Submission to

The Government of Canada
Department of Justice
39th Parliament

Regarding
The *Youth Criminal Justice Act*

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EXECUTIVE SUMMARY

The John Howard Society of Ontario and the John Howard Society of Canada respectfully submit the following analysis and recommendations for the Review of the *Youth Criminal Justice Act*. As an agency that provides services to young people during and after their involvement with the criminal justice system, as well as a range of crime prevention programs, we are uniquely positioned to comment on the challenges and benefits of the *Act.*

Our recommendations, all based on the research literature, focus on preventing and reducing the use of custodial sentences for youth. It is our considered opinion – based on consultation with practitioners in youth criminal law and a review of the recent academic literature – that the proposed amendments in Bill C-25 are contrary to good public policy and, in some instances, will actually degrade the effectiveness of the youth criminal justice system.

Recommendations

1. The Act must not be amended to include deterrence and denunciation as sentencing principles. The John Howard Society concludes that these principles are not supported by evidence, will not prevent crime or reduce re-offending, and may actually degrade the optimal operation of the *Act*.

2. Pre-trial detention must be used only if it is the least restrictive option for mitigating an assessed and specific risk to public safety.

3. Action must be taken – through improvements to the efficiency of the youth criminal court process and in cooperation with provincial and territorial authorities – to decrease the interval between arrest and sentencing or acquittal.

4. The imposition of adult sentences for young people must remain a rare exception. The onus to show that an adult sentence is necessary must rest with the Crown.

5. The federal government must increase funding for (a) primary crime prevention programming; (b) community-based extrajudicial measures and sanctions; and (c) research into youth crime.

6. Any amendments to the YCJA should be (a) evidence-based, (b) targeted at reduced delays in the court process; (c) aimed at decreasing the use of custody for young people; and (d) at increasing the use of evidence driven community-based alternatives.

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INTRODUCTION

1. Purpose

The John Howard Societies of Ontario and Canada are pleased to make this submission to the Department of Justice. As an agency with decades of experience working with youth involved in the criminal justice system, as well as in communities affected by crime, we have a unique and ideal vantage point from which to consider the success and challenges of the *Youth Criminal Justice Act* (*YCJA*).

It is our position that the *YCJA* led to many positive changes to the youth criminal justice system. However aspects of the *Act's* implementation as well as the recently proposed amendments give us significant cause for concern due to the significant negative impact these issues do – or have the potential to – have on youth in contact with the criminal justice system.

We have chosen four issues on which to focus our comments in this submission. We conclude with a set of recommendations, all based on the research literature and consistent with the mission statement that guides the work of the John Howard Societies of Ontario and Canada and is, we are certain, shared by the Department of Justice:

"Effective, just and humane responses to crime and its causes."

2. The role of John Howard Society in reviewing the *YCJA*

Through the work of 65 offices throughout Canada, the John Howard Society helps youth at risk of becoming involved in the criminal justice system, together with their families. In Ontario alone, thousands of youth clients are assisted by 18 affiliate offices. Staff and volunteers are very aware of the needs in their communities and provide unique, local programming.

A primary focus of the Society is reaching out to those youth at risk of becoming involved in crime with our crime prevention programs. Our affiliates provide a range of school and community-based programs to target risk factors, such as drug and alcohol programs, family and individual counseling, employment services and bullying prevention. The importance of early intervention and primary crime prevention in improving public safety will be discussed throughout this submission. Our institutional workers work with incarcerated youth to prepare them for safe and effective re-integration. We continue to provide services after release to assist young people to overcome social challenges like finding housing and employment.

The Society's policy units locate and analyze the peer-reviewed research in criminal justice, including youth justice. We continually evaluate the efficacy of our programs

and services, and advocate for the inclusion of a 'best practices' approach in Canada's criminal justice policies.

a. Principles and Values that Guide Our Analysis

As a matter of principle, the John Howard Society is drawn to evidence-based research that has been shown to reduce crime – in the first instance – and reduce the rate of re-offending by persons released from prison. Taking our inspiration from John Howard himself, we advocate for a prison system that does not make *worse* those who have been determined by due process to be temporarily unfit to live as pro-social community members.

Our long experience – and the burden of scientific evidence – convinces us that punishment does not prevent or reduce crime. Nor does punishment promote rehabilitation. In truth, punishment "tends to have the opposite effect by increasing the likelihood that people will commit crimes."[1] We understand that society as a whole expects to see some punitive consequence as a means to confirm social norms and expectations, but we contend that there can be no justification for punishments that exceed these social goals. Punishment is inherently destructive and expensive and – accordingly – should only be used with the utmost restraint and in accordance with fundamental principles that are coherent and thoughtfully applied so as to minimize unintended and harmful consequences. Punishment that deepens already existing harms – be they physical, mental, familial – undermines community connections or interferes with the educational treatment or pro-social opportunities normally available to individuals is to be avoided. The criminal justice system ought to be driven by an ethic of "do less harm" to persons in conflict with the law.

Punishment does not relieve us – the community – of our collective responsibility to care for the young person and contribute to their pro-social growth as healthy and responsible citizens. We cannot justify removing from a young person in conflict with the law those supportive elements of family and community life that we acknowledge are essential for the full development of all young persons. The Youth Criminal Justice System can enhance public protection only to the extent that it facilitates safe and effective reintegration of a young person back into the community. Custody alone offers very limited public protection and may even *increase* a young person's risk of re-offending. We have found no evidence to contradict – and much evidence to confirm – the conclusion of the National Advisory Commission on Criminal Justice Standards and Goals that "the prison, the reformatory, and the jail have achieved nothing but a shocking record of failure.

