

# ***Fixing the Youth Criminal Justice System***



**More Care Less Court**



**Executive Summary**



## **Background**

New Brunswick's rate of youth charged for criminal offences has been decreasing since the enactment of Canada's youth crime legislation, the *Youth Criminal Justice Act*, in 2002. Yet still nearly a decade passed in our Province without corresponding progress being made in regard to the number of youths being sent to pre-trial detention and secure custody. Far too often it is the most vulnerable youths who are caught in the system – youths with mental health disorders, youths with addictions issues, youths with backgrounds as victims of abuse and neglect; homeless youth; youth with intellectual disabilities; youths from marginalized or minority identity groups.

The good news is that New Brunswick has in the past few years begun to make real progress in youth criminal justice issues. The RCMP and their Community Program Officers, as well as municipal police forces, began to lead the way by increasingly diverting youth away from court and toward supports that can reduce their risk of further involvement in crime. However, it takes the work of many different stakeholders to address youth crime effectively, and it takes a system that is built to be responsive to the developmental needs of youth.

Very recently, government's Provincial Crime Prevention and Reduction Strategy has worked with police and civil society to produce a Youth Diversion Model that addresses some of the root causes of youth crime. The model is in line with a shift toward an evidence-based child-rights focus that reflects not just what is easiest but what works best. This work deserves praise and holds much promise, but we must bear in mind it is only the beginning of the necessary shift.

Much work is still to be done to keep youth from crime. Pre-trial detention rates and secure custody rates remain unduly high. Youth admissions to correction services as a whole in New Brunswick remain higher per capita than other provinces. Reaction must be in proportion to the gravity of the offence. Sentencing should be for the shortest time possible. Community-based sentences should be the usual route. Incarceration should be a last resort, normally reserved for serious violent offences. Only in the most serious cases should youth have to await trial while detained at the detention and secure custody facility. If New Brunswick can take a child-rights approach in all areas involving children and youth, we can lead the way in providing the means to allow children to develop positive senses of how they feel, think and act. This is what will keep youth out of the criminal justice system. The More Care Less Court report seeks to provide an overview of the youth criminal justice system in New Brunswick generally, and shed some light on some of the most apparent problems with the system. The report's recommendations intend to support the work of the Provincial Crime Prevention and Reduction Strategy, and suggest necessary improvements to the youth criminal justice system.

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**"If things were different I wouldn't be here, but I don't have anybody looking out for me. It's just me.**

**Martin, 17 year-old youth on pre-trial detention at the closed-custody detention facility**



### Extrajudicial Measures

Children and youth are in a process of development of their personalities and their understanding of social norms. Impulsive behaviour and lack of consideration of consequences of actions are more common in children and youth than in adults. The fact that they are developing in maturity, and have less capacity for moral judgment than adults, has led the Supreme Court of Canada to recognize that youths should be presumed to be less morally blameworthy. The *Youth Criminal Justice Act* is founded on comprehensive research into the best means of providing youths the supports and opportunities that will keep them out of the criminal justice system.

Youths will always run afoul of the law, usually in ways that are not serious. The vast majority of youth crime involves non-violent, minor offences. It is imperative that society addresses the underlying causes for offending behaviour. To keep youth out of crime, the system needs to address their therapeutic, social, educational and vocational needs.

As a society we want to protect ourselves from crime by preventing it to the maximum extent possible. To achieve this we need our youth to grow feeling secure, confident and included. We must also ensure that when youth do commit crimes, they are diverted away from the pattern of arrest, prosecution, incarceration and repeat offending. When youth who have committed a non-violent crime are dealt with in a severe manner within the system, they develop a heightened risk of becoming repeat and potentially more serious offenders.

Under the *Youth Criminal Justice Act*, diversion away from prosecution comes in the form of what are called Extrajudicial Measures. These include all measures outside the formal criminal justice system of prosecution. For a youth not at risk of further criminality, diversion entails measures that are proportionate to the severity of the offence, without severe sanctions. For youth at risk of repeat offending, diversion is about community and family supports. Diversion from prosecution can be the most effective means of crime prevention we have.

