



Canadian Friends Service Committee (Quakers)

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RE: The Independent Review of British Columbia's Justice System

Brief submitted by the Canadian Friends Service Committee

May 2012

The Canadian Friends Service Committee (CFSC) welcomes the opportunity to submit input into a formal independent review of British Columbia's justice system by Geoffrey Cowper, Q.C. as Chair, Justice Reform Initiative. The goals of the independent review are to look at the facts underlying the concerns raised by the government and public with regard to criminal justice issues, and to recommend solutions that would make the system more efficient and effective.

Founded in 1931, CFSC is the peace and service agency of the Religious Society of Friends (Quakers) in Canada. It is a federally registered charity and not-for-profit. The worldwide community of Quakers has worked on concerns related to justice issues for over 350 years and brings a wealth of experience that ranges from work within prisons and restorative justice processes to participating in the establishment of norms and standard setting at the United Nations. Quakers Fostering Justice (QFJ) is a program committee under CFSC and is composed of members and associates who are involved with a range of justice related work in Canada such as: chaplaincy and remedial programs within prisons; re-integration into communities; work with victims, restorative justice and crime prevention in communities. The Quaker United Nations Office (QUNO) in Geneva, with which CFSC collaborates, has been working on issues related to women in prison and children of prisoners for a number of years. QFJ's mandate is to work toward discerning, developing and encouraging responses that are creative, healing and empowering; that is, the building of a caring community which has no need of punishment or prisons.

Based on our experience and concerns in justice work, CFSC's key recommendations are:

Recommendation 1: Detention should only be used as a last resort. Diversion and alternative measures such as restorative justice should be used. In the short term this may involve diverting more resources to alternative measures such as restorative justice and enhancing metrics that measure their effectiveness. In the long-term this may involve creating a framework in which diversion and alternative measures such as restorative justice are sustained over time.

Recommendation 2: In the short term, the immediate needs of women within the justice system should be met. In the long-term, the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (The 'Bangkok Rules'), adopted in December 2010, should be incorporated into British Columbia's overall framework.

Recommendation 3: Appendix A lists those articles of the *United Nations Convention on the Rights of the Child* and Appendix B lists UN rules and guidelines which should be used as key reference points when considering standards for children and youth in the British Columbia justice system and those affected by parental incarceration, and how best they should intersect with other important crucial service sectors for the healthy development of children.

Recommendation 4: That the province of British Columbia develop a specific strategy for how it will deal with young people under the *Safe Streets and Communities Act* that upholds the articles in the *United Nations Convention on the Rights of the Child* and gives full effect to the principles of rehabilitation and reintegration by adequately funding diversion and non-custodial options.

Recommendation 5: That any changes to British Columbia's youth criminal justice system recognize that the vast majority of young people involved in offending behaviours are vulnerable young persons, who have often been subjected to neglect, abuse and/or exposed to domestic violence themselves, who can benefit from prevention, early intervention and community-based programming, rather than being placed in detention or given custodial sentences.

Recommendation 6: For young people who come into conflict with the law, detention and custodial sentences should only be used as a last resort. We recommend that diversion and alternative measures, such as restorative justice, in line with relevant human rights instruments, be used.

Recommendation 7: If incarceration is deemed necessary, youth should only serve their sentence in a facility that is exclusively limited to youth.

Recommendation 8: Youth serving time in a correctional facility or detention centre be provided developmentally appropriate mental and physical health care, as well as rehabilitation and educational services, consistent with Canada's commitment to the *UN Convention of the Rights of the Child*.

Recommendation 9: Any youth crime prevention strategy should include early detection and treatment of mental and behavioural health issues that might otherwise lead to criminal activity.

Recommendation 10: Custodial measures, including pre-trial and at sentencing, should only be used as a last resort, especially in the case of sole or primary carers for children.

Recommendation 11: The best interests of the child should be taken into account in all criminal justice proceedings relating to parents, including arrest, pre-trial measures, trial, sentencing and parole/early release considerations, and in accordance with their age and maturity, such children should participate in decisions concerning them.

Recommendation 12: Unless it is contrary to the best interests of the child, children should be enabled and encouraged to maintain a relationship with their imprisoned parent, including the possibility of babies and young children living in prison with their mother, children having extended stays as part of their visits – weekends, holidays – as well as child-friendly visiting procedures more generally.

Recommendation 13: That the province of British Columbia provide ongoing training on the rights of the child for all actors in the system at all stages of the criminal justice process, including law enforcement, prison service professionals and the judiciary.

Recommendation 14: When considering alternate care for children and youth, the *UN Guidelines for the Alternative Care of Children* should be used as a reference point.

Recommendation 15: That the province of British Columbia enhance the gathering of metrics related to women, children and incarcerated parents within the justice system and implement child impact assessments for any policies developed within the justice framework.

More in-depth information is provided in the attached briefing. There are many short-term and long-term changes that can be made that will truly enhance the justice system, create standards for best practices within British Columbia and be a model for other jurisdictions whilst concurrently creating better outcomes in overall public safety for British Columbians.

