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CHAPTER 9 - PUBLICATION, INFORMATION SHARING AND RECORDS

The confidentiality of juvenile court proceedings has been a cornerstone of juvenile justice legislation in Canada and most other Western democratic societies throughout this century. Under the Juvenile Delinquents Act (JDA), juvenile court proceedings were held in private, i.e. without public or media access to the proceedings.[1] The JDA also banned the publication of the identity of young persons. While there was not an absolute ban in law, it amounted to a complete ban in practice.[2] The JDA was silent on the use and dissemination of records but, consistent with the confidentiality provisions, records were not publicly accessible. There were also different practices across jurisdictions, varying according to applicable provincial legislation, respecting the use of juvenile court records in adult criminal court proceedings. As well, there were some differences across jurisdictions in the fingerprinting of juvenile offenders.

These strict confidentiality provisions were consistent with the juvenile court's role in promoting the best interests and rehabilitation of delinquent children and in protecting them from detrimental circumstances, i.e. the potential stigma and labelling that could arise from the glare of publicity or public knowledge of their status.

In the period leading up to the passage of the Young Offenders Act (YOA), a consensus emerged that, in the interests of establishing an open and accountable youth court process, there should be a greater degree of public and media access to youth court proceedings. A consensus also developed, however, that there should be a continuation of the ban on the publication of the identity of young persons and strict controls on the use and retention of records information. In effect, a compromise had been reached that would allow for public and media scrutiny, but continued privacy respecting publication of identity.

Since proclamation of the Act, the publication, information sharing and records provisions have provoked considerable controversy, for different reasons. The ban on publication of identity has prompted debate about, for

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[1] In 1981, the Supreme Court of Canada affirmed the in camera nature of juvenile court proceedings, C.B.v. R. (1981) 62 C.C.C. (2d) 107. However, with the advent of the Charter of Rights and Freedoms in 1982 there were some successful challenges to exclusion of the media and the public in Ontario appellate courts.

[2] Subsection 12(3) JDA allowed the publication of the identity of delinquents with the "special leave of the court" but such leave was apparently rarely, if ever, granted. It is unlikely that a court would have found publication to be in the best interests of the child.

example, the alleged "secrecy" of youth court proceedings and infringement of the public's right to know, diminished deterrence arising from the incapacity to identify young offenders publicly, and public safety concerns respecting the identification of young persons who pose a risk of harm to others. The records and information sharing provisions have prompted less visible concerns among youth justice system professionals, allied helping professionals (e.g., school personnel), and others respecting impediments to information sharing, a lack of clarity, and cumbersome administration of the provisions.

Several amendments to these provisions were made in 1986 (Bill C-106) and 1995 (Bill C-37). Generally speaking, these changes allowed for: limited disclosure of identity for public safety purposes, greater ease of administration, broader information sharing with helping professionals and for law enforcement purposes, and lengthier retention of records of serious offences for criminal justice purposes.

The provisions respecting publication, public disclosure, information sharing and records are set out in sections 38 and 40-46 YOA. "Publication" is not defined in the Act but has been broadly interpreted in case law as including any communication from one to another.[3] Hence section 38 casts a wide net and includes the sharing of information between agencies and individuals. Accordingly, section 38 (as amended by Bill C-37) also establishes exceptions to the publication ban such as: where identifying information is necessary to be disclosed in the interests of the administration of justice; in the preparation of pre-disposition reports; disclosure of information to schools and others; and, with court approval, disclosure to specified members of the public where there is a risk of serious harm.[4]

The meaning of a "record" is not defined in the Act. More importantly, the records provisions also address information sharing insofar as they specify parties or agencies to whom records may be disclosed. The overlap in the publication and records provisions respecting information sharing are confusing and the inter-relationship between these provisions is unclear.

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[3]See, for example, Peel Board of Education v. W.B. (1987) O.R. (2d) 654 (H.C.).

[4]It is not clear whether these public notification provisions would allow for media broadcast in extenuating circumstances or only notification of specified members of the public who are considered to be at risk.

Given this, the Task Force recommends that:

Publication, public disclosure, information sharing and records should be defined in the Act, along the lines of:

(1) **"Publication" means the identification, by means of print, broadcast or electronic media, posters, or like means, of a young person accused of or found guilty of an offence where the purpose of the publication is to make the identity of the young person known to the community or general public. The definition should also continue to apply to children or young persons who are victims or witnesses in youth court proceedings.**

(2) **"Public disclosure" means the communication of identifying information, including a record, relating to a young person accused of or found guilty of an offence to persons specified by the youth court, and to the extent specified by the youth court, where the purpose of the communication is avoiding or reducing a risk of serious harm to others.**

(3) **"Information sharing" means the communication of identifying information, including a record, relating to a young person accused of or found guilty of an offence to persons or organizations where the information communicated is relevant to and necessary for a purpose authorized by the Act or to a person or organization specifically authorized by the Act.**

(4) **"Record" means any record of information, however recorded, whether in printed form, by electronic means or otherwise, which identifies a young person as accused of or found guilty of an offence or otherwise subject to proceedings under the Act (e.g., peace bonds).**

The inclusion of these definitions in the Act will consequently require a comprehensive re-organization and revision of the publication and records provisions of the Act.

This chapter is organized around a discussion of the four above-noted topics.

This chapter does not consider the related issue of youth court proceedings being open to the public and the media. This has not been a contentious issue. There is no doubt that the scrutiny brought about by open youth court proceedings is essential to fostering an understanding of the administration of youth justice and to contributing to the accountability of the system. As well, the current provisions respecting fingerprinting and the principle of using youth court records in adult criminal court proceedings are not examined since they are considered satisfactory and have not been

contentious.[5]

9.1 PUBLICATION

> "From time to time suggestions are made that ... publicity should be given to the names of juvenile offenders and the details of their offences... Some persons argue that the fears engendered by public notoriety will serve as a deterrent to the juvenile offender or will make parents more anxious to exert control over their delinquency-prone youngsters." (Report of the Department of Justice Committee on Juvenile Delinquency in Canada, 1965, p.139).

As noted earlier, the discussion of publication in this section is limited to publicity arising from media or other means (e.g. leaflets) of widespread identification where the purpose of the communication is to make the identity of the young person[6] known in the community.

Section 38 prohibits publication of the identity of a young person accused or found guilty of an offence, except when:

- The young person is transferred to adult court.
- Upon application by a peace officer and a finding by a youth court judge that a young person is dangerous to others and publication is necessary to assist in apprehending the young person. The publication period is limited to two days, but can be renewed upon application.
- Upon application by the young person, if the court is satisfied that publication is not contrary to the young person's best interests.[7]

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[5]However, Article 21.2 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice expressly states that the records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender. Notwithstanding this requirement, this is a common international practice.

[6]The section 38 protections also apply to other young persons or children who are victims of an alleged offence committed by a young person or who appear as witnesses in the proceedings. These protections have not been questioned. Parallel protections are not available for young persons and children who are victims or witnesses in adult criminal court proceedings.

[7]Section 38(1.1) also creates an exception "in respect of the disclosure of information in the course of the administration of justice where it is not the purpose of the disclosure to make the information known in the community". This is usually interpreted fairly narrowly as, for example, allowing youth court lists (with names) to be posted because this is necessary for the administration of justice.

Transfers to adult court are very uncommon: there were only 64 cases - or 0.07 percent of all cases - transferred in 1993-94. Applications under the latter two circumstances rarely occur. There are, therefore, very few cases in which the identities of young persons are published.

The ban on publication of identity was not a major issue under the JDA and occasioned virtually no debate when Bill C-61 was before Parliament in 1982. Since that time, however, it has become a contentious issue. This difference has probably been brought about by key changes in the legal and social context in which the issue of publication is considered. First, and most importantly, constitutional entrenchment of the Charter of Rights and Freedoms in 1982 guaranteed the fundamental rights of freedom of the press and the right to a public hearing in criminal matters. Second, there has been a growing trend in public demands for greater openness and accountability of all public institutions, a trend which is reflected, for example, in the enactment of access to information legislation in many jurisdictions. Third, the much greater public and media scrutiny allowed by the YOA (as compared to the JDA) has, ironically, probably contributed to erosion of public confidence in the Act because of the increased public and media awareness of youth court proceedings and also, perhaps, because of the paradox of a ban on identification within the context of a publicly open system.

Proponents of changes to the publication ban advocate either a complete lifting of the ban in all cases or a more selective lifting of the ban in cases involving more serious offences or offenders, e.g., serious violent offences, repeat offenders, or older offenders such as sixteen and seventeen year olds. The arguments commonly advanced for a complete or partial lifting of the publication ban relate to the need for openness or are based on deterrence and public protection concerns, and include:

- The "shroud of secrecy" around the identities of young offenders would be lifted, thereby enhancing the openness and accountability of the youth justice system and enhancing public confidence in the system. This is connected to the issue of freedom of the press.

- Young persons would be deterred from committing crimes if they knew their identities would be published, i.e. specific and general deterrence.

- Parents would be encouraged to take more responsibility for their children if they knew the identity of the family would be published.

- If the parents of a young person who is associating with a young offender knew that that person was a young offender, the parents would be able to take steps to stop that association, thereby avoiding detrimental influences.

- Identification would allow the public to take protective measures from dangerous youth.

- Recidivist offenders should, by virtue of their repeat offending, be considered to have forfeited the benefit (privilege) of confidentiality.

The arguments advanced in support of retention of the ban on publication are rooted in the protective role of the youth court vis-a-vis the level of development and special needs of young persons, and include:

- The labelling and stigma associated with publication would impede rehabilitation efforts or detrimentally affect young persons, thereby compromising public safety in the long run. As well, some attention seeking youth may be encouraged to commit crimes in order to attract public notoriety.

- Publicity may unfairly tarnish some well-meaning parents as "bad" parents or impede efforts to address family problems through, for example, family counselling. Siblings may be unfairly labelled as prospective delinquents or otherwise be negatively affected.

- There is no evidence that publicity deters youth or encourages parents to take greater responsibility for their children.

- Many youths commit offences, yet still eventually mature into law-abiding citizens. These youths should be allowed to become contributing members of society without long-term effects on educational or employment prospects.

- It is inappropriate to assume the media should be used as a vehicle for punishment. Variable reporting by the media would lead to inconsistencies and unfairness of treatment.

- The public may make false assumptions about who are or are not dangerous youth. Publication may lead to a false sense of security among the public.

- Because the youth court process is already open and accountable, there is no appreciable greater benefit to be gained by public identification.

The Charter establishes freedom of the press and the right to a public hearing as fundamental rights in Canadian society, subject to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Given this, any discussion of the ban on publication of identity must recognize that the onus is on those who wish to continue the ban to justify the same, rather than on those who wish to lift the ban.

Unfortunately, there is a dearth of research on the effects of publication and on the tangible benefits of publication bans. In large part, the arguments for and against the ban must be examined by means of analysis and inference.

9.1.1 The International Context

The United Nations Convention on the Rights of the Child provides that "every" child (i.e. a person under eighteen years) accused of having infringed the criminal law is entitled to a guarantee to "have or his or her privacy fully respected at all stages of the proceedings."[8] There is little room for interpretation of this requirement: full privacy is expected; there are no qualifications. Other United Nations instruments respecting the administration of juvenile justice, which were developed at an earlier date than the Convention and which do not impose the same degree of obligations on Canada,[9] establish similar but less stringent (more qualified) standards respecting the privacy of accused young persons.[10]

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[8]Article 40(1)(b)(vii).

[9]These other United Nations instruments establish exemplary standards to which all states can refer. They do not require ratification by states and therefore do not impose obligations on states in the same manner as ratified multilateral conventions such as the U.N. Convention on the Rights of the Child.

[10]For example, the United Nations Standard Minimum Rules for the Administration of Justice (Beijing Rules) establish somewhat qualified rights to privacy:

> "8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity."
>
> "8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published."

The United Nations Standard Minimum Rules for Non-Custodial Measures (Article 3.11) and the International Covenant on Civil and Political Rights (Article 14(1)) also address privacy and publication respecting young persons.

Given the apparent stringency of these requirements, a complete lifting of ban on the publication of identity, or allowing for publication in select cases involving serious offenders, would likely infringe on the Convention. Indeed, it could be argued that Canadian law and practice already infringes on the privacy requirements of the Convention.[11] In this regard, publication is already permitted in exceptional cases of transfer to adult court or fugitive dangerous offenders. Furthermore, the public nature of youth court proceedings, along with the provisions allowing notification to targeted members of the public in cases involving a risk of serious harm to others (Bill C-37), could be construed as non-compliance with the letter of the Convention.

The Convention does not have the force of law in Canada, but Canada has committed itself, in an international forum, to comply with the Convention and a failure to do so could lead to embarrassment.

Internationally, the general rule is not to permit the publication of identity. In Europe, the general rule is a ban on publication, as well as closed or private court proceedings. There is a ban on media publication in France and Italy; in Italy, juvenile court proceedings are also closed to the public. In Sweden, where there is not a distinct juvenile court system, there are no special legal rules prohibiting publication but, generally speaking, juveniles are not named or photographed by the media except in some cases involving serious violence.

In England, Wales and Scotland, the youth courts are not open to the general public, but they are open to the media. In these countries, there is a ban on publication of the name, address, school and other identifying information. In England and Wales, a range of serious violent offences are automatically proceeded to Crown (adult) court, while the youth court also has the discretion to waive other serious cases to the Crown court. Even where juvenile cases are proceeded in adult courts in England and Wales, there is usually a publication ban.

Australian states and New Zealand also ban publication of identity. In several of these Commonwealth countries, there is some discretion to publish identity in broadly defined circumstances. For example, in England, Wales, and Scotland, the court has the discretion to dispense with the

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[11]Canada did not enter a reservation regarding this aspect of the Convention.

publication ban if it considers it in the interests of justice to do so.[12]

Ireland also prohibits publication of the identity of juvenile offenders.

The United States is an exception to the general rule of banning publication, but there are mixed practices. Although the United States Supreme Court has upheld the constitutionality of publication bans in juvenile proceedings, it remains the prerogative of individual states to determine whether or not publication will be allowed. In recent years there has been trend toward greater use of publication in several states. Twenty-nine (29) states allow names (and sometimes pictures) of juvenile offenders to be released to the media. In nineteen (19) of these states there are, in effect, "two-tiered" systems in which publication is only permitted in cases of specified serious offences and/or repeat offenders. The trend toward increasing use of transfers to adult court through mechanisms such as legislative waiver or prosecutorial discretion in many American states also results in the removal of publication bans.

In Japan, juvenile court proceedings are closed to the public and media publication of identity is prohibited.

9.1.2 The Probability of Public Identification

Experience with the publication of identities in adult criminal cases can be instructive about what might occur if the publication ban was lifted in young offender cases. Surveys by the Canadian Sentencing Commission found that the vast majority of the public's information about the criminal justice system is based on news media reports, principally newspapers. A review of major Canadian newspaper articles by the Commission indicated that violent crimes are greatly over-represented in newspaper reports: more than one-half involved violent offences; more than one-quarter involved homicide. Newsworthiness was the feature consideration in the selection of cases to report, the principle criteria being the seriousness of the offence, the prominence of the offender, or unusual characteristics of a particular case. In short, relatively few adult cases are reported in the media, typically more serious cases and usually only the most serious of these, even though the vast majority of adult crimes are non-violent in nature.

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[12]In England and Wales, the Secretary of State also has the administrative authority to dispense with the ban where it is in the interests of justice. In Victoria, Australia, publication can occur with the permission of the Children's Court Senior Magistrate. There is no reliable data indicating how these exceptional provisions allowing for publication have been applied in practice; reportedly, dispensing with the publication ban is rare in England and Wales.

Since the identities of relatively few adult offenders are published, it could be expected that similar reporting practices would occur with young offenders if publication was permitted. What this suggests is that the alleged benefits of allowing for publication of identity, or of continuing with the publication ban, are considerably over-stated, at least in urban centres, in terms of the number of young persons affected. For example, enhanced specific deterrence of young offenders or greater encouragement of parental responsibility for children is very unlikely to be achieved, precisely because the vast majority of cases would not be reported. For the same reasons, relatively few young offenders and their families would be exposed to the potential stigma, labelling, and detrimental effects on rehabilitation efforts. Nonetheless, some cases would be reported and therefore affected, in one way or another.

Different reporting practices are evident in many smaller or middle- sized communities; there appears to be a greater likelihood of reporting of less serious cases in local or smaller suburban newspapers.[13] Some cases involving car thefts or breaking and entering, for example, are considered newsworthy in smaller communities but would not be considered so in urban centres unless there was some unusual aspect or curiosity value to the case. In short, there are considerable differences between what is reported for adults in Toronto versus Sydney, Nova Scotia, and this would probably apply if publication of the identities of young offenders was permitted.

News media are not the only means by which public identification may occur. It is common that a young offender or a parent will inform other significant persons such as relatives, friends and neighbours, adolescent peers, teachers, and others. Since youth courts are open to the public, the identities of young offenders can also become known to members of the public and passed on to others in the community. One cannot and should not, of course, attempt to regulate informal personal communications, or gossip, among members of the public. In a small community such as Boston Bar, British Columbia, many members of the community are probably already aware of the identity of the more serious young offenders in their community, despite the publication ban. In short, if publication were allowed, it would probably make little difference in small communities such as Boston Bar or, except for a few sensational cases, in major urban centres such as Toronto, but could possibly make a considerable difference in middle-sized communities such as Sydney.

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[13]The survey of newspapers carried out by the Canadian Sentencing Commission was limited to major urban newspapers.

Probable differences in reporting practices according to case characteristics, location, or slow news days raise fundamental questions about fairness and equality of treatment of offenders and their families. It would be impossible and inappropriate to regulate media reporting to ensure greater equity of treatment. While inequities in public identification are a reality faced by adult offenders and their families, inequity is a factor to be considered in deciding whether to allow publication of the identities of more immature and vulnerable persons.

It could be argued, however, that a more restricted approach to publication would provide greater equity of treatment. Permitting publication only in cases of serious violent offences, for example, could provide more equitable treatment by the media since these are the very cases the news media are more likely to report, regardless of location.

9.1.3 Publication and Deterrence

Proponents of publication argue that public identification will deter young offenders, either specifically or generally. Because the courts already mete out consequences for offending behaviour, this is not an argument about the merits of deterrence per se, but rather about enhanced deterrence, i.e. that along with court-imposed consequences, the additional penalty of publication (embarrassment or shame) will cause apprehended offenders to desist in their offending behaviour and cause other young persons who might otherwise be inclined to offend to refrain from doing so.

There are only two known reports about the direct deterrent effects of publicity on criminal behaviour, neither of which is helpful on the issue.[14]

For publication to work as a deterrent, the following conditions would have to be satisfied:

- young persons would have to rationally consider and weigh the risks of being apprehended;

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[14]A report about a dated study by the National Council on Crime and Delinquency on the "open" system in Montana indicated no apparent deterrent effect on juvenile crime; the system only added further degradation and embarrassment(cited in Litsky, 1972). Despite requests, the original study was not located. Another report studied the incidence of shoplifting and impaired driving/refusing a breathalyzer in St. John's, Newfoundland following a period in which the names of adult offenders convicted of these offences were routinely and comprehensively published in a local newspaper (Ross and White, 1987). The results were inconsistent: the incidence of shoplifting decreased but impaired driving/breathalyzer offences increased. This study was methodologically weak. For example, there were no controls involving comparable locations where similar measures were not undertaken, comparisons with other offences not routinely reported, and there was no consideration of potential effects on police charging practices.

- young persons would have to rationally consider and weigh the potential consequences to themselves, including public identification, before committing an offence;

- young persons would have to know that their identities would be published;

- the news media would have to routinely or at least frequently publish the identities of young offenders;

- relevant members of the public would have to inform themselves of the published reports, link the report to specific offenders, and express social disapproval of the offenders; and

- young persons would have to regard the prospect or reality of public identification as shameful or embarrassing (punishing).

Given the above, it seems very unlikely that publication would achieve the desired effect of general reductions in crime rates. Some (likely few) individual young persons may be deterred. This must be weighed against potential damaging effects of publication and the possibility that attention-seeking youth may have their criminal propensities reinforced by inadvertently providing them the very public notoriety they seek. In the latter regard, there is reason to believe that publicity can reinforce criminal behaviour in some cases. For example, some young adults have been known to keep press clippings about their exploits. Furthermore, the negative reinforcing effects of publicity are, to some extent, recognized in the law enforcement community: for example, it is a common police strategy not to publicly name gangs (especially newly emerging gangs) because the attendant notoriety may accord status to the gang, thereby encouraging gang cohesion and gang formation.

9.1.4 Effects on Parenting

Although couched as supportive, the "encouragement of parents" rationale is in fact another argument based on specific and general deterrence: the threat or reality of public humiliation will motivate parents to assume greater responsibility for their children by, for example, supervising them more closely. For the same reasons noted above about publication as a deterrent to young persons, it seems very unlikely that publication would have a deterrent impact on parents.

Parental liability laws share a similar rationale of encouraging greater parental

responsibility but, as discussed in Chapter 10, there is no empirical evidence that parental liability laws do in fact encourage greater parental responsibility and consequently impact youth behaviour.[15]

This rationale also assumes that parental behaviour actually causes or can prevent youth crime. This is far too simplistic. Criminological research does indicate that a variety of factors related to family dysfunction, including poor parental supervision and inconsistent discipline, are associated with serious youth crime. However, youth crime is associated with a variety of different "risk factors" which interact. No single risk factor - including parenting - "causes" delinquency.

Given the perceived connection between parenting and youth crime that is common among the public, publicity could lead many members of the public to conclude: "bad kid, bad family". In many cases, this would be both erroneous and unfair: as examples, the divorced single mother from a formerly abusive relationship who is struggling to raise her children in circumstances of poverty; the parents of a severely learning disabled child who has experienced consistent failure and rejection in the school system and has now fallen into the company of a negative peer group; the parents of a child who was sexually abused by a neighbour; and so on. As well, some parents may indeed have formerly been poor parents but now are making earnest efforts, e.g. the recovering alcoholic. Even if there are current parenting problems, additional pressures imposed on a family in crisis would probably not have a constructive result. Nor does it seem likely that publicity would transform a "bad" parent into a good one. Further, the youth justice system, being more interventionist and treatment-oriented than the adult system, also tends to be more intrusive, often gathering more detailed and sensitive personal and family information about the accused. Accordingly, public identification in combination with the public exposure of sensitive information in some cases could be construed as being more invasive of the privacy of accused young persons.

