less a day disposition, a life offence such as aggravated sexual assault could attract a maximum disposition of three years custody and two years less a day conditional supervision, whereas a non-life offence such as sexual assault with a weapon would be subject to a maximum of two years custody and three years less a day conditional supervision; or

- amend paragraph 20(l)(k) YOA so that the life/non-life criteria is substituted by a three year custody period being able to be imposed where the young person is found guilty of a scheduled indictable offence involving violence for which an adult would be liable to imprisonment of ten years or more. If so, a wider range of serious violent and sexual offences - including, for example, aggravated assault, sexual assault with a weapon, and sexual assault - would be subject to a maximum of three years custody and two years less a day conditional supervision.

In either case, a scheduled list of eligible violent offences would be required in order to avoid, for example, increasing the maximum disposition length for breaking and entering of a private dwelling house, which is a life offence for adults, or of theft over $5000, which (on indictment) carries a maximum of ten years for an adult.

The first choice would present fewer complications for youth correctional systems vis-a-vis programming, placement, and costs. In effect, there would be no direct increase in the maximum duration of custody, with the potential increase in custody being limited to the unusual circumstance of continuation of custody (s.26.1) or a suspension (s.26.3) or court review (s.26.6) of a conditional supervision order.

Since this option would retain all the features of the status quo, except for the increase in the maximum available disposition for specified offences, it would retain the advantages and disadvantages of the status quo (Option 1) discussed earlier. The **additional** advantages of this option include:

- the youth courts would have greater flexibility to impose dispositions that are commensurate with assessed need and risk in a wider range of "higher end" serious violent and sexual offences, within a system designed for youth and which address the special needs and interests of young persons.

- assuming there is no increase in the maximum duration of custody, the increase in the dispositional maximum is principally community-based (conditional supervision). This will likely result in minimal impacts on youth custody systems vis-a-vis programming, placement, and costs; the implications for youth custody systems would be limited to unusual circumstances of continuation of custody (s.26.1) or suspension/court review of conditional supervision orders.

- the availability of conditional supervision, which is more readily enforceable than probation, and of a lengthier period of community supervision to facilitate community re-integration and public safety.

- potential avoidance of transfer to adult court in some cases.

- potentially promotes public confidence in the youth justice system.

The additional **disadvantages** of this option include:

- potential increase in the dispositional "tariff" for the "lower end" cases among the specified offences and for other offences.

- assuming manslaughter, attempt murder and aggravated sexual assault would be included in the scheduled list - offences for which sixteen and seventeen year olds are subject to "mandatory" transfer hearings and a reverse onus - potential aggravation, in the view of some, of conflicting strategic directions, i.e. ,increasing disposition lengths for these offences may militate against transfer, whereas a reverse onus may increase the likelihood of transfer.

- potentially increased programming and placement concerns regarding serious older offenders, especially because (unlike probation) a suspension/court review of a conditional supervision order results in a

young person who is eighteen or older being brought before the youth court and youth custody being imposed.[129]

- additional costs to youth correctional systems to administer longer dispositions and additional prosecution, court and legal aid/court-appointed counsel costs for section 26.1 (continuation of custody) hearings and related conditional supervision proceedings.

Option 4: Enhanced Capacity Model

An "enhanced capacity model" refers to the strategic direction (discussed earlier) wherein the youth justice system expands its capacity to address the most serious offences or most dangerous and/or persistent young offenders. Transfer as a "safety valve" is extremely restricted as a mechanism for dealing with the most severe cases. The enhanced capacity of the system is twofold: longer dispositions would become available for offenders who commit offences eligible for an "exceptional" disposition regime; a second aspect of the scheme is to provide a mechanism for review and graduated release into the community.

It is important to emphasize the philosophical underpinnings of the scheme: the principles of the YOA ought not be lost simply because the young person has committed a very serious offence and/or has committed an offence involving serious violence and clinical assessments indicate a high degree of continuing dangerousness. It is recognized, however, that the mechanism to deal with these persons must differ significantly from that which is used in relation to most young offenders. The philosophy of the Act, as interpreted by the Supreme Court of Canada in R. v. M.(J.J.)(1993), emphasizes rehabilitation as a primary principle in sentencing young persons. The rehabilitative interests of the young person subject to an exceptional disposition are still to be accommodated. They are addressed, however, in the context of parameters of sentencing which are set largely in relation to the seriousness of the offence and the culpability of the offender. The continuing dangerousness of the offender is also to be addressed within these parameters. It is not contemplated that dispositions for serious

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[129]A young person who breaches a youth court probation order after attaining the age of eighteen commits a criminal offence as an adult and, accordingly, is brought before the adult court and is subject to imprisonment as an adult. In contrast, a breach of a conditional supervision order does not constitute a new offence, but rather can trigger a review of the order by the youth court (s.26.6), at which time the youth court can order continuation of the suspension of conditional supervision, i.e. order youth custody. Given that about three-quarters of young persons are sixteen years or older at the time of disposition for serious violent offences (Lee and Leonard, 1995), it is likely that most young persons subject to longer periods of conditional supervision would be eighteen or older during the conditional supervision period.

offences would be inflated beyond that which was proportionate simply to contain a young person who is at high risk of violent reoffending.

As a means of illustrating the concept, an exceptional disposition model might include the following features.

- The transfer provisions of the current Act would be severely limited, applying only in circumstances where a dangerous offender application under the Criminal Code is warranted.

- The Crown would be required to give pretrial notice to a young person that it would be seeking an application for an exceptional disposition upon a finding of guilt.

- Upon application for an exceptional disposition (or upon a finding of guilt for a qualifying offence in the longer maxima scheme), the court would be required to order a case conference and adjourn the case:

    (i) a case conference would be held whereby an officer of the court (e.g. youth worker) would be required to gather evidence from a wide variety of sources such as the offender's family, psychologists, psychiatrists who had treated the offender, school and community officials, employers, etc.;

    (ii) the case conference could involve a meeting of some or many of these individuals to formulate a list of concerns, as well as recommendations in respect of disposition;

    (iii) at the disposition hearing, the results of the case conference would be the subject of examination and cross-examination;

    (iv) the youth court judge would be required to consider, but would not be required to follow, the results of the case conference.

- the normal maxima for dispositions for serious offences set out in the Act, as amended by Bill C-37, would be retained:

    - ten years for first degree murder (six years custody plus four years conditional supervision);
    - seven years for second degree murder (four years custody plus three years conditional supervision);
    - three years for an offence that an adult would be liable to life imprisonment (e.g. manslaughter); and

- two years for other indictable offences (e.g. aggravated assault);

- the enhanced maximum dispositions that could be imposed would, subject to satisfying the youth court that an enhanced disposition is required, be fifty percent greater than the normal maxima:

  - fifteen years for first degree murder (nine years custody plus six years conditional supervision);
  - ten and one-half years for second degree murder (six years custody plus four and one-half years conditional supervision);
  - four and one-half years for an offence that an adult would be liable to life imprisonment; and
  - three years for other indictable offences.

- for both the normal and enhanced maximum dispositions for first and second degree murder, the current provisions respecting extension of custody into the conditional supervision period (s.26.1) would apply.

It should be emphasized that the enhanced maximum dispositions described above are only selected to illustrate the concept. The suggested scheme is not the only viable structure; further study would be required.

The concept of an exceptional sentence was developed by the Canadian Sentencing Commission both as an alternative to indeterminate sentencing and to address the most heinous instances of a "serious personal injury offence", described below. It is important to stress at the outset that the scheme devised by the Commission related to adult, as opposed to young offenders. The Commission recommended that in respect of a restricted number of the most serious offences, the maximum sentence should be subject to an enhancement of up to fifty percent. The penalty scheme to which the exceptional sentence would be applied was one which prescribed a maximum sentence of twelve years for the most serious offences, except murder and high treason (which would remain subject to a life sentence). Examples of offences that the Commission recommended for a twelve year maximum were attempted murder, manslaughter, aggravated sexual assault, and criminal negligence causing death. Offences recommended to carry a maximum sentence of nine years would also be eligible for the exceptional sentence. Examples of offences of this nature were robbery, extortion, arson, aggravated assault, sexual assault with a weapon or causing bodily harm. Offences subject to lower maxima would not be eligible for the exceptional sentence.

In the regime proposed by the Sentencing Commission, the exceptional sentence had three main features: remission did not apply to a sentence which was subject to an enhancement; the offender was entitled to review of the sentence at the commencement of the enhanced period (e.g. at twelve years if the enhanced portion of the sentence was three years for a total of fifteen years); and the dangerous offender provisions of the Criminal Code would be repealed.

For young offenders, an exceptional disposition would be imposed in one of two situations:

- where the circumstances of the offence are especially brutal; or

- the offence forms a part of a pattern of repetitive behaviour by the young person involving serious acts of personal violence or the offender has committed one of the qualifying offences and the court is satisfied that the young person represents a continuing danger to society.

In the latter situation, a young offender would not be held in custody beyond a period of time proportionate to the seriousness of the offence or to the young person's culpability. It is not intended that the enhanced maxima would be used as a substitute for dangerous offender proceedings.

As noted above, the exceptional sentence scheme recommended by the Canadian Sentencing Commission applied only to "serious personal injury offences", defined as an offence involving the use or attempted use of violence against another person, or conduct endangering or likely to endanger the life or safety of another person. An exceptional sentence could only be imposed in respect of a serious personal injury offence which carried a maximum sentence of either twelve years or nine years and which met one of two additional, alternative criteria:

- the offence was of such a brutal nature as to compel the conclusion that the offender constitutes a threat to the life or safety or physical well-being of other persons; or

- the offence formed a pattern of serious repetitive behaviour by the offender showing a failure to restrain his/her behaviour and a wanton and reckless disregard for the lives, safety or physical well-being of others.

The Commission characterized these criteria as "primarily offence-oriented"

rather than focused on predictions of future behaviour.

The criteria of the exceptional sentence scheme, as proposed by the Canadian Sentencing Commission, reflect criteria very similar to those found in the dangerous offender provisions of the Criminal Code. This is not surprising, given that they were intended to replace these provisions and to address predictive assessments of dangerousness in the context of sentencing decisions.

Formulating criteria for the imposition of exceptional sentences involves consideration of the goals of exceptional sentencing. In this regard, the following questions are relevant: Is the exceptional sentence intended primarily to provide additional lengths of time to accommodate offenders assessed to be at risk of committing future violent offences? If so, is the goal to incapacitate them for the entire period of their continuing dangerousness? Arguably, to adopt this goal would be to usurp the function of the dangerous offender provisions. In this model for young offenders, however, transfer to adult court would continue to be available for those offenders for whom a dangerous offender application would be sought in adult court.

Given this, it would seem that it would be most appropriate to provide longer sentences in one of two situations: where the offence contained aggravating circumstances of such a nature that a proportionate sentence could not be imposed by reference to the "regular" maximum available. Predictions of future dangerousness would play a marginal, rather than a major role in these assessments.

The concept of dangerousness or high risk of serious future offending might be accommodated, to a somewhat greater degree, by adding a second criterion which used the concept of "repetitive behaviour" to establish a present risk of future offending. In discussion of the merits of this option, it would be advisable to examine the research which considers the accuracy of predictive assessments. In this regard, a prior record for similar offences could be used either to "aggravate" disposition or to indicate a risk of future dangerousness which could not be accommodated by use of the "regular" maximum.

The criterion which is most faithful to the concept of proportionality (i.e., dispositions which reflect the gravity of the offence and the culpability of the offender) is that which permits the imposition of exceptional dispositions only for offences involving serious personal violence or the risk of violence where aggravating circumstances of the offence or of the offender are such

that a proportionate disposition cannot be imposed within the regular maximum available. A test of this nature would embrace a very limited concept of future dangerousness. The dangerous offender provisions would be available to deal with those offenders who were at high risk of future serious offending. (It should be noted that the criteria proposed by the Canadian Sentencing Commission are actually more narrow than those which govern dangerous offender applications in the Criminal Code).

It should be remembered that in the exceptional disposition scheme, the length of a disposition is determined primarily in relation to offence seriousness. The rehabilitative needs (and/or dangerousness) of the offender determine the speed with which the young person will be cascaded into the community.

In view of the principle of mitigated accountability in s.3 of the YOA, and in view also of the smaller number of young persons under the age of sixteen who commit serious acts of violence, the policy position could be pursued of restricting application of the exceptional disposition to persons who committed their offences over a certain age, e.g. persons fourteen years of age and older, or sixteen years of age and over.

As noted above, an enhanced disposition could be subject to the current review and conditional supervision regime, or to one specially designed to deal with serious young offenders (e.g. the test and criteria for consideration might be different - the onus would be on the offender to show that public protection would not be jeopardized by the offender being subject to a less intrusive measure).

Treatment would be recognized as an important component of the disposition; treatment resources might be provided through targeted cost-sharing agreements (if cost-sharing issues are resolved).

Young persons subject to an exceptional disposition would be placed in accordance with the current placement principles in the Act. For example, it would be possible to place a young person in a youth facility until age eighteen or twenty and to provide for placement in an adult facility after this point. Some would argue that in this respect the exceptional disposition is a fiction because it implies that youth are retained in the youth system for the duration of their disposition. A counter-argument, however, is that placement issues are common to both an exceptional disposition and a transfer regime and must be considered independently of which of these two regimes is adopted.

