"Source: Department of Justice Canada, A Review of the Young Offenders Act and the Youth Justice System in Canada: Report of the Federal-Provincial-Territorial Task Force on Youth Justice, 1996. Reproduced with the permission of the Minister of Public Works and Government Services Canada, 2008."

CHAPTER 11 - DUE PROCESS ISSUES

11.1 RIGHT TO COURT-APPOINTED COUNSEL

Increasing cost pressures in jurisdictions in relation to providing programs and services required under the Young Offenders Act (YOA) and for other justice services, together with the perspective that young persons and their parents should assume more responsibility generally under the legislation, have raised the issue of whether the provisions relating to court-appointed counsel should be amended in any way.

The Declaration of Principle (s.3 YOA), which establishes the policy for Canada in respect of young persons, states:

> "young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of Rights and Freedoms or in the Canadian Bill of Rights ... and young persons should have special guarantees of their rights."

Because of their immaturity, inexperience and dependency, young people are in a more vulnerable position than adults and therefore, many would argue, require greater assurances of the right to counsel. Accordingly, one of the Act's "special guarantees" of the rights of young persons is the right to court-appointed counsel.

At present, young persons have the right to counsel, appointed by the court, regardless of the nature of the offence, regardless of the financial circumstances of the young person or his or her parents, and without any apparent ability of the court to set criteria on the need for appointment. Relevant provisions of section 11 of the Act provide:

> 11(1) "A young person has the right to retain and instruct counsel without delay, and to exercise that right personally, at any stage of proceedings against the young person and prior to and during any consideration of whether, instead of commencing or continuing judicial proceedings against the young person under this Act, to use alternative measures to deal with the young person."
>
> (4) "Where a young person at his trial or at a hearing or review referred to in subsection (3) wishes to obtain counsel but is unable to do so, the youth court before which the hearing, trial

or review is held or the review board before which the review is held

(a) shall, where there is a legal aid or assistance program available in the province where the hearing, trial or review is held, refer the young person to that program for the appointment of counsel; or

(b) where no legal aid or assistance program is available or the young person is unable to obtain counsel through such a program, may, and on the request of the young person shall, direct that the young person be represented by counsel."[1]

(5) "Where a direction is made under paragraph (4)(b) in respect of a young person, the Attorney General of the province in which the direction is made shall appoint counsel, or cause counsel to be appointed, to represent the young person."

(8) "In any case where it appears to a youth court judge or a justice that the interests of a young person and his parents are in conflict or that it would be in the best interest of the young person to be represented by his own counsel, the judge or justice shall ensure that the young person is represented by counsel independent of his parents."

Therefore, in accordance with subsections 11(4) and (5), if a young person charged with an offence applies for legal aid, and is refused legal aid because he or she does not qualify, the youth court is nevertheless required to appoint counsel to represent the young person if the young person desires counsel. In practical terms, this accords the young person an absolute guarantee of the ability to exercise the right to counsel, once the young person appears before the court.

The right of the young person to be represented by counsel is recognized in many provisions of the Act; the young person, however, is not required to be represented by counsel if he or she does not desire counsel. The young person is entitled to waive the right to legal counsel.

When directing that counsel be appointed, the court has no discretion to inquire into the financial circumstances of the young person or any other

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[1] Subsection (6) establishes somewhat parallel provisions to subsection (4) where a young person appears at a hearing before a justice who is not a youth court judge.

matter: the court must appoint the counsel automatically (see R. v. C.(S.T.); R. v. T.(D.M.). This means that counsel must be appointed even if a young person's parents are very wealthy, or if a young person is charged with a minor offence where it is apparent that there is no chance of custody.

Section 11 of the Act does not specifically address the funding of court-appointed counsel, but historically the Attorney General or other Minister in each province or territory has made arrangements for the appointment and payment of such counsel.

This has caused some to express concerns that access to automatic publicly-funded counsel should somehow be restricted, or that the youth or parents should be responsible for contributing to the costs of counsel, if financial means exist. Given that, as a general rule, adults do not have the right to "free" legal counsel if they do not qualify for legal aid, some argue that similar rules should be applied to young persons. On the other hand, concerns have been expressed that any limitation on access to counsel, or the imposition of any requirement that parents or young persons pay for counsel, would undermine the intent of the Act to ensure due process for youth; it is argued such changes would not adequately recognize the immaturity or dependency of many young persons, or issues in relation to the payment for counsel by parents or youths.

Under the Constitution Act, both provincial and federal governments share responsibility for criminal justice. Accordingly, both levels of government have agreed to cost-share legal aid and court-appointed counsel expenses under the federal-provincial-territorial Legal Aid Agreement. For a useful discussion on Canadian constitutional arrangements for legal aid generally, see the Report on the National Review of Legal Aid, a report prepared by officials representing different governments in Canada.

The costs of legal aid and court-appointed counsel to young persons are incorporated into federal-provincial-territorial cost-sharing agreements for legal aid. Historically, the amount of federal contributions were based on actual expenditures but, as a fiscal restraint measure, federal contributions were "capped" at 1989/90 contribution levels, with only minimal increases allowed thereafter.[2] Commencing in 1996-97, federal contributions will be reduced by nearly four percent of the capped amount. The most recent federal budget provides that the total budget of the

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2 An increase of 1 percent per year for 1992/93 and 1993/94, but no increase thereafter.

federal Department of Justice will be reduced by 3.5 percent, commencing in 1998-99; whether this will result in further reductions in federal contributions to legal aid is not known at this time.

In contrast to the changing fiscal climate, the costs of counsel to young persons are, in effect, unchangeable because publicly funded legal services are mandatory under the Act. For example, changes in legal aid eligibility criteria for young persons would not reduce costs because this would simply result in these cases being provided publicly funded legal services by way of the court appointing counsel. The adolescent population is projected to increase considerably over the next several years (in several jurisdictions); consequently, it is expected there will be a growth in demand for youth justice services. The combination of the certainty of publicly funded legal services to young persons and expected growth in demand for services, in the context of fiscal restraint, suggests that the costs of counsel to young people will comprise a growing proportion of the costs of legal aid programs, which also provide needed legal services in other areas such as adult criminal, family and immigration matters. In short, this could lead to pressures on these other services and a diminished capacity to maintain them.

Recently, the apparent requirement for court-appointed counsel to be publicly funded has been called into question. In R. v. C (S.T.), (1993), the Alberta Court of Queen's Bench observed that section 11 YOA does not address payment for court-appointed counsel:

> "It is implicit that the intent of the legislation is to leave that issue to be determined by provincial authorities...Section 11(4) provides the means to ensure that any young person who wants a lawyer will have one; it may not guarantee that the lawyer will be provided free of any charge" (p. 416).

Therefore, it appears at least arguable that provincial authorities may have the jurisdiction to develop cost-recovery schemes in relation to the funding of court-appointed counsel, but the authority to do so is not entirely clear.

11.1.1 Canadian Charter of Rights and Freedoms

Although various sections of the Canadian Charter of Rights and Freedoms address a young person's right to legal counsel, it is questionable whether the Charter specifically requires publicly-funded counsel for all young persons, regardless of the seriousness of the offence or the financial circumstances of the young person or parent.

Relevant Charter provisions are as follows:

> Section 7. "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
>
> Section 10. "Everyone has the right on arrest or detention
>
> (b) to retain and instruct counsel without delay and to be informed of that right;"
>
> Section 11. "Any person charged with an offence has the right
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;"
>
> Section 15. (1) "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."
>
> (2) "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

These Charter provisions speak to the right to counsel, but do not address funding arrangements for counsel. Section 11 YOA is much broader than the Charter provisions; section 11 specifically states that counsel shall be appointed by the court if the young person so desires, provided the young person is unable to obtain legal aid.

The Task Force agrees with the conclusions in the Report on the National Review of Legal Aid that it is likely that the delivery of some level of criminal legal aid services is now a matter of law under the Charter. This reasoning would also appear to extend to court-appointed counsel.

11.1.2 Historical Perspective

The Juvenile Delinquents Act (JDA) was silent on a young person's right

to counsel. Two years before the repeal of that Act, the Charter came into force (except for the delayed equality rights).

Before the 1970's, representation by counsel was rare in juvenile courts. During the 1970's, jurisdictions introduced legal aid plans, which included services to juveniles, and duty counsel services were established in several urban centres. A national study of the functioning of the juvenile courts in Canada found that, in 1981-83, the proportion of juvenile court cases with no legal representation at all at any hearing ranged from 2 to 31 percent in the major urban courts of Toronto, Montreal and Vancouver. In smaller urban and rural courts, however, the range was from 51 to 88 percent of cases with no legal representation.

While the 1965 report of the Department of Justice committee on Juvenile Delinquency in Canada was critical of inadequate rights and legal representation in the juvenile court system, it did not make specific recommendations for improvements in legal representation, except further study of a "law guardian" system provided at public expense.

The 1975 report of the Solicitor General's committee on Young Persons in Conflict with the Law recommended that young persons be explicitly accorded the right to retain and instruct counsel. The committee considered but did not recommend a legislative requirement that legal services be made available to young persons. Instead, it was suggested that young persons would, as with adults, have to make their own arrangements for legal services.

When Bill C-61 was before the House of Commons, the right to counsel provisions were the source of some controversy (though less so than other issues) vis-a-vis costs and concerns that the increased presence of defence counsel would introduce an adversarial and more complex process.

After the Act was proclaimed, the only substantive amendment to section 11 was in 1986 (Bill C-67), which accorded a young person the capacity to exercise the right to retain and instruct counsel "personally". This was in response to a decision by the Manitoba Court of Appeal which had decided that a young person did not enjoy that right.

11.1.3 International Perspective

Even prior to the Charter, Canada acknowledged the right of an accused person to receive publicly-funded counsel. Section 3(d) of the United

Nations International Covenant on Civil and Political Rights (1976) states that an accused is entitled to free legal counsel "where the interests of justice so require," and "if he does not have sufficient means" to pay for counsel. This Covenant is only binding at international law, but Canadian courts may rely on the Covenant to interpret Canadian legislation or the extent of rights and guarantees under the Charter.

Similarly, section 6(3)(c) of the European Convention on Human Rights also states an indigent accused is entitled to free legal assistance "when the interests of justice so require." Although Canada is not a party to this Convention, a court may nonetheless look to the Convention for assistance in interpreting Canadian legislative provisions. For a fuller discussion of these international instruments, and their impact, see the Report on the National Review of Legal Aid.

With respect to international instruments that more specifically address young persons, the United Nations Convention on the Rights of the Child addresses the right to counsel as follows:

> Article 37 "States Parties shall ensure that:
>
> (d) every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."
>
> Article 40 1. "States Parties recognize the right of every child...
>
> (a)(ii) to be informed promptly and directly of the charges against him or her, and if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
>
> (a)(iii) to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance..."

It is interesting to note that this Convention also states that a young person has the right to free assistance of an interpreter if the child cannot

understand or speak the language used (Article 40). Therefore, it appears the issue of the right to publicly-funded interpreters has been specifically addressed in the Convention, but not the right to publicly-funded legal counsel.[3]

The legislation of other western industrialized countries in relation to the right to publicly-funded counsel is instructive.

In the United States, for example, as a result of the Supreme Court decision In Re: Gault, (1967), young persons are entitled to state-funded counsel if the parents do not have the means to pay. In a report on the response to juvenile crime in the United States from a Canadian perspective, the authors conveniently summarize the American situation:

> "One of the most significant constitutional rights that a juvenile is afforded is the right to counsel. As articulated by the Supreme Court in 1967 in Gault, this requires that if a juvenile may face removal from the home:
>
> > 'the child and his parents must be notified of the child's right to be represented by counsel retained by them, or, if they are unable to afford counsel, that counsel will be appointed.(387 U.S.1, at 41)'
>
> While Gault resulted in many more juveniles having legal representation, the reality is that many, and in some states most, juveniles are still not represented in court. The extent of legal representation varies greatly within states, as some judges encourage representation, while others encourage juveniles to waive their right to representation, for administrative or philosophical reasons ... It is argued by American critics that many juveniles who are waiving their right to state-appointed counsel may not appreciate the significance of this ..."

In many states, parents who can afford to retain counsel but do not do so are required to reimburse the government for any expenditures of

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[3] The Convention does not have the force of law in Canada, but Canada is a signatory in an international forum. Consequently, a departure from the terms of the Convention could lead to embarrassment or criticism. Moreover, Canadian courts may look to the Convention to interpret Canadian legislation, bearing in mind that the Convention does not directly address state-funded counsel.

public funds (see Minn. State. Annot., para 260.251 (4) [1984]: see In Re: M.S.M., 387 N.W. 2d 194 (Minn. 1986). As a result, parents who are unwilling to pay for counsel may also discourage their children from seeking assistance through a court-appointed lawyer."[4] (Hornick, Bala and Hudson, 1995)

In the Minnesota example cited above, if the court has appointed counsel, the court may inquire into the ability of the parents to pay for counsel, and after giving the parents a reasonable opportunity to be heard, the court may order the parents to pay the counsel's fees.

The Minnesota legislation in this connection reads as follows:

(A) **"When Parent or Child Cannot Afford to Retain Counsel.** If the child or the parent(s) of the child cannot afford to retain counsel the child is entitled to representation by counsel appointed by the court at public expense.

(B) **When Parent Can Afford to Retain Counsel.** If the parent(s) of a child can afford to retain counsel in whole or in part and have not retained counsel for the child, and the child cannot afford counsel, the child is entitled to representation by counsel appointed by the court at public expense. However, the court may order, after giving the parent(s) a reasonable opportunity to be heard, that service of counsel shall be at the parent(s)' expense in whole or in part depending on their ability to pay." (MN ST JUV P Rule 4.01)

In New Zealand, a young person charged with an offence must be represented by an ordinary barrister/solicitor or a youth advocate (a specially appointed barrister/solicitor); the court may appoint either. The relevant provisions of New Zealand's Children, Young Persons and Their Families Act 1989 read as follows:

"Section 323. Appointment of Youth Advocate to represent child or young person--(1) Where a child or young person appears before a Youth Court charged with an offence, then

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[4] As well, a report by the American Bar Association released in January, 1996 concluded that significant numbers of youths appear in juvenile courts without lawyers and that juvenile defenders, on average, carry staggering caseloads - more than 500 cases per year - resulting in inadequate representation of juveniles accused of crimes.

unless--

(a) The child or young person is already represented by a barrister or solicitor in those proceedings; or

(b) The Court is satisfied that legal representation has been arranged, or will be arranged, for that child or young person in those proceedings,--

the Court shall appoint a barrister or solicitor to represent that child or young person in those proceedings.

(2) Where the Court appoints a barrister or solicitor under subsection (1) of this section, it shall, so far as practicable, appoint a barrister or solicitor who is, by reason of personality, cultural background, training, and experience, suitably qualified to represent the child or young person.

(3) Where,--

(a) Pursuant to subsection (1) of this section, the Court is required to appoint a barrister or solicitor to represent a child or young person in any proceedings; and,

(b) A Youth Advocate has been appointed to represent the child or young person in any previous proceedings,-- the Court shall, where possible, appoint that Youth Advocate to represent the child or young person in the later proceedings.

325. Payment of Youth Advocate--(1) The fees and expenses of a Youth Advocate shall, in accordance with regulations made under this Act, be paid out of the consolidated Account from money appropriated by Parliament for the purpose.

(4) Notwithstanding subsection (1) of this section, the Court may, if it thinks proper, order any party to the proceedings to refund to the Crown such amount as the Court specifies in respect of any fees and expenses paid under that subsection, and the amount ordered to be refunded shall be a debt due to the

Crown by that party and shall be recoverable accordingly in any Court of competent jurisdiction."

Virtually identical provisions in New Zealand's legislation also exist for payment of court appointed barristers and solicitors.

Therefore, in New Zealand, although it appears the appointment of counsel to represent young persons is mandatory, the court is authorized to order any party to the proceedings to contribute to the cost of counsel. The amount ordered is then considered a debt, to be enforced civilly.

In Australia, where states have full jurisdiction over the criminal law, the legislation relating to young offenders varies from state to state in terms of specifically addressing the right to counsel. In Victoria, Australia, the Children and Young Persons Act 1989 is quite specific and sets out the circumstances where a child must be legally represented. Section 20 of that Act states that if a child is not represented by counsel in certain proceedings, the court must not resume the hearing until the child is represented by counsel (unless the child has had reasonable opportunity to obtain counsel but has failed to do so). The proceedings in which the child is required to be legally represented are as follows:

Section 21 (2) "A child must be legally represented in the following proceedings in the Criminal Division:

(a) Application for bail if the informant or prosecutor or any person appearing on behalf of the Crown intends to oppose the grant of bail;

(b) Proceeding under section 24 of the Bail Act 1977;

(c) Hearing of a charge for an offence punishable, in the case of an adult, by imprisonment;

(d) Review of a monetary penalty imposed by the Court in respect of an offence punishable, in the case of an adult, by imprisonment;

(e) Application in respect of a breach of an accountable undertaking, bond, probation order, youth supervision order or youth attendance order imposed by the Court in respect of an offence punishable, in the case of an adult, by imprisonment."

This Act also requires that any counsel representing a child must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so, having regard to the maturity of the child (section 20(9)).

This Australian Act is silent on whether the parents or the youth may be required to make a contribution to the cost of counsel.

In South Australia, the Children's Protection and Young Offenders Act 1979 recognizes the right of a child to legal counsel at court hearings, although such representation is not assumed to be automatic; the court exercises the discretion as to whether a child needs representation.

11.1.4 Statistical Measures

The costs of legal aid and court-appointed counsel are shared between federal and provincial governments.

Approximately 16 percent of the total criminal legal aid federal contribution to all young offender programs is spent on legal aid for young offenders (the rest being spent on adult criminal legal aid)l. The fiscal arrangements in place for reimbursement of cost-shared claims do not specifically identify costs for court-appointed counsel, as compared to legal aid counsel. Therefore, in the absence of a formal audit or evaluation, there does not appear to be any accurate statistical information outlining actual costs or numbers associated with court-appointed counsel. There is a perception shared by all jurisdictions, however, that these costs have been increasing over the years.

As a result of cost pressures in relation to both adult and young offender legal aid, the Report on the National Review of Legal Aid indicates that:

> "Provinces have responded in a number of ways including restricting services, searching for efficiencies in delivery, restructuring eligibility, searching for alternate sources of revenue, increasing provincial funding, and continuing federal-provincial discussions." (Chapter 2).

With respect to legal aid generally, this Report also indicates that some jurisdictions utilize client contribution schemes (from adults) to offset legal aid costs. The amount contributed by accused persons ranges from less than 1 percent to almost 8 percent across Canada (Chapter 7).

Statistics regarding the proportion of young persons who are represented by counsel - whether by legal aid, court appointment or private retainer - are not available. Studies of the initial years of implementation of the Act in Ontario, Alberta, and British Columbia indicate that a substantial majority of young persons were represented, and that this level of representation was much greater than under the JDA. Observers of the system agree that it is very uncommon for young persons to appear without some legal advice and assistance, at minimum by duty counsel. It is also generally agreed that the vast majority of cases involve legal representation funded by legal aid or court-appointed counsel; retaining private counsel appears to be uncommon.

11.1.5 Jurisdictional Practices/Application

In most jurisdictions in Canada, arrangements relating to court-appointed counsel are superimposed on existing legal aid schemes relating to young persons. Eligibility and coverage for legal aid varies across the country to a certain extent. For example, in some provinces young persons are provided with legal aid regardless of the seriousness of the offence, while in others legal aid is only provided for summary conviction offences if it is likely custody would result, or in some cases, if it is likely there would be a loss of livelihood.

With respect to legal aid, all jurisdictions apply some form of means test to determine eligibility for legal aid. In some provinces, the financial circumstances of the parents are taken into account in determining if a young person is eligible for legal aid. If the parents can afford counsel, legal aid counsel is refused; the young person is then entitled to court-appointed counsel if the young person desires counsel.

In most jurisdictions, legal aid programs administer the appointment and payment of court-appointed counsel. The process for appointment of counsel varies slightly across Canada, with some provinces requiring more court appearances than others. Usually, however, at first appearance in court the issue of counsel is addressed and the young person is referred to the legal aid program. If legal aid is refused, the young person returns to court and the court orders that counsel be appointed. The matter is then adjourned so that arrangements can be made and the young person can meet with counsel prior to the next court appearance. In some provinces, a "conditional order" of sorts is made: at first appearance, the judge will authorize counsel to be automatically appointed if legal aid refuses to provide counsel to the young person because the young person does not qualify. In some provinces, the administrative arrangements relating to

court-appointed counsel are dealt with by other government officials, and not necessarily the legal aid program itself.

Presently, neither young persons nor their parents contribute to the cost of court-appointed counsel. In Alberta, however, an innovative policy was recently implemented which requires a young person or his or her parents to contribute to the cost of court-appointed counsel. Young persons are required to sign a Promissory Note, usually in the amount of $500, but in serious cases, the amount may be larger. The parents or other persons who are legally responsible for the youth are also asked to sign the Promissory Note as an endorser. The parents, by this endorsement, are guaranteeing payment of the Promissory Note. If the youth or parent refuse to sign, court-appointed counsel will still be provided. If cash bail has been posted, legal aid will obtain an assignment of bail, if the bail has been posted by the youth or on behalf of the youth, or by a parent or guardian of the youth. If the legal fees are less than the amount of the Promissory Note, the youth and the parent are only obliged to pay the actual fees. In the event the youth or the parent refuses to sign the Promissory Note, they will still be required to pay the full amount of the legal fees: legal aid officials in Alberta will proceed to collect the debt civilly, if necessary.

11.1.6 Options

The Task Force considered various general options:

OPTION 1: **The Status Quo.**

OPTION 2: Section 11 YOA could be amended to **restrict access to automatic court-appointed counsel in some circumstances;** and

OPTION 3: Section 11 could be amended to authorize a **financial contribution from parents or the young person in certain circumstances.**

These options were considered in more detail as follows:

1. Status Quo

2. Options setting out restrictions on access to court appointed counsel

Option 2(a) - Judicial Discretion, Based on Statutory Criteria, Whether to Appoint Counsel.

Option 2(b) - Administrative Discretion, Based on Statutory Criteria, Whether to Appoint Counsel.

Option 2(c) - Judicial Discretion Whether to Appoint Counsel, Based on a Combination of Means to Pay and Offence-Based Criteria.

3. Options setting out the requirement for contribution for the cost of counsel from young persons or parents

Option 3(a) - Court-Ordered Contribution.

Option 3(b) - Administratively-Determined Contribution.

Before presenting a detailed analysis of these options, it should be noted that the Task Force considered whether older, more mature young persons should be treated differently in terms of court-appointed counsel. For example, it was questioned whether the Act should be amended so that young persons who were sixteen or seventeen years of age at the commission of the offence would not be entitled to publicly funded court-appointed counsel. Young persons sixteen and seventeen years of age would then be subject to the same legal aid eligibility and coverage requirements that exist for adults.

It was observed that treating young persons sixteen and seventeen years of age the same as adults in terms of court-appointed counsel would arguably recognize the increased maturity and responsibility of this age group, and the increased ability to generate income to pay for counsel. However, the Task Force noted that even in the absence of a provision specifically authorizing court-appointed counsel in certain circumstances, there may be a tendency for courts to rely on the Charter to appoint publicly funded counsel for young persons sixteen and seventeen years of age charged with various offences if they do not qualify for legal aid, and that problems relating to inconsistencies and inefficiencies might result. There were also policy concerns that "older" adolescents (and their parents) should not be treated differently than younger people in this connection. On balance, the Task Force agreed not to consider any option which would differentiate between young offenders on the basis of age.

A detailed analysis of the options considered by the \ is as follows:

1. Status Quo

This option would maintain the present system of court-appointed counsel. If a young person charged with any offence desires counsel, the court would continue to appoint counsel if the young person is unable to obtain legal aid.

Suggested Advantages:

- Ensures that young persons would continue to be represented by counsel in all circumstances (unless the young person directs otherwise).

- This option is more straightforward than any other option and, since it is already in place, does not have implementation issues associated with the establishment of different options.

Suggested Disadvantages:

- During times of limited public finances when governments are necessarily seeking ways to reduce expenditures, including reduction in other social programs, it is difficult to justify the continuation of public financing of the costs of counsel in circumstances where the young person or parents have an ability to pay or where there is not a threat to the liberty or livelihood of the young person.

- Projected growth in the juvenile population over the next several years in the context of "capped" federal contributions to legal aid and the continuation of unrestricted access to counsel (or no capacity to recover costs), will likely translate into the costs of counsel for young persons accounting for an increasing share of total legal aid expenditures. Consequently, the capacity of legal aid plans to fund other needed services - such as adult criminal, family and immigration matters - will diminish.

- Funds spent on court-appointed counsel cannot be re-directed to other legal aid or youth/criminal justice programs or needs.

- Public confidence in the youth justice system may be undermined if parents or young persons with the ability to pay are entitled to state-funded court-appointed counsel, especially in light of reductions in available public financing of other social programs.

- Many would argue that providing publicly funded counsel discourages young persons and their parents from taking more responsibility for the

offending behaviour.

2. Options Setting Out Restrictions on Access to Court-Appointed Counsel

These options would authorize, in certain circumstances, that a young person need not be provided with court-appointed counsel.

Option 2(a): Judicial Discretion, Based on Statutory Criteria, Whether to Appoint Counsel

Section 11 of the YOA could be amended to afford the court the discretion not to appoint counsel if the offence is not serious and would not likely result in custody. Offence-based guidelines could be set out in the Act. For example, counsel would not be appointed by the court for shoplifting or mischief charges, unless special circumstances existed. Crown prosecutors could be required to indicate if custody would be sought (although this would not in any way fetter the court's discretion).

Suggested Advantages:

- The costs saved could be re-allocated to other legal aid or youth/criminal justice programs or needs.
- Public confidence and the respect of young persons for the youth justice system may be enhanced if technical defences are not promoted, especially in relatively minor cases.
- The decision whether to appoint counsel would be an independent decision, made in open court, and not be affected by administrative considerations.
- Adjournments, delays, and lengthy trials for relatively minor matters would be discouraged.

Suggested Disadvantages:

- In exercising discretion whether to appoint counsel, the court may take a significant amount of time, on a case by case basis, to determine the seriousness of the offence, and whether special circumstances exist, thereby increasing court delay, backlog, and costs.
- Some young persons would ultimately not be represented by counsel in

youth court, and given varying levels of age and maturity, it is questionable whether they would truly appreciate the significance of the proceedings. Therefore, the principle of "special guarantees" of the rights of young persons would be eroded.

- Some young persons could have criminal histories which may not come to the attention of the youth court until the dispositional hearing. If the court has exercised discretion not to appoint counsel based on the seriousness of the offence, young persons could be subject to custody in any event because of the prior record.