It is possible, however, that publication of identity could better enable the parents of other young persons to fulfil their parental role. For example, if publication was permitted and parents consequently knew that their son or daughter was associating with another young person who was a repeat or

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[15]For example, in 1986, Wisconsin enacted a "grandparent liability" law which allowed parents to be made financially responsible for the children of unwed teenage mothers. One purpose of the law was to encourage the parents of teenage girls to take more responsibility for their adolescent children, thereby reducing the incidence of unwed teenage pregnancy. After the law was enacted, teenage pregnancies actually increased.

serious young offender, then the parents might take steps to stop the association or, at least, monitor the situation closely. Given the influence of peers during adolescence, and that many offences are committed with peers, this could be useful to the parent avoiding that son or daughter being drawn into the commission of offences. Again, the extent to which this might be a benefit would depend upon the media reporting the case, the parents apprising themselves of the information, and making the linkages with the identified young offender. In many cases parents would already know, if they had a reasonably open relationship with their child.

Unconcerned and negligent parents are legitimate cause for public concern. It is possible that publication could have a beneficial effect in some cases, perhaps more so in respect of some parents of other young persons who could be better informed that their children are associating with a repeat of serious young offender. This must be weighed against the potential for damaging and unfair impacts on the parents of young offenders and other secondary parties, such as siblings, who may be affected.

9.1.5 Openness and Public Confidence

The purpose of an open process in the adult criminal justice system is not to punish offenders by publicly identifying them. The public and media scrutiny afforded by an open process not only promotes public understanding of the criminal justice system but, more importantly, ensures that the state acts fairly and within the law, without political or social bias.

The fundamental rights to an open and public hearing and to freedom of expression, including freedom of the press, are guaranteed under the Charter, subject to reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society. The onus is therefore on those who would infringe on these fundamental rights to demonstrate, on sound policy grounds, that the infringement is justifiable. Appellate courts have determined that the ban on the publication of identity is indeed an infringement on the freedom of the press, but that this is justifiable because the ban supports a social value of superordinate importance - the protection of young persons from harm.[16]

Under the YOA, youth court proceedings are open to the public and to the

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[16]Re Southam Inc. and the Queen (1986) 25 C.C.C.(3d) 119 (Ont. C.A.). See also the original decision, (1985) 16. C.C.C.(3d) 262 (O.H.C.J.)

press.[17] All of the details of the proceedings may be observed by the public (including identification of the accused) and reported by the press, except the name of the young person or other details that may serve to identify the young person. Given this, it could be argued that the fundamental purposes of an open process - i.e., accountability and public understanding - are served by the present system. From this perspective, many would submit that it is difficult to conceive how public identification - characterized as a "sliver of information"[18] - could contribute further to these objectives. It overstates the case to characterize youth court proceedings as "secret".

Public confidence is an elusive concept closely related to public openness and accountability. Confidence in the youth justice system means the public has a "firm trust" or "assured expectation"[19] that commonly shared objectives - such as a fair and impartial process, appropriate consequences for wrongdoing, and appropriate measures to protect the public - are satisfied. Open youth court proceedings do allow the public to make these determinations. Arguably, one exception arises because the ban on publication does not allow the public to know if there are dangerous or chronic offenders in their midst. In short, the issue of public confidence (in the context of publication) seems to be connected to public safety concerns and, possibly, denunciation. It must be acknowledged, however, that the public right to know, especially in very serious cases, is a fundamental right which has intrinsic value and, therefore, any abridgement of that right contributes to an erosion of public confidence in the youth justice system. While identity might be just a "sliver of information", many would argue that it is a very important sliver which, when withheld, does cast a degree of secrecy over proceedings, thereby undermining public confidence.

9.1.6 Public Safety

The Task Force supports the principle that relevant members of the public should, in order to take the necessary protective measures, be notified if an offender poses a present risk of serious harm to them. As an obvious example, the parents of a child who is known to be associating with a convicted young pedophile who has refused treatment and is a risk to children, should be informed so that they can take steps to stop the association. Recent amendments (Bill C-37) allow for a limited degree of

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[17]Subject to an exclusion order under s.39, which is rarely applied.

[18] Supra, note 15.

[19]Oxford Dictionary definition of confidence.

judicially approved public notification and are discussed later in this Chapter. These amendments may only allow for selective public notification of persons who are at risk of serious harm and may not permit publicity to the community at large.[20] The real question then is about the potential effectiveness of methods, i.e., whether media publicity to the public at large will afford greater public protection than the selective public notification policy established by Bill C-37.

Critics of publication typically point to several flaws in the argument that media publication will afford enhanced public safety.

The proposition that media publicity will result in greater societal protection from young offenders who pose a risk of serious harm to others assumes that the media will publish the identities of all such young persons and that relevant members of the public will avail themselves of this information. While the media do tend to report adult cases involving violence more frequently, certainly not all cases are reported, nor are all of the cases that are reported conveyed in a prominent manner that would command the attention of relevant members of the public. Even if reported, it is doubtful that all relevant members of the public would apprise themselves of the information, remember it, and make the necessary linkages to the identified person. Despite the availability of publicity in the adult criminal justice system, it is likely that the vast majority of Canadians would be able to enumerate only a handful of the most notorious (and already imprisoned) adult offenders. There is, it is argued, no reason to believe that this would be different if media publication of young offender identities was permitted.

The public protection rationale also assumes that the public can make accurate assessments about the degree of risk on the basis of media reports alone, which largely involve the circumstances of the offence. Sometimes, these public assessments of risk might be reasonably accurate. Erroneous conclusions and unnecessary public alarm may, however, result in some cases because not all young offenders found guilty of an ostensibly violent offence (e.g. robbery) pose an ongoing or current risk of harm to others. Conversely, an apparently less serious charge is not necessarily indicative of a low risk to others, e.g., trespass by night when the motivation for the offence is sexual assault.

There is also the practical consideration that young offenders who pose a (known) significant risk of harm to others will very often be committed to

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[20]Argument could be raised that these provisions could, in rare circumstances, allow for notification of the community at large through media publication.

custody. Since media publicity almost always occurs at the time of arrest, trial or sentencing, relevant members of the public would often have to recall publicity that arose well before the young person's release from custody. If the Act was silent with respect to publication and disclosure so that media publication of identity was permitted, there still would be no guarantee of public knowledge of the young person's release from custody because, as with adult offenders, information would probably only be able to be publicly released in accordance with privacy and access legislation enacted in several jurisdictions.[21] Such legislation typically only allows for the public release of personal information in accordance with a "public interest" test, which includes public safety, wherein the public interest outweighs the privacy interests of the offender. Notification of the community at large about high risk adult offenders released from jail occurs only infrequently.

The public protection rationale also assumes that an offender's circumstances will not change. For example, publicity about a violent offence occurring in Calgary would do nothing to ensure public safety if the young person subsequently moved to Winnipeg.

Notwithstanding the several limitations noted above, there is no doubt that, if publication of identity was permitted, at least some cases would be reported and there would be at least some greater degree of community awareness of high risk young offenders. Would this be more effective than the selective public notification policy established by Bill C-37? Relying on media publicity as a mechanism for public notification is, in essence, a passive approach: the youth justice system would merely permit publicity and then rely on the media and the public to do the rest of the job. In contrast, the policy respecting public notification in Bill C-37 involves a proactive approach whereby, after determination of a serious risk of harm, the youth justice system takes active steps to ensure that relevant members of the public are in fact informed of that risk. This may prove to be a more reliable and focussed mechanism of public notification than would general media publication.

Still, we do not know whether media publication or the selective public notification policy of Bill C-37, which has not been tried and assessed, will be more effective in enhancing public safety. What we do know is that the adult criminal justice system, which allows for media publication of identity,

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[21]This assumes that, if publication was no longer prohibited by the Act, personal information would thereafter be dealt with in a similar manner as adults and, therefore, subject to privacy legislation because such legislation would fill the void in federal legislation. It would be anomalous to afford young persons less privacy than adults.

has been wrestling with this thorny issue in recent years, without any easy resolution. This will undoubtedly be an ongoing and controversial problem in both systems, and one that defies simple solutions.

Before leaving this section, it should be noted that there may be situations where the selective public notification approach of Bill C-37 could prove inadequate. For example, if a young person convicted of murder was detained in custody (on the grounds of dangerousness) for the conditional supervision period (s.26.1) and remained a danger to others until the expiration of the court order, there would be no legal authority to control or monitor the young person's subsequent activities in the community. While there may be a risk of serious harm to others in these circumstances, it may be difficult to determine the specific parties who may be at risk. In circumstances where selective notification of members of the public may be infeasible or inadequate, general public notification by way of media publicity could be warranted.

If an amendment was made to allow for notification of the community at large to address circumstances such as those noted above, then the youth justice system would have a capacity for public notification that is more similar to what is available in the adult system. In the adult system media publication of identity is, of course, permitted during the court process, but thereafter (in most jurisdictions) public release of information relevant to risk (e.g., upon release from jail) is subject to a public interest test under privacy and access to information legislation, which can allow for notification of specified individuals or, infrequently, broad community notification where there is a serious risk of harm. In short, the outcomes (selective and broad public notification) would be the same, but the processes would be different: for adult offenders decisions about public safety notification under privacy and access to information legislation are administratively determined (subject to review), whereas decisions respecting young offenders are judicially determined.

9.1.7 Repeat Offenders

It is argued that if one purpose of the ban on publication is to provide young offenders a "second chance", then a case could be made for publication in cases of repeat (recidivist) offenders.

One difficulty with this proposal is the incongruities that would arise from a simple formula of "second time around" resulting in publication. For example, the identity of a young person found guilty of a repeat episode of shoplifting could be published, whereas a young person found guilty of a

single serious offence such as armed robbery or of an (uninterrupted) string of breaking and enterings[22] could not. These inconsistencies could possibly be overcome; to do so however, would require the development of complex formulae based on the seriousness and frequency of offending, or judicial determination on a case by case basis.

This argument assumes that repeat young offenders will not mature or be rehabilitated and therefore will not adopt a law-abiding lifestyle in their adult years. Criminological research does confirm that prior offence history is one of the best predictors of future offending. This does not mean, however, that repeat offenders will necessarily offend again. For example, a recent study followed up young offenders for five years - principally repeat offenders (74 percent) - who were committed to custody for the first time in British Columbia. A sub-sample of sixteen and seventeen year olds allowed for a three to five year follow-up into early adult years: about 40 percent did not re-offend as young adults.[23]

A small proportion of repeat young offenders can be characterized as chronic offenders, i.e. very repetitive offenders who are in the process of becoming enmeshed in a criminal lifestyle. Chronic offenders are probably the least likely to be harmed by publication. On the other hand, chronic offenders - already undeterred by custody dispositions - are probably the least likely to be deterred by publication and the most likely to have their criminal propensities inadvertently reinforced by the notoriety of public exposure. Again, determining who is or is not a chronic offender would require development of a formula or judicial determination on a case by case basis.

The publication ban on youth court findings continues into adulthood, i.e., even if a person with a serious or extensive record of offending as a young person is convicted of further serious offences as an adult, the prior young offender record may not be published.[24] If the primary purpose of the continuation of the ban on publication into adulthood is to allow young persons to mature into adulthood without the handicaps of being labelled as an "offender", this premise is no longer valid when a young person goes on

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[22]The latter is not a recidivist or repeat offender, but rather a multiple offender. A recidivist is a person who commits further offences after first apprehension and disposition, regardless of the number of offences that led to the first apprehension and disposition.

[23]Sample size was 233; sub-sample of 16 and 17 year olds was 121. See, British Columbia Corrections Branch (1996).

[24]The youth court record may, however, be considered in determining the adult sentence, subject to the non-disclosure provisions set out in sections 45 and 45.1.

to commit serious offences as an adult. In these circumstances, it could be argued that the offender should forfeit the benefit of continued privacy respecting prior youth court history by virtue of subsequent adult criminal behaviour. We are aware of cases where persons who were found guilty of very serious offences in youth court have been convicted of very serious offences in adult court, but the youth court history has not been able to be reported.[25] This appears to be an area where changes could be considered.

9.1.8 Denunciation

Denunciation is an expression of social and moral condemnation of blameworthy criminal conduct - especially in cases of heinous offences - that serves to affirm social values and promote respect for the law[26], i.e., while denunciatory measures may be directed at the offender, they serve broader social purposes.

The trial, conviction and sentencing of an offender in a public forum emphasizes society's disapproval of criminal conduct in a forceful manner. The Canadian Sentencing Commission observed that the degree to which the goal of denunciation can be achieved is dependent upon public awareness of the condemnation. Given that the youth court process is open and that the results of youth court decisions (except identity) can be published in the media, it could be argued that the goal of denunciation can be largely satisfied without public identification.

Denunciation is commonly supported as a rationale for sentencing in cases of very serious crimes, at least in the adult context.[27] If the principle of denunciation is accepted as a relevant consideration in addressing serious criminal offending by young persons, it would seem to be much more closely connected to the issues of sentencing and transfer to adult court than it is to publication. The social and moral condemnation of a heinous offence can be accomplished by way of a (publicly known) lengthy youth court disposition or transfer to adult court, rather than public identification. Transfer to adult court, of course, results in publication of identity.

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[25]This can also present dilemmas to the media in how to report the case. The media can choose not to report the young offender record. Alternatively, the media can choose to report that an unidentified adult with a history of serious offending as a young person has now been convicted of a serious offence as an adult.

[26]Denunciation is discussed in more detail in Chapter 8.

[27]Both the Law Reform Commission of Canada and the Canadian Sentencing Commission regard denunciation as a key consideration in sentencing.

Denunciation and shaming offenders through public identification should be distinguished. Public shaming is much more closely connected to deterrence (discussed above). Aboriginal justice measures such as sentencing circles and healing circles involve members of the aboriginal community at large and hence involve some elements of shaming. Australian criminologist John Braithwaite makes a distinction between reintegrative and disintegrative shaming. Disintegrative shaming involves stigmatization in which there is no attempt to reconcile the offender with the community. In contrast, reintegrative shaming involves efforts to reintegrate the offender back into the community in an atmosphere of reconciliation, including forgiveness. Aboriginal justice measures can be examples of reintegrative shaming, while shaming through public (media) identification can be an example of disintegrative shaming (which, Braithwaite argues, provokes additional crime).

9.1.9 Labelling and Reintegration

The key argument against publication is that the labelling and stigma that may result from public identification as a "young offender" will reinforce the criminal propensities of identified adolescents, undermine rehabilitation efforts, and inhibit reintegration into the community by, for example, affecting employment opportunities.

Labelling theory holds that self-identity and the roles people acquire are a product of interactions with significant others. Once socially defined as a "young offender", the theory goes, that social label affects the behaviour and expectations of others as well as the adolescent, who then sees himself as a young offender and acts accordingly. Hence the label becomes a self-fulfilling prophecy that perpetuates and promotes the labelled behaviour ("secondary deviance").[28]

There is little direct empirical evidence to verify the effects of labelling in the criminal justice process[29], perhaps in part because the process and effects of labelling are difficult to define and measure (operationalize). Moreover, the effects of labelling principally result from the reactions of significant others. The ban on publication does not avoid this type of labelling because these "significant others" - parents; probation officers and allied helping professionals; often extended family, neighbours and peers; and sometimes school personnel - are informed of the young person's new status. However,

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[28]See, for example, Becker (1973).

[29]See, for example, Raine (1993) and Akers (1994).

media identification could be a more dramatic and powerful form of labelling.

While there is little empirical evidence to support labelling theory in a criminal justice context, there is evidence of the effects of labelling in other social contexts such as schools. As well, the child development literature indicates that adolescence is a key period in identity and values formation, during which the adolescent can experiment with different social roles; adolescents do define themselves, at least partly, in the way other people regard them.

There seems to be little doubt that publication could have harmful labelling and stigmatizing effects in some cases. A youth who is "on the edge" - i.e., at a critical moment in development when he could turn to a law-abiding lifestyle - could just as easily be pushed in the other direction by publication of identity. Moreover, the linkage of social or personal history information such as prior abuse or mental disorder with publication could amount to little more than humiliation and degradation, thereby diminishing self-esteem. Further, publication could lead to unfair and damaging public conclusions about parents and siblings, thereby interfering with a crucial factor in socialization - family integration. In counterpoint, it should be noted that these potentially damaging effects on parents and siblings already occur in some cases as a result of the completely open operation of the adult criminal justice system, e.g., where an older sibling (who is a young adult) or a parent is convicted of an offence and the family member's identity is published. Given this, there is some degree of inconsistency in the argument that publication of the identity of young persons should not be permitted on these grounds.

Research has confirmed that a criminal record of conviction, and even a record of an acquitted charge, can negatively affect employment prospects.[30] The degree to which publication would have significant impacts on the future employment of young offenders would depend upon certain factors. Most young offenders are either in school or unemployed; some are currently employed, often in part-time jobs. For publication to affect future employment prospects would require the following conditions to be satisfied:

- the identity of the young person would have to be reported;
- prospective employers would have to inform themselves of the publication; and

[30]For example, see Schwartz and Skonick (1961).

- o most importantly, prospective employers would have to remember the published information - often several years later - and make the necessary linkages with the applicant young offender.

This seems to be an unlikely prospect, although differences in impacts might vary, for example, according to setting (i.e., small town versus urban setting). Potential effects on future employment, therefore, seem to be more connected to the issues of information sharing and records, rather than publication.

9.1.10 Discussion and Recommendations

A lifting of the ban on publication of identity, either in whole or in select cases, would be inconsistent with Canadian legal tradition, the tradition and current practices of other Western democratic societies (except some American States), and with the United Nations Convention on the Rights of the Child. Changes to the publication ban could, therefore, only be justified if a demonstrable social benefit could be achieved, such as lower youth crime rates, improved parenting or enhanced public safety. Although some marginal benefits of specific deterrence or improved parenting might be accomplished in a small number of individual cases, there is no evidence, or even sound argument, to lead one to conclude that there would be appreciable reductions in youth crime rates, enhancements in public safety, or generally improved parenting accomplished by lifting the publication ban on identity.

Nonetheless, the rights to a public hearing and to freedom of the press are fundamental values that may only be abridged in justifiable circumstances. Publication could have harmful effects on some individual young offenders and on secondary parties such as parents and siblings, thereby undermining rehabilitation efforts. As well, publication of identity could inadvertently reinforce the criminal propensities of attention-seeking youth by providing them the very public notoriety they seek. This would not serve the public interest. Given this, the Task Force agreed that there should not be a general lifting of the ban on publication of identity in all youth court cases.[31]

It seems reasonable to conclude that a lifting of the ban on publication of identity could have a marginal beneficial effect in a small number of individual cases, harmful effects in some cases, and make no difference in many cases. The latter would largely result because most cases would not be reported

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[31]The Yukon Territory, however, supported a general lifting of the publication ban.

(especially in urban centres), but this would likely vary according to community size and the practices of local media.

If publication of identity would be damaging in only some cases, then it could be argued that the court could make these determinations on a case by case basis. This would not seem feasible. In the case of Re: Southam Inc. and the Queen, Supra, the court addressed this issue:

> "The witnesses all agreed that the absolute ban ... is not necessary, and concluded that there may be some cases where no harm would be done. However, the evidence showed that it is difficult for professionals ... to anticipate which would be harmed and which would not. To repeat, it would be virtually impossible to put before the youth court judge all the information that would be necessary for his decision, if there was discretion in the trial judge."

Connected to this argument is the additional consideration of the considerable costs, court delays and court backlogs that would inevitably result from the additional time required to make these determinations on a case by case basis. These concerns could be mitigated by limiting court applications for publication of identity only to a narrow range of cases, such as serious violent and chronic offenders. While a narrower range of cases would limit the potential volume of hearings, it would not surmount the issue of at least some potentially lengthy hearings to gather the required information to make the difficult determination of whether publication of identity would be harmful or not, or in the public interest.

The length and complexity of hearings could be avoided by establishing an automatic procedure which would allow publication in cases involving a scheduled list of serious violent offences and in defined cases of chronic offenders. As noted earlier, however, establishing a formula to define what constitutes a "chronic offender" would be very problematic. In addition, an automatic procedure would not involve any consideration of the characteristics of the case. It would seem that it is the personal characteristics and social circumstances of the young offender (rather than offence history or current offence) that would be determinative of whether publication of identity would be harmful or beneficial. An automatic procedure could result in the publication of the identity of, for example, an attention-seeking chronic offender or of a disturbed, multi-problem first-time violent offender who is in need of extensive treatment services.

A partial lifting of the ban on publication of identity could increase the risk of a successful challenge, on Charter grounds, to maintaining the ban for other cases.

Regardless of how the determination would be made, the question remains about what would be accomplished by publication of identity in cases of serious violent or chronic young offenders. There are no convincing reasons to believe that publication will enhance deterrence or reduce crime rates. Chronic offenders - undeterred by previous custodial dispositions - are the least likely to be deterred by publication and most likely to be reinforced by their newfound public notoriety. Serious violent young offenders - nearly half of whom have no previous youth court history[32] - are probably those most in need of rehabilitative measures.

With respect to public safety, the Task Force does not question the principle that members of the public should be notified if a young offender poses a risk of serious harm. The question in relation to public safety is really more about the potential effectiveness of different methods, i.e., whether media publication would prove to be more effective than the public notification policy reflected in Bill C-37. We do not know the answer to that question - the public safety notification processes established by Bill C-37 have not yet been tried and assessed. Moreover, public safety notification is a thorny and very complex problem which continues to plague the adult criminal justice system - a system which allows publication of identity. It is unrealistic to expect that easy and simple solutions will be found in the youth justice system.

While publication of identity may not be justified on the basis of identifiable utilitarian goals (e.g. public safety, deterrence), (fully) public hearings and freedom of the press are fundamental rights which have intrinsic value. Arguably, the intrinsic value served by publication of identity increases with the seriousness of the offence: for example, homicide and other serious violent offences involving very threatening or heinous circumstances understandably command considerable public attention. Therefore, the public's right and need to know all of the circumstances of the offence and offender increases accordingly. Essentially, this amounts to a case of legitimate and competing values: between, on the one hand, avoiding the potential harm that might be occasioned by publication of identity and the

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[32]This figure is based on the youth court histories of 1911 young persons charged and brought before the youth courts between 1986/87 and 1993/94 for the offences of murder, manslaughter, attempted murder, aggravated sexual assault, sexual assault with a weapon, aggravated assault and rape (Lee and Leonard, 1995). The actual percentage is 48.6 percent.

consequent undermining of rehabilitation (which serves the public interest) and, on the other hand, the public interest that is served by the fundamental rights of a fully public trial and freedom of the press. A case could be made then that greater weight should be given to the public's right to know in cases involving homicide and other serious violence, precisely because of the seriousness of these offences and the consequent public interest in them, and despite the possibility of compromise of rehabilitative measures applied to the young person. This, of course, depends upon how one weighs and balances these competing values and interests.