DIVERSION, RESTORATIVE JUSTICE / ALTERNATIVE MEASURES

“The conventional attitude to crime in Canada has been to see it in terms of abstract offences against the law or the state - an offender is found guilty and punished, usually with fines or incarceration”.ⁱ As a result, the legal and correctional systems in Canada have, historically, been almost entirely offender-focused. Fewer resources have gone into assisting victims of crime meet their needs based on the harms they have experienced and for engaging in justice processes in meaningful and satisfying ways.ⁱⁱ With more than 95% of prisoners in Canada being released back into communities, it is not clear that all of the resources expended on prisoners work towards ensuring that they are released with every chance of succeeding as contributing members of society (with a sense of belonging and good relationships).

Canada has a higher rate of incarceration than most Western countries,ⁱⁱⁱ which the Canadian Criminal Justice Association,^{iv} amongst others, argue are more costly and less effective in dealing with many types of crime. These concerns amongst others, have led to an increasing interest in and implementation of restorative justice in resolving conflict and preventing crime. The Correctional Service of Canada describes restorative justice as “a non-adversarial, non-retributive approach to justice that emphasizes healing in victims, meaningful accountability of offenders, and the involvement of citizens in creating healthier, safer communities”.^v According to Justice Canada:

Less-serious crimes and issues of personal and community conflict are often best resolved without getting the justice system involved, while other crimes may require some formal intervention or diversion to social services agencies. Even in more serious cases, however, there is room for restorative options at many points in time after a conflict has occurred or a crime has been committed.^{vi}

The aim of restorative justice is to heal the hurt and damage caused by crime, to restore harmony and relationships, and to prevent further crime from occurring; “it is about the idea that if crime hurts, justice should heal”.^{vii} It is a more integrated approach to dealing with justice.

Some of the different types of restorative programs available throughout Canada, as documented by the Correctional Service of Canada’s Dispute Resolution Unit, are: community justice forums, victim-offender mediation; community conferencing/family group conferencing; sentencing circles, healing circles and community-assisted hearings, peacemaking circles, circles of support and accountability, healing lodges, surrogate victim/offender restorative justice dialogue.^{viii} There has been much research on the effectiveness of restorative justice. The Canadian Department of Justice has been a leader in some of this research. There is now evidence^{ix} that restorative justice:

- Reduces repeat offending for some offenders
- More than doubles the number of offences brought to justice as diversion from criminal justice
- Reduces crime victims’ post-traumatic stress symptoms and related costs
- Provides both victim and offenders with more satisfaction with justice
- Reduces crime victims’ desire for violent revenge against other offenders
- Reduces the costs of criminal justice, when used as diversion from criminal justice
- Reduced recidivism more than prison (adults) or as well as prison (youths)

In the past, the federal government’s leadership in restorative justice has been very important and highly influential. The *Daubney Report* and the resulting inclusion of restorative values in sentencing legislation (subsequently endorsed in *R. v. Gladue*) created a legal framework for restorative approaches. Canada also brought to the United Nations decision-making process for endorsement, the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.^{x; xi} In British Columbia, the Ministry of Justice has said, that the “Victim Services and Crime Prevention of the Ministry of Public Safety and Solicitor General is committed to a restorative justice approach that considers the involvement of victims, offenders and communities in achieving justice and addressing the harm caused by crime”.^{xii}

How does this relate to the BC Justice Reform Initiative?

[*Modernizing British Columbia's Justice System: Green Paper*](#)^{xiii} (hereafter referred to as the *Green Paper*) sets out a number of challenges faced by the Province's justice system and forms the basis of this review and reform initiative. Compared to other provinces, British Columbia has the largest number of restorative justice programs.^{xiv} The *Green Paper* reported variations in rates of alternative remedies and their under-utilization. A strengthened commitment to diversion and alternative measures would assist in addressing the following concerns:

- While restorative justice is about ensuring justice and not just about reducing cost, the increasing costs related to policing, trial delays and corrections as outlined in the *Green Paper*, can be controlled through diversion and alternative measures which would be less costly, whilst still addressing justice issues. Various restorative justice programs have been shown to reduce trials, time to process a case, and costs of incarceration. For example, the Hollow Water First Nation Community Holistic Circle Healing strategy saved millions of dollars on the 107 offenders participating in the program in its first ten years.^{xv} The cost for the restorative program was \$2.4 million and the estimated cost to imprison was \$6.2 to \$15.9 million. It was estimated that for every \$1 it spent on the program, it would have cost \$3.75 to provincial governments for pre-incarceration costs, prison and probation and \$2.46 to \$12.15 to the federal government for incarceration and parole. In British Columbia, the Victoria Restorative Justice Society has documented that for one offence the cost of going through the courts is approximately \$3,779 (with the majority of the money going towards the police, crown and probation) requiring about 78.5 human resource hours whereas it cost \$715 and 37 human resource hours for the same offence to go through their restorative justice program.^{xvi} In another example, a British Columbian community program of supervision and intervention with a youth offender costs about \$20,000 per year compared with about \$215,000 for a year in custody.^{xvii}
- There is strong evidence that the recent Federal omnibus legislation, the *Safe Streets and Communities Act*, will increase the incarceration numbers for youth, women and non-violent people (e.g., for those using drugs and those with mental health problems) leading to even greater costs and impacts than are currently being experienced both within the justice system and society at large.^{xviii} For example, there is the potential for increased recidivism for incarcerated youth, increased impacts on children, youth and sole or primary care providers of children (see discussion below), and increased transmission of blood-borne diseases like HIV and hepatitis C.^{xix} Diversion and alternative measures would address some of these issues, at least in part.
- The increasing violation of court orders due to longer delays and trial waiting periods. Earlier interventions with alternative measure would, also, contribute toward preventing increased recidivism. British Columbia's Representative for Children and Youth, Mary Ellen Turpell-Lafonde has affirmed, "Consequences of actions simply aren't as meaningful for young people if it takes a year or longer to get to trial".^{xx} Diversion and alternative measures take place in a much timelier manner than court processes.

Recommendation 1: Detention should only be used as a last resort. Diversion and alternative measures such as restorative justice should be used. In the short term this may involve diverting more resources to alternative measures such as restorative justice and enhancing metrics that measure their effectiveness. In the long-term this may involve creating a framework in which diversion and alternative measures such as restorative justice are sustained over time.

RECENT DEVELOPMENTS IN THE INTERNATIONAL HUMAN RIGHTS SYSTEM AND CANADIAN LAW

CFSC would like to draw attention to recent developments in human rights standards with regard to women in the criminal justice system and the rights of the child. These international standards were developed to address documented problems in many countries, including Canada. All signatory countries are obligated to implement these standards. As criminal justice falls under federal jurisdiction in Canada, these obligations apply equally to every province. Given the current initiative to reform the British Columbian justice system, this is a timely opportunity to assess whether these standards are being met and, if not, to ensure that they will be implemented. These standards are crucial in creating the need for a more integrated approach to justice that was raised in the *Green Paper*.

a) Women in the criminal justice system

The *UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (The 'Bangkok Rules') were adopted by consensus by the UN General Assembly in December 2010^{xxi}. These rules supplement but do not replace the *UN Standard Minimum Rules for the Treatment of Prisoners*^{xxii} and the *UN Standard Minimum Rules for Non-custodial Measures*^{xxiii} (the 'Tokyo Rules'). The *UN Handbook for Prison Managers and Policy Makers on Women and Imprisonment* also provides useful guidance on the treatment of female prisoner.^{xxiv}

Women (and girls) are a minority prison population in British Columbia, as they are around the world. Annually, about 1,500 women^{xxv} go through the provincial jails in British Columbia. This fact, coupled with factors relating to their status and position in many societies, has meant that women's characteristics and needs as subjects of the criminal justice system have gone largely unacknowledged, are little understood, and their needs have gone unmet.

Implementation of the Bangkok Rules requires action at international, national and regional levels, and they should be incorporated into British Columbia justice policy. The 70 Rules address the following issues relevant to women's experience in the criminal justice system:^{xxvi}

- Prisoners under arrest and awaiting trial: access to non-custodial measures, post-sentencing dispositions
- Prisoners under sentence: classification and individualisation, the prison regime and aftercare, including:
 - Admission: registration and allocation
 - Personal hygiene
 - Healthcare services: medical screening on entry, gender specific care, mental health and healthcare, HIV and AIDS prevention, treatment, care and support, substance abuse treatment programmes, suicide and self-harm, preventative healthcare services, responses to allegations of rape and other violence or torture
- Safety and security, searches
- Discipline and punishment: instruments of restraint, information to and complaints by prisoners, inspections
- Contact with the outside world
- Institutional personnel and their training
- The specific needs of pregnant women, breastfeeding mothers, women with dependent children, juvenile female offenders, foreign nationals, minorities and indigenous people
- The need for research, planning and evaluation, public awareness raising, information sharing and training.

Recommendation 2: In the short term, the immediate needs of women within the justice system should be met. In the long-term, the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (The 'Bangkok Rules'), adopted in December 2010, should be incorporated into British Columbia's overall framework.

b) Children affected by the justice system

Human rights documents and laws like the *Canadian Charter of Rights and Freedoms* do not recognize the unique developmental needs of children.^{xxvii} The *UN Convention on the Rights of the Child*^{xxviii} is a human rights treaty that focuses on the specific needs of children for their healthy development. Canada assumed obligations to respect and promote the rights of children when it ratified the *Convention* in 1991. A number of British Columbian children receive inadequate health care and nutrition, experience violence and abuse, are exposed to toxins and sometimes discriminated against;^{xxix} making the *Convention on the Rights of the Child* “a valuable means of emphasizing the continuing need to protect children from conditions that compromise their healthy development, and to provide optimal conditions to ensure their well-being”.^{xxx} Many of these factors, unfortunately, contribute to a significant number of these children coming into contact with the criminal justice system.

