

Sébastien, AB, and Ashley Smith:
A Youth Criminal Justice Act for All Canadians
Submission on Bill C-4 by the Canadian Coalition for the Rights of Children

Introduction

Bill C-4 is named Sébastien's law to remember a young person killed by another young person. We also need to remember AB and Ashley Smith. AB is the child at the heart of the Nunn Commission of Inquiry: a boy with learning disabilities in a complex web of fractured relationships, who spiralled out of control and came to public attention when he went joyriding in a stolen car and killed a woman in Halifax. Improving early intervention is the main message of the Nunn Commission Report, cited as a basis for Bill C-4. Ashley Smith committed suicide shortly after being transferred from a youth detention centre to an adult jail at age 18. Several reports on this case conclude that a young girl with mental health problems did not get the help she needed, outside or inside Canada's detention centres.

Adolescents who get involved in criminal activity after they fall through the cracks of underdeveloped, sporadic, and poorly coordinated services for children in need is the primary challenge for Canada's youth justice system. Young people within the system brought that message directly to a panel of Members of Parliament from all parties at a forum hosted by the Canadian Coalition for the Rights of Children in 2007.¹ If the findings from the recent consultations on implementation of the Youth Criminal Justice Act are released, prevention through early intervention would likely be the top priority. Some of our members participated in those sessions and more members work directly with young people to help them stay out or get out of the criminal justice system.

Unfortunately, Bill C-4 adds nothing to address the primary needs in youth justice. The solution is not incarcerating more children, as Bill C-4 would do. Canada already has a high rate of youth incarceration relative to other industrialized countries.

The youth justice system must serve Sébastien, AB, Ashley, all young people in Canada, and all Canadians who want safe and healthy communities. Building communities that respect the rights of all persons, including children under the age of 18, is the perspective brought by the Canadian Coalition for the Rights of Children (CCRC). The CCRC is a national umbrella group of organizations who work with children and individuals who are committed to promote respect for the rights of children. Our contribution to the committee's study of Bill C-4 is an analysis of its provisions in relation to the Convention on the Rights of the Child (Convention), which Canada ratified in 1991. In addition, we ask the committee to consider the recommendations for youth justice that Canada received from the UN Committee on the Rights of the Child in 2003, after its second review of implementation of the Convention.

¹ Canadian Coalition for the Rights of Children. "*Silenced Citizens No Longer: Taking Action on the Rights of Children.*" Report from a Public Forum on the Senate Report, *Silenced Citizens*. September 28, 2007. Available at www.rightsofchildren.ca.

I. Basic Principles

A. Short and long-term protection of the public

Children, defined as persons under age 18, are part of the public. They are one quarter of Canada's population and the most prevalent victims of violence in our society. Protecting young people from violence should be a top priority, but that is not the focus of Bill C-4.

A comparison of the proposed text in Bill C-4 and the current text in the Youth Criminal Justice Act (YJCA) reveals that "protection of the public" is being used to re-orient the youth criminal justice system in ways that ignore the main findings of the Nunn Commission Report and contradict the basic principles of the Convention on the Rights of the Child. The primary emphasis of the Nunn Commission Report was to strengthen early interventions, and it emphasized that protection of the public should include both long and short-term protection. Bill C-4 shifts the focus to short-term protection and weakens the primary focus on prevention.

<u>Proposed Wording in Bill C-4</u>	<u>Current Wording in YCJA</u>
<p><i>(a) The youth criminal justice system is intended to protect the public by:</i></p> <p><i>(i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person;</i></p> <p><i>(ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and</i></p> <p><i>(iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;</i></p>	<p><i>(a) the Youth Criminal Justice System is intended to:</i></p> <p><i>(i) prevent crime by addressing the circumstances underlying a young person's offending behaviour;</i></p> <p><i>(ii) rehabilitate young persons who commit offences and reintegrate them into society; and</i></p> <p><i>(iii) ensure that a young person is subject to meaningful consequences for his or her offence in order to promote the long-term protection of the public.</i></p>

The CCRC shares the concern raised by other witnesses about the implications of replacing the concept of "meaningful consequences" with the proposed measures of accountability. In addition, the proposed revision weakens the prevention principle and narrows the obligation of governments to referral to community services. Under the Convention, the government has an obligation to ensure that appropriate support and corrective services are available for children who need them, outside and inside the criminal justice system.