In Chapter 8 we discussed, with respect to transfer to adult court, the two different strategic directions that can be adopted in responding to the most serious offenders. Very serious offenders place a considerable degree of pressure on the youth justice system to respond appropriately. One way to address this pressure is to expand the capacity of the youth justice system, i.e., by increasing the available lengths of disposition or allowing for the publication of identity in cases of very serious offences. The other strategic direction in responding to the pressure occasioned by very serious offences/offenders is to rely on the "safety valve" of transfer to adult court where, if transferred, the young person is subject to the lengthier sentences available in the adult system and to publication of identity.

These two strategic directions are not only different, they are largely incompatible, i.e. both directions cannot be adopted because they work against one another. For example, lengthier youth court dispositions militate against the likelihood of transfer to adult court because a longer period is available in the youth system to accommodate concerns about a sufficient period of time to deter, denounce, incapacitate or rehabilitate the young person. Similarly, a provision which would allow for publication of identity in specified serious cases within the youth court system could arguably also militate against transfer to adult court since publication - or accountability within a public forum - has been a consideration in some transfer decisions (among some but not all appellate courts).

If there is some need for change to the publication ban in respect of very serious offenders, then the primary strategic options include an "expanded capacity" approach - i.e., provisions which allow for publication of identity in very serious cases within the youth justice system - or the "safety valve" approach of transfer to adult court. In Chapter 8, a substantial majority of provincial and territorial Task Force representatives recommended, in respect of the issue of facilitating lengthier sentences for very serious young offenders, the safety valve approach of transfer to adult court. An approach which relied on transfer to adult court as a means of facilitating publication

of identity in the most serious cases would be consistent with this recommendation.

Bearing in mind that the Task Force agreed that there should not be a general lifting of the ban on publication of identity in all youth court cases, three primary options respecting the ban in cases of more serious young offenders were considered:

Option 1 Status quo, i.e., a ban on publication except in the limited circumstances allowed by the Act (e.g. transfer to ordinary court).[33]

Option 2 The Act be amended so that where a young person has been found guilty of an offence set out in a scheduled list of serious violent offences, the court be required to consider whether publication of identity should be permitted. If the youth court is satisfied, having regard to the effects on the young person and the young person's family, that publication is in the public interest, then publication shall be ordered.

Option 3 Instead of the second option, rely upon transfer to adult court as the mechanism for facilitating publication of identity in the most serious cases, amending Act so that publication of identity is set out as an express consideration in determining whether to transfer to adult court in section 16 YOA.

The Task Force was not able to reach a consensus. In considering the options in light of the discussion above, a substantial majority of Task Force representatives supported some legislative change (i.e., Options 2 or 3). The majority of representatives who supported change supported Option 3. Some jurisdictions - including Alberta and Ontario - supported Option 2.

In light of the above:

The Task Force recommends that there should not be a general lifting of the ban on publication of identity in all youth court cases. A substantial majority of representatives also do not support a partial lifting of the ban which would, for example, allow for publication of identity in cases involving serious offences. Instead, a majority recommends that transfer to ordinary court should be relied upon as

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[33]Note, however, the additional recommendations in this chapter respecting publication where public safety notification of individuals may prove inadequate and allowing a young person who is eighteen years or more to consent to publication without need for approval of the youth court.

the mechanism to facilitate the publication of identity of serious young offenders and, to that end, section 16 of the Act should be amended to expressly set out publication of identity as a consideration in determining whether a young person should be transferred to adult court.

Five other possible areas of amendments to the publication ban were also identified. First, there could, as noted, be circumstances (albeit rare) where a young offender poses an ongoing and general risk of serious harm to others and where authorities are unable to identify specific members of the community who are at risk. In these circumstances, the public notification provisions of Bill C-37 - section 38 (1.5) YOA - may not be applicable because these provisions may only permit notification of specified persons in the community, not media publication. A substantial majority of the Task Force agreed that, with court authorization, a broader, media-based notification to the community at large should be permitted where disclosure to persons specified by the court would be insufficient to reduce the risk of serious harm to others and media publication is necessary for the reduction or avoidance of that harm. Such a measure would be rarely used, given that section 38 (1.5) itself is intended to be used as an exceptional measure.

Second, the ban on publication of identity continues on after the young person becomes an adult. As noted, this is based on the rationale that young persons should be allowed to mature into law-abiding adults without the impediments associated with being publicly labelled as an offender. If a former young offender goes on to be convicted of a serious offence as an adult then the very rationale for continuing the ban no longer applies. There have been cases where persons found guilty in youth court of serious violent offences have subsequently been convicted as adults of serious violent offences, but the youth court record could not be published because the publication ban on youth court records continues indefinitely into adulthood.

This issue has been partly addressed by Bill C-37. As amended, section 45.01 YOA provides that where a young person who has been found guilty of a summary or indictable offence and is subsequently found guilty as an adult of an offence before the expiration of the non-disclosure time periods set out in subsection 45(1), the provisions applicable to criminal records of adults shall apply, i.e., in effect, the youth court record is automatically converted to an adult record. There is a similar automatic conversion in respect of scheduled serious offences kept in a special records repository, see, s.45.02(3) YOA. Nonetheless, these provisions only apply to the disclosure of records and are silent with respect to publication of identity. Accordingly, the Task Force agreed that the records and publication

provisions should be reconciled vis-a-vis the status of records/publication when a former young offender goes on to commit an offence as an adult. If an amendment is made in this regard, the information that may be published should be defined - including prior youth court findings of guilt and dispositions, and possibly the circumstances of those offences - but should exclude more personal information such as predisposition and medical and psychological reports.

Third, a young person may, pursuant to subsection 38 (1.4) YOA, make application to the youth court to make an order permitting publication of his or her identity. The court may so order if it is satisfied that publication is not contrary to the best interests of the young person. These provisions are problematic insofar as the publication ban, and the control of the youth court, continue in perpetuity despite the consent of the young person, i.e. after the young person becomes an adult and is presumed capable of determining what is or is not in his or her best interests. There are, for example, many biographical and autobiographical books and articles in which the former exploits of the author (or subject) as a young offender are recounted. Technically, these publications are a violation of the law (but not enforced). The Task Force agreed that the indefinite jurisdiction of the youth court to determine the best interests of a person vis-a-vis publication seems to be an unjustifiable infringement on freedom of expression.

If a change is made to allow for publication in these circumstances, it is possible that a former young offender who is now a young adult may not be fully appreciative of the implications of consenting to publication of his or her identity. This might be mitigated by developing information brochures which could inform the person of his or her rights in these circumstances (see, 9.4.2 in this chapter).

Fourth, section 38 does not allow publication of identity in circumstances where the health or safety of the young person may be at risk.[34] There have been cases where a young person has absconded and there is reason to believe his safety is at risk because, for example, he is alone in unsafe circumstances (e.g. wilderness area) or requires medication (e.g. for diabetes). In such circumstances, publication may be required to mobilize assistance from the community in locating the young person. Normally, this can be accomplished by simply describing the young person as a "runaway", not as a young offender. However, different media sources may initially report the circumstances in different ways - one identifying the young person

[34]s.38 (1.2) YOA is restricted to circumstances where there is reason to believe that the young person is dangerous "to others".

as runaway and the other media source reporting that an unidentified young offender has absconded in unsafe circumstances. If so, any subsequent personal identification of the young person by, for example, the media or posters could constitute an infringement of section 38, thereby hindering efforts to help the young person.

The Task Force agreed that the Act should not stand in the way of genuine efforts to preserve the health and safety of young persons. Accordingly, consideration should be given to amending section 38 so that, upon application, the youth court may authorize the publication of identity, for a time-limited period, where it is necessary to facilitate the health or safety of the young person.

Finally, if a young person is transferred to adult court, publication of identity appears to only be permissible in respect of the specific offences for which the young person was transferred, i.e., information relating to previous findings of guilt in youth court do not appear to be able to be published. This can produce anomalous situations in which information that is key to the transfer decision and to subsequent sentencing in adult court is not able to be published. This does not assist in promoting public understanding of the justice system, nor can it be said that the publication of this information will, in these circumstances, harm the young person. Consideration could be given to clarifying the Act so that, once transferred to adult court and all reviews (appeals) respecting the transfer decision are complete, specified information (e.g. findings of guilt) relating to the youth court history of the transferred young person may be published. If so, however, a further problem could be created: if the young person is subsequently found not guilty of the offence in adult court, then the youth court history of an acquitted young person would become publicly known.[35]

This dilemma could be resolved if, as recommended in Chapter 8, a post-adjudicative transfer process is adopted. If this recommendation is not accepted, then this issue should be reviewed.

In light of the above, **and bearing in mind that the first element of the recommendation below was supported by a substantial majority of representatives, the Task Force recommends that:**

Section 38 YOA should be amended:

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[35]This now occurs, at least with respect to the offence for which the young person was transferred, i.e. the young person becomes publicly known as accused of the offence.

(1) To allow, in exceptional cases, for the media publication of the identity of dangerous young persons who have been found guilty of a serious personal injury offence where, upon application to the youth court, the criteria set out in subsection 38(1.5) are satisfied and, additionally, the court is satisfied that:

(a) disclosure of the information to a person or persons would be insufficient to reduce the risk of serious harm to others, and

(b) (media) publication is necessary for the reduction or avoidance of that harm.

(2) So that, if before the expiration of the time periods set out in the Act for non-disclosure of records, a young person is subsequently found guilty of an offence as an adult (or in ordinary court), defined information relating to the prior youth court history of the young person may be published. This change could apply where there is a subsequent conviction in adult court for any offence or could be limited to a narrower range of more serious offences. In either case, the provisions respecting the effect of subsequent adult convictions should be consistent between the publication and records sections.

(3) To enable a young person, after having attained the age of eighteen years, to consent to the publication of his or her own identity, or other identifying information, without need to apply to the youth court for approval of the same.

(4) So that, upon application to the youth court, the publication of identity may be authorized for a time-limited period where the court is satisfied that publication is necessary to facilitate the health or safety of the young person.

9.2 PUBLIC DISCLOSURE

Public safety disclosure has already been discussed to some extent in the context of media publication (see, 9.1.6). The discussion and recommendations in this section assume that the Bill C-37 amendments respecting selective public notification will remain in place.

These amendments provide that, on application by the provincial director, the Attorney General or agent of the Attorney General, or a peace officer, the youth court may make an order permitting the applicant to disclose information relating to a young person to specified persons if the court is satisfied that the disclosure is necessary, having regard to:

- the young person has been found guilty of an offence involving serious personal injury;
- the young person poses a risk of serious harm to other persons; and
- the disclosure of the information is relevant to the avoidance of that risk.

The young person and the young person's parents have an opportunity to be heard, but an ex parte application may be made where the youth court is satisfied that reasonable efforts have been made to locate the young person and that these efforts have not been successful. If the disclosure is approved, the youth court must specify the person or persons to whom the information is to be disclosed and must also specify the nature of the information to be disclosed.

In effect, these new provisions preserve the privacy of young persons but, in weighing competing interests and values, allow for exceptions to be made in circumstances where there is a risk of serious harm to others. The court adjudicates these applications, thereby ensuring that the interests of the public and of the young person are considered and balanced.

There is no question that these provisions are needed and justifiable. Virtually every experienced administrator involved in the youth justice system can cite case examples, usually but not always involving sex offenders, where there is a risk of serious harm to others and notification would be appropriate. For example, a former young offender who has been found guilty in youth court of sexual interference with a child may, after not responding to court-ordered treatment and following expiration of the youth court order, enter into a common-law relationship with a woman who has a young child. It is clear that the protection of the child in circumstances such as this outweighs the privacy interests of the young person - notification to

the mother of the risk to her child, so that protective measures can be taken, is simply the right thing to do.[36]

Arguably, these new provisions may not allow for media publication of identity, but rather only notification to specified members of the public who are identified as being at risk of serious harm. This selective public notification process might provide a more reliable means of enhancing public safety than media publicity, but this will remain unclear until these new provisions are tried and assessed. As noted, relying on media publicity is, in essence, a passive approach wherein the youth justice system would merely permit publicity and then rely on the media and the public to do the rest of the job. In contrast, the public notification policy reflected in Bill C-37 involves a proactive approach whereby the youth justice system takes active steps to ensure that relevant members of the public are informed of a risk of serious harm. Nonetheless, it is possible that rare circumstances could arise where selective public notification could prove inadequate. Consequently, a substantial majority of the Task Force has recommended an amendment to the Act to allow, in exceptional cases and upon approval by the youth court, for the media publication of identity (i.e., mass notification) where selective public notification would be insufficient to avoid or reduce the risk of serious harm to others. (See, 9.1 in this chapter).

A public notification process is by no means foolproof. There undoubtedly will be cases where the risk of subsequent serious harm to others could not have been predicted or will be under-estimated (or, conversely, over-estimated). Moreover, the effectiveness of a selective public notification process is dependent upon youth justice authorities being apprised of the particular circumstances of the young offender on an ongoing basis; this is not always feasible, especially after a court order has expired.

While the Task Force endorses these new public notification provisions, there are four areas in which improvements could be made. First, there could be circumstances where a young person poses a risk of imminent serious harm and there is not sufficient time to avoid that harm while, at the same time, satisfying the procedural requirements of filing an application before a youth court judge, ordering a medical or psychological report and conducting a full hearing to adjudicate the application. To address these (rare) cases of imminent harm, the Task Force agreed that an exceptional procedure

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[36]An alternative but more intrusive approach is to notify child welfare authorities, in which case the child may have to be (inappropriately) apprehended. Before Bill C-37, some successful notifications were made in British Columbia under the broad provisions of s.44.1(1)(k) YOA - "desirable in the interests of the administration of justice" - but the legal authority for such applications was tenuous.

allowing for an expeditious order to be made by the youth court should be considered.

Second, sub-sections 38(1.12) and (1.14) YOA prohibit the subsequent disclosure of information relating to a young person, except in specified circumstances. Subsection 38(2) specifically creates a hybrid offence for subsequent disclosure in contravention of subsections 38(1.12) and 38(1.14). There is, however, no offence specifically created for a member of the public who is notified pursuant to subsection 38(1.5) and who subsequently discloses that information to another person, e.g. neighbours. Certainly, cogent argument could be raised that, notwithstanding this apparent inconsistency, a person who is notified pursuant to section 38(1.5) and who subsequently discloses that information to others (e.g., neighbours) in an egregious manner, would still be contravening section 38(1) and, therefore, could be charged. Any changes concerning subsequent disclosure, then would really amount, for greater certainty, to a clarification of the law on this matter.

Third, subsections 38(1.11) to (1.15) YOA permit disclosure of information for the purposes of procuring information that relates to the preparation of a report and to professionals or other persons, including schools, engaged in the supervision or care of a young person. Such disclosures are administrative and, according to the definitions we have recommended, therefore involve information sharing. Accordingly, these provisions should be removed from section 38, revised, and included in provisions respecting information sharing. This is implicit in our earlier recommendation respecting definitions, but is reiterated here for clarity.

Fourth, it is possible that these new provisions permitting subsequent disclosure could inappropriately encroach upon the provisions for judicially authorized disclosure to members of the public for safety purposes. In this regard, subsection 38(1.13) permits administrative disclosure of information to a school where it is necessary to "ensure the safety of staff, students, or other persons, as the case may be". Subsection 38(1.14) then permits the school to subsequently disclose that information to "any other person" if the disclosure is necessary for a purpose identified in subsection 38(1.13), e.g., to ensure the safety of "other persons". It is possible that these provisions could be misconstrued and misused so that a school could, for example, employ an apparent legal authority to notify a neighbour adjoining school property. Given this, and that public safety disclosure is intended to be a judicially authorized procedure, these provisions should be clarified to limit the authority respecting subsequent disclosure.

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

The public safety disclosure and information sharing provisions enacted by Bill C-37 should be modified to:

(1) **Permit disclosure to be authorized by a youth court judge at an ex parte hearing in exceptional and urgent circumstances where the criteria set out in s.38(1.5) YOA are satisfied and the imminence of the risk of serious harm to others is such that serious harm cannot be avoided or reduced in the time required to proceed by way of the normal procedures set out under s.38(1.5).**

(2) **Clarify that it is an offence for a person notified pursuant to subsection 38(1.5) YOA to subsequently disclose that information to other persons.**

(3) **Clarify that where information is shared, pursuant to subsection 38(1.13) YOA, with schools or other professionals involved in the supervision or care of young persons, the information may not be subsequently disclosed to members of the public.**

In closing, these provisions for public safety notification are new and untested. They are also important, As noted, it is uncertain as to how well they will work. The procedures - and, to some extent, values - respecting public safety notification are evolving in both the youth and adult criminal justice systems. Further, some jurisdictions have expressed concerns that the process of requiring judicial authorization could, depending on the number of applications, contribute to court backlogs and prove to be costly. Alternative approaches could include (subject to statutory criteria) an administrative decision-making process or determination by an administrative tribunal. Moreover, some members of the Task Force raised the issue of whether the public safety notification provisions should be extended to non-adjudicated youth, such as those on bail for serious personal injury offences. This should be examined in future and in light of experience with the new provisions for adjudicated youth. In light of this, **the Task Force recommends that:**

> **Federal-Provincial-Territorial Senior Officials Responsible for Youth Justice should develop a plan for monitoring and assessing the public safety notification provisions of Bill C-37.**

9.3 INFORMATION SHARING

Provisions respecting information sharing are set out in the publication and records disclosure sections of the Act. This overlap is the source of considerable confusion. For example, with respect to schools and other youth serving organizations, section 38 YOA indicates that information relating to a young person may be shared (disclosed): where that disclosure is necessary for procuring information that relates to any report required under the Act; to ensure compliance by the young person with a court order or authorization under the Act; or to ensure the safety of staff, students or other persons. Subsection 38 (1.1) also provides that the publication ban does not apply in respect of the disclosure of information in the course of the administration of justice where it is not the purpose of the disclosure to make the information known in the community.

At the same time, subparagraph 44.1(1)(g)(iii) YOA indicates that records relating to a young person may be disclosed to any member of a department or agency of a government in Canada that is engaged in the supervision or care of the young person. Subparagraph 44.1(1)(h) also permits records to be disclosed to a person, or person within a class of persons, designated by the Lieutenant Governor in Council of a province. Both of these provisions in section 44.1 can be used or construed as authority to share information with schools[37] and other youth serving organizations. Unlike section 38, these provisions under section 44.1 do not prescribe the purposes for which records may be disclosed.[38]

There are many uncertainties about information sharing, a grey area that has been darkened by the new and more overlapping provisions of section 38 respecting disclosure to professionals and other persons engaged in the supervision or care of young persons. Can a probation officer (youth worker) "disclose" information to a school during the course of a social inquiry investigation to determine suitability for alternative measures, given that these investigations (unlike pre-disposition or progress reports) are not "required" under the Act? Can a youth worker even attend a meeting with school personnel and officials from other youth serving agencies (e.g.

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[37]Whether a school (or school board) is an "agency" of a government in Canada is unclear; child welfare authorities could be construed as a department or agency engaged in the supervision or care of the young person but a children's aid society may not fall within the meaning of "department or agency". Some jurisdictions have designated schools and other youth serving agencies as authorized recipients of records, pursuant to s.44.1(1)(h) YOA.

[38]Section 44.1(1)(h) YOA does state that an Order-in-Council should specify a purpose for an authorized party to receive a record but, unlike section 38, does not expressly define these purposes.

addictions treatment, child welfare, etc.) for case planning purposes where the issue is the provision of services to the young person rather than compliance with an order or the safety of others? Even if the youth worker remains silent about the specific nature of the offences committed by the young person, does not the very presence of the youth worker at such a meeting "publish" or "disclose" that the young person is an offender? Are these uncertainties (and there are many others) addressed by the records disclosure provisions in section 44.1 or section 38 (1.1)? If so, why are there overlapping and apparently conflicting provisions?

Because of the overlaps and uncertainties, we have recommended that publication, public disclosure, information sharing and record be defined in the Act. We have also recommended that the provisions in section 38 which address information sharing - i.e., subsections 38 (1.11) to (1.15) - be removed from section 38, amended and merged with provisions respecting information sharing (i.e., an amended section 44.1).

These changes, if accepted, will only address part of the present confusion. The current provisions in section 38 that address information sharing specify the purposes for which information may be provided, e.g. for the administration of justice; to ensure compliance by the young person with an order of the court; or to ensure the safety of students, staff or others. In contrast, the information sharing provisions of section 44.1, more or less, [39] set out a "shopping list" of parties with whom information may be shared, e.g. the young person, the young person's parents or counsel, the victim, peace officers investigating an offence, etc. Except for youth court records, which shall be provided (upon request) to specified parties, police and government records "may" be provided to the listed parties, i.e., there is discretion to provide the information or not. There are, however, no provisions to explicitly guide the exercise of this discretion. Given this, there is a need to explicitly set out in the Act the purposes for which information may be shared. This is the approach generally taken in privacy and access to information legislation.[40]

As noted, many of the purposes for information sharing - i.e. law enforcement, the administration of justice, etc. - are already set out in the

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[39]In some cases, purposes are defined in section 44.1, e.g. where a record is disclosed to a peace officer investigating an offence allegedly committed by a young person or (as per Bill C-37) for "any other law enforcement purpose".

[40]The Task Force considered a comprehensive revision of the records provisions along the lines of privacy legislation (see, Coflin, 1995), but elected an approach which incorporates only some elements of privacy legislation, i.e., setting out the purposes for information sharing.

Act either directly or indirectly, albeit in a rather confused and disjointed manner. These need to be clearly explicated. In this regard, a key area of concern is the sharing of information with persons or organizations for the purposes of providing care or supervision of, or services or assistance to, young persons.

In Chapter 2, we discussed the need for better integration and coordination of services and enhancement of multi-disciplinary approaches. Many young offenders have multiple problems. Addressing the multiple needs of young offenders is crucial to rehabilitation and reintegration into society, thereby reducing the likelihood of recidivism and helping the young person become a contributing member of the community. Several agencies and systems may have mandates, resources and expertise to respond to the different needs of these youth, e.g., child welfare services, schools, mental health agencies, etc. Others may also need to be involved, including the family and some community members such as aboriginal elders, ministers, and so on. For example, we have recommended a strengthening of "conferencing" approaches to conflict resolution and to case planning/ administration, whether in the form of youth justice committees, community accountability panels, family group conferences, aboriginal sentencing circles, or case conferences involving professionals and others. A key to the effectiveness of these approaches, and to coordination of services generally, is the capacity to share information with the participating parties.

