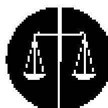
Submission on Bill C-3

Youth Criminal Justice Act

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION



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PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Criminal Justice Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Criminal Justice Section of the Canadian Bar Association.

Submission on Bill C-3

Youth Criminal Justice Act

I. INTRODUCTION

The National Criminal Justice Section (the Section) of the Canadian Bar Association (CBA) has been actively involved in the government's review of and amendments to youth justice legislation over the past several years. The Section consists of Crown and defence counsel from across Canada. Both senior prosecutors with experience in youth court and defence lawyers with a significant young offender clientele were consulted in the preparation of this submission.

In our 1994 submission on Bill C-37, representing Phase I of the review of the *Young Offenders Act* (*YOA*), the Section opposed the harsher penalties in the Bill, and urged Government to instead give priority to improving treatment and rehabilitation options. In Spring 1996, the Section appeared before the Commons Justice and Legal Affairs Committee during Phase II of the review. The Section welcomed the scope of the review and urged the Government to meet its earlier commitment to ensure adequate treatment and rehabilitation programs for young offenders. The Parliamentary Committee's report was issued in April 1997, and in May 1998, Justice Minister Anne McLellan announced a new Youth Justice Strategy, focussing on prevention, meaningful consequences for youth crime and intensified rehabilitation. To implement that strategy, Bill C-3 has now been tabled to replace the current *YOA*.

II. WHAT WE SUPPORT

The Section believes that Bill C-3 is a progressive piece of legislation. We support its passage and commend the Government for the innovations for youth justice contained in the Bill. In its report, *Renewing Youth Justice,* the House of Commons Standing Committee on Justice and Legal Affairs emphasized that "...most youth offending behaviour is minor and temporary with only a minority of young offenders involved in serious and persistent criminal acts. Yet, youth in conflict with the law in this country are processed through the courts and sentenced to custody at rates higher than those in many other industrialized countries."[1]

Bill C-3 would divert youth from the formal court system at the pre-charge and post-charge stages through increased use of warnings, cautions, victim/offender mediation and family conferences. It prescribes extrajudicial measures to respond to many situations.

> Alternatives to the traditional youth justice system can be used in a timely way, can be more effective than the court process, and can involve a range of people from the community, like the victim, and the family of the accused. As a result, alternatives can have a very immediate effect on kids, as they quickly confront the real, human consequences of their offences.[2]

We have supported and continue to fully support measures aimed at minimizing the incarceration of youth.[3]

We also commend the Government on the principles and objectives set out in the Bill, which outline the underlying intent of extrajudicial measures and direct that those measures

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1 Thirteenth Report of the Standing Committee on Justice and Legal Affairs (Shaughnessy Cohen, M.P. Chair), *Renewing Youth Justice* (Ottawa: Publishing, Public Works and Government Services Canada, 1997) 1.

2 Research and Statistics Division, Fact Sheet #7: *Community Based Alternatives to the Traditional Youth Justice System* (Ottawa: Department of Justice, 1999).

3 See, for example, section 38(2).

be used to address many situations involving youth (sections 4 and 5). The more clearly defined role proposed for citizen involvement through youth justice committees under section 18 will facilitate a community response to deal with youths who have committed offences. Bill C-3 focuses on keeping youth out of custody unless necessary, especially for non-violent offences, emphasizing that incarceration should be used as a last resort. The Bill contains sentencing options like those in the current *YOA* that direct youths to repair the harm done or make restitution to enhance accountability (sections 41(2)(e), (g), (h)) and provide real alternatives to incarceration in sentencing (sections 41(l), (2) and sections 18 and 19). The proposed new conditional release plan is effectively designed to have a youth serve the last third of a sentence under careful supervision in the community. These initiatives are akin to those that the Section has proposed over the past several years, and consequently fully endorses within Bill C-3.

