BILL C-4: A RUSH TO A STRICTER YOUTH CRIMINAL JUSTICE SYSTEM

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

23 March 2011

POSITION OF UNICEF CANADA

The position of UNICEF Canada is that any further consideration of Bill C-4 be stayed or suspended by the Parliament of Canada. As indicated in the cross-country roundtable discussions, and cited in this submission, the most significant flaws in youth justice are not in the legislation, but in the system, and any changes to the *Youth Criminal Justice Act* (*YCJA*) should be made only after a period of thoughtful analysis that gives proper consideration to evidence-based research and allows for improvements in the child welfare and youth justice systems that operate behind the law. One benchmark date for further consideration of Bill C-4 or a successor Bill could be April 2013, which would coincide with the tenth anniversary of the proclamation of the *YCJA*. This submission contains thirteen General Recommendations and five Technical Recommendations.

The *YCJA* is relatively recent legislation, having been enacted in April 2003, and the early returns suggest that it has been successful in reducing the rates of both youth crime and youth incarceration, which in the latter case, had been one of the highest in industrialized countries.

In our estimation, most of the proposed amendments to the *YCJA*, as set out in Bill C-4, are not compliant with the Convention on the Rights of the Child and do not treat the best interests of children as a primary consideration. These proposed amendments are also incompatible with the evidence-based principles of rehabilitation and reintegration, as set out in the Preamble and the Declaration of Principle in the *YCJA*. Consequently, while one of the motivations for the Bill is to address the most violent crimes, committed by a small proportion of young people, the likely effect is a harsher regime for many who come into conflict with the law, hampering their chances of rehabilitation and reintegration, and diminishing social protection. As Professor Nichols Bala has indicated in his March 2011 written submission:

> "Such a move from a restorative and rehabilitative model is unnecessary, expensive and will not result in a safer society. Some of the proposals may actually decrease public safety, and the long-term protection of Canadian society."

Recommendation 1: That the Parliament of Canada stay or suspend any further consideration of the proposed amendments to the *Youth Criminal Justice Act*, as set out in Bill C-4.

ABOUT UNICEF

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

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

PROFESSIONAL EXPERIENCE

This submission is also being filtered through my lens as a lawyer, child protection professional and child rights advocate, having regard to my 28 years of child welfare experience in the Province of Ontario (3 years as Counsel to the Children's Aid Society of York Region in Newmarket, Ontario; 20 years as Chief Counsel to the Catholic Children's Aid Society of Toronto; 5 years as Director of Policy Development and Legal Support for the Ontario Association of Children's Aid Societies); 5 years as Children's Advocate for the Province of Saskatchewan; and 6 months as Chief Advisor, Advocacy for UNICEF Canada.

A CHILDREN'S RIGHTS PERSPECTIVE

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

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

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

It is, therefore, of fundamental importance that many of the proposed amendments to the *YCJA* in Bill C-4 are inconsistent with the Convention on the Rights of the Child; the recommendations to Canada in 2003 by the United Nations Committee on the Rights of the Child in relation to its review of Canada's second report on the implementation of the Convention and General Comment 10 issued by the Committee on the Rights of the Child in 2007 concerning children's rights in juvenile justice.

We agree with the comments of Peter Dudding on behalf of the Child Welfare League of Canada in his written submission of May 27, 2010:

> "The *YCJA* was one of the first pieces of Canadian legislation that was written to conform to the United Nations Convention on the Rights of the Child which was signed and ratified in 1991. The Convention recognizes that all children under the age of 18 have specific and immutable rights, which take into account their vulnerability due to age, their relative position in society and their evolving capacities. Sebastien's Law unfortunately violates some of these rights, notably Article 3 which states that the best interests of children should be the primary concern in making decisions that may affect them."

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

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

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

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

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

> "…that the State party continue its efforts to establish a system of juvenile justice that fully integrates into its legislation, policies and practice the provisions and principles of the Convention,

in particular articles 3, 37, 40 and 39, and other relevant international standards in this area, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty and the Vienna Guidelines for Action on Children in the Criminal Justice System. In particular, the Committee urges the State party:

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

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

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

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision".

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

"States Parties shall ensure that:

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it

is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.”

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

“1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence".