[1]Paul Redekop, Changing Paradigms: Punishment and Restorative Discipline (Waterloo: Herald Press, 2008) 54.

There is overwhelming evidence that these institutions create crime rather than prevent it."[2]

We consider the *Youth Criminal Justice Act* to exemplify evidence-based policy in as much as it recognizes that youth are still learning and are less responsible than adults. Youth deserve special attention under criminal justice legislation. Indeed, the very young should not be brought under criminal justice legislation at all, but managed through child welfare legislation. The recognition of immaturity should be reflected as the primary focus of the youth justice system by ensuring the greatest restraint in the use of punishment and avoidance of all sentencing practices that are not grounded in the principle of proportionality and buttressed by evidence-based best practices. The John Howard Society, therefore, deplores the present desire to include deterrence and denunciation as principles of sentencing in the *YCJA*. The introduction of these values will not – according to the evidence – produce the desired results and may even worsen the chances of rehabilitation, which is and ought to be the articulated primary goal of youth criminal justice legislation.

3. A Brief History of the *YCJA*

A Parliamentary Committee in 1997 recommended that the youth criminal justice system be changed to reduce the use of custody and increase the use of community-based sanctions for youth.[3] The Committee, together with academics and provincial officials, recognized that custody was overused for minor offences, expensive and ineffective at reducing re-offending by youth.[4]

The *YCJA* was introduced with the clear goal of decreasing the use of custodial sentences for young people. The Act explicitly strives for the increased use of non-custodial sanctions for non-serious crimes, increases in consistency, and clearer guidance to the court around sentencing.[5] While the *YCJA* was initially presented as a 'tough on youth crime' approach, the Act as intended to reduce the impact of punitivism in the youth justice system.[6]

In the five years since the proclamation of the Act, positive changes have already begun to be seen. The use of community-based sanctions has increased[7] and the

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[2] National Advisory Commission on Criminal Justice Standards and Goals. Reports. (Washington: Unites States Government, 1973) 597.
[3] Discussed in Anthony Doob & Jane Sprott. "Punishing Youth Crime in Canada," Punishment & Society. 8.2 (2006): 224
[4] Anthony Doob & Jane Sprott.
[5] Raymond Corrado et al., "Should deterrence be a sentencing principle under the *Youth Criminal Justice Act?*," Canadian Bar Review. 85 (2007)
[6] Anthony Doob & Jane Sprott.
[7] Nicholas Bala and Sanjeev Anand. "The first months under the Youth Criminal Justice Act: A Survey and Analysis of Case Law," Canadian Journal of Criminology and Criminal Justice. 46.3 (2004)

number of youth admitted to sentenced custody has declined significantly.[8] However recent proposed Amendments, as well as inconsistencies and gaps in the implementation of the Act, give rise to concern.

AREAS OF CONCERN

1. Denunciation and Deterrence as Sentencing Principles

The YCJA preamble meaningfully improved the youth criminal justice system by clarifying the intended purpose, goals and priorities of the court's approach to youth crime. Specifically, it acknowledged that behavioural concerns in young people cannot be addressed solely through the criminal justice system, directed the court to use incarceration with restraint, and explicitly emphasized the use of "meaningful consequences" and rehabilitation over punishment. The Supreme Court found unanimously that general deterrence and denunciation as sentencing principals were deliberately omitted in the *YJCA*.[9]

However, Bill C-25 *An Act to Amend the Youth Criminal Justice Act*, introduced in November of 2007, seeks to add general deterrence and denunciation as sentencing principles. To this the John Howard Society strongly objects. These amendments are not supported by evidence, will not prevent crime or reduce re-offending, would inevitably increase in the use of custodial sentences and may actually degrade the operation of the *Act*.

a. Denunciation

Denunciation – *i.e.,* "the communication of society's condemnation of the offender's conduct" – is "a symbolic, collective statement that the offender's conduct should be punished for encroaching on [our] basic code of values." [10] Denunciation in sentencing derives from a retributive impulse to express condemnation. It is typically reserved for crimes that are particularly offensive and, when applicable, usually trumps the rehabilitation principle.[11] Denunciation – as a sentencing goal – is only as effective as the publicity of the condemnation.[12] It is educative in nature and, logically, is aimed at *preventing* offending by "sending the signal" that certain behaviours will be met with the condemnation of the community against which the offense took place. This, at least, is the theory upon which denunciation is held to

[8] Statistics Canada. "The Daily," 14 March 2007
[9] Standing Committee on Justice and Human Rights, "Evidence," 7 December 1999: 1209-1210
[10] Nicholas Bala, "Canada's Youth Criminal Justice Act after Five Years: A Modest Success in Changing Responses to Young Offenders," (prepared for the British Columbia Youth Justice Provincial Forum, February 2008) 36-37.
[11] Personal communication: Professor Anthony Doob, Centre for Criminology, University of Toronto, July 15, 2008.
[12] *Sentencing Reform: A Canadian Approach* (Report of the Sentencing Commission, (Ottawa: Minister of Supply and Services, 1986) 142.

operate. Like its sibling principle, deterrence, it looks backward to the crime so denounced and forward to the prospect of altering the future behaviour of others. Denunciation and deterrence share the status of seeming to be intuitively obvious qualities of a criminal justice system: so intuitively obvious that they resist the evidence-based finding that they are ineffective and may – as the evidence reveals – do more harm than good. Not only is denunciation ineffective, it may actually make *worse* what is already, in its nature, bad.

