



## **Best Practice Model for Child Welfare in Working with Cross-Over Youth**

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*Navigating the system and planning  
for good outcomes*

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This document will provide an understanding of issues specific to youth involved in both the Child Welfare and the Youth Criminal Justice Systems in Ontario and practices that will promote the best possible outcomes.

## Acknowledgements

The Cross Over Youth (COY) project co-chaired by Professor Judy Finlay at Ryerson University and Justice Brian Scully, Ontario Court Justice, received funding in the initial phase of development in 2015 from the Department of Justice Canada's Youth Justice Fund to address the concerns of youth in care entering the criminal youth justice system. A Steering Committee of the COY project was developed and comprised of many community partners related to youth involved in child welfare and youth criminal justice. A subcommittee of the steering committee was formed to develop a protocol for child welfare staff working with COY as well as to create a best practice document to guide practice. This document is intended to provide child welfare staff with knowledge about the youth justice system in Ontario and how to navigate to promote good outcomes for youth. We would like to acknowledge the subcommittee members for their commitment and work to develop this best practice guide.

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## **Disclaimer**

*The content of this Best Practice Model is provided for general information purposes only and does not constitute legal advice.*

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## Introduction

The Cross-Over Youth (COY) project received funding in the initial phase of development in 2015 from the Department of Justice Canada's Youth Justice Fund. The project has a four-year funding grant with additional funding from the Ministry of Children and Youth Services (MCYS). The COY project was designed to develop local competencies and sustainability of a coordinated approach to serving cross-over youth. The goal is to help keep youth in care out of the youth justice system and improve outcomes by coordinating system wide response with child welfare, youth justice and community partners.

The purpose of developing a best practice model for cross-over youth is to provide a resource for all Children's Aid Society (CAS) staff who work with youth in care who are also involved in the youth justice system. The primary purpose was to develop a model for use specifically in regions where the Cross-Over Youth Project was operating, but the materials are also applicable to all CASs where youth are involved with youth justice systems. The intent is to provide an understanding of issues specific to cross-over youth and practices that will support the best possible outcomes for this cohort. There is a recognition that there is a gap in knowledge for workers, resource parents and group care staff in understanding the complexities of the youth justice system. There is also an over-representation of youth in care who are also involved with youth justice, specifically indigenous and Afro-Caribbean Canadian youth. CAS workers are required to understand multiple systems related to youth in care and in providing some information to help navigate those systems, it is anticipated that better outcomes can be achieved for youth. The information provided is based on research as well as the experiences and learning from the Cross-Over Youth Project.

Suggestions for using the document:

- Provide staff with access to the document and encourage knowledge building
- Staff working with youth should review the document and consider how the ideas apply to youth with whom you work
- Discuss in team meetings and review scenarios of youth involved with youth justice in your organization
- Share information with caregivers and external placements
- Regularly review your agency practice and outcomes for youth who are involved with the Youth Criminal Justice System (YCJS)

## Understanding the Issues

Cross-over youth have life experiences that have resulted in their entry into the child welfare system. When these youth incur charges that propel them into the youth justice system, their lives become more complex. Many of these youth have also experienced complex trauma from their family and systems and lack a consistent caregiver to assist in navigating the child welfare and youth justice systems. Youth who have experienced trauma, abuse, neglect and abandonment from their family and/or systems, require a core ingredient of strong caregiver-young person relationships.<sup>1</sup>

In addition, many of these youth also require mental health support and have educational needs which may be compromised when they become involved in multiple systems. Youth voices from the Cross-Over Youth Summary Report (2015)<sup>2</sup> clearly outlines the concerns when there is involvement in the youth criminal justice system. Some insight into the experience of youth from this report include:

*“Police are not trained to handle these kids. They’re not social workers or youth workers.”*

*“As soon as a police officer hears you’re in foster care, their opinion of you changes immediately.”*

*“Once a youth has a criminal record.... they can’t live life like a teenager because if the police catch me the punishment is going to be 10 times worse.”*

What workers, care providers, police and other partners in the lives of youth in the care of child welfare agencies need to understand for these youth is:<sup>3</sup>

- Youth in care often face multiple moves, which contribute to issues related to attachment and ability to maintain relationships of trust. This can lead to acting out behaviors which may lead to entry into the justice system
- The antecedent to criminal behaviors is more likely related to maltreatment, attachment disruptions in the family and society, such as systems trauma
- History of trauma combined with likelihood of further disruptions adds to the vulnerability of youth in care, leading them to threshold of the youth justice system
- Unmet educational needs can exacerbate frustration and further inhibit a youth’s ability to relate pro-socially and to succeed in general
- Youth in care are less likely than youth out of care to have their mental health needs addressed well
- Rules and rigidity of group care combined with the “push back” response of adolescents can lead to criminal charges
- Use of restraints can lead to the criminalization of youth

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<sup>1</sup> Ministry of Children and Youth Services, (February 2016). Because Young People Matter: Report of the Residential Services Review Panel. (p. 37)

<sup>2</sup> Summary Report: Justice of the Peace Service Sector (2015). Prepared for the Cross Over Youth Committee. Finlay, J. and Justice Scully, B. Ryerson University, Toronto, Ontario.

<sup>3</sup> Cross-Over Youth: Care to Custody. (2015). Finlay J. and Justice Scully, B. Ryerson University, Toronto, Ontario.

- Frustration with restrictive rules and desire to see family and friends contributes to running behavior, illegal activities and thus exposing youth to criminal charges
- A youth’s experience of ongoing racial oppression creates invisible wounds that they carry and sustain which can lead them to become hyper-vigilant in their reactions. This trauma creates a state of dysregulation which can be interpreted as “acting out”.

It is well documented that there is an over–representation of Indigenous and Afro-Caribbean Canadian youth in the child welfare and youth justice systems.<sup>4</sup> In the report on “Because Young People Matter” this over-representation is noted, and it is recognized that this must be addressed within the context of cross-over youth. The experience of African Canadian youth involved in the criminal justice system was noted in the OACAS One Vision One Voice report of 2016. African Canadian youth shared their experiences of group care and stereotyping in focus groups for the project.<sup>5</sup> Some of their comments included:

*“A lot of group homes hire ex-cops and not CYWs so they don’t have the training to deal with us. They treat us like gangsters and then they wonder why we have so much anger.”*

*“The consequences are harsher for me even though another kid would have done the same thing.”*

Cross-over youth need extra attention and consistent support. To successfully support cross-over youth, frontline CAS workers should consider including supports outside of the agency. Workers can develop creative ways to find relationships for youth for supports who can be there for them when needed. Of significant importance is to consider cultural and identity connections for youth. To be consistent with overarching practice approaches, youth should be offered *choice* in accepting supports that are suitable to them.

Some ideas for supports include:

- a) Logistical Supports - Youth in Transition Worker, Housing Worker
- b) Identity-Specific supports - African Canadian community resources, Indigenous legal and cultural Services, LGBTQS+ services, OVOV Aunties and Uncles Program
- c) Therapeutic Supports - Youth Court mental health workers, counsellors, Canadian Association for Mental Health, Healing Circles
- d) Mentoring / Outreach Workers

Refer to Intersection Points in **Appendix A** for information on how innovative alternatives can be offered to Cross-Over Youth.