- Although the offence may be less serious and there may not be a likelihood of custody, there may nonetheless be defences or sentencing submissions that the court would not have the benefit of considering if the young person is not represented by counsel. A finding of guilt and disposition forms part of the youth record, and may be used against the young person in any subsequent proceedings.

- If a young person is not represented in youth court, there may be a more onerous role for the court and Crown prosecutor to play in that, on a practical level, they must attempt to compensate for the lack of defence counsel in ensuring that all substantive and procedural matters are addressed. This could contribute to court delay, particularly if very youthful or inexperienced accused are involved.

- It would be unclear what the role of the Crown prosecutor would be when the court is making the determination that counsel is not necessary for the young person. It may not be appropriate for the Crown prosecutor to address this matter in court, given the perception that there may be an undue advantage to the Crown if the accused is unrepresented.

- There may be concerns under the Charter that the principles of fundamental justice, for example, may be contravened if young persons are unrepresented in court in circumstances where counsel is desired. There would always be the possibility that, on a case by case basis, decisions to restrict access to counsel could be challenged in superior courts.

OPTION 2(b): Administrative Discretion, Based on Statutory Criteria, Whether to Appoint Counsel

Section 11 of the YOA could be amended so that the court would no

longer be authorized to appoint counsel. Legal aid programs (or other designated officials) would be authorized to exercise administrative discretion to provide young persons with counsel, applying similar criteria to young persons and adults in terms of coverage and eligibility.

Suggested Advantages:

- The costs saved could be re-allocated more effectively to other legal aid or youth/criminal justice programs or needs.

- Legal aid programs (or officials) would apply objective criteria and would have the flexibility to determine service delivery options, which could include a continuum of summary legal advice, duty counsel, and full legal representation.

- Public confidence and the respect of young persons for the youth justice system may be enhanced if technical defences are not promoted, especially in relatively minor cases.

- Adjournments, delays and lengthy trials for minor matters would be discouraged.

- Since those with an ability to pay the costs of counsel would not be able to fall back onto provisions for court-appointed counsel, young persons and parents would be held more responsible under the Act.

Suggested Disadvantages:

- Some young persons would ultimately not be represented by counsel in youth court, and given varying levels of age and maturity, it is questionable whether they would truly appreciate the significance of the proceedings. Therefore, the principle of "special guarantees" of the rights of young persons would be eroded.

- If a young person is not represented in youth court, there may be technical defences or sentencing submissions that the court would not have the benefit of considering if the young person was represented by counsel. A finding of guilt and disposition forms part of youth record and may be used against the young person in any subsequent proceedings.

- If a young person is not represented in youth court, there may be a more onerous role for the court and the Crown prosecutor to play in

that, on a practical level, they must attempt to compensate for the lack of defence counsel in ensuring that all substantive and procedural matters are addressed. This could contribute to court delay, particularly if very youthful or inexperienced accused are involved.

- There may be concerns under the Charter that the principles of fundamental justice, for example, may be contravened if young persons are not represented in youth court in circumstances where counsel is desired. There would always be the possibility that, on a case by case basis, decisions to restrict access to counsel could be challenged in superior courts.

- Even in the absence of a provision specifically authorizing court-appointed counsel, there may be a tendency for courts to rely on the Charter to appoint publicly funded counsel if young persons do not qualify for legal aid. Problems relating to inconsistencies and inefficiencies might result.

OPTION 2(c): Judicial Discretion Whether to Appoint Counsel, Based on Combination of Means to Pay and Offence-Based Criteria

This option would not require the parents or young person to pay for the cost of court-appointed counsel, but rather would only authorize the court to consider the ability to pay for counsel when determining whether to appoint counsel.

Section 11 of the YOA would be amended to specifically provide for judicial discretion to refuse to direct the appointment of counsel if the court was of the view that:

- the young person has the independent means to retain counsel privately;

- the young person has the ability, with the assistance of his or her family, to retain counsel privately; or

- the nature of the charges, and the circumstances of the young person are such that the proceedings can be fairly conducted without the assistance of defence counsel.

At a recent Uniform Law Conference, the majority of jurisdictions considered the above option and agreed that the Act should be reviewed to determine whether it should be amended to allow the court to consider

the means of the accused young person in determining whether counsel should actually be appointed by the court at public expense. Unlike **Option 2(a)** above, this Option requires the court to consider the parents' or young person's means or ability to pay for counsel. Suggested Advantages and Disadvantages are similar to the above, with the following additional ones:

Suggested Additional Advantages:

- This option requires a balancing of the seriousness of the offence and the financial circumstances of the young person and parents when determining whether publicly funded counsel should be appointed.

- The decision whether to appoint counsel would be an independent decision, made in open court, and not be affected by administrative considerations.

Suggested Additional Disadvantages:

- It may take significant time for the court to assess the ability of the young person or parent to pay for counsel, the seriousness of the offence and the circumstances of the young person, thereby increasing court delay, backlog, and costs.

- If the young person or parents have the ability to pay for counsel, but refuse to do so, this means that some young persons would not be represented by counsel in court, and given varying levels of age and maturity, it is questionable whether they would truly appreciate the significance of the proceedings. Therefore, the principle of "special guarantees" of the rights of young persons would be eroded.

- It would be unclear what the role of the Crown prosecutor would be when the court is making the determination that counsel is not necessary for the young person. It may not be appropriate for the Crown to address this matter in court, given the perception that there may be undue advantage to the Crown if the accused is unrepresented.

- The court, in some circumstances, might require the assistance of counsel or others with respect to ascertaining the ability of the parents to pay. (This concern could be minimized, however, if legal aid programs, for example, conducted eligibility assessments for court-appointed counsel as they do with legal aid funded counsel). The court may require counsel representing the Crown or the legal aid

program to appear to speak to the matter.

- Parents may be required to attend court to provide evidence or make submissions in relation to their ability to pay for counsel for the young person. In some circumstances, ironically, this may necessitate that parents retain their own counsel to represent their interests.

3. Options Setting out the Requirement for Contribution for the Cost of Counsel from Young Persons or Parents

These options would not in any way restrict the young person's access to legal counsel.

Before or after the proceedings are concluded, however, an assessment would be made with respect to whether the young person or parents have the financial means to pay all or part of the costs associated with counsel.

In 1994, the Ontario Criminal Lawyers Association passed a general resolution that parents should be required to contribute to the cost of defence counsel.

OPTION 3(a): Court-Ordered Contribution

Section 11 YOA could be amended to authorize the court to order the parents or young person to contribute to the costs of counsel if they have the financial means. Any payments would be paid to the government, and not to a specific defence counsel. The debt would be enforced civilly, if appropriate. Borrowing from the approach taken in New Zealand, the amendment could provide that:

> "The court may, if it thinks proper, order the parents or young person to refund to the Crown any such amount as the court specifies in respect of fees and expenses, and the amount ordered to be refunded shall be a debt due to the Crown and shall be recoverable accordingly in any court of competent jurisdiction."

Similarly, this option might borrow from the Minnesota approach cited earlier.

This option might also state clearly that, regardless of fiscal arrangements, defence counsel clearly represents the young person, i.e., a clear statement to the effect that the lawyer shall act solely as counsel for the child.

Suggested Advantages:

- Does not erode the principle of "special guarantees" of the rights of young persons because counsel would be appointed in every case, when requested.

- Some would argue young persons and their parents would be held more responsible under the Act if they are required to contribute to the cost of counsel. If parents realize there is a possibility they may be required to contribute to the cost of counsel, they may show a more active interest in the conduct of their children. The obligation of parents in this regard is not an indirect form of parental liability, but rather should be construed as part of the general responsibility of parents to provide needed services to their children (eg. akin to dental services).

- The court would have the discretion to not make an order for parental contribution in circumstances where this would not be appropriate, such as where the parent is the victim of the offence (eg. assault).

- The costs saved could be re-allocated more effectively to other legal aid or youth/criminal justice programs or needs.

- Concerns under the Charter would be minimized if there is no possibility that the young person would be unrepresented by counsel in court (unless the young person chooses not to exercise the right to be represented).

- Concerns would be minimized with respect to the young person's ability to present a full answer and defence, which includes his or her ability to understand the proceedings.

Suggested Disadvantages:

- Many parents and young persons are impecunious and would not have the financial means to contribute to the cost of counsel. Therefore, there may not be many orders requiring parents or young persons to contribute to the costs of counsel.

- Some would argue that parents should not be penalized for their inability to prevent their children from committing offences by establishing an obligation to contribute to the costs of counsel. As such, it could amount to an indirect form of parental liability, imposing

an unfair responsibility on parents who have tried their best, especially in circumstances when the youth's offending behaviour is partly related to circumstances (such as attention deficit disorder) beyond the parent's control (bearing in mind that the court would have the discretion not to make an order).

- Administrative collection costs and possible civil court action may significantly decrease the net costs recovered.

- If parents realize they might be obligated to contribute to the costs of counsel, there may be a tendency for them to discourage young persons from obtaining counsel; young persons may waive their right to counsel or plead guilty because of parental pressures.

- Potential negative effects on parent-child relations. For example, parents may encourage their children to become emancipated if they realize they might be responsible for contributing to costs (if their child is still a dependent living at home). Tensions between parents and young persons may be created or aggravated.

- The court may require assistance to determine whether it is appropriate to order a parent or young person to contribute, and this may mean that counsel for the Province will be expected to speak to the matter in court. It is unclear what the role of Crown Counsel, if any, would be in this connection.

- Parents may be required to attend court to provide evidence or submissions with respect to ability to pay.

- It may take significant time for the court to assess whether it is proper, in the circumstances, to require the young person or parent to contribute to the cost of counsel, thereby increasing court delay, backlog and costs.

OPTION 3(b): Administratively-Determined Contribution

Section 11 YOA could be amended to authorize the province to designate a legal aid program or other agent of the province to assess the parents' or young person's ability to pay. The debt could be collected in accordance with provincial cost recovery programs or civil enforcement. As with Option 3(a) above, payments would be made directly to the government, and not to a specific defence counsel. The assessment and collection could occur after the court appoints counsel and all proceedings have

been concluded, but this would depend on the approach taken in each jurisdiction. The court would only be involved with the initial appointment of counsel, and would not concern itself with assessing contribution or means to pay.

This option might also state that, regardless of fiscal arrangements, defence counsel represents the young person, i.e., a clear statement to the effect that the lawyer shall act solely as counsel for the young person.

Suggested Advantages:

- Does not erode the principle of "special guarantees" of the rights of young persons because counsel would be appointed in every case, when requested.

- Given that ability to pay and collection issues would be dealt with administratively, and not by the court, there would be no additional court backlog, delay and costs associated with the assessment of ability to pay.

- Each province or territory would have the flexibility to determine assessment and collection measures.

- Many would argue young persons and their parents would be held more responsible under the Act if they are required to contribute to the costs of counsel. If parents realize there is a possibility they may be required to contribute to the costs of counsel, they may show a more active interest in the conduct of their children. The obligation of parents in this regard is not an indirect form of parental liability, but rather should be construed as part of the general responsibility of parents to provide needed services to their children (eg. akin to dental services).

- The costs saved could be re-allocated more effectively to other legal aid or youth/criminal justice system programs or needs.

- Concerns under the Charter would be minimized if there is no possibility that the young person will be unrepresented by counsel in court (unless the young person chooses not exercise the right to be represented).

- Concerns would be minimized with respect to the young person's ability to present a full answer and defence, which includes his or her

ability to understand the proceedings.

- Administrators would have the capacity to not require parental contributions in circumstances where this would not be appropriate, such as where the parent is the victim of the offence (eg. assault).

Suggested Disadvantages:

- Many parents and young persons are impecunious and would not have the financial means to pay. Therefore, there may not be many cases where parents or young persons are able to contribute to the costs of counsel.

- If parents realize they might be obligated to contribute to the costs of counsel, there may be a tendency for them to discourage young persons from obtaining counsel; young persons may waive their right to counsel or plead guilty because of parental pressures.

- Potential negative affects on parent-child relations. For example, parents may encourage their children to become emancipated if they realize they might be responsible for contributing to the costs of counsel, if their child is still a dependent living at home. Tensions between young persons and their parents may be created or aggravated.

- Some would argue they would have more confidence in a judicially-determined contribution than an administratively-determined one because judicial decisions are not influenced by administrative considerations.

- Administrative assessment and collection costs, and possible civil court action, may decrease potential recoveries, but to a much lesser extent than a process involving judicial determination.

- Potentially, differences across jurisdictions in standards respecting ability to pay (i.e., higher and lower limits) could lead to differential treatment of young persons and parents across jurisdictions.

- Parents may argue that if their child is acquitted, they should not be required to contribute to the costs of counsel.

- Potential aggravation of parental concerns about their relationship with counsel. Counsel represents the young person, not the parent. In

some cases, parents have expressed concern about being "shut out" of advice and decisions affecting their children and, in turn, their families. If parents are required to pay or contribute, parental alienation may be increased.

11.1.7 Recommendation

In ideal circumstances, it would probably be preferable to continue with the present provisions of the Act, which accord young persons an absolute guarantee of the right to counsel once they appear in court and if they wish to exercise that right. These provisions seem to be the best means of ensuring legal representation, with the fewest complications.

This ideal must, however, be set in the context of the fiscal realities of the day and weighed against the imperative to maintain other needed services. The costs of court-appointed counsel for young persons directly affects the capacity of legal aid programs to adequately fund other needed services, such as adult criminal, family and immigration matters. Legal aid programs have faced a combination of federal fiscal restraint measures that have reduced contributions, the need for provincial and territorial governments to restrain expenditures and a growth in demand for legal aid generally. Projected increases in the youth population (in several jurisdictions) over the next several years suggest that the costs of court-appointed counsel for young persons will grow, thereby increasing pressures on legal aid programs and further affecting their capacity to maintain other needed services.

In the face of these realities, it is difficult to justify the continuation of a policy of automatically providing state funding for counsel in every case, especially when the young person and/or parents have an ability to pay. The identified several options and, in weighing the advantages and disadvantages of each, agreed that there should be an amendment to section 11 of the Act to authorize the province or Lieutenant Governor-in-Council to designate a legal aid program or other agent of the province to assess the parents' or young person's ability to pay, which costs could be collected in accordance with provincial recovery programs or civil enforcement (Option 3(b)). Without re-iterating the advantages of this option, it offers the assurance of continued legal representation for young persons and a practical means of recovering costs. As well, while acknowledging that there could be adverse affects in some cases - for example, on parent-child relations - there is intrinsic merit to the notion that young persons and parents should, where they are able, assume responsibility for themselves and not rely on limited public resources.

However, several jurisdictions - including British Columbia, Alberta, Manitoba and Ontario - do not agree that full legal representation should, where requested, be provided in every case - even minor cases - and therefore do not think that the above-mentioned proposal goes far enough. Accordingly, these jurisdictions prefer options that would restrict access to automatic court appointed-counsel in some circumstances.

In light of the above, **the recommends - bearing in mind that a minority of jurisdictions prefer other options that would restrict access to automatic court-appointed counsel in some circumstances - that:**

> **Section 11 of the Act should be amended to authorize the province or Lieutenant Governor-in-Council to designate a legal aid program or other agent of the province to assess the young persons's or the parents of the young person's ability to pay the costs of counsel appointed by the court pursuant to that section. The amendment should further provide that assessed costs can be collected in accordance with cost recovery programs established by the province and can be civilly enforced.**

11.2 CAPACITY OF YOUNG PERSONS TO INSTRUCT COUNSEL

As discussed in the previous section, the right of a young person to be represented by counsel is recognized in Canadian law and in international instruments pertaining to juvenile justice. For example, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice state that youth have the right to counsel and the right to be represented by a legal advisor or to apply for free legal aid.[5] The rights accorded under the Charter, including the right to retain and instruct counsel, apply to all Canadians. Discrimination on the basis of age is only acceptable if it has as its object "the amelioration of conditions or disadvantaged individuals" (s.15), including those disadvantaged by age, or if the restriction of rights is justifiable in a free and democratic society (s.1).

Beyond these Charter rights, the YOA accords young persons "special guarantees" of their rights (s.3), which are realized (in part) through the provisions respecting the right to counsel (s.11). Importantly, section 11 accords young persons the right to retain and instruct counsel "personally", a matter that has been reaffirmed by the Supreme Court of Canada.[6]

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

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

The effective exercise of the right to instruct counsel is important, given the serious consequences, such as loss of liberty, that may result for a young person who fails to appreciate or fully exercise his or her legal rights. Yet the right to instruct counsel raises several questions. Should all young persons be presumed to have the capacity to instruct counsel, given the wide range of maturity and understanding among youth in the twelve to seventeen year old age range? Are there ways to determine when young persons are capable of appreciating the complexities of the legal process and of instructing counsel? Are there ways to improve or

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[5]The Beijing Rules, articles 7.1 and 15.1.

[6]See, R. v. I (L.R.) and T. (E.) (1993).

compensate for a limited understanding of these rights and complexities so that these rights can be more effectively exercised?

These questions are pertinent to all young persons, especially those in the younger age ranges.[7]

As well, the capacity of young persons to personally retain and instruct counsel can result in complexities vis-a-vis how parents (or other significant adults) can participate in decisions related to the legal rights of the child. As the Declaration of Principle acknowledges, parents have responsibility for the care and supervision of their children; parents can and should play a key role in addressing their children's needs for guidance and assistance. How can this be reconciled with their child's independent right to retain and instruct counsel? For example, some parents may be concerned that a not guilty plea and acquittal on "technical grounds" will teach their children that they can avoid responsibility for their contraventions, to the (perceived) detriment of their children. Should a parent be able to participate in the process of instructing counsel? How would this affect solicitor-client privilege? Are there means by which a balance can be struck between preserving the young person's legal rights and maintaining continuity in the role of the parent (or significant other, such as elders in the case of aboriginal youth)?

11.2.1 Solicitor/Client Relationships

The legal profession supports the balancing of individual and collective rights in a democratic society by providing a strong tool to advocate for the protection or advancement of such rights and liberties and by ensuring that the rule of law is applied equally to and for the benefit of all citizens. To carry out this task, clients must have sufficient trust in the lawyer/client relationship to enable them to disclose all information relevant to their case. Counsel requires access to all the facts to represent the client in the most effective manner. To foster this relationship of trust and disclosure, rules of practice have evolved whereby information disclosed to counsel is confidential and disclosure by counsel is only possible in limited circumstances. A lawyer can disclose information in some exceptional circumstances, such as where disclosure is necessary to prevent a crime being committed or where disclosure is required by law or by order of a court. Outside these circumstances, a lawyer is guilty of professional misconduct in disclosing any information obtained from a

[7]For a discussion of the capacity of children under twelve to instruct counsel, see Chapter 3.

client, without their consent. Such a breach would be dealt with seriously by the governing bodies of the legal profession, which have been given responsibility under provincial legislation in Canadian jurisdictions to discipline their members.

As well as rules related to confidentiality and disclosure, lawyers are also required to be impartial and to avoid a conflict of interest in acting for a client. For example, a lawyer must not advise or represent both sides of a dispute. Nor should a lawyer act in a manner that might adversely influence his/her loyalty to a client or to their interests. This includes acting for multiple clients, even if the clients consent, where it is reasonable to foresee that contentious issues, divergent interests, rights or obligations may arise between the clients.

In 1989, the Law Society of Upper Canada examined the issue of child representation and capacity in the context of child protection proceedings. No conclusion was reached, given the ambiguity of the legislation. It was noted that there were two opposing camps - those who took a paternalistic view that the lawyer should act in the child's best interest, with others suggesting that the principles of natural justice should equally apply to matters affecting children's rights as well as to adults. Generally, however, there was support that counsel should act on the instructions of the child, not the parents. In terms of criminal proceedings, however, the review took the position that traditional solicitor/client roles should be adopted in youth court proceedings.

Recently, proposed standards for counsel representing children in child protection cases in the United States were outlined by the American Bar Association. These standards propose that the child's lawyer/attorney owes the same duties of individual loyalty, confidentiality, and competent representation to a child as to any adult - as befits any separate individual. When acting as the child's attorney, the lawyer is to act independent from the court, parties and the state.

Both areas are matters of significant concern in matters involving children/youth and parents (or significant others) and the provision of legal services. The lawyer is bound by a duty not to disclose information related to the client without his/her consent. The YOA is clear in stating that the young person has an independent right to retain and instruct counsel - the young person is the "client". Therefore, disclosure of information to parents or significant others, outside the limited exceptions noted above, requires the young person's consent. As well, even in a situation where the young person consents to have the parents or

significant others involved in instructing counsel, the lawyer is under a duty to avoid a situation of serving multiple clients or perceived clients (particularly when the parents are paying for counsel costs), if there is any prospect of the interests of the parties diverging, or of the advice of counsel being influenced by the views of the parents on what is seen by them to be "best" for the youth.

The Task Force agreed that young persons should continue to have the right to retain and instruct counsel personally. Such representation should follow the traditional role of counsel as advocate for the youth's expressed will, subject to any exceptional processes required to deal with capacity to instruct counsel. It was also agreed that a lawyer representing a youth is required to respect normal standards of solicitor/client privilege and shall not release privileged information to parents or other interested parties without the consent of the youth.

11.2.2 Determining Capacity

An endorsement of traditional solicitor/client relationships does not resolve concerns about what to do when there are concerns about a young person's competence to instruct counsel nor answer questions about how it can be determined whether a youth is competent to instruct counsel.

In general, lawyers have reacted to concerns about child/youth[8] competency to give instructions in the civil or criminal legal process by acting in one of three ways: representing the child's instructions, acting in the child's presumed best interests, or merely ensuring that the child's rights are respected throughout the legal process. The rules governing ethical legal practice often do not address the determination of a client's competence to instruct counsel, nor what should be done if the client is not competent, particularly in the context of children and youth.

In a civil law context, children/youth are entitled to make some legal rights decisions if they are found to have the independent capacity to do so as a "mature minor". A mature minor is a person under the age of majority - as defined in the jurisdiction (often age eighteen) - with sufficient mental capacity to consent to or refuse medical treatment, for example. In most cases, mature minors tend to be in their middle to late teens. Case law

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[8] "Under the YOA, a "young person" is a person between 12 and 17 inclusive, and a "child" is a person under 12. In the research and some legal literature, however, a child is a minor and could, within the meaning of the YOA, be a child or young person. Hence "child" and "youth" are used interchangeably in this section.

holds that capacity depends on the minor's ability to fully appreciate the nature and consequences of the decision.[9] The determination of mature minor status ultimately rests with the courts if the status or competency is challenged.

However, decisions on personal matters, such as health care, where the mature minor test has most frequently been argued, may be more naturally within the developmental realm of maturing youth than the complexities of legal process and legal consequences.

In terms of the ability of young people to appreciate legal process, rights and relationships, the research indicates that there is a range of developing competencies and an uneven appreciation of issues related to legal proceedings. Perhaps this is no different for some adults, as well.

One Canadian study of children and youth from varying grade levels, drawn from students attending school in an urban area in Ontario, assessed their understanding of legal rights and concepts. The researchers found that their results replicated other research findings which indicate that, as age increases, there is a general trend toward greater legal sophistication, and observed:

> "...the knowledge demonstrated by subjects was quite variable across the various legal concepts addressed. For example, with respect to the lawyer-client relationship, a majority of even the youngest subjects demonstrated an adequate understanding of the concept of defence counsel as an advocate in the criminal process. In contrast, youths showed substantial ignorance of the principle of lawyer-client confidentiality ... Similarly, with respect to their knowledge of plea, while 80 percent of the subjects 12 years of age and over correctly defined a plea of Guilty, virtually no subjects at any age demonstrated accurate understanding of the Not Guilty plea." (Peterson-Badali and Abramovitch, 1992, p.156).

In looking at the areas of competency of children, regard must be paid to the different developmental processes that affect children. James Weissman has noted that children are, of course different from adults in terms of their needs and competencies and suggests that it is not sufficient to merely compensate for these differences by adding new protections to the same ones afforded to adults. He argues instead for

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[9] C. v. Wren (1987).

"substituted protections". This concept involves understanding the role of due process rights and protections in the adult system, and taking account of the developmental differences between adults and children in such matters as time sense, understanding, and independence.

The research suggests two conclusions: that youth competency is an imprecise area to measure and is variable; and that youth may possess irregular knowledge of the legal process and procedures. Measures may be needed to try to smooth out these irregularities in knowledge if the youth is to meaningfully participate in proceedings. This may involve some mechanisms of "substituted protections".

At a minimum, the standard of competency for the youth must involve the ability to understand the role of defence counsel as an advocate/defender for the youth. It is probably less important that they have a clear understanding of the rights of solicitor-client confidentiality. Similarly, it is very important for the youth to appreciate the nature of a plea of guilty or not guilty and the presumption of innocence, while it may be less important that he or she fully appreciate all the aspects of the court process or the specific roles of other players.

A recent paper by the Barreau du Quebec dealing with child representation has suggested that there are four key faculties that should be considered in assessing the general ability of a child to provide a mandate to counsel in legal matters. These four faculties, and suggestions as to how they are applied in the context of the criminal defence counsel role (brackets), are:

- the ability to express one's will (ability to decide how to plea);
- the taking in and comprehension of advice regarding the problem and consequences of action (appreciation of the penal consequences of being found guilty);
- the expression of one's choice regarding the extent and methods of execution of the mandate (ability to instruct counsel generally); and
- the power of revocation of the mandate, if necessary (ability to fire counsel).

The American Bar Association has suggested some interesting ideas for assessing child/youth competency. Lawyers have an obligation to explain clearly, precisely and in terms the client can understand the meaning and consequences of action. If necessary, they suggest the lawyer may need to work with social workers or other professionals to assess developmentally appropriate means of communication. Accordingly, they recommend that:

> "Developmentally appropriate" means that the child's attorney should ensure the child's ability to provide client-based directions by structuring all communications to account for the individual child's age, level of education, cultural context, and degree of language acquisition" (American Bar Association, 1995, p.377).

To enable the lawyer to advocate for the youth, they also suggest that the lawyer should counsel the youth concerning the subject matter of the proceedings, the lawyer's role, and what to expect in the legal process. As well, the lawyer should assist in identifying appropriate family and professional resources for the youth.

In terms of competency, the American Bar Association does not accept that children of certain ages are "incompetent" or lack capacity to determine their position in proceedings. Instead, they suggest that disability is contextual, incremental, and may be intermittent. Thus, the child or youth may be able to participate in some decisions, but not in others. This requires the lawyer to be diligent in eliciting the child's preferences or directions in a developmentally appropriate manner. This may include being aware of the power dynamics inherent in adult/child relationships. Thus, the lawyer, as an adult, must be careful not to override the will of the child/youth. It a youth has difficulty expressing a preference because of a conflict with a parent or in the presence of the parent, the lawyer may need to determine the youth's wishes separately and represent the youth as best he or she can.