The Section generally supports the passage of Bill C-3. However, we have several suggested improvements and some concerns about certain elements of the Bill.

III. CONCERNS WITH THE BILL

A. Introduction

Youth justice seems to be an area especially vulnerable to misconceptions. For example, since the Bill was introduced, the media has repeatedly reported that it would allow fourteen-year-olds to be transferred to adult court. In fact, that has been the case since the *YOA* was enacted, but the suggestion is that a harsher law was necessary to control young people.

> The nature of media reports can contribute to the anxiety of the Canadian public, for example, in a two-month period in 1995, 90% of the 113 stories about youth crime that appeared in Toronto newspapers focussed on serious interpersonal violence. Though this does NOT represent the statistical reality behind youth crime across Canada, it nevertheless shapes public perceptions.[4]

Demands for greater penalties have largely ignored that:

- the rate of youth crime in Canada is actually decreasing.[5]
- Canada's sentencing practices are already sufficiently harsh. "(T)he Canadian rate of youth incarceration is twice that of the U.S., though U.S. rates of violent youth crime are much higher than ours."[6]
- it is unclear that incarceration reduces crime in any case.[7]
- very few young people are actually involved in cases warranting harsh punitive penalties.

> The great majority of young offenders are involved in relatively minor property offences or in fights such as schoolyard scuffles. During 1996-97, of the 111,736 youth charged with crimes, more than half were charged with property crimes, usually minor vandalism or shoplifting. 20% of youth charges were for crimes legally classified as violent. But of these, half were for common assaults in which no one was seriously injured. Less than 0.1% of youths (54) charged in 1997 were accused of homicide.[8]

- the incarceration rate for young offenders in Canada is often higher than for adults.[9]

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[4] Research and Statistics Division, *Fact Sheet #1: Responding to Youth Crime* (Ottawa: Department of Justice, 1999).

[5] "In 1997, rates were down 23% from 1991. This reflects significant decreases in the most frequent of youth crimes - property crimes like minor thefts. Violent youth crime rates peaked in 1995, and have decreased by 3.2% since then." *Ibid*. at 1.

[6] *Ibid.*

[7] *Ibid.*

[8] Research and Statistics Division, *Fact Sheet #6: Youth Court Sentences and Alternatives to Custody* (Ottawa: Department of Justice, 1999).

[9] Research and Statistics Division, *Fact Sheet #2: Overview of Youth Crime in Canada* (Ottawa: Department of Justice, 1999).

In the Section's 1994 submission regarding Bill C-37, we said:

> (R)eports that encourage the public to believe that there is a more serious problem with youth crime than that which actually exists may place unreasonable pressure on the government to reform the laws pertaining to young offenders. The National Criminal Justice Section of the Canadian Bar Association urges the government to ascertain, and educate the public as to the actual incidence and type of crimes being committed by youths, as well as the factors that contribute to such crimes. An assessment of the costs of incarceration relative to the costs of preventative measures and the relative effectiveness of each in protecting society and rehabilitating troubled youth is also badly needed.[10]

While we objected to recent amendments to "toughen up" the *YOA*, it is not a law that we see as truly warranting repeal. Hopefully the Government is not proposing legislation to address misconceptions about the *YOA* in an attempt to find a quick fix to isolated and sensationalized, though terrible crimes involving youth.

Bill C-3 clearly attempts a balanced approach to youth justice, but particular sections seem inconsistent with the fine balance sought. We are concerned about the presumptive offence provision contained in Bill C-3, which would increase the incidence of youths being sentenced as adults. We are strongly opposed to the erosion of the rights contained in section 56 of the current law, which prescribes stringent conditions for statements taken from youth by police to be admissible in court.[11]

Among the stated objectives of the Bill is to clarify and firm up the present *Act*, yet many new terms are introduced without definition or with inadequate detail. For example, for special sentences such as "intensive rehabilitative custody," exactly what is entailed and where will it happen? Section 38(1)(c) seems to say that custody is mandated when there is a criminal history. As most property offences are hybrid or indictable and many young offenders have a significant history of violations for minor offences, this direction to custody

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10 National Criminal Justice Section, Submission on Bill C-37, An Act to amend the *Young Offenders Act* and the *Criminal Code* (Ottawa: Canadian Bar Association, 1994).