The **advantages** and considerations that apply to this model include:

- o as compared to increasing the maximum length of dispositions, the exceptional disposition is a means of maximizing flexibility of sentencing in respect of the most serious offences and offenders without necessarily signalling an overall increase in the sentencing "tariff".

- o the requirement for an application to seek an exceptional disposition would reduce pressures to increase maxima for the more serious offences in youth court. Costs and procedural complications in respect of jury trials would be controlled through maintaining maxima at less than five years (except for murder). In the option described above, first and second degree murder are the only offences that would be eligible for jury trials.

- o the exceptional disposition remains a youth court disposition and, therefore, maintains its ability to respond to the needs and circumstances of youth involved in crime. Although the disposition would be longer, it would remain distinctive through the continuing application of, for example, the review provisions and conditional supervision.

- o treatment is an integral part of the disposition. Graduated release would be tied to progress in treatment such that the onus would be on the offender to demonstrate lack of continuing risk to the public.

- o provision for conditional release in suitable cases by way of court review provides for restraint to ensure public protection without incurring the costs of continued incarceration.

- o longer dispositions would be available to better satisfy the requirements of proportionality (and denunciation, where appropriate) without violating opportunities to address the young person's rehabilitative needs. This advantage is especially important in respect of attempting to rehabilitate and control sex offenders.

- o resolves the conflicting strategic directions inherent in Bill C-37, (i.e., the conflicting directions of longer youth court dispositions combined with a reverse onus transfer for murder).

The **disadvantages** and considerations that apply to the exceptional sentence model include:

- one of the most pressing disadvantages to the exceptional disposition model concerns the issue of placement. Youth custody facilities are not equipped to handle offenders committed to long periods of custody. This might make placement of young offenders in adult facilities an inevitability. Youth who are initially placed in youth custody facilities at an early age and benefit from such placement will have this programming suspended and replaced upon placement in an adult facility. If so, then what is the rationale for retaining these offenders within the youth system?

- a response to the problem of placing older young offenders noted above might be that placement of persons under the age of eighteen in an adult facility should be restricted to a very limited set of circumstances, e.g. where they pose a risk to the safety of others or exercise a detrimental influence on other youth in the facility, or where there is a program to their benefit in an adult institution. As a matter of policy, it is probably less offensive to place a nineteen year old in the penitentiary to serve a seven year sentence than it is to place a fifteen year old who is part-way through a ten year disposition.

- provision for an exceptional disposition mechanism will increase the number of youth serving lengthy dispositions within youth correctional systems and, therefore, intensify concerns about placement, programming and increased costs.

- additional prosecution, court and legal aid/court-appointed counsel costs for section 26.1 (continuation of custody) hearings and related conditional supervision proceedings.

- the proposed criteria for enhanced dispositions appear to set a very high standard, which suggests that, in practical application, enhanced dispositions may be very uncommon.

- given the similarity between the criteria for enhanced dispositions and the Criminal Code criteria for dangerous offenders, question can be raised about the practical distinction between the two.

- the severe restrictions on the capacity to transfer to adult court could, in respect of cases of extreme seriousness (e.g. murder), lead to perceptions that the Act is "soft", thereby potentially eroding public confidence in the Act. Given that dangerous offender designations under the Criminal Code have rarely, if ever, occurred with youth who have been transferred to adult court, the practical effect of limiting

transfer applications to circumstances where a dangerous offender application is warranted may be to eliminate transfer to adult court altogether.

- o the Sentencing Commission model of enhanced sentences, which was intended to replace the dangerous offender provisions, was not accepted for adults and, indeed, the policy direction has been the opposite, i.e., steps have been taken to facilitate dangerous offender designations. The lack of acceptance of this approach for adults raises questions about why it should be accepted for youth.

- o longer youth court dispositions may blur the distinctions between the youth and adult systems.

- o depending on the complexity, time, costs and obstacles associated with a hearing to determine whether an exceptional disposition should be imposed, the incentive for the Crown to seek an exceptional disposition in some cases might be minimal, given relatively small differences in the normal and exceptional maxima, e.g. three years instead of two years maximum for indictable offences for which an adult is liable to ten years or more.

Option 5: Strengthened Transfer Model

The Task Force considered the options of facilitating transfer to adult court by way of legislative exclusion or prosecutorial discretion, but rejected these as undesirable.

Legislative exclusion, as reflected in several American states and Commonwealth countries such as England and New Zealand, involves removing certain serious offences from the jurisdiction of the youth court altogether, thereby resulting in automatic transfer to adult court.[130] Legislative exclusion ensures certainty and consistency in decision-making, as well as cost and time efficiencies because the long and complex process associated with a judicial discretion model would be avoided altogether. As an alternative to its position favouring a lowering of the maximum age jurisdiction of the Act (see Chapter 3), Ontario expressed support for legislative exclusion of sixteen and seventeen year olds charged with serious violent offences. Legislative exclusion was considered in respect of murder

[130]"Transfer" is used loosely here - there is, in fact, no "transfer" because the youth court has no jurisdiction over these offences in the first place.

and manslaughter, but was not supported by a substantial majority of the Task Force on the grounds that, even with these most serious offences, there are at least some cases where especially mitigating circumstances of the offence or of the offender would lead one to conclude that transfer would not be necessary. In short, legislative exclusion would not allow for consideration of exceptional circumstances that could (and do) arise in individual cases and, therefore, could lead to some inappropriate transfers.

A prosecutorial discretion model, as reflected in some American states, involves according the youth and adult courts dual jurisdiction to hear certain serious cases while vesting sole discretion with the Crown Attorney to determine whether a case will be heard in youth or adult court. The major advantages of a prosecutorial discretion model are the time and cost efficiencies realized by avoiding the long and complex process associated with a judicial discretion model. Alberta expressed support for this approach. A prosecutorial discretion model was not supported by a substantial majority of the Task Force for several reasons. Although Crown Attorneys are impartial and carry out quasi-judicial functions, a prosecutorial decision-making process would be less public and accountable than a court decision-making process. Second, prosecutorial discretion could lead to significant disparities in decision-making between jurisdictions. For example, one jurisdiction might adopt a policy directing Crown Attorneys to elect adult court for most or all cases, whereas another jurisdiction might not. Third, the Crown would not have all the information necessary to make a fully informed transfer decision, i.e., the Crown cannot order medical or psychological reports or predisposition reports. Finally, some would argue that there would be the danger that prosecutorial decisions could be influenced by factors such as media or public reaction.[131]

As a result of these considerations, a substantial majority of the Task Force agreed that a decision-making process that vests discretion with the court is the most appropriate model.

The model described below involves several elements and is intended to focus the use of transfer on murder (or murder and manslaughter) and other serious violent offences. To be clear, the intention is to ensure that there is

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[131]An alternative approach would be a blended approach involving exclusion, prosecutorial discretion, and judicial discretion for murder and manslaughter. In this approach, murder and manslaughter would be excluded from the jurisdiction of the youth court, except where the Crown applied to the youth court for a judicial determination in circumstances where Crown Counsel is unable to conclude that it would be in the public interest for the young person to be subject to adult court sanctions. A case conference (Chapter 2) could be held to develop recommendations for the court. In effect, this approach would accord some flexibility and discretion to a legislative exclusion approach.

greater consistency in transfer decisions across jurisdictions and to ensure that there is more frequent transfer of these cases of serious violence. The model assumes that murder is such a serious offence that, on the basis of the social value given to life in Canadian society, transfer can be warranted in a substantial majority of cases on the grounds of either public protection and/or the need for longer sentences which denounce these crimes and are more proportionate to the gravity of the offence.

In respect of these other serious violent crimes, the model makes the assumption that factors such as denunciation, proportionality, public protection accomplished by incapacitation and restraint, and accountability in a public forum (i.e., publication of identity) should be expressly set out as considerations in transfer decisions. Many would argue that general deterrence should be added to this list of factors. With respect to these serious violent offences, the intent is **not**, however, to transfer most or all of these cases but rather, by requiring the court to consider these additional factors, to increase the likelihood of transfer in the most serious of these cases. For example, not all or a majority of the most serious sexual assaults require transfer, but the most serious of these which involve especially brutal circumstances may require transfer because denunciation, for example, becomes a more important consideration in such cases. Between 1986-87 and 1992-93, only 1.5 percent of youth court cases involving aggravated sexual assault and sexual assault with a weapon resulted in transfer to adult court. In 1993-94, only 0.07 percent of all youth court cases were transferred. A doubling or tripling of the transfer rate would mean that more of the most serious of these cases would be transferred, but the overwhelming majority would still be dealt with by way of a youth court disposition.

As well, the model assumes that, once transferred, some juvenile justice considerations such as mitigated sentencing and placement in youth custody should, in consideration of immaturity of the time of the offence, continue to apply to transferred young persons and perhaps be strengthened.

The model assumes that lengthy dispositions (e.g. as in Bill C-37) are not appropriate to the youth justice system and, as discussed earlier (Strategic Directions), ultimately compromise the unique character of the system.

Finally, the model assumes that the Act has been discredited on the basis of a relatively small number of cases involving serious violence that were not transferred and that, accordingly, changes to better ensure transfer will assist in restoring public confidence in the Act. This further assumes that the changes brought about by Bill C-37 are not clear, nor will they be

sufficient to restore public confidence in the Act.

The elements of this model are described below:

- making it mandatory that every case involving a young person, who was fourteen years or more at the time of the offence and who is accused of first or second degree murder, would be subject to a hearing to determine transfer to adult court, subject to the Crown consenting to the matter being heard in youth court. If found guilty of murder, the onus would be on the young person to convince the court that transfer should not be imposed.[132]

  In addition, murder would be subject to a separate and strong test which would ensure that a substantial majority of young persons found guilty of murder would be transferred to adult court. This strong test should still, however, allow for a minority of these cases which involve especially mitigating circumstances of the offence or of the young person to be dealt with by way of a youth court disposition. This strong transfer test could, for example, state that "a young person found guilty of murder shall be proceeded against in ordinary court unless mitigating circumstances of the offence compel the conclusion that the interests of society will be better served by proceeding against the young person in youth court".[133] (Some jurisdictions expressed support for including manslaughter, in this "first level" transfer test.)

- Transfer proceedings for offences other than murder would be subject to application by the Crown, with the onus on the Crown to satisfy the court that an order for transfer should be imposed.

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[132]This procedure would be akin to that established by Bill C-37, except it would be applicable only to murder (excluding manslaughter, aggravated sexual assault and attempt murder) and would be applicable to accused young persons who were fourteen years or more at the time of the offence (instead of only 16 and 17 year olds). In a post-adjudicative model, the Crown would normally file a pretrial notice of intention to seek an adult sentence. These notices would not be required in cases of murder because a transfer hearing would be mandatory in these cases, subject to the Crown consenting to the case being heard in youth court. The implication is that every murder case involving a young person over fourteen would be eligible for a jury trial, except where the Crown consents to the matter being heard in youth court.

[133]There are different ways in which a strong transfer test could be framed. This is only an example. Another example is that "a young person found guilty of murder shall be subject to the penalties for murder set out in the Criminal Code for young persons unless the young person demonstrates to the court that extenuating circumstances exist, such that it is in the public interest to impose a disposition for murder under the Young Offenders Act". There are other examples that could be considered.

- The test for transfer for offences other than murder would be revised so that - along with retaining the rehabilitation of young persons as a primary objective - additional objectives and considerations in relation to either serious personal injury offences (as defined in the Criminal Code) or to a scheduled list of serious violent offences would be express considerations. These objectives would include:

  (a) the expression of society's denunciation of the offence;
  (b) the protection of society by means of incapacitation and restraint; and
  (c) the imposition of sanctions proportionate to the gravity of the offence and the degree of responsibility of the young person for the offence.

  An additional consideration would be the benefit, if any, to the public or to the administration of justice that would result from publication of the identity of the young person if an order was made to proceed against the young person in ordinary court. (Some representatives expressed support for including general deterrence as an objective.)

  In addition, the revised transfer test would require that where these objectives, as are applicable to the case, cannot be satisfied by imposing a youth court disposition, the court shall make an order for transfer.[134]

- The eligible offences for which a young person under the age of sixteen at the time of the offence may be transferred would be limited to first or second degree murder, manslaughter, and a scheduled list of other serious offences (or serious personal injury offences).

- Assuming that a transfer test can be developed which would ensure that most young persons found guilty of murder would be transferred, the Bill C-37 youth court dispositions of ten and seven years for first and second degree murder would be repealed, substituting a youth court disposition of five years less a day.

- The Bill C-37 provisions for "mandatory" transfer hearings and a reverse onus applicable to sixteen and seventeen year olds accused of manslaughter, aggravated sexual assault and attempt murder would be repealed.

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[134]One implication of expressly setting out these objectives is that the Declaration of Principle may have to be amended in some way (see, Chapter 2).