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<sup>4</sup> Ministry of Children and Youth Services, (February 2016). Because Youth People Matter: Report of the Residential Services Review Panel. (p. 72, 77)

<sup>5</sup> One Visions One Voice: Changing the Ontario Child Welfare System to Better Serve African Canadians. Practice Framework Part 1: Research Report. September 2016

## Overarching Practice Principles

CAS staff and all stakeholders should consider some core principles when working with cross-over youth. To uphold these practice principles in working with cross-over youth, consider the value in cross-sectoral communication, collaboration and education between Children’s Aid Societies, Courts, School Boards, and other service providers involved in cross-over youth’s lives. Based on the United Nations Convention of the Rights of the Child, these include:

- Youth Centering and Youth Voice<sup>6</sup>
  - Relational approach, being present with youth
  - Engage in open and honest communication with youth throughout process
  - Engage youth in decision making
  - Respect for the youth’s views and wishes, youth is the expert
  - Provide and involve services that respects youth’s rights
  - Include in the development of programs and services for young people in and out of home care
  - Include the youth in the design of programs (rules, procedures, physical design, treatment and relationships)
  - Active involvement and joint decision-making between young people, families and professionals in context of major transitions

The *Child, Youth and Family Services Act (CYFSA)* requires anyone providing services to youth to:

“To express their own views freely and safely about matters that affect them”

AND

“To be engaged through an honest and respectful dialogue about how and why decisions affecting them are made and to have their views given due weight...”

- Anti-Oppression Lens
  - Marginalized youth, especially Afro-Caribbean Canadian and Indigenous youth are disproportionately over-represented in both the child welfare and justice systems, and thus, in the population of cross-over youth
  - Recognize and respond to the unique needs of Indigenous and Afro-Caribbean Canadian youth, LGBTQ2S+ youth, youth living in poverty and youth living with disabilities by utilizing an anti-oppressive, anti-racism and anti-Black racism lens
  - Utilizing an anti-oppression, anti-racism and anti-Black racism lens is by first acknowledging that oppression is embedded in social structures and policies and that inequality exists amongst

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<sup>6</sup> Because Youth People Matter: Report of the Residential Services Review Panel. Ministry of Child and Youth Services, February 2016.



marginalized groups. Recognize when a youth is faced with oppressive barriers, raise the issues and challenge them.

- Trauma-Informed Lens

- Cross-over youth have often been traumatized in relation to being in care and involved with the youth justice system. When youth experienced multiple incidents of trauma or complex trauma, helping professions struggle to see the correlation between their past and the presenting behaviours.<sup>7</sup> Youth with histories of complex trauma often respond with negative behaviours and tend to be diagnosed with disruptive behaviour disorders such as ADHD, oppositional defiant disorder or conduct disorder. Some youth respond with depression and anxiety. These are the youth who may at times fight, argue, refuse to comply, run away, lie and steal
- Consequences should be focused on teaching appropriate behavior rather than punishing the behavior
- Professionals who respond to youth's defiant behaviours with frustration and anger only reinforce the same feelings in traumatized youth
- It is harder to respond effectively to youth who refuse to comply and are disrespectful, but these are the youth who need the most attention and support
- Four key factors to trauma-informed practice:<sup>8</sup>
  1. Normalizing and validating youth's feelings and experiences
  2. Assisting youth in understanding their past and its emotional impact
  3. Empowering youth to better manage their current lives by building skills and capacity by modeling ideal behavior and providing education
  4. Helping youth understand current challenges by diminishing personal responsibility for their actions and by helping them problem solve
- Five factors for trauma informed practice related to racism and oppressions by Ken Hardy:<sup>9</sup>
  1. Creating space where youth can discuss everyday experiences of oppression including experiences of pain
  2. Supporting youth to build survival strategies to cope with everyday oppression
  3. Supporting youth to understand and strengthen their individual and group identity for resilience
  4. Encourage youth to discuss your impact on them individually and in terms of group identity
  5. Recognize cultural/ Intergenerational trauma and collective resilience

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<sup>7</sup> Beverly Tobiason. "We Need to Understand How to Provide Trauma-informed Care". *Youth Today*, [youthtoday.org/2016/07/we-need-to-understand-how-to-provide-trauma-informed-care/](http://youthtoday.org/2016/07/we-need-to-understand-how-to-provide-trauma-informed-care/)

<sup>8</sup> Knight, Carolyn (2014), Trauma-Informed Social Work Practice: Practice Considerations and Challenges, *Clinical Social Work Journal*, 43 at pg. 2

<sup>9</sup> Hardy, Ken (2013), "Healing the Hidden Wounds of Racial Trauma" *Reclaiming Children and Youth*, v22 n1 at pg. 24

## Five Key Responses to Avoid:

1. Do not demand respect because of seniority or position of power, as this will reinforce the authority/subordinate dynamic between you and the youth. It will not create a sense of order, but rather provoke rebellion and escalation
2. Do not expect a traumatized youth to take personal responsibility for their actions. Most likely their actions and reactions are an instinctual survival response in a way that differs from the general population. Assigning personal responsibility will be more confusing than corrective
3. Traumatized youth may not have the cognitive capacity to understand and learn from consequences. The negative consequences of punishment will just be amalgamated with all the other negative associations and experiences the youth is carrying with them. It may increase anger, hurt and pain the youth feels and they will not be able to compartmentalize them into a useful lesson. Until the underlying trauma is treated or stabilized the youth will not have the capacity to learn through punishment
4. Do not use isolation as a de-escalation technique. Most traumatized youth have associated attachment disorders and for these youth there is no worse punishment than isolation. It will only exacerbate the youth's feelings of abandonment
5. Avoid separating individuals that motivate each other to engage in negative behaviour. Traumatized youth are extremely hesitant to trust others and are resistant to form friendships. Permanent separation from a peer or an environment should only be explored with caution and a last option

To uphold these practice principles in working with cross-over youth it is important to consider cross-sectoral communication, collaboration and education between Children's Aid Societies, Courts, School Boards, and other service providers involved in cross-over youths' lives.

Refer to Trauma-Informed Lens Guideline for Practical Implementation in **Appendix B**. This document provides information on understanding trauma and its origins, physical effects, changes to the brain and trauma informed practice.

## What Youth Want their Workers to Know

The Cross-Over Youth Project conducted a focus group with cross-over youth. They provided the following feedback about what they felt were the most important issues that cross-over youth had with the child welfare system:

- Youth should not need to tell their story multiple times. Youth felt this process is traumatizing, and felt they should have it recorded by one individual, and the subsequent workers could be informed of the youth's situation through this file
- Youth reported multiple workers (sometimes in excess of 15). They felt the lack of established relationship with these workers made it difficult to tell their stories. They felt a deeper relationship with the workers would have made it easier to disclose their personal, traumatic histories.

- Youth felt the need to “prove” how sick they were (for those with mental health issues). They reported that telling their guardians they needed help often wasn’t enough, they had to “play up” their illnesses, or act provocatively to get medical, or mental health attention.
- Youth were not adequately informed of what was happening to them once they became involved in the CAS system. One wasn’t aware what a “crown ward” was, but she was threatened she would become one if she didn’t cooperate.

All of the youth we spoke with expressed frustration at these issues. It is the type of frustration that can quickly escalate. Addressing these issues in your practice and in child welfare systemically will contribute towards the pre-escalation process. Pre-escalation (making sure youth are heard and their issues are addressed respectfully) is a key step in ensuring youth are not put in a position where there is conflict that could escalate to the engagement of police.

## Navigating Youth Court

### Philosophy of the Youth Criminal Justice Act

To understand what is going on in Youth Court and what is motivating the decisions being made it is important to understand what principles Parliament intended to be incorporated into the process. The embedded principles include:

- Address the developmental challenges and needs of youth.
- Work in partnership to prevent youth crime by addressing the underlying causes, responding to their needs and providing guidance and support.
- Young people have special rights including those guaranteed to them under the United Nations Convention on the Rights of the Child.
- Accountability is achieved through meaningful consequences, rehabilitation and reintegration.
- The most serious interventions should be reserved for the most serious crimes. The over-reliance on incarcerations should be reduced.