11 See section 145(6) in particular.

seems to run against the overall tenor of the Bill. Perhaps the section is intended to direct judges to resist putting youth in jail unless prescribed minimum standards are met, but it does appear contradictory and should be clarified. It is also unclear as to who will pay for the reasons for sentence mentioned under section 47 if a parent or other interested party should request a copy. As a general comment, the Bill is unnecessarily confusing, jumping from section to section, back and forth. For example, adult penalties are mentioned in at least the preamble and sections 3, 36, 37, 38, 41(8), 61, 62, 63, 70, 71, 72 and 74.

Finally, we have fundamental concerns about the commitment of sufficient funding for the infrastructure required for the Bill's many progressive changes, including the communication and training plan that will be needed for the implementation of these new schemes. We urge federal, provincial and territorial governments to ensure that sufficient resources are committed to make the Bill's new options successful.

In the remainder of this submission, we will elaborate on the few areas of the Bill we see as objectionable, and make specific suggestions for improving other sections where we anticipate technical difficulties or propose clarification.

B. Adult Penalties

The Section has expressed ongoing opposition to presumptive transfers of youths to the adult justice system in its past submissions to government regarding youth justice legislation. We have argued instead that the youth justice system should be made adequate to deal with all but the most extreme cases.[12] Our objections increase if the age of application for such transfers is to be lowered from sixteen to fourteen years of age, as proposed by Bill C-3.

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12 *Supra*, note 10.

RECOMMENDATION:

1. **The National Criminal Justice Section recommends that the age of application for the presumptive transfers contained in Bill C-3 not be lowered beyond the current level of sixteen years of age.**

Presumptive transfers previously applied only to youths charged with the few most egregious offences. Bill C-3 would expand that application to fourteen-seventeen year olds who commit three "serious violent offences," an expansion we find particularly troublesome. Of course, common sense supports dealing more severely with youths who have a pattern of violent behaviour. However, the Bill seems to define virtually any offence involving violence and where an adult could receive a sentence of two years or more as a "serious violent offence". Impaired driving causing bodily harm, impaired driving causing death, criminal negligence causing bodily harm, criminal negligence causing death, sexual assault, aggravated assault, robbery, kidnapping, unlawful confinement, extortion, residential break and enters, and weapons offences all potentially fall into this category and are therefore subject to presumptive transfer if the third in a series of offences. In past submissions, we have highlighted our particular concern with including manslaughter as a presumptive offence, given the absence of specific intent.[13] The sentences rendered for manslaughter cover the broadest range recognizing the many unique circumstances under which this offence can be committed. We note that offences which would qualify for presumptive transfer if the third offence include others without specific intent, such as criminal negligence causing death and impaired driving causing death.

This Bill would create a wholesale ability to move youths fourteen and up into the adult system for sentencing once they have been convicted of a third offence. In our view, this

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13 See, National Criminal Justice Section, Submission on Bill C-126, *An Act to amend the Criminal Code and Young Offenders Act* (Ottawa: Canadian Bar Association, 1993).

is contrary to the premise underlying the creation of a separate youth justice system - treating children differently from adults and only using incarceration as a last resort.

RECOMMENDATION:

2. The National Criminal Justice Section recommends that there be no presumptive transfer after a designated number of serious violent offences. Instead, where there is a persistent pattern of behaviour demonstrated by guilty verdicts for at least three serious violent offences, the Crown should apply to a judge to consider transfer to adult court.