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

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

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

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

In its 2007 General Comment 10, the Committee on the Rights of the Child issued guidelines and recommendations to all States Parties to ensure that their juvenile justice system was consistent with the Convention.

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

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

reference to Canada's obligations under the Convention on the Rights of the Child, before sending the bill back to the House."

When this point was raised by Kathy Vandergrift, Chairperson, Board of Directors, Canadian Coalition for the Rights of Children, in her testimony before the Standing Committee on Justice and Human Rights on June 10, 2010, there was a statement of intent by the Committee to check on this point and to get back to Ms. Vandergrift. I understand that this has not yet occurred.

Mr. Bernard Richard made the following observations in his written submission, which we support:

> "…some of the amendments proposed in Bill C-4 risk jeopardizing Canada's commitment to respect and implement inclusively the provisions of the CRC. Worse, some of the proposed changes to the *YCJA* could put our youth justice criminal system in violation of the legally binding international convention. This would be a sad moment for Canadian children and youth who rely on us to serve, treat and guide them. It would be an embarrassment for Canada, a nation that prides itself on upholding the fundamental rights of every child in this country".

The Canadian Council of Child and Youth Advocates has also advanced the following recommendation in its written submission:

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

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

Article 4 of the Convention stipulates:

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

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

As Children's Advocate in Saskatchewan, I had some direct experience in this area when I introduced 8 *Children and Youth First* Principles for the provincial government's consideration – and which were ultimately adopted by the Premier in February 2009. This was motivated by our concern that there were

too many situations where financial, political and jurisdictional considerations were overtaking the best interests and well being of children in the province.

Recommendation 2: That the proposed amendments to the *Youth Criminal Justice Act*, as set out in Bill C-4, be evaluated for compliance with the Convention on the Rights of the Child, with particular emphasis on Articles 3, 37, 40 and 39.

Recommendation 3: That the proposed amendments to the *Youth Criminal Justice Act*, as set out in Bill C-4, be evaluated for compliance with the recommendations for youth justice (paragraphs 56, 57) and the best interests of the child (paragraphs 24, 25) that Canada received from the United Nations Committee on the Rights of the Child in 2003, after its second review of Canada's implementation of the Convention.

Recommendation 4: That there be a public reporting and due consideration of any existing evaluation of the proposed amendments to the *Youth Criminal Justice Act*, as set out in Bill C-4, for compliance with the Convention on the Rights of the Child and the recommendations made in 2003 by the United Nations Committee on the Rights of the Child to Canada.

Recommendation 5: That the federal government ensure that any future proposed changes to the youth criminal justice system undergo a valid child rights impact assessment process and publicly provide a report of that assessment process, as well as evidence of compliance with the provisions and spirit of the United Nations Convention on the Rights of the Child.

ROUNDTABLE DISCUSSIONS REPORT – CONSISTENT CROSS-JURISDICTIONALTHEMES

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

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

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

This roundtable report, which has only recently been made public, is worthy of serious consideration and identifies a number of consistent messages from all provinces and territories. The key themes are as follows:

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

Under this theme, it was noted that:

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

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

Under this theme, it was noted that:

> "The absence of an adequately resourced social safety net was the foundation of a number of related issues that dominated the roundtable discussions in every province and territory. There was national consensus that prevention and early intervention programs and services need to be in place. The need for partnerships and collaboration of systems surfaced quickly into each discussion of the *YCJA*. Participants identified the need for systems to work together, not in silos, and to be better resourced to support children and families before they enter the youth justice system. Systems need to communicate and link with each other and ultimately to the justice system.
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> Provinces and territories all identified a lack of resources, or sustainable resources, to implement the programs and services necessary to fully embrace the *YCJA*. There needs to be equal allocation of resources to address the problems in communities. Participants expressed a need for provincial/territorial governments and the Government of Canada to continue discussions similar to the Roundtable forum to work together to address *YCJA* funding issues and develop multi-system strategies, partnerships and collaborations."

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

Under this theme, it was observed:

> "Less than 1 percent of the participants supported the concept of deterrence for sentencing. Academics advised that this is a principle for middle-class adults and there is no evidence in the last 40 years that it works for adults, so why would it work for young people? Deterrence assumes that a person has planned and considered the consequences. Adolescent brains are not fully developed and they are less able to control impulses and more driven by the thrill of rewards.