**Note:** When applying these principles, a youth’s identity (i.e. developmental challenges), and how these may be different if youth is part of an oppressed group, should be taken into consideration.

### Youth Criminal Justice System

Cross-over youth and their CAS workers are not always familiar with the workings of youth court or the options available to youth. The following information provides some specific materials to assist in understanding the YCJ system.

*What to expect when you attend youth criminal court?*

First and foremost, anticipate having to wait. Everything in criminal court takes longer than you expect, and processes must be followed correctly. Secondly, every courthouse operates at least a little bit different logistically.

It is important to make yourself known to the Crown or Duty Counsel or your client's lawyer. This will help the process move forward. However, do not interrupt the court proceeding. This should be done on break or in the hall.

The Court docket (list of matters that the court will address for the day) will have multiple matters on it. Typically, the docket is posted outside of youth court or on a bulletin board near the entrance of the courthouse. The docket is posted with only the initials of the youth. Matters will be dealt with in the order of those ready to proceed with most senior defence counsel first, to most junior counsel, then articling students, then duty counsel and lastly self-represented individuals.

Don't be intimidated or embarrassed! It is very important that the youth have their guardian in court. They need support. If they have been in custody they may not have had the ability to contact anyone and they may see you as their only lifeline.

### **Advocating for Youth**

The CAS worker should be the youth's strongest advocate in court, despite the alleged actions of the youth. Agencies need to be structurally designed to allow the worker to be the young person's advocate. The worker's role is to advocate to the courts for the youth's rights and well-being. Ask questions and raise concerns about the process. Ways to advocate:

- Youth should never be held in custody awaiting bail because of no placement availability. It is the worker's responsibility to advocate to their Resource Department/Agency to find a suitable placement for the youth to ensure that bail is received in a timely manner
- If the primary worker is unable to attend court to support a youth's bail, arrange for an alternate worker, preferably one who knows the youth.
- Youth also don't want to have to tell their story over and over again, as it is retraumatizing. When the primary worker is recording the youth's past they should create a version with the youth that highlights the important points for the replacement workers to know. It should only have as much information as the youth wants shared.
- Avoid postponing bail hearings. Youth with histories of trauma have an increasingly significant chance of continued retraumatization for every extra day they spend in custody. Workers must prioritize youth in custody.
- Workers should use caution in sharing information with the Crown attorney and to be mindful not describe the youth in a negative manner; the Crown as they may use this information to form an inaccurate judgement of the youth. This is also true for a coverage worker or other stakeholders.
- If a youth is in closed-custody when attending court, the worker may ask defence counsel or duty counsel for assistance in meeting with the youth in cells prior to their appearance in court

- Discuss placement options with the youth in advance when release is anticipated
- Provide advocate from the young person's community (i.e. African Canadian, Indigenous Community member)
- Custody should **not** be a consideration as an option for placement for youth. It is not a "safe" bed. It is not only contrary to s.29 of the *YCJA*, it is detrimental to the youth's wellbeing no matter the alternative
- Recognize and explore anxiety of youth and how it may differ based on identity; use clinical analysis (i.e. what might be the experience of an African Canadian male in custody)
- Given that child welfares have a practice of not acting as a surety for youth in care, the procedure for advocating for bail for any CAS involved youth under a Voluntary Youth Services Agreement (VYSA) is the same even though CAS is not the youth' official guardian.

### **Court Roles**

#### Crown Attorney (Prosecutor)

- In charge of proving to the court that all elements of the allegations are true.
- Suppose to serve justice at large not just win the case
- it is important not to discuss substantive information with the Crown unless the youth's Defence Counsel has approved.
- They are usually very busy and have many different cases to speak about per day.
- They will often have only looked at the file on the day of court, sometimes moments before speaking to it. They are relying on the notes of other Crown Prosecutors from previous occasions.

#### Duty Counsel

- There is a Duty Counsel in all bail and set date courts.
- They are there to provide legal advice to any youth that is not yet represented by a Defence Counsel.
- They can run a bail hearing, but they are not allowed to run a trial.
- Their duty unlike the Crown's is strictly to the youth. They are a safer person to propose questions to.
- They are also very busy, as they will be speaking to all matters. But it is their job to make sure all unrepresented youth are fully informed of their rights.

#### Defence Counsel

- Youth should preferably have their own lawyer
- It is not sufficient that a youth have any lawyer, the lawyer should specialize in, or at least have a specific understanding of, youth matters
- Ask other professionals who have court experience (other CAS workers, court stakeholders) for suggestions

- Get multiple opinions, do not just select the first lawyer suggested to you or blindly pick from a list
- Interview the lawyer, ask informed question based on this guide
- Judge the lawyer based on their engagement on the issues, their interest in your youth and their knowledge of cross-over youth issues
- If another one of your youth has had a lawyer in the past do not just use the same lawyer unless they were a strong advocate and achieved a client centred result in a timely manner
- Legal Aid is close to finalizing a special empanelment for lawyers that handle youth matters - once that is finalized only empaneled lawyers should represent your youth
- The defence council's only obligation is to the youth.
- Information discussed between them is protected by solicitor/client privilege. They cannot relay any information unless explicitly directed to by their client.
- They will take the lead in navigating the matter through the court.
- However, they may rely on the youth's worker for some information gathering and planning outside their capacity
- African Canadian youth should get assistance from lawyers in their community when possible (i.e. Black Legal Aid Clinic)

#### Justice of the Peace

- They sit in bail court and set date court in most jurisdictions (though not universally, especially in youth court).
- They are not necessarily former lawyers.
- They control the court process but may defer to the Crown or Defence counsel in some instances.
- JP's are recognized by the green sash they wear in court
- They must be referred to as "Your Worship"
- You must stand when they enter and exit the court
- You must bow and look at them when you are exiting the court

#### Judges

- They hear all other court matters
- They are formerly lawyers from a variety of backgrounds.
- They control the court process but may defer to the Crown or Defence counsel in some instances.
- A Judge will wear a red sash
- They must be referred to as "Your Honour"
- You must stand when they enter and exit the court

- You must bow and look at them when you are exiting the court

#### Legal Aid Worker

- Not all courthouses have a legal aid worker
- Their role may differ between courthouses, however, they provide youth with legal aid certificates or information on how to obtain a certificate and the process to choosing a lawyer
- They sometime assist duty counsel with administrative work

#### Mental Health Court Worker

- Not all courthouses have mental health court workers
- They connect youth to mental health services
- If there is a mental health court - they will assist in running it
- They will assist with s.34 reports

#### Indigenous Court Worker

- Not all courthouses have mental health court workers
- They connect youth to cultural services if they self-identify as indigenous
- They will assist with *Gladue* court, *Gladue* reports and restorative justice

#### Probation

- If the youth is sentenced to an out of custody sentence that includes probation the youth must check in with the court probation worker before they leave court
- The Probation court worker will connect them with the Probation officer that will supervise them

### **How charges move through the court system**

#### 1. Police Diversion (Extrajudicial Measures)

- a. If a youth is detained, the first option for an officer through formal or informal means is to choose to exercise their discretion and NOT charge the youth. If you have the opportunity to speak with the officer during this process (either the officer or the youth calls you) ADVOCATE for this option.
  - i. In some circumstances this option may not be available (the charges are too serious, or the youth's record is too long), however, there is absolutely no penalty for trying.
- b. Formal diversion (where available) is when a program is offered by the Officer as a way to resolve the youth's charges without a charge. Usually, the youth must take responsibility for their actions and complete some programming. When the Officer has confirmation, they will formally close the file on the matter.
- c. Officers are obligated to notify the parent/guardian if they are choosing to forgo diversion and charge instead
  - i. Ask what the youth's charges are. Depending on the charge, officers have discretion whether to release the youth on a promise to appear or hold them in custody for a show cause hearing. The more minor the charge the more likely they will be released on a promise to appear.