On a final note, by including "serious violent offences" in the presumptive offences section, a youth found to fit the category could be eligible for dangerous offender proceedings under Part XXIV of the *Criminal Code*, by virtue of section 74. Hopefully, we live in a society not ready to give up on very troubled youths quite so easily. The National Criminal Justice Section strenuously opposes and recommends against the availability of dangerous offender proceedings for young offenders.

RECOMMENDATION:

3. The National Criminal Justice Section recommends that Bill C-3 specifically state that dangerous offender proceedings will not be available for young offenders.

C. Serious Violent Offences

The "serious violent offence" and "violent offence" provisions give scant guidance on how to determine if an offence qualifies. Is it on the basis of the offence *per se* or the offence given all the circumstances? To make the finding of a "serious violent offence," should the judge be satisfied beyond a reasonable doubt that the offence meets that threshold? We are concerned that even offences such as uttering threats or common assault could qualify, based on substantial risk. An individual could be found to have committed one of these offences for something quite minor if a substantial risk of causing serious bodily harm is also found. For example, an antisocial twelve-year-old first charged in a school yard brawl, who at thirteen subsequently commits a robbery by pushing another youth and stealing his hat, is potentially only one step away from being sentenced as an adult when convicted of a third offence. This could be especially troublesome if a judge intended only to impose a somewhat harsher penalty than required to discourage further misbehaviour, but therefore inadvertently started the ball rolling by making a relatively minor violent offence count as "strike one".

The ambiguity of these concepts could lead to increased litigation and possibly different applications across the country. Legislating this distinction between violent and non-violent offences also stresses how fundamentally different offenders charged with violent offences are from those charged with non-violent offences. In our view, this emphasis risks creating false distinctions. Certainly, violent offences typically are more serious cases, but this is not always so.

RECOMMENDATION:

4. The National Criminal Justice Section recommends that if an offence is deemed to justify presumptive transfer to the adult system, the basis for that designation must be carefully and

> **clearly circumscribed and based on the serious harm caused by the offence.**

Further, section 41(8) does not provide any notice period for the Crown to apply to have the offence labelled as a serious violent offence, so defence counsel could be taken by surprise by that application, with significant consequences for the youth. As this determination will then be part of the sentence, there will be no automatic right of appeal and leave to appeal must be sought. Given the repercussions of the determination, it is more comparable to a further conviction than a sentence. The potential for injustice is compounded, given that in some provinces legal aid for sentence appeals for youths is very limited.

D. Statements

Section 56 of the *YOA* recognizes the special difficulties unique to young people in their dealings with the police. The section requires police to ensure certain conditions are met before a youth gives a statement, failing which the statement cannot be admitted. The provisions attempt to put a young person in the same position as an adult when deciding whether to waive their constitutional rights to remain silent and provide a statement to police, recognizing that youth often do not understand their rights or the significance of giving up those rights when being questioned. Young people may even confess to something they have not done to escape an unpleasant situation.

This disadvantaged position has been recognized by the Supreme Court of Canada many times. For example:

> By its enactment of section 56, (of the *Young Offenders Act*) Parliament has recognized the problems and difficulties that beset young people when confronted with authority. It may seem unnecessary and frustrating to the police and society that a worldly wise, smug 17-year-old with apparent antisocial tendencies should receive the benefit of this section. Yet it must be remembered that the section is to protect all young people of 17 years or less. A young person is usually far more easily impressed and influenced by authoritarian figures. No matter what the *bravado* and *braggadocio* that young people may display, it is unlikely that they will appreciate their legal rights in a general sense or 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 would most adults. Teenagers may also be more susceptible to the subtle threats arising from their surroundings that the presence of persons in authority. A young person may be more inclined to make a statement, even though it is false, in order to please an authoritarian figure. It was no doubt in recognition of the additional pressures and problems faced by young people that led Parliament to enact this code of procedure.[14]

