PRE-TRIAL DETENTION UNDER THE YOUTH CRIMINAL JUSTICE ACT:

A Consultation Paper

Department of Justice Canada
June 1, 2007

It is important to be vigilant in safeguarding the fairness and effectiveness of our justice system. It is equally important to ensure that the fundamental principle of our justice system is the protection of society. For that reason and as a direct result of the Nova Scotia's Nunn Commission report, I have decided to do a comprehensive review of the pre-trial detention and release provisions under the youth justice system. Recent events, research findings, and concerns raised by heads of corrections, judges, academics, practitioners, provincial and territorial governments and others support an undertaking of this nature.

The Government has a clear interest in ensuring that those who have been charged with offences are brought to justice, and that they do not abscond or cause serious harm to society while awaiting trials. At the same time, we recognize protections against arbitrary detention and for reasonable bail which are respected both in our *Bill of Rights* and the *Charter*.

The federal government now seeks your views and advice as part of a comprehensive review of pre-trial practices and provisions applicable to youth facing criminal charges. This consultation paper: sets out information on experience with the pre-trial detention regime for youth; identifies a number of issues; and raises questions about how the pre-trial detention system for youth should be structured. This is a complicated area involving the *Criminal Code*, the *Youth Criminal Justice Act* and fundamental principles of justice. We therefore appreciate and look forward to learning your views on these or any other aspects of pre-trial issues facing youth. As this is an important issue that needs to be addressed in a timely manner, we would appreciate receiving your comments by August 31st, 2007.

Thank you for contributing to make our youth justice system fairer and more effective.

The Honourable Rob Nicholson, P.C., Q.C., M.P.
Minister of Justice and Attorney General of Canada

PRE-TRIAL DETENTION UNDER THE YOUTH CRIMINAL JUSTICE ACT: A Consultation Paper

TABLE OF CONTENTS

Introduction ……..…… p. 3

I. GENERAL PRINCIPLES …….. p. 5

II. PRE-TRIAL DETENTION BY POLICE ……. p. 6

A. Criminal Code Provisions …….. p. 7
- **1. Arrest without a Warrant**
- **2. Release by Officer in Charge if Arrest is without a Warrant**
- **3. Arrest with a Warrant**
- **4. Release after Arrest with or without a Warrant**

B. Research on Police Detention of Young Persons ……. p. 9
- **1. Percentage of Arrested Young Persons Detained**
- **2. Jurisdictional Variation**
- **3. Factors Associated with Police Detention**
- **4. Reasons Given by Police for Detaining Young Persons**
- **5. Types of Release by Police**
- **6. Conditions of Release**
- **7. Restrictions on Arrest and Detention**
- **Summary**

C. Issues for Discussion …….. p. 14

III. JUDICIAL INTERIM RELEASE ……. p. 16

A. Research ……. p. 17
- **1. Appearance before a Justice**
  - **Issues for discussion**
- **2. Number of Young Persons Detained**
- **3. Jurisdictional Variation**
- **4. Length of Pre-trial Detention**
- **5. Release on Crown Consent**
- **6. Other Factors Associated with Detention of Young Persons**
- **Summary**

B. Grounds for Detention …….. p. 23
1. Predicting Risk
2. Necessary to Ensure Attendance in Court
- **Issues for discussion**

3. Necessary for Public Safety
- **Issues for discussion**

4. Necessary to Maintain Confidence in the Administration of Justice
- **Issue for discussion**

5. Detention as a "Wake-up Call"
- **Issues for discussion**

C. Prohibition on Detention for Social Welfare Purposes ……..... p. 29
- **Issue for discussion**

D. Presumption against Detention …….. p. 31
- **Issues for discussion**

E. Conditions of Release …….. p. 35
1. Research on Conditions of Release
- **Jurisdictional Variation**
- **Release Conditions Imposed**
- **Release Conditions Breached and Charged**

2. Issues for Discussion

REFERENCES …… p. 40

APPENDIX - CONSOLIDATED LIST OF ISSUES FOR DISCUSSION p. 42

Introduction

Purpose

The purpose of this paper is to obtain feedback about the use of pre-trial detention and release of young persons under the *Youth Criminal Justice Act* (YCJA*)*. The Department of Justice Canada is interested in receiving comments on the issues for discussion that are identified in this paper, as well as any other relevant issues, and suggestions as to what should be done to address the issues.

In order to facilitate discussion of the issues, the paper summarizes some of the relevant law, available research and other information on the detention and release of young persons. Due to the absence of research and statistics in some areas, a comprehensive picture of pre-trial detention of young persons is not possible at this time. Consultation with those who are involved in the youth justice system is important to helping to fill in some of the gaps in knowledge. Consultation can also help in the development of proposals for reform of policies, programs and legislation.

The appendix contains a consolidated list of issues for discussion that are identified in the paper as well as information on where to send comments.

Background

A fundamental principle of criminal law is that a young person accused of a criminal offence is presumed to be innocent and can not be punished until found guilty of an offence. However, the criminal law permits, in certain circumstances, the police and the court to detain an accused young person prior to a finding of guilt. Two main legal grounds that can justify detention prior to a finding of guilt are that detention is necessary to ensure that the young person appears in court and that detention is necessary for the protection or safety of the public.

The decision to order the pre-trial detention of a young person is a serious decision that not only deprives a presumed innocent young person of liberty but can also disrupt the young person's education, employment, family life, and social and community involvement. Detention of a young person also increases his or her chances of being found guilty of the offence and being sentenced to custody if found guilty.

Prior to the coming into force of the YCJA in 2003, research indicated that there was a substantial increase in the use of pre-trial detention under the *Young Offenders Act* (YOA). In passing the YCJA, Parliament intended to reduce the over-reliance on incarceration of young persons that had occurred under the YOA. There was also evidence of significant variation among provinces and territories in the use of pre-trial detention.

The increased use of pre-trial detention under the *YOA* and the negative consequences for young persons highlighted the need for restraint in the use of pre-trial detention. The YCJA introduced two major provisions related to pre-trial detention. Section 29(1) prohibits the use of pre-trial detention for social welfare purposes and s. 29(2) creates a rebuttable presumption that detention is not necessary for public safety if the young person, if found guilty, could not be sentenced to custody. These two pre-trial detention provisions specifically focus on the bail hearing stage of the process. The Act otherwise incorporates the relevant provisions of the *Criminal Code* related to pre-detention by police as well as the process and grounds for pre-trial detention to be applied at bail hearings.

Concerns about pre-trial detention

In the years since the YCJA came into force, there have been various concerns raised about pre-trial detention under the Act, including:

1. Continued high use of pre-trial detention. Although the number of cases going to youth court has decreased significantly under the YCJA, the Canadian Centre for Justice Statistics (CCJS) has reported that the rate of detention of young persons has remained unchanged since the last year of the YOA (2002-03). This result suggests that Parliament's objective of reducing the use of incarceration in the youth justice system is not being fully achieved with respect to pre-trial detention. The Heads of Corrections, a federal-provincial-territorial group of senior correctional officials, has expressed concern about the high rate of remand/pre-trial detention of young persons under the YCJA. Several members of another federal-provincial-territorial group, the Coordinating Committee of Senior Officials – Youth Justice, have expressed a similar concern.

2. Nunn Commission. This provincial commission of inquiry was established in response to an incident in Nova Scotia in which a young person was released at a bail hearing on auto theft charges and then stole another vehicle and collided with another car. The collision resulted in the death of the driver of the other car. The commission made recommendations related to legislative provisions, provincial policies, programs and operational matters relating to arrest warrants, requests for transfers and communication protocols. The commission expressed concern that it is too difficult to detain young persons under the YCJA and recommended various legislative amendments to make it easier to detain more young persons. The commission interpreted the YCJA presumption against detention (s. 29(2)) not as a presumption that could be rebutted but rather as a prohibition that prevented the detention of young persons unless they could, if convicted, be sentenced to custody.

3. High numbers of non-violent offenders detained. As noted above, one of Parliament's objectives in passing the YCJA was to reduce the over-reliance on incarceration of non-violent young persons. CCJS has reported that a very high percentage of young persons are detained whose most serious charge is a non-violent offence, including a high percentage whose most serious charge is an administration of justice offence. This

information, in contrast to the views of the Nunn Commission, raises the question of whether it is too easy to detain young persons charged with less serious offences.

4. Jurisdictional Variation. Available research and statistics indicate large jurisdictional variation in the rate of young persons detained. The variation raises questions about whether the pre-trial detention provisions are being applied very differently across the country, depending on the province or territory.

5. Use of detention for social welfare purposes. Despite the YCJA's prohibition on the use of pre-trial detention for social welfare purposes, pre-trial detention appears to some extent to continue to be used to address social welfare needs of young persons. There is some evidence that detention and conditions of release have been imposed on young persons "for their own good".

6. Conditions of release. If a young person is released rather than detained, it is highly likely that he or she will be required to comply with conditions of release. There is concern that too many conditions are imposed, that some conditions are unrelated to the risk that the young person is alleged to pose, and that some conditions are difficult to comply with, thereby "setting up the young person for failure". Non-compliance with a condition, such as not attending school, is a criminal offence that not only adds to the criminal record of the young person but also increases the young person's chances of being sentenced to custody.

I. GENERAL PRINCIPLES

In *R. v Oakes*, the Supreme Court of Canada set out certain principles that apply to measures that limit a right or freedom under the *Charter of Rights and Freedoms*. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective must relate to concerns that are pressing and substantial in a free and democratic society. Second, once a sufficiently significant objective is recognized, it must be shown that the means chosen meet a proportionality test, which consists of three components.

First, the measures adopted must be carefully designed to achieve the objective in question. The measures must be rationally connected to the objective. Second, measures, even if rationally connected to the objective, should impair as little as possible the right or freedom in question. Third, there must be proportionality between the effects of the measures and the objective. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

These principles apply to detention and release decisions by police as well as the decisions of a justice at a judicial interim release hearing. In brief, the principles, if applied to the decision to detain or to impose conditions of release, require the following:

- The detention or release condition must be rationally connected to a valid legal objective. Current objectives include reducing a risk to public safety and reducing a risk that the young person will not appear in court.
- The detention or release condition, even if rationally connected to such an objective, must impair as little as possible the right of the young person to physical liberty. It must be the least restrictive or intrusive means of achieving the objective.
- The adverse effect of the detention or release condition on the young person must be proportionate (or not disproportionate) to the risk that the young person is alleged to pose. This requires weighing the negative impact on the young person of being held in detention against the importance or benefit of ensuring that the young person attends court or does not endanger public safety. How public safety should be defined is an important issue that is discussed later in this paper.

In addition, the Supreme Court of Canada has stated in *R. v. Hall* and *R. v. Morales* that the ground upon which the detention or condition of release is justified must be clear and precise, not vague. In *Morales*, the Court struck down the "public interest" ground of the Criminal Code's detention provisions because it was a vague and imprecise basis for detaining a person. Similarly, the Court in *Hall* decided that the phrase "any other just cause being shown" in s.515 (10)(c) was an unconstitutionally vague basis for detaining a person.

