

Crossover Youth Project Bail Condition Recommendations

Crossover Youth: young persons who are subject to child protection intervention with unresolved Youth Criminal Justice Act charges.

Young persons who have experienced trauma face criminal charges at exponentially higher rates. Trauma negatively impacts these youth's ability to self-regulate, build their core capacities, and relate to others. They are also at a much higher risk of experiencing further trauma. The current system inadequately addresses their needs. Solutions to this systemic disparity require a system-wide approach.

Issue: Through our casework the Crossover Youth Project has identified onerous bail conditions as a major obstacle to progress for crossover youth.

Section 11 (e) of the *Charter* guarantees both the right not to be denied bail without just cause and the right to bail on reasonable terms.

In *R. v. Antic*, 2017 SCC 27, Wagner J, for the court reaffirmed that save for exceptions an unconditional release on an undertaking is the default position when granting release.

Considerations of release must be organized by the ladder principle. Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release. The guiding mantra of the ladder approach is that:

Release is favoured at the earliest reasonable opportunity and on the least onerous grounds.

A recognizance with sureties is one of the most onerous forms of release. A surety should not be imposed unless all the less onerous forms of release have been considered and rejected as inappropriate.

Joint proposals must be premised on the statutory criteria for detention and the legal framework for release.

Recommended Bail Conditions

Non-Association/Non-contact

Many crossover youth have charges with one or more co-accused. It is standard practice to include a non-association/non-communication with the co-accused and/or the complainant clause in their release order. This condition causes several problems that are particularly discriminatory to these vulnerable youth. It can result in the youth being moved out of their residential placement or their school causing further disruption to their stability. Crossover youth are often co-accused with classmates, group home peers and trusted friends. This type of restriction can have an undue burden on crossover youth, as trusting relationships are often more difficult for them to form.

It is understandable that there are public safety concerns with regards to association with co-accused. However, it is our recommendation that exceptions can be crafted in appropriate circumstances to decrease the burden of this clause.

1. Exception for the purpose of the *Education Act*
2. Exception for the purpose of residential placement
3. Exception for the purpose of counseling and supervised extracurricular activities and programming
4. Exception under the supervision of a specified adult
5. Exception for a family court order (if appropriate)

Reside

Due to the tendency for Children's Aid Societies to have difficulty placing youth with YCJA charges, it is our strong position that, at a minimum, the reside condition should not indicate a specific address but instead read "as directed by CAS". It is also important to note how disruptive CAS placements can be in the life of a crossover youth. As a result of limited placement options, youth are often sent a considerable distance away from their home communities, separating them from their friends and support systems. Naturally, youth travel back to their home communities and do not return on time or at all and are subsequently considered AWOL by their placement – which results in another criminal charge. The safety and missing persons concerns of the CAS should not be criminalized. We recommend an approach to residency that is driven by the input of the youth so that, where possible, the youth should be released on their own recognizance with no court ordered directive as to where to reside.

Curfew

It is our position that curfew can be set by the guardian or institution and thus it is not necessary to make curfew a formal condition of release. Those who want clarity in enforcement often desire curfews; however, by their nature, crossover youth often have complex cases with a high degree of nuance.

Like any teenager, crossover youth may find it difficult to meet a stringent curfew. However, while a parent or guardian is likely to provide some leniency to a youth missing curfew, crossover youth are more likely to be breached for missing a curfew. The homes that crossover youth are placed in, such as group homes, may have strict rules. Therefore, this condition may set up a crossover youth for a breach. Curfew should be left up to the judgment of the individuals who know the youth best, and in communication with the youth, and should not have criminal sanctions attached.

Controlled Substances and Alcohol

Controlled substances and alcohol are illegal for minors to possess and so it is redundant to prohibit their possession or consumption as a condition of release. If there is a question of substance abuse issues it is our recommendation that a qualified professional determine the appropriate remedy. It is our recommendation that, at a minimum, conditions of release with regards to substance misuse counseling be drafted broadly to allow for maximum flexibility. Counseling is most effective when there is genuine buy-in from the youth, and so it would be our preference that there be no formal condition attach to a release order. In the alternative, it should be worded broadly, such as:

1. Take counseling as directed by the Children's Aid Society/Guardian

Rules of the Home/Institution

It is understandable for a parent or guardian to feel that they have lost control of a youth if they are before the court. However, it is our position that, at a minimum, the court should refrain from using its power to criminalize non-adherence to household rules. In *R. v. K.(R.)*, 2014 ONCJ 566, Justice of the Peace Cuthbertson found:

“...the condition ‘be amenable to the routine and discipline of the residence’ is vague and unnecessary. It is therefore, unreasonable and arbitrary.”

Para 28, R. v. K.(R.), 2014 ONCJ 566 (CanLII)

Working from a trauma-informed perspective with an emphasis on the youth establishing a feeling of safety and trustworthiness, punishing youth who have experienced trauma for ‘breaking rules’ is not a helpful nor therapeutic approach to building capacity with a crossover youth. Providing guardians with criminal sanctions for not following household rules is unlikely to result in an increase in cooperation from the youth. Instead of this type of condition leading to more order, in practice it only leads to more criminal charges. Our shared goal should be to reduce criminal proceedings against crossover youth.

House arrest

After the SCC ruling in R. v. Antic it seems unlikely that house arrest for a youth would be justifiable in many cases. However, in the rare case in which it could be justified on the secondary or tertiary ground the restriction should not infer with pre-trial developmental endeavors. The condition should be worded to give allowances for professional assistance. The exception should be included every time house arrest is ordered even if it is not anticipated that the youth is in need of professional assistance at the time of release. The assessment that assistance is required can change at any time and should not be delayed until a variation can be organized and executed.

Remain in your residence at all times

EXCEPT

For the purpose of travelling directly to, from and while at counseling, programming or services, which have been arranged and directed in advance of departure by your court worker or surety.

Breaches

It is our position that a counter-intuitive approach should be taken with youth who repeatedly breach their bail conditions. In our experience, cases with multiple breach charges are often a result of how the original conditions were drafted as well as the

young person not being consulted. An administrative breach is a sign of the system failing to provide the youth the proper supports and the youth should not be punished for this failure. Enforcing multiple breach charges is not likely to impact the behaviour of the youth and will likely send them further along the path into the adult system.