- ii. The one exception to that rule is for breaches. Most officers will detain a youth in custody no matter how minor the infraction if it is a breach of a release condition.
- iii. If the youth is being held in custody, ask where and when their bail hearing will be and which courthouse and courtroom.

## 2. Show Cause/Bail Hearing

- a. If the police choose to charge, the youth may be detained in custody. If they are in custody, they must be brought before a Judge or Justice of the Peace within 24 hours. Ask the police for information on which court the youth will appear.
- b. At that hearing the Crown Prosecutor will either make an agreement to release them or have a contested bail hearing.
- c. If a bail hearing is required, it can either be run right away or the matter can be adjourned to another day to give more time to develop a plan for release.
- d. Plans for release need to convince the court that the youth will show up to all their subsequent court dates, that they are unlikely to commit new offences and reasonable members of public wouldn't be offended by the release.
- e. If there is a hearing and bail is denied. In the youth system it is possible to appeal the decision of a Justice of the Peace to an Ontario Court of Justice Judge within a couple of days.
- f. WASH Court – Weekend and Statutory Holiday court will be used if the youth will have a bail hearing on a weekend; confirm which court will be used for this hearing, it can often be a different courthouse than typical youth criminal court.

## 3. Set Date

- a. Cases take a long time to work their way through the system. Rarely is a Crown ready on the first return date after a bail hearing to run the trial.
- b. A case will usually be adjourned at about 4-week intervals at a time. This allows the Court to get updates on what is going on.
- c. Usually the first couple of adjournments are related to whether the court has provided disclosure (the Crown is obligated to provide all the material they have related to the case to the defence before the trial).
- d. During that time, the Crown and Defence Counsel will have a Crown Pre-trial, which is a negotiation to determine whether it can be resolved without a trial.
- e. If nothing can be resolved, then a Judicial Pre-trial is next. This is both a negotiation for resolution guided by a Judge, as well as a planning conference for the eventual trial if there is no resolution. This usually takes a couple months to schedule depending on if the youth was released on bail.
- f. If no deal is reached, then a trial date is set. In adult court, a recent Supreme Court decision held that the longest a case could be before the court without a trial starting was 18 months (without Defence delay). Youth matters should resolve more quickly. The Ontario Court of Appeal decision before the most recent Supreme Court decision held that the upper ceiling for youth is 12 to 15 months. This is an approximate guide of how long a matter could take to resolve.

## 4. Diversion (Extrajudicial Sanctions)

- a. Is when is a program offered by the Crown as a way to resolve the youth's charges without a finding of guilt or time in custody. Usually, the youth must take responsibility for their actions and complete some



programming. When the Crown has confirmation, they will formally withdraw the youth's charge.

- b. In some instances the Crown will require the youth enter into a Peace Bond to withdraw the charge(s). A Peace Bond is a binding court order not to engage in certain activity as specified in the order. If the youth has entered into a Peace Bond, the record is sealed and may not be accessed if in a child welfare proceeding
- c. Informal diversion, sometimes referred to a Crown Diversion is similar to formal diversion except the youth doesn't need to fill out any paperwork and enter an actual program. The Crown will just set a requirement, like complete some volunteer hours. Once the Crown has proof of completion the charge will be withdrawn.
- d. Mental Health Court diversion is offered to youth that are either have a mental health diagnosis or are struggling with mental health issues. Not all courthouses offer mental health diversion, so you may want to ask defence counsel or duty counsel.
- e. Indigenous Court diversion is offered to all youth that identify as Indigenous. Not all courthouses offer Indigenous court so best to ask.

## 5. Guilty Plea

- a. If and only if the youth admits to every part of the offence the youth may plead guilty before setting a trial.
- b. The Crown will often offer somewhat favourable terms to avoid using up court resources.
- c. It is important to ensure that Duty Counsel or Defence Counsel has explained in an understandable manner the consequences of a guilty plea.
- d. Any uninformed guilty plea is invalid.

## 6. Sentencing

- a. Sentencing may happen on the same day as the guilty plea but often it occurs on a separate day. This allows the youth time to prepare for a possible custodial sentence and for supporting material to be prepared.
- b. It is important to assist in preparing sympathetic material to use in sentencing. CAS is often the gatekeeper of much of the background context of the youth's experiences.
- c. Abuse, disabilities and conditions, attachment issues, displacement and adversity are all potentially mitigating factors.
- d. It is important to get the necessary consents and share that information with the youth's Defence Counsel.
- e. Letters of support, outlining any productive contributions to society are also helpful.
- f. This is the stage for counsel to make submissions about historical trauma to Afro-Caribbean Canadian, indigenous and other colonized peoples if the youth's background fits that description. The Courts have struggled to fully appreciate these factors, so if you have materials that can assist please provide them to defence counsel.

## 7. Motion

- a. If the matter is going to trial, there may be interim motion dates.
- b. They can be on a range of topics that need to be settled before the trial starts.

- c. In some instances, the result of the motion will determine whether the matter goes to trial or not.
- d. Consult with Defence Counsel if there is any material that is needed to assist with preparation.

## 8. Trial

- a. A trial requires preparation. Trials are usually set for at least a few months in the future unless the youth is in custody.
- b. It is important that the youth have transportation arranged to meet their lawyer. A trial cannot take place unless there has been adequate time to prepare.
- c. It is important that the youth take the prospect of a trial very seriously. All trials focus on detail. It is important that they focus on the details of their case

### **Legal Aid Certificates**

Most youth in the child welfare system will qualify for legal aid based on their financial circumstances. However, Legal Aid Ontario may deny the youth a certificate if the charges are unlikely to result in time in custody. It is important to challenge this determination and seek legal aid for youth in care.

A Judge can make a section 25 order which requires Legal Aid Ontario to issue a certificate. Many Youth Court Judges will be sympathetic to the consequences of not having legal representation and make the order. Once the youth has the order, request that the duty counsel complete the application.

### **Choosing Legal Counsel**

It is important to guide youth to choosing counsel that has familiarity with youth justice and the YCJA. Youth justice is very different from the adult system. Even if a lawyer has a lot of seniority and experience with adult criminal defence does not mean they understand the youth system.

If possible, it is ideal for the youth to choose counsel that has familiarity with the experience and issues for cross-over youth. The complexity of being in care and having charges requires understanding, time, patience and an understanding of the youth's identity. Legal counsel may not be compensated for all their time with the youth. If the youth is not a priority they will likely be underserved.

Choosing the first lawyer on the list provided by duty counsel or a lawyer that happens to be available in court is not the best strategy for retaining a properly qualified lawyer. Access lawyers that may have same language of youth and cultural understanding. Consider option of lawyer with an identity that may be important to the youth (i.e. LGBTQ2S+ identity).

### **Two-Hatter OCL/Defence**

It is helpful if a cross-over youth has a criminal defence and child welfare counsel that understands both systems. Ideally, the same lawyer would represent them in both proceedings. If that is not possible, ensure that both counsel have a chance to coordinate. While they are separate proceedings, there will be overlapping information, a youth is only adequately represented if their counsels are fully informed.