While criminal justice falls under federal jurisdiction, many matters that affect children, such as health and education, fall under provincial jurisdiction. In its preamble, Canada’s *Youth Criminal Justice Act* recognizes the *UN Convention on the Rights of the Child*, which means that the *Convention* can and should be used by the courts and justice officials when interpreting the Act.^{xxxi} Within Canada, both federal and provincial/territorial governments have responsibility for compliance with the *Convention on the Rights of the Child*. Successful outcomes for any children or young people that come into contact with British Columbia’s justice system only happen if the different services sectors that children and youth need for their development are well connected with the justice system.

Appendix A lists those articles of the *UN Convention* which should be used as key reference points when considering standards for children and youth within the justice system and those affected by parental incarceration. In addition the following international rules and guidelines, based on the *Convention on the Rights of the Child*, are also important when considering justice standards for children and youth (see Appendix B):

- *UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)*
- *UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)*
- *UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)*
- *Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines)*
- *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*

Recommendation 3: Appendix A lists those articles of the *United Nations Convention on the Rights of the Child* and Appendix B lists UN rules and guidelines which should be used as key reference points when considering standards for children and youth in the British Columbia justice system and those affected by parental incarceration, and how best they should intersect with other important crucial service sectors for the healthy development of children.

c) Children and youth affected by detention/incarceration

Canada already has a high rate of youth incarceration relative to other industrialized countries.^{xxxii} Prior to the introduction of the *Youth Criminal Justice Act* in 2003, which was strongly influenced by the *Convention on the Rights of the Child*, Canada had the highest youth incarceration in the world.^{xxxiii} The 2003 *Youth Criminal Justice Act* was effective in decreasing number of incarcerated youth. The Representative for Children and Youth in the province of British Columbia notes that British Columbia adapted readily to the 2003 *Act* and experienced better outcomes.^{xxxiv}

The 2003 *Youth Criminal Justice Act* used to focus more on rehabilitation and reintegration.^{xxxv} The emphasis, however, has shifted to deterrence and denunciation with the *Safe Streets and Communities Act*. Many organizations point out that deterrence and denunciation have been shown to be ineffective, and the focus should be to treat and rehabilitate young offenders many of whom are vulnerable and have mental health needs (see discussion below).^{xxxvi} Key funding for rehabilitation and reintegration, that

prevent recidivism and promote public security, could also be diverted by increasing costs related to The *Safe Streets and Communities Act*.^{xxxvii} The government of Quebec has already signaled its intention to do everything in its power to limit the clout of this legislation.

The number of youth in the justice system, including those below the age of 18, might increase again:

- Depending on what steps British Columbia takes to minimize the impacts of the *Safe Streets and Communities Act*; the act will result in increased costs, overcrowding, longer terms, adolescents being transferred to adult facilities and violations of international human rights obligations; and,
- if Bill C-31, the *Protecting Canada's Immigration System Act*, currently before Parliament, is adopted and detentions against asylum claimants (parents and children who are 16 and 17 years of age and possibly younger children for whom there is an age question).^{xxxviii}

Recommendation 4: That the province of British Columbia develop a specific strategy for how it will deal with young people under the *Safe Streets and Communities Act* that upholds the articles in the *United Nations Convention on the Rights of the Child* and gives full effect to the principles of rehabilitation and reintegration by adequately funding diversion and non-custodial options.

Youth become involved with the criminal justice system for a range of reasons:^{xxxix}

- a) The use of the justice system for children in need of care and protection; the criminalization of normal, petty misbehavior, survival behaviors and status offences; and the criminalization of children who are victims of abuse;
- b) Violence in the home and dysfunctional families;
- c) The failure of care and protection systems, including the lack of social support systems, appropriate social policies, and preventive programs;
- d) Discrimination against vulnerable groups of children, including negative attitudes and stigmatization of children based on race, gender, ethnicity, etc.;
- e) Social and economic conditions, particularly poverty and socioeconomic inequalities.

Exposure to toxins, abuse, rejection and harsh punishment can actually alter the way a child's brain develops, creating non-compliance, aggression, impaired decision-making, and difficulty with impulse control, empathy and rational thought.^{xi} In addition, emerging neuro-scientific research has shown that adolescents' brains are not fully developed to allow for adult-level reasoning.^{xii} This includes a broad array of abilities such as the regulation of emotions, organization, long-range planning, decision-making, consideration of alternatives which are associated with the prefrontal cortex, which does not fully mature until well beyond age 18.^{xiii}

Because there is a major reorganization of brain structures and brain functions during adolescence, brain injuries from early years (such as exposure to toxins like alcohol, nicotine and drugs) or inherited genetic predispositions may only become apparent in adolescence, and contributes to youth aged 13-25 having a higher risk of mental disorder onset.^{xiiii} For these reasons, youth are at greater risk of engaging in behaviours that can inadvertently lead to involvement with the justice system.