Generally speaking, it has been assumed that young people who are fourteen or older are mature minors and competent to instruct counsel. The research suggests that youth who are twelve years or older have a general competency to instruct counsel. Indeed, in the report from the Barreau du Quebec concerning general recommendations on the representation of children in civil and criminal matters, it was recommended that children generally be presumed to be competent to provide a mandate to counsel at age twelve, a recommendation which was derived from studies which indicate that at age twelve a child is capable of understanding the nature and consequences of giving a mandate to counsel - the role of counsel and ability to express their will.

Competency to instruct counsel in court proceedings can be imparted through additional efforts of counsel, justice system professionals and parents. This is similar to the duty of counsel to prepare a child witness to testify in court. In effect, it has been suggested that competence to

instruct counsel can be taught. This places an obligation on lawyers representing youth to be more familiar with child development, the level of knowledge or misconceptions that may affect young people's understanding of their rights, and so on. The Barreau du Quebec has suggested that lawyers should be required to qualify their mandate before the court.

The American Bar Association has proposed that a state body should take the initiative to publish and disseminate to the courts a set of uniform, written rules and procedures for court-appointed lawyers for minor children. In the context of the YOA, this would translate perhaps into greater clarity on the role of counsel in the Act or to rules for representation being established by the various law societies. The American Bar Association has also suggested that lawyers appointed to represent children should be required to qualify their skill before the court in terms of their ability to communicate with and represent children/youth. They suggest that the following items are relevant to providing adequate training to enable lawyers to represent children/youth:

- information about laws and process related to youth/child proceedings;
- description of applicable guidelines for representation of children/youth;
- focus on child development, needs, and abilities;
- information on multidisciplinary input required in youth related cases;
- information concerning family dynamics and dysfunction;
- information on accessible child welfare, family preservation, medical, education, and mental health resources for child/youth clients and their families; and
- provision of written material, including listings of useful material.

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

Legal practice with respect to the representation of young persons should recognize that capacity to instruct counsel is contextual, dependent on the issue, age, maturity, language skills, and developmental level of the individual young person. Provincial and territorial Attorneys General/Ministers of Justice should encourage Law Societies to develop rules of conduct respecting the representation of young persons which would require that:

(1) **Those who represent young persons take training similar to the training suggested by the American Bar Association.**

(2) **Lawyers representing young persons are under a positive**

obligation to communicate with their clients in an manner appropriate to the young person's maturity and understanding throughout the criminal process, including the use of outside professionals to facilitate communication as needed, particularly with respect to explaining the role of counsel and the nature of a plea (especially pleas of guilty).

(3) Lawyers representing young persons should consider what other community or family resources are available to assist the young person and, where appropriate, provide information to these parties to strengthen their understanding of the process and to assist the young person.

(4) Lawyers representing young persons are under a particular obligation to be aware of the adult/child dynamics of such a relationship and to ensure that neither their views nor the views of parents or others override the instructions or wishes of the young person. This includes an obligation on the lawyer to ensure that the client is aware of his or her ability to revoke instructions previously given to a lawyer and to terminate the lawyer/client relationship.

The advantages of this approach are:

- a young person who understands the advocate role and implications of a plea can provide sufficient instruction to allow for initial representation in criminal proceedings, including sharing information with counsel to assist in proceeding with the case. Information on more complex and procedural issues can be reinforced through provision of other information to the young person and to the parents.

- suggesting some level of general information sharing with parents (or significant others) ensures that the dual requirement of legal and parental advice and involvement suggested as necessary under the Act (e.g. sections 3, 9 and 56) can be accommodated and supported.

The disadvantages are:

- the approach assumes that defence counsel are able to do a general assessment of youth competency and that overall youth competency can be taught on matters not initially understood.

- the approach requires defence counsel take an active role in providing

information to parents to assist in their ability to provide support for legal decisions by the young person. This does not ensure that the young person will consult with the parents and opens up some prospect of conflicting information to the young person if the parents misinterpret legal rights.

11.2.3 Relationship Between Parents and Counsel

A young person has a right to "personally" retain and instruct counsel. As well, subsection 11(8) YOA provides that, where the court finds the interests of the young person and parents are in conflict, the court shall ensure that the young person is represented by counsel independent of the parents. These provisions affirm the traditional relationship between the lawyer and the client - the young person - as governed by the ethics of the profession.

Because most counsel for young persons are appointed through legal aid or by the court, rather than being retained by the parents - and because the traditional solicitor/client relationship applies to young persons - the parent can be distanced from important advice and decisions which affect their child and, in turn, them. The parent may learn at a very early stage in the process - for example, at the initial contact at the police station - that the young person's lawyer may be giving advice that contradicts the advice of the parents. The parents may advise their child to cooperate with authorities and "get it over with" or "accept responsibility", while the lawyer's advice is, in the young person's legal interests, to say nothing. While this has the potential to create or aggravate parent-child conflicts and promote parental alienation, it must be remembered that the legal consequences for decisions fall directly on the young person and that it is the young person's liberty interests that are at stake.

The Declaration of Principle (s.3) states that parents have responsibility for the care and supervision of their children, yet also that young persons have rights and freedoms in their own right. Given the competing interests at play, it seems inevitable that situations will, in some cases, arise in the legal process that aggravate parent-child conflicts, rather than leading to a strengthening of relations and support, where young persons independently exercise their legal rights. The role of the parent in these situations, as well as in many other areas, is subject to being reduced as a "dwindling bundle of rights" as the young person matures.

Nevertheless, parents play a key role in the lives of their adolescent children and can provide helpful guidance and support to the young

person, and to counsel, throughout the course of criminal proceedings. Notices to parents and the right of parents to participate in proceedings become meaningless, if the parent is effectively an "outsider" when important decisions are being made, including the process of a consultation, advice and instruction to counsel.[10]

The question then is how to reconcile - or at least mitigate - concerns about the potential marginalization of parents vis-a-vis their relationship with counsel, while still respecting the young person's independent rights. These are matters of practice and professional conduct, not legislation. It is important for counsel to recognize and support, to the extent possible within the ethics of the profession, the important role of parents, who can be an essential element in the process of rehabilitation and reintegration of their clients.

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

Provincial and Territorial Attorneys General/Ministers of Justice should encourage provincial and territorial Law Societies to develop rules of conduct to promote, as much as possible, positive parent-child relationships and the involvement and support of parents, recognizing a process to keep actively interested parents informed of what legal advice is being given to young persons, subject to the limitations of solicitor-client privilege.

[10]For a discussion of parental involvement, see Chapter 10.

11.3 ADMISSIBILITY OF STATEMENT EVIDENCE - SECTION 56 YOA

One of the most significant evidentiary issues that arises in proceedings concerning young persons in conflict with the law is statements or "confessions" made by young people to persons in authority. With respect to adults, the admissibility of statements made to persons in authority is governed by the common law and the Charter of Rights and Freedoms; there is no codification in the Criminal Code or other legislation of specific statutory requirements which must be met before a statement is admissible in evidence in court. With respect to young persons, the admissibility of statements is governed by the common law, the Young Offenders Act (YOA) and the Charter. Section 56 of the YOA sets out specific requirements which must be met before any statement to a person in authority (such as a police officer) is admissible in evidence.

The provisions of section 56 have been the source of considerable controversy in the legal and law enforcement communities (but not among the public generally.) Jurisdictions have experienced various problems with attempting to comply with all of the requirements set out in section 56, ranging from the requirement for absolute compliance with the provisions and hence the general lack of judicial discretion, to problems with the waiver form itself and whether section 56 applies so that warnings relating to the possibility of transfer to ordinary court need to be provided. The complexity and inflexibility of the provisions have led many peace officers throughout the country to conclude that the provisions present unnecessary obstacles to effective law enforcement and, in the view of some, are virtually unworkable. As a result, the Canadian Association of Chiefs of Police and provincial and territorial Attorneys General, for example, have recommended changes to the provisions. On the other hand, others take the position that the impressionability and general lack of knowledge and experience of young persons require a strict codification of rules in order to ensure adequate protection of their legal rights.

These different views are not really as polarized as they might seem: it should be emphasized that no one questions the general principle that there should be special protections governing statements made by young persons, given their immaturity and level of development. Rather, the central questions about the provisions relate to narrower issues such as the degree of flexibility (i.e., judicial discretion) that should apply in these circumstances, the manner in which rights may be waived, and the clarity of the provisions.

In addressing these issues, this section will look at the current law, historical and international perspectives, relevant research and identified policy issues, before proceeding to a discussion and recommendations.

11.3.1 The Current Law

The requirements set out in section 56 are intended to ensure that there are special safeguards of the rights of young persons, over and above those applicable to adults. As such, these provisions reflect the principle of the "special needs" of young persons and other principles set out in the Declaration of Principle, specifically sections (3)(1)(e) and (g), which provide that:

- "young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of Rights and Freedoms or in the Canadian Bill of Rights, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms."

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

The Supreme Court of Canada, in R. v. T.(V.), has ruled that the Declaration of Principle is more than a mere preamble and has the same force that one would normally attribute to substantive provisions.

For ease of reference, the provisions of section 56 (as amended by Bill C-37) are set out in Appendix "A" to this chapter, as are the relevant provisions of section 11 YOA (re: the right to counsel) and of the Charter.

It is beyond the scope of this report to review the considerable body of case law respecting statement evidence. A useful review can be found in Platt (1995), bearing in mind that the case law is constantly evolving. Appendix "B" to this chapter sets out a brief overview of the general principles that have emerged from the case law where an adult's or young person's rights pursuant to the Charter have been interpreted by the courts.

11.3.2 Historical Perspective

The Juvenile Delinquents Act (JDA) was silent with respect to statement

evidence (and, indeed, the legal rights of juveniles generally). At common law, a statement made by a young person to a person in authority was only admissible if proved to be voluntary. The admissibility of statement evidence was determined by a set of generally accepted guidelines; these guidelines were not absolute rights, but factors to be considered in light of all of the surrounding circumstances, including the maturity and intelligence of the young person, as well as the nature and circumstances of the offence.

Before the YOA, the courts always applied special considerations to statements made by young persons who were charged, arrested or detained, or suspected of offences[11] The guidelines developed by the courts were not absolute or definitive, but they were generally accepted to be as follows:

- an adult relative should accompany the young person to the place of questioning;
- the young person should be given the option as to whether he or she wanted the relative to stay in the room during questioning;
- the questioning should be conducted as soon as practicable upon arrival at the place of questioning;
- the young person should be cautioned in a manner which would be understandable, including an explanation of the consequences that may flow from making the statement;
- where a young person was charged, the offence for which he or she was charged should be explained; and
- where the young person was over the age of fourteen and charged with an indictable offence, it should be explained to the young person that he or she may be tried as an adult.

These common law guidelines operated in addition to the voluntariness requirement but, unlike the YOA, were not conditions precedent to the admissibility of statements.

The 1965 report of the Department of Justice Committee on Juvenile

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[11]See, for example, R. v. Jacques (1958), R. v. Yensen (1961), and R. v. Wilson (1970).

Delinquency in Canada recommended that if a juvenile was to be questioned by the police, and particularly if asked to make a statement, a responsible adult should be present.[12] Similarly, the Solicitor General's Committee proposals on Young Persons in Conflict with the Law in 1975 recommended that no written statement given to a peace officer or person in authority shall be given in evidence against him unless the young person was afforded an opportunity to consult with and give the statement in the presence of a lawyer, parent, adult relative or adult friend.

With the advent of the Charter in 1982, juveniles (and adults) were afforded, apart from the common law that had developed by that time, the additional protections of the Charter, including the right to be informed of the reasons for arrest or detention and the right to be informed of the right to retain and instruct counsel without delay. The rights established in the Charter are not, however, absolute - if a breach of a Charter right is established, the evidence shall be excluded if it is established that the admission of the statement into the proceedings would bring the administration of justice into disrepute.

Coincidental to the Charter coming into force, Bill C-61 was before Parliament. In effect, section 56 codified some of the common law and Charter protections, but also elevated them to absolute rights. In addition, the section added further protections for young persons; that is, section 56 goes beyond the common law guidelines and the Charter as follows:

- the young person must have a reasonable opportunity to consult with an appropriate adult before a statement is given;

- a statement made by a young person must be made in the presence of a person consulted, unless it is waived;

- there must be a written (or now, as per Bill C-37, videotaped) waiver of the right to consult with counsel and/or an appropriate adult and the right to make the statement in the presence of that person;

- the young person must be told that he or she is under no obligation to give a statement and that any statement given may be used in

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[12]The Committee was of the view, however, that the matter of the admissibility of any statement taken in the absence of adult advice should be left to the discretion of the judge, bearing in mind that the juvenile court should receive such evidence "only with the utmost caution". In addition, the Committee recommended that a statement taken from a juvenile who did not have the benefit of adult advice should not be admissible in ordinary court, ie., if transferred to adult court.

evidence in proceedings against him or her;

- statements made by young persons under duress to persons who are not in law persons in authority are not admissible;

- compliance with all the conditions in section 56 is absolute.

Subsequent to the proclamation of the Act, concerns continued to be expressed by police officers, prosecutors and others that section 56 was resulting in uncertainty and confusion, to the extent that many cases were not prosecuted, or unsuccessfully prosecuted, if the key evidence against the young person was a statement.

These concerns principally arose because absolute compliance with the requirements set out in section 56 is required; a breach of any of the requirements results in the automatic exclusion of the statement. From the perspective of police, prosecutors and others, this means that if otherwise voluntary statements are not permitted to be considered by the court, young persons may not be held accountable for their actions if the case cannot be prosecuted or if an unsuccessful prosecution results because of the statement evidence, thereby arguably eroding public confidence in the juvenile justice system, especially where minor technicalities result in the exclusion of the evidence and/or it is a serious offence.

In 1986, there was a minor amendment to section 56 respecting persons in authority (Bill C-106).

In 1989 and 1990, provincial and territorial Attorneys General across Canada unanimously resolved that section 56 should be amended. In 1989, provincial and territorial Attorneys General adopted the following resolution:

> "Section 56 of the Act should permit the admission into evidence of a voluntary statement given to a person in authority by a young person, notwithstanding a breach of a section where the interests of justice require it."

In 1990, another, somewhat more refined Resolution was endorsed:

> "That Section 56 be amended to permit the admission into evidence of a voluntary statement given to a person in authority at the discretion of the youth court notwithstanding a breach of Section 56(2) where the

administration of justice would not be brought into disrepute."

Following these resolutions, the federal Minister of Justice conducted public consultations in relation to amending section 56 (and other matters) and some relatively minor amendments were eventually included in Bill C-37.

To a large extent, some of the new amendments in Bill C-37 codified existing case law with respect to section 56.[13] The new amendments, however, did not address the central concern of Attorneys General across Canada with respect to adding judicial discretion to section 56, along the lines of the Charter.

Various submissions by interested parties were made to the Standing Committee on Justice and Legal Affairs in 1995 in relation to Bill C-37. These submissions demonstrate that there is a wide divergence of views with respect to how section 56 should be amended. For example:

- Professor Nicholas Bala, a leading scholar in the area of young offenders, stated that consideration might be given to creating a residual category of judicial discretion to admit statements taken in violation of section 56, provided that doing so would not bring the administration of justice into disrepute.

- The Commission de Services Juridiques observed that by limiting the cases where the taking of a written or oral statement must respect the guarantees in section 56 to only the three situations referred to in subsection (2), Parliament is limiting the rights of the young accused: "Thus, if a young person makes a statement following an informal interview with a police officer in a school or in a situation where there is no arrest, detention or reasonable grounds, the statement may be admitted even where section 56 is not complied with." The Commission considered this is a major step backwards.

- The Canadian Association of Elizabeth Fry Societies strongly opposed any measure that would make inroads into the current protections assuring inadmissibility of statements by young persons on the grounds that young people do not fully comprehend our legal system and therefore cannot evaluate even a properly administered caution given

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[13]That is, the section applies to those arrested or detained, or "suspects"; the right to consult counsel and a parent was added; videotaped waivers of the right to consult were added; and the issue of misrepresentation of age was dealt with.

by a person in authority.

- Professor Jean Trépanier, another noted academic in the area of young offenders, was of the view that the proposal to videotape an oral waiver seemed to be acceptable, although on the following condition: it must be quite clear that it is videotape, not audiotape, since sound recording alone would not offer the necessary guarantees.

- The Canadian Association of Chiefs of Police concluded that it has long been felt that the section 56 statement provisions are too restrictive and often serve only to inhibit, even in those cases where the young person truly wishes to accept responsibility for his or her behaviour. Given past experience, the Association suggested that the proposed amendments would contribute to an even more restrictive interpretation.

- Ms. Mary Beth Beaton, from the New Brunswick Department of Justice, also recommended the insertion of judicial discretion under section 56 to admit the statements of a mature young offender in circumstances where the statement would otherwise be admissible at law, and the admission would not bring the administration of justice into disrepute. Referring to the dissenting judgement in the Supreme Court of Canada case of R. v. J.T.J., she stated:

  ". . . But I think the act needs to be flexible enough to consider what we call certain relevant indicia of adulthood, especially in dealing with the young offender who is close to his or her end of protection under the legislation. While a graduated scale may be perceived as curtailment of an older offender's rights, it also serves to increase the protection to those who are children, in reality. Although it's important to preserve the test of fairness in all cases, the totality of the circumstances of the particular case must be taken into account when measuring compliance with the YOA. There needs to be some flexibility to accommodate varying levels of development and maturity."

11.3.3 International Perspectives

The international instruments which set out standards in respect of young persons accused of crimes do not directly address the specifics of taking statements. These standards are of a more general nature and guarantee certain rights - such as the right to counsel and the right to have a parent present. For example, Article 40 of the United Nations Convention on the

Rights of the Child requires that every child not be compelled to confess guilt, while the United Nations Standard Minimum Rules for the Administration of Juvenile Justice speak somewhat more directly to the issues, requiring that:

> "Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings." (Article 7.1)

> "Throughout the proceedings, the juvenile shall have the right to be represented by a legal advisor or to apply for free legal aid where there is provision for such aid in the country." (Article 15.1)

In addition, the International Covenant on Civil and Political Rights provides that:

> "Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." (Article 9)

> "In the case of juvenile persons, the procedure (criminal procedures) shall be such as will take account of their age and the desirability of promoting their rehabilitation." (Article 4)

Given the general nature of these international instruments, it would appear that the fairly stringent requirements set out in the YOA respecting statements substantially exceed these international standards. Put another way, it would seem that section 56 could be modified - for example, by introducing judicial discretion - without compromising Canada's obligations to abide by these international instruments, as long as basic elements, such as the right to consult counsel and a parent, are maintained.

Apart from these international instruments, the legislation of other countries is also instructive with respect to different approaches that have been taken to address statements made by young people to persons in authority.

While the Task Force did not have the opportunity to conduct an in-depth

assessment of the law relating to the admissibility of statements made by young persons in other countries, it reviewed a sampling of legislative provisions. The statement provisions in New Zealand, for example, are similar to Canada's in some respects, in that the police are required to explain rights to young persons in "age appropriate" language before taking statements, including the young person's right to consult with counsel and an appropriate adult. It appears that a statement must be made in the presence of counsel or an appropriate adult. There is no statutory provision relating to written or videotaped waiver of this right. However, the New Zealand legislation states that the statutory requirements are not absolute, and that reasonable compliance is sufficient,[14] i.e. unlike Canada, it appears that the courts have been accorded the discretion to determine if there has been reasonable compliance with any or all of the requirements and, if so, the statement may be admitted into evidence.

It also bears mention that in New Zealand, an explanation of the young person's rights before giving a statement is not required if the young person was already informed of the rights at least one hour before.[15]

In Queensland, Australia, section 36 of the Juvenile Justice Act 1992 lists only one requirement for the admissibility of statements made by young persons, and that is that an appropriate adult must be present when a young person provides a statement (in proceedings relating to indictable offences). However, it is noteworthy that the court is provided the discretion to admit the statement if the prosecution satisfies the court that there was proper and sufficient reason for the absence of a person at the time the statement was made or given and the court considers that, in the particular circumstances, the statement should be admitted into evidence.

Similarly, in New South Wales, Australia, the Children (Criminal Proceedings) 1987 Act sets out only one requirement: that before a statement is admissible, an appropriate adult must be present. Again, however, the court is accorded the discretion to admit the statement in any event, on similar grounds to that set out in Queensland's legislation.

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[14]Section 224 of the Children, Young Persons and Their Families Act states: "No statement shall be inadmissible pursuant to Section 221 of this Act on the grounds that any requirement imposed by that section has not been strictly complied with or has not been complied with at all, provided that there has been reasonable compliance with the requirements imposed by that section."

[15]New Zealand's statement provisions are much lengthier than those that appear in the YOA, and detailed guidance with respect to who an "appropriate adult" is for the purpose for taking a statement is set out.

In all Australian jurisdictions, youth must be questioned in the presence of their parent or an independent person, but Australian legislation generally has been criticized for not addressing the role or efficacy of the parental requirement.[16] In Australia, unlike Canada, there does not appear to be a statutory requirement for a written or videotaped waiver of the right to have a parent or other adult present during the taking of a statement.

In England and Wales, detailed procedures respecting the police questioning of young persons are governed by the Police and Criminal Evidence Act 1984 (PACE), which is accompanied by Codes of Practice established by the Home Office. As in New Zealand and Australia, an "appropriate adult" - a parent or guardian, social worker or other responsible adult - must, with specified exceptions, be present during police questioning. A "custody officer" - a police officer of at least the rank of sergeant and who is separate from the "interviewing officer" - is responsible for ensuring procedures are followed, including informing the young person of the right to free legal advice. A young person can only be interviewed without an appropriate adult or lawyer in exceptional circumstances, if the arresting officer has grounds to believe that the delay in waiting for the appropriate adult will lead to interference with evidence, alerting accomplices or hindering recovery of proceeds of crime. The interview will normally be tape recorded. A breach of the Code of Practice may result in evidence being disallowed because it is tainted or in disciplinary action being taken against a police officer.

In the United States, each state has the jurisdiction to enact criminal laws relating to statements made by young persons, provided constitutional rights are not violated. Therefore, many different approaches appear to be taken, but there are two distinct themes emerging from these approaches.

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[16]For example, O'Connor (1994) states: ". . . even in relation to this "right," the scope and intent is unclear . . . there is no clear statement of the role (and the requisite knowledge needed to fulfil the role) of the independent person. The (Queensland) Juvenile Justice Act simply requires the presence of an independent person (as outlined in Section 36(2)) when a 'statement is made or given to the police' (Section 36(1)). Section 36(3) allows admissions, in certain circumstances, of statements not made in the presence of an independent adult. The assumption that a parent will adequately safeguard the rights of the child in an interrogation is questionable (Human Rights and Equal Opportunity Commission 1989). Parents are as potentially likely as the child to be ignorant or their own or their child's legal rights and ignorant of the role of the independent person in a police interrogation. Parents may also feel intimidated. Alternatively, they may see their role as assisting the police to clear a matter up . . .

"The only controls on police in this context are the retrospective exclusion of evidence by courts and/or complaints to police complaints authorities. The efficacy of court review depends, at a minimum, on the matter being brought to the court's attention through the young person challenging voluntariness of the confession. . . ."

The first approach taken by a minority of states is what is described as a "per se" approach, whereby a parent or other interested adult is required to participate in the young person's waiver of the rights respecting self-incrimination. The parent or other adult must be advised of the young person's constitutional rights, and the adult and young person must have an opportunity to consult prior to the waiver. Waivers made without these protections are not admissible in evidence.

Proponents of the "per se" or "interested adult" approach maintain that the presence of an adult provides elements of maturity, mental capabilities and experience that a juvenile lacks, thereby compensating for the imbalance inherent in the dynamic of a police interrogation of a juvenile.

The second approach, taken by the majority of states, is what is described as the "totality of circumstances" approach. This approach involves a determination by the court that the young person voluntarily, knowingly and intelligently waived his or her privilege against self-incrimination. Five factors the courts consider in evaluating the totality of the circumstances before determining whether to admit a statement into evidence include:

- the age, physical condition, intelligence and level of education of the accused;
- the juvenile's prior experience with police proceedings;
- the juvenile's access to guidance by an attorney or parent;
- the extent of the juvenile's knowledge concerning the substance of the charges and the nature of his or her rights; and,
- the method and length of the interrogation.

The premise underlying the "totality of circumstances" approach is that age alone is not determinative, and that a young person is capable of making a decision to waive constitutional rights.

Proponents of the "totality of circumstances" approach maintain that courts are capable of evaluating all the circumstances to make an individual determination based on the facts applicable to that young person. Also, advocates of this approach suggest that it allows the police the flexibility to deal differently with sophisticated juveniles who understand their rights without the "artificial constraints of a prophylactic rule that is not needed by such juveniles" (Schaffner, 1985, p. 1246).

Schaffner succinctly summarizes criticisms of these two American approaches. With respect to the "per se" (interested adult) approach:

> "Those opposed to the per se rule argue that it neither eliminates speculation nor provides clear standards to guide the police. Critics have observed that under the per se rule, the courts and police must evaluate whether the parent was "interested," whether the warnings were understood by the parent, and whether the juvenile and parent consulted after the parent was advised of the juvenile's rights. Such a determination usually requires inquiry into the totality of the circumstances, thereby subsuming part of the value of the parental consultation requirement. In addition, the value of the presence of a parent as a protector of the child's rights has been questioned because studies have shown that parents are often no more able than juveniles to make a knowing and intelligent waiver. Moreover, the parental requirement has been regarded as worthless in so far as the parent fails to advise the child or in so far as the parent advises the child not to withhold any information from the authorities.
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> "Critics also have argued that the per se rule is far too restrictive of police activities. First, criminal investigations may be slowed while the police attempt to locate the parents of a juvenile. Second, the rigidity of the rule may result in the suppression of confessions that would have been admissible under an evaluation of the totality of circumstances. It is argued, therefore, that the rule is overly protective of sophisticated juveniles who are competent to independently waive their rights. Third, those opposed to the prophylactic affect of the per se rule claim that it is an over zealous attempt to protect juveniles and that it ignores or undervalues the competing need to protect the public from crime" (1985, p. 1235).

With respect to the "totality of circumstances" approach, Schaffner states:

> "Opponents of the totality of the circumstances approach claim that is does not go far enough in protecting the interests of juveniles. They argue that its "flexibility" leaves too much to judicial discretion, including the selection of the factors to evaluate, and the weight to be given to each factor. Further, those opposed to the totality of the circumstances test argue that it presents police with no standard by which to model their practices. Finally, it has been suggested that an examination of the totality of the circumstances may fail to reveal subtle coercive pressures at work against the particularly susceptible

minor" (1985, p. 1246).

The debate surrounding these different approaches in the United States has to a certain extent been mirrored in Canada in connection with section 56 YOA.