In our experience, section 56 is not overly onerous. Police forces have resources and training with regard to the rights of accused. Officers receive special training on interrogating and questioning suspects in order to elicit confessions and information. Police are able and should be required to provide those rights or ensure that they are properly waived. Properly providing a youth with section 56 rights may result in someone exercising his or her right to remain silent, but this is not a reason to allow statements to be admitted where rights have been infringed. Every legal right protecting an individual may make it more difficult to gather inculpatory evidence, but this does not justify diluting or eliminating those rights. There are sound policy reasons underlying section 56 - to ensure that accused youth fully understand their right to remain silent, the significance of giving up that right, and that the exercise of that right cannot be used against them. Presumably, legislators made the procedures and rights of young people mandatory before admitting a statement under the *YOA* in an attempt to guarantee appropriate protections and acknowledgement of the vulnerable position of young people in dealing with the police.

We believe the protections in section 56 of the *Young Offenders Act* would be gutted by Bill C-3. Section 145 of the Bill continues to direct police to advise young people of their

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14 *R.v. J. (J.T.)*, [1990] 2 S.C.R. 755; (1990) 59 C.C.C. (3d) 1 at 9 (S.C.C.) Cory J..

rights before questioning them, requiring a waiver in writing or on videotape before any statement may be admitted. However, subsection 145(5) would then allow a judge to admit a statement and find that a waiver has been given even if not in writing or on videotape, if police demonstrate that the rights were in fact waived. Further, subsection 145(6) allows a judge to admit a statement without a waiver if satisfied that its admission would not bring the administration of justice into disrepute.

We fully support the safeguards outlined in subsections 145(1), (2), (3) and (4) of Bill C-3. However, subsections (5) and particularly (6) are inconsistent with the previous sections, and in our view, unsupportable.[15] The Supreme Court of Canada has not focussed on whether police acted in good faith or whether the offence was serious, but simply whether young people fully understood their rights. In *R.* v. *Stillman*[16], the issues before the Court included the admissibility of teeth impressions, hair samples and buccal swabs. These items were all seized from the young offender despite a letter given to the police by his lawyers advising that he did not consent to the taking of bodily samples nor would he provide a statement. He was also interviewed in the absence of his parents or his lawyers.

Cory J. said as follows regarding the police conduct:

> Here the police knew they were dealing with a young offender. They were aware that the *Young Offenders Act* required that a parent or

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15 On principle, we have historically taken a position against absolutes and instead favored judicial discretion to do justice in the individual circumstance. However, while not a unanimous opinion, the Section, including both Crown and defence counsel, generally disagrees with including s.145(5) or (6) and favours retaining an absolute exclusion of any evidence obtained in violation of a youth's procedural rights.

16 (1997) 113 CCC (3d) 321 (SCC).

> counsel should be present when a suspected young offender was being interviewed. Nonetheless, in the absence of any adult counsellor and contrary to the specific instruction of his lawyers, the police interviewed the appellant at length and by threat of force took bodily samples and dental impressions. This was the abusive exercise of raw physical authority by the police.[17]

Under Bill C-3, the rules for taking statements from youths could become meaningless and the test for admission of a statement simply whether or not it will bring the administration of justice into disrepute. This erosion of young people's rights may shift the focus from whether the youth fully understood the rights or whether counsel or a responsible adult was present to whether the police acted in good faith or whether the offence was serious. In our view, Bill C-3 would rob young accused of a necessary protection and pit their evidence against the good faith of a professional law enforcement witness. We believe instead that failure to provide the rights or get a proper waiver should continue to result in an automatic exclusion of any evidence obtained.

RECOMMENDATION:

5. The National Criminal Justice Section recommends that section 145(5) and (6) of Bill C-3 be eliminated.

Finally, the erosion of procedural protections in section 145 seems to contradict section 3, *Declarations of Principle*, and could lead to considerable litigation as judges grapple with that obvious contradiction. For example, section 3(1)(b)(ii) guarantees "enhanced procedural protection to ensure that young persons are treated fairly...", section 3(1)(d) acknowledges that "special considerations apply in respect of proceedings against young persons...", and section 3(2) directs that "(t)his *Act* shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1)."