It is estimated that between 70-75% of incarcerated adolescents may suffer from some form of cognitive or learning disability^{xlv} and a large percentage have experienced some form of neglect. The over-representation of aboriginal children and young people with developmental disabilities and mental health issues in the youth criminal justice system is also well-documented. In a recent British Columbian study on youth in custody,^{xlv} almost three-quarters of the youth (72%) had one or more health conditions, including a learning disability, epilepsy, Fetal Alcohol Syndrome/Fetal Alcohol Effects (FAS/FAE), Attention Deficit/Hyperactivity Disorder (ADHD), schizophrenia, depression, bipolar disorder, chronic anxiety disorder, addiction problems, or problems with anger. The study also found that most of the youth in custody (73%) had been in government care at some time and over half had spent some time on the streets. About 47% were aboriginal, which significantly exceeds their numbers in the general population (8%).

Incarceration or detention of youth undermines their: cognitive, emotional and physical development, safety, and future potential.^{xlvi} The Canadian Paediatric Society, argues that the significant needs of so many youth for mental health services will not be met in an already strained justice system, in particular if adolescents are placed in the adult justice system which is not equipped to support their developmental needs.^{xlvii} According to article 2 and 39 of the *UN Convention on the Rights of the Child*, all young people who come into conflict with the law must be treated equally with other children and all young people have the right to treatment which promotes their physical and psychological recovery, and their social reintegration. Young people in the criminal justice system are often victims and there is an obligation to respect their dignity and to provide them with support they need to reintegrate into society.

It should also be noted that a key principle in the *United Nations Convention on the Rights of the Child* is that the arrest, detention or imprisonment of a children and youth should be used only as a “measure of last resort” and for the shortest period of time (Article 37 b). The *Convention* provides appropriate measures and the legal basis for diversion programs (Article 40). There are a number of human rights instruments relevant to diversion and alternatives to detentions for children and youth.^{xlviii} Diversion and alternatives, particularly when they adopt a restorative justice approach, are highly compatible with these aims—much more so than detention or custodial sentences.

Helping at-risk-young people change their behavior patterns will ensure a greater likelihood of successful transition into responsible adulthood and overall public safety. “Adult mentorship and compassionate support offered through restorative justice and prevention programs are essential for youth during their key developmental years”.^{xlix} It is for these reasons that we make the following recommendations:

Recommendation 5: That any changes to British Columbia’s youth criminal justice system recognize that the vast majority of young people involved in offending behaviours are vulnerable young persons, who have often been subjected to neglect, abuse and/or exposed to domestic violence themselves, who can benefit from prevention, early intervention and community-based programming, rather than being placed in detention or given custodial sentences.

Recommendation 6: For young people who come into conflict with the law, detention and custodial sentences should only be used as a last resort. We recommend that diversion and alternative measures, such as restorative justice, in line with relevant human rights instruments, be used.

Recommendation 7: If incarceration is deemed necessary, youth should only serve their sentence in a facility that is exclusively limited to youth.

Recommendation 8: Youth serving time in a correctional facility or detention centre be provided developmentally appropriate mental and physical health care, as well as rehabilitation and educational services, consistent with Canada’s commitment to the *UN Convention of the Rights of the Child*.

Recommendation 9: Any youth crime prevention strategy should include early detection and treatment of mental and behavioural health issues that might otherwise lead to criminal activity.

d) Children affected by parental incarceration

The *Green Paper’s* section on families states that “[i]t is vital that the justice system is able to intervene in ways which best promote safety and provide real consequences for offending, but which also minimize unwanted or unintended harm to innocent third parties – victims, their families, and the families of accused and convicted persons”. However the paper does not go into further detail of how this will happen or of how the potential conflict between the aim of providing real consequences for the offender at the same time as minimizing unintended harm to innocent third parties, such as the families and children of the incarcerated, will be resolved.

In 2007, it was estimated that 357,604 Canadian children (or 4.6% of the Canadian population aged 19 and younger), were affected by parental incarceration.ⁱ Children affected by parental incarceration include both babies and small children living in prison with their parent, and those left outside. This is clearly an issue of concern in British Columbia in the light of the 2008 closure of the successful mother-baby program which allowed mothers to keep their babies while incarcerated at Alouette Correctional Centre for Women. The Representative for Children and Youth in British Columbia stated that the program offered a chance to ensure that babies had the best chance of being nursed according to World Health Organization recommendations and of developing a strong attachment to their mothers which has an enormous impact on the infant brain.ⁱⁱ Patricia Block, a BC woman who was pregnant when she began serving her jail sentence and then had her baby taken away shortly after birth, is suing the provincial government because it cancelled the program. She claims that the Minister of Public Safety and the Solicitor General violated her and her baby's constitutional rights when they cancelled the mother-baby program.