They are characteristically more short-sighted, oriented towards immediate gratification and less able to resist peer pressure than adults, which is reflected in section 3(c)(iii) of the *Declaration of Principle*.

…It was noted that deterrence will have the most effect on judges as they would impose harsher sentences, which will take valuable resources from community programs and violates the principle of proportionality. Aboriginal youth who are already over-represented in custody and are incarcerated two times more for administration of justice offences will be the most affected by introducing the principle of deterrence."

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

Under this theme, it was noted:

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

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

DEMOGRAPHICS OF YOUTH INVOLVED IN THE YOUTH CRIMINAL JUSTICE SYSTEM

On the basis of my experience in the child protection system and as a Provincial Children's Advocate, I have come to appreciate that the vast majority of children and youth involved in conflict with the law are not individuals bent on wreaking havoc, but rather are vulnerable young persons, who have often been subjected to neglect, abuse and/or exposed to domestic violence. They often are young people who have been involved in the child protection system and have undergone multiple placements without any sense of ongoing stability and permanence. Many have multiple needs relating to mental health, addictions or developmental disabilities resulting from circumstances beyond their control, such as fetal alcohol spectrum disorder. They are disproportionately from Aboriginal communities, particularly in Western Canada. In my experience in Saskatchewan, approximately 80 percent of the children in child welfare care were Aboriginal, even though only about 15 percent of the youth population was Aboriginal. Such Aboriginal young people living on reserve are further disadvantaged by not having access to the same supports and community services and often have to leave their families and home communities to obtain the counseling and treatment that they require. It is important that we not punish, stigmatize and vilify these young people, who are often victims of maltreatment and unresponsive and underfunded service sectors.

My experience is mirrored in Mary Ellen Turpel Lafond's observations in her written submission:

> "As Representative for Children and Youth, I have expressed concern about at-risk youth who are living in the care of government, or in the home of a relative, who plunge deeper into the justice system, not on the basis of any substantive offence, but solely because they lack the personal strengths and social supports to comply with court orders. These are often highly vulnerable youth with tenuous connections to caregivers, a great deal of anger, and poor problem-solving skills. They frequently break foster home rules, run away when encountering adversity, or fail to attend school or probation appointments. Our report, *Kids, Crime and Care*, documents that children in care constituted nearly half of the youth charged with administration of justice offences in British Columbia."

In an earlier report prepared by Judy Finlay, Chief Advocate at the former Ontario Office of Child and Family Service Advocacy, it was determined that the child welfare system was often the gateway to the youth criminal justice system and that these young people can be viewed as 'Crossover Kids' who often have problems in multiple service systems, including children's mental health, health and education. For example, she found that:

> "A disproportionate number of youth in the young offender system have been in the care of child welfare authorities in Ontario. Literature suggests there is a trajectory from the children's services sector to the young offender system…The young offender system is often the last step for highly troubled 'system kids'. Although these children enter young offender institutions with complex needs, treatment services are rarely available…"
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> **…**Child welfare placement itself is not associated with an increase in offences committed by youth…In fact, recent literature postulates that both child maltreatment and attachment disruptions in the context of the family are the antecedents to the offending behavior of youth. In some studies, a youth's predisposition to delinquency has been linked to the cumulative trauma in early childhood…Such trauma includes neglect, maltreatment, witnessing domestic violence and adverse life circumstances. It is these situations that bring children into child welfare care."

The fact that so many of these youth cross over multiple service systems means that there is a need for a collaborative, multi-disciplinary and integrated strategy among the federal government and the provinces and territories that will result in the provision of a wide range of supports and services.

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

NEED TO INVEST IN THE CHILDREN LEFT BEHIND

Many of the witnesses before the committee have identified the danger of reverting to the development of a penal and custodial infrastructure that would divert funds away from emerging preventative and early intervention strategies and programming. In his written submission, Bernard Richard noted:

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

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

> "… even at this incipient stage, the work undertaken thus far suggests that major inroads are possible to reach the poorest and most vulnerable children by refocusing our energies and investment on alleviating the barriers that exclude them."