## **Custody Facilities**

### ***Open Detention***

- They are typically homes in the community that resemble group homes.
- You are allowed to call a youth and visit with them, but call ahead to notify them of your attendance.
- Typically, youth under the age of 15 are placed in open detention, unless the youth has a record of fleeing custody/detention or is charged with a serious offence.
- Youth are only allowed out with open custody/detention staff. The Facility Provincial Director will determine if a youth is placed in open or closed detention.
- You can call to advocate for a youth to be placed in open detention, but you may not always be successful.

### ***Closed/Secure Detention***

- Youth are held in closed/secure detention if there are concerns for their behavior, have serious charges against them or have a criminal record. You are allowed to call a youth in secure detention, but your information will need to be verified and once you are approved, you are put on the youth's approved contact list
- You are allowed to visit the youth, but you need to schedule your visit with 24-hour notice and will need to provide picture ID
- When a youth is first placed in closed detention, there an intake/assessment interview to determine which unit the youth should be placed in.
- The youth will be assigned a social worker if it is available, it is best to speak to them about the youth's needs and scheduling appointments

## **Bail conditions**

Bail conditions are the terms on which a youth will be released from custody. Generally, it is important to advocate for the least restrictive bail possible. Cross-over youth do not respond well to highly restrictive structures and it will be a trigger for acting out. This will likely result in additional charges, time in court and potentially custody.

Bail conditions to AVOID or to ensure are worded in a manner that allows for the maximum discretion include:

- Non-association or non-contact (with co-accused or alleged victim)
- Curfew
- Reside
- Controlled Substances or Alcohol
- Rules of the Home/Institution

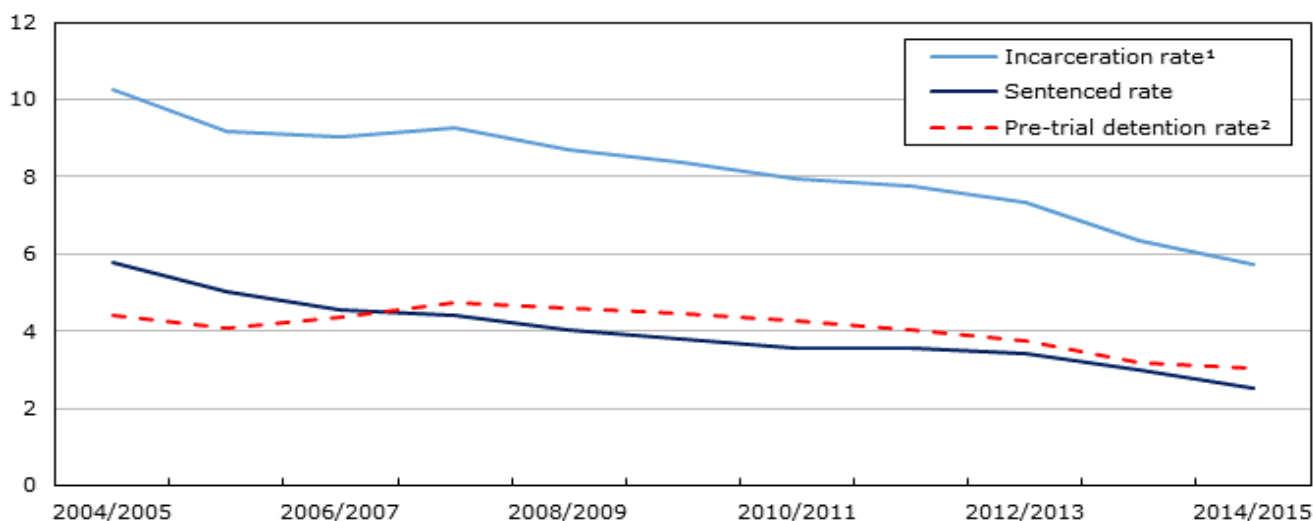
Refer to the attached bail conditions recommendations **Appendix C** for a detailed list of bail conditions to advocate against. Suggested alternative wording is also provided.

## Pre-trial detention

Pre-trial detention is when a youth is held in custody for over 24 hours awaiting their bail hearing. Pre-trial detention is one of the most serious issues facing cross-over youth as the rates of a custodial sentence upon a finding of guilt have declined propitiously.

**Chart 1**  
**Youth in custody, eleven jurisdictions, 2004/2005 to 2014/2015**

rate per 10,000 youth population



1. Incarceration rate includes sentenced custody, pre-trial detention and Provincial Director remand.

2. Pre-trial detention is to hold a young person temporarily in custody, while awaiting trial or sentencing. It is equivalent to remand for adults.

**Note:** The average rate of youth in custody at the provincial and territorial level exclude Quebec and Alberta due to the unavailability of data for part of the period covered. Rates are calculated per 10,000 youth population (12 to 17 years old) using revised July 1st population estimates from Statistics Canada, Demography Division. Rates may not match those previously published in other reports.

**Source:** Statistics Canada, Canadian Centre for Justice Statistics, Youth Corrections Key Indicator Report, 2014/2015.

In youth bail court, it is important to come to court on the first appearance. It is important not to allow youth to have their matters adjourned while in custody without a good reason. Generally, in the youth system the youth will likely be granted bail. The Crown will often consent to release. Even if the Crown does not consent generally, in the youth system the youth will likely be granted bail. This is different from the adult system. There are many combinations of charges that would cause a contested hearing in adult bail court that will be a consent release in youth court. Some lawyers will have much more experience with the adult system and may forget that different standards apply to their youth clients. One study found the consent release rate in Toronto youth court was 70 percent.<sup>10</sup> This study was conducted before the recent changes that loosened the requirements for bail. So, the percentage is likely even higher now.

Consider politely challenging any adjournments while the youth remains in custody, even for a day or two. Pre-trial custody is traumatizing, and youth should be held there no longer than is required.

<sup>10</sup> Varma, K.N. (2002). Exploring 'youth' in court: An analysis of decision-making in youth court bail hearings. Canadian Journal of Criminology, 44, 143-164 [http://www.justice.gc.ca/eng/tp-pr/cj-jp/yj-jj/moyer\\_basic/decision/p5.html](http://www.justice.gc.ca/eng/tp-pr/cj-jp/yj-jj/moyer_basic/decision/p5.html)

## **Testifying in Criminal Court re: Bail Plan**

Generally, youth who are in care are released on their own recognizance. Considering *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509 having a surety is less important for a successful bail. A worker can still contribute to a successful release by testifying to the bail plan. It helps for the Justice of the Peace to hear directly from those involved in constructing the plan.

Testifying should only be done at the request of counsel for the accused and should only be undertaken if you plan to support the youth's release. Testifying in court can be an unnerving and difficult experience.

Strategically, Crown Attorney's will try to manipulate your words and make you say more than you intended. However, once you understand it is just a strategy you can protect against it.

Do not volunteer more information than the question requires. Do not offer opinions. Take your time. Ask for any question you do not understand to be repeated or rephrase. There is no shame in replying, "I don't know" if you genuinely do not have any idea.

Attend court prepared with information about the youth and placement options. The more information on the placement location, rules and policies the better. Child welfare agencies can support positive outcomes for African Canadian children and youth in care by placing them with kin as the first option and African Canadian families as the second option, as well as by ensuring caregivers are well trained, supported, and able to support the development of a strong and positive racial identity and the maintenance of cultural connections.<sup>11</sup>

## **Two-Hatter Judges**

A two-hatter judge is not always possible. In some jurisdictions, child protection matters are heard in the Superior Court and youth justice matters are heard in the Ontario Court of Justice. In other jurisdictions, they are both heard in the Ontario Court of Justice. That information can be easily determined at the courthouse. Even if the jurisdiction hears both matters in the same court, the same Judge may not be scheduled to hear both matters.

The purpose of two-hatter judges is for the judge to understand the context of the matter they are hearing. Ask the youth's counsel to encourage a dialogue between the judges if there are separate judges hearing the matters.