The re-inclusion of denunciation to the Youth Criminal Justice Act is constituent of a regression toward a 'criminal law' approach from a 'child welfare' approach. The YCJA, in contrast, envisions that a judge will hand down a sentence grounded in principles of rehabilitation and reintegration – and that the sentence will be proportionate to the seriousness of the offense. There are, as a practical matter, two parallel if separate youth justice systems in Canada: the political youth justice system (as seen and discussed in the political and media realm) and the operational youth justice system (the system as it operates on any given day). The constitutional separation of powers in our federal system – in which youth criminal justice legislation is federal but administration is left to the provinces – has produced wide differences in the way the legislation is translated into practice. As Doob and Sprott observe, a gap has opened between the political youth justice system — which is the federal concern — and the operational youth justice system, over which the provinces preside.[13]

It is our analysis that it is the inability, or unwillingness, of decision-makers to make hard choices about what the goals of the youth justice system ought to be *in the operational realm* that have contributed to the current public ambivalence *in the political/media realm* toward how the youth justice system should operate

On the one hand, the YCJA has been successful at reducing numbers of incarcerated youth and facilitating successful reintegration – as was its intended purpose. Ironically, this has given rise to a public perception that the youth criminal justice system is lenient.[14] Simplifications of youth crime – such as those retailed in the political/media realm – offer a "cake and have it too" analysis by which legislation targeted at youth offending should be able to denounce, deter and punish while also rehabilitating.[15] Decision makers – in our view – should resist unprincipled simplifications and clearly prioritize values of rehabilitation.

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[13]Anthony Doob and Jane B. Sprott, "Youth Justice in Canada," in Michael Tonry and Anthony N. Doob (eds.) Youth Crime and Youth Justice: Comparative and Cross-National Perspectives (Crime and Justice Volume 31) (University of Chicago Press, 2004), p. 188.

[14]For example, "Let the time suit the crime, regardless of age," The Truro Daily News, 13 August 2008. But also see the more critically balanced piece in The Peterborough Examiner, "Critics blast MP's 'scare tactics': Pamphlet paints picture of youth crime," by Brenden Wedley, 14 August 2008.

[15]See Sukvinder Kaur Stubbs, *et al.,* "Young People who Offend," in Crises in Criminal Justice: A Report on the work of the All-Party Parliamentary Penal Affairs Group, 2007/2007 (London: Prison Reform Trust, 2008), pp. 67-70.

Public opinion – as expressed in fear-mongering "if it bleeds, it leads" headlines – seems to prefer harsher sentences that denounce and deter. But public opinion on criminal justice issues is susceptible to education – and when this happens we often observe black and white attitudes dissolve into shades of gray as deeper information displaces ignorance and moral panic. An enduring problem for policy makers and their public trustees in the political realm is that crime gets much more media exposure than sentencing and, accordingly, a discrepancy opens between the public's perception of criminal sanctions and the actual sanctions themselves. Amending the YCJA to address the *perception* will do nothing to change the *reality.* Experiments to verify whether there exists a relationship between the degree of blame attached to an offense by members of the public, and their actual knowledge of the severity of sentences for that particular offense, have repeatedly failed to demonstrate a connection.[16]

Public opinion, we are told, may be pushing for tougher sentences. But when public opinion surveys permit respondents to reflect on the actual facts and details of sentencing policies, expressed preferences begin to migrate toward principles of restitution, restoration and proportionality.

Table: Public ratings of the importance of various sentencing purposes, Canada, 2005[17]

Sentencing Purpose	% respondents identifying sentencing objective as				
	Single most important purpose (%)	Very important (%)	Somewhat important (%)	Not very important (%)	Not at all important (%)
Make offenders acknowledge and take responsibility for crime	27	84	14	2	0
Make offenders repair the harm caused by the offense	13	66	27	4	1
Individual deterrence	12	63	26	7	3
Satisfying the victim that "justice was done"	9	59	32	7	2
General deterrence	9	51	38	7	2
Incapacitation	9	40	41	11	3
Denunciation of the crime	3	39	41	13	4

By summing the columns "single most important" with "very important" a clear preference is apparent. Note that the highest levels of support emerge for restorative sentencing options while the lowest levels of support are for punitive objectives of denunciation. These findings suggest that Canadian attitudes have matured beyond

[16]See Julian V. Roberts Nicole Crutcher and Paul Verbrugge, "Public Attitudes to Sentencing in Canada: Exploring Recent Findings," Canadian Journal of Criminology and Criminal Justice, 49:1 (January 2007), pp. 75-107.
[17]Roberts, Crutcher & Verbrugge.

punitive approaches and are trending toward a restorative preference to sentencing – consistent with public opinion findings from other English-speaking jurisdictions.[18] In sum, the expressed preference for harsher sentences may be a mile wide, but only an inch deep.

b. Deterrence

> "There is no better established rule in criminology than that it is not the severity of punishment that deters, but its certainty."
> ~ George Bernard Shaw[19]

The use of general deterrence as a sentencing principle is deeply problematic as a matter of evidence. Not only is it without support in the academic literature as a means of reducing crime or improving public safety, it will also produce an inevitable, negative impact. It also contravenes fundamental legal principles, international human rights instruments and even thoughtful common sense.

i. Lack of research evidence

John Howard Society workers across the country have long realized that sentencing severity has no meaningful general deterrent value for young people, or anyone for that matter. People who commit crimes simply do not consider the length of the sentence they might face when making this often split-second decision. For young people, this is even more valid; a consequence of the young mind's characteristic immaturity, spontaneity and sense of infallibility.