This report was followed by another UNICEF report in December 2010, *Report Card 9: The Children Left Behind: A League Table of Inequality in Child Well-Being in the World's Richest Countries*. This Report Card ranked, for the first time, 24 industrialized countries in terms of equality in children's health, education and material well-being. Canada was found to perform at a mediocre level overall, ranking 9th in health well-being and 3rd in educational well-being, but lagging far behind in equality of children's material well-being which includes family income and other basic resources and conditions necessary for child development - placing 17th of 24 countries.

At the time of the release of this report, UNICEF Canada observed in its media release that:

> "With stronger public policy, Canada can rise above its mediocre position and leave no child behind...The level of family income is a major influence on all aspects of child well-being. Canada should address income inequality by promoting fairly paid and highly skilled employment and through sufficient and fairly distributed benefits and taxation. We also need to ensure health, education and other services reduce, rather than widen, disadvantage among our children.
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> …Canada can achieve greater equality with some practical and affordable steps that would make a real and lasting difference for children: establish a national Children's Commissioner; report regularly on the state of children; provide Canadians a clear account of public expenditures on children with a children's budget; set a national child poverty reduction strategy; close the gap between Aboriginal and non-Aboriginal children; and apply a Child Impact Assessment to policy decisions affecting children.

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> The report also notes that the heaviest costs are paid by the individual child. But the long list of problems also translates into significant costs for society as a whole. Unnecessary bottom-end inequality prepares a bill, which is quickly presented to taxpayers in the form of increased strain on health and hospital services, on remedial schooling, on welfare, and on the justice system".

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

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

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

> "In the area of criminogenic risk, which is related closely to safety, education and well-being, Aboriginal youth are grossly over-represented in the youth criminal justice system beginning at age 12 years. In Manitoba for example, Aboriginal youth represented 23 per cent of the provincial population aged 12 to 17 in 2006, but 84 per cent of youth in Sentenced Custody.
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> For Aboriginal children and youth in Canada, there is a greater likelihood of involvement in the criminal justice system, including detention in a youth custody facility, than there is for high school graduation. This is a staggeringly negative outcome and appears to have increased, particularly in some provinces, over the past decade, even while youth criminal involvement has declined nationally.
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> In 2007/2008, over 4,700 Aboriginal youth were admitted to some form of custody and over 2,700 were admitted to probation. In fact statistics indicate that since the implementation of the *Youth Criminal Justice Act*, this figure is increasing. Aboriginal youth are overrepresented at various stages including remand, admissions to secure and open custody, and admissions to probation. When policies and changes in criminal law move the system in the direction of greater emphasis on detention, [this has] a more immediate negative impact on Aboriginal children and youth than on any other group in Canadian society.
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> Social supports and improved education are central to lowering criminogenic risk factors early in life. However, no adequate and coordinated strategies are in place in Canada across jurisdictions, or in most places, within provincial or territorial jurisdictions for an effective social policy response to the elevated criminogenic risk to Aboriginal children and youth".

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

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

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

Recommendation 9: That the federal government adopt and apply an 'equity' focus by investing more heavily in its outreach to the poorest and most vulnerable children in Canada and by refocusing its energies on alleviating the barriers that exclude them.

Recommendation 10: That the implementation of a stronger 'equity' focus by the federal government include working collaboratively with the provinces/territories, with a special emphasis on establishing culturally appropriate and geographically accessible programming for Aboriginal children, to reduce the disparities in outcomes between Aboriginal and Non-Aboriginal children in the areas of material well-being, child welfare involvement, youth criminal justice incarceration, health well-being, alcohol and substance addictions, incidence of suicides and educational well-being.

Recommendation 11: That the implementation of a stronger 'equity' focus by the federal government also include working collaboratively with the provinces/territories, with a special emphasis on responding to the unique needs of young people who do not fit easily within the youth criminal justice system, such as young people with mental illnesses, disabilities, or severe behavioural and developmental disorders, such as Fetal Alcohol Spectrum Disorder.