Other relevant principles that are reflected in the Criminal Code and the YCJA include:

- The presumption of innocence applies at the pre-trial detention stage.
- An accused young person at a bail hearing should be released without conditions unless the prosecutor can persuade a justice that detention is justified or conditions are justified.
- Detention and conditions of release must not be used for the purpose of rehabilitation, treatment or punishment.
- It must be presumed that if a young person, if found guilty, could not be sentenced to custody, detention is not necessary. This presumption can be rebutted.
- Detention is not to be used to address child protection, mental health or other social welfare needs of the young person.
- Young persons in detention should be in safe, secure, and humane conditions.
- Persons responsible for enforcing the pre-trial detention provisions of the law must act with promptness and speed.

II. PRE-TRIAL DETENTION BY POLICE

In order to have a clear understanding of pre-trial detention in the youth justice system, it is important to consider the law, policy and practice of police in relation to their decisions to detain or release young persons. Police are the gatekeepers to pre-trial detention in the youth justice system. If the police do not detain a young person, a bail hearing is not

required. The initial police decision to detain a young person sets in motion further justice system processing and the involvement of other decision-makers in the youth justice system. The prosecutor must determine whether to consent to release of the young person or to seek continued detention. At a bail hearing, the youth court judge or justice of the peace must determine whether the young person will be released without conditions, released with conditions, or be detained.

It is clear, therefore, that understanding the police decision-making process is important to understanding why large numbers of young persons are detained or released with conditions not only at the police stage but also at judicial interim release hearings. Measures that address any problems that may exist at this early stage of the youth justice process may have a significant impact in addressing some of the concerns that have been raised about pre-trial detention in the youth justice system.

The authority of police to detain young persons is primarily contained in the *Criminal Code*. The YCJA provisions referred to above – the presumption against detention and the prohibition on detention for social welfare purposes - are not explicitly directed at police; however, police should take account of the provisions as well as the general principles and policy direction of the Act, which emphasize the importance of using the least restrictive alternative and reducing the use of incarceration.

This part of the paper reviews the law and research relating to police authority to detain and release young persons. It concludes with several issues for discussion.

A. Criminal Code Provisions

Police have broad authority under sections 495-503 of the *Criminal Code* to release young persons who have been arrested. The police do not have the authority to release the young person if the offence is a section 469 offence (murder, offences related to murder such as attempted murder, and other very rare offences such as treason and intimidating Parliament). For non-section 469 offences, which make up almost all youth court cases, the *Criminal Code* sets out rules on pre-trial release by the police that vary according to the type of offence involved and whether the arrest is with or without a warrant.

1. Arrest without a Warrant

Section 497 provides that, if a police officer arrests a young person without a warrant for

- an indictable offence listed in section 553 (certain less serious indictable offences such as theft of $5000 or less and breach of probation),
- a hybrid offence, or
- a summary conviction offence,

the police officer *must* release the young person as soon as is practicable unless the police officer believes on reasonable grounds that detention is “necessary in the public interest”, having regard to all the circumstances including the need to

- establish the identity of the young person,
- secure evidence relating to the offence,
- prevent the commission of an offence, or
- ensure the safety of a victim or witness.

In addition, the police officer is not to release the young person if there are reasonable grounds to believe that the young person will fail to attend court. Once there is no longer a basis for not releasing the young person (e.g., the identity of the young person has been established), the police officer must release the young person. If the young person must be released, the police officer can obtain a summons or issue an appearance notice.

Most offences committed by young persons fall within the types of offences listed in section 497. Therefore, in most cases in which a young person is arrested without a warrant, the police are required to release the young person as soon as practicable, unless one of the grounds for detention, specified in section 497, is met.

2. Release by Officer in Charge if Arrest is without a Warrant

If the young person is not released by the police officer who has arrested the young person without a warrant for an offence listed in section 497, the officer in charge of the lock-up *must* release the young person as soon as practicable unless the officer in charge believes on reasonable grounds that it is "necessary in the public interest" to detain the young person having regard to the circumstance mentioned in section 497 (e.g., the need to prevent the commission of an offence). In addition, the officer in charge *must* release the young person if the offence is one for which an adult would be liable to a maximum of five years imprisonment or less and none of the exceptions to release applies.

The officer in charge has a wider range of release options than the arresting officer has under s. 497. In addition to obtaining a summons, the officer in charge may release the young person on the basis of:

- the young person's promise to appear in court or
- a recognizance by which the young person agrees to pay an amount not greater than $500 on failing to appear in court.

Additional release provisions apply if the young person is not ordinarily resident in the province or does not ordinarily reside within 200 kilometres of the place of detention.

3. Arrest with a Warrant

Except in the case of an offence listed in s. 469, a judge or justice of the peace who issues an arrest warrant may, by endorsing the warrant, authorize the officer in charge to release the accused young person. If the warrant has been endorsed, the officer in charge may release the young person on a promise to appear or a recognizance not greater than $500.

Additional release provisions apply if the young person is not a resident of the province or does not ordinarily reside within 200 kilometres of the place of detention.

The officer in charge can also require the young person to enter an undertaking in which the young person undertakes to do one or more of the several things listed in s. 499(2), which include:

- remaining within a specified territorial jurisdiction;
- abstaining from alcohol or drugs;
- reporting at specified times to a police officer or other designated person; and
- complying with any other condition that the officer in charge considers necessary to ensure the safety and security of any victim or witness to the alleged offence.

Under s. 145(5.1), a young person who fails to comply with a condition imposed by the officer in charge can be charged with an offence.

4. Release after Arrest with or without a Warrant

The *Criminal Code* provides an additional authority for police to release a person who has been arrested. Under section 503, a police officer or officer in charge may release any person charged with any offence (other than a s. 469 offence), whether the person is arrested with a warrant or without a warrant. Section 503(1) gives very broad discretion to the police by providing that the police officer or officer in charge may release the person if he or she "is satisfied that the person should be released from custody." The release may be with conditions or without conditions. Subsection 503(2.1) authorizes the police officer or officer in charge to impose the same types of release conditions that the officer in charge is permitted to impose under s. 499(2), mentioned above. A young person who fails to comply with a condition imposed by the police can be charged with an offence under s. 145(5.1).

B. Research on Police Detention of Young Persons

Despite the significance of the decisions by police to detain, there is very little research information about police detention of young persons. However, some information is available from the following research reports prepared for Youth Justice Policy, Department of Justice Canada:

- *YCJA Monitoring Study*. This study by Sharon Moyer reviewed police, court and correctional files from the first full year of the YCJA, 2003-04, in seven courts in five cities: Vancouver, Edmonton, Winnipeg, Toronto and Halifax. The findings were compared to a baseline year under the YOA, 1999-2000. One part of the study addressed pre-trial detention.
- *Pre-trial Detention under the Young Offenders Act: A Study of Urban Courts.* This study by Sharon Moyer reviewed police, court and correctional files related to pre-trial detention from one of the last years of the YOA, 1999-2000, in the

same seven courts used in the *YCJA Monitoring Study*. It provides a baseline against which the experience under the YCJA can be compared. This study will be referred to in this paper as the *Pre-trial Detention Study*.

- *Police Discretion with Young Offenders*. This study by Peter Carrington and Jennifer Schulenberg is probably the most comprehensive study of police discretion with young offenders ever conducted in Canada. It was carried out in the last couple of years of the YOA. It contains an analysis of available statistics on police decision-making as well as the results of interviews with police at approximately 100 police services throughout Canada. This study will be referred to in this paper as the *Police Discretion Study*.

1. Percentage of Arrested Young Persons Detained by Police

The percentage of cases in which an arrested young person was detained by the police appears to have increased under the YCJA. The *YCJA Monitoring Study* found that under the YOA, 45 percent of arrested youths were detained by police, compared to 55 percent under the YCJA.

2. Jurisdictional Variation

The chances of being detained by police appear to depend to a great extent on which police force apprehends a young person. The *Pre-trial Detention Study* found there were vast differences among police forces in the percentage of young persons detained by police. The percentage of young persons detained by the police ranged from 28% to 79%. Vancouver was the highest and Toronto was the next highest (56%). The jurisdictional variation could not be explained by differences in the social and legal characteristics (e.g., offence; previous offences) of the young persons. Moyer concluded that the local legal culture, which includes the "usual practices" of police, contributed to the differences among the various sites included in the study.

Although there may be explanations of jurisdictional variation that were not captured by the available data, the study raises questions about the local legal cultures and suggests that the "usual practices" of police should be reviewed. It seems reasonable to expect that the chances of being detained by the police should not be significantly different for two young persons who live in different cities, if their relevant circumstances are basically the same. These findings also reflect the wide range of discretion and interpretation that is permitted under the wording of the Criminal Code provisions that govern detention and release decisions of the police.

3. Factors Associated with Police Detention of Young Persons

Research does not indicate the legal basis on which the police relied in deciding to detain young persons. For example, an important gap in the research is that it does not address how often the police detained young persons to prevent the commission of another offence or to ensure that young persons would attend court. However, the research does

report on other factors associated with the police decision to detain, such as the seriousness of the charge. It is important to keep in mind that these other factors do not necessarily provide a legal basis for the detention of young persons, but they may have been used by police in making predictions about whether the young person would commit an offence or appear in court.

According to the *Pre-trial Detention Study*, factors that had the strongest relationship to police detention were the seriousness of the charge, the number of charges, and prior offences. Young persons charged with indictable drug offences were most likely to be detained (84%), followed by indictable offences against the person (76%). However, next most likely to be detained were young persons charged with administration of justice offences, excluding breaches of probation (73%). Of the social and social-legal characteristics of young persons, only unconventional living arrangements, including having no fixed address, increased the probability of being detained by police.

The *YCJA Monitoring Study* found that young persons who were charged with a violent offence or who had prior findings of guilt were more likely to be detained by police under the YCJA than under the YOA. Other findings indicated that some less serious offenders were more likely to be detained by the police under the YCJA than under the YOA, including those without an indictable offence; those with no violence in their case; and those with less serious offence histories (two or fewer prior guilty findings).

4. Reasons Given by Police for Detaining Young Persons

The *Police Discretion Study* found three categories of reasons used by police for not releasing young persons and detaining them until a judicial interim release hearing is held:

- Law enforcement: e.g., establishing identity; ensuring attendance at court; and preventing the commission of an offence;
- "Detention for the good of the youth": e.g., youths who are prostitutes or who do not have a safe home to go to.
- Sanction: use of detention as a sanction, or meaningful consequence, for a young person's offence.

This study raises concerns about police practice. Two of the three reasons given by police for detaining young persons – detention as a sanction for the offence and detention for the good of the youth - are not legal grounds for detention. The general principle of the law on pre-trial detention is that a young person should not be held in detention unless there is a specific reason in the law that permits the detention. As discussed above, the specific reasons are contained in the Criminal Code. The reasons listed in the Code do not include punishing or holding the youth accountable for the offence that he or she is alleged to have committed. In addition, they do not include "detention for the good of the youth".

5. Types of Release by Police

If a young person is released following arrest and police detention, the *Police Discretion Study* found that most officers prefer the promise to appear as the method of release because they can include an undertaking which sets out conditions with which the young person must comply. Police officers "see these conditions as relatively precise, immediate, enforceable constraints on the young person's future behaviour, and immediate, concrete consequences (sanctions) for the youth's criminal act."

This finding raises additional concerns about police practice. The use of release conditions as immediate sanctions imposed by the police for the youth's alleged offence is not authorized under the Criminal Code or the YCJA. The conditions of release must relate to one of the legislated grounds in the Criminal Code. Imposing sanctions for the offence is the responsibility of a judge, not the police, after a finding of guilt.