## **Cross-Sectoral Conferencing (Section 19, Informal Conferences)**

Conferencing is at the core of COY's philosophy. One of the best hurdles for long term success for cross-over youth is a lack of cross-sectoral communication. Each agency is "siloes" and often the different stakeholders are not sufficiently read into what others are doing. These cases require everyone to be working in the same direction. Conferencing offers the venue to check in with each other to ensure that is happening. It is, however, important that stakeholders bring productive attitudes and outlooks to these conferences to be effective. Without a foundation of youth centering, anti-oppressive practices and a trauma-informed lens conferences can easily be misused. Cross-sectoral conferencing takes many forms. Scheduling these conferences can sometimes be a challenging and time-consuming aspect of the process.

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<sup>11</sup> One Vision One Voice. Changing the Ontario Child Welfare System to Better Serve African Canadians. Practice Framework Part 2: Race Equity Practices. OACAS: September 2016.

### *Informal Conference*

The facilitator of the conference may call an informal conference with a few stakeholders at any time. This is usually done to gather information or prepare the stakeholder for the conference. Be open to allowing the facilitator to guide the conference. This can happen anywhere at any time, although usually these conferences occur when stakeholders are already required to attend a location like the courthouse. A CAS worker can also initiate a conference for a service plan or a release plan.

### *Formal Conference (out of court)*

A case conference is primarily a planning conference for the youth. The aim of this is to reduce the judicial interactions for the youth. The only way to have a successful conference is if the youth's voice is centered. That means listening to what they have to say. It should not be a process to convince the youth that you as the worker know best and would be better off if they listen to you. The space should be given to the youth to feel comfortable. Stakeholders should assist by brainstorming ways to logistically achieve what the youth is expressing in a reasonable manner.

It can be challenging to schedule all the different professional stakeholders. It will require time to be scheduled for the conference and to be as flexible as possible. It is also unreasonable to expect the youth to travel long distances to make the conferences. Professionals should use their resources to meet the youth where they are. If not, it is unlikely the youth will attend, and this will be frustrating for all involved.

### *Formal Conference (in court)*

A Section 19 conference can be ordered by the Judge and is a judicially-led conference. Individuals can be called to court to attend. It is important to give some deference to the judge and counsel. They will determine who is invited to the formal conference. At a s.19 conference, the judge and the lawyers may speak first in private. Then they may open to a larger conference. If that occurs it will be important to be an advocate for the youth. Remind all the stakeholders that the conference will be most successful if the youth's voice is centered.

It is also important that each stakeholder or service provider follow through with anything they undertake to do in the conference. The consequences of a failure to uphold commitments should not be borne by the youth.

Refer to Model Flow of Case Conference – **Appendix D** – and One Vision, One Voice: Conference Guidelines

## CAS Role in Court Process

### **Working with Defence**

Defence counsels, like CAS workers, have many competing demands on their time. Defence counsel may not make a youth client their top priority, as they are less likely than other clients to face significant time in custody. Like many other stakeholders, criminal lawyers are also often careening from crisis to crisis experienced by their clients. It is essential that counsel be aware that early intervention with youth is paramount and this should be firmly reinforced. Matters should not be allowed to drag on without good reason. Check with the counsel if they will be attending each court hearing with the youth. If they do not attend court and cannot provide a sufficient

reason and the steps they took to ensure everything was covered and communicated you should meet with the legal aid representative about getting a certificate waiver to switch counsel.

Counsel should explain their defence strategy to you and the youth as their guardian. They should explain what they are planning in simplistic and comprehensive terms. They are required by the Law Society to communicate clearly with their client. As an advocate for your youth, ask questions as counsel is required to answer them.

### **Court Attendance**

In youth matters, a guardian must always be present in court. A CAS representative is required to attend all court appearances for their youth. Identify yourself to either defence counsel or duty counsel so the court knows the youth's guardian is in attendance.

Defence counsel are required to be in court for an appearance unless they have indicated ahead of time that they have sent instructions to duty counsel. It is important that the youth have time to speak with counsel in person about their charges and to review disclosure. Schedule that time with defence counsel. Be persistent. Counsel must make time to review disclosure with their client. The youth must know what evidence the Crown has against them to make an informed decision. This is very serious. If the youth's counsel does not take their responsibilities seriously, it is ineffective assistance of counsel and a violation of their duty to their client.

Assist the youth to get to any appointments with their counsel. It is unlikely that a defence lawyer will meet the youth where they are (though they should). So, suggest that your youth and their counsel use the time productively at court when they see each other to review material and get a fulsome update of what is going on in their case.

There may be some appearances that will be quick adjournments that don't require either the youth or their guardian to be there. Remember to check with defence counsel if you are required to be there on each occasion. It is unproductive to sit through a court list if nothing meaningful is happening in the matter. If the youth is in a school or other program and do not necessarily need to attend court, explore with defence counsel if the youth could sign a designation so they are not required to attend court. Section 650 of the Criminal Code allows the youth to formally designate their lawyer as counsel for a particular matter. In practical terms, it means the youth doesn't have to show up to set date appearances. As a matter of preference some defence counsel don't use these often and prefer to save them for cash clients. You should push the youth's counsel to make it easier on the youth and provide this service to their client.

### **Existing Probation Order**

If there is an existing probation order it is worthwhile to coordinate with the youth's probation officer. The probation officer will often have more information than defence counsel as to how compliance with the probation order has been.

The probation order paperwork will likely be in court. There is no need to coordinate with Crown counsel as they will likely have read it. On the rare occasion the court is unaware of a probation order, inform the court if there are any conflicting conditions.

## Section 34 Assessments

A section 34 report is a medical, psychological and/or psychiatric report ordered by the court. It is to be conducted by a qualified expert. In order for the assessment to be useful, the process requires an extraordinary invasion of a youth's privacy. The youth is questioned about intimate details and observations are made about deeply ingrained behaviours. The information contained in a section 34 is sensitive. A section 34 report has an even higher privacy standard attached to it than the rest of the *YCJA* records. These reports are marked confidential. They can only be distributed with an order from the court.

Please follow agency practices when handling these very sensitive materials.

Refer to Confidentiality and Section 34 reports – **Appendix E** - for information on privacy for youth records.

## Gladue

Aboriginal youth are 7 percent of the youth population but 47 (male) and 60 (female) percent of admissions into the correctional services in Canada. They are thus vastly overrepresented in the youth criminal justice system, a legacy which courts recognize is intimately connected to colonialism.

In 1996, in an attempt to address the crisis of the over-representation of Indigenous people in the criminal justice system, Parliament enacted s. 718.2(e) within the *Criminal Code*, and section 38(2)(d) of the *YCJA*, a new sentencing principle which required courts to consider all available sanctions available, with particular attention given to the circumstances of Aboriginal people/youth. In *R v. Gladue* (1999) and *R v. Ipeelee* (2012), the Supreme Court of Canada provided that s. 718.2(e) requires courts to consider

- 1) The systemic and unique background factors that may have played a part in bringing the particular Indigenous offender before the court which, if present, can diminish the moral blameworthiness of the offender in relation to the offence committed; and
- 2) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of their particular Indigenous heritage or connection, which addresses the efficacy of the sentence itself.

Since at least 2004, courts have recognized that *Gladue* extends beyond the sentencing process and also applies at the bail stage. Lawyers, however, are finding that the *Gladue*'s application at bail is resulting in stricter conditions of release (i.e. requirement of a surety; restrictive and numerous conditions).