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17 *Ibid.* at 343-344.

Our concerns about statements are resolvable by retaining the current protections contained in section 56 and providing more intensive training sessions for police officers. We also strongly recommend the inclusion of a standard form within the *Act* for use in all youth interrogations across the country.

E. Resources

It will be very unfortunate if the necessary resources to implement the innovations in Bill C-3 are not uniformly committed across the country. Provinces and territories must be partners in several aspects of implementing Bill C-3, if passed. Training and education will be required for Crown attorneys, defence lawyers, judges and most importantly, police officers and parole/probation officers. The federal government will need to foster enhanced levels of communication and cooperation with provincial and territorial governments. A comprehensive commitment of resources, and an effective communication and implementation plan will be necessary for the Bill to avoid attracting the same stigma currently attached to the *YOA*.

RECOMMENDATION:

6. The National Criminal Justice Section recommends that federal/provincial/territorial governments commit the necessary resources, and devise a communication and implementation plan, to ensure that the progressive measures contained in Bill C-3 become fully effective.

Resources must be put in the front end of the system rather than building bigger jails at the back end. Until we address its underlying causes, no amount of legislative change will prevent youth crime. Without resources for stronger child welfare, alleviating child poverty and providing better educational and youth mental health services, some of the more progressive aspects of Bill C-3 will not be fully effective. Too frequently young

people are referred from these other systems to the criminal justice system merely because of lack of resources, and youth are too often incarcerated as a result. We must recognize that in recent years, the trend has been to cut social programs, not increase them.

The best long term solution to youth crime is in its prevention through various means of interception, early intervention and rehabilitation. We appreciate that the federal government, through various health strategies and a new comprehensive crime prevention strategy, has taken steps to address some of these concerns. Bill C-3 provides the tools to supplement preventative programs, by directing youth from the criminal justice system when possible and providing a range of responses to youth crime. Resources must be committed by federal and provincial governments to allow these innovations to demonstrate fully their intended effect.

F. Age of Application

Since Bill C-3 was introduced in Parliament, a major criticism has been that the age for criminal responsibility was not lowered beyond twelve years of age. Child welfare legislation currently deals with youths under the age of twelve who commit offences. One argument for lowering the age of responsibility to ten is that older youths or adults use ten and eleven year old children to commit crimes, knowing that the children cannot be charged. To suppose that by lowering the age of criminal responsibility the same adults would not then move to using eight or nine year old children is naive, to say the least. Further, this reasoning suggests that we can and should address the problem by punishing, rather than protecting, the victim. The Section continues to support the use of provincial child welfare legislation in dealing with children under the age of twelve.

In our practices, members of the Section have experienced the difficulty of explaining complicated legal principles to children. Even twelve year olds have problems grasping concepts such as what constitutes being a party to an offence or self-defence sufficiently

to give counsel proper instructions. The Section is strongly opposed to lowering the age of responsibility beyond twelve years of age.

RECOMMENDATION:

7. **The National Criminal Justice Section recommends that the age of criminal responsibility not be lowered beyond twelve years of age.**

IV. SUGGESTED IMPROVEMENTS

A. General

i) Notice to parent

Section 11 requires that a parent be notified if a young person is to be dealt with by way of an extrajudicial sanction. In our view, the section should contain a "where possible" clause. It would be unfair and illogical to refuse to consider an extrajudicial sanction because a parent of the young person was unavailable to be notified.

RECOMMENDATION:

8. **The National Criminal Justice Section recommends that the words "where possible" be added to the end of section 11.**

ii) Extrajudicial measures

We fully endorse the comprehensive scheme for extrajudicial measures contained in Bill C-3. We especially support the explicit statement in subsection 4(d)(i) and (ii) regarding the non-exclusion of offenders simply because of a criminal record or the previous imposition of an extrajudicial measure. Courts are needlessly clogged by very minor

offences committed by young people, often property-related. These offences should be dealt with outside of the court process.