The *Pre-trial Detention Study* found that if a young person was released by the police, the type of police release was associated with the seriousness of the offence. The more serious the offence, the more likely it was that the young person was given a police undertaking, which can include conditions, rather than less serious types of release such as an appearance notice or summons.

In comparing the YOA and YCJA, the *YCJA Monitoring Study* found that the police typically imposed more onerous release mechanisms under the YCJA than under the YOA. Because most police undertakings entail conditions, they are viewed as more onerous than other forms of police release. There were marked increases under the YCJA in the percentage of youth released on an undertaking.

The number of conditions imposed on young persons that were released on police undertakings increased in the YCJA group in comparison to the YOA group. Under the YCJA, not only were more youth detained and more youth released on undertakings, they also received more conditions of release.

6. Conditions of Release

The *Pre-trial Detention Study* found that, in general, there was not a relationship between social and legal factors and specific conditions that were imposed by the police. Moyer suggests that the conditions imposed may be determined primarily by the local "usual practices", rather than the seriousness of the offence or the risk that the police may believe that the young person represents.

The *Police Discretion Study* surveyed police agencies as to which conditions they imposed. The most commonly imposed conditions were:

- "no go" - restricting a young person from going to a certain place or area (26% of police agencies).
- non-association – restricting a young person from coming into contact with certain specified individuals (36% of police agencies).
- keep the peace and be of good behaviour (24% of police agencies). Many officers noted that this condition can mean "almost anything".

- no alcohol or drugs (19% of police agencies).
- no weapons (2% of police agencies).
- curfew (34% of police agencies). Many officers stated that they do not have the legal authority to impose a curfew but some officers did so anyway.
- attend school (6% of police agencies).
- unspecified conditions (56% of police agencies).

The *Police Discretion Study* also found that there had been a 600% increase in administration of justice offences (e.g., breaches of conditions of release) under the YOA and that police exercise very little discretion regarding charging young persons with such offences. According to the study, police charged young persons with administration of justice offences at a higher rate than the rate for any other offence except murder. The authors concluded that police have contributed to the "epidemic" of administration of justice offences by the number and type of release conditions that they impose. More recent statistics indicate that a high rate of charging for administration of justice offences has continued under the YCJA.

7. Restrictions on Arrest and Detention

In a recent study entitled, *Controlling a Jail Population by Partially Closing the Front Door: An Evaluation of a "Summons in Lieu of Arrest" Policy*, Baumer and Adams reported that a county in the U.S. had some success in reducing its high rate of pre-trial detention by changing the rules regarding who could be arrested and detained (Baumer and Adams, 2006). The county was under a U.S. federal court order to control its jail population. In response to the order, the county court established rules that required the police to use a summons for certain non-violent offences. The police were not permitted to arrest a person for these offences. In addition, if the police brought a person charged with one of these offences to the detention facility, the officials at the detention facility were authorized to refuse to detain the person. The study suggests that an effective way to reduce the use of pre-trial detention may be to establish clear rules that specify that persons charged with certain less serious offences can not be arrested or detained.

Summary

In summary, key findings from the research discussed above include:

- The percentage of arrested young persons who are detained by the police appears to have increased under the YCJA.
- There are large differences among police forces in the percentage of young persons detained by police. The local legal culture, which includes the "usual practices" of police, appears to have contributed to the differences.
- Young persons who were charged with a violent offence or who had prior findings of guilt were more likely to be detained by police under the YCJA than under the YOA.

- Some less serious offenders were more likely to be detained by the police under the YCJA than under the YOA.
- Police have indicated that they detain young persons not only for law enforcement purposes but also for the purposes of imposing an immediate sanction on the young person and "for the good of the youth".
- If a young person was released by the police, the type of police release was associated with the seriousness of the offence.
- The police typically imposed more conditions and used more onerous release mechanisms under the YCJA than under the YOA.
- There was not a relationship between social and legal factors and specific conditions that were imposed by the police.
- Police exercise very little discretion regarding charging young persons with administration of justice offences (e.g., breaches of conditions). Police charged young persons with administration of justice offences at a higher rate than the rate for any other offence except murder.
- A way to reduce the use of pre-trial detention may be to establish clear rules that specify that persons charged with certain less serious offences can not be arrested or detained.

C. Issues for Discussion

More information is needed about:

- Reasons for the apparent increase under the YCJA in the percentage of young persons detained by police.
- The basis on which young persons are detained or released by police.
- Reasons for the apparently large provincial variation in the use of pre-trial detention by police.
- Provincial and local policies and guidelines to assist police officers in making detention and release decisions.
- The extent to which young persons are detained by police and then released prior to appearing before a justice.
- The enforcement by police of conditions of release.

Grounds for detention

- Does the *Criminal Code* provide sufficient structure and guidance for the discretion exercised by police in determining whether to detain or release a young person?
- As noted above, the *Morales* decision of the Supreme Court of Canada struck down the "public interest" ground of the Criminal Code's judicial interim release provisions because it was a vague and imprecise basis for detaining a person. Should "public interest" be removed from the other sections of the Code (e.g., s.

497; s. 498) in which "public interest" is a basis for the police decision to detain a young person?

- What should be the grounds for police detention of young persons? Are the current grounds satisfactory?
- As a means of reducing the use of pre-trial detention, should the YCJA provide that young persons charged with certain less serious, non-violent offences may not be detained?
- What assumptions and factors are used by police in making predictions about whether a young person will commit an offence or appear in court? Are the assumptions valid? Should the law specify the factors that should be taken into account in making these predictions?
- How likely should the predicted commission of an offence be to justify a police decision to detain a young person? Should there be a "substantial likelihood" that the offence will be committed, which is the wording used in the part of the Criminal Code that applies to judicial interim release hearings?
- Should the risk that a young person will commit *any* offence, including a relatively minor offence, be sufficient to detain the young person? Or, should the authority to detain on the basis of a risk of committing an offence be limited to the risk that a relatively serious offence may be committed? Is detention a disproportionate response to the risk that the young person may commit a relatively minor offence?
- Should the risk that a young person may not appear in court be sufficient to detain a young person regardless of the seriousness of the charged offence? Or, should the authority to detain on this ground be limited to relatively serious offences?
- Should the YCJA explicitly provide that detention is permitted only if the requirements of the *Oakes* case are met (e.g., the adverse effects of detention on the young person are not disproportionate to the danger to the public or to the seriousness of the risk of the young person not appearing in court)?
- As mentioned above, s. 503 of the Criminal Code provides that the police officer or officer in charge may release the person if he or she "is satisfied that the person should be released from custody." On what basis should a police officer determine whether or not he or she is satisfied?
- Should police be permitted to detain young persons as a means of imposing immediate sanctions for the alleged offence?

Release and Conditions of release

- When a police officer decides that a young person should be released rather than detained, what should be the test for determining whether conditions of release may be imposed?
- Should the YCJA explicitly provide that the conditions must meet the requirements of the *Oakes* test (e.g., a rational connection between the condition of release and the risk that the young person is thought to pose)?
- What conditions should police be authorized to impose?

- Should conditions such as “keep the peace and be of good behaviour” be prohibited because of lack of clarity and precision?
- How can the number of charges for administration of justice offences, such as breaches of conditions of release, be reduced?
- Should the YCJA more clearly require that extrajudicial measures, rather than a charge, be considered or presumed when there is a breach of a condition of release?

YCJA provisions

- Should the YCJA explicitly provide that the presumption against detention in s. 29(2) applies to police detention as well as detention decisions at bail hearings?
- Should the YCJA explicitly provide that the prohibition on detention for social welfare purposes in s. 29(1) applies to police detention as well as to detention decisions at bail hearings?
- Should all provisions for the detention and release of young persons by police be contained in the YCJA rather than the *Criminal Code*?

III. JUDICIAL INTERIM RELEASE

This part of the paper summarizes law and research related to judicial interim release hearings (bail hearings) that deal with accused young persons. Issues for discussion are raised at several points throughout the summary of the law and research.

Under the provisions of the *Criminal Code*, a young person who has been detained by the police must be brought before a justice (a youth court judge or justice of the peace) without unreasonable delay and within 24 hours of the arrest or as soon as possible if a judge or justice of the peace is not available within the 24 hour period. As discussed above, within this time period, the peace officer or officer in charge may still release the young person under the *Code* provisions discussed above or "if satisfied that the young person should be released from custody" conditionally or unconditionally (*Criminal Code*, section 503). This continuing authority of the police to release the young person may be particularly important for young persons who are facing delays in being brought before a justice.

As a general rule, there is a presumption that a young person who is brought before a justice should be released without conditions. The justice is required to order the release of the young person, unless the prosecutor “shows cause” why detention of the youth is justified or another order under the *Criminal Code*, section 515, is justified. The grounds for detention, discussed below, are that detention is necessary: (1) to ensure that the young person attends court; (2) for public safety; or (3) to maintain confidence in the administration of justice.

If the justice does not order the release of the young person without conditions, he or she must, unless the prosecutor "shows cause" why the detention of the young person is justified, order the release of the young person subject to:

- an undertaking with conditions;
- a recognizance with or without sureties in such amount and with such conditions as the justice directs; or
- a recognizance without sureties in such amount and with such conditions as the justice directs and the deposit of a sum of money or other valuable security as the justice directs.

Additional release provisions apply if the young person does not ordinarily reside in the province or within 200 kilometres of the place of detention.

A. Research

Before discussing specific provisions of the Criminal Code and the YCJA, this part of the paper reviews some of the available research on judicial interim release.

1. Appearance before a Justice

Research under the YOA suggests that it was not unusual for a young person to wait much longer than 24 hours to be brought before a justice. Such research raises questions about whether the rights of young persons were being respected and about the appropriate interpretation of the requirement that the young person be brought before the youth court judge or justice of the peace "without unreasonable delay." In addition to the *Criminal Code* time requirements, the Declaration of Principle in section 3 of the YCJA requires that those responsible for enforcing the Act must act with promptness and speed.

The *YCJA Monitoring Study* found that under the YCJA, all or almost all detained young persons had their first court appearance within three days (72 hours) of being arrested. The study is not clear about whether cases in excess of 24 hours were limited to those in which a justice was not available. The study found that there was little indication of delays longer than three days before the issue of detention was addressed by a justice.

Issues for discussion:

- How long should it be possible to hold a young person before bringing the young person before a justice? Is it necessary to allow more than 24 hours?
- What should be the meaning of "as soon as possible"? If a justice is not available within 24 hours, should three days be considered a satisfactory length of time between arrest and first court appearance?
- Should the seriousness of the charged offence be relevant to how long a young person may be held before being brought before a justice?

2. Numbers of Young Persons Detained

The Canadian Centre for Justice Statistics (CCJS) reported in its publication *Youth Custody and Community Services in Canada, 2004-05* that remand (detention) admissions declined by 7% from 2003-04. There was substantial variation among the provinces and territories, with some jurisdictions reporting large decreases and some reporting large increases.

The rate of young persons in remand has remained unchanged at about 3% from the last year of the YOA (2002-03) to 2004-05. The remand rate refers to the number of young persons in remand per 10,000 young persons in the population. The average number of young persons in remand declined somewhat over the three years but the rate of remand remained stable because of a decrease in the youth population.

