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Katherine Catton

Jeffrey S. Leon

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LEGAL REPRESENTATION AND
THE PROPOSED YOUNG PERSONS
IN CONFLICT WITH THE LAW ACT

By Katherine Catton*
and
Jeffrey S. Leon**

A. INTRODUCTION

At the outset of its Report on proposals for new legislation to replace our Juvenile Delinquents Act, the Solicitor General's Committee is critical of the traditional approach to juvenile justice in Canada, in that "while espousing help, and understanding of the problems experienced by young persons, this approach has not totally avoided the development of characteristics similar to the adult criminal process . . . . [E]lements such as deterrence, punishment, detention and the resulting stigma have surfaced in the juvenile justice process despite initial intentions to the contrary." The Report suggests that a major component of reform will be the recognition of "sufficient substantive and procedural safeguards" for children involved in the court process. Central to concerns with providing effective legal rights must be, of necessity, considerations of how these rights are to be enforced, and, in this regard, the availability of legal representation for children is crucial. Thus, it is with a view to evaluating the adequacy of provisions for representation that the draft Young Persons in Conflict with the Law Act will be reviewed. In conclusion, an analysis of alternative systems of representation, both current and proposed, will be presented.

B. CURRENT DELINQUENCY LEGISLATION AND RIGHTS ACKNOWLEDGED THEREUNDER

The Juvenile Delinquents Act itself does not refer to rights of children generally and no section deals specifically with the idea of legal representation for children. "Theoretically," however, claim Fox and Spencer, "the pro-

* Copyright, 1977, Katherine Catton and Jeffrey S. Leon.
** Legal Research Co-ordinator, Child in the City Project, University of Toronto, Toronto, Canada.
*** Research Assistant, Child in the City Project, University of Toronto, Toronto, Canada.

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3 Supra, note 1 at 3.
4 Id.
cedural rights of a child charged with the offence of delinquency under present law are equal to those granted to adults." The authors cite, in this regard, the Bill of Rights as offering the "promise of a variety of safeguards including freedom from cruel and unusual treatment or punishment, and the right to a fair hearing 'in accordance with the principles of fundamental justice for the determination of . . . rights and obligations.' Similarly," they continue:

The Canada Evidence Act also applies to juvenile proceedings except where expressly excluded (s. 4(2)). Under section 5(1) of the Juvenile Delinquents Act prosecutions and trials are declared to be summary in nature and are to be governed, mutatis mutandis, by the provisions of the Code relating to summary convictions insofar as they are applicable. This includes, for instance, the requirement that a plea be taken, and a statement of the accused's rights to examine and cross-examine witnesses under oath (s. 736 and s. 737).

In the course of defining the limits of the juvenile's rights under the Juvenile Delinquents Act, a substantial body of case law has developed which provides the child with several of the due process protections accorded to an adult. The procedural problem has been one of reconciling s. 5 of the Act which states that the prosecutions are to be summary in nature, with both ss. 17 and 38 of the Act. Section 17 allows for proceedings to be "as informal as the circumstances will permit, consistent with a due regard for a proper administration of justice." It further prevents the quashing or setting aside of an adjudication or other action of a juvenile court "because of any informality or irregularity where it appears that the disposition of the case was in the best interests of the child." Section 38 requires that the Act be "liberally con-

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6 R.S.C. 1970, Appendix III.
7 Supra, note 5 at 198. Thus far, however, the courts have, in general, been reluctant to construe the Bill of Rights so as to render sections of the Juvenile Delinquents Act inoperative: Re Regina and M (1973), 15 C.C.C. (2d) 214 at 216-17 (Ont. H. C., Houlden J.) dealing with s. 9(1) (transfer); R. v. O. (1972), 6 C.C.C. (2d) 383 (B.C.S.C., McIntyre J.) dealing with s. 37(3) (30 day maximum for application for leave to appeal); Re Dubrule v. The Queen (1974), 19 C.C.C. (2d) 104 (N.W.T.S.C., Morrow J.) dealing with s. 2(2) (proclaiming upper age limit to be 18 years); In the Matter of Section 12(1) and (2) of the Juvenile Delinquents Act and Section 2(f) of the Canadian Bill of Rights (Unreported, September 29, 1975, Ont. Prov. Ct., Fam. Div., Wang Prov. Ct. J.) (proceedings to be held without publicity). See also R. v. Burnshine and A.G. for Ontario (1974), 25 C.R.N.S. 270 (S.C.C.) per Martland J. at 280-81 and per Laskin J. at 287-89. Noteworthy in this regard is the statement of Mr. Justice Galligan of the Ontario High Court, to the effect that "[i]there is nothing in the Juvenile Delinquents Act . . . which would abrogate or infringe the fundamental right to counsel in the case of a minor. Indeed, if there were any such provision, unless it were declared to operate notwithstanding the Canadian Bill of Rights, it would probably be held by the courts to be inoperative." (citing Brownridge v. The Queen, [1972] S.C.R. 926) P. T. Galligan, "Protection and Representation of Minors," (Paper presented to the Thirteenth International Symposium on Comparative Law, Ottawa, October 19, 1975) at 9.
8 Supra, note 5 at 198.
9 Supra, note 2, s. 17(1).
10 Id., s. 17(2).
strued in order that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents, and that as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance." In Smith v. The Queen, ex. rel. Chmielewski, the Supreme Court of Canada overturned the majority decision of the Manitoba Court of Appeal, holding that a juvenile has the right to plead to the charge before the court and to be heard in this regard. Thus, the rules of criminal procedure applicable in adult court summary conviction trials are to be used in proceedings under the Juvenile Delinquents Act, despite the provisions for informality.

This body of case law which has emerged under the Juvenile Delinquents Act spells out the procedural safeguards to which a child in a delinquency hearing is entitled. In summary, the nature of the offence must be made clear to the child, who then has the right to make full answer and defence, including the right to cross-examine witnesses, to call witnesses and to testify in his own behalf (and be sworn if the meaning of the oath is understood). A juvenile also has the right not to give self-incriminating evidence, the right to require that an alleged statement or confession be excluded in the absence of proof of voluntariness, and the qualified right not to be questioned in the

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16 R. v. Tillitson, id. In the words of Wilson J., "I am not concerned with barren technicalities, but with fundamental rights: rights which we provide for the sorriest scoundrel tried in our criminal courts, and should accord with double-handed generosity to an immature lad" (at 234 (W.W.R.); 391 (C.C.C.)).
absence of a parent or counsel, or without being warned. Finally, a juvenile may be convicted only on legally sworn evidence, and is entitled to an open and fair trial.

In a recent effort to deal with the issue of due process protections in delinquency proceedings, Mr. Justice Andrews, of the British Columbia Supreme Court, held on appeal in R. v. Moore\(^{20}\) that to deny a juvenile the benefit of the rule in *Hodge's Case*, by making a finding of delinquency based on circumstantial evidence with the case not proven beyond a reasonable doubt, was more than an "irregularity" under s. 17. The liberal construction required by s. 38 was held to have no application until the child was adjudged delinquent. The following statements by the juvenile court judge in the original proceeding indicate the confusion surrounding the proper procedure to be followed in juvenile court proceedings:

\[\ldots\text{it is better to err on the side of mercy than otherwise and in juvenile court}\]
\[\text{I am inclined to think that erring on the side of mercy would be to not let juvenile}\]
\[\text{offenders think that they can get away with these offences} \ldots \text{(while) at the adult}\]
\[\text{level I might have to have found otherwise} \ldots, \text{it would be wrong for a young}\]
\[\text{person to think that he can take advantage of technical defences that are of,}\]
\[\text{perhaps, more use at an adult level than here where the result of a finding of}\]
\[\text{guilt is an effort on the part of our workers to help re-direct a young person}\]
\[\text{into a better way of living and spending his time.}\]

In response, Mr. Justice Andrews referred to the case of R. v. B.,\(^{21}\) in which it was stated that "case law has always been to the effect that informal procedure may never be used in such a way as to prejudice the rights of an accused person." Essentially then, although a "liberal interpretation" of the Act may have relevance at the disposition stage of the proceedings, a juvenile is entitled not to have his rights prejudiced by informal proceedings. He is therefore entitled to certain due process protections during adjudication.