PROVINCINCIAL DISPARITIES AND THE NEED FOR A NATIONAL CHILDREN'S ADVOCATE/COMMISSIONER

Within Canada, both the federal and provincial governments have responsibility for compliance with the Convention on the Rights of the Child. However, because Canada has a 'dualist' legal system, with both distinctive federal and provincial domains of jurisdiction, many of the matters covered by the Convention such as child welfare, education and health - are under provincial jurisdiction, although criminal law and youth criminal justice fall under federal jurisdiction.

This complication creates a significant challenge in terms of equitable access to services and coordination among them. Jurisdictional wrangles sometimes ensue, to the detriment of those young people who fall between the cracks.

As previously mentioned, many of the youth who enter the youth criminal justice system have multiple needs and cross-over different service sectors. If there is more effective prevention and early intervention programming within social services, child welfare, education, and health within the provinces and territories, it is less likely that those youth will enter the youth criminal justice system in the first place. As

well, Aboriginal children who live on reserve rely on federal funding to support the provision of particular services and these may be funded at a lesser level than for those children living off-reserve.

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

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

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

Provincial and territorial independent advocates or ombudspersons for children are an important mechanism to promote the best interests of children. However, they require a federal counterpart in Ottawa to complement the important work they are doing at the provincial and territorial levels.

A national Children's Advocate or Commissioner would help co-ordinate the substantial work being done by all levels of government and by children's advocates, and work to eliminate gaps in service between federal and provincial governments that are widely recognized as a major barrier to the equal protection and provision of children's rights in Canada.

When I was the Children's Advocate in Saskatchewan, I encountered many jurisdictional conflicts that impacted negatively upon children in receipt of government services and it would have been extremely helpful to have had a counterpart in Ottawa who could have collaborated with me in navigating these inter-jurisdictional disputes.

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

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

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

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

Unfortunately, in the Federal Government's response to the Senate Committee Report, no mention was made of a national Children's Advocate or Commissioner, although there is currently a Private Member's Bill before the House to establish such a position.

Recommendation 12: That federal, provincial and territorial authorities and their respective oversight agencies work collaboratively towards ensuring that children in all parts of Canada receive a fair and equitable allocation of supports and services that will meet their full range of needs and prevent them from coming into conflict with the youth criminal justice system.

Recommendation 13: That all parliamentarians work towards consensus to ensure that an independent Children's Advocate or Commissioner for Canada is established that respects the distribution of legislative powers.

TECHNICAL ANALYSIS (IN CASE BILL C-4 IS NOT STAYED OR SUSPENDED)

While there are some laudable changes contained in Bill C-4 in the areas of the principle of diminished moral blameworthiness or culpability (proposed amendment to section 3(1)(b) of the *YCJA*) and the prohibition against youth serving time in adult prisons (proposed amendment to section 76(2) of the *YCJA*), the majority and most impactful proposed amendments to the *YCJA* present serious problems. They would, in my view, jeopardize the emerging successes in rehabilitating children in conflict with the law and reducing youth crime, and fail to advance the rights of children under the Convention on the Rights of the Child or to address their best interests as "a primary consideration", as required under Article 3 of the Convention. The most likely outcome would be a reduction in public safety.

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

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

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

This proposed amendment to give primacy to the protection of the public in the Declaration of Principle (Policy for Canada with respect to young persons) would have the effect of superseding the principles of

"effective rehabilitation and reintegration", as stated in the Preamble in the Declaration of Principle. Specifically, the Preamble provides in part:

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

Additionally, the Committee on the Rights of the Child has acknowledged in its General Comment 10 that:

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

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

Recommendation 14: That Section 3(1)(a) of the *Youth Criminal Justice Act* should not be amended to give primacy to the protection of the public and to de-emphasize long-term protection of the public in the Declaration of Principle.

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

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

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

> "…There are a number of factors which negate the possibility of achieving a reduction in youth crime by increasing the severity of sanctions. The biggest limitation to achieving a deterrent effect from youth sentencing is that youths who commit offences are generally not considering the likelihood of being caught and punished. Adolescence, especially for youth who are likely to engage in serious or repeat offending, is a stage of life when many have a sense of invulnerability and a significant likelihood of engaging in various types of risk behaviour. The reality is that youth who are prone to committing offences are not thinking about the consequences of their acts, and

so increasing the severity of the consequences if they are apprehended will not have an effect on their behaviour. Adolescents are not only more impulsive than adults but are also less future-oriented. For adolescents, the short term excitement and the perceived psychological, social or monetary rewards of offending are likely to outweigh potential long term penal consequences, which youth are likely to view as a remote possibility. For many youth, gaining acceptance with peers who are also offending is much more salient than any possible future criminal justice sanction".