3. Jurisdictional Variation

The *Pre-trial Detention Study* found that there were vast differences among the courts in the percentage of young persons detained. The percentage of young persons detained by the court ranged from 26% to 48%.The jurisdictional variations could not be explained by differences in the social and legal characteristics of the young persons. Moyer concluded that the local legal culture, which includes the "usual practices" of police, Crown attorneys, judges and justices of the peace, contributed to the differences by court location. The *YCJA Monitoring Study* found that considerable jurisdictional variation continued under the *YCJA.*

Although there may be explanations of jurisdictional variation that were not captured by the available data, the research raises questions about the local legal cultures and suggests that the "usual practices" should be reviewed. As noted above with respect to police detention, it seems reasonable to expect that the chances of being detained should not be significantly different for two young persons who live in different cities, if their relevant circumstances are basically the same. These findings may also be reflecting the wide range of discretion and interpretation that is permitted under the *Criminal Code* provisions that govern detention and release decisions.

The YCJA narrows this discretion somewhat, particularly through the prohibition on the use of detention for child welfare purposes in s. 29(1) and the presumption against detention in s. 29(2). However, the *Code* provisions that are adopted by the YCJA continue to be open to various interpretations and decisions.

4. Length of Pre-trial Detention

A large percentage of detained young persons remain in detention for a significant period of time. In *Youth Custody and Community Services in Canada, 2004-05,* CCJS reported that about 52% of detained young persons were released within one week; about 28% spent between one week and one month in detention; and 19% spent between one month

and six months in detention. The remainder, about 1%, spent more than six months in detention.

The *YCJA Monitoring Study* found that young persons who were detained by the court had, on average, detention stays of about 7 weeks under the YCJA. There was not a significant difference between the YOA and the YCJA in the length of detention.

5. Release on Crown Consent

The position of the Crown on whether a young person should be released is a major factor that influences judicial interim release decisions. The *Pre-trial Detention Study* notes that, although the justice is formally responsible for the bail decision, it is the Crown prosecutor who, in effect, makes most of the decisions to release. In her study of 118 bail hearings in Toronto, Varma found that in every case in which the prosecutor did not contest release, the young person was released by the justice (Varma, 2002).

The *YCJA Monitoring Study* found that, in the overall sample of court sites, 63% of young persons were released on Crown consent. This percentage did not represent a significant change from the YOA, under which 59% of young persons were released on Crown consent.

Under the YCJA, there were significant jurisdictional variations in the percentage of young persons released on Crown consent. For example, in Toronto, the Crown consented to release in 71% of cases while, in Winnipeg, the Crown consented to release in only 43% of cases. In addition, in comparison to the YOA, Crown consent increased under the YCJA in some courts and it decreased in other courts. For example, in Toronto Crown consent increased from 46% of cases under the YOA to 71% under the YCJA. In contrast, in Surrey, Crown consent decreased from 80% of cases under the YOA to 58% under the YCJA.

In the study entitled *Crown Decision-Making under the YCJA*, Moyer examined Crown decision-making in forty-nine bail cases in five youth courts in two provinces, British Columbia and Saskatchewan, in the first few months after the *YCJA* came into force. Moyer found that in both provinces Crowns consented to release in 44% of cases. This percentage is lower than the finding of 60% in Toronto in Varma's research. Other findings from the study include:

- The Crown's consent to release was influenced by having fewer current charges, having no outstanding charges, and no evidence of abuse of alcohol or drugs.
- Because of low numbers and because more than half of the most serious current charges were administration of justice offences, it was difficult to characterize the relationships between substantive offences (e.g., property offences; violent offences) and Crown consent.
- "Meaningful consequences" was cited in Crown consent cases in which the Crown believed that the arrest and overnight stay in detention had been sufficient to get "the attention" of the young person.

- The opinions of probation officers and, in Saskatchewan, Judicial Interim Release Program staff greatly influenced Crown decisions. In every case in which these personnel recommended release, the Crown agreed to release.
- Concrete release plans carry considerable weight even in cases that are on their face highly detainable.
- If the Crown had spoken to a parent or guardian, the Crown was much less likely to consent to the release of the young person. Typically, the parent wanted the young person "locked up" or labelled the young person as "out of control".

These findings highlight the importance of relevant information for the decision-makers at the bail stage. Both BC and Saskatchewan have programs that are consistent with the YCJA in that they increase the likelihood that young persons will be released rather than detained. These programs appear to be guided by provincial policies that encourage release. The Saskatchewan JIR program was independently evaluated a few years ago and found to be a highly successful model for reducing the use of pre-trial detention.

The findings also highlight the importance of parental views and their influence on whether the young person will be detained.

6. Other Factors Associated with Detention of Young Persons

It was noted earlier in the discussion of police detention that research does not indicate the specific legal basis on which police relied to detain young persons. Similarly, research does not provide information on the legal grounds on which justices rely in deciding to detain young persons. For example, research does not address how often justices detain young persons on the ground that detention is necessary for the safety of the public or the ground that detention is necessary to ensure that the young person will attend court. However, the research does report on other factors associated with the detention of young persons, including: the seriousness of the current charge; prior criminal record; the young person's living arrangements; whether the young person is Aboriginal; and provincial policies and programs. It is important to keep in mind that these other factors do not necessarily provide a legal basis for the detention of young persons, but they may have been used by courts in making predictions about whether the young person would be a danger to public safety or appear in court. Research information on these factors includes the following:

Charges

The *YCJA Monitoring Study* found that under the YCJA young persons charged with an indictable offence were more likely to be detained than those charged with a summary or hybrid offence.

Most detained young persons (73%) are charged with non-violent offences and 37% of detained young persons are charged with a category of offences that mainly consists of administrative offences. In *Youth Custody and Community Services, 2004-05,* CCJS

reported that the most serious charges against detained young persons were charges of committing the following offences:

- "other Criminal Code offences", which mainly include administrative offences such as failure to appear in court and disorderly conduct - 37% of detained young persons.
- violent offences - 27% of detained young persons;
- property offences - 26% of detained young persons; and
- "other offences", which include drug-related offences and YCJA offences (e.g., failure to comply with an order) – 9% of detained young persons.

In *Crown Decision-Making under the YCJA*, Moyer found that in more than half of the cases, the most serious charge was an administration of justice offence. Breach of probation was the most serious charge in 40% of BC cases and in 10% of Saskatchewan cases. "Other administration of justice charges" was the most serious charge category in about 33% of cases in both provinces.

The *Pre-trial Detention Study* found that justices most often detained young persons charged with indictable offences against the person and certain administration of justice offences, particularly failure to attend court and failure to comply with an undertaking.

Prior Record

The *Pre-trial Detention Study* found that the most significant factor related to court-ordered detention was the young person's prior record. The longer and more serious the record, the more likely it was that the young person would be detained.

The *YCJA Monitoring Study* found that under the YCJA:

- young persons with a record of failing to comply with a non-custodial sentence were more likely to be detained than those with no such record; and
- young persons with a record of three of more prior findings of guilt were more likely to be detained than those two or fewer prior findings of guilt.

Living arrangements

The *Crown Decision-Making* study found that in 33% of the BC bail cases the young person lived with a parent while in Saskatchewan 60% of the young persons in bail cases lived with a parent.

The *Pre-Trial Detention* study found that, like police detention, young persons in living arrangements that appeared to offer less potential for supervision were more likely to be detained by the justice, when all other factors were controlled.

Aboriginal young persons

In *Youth Custody and Community Services, 2004-05*, CCJS reported that Aboriginal young persons, who represent about 5% of the total youth population, accounted for 22% of all admissions to remand.

In *Crown Decision-Making under the YCJA*, 70% of the Saskatchewan bail cases involved Aboriginal young persons. 40% of the BC cases involved Aboriginal young persons.

More detailed analysis would be required to determine whether the over-representation of Aboriginal young persons in admissions to remand indicates discrimination against Aboriginal young persons. For example, the seriousness of the current charge, prior record, and instability of living arrangements may be the determining factors rather than the Aboriginal status of the young person.

It is noteworthy that 60% of the Aboriginal young persons in Saskatchewan who were detained by police and sent for a bail hearing were living with a parent. Although living with a parent might be thought to favour release to the parent rather than detention, it may, as noted above, have the opposite effect, depending on the parent's view. It is also noteworthy that 75% of Aboriginal young persons in Saskatchewan who were detained by police and sent for a bail hearing were going to school or working, another factor that might be thought to favour release rather than detention.

Policies and Programs

The *Crown Decision-Making Study* found that:

- No provincial policies specifically on bail decision-making by Crown counsel under the YCJA were located by the researchers.
- Judicial interim release (JIR) programs were available in Saskatoon and Regina. The JIR programs supervise and monitor young persons while on bail. As mentioned above, Crowns placed considerable weight on the assessments prepared by JIR staff regarding the suitability of a young person for bail.
- British Columbia has developed policies for pre-bail enquiries. The enquiry is conducted by probation officers who report to the court on the factors, including alternatives to detention, relevant to the detention or release of the young person. The policy provides explicitly that lack of a suitable home is not a sufficient basis for detention. If a young lacks a suitable home, the probation officer is directed to refer the case to a social worker, financial assistance worker or a community-based residence such as a youth hostel.

Provincial policies on bail decision-making can be an important tool in guiding the discretion of Crowns. Ideally, the policies should reflect a serious assessment of the validity of the common assumptions and "usual practices" that Moyer found in her earlier study were the probable explanation of the significant jurisdictional variations in the use of pre-trial detention with young persons.

The JIR programs and pre-bail enquiries highlight the importance of information at the bail stage of the youth justice process. If these types of programs provide accurate information that is directly relevant to the grounds for detention, they can make a significant contribution to the quality of decision-making.

Summary

In summary, key findings from the research discussed above include:

- All or almost all detained young persons had their first court appearance within three days (72 hours) of being arrested.
- The rate of young persons in remand has remained unchanged from the last year of the YOA (2002-03) to 2004-05.
- There are large variations among the provinces and territories in the percentage of young persons detained by the courts.
- The average length of detention of young persons who were detained by the court was about 7 weeks.
- About 60% of young persons detained by the police and brought for a bail hearing were released on consent of the Crown. There were significant jurisdictional variations in the percentage of young persons released on Crown consent.
- Most detained young persons (73%) are charged with non-violent offences and 37% of detained young persons are charged with a category of offences which mainly consists of administrative offences.
- The most significant factor related to court-ordered detention was the young person's prior record.
- Aboriginal young persons are over-represented in detention. They represent about 5% of the total youth population and account for 22% of all admissions to remand.

B. Grounds for Detention

The grounds upon which detention may be justified are set out in subsection 515(10) of the *Criminal Code* and can be summarized as follows:

1. where the detention is necessary to ensure the young person's attendance in court;
2. where the detention is necessary for the protection or safety of the public, having regard to all the circumstances, including any substantial likelihood that the young person will commit a criminal offence or interfere with the administration of justice; and
3. where the detention is necessary to maintain confidence in the administration of justice.

Where a justice is satisfied that one of the grounds is present, he or she may make an order under subsection 515(5) that the young person be detained in custody. Section 29 of the YCJA sets out additional limitations on the use of detention.