Aware of the wide-ranging and overwhelmingly negative impacts a parent's imprisonment has for a child, as well as the extent to which this issue has been historically neglected, the UN Committee on the Rights of the Child decided to devote its 2011 Day of General Discussion to "Children of Incarcerated Parents". Notably, the official *Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents"*ⁱⁱⁱ states **that non-custodial measures should be prioritised when sentencing a parent and alternatives to detention should be used:**

30. The Committee emphasises that in sentencing parent(s) and primary caregivers, non-custodial sentences should, wherever possible, be issued in lieu of custodial sentences, including in the pre-trial and trial phase. Alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of affected child(ren).

CFSC would like to suggest that alternatives may include restorative justice and diversion.

The Committee's report also emphasizes that:

- **the best interests of the child should be taken into account by all actors and at all stages of the criminal justice process, including law enforcement, prison service professionals and the judiciary.** The report emphasizes the child's right to development and non-discrimination, in line with the *Convention on the Rights of the Child*.
- **the child's right to maintain contact with his or her parent and receive information be respected.** As stated at Article 9.3 on the *UN Convention on the Rights of the Child*, the child who is separated from his or her parent has the right to maintain contact, except where doing so is not in the child's best interests. The Committee's report reminds States parties to the *Convention* of their obligations in this regard (para.35).
- **the child's rights regarding provision within prisons be respected.** The report goes on to detail recommendations regarding provision for children living in prison with a parent, as well as those left outside (paras. 34 and 35). It underscores the child and family's right to privacy, as well as the child's right to be heard in decisions concerning him or her (Article 12 of the *Convention* – a guiding principle of the Convention).

Finally, CFSC would like to draw attention to the UN Human Rights Council Resolution adopted following the Day of Discussion on the Rights of the Child.ⁱⁱⁱⁱ It includes the following relevant sections:

5. *Encourages* States to develop and strengthen the collection, analysis and dissemination of data for national statistics, including in the area of juvenile justice and on children deprived of liberty, as well as children of incarcerated parents, and, as far as possible, to use disaggregated data by, inter alia, age, sex, ethnicity, location, language, family income, disability and other relevant factors that may lead to disparities, and other statistical indicators at the national, subnational, subregional, regional and international levels, to develop and assess social policies and programmes so that economic and social

resources are used efficiently and effectively for the full realization of the rights of the child;

68. *Welcomes* the day of general discussion on children of incarcerated parents, held by the Committee on the Rights of the Child on 30 September 2011, takes note with interest of the outcomes thereon, and invites States to take the recommendations made at the discussion into account;

69. *Calls upon* States:

(a) To give priority, when sentencing or deciding on pretrial measures for a pregnant woman or a child's sole or primary care-giver, to non-custodial measures, bearing in mind the gravity of the offence and after taking into account the best interests of the child;

(b) To ensure that the best interests of the child should be a primary consideration in relation to the question of whether and how long children of imprisoned mothers should stay with them in prison, and emphasizing the responsibility of the State to provide adequate care for women in prison and their children;

(c) To provide children of persons accused or convicted of offences with access to their incarcerated parents or parental caregivers throughout judicial proceedings and the period of detention, including regular and private meetings with the prisoners, and wherever possible contact visits for younger children, subject to the best interests of the child, taking into account the need to ensure the administration of justice;

(d) To recognize, promote and protect the rights of the child affected by parental incarceration, in particular the right to have their best interests included as an important consideration in decisions relating to one or both of their parent's involvement with the criminal justice system, as well as the right not to be discriminated against because of the actions or alleged actions of one or both of their parents;

(e) Bearing in mind the best interests of the child, to keep children or their legal guardians informed of the place of imprisonment of their incarcerated parents or parental caregivers and, in advance, of any transfer, as well as of the progress of petitions for pardons, reports presented to bodies such as clemency commissions, and the reasoning behind the recommendations of these bodies to support or reject petitions;

These developments in international standards lead CFSC to recommend the following:

Recommendation 10: Custodial measures, including pre-trial and at sentencing, should only be used as a last resort, especially in the case of sole or primary carers for children.

Recommendation 11: The best interests of the child should be taken into account in all criminal justice proceedings relating to parents, including arrest, pre-trial measures, trial, sentencing and parole/early release considerations, and in accordance with their age and maturity, such children should participate in decisions concerning them.

Recommendation 12: Unless it is contrary to the best interests of the child, children should be enabled and encouraged to maintain a relationship with their imprisoned parent, including the possibility of babies and young children living in prison with their mother, children having extended stays as part of their visits – weekends, holidays – as well as child-friendly visiting procedures more generally.

Recommendation 13: That the province of British Columbia provide ongoing training on the rights of the child for all actors in the system at all stages of the criminal justice process, including law enforcement, prison service professionals and the judiciary.

Recommendation 14: When considering alternate care for children and youth, the *UN Guidelines for the Alternative Care of Children* should be used as a reference point.