In short, the provisions of the Act need to be clarified and broadened to permit information sharing between youth justice authorities and other relevant youth serving agencies and persons who are engaged in providing supervision or care of, or services or assistance to, young persons. This concern applies to information sharing both during the course of a disposition and once the disposition is concluded: the ability of helping agencies to provide necessary services after a disposition is completed should not be unduly fettered by constraints on information sharing. Information sharing also needs to be proactive, i.e., where youth justice authorities reach out and actively engage relevant helping agencies or persons. In this regard, the current records disclosure provisions only permit government records to be disclosed "on request". There is a paradox here: for example, the provincial director cannot, without a request, share information with a mental health agency for case planning purposes while the mental health agency cannot, of course, request the information if it does not know of the young person's

conflict with the law.[41]

We are aware that broadened information sharing provisions may provoke some concern among some. For example, the provision of information to schools could (hopefully, in only rare cases) prompt inappropriate reaction from school authorities who might be concerned about having a particular young offender enrolled in the school. If so, there are administrative remedies available within the school system itself. It should also be noted that the provision of information can be helpful in assuaging such concerns. For example, if a school learns, by virtue of contact with a youth worker checking on school attendance, that a young person is on probation, the school may assume the worst. If the youth worker is able to indicate that the young person is a non-violent offender (as is usually the case) the school's concerns will undoubtedly dissipate. Further, the appropriate inter-agency use of information can be better assured by establishing inter-agency protocols respecting information sharing and ensuring that agency personnel are suitably trained.

Critics of the youth justice system cannot have it both ways: on the one hand, lamenting the lack of coordination of rehabilitative services and then, on the other hand, urging a strict policy respecting the privacy of young persons which inhibits the coordination of these services. A balance needs to be found between addressing public protection, accountability and the special needs (i.e., coordinated rehabilitative measures) of young persons. In this regard, we note that the Bill C-37 amendments to the publication and records provisions of the Act only addressed public safety and accountability interests, but not the special needs of young persons. In effect, the debate about whether information sharing for the purposes of case planning/ administration should or should not be enhanced reflects a tension between two different means of achieving rehabilitation, i.e., preserving the young person's privacy (and thereby avoiding labelling) versus facilitating the coordinated delivery of services to address the young person's needs.

It should also be emphasized that we do not contemplate the broad and unrestrained dissemination of official records: information relating to a young person, including official records, should only be disclosed where it is relevant to and necessary for a specified purpose and then only to the extent necessary. Given this, official records such as copies of court orders or pre-disposition reports should only be shared on a need-to-know basis. This will

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[41]Subsection 38 (1.13) does permit proactive information sharing, but only for specified purposes, i.e. compliance and safety - but is silent with respect to case planning. Some would argue that case planning is a component of case supervision which, in turn, is inextricably linked to compliance and safety.

vary according to the circumstances. For example, a copy of a pre-disposition report should rarely, if ever, be forwarded to school counsellors but could be necessary for a child welfare worker who is arranging for substitute parenting care. On the other hand, a copy of a probation order with conditions prohibiting contact with another student in the school may, for enforcement purposes, need to be provided to the school in some cases because it is relevant. In most cases, however, the sharing of "official" records can and should be avoided altogether. Having said that, a case synopsis which (among many other issues) indicates that a young person is on probation with certain conditions, and which is distributed to a case conference of helping professionals, is a "record" insofar as it identifies the young person as an offender. Such communication, where it serves the rehabilitative interests of the young person, should not be prohibited.

The law is a blunt instrument. Because information sharing requirements vary so much according to the different circumstances of individual cases, the law cannot particularize what information will be shared with whom and when. The law can only establish clear principles and guidelines (i.e. purposes) which, with the assistance of complementary policy and protocols, must be interpreted and applied on a case by case basis.

While setting out the purposes for information sharing in the Act would be helpful, retention of the current provisions of section 44.1 would, if modified, also be helpful insofar as these provisions set out parties to whom youth court records must be provided and to whom police and government records may be provided. In effect, the current provisions of subsection 44.1(1) establish a right of access to youth court records to these enumerated parties. This right of access should be maintained.

Access by the enumerated parties in subsection 44.1(1) to police and government records is discretionary, but there is no guidance in the Act as to how this discretion is to be exercised. If section 44.1 included both a statement of purposes and a "shopping list" of enumerated parties to whom police and government records may be provided, then there would be clear guidance as to how to exercise this discretion. As well, there is a need to clarify and, to some extent, expand upon the enumerated parties to, for example, include the provincial director, an Ombudsman, coroner, youth or child advocate, provincial licensing systems, auditors, and a person carrying out a public inquiry or investigation.

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

Sections 44.1 and 44.2 YOA should be retitled "Privacy and

Information Sharing" and be amended, along the lines of the appended draft which, in summary:

- o establishes the principle of the need to preserve the privacy of young persons;

- o establishes that information may be shared, to the extent necessary, where it is relevant to and necessary for a defined purpose;

- o defines the purposes for information sharing as including (in brief):
  - (I) law enforcement;
  - (ii) the administration of the criminal law;
  - (iii) the administration of justice, including civil proceedings;
  - (iv) pretrial disclosure by the Crown;
  - (v) the care or supervision of, or provision of services or assistance to, a young person;
  - (vi) ensuring compliance with an order of the court;
  - (vii) the safety of staff, students, or other persons;
  - (viii) granting government security clearances;
  - (ix) research statistical, or auditing purposes;
  - (x) victim assistance services or criminal injury compensation; or
  - (xi) any other purpose which a youth court is satisfied is consistent with the enumerated purposes, or necessary in the public interest, or necessary in the best interests of the young person;

- o maintains a list of enumerated parties to whom youth court records shall be disclosed and to whom police and government records may be disclosed;

- o clarifies that records or information in or derived from a police or government record (s.41 to 43) may be disclosed with or without request; and

- o expands the enumerated parties to include:
  - (I) the provincial director
  - (ii) any person participating in a conference, as defined in the Act;
  - (iii) a broader definition of "any member of a department or agency of a government in Canada, or any agent thereof";
  - (iv) an Ombudsman or child or youth advocate appointed pursuant to an Act of a legislature;
  - (v) government agencies responsible for the licensing or regulation of driving or vehicles, or the acquisition or possession of firearms;

(vi) **to an officer investigating, or a tribunal or court determining, whether to grant citizenship, immigrant or refugee status, or to deport a person, whether as a young person or as an adult, and**

(vii) **a coroner or other person appointed to carry out a public inquiry or investigation where the record or information is relevant to the investigation, inquiry or inquest.**

If these recommendations are accepted, it will be a considerable period of time before the legislation is changed. In the interim, amendments brought about by Bill C-37 affect information sharing with schools and other helping agencies providing services to young offenders. Schools and other agencies need to know the legal constraints on information sharing, the extent of information they may receive, and what to do with that information once it is received. For example, it is not necessary for schools to receive a list of every student at the school who is on probation. When information is provided, schools and other agency officials need to decide what, if any, actions may be required. Policies will need to be developed. These decisions and policies would be best made in collaboration with youth justice agencies.

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

Provincial and Territorial Ministers Responsible for Youth Justice, in collaboration with schools and other helping agencies, should take steps to facilitate:

- **the development of protocols respecting information sharing; and**

- **training of relevant personnel from schools and other helping agencies about young offender information sharing.**

9.4 RECORDS

As noted in the introduction to this chapter, we have recommended that "record" be defined in the Act.

There has been some criticism of the Act for (not defining a "record". Consideration was given to whether it would be possible to develop a functional or operation definition of record which would itemize every conceivable document that might constitute a record, such as information, arrest warrants, pre-disposition reports, and so on. However, given the great number and variety of documents that exist, and the different forms in which these documents may be disclosed, it was agreed that an exhaustive definition, described at the outset of this chapter, was not feasible or appropriate. Instead, the Task Force opted for a definition which in many respects parallels the definition of record found in access and privacy legislation.

With respect to records retention, subsection 45(1) YOA sets out time periods which, after being realized, require that records not be disclosed or, in the case of police records kept in a central repository (CPIC), destroyed. As amended by Bill C-37, the Act also provides for the indefinite retention, in a special records repository, of police records of first and second degree murder and other serious offences set out in s.16(1.01)(b) YOA, as well as the longer retention (five additional years) of records of serious offences set out in a schedule to the Act.

The records retention scheme is generally acceptable, but clarification is required in one area.

Subsection 45.02(3) YOA provides that where a young person commits one of a scheduled list of serious offences, a police record of the offence may be kept in a special records repository for an additional five years. If the young person (now an adult) is subsequently found guilty of an offence set out in the schedule, the record for the earliest offence is, in effect, automatically converted to an adult criminal record.

The problem with these provisions is that the schedule does not include first or second degree murder. Hence, if a young person is found guilty[42] of attempted murder and is subsequently convicted as an adult for aggravated

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[42]In fact, subsections 45.02(2) (3) and (4), and 45(2.1) YOA employ the word "convicted". These should also be amended because a young person found guilty under the Act is deemed not to be convicted of an offence (s.36), nor is the word convicted used elsewhere in the Act in relation to youth court decisions.

assault, the record of the first offence (attempted murder) would be automatically converted to an adult record. If, however, that adult offence was first or second degree murder, the record would not be automatically converted. Given this, the schedule of offences to the Act relating to subsections 45(2.1), 45.02(3) and 45.02(4) should be amended to include first and second degree murder.[43]

The status or meaning of a young offender record is confusing. Under the Act, young persons are not "convicted" of offences, but rather "found guilty". A court imposed sanction is not a "sentence", but rather a "disposition". Section 36 provides that where a young person is discharged absolutely or all dispositions have ceased to have effect, the young person shall be deemed "not to have been found guilty or convicted of the offence".

Even though a young person is deemed not to have been found guilty of an offence once all dispositions have ceased to have effect, the record may still be disclosed to and used in accordance with the provisions of sections 36 and 45 YOA. For example, a young person who has been found guilty of breaking and entering and having completed one year probation is deemed not to have committed the offence (s.36); notwithstanding this, the record of the offence may, under section 44.1, still be disclosed to a government in Canada for the purposes of security screening for employment.

Once the time periods for non-disclosure (or, in the case of central repository police records, destruction) are realized, subsection 45(4) provides that a young person shall be "deemed not to have committed any offence". Notwithstanding non-disclosure, a record may be "revived" under s.45.1 where, upon application, a youth court judge is satisfied that disclosure is desirable in the interests of the administration of justice. Further, even though a young person is deemed not to have committed any offence, police records of specified serious offences may be transferred to a special records repository and made available for use in limited circumstances.

Given all this, does a young person have a "record"? A youth court record? A criminal record? What is the practical effect of being deemed not to be convicted or found guilty of an offence, or not to have committed any offence? What is the difference between being deemed not to have committed any offence at one point under section 36 and again at a later point under subsection 45(4)? These are questions that legal scholars wrestle with: the answers are incomprehensible to young persons, parents

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[43]Since this is a minor technical matter, a formal recommendation is not required. There are several technical matters relating to publication, information sharing and records that could be identified.

and the lay public.

A pardon is not available under the Act because, from a legal perspective, it is not necessary, i.e., because records become non-disclosable and young persons are deemed not to have found guilty of any offence. In the eyes of young persons and the public, however, this is an obscure legal explanation. In contrast, a pardon is fairly well understood by the public and by young people: in effect, it means that an offender, having demonstrated a law-abiding lifestyle, is excused or forgiven for the offence. A pardon may be especially important to young persons in applications for employment, given that there are lawful means by which private employers can obtain access to young offender records. Given this, it would be helpful to clarify and reconcile the language in the Act used to describe the status of records and also to provide that, once the circumstances set out in subsection 45(1) are realized, a young person is deemed to be pardoned for the offence, bearing in mind that the effect of this proposal on records kept in the special records repository requires further study - deeming a person to be pardoned for a scheduled offence should not bar the use of records kept in the special records repository.

With respect to access to records, some employers, instead of directly requesting a (young offender) criminal records check from the police (which would be denied), ask the young person to make a personal request to the R.C.M.P. for their own criminal record. Since the R.C.M.P. are governed by the federal Privacy Act, which entitles any person access to government records pertaining to themselves, the R.C.M.P. are obliged to produce the records for the young person. Although this procedure circumvents the intent of the confidentiality of records in the YOA, there appears to be no reasonable way to resolve it. To do so would require amendment to the federal Privacy Act such that young persons were, unacceptably, denied access to their own records.

Employer access to young offender records by the means described above can be avoided administratively. If a young person makes a personal request for his or her record, but also specifies that the record is for employment purposes, a record with a youth history should not be produced because the record is intended to be used for a purpose that is not permitted by the Act. In effect, an edited version of the person's record, excluding the youth record, should be produced. (This is no different than what occurs with respect to adult records that have been pardoned.) To accomplish this, young persons need to know the implications of requesting one's own record, and how to do so, while police forces need to establish or reinforce policies such that, if a young person requests his or her own record,

enquiries are made as to the purposes of that request.

Finally, it is not surprising that given the complexity of the records provisions, young persons, parents and others do not fully understand the use and status of young offender records. This, however, often goes beyond a lack of understanding of complexities and includes erroneous beliefs: for example, it is commonly held that a young offender record somehow disappears or is vacated once a person becomes an adult (age 18). This, of course, is not true. Better information is required to inform young persons, parents and the public about young offender records.

Given this, **the Task Force recommends that:**

- **Subsection 45(4) YOA should be amended so that, once the circumstances set out in subsection 45(1) are realized, a young person shall be deemed to be pardoned for the offence.**

- **The federal Department of Justice, in consultation with provinces and territories, should develop prototype "plain language" public information brochures respecting the use and status of young offender records, including information which indicates that, where a young person requests access to a record for employment purposes, this should be indicated to police forces. Provinces and territories should make these information brochures available to young persons, parents and the public.**

- **The R.C.M.P. and other police forces should establish policies such that, when a person with a youth record requests a record, enquiries are made as to whether the record is for employment purposes.**

There are several details about the recommendation respecting pardons that need to be worked out.[44]

In closing, the subject of employer access to records - and the discussion

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[44]For example, clarification may be required that any pardon would be subject to being lifted if subsequent offences are committed; in accordance with an application made pursuant to section 45.1; and any disclosure made pursuant to section 45.02. Other matters could include clarification that: (1) the pardon provision of the Criminal Code and Criminal Records Act would not apply; (2) that, unlike the situation with respect to adults, there would be no distinctions concerning the revocation of pardons for summary conviction and indictable offences; (3) that the effect of adult versus youth pardons needs to be examined (i.e., adults are not deemed to have not been convicted of the offence; the conviction is only "vacated"); and (4) whether, pursuant to section 45.03 (special fingerprints repository), fingerprints can be retained notwithstanding that the young person has been deemed to be pardoned.

above - raises the issue of access to young offender records information by private employers such as day care operators in circumstances where the person applying for employment has a youth court record relating to the sexual abuse of children.[45] Such employers cannot lawfully access youth court records to screen out known abusers and, according to the discussion above, would not be able to gain indirect access by requesting that the young person apply for a copy of his own record. The protection of children in these circumstances is something, most would agree, that outweighs the privacy interests of young offenders. Yet, this is a thorny and complex issue which requires further study and should be taken into account in considering revisions to the records and information sharing provisions of the Act.

[45]There are limited means by which public employers may have access to young offender records to screen out prospective employees who are known abusers of children. S.44.1(1)(l) permits the disclosure of records to any person for the purpose of determining whether to grant "security clearances" required by a government for the purposes of employment or the performance of services. However, it is not clear that the term "security clearances" contemplates criminal history checks for these purposes. As well, s.44.1 (l)(h) enables the Lieutenant Governor in Council to designate access to records for specified purposes, however, it is questionable as to whether provisions could be used to accord private employers access to records. Note also that these provisions do not apply once the time periods for non-disclosure set out in section 45 have been satisfied. British Columbia recently enacted legislation which requires screening of persons who provide (public) services to children; youth records are accessed by way of an Order-in-Council.

9.5 ADDITIONAL CONSIDERATIONS

In this chapter we have recommended several amendments which, if accepted, will require a fairly comprehensive revision of sections 38 and 40 to 46 of the Act. We have, in the main, limited ourselves to key changes required. Not included are details of consequential changes that would be required. For example, if the recommendations respecting information sharing are accepted, s.44.2 should be repealed (as redundant) and sections 45.02 and 45.1 should be amended to reflect, where applicable, the same modified language in section 44.1. If it is clarified that peace bonds are applicable to young persons (Chapter 4), then there will also have to be clarification of their status vis-a-vis records because a person who is subject to a peace bond is neither "accused of or found guilty of an offence". Another matter which requires further study is the status of police incident reports and police notebooks, which often precede an actual allegation or charge.

There are also several other matters which require further study. For example, some concern has been raised about changes (reductions) in the records retention periods for summary conviction offences brought about by Bill C-37, in light of recent criminal Code amendments which encourage more summary conviction changes to be laid (by increasing the penalty to eighteen months). It is anticipated that there may be an increase in the number of more serious offences, such as sexual offences, being dealt with summarily, which raises concern about the (new) three year retention period for summary conviction offences.

Another issue to consider is the meaning of the phase "after all dispositions made in respect of that offence" as it appears in section 45(1) (9), and the drafting of section 45(4), concerns about which has been prompted by a recent case brought before the British Columbia Court of Appeal (R. v. McKay, 1996) and amendments to section 45 brought about by Bill C-37. Yet another issue is the question as to whether an application needs to be made pursuant to section 45.1 for disclosure of a youth court record in the special records repository.

Several other examples of consequential amendments, issues requiring further study and desirable changes could be given. Suffice to say that these technical matters are best left to be reviewed by federal/provincial/territorial Senior Officials Responsible for Youth Justice.

APPENDIX- CHAPTER 9

PROPOSED REVISION OF S.44.1 YOA

"(1) Subject to section 38 or an order made pursuant to subsections 13(6) or 14(7), a record or part thereof kept pursuant to sections 40 to 43 or any information in or derived from a record may, to the extent necessary, and having regard to need to preserve the privacy of young persons, be provided to and used by another person or organization where it is relevant to and necessary:

(a) for any law enforcement purpose;
(b) for the purposes of the administration of this Act, the Criminal Code, or any other federal or provincial law or regulation related to the administration of the criminal law;
(c) for the purposes of the administration of justice, including any civil proceedings commenced against, by or relating to a young person accused of or found guilty of an offence under this Act;
(d) for the purpose of pre-trial disclosure by the Attorney General or agent of the Attorney General to any person accused of an offence, or to counsel for the accused person, where the Attorney General or agent of the Attorney General is satisfied that such information or record is relevant to the defence of the accused;
(e) for the care or supervision of, or provision of services or assistance to, a young person;
(f) for procuring information that relates to the preparation of any report or inquiry required under or related to this Act;
(g) to ensure compliance by the young person with an agreement made pursuant to section 4, an authorization pursuant to section 35, or any order of the court;
(h) to ensure the safety of staff, students or, except where an authorization is required pursuant to section 38 (1.5) (public safety disclosure), other persons, as the case may be, where information is provided to any professional or other person who, with or without remuneration, is engaged in the supervision or care of, or provision of services or assistance to, young persons, including the representative of any school board or school or any other educational or training institution;
(i) for the purpose of determining whether to grant security or criminal history clearances required or authorized by the Government of Canada or the government of a province or a municipality for the purposes of any employment or, with or

without remuneration, the performance of any services;

(j) for research or statistical purposes approved, in respect of records kept pursuant to section 40, by a youth court judge or, in respect of records kept pursuant to sections 41 to 43, by the Attorney General or agent of the Attorney General, the provincial director, or the Commissioner of the Royal Canadian Mounted Police or of a provincial police force or the chief of a municipal police force;

(k) to facilitate the provision of assistance or services to a victim by a program approved by the Attorney General or to determine an application by a victim for criminal injury compensation; and

(l) any other purpose which, upon application by any person who has a valid and substantial interest in the record or information, a youth court judge or, as the case may be, a superior court judge, is satisfied

(i) is consistent with a purpose set out in paragraph (a) to (l), or

(ii) is necessary in the public interest, or

(iii) is necessary in the best interests of the young person.

(2) No person to whom a record or any information is provided pursuant to subsection (1) shall communicate that information to any other person unless the communication is necessary for a purpose referred to that subsection.

(3) Without limiting the generality of subsection (1), any record or part thereof, subject to an order made pursuant to subsections 13(6) or 14(7), that is kept pursuant to section 40 shall, upon request, and any record or part thereof, or information in or derived from a record kept pursuant to sections 41 to 43 may, upon request or without request, be provided to:

(a) the young person to whom the record relates;

(b) counsel acting on behalf of the young person or any representative of that counsel;

(c) the Attorney General or an agent of the Attorney General;

(d) the parent of the young person, any adult assisting the young person pursuant to subsection 11(7) or, with the consent of the young person, an appropriate adult assisting the young person during the course of any proceedings relating to the offence or during the term of any disposition;

(e) any judge, court or review board, for any purpose relating to proceedings relating to the young person under this Act or to proceedings in ordinary court in respect of offences committed or alleged to have been committed by the young person,

whether as a young person or as an adult;

(f) to any peace officer,

(i) for the purpose of investigating any offence that the young person is suspected on reasonable grounds of having committed, or in respect of which the young person has been arrested or charged, whether as a young person or an adult;

(ii) for any purpose related to the administration of the case to which the record relates during the course of proceedings against the young person or the term of any disposition; or

(iii) for the purpose of investigating any offence that another person is suspected on reasonable grounds of having committed against the young person while the young person is, or was, subject to an order of any court;

(g) the provincial director;

(h) any member of a department, agency, board, commission, or similar body of a government in Canada, or any agent or contractor thereof, that is

(i) engaged in the administration of alternative measures in respect of the young person;

(ii) preparing a report in respect of the young person pursuant to this Act or for the purpose of assisting a court in sentencing the young person after the young person becomes an adult or is transferred to ordinary court pursuant to section 16;

(iii) engaged in the supervision or care of, or provision of services or assistance to, the young person, whether as a young person or an adult, or in the administration of a disposition, sentence or other order of the court, or an authorization under section 35, in respect of the young person, whether as a young person or an adult;

(i) any person participating in a conference, as defined in this Act;

(j) an Ombudsman or child or youth advocate appointed pursuant to an Act of legislature;

(k) in respect of an offence committed by or alleged to have been committed by a young person relating to driving a motor vehicle or the possession or use of firearms, or a prohibition or order against driving or against the possession of firearms imposed on a young person, to a member of a department, agency, board, commission or similar body of a government in Canada, or any agent thereof, responsible for the licensing or regulation of driving or motor vehicles or the acquisition or possession of

firearms;

(l) an officer investigating, or a tribunal or court determining, pursuant to the Citizenship Act whether to grant a citizenship, immigrant or refugee status, or to deport a person accused of or found guilty of an offence, whether as a young person or an adult;

(m) the victim of an offence, as defined in section 735 of the Criminal Code, committed by or alleged to have been committed by the young person to whom the record relates;

(n) an insurance company for the purpose of investigating any claim arising out of an offence committed or alleged to have been committed by the young person to whom the record relates;

(o) any employee or agent of a government in Canada for statistical purposes pursuant to the Statistics Act or required by the province, or for the purposes of an audit, including an audit of an agreement made pursuant to section 70 of this Act or any person carrying out research or collecting statistics who is authorized to do so under subsection (1);

(p) a coroner or other person appointed by the province or Attorney General to carry out an inquiry or investigation where the record or information is relevant to the inquiry, investigation or inquest; or

(q) any person, or person within a class of persons, designated by the Governor in Council, or the Lieutenant Governor of a province, for a purpose and to the extent specified by the Governor in Council or the Lieutenant Governor in Council, as the case may be.