- The provisions of the Criminal Code which accord mitigated periods of parole ineligibility to young persons who are transferred and subject to life imprisonment for murder would be retained.[135]
- A new provision could be established in the Criminal Code wherein the court, upon application by a young person who has been transferred to adult court and sentenced to life imprisonment for first or second degree murder, may terminate a life sentence if the young person has ten crime-free years while on parole and the court is satisfied, subject to a report by the National Parole Board and a medical or psychological report, that the person does not pose a risk of harm to others. (Issues relating to notice to victims, the role of the victim, and so on, at these hearings would have to be clarified.)

- The provisions of section 16.2 YOA would be modified so that, where a young person is transferred and sentenced to imprisonment, there is a presumption of placement in a youth custody centre until the young person attains the age of eighteen years, subject to the court being satisfied that such placement would be in the better interests of the young person, not contrary to the public interest, and not contrary to the interests of other young persons in custody. Akin to section 16.1 YOA, there would also be a presumption of placement in a provincial adult correctional centre or, where the sentence is two years or more, a penitentiary if the young person is eighteen years or more. These placement provisions would continue to be subject to the considerations set out in subsection 16.2(2), e.g. safety, detrimental influence on other young persons, etc.

Advantages and considerations applicable to this model include:

- assuming there would be increases the frequency of transfer of cases of murder, public confidence in the Act would be bolstered.

- focuses transfer on serious violent crime and, while retaining the

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[135]Some jurisdictions have expressed concern, however, that the revised parole ineligibility periods brought about by Bill C-37 will, in some circumstances, lead to "softer" adult sentences for transferred young murderers. For example, under Bill C-37, a transferred young person who is found guilty of second degree murder is subject to a fixed parole ineligibility period of 7 years if he was 16 or 17 years old at the time of the offence, or at between 5 and 7 years (at the discretion of the court), if he was under 16 at the time of the commission of either first or second degree murder. Before Bill C-37, a stronger penalty - up to 10 years before parole eligibility - could be imposed. Note, however, that Bill C-37 fixed the parole ineligibility period at 10 years (if 16 or 17 years old) for first degree murder, whereas there was discretion (at between 5 and 10 years) before Bill C-37, i.e., this amounts to a toughening up by establishing what was formerly the maximum period of parole ineligibility as the standard in all of these cases involving first degree murder by 16 and 17 year olds.

rehabilitation of young persons as a primary objective in respect of serious violent offences (other than murder), clarifies that the objectives of denunciation, incapacitation and restraint, proportionality and accountability in public forum (publication) should be expressly considered by the court in transfer decisions.

- o more likely to bring about greater predictability of outcome (i.e., transfer) and consistency in decision-making across jurisdictions in respect of murder and, by clarifying the test for transfer, in other cases involving serious violent crime.

- o reduces the reliance on transfer in cases involving non-violent crime by restricting the eligible offences for young persons under the age of sixteen and, implicitly, for sixteen and seventeen year olds by focusing transfer on serious violence.

- o largely resolves the problems posed to youth correctional systems (contamination, programs, costs) in administering lengthy youth court dispositions for murder (assuming that transferred youth, at least at age eighteen or thereabouts, are placed in the adult correctional system).

- o resolves the conflicting strategic directions inherent in Bill C-37 (i.e. longer youth court dispositions combined with a reverse onus transfer for murder).

- o eliminates "mandatory" transfer hearings in cases of sixteen and seventeen year olds charged with manslaughter, attempt murder and aggravated sexual assault, thereby reducing the complexities of process brought about by these new provisions.

- o maintains and strengthens mitigated sentencing (i.e., reduced parole ineligibility in murder cases) and placement of young persons under the age of eighteen in youth custody, if transferred.

The **disadvantages** and considerations that apply to this model include:

- o the perception among some that the Act is being "softened" because the youth court penalties for murder are reduced and the presumption of transfer of sixteen and seventeen year olds charged with manslaughter, attempted murder or aggravated sexual assault is eliminated.

- a stronger and separate test for murder which leads to most cases being transferred would limit judicial discretion, thereby leading to less individualized decision-making in cases involving murder and, generally speaking, a greater emphasis on the seriousness of the offence at the expense of an emphasis on rehabilitation. This is least consistent with the spirit of the United Nations Convention of the Rights of the Child.

- a strong transfer test that leads to most young persons being transferred in murder cases may be vulnerable to Charter challenges vis-a-vis the right to life, liberty and the security of the person (section 7).

- removes rehabilitation as a primary consideration in murder cases and assumes that cases of murder usually cannot (or should not) be accommodated in the youth justice system.

- arguably, the potential for unnecessary resort to transfer in some cases involving serious violent offences and the consequent belief among some that the proposals go too far.

- a disproportionate and potentially adverse effect on aboriginal youth, who are over-represented in the youth justice system.
- adds complexity to the transfer process by creating, in effect, a three-tiered approach to transfer, i.e., a first level test for murder, a second level test for other violent offences, and a third level test for remaining eligible offences.

- introduces considerations of denunciation and proportionality expressly in statute, considerations which are not expressly referenced in the Declaration of Principle.

- express reference to denunciation and proportionality in respect of identified serious violent offences may be interpreted as meaning these principles have no application at all to other offences.

- may be premature without a thorough assessment of the impacts of changes brought about by Bill C-37. In particular, it may be premature to remove the reverse onus relating to manslaughter, attempted murder, and aggravated sexual assault because it has not yet been tested.

8.6.9 Recommendation

Transfer to ordinary court proved to be the most difficult and contentious issue faced by the Task Force. Full consensus was not reached.

A substantial majority of representatives of provincial and territorial jurisdictions agreed that the provisions for transfer to ordinary court should be strengthened to better respond to serious violent offences. Accordingly, there should be amendments to the transfer provisions which would lead to:

(1) the transfer of a substantial majority of young persons over the age of fourteen who are accused of (or, assuming a post-adjudicative process, found guilty of) first or second degree murder; and

(2) some increased reliance on transfer for other serious violent offences.

Federal representatives did not take a position on the identified options, preferring instead to await the results of the review of the Act by the House of Commons Committee on Justice and Legal Affairs, including the issue of serious young offenders.

Some jurisdictions, including Ontario, indicated that the above are only minimally acceptable and, accordingly, they would support changes to the transfer provisions that would go farther than indicated above.

Most provincial and territorial representatives also agreed that transfer to ordinary court is the preferred mechanism to access longer sentences, where required, rather than increasing the length of dispositions available in the Act.

Several jurisdictions also indicated that consideration could be given to repeal of the (Bill C-37) ten and seven year youth court dispositions for murder, substituting a disposition of five years less a day, if the transfer provisions are sufficiently strengthened. This, however, would depend upon the strength of a new transfer test for murder and the degree of assurance that longer youth court dispositions would no longer required because a substantial majority of cases would be transferred.

It should be noted that the support of a substantial majority of provincial and territorial representatives for strengthened transfer provisions does not necessarily imply support for Option 5, described earlier, which is an illustration only. There are a variety of different ways to strengthen the transfer provisions.

8.6.10 Placement of Transferred Youth

If a young person is transferred to adult court, placement in an adult correctional facility is not automatic nor immediately required, although it is probably inevitable if there is a long term adult sentence. Section 16.1 YOA accords the youth court the discretion to place a transferred young person who has been detained in custody while awaiting trial or sentence in a place of detention for young persons or in a place of detention for adults. If convicted and sentenced in ordinary court to imprisonment, the court may - after affording the young person, the provincial director and representatives of the provincial and adult correctional systems an opportunity to be heard - place the transferred young person in youth custody, a provincial adult correctional centre or, if the sentence is two years or more, in a penitentiary. Placement decisions under sections 16.1 and 16.2 are reviewable by the court so that the placement can be altered if there are changed circumstances. Accordingly, section 16.2 can allow for blended placements (sentence management) which relate to the maturity of the young person. For example, a transferred young person who is sentenced to a lengthy period of imprisonment, but who is only seventeen years old could be placed in a youth custody facility for a period of time until he is sufficiently mature to be placed in a penitentiary.

There are some differences between section 16.1 and 16.2 respecting how placement decisions are made. Section 16.1 establishes a presumption of placement in youth detention if the young person is under eighteen years of age and, if eighteen or older, there is a presumption of placement in adult detention. A similar presumption is not applicable to placement decisions made under section 16.2.[136] Instead, section 16.2 enumerates a number of factors - such as the safety of the young person, the safety of other young persons in custody, detrimental influences on other young persons, and so on - for the court to consider in deciding placement.

Sections 16.1 and 16.2 reflect the principle of the segregation of young persons from adult offenders: even though transferred, immature young persons should not be exposed to the detrimental influences of more sophisticated adults in custody unless (in effect) it is necessary to do so in the public interest.

Since they allow for the placement of young persons under the age of eighteen in adult correctional facilities, sections 16.1 and 16.2 do not

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[136] In R.v. Godlewski and Ginter, the Manitoba Court of Appeal ruled that section 16.2 is not applicable to transferred young persons who are eighteen years or older at the time of the placement decision.

completely accord with Article 37 of the United Nations Convention on the Rights of the Child, which requires the separation of young persons and adults unless it is considered in the child's interest not to do so. Canada, along with several other countries, has entered a reservation respecting Article 37 which provides that, while supporting the principle of separation, there should be for exceptions to the general rule.

Placement of young persons under eighteen years of age in adult correctional facilities is rare because transfers to adult court are very uncommon and, more importantly, by the time all proceedings are completed the vast majority of transferred youth are eighteen or older.[137] If, however, more young persons are transferred as a result of recent changes to the transfer provisions (Bill C-37) or if further decisions are taken to increase the frequency of transfer as recommended earlier by most provincial and territorial representatives, then the potential exists for more frequent placement of young persons under eighteen in adult correctional facilities.

A key question about placement decisions under section 16.2 is whether, like section 16.1, there should be a presumption of placement in youth custody if the young person is under the age of eighteen at the time of the placement decision. A presumption would make it clear that placement of a youth who is under eighteen in an adult correctional facility should only arise in exceptional circumstances. Arguably, the protection of immature young persons from the detrimental influences of more sophisticated adults serves the long-term public interest.

On the other hand, it could be argued that a presumption of placement in youth custody may be unnecessary. In this regard, section 16.2 already sets out a number of factors for the court to consider, including the young person's level of maturity and the availability and suitability of resources in adult and youth custody. These considerations should militate against inappropriate placements. A presumption, it could be argued, gives inordinate weight to the factor of age as opposed to a careful consideration and balancing of all the factors that are set out in section 16.2(2), while possibly leading to a lack of clarity about how the presumption would operate in conjunction with the enumerated factor to be considered. Further,

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[137]Between 1988-89 and 1993-94 there was an annual average of only five young persons under the age of eighteen placed in penitentiaries. In 1994-95 there were twenty-one placed, but this increase was entirely attributable to Manitoba, where some young persons apply to have themselves transferred to adult court in order to attract an adult sentence and placement. National data respecting placements in provincial adult correctional facilities are not available, but in 1993/94 there were no placements of young persons under eighteen in Ontario. Ontario accounted for about one-quarter of the national total of transfers to adult court in that year.

it could be said that the differences between section 16.1 (presumption) and section 16.2 (no presumption) are justifiable because a section 16.1 placement is pre-adjudicative (involving an accused person) whereas section 16.2 addresses the placement of a convicted and sentenced person. Moreover, the purpose of establishing a presumption is to avoid placement in an adult facility yet, as noted previously, this rarely occurs. Again, however, if Bill C-37 leads to more frequent transfer (an uncertain prospect) or if further changes are made to the Act to allow for more frequent transfer (see earlier options), this may become a more pressing concern.

Some youth correctional administrators have expressed concern about the possibility of establishing a presumption of placement in youth custody, given the potential problems associated with managing chronic or very serious offenders serving lengthy sentences of imprisonment. These young persons may have little incentive to participate in and cooperate with youth programs, especially if they know that once they are older they are likely to be placed in an adult correctional facility. Youth custody programs may have to enhance security and control measures; to some extent, the degree of security and control in an institution is dictated by the "worst case", which in turn impacts the degree of security and control exercised over other young persons in custody. As well, very serious or chronic offenders can have detrimental influences on other less sophisticated young persons in custody, sometimes in a manner that is subtle. Further, the young person could, before the transfer decision, have already been provided the best available resources in the youth justice system, to no avail; hence a further placement in the system would be in vain. Given these concerns, establishing a presumption of placement in youth custody could lead to placement decisions that detrimentally affect other young persons in custody or the effective operation of those facilities.

One possible solution might be to establish a presumption of placement in youth custody if the transferred young person is under the age of eighteen but, where placement is so ordered and the provincial director subsequently requests a review of the placement on certain specified grounds, the court would be required to place the young person in an adult correctional facility if there are reasonable grounds to believe that the grounds for review have been satisfied. These specified grounds could, for example, include that the young person poses a risk to the safety of the public or the safety of other young persons in custody, a risk of escape, or has a detrimental influence on other young persons in custody. While the provincial director would have to adduce evidence to support the review application, a standard of "reasonable grounds to believe" would not be insurmountable. Such an approach would provide greater assurances of placement in youth custody, but also establish

a stronger safety valve to the provincial director in the event the youth custody placement does not work out as originally intended.