METRICS

The *Green Paper* mentioned that for a more integrated and better functioning system, better statistical information needed to be gathered. The need to strengthen the collection, analysis and dissemination including in the areas of juvenile justice and children of incarcerated parents was also identified in article 5 of the UN Human Rights Council Resolution adopted following the Day of Discussion on the Rights of the Child (as discussed above). It is important that any policies developed are based on evidence and respect human rights standards. To do this more information needs to be gathered on women and youth in the justice system, and on children of incarcerated parents. The Representative for Children and Youth in the Province of British Columbia, emphasizes that to ensure compliance with *United Nations Convention on the Rights of the Child*, it will be crucial to define and measure outcomes that inform the justice system on how well it is complying.^{iv}

Child rights impact assessments are also a useful tool for considering the impacts on children of proposed policy changes before implementing them.^{iv} In 2007, the Canadian Senate recommended child impact assessments as a tool to implementing the *Convention on the Rights of the Child*.^{vi} The use of child impact assessments within the British Columbian justice system, would contribute significantly to mitigating some of the short-term and long-term consequences for children and youth that are affected by the justice system.

These lead CFSC to recommend the following:

Recommendation 15: That the province of British Columbia enhance the gathering of metrics related to women, children and incarcerated parents within the justice system and implement child impact assessments for any polices developed within the justice framework.

Respectfully submitted,
Canadian Friends Service Committee

APPENDIX A

PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD APPLICABLE TO BC'S JUSTICE SYSTEM

Principle of Equality and Non-Discrimination (Article 2)

According to the UN Committee on the Rights of the Child, all children who come into conflict with the law must be treated equally “without discrimination of any kind” and are entitled to the same treatment as other children. Policies and procedures must ensure this. Many youth who are in conflict with the law are also victims of discrimination. We need to respect their dignity and to provide them with support and assistance to reintegrate into society, or to integrate into society if there are barriers to this. The public also needs to be educated with regard to the *right* of youth, that are getting support, to assume a constructive role in society.

Behaviours that are not criminalized when engaged in by adults should not be criminalized when youth engage in them (vagrancy [hanging around], truancy [skipping school], running away, etc.). Youth should not be penalized for behaviours that arise from psychological, sociological or economic problems and which are not criminal offences for adults. When youth behave in these ways we must look for effective support measures (family, agency) that can address the root causes of these behaviours.

We must ensure that every child is protected against all forms of discrimination or punishment arising from the status, activities, opinions or beliefs of the child's parents, legal guardians or family member.

All young people have the same human rights. This means that everyone's needs are equally considered regardless of social and cultural background, family affiliations, and regardless of whether they are victim or offender. This allows us to take a balanced approach to healing harm done.

Principle of the Best Interests of the Child (Article 3)

This principle provides that the best interests of the child “shall be a primary consideration” in all actions concerning children at all times. This must be a key principle in all of our justice processes. Children are “persons in formation”. Their physical and psychological development, their emotional and educational needs differ from those of adults. They are less responsible for the mistakes they make, as they are learning and growing in life. Thus, the justice system must concentrate on rehabilitation and restorative measures for them, keeping in mind always, the need for public safety. The justice system must pay particular attention to the safety and well-being of youth in every situation. The justice system should also bear in mind the rights and duties of their parents.

The Right to Family Integrity (Article 5)

This provision recognizes that, wherever possible, children are entitled to grow up in a family environment with parents, extended family or community members, and means that children should not be separated from parents or other family members unless it is in their best interests.

The Right to Survival and Development (Article 6)

This provision notes the requirement to ensure “to the maximum extent possible, the survival and development” of children. Many of the children in the justice system come from situations that have had a negative impact on their development. Rights-based youth justice processes consider the healthy development and safety of young people who may be vulnerable. Everybody involved must feel a sense of safety throughout the process. The justice system we must respond to the behaviours of children and youth in ways that support their development toward becoming fully functioning and contributing members of our communities.

The Right to Protection from Arbitrary Separation from Parents (Article 9)

This provision ensures the right of children to be protected from separation from their parents “against their will,” and “to maintain personal relations and direct contact with both parents on a regular basis,

except if it is contrary to [their] best interests.” The issue of regular family access by children is an important consideration.

The Right to Child Participation (Article 12)

This provision affirms the right of children to express their views freely in all matters affecting [them],” with such views “being given due weight in accordance with [their] age and maturity,” and means that their views must be sought whenever decisions concerning them are being made. It is important that youth know and understand that they have the right to express their views from their first contact with the justice system until the completion of their encounter with it. Their views must be heard and taken into consideration in every decision that affects them.

In restorative justice processes, it is important for practitioners to ensure that youth are willing participants. Their participation must be voluntary. There must be no coercion, i.e., youth must not be pressured into or forced into participating in our processes or completing their agreements. They must be fully and clearly informed from the start about how their participation will take place and what the impact of their participation will be.

The Right to Protection for Children Deprived of Family Environment (Article 20)

This provision provides that children temporarily or permanently deprived of their family environment or whose best interests demand that they leave such environment “shall be entitled to special protection and assistance...” Alternative care must also be ensured for such children, which is to include “foster placement...adoption, or if necessary, placement in suitable institutions for the care of children”, while having regard to “the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.”