11.3.4 Relevant Research

The requirements of section 56 are predicated on the assumption that, due to their immaturity and general lack of understanding, young people require special safeguards to ensure that their legal rights are adequately protected and, therefore, that the statement is reliable and voluntary. Social science research supports these general assumptions. Generally speaking, the research into how well children and adolescents understand legal concepts, while usually limited by testing under artificial circumstances, indicates that the level of understanding of key legal concepts increases with age, but there is, nonetheless, a substantial degree of ignorance or misunderstanding of these concepts among all age groups.[17]

One Canadian study by Abramovitch et. al. (1993) is especially pertinent because it specifically examined the extent to which children and young persons understand the waiver of rights pursuant to section 56 of the YOA. The sample consisted of students from different grade levels who were read the section 56 statement form used by the Peel Regional Police. Half the young persons were directed to imagine they were guilty of shoplifting, and the other half were directed to imagine they were not guilty. Two-thirds of the youth understood the basic meaning of the form - i.e., that if they signed, they would not be asking anyone to come to the police station, and that if they did not sign, it meant that they could call someone to be with them. Overall, a large proportion (71%) said that they would not sign the form. Almost ninety percent of those who understood the waiver refused to sign it, but almost 65 percent of those who did not understand the form agreed to sign the waiver. Many of those who understood that **not** signing the form meant that they could have someone with them did not understand that they would then be

[17]See, for example, Peterson (1988) and Peterson-Badali and Abramovitch (1992). Note that an understanding of legal concepts should, because it requires a more refined understanding, be distinguished from the broader issue of capacity to form criminal intent (eg., see Dalby, 1985).

questioned by police.[18]

The researchers suggested that, in all likelihood, the proportion of youth who would not sign the waiver is an overestimate of how young persons would react in a non-hypothetical, more stressful situation of being under arrest. In their view, the two major findings of the study were that those young persons who understood the waiver were less likely to sign and that very few young persons fully understood the implications of waiving their rights. Just over half the young persons understood that they would be asked to make a formal statement and few understood that the presence of a lawyer could give them protection or advice on procedure.

The researchers also suggested that three pieces of information were considered to be a minimum for sufficient understanding of a young person's rights:

- signing the waiver means that the young person cannot have a lawyer present;

- they will subsequently be questioned and asked to make a formal statement; and

- the role of lawyer is to protect the young person during questioning by advising them what, if anything, to say and preventing police from doing or asking anything improper.

While the results of this study are instructive, it should be observed that the statement form relied on by the researchers appears to be quite different from forms used in other parts of Canada. There is, for example, no indication on the study form that the young person consents to give a statement to the police or intends to give a statement to the police and the young person is apparently required to sign the form at one spot only (i.e., not acknowledge an understanding of each explanation with a signature or other mark). Case law has evolved since the early 1990's when the study was conducted, and it appears that the section 56 form utilized in the study may not now be considered a valid form in some other provinces. In any event, notwithstanding more detailed and user friendly

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[18]In addition, the researchers found that age differences were apparent, and the overall trend was for subjects in the higher grades to show greater comprehension. There were, however, no significant differences in grades with respect to signing or not signing the waiver and understanding the "basic" meaning of the form. In other aspects - such as understanding that questioning would follow the signing of the form; paraphrasing the right to counsel; and understanding they would not have to pay a lawyer - significant grade differences were found, and in the expected direction.

statement forms that may exist in some provinces, and notwithstanding that police make special efforts to explain to young persons in "age appropriate" language all of the contents of the forms (i.e. not simply relying on the written form to provide explanations), it appears that many of the observations and conclusions reached by the researchers in the study continue to be relevant.

There are also American empirical studies addressing the issue of juveniles' understanding of their rights in police interviews, and waiver of those rights vis-a-vis the Miranda warning. These studies have found, for example, that: those who do not waive their rights were older (15 or 16 years) and tended to have more prior convictions than others; more than ninety percent of juveniles did not understand all components of the warning, with the rights to a lawyer during the police interview and for free legal advice being least understood; and that when youths who were brought into custody were asked to explain the Miranda warning, only one-fifth understood all four warnings and just over one-third understood all major words.[19]

It is also well known that many young offenders have learning disabilities and/or have poor academic achievement, factors which may diminish their ability to understand written forms.

There has also been some empirical research in the United States and Britain regarding the advice given juveniles by parents or other appropriate adults. The American research, which involved actual observation of advice given by parents to arrested juveniles, indicated that most often parents did not advise their children about the right to silence (71%), the right to obtain a lawyer (88%) and, indeed, most often (66%) gave no advice.[20] In a small proportion (16%) of cases, parents advised their children to waive their rights. British research carried out by the Royal Commission on Criminal Justice respecting the role of "appropriate adults" giving advice to youth found that:

> "the presence of such persons had little effect on the tactics used by the police. They were usually silent and, when they did intervene, they were as often helpful to the police as the suspect" (cited in NACRO, 1996, p. 6).

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[19]See: Grisso and Pomicter (1977); Ferguson and Douglas (1970); and Grisso (1981).

[20]Grisso (1981).

In response, the Home Office is developing more detailed guidance to the police officers on the role of the appropriate adult and some local forces have developed information brochures for "appropriate adults."

Another Canadian study, not directly related to section 56 statement forms, compared the knowledge of students in grades 5, 7, and 9 with that of young adults vis-a-vis to the subjects' understanding of general concepts associated with the criminal justice system as a whole (e.g. understanding of a plea of guilty or not guilty; the role of defence counsel, etc.). While the study showed a general trend of greater legal sophistication with increased age, the knowledge shown by subjects was quite variable across the various legal concepts addressed. In fact, the researchers found more similarities amongst the understanding of young persons and young adults then they did differences. Further, the researchers found that the areas of legal knowledge which were most problematic for young people also posed considerable difficulty for the young adults (e.g. understanding of a plea of not guilty). There were some areas in which legal misconceptions were actually more prevalent among older subjects than among the young students.[21] This research tends to confirm that a detailed inquiry into the subjective understanding of the suspect's rights prior to the admission of a statement is a prerequisite for both younger and older subjects.

It is reasonable to suggest that problems with understanding legal concepts and statement forms are probably compounded when language or cultural barriers must be overcome. For example, among aboriginal peoples in Canada, there may, as one author/prosecutor suggests, be a different conception of what the "right to silence" connotes:

> "Among all Native groups with whom I have worked there appears to be nothing akin to our "right to silence," our right to refuse to incriminate ourselves. On the contrary, there appears to be an opposite commandment, one that requires full disclosure, full acknowledgement of wrongs. It is apparently seen as an essential first step towards rehabilitation and the reintegration into the community. It may be that this ethic contributes substantially to the high frequency of guilty pleas by Native accused. At the very least, it contributes to a high rate of full confessions during police questioning, and these confessions are often what lead defence counsel to the conclusion that a plea of "Not Guilty" would be fruitless.

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[21] Peterson-Badali and Abramovitch (1992).

> "I have also regularly watched Native accused show clear discomfort when they enter pleas of "Not Guilty" upon the advice of their lawyers, especially where the court is taking place in their home community. . ." (Ross, 1992, p. 14).

The author goes on to describe aboriginal values in terms of non-interference with child-rearing, allowing children the freedom to choose, and not providing advice to children in many circumstances. It seems at least possible that these tenets of aboriginal culture could influence the role of parents, if consulted pursuant to section 56.

Obviously, the research in this area confirms that special protections vis-a-vis the taking of statements from young persons are necessary. Since many young people have difficulty understanding legal concepts and specific aspects of a waiver form, the waiver form itself offers no guarantee that the young person has understood his or her rights. Obviously, waiver forms need to be as user friendly and understandable as possible. No matter how user friendly and understandable, however, there will still be considerable variation in the understanding of young people. Given this, a subjective assessment of the young person's understanding of waiver will be required on a case by case basis, if this is at issue.

Police have the primary responsibility for taking statements from young persons. It is important for police officers to be aware of the limitations of young people's understanding of legal rights, varying levels of comprehension, confounding factors such as learning difficulties and cultural differences, and means to compensate for these considerations, thereby improving understanding. As well, the questioning of a young suspect is a complex enterprise, with the case law constantly evolving. In these situations, police must make quick assessments of the circumstances and react on the spot, which requires considerable skill. They do not have the luxury of time to undertake a detailed analysis of all the nuances that may arise and the case law, as do the courts when they later examine the circumstances of the statement. Given these considerations, steps should be taken to review and, as required, strengthen the training provided to police officers respecting the taking of statements from young persons.

The research also indicates that if a young person chooses not to consult with counsel and chooses instead to consult with a parent or other appropriate adult, it cannot be assumed that the young person's understanding of his or her legal rights will be improved, or even that such advice will be given. These findings seriously question the suggestions

made by some that a statement should not be admissible into evidence unless the young person has actually consulted an appropriate adult (as distinct from being given the opportunity to do so).

If consulted, a parent should offer guidance and assistance. In order to provide guidance, parents and other appropriate adults need to be apprised of their role and what is expected of them in these circumstances. In Chapter 10, the Task Force recommended the development of brochures to better inform parents about their roles and responsibilities under the Act. Information about a parent's role in these circumstances should be included in these brochures.

It should also be emphasized that the social science research does not indicate that all young people misunderstand specific legal concepts and waiver forms. Given this, the research does not answer questions about, for example, whether strict compliance with specified requirements should be required in every case, whether a written waiver is the best method of verifying a waiver of rights, nor about several other issues related to section 56.

11.3.5 Issues From a Criminal Justice Perspective

Section 56 recognizes the unique circumstances and vulnerability of young persons and accords them special protections that go beyond those given adults. The rights to consult a non-counsel adult, and to have a statement made in the presence of that adult, provide better assurances that impressionable young people who often lack a full appreciation of their rights, will be accorded adult guidance. The requirements for a written waiver provide evidence that the young person was at least informed of his or her rights and serves a cautionary function, impressing upon the young person the potentially serious implications of a decision to waive rights. The strict compliance requirements of the section, some would argue, are necessary to ensure that adequate protections are applied to all young persons.

Since the Act was proclaimed, however, jurisdictions have experienced several difficulties operationalizing the requirements of section 56. Problems specifically associated with subsection 56(2) include:

- the provisions do not reflect the varying levels of maturity and development of young persons before the court.

- in all cases, the young person must be afforded the opportunity to

consult with an adult relative or appropriate other person and counsel if desired, regardless of the practical difficulties sometimes experienced in facilitating the presence of a parent or other adult relative (it should be noted that amendments brought about by Bill C-37 vest the young person with the right to the opportunity to consult with counsel **and** a parent or appropriate adult **and** require that the statement be made in the presence of both of these persons).

- subsection 56(2) does not include a complete codification of all the law in relation to the admissibility of statements - such as the right to be advised that questioning must cease until counsel is consulted; the right to be told about the possibility of transfer, where relevant; and the right to be advised of legal aid or duty counsel - leading to unnecessary confusion and duplication.

- the law relating to "persons in authority" has developed to include persons who may not be familiar with the requirements of section 56. School principals, for example, may not be aware of the requirements of section 56; therefore, if they are found to be a "person in authority," an inculpatory statement made to a principal by a young person would not be admissible in evidence.

- first statements which do not conform with each and every requirement of section 56 "taint" second statements (even if they are made shortly thereafter) which do conform with the section.[22]

- the statutory requirement that language be used appropriate to the young person's age and understanding may have created some uncertainty, given that there is a common law and Charter requirement that persons questioned must understand their rights. Are additional requirements needed? What is gained by reference to "age appropriate language"?

- clarification is required that subsection 56(2) does not apply to witnesses (i.e. persons who are not arrested, detained, or suspects).

- with respect to the right to consult, it is currently unclear as to who an "appropriate adult" is and when it is appropriate for someone other than a parent to be consulted.

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[22]See, E.T. v. The Queen (1993).

- there is some uncertainty in relation to whether privilege attaches to conversations between young persons and parents.

- there is uncertainty relating to statements made by young persons to police officers during undercover police investigations. As Platt, a leading expert has observed, it may be that section 56 applies so that statements made to undercover police officers cannot be admitted in evidence.[23]

Other identified problems specifically associated with subsection 56(4), vis-a-vis the written waiver, include:

- there is uncertainty as to the acceptable form for a written waiver, with the result that case law varies as to the necessary wording of a waiver. For example, should the waivers follow the statute **exactly**, or should it be drafted to reflect the age and understanding of the youth?

- the statement evidence is inadmissible even though the court is satisfied that the statement was given voluntarily and an oral waiver has been given. This has arisen in some cases where, for example, "streetwise" young offenders, familiar with the technical requirements of section 56, orally agree to make a statement to a peace officer, orally waive the right to consult a parent, but refuse to sign a written waiver of the right to consult a parent.

- practical problems insofar as persons "deemed" to be persons in authority (such as school principals) do not have section 56 statement forms readily accessible, are not trained in their application, nor would it be feasible to do so.

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[23] "The introductory words of section 56(2) state that 'no oral or written statement given by a young person to a peace officer or other person who is, in law, a person in authority' is admissible unless the provisions in paragraphs (a) to (d) are complied with. It is noteworthy that the words 'peace officer' are used, in addition to the reference to 'persons in authority.' This may mean that, unlike in respect of investigations of adult offenders, undercover police investigations of young persons governed by section 56 cannot take place since any statement made in this regard would be to a 'peace officer,' even where the 'peace officer' in this context would not, subjectively, be a 'person in authority.' Given the reasoning above, in R. v. J.(J.) (1988), 43 C.C.C. (3d) 257 (Ont. C.S.) since section 56(2) applies to those young persons who are accused, then undercover police investigations may not take place once the young person is arrested. Given the Supreme court of Canada's decision in J.(J.T.) where the youth is a suspect, section 56 applied as well. Therefore it may be that undercover police investigations cannot take place where the young person is reasonably being investigated as a suspect." (Platt, 1995, p. 355.) Recent amendments to section 56 (Bill C-37) do not appear to clarify this issue since the section is now clearly extended to apply to all statements made by young persons if the police officer "has reasonable grounds for believing that the young person has committed an offence."

- if the young person signs or initials a section 56 form in the wrong place, the statement may be excluded.

- jurisdictions use different waiver forms. The complexity of the requirements relating to the waiver form has led one jurisdiction to create a thorough eight page statement form, which must be clearly explained to the young person by the person in authority (see Appendix C). The length of the form varies from jurisdiction to jurisdiction, and even within jurisdictions. Lengthy and complex forms are probably confusing to many young people yet, paradoxically, the law - in the interest of facilitating comprehension - demands these types of forms.

While there are many issues in relation to section 56, the two most important and controversial ones involve strict compliance with the statutory requirements and the method by which rights may be waived (i.e., written waiver).

11.3.6 Strict Compliance

The rationale for strict compliance with the requirements of section 56 appears to be twofold: that young persons require special or additional rights beyond those enjoyed by adults, and the most appropriate method for protecting these rights is through strict compliance with a statutory scheme. The first of these two premises is not questioned. The second requires closer examination. At issue is whether there should be judicial discretion to admit statement evidence where the statement was voluntarily given, but where there has not been strict compliance with the requirements of section 56.

The protection of rights necessarily involves adequate opportunity to be apprised of those rights; adequate appreciation of the rights so that the person is able to exercise informed choices; and sufficient opportunity to exercise the rights. The assessment of whether a young person was adequately apprised of rights and sufficiently understood the rights to be able to make choices about conduct is necessarily a subjective assessment. The relevant question is: "Did this young person in these circumstances understand and appreciate his or her rights?" Assessments of subjective understanding of rights can only be made through judicial consideration of each individual case.

Arguably, a subjective standard cannot be achieved by reference to absolute compliance with a statutory scheme. The latter is objective in nature and does not lend itself to subjective assessments. The research

(discussed above) respecting comprehension of waiver illustrates that the requirement of a written waiver does not ensure an appreciation of the rights being waived. Clearly, the signed waiver was not a guarantee of the subjective appreciation of rights. Further, other research with respect to young people's general knowledge of the legal system demonstrates the need to conduct subjective inquiries.

The other difficulty with strict compliance is that, in some cases, it can obviate the opportunity to strike a balance between individual rights and societal interests. For example, where a breach of procedure is extremely minor (e.g. the young person omits to initial one entry on a waiver form) and the offence is very serious, exclusion of the statement even though the statement was voluntarily made and complied with the Charter may well bring the administration of justice into disrepute. While such a balancing exercise is currently required in the application of section 24 of the Charter, it is absent in the strict compliance model established in section 56 YOA.

There has been significant litigation with respect to whether the admission of evidence, including statement evidence, would bring the administration of justice into disrepute within the meaning of section 24(2) of the Charter. Generally, the operative consideration in assessing whether to admit a statement obtained in breach of section 10(b) Charter rights is whether the trial process would be rendered unfair. The courts have identified relevant factors in assessing whether the administration of justice would be brought into disrepute under section 24(2).[24] These factors include:

- the nature of evidence obtained.
- the nature of the Charter right infringed.
- whether the Charter violation was serious or merely technical in nature.
- was the violation deliberate, wilful or flagrant, or was it inadvertent or committed in good faith (e.g. by police)?
- did the violation occur in circumstances of urgency or necessity?
- were there other investigative techniques available?

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[24]See, for example, Collins v. The Queen (1987).

- is the offence serious?
- is the evidence essential to substantiate the charge?
- are other remedies available?

In Collins v. The Queen, the Supreme Court of Canada pointed out that it must consider whether the judicial system's repute would be better served by admission or exclusion of the evidence. The administration of justice could be brought into disrepute by the exclusion of evidence essential to substantiate the charge because of a trivial breach of the Charter. If the admission of the evidence were to operate unfairly, the more serious the offence, the more damaging to the system's repute would be an unfair trial.

Collins, and other Charter case law, of course, apply to young persons who provide statements to persons in authority. It is instructive to reiterate these basic principles in a discussion of whether judicial discretion should be incorporated in section 56 because, if so, it is envisioned that the courts would continue to consider the same factors generally in assessing whether there has been compliance with the special, additional factors set out in section 56 and whether, given the facts of a case, the statement should also be admitted in order not to bring the administration of justice into disrepute. In determining whether the administration of justice would be brought into disrepute if all the requirements of section 56 are not met, the court would have the discretion to balance the seriousness of the non-compliance with other interests in every case. Admission of a statement in breach of a statutory protection would be the exception to the rule. The operative consideration would continue to be the fairness of the proceedings: an unfair trial brings the administration of justice into disrepute and thus precludes the admission of any statement made by a young person.

A brief overview of the general principles that have emerged from the relevant Charter case law is set out in Appendix "B" to this chapter. The purpose of this review of compliance with the Charter is to examine in greater detail the kinds of situations where statements have been both excluded and admitted in accordance with the standard. The review indicates that various principles are routinely applied by the courts to define rights under the Charter and the courts must routinely exercise discretion with respect to the admissibility of statements made to persons in authority.

Arguably, it is provision for additional rights to young persons, rather than the need for strict compliance, which is mandated by the Declaration of Principle (s.3 YOA). If compliance with the "guidelines" of voluntariness at common law and the rights guaranteed under the Charter have been assessed - having regard to the age, maturity, worldliness, mental and emotional capabilities of the young person - it is difficult to argue that the special needs of young persons have not been recognized. The research discussed above about the variable comprehension of young persons in respect of their rights can be seen as an argument for judicial discretion, which involves an assessment of the young person's subjective understanding of his or her rights, rather than as evidence which supports a strict compliance model.

Also, it is arguable that the current legislation, with its mechanistic approach to strict compliance, represents a challenge to judicial discretion and the integrity of the court. Simply put, a strict compliance model can be seen to imply a lack of confidence in the judiciary to assess all the circumstances of each case and decide whether the statement was voluntarily given. Experience with the Charter demonstrates that the courts will provide strong protection for individual rights. In light of this experience, it seems unnecessary that the additional protections that are justifiably accorded young persons should be measured against a standard greater than that provided for in the Charter.

If there was judicial discretion, a statement could be ruled admissible in appropriate circumstances, regardless of whether there was absolute compliance with section 56. The standard for admission of the statement in evidence, if Crown Counsel has failed to prove strict compliance with the requirements of section 56, could be similar to what is set out in section 24(2) of the Charter.

Incorporating judicial discretion into section 56 would be consistent with the approaches taken in New Zealand, Australia, and England. It would also be consistent with the "totality of circumstances" approach adopted by the majority of American states. Further, it would not appear to infringe on international instruments respecting juvenile justice.

A case from the Supreme Court of Canada illustrates the debate about judicial discretion and how judicial discretion might be exercised on a case-by-case basis. In R. v. J.T.J. (1990), the majority found that the young person's statement was inadmissible. In that case, the facts are instructive. J.T.J. was a seventeen year old charged with the first degree murder of a three year old girl, following a sexual assault. The day

following the murder, the police brought J.T.J. to the police station, where he was questioned for about two hours. The police left and then returned, at which point J.T.J. stated he had grabbled the little girl, taken her to a garage down the lane and then blacked out. At that point, the police asked if he wanted to have an adult present (his uncle). J.T.J. replied that he did. The police left the interview room and arranged for the attendance of the uncle. J.T.J. was then charged with the murder and informed of his right to retain and instruct counsel. Indicating that he wished to retain counsel, J.T.J. gave the police the card of his lawyer and then consulted with his lawyer. The police subsequently asked if he wished to make a written statement concerning the events, at which point he responded that his lawyer had told him not to. The police then divulged some evidence and asked additional questions, at which point J.T.J. replied willingly, disclosing details about the murder.

The majority of the Supreme Court of Canada found that section 56 had not been complied with because the accused was not told before each statement was made that he had the right to consult counsel or an adult relative. Further, neither counsel nor an adult relative was present when he made any of the statements. In commenting on the requirements of section 56 and the need for strict compliance, Justice Cory stated:

> ". . . it is unlikely that they (young persons) will appreciate their legal rights in a general sense of the consequences of oral statements made to persons in authority; certainly they would not appreciate the nature of their rights to the same extent as adults . . . as soon as the requirements are relaxed because of the belief in the almost certain guilt of a young person, they will be relaxed in the case of those who the authorities believe are probably guilty . . . principles of fairness require that the section be applied uniformly to all without regard to the characteristics of the particular young person."

The position of the majority of the court seems to reflect a similar rationale to that of an American researcher in the area:

> ". . . the problem of providing unnecessary protection for sophisticated youth is overshadowed by the need to afford adequate protection to most juveniles" (Grisso, 1980).

In her dissenting judgement, Justice L'Heureux-Dubé found the intention of section 56 had been fulfilled and that the statement ought to be admitted. While recognizing and fully endorsing the need for special protections for young persons, she parted company with the majority of

the court in the application of these principles. She envisions that the Act ought to assess compliance on a subjective scale that takes into account factors such as age, maturity and sophistication with respect to the criminal justice system, and stated:

> "However, young offenders suspected of a criminal office should also be treated in a manner befitting their ages. The Young Offenders Act makes it clear that young persons should bear responsibility for their contraventions. The term 'young persons' cannot be interpreted in static isolation. Adolescence cannot be viewed as a snapshot in time. These youths between the ages of 12 and 18 cannot be aggregated and dealt with uniformly without regard for the discrepancies in their faculties and competence.
>
> The spirit of the Act is intended to reflect the evolution of the maturation process. The Act establishes a spectral scheme ensuring that the treatment of these young persons is commensurate with their abilities and understanding . . .
>
> J.T.J. was 17 years old at the time of his office. Prior to that, he had lived in a common law relationship for about 10 months. That union produced a child. While he no longer resides with the mother, he had made sporadic support payments. J.T.J. was working as a roofer for his cousin, H.J., who was present at the police station and provided guidance and support. When the police advised him of his right to counsel, J.T.J. produced a solicitor's business card from his pocket. He subsequently consulted with his solicitor for 37 minutes. The solicitor either acknowledged the police's statement that they would have to speak with J.T.J. some more, or told the police that her client would not be making a statement.
>
> These facts reveal that the accused was relatively advanced and well apprised of his predicament. His level of maturity would have alerted him to the dangers of answering certain questions after he had received explicit warnings from both the police as well as his solicitor. These indicia of adulthood do not excuse non-compliance with the Act. Rather, they define with sharper resolution what measures are necessary in order to extend the prescribed safeguards to this particular young person, taking into account his age and level of sophistication."

Justice L'Heureux-Dubé's comments operate within the context of the existing legislation. While there appears to be merit in her approach, it must be remembered that the majority of the court disagreed with her

interpretation of the legislation. Her approach would only work if the legislation was amended to permit, in an appropriate case, the admission of a statement even if the court was not satisfied there had been strict compliance with all of the requirements of section 56.

The options, then, are to continue with the current strict compliance approach or to incorporate judicial discretion into section 56.[25] With respect to judicial discretion, the requirements of section 56 would remain in place - subject to any clarification, simplification, or modifications discussed later - but a section would be added which would permit the court to exercise discretion, on a case by case basis, to admit the statement. While the Task Force did not formalize the wording of any test that could apply, one possibility could be:

> "Notwithstanding a breach of section 56(2) or (4), the court may, after considering the totality of the circumstances, admit into evidence a statement which otherwise is voluntary and satisfies the requirements of the Charter of Rights and Freedoms, if the court is satisfied that the admission of the statement would not bring the administration of justice into disrepute."

This is an example only, intended to capture the nature of the possible new provision, and requires further study.

The key **advantages and considerations** that apply to incorporating judicial discretion into section 56 include:

- it would recognize the considerable differences in the levels of development, maturity, experience and understanding of young persons, allowing these considerations to be taken into account in the determination of admissibility. The recognition of a sliding scale of development is arguably more consistent with the philosophy and other substantive provisions of the Act and with social science research.

- since section 56 would continue to specify special protections for young persons, permitting judicial discretion would remain consistent

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[25]It has been suggested from time to time, especially by the law enforcement community, that section 56 should be repealed, instead relying on the Charter and the common law. This was not supported by the Task Force, principally on the grounds that repeal would not provide the same degree of clarity about protections to young persons and could contribute to considerable judicial disparity in the admission of statements.

with the Declaration of Principle vis-a-vis the special guarantees of the rights of young persons and their special needs. Arguably, there would be no real erosion of the special guarantees of rights because there would still be a heavy burden on the Crown to clearly and unequivocally demonstrate to the court that the statement was voluntary.

- potentially greater confidence in the youth justice system because a voluntary statement could be admitted in evidence in circumstances where technical deficiencies currently result in exclusion. This could avoid circumstances where the administration of justice can be brought into disrepute, especially if the offence is serious, because an otherwise voluntary statement is excluded in the current strict compliance approach.

- more consistent with the "balance" of competing interests envisioned by the Act generally and by the Declaration of Principle in particular. While the recognition of special needs and of special protections for young persons would continue to be reflected, the principles of public protection and the responsibility and accountability of young persons would be better recognized because some voluntary statements would not, as is currently the case, be excluded on technical grounds.

- the traditional role of judicial discretion would be recognized, reflecting an expression of confidence in the judiciary to assess admissibility of evidence on a case by case basis. In fact, this would only be an extension of judicial discretion because the courts must currently assess, for example, whether the young person was explained rights in language appropriate to his or her age and understanding, understood these rights, etc.