However, restricting the options in section 4 to non-violent offences will exclude very minor violent offences from being addressed through extrajudicial measures. Pushes between school mates or punches between siblings too frequently end up before the youth court, mostly as a result of zero tolerance policies in the schools and parents' inability to manage their children. We strongly believe that these minor assaults could also be appropriately managed by extrajudicial measures.

Clarification is required about the difference, if any, between the concepts of an extrajudicial sanction and extrajudicial measures. Because the word "sanction" is new to youth justice legislation, it is important to have a clear understanding of what it entails. Whether extrajudicial sanctions are possible at both the pre-charge and post-charge stages should also be clarified.

We oppose a legislative distinction between violent and non-violent offences and the removal of judicial discretion in that regard, and also a legislative distinction between serious violent offences and violent offences for the purposes of access to extrajudicial measures. Section 4(c) establishes a presumption of an extrajudicial measure if the person has no record and has committed a non-violent offence. While those are two of the most important factors to be considered in sentencing, arguably equal considerations are the degree of planning and deliberation involved in the offence, the harm done to the victim, the motive behind the commission of the offence, the cooperation of the offender and the level of remorse of the offender. There will be circumstances where non-violent cases involving people without records are more serious than violent offences where a youth has a record, perhaps one that is stale, unrelated or involving only a minor non-violent incident.

The discretion to assess the case should be left to the party deciding whether to invoke the extrajudicial measure.

RECOMMENDATION:

9. The National Criminal Justice Section recommends that discretion be allowed to determine whether extrajudicial measures should be available for minor violent offences, as well as those that are non-violent.

B. Sentencing and Imprisonment

Part 4 of Bill C-3 begins with a statement of the purposes and principles of the Bill's sentencing regime. It emphasizes reintegration and that the least restrictive sentence capable of achieving the purposes of the Bill should be the one chosen. It stresses that any sentence imposed should be proportionate to the seriousness of the offence and the degree of responsibility of the youth for that offence. Perhaps most critically, it prohibits use of custodial sentences except under certain stringent conditions. Section 38(2) expands on this to require the court to consider all alternatives before considering custody. A parallel provision to that in section 718.2(e) of the *Criminal Code* should also be added to recognize the special circumstances of particular groups; most notably aboriginal offenders, in contact with the criminal justice system.[18]

RECOMMENDATION:

10. The National Criminal Justice Section recommends that Bill C-3 include a parallel provision to that in section 718.2(e) of the *Criminal Code* to recognize the special circumstances of

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18 This recommendation is especially supported given the recent decision of the SCC in *R.v. Gladue*, [1999] 1S.C.R. 688.

particular populations, most notably aboriginal offenders in contact with the criminal justice system.

We have long been a proponent of the principles set out in Part 4. A 1991 submission of the Canadian Bar Association recommended the establishment of principles for sentencing adults with many of the same themes: that imprisonment should be used only to address the most serious harm caused to society; and that the least intrusive sanction to reflect the gravity of the offence, the repetitive violent nature of the conduct, or to protect the public adequately should be chosen. That submission also highlighted the fact that "serious harm" cannot be predefined, but should flow from judicial consideration of individual cases.[19]

i) Rehabilitative custody and supervision

Section 41(2)(q) is troubling in that intensive rehabilitative custody and supervision are not defined, though seem to suggest treatment. Former section 22 of the *YOA,* which allowed a judge to order treatment subject to the consent of the young person and the treatment provider, was repealed in 1995 because of concerns about its constitutionality. This new proposal seems to be a treatment provision subject only to the consent of the provincial director. If rehabilitative custody is intended to be the same as a treatment order, we believe it is likely to run into the same constitutional challenges faced by previous treatment provisions.

ii) Mandatory conditional supervision

The mandatory conditional supervision scheme in Bill C-3 is another positive development. However, it is unclear whether a separate scheme with officers like parole officers is intended, because the supervision during the one-third period is to be much more intense

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19 Directions for Reform: Response to The Green Paper on Sentencing, Corrections and Conditional Release (Ottawa: Canadian Bar Association, 1991) at 36.

than a typical probation order. A distinction similar to the separation between the work of parole officers and probation officers may be advisable.