A Provincial Diversion Steering Committee has now brought together police and seven youth-serving government Departments to oversee a community-based approach to diverting youth away from courts and into supports. A Youth Diversion Model has been developed that emulates some of the best practice nationally in youth criminal justice, and holds the potential to maximize community and family involvement. It is imperative that police and prosecutors fully embrace the principle of diversion in their practices.

Police and prosecutors play an essential role in diverting youth away from repeated crime and custody. Police can give verbal warnings, and this is often sufficient to stop a youth from repeated crime. They can also issue written police cautions to parents and youth. They can refer a youth to a program to address the underlying cause of the youth's behaviour. Prosecutors can also play a role in this less institutional approach, by administering written 'Crown cautions' to parents and youth, adding more weight without proceeding with charges. We see the beginnings of appropriate use of Extrajudicial Measures, but it lacks consistency across the Province, leading to advantage or disadvantage depending on where a youth lives.

***Police forces across the Province should work collaboratively with the Attorney General and the newly established community-based Youth Justice Committees to produce standard and consistent practices and protocols for the use of these Extrajudicial Measures.***

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## Youth Justice Committees

The Attorney General is sanctioned under the *Youth Criminal Justice Act* to officially designate community-based Youth Justice Committees. The Child and Youth Advocate has been advocating for the creation of these Committees for several years. Some have recently been sanctioned in communities across the Province. It remains to be seen whether these Youth Justice Committees will be utilized to their maximum potential. We have already heard stories about difficulties getting representatives from certain government Departments to participate, and some Committees have yet to convene. Conversations we have had with people involved in the newly created Youth Justice Committees have led us to have concerns that there is as yet a lack of understanding among all stakeholders regarding the full mandates of these Committees under the *Youth Criminal Justice Act*.

A Youth Justice Committee can hold a case conference about a particular youth. It can coordinate the work of community groups, government agencies and schools to ensure that support services, mentoring, supervision and rehabilitation are provided in ways that address a youth's particular circumstances. Youth Justice Committee can provide support to youths following their release from custody: assisting in securing volunteer work; helping youths become involved in extracurricular activities; helping youths transition effectively back into the classroom; and connecting youths to existing services and programs in communities. The system that is presently being formed under the Youth Diversion Model, in conjunction with school-based Integrated Service Delivery teams, should be able to realize the full potential of Youth Justice Committees, if there is sufficient buy-in and training.

However, Youth Justice Committees can have other important functions, and we have not yet seen movement toward institutionalizing all of the possible Committee roles. For example, Youth Justice Committees can give advice to Crown prosecutors on appropriate Extrajudicial Sanctions in a youth matter. They can monitor youth justice services and advise the government as to whether youths' rights are being respected. They can provide advice to government on youth criminal justice policy in general. And they can play an education and outreach role in providing information to the general public on youth criminal justice issues. We hope to see all of these roles being promoted and supported in the future.

***The Department of Public Safety and the Office of the Attorney General should promote the full use of Youth Justice Committee functions, including: advice to Crown prosecutors and police concerning Extrajudicial Sanctions; suggestions to Court regarding appropriate sentencing; and advising government on youth justice policy.***

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### *Case Conferencing*

We have seen a lack of case conferencing in New Brunswick's youth criminal justice system. Case conferences provide an alternative process to the traditional criminal justice prosecutions function. They are aimed at providing better opportunities to youth for rehabilitation, victim-offender reconciliation, accountability and restitution. They also provide a mechanism for connecting youth with services that will enhance pro-social protective factors and further reduce risk of future offending.

We expect the new Youth Justice Committees to convene case conferences, in order to provide: opportunities for a wider range of perspectives; more creative solutions; better coordination of services; and increased involvement of young persons, the victim and other community members. Case conferences are especially important for repeat offenders who typically come from difficult backgrounds and have complex needs, often with mental health and addictions issues. They require structure, stability, and supports. Case conferences are a vital mechanism to ensure holistic approaches to individual situations.

It will be important for the Public Prosecutions branch to begin to embrace its role in case conferencing under the *Youth Criminal Justice Act* (and for Legal Aid and the defence bar generally to support these processes). Judges can also call for case conferences to be convened to provide advice on conditions for interim release or for sentencing.