It should be noted that, while there are some cases of transferred young persons under the age of eighteen who need to be placed in the adult system on public interest grounds, there are also some cases where an adult placement may be in the better interests of the young person. For example, it may be better for a young person who is nearly eighteen to be placed directly in the adult system and engage in programs there, rather than spend a short amount of "dead time" in the youth custody system while awaiting eventual adult placement. As well, in some cases the adult system may actually have more suitable programming available, such as violent offender treatment programs in Regional Psychiatric Centres.

A presumption of placement in an adult correctional facility of a transferred young person who is eighteen years old can be supported on the grounds that these are serious offenders who have been transferred to the adult system and who, in fact, are young adults. On the other hand, placement in a penitentiary if the sentence (or remanet) is two years or more may not be the best alternative in some cases - placement in an adult provincial correctional facility might be the better alternative. These cases could be addressed through Exchange of Services Agreements, which, with administrative consent, allow for the placement of penitentiary inmates in provincial adult correctional centres (or vice-versa).

A less pressing concern respecting the placement of transferred youth relates to section 733 Criminal Code, which accords the provincial director the administrative discretion to place in youth custody a transferred young person who has been sentenced to imprisonment. This provision, in effect, was the administrative predecessor to section 16.2 YOA, which establishes a judicial decision-making approach and was proclaimed in force in 1992 (Bill C-12). Section 733 was retained in force to continue to allow for the placement of cases transferred before enactment of section 16.2. It is now no longer necessary and should be repealed.

There is also some lack of clarity with respect to the jurisdiction of courts to decide detention placement where a young person has been transferred to adult court and is awaiting trial or sentencing. In this regard, subsection 16(7) YOA provides that where transfer is ordered, proceedings under the Act shall be discontinued and the young person shall be taken before the ordinary court. This accords the ordinary courts full jurisdiction over the case, including bail and detention. Section 16.1, however, accords the youth court jurisdiction over detention placement, including reviews of

detention placement decisions. This creates the anomalous circumstance where the young person must appear before an ordinary court for matters pertaining to bail and detention, but before the youth court for detention placement. This could be clarified. Similarly, these bail, detention and placement issues need to be clarified in respect of the offences enumerated by Bill C-37for sixteen and seventeen year olds, which result in the young person being dealt with in ordinart court, unless there is application to have the matter dealt with in youth court. It should be noted, however, that if, as recommended, a post-adjudicative transfer process is endorsed, then section 16.1 will no longer be necessary because the transfer decision will be made at the time of sentencing/disposition.

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

With respect to the custodial placement of young persons who have been transferred to adult court and sentenced to imprisonment:

(1) **Section 16.2 YOA should be amended to provide for a presumption of placement in a youth custody facility if a young person who has been transferred to adult court is under the age of eighteen at the time of being sentenced to imprisonment and, if the young person is eighteen years or older at the time of sentence, there should be a presumption of placement in a provincial adult correctional facility or, if the sentence is two years or more, in a penitentiary.**

(2) **Section 16.2 YOA should also be amended so that, where placement in youth custody is ordered and the provincial director subsequently applies for a review of the placement decision on certain specified grounds, the young person shall be placed in a provincial adult correctional facility or where the remanet of the period of imprisonment is two years or more, in a penitentiary, where the court is satisfied that there are reasonable grounds to believe that the young person, if kept in a place of custody for young persons, would pose a risk to the safety of the public or other young persons in custody, risk of escape, or has a detrimental influence on other young persons in custody.**

(3) **Where a transferred young person has been ordered to be placed in a penitentiary because the sentence or remanet is two years or more, consideration should be given to using existing Exchange of Services Agreements in appropriate cases to facilitate placement in a provincial correctional facility for adults.**

(4) Section 733 Criminal Code should be repealed.

(5) If a pre-adjudicative transfer process remains in place, section 16.1 YOA should be amended to clarify that, where transfer is ordered and the youth court makes the initial determination of placement, the ordinary court subsequently acquires jurisdiction to hear reviews of the placement order.

In closing this section, it should be noted that section 16.1 establishes a maximum age for placement of a transferred young person in youth detention. After attaining the age of twenty, the young person must be placed in adult detention. A similar maximum age is not established for placements made under section 16.2. The issue of a maximum age for youth custody placement is discussed later (see, 8.9 in this chapter).

8.7 DISPOSITIONAL STRUCTURE

As amended by Bill C-37, the current structure for custodial dispositions under the Act includes the following available maxima:

- six months for a summary conviction offence;
- two years, where the offence is an indictable offence for which an adult would be subject to a maximum that is less than life imprisonment;
- three years, where the offence is one for which an adult would be subject to imprisonment for life or where more than one disposition is made in respect to different offences; and
- ten and seven years for first and second degree murder, respectively (bearing in mind that realizing the maximum custodial period is subject to a successful application for extension of custody into the conditional supervision period).

Some provincial and territorial jurisdictions have suggested that the ten and seven year maximum dispositions for first and second degree murder could be repealed and substituted with the former maximum disposition of five years less a day. This is based on the assumption that a recommendation respecting strengthening the transfer of cases involving murder will be endorsed. If a substantial majority of these cases are transferred to adult court, there would, it is argued, be no need for these lengthy youth court dispositions.

The adequacy of the dispositional structure of the Act is connected to the issue of transfer to adult court. From the point of view of a substantial majority of provincial and territorial representatives, lengthening the maxima available under the Act is not, for reasons discussed earlier, the best means of addressing the most serious young offenders. Rather, if longer sentences are required, transfer to adult court is the preferred course.

Some have pointed out an anomaly in the available maximums under the Act: a breaking and entering of a private dwelling (which can attract a life sentence for an adult) could lead to a three year custody disposition, whereas serious violent offences such as aggravated assault or sexual assault with a weapon can attract a maximum of two years custody. This is more theoretical than real because breaking and entering does not, in practice, result in three year custody dispositions. Perhaps, this is more a

comment on the available maximum sentence of life imprisonment for an adult convicted of breaking and entering than it is about the available maximums under the Act.

Since the dispositional maxima available under the Act is so closely connected to the issue of transfer, the Task Force decided to make no recommendation on this matter, except to re-iterate that most provincial and territorial representatives do not support increases to the dispositional maxima - if longer sentences are required, transfer should be the mechanism employed.

The Task Force did not have the time to examine all issues in relation to sentencing. One of these was with respect to the desirability of establishing minimum mandatorial custodial penalties in the Act, for example, when a young person uses a firearm in the commission of a serious offence.[138]

8.8 DANGEROUS AND HIGH RISK YOUNG OFFENDERS

For the purposes of this section, a dangerous young offender means a young person who has been found guilty of an offence involving death or serious personal injury and who poses a substantial and ongoing risk of serious harm

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[138]Bill C-68 recently amended the Criminal Code so that a mandatory minimum of four years imprisonment applies when an adult uses a firearm in the commission of serious offences, such as attempted murder, robbery, and so on.

There are several reasons why mandatory minimum penalties should not be employed for young offenders, most of which relate to these sanctions being inconsistent with the general scheme of the Act and specifically with the Declaration of Principle (s.3). In this regard, the Declaration provides that young persons should not in all instances be held accountable in the same manner as adults and they have a right to least possible interference with freedom that is consistent with the protection of society. As the Supreme Court of Canada has affirmed in R. v. M. (J.J.), the over-arching considerations in the sentencing of young persons are their special needs and rehabilitation. Implicitly, this requires that the court be given the scope to adapt dispositions to the unique needs and circumstances of each case - mandatory minimum custodial dispositions would remove all discretion from the youth court. Moreover, it is argued that since custody is known to be ineffective, mandatory minimum dispositions may actually prove to be counterproductive to the long term protection of society, especially if intensive community-based alternatives would be more suitable.

In counterpoint, it is argued that mandatory minimum custody dispositions need not hold young persons as accountable as adults, but still could provide greater assurances of accountability. For example, a mandatory minimum of one or two years custody for specified serious offences involving the use of a firearm would be less onerous than the four year minimum for adults. Similarly, a youth court mandatory minimum period of custody for murder would still be mitigated when compared to the penalties imposed on adults for the same offences. Further, a considerable degree of flexibility and adaptation to the special needs of young persons could still be accommodated in appropriate cases through the use of the open custody provisions (instead of secure custody) and the potential for early, judicially-approved release from custody.

to others, which risk is unlikely to be reduced by means of rehabilitative interventions. This population should be distinguished from young persons who have been found guilty of an offence involving death or serious personal injury but who do not pose a substantial and ongoing risk of serious harm to others (e.g. "situational" offenders) or who are amenable to available treatment programs which are likely to reduce the risk of re-offence. While this latter population was clearly dangerous at one point in time, within a given set of circumstances, this does not mean that they necessarily pose an ongoing risk of serious harm to others.

In short, dangerousness involves establishing proof of two key elements - prior dangerous conduct and the reliable prediction of future dangerous conduct.

Establishing that a young person is a "dangerous offender"(whether within the legal or clinical meanings of those words) is a very difficult and uncertain enterprise, for a variety of reasons. As noted previously, the prediction of human behaviour is hardly an exact science, especially in the context of violence and adolescence. It is more difficult to predict uncommon behaviour as opposed to common behaviour. Because more serious violence is relatively uncommon behaviour, it is more difficult to predict. As well, because of developmental factors associated with adolescence, there is greater difficulty in establishing reliable assessments of future risk, ie, adolescence is a period of greater fluidity and change. For example, psychopathy - which is associated with a violent criminal career - is not a diagnosis in the American Psychiatric Association's Diagnostic and Statistical Manual (DSM) that is applicable to persons under the age of eighteen. While more sophisticated risk assessment instruments such as the Psychopathy Checklist (PCL-R) have been adapted for application to young offenders, this instrument is not sufficiently reliable to apply to young offender populations on a practical basis and should only be used for research purposes.

The best predictor of future conduct is previous conduct. Although it may be possible to assess dangerousness on the basis of a single brutal offence and complementary clinical assessment, a much more common and convincing indicator of dangerousness is a demonstrated pattern of prior dangerous conduct, ie., multiple incidents. Given this, and that the incidence of serious violent conduct among young persons (under eighteen) peaks among sixteen and seventeen year olds, the practical reality is that there is usually not sufficient time available for the young person to establish a pattern of prior violent conduct before he or she becomes an adult and subject to prosecution in ordinary court.

Dangerousness, and the need for incapacitation and restraint of dangerous young people, is closely connected to the effectiveness of rehabilitation. Insofar as rehabilitative interventions may be successful in reducing the risk of re-offence, the need for incapacitation and restraint consequently diminishes. Research on the effectiveness of rehabilitative measures with serious violent young offenders is scant.[139] As well, the effectiveness of rehabilitation is dependent upon the availability and quality of services, and the amenability of the young person to treatment.

Findings that an adult is a dangerous offender pursuant to section 753 C.C. are rare in the adult system. Given the above-noted considerations, along with the fact that young offenders represent a small proportion of the total violent offending population, it could be expected that findings that a young person is a dangerous offender would be even rarer. There are no known cases in which a young person has been transferred to adult court and subsequently found to be a dangerous offender pursuant to section 753 C.C., although the leading case respecting the constitutionality of the dangerous offender provisions of the Criminal Code (R. v. Lyons) actually involved the case of a sixteen year old (which was heard in the adult courts before the uniform maximum age was proclaimed in force).

Some have proposed that there should be special provisions within the YOA to facilitate the designation of young persons as dangerous offenders.[140] This proposal raises the same questions that were previously discussed in respect of serious young offenders and transfer to adult court: should the youth justice system expand its capacity to respond to rare cases of dangerous young offenders by establishing special provisions within the Act or should the dangerous offender provisions applicable to adults in the Criminal Code be accessed by way of the "safety valve" of transfer to adult court and subsequent dangerous offender proceedings? The Task Force agreed that the latter approach is the preferred course.

Accessing dangerous offender provisions by means of transfer to adult court raises the question about whether the law is clear that the provisions of section 753 C.C. do apply to young persons who are transferred. A review of the applicable law indicates that there is no apparent legal impediment to proceeding with a dangerous offender application after a young person has

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[139]This does not mean that rehabilitative measures will or will not work, but rather that there is very little empirical evidence one way or another.

[140] For example, this was part of the Liberal Party platform on crime and justice prior to the 1993 election.

been transferred and found guilty, except for an inconsistency with respect to the placement of transferred young persons.

In this regard, section 16.2 YOA requires, once a transferred young person has been sentenced to imprisonment in adult court, that the court determine whether the young person should be placed in youth custody, a provincial adult correctional centre or, "where the sentence is two years or more", in a penitentiary. Where a person is found to be a dangerous offender pursuant to section 753 C.C., however , the court may impose "a sentence of detention in a penitentiary for an indeterminate period", i.e., section 16.2 YOA does not appear to contemplate an indeterminate sentence, while section 753 C.C. requires detention in a penitentiary. Since section 51 YOA states that all the provisions of the Criminal Code apply to young persons, except to the extent that they are inconsistent with or excluded by the YOA, the apparent inconsistency between section 16.2 YOA and section 753 C.C. could lead to argument that Parliament did not intend the dangerous offender provisions to apply to transferred young persons.