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CHAPTER 10 - PARENTAL INVOLVEMENT AND RESPONSIBILITY

10.1 PARENTAL INVOLVEMENT

Because the family is the primary instrument of socialization, it has been described as the first line of social defence against crime. Research on the causes and correlates of delinquency have identified key risk factors associated with offending behaviour. Family dysfunction and poor parental supervision and socialization practices are, among other factors, important influences on a youth's involvement in delinquency. Youths who become involved in more persistent or serious crime often have developed a pattern which includes unacceptable behaviour, difficulty at school and problems maintaining healthy relationships with peers and others. Inadequate or inconsistent parental supervision, a lack of social skills and interpersonal difficulties within the family have, for example, been identified as factors which influence the development of these problems.

While the family can be a risk factor in delinquency, it can also be a protective factor. Even in an environment where adolescent involvement in crime might almost be expected, most youth - while they might break the law in a minor and transitory way at some time during adolescence - do not become involved in persistent or serious crime. These non-offending youth provide clues as to what sets them apart from others in similar situations who do become involved in repeat or serious crimes. Youths who avoid conflict with the law tend to have a long-term goal or dream which helps them avoid making destructive choices. Young people with a dream for the future, and the capacity to defer gratification, tend to remain optimistic and hopeful about their lives. They also often have a close and positive relationship with at least one caring parent or caregiver.

When one parent has some leadership skills, is affectionate, self-confident and supportive, children tend to be less likely to become delinquent.[1] In the absence of a positive relationship with at least one caring parent, some non-offending youth have developed a close, trusting relationship with another caring adult outside of the parent. This can, for example, be a relative, an older sibling, an alternative caregiver or a member of the community who, in effect, substitutes for or fills in the gaps for the natural parent.

In many young offender cases there is a need to involve the extended family,

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[1]While there is a tendency to correlate single parent families with higher levels of delinquency, most experts agree that it is "family functioning" rather than family structure that has a greater influence on whether a child becomes delinquent or not.

especially in aboriginal communities where extended family members tend to play a greater socializing role. Involvement of the extended family, as well as of the parent, can assist the youth with rehabilitation and reintegration into the community after an offence has been committed. Facilitating this type of involvement can lessen the burden on the parents, and upon the state, and better ensure the continuity of family and community relations.

An over-arching concern in decisions about young persons in conflict with the law is their special needs. One of the most important needs of young people is the active and supportive involvement of parents and/or extended family members. In this regard, there has been a growing recognition that the youth justice process has built-in barriers to parental involvement. Commentary from parents indicates that many feel they are only observers in a complex, cumbersome and intimidating process. Many are left feeling powerless and guilty after their contact with the system.

While some parents are too dysfunctional as individuals or too disinterested in what happens to their offending children, most parents are able and willing to be involved, but often they occupy a position on the fringes of the system. While there are some barriers to the involvement of parents, the greater issue is that most parents are not actively encouraged to participate in the process. This means that many parents who want and need to have continuity in their involvement with their child tend to be nudged aside by the youth justice system while it does its business with their children, then leaves them to try to re-engage as responsible caregivers. The difficult job of being effective parents to adolescent children can be made more difficult by their child's near solo involvement in the youth justice process. If so, parents can be rendered more ineffective.

To some extent, the alienation that many parents experience is an inevitable by-product of a complex legal system which is adversarial in nature and which focuses on the personal guilt and accountability of the young person. Steps need to be taken to mitigate the marginalization of parents, to encourage greater parental involvement and to provide more support of parents.

It is recognized that there are exceptional cases where parental involvement can be damaging to the young person and, therefore, to the public interest. These cases often occur in situations involving younger adolescents where the child welfare system is already involved or needs to be engaged.

A somewhat different circumstance arises with some older adolescents, such as those who are sixteen or older, because this age range is a time when

many youth are in transition to independence. This does not mean, however, that there should not be parental participation in the process for older adolescents. In some ways, greater care needs to be taken vis-a-vis parental involvement and support in these circumstances because it is a period during which parent-child conflicts are, to some extent, an expected aspect of family relationships. A youth's involvement with an offence could be an event which creates or aggravates such conflict.

Given the above, the youth justice system should operate so as to maximize throughout the process:

- the parent's ability to continue parenting, and
- the parent's constructive involvement, including the rights to be notified of and participate in proceedings, and to be informed of these rights.

As well, parental rights and responsibilities should be:

- balanced with the rights and responsibilities of the young person, having regard to the age, maturity and degree of independence of the young person;
- limited where their exercise would be harmful to the young person; and
- balanced with the objectives of accountability, rehabilitation and protection of the public.

These objectives are reflected throughout the remainder of this section, which addresses: the Declaration of Principle, notices to parents, parent participation in proceedings, and parent support and training programs. The relationship between the parent and counsel for the young person is discussed in Chapter 11.

10.1.1 Declaration of Principle

The Declaration of Principle (s.3) establishes the policy for Canada with respect to young offenders. As the Supreme Court of Canada affirmed in R. v. M. (J.J.)[2], the Declaration should not be treated as merely a preamble, but

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[2](1993)20 C.R. (4th) 295 (S.C.C.). This decision is also noteworthy because the court considered how an "intolerable" home situation should be dealt with at disposition, indicating that: "Intolerable conditions in the home indicate both a special need for care and the absence of any guidance within the home. The situation in the home of a young offender should neither be ignored nor made the predominant factor in sentencing. Nonetheless, it is a factor that can be properly taken into account in fashioning the disposition."

rather it should be given the force normally attributed to substantive provisions. The Declaration sets out ten principles which govern the processes and decision-making under the Act, including the key principles of: the accountability of young persons; the protection of society; the requirements for supervision, discipline and control of young persons and their special needs; and the rights and freedoms of young persons.

The interests of the family and the role of parents are specifically referenced in paragraphs (f) and (h) of the Declaration:

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

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

Although these provisions acknowledge the relationship between parents and children and affirm the importance of continuity of parental care and supervision, there is no direct connection between the role of parents and the needs of young persons. Nor is there affirmation in the Declaration about the rights of parents to be informed of proceedings and to participate in processes and decisions that affect their children and which, in turn, affect family circumstances. As well, the Declaration is, unlike some other legislation respecting children, silent about the need to support and strengthen the family.[3]

The intolerable home situation was one of the factors which prompted a custodial disposition by the court that was probably longer than would be expected, but justifiable because of the pressing need to provide guidance and assistance to the young person. This case is illustrative of the dilemma vis-a-vis the role of the youth justice system in facilitating services to young persons versus sentencing on the basis of the offence and offence history. Bill C-37 amended the Act - s.24(1.1) - so that before imposing a custody disposition, the youth court must take into account that "an order of custody shall not be used as a substitute for appropriate child protection, health and other social measures ..."

[3]Some child welfare legislation is an example. In New Zealand, section 208 of the Children, Young Persons and Their Families Act (1989) establishes the guiding principles for youth justice, which include:

(c) "The principle that any measures for dealing with offending by children or young persons should be designed
  (i) to strengthen the family, whanau, hapu, iwi and family group of the child or young person concerned; and
  (ii) to foster the ability of families, whanau, hapu, iwi and family groups to develop their

There is a need for a stronger and more coherent message in the Declaration identifying the primary role of parents and the role of the extended family, the latter being especially important among aboriginal peoples. In Chapter 2, we discussed the need for a comprehensive review of the Declaration and consideration of additional principles, which would include a stronger statement about the role and responsibilities of parents/extended family. Given this, there is no need to repeat that recommendation here.

10.1.2 Notice to Parents of Proceedings, Orders or Reports

For parental involvement to be a feature of the youth justice process, parents need to be aware of what is going on and have before them relevant information. Notice to parents is important because it facilitates parental participation, allowing the parent to advise the child as to the proper course of action and to take advantage of opportunities to have input into decisions which affect their children and which, in turn, affect their family circumstances. Notice is essential if the normal functions of a parent are to continue through the period of a youth justice episode. Failure to ensure notice could have the effect of placing parental guidance, support and responsibility in abeyance until the youth justice episode is concluded, which would not be consistent with the interests of young persons nor the public interest.

A caveat to the principle of notice is the need for hearings and other processes to proceed without undue delay.

Although the Declaration of Principle does not expressly entitle parents to be notified of proceedings, this principle is, more or less, reflected in the substantive provisions of the Act. Often, however, the necessity for notice may be dispensed with by the court.

Subsection 9(1) YOA provides for written or oral notice to parents in the event of the arrest and detention of a young person. In the case of a summons, appearance notice, promise to appear or recognizance, the police are required to give written notice. Failure to provide notice will invalidate subsequent proceedings, but this is obviated if the parent attends court, the matter is adjourned to allow for notice or the youth court dispenses with the

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own means of dealing with offending by their children and young persons.

(f) "The principle that any sanctions imposed on a child or young person who commits an offence should -

(i) take the form most likely to maintain and promote the development of the child or young person within his or her family, whanau, hapu, and family group ...".

notice requirement (s.9(9)). There is potential for there to be legislative clarification of section 9 in future miscellaneous amendments.[4]

In cases where a medical or psychological report (s.13) or a predisposition report (s.14) is prepared, the parent is entitled to a copy of the report, if the parent is in attendance at the proceedings. If the parent is not in attendance, the youth court may order a copy to be given to the parent, if the parent has taken an active interest in the proceedings. The court can, in rare circumstances, withhold a report under section 13 from a parent if the court is of the opinion that the disclosure of the report "would seriously impair the treatment or recovery of the young person, or would be likely to endanger the life or safety of, or result in serious psychological harm to, another person". In turn, this is subject to situations where disclosure is essential in the interests of justice.[5]

There are also parental notice provisions with respect to the mental disorder provisions of the Criminal Code which have been incorporated into the youth justice system by section 13.2 YOA. These are similar to the provisions for notices to parents upon arrest and detention, summons, and so on.

Parents are also entitled to receive notice of a placement hearing with respect to a conviction in ordinary court (s.16.2(6)).

Subsection 20(6) requires that a parent be provided a copy of a disposition; a disposition also includes an order made by the court on review of a disposition.

Parents are also entitled to notice of an application for continuation of custody (s.26.1(7)) in cases of youth court dispositions for murder, a copy of the order of the court, and, upon request, a copy of the transcript of the reasons why the court made the order. There are similar provisions with respect to a review of conditional supervision (s.26.6). Parents are to be given notice of reviews of custodial dispositions (s.28), and of the

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[4]For example, there appears to be a lack of clarity in s.9(10) as to whether the court can dispense with notice or adjourn proceedings to facilitate notice in circumstances where notice to parents is not served as soon as possible pursuant to s.9(1). See, R.v.M. (L.J.).

[5]In contrast, there are no parallel provisions respecting predisposition reports, even though the same kind of detrimental information could be included in these reports, which involve detailed social and personal histories. A predisposition report can be withheld from a private prosecutor, but not from the parents or young person. The Task Force was not aware of cases where concern has been raised about this discrepancy - probably because the withholding of s.13 reports rarely occurs - but this is an issue that could be considered further, with consideration being given to reconciling the withholding provisions of sections 13 and 14.

recommendations by the provincial director for a transfer from secure to open custody or to probation (s.29). Parental notice is also given with respect to review board hearings (s.30) and reviews of dispositions not involving custody (s.32). A parent also has a right of access, upon request, to youth court records and may be provided police and government records during the course of any proceedings or during the term of any disposition (s.44.1).

Despite these provisions, there are some areas in which parental notice is not required:

- o alternative measures (s.4),
- o review of detention or bail (s.8),
- o application for transfer to a provincial correctional facility for adults (s.24.5), and
- o applications for "conversion" of a youth court disposition to an adult sentence (s.741.1 C.C.).[6]

The omission of parental notice in three of these circumstances seems clearly justifiable. Since alternative measures is a more informal process, section 4 sets out only minimum requirements rather than a codification of procedure. In any event, parental contact and involvement appears to be a regular aspect of alternative measures programs and is appropriately governed by policy.

Notice to parents of applications under section 741.1 C.C. and section 24.5 YOA are not necessary because, in both cases, these hearings are applicable to young offenders who are now young adults, i.e. eighteen years or older. In Chapter 8, however, the Task Force recommended an amendment to section 24.5 so that, in exceptional circumstances, application could be made to place a sixteen or seventeen year old in an adult correctional facility. If this recommendation is endorsed, consideration should be given to providing parental notice and opportunity for the parent to be heard at the hearing.

The Task Force considered a proposal to amend the Act to require parental notice in circumstances where a review of a bail or detention order is heard

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[6]Another area that requires further review is the apparent absence of a requirement to notify parents when a young person is required to attend for finger printing pursuant to the Identification of Criminals Act.

by a youth court judge.[7] A substantial majority of the Task Force did not, however, support this proposal because a requirement for notice would add procedural complexity and could lead to additional delay, potentially resulting in young persons being held in detention for longer periods in order to facilitate parental notice. It should be noted that informing and involving parents in the bail review process can be accomplished by other means, such as conferencing (Chapter 2), proactive engagement by the provincial director (especially when alternatives to detention are being considered; Chapter 5) and, as discussed in Chapter 11, communication between parents and counsel for the young person.

If a parent is not given proper notice, there can be serious implications. In R.v.M. (L.M.), the Ontario Court of Appeal dealt with the issue of failing to provide a copy of the probation order to a mother who had been in attendance at proceedings against her son. The court first decided that "proceedings" means "the proceedings as a whole against the young offender, and not merely the last technical step in the preparation of the formal probation order", then characterized the requirement to provide the copy of the parental order to the parents as a mandatory duty. There is no curative or saving provision for a failure to comply with this mandatory duty. The Court of Appeal upheld the youth court acquittal; the youth court had decided that it was incumbent upon the Crown to prove compliance with the mandatory terms of s.23(3)(c) YOA. Failure to comply with this mandatory duty proved fatal to the Crown's case on the grounds that such failure offended an important principle - the young person's need for guidance and assistance from his parents. The court did not comment on the effect of a failure to comply with subsection 20(6), which requires a copy of any disposition order to be provided to a parent (regardless of parental attendance) and which also does not have a curative provision.

In the view of the Task Force, the decision of the Ontario Court of Appeal went too far. The policy behind the mandatory requirement to provide a parent a copy of a probation order is to allow the parent to supervise, guide and assist his or her child in complying with the order. The degree to which a parent can do so often varies with the age, maturity and degree of independence of the young person. Obviously, the need for parental guidance and assistance of a twelve year old is far greater than would be expected or required for most seventeen year olds. Importantly, the effective

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[7] A review of an order for detention or bail is heard by a youth court judge when the order is made by a justice or in circumstances where a youth court judge is reviewing an order made by a youth court judge (e.g. a variation). Otherwise, reviews (appeal) of orders made by a youth court judge are heard by a superior court judge.

invalidation of a disposition - and of the necessity for a young person to comply with the disposition - because of a failure to provide a parent a copy of the order runs counter to the principle of the accountability and responsibility of young persons for their contraventions. For this to invalidate the young person's responsibility for a breach amounts to a kind of inverse form of vicarious parental liability for a young person's criminal conduct (see 10.2), in this case a kind of vicarious parental defence for criminal conduct (i.e., a breach) by the young person. Arguably, the balance between the principle of accountability and the principle of the needs of young persons for guidance and assistance can be achieved by the failure to provide a parent a copy of the disposition order being a factor to consider at disposition for failure to comply (s.26), rather than at adjudication of a breach. In some instances, for example the case of a curfew, the fact that the parents were not informed of the term of probation should be considered by the court at disposition for breach of the curfew on the basis that, if the parents had known of the terms of the order, the breach might have been avoided by proper supervision.

The Task Force agreed that this issue should be addressed by amending the Act. There are two different ways to do so. First, the Act could be amended so that a failure to provide a copy of the probation order or other disposition to a parent does not affect the enforceability of the order.[8] Some would argue that this would erode the principle of parental involvement and render the requirement to provide a copy of the order to a parent much less meaningful. Alternatively, the Act could be amended as noted, with the addition that a failure to provide a copy of the order to a parent may be considered a mitigating factor at disposition for a failure to comply under section 26 where court is satisfied that such failure detrimentally affected the young person's ability to comply with the terms of the disposition. On the other hand, there may be no need to codify this mitigating factor because consideration of the failure to provide the parents of a copy of the order could still, like other non-statutory mitigating factors, be taken into account by the youth court, in appropriate circumstances, in deciding disposition, i.e. it could be left to be a matter of case law. A majority of the Task Force

[8]An amendment to section 23 alone would be inadequate. Subsection 20(6) requires the court to provide a copy of a disposition order to be provided to a parent, regardless of whether the parent is in attendance at proceedings. If the Ontario approach is followed, there is potential for other dispositions, such as community service or compensation, to be rendered effectively unenforceable for a failure to provide parents a copy of the disposition.

supported the first option.[9]

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

> **Sections 20 and 23 of the Act should be amended to clearly indicate that if a parent is not provided a copy of a probation or other disposition order, the enforceability of the order is not affected.**

10.1.3 Parental Participation in Proceedings

Parental entitlements to notice and to information can be described as "passive rights". There are also a number of "active rights" for parents in the Act which, if actioned, can increase their participation in and influence of the process. These include circumstances where parents may make application in respect of their child and also proceedings where the court must hear representations from parents, if the parent choose to do so.

Apart from the requirements for notification of parents in cases of arrest or charge set out in section 9, a young person has a right to consult with a parent and to have the parent present before the police take a statement. It should be kept in mind, however, that this is a right of the young person and not of the parent - if the young person chooses not to exercise his or her right, then the parent is not entitled to be present or to participate.

Where reasonably possible, a predisposition report should include the results of an interview with the parents - and, where appropriate and reasonably possible, members of the young person's extended family - which should address the relationship between the young person and the parents/extended family and their degree of control and influence over the young person (s.14).

Parents are given an opportunity to make representations or submissions when a disposition under the mental disorder provisions (s.13.2) is being made by a court or review board. They are also to be given an "opportunity to be heard" at a hearing to decide transfer to adult court (s.16); placement of a transferred and sentenced young person (s.16.2); to a hearing to determine continuation of custody (s.26.1); a review of dispositional custody (s.28 or 29) and a review of a non-custodial disposition (s.32). A parent is

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[9]It should be noted that any amendments in this regard could go beyond matters relating to parents and sections 20 and 23. For example, there is a known case where the court, following R.v.L.A.M., entered an acquittal because defence counsel was not provided a copy of the probation order. As well, sections 13 and 14 YOA set out a mandatory duty to provide copies of reports to parents; there may need to be clarification that if these reports are not provided to parents, any order would continue to be enforceable. These are matters which require further review.

also entitled to make "representation" at disposition (s.20).[10]

Parents can take a more active role by making application to the court in a number of situations. If the parent has executed a "responsible person" undertaking under section 7.1, the parent can apply to be relieved of that obligation. Parents may also make application with respect to a review of detention pending trial if the young person has been transferred to adult court (s.16.1); review of placement on conviction by ordinary court (s.16.1); transfer of disposition (s.25); review of a custodial disposition (s.28.1 or 29) and review of a non-custodial disposition (s.32). Notably, these applications by parents are generally limited to circumstances of reviews of decisions, not original applications. For example, a parent cannot apply to have the young person transferred to adult court nor to seek a medical or psychological report. This limited role is understandable: parents are not parties to trial proceedings. They cannot call evidence, examine witnesses, make submissions as to innocence or guilt, nor instruct their child's counsel.

There are, however, some areas where a parent does not have statutory entitlement to make representations to the court, including:

- at a hearing to determine detention or bail (s.7), including the placement of the young person in a detention centre for adults (s.7(2)) and in the care of a responsible person other than the parent (s.7.1);

- at review of an order for detention or bail heard by a youth court judge (s.8);[11]

- at initial determination of placement pending trial, if the young person has been transferred to adult court (s.16.1);

- at sentence in ordinary court, if the young person has been transferred

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[10]There are differences in how these are characterized in the Act. For example, s.13.2 permits the parent to make "representations or submissions", section 20 "representations" and other sections speak to "affording an opportunity to be heard". Arguably, the latter has greater force. As well, "affording" an opportunity to be heard arguably suggests the court must actively determine whether that opportunity has been provided even if the parent is not in attendance, as opposed to the situation where a parent is simply given an opportunity when the parent is in attendance. This is an area where it might be helpful to review and reconcile the language of the different sections.

[11]As with notice to parents, parents are also not, in statue, afforded an opportunity to be heard during determination of alternative measures nor at hearings under s.24.5 or s.741.1 C.C., but the same rationale for exclusion applies. If, however, the Task Force's recommendation to allow for the placement of a sixteen or seventeen year old in adult custody by way of s.24.5 is endorsed (Chapter 8), consideration should be given to according the parents an opportunity to be heard in those circumstances.

and convicted;

- at a hearing to set the terms of conditional supervision (s.26.2); and
- at a youth court review of a conditional supervision order that has been suspended by the provincial director (s.26.6).[12]

At each of these decision points, parents may be directly affected by the decisions (e.g. terms of orders) or may have useful information or opinions to contribute. There is also the matter of consistency between provisions. It seems anomalous that parents would be accorded an opportunity to be heard at transfer hearings (s.16) or, if the young person is transferred and convicted, at placement hearings (s.16.2), but not at initial determination of placement pending trial or at sentence in ordinary court.[13]

Similarly, it is inconsistent that parents are able to make representations at disposition (s.20) or review (s.28 or 32), but not at hearings to set the terms of conditional supervision or at a review of a conditional supervision order.