Why these due process rights and protections are seldom acknowledged in the actual proceedings of the juvenile court is in part a function of the philosophy underlying this court. Canadian delinquency legislation is based on the family model of the criminal process. The central premise of the family model philosophy is a "reconcilability of interests between the state and the

\[^{18}\text{A conviction on the sole basis of an ambiguous confession that is taken in objectionable circumstances, and the truth of which is denied at trial, may be sufficient cause to grant leave to appeal and to quash a conviction. (R. v. M., [1975] 7 O.R. (2d) 490 (Ont. H.C., per Grange J.)). \("[T]he inherent vulnerability of the child when \ldots\) dealing with older persons in authority" renders the absence or inadequacy of a caution, or the absence of parents or a person in *loco parentis* when a statement is taken, particularly critical (R. v. R. (No. 1) (1972), 9 C.C.C. (2d) 274 (Ont. Prov. Ct., (Fam. Div.), per Thomson Prov. Ct. J.) at 275). However, the presence of a parent or a person in *loco parentis* is not an absolute requirement (Re A., [1975] 5 W.W.R. 425 (Alta., S.C., per Shannon J.). See generally, W. H. Fox, *Confessions by Juveniles* (1963), 5 Crim. L.Q. 459.}\]

\[^{19}\text{However, the same does not hold true for the admissibility of evidence for purposes of disposition and transfer. See cases supra, note 17.}\]


\[^{21}\text{Id. at 191.}\]

\[^{22}\text{Id. at 192. R. v. B., supra, note 13 at 652 (W.W.R.); 383 (C.C.C.).}\]
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accused” just as there is a reconcilability of interests between a parent and child within the idealized family structure. In this model, a parent always acts in a manner consistent with the basic well-being of his child. Similarly, the goal of our Juvenile Delinquent Act is to treat the particular child before the court in a manner consistent with his basic well-being. Section 3(2) of the Act states that “where a child is adjudged to have committed a delinquency he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision.” Hence all the proceedings are geared towards determining and acting upon what will in the end prove best for the child. Unfortunately, the legislation sets out no principles to guide the judge in this determination. As illustrated in the above quote from the trial judgment in R. v. Moore, procedural niceties, when they are thought to interfere with this “best interests” goal, are frequently shunted aside despite the fact that there are often as many different views of what is best for the child as there are participants in the juvenile court hearing.

Some suggest that the child gains from a process in which his legal rights are not given full recognition and protection though there appears to be no empirical support for this view. Mr. Justice McRuer, for example, has argued that “strict adherence to the procedure of the ordinary courts might well work to the detriment of the child. The function of the judge is not so much to determine guilt as to find out the underlying causes which have brought the child before the court, and when these have been determined to prescribe treatment.” In his view, while “some basic” legal protections require recognition, the function of the judge, as “a social physician charged with diagnosing the case and issuing the prescription . . . cannot be properly performed if he is surrounded by too many legalistic trappings.” It is only when one questions whether the outcome of juvenile delinquency proceedings in fact functions in the child’s best interests, and sees that it often does not achieve this goal, that consideration must be given to whether greater emphasis on protecting the child’s basic rights in this forum is required.

It has been argued that, although juvenile court proceedings supposedly operate on a family model of criminal procedure, when carefully scrutinized they in fact more closely resemble what Herbert Packer labels a crime control

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26 Id.
29 See supra, note 23.
model of criminal procedure.30 Under a crime control model, procedural protections are abrogated not so that what is in the best interests of the accused can be readily accomplished, but rather, so that criminal behaviour may be repressed in as expeditious a manner as possible. The most important function of the criminal process from this philosophical vantage point is to achieve fast, final and efficient convictions of those who are “probably guilty.” Speed is obtained by using uniform and routine procedures; finality, by minimizing the opportunity to challenge the process; and efficiency, by screening out those who are “probably innocent” early-on through a pre-judicial fact-finding process. An analysis of the current procedures used in the Metropolitan Toronto juvenile courts has indicated a close parallel to those set out in the crime control model of criminal procedure.31

Those rights and protections which have been developed in the case law are often ignored in the rare cases where counsel is even aware that many standard procedural protections apply in this forum. Why is it that rights which exist in law are not enforced in the juvenile courts? It would seem that either the absence of legal representation, or when present, the absence of adequate legal representation, is the prime factor that accounts for the continued neglect in enforcing these due process protections in delinquency hearings.

The Ontario Legal Aid Plan has, since 1966, provided duty counsel to represent juveniles appearing in juvenile court. By Regulation 55732 under the Legal Aid Act,33 duty counsel is charged as follows:

69. Where a person has been taken into custody or summoned and charged with an offence, he may obtain before any appearance to the charge the assistance of duty counsel who shall,

a) advise him of his rights and take such steps as the circumstances require to protect his rights, including representing him on an application for remand or adjournment or for bail or on the entering of a plea of guilty and making representations with respect to sentence where a plea of guilty is entered. . .34

Further, the regulations provide that:

37. An area director may require that an application for legal aid for an infant be made on his behalf by his parent or guardian, when the circumstances appear to so justify.35

By this means, a juvenile may, by himself or through his parents, retain a private lawyer under the legal aid scheme to represent him at his hearing. A minor has no independent right under the present Legal Aid Act to apply for assistance should his parents refuse to do so for him when the area director requires that they, rather than the child himself, make the application. Where

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31 Supra, note 28 at 195-98.
34 Id., s. 69.
35 Id., s. 37.
a conflict exists between the parent and child, it is possible that the child may be unable to obtain legal representation.\(^8\)

In Toronto, duty counsel arrives at juvenile court approximately one hour before the hearings commence, obtains the list of cases from the court clerk, and proceeds to interview either the parent or child or both. A recent study\(^6\) indicates that this representation by duty counsel is totally inadequate. Although some individuals perform a meaningful role, this appeared to be more a function of personality than legal training. In the sample studied, many children had no idea who duty counsel was, or that he was a lawyer who was supposed to represent them. Duty counsel often had trouble communicating with the child and consequently often directed his questions to the parents, sometimes to the total exclusion of the child. During the actual hearing, duty counsel usually took no active part, even when confusion arose or clear breaches of the rules of evidence occurred.

A series of earlier studies provide clues as to why duty counsel is so ineffective in this forum. A lawyer in juvenile court is under many pressures from the different participants to perform diametrically opposing roles.\(^8\) His own training places him in the role of an advocate speaking for his client, although it may be unclear who his client is when parent-child conflicts arise. But the philosophy of the juvenile court, with its “best interests of the child” goal, results in an informal procedure in which the role of advocate becomes inappropriate. There are strong pressures on the lawyer to modify his role into that of a social worker, and to see that what is “best” for the child is done, even when this does not mean acquittal.\(^9\) A compromise posture duty counsel can assume is that of an amicus curiae. In this role, duty counsel acts as an intermediary between the judge, child, caseworkers, and parent, advising all participants on relevant points of law and other matters.\(^40\)

A further source of confusion for duty counsel in the juvenile court is the lack of a clearly defined prosecutor. Almost every other participant in the hearing except the child appears to function in this role at some time. Nothing in the lawyer’s training prepares him to deal with such vaguely defined and often contradictory role expectations.\(^41\) A further study by Erickson\(^42\) of how judges and social workers view lawyers in the juvenile courts confirms the lawyers’ view of the contradictory role expectations placed upon them. Some

\[\text{References}\]

\(^{38}\) See D. Steinberg, *The Young Offender and the Courts* (1972), 6 R.F.L. 86.


\(^{38}\) *Supra*, note 24.

\(^{39}\) *Id.* at 143.

\(^{40}\) These are similar to the duties envisioned by the Ontario Law Reform Commission in recommending Law Guardians for court proceedings involving children (see *infra*, note 113).


judges and social workers indicated that the presence of lawyers was important, some thought it not important at all; some felt they should act in a highly legalistic manner, and others suggested that the child did not need anyone to protect his rights, since everyone involved wanted only what was best for the child.\textsuperscript{43}

The above studies also indicated that the private lawyer in juvenile court experienced much less role conflict than duty counsel, both internally and from external sources. The private lawyer saw himself as much more of an advocate representing his client, the child, although this role too was subject to many conflicting expectations.\textsuperscript{44} Again, the absence of a clearly defined prosecutor made it difficult for the private lawyer to function in a purely legalistic manner.