Youth justice case conferences in other areas in Canada typically have an emphasis on restorative justice that involves the offender and his or her family members, the victim, and various community members in a process of discussion about the offence and its effects. Restorative justice is essentially about building relationships and reintegrating the offender back into being a responsible member of the community and of society at large. It is a powerful tool that can be utilized in New Brunswick as it is elsewhere in Canada and the world.

*The Department of Public Safety and the Office of the Attorney General should provide training on effective use of case conferencing for Crown prosecutors, Legal Aid, probation officers, police and judges, to provide for a fulsome application of case conferencing under section 19 of the Youth Criminal Justice Act. They should also provide the means for Youth Justice Committees to build capacity for Restorative Justice practices.*

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### ***Prosecutorial Screening of Youth Charges***

We are one of the few Provinces where prosecutors screen all charges before proceeding to court. This is a beneficial system. However, we believe that to be most effective, the screening of charges for youth should have a comprehensive youth focus. The *Youth Criminal Justice Act* is meant to create a separate justice system for youth. The *Act* provides for prosecutorial screening of youth charges to ensure that Extrajudicial Measures and Extrajudicial Sanctions are routinely used to divert youth away from the ‘charge-prosecute-incarcerate’ sequence.

All matters proceeding under the *YCJA* should be screened only by Crown prosecutors specially trained in respect to the principles and provisions of the *YCJA*. At the present time there is no regular measurement aspect of the charge screening program, and the discretion vested in prosecutors to determine whether it is in the public interest to proceed with charges can potentially lead to a lack of consistency.

*In order to ensure a distinct youth-focused process, we believe that the Attorney General should develop more detailed guidelines for pre-charge Crown screening of youth cases. This screening should incorporate national and international legal principles and standards. The charge screening process of youth cases should have a means of monitoring and measurement to ensure efficacy and consistency across the Province.*

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### *Ending the Use of Criminal Prosecutions as a Means to Access Services for Youth in Need*

Criminalization of youth who suffer from mental health disorders has occurred in New Brunswick for too long. Without adequate diagnosis and treatment, mental health and addictions issues put youth at risk of being repeatedly caught in the criminal justice system.

New Brunswick has been using court as a surrogate measure to address its failings in providing services for mental health issues. Along with youth with mental health disorders, other disadvantaged youth are also disproportionately liable to fall easily into the trap of the criminal justice system and be unable to get out. These include youth with backgrounds as victims of abuse and neglect, homeless youth, youth with addictions issues, alienated youth, and other vulnerable groups. Everyone involved with these youth needs to understand the importance of social supports and health supports to keep them safe and free from criminal activity.

***Government should provide training in diversion, mental health and child development to all youth-serving workers, including social workers, probation officers, educators, group home staff, foster parents, correctional staff, police and others. Further, government should create strong processes to enforce the prohibition in section 29 of the YCJA against detention as a substitute for social or mental health measures. For those youth with high needs who do come to court, government should ensure that prosecutors and defence counsel are aware of the benefits of sections 34 and 35 of the YCJA, to recommend that judges order referrals for assessment of needs related to social services, physical health, learning disabilities and mental health issues.***

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### *Creating a Youth-focused Youth Court System*

In New Brunswick, Provincial Courts sit at times as Youth Courts for *YCJA* matters. But in New Brunswick Youth Court is not, as one might expect, a distinct court with its own space. One day in a week is set aside to hear Youth Court matters in the regular court rooms. It is a public forum where sometimes youth are forced to wait while adult cases are ‘cleared’ first. Youths barely understand the process. It is indiscernible and frightening. The lack of a youth-centred system is apparent in the diverse functioning of Youth Courts across the Province. There appears to be a wide spectrum of levels of understanding of the *YCJA* among duty counsel, defence counsel and prosecutors.

When speaking with youth at the youth secure detention and custody facility, it is most common to hear that they did not have lawyers other than duty counsel when they were remanded into custody. The youth we speak to there generally tell us that if they spoke to duty counsel at all prior to being called at their first appearance in court, it was only for a couple of minutes at the courthouse.