With respect to matters pertaining to bail or detention, however, consideration should be given to our earlier comments vis-a-vis parental notice (10.1.2) and the potential for added complexity, delay and inadvertently contributing to lengthier detention periods, especially given expeditious manner in which, for example, show cause hearings are expected to be carried out. Accordingly, the parental entitlement to make representations to the court should be limited to circumstances where the parent is in attendance at the proceedings.

While parents are accorded several active rights under the Act, the more critical issue, perhaps, is the exercise of these rights by parents. The mere

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[12]It is noted, however, that in many cases, transferred young persons are, in fact, young adults (i.e. eighteen or older) by the time the decision to transfer is made. As with notice to parents, parents are also not, in statute, afforded an opportunity to be heard during determination of alternative measures nor at hearings under s.24.5 or s.741.1 C.C., but the same rationale for exclusion applies. If, however, the Task Force's recommendation to allow for the placement of a sixteen or seventeen year old in adult custody by way of s.24.5 is endorsed, (Chapter 8) consideration should be given to according the parents an opportunity to be heard in those circumstances.

[13]It is noted, however, that in many cases, young persons are, in fact, young adults (i.e. eighteen or older) by the time the decision to transfer is made. This is not peculiar to transfer decisions. There are many cases where, for example, a young person commits an offence before age eighteen but the matter is not heard or disposed of until after age eighteen. As well, reviews of dispositions often involve young adults. Given that these cases involve young adults, question can be raised about whether parental notice and a capacity for the parents to make representation is necessary. This is a matter that could be considered for further review.

existence of statutory rights of notice and participation does not mean that parents will actually involve themselves in the process. Unfortunately, in some cases parents do not involve themselves at all in the process - for example, refusing to attend at the police station if a youth requests a parent present during the taking of a statement, not attending court, or only attending part of the proceedings. Even when there is full parental attendance, many parents are passive observers rather than active participants. While parents, for example, are entitled under section 20 to make representations to the court about disposition, their input often comes through third parties such as the young person's counsel or the probation officer who prepares the predisposition report. Disagreement or concern about what is being said, or not said, may never be heard in youth court if the judge does not call on them. When this happens, many parents are, in effect, placed or place themselves "on the outside" during the process.

There are many reasons why there is often little parental participation in the formal youth justice process. In some cases, a lack of parental participation can be reflection of actual disinterest, parent-child conflict, or the chaotic lifestyle of the parent. Parental disinterest or parent dysfunction are difficult obstacles to overcome. In some cases, full parental attendance during the court process is hampered by other considerations, such as employment, the need to care for younger children, the time and costs associated with travelling, embarrassment, a sense of failure for being a "bad" parent, and so on. Commonly, parents are intimidated and mystified by a complex legal process and, therefore, are reluctant to participate.

There are no simple solutions to the obstacles to parental participation. The degree to which parents will involve themselves in the process can be affected by the way in which key actors in the system conduct themselves - defence counsel involving the parent and taking the time to explain the process, the probation officer being sensitive to the parent's feeling of guilt or anxiety, the judge being attuned to the fact that the everyday vernacular of court dialogue is often not understood by the parent (or youth), and so on. Simply put, the key actors in the system - especially the police, defence, probation officer and judge - need to be sensitive to and constantly aware of the needs and concerns of parents. These are matters of practice, not legislation or even policy.

Parental involvement was a key theme of the Jasmin Report, Quebec's task force study of the application of the Act in that province. Relevant administrative recommendations of that report include (in short):

- Police forces ensure that at least one person with parental authority is

informed by the responsible police officers when significant action is taken with respect to his or her child and is notified forthwith when the child is arrested; if necessary, it should be insisted that the person come to the police station.

- Youth workers increase participation by parents both in making assessments and in applying alternative measures and, in so far as possible, make them partners in any action taken.

- Defence counsel ensure that parents be provided with adequate information about the true meaning of a not guilty plea entered before the evidence is disclosed.

- Taking various steps to avoid needless summons and trips to court by parents (and others).

- The provincial director's delegate who prepares a predisposition report contact the young person and parent before the dispositional hearing to explain the contents of the report.

- Developing information brochures which explain in simple terms to parents the conduct of court proceedings and the role of parents both in court and in connection with related action taken by the provincial director.

- When a young person is detained between arrest and appearance in court, the director of youth protection's delegate who authorizes the detention[14] ensure the parents are contacted and told of the young person's situation, the nature of upcoming proceedings and the fact that it is important for them to participate.

- Those involved in the judicial process treat parents with respect, clearly inform them about the conduct of proceedings and their place therein and try as much as possible to make them partners in any action taken.

- When parents do not attend court even though a notice has been sent to them, the judge always ascertain why they are absent and try to ensure their attendance in court by any reasonable means, especially during a dispositional hearing.

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[14]This is a procedure allowed in the Act, but authorization by the provincial director is unique to Quebec.

- Judges remind parents of their responsibility to play a role as active partners in ensuring the success of probation.

- Provincial directors and youth workers make better use of the support that is available to young persons on probation from community resources, family members and other persons.

- Ensure that workers are available outside normal working hours to enable meetings with young persons and their parents, without interfering with school or work obligations.

- Social workers and justice officials give special attention to the participation of parents as partners in any action taken and give them the support and assistance they need to play this role.

- Public education programs be established to make parents and other educators aware of their responsibilities and the consequences of failing to fulfil them.

It was beyond the mandate of the Task Force to review the administration of youth justice in every jurisdiction. Accordingly, the extent to which the above recommendations apply to and are required in every jurisdiction is not known. However, the recommendations are fairly generic and would be a useful reference to other jurisdictions considering administrative measures.

One reason why parents do not participate as fully in proceedings is that they are simply not aware that they can. This is probably because of the technical nature of many of the rights accorded them, their unfamiliarity with the court process generally, and the Act in particular. If these rights are not known, they will not be exercised. Often parents will depend on the young person's lawyer to advise them. It is questionable whether this dependency on counsel is a reliable and appropriate means of ensuring continuity of parental involvement and participation, especially since counsel represents the young person, not the parent. Sometimes parents may make inquiries to the Crown, whose role in this area is unclear.

Efforts should be made to increase parental awareness as to the rights they already enjoy under the legislation. This, in itself, may not promote the use of existing rights by parents unless it is also accompanied by efforts to increase the level of awareness of key professionals in the youth justice system as to these rights. These professionals, including lawyers, may not be aware of these rights or their full extent. Even if they are aware, they need to develop mechanisms to encourage parental involvement. A starting

point might be found in the training of these professionals.

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

(1) The Act and, as applicable, the Criminal Code should be amended to maximize parental participation in the youth court process by permitting parents to make representations to the court at:

- **(a) a hearing to determine detention or bail (s.7) and at a review of an order for detention or bail heard by a youth court judge (s.8), if the parents are in attendance at those proceedings;**
- **(b) at initial determination of placement pending trial when the young person has been transferred to ordinary court (s.16.1) and at sentence in ordinary court if the young person is under eighteen years at the time of detention placement or sentence; and**
- **(c) at a hearing to set the terms an order of conditional supervision (s.26.2) and at a youth court review of a conditional supervision order that has been suspended by the provincial director (s.26.6).**

(2) The Federal Department of Justice, in consultation with provinces and territories, should develop prototype "plain language" information brochures respecting the rights and responsibilities of parents so that parents can be better informed. Provinces and territories should make these information brochures available to parents.

(3) Provincial and Territorial Ministers Responsible for Youth Justice should initiate reviews within their own jurisdictions respecting administrative measures that could be taken to maximize parental involvement in the youth justice process and, in doing so, consider the applicability of relevant recommendations of the Jasmin Report.

10.1.4 Parent Support and Intervention Programs

Criminological theory and research long ago abandoned the assumption that delinquency is rooted in a moral or character defect of the adolescent. Rather, the causes - and solutions - to delinquency are the result of a combination of individual, family and other social factors. Accordingly, intervention strategies should focus, not only on the individual, but also the individual's surrounding environment, including the family.

Parental involvement is intrinsically desirable because it facilitates continuity

of the parental role and responsibility for children. Beyond that, however, many parents/ families require assistance or intervention. In many cases, parents are open to such assistance. Sometimes, parents are resistant, adopting a "you-fix-my-kid" attitude.

There are several promising interventions with parents/family, including different types of family skills training, family preservation, parent training, and family counselling programs.[15] In some cases, a parent support group and/or parent education program is all that is required, the degree of intervention or support required depending upon the needs and circumstances of the individual case.

In Chapter 6, we discussed the need for community-based alternatives to custody. Family support and intervention programs are a necessary component of alternative programs in many cases.

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

> **Parent/family support and intervention programs should, to the extent practicable, be incorporated as components of community-based programs which are alternatives to the formal court process or to custody or which facilitate transition from custody, and reintegration into the community.**

[15]See, for example, Kumpfer (1994).

10.2 PARENTAL LIABILITY

"A bad family is no defence".
(Robert Kaplan, Solicitor General of Canada, House of Commons, 1982)

Parental liability laws - also known as parental responsibility laws - refer to legal sanctions by which parents can be held liable, either civilly or criminally, for the criminal activities of their children. Under civil liability statutes, the parents of a delinquent child can be found to be financially liable for losses or damages incurred by the victim.

Statutory provisions which are or have been available in Canada and other countries (principally, the U.S.) by which parents (or others) may be held criminally liable fall on a continuum ranging from broadly-framed "contributing to juvenile delinquency" offences to offences which address direct parental participation in criminal activities. Although these criminal liability statutes come in many forms, they can be categorized into five types:

- "Omnibus" offences such as contributing to juvenile delinquency which do not restrict the accused's criminal liability to well-defined circumstances and, therefore, are tantamount to the de facto imposition of vicarious criminal liability, i.e. imputing criminal responsibility for the actions of one person (the young person) to another (parent or other adult).

- More narrowly defined offences, based on the concept of negligence and coupled with a statutorily defined duty of care for parents to, for example, provide reasonable care, control and supervision of their children. These types of statutes are principally based on acts of criminal omission and, depending on how broadly or narrowly they are framed, can involve greater and lesser degrees of vicarious criminal liability.

- Statutory provisions which permit the court to order a parent to participate in counselling or education programs, to pay costs of damages or losses to the victim, or to pay the costs of court proceedings or of services provided to their children. Such orders are usually linked to findings relating to the above (i.e., contributing, negligence) or some similar form of legal test. Under these types of statutory provisions, civil liability is, in effect, attached to the parent by way of a criminal process.

- Offences which address parental failure to co-operate with orders of the court made against a delinquent, eg., where a parent fails to report to authorities a breach of the terms of a court order or induces a breach.

- Offences which address situations where parents are direct accomplices in offences with their children or where they aid, abet or counsel the commission of an offence. Such offences are, of course, applicable to any accomplice and hence are not specific to parents, but nonetheless may be applied against parent accomplices.

Under the Juvenile Delinquents Act (JDA), all of the above-described types of criminal liability could be imposed on a parent. These provisions included:

- Under section 22 JDA, the juvenile court could order a parent to pay a fine, damages or costs if the court was "satisfied that the parent... conduced to the commission of the offence by neglecting to exercise due care of the child...",[16] i.e. a negligence-based provision. These pecuniary penalties were imposed on the parent instead of being imposed on the delinquent child.

- Section 33 JDA created a summary conviction offence for a parent or guardian who "...being able to do so, knowingly neglects to do that which would directly tend to prevent said child being or becoming a juvenile delinquent or to remove the conditions that render or are likely to render the child a juvenile delinquent...", i.e., a broadly framed negligence offence.

- Section 33 JDA also created an offence for any person, whether a parent or not, "who knowingly or wilfully (a) aids, causes, abets or connives at the commission by a child of a delinquency or (b) does any act producing, promoting, or contributing to a child's being or becoming a juvenile delinquent or likely to make any child a delinquent". In short, these provisions addressed accomplices and also created a broadly framed negligence (contributing) offence.

- Section 34 JDA created an offence for a parent or guardian (or other person) to induce a delinquent child to leave a detention home, foster home, or other institution in which the delinquent child had been placed.

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[16]While a fine imposed on a child was limited to $25.00 under the JDA, the (then) maximum limit of $500 for a summary conviction offence applied to a fine imposed on a parent.

- Section 20 (2) JDA also authorized the juvenile court to make an order upon the parents of a delinquent to contribute to the child's support such sum as the court may determine. A similar order could be made upon a municipality, which also was empowered to recover from the parent any sums paid pursuant to such order.

As well, there were (as today) offences under the Criminal Code that could be applied to a parent who is a party to the commission of an offence (eg. sections 21 to 23 C.C.), any person corrupting children (s.172 C.C.), and other Criminal Code offences (eg. sexual offences against children). Given this, there was, to some extent, redundancy in some offences applicable under the JDA and the Criminal Code.

The 1965 Department of Justice Committee report on Juvenile Delinquency in Canada was very critical of the parental liability provisions of the JDA and recommended repeal of the same, except for parental failure to co-operate with a court order. The 1977 report of the federal Solicitor General on Young Persons in Conflict with the Law did not, however, recommend repeal of the JDA provisions for contributing to juvenile delinquency, but rather the enactment of a similar offence in the Criminal Code.

With proclamation of the Young Offenders Act (YOA) in 1984, the offence of contributing to juvenile delinquency and the capacity to order a parent who had "conduced" to the commission of an offence to pay a fine, damages, or costs was not maintained.

The only remnants of liability offences in the Act in relation to young persons (which are applicable to parents or others) are offences under section 7.1 (care of a responsible person) and section 50 (interference with dispositions) YOA. As well, any adult (including a parent) may be prosecuted for offences directly committed in association with a young person, i.e. conspiracy, parties to an offence or as a co-accused. An amendment arising from Bill C-61 in 1986 (re: section 23.1 C.C.) clarified the criminal law in relation to a person being a party to an offence involving a child under twelve years of age. The present law is discussed in more detail later.

Since the advent of the YOA, several interest groups and some provincial governments have advocated amendments to the Act which would restore an offence such as contributing to juvenile delinquency and parental financial liability (eg. compensation) for the criminal acts of their children. The key arguments advanced in favour of such proposals include:

- o If the parents of young persons who have been found guilty of offences were held criminally and/or financial liable for the criminal acts of their children, they would accordingly be prompted to exercise a greater degree of supervision and control over their children, thereby reducing the likelihood of recidivism.

- o If other parents knew that they could be held criminally or financially liable for the criminal acts of their children, they would be similarly encouraged to exercise a greater degree of supervision and control of their children, thereby reducing the likelihood of their children committing offences. The police and other social control/helping agencies would also be provided a tool to encourage better parenting.

- o There are some circumstances of egregious parental neglect vis-a-vis the supervision of their children that demand denunciation by way of criminal sanction, especially where the young person commits an offence involving death or serious personal injury.

- o In respect of parental financial responsibility, there would be a more reliable source of compensation to innocent victims and, in respect of the costs of services to young offenders, reduced costs to government.

While usually couched in supportive terms ("encouraging parents"), the primary rationale for parental liability laws is general and specific deterrence, i.e., the threat or reality of criminal sanctions or financial liability will promote better parenting and thereby reduce youth crime rates. A second rationale is that egregious conduct should be punishable, regardless of whether that punishment will have a deterrent effect or not.

The criticisms of parental liability laws are numerous and, to some extent, vary according to type of measures proposed. For example, civil liability statutes are usually considered less offensive than imposing criminal sanctions on parents because the goals and consequences differ - with civil liability, the principle goal is reparation to the victim, rather than the punishment of negligent parents.[17]

The principal arguments against parental liability laws include:

- o There is a fundamental philosophical contradiction between, on the

[17]Some critics have noted, however, that the principle goal of American civil liability statutes is reduction in delinquency, rather than compensation. See, Geis and Binder (1991).

one hand, demanding that young people be held accountable for their criminal acts and then, on the other, also demanding that parents be held accountable for these same acts. If parents are held liable, the implicit message to young people is that it is not themselves, but rather their parents who are responsible.

- o These laws represent a fundamental intrusion by the state into the privacy, autonomy and integrity of family life, and of child rearing. Therefore, these laws represent a philosophical shift in the state's approach to the family; traditionally, the state has been reluctant to prescribe standards or criminalize conduct in respect of parent-child relations, except in extreme cases, such as child abuse and neglect. The criminal law cannot and should not legislate good parenting; parents do not and cannot have sufficient control of their adolescent children to justify criminal liability.

- o To greater and lesser degrees, these laws rely upon vicarious liability, are commonly vague and over-inclusive, and violate fundamental principles of fairness. Accordingly, these laws are fraught with legal and constitutional problems, including cruel and unusual punishment because a criminal sanction (potentially, imprisonment) is disproportionate to the parent's degree of blameworthiness.

- o There is an implicit assumption that poor parenting "causes" delinquency, which reflects a simplistic and erroneous view of delinquency causation. Children are separate legal individuals whose criminal behaviour is usually prompted by several inter-related factors which are often difficult to discern. Even where poor parenting is evident, it would be impossible to separate out the degree to which poor parenting contributed to a child's criminal act.

- o What constitutes good or poor parenting is, to a considerable extent, subjective. Given this, enforcement would potentially be arbitrary and/or discriminatory.

- o There is no evidence that these laws are effective in reducing delinquency or in improving parenting skills.

- o There are alternative and more constructive social responses to poor parenting such as parent training and family counselling or, in extreme cases of abuse or neglect, child protection laws can be applied.

- o These laws, in effect, create status offences which criminalize the

status of parenthood.

- o It is unlikely that punishment - or the threat of the same - will transform a "bad" parent into a good one. Potential disruptions to parent-child relationships - such as parental over-reaction (abuse), hostility, or asking the child to leave the home - may have adverse effects on young people and family circumstances, thereby exacerbating the problem.

- o Since many parents of young offenders are disadvantaged, sanctions or financial liability would be disproportionately applied to this population of parents, eg., poor, single mothers of "latchkey" children. Arguably, middle class parents do not necessarily have better parenting skills, but rather more resources to facilitate better parenting.

10.2.1 Historical Perspective

Juvenile court data from the final year of the JDA indicate that 631 charges for contributing to juvenile delinquency were heard by the juvenile courts in Canada in 1983. Of these, 88 percent resulted in findings of guilt; most were placed on probation or fined. Eighty-five percent of all the Canadian charges were heard in Quebec juvenile courts and nine percent in Ontario. Since a contributing charge could be laid against any adult or even another juvenile, the number of charges involving parents is not known; 96 percent of the charges involved adults.

These statistics very likely under-estimate the volume of contributing charges heard by courts in Canada because a person so charged could be proceeded against in either juvenile or adult court. Data respecting charges heard by adult courts is not available. Given this dual court jurisdiction, inter-jurisdictional differences in procedure may account for the inter-jurisdictional differences in volumes noted above.

Whether one could be charged with contributing to juvenile delinquency was affected by the definition of delinquency. Under the JDA , a "delinquency" included not only criminal offences, but also provincial statute and municipal by-law violations and the status offence of "sexual immorality or other similar form of vice". Therefore, a person could be found to contribute to a very wide range of youthful misconduct.

In a 1982 commentary on contributing to juvenile delinquency, Professor Larry Wilson cited a number of case examples of circumstances addressed by

the offence of contributing, which he described a "incredibly vague". These example included: adult sexual activities with juveniles, sexual activities between adults in the presence of juveniles, living in adultery, eloping with a juvenile for the purpose of marrying, supplying intoxicants, being present in a place where juveniles are consuming intoxicants, indecent exposure, receiving stolen goods from juveniles, and family bathing in the nude.

The 1965 Department of Justice Committee report noted that a large percentage of contributing charges could have otherwise been laid under some appropriate section of the Criminal Code. In some cases (eg. sexual offences), prosecution was made easier by laying a contributing charge.

Given the above, it cannot be said that the repeal of the offence of contributing to juvenile delinquency completely removed the capacity to prosecute similar forms of behaviour. It is, for example, likely that some of the same fact situations (eg. sexual offences, receiving stolen goods, supplying alcohol, etc.) are or could now be prosecuted as offences under federal criminal law or provincial statute. As well, some of the behaviour formerly prosecuted would not, today, be considered worthy of criminal sanctions, e.g. family bathing in the nude.

Statistics respecting the extent to which parents were found to have "conduced" to the commission of the offence (s.22 JDA), and therefore found liable for loss, damages or costs, are not available.

10.2.2 International Perspectives

The United Nations Convention on the Rights of the Child and other international instruments which affect juvenile justice do not directly address parental liability. The maintenance of the integrity of the family and the provision of helpful services to children and families are, however, consistent themes in these international instruments. To the extent that parental liability laws punish parents and disrupt parent-child relationships , these laws could be construed as being inconsistent with the general directions set out in these international instruments.

European civil law is somewhat different than English common law: in European civil law, a child's harmful acts can be attributed to the parent.

In England and Wales, there are parental liability provisions which are quite similar to the former provisions of section 22 JDA. A youth court may require a parent or guardian to pay a fine, damages or costs of prosecution "unless" (i.e. presumptively) the court is satisfied that the parent or guardian

has not conduced to the offence by neglecting to exercise due care of the child or young person. While the court may consider such an assessment in the case of young persons (fourteen or older), the court must do so in the case of a child under fourteen. If ordered, the fine or costs are imposed on the parents, instead of on the child.

In New Zealand, the youth court may make an order for the costs of prosecution, or compensation or restitution, against a parent if the accused child is under sixteen years of age. There is no statutory test (e.g. conducing) but the youth court must afford the parents an opportunity to make representations and an order may be appealed by the parent.

The United States can be considered the heartland of parental liability laws. Every American state, except one, has adopted parental responsibility statutes which impose civil liability upon parents for property damages/losses and personal injuries caused by their children's actions. Most of these statutes are limited to wilful and wanton torts of the child and require knowledge by the parent before liability can be attached; the amount of financial liability is limited. Some states restrict recovery to property damage or loss, while others permit recovery for both property damage and personal injury. These statutes have withstood constitutional challenges (except in Georgia).

