

Children's Rights and Criminal Justice System Reform: Submission by the Canadian Coalition for the Rights of Children

Introduction

The Canadian Coalition for the Rights of Children (CCRC) welcomes the government's commitment to substantial reform of Canada's criminal justice system and supports the following stated goals for the proposed transformation:

- ensuring consistency with the *Canadian Charter of Rights and Freedoms*
- reducing the over-representation of vulnerable populations
- assessing the impacts of criminal sentencing reforms made in recent years
- improving efficiency, effectiveness and timeliness
- increasing transparency, accountability and oversight
- increasing the use and acceptance of restorative justice processes

Changes to achieve these goals are needed in some policies that affect young people involved in the criminal justice system. The Coalition is particularly focused on respect and realization of children's rights, as articulated in the Convention on the Rights of the Child. As well as ratification, Canada has committed to use the Convention to interpret Charter rights for children, since children's rights are not directly addressed in the Charter. Taking the stated goals seriously requires amending the Criminal Code and the Youth Criminal Justice Act (YCJA) to be consistent with Canada's obligations to protect the rights of children.

The Coalition strongly supports stated intentions to include more restorative justice measures throughout the criminal justice system. Expanding options in the youth justice system for extra-judicial measures, based on sound practices rooted in restorative justice, can build on the experience and documented evidence of the effective use of such measures across Canada.

With the government's stated goals in mind, the Coalition draws attention to recommendations for legislative reform that Canada received in previous reviews of implementation of the Convention related to:

- a. Protecting the right of all children to be free from all forms of violence, and
- b. Protecting the rights of children involved in the criminal justice system.

We note that Canada is now undergoing its 5th/6th review, which adds weight to the call to act on previous recommendations.

Prevention of Violence against Children

The Coalition appreciates that the government has made addressing violence against girls a high priority. The goal of preventing violence against girls is best achieved within the context of preventing violence against girls and boys in the context of Article 19 of the Convention, which articulates the right of every child to be free from all forms of violence. While Canada has taken action on specific aspects of violence against children, it has yet to make preventing all forms of violence against children a clearly stated goal. At the same time, international evidence is clear that a comprehensive approach to preventing violence against children is most effective. Canada's rates of violence against children remain unacceptably high.

In 2012 Canada received a strong recommendation from the UN Committee on the Rights of the Child with regard to violence against children and repeal of section 43 of the criminal code:

45. The Committee urges the State party to repeal Section 43 of the Criminal Code to remove existing authorization of the use of "reasonable force" in disciplining children and explicitly prohibit all forms of violence against all age groups of children, however light, within the family, in schools and in other institutions where children may be placed. Additionally, the Committee recommends that the State party:

(a) Strengthen and expand awareness-raising for parents, the public, children, and professionals on alternative forms of discipline and promote respect for children's rights, with the involvement of children, while raising awareness about the adverse consequences of corporal punishment;

(b) Ensure the training of all professionals working with children, including judges, law enforcement, health, social and child welfare, and education professionals to promptly identify, address and report all cases of violence against children. (UN Committee on the Rights of the Child. Concluding Observations: Canada, paragraphs 44 and 45, CRC/C/CAN/C/3-4/p.9)

In addition, the Truth and Reconciliation Commission called for repeal of section 43 as one of its Calls to Action, which the Government committed to implement. This would be another step on the road to reconciliation.

A positive response to the recommendation of the UN Committee on the Rights of the Child will also improve Canada's international reputation, given that 53 states have prohibited corporal

punishment and 56 states have made public commitments to do so, leaving Canada significantly behind international good practice based on a growing volume of evidence in both Canadian and international research.

A comprehensive revision of the criminal code is a good opportunity to bring Canadian law into compliance with Article 19 of the Convention. This can be done by repealing Article 43 which continues to legitimize some forms of violence against children, making any other amendments to be consistent with Article 19, and publicly begin a national campaign to end all forms of violence against children. It is unacceptable that Canadian law still has a lower standard of protection from violence for children than for adults.

Recommendation: As part of making the criminal code more coherent and consistent, repeal section 43 and publicly declare that the standard in Canadian law is the right of all children to be free from all forms of violence, as part of implementing the Convention on the Rights of the Child, fulfilling the Calls to Action in the Truth and Reconciliation Commission, and following international evidence with regard to the most effective way of preventing violence against children.

Recommendations relating to children involved in the criminal justice system

In 2012 the report on how Canada implements the Convention on the Rights of the Child included several recommendations relating to the administration of juvenile justice. Along with expressions of concern about a number of serious issues, the Committee made the following recommendations:

86. The Committee recommends that the State party bring the juvenile justice system fully in line with the Convention, including Bill C-10 (2012 Safe Streets and Communities Act) in particular articles 37, 39 and 40, and with other relevant standards, including the Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), the Vienna Guidelines for Action on Children in the Criminal Justice System; and the Committee's general comment No. 10 (2007). In particular, the Committee urges the State party to:

- (a) Increase the minimum age of criminal responsibility;*
- (b) Ensure that no person under 18 is tried as an adult, irrespective of the circumstances or the gravity of his/her offence;*

(c) Develop alternatives to detention by increasing the use of extrajudicial measures, such as diversion, and ensure the protection of privacy of children within the juvenile justice system;

(d) Develop guidelines for restraint and use of force against children in arrest and detention for use by all law enforcement officers and personnel in detention facilities, including the abolishment of use of tasers;