- consistent with international instruments respecting juvenile justice and with the practices of other countries.

The key disadvantages and considerations related to incorporating judicial discretion into section 56 include:

- arguably, an erosion of the special guaranties of the rights of young persons insofar as the requirements of section 56 would no longer be absolute. This may apply more so in cases involving older youths whose chronological age and apparent experience suggests a maturity and level of understanding that may not in fact exist.

- potential disparities in application across jurisdictions if appellate courts adopt broader and narrower interpretations of the extent and circumstances to which judicial discretion may apply (bearing in mind that these differences, if they arise, would probably be eventually clarified by the Supreme Court of Canada).

- potentially increased litigation vis-a-vis the extent and circumstances to which judicial discretion may apply.

- arguably, less certain procedure for the police, given uncertainties about the extent and circumstances to which judicial discretion may apply.

- judicial discretion may, in practical application, make little difference, given the codification of special protections for youth, a stringent test, and the consequent heavy burden on the Crown to justify admission of the evidence in circumstances where there was a breach of the codified requirements.

The Task Force unanimously agreed that judicial discretion should be incorporated into section 56. A test which incorporates judicial discretion in assessing compliance with statutory rights is based on the rationale that the appreciation of rights is necessarily a subjective assessment which can only be determined by examining the particular circumstances of each individual case. By tying admission of a statement obtained in breach of statutory rights to the test of whether it would bring the administration of justice into disrepute, the court is required to balance competing interests: the actual and perceived jeopardy to the young person of providing self-conscripted evidence versus the societal interests in proving criminal offences. Judicial discretion, rather than absolute compliance with a statutory scheme, appears to be a more balanced approach while still ensuring that the rights of young persons are not unduly undermined by the actions of law enforcement officials. Therefore, **the Task Force recommends that:**

> **With respect to the admissibility of statement evidence, section 56 YOA should be amended to incorporate judicial discretion so that, notwithstanding a breach of subsections 56(2) or (4), the court may, after considering the totality of the circumstances, admit into evidence a statement which is otherwise voluntary and satisfies the requirements of the Charter of Rights and Freedoms, if the court is satisfied that the admission of the statement would not bring the administration of justice into disrepute.**

While all representatives of the Task Force endorsed the general principle of incorporating judicial discretion into section 56, there was some question about how far this should go. In this regard, it should be noted that the recommendation addresses both subsections 56(2) and (4). Subsection (2) addresses the specific protections accorded young persons (eg. the right to consult a parent), whereas subsection (4) addresses the requirement for a written or, as per Bill C-37, videotaped waiver of rights. At issue here is whether judicial discretion in respect of section 56(4) should apply only in narrow circumstances of a procedural or technical breach such as where, for example, the young person omits signing one aspect of the waiver form but, regardless, the Crown has clearly and unequivocally satisfied the court that the young person waived the right in question.[26] Provincial and territorial representatives do not support such a narrow approach, but rather support a broader approach which would maximize the flexibility and discretion of the court. Some federal representatives expressed serious concern about this broader approach but agreed to study the matter further.

11.3.7 Waiver

The requirement in section 56(4) for a written waiver of rights has, as noted previously, been the subject of considerable concern and of proposals for change. Although Bill C-37 has amended section 56(4) to permit videotaped waivers, it is expected that the vast majority of waivers will continue to be in writing because videotaping equipment is not always accessible to police officers (and sometimes not available at all), nor are the many circumstances under which police questioning takes place necessarily amenable to videotaping.

The principal advantages of the requirement for a written waiver are:

- it provides evidence that the young person was informed of his or her rights (but not that those rights were adequately explained and understood).

- the formality of having to sign a written waiver form can serve a cautionary function, impressing upon a young person the serious implications of his or her decision to waive rights and make a

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[26]If an amendment was drafted along the lines discussed above, and a decision is made to limit judicial discretion vis-a-vis section 56(4) only to technical or procedural breaches of the section, then this may require further legislative clarification.

statement.

- the formality of being asked to sign the waiver form also provides an opportunity to re-consider that decision and reflect on the serious implications of it.

- a waiver form provides a guide to the police as to the rights that need to be explained (but not how they should be explained in a manner that is appropriate to the individual case).[27]

These advantages need to be weighed against the several concerns raised earlier about written waivers (11.3.5) including, in particular, that a clearly voluntary statement is still inadmissible if there is no signed written waiver or if the written waiver departs in some way from what is considered necessary.

It has been suggested, especially by many law enforcement and prosecution authorities, that the requirements of section 56(4) should be changed in some way. Broadly speaking, there are two different ways in which this could be accomplished:

- removing any reference to the requirement or method by which rights are waived by repealing section 56(4), thereby allowing the courts to determine on a case by case basis whether rights were waived with full knowledge of the rights and appreciation of the consequences of giving up those rights.

- retaining section 56(4), but incorporating greater flexibility vis-a-vis the method of waiver.

With respect to the repeal of section 56(4), a key consideration is that the Crown would have the burden of not only satisfying the court that the statement was voluntary but also that the young person was aware of and actually understood the additional statutory rights set out in section 56(2). Given this, any waiver of rights must be expressly made. The particular manner for the express waiver of rights, however, need not be articulated, given the very high standards for waiver of rights set by the Supreme

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[27]It should be noted that the last three advantages do not apply in circumstances of videotaped waivers (although some might argue that the procedure of videotaping, to some degree, serves as a cautionary function). Videotaping not only provides evidence that the young person was informed of his or her rights, but also gives evidence about how those rights were explained and, indirectly, understood (eg. demeanour, hesitation).

Court of Canada in other contexts (eg., R. v. Clarkson).

The potential advantages of repeal of section 56(4) are that many of the problems identified earlier respecting written waivers would be resolved, and that the Charter would obviously apply so that any waiver would have to meet continuously evolving criteria established by the courts. With respect to disadvantages of repeal of section 56(4), some would argue that whatever protections that might attach to a written waiver would be lost and there may be some concern that elimination of a statutory waiver requirement might have the practical effect of shifting the evidentiary burden to the young person to satisfy the court that the statutory rights were not waived.

A variant on repeal of section 56(4) is to retain the subsection but to amend it so that it does not enumerate specific methods of waiver.

With respect to the second broad option of retaining section 56(4), but incorporating greater flexibility vis-a-vis the method of waiver, there are several ways of accomplishing this. These would all allow for some greater flexibility in the method by which rights are waived but, depending on the choice, would do so to greater and lesser degrees. These include:

- incorporating judicial discretion in relation to section 56(4) so that, as discussed earlier, the court would have the discretion to admit the statement where there was a breach of the subsection (i.e., not videotaped and no written waiver), subject to the test and considerations described in the recommendation above. This would probably result in the admission of an oral or audiotaped waiver only in very exceptional circumstances.

- more directly incorporating judicial discretion into section 56(4) by expressly setting out in that subsection that, for example, the court may, having regard to all of the circumstances, accept any other form of waiver that the court determines is adequate.

- expressly including audiotaped waivers (but not oral waivers that are not audiotaped) in section 56(4).

- expressly including oral waivers in section 56(4).

The common element in all of these options is that oral (or audiotaped) waivers would be permitted. The central question around specifying the requirements for any method of waiver is that waiver's effectiveness is

dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted and of the waiver will have on those rights in the process.[28] The onus shifts to the Crown to establish that the accused waived a right, and the Crown must establish clearly and unequivocally that the accused waived the right with the full knowledge of the extent of the right and awareness of the consequences of waiving it.

There is, it is argued, no magic to a written waiver: it does not prove that rights were adequately explained and understood. As discussed earlier, the social science research indicates that many young people do not understand written waivers, which are necessarily and paradoxically lengthy and complex. An oral waiver would also better recognize the realities of illiteracy, learning disabilities, and language differences than would written waivers. An oral waiver would allow for the admission of statement evidence in cases where young persons clearly waive their rights but then refuse to sign a written waiver, a matter especially pertinent to experienced and criminally sophisticated youth. It should always be remembered that the young person's interests would still be protected by other requirements that the statement be voluntary and the demanding burden that the Crown prove that the young person, in accordance with the Charter and common law, was adequately informed of and understood his or her rights, including the additional rights for young persons set out in section 56(2).

As noted earlier, it was argued when Bill C-37 was before the House of Commons Justice and Legal Affairs Committee that only videotaped waivers (and not audiotaped ones) should be permitted because sound recording alone does not offer the necessary guarantees - audiotape would not allow the young person's demeanour to be observed. It could be argued, however, that audiotaped waivers would be a substantial improvement over written waivers because audiotaped waivers would offer a full and accurate account of what was said and, additionally, would capture nuances such as tone, pauses and hesitations, and apparently gratuitous remarks that, when considered in all the circumstances, may have a bearing on issues related to admissibility.

In considering the above:

A substantial majority of the Task Force, including all provincial and

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[28]See R. v. Clarkson (1986).

territorial representatives, recommend that section 56 YOA should be amended to allow, before making a statement to a person in authority, rights to be waived by methods beyond written or videotaped waivers. Examples of options in this regard include:

(1) either repealing section 56(4) or removing from that subsection any specific enumeration of the means by which rights are waived, thereby allowing the courts to determine on a case by case basis whether rights were waived with full knowledge of the rights and appreciation of the consequences of waiving those rights.

(2) according the court the discretion to accept any other form of waiver (i.e., beyond written or videotaped) that the court, having regard to all the circumstances, determines is adequate.

(3) incorporating oral and/or audiotaped waiver into section 56(4).

Provincial and territorial representatives supported options which would maximize flexibility in this regard, including the repeal of section 56(4). Some federal representatives expressed serious concern about the repeal of section 56(4) but agreed to study the matter further.

If written waivers continue to be specified as a means of waiver in section 56(4), a second issue relates to the written waiver form itself. Each jurisdiction has developed different waiver forms. Many are long and complex. The acceptable form for a written waiver has been the subject of considerable litigation and varying case law, with the result that there are uncertainties and differences as to the necessary wording. For example, should the wording of the waiver form follow the statute exactly or should it be drafted to reflect the age and understanding of the youth (which can be quite variable)? One way to address these concerns is to develop a uniform statutory form.

Accordingly, the Task Force recommends that:

If written waivers continue to be specified as a means of waiving rights in section 56 YOA, federal-provincial-territorial Senior Officials Responsible for Juvenile Justice should develop a standard written waiver form which would have the force of law pursuant to section 67 YOA.

These Senior Officials should also establish a mechanism to review, on an

ongoing basis, the case law in respect of written waivers and other matters related to section 56.

11.3.8 Simplification and Clarification

Section 56 sets out an extensive codification of not only the special protections that are uniquely applicable to young persons, but also duplicates many (but not all) of the rights that are applicable to all persons under the Charter and the common law (see Appendix B). It could be argued that the enumeration of these rights in one place serves an educative function and provides a readily accessible guide for practitioners.

On the other hand, it could be argued that this enumeration of rights is redundant, thereby only adding unnecessary complexity to the law. It could be said that there is no need, for example, to codify that a statement must be voluntary and that the young person is under no obligation to give a statement - these rights are clearly applicable to all persons and do not need to be repeated in section 56. Even the requirement to explain rights in language that is appropriate to the young person's age and understanding is redundant because the Charter case law requires, for example, that the right to counsel is only satisfied if it is explained in language that the person can understand and the police must establish a reasonable basis for believing that the person in fact knows and has adverted to his or her rights, and is aware of the means by which these rights can be exercised. Another concern is that the requirements set out in section 56 vary slightly from the requirements of the Charter and the common law, thereby leading to some lack of clarity. An example of this is, as discussed earlier, the uncertainty as to whether statements made to undercover peace officers would be admissible.

One way to address this concern could be to simplify section 56 by reducing the enumerated rights to only those which are uniquely applicable to young persons, specifically that:

- a reasonable opportunity to consult a non-counsel adult be given prior to the taking of the statement; and

- any statement made by the young person is required to be made in the presence of a non-counsel adult and counsel consulted, unless the young person waives the right.

While these protections are presently included in section 56, the section

could be re-drafted to clearly emphasize that these rights go over and above the rights afforded to adults and the rights afforded to young persons under the common law and the Charter. If the present enumeration of rights is retained, an alternative would be to review the provisions and ensure that the enumerated rights are better reconciled with the requirements of the Charter and the common law.

While simplification might be desirable, there are areas in which clarification would be helpful, especially in respect of "transfer warnings" that must be given by the police before a waiver of rights will be valid in some circumstances. In this regard, the Supreme Court of Canada, in R. v. E.T. (1993), found that there is no absolute requirement that the young person be advised of the possibility of transfer to ordinary court, but that the presence or absence of such a warning is an aspect of determining whether the statement was voluntary; if the young person waives the right to consult counsel without being aware of the possibility of being transferred to ordinary court (if applicable), then the waiver will be invalid.

The Supreme Court decision has caused some confusion as to the scope of its application. In some jurisdictions, out of an abundance of caution, all young persons who are fourteen or older and charged with an indictable offence are given a "transfer warning" even though there is no realistic prospect of transfer, or even consideration of the same, in the vast majority of cases. In other jurisdictions, the warning is only given in situations where the young person is charged with a very serious, violent offence.

While it would be inappropriate to amend the section to require a transfer warning in most cases (because the vast majority of cases are not transferred), there may be merit in clarifying in the section specific offences (i.e., serious, violent ones) where the police should consider the transfer warning. This may, in turn, depend on the outcome of decisions that may be made respecting changes, if any, to the provisions for transfer to ordinary court (see Chapter 8).

Other areas that might benefit from clarification - but which require further review in light of any decisions that may be made about whether judicial discretion is incorporated into section 56 - include:

- defining who an "appropriate adult" is, given that an appropriate adult must be consulted prior to the taking of a statement and must be

present, unless the young person waives that right.[29]

- defining the words "in the absence of a parent" as they appear in section 56(2)(c).

- clarifying the meaning of "reasonable opportunity to consult" and "reasonable opportunity to make the statement in the presence of the person consulted."

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

In the interests of simplifying and clarifying the requirements of section 56 YOA:

(1) Consideration could be given to simplifying the section by limiting the enumeration of rights to only those which go beyond the Charter and common law and which, therefore, are uniquely applicable to young persons. Alternatively, the section could be reviewed to better reconcile the requirements of the section with the requirements of the Charter and the common law.

(2) The section should be reviewed and amended to provide clarity about the circumstances in which the "transfer warning" applies.

[29]Perhaps New Zealand's approach to defining an "appropriate adult" could be considered.

APPENDIX A - CHAPTER 11

Section 56 YOA addresses statement evidence and, with parts that were recently amended by Bill C-37 being identified in italics, reads as follows:

(1) "Subject to this section, the law relating to the admissibility of statements made by persons accused of committing offences applies in respect of young persons.

(2) No oral or written statement given by a young person to a peace officer or to any other person who is, in law, a person in authority on the arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against the young person unless

(a) the statement was voluntary;
(b) the person to whom the statement was given has, before the statement was made, clearly explained to the young person, in language appropriate to his age and understanding, that
  (i) the young person is under no obligation to give a statement,
  (ii) any statement given by him may be used as evidence in proceedings against him,
  (iii) the young person has the right to consult counsel and a parent or other person in accordance with paragraph (c), and
  (iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance with paragraph (c), if any, unless the young person desires otherwise;
(c) the young person has, before the statement was made, been given a reasonable opportunity to consult
  (i) with counsel, and
  (ii) a parent, or in the absence of a parent, an adult relative, or in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person; and
(d) where the young person consults any person pursuant to paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

(3) The requirements set out in paragraphs (2)(b), (c) and (d) do not apply in respect of oral statements where they are made spontaneously by the young person to a peace officer or other person in authority before that person has had a reasonable opportunity to comply with those requirements.

(4) A young person may waive the rights under paragraph (2)(c) or (d) but any such waiver shall be videotaped or be in writing, and where it is in writing it shall contain a statement signed by the young person that the young person has been apprised of the right being waived.

(5) A youth court judge may rule inadmissible in any proceedings under this Act a statement given by the young person in respect of whom the proceedings are taken if the young person satisfies the judge that the statement was given under duress imposed by any person who is not, in law, a person in authority.

(5.1) A youth court judge may in any proceedings under this Act rule admissible any statement or waiver by a young person where, at the time of the making of the statement or waiver,

(a) the young

(b) the person to whom the statement or waiver was made conducted reasonable inquiries as to the age of the young person and had reasonable grounds for believing that the young person and had reasonable grounds for believing that the young person was eighteen years of age or older; and

(c) in all other circumstances the statement or waiver would otherwise be admissible.

(6) For the purpose of this section, an adult consulted pursuant to paragraph 56(2)(c) shall, in the absence of evidence to the contrary, be deemed not to be a person in authority."

Section 11 of YOA, which addresses the right to counsel, is also relevant to the issue of taking statements from young persons and provides that:

(1) "A young person has the right to retain and instruct counsel without delay, and to exercise that right personally, at any stage of proceedings against the young person...

(2) Every young person who is arrested or detained shall, forthwith

on his arrest or detention, be advised by the arresting officer or the officer in charge, as the case may be, of his right to be represented by counsel and shall be given an opportunity to obtain counsel.

Some provisions of the Charter of Rights and Freedoms are also particularly relevant with respect to statement evidence, and apply equally to adults and young persons:

- "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except inn accordance with the principles of fundamental justice." (s.7)

- Everyone has the right on arrest or detention...to retrain and instruct counsel without delay and to be informed of that right..." (s.10(b)).

- "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." (s.24(1)).

- "Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." (s.24(2)).

APPENDIX B - CHAPTER 11

Overview of the Charter of Rights and Freedoms: Standards That Must Be Met

There are many cases where an adult's or young person's rights pursuant to the Charter of Rights and Freedoms have been interpreted by the courts. A brief overview of the general principles that have emerged from the case law is as follows:

a) Constituent Elements of the Section 10(b) Rights (Sub-rights):

Upon arrest or detention, the 10(b) rights (right to counsel) are operative and include the following:

- the right to be told of the reasons for the arrest or detention (knowledge of extent of jeopardy is a 10(b) right and also a 10(a) right.
- the right to be informed of the right to retain and instruct counsel without delay.
- the right to be given a reasonable opportunity to retain and instruct counsel without delay.
- the right to consult counsel in private.
- the right to be told that if a person cannot afford counsel, he or she may contact duty counsel at an 800 number or a legal aid lawyer.
- the right to be told of whatever system for free and immediate, preliminary legal advice that exists in the jurisdiction.
- the right to have the police desist from eliciting evidence until the detainee has had a reasonable opportunity to retain and instruct counsel.
- the right to counsel is only satisfied if it is explained in language that the detainee can understand.
- the right to counsel is only satisfied if the person detained has the limited cognitive capacity required for fitness to stand trial (this applies to persons with mental illness but also to persons who, because of lack of maturity or limited mental ability, do not understand the legal process, the role of the various actors in it, etc.).
- where a detainee has indicated that he/she wishes to exercise a right to

counsel, has difficulty reaching counsel and then indicates he/she has changed their mind and does not wish to consult with counsel, the police must tell the person that he/she has the right of a reasonable opportunity to contact a lawyer and, in the interim, the police are obliged not to solicit evidence from the detainee.

- once a detainee has asserted a right to counsel, there must be a clear indication that he/she has changed his/her mind and the burden of establishing an unequivocal waiver will be on the Crown. The waiver must be free and voluntary and it must not be the product of direct or indirect compulsion.

- a person who asserts that they know their rights does not thereby waive them; the police must establish a reasonable basis for believing that the detainee in fact knows and has adverted to his/her rights, and is aware of the means by which these rights can be exercised.

- In order to comply with section 10(b), the police must restate the accused's right to counsel when there is a fundamental and discrete change in the purpose of the investigation, one involving a different and unrelated offence or a significantly more serious offence than that contemplated at the time of the original warning.

b) Limitations on Section 10(b) Rights:

- section 10(b) rights do not apply to persons who, at the time of making the statement, were not arrested or detained.

- section 10(b) has been complied with where there is a delay between the time the suspect is advised of his/her rights and the time that he/she is detained. (In Schautz (1990), the accused was informed of his 10(b) right before he was actually detained. The Supreme Court of Canada held that at the time of his subsequent detention a short time later, he did not have to be rewarned.

- the words "upon arrest or detention" indicate a point in time, rather than a continuum. Thus, the accused does not have the right to be informed of his/her right to counsel and to be given an opportunity to instruct counsel whenever he/she has a critical encounter with the police or other authorities. The accused does not have a continuing right to be instructed before every occasion on which the police obtain a statement from the accused.

- absent proof of circumstances indicated that the accused did not understand the right to retain counsel when informed of it, the onus is on him/her to provide that he/she asked for the right but it was denied or he/she was denied any opportunity to even ask for it.

- the duties imposed on the police to refrain from attempting to elicit evidence from the suspect are suspended when he/she is not reasonably diligent in the exercise of his/her rights. (In Smith (1989), the accused was told of his right to counsel but did not bother to try and call a lawyer. The police resumed questioning. The statement was admitted: the Supreme Court of Canada held that a detainee who has a reasonable opportunity to communicate with his counsel but who was not diligent in the exercise of the right cannot in the absence of exceptional circumstances subsequently require the police to suspend one more time the investigation or the questioning).

- in appreciating the jeopardy he/she faces, the accused need not be informed of the precise charge or of all of the details of the case. What is required is that he/she be possessed of sufficient information to allow making an informed and appropriate decision as to whether to speak to a lawyer or not. The emphasis must be on the reality of the total situation as it impacts on the understanding of the accused, rather than on the technical detail of what the accused may or may not have been told.

c) The Right to Remain Silent: Section 7:

Description of the Right:

The relationship between the right to remain silent and the right against self-incrimination has been defined as follows:

> "It would appear that s. 11c and 13 of the Charter deal only with the testimonial right not to testify and are not applicable to the facts of this case.
>
> "However, the right against self-incrimination cannot be limited to ss. 11c and 13 of the Charter. Consideration must still be given to the extent to which that same right, at least to the extent that it is encompassed within the principle of the right to remain silent, is protected by s. 7 of the Charter. It is clear that the provisions of ss. 8 to 14 of the Charter are simply specific illustrations of the greater right which is provided by s. 7 (Cory J. in Woolley (1988), 40 C.C.C. (3d) 541 (Ont. C.A.) at 538.

> "The measure of the right to silence resides in the notion that a person whose liberty is placed in jeopardy by the criminal process cannot be required to give evidence against himself, but rather has the right to choose whether to speak or to remain silent. Once it is established that a detained suspect subjectively possesses an operating mind, then the issue is whether the conduct of the authorities, considered on an objective basis, effectively and unfairly deprived the suspect of the right to choose whether to speak to the authorities (McLachlin J. in Hebert, (1990) 5 W.W.R. 1 (S.C.C.) at 41)."

Defining the relationship between the "principles of fundamental justice" and the right to remain silent:

> "Section 7 of the Charter provides that a person is not to be deprived of his liberty except in accordance with the principles of fundamental justice. Those fundamental principles are to be found in the basic tenets of our legal system. It has always been a tenet of our legal system that a suspect or accused has a right to remain silent at the investigative state of the criminal process and at the trial stage. At the very least, it is clear that an accused person is under no legal obligation to speak to police authorities and there is no legal power in the police to compel an accused to speak . . . " (Cory J. in Woolley at 538).

d) Constituent Elements of the Right to Remain Silent:

- the right to silence is confirmed by related rights, the most important of which is the right to counsel under section 10(b) of the Charter, to ensure that the suspect understands his/her rights, especially the right to silence.

- where the accused has made a choice not to make a statement, the state is not entitled to use its superior power to override the detainee's will and negate his/her choice.

- the scope of the right to remain silent extends to exclude tricks which would effectively deprive the suspect of his choice.

- the use of undercover agents to actively elicit information in violation of the suspect's choice to remain silent is a breach of section 7.

e) Limitations on the Right to Remain Silent:

- section 7 does not afford the protection prior to the time that the accused is detained by the state.

- section 7 does not limit the use of undercover police officers prior to detention.

- section 7 does not limit the use of undercover police officers used to merely observe the accused - statements made spontaneously to these officers by the accused are admissible.

- section 7 does not preclude police questioning a detainee in the absence of counsel after the detainee has retained counsel.

- section 7 does not affect the admissibility of statements made by the detainee to persons other than police officers (provided those other persons were not acting as agents of the state). In determining who is an agent of the state, the test to be applied is whether the exchange or contact between the accused and the informer would have taken place, in the form and manner in which it did take place, but for the intervention of the sate or its agents. If the informer was an agent of the state, there will be a violation of this section if the agent elicited the information. Evidence has been elicited if there is a causal link between the conduct of the state agent and the making of the statements by the accused. This in turn requires consideration of two sets of factors, namely, factors relating to the nature of the exchange between the accused and the agent and factors concerning the nature of the relationship between the agent and the accused.

- the right to remain silent does not affect a voluntary statement made to fellow cell mates.

- the right to remain silent is not absolute and there need not to be a waiver of it.

APPENDIX "C" - CHAPTER 11

UNE TRADUCTION EN FRANÇAIS DES DÉTAILS DE CE DOCUMENT PEUT ÊTRE OBTENUE SUR DEMANDE.

YOUNG OFFENDER'S STATEMENT FORM

STATEMENT OF _____

ADDRESS _____

DATE OF BIRTH _____ DAY OF _____, 19 _____ TELEPHONE _____

NAME OF PARENT(s) _____

ADDRESS OF PARENT(s) _____ TELEPHONE _____

TAKEN THIS _____ DAY OF _____ 19 ___ AT _____

IN THE COUNTY OF _____, IN THE PROVINCE OF NOVA SCOTIA

TIME STARTED _____

TAKEN BY _____

WE ARE INVESTIGATING THE _____

_____

AND _____ YOU HAVE BEEN, OR _____ YOU MAY BE CHARGED WITH _____

_____

DO YOU UNDERSTAND?

ANSWER _____

A) YOU DO NOT HAVE TO SAY ANYTHING.

DO YOU UNDERSTAND?

ANSWER _____

B) YOU HAVE NOTHING TO HOPE FROM ANY PROMISE OF FAVOUR AND NOTHING TO FEAR FROM ANY THREAT WHETHER OR NOT YOU SAY ANYTHING. THIS MEANS THAT YOU SHOULD NOT BE INFLUENCED BY ANY PROMISE OR THREAT MADE TO YOU.

DO YOU UNDERSTAND?

ANSWER _____

C) ANY STATEMENT YOU GIVE MAY BE REPEATED IN COURT AND USED AS EVIDENCE IN PROCEEDINGS AGAINST YOU.

DO YOU UNDERSTAND?

ANSWER _____

NOTE TO POLICE:

If the criteria in 1 or 2 are satisfied, Transfer Warning must be given.

