The John Howard Society of Alberta

Incorporated 1949

Youth Criminal Justice Act Roundtable

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Submission of John Howard Societies in Alberta

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I. Introduction

This Submission is prepared by The John Howard Society of Alberta [JHSA] for consideration by a joint Canada – Alberta Roundtable on The *Youth Criminal Justice Act* [YCJA], held in Edmonton, Alberta May 21st, 2008. The Roundtable is hosted by the Honourable Rob Nicholson, Attorney General and Minister of Justice of Canada, and the Honourable Alison Redford, Attorney General and Minister of Justice of Alberta.

The JHSA was formed in Edmonton in 1947, and incorporated under the *Alberta Societies Act* on April 11, 1949. In 1985, the District Offices of the Society each incorporated as separate Societies under the *Societies Act*, and there has been in place since that time Terms of Agreement that govern the relationship amongst the Societies in Alberta.

II. Background

The YCJA came into force on April 01, 2003, which means that now, 5 years following the coming-into-force of the Act, is an appropriate time to revisit it and consider whether the sought-after outcomes are being achieved; if not, what the reasons for that might be; and perhaps whether these sought-after outcomes are still appropriate.

To do that in a meaningful way, any discussion of the YCJA ought to occur within the context of the legislative and social precedents to the *Act*. The YCJA was preceded by, and replaced, the *Young Offenders Act* [YOA] of 1984, which in its turn was preceded by and replaced the *Juvenile Delinquents Act* [JDA], that had governed the treatment of young persons by the criminal justice system since the early part of the 20th century.

In the years following the enactment of the YOA, even though the crime rates of young persons in Canada began a steady decline commencing within a few short years of its enactment, by the mid-1990s, Canada had attained the somewhat dubious distinction of having one of the highest per capita incarceration rates of young persons in the Western World[1]. It was in response to this that government officials began in the mid-1990s to consider what might be an appropriate alternative to the YOA, and the result of that consideration was the YCJA.

III. Principles of the YCJA

In our publication, Youth Criminal Justice Act Handbook[2], we state on page 8:

> *The Declaration of Principles in the Act outlines the principles and key goals of this law for young people. The principles in the YCJA are meant to assist judges,*

1 See, "Harsh Reality of the Young Offenders Act", published by the John Howard Society of Alberta in 1999, and found at http://www.johnhoward.ab.ca/PUB/PDF/C9.pdf the Executive Summary of which is appended hereto as Appendix "A".

2 The John Howard Society of Alberta, 2002, 2007, as found at http://www.johnhoward.ab.ca/pub/youthcrim/youth.pdf

lawyers, police and others [to] interpret the law when applying it to youth. The principles reflect Parliament's interpretation of how Canadian society desires to respond to youth crime through its youth criminal justice system.

We then go on to indicate each of the 4 main areas of Principle set out in the Declaration of the *Act*. For the purposes of this Submission, we present the following listing of these principles, along with our comments concerning them, reflecting our experience in the 5 years since the enactment of the YCJA.

Guiding Principles	Observations 5 Years From Enactment
The ***first section*** of the Declaration says that the youth criminal justice system is meant to: ► prevent crime by looking at the underlying or basic reasons for the behaviour; ► rehabilitate youth and reintegrate or bring them back into society; ► ensure that youth receive meaningful consequences for breaking the law.	We agree with and support: ➢ The prevention of crime by looking at the underlying or basic reasons for the behaviour, and believe the *Act* has been more effective in this regard than preceding legislation; ➢ The rehabilitation of youth and their reintegration into society, and believe the *Act* has been more effective in this regard than preceding legislation; ➢ While we agree that it is important that there be "meaningful consequences" for offenders, we ask, "meaningful to whom?" That is, "meaningful" to the offender? The victim(s)? The community? Clearly the answer to this is required before discussion can take place concerning how effective the *Act* has been in this regard. Although we would note that the evidence is overwhelming that "meaningful consequences" are far more likely to be achieved (for all) by use of the Restorative Justice process and, insofar as the Act encourages the formation of Youth Justice Committees, has been effective in that sense.
The ***second section*** of the Declaration says that the criminal justice system for youth has to be separate	We agree with and support the proposition that the youth criminal justice system be