On the other hand, principles of statutory construction would suggest that the specific provisions of the dangerous offender legislative provisions would prevail over the more general section 16.2 YOA placement provisions, and that section 16.2 would be subject to any penitentiary placement pursuant to section 753 C.C.

An amendment to section 16.2 YOA which expressly referenced the placement of transferred young persons who are subject to an indeterminate sentence pursuant to section 753 C.C. would not only resolve any interpretation issues that might arise, but also act as a clear signal that the dangerous offender provisions are intended to apply to transferred young persons.

In response to the 1995 report of the federal/provincial/territorial Task Force on High-Risk Violent Offenders, Ministers of Justice endorsed a proposal to amend section 753 C.C. such that, if the court chooses not to declare an offender to be a dangerous offender, it may declare the offender to be a "long term offender" and, consequently, subject to federal incarceration to be followed by long term community supervision. This proposal is intended to address high risk offenders who are not likely to be found to be dangerous offenders, especially pedophiles who may be amenable to treatment and long term community restraint by means of supervision and relapse prevention techniques.

An application to find a transferred young person a dangerous offender

would not only be constrained by the need to satisfy statutory criteria and the probable reluctance of courts to label a young person a "dangerous offender", but also by the considerations of rehabilitation and diminished accountability which apply to young persons, even when transferred. Given this, the proposed long term offender sentence may be a useful alternative in appropriate cases. Therefore, it is important that these new provisions be drafted in a manner so as to clearly permit their application to transferred young persons.

Since transfer to adult court is rare and subsequent applications to find a transferred young person a dangerous or long term offender will always be even rarer, perhaps the more relevant issue in respect of higher risk young offenders who have not been transferred is the capacity to use young offender records in subsequent dangerous offender applications, if the young offender commits a serious personal injury offence as an adult. This information can be important to the prosecution's case as part of evidence which establishes that there has been a pattern of repetitive behaviour by the offender.

A review of the applicable law indicates that young offender records may indeed be used in respect of dangerous offender proceedings against that person as an adult. This capacity has been enhanced by changes brought about by Bill C-37. In this regard, young offender records relating to murder, manslaughter, attempt murder and aggravated sexual assault can now be kept indefinitely in a "special records repository", while records relating to a scheduled list of offences (mostly, serious personal injury) can be kept in the same repository for longer periods of time. These records, pursuant to paragraph 45.02(4)(c) YOA, may be made available to a Crown Attorney and to a court for any purpose relating to proceedings in ordinary court. As well, sections 45.01 and 45.02(3) YOA, in effect, provide for the conversion of young offender records to adult records where the young person has been subsequently found guilty of an offence as an adult, while section 45.1 enables the Crown to make application to a youth court judge for disclosure of a non-disclosable record if the Crown has a valid and substantial interest in the record and it is necessary for the record to be made available in the interest of the administration of justice.

The Task Force on High-Risk Violent Offenders also recommended, and Ministers of Justice endorsed, the establishment of a national "flagging system" (through CPIC) which will include individuals whose personal and offence characteristics (except for "persistent pattern") meet the criteria set out in sections 752 and 753 C.C. In effect, this flagging system is intended

to identify offenders who may be candidates for dangerous offender (and long term offender) applications in future, thereby alerting Crown Attorneys to pertinent background information and sources and to the need to review the case to determine whether an application may be warranted. In follow-up work respecting the identification of criteria and information that should be included in the national flagging system, the Task Force on High-Risk Violent Offenders has proposed the inclusion of pertinent young offender records information, e.g. prior findings of guilt for serious personal injury offences. We endorse this proposal.

There is, however, considerable uncertainty about whether young offender records of serious personal injury offences, once the circumstances set out in section 45 YOA for non-disclosure are realized and the record is transferred to the special records repository, can be lawfully included or referred to in the national flagging system. This is an area where amendment to section 45.02 YOA should be considered. This only requires that this section be clarified; it is not suggested that the (Bill C-37) permissible time limits for retention of records be extended.

Finally, there are some high risk young offenders who will not be transferred to adult court, e.g., where it is believed that the young person is amenable to available treatment within the dispositional limits of Act. Many of these high-risk young offenders are multi-problem youth in need of intensive, multi-disciplinary interventions. Earlier, we have suggested means to improve the youth justice system's effectiveness in responding to these (and other) young offenders by, for example, giving priority to the development of rehabilitation and intensive supervision programs and by establishing protocols and mechanisms (e.g., conferencing) to facilitate enhanced multi-disciplinary approaches.

Notwithstanding these measures, there undoubtedly always will be a small number of young offenders who will continue to pose a high risk of serious harm to others at the end of disposition, e.g., where the young person proves not to be amenable to treatment or where treatment simply fails. In such cases, it is necessary for youth correctional authorities to take appropriate steps to reduce the present and future risk to others by, for example: alerting police authorities as to the circumstances of the case; ensuring protocols are in place and referrals are made to mental health authorities, when appropriate; and taking steps so that the proposed national flagging system is provided with relevant information.

With respect to dangerous young offenders, the Task Force recommends that:

(1) The legal mechanism for addressing dangerous young offenders continue to be transfer to adult court and, where appropriate, subsequent application for dangerous offender status under s.753 Criminal Code.

(2) The Criminal Code and/or YOA be amended to clarify the applicability of section 753 Criminal Code to transferred young offenders in respect to custodial placement.

(3) Proposals endorsed by Ministers of Justice to provide for "long term offender" designation, by way of section 753 Criminal Code, be drafted so that it is clear that these provisions can be applied to transferred young persons.

(4) Proposals to include relevant young offender record information in the national flagging system for high-risk violent offenders be endorsed.

(5) Section 45.02 YOA be amended to clarify that relevant young offenders records of serious personal injury offences may be included or referred to in the national flagging system for high-risk violent offenders.

(6) Provincial and territorial Ministers of Justice take steps to establish youth correctional policies and protocols respecting young offenders who represent a high risk of serious harm to others at the end of disposition, specifically to:

(a) alert police authorities about the circumstances of the case;
(b) facilitate the post-dispositional involvement of mental health authorities, where appropriate; and
(c) provide relevant information to the proposed national flagging system for high-risk violent offenders, where the criteria for inclusion in that system are satisfied.

8.9 CUSTODIAL PLACEMENT OF YOUNG PERSONS NOT TRANSFERRED

8.9.1 Introduction

Although the maximum age jurisdiction of the Act includes young persons up until their eighteenth birthday, many young persons in custody are, in fact, young adults - it is estimated that more than twenty percent of youth custody populations are eighteen or older. Young adults are found in youth custody because of delays in the processing of cases and/or the length of custodial dispositions. For example, a young person who is sixteen years old at the time of the commission of the offence will often be seventeen by the time of disposition and, depending upon the length of custody disposition, could remain in custody until age nineteen or, sometimes, well past the age of twenty. Many cases involving persons who were seventeen at the time of the offence are not first heard and/or disposed of until the person is eighteen. In more uncommon "historical" cases - usually involving sexual offences - the offence may have been committed a decade or more before first appearance. These cases must still be heard in youth court (unless transferred) and can involve persons in their twenties or thirties.

The issue of young adults in youth custody is cause for considerable concern among many youth correctional administrators. The ages of the clientele in youth custody centres can literally range from twelve year olds to persons in their early twenties, with a substantial majority falling in the sixteen to nineteen year old age range. Consequently, there can be vast differences in the physical and psychological maturity - and the degree of criminal sophistication - of these young persons. Some older adolescents in custody - especially more criminally sophisticated chronic offenders - can have detrimental influences, or "contaminating" effects, on younger persons in custody. Sometimes these detrimental effects can be indirect and subtle, such as where a criminally sophisticated older offender carries "status" and therefore provides a poor role model for the younger offender. More direct detrimental effects can include peer abuse, intimidation or education about or recruitment into criminal activities, including gangs.

Concerns about contaminating effects are usually raised in the context young adults, but sometimes these same concerns are raised about a small number of especially sophisticated or difficult-to-manage sixteen or seventeen year olds in youth custody. Sophisticated and difficult-to-manage young persons can also have significant effects on the general operation of youth custody programs. For example, standards of security and control tend to be dictated by a small number of the most difficult cases.

In addition to contaminating effects, the program needs of younger and older offenders can vary considerably. For example, there is usually a greater emphasis on remedial school education with younger adolescents, whereas older adolescents may be more suited to pre-employment/work training and independent life skills programs.

The issue of older persons in youth custody is, in part, connected to the maximum length of custody dispositions available under the Act: the greater the length, the more likely these young persons will mature out of or become unsuitable for youth custody systems. Accordingly, measures taken to toughen the Act by increasing maximum available custodial dispositions for certain offences and possibly increasing the "tariff" for other offences, can have unintended effects on youth correctional systems. An example of this is seen in the increased disposition lengths of ten and seven years for first and second degree murder (Bill C-37), which have prompted considerable concern among youth correctional administrators about the potential contamination, programming and cost implications of administering lengthy custody dispositions for persons in late adolescence and in their twenties. Even if these new dispositions are repealed and substituted with a disposition of five years less a day, as recommended by some provincial and territorial officials earlier, the problem of older persons in youth custody will not go away - these new lengthy dispositions only potentially aggravate an existing problem.

Ideally, sophisticated or difficult-to-manage older persons in youth custody should be separated from younger, less sophisticated offenders. In Ontario, this is largely accomplished by a two phase youth correctional system, wherein young persons under the age of sixteen are placed in facilities and programs operated by the Ministry of Community and Social Services and young persons who are sixteen years or older are placed in separate facilities and programs operated by the Ministry of the Solicitor General and Correctional Services. The development of separate streams for older and young persons is feasible in Ontario because that province has a large youth custody population - by far the largest in the country. Since other jurisdictions have much smaller youth custody populations, there is a much diminished capacity to separate youth custodial populations. As well, these smaller populations need to be separated according to different legal and operational considerations such as: detention versus sentenced populations, open versus secure custody, shorter and longer term dispositions, male versus female, geographical proximity to home, protective custody, and rehabilitative needs such as specialized programs for substance abuse or sexual offending.

Aside from administrative separation within youth custody programs, a key mechanism to address young persons who are eighteen years or older in custody is for the provincial director to apply to the youth court under subsection 24.5(1) YOA, either on the grounds of the public interest or the best interests of the young person, to place the young offender in a provincial correctional facility for adults. Applications may be filed in the public interest in order to separate sophisticated or difficult-to-manage older persons or in the best interest of the young person, such as facilitating access to adult correctional programs more suited to the age, maturity and program needs of the young person. Although only the provincial director may apply, some young persons request adult placements; in these cases, the court makes the order, in effect, with consent.

Another mechanism is available under section 741.1 Criminal Code wherein, if a young person serving a youth custody disposition is sentenced for an offence as an adult, the Crown Attorney may apply to the court to have the youth court disposition (in effect) "converted" to an adult sentence of imprisonment. The court may approve these applications unless to do so would bring the administration of justice into disrepute. If the youth custody disposition is converted by the court, the disposition becomes an adult sentence in all respects, including the application of remission and parole and placement in an adult correctional facility. These applications are usually made in circumstances where a person in youth custody who is now an adult commits an offence such as escape or assault, or where a person is appearing before both the youth and adult courts for offences committed before and after his or her eighteenth birthday.

Since applications under section 24.5 YOA and section 741.1 C.C. can only be made with respect to persons who are eighteen years of age or older, there is no legal capacity to place very sophisticated or difficult-to-manage young persons under the age of eighteen who have been committed to custody under section 20 YOA in an adult correctional facility. There is, however, a capacity to do so with respect to a young person who is detained prior to adjudication or disposition under subsection 7(2) YOA if a youth court judge or justice is satisfied that the young person, having regard to the young person's safety or the safety of others, can not be detained in a place of detention for young persons.

Transfer to adult court is also a means by which, subject to the placement provisions of section 16.2 YOA, placement in an adult correctional facility can be accomplished. Transfers are very uncommon. In Manitoba, some young persons apply to have themselves transferred in order to access an adult sentence and placement in an adult facility.

Older and/or sophisticated and difficult-to-manage young persons in custody raise several issues, including:

- o the desirability of a maximum age for youth custody placement;
- o alternate means of facilitating separation of younger and older offenders;
- o the procedures and criteria for applications and decisions under section 24.5 YOA;
- o procedures for applications under section 741.1 C.C.; and
- o related miscellaneous issues.

These issues are discussed below.

8.9.2 Maximum Age for Placement in Youth Custody

Simply put, the age range for the placement of young persons in detention or custody is, in the opinion of many of those involved in youth services, simply too great.[141] While still legally young persons within the meaning of the Act because their offences were committed when they were under eighteen years of age, persons in their twenties are in every other respect adults. Some outside age limit should be established. This begs the question about what that age should be. There is a maximum age limit for youth custody placement already established in the Act for some matters. In this regard, subsection 16.1(7) YOA, respecting the placement in detention of young persons who have been transferred to adult court and are awaiting trial, provides that no young person shall remain in custody in a place of detention for young persons under that section after the young person attains the age of twenty years. A similar maximum age of twenty is established under section 733 Criminal Code.[142] This age limit does not apply to an order for detention under section 7, a committal to custody under section 20 or the section 16.2 placement of transferred young persons who have been

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[141]For example, the Youth Court Survey indicates that about 21 percent of young persons committed to custody were 12 to 14 years of age at the time of the offence, while it is estimated that more than 20 percent are 18 or older.