The intent of the Nunn Commission Report would be better reflected by adding short and long-term protection of the public to the list of principles in the current YJCA without revising the rest of the principles in clause 3(1)(a).

Recommendation: That clause 3 of Bill C-4 be amended to add "promote the short and long-term protection of the public" as a basic principle, and maintain the

existing principles in the YJCA, to better reflect the intent of the whole Nunn Commission Report, as well as recommendation 23.

B. “Best Interests of the Child” as a basic principle for youth justice

The CCRC appreciates the incorporation of the Supreme Court ruling that “diminished moral blameworthiness or culpability” of young persons, depending on their age and level of development, is a fundamental principle of law. This recognizes that children are not adults, and children’s rights are different than adult rights; they combine protection and self-determination, based on children’s evolving capacities. This is one step in the process of making Canada’s domestic laws consistent with its ratification of the Convention on the Rights of the Child.

An additional amendment could take another essential step in this direction. The Supreme Court, in its judgment on the Omar Khadr case, makes reference to protecting the best interests of a child as a matter of fundamental justice.² As one of the core principles for children’s rights, Article 3 of the Convention states that:

*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.*³

In 2003, Canada was asked by the UN Committee on the Rights of the Child to integrate the best interests principle in revision of domestic laws that have an impact on children, including the juvenile justice system.³ Last year Canada made a commitment at the UN Human Rights Council to improve its implementation of international human rights agreements. This is a good opportunity to do so.

The current YCJA refers to the Convention in the preamble and the best interest principle in relation to one provision, placement in an adult prison. It should be a basic principle for all decisions that affect children. That would be consistent with the Supreme Court judgment that it is a matter of fundamental justice and consistent with the reference to the Convention in the preamble.

² In its determination that the government violated the principles of fundamental justice, the Supreme Court judgment cites as a reason: “*It was also known that Mr. Khadr was 16 years old at the time and that he had not had access to counsel or to any adult who had his best interests in mind.*” In an earlier judgment, known as the Baker case, the Supreme Court ruled that the best interests of the child had to be given priority in matters relating to immigration and refugee law.

³ In the Concluding Observations of the Committee on the Rights of the Child, after review of Canada’s second report, paragraph 25, the committee “recommends that the principle of the “best interests of the child be ... integrated in all revisions of legislation concerning children, legal procedures in courts, as well as in judicial and administrative decisions ... which have an impact on children. In paragraph 57 on juvenile justice, the committee explicitly names article 3 in its recommendation that Canada integrate all the principles of the Convention and international standards for youth justice into its youth justice system. Committee on the Rights of the Child. Concluding Observations of the Committee on the Rights of the Child: Canada, CRC/C/15/Add.215, 3 October 2003.

Recommendation: That Clause 3(2) of Bill C-4 be amended to add the “Best Interests of the Child” as a guiding principle that separates the youth justice system from the adult system under paragraph 3(1)(b) of the YJCA, along with recognition of the diminished moral culpability of children. The Convention is a guide for wording of the provision: “the best interests of the child shall be a primary consideration in all decisions affecting children.”

II. Pre-trial Detention

The Convention includes specific provisions with regard to detention of children. Article 37(b) states that: “*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.*” This provision is based on evidence that detention of children is not an effective way of helping children who need help and is often harmful for children.

The CCRC suggests that the provisions in Bill C-4 be revised to be consistent with the provisions of the Convention and other international principles of youth justice. The proposed “serious offence” criterion includes a wide range of offenses, including property offenses and all forms of assault, and children could be detained when they are charged, but not convicted, of a wide range of offences. This results in a situation where pre-trial detention could easily be used and potentially misused by police forces to arbitrarily “put away” troublesome young people. The proposed text does not reflect the principle of “last resort” and makes no provision for “the shortest appropriate period of time.”