*Gladue* applies to all Indigenous youth – First Nations, Inuit, and Métis, with or without status. In *Gladue*, *Ipeelee* and subsequent case law, the SCC has recognized that overrepresentation of Indigenous people in the criminal justice system is one of many legacies intimately tied to colonialism. More bluntly, this legacy is tied to the role that governments in Canada played in imposing laws and policies on Indigenous people to eradicate them and their cultures within what is now known as Canada.

The application of *Gladue* principles is mandatory when the person before the court self-identifies as Aboriginal/Indigenous. Significantly, the SCC has provided that Counsel (including Crowns) have a duty to bring information relevant to *Gladue* before the courts.

Self-identification as Indigenous, however, does not automatically mean a sentence reduction – though the offender does not need to draw a causal link between the particular offence they are charged with and background factors associated with the legacy of colonialism, the factors are only relevant to the adjustment of an appropriate sentence insofar as they diminish the moral blameworthiness of the offender.



*Gladue* court or Indigenous Peoples Court is a courtroom process separate from other court processes, which are staffed by specialized counsel and judges who are well-positioned to understand and apply *Gladue* accurately. Gladue Reports – one tool to assist the court in understanding the Indigenous youth’s personal background and how it relates to their presence in court and which may diminish their moral blameworthiness with respect to the particular offence – can be prepared by Gladue Writers. Though courts are required to consider *Gladue* factors when an Indigenous accused or offender is before the court, the Indigenous person (or the court) does not have a right to Gladue Report.

Gladue Reports can be requested by the Crown, defence counsel or the court, but ultimately the decision to prepare a report is at the discretion of the service provider – these decisions are based on need, proposed sentence and available resources.

The *Gladue* court sentencing process may be structured as a ‘sentencing circle’ and can include the participation and input of Indigenous Elders. The sentencing circle is meant to symbolize the ‘circle of care’, foster the self-worth of the Indigenous youth and establish non-hierarchical relationships between Indigenous youth and the justice system participants (which can include Indigenous Elders in many cases). During this process, the opportunity for input by relevant justice system actors (including Indigenous Elders) is welcomed by the court. In aiming to create a sentencing process that connects the Indigenous youth with resources that can assist them and facilitate accountability, the process is different from – and can be more meaningful than – “regular” court, contributing to the overall justice system goal of reducing recidivism.

### Best Practice for Placement Considerations

Youth in care can find themselves with additional charges or sometimes their first charge because of interactions in their placement. Of concern is the number of additional administrative breach charges that cross-over youth in group home settings incur. When finding a placement for a youth, it is critical that group home staff and/or foster parents understand the issues cross-over youth face and that youth are matched with caregivers who can respond to any behavior constructively and work to understand the needs behind the behavior. Wherever and whenever possible, include youth in the decisions around where and who they will live with and provide them with the opportunity for pre-placement visits.

Youth should be matched to the best possible placement racially, culturally, socially and developmentally. Placements must respect and support each youth’s culture, race, identity and circumstance. Review the One Vision One Voice Framework on Race and Equity Practices that suggest placement with kin, training and resources for kin and adoptive families and workers, training related to understanding LGBTQ youth.<sup>12</sup> Review your agencies guidelines on placing youth. Explore internalized oppression for youth who may not want same identity placements. Make efforts to find placements that will match the youth’s needs.

At the time of placement, the worker plays an important role in helping to amplify the youth’s voice. Workers and resource parents should have opportunities to develop skills to assist youth in amplifying the voice of youth. When a youth moves to a new placement or is moving to a group home or foster home for the first time, the worker should facilitate an open discussion between the youth and the caregiver where the youth is given the opportunity to talk about what they need from the adults caring for them, what is helpful when and if there is a crisis or they become upset and what they know is *not* helpful.

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<sup>12</sup> One Vision One Voice. Changing the Ontario Child Welfare System to Better Serve African Canadians. Practice Framework Part 2: Race Equity Practices. OCAS: September 2016. Pg. 19.

The caregiver should be asked to share with the youth and worker information about how they will parent them, what their expectations are, how they resolve issues and, what if any role police play in this. The worker should be involved wherever possible in any decisions to involve police, to advocate on the youth's behalf. Workers should highlight for caregivers any potential barriers that youth may face in accessing equitable treatment should they encounter police or the justice system while in the placement (for example, ensuring that a racialized youth be given equitable access to a diversion) and discuss how the adults can advocate for the youth.

Also, at the time of placement, any existing bail conditions should be discussed to ensure that everyone has the same understanding of what is needed to meet the conditions and under what circumstances the police or probation would be notified if conditions are not being met. If a youth is incurring multiple breach charges while in a placement, this should be seen by the adults as an indication that we are in some way not meeting this youth's needs or that the conditions set out are not in keeping with the youth's best interest - please refer to best practice document for bail conditions, Appendix C.

The worker and youth should review with caregivers at the time of placement their specific practices regarding when a youth has left their home without permission or if staff or foster parents do not know where the youth is. Options for how to respond should be discussed that do not involve contacting the police to prevent any unnecessary contact with the youth criminal justice system. These discussions should promote knowledge and opportunities for de-escalation of issues.

Throughout the youth's time in care, there should be an ongoing process of collaborative planning between the youth, worker and the placement.

### Best Practices Educational Considerations

The impact for youth in care involved with the criminal justice system is significant for outcomes in education. An essential role for workers is to advocate on behalf of youth on these issues. These considerations include:

- Change in school for orders due to no contact order or new placement requirements; translates into loss of attending sports and other events including graduation
- Time spent having to appear in court may put their work requirements behind
- Negative responses from peers who hear about the charges (name calling, not wanting to associate, etc.)
- Depending on the charges, if they are related to activities in or around school, this may involve suspensions, so despite whatever happens in the criminal matter, the record of suspension remains in the Ontario School Record
- Youth face discrimination based on racial identities; high rate of drop-out for Afro-Caribbean Canadian and Latino youth has been noted in some agencies;
- Most of our youth with criminal charges usually live on their own without family support; they often require adult support outside of CAS to help advocate and support them
- Some youth experience labelling by school boards due to information in their psychological reports; schools may not understand the trauma of the youth's history
- High percentage of youth are not given the opportunity or feel they will not be able to pursue high school or post-secondary education

- Youth are often placed in section classes in community school or group home classrooms and find themselves further segregated from other school community experiences
- When youth have multiple court appearances and some charges are in various jurisdictions, a full day may be lost to attending court. Staff are trying to encourage youth to stay in school and not breach, but it is a set up when they miss many days due to court appearances from school. Example: a youth may have charges in 4-5 jurisdictions and if they have moved placements a few hours away, they can often miss up to five days of school. If a youth started late or into mid-term they are already behind academically

### **Recommendations to support education:**

- Review Bail conditions
- Provide accommodation for missed work
- Address education planning in any conferences scheduled for the youth, including court conferencing
- Connecting with school and guidance staff to address youth's needs
- Consider alternative school programs
- Advocate for school program that best suits the youth's educational need – regularly review appropriateness of program and aim high
- Check your agency educational protocols if your agency has one
- Youth living on their own also require CAS support – attend court on behalf of all youth involved in the YCJS
- Support to minimize number of court appearances by working through their lawyer to speak on their behalf i.e.: merging charges, appearing on their behalf while they are attending school
- Ensure educational needs are included in conferencing