In sum, there are a number of operative factors which contribute to the frequent lack of procedural due process in juvenile courts despite the body of case law which asserts this right. They include:

1) the procedural informality in this forum;
2) the recent introduction of lawyers into the proceedings;
3) the lack of experience of many juvenile court duty counsel;
4) the inability of children to articulate their position or comprehend the intricacies of the hearing;
5) the underlying philosophy of the \textit{Juvenile Delinquents Act}; and
6) the tradition which questions whether children should have "procedural rights" to protect in the first place.

Since the espoused purpose of the juvenile court is to "maintain the delicate balance of helping children and preserving their rights, while at the same time protecting society from harmful conduct,"\textsuperscript{45} it is critical to ask whether legal representation will further this aim; and if so, what sort of legal representation will most effectively achieve this goal?

What is needed are lawyers who understand the philosophical basis of the court without being overwhelmed by it; lawyers who will not succumb to someone else's perspective of the best interests of the child when the child's legal rights must be sacrificed to achieve this end. A person's right to procedural due process is one of the most cherished traditions in a democratic society. It seems unlikely that actions taken on behalf of a child can be in his best interests when an abridgement of his legal rights is a concomitant part of the process.

What is needed are lawyers who can communicate effectively with the child, explain the process to him, inform him of the consequences of certain events in the hearing, and help him to understand, as far as possible, the nature and consequences of the process. This assistance is essential to ensure

\textsuperscript{43} Id. at 131 et seq.
\textsuperscript{44} Supra, note 41 at 83-85.
\textsuperscript{45} Supra, note 1 at 3.
that the young person can effectively participate in the proceedings should he so desire.

The proposed Young Persons in Conflict with the Law Act\textsuperscript{40} gives the young person the right to be represented by legal counsel or a responsible adult at all stages of the proceedings.\textsuperscript{47} An examination of various sections of this draft Act will now be undertaken to determine whether this proposed legislation adequately protects the rights of the child.\textsuperscript{48}

C. YOUNG PERSONS IN CONFLICT WITH THE LAW ACT

The preamble of the Young Persons in Conflict with the Law Act states that:

Young persons have basic rights and fundamental freedoms no less than those of adults; a right to special safeguards and assistance in the preservation of those rights and freedoms and in the application of the principles stated in the Canadian Bill of Rights and elsewhere; and a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them. [emphasis added]

This is an admirable and sweeping statement that gives recognition to the rights of young persons in our society. Unfortunately, the substantive provisions of the proposed legislation do little to advance this principle. In fact, many provisions in this proposed Act detract from, rather than enhance, the legal rights of young persons. Without examining each provision in detail,\textsuperscript{49} some examples of the inadequacies of this legislation will be adumbrated.

1. Rights to Representation

Section 10(1) of the Young Persons in Conflict with the Law Act states that "[a] young person is entitled to be assisted by a lawyer . . . during all
proceedings”; and s. 10(2) states that a “young person is entitled to be assisted by any responsible person . . .” at all stages of the proceedings “. . . except that he is not entitled to be represented at his trial by a person who is not a lawyer unless the judge is satisfied that no lawyer is reasonably available. . . .” The principal failing in this provision is that, in all proceedings, the onus is on the young person himself to obtain counsel. Since most young people would be under some stress at the outset of these proceedings which would reduce their capacity to make reasoned decisions, and since many would lack the sophistication to realize the advantages of retaining legal counsel or the implications of not doing so, it would appear preferable, from the young person’s perspective, to make legal representation mandatory rather than optional. Moreover, there is no point in having representation at trial if the absence of counsel before trial has placed the young person in the position of having given up most of his rights prior to this point in time.\(^{60}\)

The provision for representation “by any responsible person” signals the importance which this proposed legislation attaches to the legal rights of young persons. If young persons are to have the same “basic rights to fundamental freedoms” as adults, then surely they require equivalent legal representation as well. If “any responsible person” is unable to advise and represent adequately the rights of an adult involved with the legal system, then this person is no better able to provide a young person with legal advice and representation. To establish so ineffectual a protection and so inadequate an enforcement mechanism is, in effect, to deny young persons their basic legal rights.\(^{51}\)

Some attempt is made to assist the young person in learning about and enforcing his legal rights by providing him with a “youth worker.” Sections 24 and 25 deal with the assignment and duties of the youth worker. The worker is assigned to the young person as soon as he enters the system whether it be by appearance notice, summons or arrest. The various duties specified for the youth worker include explaining the youth’s rights to him, including his right to retain a lawyer, and assisting the young person in asserting these rights.\(^{52}\) These provisions effectively create a form of para-legal personnel. The youth worker performs many functions that counsel would ordinarily be expected to perform. The probable effect of this section may be to minimize the number of lawyers brought into the system. But this youth worker cannot adequately replace independent legal counsel.

\(^{60}\) Even s. 10(3), which deals with the use in evidence against the young person of a “written statement given by a young person to a peace officer or person in authority over him,” requires only that the statement have been given “in the presence of, a lawyer, parent, adult relative or adult friend.” At the risk of being trite, it might be noted that adults who become involved in the criminal process frequently fail on their own behalf to realize the implications of making such a statement.

\(^{51}\) A major factor in providing mandatory representation for children is obtaining the requisite funding. While this consideration is recognized, financial constraints should prove no more problematic in this regard than with respect to the other somewhat costly recommendations arising from the proposals. See the discussion of possible models, infra, note 103 et seq.

\(^{52}\) Supra, note 1, s. 25(1)(a).
The following problems may arise from incorporating a youth worker into this system. First, the young person may not see the youth worker as an independent agent. He may instead be identified as part of the court structure and probably will be seen as someone “on the other side.” Because of this, the young person would be as unlikely to confide in him as he would in independent legal counsel. The youth worker therefore may not be informed of all the facts necessary to properly advise the young person of his legal rights.

Secondly, s. 2 defines “youth worker” to include persons appointed or designated by the title of “probation officer.” This, combined with the additional duties of the worker\textsuperscript{53} to supervise dispositions\textsuperscript{54} and to prepare pre-disposition reports, creates an inherently ambiguous role, particularly from the perspective of a young person. The youth worker’s role is defined in a manner similar to the role presently filled by many duty counsel. Because different parties in the proceedings will have different role expectations for him, he is bound to experience considerable external role conflict. These conflicting pressures will make it difficult for him to advise the child in an independent and objective fashion.

Further, the youth worker’s role is not clearly that of a defender of the young person’s rights. Rather he is to apprise the young person of his rights. The worker’s duties seem to require that he act in the overall best interests of the youth, and this cannot necessarily be equated with what the youth may be legally entitled to or want.

Fourthly, because the youth worker is not trained in the intricacies of the law, he would not have sufficient technical knowledge to fill a role similar to that of a lawyer in advising the child of his legal rights. Finally, the youth worker has a vested interest in keeping the young person in the system. Since his job is to advise young persons as they are being processed through this system, the sooner they exit from the system, the less work exists for the youth worker.

2. Notice

Sections 6(1) and 6(2) provide that a parent, adult relative or adult friend of a young person must be “notified” when the young person, by appearance notice, summons, warrant or arrest, is brought into the process, unless the young person is over the age of sixteen and requests that such notice not be given and, except where the young person is temporarily restrained elsewhere than a place of detention, a judge consents to the request. Section 6(5) stipulates that the notice shall contain:

1) the substance of the charge against the young person;

\textsuperscript{53} These duties include: attending the youth court proceedings relating to the young person; assisting the young person in complying with the conditions of any disposition; assisting the young person prior to discharge or expiry of a disposition; and preparing a pre-disposition report (s. 25(1)(b)-(e)).

\textsuperscript{54} Under s. 23(1)(d), it is mandatory that a probation order contain a condition “that the young person report to and be under the supervision of a parent, adult relative, adult friend \textit{or youth worker}, during the duration thereof.” [emphasis added]
2) the next step in the proceedings, if known;
3) the right of the young person or his parent to retain a lawyer;
4) the place where the young person is detained, if applicable, and the name and address of the person in whose care he is.

Again, the importance accorded the legal rights of the young person is reflected in the fact that nowhere in the Young Persons in Conflict with the Law Act is any provision made to ensure that the young person himself obtains such notice. Perhaps this is one of the functions of the youth worker, although this is not explicitly stated in s. 25. Alternately, perhaps s. 40, which states that provisions with respect to summary conviction proceedings in the Criminal Code apply except to the extent that they are inconsistent with or irrelevant to this Act, imports the requirement of notice. But s. 723 of the Criminal Code states that proceedings for summary conviction offences are commenced only by laying an information. Since the whole screening agency process may occur before an information is laid under this Act, s. 40 does not adequately provide for notice to the young person. Thus, from the perspective of protecting the child’s due process rights, the notice provisions appear completely inadequate.