The CCRC notes that, while the Nunn Commission Report recommended making section 29 stand on its own and include serious offences, it did not recommend this broad definition.

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.⁴ 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. We are confident that a thorough analysis would propose a more precise set of criteria to ensure that detention is only used as a last resort and for as short a time as possible.

A second area of concern is the uneven quality of services provided in youth detention centres across the country. Many are under-resourced and will be under great strain with the increased use of detention that is the predictable result of Bill C-4. A report on the Ashley Smith case by the New Brunswick Children’s Advocate suggested that the YCJA

⁴ *Government Response to the Standing Senate Committee on Human Rights Report, “Children: The Silenced Citizens; Effective Implementation of Canada’s International Obligations with Respect to the Rights of Children,” page 4.* Tabled in November, 2007.

be amended to include a guarantee that appropriate mental health and social services will be provided to young people in youth detention and correctional facilities.⁵

Recommendation:

1. That clause 4 of Bill C-4 and the definition of “serious offence” in clause 2 be amended to reflect the following:

- a. incorporate a clear statement of the Convention principle that “detention is to be used as a last resort and for as short a time as possible.”**
- b. more precise definition of the criteria, based on an assessment of the proposed text in comparison with international agreements Canada has adopted and best practices in international law on youth justice;**
- c. recognition of the state’s obligation to provide appropriate services to young people in youth detention services.**

III. Sentencing Principles

No evidence has been presented to show that deterrence is an effective strategy for young people. Adding denunciation is not consistent with the proposed recognition of the “reduced moral blameworthiness and culpability” of young people and the need to take into account the stage of development of each young person.

Recommendation: That clause 7 of Bill C-4 be amended to delete the addition of denunciation and deterrence, on the grounds that there is no substantial evidence showing that deterrence is effective and denunciation is inconsistent with Canada’s obligations under the Convention on the Rights of the Child.

IV. Treatment of Extrajudicial Measures and Sanctions

The committee should carefully consider the counter-productive impact of requiring police to keep official records of all extrajudicial measures and provide those to other police forces if there are subsequent charges. Often extrajudicial measures are used with the voluntary agreement of a young person before conviction, as a preferred route to long court processes that may not result in conviction. If these now become part of official records, a young person may be more reluctant to agree to them, especially in cases where it may be difficult for the crown to prove guilt.

Early and appropriate intervention is the overwhelming recommendation of all the major studies on how to protect the public by reducing youth crime. There is broad consensus that the increased emphasis on extrajudicial measures in the YCJA has been effective. The current YJCA provides that police may keep records, if they consider it appropriate. Requiring them to do so removes the flexibility needed for effective police work with young people. The proposed change is likely to be counter-productive.

⁵ *The Ashley Smith Report: A Report of the New Brunswick Ombudsman and Children’s Advocate on the Services Provided to a Youth Involved in the Youth Criminal Justice System*, p. 57.

A similar concern relates to the proposal in clause 8 regarding extrajudicial sanctions. Including them in the considerations for a custodial sentence reflects a punitive approach more than rehabilitation. If they are treated the same way as a finding of guilt, then there is less reason for young people to choose such sanctions. Their increased use has been one of the positive impacts of the YJCA. Extrajudicial sanctions are rarely offered more than twice and are available for minor offenses only; there is no justification for the proposed change in Bill C-4 and it is likely to have a negative effect.

Recommendation: That clause 25 of Bill C-4 be amended to delete the proposal to require police forces to keep a record of all extrajudicial measures, and clause 8 be amended to remove the reference to extrajudicial sanctions, on the grounds that these are counter-productive to the main objective of protecting the public through early and appropriate interventions for young people who get in trouble with the law.

V. Adult Sentences for Young Offenders

The CCRC appreciates that Bill C-4 complies with the Supreme Court judgment on reverse onus and puts the responsibility for proving that an adult sentence is necessary on the crown prosecutor, rather than requiring a young person to prove that an adult sentence is not appropriate.