from the adult system and focus on: ► rehabilitation and reintegration; ► fair and proportionate accountability consistent with young persons' greater dependence and reduced level of maturity; this means that young persons' accountability for their crimes needs to be in line with or fairly balanced with the fact that they are not as mature as adults; ► enhanced procedural protection in the youth justice process to ensure that young persons are treated fairly and that their rights are protected; ► timely responses that reinforce the connection between the offence and the consequence; ► promptness and speed in the system's response, given young persons' perception of time.	separate from the adult system, and: ➢ That the youth system be based upon the principles of rehabilitation and reintegration (indeed, we believe that the adult system should also be based on these principles), and that the *Act* has the potential to be more effective in this regard than preceding legislation. Whether the *Act* has actually been more effective is a matter of some question – it certainly has been in some circumstances but not, we believe in others. By this we mean that it is our experience that provisions are not adhered to consistently by police, prosecutors, and Courts. Further, there is no doubt that there is woefully inadequate funding for the programs needed to give effect to these principles, so they don't exist at all in many locations, and those that are in place are seriously under-resourced; ➢ That youth are not adults, and ought not to be treated as adults by the criminal justice system, and the *Act* has been more effective in achieving that, in most respects, than preceding legislation; ➢ That the principle of treating young persons fairly and protecting their interests is laudable, and the Act is somewhat effective in that regard, but there continue to come to our attention disturbing anecdotal accounts of abuses of this principle, particularly in the rural areas, and with regard to certain populations; ➢ The criminological evidence clearly

	demonstrates that "timeliness and surety of response" is far more important (in responding to criminal activity) than is "severity of the response", and the *Act* certainly has been more effective in this regard insofar as, in particular, the ability to impose extrajudicial measures and extrajudicial sanctions.
The ***third section*** of the Declaration of Principle says that within the limits of fair and proportionate accountability, responses by the system to youth crime should: ► reinforce respect for society's values; ► encourage the repair the harm done to victims and the community; ► be meaningful to the young person, taking into account his or her needs and level of development, and where it is appropriate, involve the parents, other family members and other agencies in the young person's rehabilitation and reintegration; ► respect gender, ethnic, cultural and language differences and respond to the needs of Aboriginal young persons and of young persons with special requirements.	We agree with and support the proposition that the response to young persons who offend should be fair and proportionate, and: ➢ That the embodiment of these 4 principles in the *Act* is in accord with identifying meaningful outcomes to benefit our society and the young persons in difficulty and has, for the most part, provided police, prosecutors, and the Courts an opportunity to respond in a way that will more effectively achieve these outcomes. This is particularly true in those instances where Youth Justice Committees or some comparable form of Restorative Justice process has been utilized; ➢ But again, there remain serious issues concerning disparity of application of these principles from place to place and time to time, and the resources needed to seriously effect positive outcomes remain scarce.
And finally, the ***fourth section*** of the Declaration says that special factors apply to **proceedings** against youth. These special factors include: ► that young persons have rights and freedoms and that they have special guarantees of these rights and freedoms;	We agree with and support the proposition that responding to young persons in conflict with the law requires an approach recognized in the enunciated principles, and: ➢ It is critical that the procedural treatment of young persons by adults

► victims should be treated with courtesy, compassion and respect for their dignity and privacy, and should suffer the least inconvenience possible as a result of being involved in the youth criminal justice system; ► victims should be given information about the proceedings and given an opportunity to participate; ► parents should be told of what is happening in their child's case and be encouraged to support their children in addressing the behaviour that resulted in their involvement with the youth criminal justice system.	in positions of authority be fair and objective, and value the rights and freedoms of young persons. Certainly the *Act* is potentially far more effective in this regard than preceding legislation, albeit reports of incidences of failure to abide by this requirement continue to arise; ➢ The *Act* allows for greater recognition, and participation of victims in the process of responding to young persons who offend, and is more effective than preceding legislation in that regard. This is especially so with respect to the opportunities for Restorative Justice approaches, and with respect to the extrajudicial measures and extrajudicial sanctions; ➢ Involving parents (or other family members) in the response to youthful offending, as well as the extended community (and victims) in Restorative Justice processes is a far more effective and fulfilling process and response than that of incarceration, and the Act should, if anything, allow and encourage this approach as often as possible, taking all of the circumstances of each individual case into account.