The two-thirds and one-third breakdown between custody and community supervision contained in Bill C-3 will also cause concern if judges tend to increase the term imposed so that the young person still serves the amount previously considered appropriate (as in giving nine months for an offence that would usually attract six months). While section 38(8) specifically directs that the youth court should not make this adjustment, it may be difficult not to refer subconsciously to the previous regime. Similarly, if probation orders remain at current lengths, the period of community supervision would be significantly increased. The result will be to increase the workload of probation officers and the likelihood of breaches, even by the most well-intentioned youths. Excessively long periods of continued supervision may not be the most effective rehabilitative tool.

iii) Level of custody

Bill C-3 provides that the young person has a right to be heard before the provincial director determines the level of custody. Does the right to be heard include the right to be represented by counsel? Does legal aid funding apply? Will the hearing be a matter of record? What will be the nature of the hearing, the rules of evidence, and the rights of victims to be heard? In our view, all of these issues should be clarified.

V. CONCLUSION

The Section enthusiastically supports the many innovations contained in Bill C-3 to keep youths out of the criminal justice process whenever feasible. We have stressed that the necessary resources must be provided so that the progressive features of Bill C-3 can achieve their optimal effect. In addition, we have highlighted a number of minor ambiguities and suggested clarifications to improve the Bill. Finally, we have raised a few significant

concerns we have with the Bill, and made recommendations which would remedy those concerns.

We are concerned about the Bill's significant reliance on a distinction between violent and non-violent offences as a basis for establishing a pattern of behaviour to justify presumptive transfer to the adult criminal justice system. In our experience, this distinction is not always clear nor is it a reliable indicator of the seriousness of the offence. This concern is exacerbated because the Bill would make even younger people subject to presumptive transfer than under the *YOA*. We are also strongly opposed to any dilution of the protections currently offered to youths in their dealings with police.

We urge that amendments to Bill C-3 be made to remedy these concerns, and to permit the Bill's full potential for reform of the youth criminal justice system to take effect.

VI. SUMMARY OF RECOMMENDATIONS

The National Criminal Justice Section of the Canadian Bar Association recommends that:

1. **the age of application for the presumptive transfers contained in Bill C-3 not be lowered beyond the current level of sixteen years of age.**

2. **there be no presumptive transfer after a designated number of serious violent offences. Instead, where there is a persistent pattern of behaviour demonstrated by guilty verdicts for at least three serious violent offences, the Crown should apply to a judge to consider transfer to adult court.**

3. **Bill C-3 specifically state that dangerous offender proceedings will not be available for young offenders.**

4. **if an offence is deemed to justify presumptive transfer to the adult system, the basis for that designation must be carefully and clearly circumscribed and based on the serious harm caused by the offence.**

5. **section 145(5) and (6) of Bill C-3 be eliminated.**

6. **federal/provincial/territorial governments commit the necessary resources, and devise a communication and implementation plan, to ensure that the progressive measures contained in Bill C-3 become fully effective.**

7. **the age of criminal responsibility not be lowered beyond twelve years of age.**

8. the words "where possible" be added to the end of section 11.

9. discretion be allowed to determine whether extrajudicial measures should be available for minor violent offences, as well as those that are non-violent.

10. Bill C-3 include a parallel provision to that in section 718.2(e) of the *Criminal Code* to recognize the special circumstances of particular populations, most notably aboriginal offenders in contact with the criminal justice system.