Bill C-37 to amend the *Young Offenders Act: Implications for the Correctional Service of Canada*

A rash of recent violent incidents involving youthful offenders has resulted in a public outcry for greater severity in the youth justice system. In response, the Minister of Justice and Attorney General of Canada tabled Bill C-37 in June 1994, proposing amendments to the Young Offenders Act *aimed at dealing more severely with young persons who commit serious crimes.*

This article briefly compares the current youth and adult justice systems to provide a clear understanding of the potential implications of these amendments for the Correctional Service of Canada.

Comparing the systems

The philosophy underlying the youth justice system is that a young person can be rehabilitated. Judges choose from a variety of sentences aimed principally at the reintegration of the young offender into the community. Instead of simply punishing offending behaviour, the system tries to understand its cause and change the circumstances that resulted in the offender's delinquency.

However, it is difficult (if not impossible) for young persons to modify their behaviour and accept new values in an environment unfavourable to such change, such as custody in a closed environment or, even worse, imprisonment in a penitentiary. Of course, there are cases where incarceration is the only solution, but this sanction is a last resort.

Under the current legislation, any person younger than 18 charged with a criminal offence must be proceeded against in a youth court. The Act allows for transfer of a case to adult court, but this is an exceptional procedure that occurs very rarely - the process places a fairly heavy burden of proof on the Crown to justify the transfer.

However, if the transfer is made, the whole context changes for the young offender. There is a fundamental difference between adult court's jurisdiction, severity and limited range of sentences, and youth court's protective and instructive approach that focuses on re-educating offenders in an open environment.

A young person convicted in adult court can be given the same sentence as an adult. For example, if found guilty of first-degree murder by an adult court, a youth would receive a life sentence (although their parole ineligibility period would be shorter than that of an adult). However, if the youth is convicted of murder by a youth court, the maximum sentence is currently five years less a day. The less "severe" youth justice system means that young offenders rarely serve penitentiary sentences.

A brief overview of the bill

Most of the amendments Bill C-37 will not affect the proposed in Correctional Service of Canada, since they relate to trials. The bill also encourages alternatives to incarceration (particularly restitution and community service) for young offenders who commit less serious offences, reserving custody in a closed environment (under provincial or territorial jurisdiction) for those who commit more serious offences or require closer supervision or special care. The bill does, however, propose that the maximum youth court sentence for first-degree murder become 10 years.

One of the most significant amendments from the Correctional Service of Canada perspective deals with

the parole eligibility of young persons convicted of murder in **adult** court. The current judicially set (between five and 10 years) prohibitions on parole eligibility will become mandatory seven- and 10-year prohibitions (for second- and first-degree murder, respectively). Of course, the National Parole Board can deny parole if it is deemed to be inappropriate.

The amendment that proposes to increase the time period that must elapse before young offender criminal records are destroyed is a positive change. Currently, young offender records (kept by the Royal Canadian Mounted Police) must be destroyed after a set period of time, depending on the seriousness of the offence and the sentence to be served. As a result, it is often difficult for the Service to accurately assess adult offenders' criminal backgrounds because their youth criminal histories have been destroyed.

It is proposed that these records now be kept open for three to 10 years, and that the records be destroyed only if the young person is not convicted of further offences during this period. This would mean the Service would be more likely to receive a more complete picture of an offender's criminal history when they arrive in the federal correctional system.

The most fundamental amendment for the Service, however, is the creation of a **presumption** that certain young offender cases will be transferred to adult court. Currently, the chances of a transfer to adult court are very slim. The bill alters this by proposing that 16-and 17-year-old offenders are to be proceeded against in adult court if they are charged with certain offences - murder, attempted murder, manslaughter, aggravated sexual assault and aggravated assault. These cases can still be heard in youth court, but the heavy burden of proving the appropriateness of doing so will now be placed on the young offender.

Implications for the Correctional Service of Canada

The first question that comes to mind is whether this legislation will substantially increase the number of young persons serving sentences in federal penitentiaries.(2) However, conclusions cannot be hastily drawn. It is impossible to predict the effect that the changes would have on the custody of young offenders - a number of factors may come into play.