The social development research literature supports this, particularly for the very people that the Bill C-25's Amendments are meant to target: youth who commit serious crime. A large scale meta-analysis from the Solicitor General's office in 2002 concluded that there exists no correlation between recidivism and type of sanction.[20] Specifically, the rates of recidivism are the same regardless of whether a person received an institutional or community-based sanction. Worse, the analysis provides a tentative indication that increases to the length of incarceration correlate with slightly greater rates of recidivism. The authors warn that;

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[18]Mike Hough and Julian V. Roberts, "Youth Crime and Youth Justice: Public Opinion in England and Wales," Institute for Criminal Policy Research (April 2003)

[19] George Bernard Shaw. "Preface" in Sydney and Beatrice Webb. English Prisons under Local Government (London: Fabian Society 1922)

[20] Paula Smith, Clair Goggin & Paul Gendreau, "The The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences. (Ottawa: Solicitor General Canada, 2002)

> "there is absolutely no cogent theoretical or empirical rationale for criminal justice sanctions to suppress criminal behaviour in the first place. At best, most criminal justice sanctions are threats (e.g., "do something unspecified sometime in the future and something may happen"). To those who believe that criminal justice sanctions in general or threats in particular are effective punishers or negative reinforcers, we advise they consult the relevant behaviour modification literature or any experimental learning text for supportive evidence. There is none."[21]

The concept of deterrence is based in rational choice theory; the idea that people assess the likely cost and benefit outcomes when making decisions about how to act. However, the evidence about whether young people actually use rational choice decision-making process when faced with the temptation to engage in anti-social behaviour is extremely unclear.[22] Corrado and his colleagues confirm that their research "underscores that seeking deterrence for young offenders is a misguided venture and of little value."[23] A classic study on the decision to recidivate found that few violent, incarcerated youth reported that – before committing a crime – they thought about their chances of being caught, the impact on their family or the potential sentence they would receive if caught.[24]

There is, in fact, much literature to suggest that the very issues that are correlated with criminality in young people (such as family conflict, school disruption and substance abuse) are also correlated with high impulsivity, low self-control, mental health concerns and addictions; all issues that reduce capacity to perform balanced cost-benefit calculations.[25] For example, the use of alcohol and drugs is disproportionately high in youth prisoner samples and is reliably associated with a reduced capacity for rational decision-making.

The impact of past legislative and policy changes also provides us with plain evidence that people do not consider sentencing principles when making the decision to commit a crime. For example: the homicide rate in Canada has been generally declining since the mid 1970s despite capital punishment being effectively abolished in 1976;[26] Californian counties which enforced the notorious "Three Strikes" law did not show any decline in crime compared to

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[21] Paula Smith, Clair Goggin & Paul Gendreau.
[22] Raymond Corrado et al.
[23] Raymond Corrado et al.
[24] Anne Schneider. Deterrence and Juvenile Crime: Results from a National Policy Experiment. (New York: Springer-Verlag, 1990)
[25] Raymond Corrado et al.
[26] Statistics Canada. 2006. The Daily. "Homicides." November 8. http://www.statcan.ca/Daily/English/061108/d061108b.htm (Accessed 13 August 2008)

more lenient counties;[27] and, American states that use the death penalty actually show consistently higher rates of homicide than those that do not.[28] The Department of Justice itself declares: "If incarceration was an effective deterrent, the U.S. would have one of the world's lowest crime rates. Retribution by the criminal justice system has been demonstrated to be an ineffective deterrent."[29]

It would appear that the only recipients of the general "message" of sentencing decisions are those concerned about courts being lax on crime. And while a message of punitivism may garner votes, it does not increase public safety. We submit that youth must not face undue incarceration or punitiveness for short-term vested political advantage in the absence of evidence that deterrence and punitiveness reduce crime or re-offending.

ii. Contravention of international human rights instrument

The inclusion of general deterrence is problematic from the perspective of fundamental principles of International law as it will result in sentencing practices that are based, at least in part, on the thoughts and actions of others. The authors of *Justice for Children and Youth* writes:

> "Canada's international obligations under the *UNCRC* and the *YCJA* and its obligations to comply with international standards in the administration of justice for young people require Youth Justice Courts to impose sentences that ensure the care and protection of youthful offenders, that avoid the detrimental effects of detention as much as possible, that are proportional above all, and that consider the well-being of the individual offender. International standards do not allow any room for using a young person, or his or her sentence, as a tool to send a message to others.[30]

Indeed, instruments such as the *Beijing Rules*,[31] the *UN Convention on the Rights of the Child*[32], and the *UN Rules for the Protection of Juveniles Deprived of their*

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[27] Mike Males & Daniel Macallair. "Striking Out: The Failure of California's Three Strikes and You're Out Law." Stanford Law and Policy Review. 11.1 (1999):65-74

[28] Ernie Thomson. "Deterrence Versus Brutalization: The Case of Arizona" Homicide Study. 1.2 (1997): 110-128

[29] Department of Justice. "Website: Myths and Realities about Youth Justice." http://canada.justice.gc.ca/eng/pi/yj-jj/information/mythreal.html#r10#r10 (Accessed 13 August 2008)

[30] The Canadian Foundation for Children, Youth and the Law. "Factum of the Intervener" in SCC File Nos: 30512 & 30514 (R. v. B.V.N and R. v. B.W.P.)