In keeping with the "get tough" trend in the United States in recent years, many American states have enacted statutory provisions which impose liability on the parents of a delinquent through criminal legislation. These range in scope from offences akin to contributing to juvenile delinquency to criminal provisions requiring parents to pay the costs of compensation or services associated with their children's delinquencies. Some states also permit the youth court to order parents to participate in educational, counselling or treatment programs. As well, several cities have ordinances (some strict liability) which impose penalties on parents for a narrower range of youthful misconduct, such as curfew violations or truancy.

A review of American juvenile justice statutes indicates that in 1993 there were thirty-one states with some form of parental liability law; twenty-three had established provisions which address contributing to juvenile delinquency.[18] There are considerable differences in the scope of these laws.

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[18]See, Szymanski (1993). Note that the number of states with this type of legislation has probably increased since 1993: in May, 1996, the New York Times reported that 15 American States changed their parental responsibility laws in the previous two years or were currently debating changes in their legislatures. It is also possible that some states have enacted offences through other adult criminal statues; the review was

For example, in Kentucky, a parent of an adjudicated delinquent may be required to enter into a recognizance with a surety up to $500, if the court finds the parent has failed or neglected to subject the child to reasonable parental control and authority, which failure or neglect is the proximate cause of the child's delinquent acts. If the delinquent child commits a further offence or violates a condition of probation, the court may, at a second hearing to determine whether there is continuing parental failure or neglect and proximate cause, order forfeiture of all or part of the financial surety, which may be applied against any present or future damages arising from the acts of the child. In contrast to this moderate (and convoluted) approach, an adult in Maryland who wilfully contributes to, encourages, causes or tends to cause a child to commit a delinquent act - even if the child is not adjudicated delinquent - is liable to a $2500 fine or three years imprisonment, or both, or a suspended sentence with probation.

Perhaps the most well known of parental liability laws was established in California in 1988, by way of The Street Terrorism and Enforcement Act, in response to public concerns about youth gangs. This statute imposes a duty of care on parents "to exercise reasonable care, supervision, protection and control over their minor child". Any person (including a parent) commits an offence if that person acts in a way or omits the performance of any duty which causes, tends to cause, contributes, induces or endeavours to induce any person under the age of eighteen years to become a delinquent child. A parent convicted of this offence is liable to one year in jail or a $2500 fine, or both a fine and jail, or probation for up to five years. In 1993, the California Supreme Court upheld the constitutional validity of this law but, in doing so, stated that a parent could only be convicted for "gross or extreme departures from the objective reasonable standard of care" and only if the prosecution could prove "causation", i.e., a link between the parental acts or omission and the child's delinquent acts.[19] In effect, this offence can only be applied in a narrow range of circumstances.

There is no evidence that the enactment of the California law caused a decrease in the juvenile crime rate; the juvenile violent crime index rate increased.

No measure, whether a law or a program, will be effective if it is not implemented consistently and applied to the target population. In this regard,

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of juvenile justice codes only. It is also noted that the number of states with contributing statutes, compared to the 1960's, appears to have diminished: in 1961, 48 states had established contributing offences.

[19]Cited in Hornick et.al. (1995).

it has been observed that the hallmark of American parental responsibility laws is infrequent enforcement and low conviction rates, for a variety of reasons, including:

- o difficulties in proving parental knowledge and permission or omission;
- o parents are rarely with a young person when an offence occurs, know that it will occur, or could be reasonably expected to know;
- o given the nature of the conduct, evidence is often hearsay and therefore inadmissible; and
- o difficulties in establishing a clear causal connection between the parent's act or omission and the young person's criminal act.

10.2.3 Research Evidence

Despite the prevalence and popularity of parental liability laws in the United States, there has been surprisingly little research on the effectiveness of these laws. What little has been carried out is dated and not well controlled.

A study by the U.S. Department of Health, Education and Welfare in 1963 compared changes in juvenile crime rates, over a five year period, of sixteen states that had enacted parental civil liability statutes with changes in rates for the entire country over the same period. There was no appreciable difference. This study, however, was not well controlled.[20]

A study in the 1940's examined the effects of enforcement of the offence of contributing to juvenile delinquency in Toledo, Ohio over a ten year period. Despite progressively increasing and fairly frequent enforcement, which was well publicized and principally directed to "inadequate" parents, no evidence was found that punishing parents had an effect on delinquency rates.[21]

New Hampshire, which stands alone among American states because it does not have a parental liability statue, has a rate of youth crime that is not significantly different from its neighbouring New England states and which is

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[20]For example, the study did not match the jurisdictions with parental liability laws against those without them, nor did it compare contiguous states to control for important demographic and cultural differences. (Cited in Geis and Binder, 1991).

[21]See, Alexander (1948).

notably lower than that for the United States as a whole.[22]

In 1986, Wisconsin enacted a "grandparent liability" law which allowed parents to be made financially responsible for the children of unwed teenage mothers. It allowed for fines of up to $10,000 and possible two year jail terms. One purpose of the law, like similar delinquency provisions, was to encourage the parents of teenage girls to take more responsibility for their adolescent children, thereby reducing the incidence of unwed teenage pregnancies. After the law was enacted, unwed teenage pregnancies increased.[23]

The 1965 Department of Justice Committee report indicated that the parental liability provisions of the JDA sometimes had unintended and adverse effects, citing known case examples of juveniles committing significant damage in order to "get even" with their parents, who they believed would be held financially liable.

In contrast to evidence about the effects of parental liability statutes, there is a plethora of research relating to the causes and correlates of delinquency, including the role of family and parenting factors. A consistent theme in this research is that family dysfunction emerges as a strong correlate of chronic juvenile offending. Family dysfunction includes a constellation of family and parenting factors, including: abuse or neglect, poor or inconsistent discipline, excessively harsh discipline, family disruption (eg. divorce), excessive family conflict, lack of affection (especially maternal), lack of attachment, parent criminality, and parental absence. A major factor, consistent with concerns about "bad" parents, is inadequate parental supervision.

Given that the family is the primary instrument of socialization, it is not surprising that family and parenting-related factors play an important role in delinquency. To say, however, that poor parenting "causes" delinquent behaviour is far too simplistic. While these factors can play an important role, they are but one of several key "risk factors" which contribute to delinquency. Other risk factors include, for example: poverty and social deprivation, poor school achievement, peer influences, community factors such as neighbourhood disorganization and high density housing, and even biological/genetic and environmental factors. Delinquency is rarely the

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[22]Geis and Binder (1991). Note, however, that in May 1996, the New York Times listed New Hampshire as one of the states that, in the previous two years, had changed or was currently contemplating change to parental responsibility laws.

[23]Cited in Weinstein (1992).

product of any one risk factor, but rather multiple risk factors; as the number of risk factors increase, the probability of delinquency increases. Parenting-related factors, although important, by themselves can only explain a relatively small proportion of the reasons why delinquency does or does not arise (i.e. the variance). Certainly many young offenders are subject to lax parental supervision, but by no means do all children who are poorly supervised by their parents become young offenders.

The types of parent-related factors described above raise questions about, if delinquency causation were to be attributed to parents, what types of parents should be held responsible for the wrongdoings of their children. For example, poor parental supervision can be an important factor, but so too can other parenting related factors. Should unaffectionate mothers be held responsible? Overly harsh fathers? Divorced parents? Welfare (poor) parents? Carrying this type of argument to a logical extreme, the grandparents of delinquents might be held responsible for raising children who proved to be poor parents. Further, the research principally connects early childhood (i.e. pre-school) or pre-adolescent parenting factors with delinquency; these parenting characteristics may or may not still be present once the young person comes to the attention of the youth court. For example, should formerly negligent parents who have now turned their lives around (e.g. recovered alcoholics) now be held responsible for the criminal acts of their children?

In some cases the attribution of parental liability could be very inappropriate and counter productive, such as where a single mother from a formerly abusive marriage is now struggling to raise her adolescent children in circumstances of poverty. In many cases, the influence of parenting on the youth's behaviour may be less discernable (e.g. inconsistent discipline, emotional abuse) or not apparent at all. For example, in some families there may be several children, but only one may come into conflict with the law. Should a parent be held responsible in these circumstances when there is clear evidence of sound parenting skills?

Translating the findings of social science research about the relationship between family/parenting dysfunction and delinquency into a general principle of attribution of parental responsibility is fraught with problems and hardly supportable. Nonetheless, at the individual case level, there are clearly circumstances where some degree of parental responsibility - whether legal or moral - can reasonably be attributed. A parent who actively participates in crimes (e.g. co-accused; party to an offence) with a child or young person is an obvious example. Parents can be prosecuted in these circumstances. Beyond this, there are certain fact situations where parental

neglect is unacceptable, at least from a moral and social point of view. An alcoholic and indifferent parent who takes no steps to supervise his or her adolescent child arguably bears at least some responsibility for the child's subsequent offending. More specifically, if an adolescent who has been previously found guilty of thefts persistently brings home valuable items (known to the parent) without any parental enquiry or action, then that parent has departed from reasonable standards of parental supervision. If there is similar inaction in circumstances of parental knowledge and prior violent offences, and the adolescent goes on to commit a serious personal injury offence, then the parent's failure to act becomes more reprehensible.

Few would question that there should not be at least some social response to the kinds of situations described above. The key policy issue is what kind of response and what role, if any, the criminal law should play in addressing these circumstances. The sections below will describe the present law and options.

10.2.4 The Present Law

Under the Criminal Code, a parent (or other person) who commits an offence with a child or young person may be charged as a party to an offence. This can occur in circumstances of direct participation where the parent and child commit the offence together (e.g. both charged with theft) or of aiding or abetting an offence (s.21), counselling the commission of an offence (s.22), counselling an offence even if that offence is not committed (s.464), or being an accessory to an offence after the fact (s.463).

While it is common to speak of "aiding and abetting" an offence (s.21), a person may be charged with either aiding or abetting an offence - the two concepts are not the same. A person aids an offence if the person "does or omits to do anything for the purpose of aiding any person to commit it". To "abet" an offence means to encourage an offence. These provisions are not applicable to circumstances of general parental neglect to supervise or control a child. For example, such failure could not be construed as encouraging an offence - the parent's actions (encouragement) must relate directly to and be intended to encourage the commission of the offence. Even if a parent knew his adolescent child was about to commit an offence and took no action, the parent could not be charged with omitting to do anything for the purpose of aiding an offence because there is no statutory or common law duty for a parent to act in these circumstances.

Section 23.1 C.C. clarifies that being a party to an offence applies notwithstanding that the person who is aided or abetted (etc.) cannot be

convicted of the offence. Hence a parent who is a party to an offence committed by a child under the age of twelve may be charged, even though the child may not be charged.

Section 50 YOA creates an offence for any person (including a parent) to interfere with a dispositional order of the court by, for example, assisting or inducing a young person to unlawfully leave a place of custody, wilfully assisting or inducing a young person to disobey or contravene a term or condition of a disposition, and so on.

The above-described offences are rarely prosecuted, probably because:

- o they occur infrequently;
- o when they do occur, many would not come to the attention of authorities; and
- o when they do come to the attention of authorities, it is difficult to gather admissible evidence (e.g. not hearsay) and to prove offences such as counselling, conspiracy or aiding or abetting.

Where a parent does not directly participate in an offence, a parent's actions - such as abuse or neglect - could indirectly contribute to the child or young person's offending behaviour. A parent may be charged with assault; there are a range of offences applicable to sexual abuse of children. Sections 215 and 218 C.C. make it an offence for a parent to fail to provide the necessaries of life to a person under the age of sixteen or to abandon a child under age of ten years so that the child's life or health is, or is likely to be, endangered or permanently injured. As well, child welfare legislation establishes a duty to report child abuse and grounds for intervention or apprehension.

There is no equivalent offence to the former contributing to juvenile delinquency. Section 172 C.C. makes it an indictable offence for anyone to corrupt a child by, in the home of the child, participating in adultery, or sexual immorality or indulging in habitual drunkenness, or any other form of vice, and thereby endanger the child or render the home an unfit place for the child to be in. This offence is rarely, if ever, prosecuted, probably because of its antiquated nature.

10.2.5 Offences Committed With Children and Young Persons

Any adult may be charged where that person is a direct participant in or a party to an offence with a child or young person. When that adult participant or party is a parent or guardian - or other adult in a position of

trust or authority, or in a relationship of dependency with the child or young person - the adult has not offended the community in the same way as any other offender charged with the same crime. By providing a criminal role model, and in leading an impressionable child to believe that criminal conduct is to be encouraged and condoned, the parent has betrayed a trust in relation to the child and the community: parents are expected to supervise and guide their children in a positive (or, at minimum, not harmful) manner and to be a pro-social role model to their children.

A similar argument could be made where a parent (or other person in a position of trust or authority in relation to a child or young person) commits an offence, not with, but in the presence of his or her child, e.g. where a parent receives and sells stolen goods, or traffics in illicit drugs, in a manner that is obviously known to his or her child. While perhaps less egregious than actually participating in criminal conduct with a child or young person, the principle is the same - corrupting children. Section 172 C.C. creates an offence to corrupt children but this is rarely, if ever, prosecuted, probably because of the antiquated references to adultery, habitual drunkenness, and to "other forms of vice".[24] In effect, the commission of criminal offences with one's own child, or in the presence of that child, amounts to a more modern, narrower and clearer definition of circumstances that corrupt children. This is not a matter of subjective judgements based on vague notions about what constitutes "good" parenting: such conduct is clearly beyond the bounds.

The Task Force considered, but rejected the option of creating a new, separate offence to address circumstances where a parent commits an offence with, or in the presence of, the child or young person. While arguably feasible[25], a separate offence would appear to offer little advantage: the parent is, after all, already charged with a criminal offence. The real issue, therefore, relates to the sentencing of the parent. Given this, there are two options:

- o reviewing and, where required, strengthening Crown policies so that the Crown, in appropriate circumstances, will make representations to

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[24]It seems likely that s.172 C.C. may be quite vulnerable to Charter challenges.

[25]Constitutional challenges to two separate offences arising from the same set of circumstances have been withstood, e.g. the use of a firearm during the commission of an indictable offence (s.85 C.C.). A parent committing a criminal offence with a child could likely be a stand alone offence. Committing a criminal offence in the presence of a child would likely require a "test of harm" to the child, such as endangering the moral, psychological or social development of the child, or leading or tending to lead the child or young person to believe that criminal conduct is to be condoned. Such a test would likely be difficult to prove.

the court that the circumstances of the offence involving the child constitutes an aggravating circumstance and, therefore, a more onerous sentence; or

- amending (the soon to be proclaimed) section 718.2 Criminal Code (Bill C-41) so that these circumstances are deemed to be an aggravating factor in sentencing.

Before considering the merits of either of these options, question can be raised about whether either measure is necessary. The key arguments against either measure include:

- these circumstances occur very infrequently;
- the parent-child relationship is more likely to be harmed than helped, especially if the parent is incarcerated; and
- there are more constructive social measures that could be taken, such as voluntary counselling or parent training or, if necessary, child protection.

In counterpoint:

- a more onerous sentence would reflect society's denunciation of such conduct and afford a greater degree of specific and general deterrence.
- criminal measures and non-criminal social measures are not a mutually exclusive "either/or" choice. For example, child abuse and severe neglect can be addressed both criminally (e.g. assault) and civilly (e.g. child protection); abuse of a child by a person in a position of trust or authority is an aggravating factor under section 718.2 C.C. Not all parents in these circumstances would be willing to participate in voluntary social interventions vis-a-vis parenting; only the most extreme situations would likely provide grounds for child welfare apprehension. Conditions of probation or a conditional sentence could, for example, better ensure that the parent undertakes appropriate counselling and parent training. Even if the parent is incarcerated, in some circumstances this could be construed as less intrusive than child welfare apprehension and removal of the child from the family.
- express statutory reference would accord the courts clearer authority to make relevant orders respecting parenting, such as attendance to parent training or family counselling.

A substantial majority of the Task Force agreed that there is merit in seeking a more onerous sentence in circumstances of parental involvement in criminal offences, which could be accomplished by way of amendment to section 718.2 C.C. (Bill C-41), which deems three types of circumstances to be aggravating at sentencing: offences motivated by bias, hate or prejudice; abuse of the offender's spouse or child; and abusing a position of trust or authority in relation to the victim of the crime. None of these three circumstances appear to address circumstances of parental involvement in offences in relation to children or young persons.[26]

The advantages of an amendment to section 718.2 C.C. include:

- there would be a clear signal of society's disapproval of parental misconduct of this nature;
- there would be better assurances of consistency of application in all cases; and
- codification would possibly ensure that these aggravating circumstances have greater force and effect.

In counterpoint, it could be argued that an amendment is unnecessary: Crown Attorneys, in appropriate circumstances, can and do make sentencing submissions to the effect that these are aggravating factors and the courts do take this into consideration in sentencing.

Perhaps the greatest disadvantage of an amendment to the 718.2 C.C. is potential lack of flexibility and consequent over-reaching application: for example, less serious situations - a mother on welfare who shoplifts while with her child - would be deemed to be an aggravating circumstance. For this reason, a majority of the Task Force agreed that an amendment should be limited to only the more grievous circumstances where a parent commits an offence directly with or is a party to an offence committed by the child or young person, i.e., excluding those circumstances where a parent commits an offence in the presence of the child or young person. These latter circumstances can be addressed by Crown policies which should, as necessary, be reviewed and strengthened.

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[26]Abusing a position of trust or authority is limited to circumstances where that abuse of trust is in relation to the victim of the crime; if a parent is a co-accused with his child, that child is not the victim of the crime. Abuse of the offender's child is intended to capture circumstances of, for example, physical or sexual abuse of a child; it is doubtful that this provision could be construed as extending to situations of parental involvement in crimes with their children.

In light of the above - and bearing in mind that the second recommendation below is supported by a majority of representatives - the Task Force recommends that:

(1) **Federal/Provincial/Territorial Ministers Responsible for Justice should take steps to review Crown policies and , as necessary, strengthen them so that Crown Attorneys make sentencing submissions vis-a-vis aggravating circumstances in situations where a parent or guardian - or other adult in a position of trust or authority, or in a relationship of dependence with the child or young person - commits an offence with, in the presence of, or is a party to an offence committed by the child or young person.**

(2) **Consideration should be given to amending section 718.2 Criminal Code (Bill C-41) so that it is deemed to be an aggravating circumstance for sentencing purposes where a parent or guardian - or other adult in a position of trust or authority, or in a relationship of dependency with the child or young person - commits an offence with or is a party to an offence committed by the child or young person.**

10.2.6 Contributing and Negligence Offences

The Task Force considered and rejected the option of re-establishing an offence of contributing to juvenile delinquency on the grounds that these offences:

- are vague and fail to provide clear and fair notice of the standard of parental care (behaviour) expected;
- are over-inclusive;
- do not adequately define a causative link between the parent's (or other adult's) conduct and the child's criminal conduct;
- establish vicarious criminal liability, a concept foreign to the criminal law;
- would be very vulnerable to constitutional challenges under the Charter; and
- address many circumstances that can already be prosecuted under federal criminal law or provincial statute, e.g. receiving stolen goods,

supplying alcohol or drugs, sexual offences, abetting an offence, and so on.

Contributing to juvenile delinquency is, in effect, a very broadly framed negligence offence. While there are sound reasons to reject a contributing offence, it could still be feasible to establish a carefully defined negligence offence which addresses a much narrower range of circumstances relating to parental misconduct.

There are several negligence offences in the Criminal Code, e.g. sections 33, 79, 86, 215, etc. Offences involving criminal negligence are necessarily coupled with a "duty of care", which duty can be statutorily defined directly (e.g. necessaries of life, s.215 C.C.) or indirectly (e.g. careless use of a firearm, s.86 C.C.), or can arise from a common law duty of care. There are no Criminal Code offences which address acts of omission in relation to parental supervision of children or young persons, as opposed to acts of commission (e.g. parties to an offence) and corrupting children (s.172).

Criminal negligence offences are controversial - a government order to act (duty of care) is far more intrusive than a demand to refrain from proscribed conduct (e.g. theft). Accordingly, negligence offences are usually limited to circumstances that concern the life or safety of others, e.g. criminal negligence causing death, careless use of a firearm, etc.[27] Given this, establishing a negligence offence in relation to parental omission of a duty of care to supervise children should, if considered, be restricted to circumstances affecting the life or safety of other persons.

The considerable body of law respecting negligence offences indicates that there are several elements that need to be satisfied to make out a valid offence, including: avoidance of vagueness and over-inclusiveness; a statutory duty of care which provides clear and fair notice of the standard of care (behaviour) expected; knowledge (or foreseeability) by the accused; the capacity of the accused to act and to appreciate the risk; wanton or reckless disregard; a causative link between the harm done and the negligence (causation); and proof of conduct (or a failure to act) which reveals a marked and substantial departure from what would be expected of a reasonably prudent person in the circumstances.[28]

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[27]There are some exceptions, e.g. s.436 C.C. concerning arson by negligence applies whether the negligence results in bodily harm to another person or damage to property.

[28]See, for example, R. v. Finlay (1993), R. v. Creighton (1993) and R. v. Gosset (1993).

Given the above, it would be possible to create an offence of criminal negligence in relation to egregious circumstances of parental omission of an affirmative duty of care and supervision (perhaps linked to s.219 C.C.) where:

- a parent, guardian or other responsible adult has responsibility for the care and supervision of the child or young person;
- the young person or child commits an offence involving death or serious personal injury;
- the parent, guardian or other responsible adult knew or ought to have known that the young person intended to cause, was causing, or was likely to cause death or serious personal injury;
- the parent, guardian, or other responsible adult displayed a wanton and reckless disregard for the life or safety of other person; and
- the action or failure to act resulted in or facilitated the harm.

An offence of this nature might address uncommon situations where, for example, a parent of a known youth gang member who is known to the parent to have an illegal gun, takes no steps to remove the gun and the young person then goes on to harm another person with the gun.

The primary concern about a negligence offence of this nature is undue state intrusion into privacy and integrity of the family, and of parent-child relations. Historically, the state has not intruded into the privacy of family relations, except in respect of crimes of commission where there is a threat to life or safety (e.g. child abuse, spouse assault) or, rarely, in respect of crimes of omission, such as a failure to provide for the necessaries of life (s.215), where there is a threat to the life or health of vulnerable and dependent children.[29] As noted, a government order to act (duty of care) is more intrusive than a government order to refrain from prohibited conduct; when that government order to act concerns family relations, the law becomes even more intrusive.

A negligence offence of this nature also raises a much broader social policy issue: Why should an offence of this nature be restricted to just parents?