The notice provisions also highlight a failure to appreciate the potential dimensions of parent-child conflict. It is not clear why only those over sixteen years of age can avail themselves of the opportunity to waive this notice to others. “Parents have a right to be informed of the State’s intervention in the life of their child,” suggests the Committee, “as does a child have a right to have his parent so informed.” [emphasis added] There appears to be some confusion here between legal rights and social conventions or mores. Further, it is not clear why the child equally does not have the right not to have his parents informed, given the potential disruptive effects such information may have on family relationships.

3. The Screening Agency

The Young Persons in Conflict with the Law Act provides in s. 9 that, if the Attorney General or his agent so decides, the case may be referred to a screening agency before an information is laid. The screening agency may recommend that an information be laid, and then the matter proceeds at the discretion of the Attorney General. If, however, the screening agency recommends that no information be laid, then no information may be laid in respect of any offence that is apparently disclosed by the facts before the screening agency. Section 9(3) states that this agency is to be guided by the general principle that:

56 Supra, note 1, s. 9. See infra, note 58 et seq.
56 Section 6(9) states that “[f]ailure alone to give a notice pursuant to this section does not take away the jurisdiction of a judge to deal with the case, nor is such failure alone a ground upon which a court may set aside a decision, finding or disposition or order the release of a young person from custody.”
57 Supra, note 1 at 24.
58 Id., s. 9(5).
Information should be laid against a young person unless there are clear indications that the needs and the interests of the young person and of the public cannot be adequately served without the use of procedures and facilities that are available to the court.

Viewing this principle from another vantage point, one might translate the preceding section as follows:

A young person has no right to have a charge against him tried in a judicial forum unless the screening agency so decides or unless they are unable to come to some agreement with him which amounts to an admission of guilt.

In essence, s. 9(4) indicates that the screening agency operates on a presumption of guilt. It must consider the seriousness and the circumstances of the alleged offence. But if, in fact, no offence has been committed, these factors are irrelevant. Further, it must consider the age, maturity, character and attitudes of the young person, including his willingness to make amends. Again, if no offence has been legally established, then such considerations are beside the point. Similarly, why should a young person who has not been demonstrated to be guilty of any offence be required to put forward plans for his improvement or for changes in his conduct? If, as the preamble states, the young person has the same rights as an adult, then a primary right is the right to be left alone, the right to be free from unwarranted official intervention. Not only do these provisions violate the child's right to privacy, but the entire notion of a screening agency raises serious questions of possible abuse.

Although the possible advantages of diverting young persons from youth court proceedings are not to be denied, comprehensive evaluation of the various diversion programs has yet to be conducted. Similarly, while the need to structure the discretion exercised by diversion agencies has been acknowledged, the possible impact of diversion on the discretion exercised by other personnel within the juvenile justice system, in particular by police officers and judges, is not known. Conceivably, a diversion program could result in more young persons being "officially processed." The police could cease their policy of issuing simple "warnings" in many instances, viewing this as the function of the diverting agency. Further, those young persons who do eventually appear in court, after having been processed through diversion, will no doubt be labelled as particularly "serious" cases by the very fact that they appear in court, rather than having been previously diverted from the process.

69 Id., s. 9(4)(a).
60 Id., s. 9(4)(b).
61 Id., s. 9(4)(f).
63 It has been suggested in this regard that the proponents of diversion have, in their enthusiasm, over-estimated the "success" of their programs (F. E. Zimring, Measuring the Impact of Pretrial Diversion from the Criminal Justice System (1974), 41 U. Chi. L. Rev. 224).
Inherent in the screening agency diversion proposal in the Young Persons in Conflict with the Law Act is a danger that young persons innocent of the offence charged will be dealt with unfairly. Short of convincing the screening agency to recommend that no information be laid, or that no action be taken, both of which may be difficult given the presumption of guilt, the innocent young person is faced with a dilemma. This screening process is, in essence, a highly coercive procedure. A young person innocent of the charges may be “better off” simply accepting the relatively mild penalties imposed by the screening agency rather than subjecting himself to the inconvenience, stress, stigma and expense of a trial with the risk of an even greater penalty if, at trial, he is found to have committed the offence. Parental pressure may often force the young person to “go along with” the screening agency even though he may not have committed the offence. These coercive elements in the process are antithetical to the supposed contractual nature of the agreement between the screening agency and the young person. Further, since the Attorney General refers cases to the screening agency at his discretion, this process could be used as an outlet for “weak” cases that would not stand in a court of law and would otherwise be dropped. Finally, although the record of the screening agency proceedings cannot be used for any purpose, including use in subsequent proceedings, without the consent of the young person, the very fact that the screening agency has decided to lay an information, in view of its guiding principle that no young person should go to trial unless the public’s needs and interests cannot be adequately served in another manner, may prejudice the outcome of the trial. The negative “halo” effect is a well known and easily demonstrated psychological phenomenon. One more readily makes negative inferences about a person previously associated with other negative information. The negative connotation implicit in the screening agency's recommendation to proceed is not one that even a highly trained judge may readily overcome. Thus, at trial, there will be a presumption of guilt characteristic of the “crime control” model of criminal procedure.

In view of the coercive nature of the screening agency process and its prejudicial implication at any subsequent trial, and because there is a need to ensure that the conditions of any “agreement” are reasonable and acceptable to the young person, adequate legal representation is essential in this forum. While s. 10 allows the child to have representation at all stages of the proceedings, nothing in the draft Act ensures representation at this stage. Since the young person does not have to consent prior to being ordered to appear before the screening agency, and since the screening agency has power to

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65 Supra, note 1, s. 9(6).
66 Id., s. 9(8).
67 Id., s. 9(7).
68 Id. at 28. "The intention is to permit the screening agency and the young person to have an opportunity to agree on a mutually satisfactory basis what should be done to resolve the situation at hand."
69 Id., s. 9(2).
70 Id., s. 9(9).
place restrictions on his personal liberty\textsuperscript{72} and impose other penalty-like conditions, it can be argued that the functions of this agency are quasi-judicial and hence governed by the rules of natural justice. The preamble of the Act states that young persons have “a right to be heard in . . . the processes that lead to decisions that affect them.” This, combined with the “liberal construction” provisions of s. 3, the direction to the screening agency in s. 9 that it “consider, in the light of the preamble, the facts of each case that is referred to it . . . ,” and that it maintain a record of the proceedings are all factors pointing to the judicial nature of this body.\textsuperscript{73} The screening agency therefore has a duty to give a full and fair hearing. This implies that it has a duty to give the young person adequate notice of the case he has to meet, to listen to the young person and to reach a decision untainted by bias.

In several respects the role, philosophy, and procedures of the screening agency parallel the present juvenile court functions and processes, and the compelling reasons suggested as to the need for legal counsel in the present juvenile court hearings are equally applicable to a hearing before the screening agency.

4. Adjudication, Finding, and Disposition

As previously stated, the young person, if represented at all at his trial, must be represented by a lawyer “unless the judge is satisfied that no lawyer is reasonably available, in which case the judge, upon the request of the young person, may permit the young person to be assisted by anyone, except a youth worker, whom the judge considers to be a responsible person.” [emphasis added]\textsuperscript{74} From the wording of ss. 10 and 11 it is clearly possible that the young person could appear in court with no one to represent him, although it can be argued that representation other than by legal counsel would be equivalent to no representation at all. Section 11(2) provides that the judge shall not accept an admission of the offence by the young person unless the young person has first had the opportunity to be assisted by some adult who is, in the judge’s opinion, capable of assisting him.\textsuperscript{75} A parent or adult friend is not, however, capable of counselling a young person on whether or not he has, in law, committed an offence. Many children who have committed an act which lacks all the requisite elements of a Criminal Code offence may “feel” guilty, and therefore admit to a crime which they have not, in law, committed. Only proper legal counsel can provide adequate advice as to plea in this situation.

