

Legislative  
Assembly  
of Ontario



Assemblée  
législative  
de l'Ontario

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Mr Ed Fast  
Chairperson  
Standing Committee On Justice and Human Rights  
Sixth Floor, 131 Queen Street East  
Ottawa, Ontario  
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**Re Bill C-4 Proposed Amendments To The Youth Criminal Justice Act**

I want to begin my comments by saying something about process. As you know a federal/provincial/territorial (F/P/T) task force spent several years reviewing the Young Offenders Act and looking at best practices across the country. There was extensive consultation and participation at all levels including the House of Commons Standing Committee on Justice and Legal affairs. Following that the "Youth Justice Renewal Strategy was developed in 1998 which was then translated into the Youth Criminal Justice Act coming in force in April 2003. That was several years of studying, consulting and talking to people, likely all adults, before making changes to our youth justice system.

In 2008, Bill C-25, which had changes similar to Bill C-4, was introduced without any prior consultation. I am told from other Provincial Advocates that roundtable discussions were held on Bill C-25 after it was introduced but I have not heard the results of these discussions. I find this lack of transparency, if nothing else, at least curious.

Now, we have Bill C-4, again without any true consultation. Before we make any significant changes to the YCJA we need to talk to the people who work with this legislation. I think we need to talk with young people themselves.

My understanding based upon comments of those introducing Bill 4 is that the 'protection of society is a primary goal of the act'. I understand that reference has been made to the Nunn Commission

Report which recommends highlighting the protection of society in the law that “gives courts a tool to ensure the protection of society is taken into account in sentencing youth who commit violent and repeat offences”.

What may have been forgotten is that the Nunn Commission Report concluded that “the Youth Criminal Justice Act is sound legislation” and the report expressed concern about deviating from “the sound underlining principles enshrined in the Act”. This is exactly why we need a consultation process before tampering with a sound piece of legislation.

In my experience I feel that we would be very well served to think more about the implementation of the YCJA. We should be considering the lack of resources available to support young people to change their lives- to reintegrate, to rehabilitate, to change.

I have thought a great deal about what I might say to you. I know I am one of a group of characters you might meet here. I know you probably already know the kind of things you might expect me to say. I have wanted to find a way to move past the discourse created by the “law and order” vs “hug a thug” debate.

The Act that governs my work in Ontario instructs me to elevate the voice of youth in conflict with the law. In trying to hear and understand that voice I have spent a good deal of time in youth justice facilities speaking with young people.

In doing so I came to realize that they were someones son or daughter. They can have hopes and dreams. Ask them and they tell you they are our future plumbers, doctors, accountants, carpenters, parents. They are our future taxpayers. I ask you to think about them in this way as you contemplate how the legislation you create will alter their lives.

In doing so I think we can find common ground. In doing so I think we will find true public safety.

With respect to the Bill itself I have the following concerns:

The Declaration of Principle applies to the entire Act and changing the primary goal to protection of the public to address a small group of violent and repeat offenders has changed the original intention which was to prevent crime, rehabilitate and reintegrate young persons and ensure meaningful consequences. This is a huge shift in philosophy and it will affect every decision being made at every stage in the process and will likely result in more young people being incarcerated. It blatantly ignores Article 3 of the UN CRC where “the best interests of children must be the primary concern in making decisions that may affect them”.

Legislating the definition of serious violent offence makes sense but the definition of violent offence seems too broad. Many of the young people who contact my office are involved in several systems and I could see a young person with mental health issues or family or behavioural problems gets into a power struggle with his parent or worker and threatens to harm them. Under this definition they would be committing a violent offence yet their behaviour has no criminal intent and they would likely be placed in detention. Also the phrase “likelihood of causing bodily harm” requires a

determination of perceived risk which leave the youth vulnerable to subjective interpretation of what they might do next.

Replacing section 29(2) of the pre-trial detention provisions removes the presumption that detention is not necessary if the young person could not on being found guilty be committed to custody as per section 39(1)(a,b,c).