As discussed earlier, the test set out by the Supreme Court of Canada in the *Oakes* case can be used to assess the appropriateness of the grounds for detention. Applying the test to the primary and secondary grounds means that detention of a young person is permitted only if:

(a) detention is rationally connected to reducing the risk that the young person will not appear in court or reducing the risk that the young person will endanger the public;

(b) detention, even if rationally connected to one of those objectives, impairs as little as possible the right of the young person to physical liberty (i.e., it is the least restrictive alternative); and

(c) the effect of detention on the young person is proportional to the risk of the young person not appearing in court or to the danger to the public that the young person is alleged to pose. Incarceration of a young person is a severe restriction of liberty and the danger that would be prevented by the incarceration must be proportionately important in order to be considered reasonable and demonstrably justifiable in a free and democratic society.

1. Predicting risk

The decision to detain a young person is usually based on the primary or secondary ground. Both of these grounds involve a prediction of future behaviour by the young person if released. The primary ground involves a prediction as to whether the young person, if released, will appear in court when required to do so. The secondary ground involves a prediction as to whether the young person, if released, will commit an offence that affects the safety of the public.

As Trotter notes in *The Law of Bail in Canada*, the Supreme Court of Canada in *R. v. Morales* recognized the difficulty in accurately predicting dangerousness for the purpose of determining whether detention is necessary for public safety. However, the court accepted that "dangerousness is a fact of social life that the courts must try their best to cope with." Trotter also notes: "An important peg in the Supreme Court's constitutional analysis of s. 515(10)(b) was the exacting standard created by the 'substantial likelihood' requirement of the paragraph. Since *Morales*, other courts have emphasized the importance of this element."

It is not clear that the factors relied on in the case law accurately predict court attendance or re-offending on bail. It may be that the "common sense" assumptions about the risk of non-appearance and future offending are not valid.

In reviewing issues related to prediction of dangerousness in criminal justice decision-making, Tonry states that one of the major concerns is the low level of accuracy of such predictions (Tonry, 1987). He mentions that there is a widely held view that predictions of dangerousness have a 33% accuracy rate. He notes that, even with a 50% accuracy rate, it can be argued that the accuracy of predictions is too low to provide the basis for denying liberty. The high probability that risk predictions are not accurate reinforces the need to be cautious about detaining young persons and about the factors that should be considered relevant in making a prediction of risk.

Although standardized risk assessment tools appear to be used in some jurisdictions to predict behaviour while on bail, serious objections to the use of such instruments have been raised, including their potential unfairness, their tendency toward over-prediction and imprecision, and their great reliance on static predictors. In *Youth Risk/Need Assessment: An Overview of Issues and Practices*, the authors raise serious doubts about the validity and reliability of risk assessment instruments with young offenders. (Hannah-Moffatt and Maurutto, 2003).

2. Primary ground: necessary to ensure attendance in court

Trotter identifies some of the factors courts rely on in making risk predictions about whether an accused person will attend court, including: the nature of the offence and the potential penalty; the strength of the evidence against the accused; the accused's record regarding complying with previous court orders; and the ties the accused has to the community. With respect to young persons, ties to the community are measured by whether the young person is attending school or is employed, the stability of his or her home situation, and whether parents or guardians are able to adequately supervise or "control" the young person.

Issues for discussion

Detaining a young person for the purpose of ensuring attendance in court raises issues such as:

- How likely must the non-attendance be? Should the law require that non-attendance be a substantial likelihood before detention or other restrictions can be imposed?
- Are valid assumptions and factors used in making the prediction that the young person will not attend court?
- What assumptions and factors should be relevant in determining whether the young person will attend court?
- What weight should be given to the seriousness of the offence that the young person has allegedly committed? Should the authority to detain on this ground be limited to relatively serious offences?
- How does the requirement of proportionality apply? For example, if there is a high risk that the young person will not attend court for a shoplifting charge, is detention a proportionate response? How should the objective of ensuring that the

young person attends court be weighed against the deleterious effects of the young person's detention, which could be for a period of several weeks?

3. Secondary ground: necessary for public safety

It appears from the case law and discussions with practitioners that most decisions to detain a young person are based on the secondary ground, which is that detention is necessary for public safety. "Public safety" is a broad term that is not defined in the Criminal Code and is open to many interpretations. In the context of pre-trial detention of young persons, it raises the question of what type and degree of harm should be considered as endangering public safety. For example, should the detention of a young person be permitted if there is a predicted risk of any offence being committed, regardless of how minor the offence may be? A risk of a violent offence? A risk of an offence that creates a risk of physical or psychological injury? A risk of an offence that causes economic harm? Should the risk of harm be required to be a risk of serious harm?

The risk to public safety is required to be balanced against the restriction of the young person's liberty interests. Statistics, as noted above, suggest that a large number of young persons are being incarcerated when the most serious offence that they are charged with is a relatively minor offence. These statistics raise questions about how the liberty of the young person should be weighed against the risk that a relatively minor or less serious offence might be committed if he or she is released.

The public safety ground includes consideration of whether there is a "substantial likelihood" that the young person will commit a criminal offence. In *The Law of Bail in Canada*, Trotter notes that attempts in the case law to give meaning to the standard of "substantial likelihood" have not been helpful, but he concludes that the accepted approach is a slightly enhanced balance of probability standard. That is, there must be slightly more than a 50% chance that the young person will commit an offence in the time period between the bail hearing and when he or she is next required to appear in court.

Although the secondary ground refers to a "substantial likelihood" that the accused will, if released, commit an offence, discussions with practitioners suggest that, in practice, a "sliding scale" approach is used regarding what constitutes a substantial likelihood. The "sliding scale" approach means that the more serious the underlying offence, the lower the likelihood necessary to obtain a detention order; the less serious the underlying offence, the higher the likelihood necessary to obtain a detention order.

It is unclear how the sliding scale approach complies with the law. It does not clearly flow from the concept of substantial likelihood. In essence, it appears to mean that if the current charge is serious, then it is not necessary for the Crown to show that there is a substantial likelihood that the young person will commit an offence if released.

In light of the difficulty in making accurate predictions of future criminal behaviour, it is important to consider the factors that might be relevant in attempting to make detention

decisions based on prediction of criminal behaviour. Examples of factors that are currently used include the current offence, prior record, a new charge while on release, and history of compliance with previous orders. These factors reflect a reliance on previous behaviour. Their use is consistent with the view that although the ability to predict criminal behaviour is not very good, the best predictor among the not-very-good predictors of future criminal behaviour is past behaviour. However, it should not be assumed that the previous failure of a young person to comply with a condition, such as attending school, necessarily indicates that he or she will commit a criminal offence if released.

Issues for discussion

- How should "public safety" be defined? What types of harm should be considered as endangering public safety? What degree of harm should be required?
- Should the YCJA explicitly provide that detention is not permitted if it would be disproportionate to the seriousness of the offence that might be committed?
- As a means of reducing the use of pre-trial detention, should the YCJA provide that young persons charged with certain less serious, non-violent offences may not be detained?
- How should proportionality be determined? For example, if it is likely that a young person, if detained, will be detained for seven weeks, how serious must the predicted offence be for detention to be a proportionate response?
- Should the law permit the use of a "sliding scale" approach to substantial likelihood of committing an offence? That is, should there be a lower level of likelihood required if the predicted offence is serious and a higher level of likelihood required if the predicted offence is less serious?
- What factors should be relevant in making a detention decision based on a prediction that the young person will commit an offence if released? Should the factors pertain primarily to past criminal behaviour?

4. Tertiary ground: necessary to maintain confidence in the administration of justice

The wording of the tertiary ground reflects the decision of the Supreme Court of Canada in *R. v. Hall* in which the court struck down parts of the previous wording: "*on any other just cause being shown and, without limiting the generality of the foregoing,* where the detention is necessary in order to maintain confidence in the administration of justice …" The court found that the italicized words violated sections 7 and 11 of the Charter but that the rest of the provision was constitutional.

Writing before the *Hall* decision, Trotter's opinion was that the tertiary ground was unconstitutional. He noted that it achieves the same objective as the former "public interest" wording that was struck down by the Supreme Court in *R. v. Morales*: "it permits the detention of an accused person based upon the anticipated reaction of the

public to the decision, free of any concern about the accused person absconding or re-offending."

A strong dissenting opinion by four of the nine judges in the *Hall* case argued that the tertiary ground should be deleted entirely. The judges stated that "confidence in the administration of justice" did not provide a sufficiently precise standard and that the specific factors listed in s. 515(10)(c) provide "little more than a facade of precision". In their view, the wording also failed to set out a valid ground for denying bail that is not already covered by the primary and secondary grounds. They also found that s. 515(10)(*c*) is "ripe for misuse, allowing for irrational public fears to be elevated above the *Charter* rights of the accused."

The dissenting judges also concluded that the provision could not be saved under s. 1 of the Charter. Applying the *Oakes* test, they found that it was difficult to justify the provision as reflecting a "pressing and substantial" objective, especially given the Crown's failure to identify particular circumstances where it would validly operate. They concluded that the provision does not have a rational connection to the proper functioning of the bail system. In their view, it also fails the minimal impairment requirement because by granting open-ended discretion to the bail judge, the provision authorizes pre-trial detention in a much broader array of circumstances than necessary. Finally, the judges found that there is no proportionality between the deleterious effects of pre-trial detention and any potential salutary effects of the provision. In recognizing that pre-trial detention has concrete and profound deleterious effects on the accused, the judges stated: "Not only does pre-trial detention present a serious imposition on the liberty of the accused and his or her right to be presumed innocent, but also there are demonstrated and troubling correlations between pre-trial detention and both the ability to present a defence and the eventual outcome of the trial."

Case law under the YCJA indicates that the tertiary ground should be rarely used.

Issue for discussion

- Is the tertiary ground – "necessary to maintain confidence in the administration of justice" – too vague to be a ground for detaining a young person?

5. Detention as a "wake-up call"

Discussions with practitioners suggest that, in practice, detention is often used as a "wake-up call" for "nuisance offenders", such as a young person who repeatedly shoplifts or repeatedly breaches conditions of release. The wake-up call approach is also apparently used with young persons who are considered to be "out of control" and those who are a danger to themselves. Although detention that serves as a wake-up call is sometimes based on the ground of public safety, the detention is often a result of a short adjournment, rather than a final detention order. Using an adjournment avoids the issue of whether detention can be justified on the primary, secondary or tertiary grounds in the Code.

The wake-up call approach is intended to be a short, sharp shock that, prior to a finding of guilt, gives some immediate consequences to the young person. As discussed above, the practice of using detention to impose immediate consequences on a young person has also been a common practice of police, according to Carrington's research on police discretion. It is important to remember that the young person who receives the wake-up call is still presumed innocent and that the imposition of punishment prior to a finding of guilt is not permitted under the YCJA.

Issues for discussion

- Should detention as a "wake-up call" be permitted? If not, how could it be prevented?
- Can the detention of a "nuisance offender" be justified under the secondary or tertiary ground?
- Should there be a separate ground for the detention of "nuisance offenders"?

C. Prohibition on Detention for Social Welfare Purposes

Subsection 29(1) of the YCJA states that judges may not use detention as a substitute for appropriate child protection, mental health or other social measures aimed at addressing the needs of the young person. This is designed to address concerns about the inappropriate use of detention for child welfare or mental health purposes — rather than criminal justice purposes. Youth court judges expressed concern that under the YOA detention was often proposed for young persons who were essentially management problems for the child protection system.