(e) Conduct an extensive study of systemic overrepresentation of Aboriginal and African Canadian children and youth in the criminal justice system and develop an effective action plan towards eliminating the disparity in rates of sentencing and incarceration of Aboriginal and African Canadian children and youth, including activities such as training of all legal, penitentiary and law enforcement professionals on the Convention;

(f) Ensure that girls are held separately from boys and that girls are monitored by female prison guards so as to better protect girls from the risk of sexual violence and exploitation. (Committee on the Rights of the Child, Concluding Observations: Canada, paragraph 85-86, CRC/C/CAN/CO/3-4, pp 20-21)

Acknowledging that the YCJA and subsequent changes fulfill a few of the specific points in these recommendations, the Coalition looks forward to seeing Canada's response to the following recommendations, as part of the criminal justice review and in consultations leading up to Canada's next report and review of how it implements the Convention.

1. Removal of denunciation and deterrence as objectives for sentencing

The coalition appreciates that rehabilitation and reintegration are the primary objectives for sentencing in the youth criminal justice system. In 2012 denunciation and deterrence were added, largely as a reaction to one high profile case in one province. Substantial evidence shows that more severe sentences are not effective as specific or general deterrence in youth justice, and can be counter-productive for the objectives of rehabilitation and reintegration. In the interests of greater coherence and consistency in Canada's criminal justice system, they should be removed.

Recommendation: Delete deterrence and denunciation from the list of objectives for sentencing in the youth justice system.

2. Pre-trial detention as last resort with conditions to protect children's rights

As part of its review of criminal justice system provisions for detention and related conditions, the Coalition recommends that Canada bring its criminal code into compliance with international standards and guidelines. We commend Canada for the approach taken in the YCJA and for

efforts made to reduce over-reliance on detention for young people in the criminal justice system. In the area of pre-trial detention, however, Canada still needs to make improvements. The Coalition encourages Canada to introduce even stronger language to ensure that detention, including pre-trial detention, is used only as a last resort for young people, not as a replacement for adequate social services supports, and only under conditions that give priority to the rights and best interests of children.

Recommendation: Take the necessary steps to ensure that pre-trial detention is only used as a last resort, when it has been determined to be in the best interests of the children involved, and with robust procedural review to prevent its misuse.

3. Presumption of Youth Sentences for Youth Offenders

The YCJA made significant progress in terms of appropriate sentencing for young people involved in the youth criminal justice system, and in 2008 the Supreme Court ruled that a presumption of an adult sentence for serious offences violated a young person's right to a presumption of "diminished moral blameworthiness or culpability" based on heightened vulnerability and less maturity by reason of age. (*R. v. D.B.*, [2008] S.C.J. No. 25) In 2012 the government amended the YCJA to require that the Attorney General "must consider" applying for an adult sentence where a young person is over 14 years of age and the offence is a "serious violent offence" and report its findings to the court. This runs counter to international guidelines for allowing maximum discretion to those who are closest to the particular circumstances of a case.

Recommendation: That the YCJA more clearly establish a presumption in favour of youth sentences and eliminate the mandatory consideration of an adult sentence in respect of the most serious offences. It is consistent with international legal norms to allow full discretion to the prosecutor on whether to seek an adult sentence, based on the circumstances of the individual case.

4. Transfer at age 18 to adult jail only when best interests are clear

The Coalition appreciates that the *YCJA* was amended in 2012 to require that young people serve correctional sentences in youth correctional facilities. However, the inclusion of permission to transfer a young person at age 18 to adult jail is inconsistent with the goal of giving highest priority to rehabilitation and reintegration of young offenders back into society. The goals for the current reform process also justify making an amendment.

Recommendation: That the YCJA be amended to give priority to a young offender continuing to serve a sentence in a youth corrections facility, even if the offender turns 18, and allow for transfers only when it is shown to be in the best interests of the young people affected by the decision.

5. Clarification of the definition of violence as a ground for a custody sentence

The *YCJA* limits the possibility of imposing a custodial sentence on a young person to cases involving a “violent offence.” In 2012 the definition of a violent offence was broadened to include offences where there is an “attempt” or “creating a substantial likelihood” of bodily harm. The Coalition recommends that this definition be reviewed and clarified to comply with the international norm that custodial sentences be used for young people only as a last resort. The goals of the current reform process also support a more clear definition and a stronger focus on other options with greater potential to achieve the goals of rehabilitation.

Recommendation: That the definition of violent offence as a grounds for a custodial sentence for a young person be more precisely defined to apply to situations where there has been bodily harm, so as to better comply with the international norm that custodial sentences for young people be used only as a last resort.

6. Publication of the names of young people dealt with under the *YCJA*

A cornerstone of youth justice is that the names of the young persons are not publicized. In 2012 the provisions were amended to allow the publication of the name of a young person who had committed a violent offense under some circumstances, supposedly for public safety. This was done as part of a political “fear-of-crime” agenda without any evidence that it increased public safety. At the same time, the evidence is clear that publication of names is not consistent with giving priority to the objectives of rehabilitation and reintegration. The goals of the current reform support returning to best practices in youth justice.

Recommendation: That Canada return to the best practice standard of not publicizing the names of young persons.

Conclusion

Members of the Coalition are willing to work with Justice officials on further explanation or details related to these recommendations. We look forward to the day when Canada’s criminal justice system fully complies with Canada’s obligations under the Convention on the Rights of the Child and reflects other international norms for effective measures in youth justice.

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