Requiring crown prosecutors to consider adult sentences for all violent offenses and report to the judge why they are not recommending adult sentences, however, is an unnecessary complication of the YCJA and shows a bias toward long custodial sentences that is inconsistent with the basic principles for youth justice under the Convention on the Rights of the Child. This is especially true because the definition of “violent offences” in Bill C-4 is broadened to include behaviours that “create a substantial likelihood of harming another person.” Determining the “substantial likelihood for harm” includes an element of subjective judgement in cases that go beyond obviously harmful behaviours.

Allowing provinces to set different ages for consideration of adult sentences contravenes the basic provision for equitable treatment of all children in the Convention on the Rights of the Child. In 2003 Canada was asked by the UN Committee to review how it ensures equitable treatment of children in a number of areas, a request that has not been addressed in its third and fourth report to the committee. The federal government is obligated to ensure equitable treatment of all children; that needs to be part of Canada’s commitment to improve its implementation of international human rights agreements. Parliament should not pass a new law that enshrines inequitable treatment.

In 2003 the UN Committee on the Rights of the Child recommended that Canada amend its youth justice law to “*ensure that no person under 18 is tried as an adult irrespective of the circumstances or the gravity of his/her offence.*”⁶

⁶ Committee on the Rights of the Child. Concluding Observations of the Committee on the Rights of the Child: Canada, CRC/C/15/Add.215, 3 October 2003, paragraph 57a.

Recommendations: That clauses 11 and 18 of Bill C-4 be amended to:

- a. remove the requirement that crown prosecutors consider an adult sentence;
- b. ensure equitable treatment for all young people in Canada through use of consistent age levels in national legislation.
- c. make age 18 a consistent age across Canada for treatment as an adult in the criminal justice system.

VI. Place of Detention

The CCRC supports the proposed change to require that young people serve their sentences in youth facilities, separated from adult prisoners. This is consistent with a specific provision in the Convention, Article 37 (c).

Further specification is required as to what constitutes a youth facility. We note that conditions vary widely across the country and include some facilities that are labelled youth facilities but resemble adult jails. Article 37 (c) also states that young persons in prisons be treated “*in a manner which takes into account the needs of persons of his or her age.*” In keeping with the federal government’s responsibility to ensure equitable treatment of all children, steps should be taken to provide common standards and a mechanism by which children could appeal sub-standard treatment.

Recommendation: That the proposed change in clause 21 of Bill C-4 be supported and supplemented with a recommendation that the federal government, in consultation with provincial governments, develop common standards for what constitutes an appropriate youth facility and provide an effective mechanism for appeal in cases of sub-standard treatment.

VI. Publication of Names

The CCRC appreciates that Bill C-4 complies with the Supreme Court judgment regarding the onus of proof in the matter of publication of the names of convicted young persons by requiring that the prosecutor prove that publication is necessary for public safety, rather than requiring the young person to argue for non-publication. The broader definition of violent crime in Bill C-4, however, is a concern, along with the subjective nature and vagueness of the requirement to show that there is a “substantial likelihood” that the young person might commit another crime. We note that this applies to persons as young as 14.

There is overwhelming evidence that publication of a young offender’s name makes rehabilitation more difficult. More specific criteria are needed for proving that publication of the name would substantively contribute to public safety and that no other, equally effective measures could be used to provide short-term protection for the public, recognizing that rehabilitation of young offenders is the best long-term protection of the public.

Article 40.2.b. vii of the Convention states that every child has a 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 that Canada “ensure that the privacy of all children in conflict with the law is fully protected in line with article 40 (2) (b) (vii) of the Convention.”

Recommendation: That clauses 20 and 24 of Bill C-4 be amended to comply with Article 40 (2) (b) (vii) of the Convention on the Rights of the Child.

VIII. International standards for Youth Justice

For the information of the committee, below is the entire recommendation on youth justice Canada received in 2003 from the UN Committee on the Rights of the Child, after its second review of implementation of the Convention. It includes a list of the relevant international standards and matters that are not addressed in Bill C-4:

The Committee recommends 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;*
- (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.⁷*

⁷ Committee on the Rights of the Child. *Concluding Observations of the Committee on the Rights of the Child: Canada*, CRC/C/15/Add.215, 3 October 2003, paragraph 57.