Section 14 deals with the transfer of jurisdiction to adult court. A judge, upon his own motion or upon application of the Attorney General, may, after affording the young person an opportunity to be heard, transfer the case to

\textsuperscript{72} Lingley v. Hickman, [1972] F.C. 171.
\textsuperscript{74} Supra, note 1, s. 10(2).
\textsuperscript{75} A young person who makes such an admission without having had such an opportunity is deemed for the purpose of s.-s. 15(2) not to have admitted the offence.
adult court. Subsection (3) provides that a young person, over the age of sixteen years, who would be tried by a judge and jury in adult court because of the nature of the charge, can himself request that his case be transferred to adult court. But without legal representation who will apprise the young person of this right? Without legal representation who can help him weigh the merits of such a decision? A person lacking legal training is unlikely to be able to do so. Perhaps this is to be one of the duties of the youth worker, although not explicitly so stated in s. 25. It has been suggested that "in many respects, the problem of waiver (or transfer of cases to adult court) is the true test of a juvenile court." That is, transfer cases serve as indicators of how far the courts are willing to go in allowing children access to the "benefits" afforded by delinquency legislation. This is no less true of transfer proceedings under the Young Persons in Conflict with the Law Act than under the Juvenile Delinquents Act. It is therefore essential that the young person be advised of the possible consequences of such a request on his part and that he have a legal representative to speak to his right either to be tried under this special legislation, or alternatively, to be tried in adult court by a judge and jury.

Section 15 deals with the actual adjudication of the charge. The standard of proof required is the same as that applied in adult criminal proceedings — proof beyond a reasonable doubt. However, s. 15(2)(b) allows the judge to simply postpone making a finding and then to discharge the young person under s. 16(1)(a) if he "is of the opinion that there is a reasonable likelihood that the appearance of the young person before the court will itself serve the purposes of this Act, without making a finding that the young person committed the offence . . . ." [emphasis added] Otherwise, under s. 16(1)(b), the judge "may make a finding that the young person committed the offence" and then dispose of the case in a manner set out in s. 16.\footnote{G. Parker, The Appellate Court View of the Juvenile Court (1969), 7 O.H.L.J. 155 at 166. In addition to the transfer cases cited, supra, note 18, see Re L.Y. (No. I), [1944] 3 D.L.R. 796 (Man. C.A.); R. v. Truscott (1959), 125 C.C.C. 100 (Ont. H. C.); and R. v. Chamberlain (1974), 15 C.C.C. (2d) 379 (Ont. C.A.).}

It should be noted that when the young person is deemed innocent, there is no finding of not guilty; similarly, there is no finding of guilty when the

\footnote{77 Dispositions (s. 16(1)(b)(i)-(vii)) include: payment of a fine (maximum two hundred dollars); performance of an appropriate community service, possibly in conjunction with a monetary contribution to a charity (maximum two hundred dollars); combination of previous dispositions (maximum four hundred dollars); placement on probation (maximum three years; alone or in conjunction with open custody — written reasons required); commitment to continuous or intermittent care and open custody (maximum three unbroken years, alone or in conjunction with probation — only if necessary having regard to factors in s. 9(4) — written reasons required); commitment to continuous or intermittent care and secure custody (maximum three unbroken years — only if necessary having regard to factors in s. 9(4) or "to prevent the young person from doing harm to himself or another or because he would be likely to escape if placed in a place of care and open custody" supra, note 1 at 76 — written reasons required); imposition of such reasonable conditions ancillary to commitment as the judge deems advisable and in the best interests of the young person; and for an offence involving the operation of a vehicle or vessel, etc., or an offensive weapon, a prohibition or restriction on the operation in respect of the vehicle or vessel, etc., or possession or use of the weapon (maximum two years).}
evidence proves beyond a reasonable doubt that the young person did commit the offence.

Herbert Packer has stated that the doctrine of legal guilt, that is, the requirement that guilt be proved beyond a reasonable doubt to an impartial tribunal in a procedurally regular manner, is central to a due process model of adjudication. While the adjudication procedure under this Act adheres to the principle of legal guilt, it avoids the practice of finding legal guilt. The Committee’s Report accompanying the draft legislation states that “[w]e have chosen not to use the words ‘guilty’ and ‘not guilty’ because of the elements of criminal connotation and moral condemnation associated with these terms.”

There is evidence, however, that the concept of guilt is the one element which young persons most clearly understand about the trial process. To remove this for superficial and token public-relation purposes, when it may have serious repercussions on the young person’s perceptions of the fairness of the process, is to remove the appearance of justice while obtaining no concomitant benefit. A major criticism leveled against the informal juvenile court proceedings under the present Juvenile Delinquents Act is the blur which often occurs between adjudication and disposition. The absence of a specific finding, a concrete demarcation point in the hearing, will perpetuate this blur and only increase confusion and misunderstanding of what is an already complex procedure.

Section 40 of the Young Persons in Conflict with the Law Act states that Part XXIV of the Criminal Code applies where not inconsistent with the provisions of this Act. By this Part, the general rules of evidence are imported into this forum. Here again, it is unrealistic to expect that anyone but a lawyer could provide the child with adequate legal advice in so complex an area.

There is no provision in the Young Persons in Conflict with the Law Act stipulating that the young person may not receive a longer sentence under a youth court proceeding than he could receive if he were tried on the same charge in adult court. Since a primary purpose of this proposed Act is to place limits on the adult court-like elements of deterrence, punishment and detention in the youth court proceedings, it is reasonable that such a provision should be included. This is especially so if the rehabilitative aim of the legislation is to be furthered, for it is patently unjust that a young person be subject to restrictive measures for a longer period of time than an adult for committing the same offence.

Since s. 10 states that the child should have legal representation “at

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78 Supra, note 30.
79 Supra, note 1 at 141.
80 Supra, note 37 at 16.
81 Supra, note 1 at 3.
82 Legislation that “benefits” young people by providing longer periods of incarceration for rehabilitative purposes has been held to be consistent with the Bill of Rights (R. v. Burnshine (1974), 44 D.L.R. (3d) 584 (S.C.C.)).
trial,” this presumably includes the disposition phase of the hearing. However, as with the adjudication, any other responsible adult may appear in certain circumstances.

5. Pre-Disposition Reports

Section 17(5) provides that a judge can direct that a “copy” of the pre-disposition report not be given to the young person or his parents when disclosure would be “seriously injurious” to the young person. However, if the young person has a lawyer on the record, this lawyer is entitled to a copy of the report. There is no provision which prevents the lawyer, or any other person who receives a copy of the report, from disclosing its contents to the child. This section may result in the child who is without legal counsel being placed in a disadvantageous position, in that the judge could deny the child or his representative access to the report, whereas he cannot deny it to a young person’s lawyer.

Any lawyer who obtains a copy of a negative report may, of necessity, have to disclose some of its contents to the child in order to check its veracity. Further, since the rules of evidence should be, under the proposed Act, as applicable to disposition as they are to adjudication, it would be wrong for a judge to consider evidence such as this without giving the child the right to cross-examine, and to deny or challenge the contents of the report. A right of cross-examination again underscores the importance of true legal representation.

The pre-sentence report, by s. 17(6), forms part of the record of the case. Surely the child should not be denied access to the entire record when an appeal is allowed by s. 42 with respect to the disposition. By s. 39, the contents of this report are made available to anyone “treating” the child; with the judge’s consent, to any peace officer where it is necessary for the investigation of an indictable offence; or to any other person whom the judge considers to have a valid interest. The relative disadvantages of disclosing a negative report to the child and his family must be weighed against the possibility of creating a miasma of secrecy and mistrust concerning the report. Whenever a report is withheld, the young person will know that the reason for doing so is its negative contents. Can what he imagines or fears to be in it

83 For an excellent article on the importance of counsel at sentencing hearings, see R. Fox and B. O’Brien, Fact-Finding for Sentencers (1975), 10 Melb. U. L. Rev. 163.
84 See also supra, note 1, s. 39(1)(a) with respect to youth court records.
85 This would, however, be contrary to the distinction proposed by Mr. Justice Zuber in Re. P., supra, note 17. One juvenile and family court judge has emphasized the equal importance of recognizing the rights of children at disposition as well as at adjudication: G. Thomson, The Child in Conflict with Society (1973), 11 R. F. L. 257.
86 The right to effectively cross-examine the report of a medical examination under s. 18 must also be safeguarded.
87 Supra, note 1, s. 39(1)(a).
88 Id., s. 39(1)(c).
89 Id., s. 39(1)(f).
90 Id., s. 39(1)(g).
be any worse than the actual contents? Is the risk of creating such suspicion and mistrust, with the resulting feeling of injustice, worth the price? We would argue that it is not. The child may rightly feel that he is the victim of a conspiracy where everyone else can know the facts but him, and yet he is the one who must endure the consequences.