Under the YCJA, there have been reports in some jurisdictions of non-compliance with the prohibition in s. 29(1). Also, as discussed above, discussions with practitioners suggest that many of the youths who are detained for the purpose of a "wake-up call" have social welfare needs that should be dealt with under child welfare legislation and s. 35 of the YCJA, which enables a justice to refer a young person to a child welfare agency.

Referral to the child welfare system is often not very effective for young persons in the youth justice system who have social welfare needs, particularly for those who are 16 years of age or older. Concerns have been expressed that child welfare does not have sufficient resources; that there is not good coordination between the youth justice system and the child welfare system; and that once the youth justice system is involved, the child welfare system backs off.

Conferences under s. 19 of the YCJA appear to be used to a limited extent at the pre-trial detention stage in order to address the social welfare needs (e.g., housing) of youths who are likely to be detained if the social welfare needs are not met.

It is often difficult to separate social welfare concerns from valid legal grounds for detention. The social welfare problem of a young person, such as the lack of adequate housing, may lead to the conclusion that he or she is unlikely to appear for trial or will commit a criminal offence. However, depending on the circumstances of the case, it may be reasonably argued that a decision to detain a young person who lacks adequate housing would be using detention as a substitute for a social measure and should not be permitted.

It is clear from the reported case law that the prohibition on the use of detention as a substitute for child welfare or mental health services is being carefully considered by some courts and influencing their decisions. For example:

- In *R. v. H.E.*, after considering s. 29(1), the court found that "(y)oung people are not to be detained in custody because their home situation is poor. Denial of bail is not to be used to get them out of a bad home environment."
- In *R.* v. *W.S.C.*, the court stated**:** "Despite the shift in emphasis in the YCJA away from using the justice system to address social problems, the thinking and the resources have not yet shifted and we continue to be confronted with requests to "do something" for the child for whom there are no other options. We all fear the gap that is left between the justice and social support systems will not serve children and families, nor society well. However, if the justice system continues to fill that void, it is not likely to be filled by the social support system either."
- *In R.* v. *W.A.L.D.*, in refusing to detain a young person who had Fetal Alcohol Spectrum Disorder and for whom appropriate resources were not available, the court stated: "While the availability of resources is relevant when considering alternatives to custody at sentencing, it cannot be a legitimate factor in a determination of pre-trial detention. To do otherwise would run afoul of s. 29(1) of the YCJA and jeopardize the operation of the presumption of innocence."
- In *R. v. M.J.S.*, the Nova Scotia Supreme Court used a similar prohibition in s. 39(5) to overturn the sentence imposed by a youth court judge. The Supreme Court found that the sentencing judge's main concern related to the young person's need for protection and mental health intervention. The court stated: "It is clearly contrary to the principles of the Youth Criminal Justice Act to imprison young persons simply because of the lack of adequate treatment facilities. Criminal sanctions should not be used as a substitute for medical interventions including psychological or psychiatric counselling. … In addition sanctions directed at rehabilitation must not violate the proportionality principle. A young person who has committed a relatively minor offence but has serious psychological needs that seem to have contributed to the behaviour should receive a sentence that reflects the seriousness of the offence, not the seriousness of the psychological needs. The sentence must not be more intrusive than the offence warrants."

Issue for discussion:

- What should be done to ensure that pre-trial detention of young persons is not used for the purpose of addressing the social welfare needs of young persons?

D. Presumption against Detention

S. 29(2) of the YCJA states:

In considering whether the detention of a young person is necessary for the protection or safety of the public under paragraph 515(10)(b) of the Criminal Code, a youth justice court or a justice shall presume that detention is not necessary under that paragraph if the young person could not, on being found guilty, be committed to custody on the grounds set out in paragraphs 39(1)(a) to (c).

S. 29(2) of the YCJA creates a rebuttable presumption that judges must apply in their consideration of whether detention of a young person is justified on the secondary ground. The youth court judge or justice of the peace is required to presume that detention of a young person is not necessary for the protection of the public if the young person could not, on being found guilty, be sentenced to custody on the grounds set out in s. 39(1)(a) to (c). If the young person could, on being found guilty, be sentenced to custody on the grounds set out in s. 39(1)(a) to (c), the presumption does not apply. S. 39(1) sets out three minimum or threshold criteria for the use of custody as a sentence:

- the young person has committed a violent offence (paragraph 39(1)(a);
- the young person has failed to comply with two or more non-custodial sentences (paragraph 39(1)(a)(b); or
- the young person has committed an indictable offence for which an adult would be liable to imprisonment for more than two years and has a history that indicates a pattern of findings of guilt (paragraph 39(1)(a)(c)).

If the young person, on being found guilty, would not meet any of these criteria, the judge or justice of the peace must presume that the detention of the young person is not necessary for the purpose of protection of the public. The rationale behind this provision is that it is generally unfair to incarcerate a presumed-innocent young person on the ground of public safety at the pre-trial stage if Parliament has determined that he or she cannot be incarcerated if found guilty of the alleged offence. This provision reflects the objective of the Act to reduce the youth justice system's reliance on incarceration of young persons.

The presumption provides a starting point for the pre-trial detention decision. It is based on the idea that if the young person who is found guilty could not be sentenced to custody, then the starting point at pre-trial detention should be that the young person who has not been found guilty should not be detained before trial. The presumption can be rebutted by the Crown.

Meeting one of the criteria in s. 39(1) is not sufficient to order the detention of a young person. If the presumption against detention does not apply because one of the criteria in s. 39(1)(a) to (c) is met, it does not mean that the justice must order the detention of the young person. The justice must use an alternative to pre-trial detention, if one is available that is in accordance with the provisions of the *Code* and the YCJA pertaining to judicial interim release.

S. 29(2) creates a presumption, not a prohibition on detention. As the wording of s. 29(2) provides, "a youth justice court or a justice shall *presume* that detention is not necessary". The presumption can be rebutted and detention can be ordered, if the Crown can persuade the court that, despite the fact that the young person does not fit under any of the criteria in s. 39(1)(a) to (c), detention is necessary for the protection or safety of the public.

Courts have recognized that the presumption is rebuttable but that it should not be easily rebutted. For example, in *R. v. J.J.O.*, (2005) B.C.J. No. 2294, the young person had repeatedly failed to comply with court orders. The court found that it was possible to rebut the presumption against detention in a case where there are repeated breaches, but the court refused to rebut the presumption "without an indication that more substantive offences may occur as a result of the non-compliance".

Despite the wording of s. 29(2), some courts have treated the presumption as a prohibition. They have interpreted the provision as meaning that if the young person does not meet the threshold custody criteria in s. 39(1), it is not possible to detain the young person.

Similarly, the Nunn Commission appears to have found that in Nova Scotia the presumption in s. 29(2) is considered to be, in practice, close to a prohibition on detention rather than a presumption that can be rebutted. The Commission's view is reflected in various parts of the Commission's report. For example, the Commission states at page 241:

"Without the express circumstances of subsections 39(1) (a), (b), and (c), pre-trial detention is pretty much a myth."

In other words, the Commission's understanding is that if the young person has not committed a violent offence, failed to comply with non-custodial sentences, or has a pattern of findings of guilt, then it is practically impossible to detain the young person at the bail hearing stage. As reported court decisions from across the country have made clear, many courts have concluded that this is not what the Act provides.

Despite the Commission's concern that it is too difficult to detain young persons under the YCJA, it is noteworthy that in the *A.B.* case, which led to the appointment of the Commission, a court determined that A.B. could be detained because he met the legal requirements for pre-trial detention. Instead of detaining A.B., however, the court made a responsible person order.

In Nova Scotia, the practice of interpreting s. 29(2) as a prohibition has not been a universal practice. In February 2006, ten months prior to the release of the Nunn Commission report, the court in *R. v. M.T.S.*, a Nova Scotia decision, interpreted s. 29(2) as a rebuttable presumption, not a prohibition. The court found that the Crown had rebutted the presumption against detention. The young person's out-of-control behaviour, including alleged breaches of conditions of an undertaking, persuaded the court that he would endanger the safety of the public by committing vehicle theft.

In January 2007, the Public Prosecution Service of Nova Scotia issued a practice memorandum to Crown attorneys advising them that the decision in *M.T.S.* "exemplifies the approach being taken by the courts in Nova Scotia." The memorandum directed Crown attorneys to be guided by the *M.T.S.* decision (Nova Scotia Public Prosecution Service, 2007).

The practice of interpreting s. 29(2) as a prohibition may be changing. Discussions with practitioners suggest that prosecutors in Nova Scotia have been successful recently in persuading courts that the correct interpretation of s. 29(2) is that it creates a rebuttable presumption, not a prohibition.

One possible legislative response to the different interpretations of s. 29(2) is to amend the Act to clarify that the presumption is, in fact, a presumption that can be rebutted. The Commission's understanding that the presumption in s. 29(2) is a prohibition appears to have been an important underlying factor in recommending a different legislative response. It recommended that the threshold custody criteria in s. 39(1) be amended to enable the detention of a broader range of young persons.

The Commission recommended that the federal government amend the definition of "violent offence" in section 39(1)(a) of the YCJA to include conduct that endangers or is likely to endanger the life or safety of another person. In *R. v. C.D.*; *R. v. C.D.K.*, the Supreme Court of Canada defined "violent offence" under the YCJA as an offence in the commission of which the young person caused, attempted to cause or threatened to cause bodily harm. The Supreme Court rejected a broader definition of violent offence that would include an offence in which the young person did not cause, attempt to cause, or threaten to cause bodily harm but created a risk of endangering others.

The Commission recommended that the federal government also amend section 39(1)(c) of the YCJA so that the requirement for a demonstrated "pattern of findings of guilt" would be changed to "a pattern of offences," or similar wording. The goal of this recommendation was that "both a young person's prior findings of guilt and pending charges are to be considered when determining the appropriateness of pre-trial detention."

Both of these recommendations appear to reflect the Commission's view that s. 29(2) creates a prohibition. If the presumption in s. 29(2) is understood to be a rebuttable presumption, then there is nothing in the YCJA to prevent the consideration of pending

charges or conduct that endangers life when determining whether a young person should be detained.

The Commission also recommended that the federal government amend and simplify the statutory provisions relating to the pre-trial detention of young persons so that section 29 would stand on its own without interaction with other statutes or other provisions of the YCJA. The pre-trial detention provisions of the YCJA require reference to the pre-trial detention provisions of the Criminal Code as well as certain sentencing provisions of the YCJA. The Commission concluded that such cross-referencing creates unnecessary complexity in the Act and makes the Act difficult to apply. The solution recommended by the Commission is to create separate provisions in the YCJA that relate solely to pre-trial detention of young persons.

Issues for discussion:

- Should the YCJA be amended to clarify that the presumption in s. 29(2) is a rebuttable presumption?
- Should the YCJA set out what is required to rebut the presumption in s. 29(2)?
- For purposes of pre-trial detention, should the definition of "violent offence" be amended to include conduct that endangers or is likely to endanger the life or safety of another person?
- For purposes of pre-trial detention, should "pattern of findings of guilt" be changed to "a pattern of offences," or similar wording?
- Should the presumption against detention be broadened to include all of the grounds for detention - i.e., should the presumption apply not only to the public safety ground but also to the primary and tertiary grounds? If the alleged offence or prior record of a presumed-innocent young person is not serious enough to permit a custody sentence if the young person is found guilty, should it be presumed that the young person should not be detained at the pre-trial stage regardless of the specific ground relied on by the Crown?
- Should all provisions for the detention and release of young persons be contained in one part of the YCJA rather than in the *Criminal Code* and in the pre-trial detention and sentencing parts of the YCJA?