[142]This section accords the provincial director the administrative authority to place in youth custody a young person who has been transferred to adult court and sentenced to imprisonment. In light of the 1992 amendment (Bill C-12) respecting the placement of transferred young persons (s.16.2 YOA), this provision is now anomalous and was rarely employed before 1992. It was recommended earlier that s.733 be repealed.

sentenced to imprisonment in adult court.

The selection of a maximum age for placement in youth custody will inevitably be arbitrary to some extent, but twenty appears to be a reasonable choice because these persons can no longer be considered adolescents. We believe, however, that a maximum age, if established, needs to have some flexibility to allow for continued placement in youth custody in circumstances where this may be the best program decision. For example, automatically requiring a young person who has served a lengthy youth custody disposition to be placed in an adult correctional facility at age twenty, even though there are only a few months remaining in the disposition, might be disruptive and counter-productive. To provide flexibility in such circumstances, it would be better to accord the provincial director the discretion to keep the person in the youth custody system after attaining the age of twenty.

It is doubtful that establishing a maximum age of twenty could be construed as an infringement of Article 37 of the United Nations Convention on the Rights of the Child, which requires the separation of children and adults. A twenty year old, although serving a youth court disposition, is no longer a child within the meaning of the Convention, i.e., a person under eighteen years. Indeed, it could be argued that a maximum age for placement is consistent with the intent of Article 37, that is, the avoidance of detrimental influences of older persons on children in custody.[143]

While there was broad (but not unanimous) agreement among Task Force representatives that a maximum age of twenty would be desirable, there was disagreement about one element of this proposal: which types of adult correctional facilities - provincial adult facilities or federal penitentiaries - a person should be placed in at age twenty if there are two or more years remaining on the youth custody disposition at that time. Having two or more years remaining on a youth custody disposition at age twenty will probably be very uncommon, possibly occurring with young offenders who are serving a ten or seven year disposition for murder (Bill C-37) or perhaps in some cases of serious "historical" offences, where the accused is not apprehended and prosecuted until several years after the commission of the offence.

Provincial and territorial representatives supported placement in a federal penitentiary in these circumstances, principally on the grounds that this would conform to the established "two year rule" vis-a-vis penitentiary placement and that provincial adult correctional centres are primarily geared

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[143]In any event, Canada has entered a reservation respecting the application of Article 37 of the Convention.

to the administration of relatively short term sentences, not long term ones. As well, these cases are most likely to involve serious violence, which are much more commonly found in penitentiaries that have more suitable programming for this type of population. If placed in the provincial adult system without suitable programming, there is a danger that these youth will simply do "time", which would not serve the public interest.[144]

Federal representatives, however, do not agree that two years remaining on a custody disposition should automatically result in penitentiary placement. This would "leapfrog" these still potentially vulnerable young people from youth custody centres into the penitentiary system, which accommodates an older, more criminally sophisticated and violent population. This could have detimental effects, including the potential acceleration of the person's criminal career. As well, the simple length of custody disposition should not dictate penitentiary placement, which should only arise in exceptional circumstances and should be decided on the basis of more pertinent considerations such as security concerns, degree of maturity and sophistication, and program needs. From this perspective, then, the placement of these young people into the penitentiary system at age twenty may not serve the long term public interest.

It should be emphasized that this disagreement is limited to the question of who holds jurisdictional responsibility in circumstances where there are two or more years remaining on the youth custody disposition. Despite these differences, there was recognition that the two year rule vis-a-vis penitentiary placement is somewhat arbitrary and that there is a need for flexibility to adapt to the individual circumstances of each case. For example, a twenty year old aboriginal youth with more than two years custody remaining might, in some circumstances, be more suitable for placement in available programming in the provincial adult system, while another youth with less than two years custody remaining might best benefit from placement in a Regional Psychiatric Centre program. Exchange of Services Agreements allow for the administrative exchange of provincial adult and federal prisoners; these would need to be adjusted to allow for the exchange of young people who are placed in the adult system (which may require consequential amendments). Still, question remains about who would hold original jurisdictional responsibility. If the jurisdictional

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[144]Some would argue that a presumptive maximum age of twenty, with potential placement in a penitentiary at that age, may encourage youth court judges to keep youth in the youth system (rather than transfer to adult court) because they may have the "best of both worlds", i.e., the benefits of placement in the youth correcitonal system while the youth is still an adolescent and then access to penitentiary resources (instead of only provincial adult correctional centres) once the young person is twenty.

responsibility rested with Correctional Services Canada, then placement in a provincial adult facility would require the administrative agreement of provincial adult correctional authorities. If the jurisdictional responsibility rested with provincial adult correctional authorities, then the converse would apply. Along with jurisdictional responsibility goes the responsibility for correctional costs.

Regardless of whether placement is in the provincial adult or federal correctional systems, common problems that would arise either way are the difficulties associated with administering youth custody dispositions in an adult correctional context because these dispositions are not subject to the same laws and procedures respecting adult sentence administration and release, i.e., remission/statutory release and parole eligibility. One possible way around this might be to "convert" a youth custody disposition to an adult sentence of imprisonment. Section 741.1 Criminal Code permits the court, upon application by the Crown, to convert a youth custody into an adult sentence of imprisonment, but this only applies where the offender is or has been sentenced in ordinary court for an offence while subject to a disposition and only if the order would not bring the administration of justice into disrepute.

These provisions could be extended to apply to the circumstances discussed above, i.e., where the offender is placed at age twenty in the adult correctional system, even though he or she has not been sentenced in ordinary court. Despite efforts, the Task Force was not able to devise a means by which lengthy youth custody dispositions could be converted to adult sentences of imprisonment without potentially bringing the administration of justice into disrepute. For example, if converted, a twenty year old with three years youth custody remaining would, given the statutory release applicable to adult sentences, be released after two years and would be eligible for parole after one year. Federal representatives submit that it is worthwhile to further explore means of conversion that might possibly overcome these obstacles and, given the complexity of the placement issues and the potential benefits of consultation with other key players (such as provincial correctional authorities), there should be further consultations before recommendations respecting placement are pursued legislatively.

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

With respect to custodial placement, the Act should be amended so that where a young person has been detained in youth custody under section 7, committed to youth custody under section 20, or placed in youth custody under section 16.2 YOA, a young person who has attained the age of twenty

years or more shall, except where the provincial director consents to placement in youth custody, be placed in a correctional facility for adults.

Establishing a maximum age for young persons committed to custody under section 20 would be best achieved by way of an amendment to section 24.5 YOA. To ease administration, the placement of young persons who have been detained in youth custody under section 7 or committed to youth custody under section 20 should be able to be effected administratively by the provincial director once the young person attains the age of twenty.

Provincial and territorial representatives also recommend that, where the remanet of the youth custody portion of the disposition is two years or more, the offender should become the jurisdictional responsibility of Correctional Services Canada, having regard to the need to adjust Exchange of Service Agreements so that there could be flexibility to allow for the placement of some of these cases in provincial adult correctional centres in suitable circumstances.

While supporting a maximum age of twenty, federal representatives do not support automatic jurisidictional responsibility and probable penitentiary placement in these circumstances. Instead, they recommend that the Ministry of the Solicitor General Canada, in conjunction with Heads of Corrections and Senior Officials Responsible for Youth Justice, address issues respecting the placement of young offenders in adult facilities and the conversion of youth custody dispositions to adult sentences of imprisonment, the latter having regard to the need to respect the integrity of the original youth custody disposition.

To clarify the meaning of remanet of the custodial disposition in the recommendation by provincial and territorial representatives, it would only apply to the remainder of the custodial portion of the order at the time of the placement. For example, if a young person committed to four years custody and three years conditional supervision was at age twenty, and after serving three and one-half years, placed in an adult facility, that facility would be a provincial adult correctional centre for adults (because only one year custody is remaining). If, however, the young person was subject to an extension of custody for the full conditional supervision period (three years), the placement would be in a penitentiary because the remanet is more than two years.

This issue is linked to the process and criteria for decision-making under section 24.5 YOA, a matter that is discussed later in this section (8.9.4).

8.9.3 Joint Placement of Older Adolescents

As noted earlier, the capacity to establish custodial facilities or programs that separate younger offenders from older, or sophisticated or difficult-to-manage, offenders in youth custody is limited by the relatively small populations in most youth custody systems and by the legal and operational considerations that require the separation of youth custody populations in other ways. There are similar constraints in provincial adult correctional systems, where small numbers of imprisoned eighteen and nineteen year olds usually preclude the establishment of facilities or programs, separate from older adults in custody, which might be better suited to the age, maturity and program needs of this young adult population.

It might be possible to separate and better address the program needs of the older adolescent youth custody and young adult prison population if there was a legal capacity to mix these two populations. They are, after all, approximately (often, exactly) the same age. With a larger population base to draw upon, it would likely be more feasible to establish, for example, specialized facilities or programs for "youthful offenders" in the sixteen to nineteen year old (inclusive) age range, separate from other adults in custody, such as an open custody program which focuses on employment and independent living skills or a specialized unit for difficult-to-manage older adolescents. It would also be particularly advantageous in jurisdictions with larger youth/young adult aboriginal populations in custody because it could better facilitate the development of culturally appropriate programs for this population. These programs might also be able to be used in some cases, through Exchange of Service Agreements, for the placement of transferred young persons who have been sentenced to penitentiary terms.

An approach akin to this is taken in England and Wales, where there are three levels of age-based custodial facilities: children under the age of sixteen are held in a variety of separate facilities for children; young offenders and young adults between the ages of sixteen and twenty-one are held in separate "young offender" facilities; and persons over twenty-one are held in adult prisons. Canada's much smaller population and much larger geographical area precludes the establishment of a similar system on a wholesale basis in this country, but greater flexibility in the law would likely allow correctional administrators to take partial steps toward greater program separation.

The advantages of this proposal include:

- greater separation of young adolescents from older, or sophisticated

and difficult-to-manage, adolescents in youth custody;

- o greater separation of young adults in provincial adult custody from older adults in custody; and

- o a greater capacity to establish specialized programs suitable to the age and maturity of young offenders and young adults in custody.

The disadvantages of this proposal include:

- o from a correctional perspective, the difficulties associated with administering populations that are subject to different schemes of sentence administration (e.g. judicial release versus parole/remission);

- o possibly greater logistical problems establishing cooperative programs in jurisdictions where youth and adult correctional services are administered by different departments; and

- o overcrowding pressures possibly leading to administrative "off loading" of youth custody cases to inappropriate programs, without the attendant benefits of programming suited to the needs of these older adolescents.

The latter concern might be mitigated by drafting an amendment to the Act in a manner that clearly establishes Parliamentary expectations of suitable programs, e.g., a special program of rehabilitation for youthful offenders.

We do not think that facilities or programs that mix older adolescent young offenders and young adult offenders could be construed as an infringement of Article 37 of the United Nations Convention on the Rights of the Child. These are adolescents of very similar or the same ages. To say, on the one hand, that it is acceptable to mix sixteen or seventeen year olds with eighteen and nineteen year olds in youth custody centres because they were all committed to custody by youth courts and then, on the other, to say that these same youth cannot be mixed with other eighteen and nineteen year olds because they were imprisoned by an adult court seems to be an unduly narrow interpretation of the Convention.[145] If such a narrow interpretation of the Convention is applied, then it could be equally argued that present practices widely violate the Convention because young adults serving youth custody dispositions (i.e. eighteen or older) are routinely mixed with young

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[145] Ibid.

persons under eighteen.

In light of the above, the Task Force recommends:

The Act should be amended to permit the provincial director to administratively place young persons in custody who are between sixteen and nineteen years old (inclusive) together with imprisoned young adults in the same age range in a special secure or open custody facility or program of rehabilitation for youthful offenders, separate from other adults in custody, where the Lieutenant Governor in Council has established such a program.

It should be noted that this recommendation is consistent with an earlier recommendation for studies to determine whether it is feasible to establish specialized, cooperatively funded federal/adult provincial/youth custodial treatment programs for older adolescent serious violent offenders (see, Rehabilitation and Reintegration). If feasible, these programs could be implemented under the authority of this proposed amendment (which would also require an amendment to s.24.2(4) YOA to allow for an exception to the requirement for the separation of young persons and adults). In effect, we are suggesting that these cooperative programs need not be restricted to only serious violent offenders but could be extended to include other programs for older adolescents in custody.

8.9.4 Issues Related to Section 24.5

Even if the above recommendation is accepted, the placement of older adolescent young offenders in generally available adult correctional facilities will still, from time to time, be required. In jurisdictions with small populations, there may not be sufficient numbers of older adolescents in youth custody and provincial adult custody to warrant the development of any joint programs; in medium-sized jurisdictions, there may only be sufficient numbers to develop one or two small programs. Even where some of these proposed programs are established, it could not be reasonably expected that they would be able to accommodate every circumstance where placement in an adult correctional facility might otherwise be indicated as desirable or necessary.