The Right to Protection from Arbitrary Detention (Article 37)

Article 37 sets out a number of protections for children who are detained. It ensures that:

- 1) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.
- 2) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment shall be used only as a last resort and for the shortest appropriate period of time.
- 3) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. Any child detained has the right to contact parents or caregivers.
- 4) Every child arrested or detained has the right to prompt access a lawyer and other appropriate assistance, and the right to challenge the legality detention in court or other authority and to have a prompt decision.

Physical and psychological recovery and social reintegration (Article 39)

Any child who has been neglected, exploited, abused, tortured or subject to any other form of cruel, inhuman or degrading treatment or punishment, or armed conflict, has the right to physical and psychological recovery and social reintegration in an environment which supports the health, self-respect and dignity of the child.

The right to be treated with dignity (Article 40)

Any legal processes for young people in conflict with the law should *promote the child’s sense of dignity and worth*, which in turn reinforces the child’s respect for the human rights and fundamental freedoms of others, and which takes into account the child’s age and the promotes the child’s reintegration into the community so that s/he can assume a constructive role in society.

1. Specifically:

- (a) If the act committed by the youth wasn’t against the law at the time it was committed, s/he can’t be accused of breaking the law if the act becomes illegal later.
- (b) Every child said to have or accused of breaking the law has *at least* the following guarantees:

- (i) **To be presumed innocent until proven guilty** according to law;
- (ii) To **be informed promptly and directly of the charges against him or her**, to be so informed by parents or legal guardians if appropriate, and to have legal or other help in preparing a defense.
- (iii) **To have the matter dealt with as soon as possible by a competent, independent and impartial authority** in a fair process, with a lawyer or other appropriate supporter, and, considering her/his age, his parents or guardians, unless that would be bad for him.
- (iv) **Not to be pressured to testify or to confess guilt.** A youth has the right to question witnesses or to have them questioned on her behalf, and to ask witnesses to participate on his or her behalf.
- (v) **If found guilty** of breaking the law, to have that decision and any imposed punishment or conditions reviewed by a higher competent, independent and impartial authority, according to law.
- (vi) To have the **free assistance of an interpreter** if the child cannot understand or speak the language used;
- (vii) To have his or her **privacy fully respected** at all stages of the proceedings.

2. Governments must:

- (a) **Establish a minimum age** below which a child is presumed to be incapable of breaking the law. *In Canada, Section 13 of the Criminal Code forbids the conviction of any person under the age of 12 years of any criminal offence for any act or failure to act committed by the child.*
- (b) **Provide measures for dealing with children/youth outside of the court system**, providing that human rights and legal safeguards are fully respected. In Canada, sections 6 to 10 of the Youth Criminal Justice Act provide for the use of alternatives to the formal court process (extrajudicial measures). These measures are meant to ensure an effective and timely response, to encourage reparation to those affected and acknowledgement of the harm caused, and to promote family, community and victim involvement in the process. All of this is to be implemented consistently with the rights and freedoms of young persons, and is required to be proportionate to the seriousness of the offence. This is a central focus of the YCJA and is consistent with restorative principles and practices. In BC, Section 3, paragraph 28 states that the minister *may* provide alternative measures or extrajudicial sanctions programs.

APPENDIX B

RELEVANT INTERNATIONAL LEGAL FRAMEWORK ON JUSTICE FOR CHILDREN APPLICABLE TO BC'S JUSTICE SYSTEM

Relevant international legal framework on justice for children:

- [UN Standard Minimum Rules for the Administration of Juvenile Justice \(Beijing Rules\)](#)
- [UN Guidelines for the Prevention of Juvenile Delinquency \(Riyadh Guidelines\)](#)
- [UN Rules for the Protection of Juveniles Deprived of their Liberty \(Havana Rules\)](#)
- [Guidelines for Action on Children in the Criminal Justice System \(Vienna Guidelines\)](#)
- [Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime](#)

The following instruments, although not exclusively applicable to children, are of direct relevance to issues related to child justice:

- [UN Standard Minimum Rules for the Treatment of Prisoners](#)
- [UN Standard Minimum Rules for Non-custodial Measures \(Tokyo Rules\)](#)
- [UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(Bangkok Rules\)](#)

Reports of the Secretary General:

- [Child Justice Reform \(Report of the Secretary-General on Support of National Efforts for Child Justice Reform, in particular through Technical Assistance and Improved United Nations System-wide Coordination \(E/CN.15/2009/12\)\)](#)
- [Guidelines on Child Victims and Witnesses \(Report of the Secretary-General on Implementation of the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime \(E/CN.15/2008/11\)\)](#)

For more information visit the United Nations Office on Drugs and Crime at:

<http://www.unodc.org/unodc/en/justice-and-prison-reform/childrensvictimswomensissues.html>

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