E. Conditions of Release

As a general rule, there is a presumption that a young person who is brought before a justice should be released without conditions. The justice is required to order the release of the young person, unless the prosecutor "shows cause" why detention of the youth is justified or another order under the *Criminal Code*, section 515, is justified. If the justice does not order the release of the young person without conditions he or she must, unless the prosecutor shows cause why the detention of the young person is justified, order the release of the young person subject to:

- an undertaking with conditions;
- a recognizance with or without sureties in such amount and with such conditions as the judge or justice directs; or
- a recognizance without sureties in such amount and with such conditions as the judge or justice directs and the deposit of a sum of money or other valuable security.

As mentioned earlier, additional release provisions apply if the young person does not ordinarily reside in the province or within 200 kilometres of the place of detention.

Conditions that may be attached to a release order are listed in the *Criminal Code*, s. 515(4), and include:

- report at specified times to a peace officer or other person designated in the order;
- remain within a specified territorial jurisdiction;
- abstain from communicating with any person or going to any place specified in the order; and
- comply with "other reasonable conditions" specified in the order.

Discussions with practitioners indicate that, in practice, there is not a clear standard or test for imposing bail conditions. Some have suggested that the test should be based on the grounds for detention. For example, the secondary ground of "necessary for public safety" can be used. If it is determined that imposing detention or release conditions is necessary for public safety, then conditions rather than detention should be used if the conditions would be sufficient to manage the risk to public safety.

Conditions of release are not to be punitive and they are not to be for the purpose of rehabilitation or treatment. They should have a rational connection to the ground for detention that is being addressed. For example, if the relevant ground is the protection or safety of the public, the condition that is imposed on the young person must be designed to neutralize the perceived danger to the public. The *YCJA Monitoring Study* found that, under the YCJA, 13% of release cases included a condition to "attend counselling, treatment or other residential program". Without more information, it is not clear whether this type of condition was rationally connected to public safety or ensuring attendance in court.

As noted above in relation to s. 29(1), it is often difficult to separate social welfare concerns from valid legal grounds for detention. A similar difficulty can arise regarding conditions of release. Certain conditions, such as requiring a young person to abstain from alcohol, may be of assistance to the young person and also be a tool to manage a risk to public safety. Discussions with practitioners, however, indicate that conditions are sometimes used solely as a social measure that is not related to the risk that the young person is thought to pose while on release. Depending on the circumstances of the case, examples may be conditions that require the young person to attend school or "obey the rules of the house" or to comply with a curfew. It has also been noted that sometimes parents will refuse to take the young person home unless such conditions are imposed.

At least one experienced youth court judge has expressed the view that a condition requiring a youth to "obey house rules" is too vague to be enforceable and inappropriately delegates the setting of conditions to parents or those who are in charge of the residence. It has also been reported that that very minor non-compliance with the rules of a group home (e.g., refusing to read a book) may be the basis for a breach charge against young persons in child welfare care.

There is evidence that, under the YOA, conditions that fell into the category of "other reasonable conditions" had the effect of setting up young persons for failure. Failure to comply with a condition of release is a criminal offence, which may trigger a reverse onus situation that requires the youth to justify why he or she should not be detained. Conditions of release often pertain to behaviour that, outside the context of conditional release, is non-criminal behaviour. It is important to ensure that conditions are not excessive in number, not unnecessarily intrusive, directly related to one of the grounds for detention, and likely to be complied with by the youth.

The *Oakes* test, set out by the Supreme Court of Canada and summarized above, applies to the imposition of conditions of release as well as to the detention of a young person. Therefore, in assessing the appropriateness of a condition imposed on a young person, the following criteria must be met for the condition to be constitutionally valid:

- The condition must be rationally connected to one of the objectives of reducing the risk of failure to appear in court, reducing danger to the public, or maintaining public confidence in the administration of justice.
- The conditions, even if rationally connected to one of the objectives, should impair as little as possible the young person's right to physical liberty.
- There must be proportionality between the effects of the conditions and the objective. The more severe the deleterious effects of a condition, the more important the objective must be if the condition is to be reasonable and demonstrably justified in a free and democratic society.

Research Findings on Conditions of Release

Despite the emphasis in the Criminal Code on releasing persons without any conditions, Varma's study of 118 bail hearings under the YOA found that all of the young persons

who were released were ordered to comply with conditions (Varma, 2002). The *YCJA Monitoring Study* contains a similar finding: about 98% of released young persons had conditions imposed by the justice. These findings raise the question of whether conditions are routinely imposed in cases in which conditions are not actually necessary to ensure public safety or that the young person will appear in court. As discussed below, whenever a condition of release is imposed, it creates the possibility of a breach of the condition and therefore a further charge against the young person, which increases the likelihood that he or she will be detained.

1. Jurisdictional Variation

The *Pre-trial Detention Study* found that there were vast differences among the courts regarding conditions of release. In many cases the jurisdictional variations could not be explained by differences in the social and legal characteristics of the young persons. The author concluded that the local legal culture, which includes the "usual practices" of police, Crown attorneys, judges and justices of the peace, contributes to the differences by court location.

Examples of the jurisdictional variations that could not be explained by the available data included:

- The average number of bail conditions imposed on young persons ranged from 2.9 in the Edmonton court to 4.4 in Scarborough and Vancouver.
- The use of specific release conditions also varied considerably. Depending on the court, conditions that restricted the areas to which the young persons could go were imposed on 11% to 54% of released young persons; not possessing a firearm or weapon was imposed on 1% to 48% of released young persons; and reporting to police or a probation officer was imposed on 0% (Scarborough) to 93% (Vancouver).

As with the research on decisions to detain young persons, these findings on conditions raise questions about the local legal cultures and suggest that the "usual practices" should be reviewed.

2. Release Conditions Imposed

The following table from the *YCJA Monitoring Study* indicates the types of release conditions imposed and the percentage of release cases in which each condition was included in the release order:

Conditions of court release	*YOA* sample	*YCJA* sample
	% of court-released cases with each condition	
Non-communication with victim	27.4	32.3
Non-communication with other person	41.6	41.5
Report to police/other regularly	31.0	36.7
Attend school or obtain, maintain employment	28.7	28.5
Abstain from alcohol, non-prescription drugs	22.3	24.4
No weapons	21.6	41.0
Curfew	54.2	39.5
House arrest	11.1	16.6
Attend counselling, treatment or other residential program	10.3	13.0
Total number of cases with court release conditions	467	537

Note: The shaded areas indicate a statistically significant difference between the YOA sample and the YCJA sample.

The Study also found that many bail conditions imposed were seemingly unrelated to the offence charged.

3. Bail Conditions Breached and Charged

The *YCJA Monitoring Study* found that charges involving bail violations increased from 31% under the YOA to 37% under the YCJA. The most common bail violation charges under the YCJA were failure to attend court and failure to attend at the police station for fingerprinting (30% of charges). Curfew violations were the second most common reason for the laying of a bail violation charge (20% of charges).

The *Pre-trial Detention Study* found that the condition that was most frequently violated was a curfew. Approximately one-third of young persons who were released with a curfew condition were charged with breaching that curfew. The next most frequently violated conditions were "reside" conditions and "keep the peace and be of good behaviour".

Again, these findings suggest the need to look carefully at the substance of conditions, the number of conditions imposed, and whether the conditions are relevant to the risk that the young person is thought to pose. In particular, if one out of three curfew conditions will be violated, it is important to consider whether there is a rational basis for believing that a curfew is necessary and directly related to ensuring that the young person appears in court or to protecting the public.

It is also important to consider the approach of police when they become aware of a violation of a condition of release. As discussed above under Police Detention, the *Police*

Discretion Study found that under the YOA police exercised very little discretion regarding charging young persons with administration of justice offences, such as breaches of conditions of release. According to the study, police charged young persons with administration of justice offences at a higher rate than the rate for any other offence except murder. More recent statistics indicate that a high rate of charging for administration of justice offences has continued under the YCJA.

Issues for discussion:

- What additional information is available on conditions imposed by justices?
- What additional information is available on how often young persons violate conditions of release and on the conditions that are most frequently violated?
- Should clearer direction be given in the legislation to ensure that greater restraint is exercised in the use of conditions of release?
- Should "other reasonable conditions" be replaced by a legislative provision that limits the types of conditions that may be imposed?
- Should the law prohibit conditions such as "obey the rules of the house", "attend programs as specified by a probation officer" and other conditions that delegate the substance of conditions to other persons?
- Should the law permit conditions that require the young person to participate in rehabilitative or treatment programs prior to a finding of guilt?
- Should the legislation explicitly require that there be a direct connection between a condition and the risk that the young person is thought to pose? For example, should a curfew be permitted as a condition only if there is a reasonable basis to conclude that there is a substantial likelihood that the young person will commit an offence during the hours covered by the curfew?
- How do police enforce conditions of release imposed by a justice? What policies guide police decision-making in this area?
- Are there program approaches that may be better than a charge as a means of dealing with some forms of non-compliant behaviour?

REFERENCES

Research Reports, Books and Articles

Baumer T. and Adams K. (2006). Controlling a Jail Population by Partially Closing the Front Door: An Evaluation of a "Summons in Lieu of Arrest" Policy. Prison Journal, 86(3) 386-402. Summarized in Criminological Highlights, vol.8, number 5 (April 2007), a publication of the Centre of Criminology, University of Toronto.

Canadian Centre for Justice Statistics, *Youth Custody and Community Services in Canada, 2004-05.*

Carrington, P. and Schulenberg, J., *Police Discretion with Young Offenders* (Department of Justice Canada, 2003). Available at Youth Justice website of the Department of Justice Canada: http://canada.justice.gc.ca/en/ps/yj/research/research.html

Hannah-Moffatt, K. and Maurutto, P. (2003). Youth Risk/Need Assessment: An Overview of Issues and Practices (Department of Justice Canada). Available at Youth Justice website of the Department of Justice Canada: http://canada.justice.gc.ca/en/ps/yj/research/research.html.

Moyer, S., *YCJA Monitoring Study* (Department of Justice Canada, 2006).

Moyer, S., *Pre-trial Detention under the Young Offenders Act: A Study of Urban Courts* (Department of Justice Canada, 2005).

Moyer, S., *Crown Decision-Making under the YCJA* (Department of Justice Canada 2005). Available at Youth Justice website of the Department of Justice Canada: http://canada.justice.gc.ca/en/ps/yj/research/research.html.

Nova Scotia Public Prosecution Service. (2007). Youth Criminal Justice Act Prosecutions – Nunn Commission Recommendations. Available at: https://gov.ns.ca/pps/publications/ca_manual/ProsecutionPolicies/YCJApolicyNunnRecs.pdf.

Tonry, M. (1987). Prediction and Classification: Legal and Ethical Issues, 9 *Crime and Justice* 367.

Trotter, G., *The Law of Bail in Canada* (Carswell, 1999).