Further, it is strongly advocated that there be a provision in the proposed legislation for expunging the youth court record after a certain time period has elapsed in which no further offences have been committed. This record would then be unavailable for any purpose, including proceedings under a provincial training school act or further proceedings before the youth court.

6. Review of Dispositions and Appeals

Sections 30-34 provide for judicial review of dispositions. Section 33(1) stipulates the grounds for review at the insistence of the young person or his parent, and s. 33(2) sets out the additional grounds upon which a judge, provincial director or review agency can commence a review of the disposition. Since the review can result in a further deprivation of liberty for the young person, it should be a full natural justice hearing. The provisions of s. 10 make legal representation optional at this hearing, but since further punitive measures can be imposed, the need for counsel is as compelling here as at trial.

Section 35 states that failure to comply with the disposition or a condition thereof is not an offence. Therefore, those seeking to show failure to comply do not have to proceed via another trial process in which the young person has the advantage of legal representation, the protection of the rules of evidence and the necessity that there be proof beyond a reasonable doubt. Under the Juvenile Delinquents Act, as Fox and Spencer note, the judge has

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91 That is:
(a) that he is being detained in a category of custody that was not directed in the disposition,
(b) that he has been subjected to unreasonable restrictions in respect of probation or custody,
(c) that he has made progress that justifies a change in the disposition,
(d) that he is not making satisfactory progress in respect of education, training or otherwise,
(e) that the circumstances that led to him being committed to probation or care and custody have changed materially,
(f) that services are available which were not available at the time when the disposition was made or last reviewed, and
(g) such other grounds as the judge considers to be substantial and relevant.

92 That is:
(a) that the young person has failed to comply with a material condition of a disposition or an order of probation,
(b) that the young person has repeatedly refused to comply with a reasonable direction as to deportment from a youth worker or the young person's custodian,
(c) that the young person has evaded or attempted to evade custody, and
(d) such other grounds as the youth court judge considers to be substantial and relevant.

93 Id., s. 34(2).
the option of considering "the new charge of delinquency as a fresh offence, the determination of which calls for the formalities of arraignment, plea, and adjudication and the application of evidentiary standards which exclude hearsay; or he may treat the case as falling under s. 20(3) so that only a dispositional issue arises, i.e., revision of the original sentence in light of changed circumstances, in which event the consideration of hearsay evidence may not be inappropriate."\textsuperscript{94} Thus, s. 35 may be seen as a derogation of the protection presently accorded the child under the \textit{Juvenile Delinquents Act}.

Under s. 36(3), a young person or his parents may apply to the review agency, if one is established in the province, for a review of the implementation of certain dispositions (probation, open custody, closed custody) "on the grounds of serious deficiency . . . relating to: a) the education or training that the young person is being offered; b) the physical or mental health of the young person; or c) the diet or the recreational or residential facilities that are available to the young person." In such administrative review proceedings, the young person should equally have the benefit of legal representation as in any other proceeding under the Act. It should further be noted that the young person may not have the option of such review at all if the Lieutenant-Governor-in-Council of a province chooses not to establish such an agency.

Section 42 provides for an appeal from the decision and the disposition as of right. The only points of contention here relate to the potential inadequacy of the decision, in that no reasons or findings of fact are required for some dispositions by s. 16(8) and the pre-disposition report, although forming part of the record, may be withheld from the child and his parents.

7. \textit{Age Provisions}

The age jurisdiction of the youth court is dealt with in s. 4. Section 4(1) states that the Act applies to federal offences committed by those over the age of fourteen years but under the age of eighteen years.

The Solicitor General's Committee states that a variety of factors — developmental, social, behavioural and legal — were considered in formulating the minimum and maximum age provisions. However, the basis of its decision is not spelled out. Rather, it comments that "this is a very difficult matter to resolve and does not lend itself to a purely objective analysis of an empirical nature."\textsuperscript{95}

The age provisions will be considered from two perspectives: that of those under fourteen years who are presently covered by the \textit{Juvenile Delinquents Act} but who will be excluded from the proposed \textit{Young Persons in Conflict with the Law Act}, and that of those sixteen years and over who are presently covered by the \textit{Criminal Code} provisions but who will be brought within the compass of this draft legislation.

These proposals clearly deprive those under fourteen years of any of the

\textsuperscript{94} \textit{Supra}, note 5 at 201.

\textsuperscript{95} \textit{Supra}, note 1 at 19.
rights and protections now accorded them through the case law developed under the *Juvenile Delinquents Act*. As previously indicated, in law a hearing under the *Juvenile Delinquents Act* must provide the child with many of the due process rights and protections accorded an adult. By removing those under fourteen years from the ambit of the proposed legislation, they are left without any formally stated protections. If their rights are not formally stated, and it is left to the provincial child welfare agencies to ensure their protection, those under fourteen years may be denied almost all, if not all the due process rights set out in the preamble to the *Young Persons in Conflict with the Law Act*. Further, these children may no longer have access to certain services presently provided through the juvenile court system.

This draft Act similarly curtails the legal rights of those young persons sixteen years and over. Presently, they receive all the due process protections accorded any other adult being processed through the criminal justice system. By placing them within the jurisdiction of the youth court, many of their due process rights are abrogated. As with those under fourteen, those sixteen and over are placed in a less advantageous position under this proposed legislation. Unless these individuals can be guaranteed the same rights under the *Young Persons in Conflict with the Law Act* that they currently enjoy, then they should not be removed from the jurisdiction of the adult court, even if it is thought to be in their best interests that they not be dealt with in the adult criminal justice system. Again, it must be emphasized that to act in an individual’s best interests should not involve a derogation from the individual's rights.

Even for those aged fourteen and fifteen years, it can be argued that the *Young Persons in Conflict with the Law Act* provides few real improvements over the *Juvenile Delinquents Act*. It is only because the young person’s right to due process proceedings is seldom recognized under the *Juvenile Delinquents Act* that a new system is thought to be necessary. Yet to attain a significant improvement the new system must provide both a greater recognition of rights for the young person and an effective means of enforcing these rights. The *Young Persons in Conflict with the Law Act* does not succeed on either count.

That is not to say that the proposed legislation does not provide for several specific and significant improvements in the Canadian juvenile justice system. Many of these have been mentioned above. For example, s. 4(1) limits the jurisdiction of the youth court to federal offences, thus eliminating not only violations of provincial statutes and municipal by-laws, but also the

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96 *Supra*, notes 11-22.

97 Other sections of the *Young Persons in Conflict with the Law Act* not dealt with above include: s. 26, which continues the practice of holding proceedings without publicity, albeit in an altered form; s. 27(2) which provides for exclusion of the young person from the proceedings under certain circumstances (again reinforcing the need for an effective representative to remain at the proceedings and safeguard the young person’s rights); s. 28, which lists the legal effects of a finding or discharge; s. 37, which places certain limitations on the fingerprinting and photographing of young persons; ss. 38 and 39 which cover the use of youth court records; and s. 5 which deals with detention not pursuant to a disposition.
so-called “status” offences, from this forum. Subject to the provisions of adequate legal representation and controls on the exercise of discretionary powers, a formalized diversion process may serve as a useful adjunct to the youth court. The screening agency proposed in this draft Act is only one of several possible methods of diversion.

The proposed Act also introduces measures designed to structure the exercise of judicial discretion and to secure elements of accountability in certain phases of the proceedings. Section 14(2) lists six factors that a judge must consider in forming an opinion as to whether the needs and interests of the young person and the public require that the young person be proceeded against in adult court, although the effectiveness of this specification is limited by allowing the judge to have regard to “any other factor he deems relevant.” Section 14(4) requires that a judge file written reasons for his decision to transfer a case. This at least provides the young person with some justification for such a course of action. Further, s. 16 places limits on the various dispositions available to a youth court judge by providing for definite rather than indeterminate custodial sentences; by restricting a judge’s discretion to sentence a young person to secure custody; and by requiring the judge, for the more “serious” dispositions, to have regard to the same factors as specified for the screening agency under s. 9(4), and to file written reasons for the disposition. Similarly, s. 23 lists certain mandatory conditions to appear in a probation order and leaves certain specified others to the judge’s discretion, although the option of imposing any other “reasonable condition” reduces this section’s effectiveness. Again, subject to controls on the exercise of discretion, judicial and administrative review of dispositions may prove a valuable check on the “treatment” process. Finally, the provision under s. 42 for appeal as of right from a decision under s. 15(2), a finding of insanity, or a disposition under ss. 16 or 34 eliminates the need to apply for leave to appeal, as required by s. 37 of the Juvenile Delinquents Act, and hence facilitates review of youth court proceedings.