The primary legal mechanism for facilitating placement in an adult correctional facility is subsection 24.5(1) YOA. There are several issues related to the scope, criteria and procedures of applications and decisions under subsection 24.5(1).

Applications under subsection 24.5(1) are limited to cases of young persons

in custody who are eighteen years of age or older at the time of application - there is no legal authority to place a young person under the age of eighteen in an adult correctional facility. This stands in contrast to the (rarely used) legal authority in section 7(2) YOA to place a young person who is detained in custody prior to adjudication or disposition in an adult correctional facility on the grounds of the safety of the young person or the safety of others.

In our earlier discussion about transfer to adult court, we emphasized that transfer should be construed as primarily a decision about sentencing and that a distinction should be made between transfer and placement. In this regard, transfer has been employed in some cases in order to attract a sentence of imprisonment and consequent placement in an adult correctional facility. This occurs, for example, in some cases in Manitoba and occasionally involves young persons under eighteen (who often apply for transfer themselves).

If transfer to adult court is to be employed as primarily a decision about sentencing and distinguished from placement, then there should be a legal capacity to place a young person under eighteen (who has not been transferred) in an adult correctional facility. If so, some applications to transfer to adult court may be able to be avoided.[146] In suggesting this, it is expected that such placements would be very uncommon and limited to circumstances of sophisticated, mature and serious young offenders who have no interest in engaging in youth programs or who, if placed in youth custody, would have detrimental effects on other young persons in custody or pose a risk to the safety of others or of escape. Given the significance of these placements for young persons under eighteen, the youth court should decide these applications. As well, to ensure that the placement of young persons under eighteen in the adult system only applies in exceptional circumstances, a statutory test should be developed that is stricter than the test applicable to young persons who are eighteen years or older.

There are, however, rare circumstances where placement in an adult facility can be in the best interests of the young person because comparable

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[146]In some cases, young persons are transferred to adult court, in part at least, to benefit from programs in the adult system, such as Regional Psychiatric Centre programs. If the primary purpose of transfer is to facilitate access to such programs, then question can be raised about whether there should be need to use the lengthy, complex and costly court process of transfer to adult court, as compared to a more expeditious procedure under section 24.5. As well, the young person would, if transferred to adult court in order to access adult programs, be subject to publication of identity and an adult criminal record. Accessing adult correctional programs by way of a s.24.5 application may lead to a decreased willingness to transfer to adult court, if it is known that adult programs may be accessed by other means. Conversely, some would argue that transfer to adult court is the more appropriate procedure because the very need to access specific adult correctional programs is testament that the young person is no longer suitable for the youth system.

programming is not available in the youth system, e.g. the case of a seventeen year aboriginal youth who might be better placed in a culturally appropriate adult program for aboriginal offenders or a female offender with a young child who might be placed in a dedicated program for adult female offenders which is equipped for child care. Accordingly, there could be allowance, in exceptional circumstances, for sixteen and seventeen year olds to be placed in an adult program on "best interests" grounds.

An application under subsection 24.5(1) for placement in an adult correctional facility may be approved on the grounds that such placement is in the best interests of the young person or in the public interest. Applications that are approved in the best interests of the young person usually involve cases where the young person consents to or, in fact, seeks an adult placement and the provincial director concurs. These usually involve circumstances where a young person who is eighteen years or older has exhausted the benefits of youth custody system, matured out of that system, or may better benefit from different programs available in the adult system. In such cases, applications to the youth court are typically pro forma in nature. Given the consent of a (now adult) offender in these circumstances, it seems that it should be unnecessary to apply to the youth court for placement. If an administrative procedure is endorsed, protocols will have to be developed between the youth custody and provincial adult correctional systems to ensure that all affected parties have input into the decision-making process.

Where the young person or provincial director do not consent, however, the determination should still be made by the youth court. If these changes, along with our earlier recommendation respecting a presumptive maximum age of twenty for placement, are endorsed, then the decision making process under section 24.5 would be as follows:

- the youth court would decide every case, upon application, involving a young person under the age of eighteen;

- if a young person is eighteen or nineteen years of age and the young person and the provincial director consent, the provincial director would make the administrative determination for placement (i.e., without application to the youth court), subject to consideration of a statutory test;[147]

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[147]Some would argue that a young person should not have capacity to consent in these circumstances; instead, it is suggested placement in a youth or adult facility should be administratively determined.

- where a young person is eighteen or nineteen years of age and either the young person or the provincial director do not consent, the youth court would make the determination;

- where the young person attains the age of twenty years, placement in an adult correctional facility would be determined administratively and would be automatic, except where the provincial director consents to continued placement in youth custody. (Some federal representatives suggested that there should be statutory criteria to guide the provincial director's discretion).

Applications under subsection 24.5(1) may only be made by the provincial director. In some cases, young persons apply themselves for transfer to adult court in order to effect placement in an adult correctional facility. This raises the question about whether consideration should be given to amending subsection 24.5(1) so that young persons are accorded the capacity to make application under that section. Allowing young persons the right to make application could lead to frivolous applications or young people seeking placements that are contrary to their interests and/or the public interest. In our view, the provincial director is best placed to act as a "gatekeeper" in these circumstances, i.e., if the young person's interest in seeking placement in the adult system has merit, then the provincial director can (in effect) apply on the young person's behalf. In short, young people should not be given the right to apply for placement in the adult system.

The legal test set out under subsection 24.5(1) states that an application may be authorized "if the court considers it to be in the best interests of the young person or in the public interest". Because this test is expressed disjunctively, there is some lack of clarity: theoretically, an application could be approved on the grounds of the best interests of the young person even though the placement may not be consistent with the public interest.[148] Greater clarity could be achieved by modifying the test such that an application could be approved on the grounds of the public interest alone or on where it is in the best interests of the young person and not contrary to the public interest. The test of the "public interest", however, is very broad and offers little guidance to the youth court in deciding placement. In contrast, subsection 16.2(2) YOA enumerates, in respect of the placement of young persons who have been transferred to adult court, several factors for the court to consider, such as the safety of the young person, the safety of the public, the safety of other young persons, detrimental influences on

[148]This concern was raised by a report of a Commission of Inquiry in British Columbia.

other young persons, and so on. Enumerating a similar set of considerations respecting decisions made under subsection 24.5(1) would be helpful in providing better guidance about how these decisions are to be made.

Where an application is made under subsection 24.5(1), the court may only authorize the provincial director to place the young person in a provincial correctional facility for adults - placement in a penitentiary is not permitted. Placement in a provincial adult correctional facility is appropriate for the vast majority of cases because youth custody dispositions are relatively short. Circumstances involving lengthy custodial dispositions of two years or more can, however, arise where placement in a penitentiary may be the more suitable course of action. For example, a young person may be committed by the youth court to a three year custody disposition at the age of nineteen but be too mature or unsuitable for placement in youth custody. From the perspective of provincial and territorial representatives, placements in penitentiaries, which are geared to the administration of lengthy custodial dispositions, would be better than placements in provincial adult correctional facilities, which are geared to the administration of shorter sentences, in these circumstances. If the new ten and seven year youth court dispositions for murder (Bill C-37) remain in place, this will become a pressing concern for correctional administrators.

On the other hand, federal representatives have significant concerns about "leapfrogging" potentially vulnerable youth into the penitentiary system and deciding the adult placement on basis of disposition length alone. These different perspectives reflect the same issues discussed earlier (see 8.9.2) about the adult correctional placement of persons who are twenty or older and who have two more years remaining on the custody portion of the youth disposition. Again, provincial and territorial representatives agree that, where placement in the adult system under section 24.5 is approved and the remanet of the custody portion of the disposition is two years or more, the case should become the jurisdictional responsibility of Correctional Services Canada, allowing for flexibility to administratively place in provincial adult correctional facilities through Exchange of Services Agreements. Federal representatives disagree and recommend further study, in conjunction with Heads of Corrections, of the placement of young offenders in adult facilities and of the conversion of youth custody dispositions to adult sentences.

Adult provincial correctional systems, and the penitentiary system, usually have a range of facilities involving different levels of security which are the rough equivalent of secure and open custody in youth correctional systems. Nonetheless, these facilities are not designated as secure or open custody facilities pursuant to the Act (s.24.1) nor is placement in secure or open

custody, and movement between levels of custody, of adult prisoners subject to the same constraints as are applicable to young persons under the Act. This begs the question about whether the provisions applicable to placement in secure or open custody continue to be applicable to young persons after they are placed in the adult correctional system pursuant to section 24.5. Section 24.2 YOA appears to suggest that the secure and open provisions do not apply in these circumstances, but this is not entirely clear.[149] This should be clarified; once a young person is placed in the adult correctional system, the administration of that case should, to the extent possible, be conducted according to procedures normally applicable to adults.

Finally, there have been some known cases where applications under subsection 24.5(1) have been approved by the youth court and the young person has been placed in the adult correctional system, only to find that the original plan did not work out as intended or circumstances subsequently changed. In these cases, consideration has been given to returning the young person to a placement in the youth custody system but there is not complete clarity about the procedures to accomplish this. The judicial review procedures of the Act (s.28, 29) may apply in these circumstances, but this is not entirely clear.[150]

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

Subsection 24.5(1) YOA should be amended so that:

(1) There is a capacity for the provincial director to apply to the youth court for placement of a young person, who is sixteen or seventeen years of age at the time of application, in a provincial correctional facility for adults, subject to a test and factors to consider. This test should be more restrictive than the test applicable to young persons who are eighteen years or older, when the application is made in the public interest. There still should, however, be provision for placement

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[149]Section 24.2 YOA, which addresses placement in secure and open custody, states: "Subject to ... sections 24.3 and 24.5 ...". Notwithstanding this, in the 1995 case of M.J.H. and the Queen (unreported), the court of Queen's Bench of Alberta found that subsection 24.2(8) does apply in circumstances where a young person has been placed in a provincial adult correctional facility. The facts of this case were, however, narrow.

[150]When an authorization is made under s.24.5, the young person continues to serve a youth custody disposition and the provisions of the Act, including reviews, continue to apply. Therefore, it could be persuasively argued that the review provisions could be employed to review a s.24.5 authorization. However, section 28(17) only enables the court to confirm the disposition, order a young person who is in secure custody to be placed in open custody, or release the young person to probation or conditional supervision. Section 28 is silent with respect to s.24.5 placement. The point is that the provisions are not entirely clear.

on "best interest" grounds to address exceptional circumstances where there are programs available in the adult system that are more beneficial to the young person.

(2) Where a young person committed to custody is eighteen years of age or older and the young person and the provincial director consent, the provincial director may, having regard to a test and factors to be considered, administratively place the young person in an adult correctional facility.

(3) Where a young person committed to custody is eighteen years of age or older and the young person does not consent to placement in an adult correctional facility, placement in an adult correctional facility be determined by way of application by the provincial director to the youth court.

(4) The statutory test for young persons who are eighteen years or older provide that placement may be authorized where it is either:

(a) in the public interest, or
(b) in the best interests of the young person and not contrary to the public interest.

(5) There is an enumeration of factors to be considered, similar to those set out in section 16.2 YOA.

(6) There is clarity that, once placement in an adult correctional facility is approved, the provisions respecting open and secure custody set out in section 24.2 YOA no longer apply to the administration of the case.

(7) There is clarification as to the procedures to be used for review and rescission of an authorization or decision to place the young person in an adult correctional facility.[151]

With respect to adult correctional jurisdiction, provincial and territorial representatives recommend that, if placement of a young person who is eighteen or more is approved and the remanet of the custodial portion of the disposition is two years or more, the case should become the jurisdictional responsibility of Correctional Services Canada, having regard for the need to

[151]The mechanism could involve judicial review where the decision is made by the youth court but, where the decision is made administratively by the provincial director (i.e. 18 or 19 year olds, with consent), rescission could be accomplished administratively.

provide flexibility of placement in provincial adult correctional centres through Exchange of Services Agreements. Federal representatives disagree and recommend that this issue and the conversion of youth custody dispositions to adult sentences of imprisonment be the subject of further study by the Ministry of Solicitor General, in conjuction with Heads of Corrections.

Subsection 24.5(1) only addresses circumstances where a young person is committed to youth custody and the provincial director applies for placement in the adult correctional system. Subsection 24.5(2) addresses the circumstances where a person is concurrently committed to youth custody and to imprisonment as an adult:

> "Where a young person is committed to custody ... and is concurrently under sentence of imprisonment imposed in ordinary court, the young person may, in the discretion of the provincial director, serve the disposition or sentence, or any portion thereof, in a place of custody for young persons, in a provincial correctional facility for adults or, where the unexpired portion of the sentence is two years or more, in a penitentiary."

In applying this provision, the usual practice is that the provincial director directs the young person to be placed in a provincial adult correctional facility or penitentiary. Exceptions to this general rule do occur, for example, where the sentence of adult imprisonment will expire before the youth custody disposition.