Varma, K. (2002). Exploring ‘youth in court: An analysis of decision-making in youth court bail hearings. *Canadian Journal of Criminology*, 44(2), 143-64.

Cases

R. v. C.D.; R. v. C.D.K., (2005) S.C.J. No. 79

R. v. Hall, (2002) 3 S.C.R. 309

R. v. H.E., (2003) N.J. No 299

R. v. J.J.O., (2005) B.C.J. No. 2294

R. v. Morales, (1992) 3 S.C.R. 711

R. v. M.J.S., (2004) N.S.J. No. 64

R. v. M.T.S., (2006) Available at: https://gov.ns.ca/pps/publications/ca_manual/ProsecutionPolicies/YCJApolicyNunnRecs.pdf

R. v. Oakes, (1986) 1 S.C.R. 103

R. v. *W.A.L.D.*, (2004) S.J. No. 494

R. v. *W.S.C.*, (2003) S.J. No. 810

APPENDIX – CONSOLIDATED LIST OF ISSUES FOR DISCUSSION

The following list contains the issues for discussion that are raised throughout the paper. In addition, the list includes issues related to conditions of detention, which is not an area specifically discussed in the paper. The Department of Justice Canada is interested in receiving comments on these issues as well as any other relevant issues, and suggestions as to what should be done to address the issues. Comments can be sent by email by August 31, 2007, to ptd-dap.consult@justice.gc.ca.

Comments may also be sent by mail to:

Youth Justice Policy
Department of Justice Canada
180 Elgin Street, 7th Floor
Ottawa, Ontario
K1A 0H8

I. PRE-TRIAL DETENTION BY POLICE

More information is needed about:

- Reasons for the apparent increase under the YCJA in the percentage of young persons detained by police.
- The basis on which young persons are detained or released by police.
- Reasons for the apparently large provincial variation in the use of pre-trial detention by police.
- Provincial and local policies and guidelines to assist police officers in making detention and release decisions.
- The extent to which young persons are detained by police and then released prior to appearing before a justice.
- The enforcement by police of conditions of release.

Grounds for detention

- Does the *Criminal Code* provide sufficient structure and guidance for the discretion exercised by police in determining whether to detain or release a young person?
- As noted above, the *Morales* decision of the Supreme Court of Canada struck down the "public interest" ground of the Criminal Code's judicial interim release provisions because it was a vague and imprecise basis for detaining a person. Should "public interest" be removed from the other sections of the Code (e.g., s. 497; s. 498) in which "public interest" is a basis for the police decision to detain a young person?
- What should be the grounds for police detention of young persons? Are the current grounds satisfactory?

- As a means of reducing the use of pre-trial detention, should the YCJA provide that young persons charged with certain less serious, non-violent offences may not be detained?
- What assumptions and factors are used by police in making predictions about whether a young person will commit an offence or appear in court? Are the assumptions valid? Should the law specify the factors that should be taken into account in making these predictions?
- How likely should the predicted commission of an offence be to justify a police decision to detain a young person? Should there be a "substantial likelihood" that the offence will be committed, which is the wording used in the part of the Criminal Code that applies to judicial interim release hearings?
- Should the risk that a young person will commit *any* offence, including a relatively minor offence, be sufficient to detain the young person? Or, should the authority to detain on the basis of a risk of committing an offence be limited to the risk that a relatively serious offence may be committed? Is detention a disproportionate response to the risk that the young person may commit a relatively minor offence?
- Should the risk that a young person may not appear in court be sufficient to detain a young person regardless of the seriousness of the charged offence? Or, should the authority to detain on this ground be limited to relatively serious offences?
- Should the YCJA explicitly provide that detention is permitted only if the requirements of the *Oakes* case are met (e.g., the adverse effects of detention on the young person are not disproportionate to the danger to the public or to the seriousness of the risk of the young person not appearing in court)?
- As mentioned above, s. 503 of the Criminal Code provides that the police officer or officer in charge may release the person if he or she "is satisfied that the person should be released from custody." On what basis should a police officer determine whether or not he or she is satisfied?
- Should police be permitted to detain young persons as a means of imposing immediate sanctions for the alleged offence?

Release and conditions of release

- When a police officer decides that a young person should be released rather than detained, what should be the test for determining whether conditions of release may be imposed?
- Should the YCJA explicitly provide that the conditions must meet the requirements of the *Oakes* test (e.g., a rational connection between the condition of release and the risk that the young person is thought to pose)?
- What conditions should police be authorized to impose?
- Should conditions such as "keep the peace and be of good behaviour" be prohibited because of lack of clarity and precision?
- How can the number of charges for administration of justice offences, such as breaches of conditions of release, be reduced?

- Should the YCJA more clearly require that extrajudicial measures, rather than a charge, be considered or presumed when there is a breach of a condition?

YCJA provisions

- Should the YCJA explicitly provide that the presumption against detention in s. 29(2) applies to police detention as well as detention decisions at bail hearings?
- Should the YCJA explicitly provide that the prohibition on detention for social welfare purposes in s. 29(1) applies to police detention as well as to detention decisions at bail hearings?
- Should all provisions for the detention and release of young persons by police be contained in the YCJA rather than the *Criminal Code*?

II. JUDICIAL INTERIM RELEASE

Appearance before a justice

- How long should it be possible to hold a young person before bringing the young person before a justice? Is it necessary to allow more than 24 hours?
- What should be the meaning of "as soon as possible"? If a justice is not available within 24 hours, should three days be considered a satisfactory length of time between arrest and first court appearance?
- Should the seriousness of the charged offence be relevant to how long a young person may be held before being brought before a justice?

Primary ground: necessary to ensure attendance in court

- How likely must the non-attendance be? Should the law require that non-attendance be a substantial likelihood before detention or other restrictions can be imposed?
- Are valid assumptions and factors used in making the prediction that the young person will not attend court?
- What assumptions and factors should be relevant in determining whether the young person will attend court?
- What weight should be given to the seriousness of the offence that the young person has allegedly committed? Should the authority to detain on this ground be limited to relatively serious offences?
- How does the requirement of proportionality apply? For example, if there is a high risk that the young person will not attend court for a shoplifting charge, is detention a proportionate response? How should the objective of ensuring that the young person attends court be weighed against the deleterious effects of the young person's detention, which could be for a period of several weeks?

Secondary ground: necessary for public safety

- How should "public safety" be defined? What types of harm should be considered as endangering public safety? What degree of harm should be required?
- Should the YCJA explicitly provide that detention is not permitted if it would be disproportionate to the seriousness of the offence that might be committed?
- As a means of reducing the use of pre-trial detention, should the YCJA provide that young persons charged with certain less serious, non-violent offences may not be detained?
- How should proportionality be determined? For example, if it is likely that a young person, if detained, will be detained for seven weeks, how serious must the predicted offence be for detention to be a proportionate response?
- Should the law permit the use of a "sliding scale" approach to substantial likelihood of committing an offence? That is, should there be a lower level of likelihood required if the predicted offence is serious and a higher level of likelihood required if the predicted offence is less serious?
- What factors should be relevant in making a detention decision based on a prediction that the young person will commit an offence if released? Should the factors pertain primarily to past criminal behaviour?

Tertiary ground: necessary to maintain confidence in the administration of justice

- Is the tertiary ground – "necessary to maintain confidence in the administration of justice" – too vague to be a ground for detaining a young person?

Detention as a "wake-up call"

- Should detention as a "wake-up call" be permitted? If not, how could it be prevented?
- Can the detention of a "nuisance offender" be justified under the secondary or tertiary ground?
- Should there be a separate ground for the detention of "nuisance offenders"?

Prohibition on detention for social welfare purposes

- What should be done to ensure that pre-trial detention of young persons is not used for the purpose of addressing the social welfare needs of young persons?

Presumption against detention

- Should the YCJA be amended to clarify that the presumption in s. 29(2) is a rebuttable presumption?
- Should the YCJA set out what is required to rebut the presumption in s. 29(2)?
- For purposes of pre-trial detention, should the definition of "violent offence" be amended to include conduct that endangers or is likely to endanger the life or safety of another person?

- For purposes of pre-trial detention, should "pattern of findings of guilt" be changed to "a pattern of offences," or similar wording?
- Should the presumption against detention be broadened to include all of the grounds for detention - i.e., should the presumption apply not only to the public safety ground but also to the primary and tertiary grounds? If the alleged offence or prior record of a presumed-innocent young person is not serious enough to permit a custody sentence if the young person is found guilty, should it be presumed that the young person should not be detained at the pre-trial stage regardless of the specific ground relied on by the Crown?
- Should all provisions for the detention and release of young persons be contained in one part of the YCJA rather than in the *Criminal Code* and in the pre-trial detention and sentencing parts of the YCJA?

Conditions of release

- What additional information is available on conditions imposed by the courts?
- What additional information is available on how often young persons violate conditions of release and on the conditions that are most frequently violated?
- Should clearer direction be given in the legislation to ensure that greater restraint is exercised in the use of conditions of release?
- Should "other reasonable conditions" be replaced by a legislative provision that limits the types of conditions that may be imposed?
- Should the law prohibit conditions such as "obey the rules of the house", "attend programs as specified by a probation officer" and other conditions that delegate the substance of conditions to other persons?
- Should the law permit conditions that require the young person to participate in rehabilitative or treatment programs prior to a finding of guilt?
- Should the legislation explicitly require that there be a direct connection between a condition and the risk that the young person is thought to pose? For example, should a curfew be permitted as a condition only if there is a reasonable basis to conclude that there is a substantial likelihood that the young person will commit an offence during the hours covered by the curfew?
- How do police enforce conditions of release imposed by the court? What policies guide police decision-making in this area?
- Are there program approaches that may be better than a charge as a means of dealing with some forms of non-compliant behaviour?

III. CONDITIONS OF DETENTION

More information is needed about:

- Where and under what conditions young persons are held in pre-trial detention, at the police stage, pending disposition of a judicial interim release hearing or following an order to detain.

- Policies and guidelines at the P/T or local level to govern the location or conditions of detention and to assist officials.

Legislative principles and standards governing detention:

- Should the YCJA, in accordance with the UN Convention on the Rights of the Child, prohibit placing young persons and adults in the same facilities for purposes of pre-trial detention?
- Should the YCJA extend to young persons at the pre-trial detention stage the following principles and standards applying to youth in sentenced custody: ensuring that detention is safe, fair and humane; the least restrictive measures are used; young persons retain the rights of other young persons (subject to necessary restriction as a consequence of a detention order); decisions are to be made in a forthright, fair and timely manner? Are there other rights and protections that the YCJA should extend to young persons held in pre-trial detention?
- Should the YCJA prohibit placing young persons held in pre-trial detention in the same facilities as young persons serving sentenced custody?
- Should the YCJA provide young persons with access to a review mechanism to ensure that their rights and protections while held in pre-trial detention are fully respected, and provide for appropriate remedies in cases where rights or protections may have been abused?
- Should the YCJA explicitly provide that young persons are guaranteed continued access to entitlements and necessities, such as education and health services?
- Should the YCJA provide that young persons are not required or expected to participate in therapeutic or rehabilitative measures while held in pre-trial detention; that young persons may refuse at any time in pre-trial detention to participate in such measures; and ensure that any participation in such measures by young persons while in pre-trial detention is fully voluntary?