These piecemeal improvements do not, however, justify any derogation from the procedural rights of those under eighteen years of age in legal proceedings. We have argued that while the Young Persons in Conflict with the Law Act purports to recognize and give effect to procedural rights and substantive safeguards for young persons in the court process, the proposals in effect detract from many of the rights and safeguards currently accorded to young persons under the Juvenile Delinquents Act. Central to this failure to substantiate the claims of the preamble is the inadequacy of the provisions for legal representation. The draft Act “entitles” the young person to retain

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88 Under s. 2 of the Juvenile Delinquents Act, “juvenile delinquent” includes a child “who is guilty of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under any federal or provincial statute.”


100 Supra, note 1, s. 30.

101 Id., s. 36.
legal counsel. The onus is on the young person to take action in this regard, on his own initiative, at a timely stage of the proceedings. The interjection of a para-legal youth worker into this scheme is not adequate to remedy its lack of sensitivity to the legal needs of the young person in conflict with the law. To do no more than state that a child has a right to legal representation at youth court hearings is far from being novel or sufficient. The draft Act lacks a concrete proposal for a system that would facilitate access of young persons to legal counsel at all stages of the proceedings.

The Report of the Solicitor General's Committee indicates that this shortcoming was not a mere oversight. While "the desirability of a provision in the legislation requiring that legal services be made available to young persons unable to make their own arrangements for such assistance . . ." was considered, the Committee concluded that "this matter . . . concerns more the availability of legal services and funds and a provision in legislation would not alone be sufficient to ensure the development or availability of these resources." The Committee thereby avoided the real issue, which appears to be federal unwillingness to finance federal proposals. It could be argued, however, that because administration of the courts is a provincial responsibility, it would be incumbent upon the provinces to provide the funds necessary to ensure that representation was available under the proposed legislation. Unless some system of cost-sharing can be worked out, it is likely that the recommendations for legal representation for children will remain as mere recommendations. A review of various systems and proposals will highlight the advantages and disadvantages of different models and suggest directions that might be pursued in ensuring effective legal representation for children.

D. SYSTEMS FOR LEGAL REPRESENTATION

Full legal representation for children in court proceedings has been the subject of a number of recent proposals, some of which have been implemented in legislation. In Canada, the British Columbia Royal Commission on Family and Children's Law has recommended that children be given the right to legal assistance in all decisions affecting their guardianship, custody or a determination of their status. Consistent with these ends, it was proposed that the position of "family advocate" be continued in order to provide representation for the child and others, and to protect the child's interests by advocating resolutions put forth in the child's "best interests." By s. 8 of British Columbia's Unified Family Court Act provision is made for the appointment of lawyers as family advocates, with the power, notwithstanding any other Act, to:

a) attend a proceeding in a court respecting a family matter or a matter respecting the delinquency of a child;

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102 Id. at 33.
105 S.B.C. 1974, c. 99, as am. by S.B.C. 1975, c. 4; S.B.C. 1976, c. 2, s. 33.
b) intervene at any stage in a proceeding under clause (a) for the purpose of acting as counsel for a child who, in the opinion of the family advocate or the court, requires representation by counsel; and
c) upon the request of a court, assist any party to a proceeding under clause (a) who is not represented by counsel.106

The role of the family advocate does not conform to a true adversary model of legal representation.107 The lawyer may be called upon in a proceeding to assist parties other than the child. Further, the family advocate's intervention is at his own, or at the court's, discretion. Thus, a single system for both "family matters" and "delinquency" proceedings may not be the optimal method for providing children with effective legal representation. In particular, the child should be provided with independent legal representation as of right in delinquency proceedings.

A recent Alberta study108 on the question of legal representation for children indicated that a pilot project duty counsel program was presently being conducted in its juvenile courts through the legal aid system.109 How this project compares with other duty counsel programs was not specified. For other proceedings, although the B.C. family advocate approach was favoured,110 it was felt that this approach would not be feasible in Alberta for some time, and therefore it was recommended that an office of *Amicus Curiae* be established. Under this system, the court appoints, at the request of the parties or on its own initiative, a person to represent the infant, and to make recommendations on the basis of investigations to the court. The *amicus curiae* may commission social work and psychiatric investigations and call evidence to provide the court with an impartial opinion as to the child's best interests.111 It was further recommended that intervention by this officer of the court to represent the child be made mandatory "in all cases of abuse or neglect as well as all cases involving a dispute as to custody, access or guardianship, while giving the courts a large measure of discretion in all other cases."112 Presumably then, although representation would be as of right in some proceedings, it would be discretionary in delinquency proceedings. How this system would relate to the duty counsel program is not specified.

The Ontario Law Reform Commission has recommended that the Office of the Law Guardian be established as part of the support services for the family court.113 The *amicus curiae* role envisioned for the Law Guardian

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106 Id., s. 8(2).
107 Three main orientations to legal representation for juveniles in delinquency proceedings have been documented: legalistic (adversary role), *amicus curiae* (neutral, advisory role) and social work (role of helping the child) (see supra, note 41; and Stapleton and Teitlebaum, supra, note 27, chapter 1.
109 Id. at 2.
110 Id. at 36-37.
111 Id.
112 Id.
would involve his intervention in proceedings to assert and protect the rights of children and to provide an independent opinion on the best interests of the child. A Law Guardian would represent children in delinquency proceedings. In the context of protection proceedings, the Commission emphasized that it did not have

\[\ldots\] it in mind that the Law Guardian should take a strict adversary position in the proceedings. All who have written on this subject have been at pains to point out that counsel for the child should adopt the stance of an *amicus curiae* rather than that of an aggressive advocate intent only on destroying the evidence of parents or of a child welfare agency. This is as it should be. The child's advocate should be constructive rather than destructive if he is to be of use to the child and to the court.¹¹⁶

We have characterized the role of an *amicus curiae* as essentially a compromise posture for the lawyer in delinquency proceedings.¹¹６ This type of representation requires the lawyer to assume a neutral rather than adversary position. He is concerned with advising the court as to all the available evidence relevant to a determination of the child's best interests. In delinquency proceedings, however, the child's representative must be sufficiently independent to reject a proposal as to the child's best interests should this involve a sacrifice of the child's legal rights. The *amicus curiae* does not meet this essential requirement. This type of representation would seem better suited to proceedings involving children that are of a less adversarial nature.

The Ontario Law Reform Commission did not consider the effect of the proposed Law Guardian on the present duty counsel system. Presumably, the need for duty counsel would be eliminated. As stated, the Ontario duty counsel system has a number of deficiencies.¹¹⁷ Communication between the lawyer and the child prior to delinquency proceedings is brief and inadequate. Duty counsel have not been able to function as effective advocates in this forum. As a result, the legal rights of children have often been ignored. This is not to say that all systems of representation involving duty counsel need suffer from such defects.

In 1974, the Task Force Report on legal aid in Ontario¹¹⁸ recommended that legal aid should be available as of right to those financially eligible, including infants, in respect of proceedings or proposed proceedings in a Provincial Court (Family Division),¹¹⁹ but no steps have been taken to implement this recommendation. Its report did not attempt an examination of the sufficiency of, and need for, legal representation for children. Hence, Ontario has progressed little since the implementation of the duty counsel system ten years ago in providing effective representation for children.

The Committee on the Family Court of the Quebec Civil Code Revision

¹¹⁴ *Id.* at 76.
¹¹⁶ *Supra*, notes 40 and 107.
¹¹⁷ *Supra*, note 32 et seq.
¹¹⁸ Report of the Task Force on Legal Aid (Toronto: Queen's Printer, 1974).
¹¹⁹ *Id.* at 41-42.
Office has recognized “that the presence of a lawyer at the Family Court constitutes a necessary means for protecting the rights of the parties concerned, ensuring respect of the rules governing the evidence given before the court, assisting the judge in his choice and appreciation of pertinent facts, and helping the parties to better understand, and even accept, the decision taken.”

