



September 6, 2007

Comments on the consultation for Pre-Trial Detention for Youth

The Department of Justice called together a distinguished group of educators in Law, defense and legal aid lawyers from across the country to discuss the YCJA and possible changes that may prevent the liberal use of detention for young people not yet convicted of a crime they have been charged with. Of the 17 in attendance 4 were from NGO's. A consultation paper had been written in June of this year by Dick Barnhorst from Justice Canada to discuss the use of detention both by police and after bail, the conditions affixed to the release and the alarming statistics gathered regarding detention.

“Two main legal grounds that can justify detention prior to a finding of guilt are that (primary) detention is necessary to ensure that the young person appears in court and (secondary) that detention is necessary for the protection or safety of the public. The Canadian Centre for Justice Statistics has reported that the rate of detention of young persons has remained unchanged since the last year of the YOA (2002-03). In passing the YCJA, Parliament intended to reduce the over reliance on incarceration of young persons that had occurred under the YOA.”

This discussion is coming on the heels of a commissioner's report, the Nunn Commission, regarding the release of a youth after detention in Nova Scotia for an auto theft charge who subsequently stole another vehicle and caused an accident resulting in the death of the other driver. A contributor to the report, Nick Bala, was in attendance at this meeting. The commission had interpreted that the YCJA *presumption against detention s.29 (2)* could not be *rebutted* if the youth's conviction could not result in custody. This warranted much discussion about the meaning of 'presumption' and the misunderstanding by justice officials regarding this option for rebuttal.

Much of the discussion between the lawyers, the law professors and government legislators at this meeting was concentrated on the wording of the YCJA and its interpretation by justice officials. There were many phrases used in the Act, that now seemed too broad and open to much interpretation such as “for reasons of public safety” “substantial likelihood” the youth will not attend. The Supreme Court of Canada had struck down the “public interest” ground of the Criminal Code in *R.v. Morales* stating it was too vague and imprecise in its reasons for detaining a youth. In another case *R.v. Hall*, the phrase ‘any other just cause being shown’ was found to

be unconstitutional. Another definition needing further clarity was from s.39 (1)(a) of the YCJA regarding “violent offence”. A suggestion was to include ‘conduct that endangers the life and safety of another person’. The word ‘likely’ was not to be added according to this group. The feeling from most in the room was to change phrases to clarify action and intentions in the use of detention within the YCJA. Despite the length of the new Act, the use of preambles in the YCJA was applauded as a means to explain in more detail the intentions of the Act.

Quite a bit of time was spent on the conditions given upon release of a young person. Police detention was discussed separately from bail release or detention. Certainly in naming conditions attached to the release it was recognized that many were social conditions presumed or sometimes requested by parents such as ‘obey house rules’ or curfews or non- association with certain friends, that were often seemingly inappropriate for the offence. There was no question regarding the detention of those committing violent offences or conditions to stay away from the victims but conditions such as no alcohol or drugs, illegal or prescriptive, could surely set up the addicted youth to fail and be breached. ‘Must attend school’ or ‘live at the designated residence’ are also problematic when the youth has repeatedly tried to escape the environment named. All in attendance understood these issues. In fact, all in the room felt most, if not all, conditions should be eliminated. The concluding thought was to streamline conditions and have them the same for both police and Justices. Changes to the Act could define the conditions permitted.

The paper described the relevant principles reflected in the Criminal Code and the YCJA. Detention was not to be used for child protection, mental health or other social welfare needs of the young person. Nor should it be used for the purpose of rehabilitation, treatment or punishment. Some areas in Canada could have the young person detained for up to 7 weeks waiting for a bail hearing. The question was how could this be justified, does this balance if there were a simple charge of say shoplifting even if there was skepticism that the young person would not attend court?

From the prepared Annex to the Agenda there were many questions easily answered following the healthy discussions on principles and values in the treatment of our youth. One example was answered: NO, there should not be the use of detention for a ‘wake-up call’ to youth. There were other questions needing more probing. It was noted that secondary grounds for detention could not only pertain to at risk physical harm to another but also psychological and financial harm. Question: “How should serious crime be worded: serious harm, risk of serious bodily harm: what degree of harm should be required? How should proportionality be determined? Should the law permit a sliding scale used to substantiate likelihood of committing an offence? There was consensus that secondary grounds for detaining a young person depend mostly on the current offence, their past criminal behaviour or mitigating factors such as current threats upon release. For fears of non-attendance at court, only a history of not attending court dates would permit detention. This would be listed under the primary grounds.

The suggestion regarding Tertiary grounds was to eliminate this option all together. It has proven to give permission to Justices, Crowns and police for holding youth to maintain

confidence that the administration of justice would be adhered to. A significant percentage of the youth held in detention was for the administration of justice without conviction. Again there is no balance of punishment for the crime in this action by the courts. The consultation paper cited a case of restrictions placed on arrest and detention. A city in the US had to come up with a plan to reduce the costs of maintaining huge numbers of youth in detention. Police were not permitted to arrest a youth for non-violent offences but rather to deliver a summons to the youth to appear in court. The high rate of pre-trial detention was significantly reduced. Why not use this as the best resolve for youth involved in non-violent offences??? There were many defense lawyers, legal aid defense present with youth experience and stories of the tactics used by the courts to detain youth. It was an illuminating reality. The one option I was able to put forth from my experience in working with youth was to possibly use the Youth Justice committees instead of conditions for bail to involve the youth and parent in suggesting what tactics to use to keep the youth from committing again. Catherine Latimer picked this up and suggested wording for the Justices to opt for this direction instead of using conditions. The group of lawyers at the meeting agreed that this option would thus be utilized.

It was a privilege to be invited to this consultation. The four people present representing NGO's were: Graham Stewart, Craig Jones, the new head of JHS Canada, a trainer from the Canadian Training Institute and myself representing CCJC and NAACJ. Thank you for this opportunity to learn and in a small way contribute to this discussion.

Maureen Murphy, past President of CCJC.