[31] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted 1985

Liberty,[33] mandate that youth sentences be minimal, proportional and in the child's best interest. The decision to impose a harsher sentence for one young person in order to prevent potential crime by others openly contravenes these principles.

iii. Inevitable Negative Impact

A fundamentally important reason to keep deterrence out of the *YCJA* is that the principle is inconsistent and incompatible with rehabilitation, and therefore leads to great and unjust judicial variance. Under the *Young Offenders Act (YOA*), both deterrence and rehabilitation were included as sentencing principles without prioritization and this led to a confusion and inconsistency across youth criminal court decisions.[34] Professors Doob and Bealieu concluded that this high variance was due to judges having to give precedence to one of these irreconcilable goals.[35]

The *YCJA* sets out clearly, in its *Preamble* and *Declaration of Principle*, that the objective of the legislation is to rehabilitate and reintegrate young people who commit crime. These principles will be contravened if deterrence and denunciation are added as sentencing principles through Bill C-25, re-creating the flaws and confusion that underlay the youth criminal justice system prior to 2002.

Another inevitable effect of adding deterrence to the *YCJA* sentencing principles will be an increase in the use and length of custodial sentences. Madame Justice Charon in a recent Supreme Court decision wrote that "unlike some other factors in sentencing, general deterrence has a unilateral effect on the sentence. When it is applied as a factor in sentencing, it will always serve to increase the penalty or make it harsher." [36] To the extent that general deterrence will increase the length and use of custodial sentences – thereby undermining the prior principle of rehabilitation – the John Howard Society deplores the re-introduction of deterrence as a sentencing principle in the YCJA.

Our position has long been that custodial sentences should only be used when they are (a) the least restrictive option and (b) for young people who pose a significant risk to public well being. Canada continues to incarcerate young people at rates higher than any Western democracies including the United States[37] – despite the overwhelming research demonstrating that incarceration fails to reduce the

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[32] United Nations Convention on the Rights of the Child. Adopted 1989
[33] United Nations Rules for the Protection of Juveniles Deprived of their Liberty. Adopted 1990
[34] Raymond Corrado et al.
[35] Anthony Doob & Lucien Beaulieu "Variation in the Exercise of Judicial Discretion with Young Offenders." Canadian Journal of Criminology. 34 (1992) 35-50
[36] R. *v.* B.W.P.; R. *v.* B.V.N., [2006] 1 S.C.R. 941, 2006 SCC 27
[37] Department of Justice. Website: "YCJA explained." http://justice.gc.ca/eng/pi/yj-jj/repos-depot/over-aper/2010001g.html. (Accessed 13 August 2008).

likelihood of youth recidivism or promote public safety.[38] The amendments proposed in Bill C-25 are incompatible with the stated goals and principles of the *YCJA*: to reduce over-reliance on incarceration for non-violent young people.

In summation, it is the position of the John Howard Society that:

(a) crime prevention is essential to the long-term optimal functioning of Canadian society but that crime prevention is best assured by addressing the underlying causes of youth crime. Fine-tuning amendments to the YCJA, particularly including denunciation and deterrence, will have limited – potentially regressive – consequences on the current success of the Act in the operational realm;

(b) research into public understanding on the sentencing of young persons – typically driven by media-inspired moral panic – reliably demonstrates that public opinion consistently *overestimates* the incidence and violence of youth crime and persistently *underestimates* the harshness of the criminal justice system's response, thereby calling into question the extent by which amendments to the YCJA should be influenced by public preferences;

(c) all criminal proceedings against youth should be grounded in, and founded upon, the value of rehabilitation trumping denunciation and deterrence – given the weight of evidence showing that these principles do not, in fact, work as intended and that in the criminal justice system are just as likely to *increase,* rather than reduce, the likelihood of re-offending by young persons;

(d) wherever and whenever possible, judges have recourse to alternative measures that divert young persons from the criminal justice system – and that the Government of Canada, in collaboration with provinces and territories, adequately fund evidence-based community-centered programs grounded in 'best-practice' models of crime prevention, restoration and restitution;

(e) only evidence-based deliberation on the facts of youth offending should – in the context of clearly stated and internally coherent sentencing principles – inform amendments to the youth criminal justice system; and further,

(f) the primary obstacle to evidence-based justice policy, where youth are concerned, is the predilection of legislators to yield to ill-informed public preferences in the belief – for which there is also no evidence – that punitive legislation will ever satisfy those who promote deterrence as the cornerstone of youth corrections.

[38] Smith, Goggin & Gendrea.

2. Pre-trial detention

The *YCJA* – by design – explicitly seeks to reduce the number of youth in custody at the pre-trial stage by making a number of positive changes to release provisions. The Act directs the Court to use pre-trial detention as the exception to the presumption of release and to refrain from detaining a young person for social measures such as mental health and child welfare. [39] Furthermore, the *YCJA* holds that – as a matter of principle – police are to presume extrajudicial measures to be adequate for holding a young person accountable for a first-time, non-violent offence.

Unfortunately, while the rate of youth in custodial sentences has decreased significantly since the implementation of the *YCJA*, the number of youth incarcerated on remand continues to be unacceptably high and even increasing,[40] in step with the massive and growing rates of adults on remand.[41] In recent years, admissions to remand have accounted for three quarters of all young people admitted to custody.[42] Given the evidence that an accused person, particularly if they are a person of colour, stands a greater chance of conviction and harsher sentence if they have been detained pre-trial,[43] the importance of not detaining unnecessarily is paramount.

a. Remand as punishment

Regrettably, many local John Howard Societies report that pre-trial detention decisions in their area already appear at times to be made with the goal of modifying a young person's behaviour, *prior to their conviction of any crime.* Youth courts are no doubt tempted to give youth a "sharp, short, shock" or "lesson" immediately after their arrest, however this practice is a misuse of pre-trial detention as it is based in an intention to punish, not improve public safety.[44]

The use of custody prior to conviction can serve only two functions in a criminal justice system that values human rights: to prevent a person who has been identified as very dangerous from harming others whilst awaiting trial, and to ensure the court attendance of someone who has shown themselves unlikely to appear in court on a serious charge. The Department of Justice notes that "the basic policy underpinning of the provisions of the *Criminal Code* and the *YCJA* is that pre-trial detention is a highly intrusive measure that should be used with restraint and only if it is the least restrictive alternative."