…Adding deterrence as a principle of youth sentencing…may be good politics, but it is not good public policy and will not increase public safety. It may, however, have an effect on some youth court judges, who may impose more severe sentences and increase the use of custodial sentences for youth offenders."

It also noteworthy, as previously mentioned, that only less than 1 percent of the participants in the cross-country roundtable discussions supported the concept of deterrence for sentencing.

The written submission of the Quebec Commission des droits de la personne et des droits de la jeunesse identified concerns from a child rights perspective:

"The objectives of denunciation and specific deterrence are at odds with the objectives of rehabilitation and reintegration that are to remain central to the youth justice system. According to the Committee on the Rights of the Child, protecting the best interests of the child means that 'the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety'."

The introduction of the principle of 'deterrence' in Bill C-4 also flies in the face of the decision of the Supreme Court of Canada in *R. v. B.W.P.*, where the Court concluded that the omission of 'deterrence' reflected a deliberate and legitimate recognition that it should not be part of the new sentencing regime under the *YCJA*:

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

Recommendation 15: That Section 38((2) of the *Youth Criminal Justice Act* should not be amended to include deterrence and denunciation as new sentencing principles.

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

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

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

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

In particular, the charging of a young person with a "serious offence" would become a precondition for a young person being ordered into pre-trial detention under the new amended section 29(2) of the *YCJA*. Additionally, the new definition of "violent offence" would apply to that presently undefined phrase, which appears in section 39(1) of the *YCJA*, and would then be one of the criteria for committing a young person to a custodial sentence under section 42 of the *YCJA*.

"Serious offence" would be defined as "an indictable offence under an Act of Parliament for which the maximum punishment is imprisonment for five years or more." Examples of 'serious offences' that would all have a maximum penalty of at least 5 years, but would not appear to present a severe threat to public safety, would include: fraud over $5000; uttering a forged document; possession of a stolen credit card; obstructing justice; and public mischief.

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

In the case of a "violent offence", a definition had previously been provided by the Supreme Court of Canada in *R. v. C.D.,* where it stated that a 'violent offence' is any offence where the youth "causes, attempts to cause or threatens to cause" bodily harm. However, Bill C-4 would expand the definition of 'violent offences' to include 'dangerous' acts, an approach expressly rejected by the Supreme Court of Canada in the same decision. Even if the conduct itself is not violent or does not result in bodily harm, conduct which results in a risk of bodily harm or endangerment would still be classified as a 'violent offence' under Bill C-4. This broadened definition, which could lead to a young person's incarceration, would, as the Canadian Bar Association suggests:

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

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

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

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

As well, the Committee on the Rights of the Child states unequivocally in its General Comment 10 that:

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

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

Recommendation 16: That section 2(1) of the *Youth Criminal Justice Act* should not be amended to include the proposed new definitions of "serious offence" and "violent offence", which are overly broad and will cause too many youth to end up in detention or incarceration.

4) Publication Bans for Youth: Proposed Amendment to Section 75 of the *YCJA*

Bill C-4 proposes to amend section 75 of the *YCJA* to provide that the court "shall decide whether it is appropriate to make an order lifting the ban" on the publication of identifying information for a youth found guilty of any 'violent offence'. This amendment would represent a radical change from the current situation where publication of a young person's identity is restricted to circumstances where an adult sentence is imposed; to temporary circumstances, where, for example, a dangerous youth escapes and must be captured; or a situation where the young person requests publication of his or her own identity. In opposing this amendment, the Canadian Bar Association has stated in its written submission:

> "This change would make publication possible for a conviction for anything from sexual offences, dangerous driving, flight from police, impaired driving, threats, common assault and harassment. Further, there is no requirement that publication can or should be limited to repeat or habitual offenders.