First, regardless of the offence (even first-degree murder), the jurisdiction of adult court is not absolute - these cases can still be heard in youth court. Also, there is no way of knowing whether serious youth crimes will increase or decrease. One must consider the range of current projects aimed at preventing crime.(3)

It is also difficult to predict judicial attitudes. There are no minimum offence sentences (except for murder), leaving the judge with a great deal of discretion in setting a sentence. Judges also have other sentencing options. For example, they might conclude that federal penitentiary placement is inappropriate and that the pro-vincial correctional system is better prepared to meet the special needs of young persons.

Finally, the age of the young persons in question (16 and 17) and the length of the criminal court process will, in many cases, combine to result in the young person reaching the age of 18 before the end of their trial.

However, other attitudes are possible and, for this reason, the result could be very different. For example, if the burden of proof to be discharged by the young person to remain in youth court is as heavy as the burden of proof now placed on the Crown to achieve a transfer, an increasing number of young persons will find themselves in adult court. Judges may also simply adopt a stricter attitude toward sentencing.

Therefore, although it is too soon to draw conclusions, the presence of young persons in federal penitentiaries remains a definite possibility.

The Correctional Service of Canada currently administers only adult offenders, so it has no specialized youth programs or institutions in place. In addition, even if the number of federally managed young offenders increases, there would still be far fewer young offenders than adult inmates. Will it be necessary to create programs and separate facilities for a few inmates scattered across the country? One must also consider the special needs of young aboriginal and female offenders.

Further, young persons need control and protection. Will they have to be kept separate from the general population and, perhaps be deprived of certain benefits (such as a certain degree of freedom of movement) enjoyed by adult inmates?

Finally, qualified staff will have to be hired or trained to work with young offenders. The Service will have to account for all of these factors (and more) to implement a system to meet the needs of the young persons entrusted to it.

There are numerous international standards for the administration of youth justice. The most important of these standards are the requirements that young persons be kept separate from adults and that an appropriate system be established for persons their age. However, Canada's obligations under these standards vary, and it is possible to establish exceptions - for example, when the standards relate to practices already in place.

It was from this perspective that the Government of Canada asked that it be allowed, under the *Convention on the Rights of the Child,* to reserve the right not to separate children from adults in detention.(4) Does this mean, therefore, that the Service's obligations to young offenders might be reduced?

No. It would be necessary to take action eventually. The *Corrections and Conditional Release Act* and the regulations under it set out the Service's obligations and duties toward inmates. There is no need to go into them here, but these duties and obligations apply as much to young persons as to adults.

Even if the Service decided not to establish special youth programs, it would be restrained by its fundamental obligation to respond to individual inmate needs. Needs different from those of adults would, at some point, have to be met. One example would be the need to respect inmate rights to protection and security of the person - rights specifically protected under the *Charter of Rights and Freedoms.*

Some possibilities for action

Implementing institutional programs and controls directed at the detention of young persons is not the

only possible response. Section 733 of the *Criminal Code* allows the transfer of a young person from federal to provincial jurisdiction, as long as the transfer is approved by the province. If the Service intends to use this approach, it will have to convince provincial authorities on a case-by-case basis.

Section 16.2 of the *Young Offenders Act* allows the Correctional Service of Canada, during an adult court young offender sentencing, to make representations suggesting the detention of the young offender in either a provincial facility or a federal institution. It will be up to the Service to decide what policy to follow in this area.

As well, when a young person's circumstances change significantly while serving a sentence, the court may order a placement review and, if the offender is under federal jurisdiction, the Service may argue for a transfer to the appropriate provincial jurisdiction.

One might also ask whether it would be possible to amend federal-provincial agreements on the exchange of services to include the possibility of transferring young offenders to provincial or territorial correctional systems. If the Service opted for this solution, it would first have to determine whether young offender administrative transfers are legally possible, as there are already express legal terms and conditions for judicial transfers.

This article is only a brief overview of the implications of the proposed amendments to the *Young Offenders Act* for the Correctional Service of Canada and of the possible response plans. Service authorities will have to consider these matters in greater depth to make the decisions that may soon be necessary.

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(2)Just one offender is currently serving a sentence in a penitentiary.

(3)Such as the establishment of the National Crime Prevention Council (created July 5, 1994).

(4)See the reservation set out in paragraph 37(c) of the Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989.