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[29]A parent is under a legal duty at common law to take reasonable steps to protect his child from illegal violence used by the other parent toward the child which the parent foresees or ought to foresee (R. v. Popen). This duty is, however, evidently limited to protection of one's own child.

Other persons who have relationships with adult offenders, such as spouses or friends, could also be in situations of knowledge and have a capacity to take steps to prevent harm. There are, however, differences in the nature of these relationships - there is a supervisory aspect to a parent's relationship with a child. This presupposes, however, that a parent can monitor and control a child's behaviour, a capacity which diminishes with the age, maturity and degree of independence of adolescents, i.e., a parent's capacity to monitor and control a twelve year old is much greater than the parent's capacity to do the same with a seventeen year old (who is much more likely to commit an offence involving harm to others).

A statutory duty of care only describes the duty, not the acceptable means by which that duty should be discharged. If such a negligence offence was enacted, some parents may feel that the only reasonable steps they could take is contacting law enforcement authorities. If so, this raises the spectre of the ultimate state intrusion into the privacy and integrity of parent-child relationships - in effect, parents could become informants of the state and, therefore agents of state control.

The degree to which the criminal law refrains from intrusion into the privacy of family relations is reflected not only in the absence of a duty to report serious offences, but also in limitations under the Canada Evidence Act (s.4) respecting the compellability of a spouse to give evidence against his or her partner. What were known as "hue and cry" offences were long ago abandoned in criminal law - the only remnant is a duty to report treason (s.50 C.C.). In tort law, psychiatrists and psychologists are under a duty to report circumstances where a patient is dangerous to others, but the liability for a failure to do so is civil and pecuniary. Some tort law indicates that parents can be held civilly liable for the wrongful acts of their children where the parent negligently breaches a common law (or statutory) duty of care to the victim. As an alternative to criminal liability, provincial and territorial civil legislation could be reviewed and, as necessary, strengthened to address these circumstances.

Other concerns and observations about a parental criminal negligence offence include:

- o if parents knew they could be held criminally liable for the actions of their children, they might be less willing to continue to accept responsibility for their children, e.g. asking them to leave home.

- o potential to promote or inflame parent-child hostilities, thereby aggravating the situation.

- the fact situations for which parents could be prosecuted would be rare. As well, there would be considerable difficulty in acquiring evidence and proving negligence, defences against the charge might be fairly easy to establish ("I told him not to").

- the standard of care and reasonable steps a parent should take remain vague and would not accord parents adequate notice of the conduct required of them.

- given the narrow circumstances in which the offence could apply, it would principally be reactive in nature, failing to deter other parents or promoting better parental supervision.

- substitute caregivers, including foster parents, would be reluctant to accept responsibility for delinquent youth if they knew that they could be held criminally liable for the youth's conduct.

- potentially further disadvantages parents who are in disadvantaged situations, e.g. the single, working mother trying to raise several children in circumstances of poverty.

- criminal liability requires guilt to be personal and individual; in principle, parents should not be held criminally liable unless they directly encourage (abet) or participate in their children's crimes.

In counterpoint, the advantages and arguments advanced in favour of this proposal include:

- in weighing the competing values at play vis-a-vis the privacy of parent-child relations, there is a compelling public interest in preventing serious harm to other persons, including other children and young persons, who comprise a substantial proportion of the victims of violent crime by young offenders. The protection of other vulnerable persons justifies intrusion into family relations.

- circumstances of egregious parental inaction, while infrequent, do occur and these demand criminal law intervention and denunciation. Accordingly, the social value of parental responsibility to supervise their children would be affirmed, as well as bolstering confidence in the criminal law and youth justice system. Infrequency is not a criterion by which a determination should be made as to whether the criminal law has a role to play.

- it is unrealistic to expect proposed statutory provisions to be completely specific vis-a-vis the standard of care and reasonable steps a parent should take. General terms are acceptable where it is impossible or impractical to enumerate the expected behaviour, as is the case with other negligence offences. The courts can assess the circumstances on a case by case basis and can be relied upon to avoid excesses.

- concerns about parents becoming informants of the state could be avoided by codifying a defence such that a parent could not be found guilty of the offence on the grounds of failing to inform a peace officer or other law enforcement authority.

- concerns about the potential impact on substitute caregivers such as foster parents, could be addressed by enacting special provisions protecting them from criminal responsibility.

It should also be noted that an offence of this nature could be used to address circumstances of gross parental inaction vis-a-vis the supervision of conditions of a youth court order, such as where the parent of a young pedophile, under order not to associate with young children, takes no action when the son breaches that condition. While the parent would not necessarily be obliged in law to report that the breach to authorities (assuming a codified defence), the facts of the prior finding of guilt and of the conditions of the court order could be used as a basis to establish parental knowledge of a propensity to harm and of a reasonable standard of supervision that is to be expected in the circumstances.

In light of the above, the Task Force considered three options:

Option 1: Status quo, i.e. no parental criminal negligence offence.

Option 2: Establish a parental negligence-based offence in the Criminal Code to address circumstances where the actions or failure to act by a parent or guardian, or other person responsible for the care and supervision of a child or young person, results in or facilitates an offence by the child or young person that causes the death of or serious personal injury to another person. This offence would establish a statutory duty of care and would have to be carefully and narrowly constructed to satisfy the requisite elements of criminal negligence offences, such as a knowledge or foreseeability, wanton or reckless disregard, the capacity of

the parent to act and to appreciate the risk, and a proximate connection (causation) to the commission of the offence. There could also be provisions protecting substitute caregivers, such as foster parents, from criminal responsibility.

Option 3: Establish an offence as per Option 2, but include a codified defence such that an accused may not be found guilty because of a failure to report the child or young person to a peace officer or other law enforcement authority.

For the reasons described above, a substantial majority of the Task Force supported Option 1, the status quo. In short, criminal offences should not be created vis-a-vis contributing to juvenile delinquency nor a more narrowly framed parental negligence-based offence. This does not mean, however, that there should not be any recourse available to victims, but rather only that most agreed that criminal sanctions are not a desirable alternative. As discussed later (see, 10.2.8), civil remedies are available and it appears worthwhile to explore whether these can be strengthened in any way. As well, information should be made available to victims concerning the availability of civil remedies and of criminal injuries compensation.

10.2.7 Parental Supervision of Orders

If a young person is placed under community supervision, it is hoped that parents will be active and helpful partners in supporting and supervising compliance with the conditions of the youth court order. This is usually the case, but sometimes is not. Lack of parental support can include active interference with the terms of the youth court order, a failure to act in known circumstances of non-compliance, or indifference to whether or not the young person is complying.

Section 50 YOA addresses extreme circumstances of interference with dispositions by creating an offence for everyone, including a parent, who wilfully induces or assists a young person to breach or disobey a term or condition of a disposition or to wilfully prevent or interfere with the performance by a young person of a term or condition. Section 50 also addresses circumstances of inducing or assisting a young person to unlawfully leave a place of custody or to unlawfully remove from custody or conceal or harbour a young person who has unlawfully left a place of custody.

Section 50 offences are rarely prosecuted, presumably because these offences are uncommon and because of the difficulties associated with

detecting these offences and acquiring evidence of the same. As well, prosecution is often unnecessary because the threat of the same is sufficient to motivate the person to desist in interfering.

The major concern about section 50 is its limited scope - since it is limited to interference with dispositions, there is no capacity to prosecute in similar circumstances of interference with a condition of bail,[30] assisting or inducing a young person to unlawfully leave a place of temporary detention or a peace bond. As well, there is some uncertainty as to the applicability of the offence to situations of interference with the terms of a temporary release from custody (s.35).[31]

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

> **Section 50 YOA, respecting interference with dispositions, should be amended so that it also applies to circumstances of interference with terms or conditions of bail, placement in pre-dispositional custody, temporary release from custody, or any other order of the youth court such as a peace bond.**

While section 50 YOA can be employed to address circumstances of active and wilful interference with dispositions, there is no capacity to address circumstances of parental inaction vis-a-vis circumstances of parental knowledge of breaches of a court order. There is no statutory or common law duty for a parent to report a breach of a court order, except where a parent (or other responsible person) voluntarily enters into an undertaking under section 7.1 YOA with conditions requiring them to do so.

Section 7.1 YOA provides that a youth court judge may place a young person in the care of a responsible person instead of being detained in custody. The section requires that: the young person would, but for the subsection, be detained in custody; the responsible person is willing and able to take care of and exercise control over the young person; and the young person is willing to be placed in the care of that person. Both the young person and the responsible person are required to enter into an undertaking, a breach of which constitutes an offence. Conditions of the undertaking can

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[30]Except where the young person is placed in the care of a responsible person under s.7.1 YOA.

[31]Inducing a young person to breach a term of a temporary release may not constitute interference with a disposition because a term of a temporary release does not flow from a youth court order. As well, the person interfering has not induced the young person to leave a place of custody. While this could be argued the other way, the point is that the applicability of s.50 to temporary releases is not clear.

be imposed on the responsible person, such as requiring that a breach of a condition by the young person be reported to the police or a youth worker.

It appears that undertakings under section 7.1 YOA were originally intended to apply to third parties such as relatives, family friends or foster parents, but they have also been applied to parents. Statistics respecting frequency of use are not available; it is believed that prosecutions for failure of a responsible person to comply with an undertaking are rare.

The Task Force rejected the option of creating a general statutory duty for parents to supervise and report non-compliance with youth court orders for a variety of reasons, principally because of the considerable state intrusion into the privacy of parent-child relations. Parents, in effect would be required to be informants of the state.

In the alternative, provisions similar to section 7.1 YOA could be extended to the dispositional context. In this regard, such undertakings could not be applied to regular probation orders,[32] but could be applied in circumstances analogous to section 7.1 in the dispositional context - early release from custody by way of section 28 or 29, temporary release from custody under section 35, and "conditional disposition" orders, the latter assuming that this new disposition will be established (see Chapter 6).

The advantages of this proposal include:

- parents (or other responsible persons) on undertakings would supervise court orders more closely, thereby ensuring greater compliance.
- young persons would be more likely to comply if they knew their parents were required to supervise and report compliance.
- enforcement of non-compliance would be more effective.
- greater compliance and stronger enforcement could lead to the avoidance of recidivism, including the avoidance of serious harm to other persons.

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[32]A section 7.1 undertaking is voluntary; in the context of regular probation, the youth court would not have the jurisdiction to impose a similar undertaking on a parent (or other responsible person) because the parent is not the accused, nor would it be appropriate to deny probation that would otherwise be imposed because of the unavailability or unwillingness of a parent or other responsible person to enter into an undertaking. Probation is a separate disposition and not a form of release (except when imposed by way of s.28 or 29).

- there would be a benefit to young persons insofar as the youth courts would be more likely to endorse release from custody or avoid the use of custody if they were stronger assurances of supervision. This would reduce custody rates and save costs.

- the mechanism is already established within the Act (s.7.1); therefore, judges and other justice professionals are familiar with it in the context of release from pre-dispositional custody.

- there is no vicarious liability imposed on the parent; if a parent was charged it would be for the parent's conduct, not the youth's.

- where a parent is unable to comply, there could be a review mechanism, as is the case with s.7.1, to allow the parent to be relieved of the obligation.

- since the undertaking would be voluntary, there would not be unfairness or hardship involuntarily imposed on parents.

The potential for the avoidance of serious harm to others is a particular advantage of this proposal. In some cases involving serious young offenders, compliance with conditions of community supervision are essential to the avoidance of further harm, e.g. a young pedophile avoiding association with young children or an assaultive youth avoiding the use of alcohol.

There are, however, several disadvantages to this proposal, including:

- notwithstanding that an undertaking would be voluntary, parents who agree to enter into an undertaking would nonetheless be required to be informants of the state, thereby inappropriately intruding into the privacy of family relations.

- some parents, faced with the prospect of their child being committed to/remaining in custody, may feel compelled to enter into an undertaking, i.e. the undertaking may not be truly voluntary. Conversely, some parents, thinking custody would be good for their child, may refuse to enter into an undertaking.

- potential creation or aggravation of parent-child conflicts. There is the possibility of abuse of power by parents. There is also the possibility of abuse by young persons, e.g. "setting up" and getting back at their parents by intentional non-compliance.

- o potential inappropriate decision-making and discriminatory application. Young persons may be committed to/retained in custody, in part, on the basis of the willingness and ability of their parents to enter into an undertaking. This could lead to inequitable treatment of young persons from disadvantaged families.

- o anomalous situations could be created where the parent of a young person who voluntarily entered into an undertaking would be subject to criminal sanctions but the parents of a young person in similar circumstances would not because they refused to enter into an undertaking.

- o arguably, if a parent or other responsible person is truly responsible, there should be no need for a criminal sanction which, in any event, would be an excessive social response. If there is doubt about the responsibility of parents in some cases, this could be addressed by programs such as parent training, counselling, or intensive supervision.

- o additional complexities and costs associated with imposing and enforcing undertakings.

The logical extension of these arguments against applying parental/responsible person undertakings to the dispositional context is that section 7.1 should be repealed or, at least, limited to non-parenting situations. While the arguments against this proposal appear to have considerable merit, it should be noted that concerns of this nature have not been raised in respect of section 7.1 undertakings. This may be because the concerns are over-stated or because the use of section 7.1 undertakings with parents seems to be relatively uncommon and therefore less likely to prompt concerns.

After considering the advantages and disadvantages discussed above, a substantial majority of Task Force members agreed that the status quo is preferable. However, some jurisdictions - including Alberta - supported the alternative of extending parental/responsible person undertakings to the dispositional context.

10.2.8 Liability for Compensation

In considering parental liability for damages or losses to the victim of an offence committed by a young person, the values and goals at issue are somewhat different from proposals to hold parents criminally responsible. The principle goal with civil liability is compensation to the victim. In effect, the question is not "Who should be punished?" but rather "Who should

pay?". Given their dependency and immaturity, many young persons are unable to pay and, if there is no capacity to require a parent to pay, then an innocent victim is, in effect, required to pay.

Having said that the goal is compensation to the victim, a requirement to pay the costs of damages or losses would, from the perspective of many parents, still be seen as a kind of pecuniary punishment of the parent for the actions of another person (the child), and especially so if there is no apparent negligence by the parent.

Suggestions have been made that, as under the JDA, parents should be held financially liable for compensation to victims. The principle argument in favour of this proposal is that the social value in better ensuring compensation to an innocent victim outweighs other social policy considerations. While this rationale is compelling, there are significant legal and practical problems associated with this proposal.

The law could not hold parents automatically liable for compensation to victims - at common law, parents cannot be held liable for the torts of their children unless negligence is proven. Even under the JDA, there was a (vague) legal test which had to be satisfied before the court could order a parent to pay compensation - a parent had to have "conduced" to the commission of the offence. Similarly, in other countries that have parental compensation laws, legal tests (of varying degrees of specificity) need to be satisfied before an order can be made.

Parental compensation provisions under the YOA would add a whole new dimension to the youth court process, with the potential of protracted litigation respecting the determination of parental negligence. This could considerably aggravate existing concerns about delay, backlogs, complexity and costs associated with the youth court process.

Since a parental compensation law would require a separate determination of parental responsibility for compensation, a civil process would, in effect, be attached to a criminal court function. Given this, the question is not only "Who should pay?" but also "Who should decide?" A youth court is not, in our view, the appropriate forum for making such determinations - this is the proper responsibility of the civil courts.

It is beyond the scope of this report to review the legislation and case law across jurisdictions vis-a-vis the civil liability of children and parents. In brief, a child can be held civilly liable for his or her own torts in exceptional circumstances. Parents are not vicariously liable for the torts of their

children, and since children rarely have significant assets, law suits against children are relatively uncommon. As one author notes:

> "The one characteristic of the defendant which the common law clearly takes into account is youth. Negligence law does not expect young children to possess the common sense, intelligence, and knowledge of the reasonable adult and has fashioned a standard suitable to children.
>
> It must be noted, however, that young children are very rarely sued for their allegedly negligent conduct. This is probably a result of the small likelihood that a judgment against a child can be satisfied from the child's assets, combined with the absence of liability insurance. Undoubtedly, another factor is the tolerance that victims of negligent children might have towards them, as well as the victim's knowledge that suits against children will be difficult to win as a result of the common law's indulgence." (Klar, 1991, p.214).

There is no statutory authority which expressly makes parents civilly liable for the criminal acts of their children. The common law imposes no general responsibility on parents for damage caused by their children. There are at least three exceptions. First, a parent may be held liable on the principle of agency where the child was doing something on the parent's behalf. Second, a parent may be held responsible if the parent directs or encourages the child to cause damage. Third, the parent may be liable if the parent was negligent in failing to control or supervise the child.

There are many examples where courts have considered the principles applicable to parental liability. In a very recent case of the British Columbia Supreme Court, in Trevision v. Springman, Spencer J. had the opportunity to review the principles:

> "The common law shows that a parent may be liable in negligence to someone who is injured by the acts of his or her child. Four things must be established before liability is found. I take this list from the judgment of Whittaker J., as he then was, in Streifel v. S., B. and G. (1957) 25 WWR182 (S.C.B.C.) at p.183. That case dealt with an action for damages to a motor vehicle stolen by children and damaged in an ensuing accident during a police chase. The four criteria are: that the child had a propensity to steal; that the parent knew of it; that the parent should reasonably have anticipated that the child might steal a car; and that there was some reasonable step the parent could have taken to prevent the particular theft." (p.5).

In Lelarge v. Blakney, Hughes of the New Brunswick Court of Appeal, stated:

> "The parental duty of care is a duty personally imposed upon the parent irrespective of the wrongdoing or liability of a child. The duty is to supervise and control the activities of the child and, in doing so, to use 32 reasonable care to prevent foreseeable damage to others. The extent of the duty varies with the age of the child. The degree of supervision and control required of a young child may be very different from that required of a child approaching the age of majority. As the age of the child increases and the expectation that he will conform to adult standards of behaviour also increases, the parental duty to supervise and control his activities tends to diminish..." (p.446-7).

Also, there are many examples where parents have been found liable, and some are nicely summarized by Linden in Canadian Tort Law:

> "Parents, and people who stand in their place, are required to supervise their children reasonably, although they are not vicariously responsible on the ground of their family relationship alone. Thus, where a sixteen-year old 'congenital idiot of irresponsible impulses' who was constantly playing with matches, set fire to the plaintiff's property, the father was held liable for his negligence in harbouring this 'dangerous animal'.
>
> Similarly, a parent is liable if he entrusts an air gun to an eleven-year-old son without properly training him, or if he fails to lock up a spring gun, enabling his eleven-year-old son to shoot a domestic in the eye. If the parent takes proper precautions, however, no liability will be visited upon him. A parent may be responsible for failing to train his child properly in the use of dangerous objects such as snowmobiles..." (p.120-1).

In the United States, as discussed above, modern tort statutes have been passed which impose varying degrees of responsibility on parents for the wrongful actions of their children. Typical statutes limit responsibility to the minor's malicious intentional acts and place a ceiling on the amount that can be recovered from the parents.

It may be that, in Canada, a more proactive approach to addressing civil liability of children and parents in provincial legislation should be pursued. As Linden observes:

> "Children have been treated relatively leniently by the law, but their

> victims have had to bear the losses caused by them, which can be harsh at times. It might well be that, despite our compassion for youthful wrongdoers, the law should move toward more stringent standards for children in order to instill greater responsibility in them and to encourage their parents to supervise them more closely."

There may be means by which provincial and territorial civil legislation could be enacted or amended to better facilitate and encourage civil recovery of damages for losses from parents and children.

In Ontario, the Family Law Act (s.68) provides that in an action against a parent for damage to property or personal injury or death caused by the fault or neglect of a child who is a minor, the onus of establishing that the parent exercised reasonable supervision and control over the child rests with the parent.

Manitoba is considering the development of legislation that is intended to facilitate the civil recovery from parents of compensation for property crimes committed by young persons under the age of sixteen who are living at home. This may, like Ontario legislation, include a reverse onus on parents. There may be means by which provincial and territorial civil legislation could be enacted or amended to better facilitate and encourage civil recovery of damages or losses from parents and children.

A thorough review of civil legislation and case law across jurisdictions is required before decisions can be made as to the feasibility of amending or enacting provincial and territorial legislation which would better facilitate civil recovery from negligent parents for damages or losses resulting from the criminal acts of their children.

Given the above, **the Task Force recommends:**

> **Deputy Ministers Responsible for Justice should request that the federal-provincial-territorial Civil Justice Committee undertake a cross-jurisdictional review of civil legislation and case law, with a view to determining whether model legislation can be drafted which better facilitates civil recovery from negligent parents for damages or losses arising from the criminal acts of their children.**

10.2.9 Parental Attendance Orders and Payment for Services

Suggestions have been that, where there are concerns about parenting skills or family dysfunction, the youth court should be accorded the capacity to

order the parents of young offenders to participate in parent training/education programs or family counselling. Improving parenting skills or family functioning is certainly desirable, but many would question the effectiveness of compulsory parental attendance orders. Putting this debate aside, such orders are not feasible: the parent is not an accused before the youth court; therefore, the court has no apparent jurisdiction to make a compulsory parental attendance order for counselling or training. In any event, compulsory counselling is unlikely to be effective without the cooperation of the parent.

On the other hand, it might be possible to accord the court jurisdiction to make an order, with the consent of the parent (e.g. akin to s.7.1) and where appropriate services are available, but this would raise questions as to enforceability in the event of non-compliance. As well, if the parent is willing to engage in these remedial measures, then question can be raised about the need for a court order.

It would seem that the issue of counselling or training for parents is a matter, not of the law, but rather of actively and cooperatively engaging parents in available programs. As recommended earlier (10.1.4), priority should be given to the development of parent support and intervention programs.

Suggestions have also been made that there should be a capacity to recover the costs of services to young offenders from parents, where the parents have a capacity to pay. While many parents are impecunious, some parents do have the financial capacity to contribute to the costs of, for example, state-funded counselling. In order to accomplish this, an amendment to the Act might be required to authorize the provincial director, or another party appointed by the province or territory, to assess the parent's (and young person's) means to pay and to collect the debt, which could be enforced civilly. The advantages and disadvantages of this proposal are very similar to those set out in relation to the options of recovering the costs of counsel (Chapter 11). There is, however, an important practical distinction between recovering costs of counsel and the costs of youth correctional services: unlike legal aid systems, youth correctional systems do not have established procedures and infrastructure to assess ability to pay and to recover costs. The costs associated with establishing this new process would not, in all likelihood, be able to be justified by potential cost recoveries, especially given the limited financial means of most parents.

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