> …In contrast, Bill C-4 would encourage a judge to consider publication in relation to any and all 'violent offences'. Given the proposed breadth of that category…the change would represent a huge expansion of the publication power. The underlying purpose of the publication ban is to minimize stigma and instead focus on rehabilitation of the young person. This amendment would steer judges away from that focus to more punitive considerations…[T]his amendment is contrary to the spirit and substance of the SCC's comments in *R. v. B. (D.)* concerning the effect of stigmatization and labeling on youth]."

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

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

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

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

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

As stated by the Committee on the Rights of the Child in its General Comment 10, this protection of privacy safeguard is intended to prevent stigmatization and labelling, which can set off many negative repercussions for the young person who has come into conflict with the law:

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

In terms of my own professional experience – both within the child protection system in Ontario for 28 years and as the Provincial Children's Advocate for Saskatchewan for 5 years - it has always been a vital concern in both those systems that the identities of children and youth not be reported publicly. The kind of stigma and reputation impairment generated by lifting a publication ban, as proposed in Bill C-4, could lead to the identified youth being adversely affected in terms of future living conditions, education and employment opportunities. It could also contribute to that young person's depression, self-destructive behaviour and/or reversion to anti-social behaviours and expose other family members to public ridicule. None of this supports the long-term protection of the public, as rehabilitation and reintegration back into one's home community are made more difficult.

In summary, the amendments regarding publication are without legal or evidence-based support and have the potential to stigmatize and label young persons who come into conflict with the law.

Recommendation 17: That Section 75 of the *YCJA* should not be amended to make the consideration of a public ban mandatory for a youth found guilty of any 'violent offence'.

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

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

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

Bill C-4 would similarly amend section 39(1) of the *YCJA* to add an additional category where a custodial sentence may be imposed in the case of an offending young person – that is, where "the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions or findings of guilt or both under [the *Youth Criminal Justice Act*] or the *Young Offenders Act*…"

Under this proposed amendment, a court could thus impose a custodial sentence on a young person taking into account previous extrajudicial sanctions, whereas at present it can take into consideration only previous convictions. On this point, Professor Bala has again noted an objection in his submission:

> "Judges already have a discretion to use the fact of prior participation in extrajudicial sanctions as a factor in youth sentencing [when referenced in a pre-sentence report]. Amending s. 39(1)(c) to make further specific reference to extrajudicial sanctions seems contrary to the intent of these programs, which is to give youth a 'second chance,' and may be inappropriate since youth usually agree to participate in these programs without an opportunity for having legal advice".

This change would be contrary to a directive on the subject issued by the Committee on the Rights of the Child, in its General Comment 10. The Committee defined 'diversion' as "measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings" and stressed that an admission by a child in a diversion context will not be "used against him/her in any subsequent legal proceeding." It added:

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

Mary Ellen Turpel Lafond has similarly warned of a possible 'chilling effect' on the use of extra-judicial sanctions, if section 39(1)(c) of the *YCJA* were to be enacted:

> "If enacted, this provision [proposed amendment to section 39(1)(c) of the *YCJA*] will trigger changes in the practice of extra-judicial sanctions. Youth will need to be cautioned in every instance about the potential use of the sanction in future sentencing hearings. This in turn could have a 'chilling' effect on the use of these sanctions. This would be most unfortunate, as the growth of pre-court diversion has been one of the important achievements of the [*YCJA*].
>
> …Taken together, the proposed [sections] 39(1)(c) and 115[(1.1)] blur the distinction between diversion and court proceedings. They create what is tantamount to an 'enhanced' youth court record, thus damaging a highly successful scheme of alternatives to court and potentially increasing the youth court workload".

Recommendation 18: That Sections 115(1.1) and 39(1)(c) of the *Youth Criminal Justice Act* should not be amended to establish mandatory police record keeping for extrajudicial measures and to allow the use of extrajudicial sanctions to justify a custodial sentence.

SUMMARY

These are very difficult, multi-layered issues and there are no quick fixes or magic solutions to correct the problems of the youth criminal justice system. Some colleagues of mine, who are members of the Children in Limbo Task Force of The Sparrow Lake Alliance, have attempted to make the same point in the child welfare context by naming their most recent publication, *There are No Wizards*. The same premise can be applied to the youth criminal justice system.

While there may be no quick fixes, there are, nevertheless, clear and achievable steps that can be taken to better support the continuing reduction of crime committed by children and youth and to divert them from offending behaviours. Most of these steps have little to do with altering the *YCJA*.