1. <u>Automatic Transfer to Ordinary Court</u>

NOTE TO POLICE:

If the young person was 16 or 17 years of age at the time of the alleged commission of any one or more of the following offenses: first degree murder, second degree murder, attempt to commit murder, manslaughter or aggravated sexual assault, then the following warning SHALL be given:

I MUST WARN YOU THAT YOU MAY OR HAVE BEEN CHARGED WITH THE FOLLOWING OFFENCE OR OFFENSES:

- ☐ ATTEMPT TO COMMIT MURDER
- ☐ FIRST DEGREE MURDER
- ☐ SECOND DEGREE MURDER
- ☐ MANSLAUGHTER
- ☐ AGGRAVATED SEXUAL ASSAULT

YOU WILL AUTOMATICALLY BE PROCEEDED AGAINST IN ORDINARY COURT (ADULT COURT) UNLESS A YOUTH COURT JUDGE, AFTER AN APPLICATION BY YOU, YOUR COUNSEL (YOUR LAWYER) OR THE CROWN ATTORNEY, ORDERS THAT YOU SHOULD BE PROCEEDED AGAINST IN YOUTH COURT.

IF YOU ARE CONVICTED YOU WILL BE SUBJECT TO A PENALTY OF UP TO LIFE IMPRISONMENT.

- ☐ WARNING GIVEN (This is mandatory if the young person meets the criteria above .)
- ☐ WARNING NOT GIVEN (Where the young person does not meet criteria above.)

2. Non Automatic Transfer to Adult Court

NOTE TO POLICE:

If the Young Person: (1) has attained 14 years of age, and (2) may be charged with an indictable offence for w an adult would be liable to imprisonment for 5 years or more, the following warning SHALL be given:

I WISH TO INFORM YOU THAT AN APPLICATION MAY BE MADE BY YOU, YOUR COUNSEL, (YOUR LAWYER), OR THE CROWN ATTORNEY TO TRANSFER YOU TO ORDINARY COURT (ADULT COURT). IF THE APPLICATION IS MADE AND IF IT IS SUCCESSFUL, YOU WOULD BE TREATED LIKE AN ADULT.

TRANSFER TO (ORDINARY COURT) ADULT COURT COULD RESULT IN A PENALTY OF LIFE IMPRISONM FOR CERTAIN OFFENSES.

DO YOU UNDERSTAND?

ANSWER _____

- ☐ WARNING GIVEN (This is mandatory if the young person meets the criteria above even though transfer application is going to be made.)
- ☐ WARNING NOT GIVEN (Where the young person does not meet criteria above.)

D) **YOU HAVE THE RIGHT TO CONSULT (TALK TO) WITH COUNSEL (A LAWYER) WITHOUT DELAY. YOU HAVE THE RIGHT TO CONSULT WITH A PARENT, AN ADULT RELATIVE OR ANOTHER APPROPRIATE A WITHOUT DELAY. YOU ALSO HAVE THE RIGHT TO HAVE ANY PERSON(S) WITH WHOM YOU CON PRESENT WHEN YOU MAKE A STATEMENT.**

DO YOU UNDERSTAND?

ANSWER _____

E) **YOU MAY CALL ANY LAWYER YOU WISH, YOU HAVE THE RIGHT TO APPLY FOR LEGAL ASSIST WITHOUT CHARGE THROUGH THE PROVINCIAL LEGAL AID PROGRAM.**

DO YOU UNDERSTAND?

ANSWER _____

NOTE TO POLICE:

If duty counsel available read (F) . [Duty counsel available 24 hours weekends, holidays, 4:30 p.m - 8:30 a.m. Monday to Friday.]

F) DUTY COUNSEL (A LAWYER) CAN BE CONTACTED ON YOUR BEHALF TO PROVIDE FREE AND IMMEDIATE LEGAL ADVICE.

DO YOU UNDERSTAND?

ANSWER _____

G) WE WILL PROVIDE YOU WITH THE PHONE NUMBER FOR LEGAL AID(OR CONTACT DUTY COUNSEL ON YOUR BEHALF) IF YOU WISH. DO YOU WISH TO CONSULT WITH COUNSEL (A LAWYER) NOW?

ANSWER _____

IF YES.

WHOM DO YOU WISH TO CONSULT?

_____

_____

_____

PERSON(S) CONSULTED:

_____

_____

_____

TIME CONSULTED:

_____

_____

_____

IF NO.

WAIVER OF RIGHTS
TO SPEAK WITH A LAWYER

I UNDERSTAND THAT I HAVE THE RIGHT TO CONSULT WITH COUNSEL (A LAWYER) WITHOUT DELAY, AND I ALSO HAVE THE RIGHT TO CONSULT A PARENT, ADULT RELATIVE, OR ANOTHER APPROPRIATE ADULT WITHOUT DELAY PRIOR TO GIVING ANY STATEMENT. I UNDERSTAND THAT I HAVE THE RIGHT TO HAVE ANY PERSON(S) CONSULTED PRESENT WHEN I MAKE A STATEMENT. I ALSO UNDERSTAND THAT I HAVE A RIGHT TO A REASONABLE OPPORTUNITY TO CONTACT COUNSEL (A LAWYER) AND I UNDERSTAND THAT THE POLICE MUST STOP THEIR QUESTIONING UNTIL I HAVE HAD THAT REASONABLE OPPORTUNITY.

I DO NOT WISH TO CONSULT WITH COUNSEL (A LAWYER).

_____
(SIGNATURE OF YOUNG PERSON)

_____

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NOTE TO POLICE:

If a lawyer cannot be found and the detainee refuses to waive his or her right to a lawyer, the police will be requir to hold off until the Legal Aid office opens or when a private lawyer willing to provide free legal advice can be reach or where the detainee is brought before the JP for bail purposes.

IF THE YOUNG OFFENDER FIRST SAYS YES, THEN NO:

If, while the police officer is holding off from taking a statement, the young offender changes his or her mind and indicates that he/she does not wish to consult a lawyer, the young offender must sign the statement opposite.

WAIVER OF RIGHTS
TO SPEAK WITH A LAWYER

I UNDERSTAND THAT I HAVE THE RIGHT TO CONSULT WITH COUNSEL (A LAWYER) WITHOUT DELAY. AND I ALSO HAVE THE RIGHT TO CONSULT A PARENT, ADULT RELATIVE, OR ANOTHER APPROPRIATE ADULT WITHOUT DELAY PRIOR TO GIVING ANY STATEMENT. I UNDERSTAND THAT I HAVE THE RIGHT TO HAVE ANY PERSON(S) CONSULTED PRESENT WHEN I MAKE A STATEMENT. I ALSO UNDERSTAND THAT I HAVE A RIGHT TO A REASONABLE OPPORTUNITY TO CONTACT COUNSEL (A LAWYER) AND I UNDERSTAND THAT THE POLICE MUST STOP THEIR QUESTIONING UNTIL I HAVE HAD THAT REASONABLE OPPORTUNITY.

I DO NOT WISH TO CONSULT WITH COUNSEL (A LAWYER).

_____
(SIGNATURE OF YOUNG PERSON)

_____
(WITNESSED BY)

H) DO YOU WISH TO CONSULT WITH A PARENT, AN ADULT RELATIVE OR ANOTHER APPROPRIATE ADULT?

ANSWER _____

IF YES,

WHOM DO YOU WISH TO CONSULT?

_____

_____

_____

PERSON(S) CONSULTED:

_____

_____

TIME CONSULTED:

_____

_____

IF NO,

WAIVER OF RIGHTS
TO SPEAK WITH A PARENT OR OTHER ADULT

IN ADDITION TO THE RIGHT TO CONSULT WITH COUNSEL (A LAWYER) WITHOUT DELAY, I UNDERSTAND THAT I ALSO HAVE THE RIGHT TO CONSULT WITH A PARENT, AN ADULT RELATIVE OR ANOTHER APPROPRIATE ADULT WITHOUT DELAY PRIOR TO GIVING ANY STATEMENT. I UNDERSTAND THAT I HAVE THE RIGHT TO HAVE ANY PERSON(S) CONSULTED PRESENT WHEN I MAKE A STATEMENT. I DO NOT WISH TO CONSULT WITH ANY OF THESE PERSONS.

_____
(SIGNATURE OF YOUNG PERSON)

_____
(WITNESSED BY)

NOTE TO POLICE:

<u>If the Young Person consults</u> with any person, proceed to I) and determine if the young person wishes to have the person(s) present.

<u>If the Young Person does not consult</u> with anyone, proceed to K).

I) IF YOU CONSULT SOMEONE, THE PERSON(S) WITH WHOM YOU CONSULT MUST BE PRESENT WHEN YOU MAKE YOUR STATEMENT UNLESS YOU DO NOT WISH TO HAVE THE PERSON(S) PRESENT.

DO YOU UNDERSTAND?

ANSWER: _____

J) DO YOU WISH TO HAVE ANY OR ALL OF THE PERSON(S) CONSULTED PRESENT?

ANSWER: _____

IF YES,

WHOM DO YOU WISH TO HAVE PRESENT?

_____

_____

_____

_____

_____

_____

IF NO,

WAIVER OF RIGHTS

I UNDERSTAND THAT I HAVE THE RIGHT TO HAVE ANY PERSON(S) WITH WHOM I CONSULT PRESENT WHEN I MAKE A STATEMENT. I DO NOT WISH TO HAVE ANY SUCH PERSON(S) PRESENT WHEN I MAKE A STATEMENT.

_____
(SIGNATURE OF YOUNG PERSON)

_____
(WITNESSED BY)

IF THE YOUNG PERSON WANTS ONE OR MORE BUT NOT ALL OF THE PERSONS CONSULTED PRESENT

NOTE TO POLICE:

Every person consulted must be present or a waiver signed waiving their presence; that is, any person the young offender does not wish to have present should be listed in this opposite waiver.

WAIVER OF RIGHTS

I UNDERSTAND THAT I HAVE THE RIGHT TO HAVE AN PERSON(S) WITH WHOM I CONSULT PRESENT WHEN I MAKE STATEMENT. I DO NOT WISH TO HAVE _____

_____

_____

PRESENT WHEN I MAKE A STATEMENT.

_____
(SIGNATURE OF YOUNG PERSON)

_____
(WITNESSED BY)

K) I ALSO WISH TO ADVISE THAT IF YOU CHOOSE TO MAKE A STATEMENT, THAT YOU MAY STOP AT ANY TIME YOU WISH AND EXERCISE ANY OF YOUR RIGHTS.

DO YOU UNDERSTAND?

ANSWER: _____

L) DO YOU UNDERSTAND THAT YOU DO NOT HAVE TO SAY ANYTHING UNLESS YOU WANT TO?

ANSWER: _____

DO YOU WISH TO SAY ANYTHING?

ANSWER: _____

TIME STATEMENT COMMENCED _____

THIS STATEMENT IS MADE OF MY OWN FREE WILL AND IS AS FOLLOWS:

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CHAPTER 12 - SPECIFIC POPULATIONS AND TYPES OF OFFENDING

12.1 ABORIGINAL YOUNG OFFENDERS

For the past two decades, virtually everything written and discussed in the area of aboriginal people and the criminal justice system has used as its starting point the over-representation of aboriginal people in the system. Most research literature concludes that aboriginal peoples are differentially impacted by the operation of the justice system, that the effects are adverse, and that systemic discrimination is prevalent.

Over-representation refers to a higher proportionate representation of aboriginal peoples in correctional institutions as compared to the percentage in the general population. Over-representation figures emerge from information routinely collected on admissions to correctional institutions and are largely based on self-identification. Because information is routinely collected only at the the adult corrections admission level, it is the one consistent source of data. Uniform national data regarding aboriginal youth in custody and under community supervision are not available, although several jurisdictions do collect data in this regard.

For example, aboriginal people comprise approximately two percent of the Canadian population but make up approximately thirteen percent of the federal correctional institutional population. In some regions of the country, the rates are much higher. Research data suggests that for certain aboriginal groups, such as women and juveniles, the rates may be even more extreme.

Laprairie has identified three competing but not mutually exclusive explanations for the disproportionate representation of aboriginal people in correctional institutions. These are:

(a) differential treatment by the criminal justice system (i.e. something different is happening to aboriginal people in their contacts with the various components of the criminal justice system: police charging, prosecution, sentencing and parole);

(b) differential commission of crime (i.e., aboriginal people are committing more crime due to attributes which place them at greater risk for criminal behaviour, such as socio-economic marginality, substance abuse, etc.);

(c) differential offence patterns (i.e., aboriginal people commit more crimes that are more detectable (more serious and more visible) than

those committed by non-aboriginals.

The logical starting point for an exploration of these explanations is the analysis of research knowledge regarding aboriginal young people and the criminal justice system. Considerable anecdotal data exist regarding the treatment of aboriginal people by the justice system but very little empirical data has been collected in a systematic way, particularly in regard to young people.

Prior to 1981, there was almost no empirical research dealing with aboriginal delinquency in Canada[1]. It has not been a priority item of either government or aboriginal associations. The lack of data is also due to the methodological difficulties in undertaking research on the topic.

The definition of who is aboriginal is problematic. The term "aboriginal" or "native" is a generic term which refers to status Indians, non-status Indians, Metis and Inuit[2]. Status or registered Indians are easily identifiable and "quantifiable" because of official information maintained on this group. The non-status and Metis groups are enumerated largely by "self-identification", which means that the estimates of this population size vary with people's willingness to identify themselves as being of aboriginal ancestry[3].

Some police statistics available from the Canadian Centre for Justice Statistics provide information about aboriginal involvement in crime, but the Youth Court Survey does not. Thus, we have some limited information on the "front end" of the system - the number of aboriginals suspected of crimes by police as well as on the "back end" - the number of aboriginal young persons admitted to custody. However, there is no systematic information on the youth court process and aboriginal young persons.

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[1]Nor, apparently, policy concerns: neither the 1965 Department of Justice Committee's report on Juvenile Delinquency in Canada nor the 1975 report of the Solicitor General's Committee on Young Persons in Conflict with the Law discussed aboriginal youth.

[2]As problematic as is the category of "aboriginal", the comparison group, in this case, "non-aboriginal" people, is also rather arbitrary. Some researchers compare native or Canadian Indian crime rates to "total" rates and sometimes to "white" or "Caucasian" figures. There is clearly no single correct comparison group just as there is no single "correct" definition of who is an aboriginal person.

[3]Often it is left to the police forces or government officials to identify who is of aboriginal descent. In its 1987 "Young Offenders Incarceration Issues Paper", the Ontario Native Council on Justice referred to a research project carried out by the Ontario Federation of Indian Friendship Centres on the issue of the identification of aboriginal young offenders. It was found that in many instances young offenders known by the Centres' workers to be aboriginal had not been identified and reported as aboriginal by the Ministry.

As a result, there is a lack of systematic, comprehensive information about the nature and extent of crime among aboriginal youth over different time periods and of the treatment of aboriginal young people at various decision points in the youth justice process. The available data are sketchy and offer only a preliminary basis for assessing the scope and magnitude of comparative delinquency involvement. However, over the past ten years, there has been an increasing body of research on aboriginal young offenders from various locales across the country. The various aboriginal justice inquiries in Alberta, Saskatchewan and Manitoba have provided some useful data.

12.1.1 Socio-Economic Context of Aboriginal Delinquency

The social, economic and political context in which aboriginal delinquency occurs is directly related to the situation of aboriginal people within the dominant non-aboriginal Canadian society. The dual processes of colonization and under-development have created a status of social, political and economic marginality for the majority of aboriginal people. As a result, there are very high rates of unemployment, suicide and alcohol abuse, and poor health. The generally disorganized state of many communities is reflected in high rates of family violence and sexual abuse, and the breakdown of traditional gender and leadership roles and social relations.

Whether on reserves or living in rural or urban areas, most aboriginal youth face a host of difficulties in everyday life that are not normally encountered by the majority of non-aboriginal youth. The erosion of aboriginal culture and community cohesion has meant that for this group, life is often confusing, with little hope or expectation for change. Incidents of violence, alcohol abuse and suicide are common in many contemporary communities, as is the malaise that accompanies widespread and prolonged unemployment, and the lack of recreation and other activities. Research on aboriginal delinquency has pointed to culture conflict, boredom, loss of parental discipline and feelings of hopelessness on the part of aboriginal youth as primary contributors to delinquency.

Clearly, one must be careful about making broad generalizations of this nature, particularly in light of the cultural regeneration that has occurred over the past two decades and the fact that, in some communities, tradition and culture have prevailed. Furthermore, aboriginal people are not a homogenous group; they differ along a number of socio-economic dimensions. As indicated by Laprairie in her inner-city research, aboriginal peoples are not equally at risk for the commission of crime and criminal justice processing. The individual's class, as measured by socio-economic levels, may diminish

the importance of race. Laprairie suggests that the criminal justice system responds to disadvantaged aboriginal people as it probably does to any similarly disadvantaged group - as "grist" for the criminal justice mill.

However, the effects of years of colonization and underdevelopment are not easily or quickly dispelled. For many aboriginal communities, the effects have been, and continue to be, devastating.

The effects of the loss of traditional activities and the general exclusion of aboriginal people from the mainstream economy and society is compounded by the geographic isolation of many aboriginal communities. Communities are often either too isolated to become economically self-sufficient in the modern sense or are ghettos within urban cores. Research literature suggests that the very nature of economically deprived and marginal community life increases the potential to adopt deviant or delinquent values.

The general situation in which Canadian aboriginal youth find themselves may best be summarized in the following description provided by McCaskill back in 1970 (p.26):

> "It would appear that a profile of the typical native young offender would include: a community of origin which is economically impoverished, an unstable family background, a high degree of contact with social service agencies (particularly white foster homes), limited knowledge and participation in Indian affairs, a low degree of Indian culture and a great sense of alienation from mainstream society."

There is little reason to believe that this situation is appreciably different today.

In 1994, Laprairie undertook a comprehensive study of aboriginal people living in the inner core of four Canadian cities: Regina, Edmonton, Toronto and Montreal. Entitled "Seen but Not Heard: Native People in the Inner City", the study focused on the group most vulnerable to the commission of crime, victimization and criminal justice processing - the marginalized and impoverished of the inner cities.

From the total sample of 621 respondents (aged 16 and over), four variables were found to be significantly related to the number of juvenile charges. The most significant is being male, followed by child abuse, violence in the home community and child sexual abuse. Two variables were significant for males: child abuse and family violence. This suggests that male respondents who had more juvenile charges were more likely to be victims of moderate or

severe child abuse or child sexual abuse, or severe family violence.

The respondents with the most "total charges" (including all Criminal Code offences, public drinking and juvenile charges) at the time of the interview were most likely to be males, raised in unstable families (especially in foster families), who moved around and whose parents (particularly mothers) had a drinking problem. Further they were more likely to be victims of severe family violence, moderate or severe child abuse, began drinking at less than ten years of age, were first charged with an offence at sixteen or less, and were first in detention at twenty years of age or less.

What clearly emerges from the inner city data is that childhood factors indicative of family disruption appear to be strongly related to involvement in the juvenile justice system in early life, and problems with alcohol in later life. One important finding was that the age at which a young person is first involved with the criminal justice system predicts duration and intensity of involvement in the adult system.

12.1.2 Aboriginal Youth and Crime

Age differences

Some studies indicate that aboriginal youth appear to experience conflict with the law at marginally younger ages than do non-aboriginal youth.[4]

Research conducted by the Manitoba Metis Federation in 1991 indicated that the average age of first conviction for Metis children is 14.2 years, compared to 15 years for non-natives. Manitoba Metis youth are admitted to probation at a (mean) average of 15.6 years, compared to 16.1 years for non-aboriginal. These findings, along with Laprairie's (noted above), are suggestive because criminological research indicates that earlier onset of delinquency is associated with higher rates of subsequent offending behaviour.

Characteristics of Aboriginal Youth Crime

Two studies produced by the Canadian Centre for Justice Statistics, one published in 1991, and the second in 1993, provide limited information on the nature and incidence of aboriginal and non-aboriginal crime in western

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[4]In a study involving aboriginal people in Ontario from 1980 through 1990, it was found that almost 70% of aboriginal people who police suspected of killing on a reserve were 25 years old or younger, as compared to only 41% of non-aboriginal suspects or aboriginal suspects who were accused of killing off-reserve (Doob and Grossman, 1994).

Canada. The 1991 CCJS study in Saskatchewan revealed that the nature of crime on reserve differs markedly from that which characterizes other rural communities and urban centres. Most striking is the higher proportion of violent offences reported on reserve. Violent offences (offences against persons) accounted for about one-quarter of all Criminal Code offences on reserve, compared to less than ten percent in other rural and urban areas. Offence rates per 100 population are considerably higher on reserve (5.1) than in other rural areas (0.6) and urban areas (1.0).

For aboriginal young offenders, the type of offences committed were consistent with that of non-aboriginal youth; i.e., the offences are predominately property offences, usually theft, breaking and entering and public mischief. However, the aboriginal rates for these offences were higher than those for non-aboriginal youth. For example, the CCJS study in Saskatchewan revealed that the youth rate of offending on-reserve was nearly twice as high as the non-aboriginal youth rate off-reserve.

This situation appears to be similar for aboriginal offences off-reserve. The 1993 CCJS report indicated that the off-reserve aboriginal crime rate was greater than that for non-aboriginals, a finding which is particularly important considering the transiency on and off-reserve and the apparently increasing number of aboriginal people migrating to urban areas in search of greater opportunities.

The revised Uniform Crime Reporting (UCR) survey is based on data provided by participating police forces who are asked to specify the race of persons suspected of crimes. The categories are non-aboriginal, aboriginal and unknown. Unfortunately, in some jurisdictions a very large proportion of suspects are coded as having "unknown" race and the data obtained from the survey are of little assistance. However, the Quebec and Vancouver data appear sufficiently reliable in terms of identifying the race of suspects.

Quebec is the jurisdiction with the highest participation in the revised UCR survey. The survey indicates that crimes allegedly committed by aboriginals are quite different from those involving non-aboriginals. Proportionately fewer aboriginal youth were suspected of serious offences against the person: (3 percent compared to almost 6 percent of non-aboriginals). Aboriginal young persons were much more likely to be apprehended for break and enter (40 percent versus 22 percent) and administration of justice offences such as bail violations, failure to attend court and failure to comply with a community disposition (11 percent versus 4 percent). Conversely, non-aboriginal youth were more likely to be apprehended for minor property crimes such as theft under $1,000 and mischief (42 percent compared to 25

percent of aboriginals). Thus, the crimes allegedly committed by aboriginal youth in Quebec are quite different from those involving others: aboriginals are apprehended for more serious property crimes and administration of justice offences; serious offences against the person are somewhat more likely to involve non-aboriginals.

Vancouver city police reports covering the years 1992 and 1993 revealed that the most noticeable difference by race is in the less serious property category. More non-aboriginals were apprehended for theft under $1,000 and other minor property crimes than were aboriginals. The latter were somewhat more likely to be suspects in administration of justice offences, and marginally more likely to be apprehended for other indictable offences such as break and enter and theft over $1,000.

Findings from the Quebec James Bay research conducted by Laprairie in 1991 were similar. In that region, break and enters and mischiefs comprised the majority of offences involving youth in virtually all the Cree communities. The research also indicated a general disproportionate rate of crime, particularly crimes against the person and "other" offences (including mischief and disturbances), as compared to communities of a similar size in Quebec.

Similar findings are reported by Hyde, who analyzed police occurrence reports for a five year period (1978-1983) on 25 Indian reserves in Quebec policed by a semi-autonomous police force. Hyde concluded that aboriginal criminality was characterized by higher than Canadian average rates of violent and other Criminal Code offences, and a lower than average rate of property crime. The majority of violent offences consisted of assaults and family violence and rarely involved weapons for inflicting injuries. Public disorder offences, interpersonal disputes, and liquor and drug offences were the main types of offences in the "other" Criminal Code category.

In 1992, Makivik Corporation and the Inuit Justice Task Force undertook a research project concerning crime, sentencing and recidivism in Nunavik. The report draws a profile of criminality in Nunavik for the years 1989, 1990 and 1991 based principally on regional court data. Statistics were also obtained from the Quebec Department of Public Security and the Sureté du Québec.

In 1991, the total population of Nunavik was almost 7700 individuals, 88 percent of whom reported their ethnic origin as Inuit. Nearly half of the population of Nunavik (46 percent) is under twenty years of age.

The average crime rate in Nunavik was found to be 46 percent higher than the Canadian average and 84 percent higher than the average rate for Quebec. Youth crime in Nunavik surpassed the Quebec average by 46 percent. Among young offenders, property offences were the most common, accounting for 69 percent of crime by adolescents, a figure which reflects the national average for the years 1989-1991.

Most notable is the rate of violent crime in Nunavik, reported as 400 percent higher in Nunavik than in Canada as a whole, and 588 percent higher than in Quebec. The rate of violent crimes committed by young offenders was 133 percent higher in Nunavik than in Quebec but 59 percent lower than the rate for the Northwest Territories and 48 percent lower than the rate for the Yukon.[5]

The disproportionate rate of aboriginal youth crime may be related, in part, to the disproportionate number of youth and young adults in aboriginal communities. While aboriginal people comprise approximately 2 percent of the total Canadian population, aboriginal youth represent 5.8 percent of the total number of young persons across the country.

Age distributions for aboriginal and non-aboriginal groups are quite different. In 1986, 58 percent of the aboriginal population was under 25 as compared to 38 percent of the non-aboriginal population. With respect to the group most likely to be involved in the criminal justice system - that is, those between 15-24 - 21 percent of the aboriginal population fell into that age range as compared to 16 percent in the non-aboriginal population.

The disproportionate rate of crime committed on reserve may be partly attributed to the nature of policing in these communities. The research conducted by Laprairie and Hyde in Quebec suggests that many aboriginal communities are over-policed. In many reserve communities as well as in northern and Inuit communities, there is often a dependency on police for services which are not otherwise available. Compared to the conventional law enforcement practices of the RCMP or provincial police forces, police in

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[5]The vast majority of crimes of all types were committed by young adults between the ages of 18 and 29 years of age. For the period 1989 to 1991, individuals between the ages of 18 and 24 were responsible for 73 percent of property offences and 45 percent of violent crimes.

It was found that in 85 percent of violent crimes, the apparent motive was emotional and involved personal or family conflicts. This is not surprising since, in most communities, everyone knows each other. Arguments which escalated were the cause of three out of five crimes resulting in death. According to information compiled from Surete du Quebec files, sexual desire, jealousy and arguments were the main reasons cited in cases involving violence against women. In cases involving violence against men, the motives most often given were anger and settling of accounts.

aboriginal communities are called upon more often to fulfil a variety of social service and crisis-intervention roles. This leads to a greater number of police occurrence reports, upon which most crime data is based. Combined with relatively high police to population ratios, this increases the likelihood of police interventions and criminalizes behaviours that would not necessarily be considered criminal if other agencies were involved.

Homicides

Data from the Homicide Survey maintained by CCJS clearly indicate that aboriginal young persons are suspected of homicide in much larger proportions than their representation in the total Canadian population.