Our Legal Aid defence system is grossly underfunded compared to other Provinces. Legal Aid staff lawyers and contracted counsel in New Brunswick are under intense time pressures. There is a particular knowledge set that is necessary for lawyers to have in youth justice matters. Lawyers representing youth must be knowledgeable about the psychological, educational, developmental and social issues facing these youths. It is imperative that lawyers who work in this field are cognizant of the various services available in their communities. They must also have the time to apply this knowledge. Defence counsel require time to communicate with youth clients to be effective and forceful advocates. Most importantly, they must understand and fully utilize the *YCJA*’s provisions.

Youth want to have counsel who represent them know what their situation is – and they have this right under Article 12 of the *Convention on the Rights of the Child*. New Brunswick has a long

way to go to live up to its obligations under the *Convention*. Every aspect of the youth criminal justice system (and specifically the legislated right to counsel under section 25 of the *YCJA*) should take into account the opinions of youth.

Crown prosecutors have heavy caseloads and may sometimes feel that they lack adequate time to prepare for youth cases. There are also some Crown prosecutors who could benefit from more professional development opportunities relating to the *Youth Criminal Justice Act*, the UN *Convention on the Rights of the Child*, and various international juvenile justice instruments.

The current system in New Brunswick is not conducive to youths feeling they are being held accountable through a legitimate and fair process. We find more youth-centred and effective approaches elsewhere in the country. The law demands that there be a separate criminal justice system for youths from that for adults. We hope to see that distinction be made truly genuine in practice by applying more youth-focused processes to the youth criminal justice system. For youths who are arrested and prosecuted, rights must be respected. The process must be meaningful to youths in order for them to feel that the accountability measures imposed upon them are legitimate, and for them to accept responsibility for offences. For those who are incarcerated, there must be a focus on rehabilitation and reintegration back into their communities and into society generally.

***Government should develop youth court services with specialization in the unique needs and developmental circumstances of youth. Included in this system should be the appointment of an itinerant youth court judge, specially trained youth-specific duty counsel, Legal Aid counsel, and Crown prosecutors.***

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Question to a youth incarcerated at the New Brunswick youth  
secure detention and custody facility:

“Did you have a lawyer?”

Youth’s answer:

“I don’t know.”

## ***Creation of Youth Court Worker Positions***

Youths can spend several weeks remanded to the youth closed-custody detention centre, awaiting trial or sentencing. This occurs for what are often, in our opinion, very minor offences. During this time they live in limbo. Their education is interrupted. There can be difficulties having necessary medications follow them to the detention centre. And they are torn away from any community supports they may have. They are also influenced by other youth there who have gone further down the path of crime, some of whom have committed serious violent offences.

It is more likely that a youth will be released to their homes or alternative safe place pending trial if a judge can be presented with viable options that protect the youth and society. Creating Youth Court Worker positions could provide invaluable assistance. They could guide youths and parents through court processes and the maze of government services. They could connect youth with available community resources. And they could ensure that judges have the information they need in order to make the decision to release youth into community. Creation of Youth Court Worker positions would be uniquely important for First Nations youth, who are disproportionately represented in pre-trial detention in New Brunswick.

***In order to limit the use of pre-trial detention in New Brunswick and provide for a more youth-centred, efficient and effective court process, the Department of Social Development in conjunction with the Department of Public Safety should train and provide Youth Court Workers who can coordinate with family members, duty counsel, general counsel, and Youth Justice Committee coordinators. Crown prosecutors should connect Youth Court Workers with a youth's parents or legal guardian upon the laying of charges, before a first appearance in court. All actors in the youth criminal justice system should develop working protocols with Youth Court Workers.***

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### *Separate Facilities for Youth and Adults in the Criminal Justice System*

The Office of the Child and Youth Advocate has witnessed very significant improvements in the functioning of New Brunswick's youth detention and secure custody facility (the New Brunswick Youth Centre). We have great respect for much of the work being done there. However, no matter how dedicated and skilled the New Brunswick Youth Centre staff is, this is not the appropriate place for most of these youths to be in. They need to be in their communities getting the help they require to ensure their maximum safe and healthy development.

It is inevitable that youth will be exposed to negative peer influences at a detention and secure custody facility. Detention and incarceration in such a facility can have serious psychological effects on youth. This is unsurprising given the fear, stress and stigma that accompany incarceration.