There are two areas where improvements could be made to this subsection. The first involves two possible interpretations of the meaning of the word "concurrently" in the subsection. Concurrently could be construed in its normal legal meaning within the context of sentence administration, i.e., sentences that run in parallel, one to the other. If so, this subsection would not permit the provincial director to direct placement respecting a youth custody disposition imposed consecutive to an adult sentence of imprisonment since the subsection only appears to contemplate circumstances where the sentence and disposition are concurrent. The consequence of this interpretation is that, where a youth custody disposition is imposed consecutive to an adult sentence of imprisonment (which occurs), the person would serve the sentence of imprisonment in an adult facility and then would have to be placed in a youth custody facility to serve the youth custody disposition (subject to application under s.24.5(1). Similar concerns arise where an adult sentence of imprisonment is imposed consecutively to a

youth custody disposition. Alternatively, "concurrently" could be interpreted in the more ordinary sense of the word, i.e., at the same time. If so, the provincial director would have the authority to direct placement of a youth custody disposition imposed consecutively to an adult sentence of imprisonment.
This problem could be resolved by amending the subsection to state: "Where a young person is subject to both a custodial disposition under paragraph 20(l)(k) or (k.1) and a sentence of imprisonment imposed in ordinary court ...".

Subsection 24.5(2) requires the provincial director to make a direction as to placement in every case where there is a concurrent youth custody disposition and sentence of imprisonment. It also only permits placement in a penitentiary where the "unexpired portion" of the sentence of imprisonment is two years or more. These provisions have led to circumstances where the intent of adult court's sentence has been thwarted. For example, if the adult court imposes an adult sentence of two years against a person committed to youth custody, the intent of that sentence is a penitentiary placement. However, if the provincial director does not make direction as to placement on the very same day as the young person is sentenced - which is almost inevitable, given administrative requirements - then the unexpired portion of the adult sentence is less than two years. Accordingly, a penitentiary placement is no longer permissible. As well, in the majority of cases where there are concurrent youth custody dispositions and adult sentences of imprisonment, direction is given to place the person in an adult correctional facility. Given this, the requirement for the provincial director to make a direction as to placement in every case is administratively cumbersome and unnecessary.

These concerns could be remedied by amending subsection 24.5(2) so that, where there is both a youth custody disposition and an adult sentence of imprisonment, the person shall be placed in an adult correctional facility for adults, unless the provincial director directs that the person be placed in youth custody. There are also sentence calculation issues (i.e., remission, parole eligibility dates) that should be reviewed.

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

Subsection 24.5(2) <u>YOA</u> should be amended so that where a person is subject to both a youth custody disposition and a sentence of imprisonment in adult court:

(1) It is clear that the provincial director has the authority to direct

placement in all circumstances, regardless of whether the disposition and sentence are imposed concurrently or consecutively.

(2) The person shall be placed in a provincial correctional facility for adults or, where the unexpired portion of the sentence of imprisonment is two years or more, in a penitentiary, unless the provincial director directs that the person be placed in a place of custody for young persons.

8.9.5 Issues Related to Section 741.1 C.C.

Subsection 741.1(1) Criminal Code, as amended by Bill C-37, provides:

> "Where a person is or has been sentenced for an offence while subject to a disposition made under paragraph 20(1)(j), (k), or (k.1) of the Young Offenders Act, on the application of the Attorney General or the agent of the Attorney General, a court of criminal jurisdiction may, unless to so order would bring the administration of justice into disrepute, order that the remaining portion of the disposition made under that Act or any other Act of Parliament, as if it has been a sentence imposed under this Act."

Subsections (2) and (3) allow the court to order the "converted" disposition to be served concurrently or consecutively and clarify matters related to sentence administration.

The purpose of section 741.1 is to clarify placement and sentence administration where there is both a youth custody disposition and adult sentence of imprisonment, especially in light of the different administration of dispositions and sentences such as the applicability of remission and parole. In these circumstances, youth custody dispositions are not, nor should they be, automatically converted because to do so could bring the administration of justice into disrepute. For example, if an eighteen year old serving a lengthy custody disposition for a serious offence was sentenced to imprisonment in ordinary court for escape from youth custody, a conversion of the youth court disposition could, given the application of remission/ statutory release to the converted disposition, lead to the person being required to serve less time in custody. If so, the young person would, in effect, be rewarded for escaping.

Amendments to section 741.1 C.C. arising from Bill C-37 have resolved some previous uncertainties about the timing and circumstances of applications.[152] There are, however, two remaining problems with these provisions.

There are two ways in which a person may become subject to both a youth custody disposition and an adult sentence of imprisonment:

- where the person serving the youth custody disposition subsequently commits an offence as an adult, i.e. where the sentence of imprisonment is imposed after the youth custody disposition; or

- where a disposition of youth custody is imposed after the person has already been sentenced to adult imprisonment.[153]

Section 741.1 C.C. appears to contemplate only the former circumstance, but not the latter.[154] These provisions should be amended to clarify that they are applicable to both circumstances.[155]

An application by a Crown Attorney is required under section 741.1. Crown Attorneys, understandably, are not always aware of the particulars of a custodial disposition or sentence already being served nor always attuned to the complexities and difficulties associated with the administration of (concurrent or consecutive) youth custody dispositions and adult sentences of imprisonment.[156] Hence applications are sometimes not made where a

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[152]The former provision was expressed in the present tense, suggesting an application could only be made at the time of sentencing in adult court and, if this was not done, there was no apparent capacity to make application at a later date. The amended subsection now states: "Where a person is or has been ..."

[153]This occurs, for example, where a person serving imprisonment is brought before the youth court on an outstanding charge committed as a young person or where a person who has committed offences before and after his or her eighteenth birthday has the adult offence concluded before the youth offences.

[154]Because the sub-section states "... while subject to a disposition ...".

[155]Similar language to that suggested for s.24.5(1) earlier may clarify this, i.e., "where a person is subject to both a custodial disposition under paragraph 20(l) (k) or (k.1) and a sentence of imprisonment imposed in ordinary court ...".

[156]For example, a youth custody disposition imposed consecutive to an adult sentence of imprisonment could require the person to be returned to youth custody after the sentence of imprisonment (or require application under s.24.5) and interfere with early release (temporary absence, parole) planning. Concurrent dispositions and sentences are subject to different regimes of administration and release, e.g., if paroled on the adult sentence, the person cannot be released unless a youth court approves early release on the youth custody disposition and, if so, the enforcement mechanisms for the different forms of adult and youth conditional release are different.

conversion of the youth custody disposition would be most appropriate. There may also be some reluctance, even after prompting by correctional authorities, to subsequently make an application to address what may be seen as a minor administrative problem for correctional authorities. The Crown may be reluctant to make applications because the Crown may consider it to be in the public interest for the person to continue to be subject to dispositional reviews of the youth custody disposition and to utilize that as a mechanism for early release, instead of remission/statutory release or parole that would apply if the disposition was converted to an adult sentence.

One way to address this concern, would be to amend section 741.1 so that the provincial director and representatives of the provincial and federal correctional systems have the authority to make an application under the section. There is no need, however, for correctional authorities to have the capacity to make application at the time of sentence. Hence, this capacity should be limited to circumstances where the person "has been" sentenced, i.e., only in circumstances where the Crown did not make application in the first place. Caution must be exercised so that the Crown's position on sentencing and the court order is not undermined if correctional authorities apply to convert the disposition, which could potentially result in significantly less time being served in some cases. It is, therefore, important that the Crown be notified of the application by correctional authorities and have standing to speak to the matter. It would also be helpful to develop administrative protocols between the Crown and correctional authorities so that there is appropriate consultation before applications are made by correctional authorities. (Some representatives submitted that this entire issue could be addressed through administrative protocols, instead of legislative reform.)

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

Section 741.1 Criminal Code should be amended so that where a person is subject to both a youth custody disposition and a sentence of imprisonment in ordinary court:

(1) It is clarified that the remaining portion of youth custody disposition may be "converted" to an adult sentence of imprisonment, regardless of the order of imposition of the disposition and sentence.

(2) The provincial director and representatives of the provincial adult and federal correctional systems be accorded the capacity to make application in limited circumstances under the section, having regard to

the need for the Crown to be notified and to have standing where there is an application by correctional authorities.

8.9.6 Related Issues

While subsection 24.5(2) YOA addresses the placement of persons who are subject to both a youth custody disposition and an adult sentence of imprisonment, there are three other circumstances - all involving pretrial detention - in which youth and adult custody orders can arise at the same time:

- where a person is ordered to be detained in a place of custody for young persons and is concurrently remanded in custody as an adult, e.g. for offences alleged to have been committed before and after his or her eighteenth birthday;

- where a person is serving a youth custody disposition and also is remanded in custody as an adult, e.g. for an escape or other offence committed after his or her eighteenth birthday and while in custody;

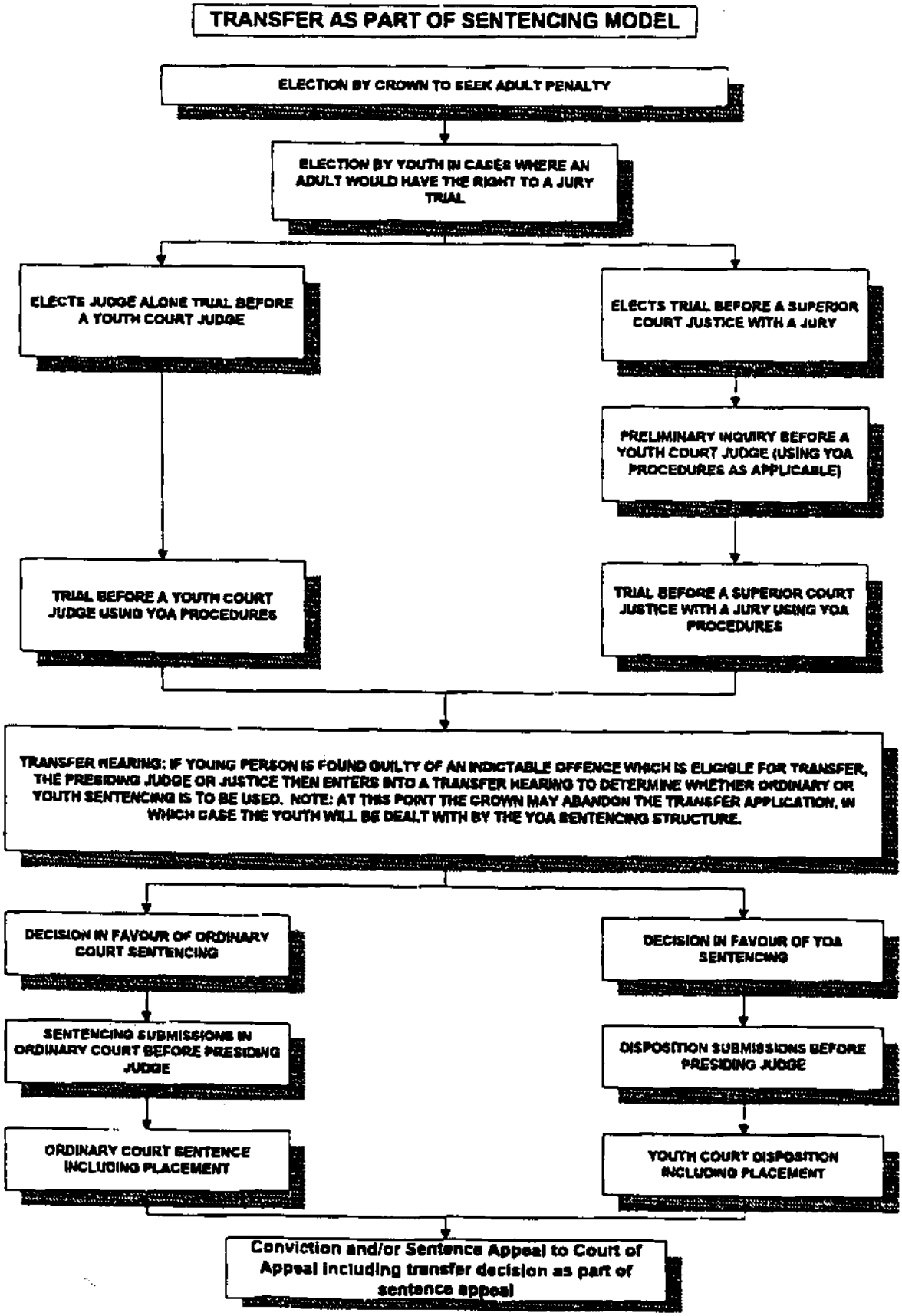
- where a person is sentenced to adult imprisonment and also ordered to be detained in a place of custody for young persons, e.g., where an already imprisoned young adult is brought before the youth court on charges arising before his or her eighteenth birthday.

Unlike concurrent youth custody dispositions and adult sentences of imprisonment, the Act and the Criminal Code are silent in respect to placement in these circumstances. In the absence of statutory direction, decisions as to placement must be made administratively. The resulting lack of clarity respecting correctional jurisdiction can, in some cases, lead to uncertainty and confusion amongst court officials, adult and youth correctional officials, and the accused as to placement.

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

The Act should be amended so that a person who is ordered to be detained, remanded or sentenced concurrently as both an adult and a young person, shall be placed in a correctional facility for adults unless the provincial director directs that the person be placed in a place of detention or custody for young persons.

APPENDIX - CHAPTER 8



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