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

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

Submitted by:

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APPENDIX OF RECOMMENDATIONS

A) GENERAL RECOMMENDATIONS:

Recommendation 1: That the Parliament of Canada stay or suspend any further consideration of the proposed amendments to the *Youth Criminal Justice Act*, as set out in Bill C-4.

Recommendation 2: That the proposed amendments to the *Youth Criminal Justice Act*, as set out in Bill C-4, be evaluated for compliance with the Convention on the Rights of the Child, with particular emphasis on Articles 3, 37, 40 and 39.

Recommendation 3: That the proposed amendments to the *Youth Criminal Justice Act*, as set out in Bill C-4, be evaluated for compliance with the recommendations for youth justice (paragraphs 56, 57) and the best interests of the child (paragraphs 24, 25) that Canada received from the United Nations Committee on the Rights of the Child in 2003, after its second review of Canada's implementation of the Convention.

Recommendation 4: That there be a public reporting and due consideration of any existing evaluation of the proposed amendments to the *Youth Criminal Justice Act*, as set out in Bill C-4, for compliance with the Convention on the Rights of the Child and the recommendations made in 2003 by the United Nations Committee on the Rights of the Child to Canada.

Recommendation 5: That the federal government ensure that any future proposed changes to the youth criminal justice system undergo a valid child rights impact assessment process and publicly provide a report of that assessment process, as well as evidence of compliance with the provisions and spirit of the United Nations Convention on the Rights of the Child.

Recommendation 6: That due consideration is given to all the themes emerging from the cross-country roundtable discussions, which clearly do not support a harsher approach to the youth criminal justice system, as reflected in the proposed amendments to Bill C-4.

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

Recommendation 9: That the federal government adopt and apply an 'equity' focus by investing more heavily in its outreach to the poorest and most vulnerable children in Canada and by refocusing its energies on alleviating the barriers that exclude them.

Recommendation 10: That the implementation of a stronger 'equity' focus by the federal government include working collaboratively with the provinces/territories, with a special emphasis on establishing culturally appropriate and geographically accessible programming for Aboriginal children, to reduce the disparities in outcomes between Aboriginal and Non-Aboriginal children in the areas of material well-being, child welfare involvement, youth criminal justice

incarceration, health well-being, alcohol and substance addictions, incidence of suicides and educational well-being.

Recommendation 11: That the implementation of a stronger 'equity' focus by the federal government also include working collaboratively with the provinces/territories, with a special emphasis on responding to the unique needs of young people who do not fit easily within the youth criminal justice system, such as young people with mental illnesses, disabilities, or severe behavioural and developmental disorders, such as Fetal Alcohol Spectrum Disorder.

Recommendation 12: That federal, provincial and territorial authorities and their respective oversight agencies work collaboratively towards ensuring that children in all parts of Canada receive a fair and equitable allocation of supports and services that will meet their full range of needs and prevent them from coming into conflict with the youth criminal justice system.

Recommendation 13: That all parliamentarians work towards consensus to ensure that an independent Children's Advocate or Commissioner for Canada is established that respects the distribution of legislative powers.

B) TECHICAL RECOMMENDATIONS:

Recommendation 14: That Section 3(1)(a) of the *Youth Criminal Justice Act* should not be amended to give primacy to the protection of the public and to de-emphasize long-term protection of the public in the Declaration of Principle.

Recommendation 15: That Section 38((2) of the *Youth Criminal Justice Act* should not be amended to include deterrence and denunciation as new sentencing principles.

Recommendation 16: That section 2(1) of the *Youth Criminal Justice Act* should not be amended to include the proposed new definitions of "serious offence" and "violent offence", which are overly broad and will cause too many youth to end up in detention or incarceration.

Recommendation 17: That Section 75 of the *YCJA* should not be amended to make the consideration of a public ban mandatory for a youth found guilty of any 'violent offence'.

Recommendation 18: That Sections 115(1.1) and 39(1)(c) of the *Youth Criminal Justice Act* should not be amended to establish mandatory police record keeping for extrajudicial measures and to allow the use of extrajudicial sanctions to justify a custodial sentence.

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