To this end, it recommended that “every person before the Court be entitled to retain the services of the lawyer of his choice, or to make use of the services provided under the Legal Aid Act if he is entitled thereto . . .” and “that every child involved in proceedings before the Family Court be entitled to legal aid services if he so desires, if his parents so request and cannot meet the legal costs involved or if the judge, the mediator or the Admission Service, assigns proprio motu, a legal advisor, or a lawyer to that child.”

This proposal does not outline the method by which the child is to be apprised of this right. Nor are methods for facilitating communication between the lawyer and the child suggested. A major fault of duty counsel programs is that they often amount to “too little — too late.”

Attempts to overcome such shortcomings have been instituted in Manitoba. The Regulations under The Legal Aid Services Society of Manitoba Act state:

**JUVENILE COURT DUTY COUNSEL**

57. Duty counsel, who shall be solicitors, may be appointed by the board, on a part-time or full-time basis, to attend at one or more Juvenile Courts in the province.

58. The board may appoint graduates-at-law to assist duty counsel as permitted by law.

59. Duty counsel assigned to a Juvenile Court shall
   a) provide information to the general public, and in particular to minors, about the law as it relates to minors;
   b) advise children who have been charged, or who may be charged, with delinquencies under the Juvenile Delinquents Act;
   c) subject to this regulation, and in his discretion, represent children in Juvenile Court proceedings, or arrange, through the office of the area director, for the appointment of solicitors, in accordance with this regulation, to represent children charged with delinquencies; and
   d) advise and assist adult persons charged, or liable to be charged, under the Juvenile Delinquents Act, including taking applications for legal aid.

By extending the duties of juvenile court duty counsel beyond the occasion of the child’s actual appearance in juvenile court, representation may become

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121 *Id.* at 129.

122 *Id.* at 129 and 132.

123 Manitoba Gazette (1972), 101 (32) at 285.

124 S.M. 1971, c. 76.
timely, and increased opportunity would be available for communicating with
the child. Under this scheme, however, representation for the child at court
proceedings is still not as of right.

Other proposals for systems of legal representation for children have
emanated from non-Canadian jurisdictions. Since 1962, a Law Guardian
system has been in effect in New York State.\textsuperscript{125} Section 241 of the \textit{New York
Family Court Act}\textsuperscript{126} provides:

This act declares that minors who are the subject of family court proceedings
should be represented by counsel of their own choosing or by law guardians. This
declaration is based on a finding that counsel is often indispensable to a practical
realization of due process of law and may be helpful in making reasoned
determinations of fact and proper orders of disposition. This part establishes a
system of law guardians for minors who often require the assistance of counsel
to help protect their interests and to help them express their wishes to the court.
Nothing in this act is intended to preclude any other interested person from
appearing by counsel.

At the request of a minor or his parent, the court must appoint a Law
Guardian to represent the minor if independent legal representation is not
available.\textsuperscript{127} A tri-partite function was envisioned for the lawyer. He was to
serve as the defender of the child’s rights, the protector of the general welfare
of the child, and the conveyor of information to the child and his parents on
the functioning of the court.\textsuperscript{128} Lawyers have encountered difficulties, how-
ever, in attempting to perform all of these functions concurrently.\textsuperscript{129}

More recently, the Australian \textit{Family Law Act 1975}\textsuperscript{130} has, by s. 65,
provided for separate representation of children in custody disputes, at the
discretion of the court:

\begin{quote}
65. Where, in proceedings with respect to the custody, guardianship or main-
tenance of, or access to, a child of a marriage, it appears to the court that
the child ought to be separately represented, the court may, of its own motion,
or on the application of the child or of an organization concerned with the
welfare of children or of any other person, order that the child be separately
represented, and the court may make such other orders as it thinks necessary
for the purpose of securing such separate representation.
\end{quote}

As indicated above, we would argue that although such independent legal
representation may be suited to custody proceedings, the adversarial nature

\textsuperscript{126} L. 1962, c. 686, as am. by L. 1970, c. 962.
\textsuperscript{127} Isaacs, \textit{supra}, note 125.
\textsuperscript{128} Isaacs, \textit{The Role of the Lawyer . . . , supra}, note 125.
\textsuperscript{129} Isaacs, \textit{The Lawyer in Juvenile Court, supra}, note 125 at 232.
\textsuperscript{130} No. 53 of 1975.
of delinquency proceedings necessitates providing children with access to suitable legal counsel as of right.\(^{131}\)

Two other recommendations with regard to legal representation are also noteworthy. The Law Reform Commission of Canada\(^{132}\) has recommended that children be provided with independent legal representation in divorce proceedings when parents are disputing custody or when a judge or other official considers such representation necessary. And finally, an English report by the Justice Committee on \textit{Parental Rights and Duties and Custody Suits}\(^{133}\) has recommended that the position of “Children’s Ombudsman” be established. In their own words:

The role we envisage for the Children’s Ombudsman includes that of a clearing agency, one branch at each family court. Everyone would know of his existence and would be expected to report to him. All relevant information would end up under one hand. He would have the power to request a welfare report whenever he thought it necessary. On behalf of a child the subject of a custody suit, he would act as the child’s spokesman and would have the duty of instructing solicitors and counsel to represent this child’s interests so that the interests of the child might be separately represented to the court independently of the adults and local or other authorities concerned. (He would have the power to do so in other legal proceedings as well.) As the child’s spokesman, it would be his particular duty to ensure that the views of any child able to express them verbally or otherwise, were ascertained in the absence of the parents or other adult “custodian” and then made known to the tribunal. He would be responsible to the Lord Chancellor (the traditional delegate of the Crown as \textit{parens patriae}).\(^{134}\)

The matter of legal representation for children has, then, generated considerable attention among those concerned with the position and rights of children in court proceedings. Analysis of the various legislative provisions

\(^{131}\) Three recent Supreme Court of Ontario cases are relevant to representation in this context. In \textit{Reid and Reid} (1976), 11 O.R. (2d) 622 (Ont. Div. Ct., per Galligan J.), the Official Guardian was appointed as the guardian \textit{ad litem} of three children, “with full power to act for the infants as though they were parties” to the custody proceedings. In \textit{Rowe v. Rowe} (unreported decision, February 2, 1976, Ont. H. C., per Reid J.) two children, the subjects of a custody dispute in the context of divorce proceedings, were represented by their own private counsel, although “grave misgivings” were expressed as to the desirability of such a procedure. Finally, in \textit{Re Helmes} (unreported decision, August 10, 1976, Ont. Div. Ct., per Morand J.) it was held that, in the context of protection proceedings under the \textit{Child Welfare Act}, R.S.O. 1970, c. 64, as amended a judge of the Provincial Court (Family Division) could not order that the Official Guardian be appointed to act as guardian \textit{ad litem} of the child. However, “if the judge is concerned as to whether the interests of the child are being properly protected the judge hearing the case would have the right to adjourn the matter, contact the Official Guardian and ask him if he wished to make representations. It would then be up to the Official Guardian if he wished to make representation. By virtue of (s. 25(3)) the Judge might then hear the Official Guardian on behalf of the child.” Whether representation in this manner is sufficient in custody or neglect proceedings will no doubt receive attention elsewhere. We have argued, however, that \textit{independent} representation provided in a \textit{systematic} manner is required in delinquency proceedings.


\(^{134}\) \textit{Id.} at 40.
and proposals suggests that an adequate system for legal representation of children in delinquency proceedings minimally demands:

1) that the child be entitled to independent representation by a lawyer as of right;
2) that access of the child to such representation be facilitated;
3) that contact be made between the child and his representative at an early stage in the juvenile justice process;
4) that the child’s waiver of legal representation be carefully scrutinized to safeguard against the exercise of undue influence by parents and others to expedite the proceedings;
5) that the representative undertake to protect the legal rights of the child as his primary function;
6) that the representative have some knowledge and appreciation of the philosophy and goals that underlie the special processing of young persons; and
7) that the representative be skilled in communicating with children.

While a number of questions remain as to the child-lawyer relationship, both in terms of the child’s capacity and ability to instruct counsel and in terms of the lawyer’s role as both an advocate for the child and as an officer of the Court, it is imperative that efforts be initiated to safeguard the rights of young persons in conflict with the law.