IV. Additional Comments

1. We note that the principle of "deterrence" whether specific or general, does not occur in the *Act*, and we are in full agreement with this deliberate omission. The criminological, psychological, and neurological evidence is overwhelming that, especially for young persons, this is just not a meaningful concept. The theory of deterrence is based wholly on the notion that those who might be tempted to offend will weigh the costs and benefits of acting illegally and base their actions on a determination of "what is in their best interests". Such a theory may be of some utility in the realm of economics, but bears little (if any) resemblance to the reality of how young persons (and most adults) actually function in their lives. **Accordingly, we strongly**

support the deliberate omission of the principle of deterrence from the Act.

2. As earlier indicated, perhaps the primary motivation for the enactment of the YCJA to replace the YOA was the Canadian incarceration rate for young persons, and the *Act* has been very effective in addressing this issue and achieving the sought-after outcome – insofar as sentencing is concerned. The data from Juristat confirms that the number of young persons incarcerated under the YCJA is in the range of some 40% below what it was under the YOA. This same data however, also indicates that there has been no appreciable (statistical) change in the rate of pre-trial incarceration of young persons under the YCJA than the YOA. And it is this apparently anomalous situation that gives us cause for concern. Clearly, contrary to what the mass media, some policing authorities, and indeed even the Recommendations of the Nunn Commission[3] would lead the public to believe, there is not a process of "catch and release" operating in Canada with respect to young persons in conflict with the law. Indeed, if anything, the data suggests that there may be far more young persons incarcerated awaiting disposition of their matter, in apparent contradiction with the principles of the *Act*, than is justifiable on either the primary or secondary grounds for pre-trial detention.

Hindsight is always 20/20. That there may be a rare instance where a young person ought to be held pending disposition and is released, is regrettable when that young person subsequently causes harm to others. But such instances are so rare as to be the statistical equivalent of "0.00%" and, notwithstanding the Recommendations of the Nunn Commission[4] earlier referenced, **we believe, without reservation, that the development of public policy and legislation in response to such statistical anomalies is <u>not</u> the preferred approach.**

3. Certainly in Alberta, and we have no reason to expect that it is different anywhere else in Canada, there continues to be some confusion amongst police, prosecutors, and the Courts as to the "correct" procedure to be applied, particularly with respect to the use of extrajudicial measures and extrajudicial sanctions. In our opinion the policies developed by the Alberta Ministry of Justice are straightforward and in accord with the principles and intent of the *Act*. But even so, we continue to receive accounts of instances, primarily outside of the metropolitan areas of, for example, young persons being charged with an offense and brought before the Court, at which time the Judge makes an Order for an extrajudicial measure or sanction, and further orders the young person to attend Court and "report" on whether this measure or sanction has been met.

We also continue to receive reports of police authorities disclosing Youth Records (or even information pertaining to "suspicions") in what seems to us to be in clear contravention of the *Act*. This seems to typically occur when a young person is applying for employment, and is obliged as a part of the application process to provide a Security Check. Our queries of police

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3 As found on May 15, 2008, at
http://www.gov.ns.ca/pps/publications/ca_manual/ProsecutionPolicies/YCJApolicyNunnRecsMTSwpd.pdf
4 *supra*

services in regard to these instances are met with the response that it is their opinion that they are obliged under the applicable Freedom of Information and Protection of Privacy legislation to disclose all the information on their file to any young person making such a request, and that what the young person subsequently does with that information is not their concern. Obviously, when such incidents do occur, the young person is understandably not inclined to "push back" against the authorities.