From 1985 to 1993, there were a total of 419 homicide suspects of youth court age: 8 percent were of unknown ethnicity, 27 percent were aboriginal and 65 percent were non-aboriginal.

This rate has not changed significantly from the earlier findings of the Homicide Surveys. Aboriginal young persons accounted for one-third of all juveniles suspected of homicide during the period from 1962 to 1984.

From 1985 to 1993, 13 percent of both aboriginal and non-aboriginal youth suspects were female. From 1962 to 1984, 23 percent of aboriginal suspects were girls or young women, compared to 9 percent of other suspects.

In a study in 1992, Moyer reported that, for the time period 1962-1984, 70 percent of aboriginal homicide incidents allegedly involved alcohol, while only 25 percent of other homicides did so. The homicide database does not differentiate between victim and suspect consumption of alcohol.

Of the information available from the Homicide Survey, the victim-suspect relationship shows the largest difference by aboriginal versus non-aboriginal status. Although one out of five of both groups were alleged to have victimized members of their immediate family (parents, spouses, siblings), aboriginal suspects are very much more likely to be suspected of killing their more distant relatives. At the same time, non-aboriginals were alleged to have killed acquaintances in much larger proportions and strangers in moderately larger proportions. This difference may well be related to differences in the social interaction patterns of aboriginals and non-aboriginals. Aboriginal young persons may associate with extended family members more often than do non-
aboriginal youth.

12.1.3 Criminal Justice Processing

Bail and Pre-trial Detention

The Aboriginal Justice Inquiry of Manitoba (AJI) found that aboriginal young offenders are not provided with the earliest possible opportunity to obtain bail and are frequently denied bail. According to their analysis of court data, 59 percent of non-aboriginal youth who spent time in pre-trial detention were released in less than three days, while the comparable figure for aboriginal youth was 35 percent. Only 16 percent of non-aboriginal youth spent more than 28 days in custody compared to 34 percent of aboriginal youth.

The AJI found that more than 90 percent of female and one-half of male young offenders held on remand were aboriginal. Census figures indicate that in 1994, 17 percent of the youth population in Manitoba was of aboriginal descent.

The Native Counselling Services of Alberta undertook a Youth Courtwatch Study in 1989 and 1990. "Docket" and scheduled trials were observed in three communities: one urban, one economically prosperous aboriginal community and one economically depressed aboriginal community. The study found that more aboriginal than non-aboriginal accused were held in custody before trial. Aboriginals with no prior records charged with summary offences were held in custody over 18 percent more often than non-aboriginals. Aboriginals accused with prior records and charged with an indictable offence were detained in custody over 33 percent more often than non-aboriginals. Slightly more aboriginals than non-aboriginals appeared in court with no counsel; 14 percent more aboriginals than non-aboriginals pled guilty.

The AJI identified a number of factors apparently related to the high pretrial detention rate for aboriginal youth, including the considerations that are used by youth court judges in deciding whether to grant bail. The court considers whether the young person has a job or is involved in an education program and whether the young person's parents are employed. The court considers the perceived "stability" and resources of the family and the community, the presence of alcohol or drug problems, whether the young person has a fixed address and, if so, how long they have lived at that address. The AJI considers that decisions made on the basis of these considerations discriminate against aboriginal people, because these factors are directly linked to their marginal social, cultural and economic situation.

Other factors identified by the AJI include:

- there are too few officials in aboriginal communities who are authorized to release young persons on bail; there is also a tendency among the RCMP to transport the youth to an urban centre, rather than appear before a local judicial officer;

- the lack of detention facilities in aboriginal communities results in youth being transported to an urban centre; long distances may make provisions for parental involvement and supervision meaningless;

- difficulty in obtaining appropriate legal counsel, given the few lawyers living in rural or northern aboriginal communities;

- there is a general unwillingness on the part of youth court judges to grant bail to youth who will be released into a situation with little or poor adult supervision;

- there are no aboriginal youth court workers, or workers with community-based organizations, who can assure the court that work, a place to live or a responsible adult supervisor can be found for young people charged with offences;

- there are few community-based programs to provide youth bail supervision;

- youth court judges are sometimes reluctant to grant bail to aboriginal youth without the preparation of a bail assessment report, which often results in aboriginal youth being held in custody for inexcusable periods of time. According to the AJI, bail assessment reports should only be done in situations where bail would likely have been denied in their absence.

The AJI made the following recommendations:

- accused youth who must be held in pre-trial detention be held in detention facilities in their own communities;

- aboriginal communities be provided with resources to develop bail supervision and other programs that will serve as alternatives to detention; and

- young offenders be removed from their community only as a last resort and only when the youth poses a public danger.

Available data from British Columbia indicate that in 1994-95, aboriginal youth comprised about sixteen percent of the youth remand detention population, or roughly three times the rate of representation of aboriginals in the general population in that province.

Custodial Dispositions

In a one day count of residents in 1990, the AJI found that aboriginal youth accounted for 64 percent of the residents at the Manitoba Youth Centre and 78 percent of the residents at the Agassiz Youth Centre.

Their analysis of court data concluded the aboriginal young offenders received open custody sentences that were, on average, twice as long (242 days vs. 109 days) as those given to non-aboriginal young offenders. In addition, 18 percent of aboriginal young offenders received closed custody sentences, compared to 11 percent of non-aboriginal youth.

A research study conducted by the Manitoba Metis Federation Justice Committee in 1989 provided data regarding the Metis and Indian admission rates for youth corrections referrals in 1987. According to this study, Metis youth constituted:

- 14 percent of those receiving diversion from court;
- 18 percent of those receiving probation;
- 30 percent of those receiving secure custody;
- 35 percent of those receiving mixed custody dispositions; and
- 38 percent of those receiving open custody.

The report claims that Metis admissions to open custody since the implementation of the YOA in 1984 exceed all non-aboriginal admissions and Indian admissions. The percentage of Metis admissions to secure custody is only 9 percent less than the percentage of all non-aboriginal admissions.

The 1991 Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta found that aboriginal young offenders were more likely to be admitted to a young offender facility than their non-aboriginal counterparts. In 1989, 39 percent of aboriginal young offenders were admitted to young offender centre facilities compared to 21 percent for non-aboriginal young offenders.

The Alberta Task Force found that while the sentenced admissions for non-aboriginals dropped by eight percent between 1986 and 1989, those for aboriginal youth increased by 18 percent. As a consequence, the proportion of aboriginal young offenders admitted into custody increased from 30 percent in 1986 to 35 percent in 1989. This compares to 29 percent aboriginal adult admissions to correctional facilities in Alberta in 1989. According to the 1994 Census, nine percent of all young people in Alberta are aboriginal.

In the Youth Courtwatch Study referred to earlier, it was found that twice as many aboriginal accused as non-aboriginal ended up serving time in a secure custody institution. However, the most frequent secure custody sentence length for aboriginals was two weeks or less and was one month for non-aboriginals.

The Saskatchewan Indian Justice Review Committee found that in June 1991, aboriginal youth constituted 45 percent of all young offenders receiving some form of disposition under the Act. They represented 72 percent of those in custody programs as opposed to 29 percent of those dealt with under alternative measures. According to 1994 census figures, aboriginal youth comprised almost 16 percent of the total youth population in Saskatchewan.

Available data from British Columbia indicate that in 1994-95 aboriginal youth comprised nearly 19 percent of the sentenced admissions to (open or secure) custody, or more than three times the level of representation of aboriginals in the general population of that province.

Alternative Measures

The Alberta Task Force underlined its concern regarding "the persistent lack of involvement of native young offenders in the Alternative Measures Program". Their research indicated that the Program accounted for 34 percent of non-aboriginal new cases and only 11 percent of aboriginal new cases.

The research conducted by the Manitoba Metis Federation indicated that in 1987, only 14 percent of alternative measures participants were Metis, whereas Metis youth constituted 17 percent of the youth probation caseloads, and 30 percent of the secure youth custody population. Their figures also indicate that 16 percent of alternative measures participants were Indian and 70 percent non-aboriginal in 1987.

12.1.4 Impact of the Young Offenders Act on Aboriginal Youth

The lack of an adequate long-term statistical information base precludes accurate assessment of the impact of the YOA and its administration on aboriginal young people and hampers program development to meet the needs of aboriginal young offenders. Certainly, there is a need for a greater body of reliable data to better inform the issues.

Clearly, any attempt to examine the application and effect of the YOA on aboriginal youth should take into account the environmental factors of geographic isolation, socio-economic marginality and the socially disorganized state of many aboriginal communities.

The potential for geographic isolation to affect the fair and equitable treatment of aboriginal juveniles has been identified by a number of researchers. Living in areas of geographic isolation is, in some respects, tantamount to being aboriginal in Canada. For the administration of criminal justice, geographic isolation often means that aboriginal people have only limited access to justice services. Attempts to redress the difficulties with circuit courts and courtworkers services have been only partially successful.

In 1986, Kueneman examined northern and rural juvenile courts in Manitoba and found a strong correlation between the remoteness of communities and the quality and availability of service. Some of the major problems identified were:

- lack of criminal justice and social services;
- lack of experienced local legal counsel;
- lack of local detention facilities;
- too much work and too little time for court officials to handle cases most effectively; and
- lack of knowledge by youth about their rights.

Researchers have pointed out that the adequacy of legal counsel is particularly critical to aboriginal youth. In his study on youth justice in the Northwest Territories, Miller identified the following reasons:

- the greater emphasis on legal rights in the YOA;
- possible cultural and linguistic differences among aboriginal youth that must be interpreted for the courts;
- the formality of the justice system under the Act;
- the need to raise all legal defences on behalf of the youth; and
- the need to ensure that the disposition involves the least possible

interference with the young person's freedom.

The effects of socio-economic marginality may be most critical with respect to those sections of the YOA that rely on a determination of community or parental suitability for supervision upon release. For example, pursuant to section 7.1 of the Act, judges have the discretion to place the young person in the care of a responsible adult as an alternative to detention. Responsibility would likely be decided on the basis of parental employment, perceived stability of family and community surroundings and a number of other environmental factors. It may be difficult for many aboriginal parents to pass the responsibility "test", given their socio-economic circumstances and the state of many of their communities. We are faced here with the problems inherent in "treating unequals equally."

It is in the area of community alternatives to incarceration where the socially disorganized status of many aboriginal communities create the greatest potential for inaction. Non-custodial dispositions assume the availability of support services and resources, which are often absent in these kinds of communities.

Kueneman noted that in many of the aboriginal communities studied, there were major deficiencies in the ability of the communities to develop alternatives to incarceration. For example, youth justice committees are difficult to establish when apathy and general social disorganization inhibit organized social action. It would appear that those communities most in need of resources and services are the least able to develop or sustain them.

The impact of these environmental factors on aboriginal youth may well result in aboriginal youth being more vulnerable than non-aboriginal youth to justice processing and to the harsher effects of certain YOA provisions.

The social and economic marginality of aboriginal people is the fundamental problem resulting in their disproportionate involvement in the criminal justice system both as offenders and victims. As pointed out by Laprairie in her study on sentencing: "the criminal justice system is not a vehicle for social restructuring; neither should it be a storage receptacle for social problems".

This seems to leave juvenile justice matters affecting aboriginal people at the level of redressing the structural imbalance as far as possible by facilitating community efforts to assume more control over criminal justice matters. This would likely enable the youth justice system to better reflect the community context from which delinquency originates and within which it can be best resolved.

12.1.5 Discussion

The Task Force was not able to undertake a comprehensive review of aboriginal youth justice issues. To do so would require a task force dedicated to that enterprise alone, and one which would be able to engage in extensive consultations with aboriginal groups and also able to scrutinize the administration of youth justice within and across jurisdictions. Importantly, aboriginal youth justice issues cannot be disentangled from broader aboriginal justice (i.e., including adult) issues, such as proposals to devolve greater responsibility in the administration of justice to aboriginal communities. In this regard, we were aware that, as the Task Force was carrying out its work, the Royal Commission on Aboriginal Peoples was inquiring into aboriginal justice issues and would be issuing a report on the same.

Instead of undertaking a comprehensive review of aboriginal youth justice issues, the Task Force considered aboriginal interests, and the implications of recommendations, in each of the areas examined. In this regard, there are several recommendations which we believe will have a positive impact on aboriginal youth, including:

- consideration of including in the Declaration of Principle:

  (i) express recognition of the particular circumstances of aboriginal young persons, and

  (ii) that measures should seek to promote and support the primary role of parents and extended family, the latter consideration being especially pertinent to aboriginal families (Chapter 2).

- legislative recognition and encouragement of "conferencing", which includes family group conferencing, sentencing circles and aboriginal youth justice committees (Chapter 2).

- the federal government developing special funding arrangements for aboriginal young persons in the interest of enhancing services to that population (Chapter 2); and

- generally, the promotion of various forms of diversion and alternatives to pretrial detention and custody in the interest of reducing the degree of reliance on custody in cases involving less serious offences (Chapters 4, 5, 6). These measures could reduce the number of aboriginal young persons formally processed by the court and

committed to custody.

It is acknowledged, however, that the recommendation of a substantial majority of provincial and territorial representatives to increase the reliance on transfer to adult court in cases of murder and very serious violence (Chapter 8) could have a disproportionate impact on aboriginal young persons.

12.2 FEMALE YOUNG OFFENDERS

In Canada, males are much more likely than females to be officially implicated in criminal activity. Young females make up about twenty percent of all young persons apprehended by police, eighteen percent of cases receiving a disposition from the youth court, about nineteen percent of probation cases, fourteen percent of the cases committed to open custody, and ten percent of the cases committed to secure custody. Therefore, young persons apprehended by the police and processed by the youth court and correctional systems are overwhelmingly male, and this is "replicated virtually everywhere and at all times.[6] In addition, the criminal profiles of female young offenders differ from their male counterparts in significant ways. The criminal careers of females have a different pattern: the apparent onset of and cessation from criminal activity occur at a younger age than for males.[7] The types of offences in which young females are involved greatly differ: females commonly come to police attention for less serious property offences, such as shoplifting, whereas males are more likely to be apprehended for more serious property offences such as break and enter. Very few female young offenders are found guilty of more serious (indictable) property offences (8%). An even smaller number of young women "graduate" to adult criminality.

Although official justice system statistics suggest that young males are processed at various points in the youth justice system at a rate that is five times (or more) greater than young females, self-report studies about involvement in delinquent activities suggest that the gender differential in "actual" behaviour is not as great as the official statistics would suggest.[8] In a recent Canadian self-report study of nearly 1000 students' involvement in delinquent activity in the previous year, the gender differential was typically no greater than a 3:1 male/female ratio and often less than 2:1 for twelve different activities reported. There were also variations in the gender differential according to the seriousness of the reported behaviour: the gender differential narrowed with less serious behaviours, but widened with more

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[6]Carrington (1995).

[7]Ibid.

[8]Simourd and Andrews (1996).

serious behaviours.[9] This study suggests that official justice statistics may overstate gender differentials in actual delinquent behaviour, but also confirms the trend in official statistics that when young females become involved in delinquent activities they do so not only less frequently, but also engage in less serious misconduct.

Despite the relatively small number of officially processed female young offenders, changes have occurred in recent years. The number of females found guilty by the youth courts increased by almost forty percent between 1986 and 1993, while there was only a ten percent increase in the number of males who were found guilty during the same time period. Youth Court Survey data indicate that from 1991-92 to 1994-95, the number of females committed to custody increased by 26 percent, while the increase for males was only four percent.[10] Moreover, females are being found guilty of crimes against the person in larger proportions than in the past - although the vast majority of these offences are less serious person offences (e.g., common assault).

It is possible that the apparent rise in female offending may not be due to increased criminal behaviour on the part of young females, but to changes in decision-making. As noted, the gender differential in "actual" behaviour may not be as great as official statistics would suggest. It is commonly theorized that the difference in the findings from self-report research and official statistics is that females are not charged in the same proportions as males because of the "chivalry" (or paternalism) of police and other system officials (or of victims and other community members who report crime). Whether the changes are due to a decline in "chivalry" or a change in actual behaviour (or both) is not presently determinable. Anecdotal evidence suggests that more young women with severe behavioural problems, including physically aggressive behaviour, are coming into contact with probation and custodial services. The apparent increase suggests that more studies of, and program development for, female young offenders should be undertaken than has occurred in the past.

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[9]Smith et al. (1995). For example, the differences in the proportions of male and female students reporting having stolen less than $50 in the previous year were not great (35 versus 26%) but were much greater for having stolen more than $50 (14 versus 4%). With respect to violence, there were also smaller gender differences with less serious behaviours such as slapping, kicking or punching someone (40.5 v. 31%) but greater differences (more than double) with more serious behaviours such as taking something by force or threat (10.5 v 4.9%) or threatening with a weapon (10.5 v. 3.8%).

[10]These figures are calculated from data provided by the Youth Court Survey, Canadian Centre for Justice Statistics, special computer runs undertaken for the Task Force, the percentage changes exclude Ontario.

There is some evidence that female young offenders are dealt with more "leniently" by the youth justice system. For example, in some jurisdictions females are diverted by police and referred to alternative measures programs in larger proportions than are males. Research would be required to ascertain whether this occurs because of gender, or because of legal factors associated with gender (i.e., girls are more likely to be implicated in less serious property crimes and tend to have no or a minimal prior record).

One feature of youth justice common to all jurisdictions in Canada is the relatively large number of female offenders re-entering the system as a result of breach of a community disposition (s.26 YOA), especially to custody. In 1993-94, for example, 28 percent of all female youth court cases resulting in a custody disposition were for breach of a community disposition. In comparison, the proportion for males was thirteen percent.

The conventional view of the apparent gender differential in the proportions of males versus females committed to custody for breach charges is that this may reflect vestiges of the former use of the "immorality and similar forms of vice" provision of the Juvenile Delinquents Act, which were also more likely to be used for females. Girls and young women who do not conform to society's expectations about normative female behaviour are more likely to be regarded as in need of intervention. This situation is not unique to Canada. In the United States, status offenders (young persons engaged in activities peculiar to their under-age status, such as truancy, running away, and drinking under age) are disproportionately female. All these phenomena are usually attributed to our society's concern about "acting out" girls: they are perceived as requiring state supervision and other interventions, perhaps because of fears that they are especially vulnerable to exploitation and victimization, or may otherwise harm themselves, as a consequence of their "out of control" behaviour.

Some observers of the system suggest that the court-ordered conditions which young females fail to keep may be unrelated to the original offence for which the community disposition was imposed and sometimes be more connected to protection and social control concerns. Elsewhere in this report, it is recommended that jurisdictions consider the development of guidelines for youth justice officials respecting the use of probation conditions (see Chapter 6). Such guidelines could have the effect of reducing the incidence of breach charges laid against female young offenders and, ultimately, reduce the use of custody for non-criminal behaviour. If protection is a key concern in some of these cases, then other agencies should have a role to play, a matter which is discussed in Chapter 2. Furthermore, the new criteria (Bill C-37) for committal to custody - which

provide that custody shall not be used as a substitute for child protection, health or other social measures - may have an impact on the disposition of breach charges, if child welfare or health concerns are evident.

There is, however, some doubt about whether there is an actual gender differential in custodial dispositions for breach charges. There are more than four times as many males than females committed to custody for breach charges and, if breached, males and females are committed to custody at about the same rate. If the number of previous findings of guilt is taken into account, the latter still holds true. It may be, then, that male and female young offenders are treated similarly for breach charges and that the higher proportion of female committals to custody related to breach charges is due to less frequent committals to custody for other types of offences (probably because of less frequent and serious offending). More research is required in this area.

A recent review of the social science research found that the risk factors important for male delinquency are also important for female delinquency, the most important being anti-social peers or attitudes, temperament or misconduct problems, educational difficulties, poor parent-child relations and minor personalty variables.[11] Such research does not, however, explain the considerable gender differences in the frequency and seriousness of offending, nor take into account contextual research which examines social interactional processes and gender roles and expectations within a patriarchal society.[12]

One of the many challenges facing the youth justice system is the development and implementation of gender appropriate programs for this growing client group. Unfortunately, very little is known about the effectiveness of intervention programs for females.[13] Although the majority of both sexes require or can equally benefit from programs such as education, anger management, cognitive skills training and so on, the programming needs of females differ to some extent. Many female young offenders require female-specific programs that, for example, deal with issues such as prior abuse, sexuality, body image and other health related issues, and, sometimes, pre-natal and parenting matters. Females also have distinctive medical needs and are more frequent users of health care

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[11]Simourd and Andrews (1996).

[12]See, for example, Reitsma-Street (1991).

[13]Ibid.

services.

While many of the programming needs of both sexes may be similar, the delivery of this programming may need to be different. For example, programming may not be as effective in co-educational programs where females may be considerably outnumbered by males. Similarly, the numerical superiority of males may serve to reinforce inappropriate sex role stereotyping and behaviours. Staffing and programming also need to attend to matters related to gender roles, power imbalances, and privacy needs.

To some extent, young female offenders suffer from the greater degree of social conformity of their female peers - if they offend, their minority representation in the youth justice system inhibits the development of specialized programs, especially in respect of custody and alternatives to custody (and even more so in jurisdictions with smaller populations and in smaller communities). Simply put, there are numerous financial and practical obstacles to developing specialized programs, precisely because of small numbers. For example, it would be impractical, or prohibitively expensive, to develop a specialized alternative program for females in a small or mid-sized town if that program is going to be constantly under-utilized due to small numbers.

The development of separate and specialized custodial programs can also be impractical because of the need to separate an already small population in different ways (e.g. open and secure custody, remand, age and maturity). The development of specialized custodial programs usually translates in centralized programs, with the consequence that females are removed farther away from their home communities. Yet, if placed in a co-educational secure custody program, female young offenders - who typically pose less of a security risk (other than self-injury) - are subject to the same security levels as males, whose numerical superiority determines the level of security at which the facility is maintained.

In short, the development of gender appropriate programs for females is no easy task. Enhancements of specialized programming and more research and evaluation are obvious needs. There are several recommendations in this report - including, for example, conferencing, diversion, community-based alternatives to custody and rehabilitation and reintegration programs - that apply equally to males and females and should benefit both sexes.

12.3 SCHOOL VIOLENCE

The school has been described as the second line of social defence against crime, the first being the family. In recent years there has been a growing awareness and concern about violence in the family. So too is there a growing awareness of violence in schools.

In recent years there have been concerns expressed in many Canadian schools about youth crime, especially weapons, group violence and gang involvement. Surveys sponsored by school boards or teacher associations have indicated that there have been substantial increases in youth violence and weapons carrying in all levels of schools. For example, a 1995 survey of Canadian School board respondents (151) and police respondents (149) indicated that 80 percent thought that school violence was much worse or somewhat worse than ten years ago. Participants in the survey, and in focus groups, saw school violence as more commonplace, more intense, and more vicious than before[14]. These surveys have typically employed somewhat crude measures comparing short periods of time and/or subjective reports. While these reports are suggestive, the absence of reliable and historical baseline data for comparison purposes make it difficult to confirm the accuracy of these purported increases - or the magnitude of the same - with any degree of certainty.

Putting aside whether there have been increases or not, there are some studies available which have attempted to measure the prevalence of violence and weapons related activities among students. A 1995 survey of 962 Calgary secondary school students indicated that: 28 percent of all the students (43 percent of males) reported having carried a weapon or having had weapons in their lockers at school within the previous year, principally illegal knives, homemade weapons, and clubs or bats[15]; 8 percent had been threatened with a weapon while at school; 6 percent had been attacked or beaten up by a group or gang; 15 percent had something taken by force; and 37 percent had been slapped, punched or kicked while at school. On most measures, the prevalence of different types of victimization was greater than or comparable to victimizations occurring out of school. The

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[14]See, Gabor (1995).

[15]Additionally, 2.6 percent reported having a handgun (4.6 percent of males), 5.1 percent a pellet gun; and 6.5 percent a replica (imitation) weapon. See, Smith et. al (1995).

study also reported about the level of student worry about victimization: for example, 46 percent indicated that they were very or somewhat worried that someone would threaten them with a weapon or that a group or gang would attack or beat them up.[16]

A survey of a larger sample of British Columbia secondary students found that 23 percent of males had carried a weapon - principally knives and razors - in the previous month and 40 percent of males reported being involved in one or more physical fights in the preceding year.[17]

These statistics should not be misconstrued. Carrying a weapon does not necessarily mean that students do so for the purpose of inflicting harm to others. Other motivations could include status, peer acceptance, attention seeking, defensive purposes, or for recreational purposes (e.g. jackknife). Similarly, a theft with force or threat of force could include a less serious incident such as theft of a baseball cap accompanied by a shove. Nonetheless, these reports, while not generalizeable to all Canadian students, suggest that concerns about the prevalence of violence and weapons in schools have some justification.

In response to concerns, many Canadian schools have established violence policies, including "zero tolerance". In many locations these policies have mushroomed beyond concerns about weapons, group violence and gang involvement to include any kind of physically aggressive, threatening or verbally harassing conduct. This seems to reflect some change in social values: bullying and fist fights that were once considered a more or less "normal" part of growing up (among males) are no longer considered acceptable.

Some observers have asserted that changing social values, as reflected in zero tolerance school policies, account for increases in officially reported youth violence crime rates. That is, the official statistics reflect changes in victim (or school) reporting of violent youth crimes (especially less serious common assaults) and changes in police charging practices, rather than

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[16]Responses varied according to a number of variables (e.g. gender, family factors), including location in a high, moderate or low crime area.

[17]The data reported from the Calgary study specifically addressed behaviour at school. The British Columbia study, while involving students, did not frame the questions to discriminate between behaviour at school and out of school. Note that there may not be substantial differences in the prevalence of weapons carrying among male students in these two studies while the Calgary study reported a 43 percent rate and the B. C. study a 23 percent rate, there were different units of time involved; i.e. weapons carrying in the previous month in the B.C. study versus within the previous year in the Calgary study. For the B.C. study, see, McCreary Centre Society (1993).

"real" changes in youth behaviour. Revised Uniform Crime Report (UCR-2) data, which provide more detailed information on alleged criminal incidents, indicate that in 1994 about twenty percent of young persons charged with offences against persons were alleged to have committed the offence on school grounds.[18] Because of the absence of comparative historical data, it is impossible to assess whether school related violence charges have increased in the past several years. However, the relatively small proportion (20 percent) of total persons charged suggests that increased reporting of school related violence (if any) probably only accounts for a modest amount of the increase in officially reported youth violence.[19]

In keeping with these observations, some critics have also claimed that zero tolerance school policies have resulted in the criminalization of conduct that was not formerly considered criminal. Again, it is not at all clear to what extent this may be occurring; it likely is occurring to some degree, varying by locale. If so, this underlines the need for zero tolerance school policies to be applied in a judicious and selective manner when it comes to invoking the full weight of the criminal law. Serious school violence demands a firm response, but less serious violence can usually be dealt with more swiftly and constructively through non-criminal measures. In saying this, we are not suggesting that less serious forms of violence should be considered acceptable, but rather that most cases can be addressed constructively without resort to the youth justice system.