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[39] Section 29(2)
[40] Statistics Canada." Youth Custody and Community Services in Canada, 2005/2006." Juristat. 28.8 (2008)
[41] John Howard Society of Ontario "Remand in Ontario" (2007)
[42] Statistics Canada (2008)
[43] Varma, Kimberly. "Exploring 'youth' in court: An analysis of decision-making in youth court bail hearings." Canadian Journal of Criminology. 44(2) (2002): 143-164
[44] Nicholas Bala. Youth Criminal Justice Law. (Toronto: Irwin Law, 2003) 254

The Act and the Courts have very clearly determined that pre-trial detention is not to be used as a form of punishment or welfare protection.[45] Young Canadians have the constitutional right to not be punished for a crime for which they not been found guilty. The right not to be arbitrarily or unjustly detained is further supported and protected in the Charter and a variety of International human rights instruments.[46] A *YCJA* that respects the principles of fundamental justice cannot include provisions for punishing a young person who has not been convicted of a crime. Public outrage is no justification for suppressing a person's rights and dignity.

b. C-25 and Nunn commission

In contrast to the underlying principles of the *YCJA*, the proposed C-25 Amendments seek to expand the use of pre-trial detention. This amendment was a direct response to certain recommendations of the Nunn Commission in Nova Scotia, which investigated the circumstances of a tragic death caused by a young person who had been released on bail. [47] Commissioner Nunn went so far as to conclude that the *YCJA* was the "real culprit" in this sad event, and argued for the increased opportunity to hold youth in pre-trial detention.

As is so often the case after tragic and senseless deaths, the response to the Theresa McEvoy tragedy was to seek increased punitiveness in the criminal justice system. But this response is not a thoughtful one. New Brunswick's Ombudsman observes that "unfortunately, Bill C-25 appears to be something of a knee-jerk reaction to isolated incidents of violent youth crimes with tragic consequences."[48] Bad cases make bad law.

For many decades, the John Howard Society has struggled at such times to keep policy-makers focused on the research evidence when an aroused public calls for 'knee-jerk' punitive responses unsupported in principle or evidence. The fact remains that making laws "tougher" does little to improve community safety; there is a substantial gap between the rhetoric of a youth crime crisis, and the actual rates of youth offending.[49] For example, one quarter of all charges under the *YCJA* arise from breach of probation conditions or failure to obey a court order, that is, crimes that in themselves pose no immediate threat to public safety.[50]

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[45] Bill C-25 *An Act to Amend the youth Criminal Justice Act*
[46] Charter Section 9
[47] Nunn Commission of Inquiry. "Spiralling out of Control: lessons learned from a boy in trouble. (Halifax: Province of Nova Scotia, 2006)
[48] New Brunswick Ombudsman & Child and Youth Advocate. "Ashley Smith: a report on the services provided to youth involved in the youth criminal justice system." (Fredericton: OOCYA, 2008)
[49] Timothy Hartnagel. "The rhetoric of Youth Justice in Canada." Criminal Justice. 4.4 (2004)
[50] Nicholas Bala. (2003) 60

Investigations into the deaths of young people in custody, such as Ashley Smith and James Lonnee, provide much-needed balance to this discussion. The Inquest and Ombudsman reports in these cases speak to the profoundly negative impact of custodial settings on young people, particularly those with mental health concerns and developmental needs.[51] Moreover, they describe the dangerous spiral of pre-trial detention and institutional charges.[52]

The recent report of the Ombudsman of New Brunswick on the Smith tragedy argues that rather than changing the pre-trial detention process, the judiciary and provinces should develop and use community-based interventions that are shown to work.[53] Fortunately, there is evidence that – when given clear information – Canadians are more likely to support criminal justice approaches based on principles rehabilitation over punitivism.[54]

c. Delays and inconsistency

Periods of pre-trial detention also continue to be reprehensibly long due to inefficiencies in the court process and to include little remedial programming. Local John Howard Society staff members and volunteers throughout the country who meet with remanded clients decry this wasted "dead time," during which young prisoners face unreasonably high security classification, little meaningful programs or opportunities for self improvement, and endless tedium.

One youth court judge has drawn the connection between inappropriately didactic bail decisions and the profound delays in the court system. Judge Harris suggests that bail courts which are making inappropriately harsh decisions may be legitimately concerned that delays in the court process will mean that any meaningful deterrent effect of an eventual sentence will be lost.[55]

While much discussion of the Nunn Commission report has focused on the increase of pre-trial detention, the Commissioner also identified significant concerns in the youth criminal court system including considerable delays between arrest and sentencing or acquittal. The Commission's report made a series of recommendations for improvement in court technologies, facilities and communication, as well as the establishment of fully-programmed attendance centres and bail supervision programs.[56] The John Howard Society supports the recommendations of the

[51] Toronto Star. "Ontario prison system partly to blame for boy's death: inquest". 23 April 1999 and New Brunswick Ombudsman & Child and Youth Advocate.
[52] New Brunswick Ombudsman & Child and Youth Advocate.
[53] New Brunswick Ombudsman & Child and Youth Advocate.
[54] Hough & Roberts
[55] Harris, Peter, Weagant, Brian, Cole, David and Weinper, Fern. "Working "in the trenches" with the YCJA." Canadian Journal of Criminology and Criminal Justiice. (2004) 46(3): 375
[56] Nunn Commission of Inquiry.