Research has proven that deterrence and denunciation are ineffective for adults but even more ineffective when it concerns young people. There is an extensive body of social science research on the negative effects of deterrence that cautions against any belief in the ability of legal sanctions to deter criminal behaviour (Canadian Sentencing Commission, 1987). Increasing penalties or increasing rates of incarceration are not associated with reductions in crime rates, nor are lengthier custodial penalties associated with reductions in recidivism rates among individual offenders. A federal/provincial/territorial review of the Young Offenders Act (1996) found that changing the degree of punishment available will not change youth crime levels. Young persons do not, generally speaking, rationally consider and weigh the risks of being apprehended for their crimes. They may be aware of the risk of being apprehended but in typical adolescence, they believe that others, not them, will be caught (Cohen and Canela-Cacho, 1994).

Adding extrajudicial sanctions or findings of guilt or both to the criteria for committal to custody will widen the net for pre-trial detention and custody and change the profile of incarcerated youth. The purpose of the YCJA was to reserve custody for serious violent offences. Typically, extrajudicial sanctions are given for summary offences and other less serious offences and offenders. With this proposed amendment a young person who has been given extrajudicial sanctions for stealing food on three occasions could be incarcerated with serious offenders. It could also penalize youth who allegedly commit a minor offence and opt for extrajudicial sanctions because a trial would be costly.

The provisions enabling the court to lift the ban on publication are also affected by the change in the Declaration of Principles in section 3. The publication ban could be lifted at anytime for the protection of the public. This undermines the young person's ability for rehabilitation and reintegration and violates a child's right to privacy in all stages of the proceedings as declared in Article 16 and 40 of the UN CRC.

Requiring the police to keep records of any extrajudicial measures they use with young people does not seem feasible operationally. A young person does not have to admit guilt to be given a measure and a measure could be as simple as taking the young person home to talk with a parent. Do these measures now form part of the youth's record?

Removing the presumptive offences from the Act and placing the onus on the Attorney General to satisfy the courts for pre-trial detention, adult sentences and lifting the publication ban are improvements to the Act. Clarifying that a young person under the age of 18 cannot serve any time in an adult facility and the inclusion of diminished moral blameworthiness in the Declaration of Principles and the in the test for an adult sentence are helpful as are the amendments to the Corrections and Conditional Release Act.

I have been asked if I think the YCJA is working. I have said, "I don't know. At this point it is like I have a brand new red Mustang in my garage (I always wanted one!) and someone asks me how I like my new car. I say I don't know because I can't get any gas. It looks nice but I have not driven it yet." For me the analogy describes where we are at with the YCJA. It is oh so easy to see the potential which is why any changes now would be devastating but I believe that in all parts of the country we have not fully implemented it yet. The YCJA needs the resources; support to our courts, support to legal aid, support to probation officers, support to police, support to community based services engaged in extra-judicial measures, support to diversion and alternatives to custody, support to communities where young people are living ....it needs the gas. Looking at finding the resources needed to implement the YCJA will take an effort by governments in all jurisdictions. This will undoubtedly help us create healthier and stronger communities for our children and ourselves. It would be a better use of the Committee's time to look at finding the resources.

Before we can recommend any changes to a 'sound' legislation we need to evaluate the status of the implementation across the country and see where the "gas" is needed and we need to do it long before any Bill is passed that makes changes to sound legislation that may prove unworkable.

Public safety is served through preventing crime by addressing the circumstances underlying the criminal behaviour. Public safety is served by "rehabilitating" our young people and "reintegrating" them into our communities. Public safety is served by ensuring that young people receive meaningful consequences for their behaviour in order to learn from their mistakes. All of this is already incorporated in the YCJA.

In my experience I feel that we would be very well served to think more about the implementation of the YCJA. Before we make any changes to our youth legislation we need to talk to the people who work with this legislation and the youth, and to analyze the stages of implementation across the country. There is still a question to be answered. Is the problem with the YCJA or is it really about the implementation of the YCJA and, in particular the resources - or more realistically - the lack of resources, that are available to make this legislation work?

Respectfully,

Irwin Elman  
Provincial Advocate for Children and Youth