V. Summation

- It is irrefutable that the crime rates for young persons have been declining in Canada (and elsewhere in virtually all developed countries) for at least the last 15 years and, while there may be spikes of youthful criminal activity in certain locations or certain kinds of activity in "selected" periods of time, the long term trend has been continuously downward – and this has not changed since the inception of the *Act*.

- Taken in its entirety, the YCJA is far superior legislation to its predecessor legislation insofar as its approach to addressing young persons in conflict with the law, and appropriate responses to these young persons.

- One exception to the above is the focus on "meaningful consequences" without, we would submit, a clear elucidation of the intended outcome and to whom it is directed. But, the enhanced opportunities for Restorative Justice responses to young persons who offend does address this in a comprehensive way.

- Another exception to the above is directly related to the principle of "meaningful consequences", and relates to the provisions whereby young persons "must" be tried and sentenced as if they were adults.

- While the *Act* has been largely effective in reducing the number of young persons serving carceral sentences, it is troubling that there has not been a corresponding decrease in young persons incarcerated pending disposition of their matter.

- It is also troubling that instances of authorities (whether police, crown prosecutors, or the Courts) failing to conform to the clear requirements of the *Act*, as well as the underlying principles, notwithstanding efforts to develop and implement clear policies that are designed to give effect to these requirements and principles.

- And finally, while we applaud the spectrum of alternatives to incarceration set out in the Act, we note that the funding required to actually achieve these outcomes has not been forthcoming at the federal or provincial levels.

Appendix A – Executive Summary from "Harsh Reality of the Young Offenders Act

Recent statistical data from the youth and adult judicial and corrections systems do not support the widespread notion that the justice system treats young people in a more lenient manner than adults. On the contrary, youth cases are more likely than adult cases to result in conviction and a greater proportion of youth cases with at least one finding of guilt result in a custodial disposition. Additionally, adults are more likely than youths to have sentences of 1 month or less. Further, the rate of incarceration for young people is much higher than the adult rate and this disparity can be explained, in part, by the higher probability of youths to be sentenced to custody.

The use of custody for young offenders has risen considerably since the introduction of the Young Offenders Act (YOA) in 1984. This legislation replaced the Juvenile Delinquents Act (JDA) which took a treatment approach to juvenile justice. The YOA, on the other hand, takes a more punitive approach - young people are now required to bear more responsibility for their actions than ever before. Youths were often sentenced to custody under the JDA, and for longer periods of time, on average, but only for specific reasons. It was thought that delinquent and neglected youths could be given care and treatment in custody - the 'best interest' of these young people was made paramount. The YOA, unlike the JDA, does not have a clear statement of purpose and consequently, many considerations in the sentencing of youths have been given validity that did not exist prior to 1984, including deterrence and denunciation. These considerations have led to an increase in the use of custodial sentences for youths, particularly sentences that are short in length. Other considerations of the youth court under the YOA that have resulted in an increase in custody are the child welfare concerns of the young offender. Under the JDA, youths with problems at home could be committed to the Director of Child Welfare of the province; under the YOA, this option does not exist. Neglected and abused children are often given lengthier custodial sentences than their offences warrant because judges have no preferable alternative.

Bill C-68, the Youth Criminal Justice Act (YCJA), which passed a first reading in the House of Commons in March of 1999, has the potential to effect a dramatic reduction in the use of custody for young offenders. The Act, in its preamble, states that society must reserve the most serious form of intervention (incarceration) for the most serious of crimes, and must also reduce the over-reliance on custody that currently characterizes the youth justice system. The majority of young offenders could be diverted from the justice process, as few youths are violent or serious repeat offenders. The YCJA recognizes this, and provides for the expansion of diversion programs and policies. It is likely that the principles of deterrence and denunciation would only be factors in sentencing for the most serious of crimes, and this could further reduce the prevalence of custodial dispositions in the youth court. Currently, the youth justice system treats youths, in many respects, more punitively than adults. It is hoped that when the YCJA comes into force, this will be the case no longer.