The New Brunswick Youth Centre and our provincial women's prison are co-located in the same facility. While there is no interaction between youths and the adult inmates, it is not a positive situation in several respects. Again, adult and youth criminal justice systems are meant to be separate, and New Brunswick's situation is a uniquely poor example in Canada. What is even more troubling is the practice of transporting youths to court, handcuffed and shackled (often for many hours) in vehicles that sometimes include adult inmates.

Youth-only detention and secure custody facilities in other Provinces are uniquely designed to help rehabilitate and reintegrate young offenders. Our Office has been calling for several years now for the creation of a new centre for youth in secure custody. This could be a small centre if the Province succeeds in bringing the number of youths in sentenced custody down to a reasonable level. This centre should be located closer to the Saint John–Moncton–Fredericton areas in order to provide greater family and community involvement with these youths.

*Government should give greater effect to the fundamental principle of the Youth Criminal Justice Act that youth justice be a separate system from the adult criminal system, by discontinuing the practice of housing adults and youth at the same facility, and by ensuring transportation that conforms to youths' developmental needs.*

**"We're kids. We shouldn't have to be treated like adults are..."**

**Darlene, a fifteen year-old girl in the NB youth secure custody facility**



### *Open Custody*

The open custody system in New Brunswick has undergone several changes in recent years and is currently in disarray. We realize that government is working to fix it, but we fear that again expediency will trump efficacy, to the detriment of youths' developmental needs. Open custody

should be readily available to young persons in their own community, in order to ensure the least disruption possible to their development and rehabilitation.

Specialized group homes in communities have been closed and presently there are two options for open custody: (1) an addictions facility and; (2) an open unit at the secure detention and custody facility. The first option has had several difficulties, and the second option was created as an interim ‘emergency’ measure when the first option became very problematic for many of the youths sent there. This interim measure is now looking like it will become permanent. Youth sentenced to open custody being located at the secure detention and custody facility does not accord with the purposes of the *Youth Criminal Justice Act* or with the *Convention on the Rights of the Child*, and it is a terrible practice.

Neither of the two current open custody facilities is located close to the communities most youths come from. This makes reintegration into home communities and families much more challenging. The remoteness of services is a problem, as is the disruption to the youths’ relationships, family life and education. There is also the matter of the disruption in the continuity of care for youths. Social workers, healthcare workers and mental health workers will not be following youth to these facilities during their time in open custody. There is also the very important matter of keeping an open custody option that is tailored to the needs of First Nations youth, which appears to have been lost in the shuffle.

The numbers of New Brunswick youth in open custody has been in steady decline, falling by nearly 70% between 2009 and 2014. As less than thirty youth are being sentenced to open custody per year presently, there is a perfect opportunity to provide community-based options such as specialized foster care that can truly address the needs of at-risk-youth. We see very different approaches to open custody being used in the provinces with the best results for preventing youth crime.

***Government should develop open custody options in accordance with the guiding principles of the Convention on the Rights of the Child and the principles of the Youth Criminal Justice Act. Such open custody options should be guided also by the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Guidelines for the Alternative Care of Children. All efforts should be aimed at reintegration of youth into community and family settings.***

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### *A Lack of Data*

We do not have enough information to provide a comprehensive statistical picture of youth involved in crime. A great deal of information is simply not collected and analyzed. However, we know, from what youth themselves and professionals involved tell us, that many youth in the criminal justice system are affected by mental health issues, family breakdown, intellectual or learning disabilities, homelessness, school drop-out, and histories of being victims of abuse and neglect.

To have evidence-based decisions, we need comprehensive data and analysis. Youth crime prevention is an area that has incurred massive spending with very unimpressive results, and our Province still lacks an extensive statistical understanding of youth crime.

*Government should develop better data-monitoring, analysis and dissemination processes in order to ensure effective evidence-based decisions are being made in youth criminal justice matters, and to guide the work of the Provincial Diversion Steering Committee as part of the New Brunswick Crime Prevention and Reduction Strategy.*

"I think I've got rights, but, yeah [laughs], I guess they're not doing me much good."

Trevor, 17 year-old in secure custody

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