Commissioner which would reduce delays in the court process, decrease the use of custody for young people and increase the use of safe community-based alternatives.

Unfortunately, Bill C-25 did not take up Commissioner Nunn's 19 recommendations that focus on streamlining the administration of youth justice, instead selecting only those 6 recommendations that aim to "toughen" the *YCJA* by expanding the use of pre-trial detention.[57] Without attention to delays in the youth court process, and consequent excessive pre-trial detention, youth will continue to waste weeks and months in the unsafe, unhealthy and unproductive environment of custodial detention. It is difficult to demonstrate that there is any benefit to Canadian communities as a result. As noted in The Beijing Rules, "The danger to juveniles of "criminal contamination" while in detention pending trial must not be underestimated."[58]

Another of the challenges of the youth criminal justice system has been the effort to have young people treated similarly by courts across the country. Under the *Juvenile Delinquents Act (JDA*) and *YOA*, there was significant judicial variance in the use of custody, sentencing decisions and the use of the criminal court to address issues such as welfare and drug treatment.[59] One of the goals of the YCJA was to provide sufficient guidance to increase consistency between courts and across the criminal justice system.

However, there remains significant variance and inequality in the ways that pre-trial detention decisions are being made throughout Canada. While s. 15 of the Charter holds that Canadians have the right to equal treatment regardless of where they live in the country,[60] practitioners are finding a troubling lack of equality and consistency in pre-trial detention decision-making.

3. Adult sentences

The Canadian public and their legal system have long taken a different view of youth and adult crime, on the basis that young people have less moral culpability.[61] Young people have profoundly different ways of making decisions and lack the moral judgment and intellectual capacity to fully understand their consequences of their actions. As a result, young people must face a separate justice system because of their diminished responsibility under the law.

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[57] Parliamentary Information and Research service. "Legislative Summary: Bill C-25, An Act to Amend the Youth Criminal Justice Act" (Ottawa: Library of Parliament, 2007)
[58] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted 1985
[59] Kimberly Varma.
[60] Canadian Charter of Rights and Freedoms. s.15
[61] Nicholas Bala. (2003)

However, from punitive attitudes towards crime in the 1990s evolved a new idea that youth who commit serious crimes should be treated as adults. The *YCJA* corroborated this idea by explicitly setting out offences for which an adult sentence is presumed to apply and lowering the age at which adult sentences could apply. This was seen by many as the lone aspect of 'tough on crime' punitivism in the new legislation.

This provision was quickly found to be unconstitutional,[62] a decision about which the current Attorney General stated his "disappointment."[63] The John Howard Society strongly objects to presumptive adult sentences for youth, and indeed any amendments that erode the principle that youth should face a distinct and bespoke justice system. For young people, more than anyone, the criminal justice process should be grounded in rehabilitation, not punitivism.

a. Canadian and International Law

The Supreme Court found it is a principle of fundamental justice that youth are entitled to the presumption of diminished moral blameworthiness or culpability and should not have onus to prove their own right to the protections that their age entitles them.[64] Indeed, the YCJA itself emphasizes, in the Preamble, the need for the youth criminal justice system to reflect the unique needs and challenges of young people. The Ontario Coroner's Inquest into the brutal death of James Lonnee in custody also recommended that young people always be dealt with by a distinct youth justice system.[65]

The United Nations Convention on the Rights of the Child states that young people are entitled to special protections, should have their best interest be the primary consideration of the court, and face sentences and dispositions which are appropriate to their age and need for reintegration.[66] The Beijing Rules also require that youth justice systems be separate and prioritize the well-being of the young person.[67] Canada is a signatory to this important human rights instrument and thus obligated to uphold its principles.

Though it is not at issue in the current *YCJA*, it is worth repeating that young people should never be incarcerated together with adult prisoners. Youth in adult institutions face extremely high risks of sexual assaults, assaults by staff, weapon attacks and

[62] Nicholas Bala and Sanjeev Anand.
[63] The Hon. Robert Nicholson, "Department of Justice Press Release," 16 May 2008.
[64] R. *v.* D.B., 2008 SCC 25
[65] Toronto Star.
[66] United Nations Convention on the Rights of the Child: Preamble and Articles 3 40
[67] The Beijing Rules

suicide.[68] Holding young people in prisons for adults contravenes international human rights documents relating to youth justice.[69]

b. Negative Impact and Lack of Public Safety Benefits

The John Howard Society strongly opposes any increases in the incarceration of Canadians. Treating young people like adults at any stage of the criminal justice process has as its only effect an increase in the harshness of the outcome and likelihood, or length, of a custodial sentence. To this we object because increased incarceration neither improves public safety nor improves the situation of prisoners.

There is simply no evidence that the broader community benefits from adult sentences. In fact, research on a massive sample of youth from Florida showed that youth who are transferred to the adult system are more likely than their matched counterparts in the youth justice system to re-offend, re-offend sooner and commit more and more serious offences.[70] This is further evidence of the utter lack of deterrence effect of incarceration on youth, as discussed above.