Most Canadian schools that have established school violence policies have recognized that a focus on simple security and law enforcement, while necessary in some cases, is inadequate to the whole task. Rather, emphasis has been placed on prevention and social interventions. The various types of programs that have been established across the country are impressive, including: peer counselling/peer mediation programs; conflict resolution skills; mentoring/buddy programs; anger management, values education, life and social skills training; self-esteem workshops; law related education; multi-cultural training; police school liaison/resource programs; School Watch and Junior Crime Stoppers programs; alternative schools and special behaviour management programs; effective parenting training and parental involvement programs; curriculum support materials that increase student

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[18]Data are reported by forces which police slightly more than one-third of the population of Canada, but may not be representative of the country as a whole. There were considerable regional differences, e.g. in Vancouver, incidents at school accounted for less than six percent of the young persons charged with offences against persons. These data probably overestimate the number of incidents related to school activities during operational hours because incidents occurring on school grounds are included, e.g. a fight on school grounds during the weekend.

[19]Unless one assumed, implausibly, there were no school related violence charges in the past.

awareness of the causes and consequences of aggression; in-service staff training; gang prevention programs; early (primary) intervention programs; and inter-agency planning and coordinating committees.

While programs of this nature should be developed at local levels in accordance with local needs, governments have a role to play in encouraging and supporting program development. As with the issue of group/gang crime, accessible information about intervention strategies, program descriptions, "best practice" models, research and program evaluation would assist schools in developing local initiatives. In this regard, reports have been produced in several jurisdictions by teachers' federations, school boards and related groups respecting policies and program initiatives that could be taken to address school violence. As well, there are reports and resource information available through the Canadian Educational Association (Toronto), the Canadian Association for Safe Schools (Toronto), and the federal Ministry of Solicitor General. We will not reiterate the many recommendations of these reports. Changing the Young Offenders Act will not decrease school violence. School violence is a social problem that requires partnerships between the schools, parents, students, police and social agencies. An emphasis needs to be placed on prevention and educational measures, as well as (non-criminal) social interventions.

Before leaving this issue, concern has been raised in the past by many Canadians school boards about the legal restrictions in the Young Offenders Act on information sharing between schools and youth justice agencies. For example, some schools have been unable to take appropriate measures in cases where a serious young offender has a court order prohibiting association with certain persons or being on school grounds because the schools have not been provided the information. Changes brought about by Bill-C-37 - s.38(1.13) YOA - clarify the authority to provide information to schools: schools may be provided information where it is necessary to ensure the young person complies with a court order or to ensure the safety of staff, students or others. While these changes should address many of the concerns previously raised, they do not address concerns about information sharing to facilitate coordinated case planning for multi-problem young offenders enrolled in schools. This issue is discussed in Chapter 9.

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

Where required, Ministers Responsible for Justice and local school boards should take steps to ensure that school violence policies, including "zero tolerance" policies, are coordinated with youth justice agencies so that:

(1) in addition to security and law enforcement measures, there are prevention and educational policies and programs in place as well as programs and procedures involving alternate forms of conflict resolution which avoid unnecessary resort to the youth justice system; and

(2) interventions involving the formal youth justice system are only employed as a measure of last resort in respect of serious or repetitive violence, thereby avoiding the criminalization of less serious school misconduct.

12.4 FETAL ALCOHOL SYNDROME/EFFECT

Some young offenders suffer from one or more of different types of congenital or psychological conditions such as attention deficit (hyperactivity) disorder, learning disabilities, post-traumatic stress disorder arising from prior abuse, and so on. It is beyond the scope of this report to address these various special needs populations, but attention needs to be drawn to a syndrome that is not well known or understood - fetal alcohol syndrome (FAS) and fetal alcohol effects (FAE).

FAS/FAE is a birth defect resulting from prenatal exposure to alcohol. This syndrome was formally identified and recognized in 1973. Full FAS involves growth deficiency, specific physical and facial anomalies and central nervous system dysfunction. The latter leads to delayed development, poor motor coordination, learning and attention problems, seizures, hyperactivity and a wide range of behavioural and emotional problems. FAS is a leading cause of mental retardation and borderline mental retardation.

While the more severe physiological and cognitive manifestations of FAS (e.g. facial anomalies, retardation) are not apparent or are more subtle in cases of FAE, alcohol-related damage to the central nervous system still leads to a wide range of cognitive, emotional and behavioural problems such as: lower intelligence; learning disabilities; poor memory retention; diminished capacity to anticipate the consequences of one's action and to learn from consequences; impulsivity and hyperactivity; poor anger control, poor social skills and peer relations; and, generally, conduct problems. Although FAE appears milder than FAS it can, ironically, lead to poorer social adaptation. Because it is more invisible, FAE can go unrecognized or be misdiagnosed; as a result, these youth may not receive the services they require.

The prevalence of FAS in the general population is not known and can only be estimated. The prevalence among socially disadvantaged groups is much higher, especially among aboriginal populations. The prevalence of FAE is believed to be about three times greater than FAS.[20]

Many of the cognitive, emotional, and behavioural difficulties associated with FAS/FAE are well-established risk factors associated with delinquent behaviour. These factors tend to put FAS/FAE youth at higher risk of coming

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[20]Estimates of prevalence in the general population range from 1 to 2 per 1000 live births. In comparison, one study indicates a prevalence of 46 per 1000 among aboriginals in the Yukon and 26 per 1000 among aboriginals in northern B.C. Aboriginals are greatly over-represented in the youth justice system.

into conflict with the law. The prevalence of FAS/FAE in the young offender population is, however, unknown.

As a result of some greater awareness of the syndrome in recent years, FAS/FAE is being more frequently diagnosed. Nonetheless, the condition is not well known and understood by many key personnel in the youth justice system (e.g. judges, probation officers) and even the medical and clinical community. The capacity to carry out assessments - which are necessarily comprehensive in nature and require special expertise - is limited.

FAS/FAE youth present challenges to the youth justice system. Because the syndrome is a life long condition, ongoing program support and intervention is required. Because the associated dysfunctions are wide ranging (i.e., learning/cognitive, emotional, behavioural) inter-agency coordination is required to establish a long term, multi-dimensional service plan involving care, management and remedial interventions. Because these youth are characteristically easily influenced by others and have more limited social skills, placement in generic custodial resources can be counter-productive. Moreover, these youth are characterized by a diminished capacity to anticipate the consequences of their actions and to understand or retain any lessons that might be learned from the imposition of consequences for their misconduct.

In 1992, a House of Commons committee issued a report on FAS/FAE, but only passing reference was made to the criminal justice system. The Canadian Centre for Substance Abuse in Ottawa has established a 1-800 telephone line and computer access for informational materials. Some core curriculum materials on FAS/FAE to assist in training professionals and the public are in the course of being developed in British Columbia.

There have been no studies of the prevalence of FAS/FAE among young offenders.[21] Knowledge of the condition among youth justice personnel is limited and training is scant or non-existent. The effectiveness of program interventions is unknown; specialized or pilot program interventions have not been established.

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[21]Some exploratory research is being conducted in B.C.

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

Health and Welfare Canada and the Department of Justice Canada, in cooperation with provinces and territories, and affected communities, should support:

(1) studies of the prevalence of FAS/FAE among the general young offender population and, given apparent higher rates, among the aboriginal young offender population; and

(2) pilot projects which provide specialized program support and remedial services to young offenders diagnosed as FAS/FAE and evaluate these pilot programs.

Provincial and territorial jurisdictions should:

(1) with technical and developmental support from Health and Welfare Canada, undertake training of youth justice system personnel (including the judiciary) in the etiology and symptomatology of FAS/FAE, incorporating this on an ongoing basis as a regular part of in-service training;

(2) review the adequacy of forensic resources to diagnose FAS/FAE and support the enhancement of these resources;

(3) establish inter-agency protocols respecting the delivery of coordinated services to young offenders diagnosed as FAS/FAE; and

(4) support the establishment of pilot projects which provide specialized program support and remedial services to young offenders diagnosed as FAS/FAE.

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CONSOLIDATION OF RECOMMENDATIONS

Declaration of Principle

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

(1) the particular circumstances of aboriginal young persons;

(2) involving and supporting the family and extended family in responding to young persons who commit offences;

(3) the interests of the victims;

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

(5) sentencing principles, including the applicability of the principles of proportionality and denunciation, especially with respect to offences involving serious violence.

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

Conferencing

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

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

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

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

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

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

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

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

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

* Indicates recommendations supported by a majority, i.e., consensus was not reached.

Conferences should be utilized for six functions, including:

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

Conferencing

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

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

Conferencing

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

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

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

Coordination of Services

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

* Indicates recommendations supported by a majority, i.e., consensus was not reached.

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

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

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

Cost-Sharing *Federal representatives recommend that:

(1) New federal-provincial-territorial financial arrangements for young offender services be structured to meet the following overall goals:
   (a) to promote and implement programs in keeping with the philosophy and provisions of the Young Offenders Act;
   (b) to achieve greater consistency among jurisdictions in the availability and application of young offender programs; and,
   (c) to target federal funding towards specific programs and services that are consistent with the social policy objectives of minimizing intervention in cases where the protection of society from serious harm is not a principal concern (e.g., the expansion of alternatives to formal justice system intervention and of alternatives to custody) and of providing rehabilitative and reintegrative programs directed towards serious and/or chronic offenders.

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

(3) The new financial arrangements shift federal funding from custody to the above-noted types of programs in a manner which will, to the extent possible:
   (a) provide stability of funding to the provinces and territories at current levels;
   (b) be introduced gradually so that service delivery is not disrupted; and,

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(c) be sufficiently flexible so that jurisdictions can develop programs consistent with their own needs and priorities but within the framework of the above-noted social policy objectives, and also flexible in the definition of eligible services so that community-based services are programmatically defined.

Cost-Sharing

*Provincial and territorial representatives recommend that:

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

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

(3) The federal government should:

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

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

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

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

Cost-Sharing

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

Other Cost-Sharing

The Federal Minister of Justice should take steps to:

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

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

Minimum Age Jurisdiction

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

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

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

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

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

Maximum Age Jurisdiction

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

Police Diversion

With respect to police diversion:

(1) Jurisdictions, in cooperation with police forces, should develop guidelines to encourage and guide police in the exercise of their discretion to deal with cases informally, which guidelines should address:

  (a) criteria respecting when alternatives to laying (or recommending) a charge should be considered and the range of possible alternatives; and

  (b) formal charges should only be laid (or recommended) when it is determined that alternative responses are not appropriate to the circumstances.

(2) The Act should be amended to encourage the use of police discretion not to lay charges in appropriate circumstances and to encourage the police to consider a range of options to formal charges, including informal warnings, formal police cautioning, and referring the young person to other agencies, and police-based diversion programs.

(3) The Act should be amended to provide for the establishment of formal police cautioning programs, which may be implemented at the discretion of each jurisdiction.

* Indicates recommendations supported by a majority, i.e., consensus was not reached.

Diversion

With respect to diversion:

(1) Jurisdictions should develop or review guidelines/best practice standards respecting diversion - including objectives, eligibility criteria, screening procedures, information sharing and coordination with other agencies - with a view to encouraging and maximizing the diversion of less serious cases from the formal youth court process.
These guidelines and standards should be made available to decision-makers in the youth justice system, including police, correctional services, Crown counsel, defence counsel, and community organizations active in youth justice issues.

(2) Jurisdictions should develop or review objectives for diversion and alternative measures. Objectives that should be considered include: to hold the youth accountable for his or her actions in the least intrusive manner possible; to focus on reparation to the victim, wherever possible; to involve victims and community members in the decision-making process and follow-up; to encourage the family and the community to take more responsibility for youthful misbehaviour and crime; to avoid delays in processing; to enhance public understanding of youth crime by increasing public involvement; and to allow for the most efficient use of resources.

(3) Jurisdictions should consider the establishment or, as applicable, further development of Youth Justice Committees, pursuant to section 69 YOA, as a means of implementing and delivering diversion programs and increasing community involvement in the youth justice system.

(4) To support the preceding recommendations, research should be undertaken into factors affecting the police or other decision-maker's discretion to charge young persons or to use diversion; variations across Canada and across locations in charging and diversion decisions; and the effectiveness of various models of police diversion and alternative measures.

Peace Bonds

The Act should be amended so that it is clarified that peace bonds, which are available for adults under section 810 Criminal Code, are also applicable to young persons with such modifications as may be appropriate to the circumstances of young persons.

Criteria for Pretrial Detention

*With respect to the legal criteria for pretrial detention, the Act should be amended to state clearly that child welfare considerations alone do not constitute a valid ground for detention.

Alternatives to Pretrial Detention

Priority should be given to the development of community-based alternatives to pretrial detention, especially in jurisdictions where the rate of use of pretrial detention is relatively high. Additionally, jurisdictions should ensure that information regarding available alternative programs is readily accessible to participants in the judicial interim release decision-making process, including Crown Counsel, defence counsel, and the judiciary.

* Indicates recommendations supported by a majority, i.e., consensus was not reached.

Involvement of Others

The active involvement of the family, the community and other youth serving agencies in the pretrial release process should be encouraged, as appropriate to the circumstances of the case.

Pretrial Detention

Jurisdictions should consider the development of best practice standards or guidelines for youth justice officials involved in pretrial detention decisions, including police, Crown Attorneys and youth workers. Standards or guidelines could include the following:

(1) Given recent amendments to the Criminal Code according police augmented powers of release, practices and procedures could be formulated, in cooperation with police forces, in respect of the decision by police to detain a young person before first appearance.

(2) Best practice standards could be developed to assist Crown Attorneys in developing positions on release, including a consideration of release to a responsible person pursuant to section 7.1 YOA.

(3) For jurisdictions implementing a screening mechanism pursuant to subsection 7(5) YOA, guidelines could ensure the effective application of objective criteria, including risk/needs assessment.

Research

Research should be conducted into factors that contribute to the use of pretrial detention of young persons generally and, in particular, higher rates of use in some jurisdictions.

Alternatives To Custody

In the interest of promoting the most effective use of community based programs:

(1) Consideration should be given to the inclusion of a "conditional disposition" in section 20 YOA, akin to the conditional sentence for adults in Bill C-41, but subject first to experience with and assessment of the impact, including net-widening, of conditional sentences in the adult system.

(2) Jurisdictions should consider the development of administrative guidelines for youth justice professionals, including probation officers and Crown Counsel, to provide guidance on disposition recommendation/submissions, including encouragement of the use of community-based alternatives to custody.

(3) Jurisdictions should give priority to the development of multi-faceted intensive supervision, day attendance and other community-based programs that act as alternatives to custody, having regard to the need to direct these programs to a population that would otherwise be placed in custody and thereby avoid or minimize net-widening. New programs should include a monitoring and assessment component and, where possible, new and existing types of programs should be formally evaluated to ascertain their effectiveness.

Compensation Orders

*The Act and, as required, the Criminal code should be amended to permit a youth court order for compensation to be filed as a civil judgment against a young person. This may also require consequential amendments to provincial legislation.

* Indicates recommendations supported by a majority, i.e., consensus was not reached.

Administration of Justice Offences

Jurisdictions should consider the development of best practice standards or guidelines for youth justice officials involved in the supervision or prosecution of administration of justice offences - including probation officers and Crown Attorneys - so that non-custodial orders are used effectively and appropriately and so that recommended conditions are aimed at offender accountability and rehabilitation, addressing issues presented by the underlying offence and the management of the risk presented by the young person.

Determination of Level of Custody

*Provincial and territorial representatives recommend that the provisions for open and secure custody in the Act be repealed and replaced by a single disposition of custody so that placement within a system of custody involving a varied range of programs and security is administratively determined.

If this recommendation is not accepted, provincial and territorial representatives alternatively recommend that the provisions brought about by Bill C-37 respecting the youth court review of secure custody placement decisions made by the provincial director should be repealed, so that the young person's recourse is to administrative review mechanisms and the common law.

Federal representatives did not take a position on this issue, preferring instead to further study the issue and consider the recommendations.

Temporary Release

With respect to temporary release from custody,

(1) Section 35 YOA should be amended to increase, from fifteen to thirty days, the maximum period the provincial director may authorize the temporary release of a young person from custody.

(2) Section 35 YOA should also be reviewed with a view to according great flexibility to the temporary release provisions, beyond the recommended thirty day maximum, in circumstances of medical, treatment or rehabilitative needs, having regard to the need to respect the processes established in the Act for judicial authorization of release from custody.

Chronic Offenders

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

Youth Gangs

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

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

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

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

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

Assessment

With respect to assessment:

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

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

Rehabilitation and Reintegration Programs

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

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

Co-operative Programs

The federal government, in collaboration with participating jurisdictions, should take the lead in undertaking feasibility studies in at least two or more largely populated provinces or regions to determine whether there are sufficient numbers of serious violent older adolescents (between the ages of 16 and 20 years) in custody in the youth, provincial adult, and federal correctional systems to establish small, specialized violent offender treatment programs which would address these similarly-aged offenders from all three systems. If feasible, cooperatively funded pilot programs should be established and evaluated. It should be emphasized that we are not recommending the establishment of new custodial facilities, but rather specialized, cooperative programs within existing space (e.g., special units).

* Indicates recommendations supported by a majority, i.e., consensus was not reached.

Transfer Procedure

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

Transfer to Adult Court

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

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

(1) the transfer of a substantial majority of young persons over the age offourteen who are accused of (or, assuming a post-adjudicative process, found guilty of) first or second degree murder; and
(2) some increased reliance on transfer for other serious violent offences.

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

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

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

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

Placement of Transferred Youth

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

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

* Indicates recommendations supported by a majority, i.e., consensus was not reached.

older at the time of sentence, there should be a presumption of placement in a provincial adult correctional facility or, if the sentence is two years or more, in a penitentiary.

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

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

(4) Section 733 Criminal Code should be repealed.

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

Dangerous Young Offenders

With respect to dangerous young offenders:

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

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

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

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

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

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

(a) alert police authorities about the circumstances of the case;

(b) facilitate the post-dispositional involvement of mental health authorities, where appropriate; and

(c) provide relevant information to the proposed national flagging

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system for high-risk violent offenders, where the criteria for inclusion in that system are satisfied.

Custodial Placement

With respect to custodial placement, the Act should be amended so that where a young person has been detained in youth custody under section 7, committed to youth custody under section 20, or placed in youth custody under section 16.2 YOA, a young person who has attained the age of twenty years or more shall, except where the provincial director consents to placement in youth custody, be placed in a correctional facility for adults.

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

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

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

Joint Placement

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

Custodial Placement

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

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

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the application is made in the public interest. There still should, however, be provision for placement on "best interest" grounds to address exceptional circumstances where there are programs available in the adult system that are more beneficial to the young person.

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

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

(4) The statutory test for young persons who are eighteen years or older provide that placement may be authorized where it is either:
   (a) in the public interest, or
   (b) in the best interests of the young person and not contrary to the public interest.

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

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

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

*With respect to adult correctional jurisdiction, provincial and territorial representatives recommend that, if placement of a young person who is eighteen or more is approved and the remanet of the custodial portion of the disposition is two years or more, the case should become the jurisdictional responsibility of Correctional Services Canada, having regard for the need to provide flexibility of placement in provincial adult correctional centres through Exchange of Services Agreements. Federal representatives disagree and recommend that this issue and the conversion of youth custody dispositions to adult sentences of imprisonment be the subject of further study by the Ministry of Solicitor General, in conjunction with Heads of Corrections.

Custodial Placement

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

(1) It is clear that the provincial director has the authority to direct placement in all circumstances, regardless of whether the disposition and sentence are imposed concurrently or consecutively.

(2) The person shall be placed in a provincial correctional facility for adults or, where the unexpired portion of the sentence of imprisonment is two years or more, in a penitentiary, unless the provincial director directs that the person be placed in a place of custody for young persons.

* Indicates recommendations supported by a majority, i.e., consensus was not reached.

Conversion of Dispositions

Section 741.1 Criminal Code should be amended so that where a person is subject to both a youth custody disposition and a sentence of imprisonment in ordinary court:

(1) It is clarified that the remaining portion of youth custody disposition may be "converted" to an adult sentence of imprisonment, regardless of the order of imposition of the disposition and sentence.

(2) The provincial director and representatives of the provincial adult and federal correctional systems be accorded the capacity to make application in limited circumstances under the section, having regard to the need for the Crown to be notified and to have standing where there is an application by correctional authorities.

Concurrent Orders

The Act should be amended so that a person who is ordered to be detained, remanded or sentenced concurrently as both an adult and a young person, shall be placed in a correctional facility for adults unless the provincial director directs that the person be placed in a place of detention or custody for young persons.

Definitions

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.

Publication of Identity

*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

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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 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.

Publication of Identity

Section 38 YOA should be amended:

(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.

Public Disclosure

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

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of young persons, the information may not be subsequently disclosed to members of the public.

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.

Privacy and Information Sharing

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:

(1) establishes the principle of the need to preserve the privacy of young persons;

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

(3) 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;

(4) maintains a list of enumerated parties to whom youth court records shall be disclosed and to whom police and government records may be disclosed;

(5) 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

(6) 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

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investigation, inquiry or inquest.

Information Sharing With Schools

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

(1) the development of protocols respecting information sharing; and

(2) training of relevant personnel from schools and other helping agencies about young offender information sharing.

Records

With respect to matters relating to records:

(1) 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.

(2) 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.

(3) 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.

Enforcement of Orders

*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.

Parental Involvement

With respect to parental involvement:

(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.

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(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.

Family Support/ Treatment

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.

Involvement of Parents in Offences

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.

*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.

Interference with Orders

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.

Parental Civil Liability

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. (Options respecting the criminal liability of parents were not supported by a substantial majority of the Task Force.)

Court-Appointed Counsel

*Section 11 of the Act should be amended to authorize the province or Lieutenant Governor-in-Council to designate a legal aid program or other agent of the province to assess the young persons's or the parents of the young person's ability to pay the costs of counsel appointed by the court pursuant to that section. The amendment should further provide that assessed costs can be collected in accordance with cost recovery programs established by the province and can be civilly enforced.

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Capacity to Instruct Counsel

Legal practice with respect to the representation of young persons should recognize that capacity to instruct counsel is contextual, dependent on the issue, age, maturity, language skills, and developmental level of the individual young person. Provincial and territorial Attorneys General/Ministers of Justice should encourage Law Societies to develop rules of conduct respecting the representation of young persons which would require that:

(1) Those who represent young persons take training similar to the training suggested by the American Bar Association.

(2) Lawyers representing young persons are under a positive obligation to communicate with their clients in an manner appropriate to the young person's maturity and understanding throughout the criminal process, including the use of outside professionals to facilitate communication as needed, particularly with respect to explaining the role of counsel and the nature of a plea (especially pleas of guilty).

(3) Lawyers representing young persons should consider what other community or family resources are available to assist the young person and, where appropriate, provide information to these parties to strengthen their understanding of the process and to assist the young person.

(4) Lawyers representing young persons are under a particular obligation to be aware of the adult/child dynamics of such a relationship and to ensure that neither their views nor the views of parents or others override the instructions or wishes of the young person. This includes an obligation on the lawyer to ensure that the client is aware of his or her ability to revoke instructions previously given to a lawyer and to terminate the lawyer/client relationship.

Parental Involvement

Provincial and Territorial Attorneys General/Ministers of Justice should encourage provincial and territorial Law Societies to develop rules of conduct to promote, as much as possible, positive parent-child relationships and the involvement and support of parents, recognizing a process to keep actively interested parents informed of what legal advice is being given to young persons, subject to the limitations of solicitor-client privilege.

Statement Evidence

With respect to the admissibility of statement evidence, section 56 YOA should be amended to incorporate judicial discretion so that, notwithstanding a breach of subsections 56(2) or (4), the court may, after considering the totality of the circumstances, admit into evidence a statement which is otherwise voluntary and satisfies the requirements of the Charter of Rights and Freedoms, if the court is satisfied that the admission of the statement would not bring the administration of justice into disrepute.

Waivers

*A substantial majority of the Task Force, including all provincial and territorial representatives, recommend that section 56 YOA should be amended to allow, before making a statement to a person in authority, rights to be waived by methods beyond written or videotaped waivers. Examples of options in this regard include:

(1) either repealing section 56(4) or removing from that subsection any specific enumeration of the means by which rights are waived, thereby allowing the

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courts to determine on a case by case basis whether rights were waived with full knowledge of the rights and appreciation of the consequences of waiving those rights.

(2) according the court the discretion to accept any other form of waiver (i.e., beyond written or videotaped) that the court, having regard to all the circumstances, determines is adequate.

(3) incorporating oral and/or audiotaped waiver into section 56(4).

Waivers

If written waivers continue to be specified as a means of waiving rights in section 56 YOA, federal-provincial-territorial Senior Officials Responsible for Juvenile Justice should develop a standard written waiver form which would have the force of law pursuant to section 67 YOA.

Statement Evidence

In the interests of simplifying and clarifying the requirements of section 56 YOA:

(1) Consideration could be given to simplifying the section by limiting the enumeration of rights to only those which go beyond the Charter and common law and which, therefore, are uniquely applicable to young persons. Alternatively, the section could be reviewed to better reconcile the requirements of the section with the requirements of the Charter and the common law.

(2) The section should be reviewed and amended to provide clarity about the circumstances in which the "transfer warning" applies.

School Violence

Where required, Ministers Responsible for Justice and local school boards should take steps to ensure that school violence policies, including "zero tolerance" policies, are coordinated with youth justice agencies so that:

(1) in addition to security and law enforcement measures, there are prevention and educational policies and programs in place as well as programs and procedures involving alternate forms of conflict resolution which avoid unnecessary resort to the youth justice system; and

(2) interventions involving the formal youth justice system are only employed as a measure of last resort in respect of serious or repetitive violence, thereby avoiding the criminalization of less serious school misconduct.

FAS/E

Health and Welfare Canada and the Department of Justice Canada, in cooperation with provinces and territories, and affected communities, should support:

(1) studies of the prevalence of FAS/FAE among the general young offender population and, given apparent higher rates, among the aboriginal young offender population; and

(2) pilot projects which provide specialized program support and remedial services to young offenders diagnosed as FAS/FAE and evaluate these pilot programs.

Provincial and territorial jurisdictions should:

(1) with technical and developmental support from Health and Welfare Canada,

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undertake training of youth justice system personnel (including the judiciary) in the etiology and symptomatology of FAS/FAE, incorporating this on an ongoing basis as a regular part of in-service training;

(2) review the adequacy of forensic resources to diagnose FAS/FAE and support the enhancement of these resources;

(3) establish inter-agency protocols respecting the delivery of coordinated services to young offenders diagnosed as FAS/FAE; and

(4) support the establishment of pilot projects which provide specialized program support and remedial services to young offenders diagnosed as FAS/FAE.

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[1]The contents and recommendations of this report do not necessarily reflect the views of any participating jurisdiction nor of any individual member representing a jurisdiction.

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