Disturbingly, youth who are Aboriginal or people of colour are much more likely to be sentenced as adults.[71] Nicholas Bala notes that "adult sentencing for the most violent of young offenders may be justified on accountability principles, but it will not produce a safer society."[72]

4. Funding needs

Finding out "what works" to reduce youth crime requires attention to the research on factors that are associated with both early-onset and later criminal behaviour in youth, as well as programs that can be shown, through evaluation, to prevent crime or re-offending.

There is much evidence that children who experience disruptive, discordant and negative family functioning develop low self-control and are more likely to engage in criminality.[73] A variety of static and dynamic family factors are correlated with later criminal justice system involvement and there is a particularly high correlation

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[68] Surgeon General of the United States. "Youth Violence: A Report of the Surgeon General" (Washington: U.S. Department of Health and Human Services, 2001)
[69] UN Rules for the Protection of Juveniles Deprived of their Liberty. Adopted 1990
[70] Donna Bishop et al., "The Transfer of Juveniles to Criminal Court: Does it make a difference?," Crime and Delinquency. 42 (1996)
[71] Nicholas Bala. (2003)
[72] Nicholas Bala. "Responding to Young Offenders: Diversion, Detention & Sentencing under Canada's *YCJA*" Queens Faculty of Law Legal Studies research Paper, 07-10 (2007)
[73] Reviewed in Raymond Corrado et al.,

between child welfare involvement and later incarceration.[74] These strong correlations speak to the reduced opportunities that some Canadian children have for a life without criminal justice system involvement. Surely the prevention of these strongly correlated factors, such as having one parent who abuses drugs or has a criminal record,[75] should be as robustly funded as the reaction of the criminal justice system to the eventual anti-social behaviour.

A recent meta-analysis of the literature on factors which predict and prevent the involvement of children in the criminal justice system in adulthood identified the need for comprehensive community-based programming for families.[76] The study uses as its title the conclusion that it is "better to build a child than to fix an adult." Indeed, researchers in the US and Canada have concluded that spending on early intervention programming recovered manifold in savings through the criminal justice system.[77] While the benefits of early intervention programs in decreasing criminality take many years to realize – and are thus less politically attractive – we are certain that the Department of Justice has the foresight to act in the long-term best interest of Canadian communities by valuing primary crime prevention.

Creating programs to effectively reduce recidivism in youth that have already offended also requires attention to the research and program evaluation literature. Unfortunately, the alternative measures and sanctions programs used in Ontario show significant gaps in services and are frequently uncoordinated.[78] The John Howard Society supports the use of safe, evidence-based, community-based measures and sanctions, and strongly endorses robust and stable funding for these programs.

[74] Alan Leschied et al., "Better to Build a Child Than Fix and Adult." (Ottawa: National Crime Prevention Council, 2006).
[75]Raymond Corrado et al.,
[76] Alan Leschied et al.
[77] Washington Public Policy Institute, leischeid, tremblay and leblanc
[78] Voula Marinos and Nathan Innocente. (In press). Canadian Journal of Criminology.

SUMMARY

Most Canadians believe that prevention, not punishment, is the primary goal of the criminal justice system.[79] Sprott, in her study of the public opinions of the Canadian youth justice system, writes "the strategy of increasing the severity of sentences and treating youth more similarly to adults will not allay the public's underlying concern about the inability of the youth justice system to accomplish anything beyond imprisonment."[80]

Punishment for its own sake does not make communities safer because punitive measures fail to rehabilitate, reduce recidivism or promote pro-social behaviour. Furthermore, they do not prevent crime and are both fiscally and socially expensive. No matter the allure of using "tough on crime" punitivism to gain political support, governments must look to the research and recognize that punitive approaches do not meet the goal of making communities safer.

The mandate of the John Howard Society of Canada, and its provincial and community affiliates, is to prevent and reduce crime and it causes through evidence-based best practices, policies and programs. We urge the Department of Justice to do the same in its review of the *YCJA*.

Finally, John Howard Society endorse enhanced funding of evidence-based primary crime prevention, reintegration planning and community-based measures and sanctions. Preventing crime by addressing the root causes of youth offending behaviour is less expensive and more effective than increased incarceration. Moreover, the social development strategies that provide the theoretical and practical foundation for crime prevention programs meet the needs of all Canadians for safer, healthier communities.

Recommendations

1. The Act must not be amended to include deterrence and denunciation as sentencing principles. The John Howard Society concludes that these principles are not supported by evidence, will not prevent crime or reduce re-offending, and may actually degrade the optimal operation of the *Act*.

2. Pre-trial detention must be used only if it is the least restrictive option for mitigating an assessed and specific risk to public safety.

3. Action must be taken – through improvements to the efficiency of the youth criminal court process and in cooperation with provincial and territorial

[79] Canada. Department of Justice. 2004. "Canadian Attitudes towards Crime Prevention."
[80] Jane Sprott. "Understanding Public Opposition to a Separate Youth Justice System" Crime & Delinquency. 44.3 (1998): 399-411

authorities – to decrease the interval between arrest and sentencing or acquittal.

4. The imposition of adult sentences for young people must remain a rare exception. The onus to show that an adult sentence is necessary must rest with the Crown.

5. The federal government – which establishes and updates Canada's Criminal Code – should increase funding for (a) primary crime prevention programming; (b) community-based extrajudicial measures and sanctions; and (c) research into youth crime.

6. Amendments to the YCJA should be (a) evidence-based, (b) targeted at reduced delays in the court process; (c) aimed at decreasing the use of custody for young people; and (d) at increasing the use of evidence driven community-based alternatives.

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