### **Conclusion**

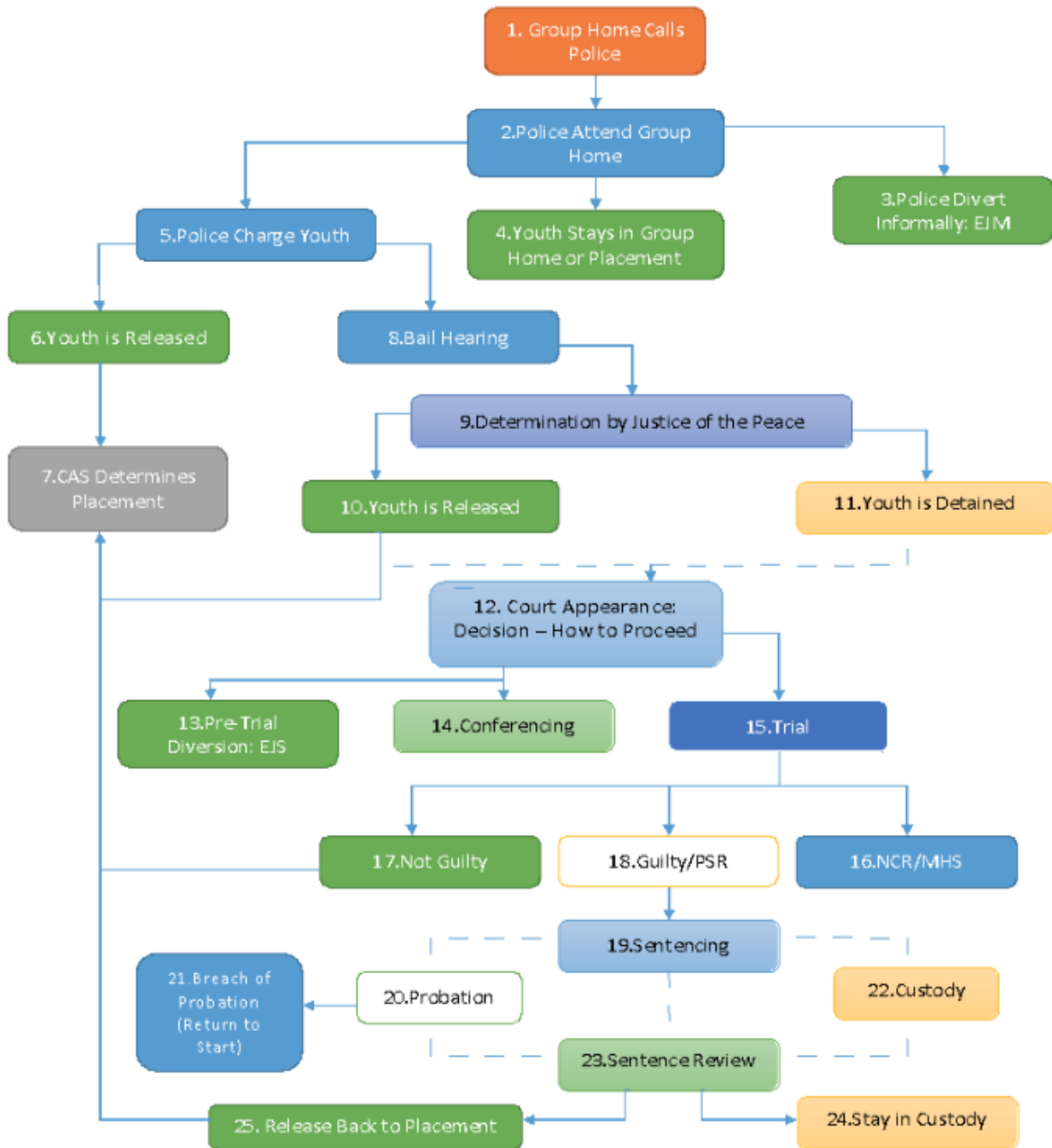
A youth's CAS worker is a very important figure in their life. They should be a continuous presence that help youth with histories of trauma navigate their new reality. Adjusting to a new environment, a new routine, a new chapter is a tremendously difficult thing. It is to be expected that some youth will act out as a result. Cross-over youth need understanding, they need patience, they need someone to listen.

A worker can be a powerful ally that helps guide a young person through the rough waters. To be an effective guide, a worker needs to be informed about the system and practiced in how to navigate it. Help your youth by staying current with the changes to the system and in your youth's life.



Appendix A – Intersection Chart

Intersection Points Highlighted by Project for Innovative Intervention:



## Appendix B – Trauma Informed Lens: Guideline for Practical Implementation

Trauma exposed youth are exponentially more likely to face criminal charges. This is a systemic problem that needs a system-wide approach to rectify it. The current system is inadequately addressing their needs.

### *COY Model*

1. **Awareness of trauma** - the service provider or stakeholder must recognize the role past trauma can play in current behaviour. They must understand and identify the symptoms of trauma and learn the most beneficial ways for young people to cope. Trauma-informed education and training is key to incorporating these concepts into practice.
2. **Relational Practice** - strong, healthy, trusting, therapeutic relationships are paramount to the healing process of trauma. Service providers must take the time to build their relationships with the youth in order to be influential in the youths healing. As the relationship builds so will the youth's capacity to form new relationships. Over time these healthy relationships can enable a youths to begin to counteract the effects of their trauma. An important foundation of support required with Crossover Youth is relationships with stakeholders. It is these significant relationships that can help build the blueprint so young people can achieve their potential. Relationships need to be about touch, talk, eye contact, listening, understanding and validating.
3. **Provide a place of safety** (physical, emotional, social and spiritual) - none of this work can begin without a safe space for the youth. The safe space is both about their environment and the metaphysical space in their mind. It is not ethical to begin working on their trauma without first providing them physical safety, as well as building up trust through relationships.
4. **Awareness of self/co-regulation** - service providers and stakeholders must have an awareness of their own responses. Self-awareness and self-regulation are vital skills for working with traumatized youth. It is important not to allow the trauma experienced (past and present) by service provider and stakeholders, both in their personal life and during their work experience, to negatively impact their responses to the youth.
5. **Restorative Thinking** – This is about restoring relationships – how can the victims heal, how can the offenders get support to be accountable to what they have done, and how does the community feel safe and supported. It is about moving forward for all those impacted. If we want to be trauma-informed we need to have a restorative view on situations. We can use this process as a form of healing. According to Howard Zehr, restorative justice is “a process to involve, to the extent possible, those who have a stake

in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible.”<sup>13</sup>

### *Things to avoid*

It is important to remember that a trauma-informed practice lens does not mean a trauma-centered approach: “extensive and **detailed immersion** in [traumatic] material itself is **not encouraged**, because...this tactic is...destabilizing and counter-productive”

Victims of trauma report that service providers who did try to address their trauma, often asked for **too much detail** and encouraged expression of feelings when it wasn’t appropriate, and minimized the significance of the trauma in the client’s current life, which **unhelpful** in the recovery process.

It is important to **avoid perpetuating negative bias**. Many crossover youth who experienced primary trauma (the events that caused their removal from the home) have also experienced the by-products of historical trauma.

Services Providers should examine the use of “positive” “**common-sense**” **values** they may be **counterproductive** in cases of complex trauma. Examples of these values include demanding **respect**, assigned **personal responsibility**, **punishment**, **isolation** or **separation**.

### *Conclusion*

Healing is the restorative process of becoming healthy and whole. It is a central element in recovery. The COY model is designed to give youth the time, space and chances to work on restoring and healing themselves. As a service provider or stakeholder in the youth justice or child welfare system, it is your responsibility to play a role in helping a youth to a place of stability that will allow them the opportunity to achieve their potential.

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<sup>13</sup> Zehr, H. (2002). *The Little Book of Restorative Justice*. Intercourse: Good Books.

## Appendix C - Bail Conditions Recommendations

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 laddered 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)



*\*These expectations are now included in the forms Judicial Officers to consider when imposing release or probation conditions*

### *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

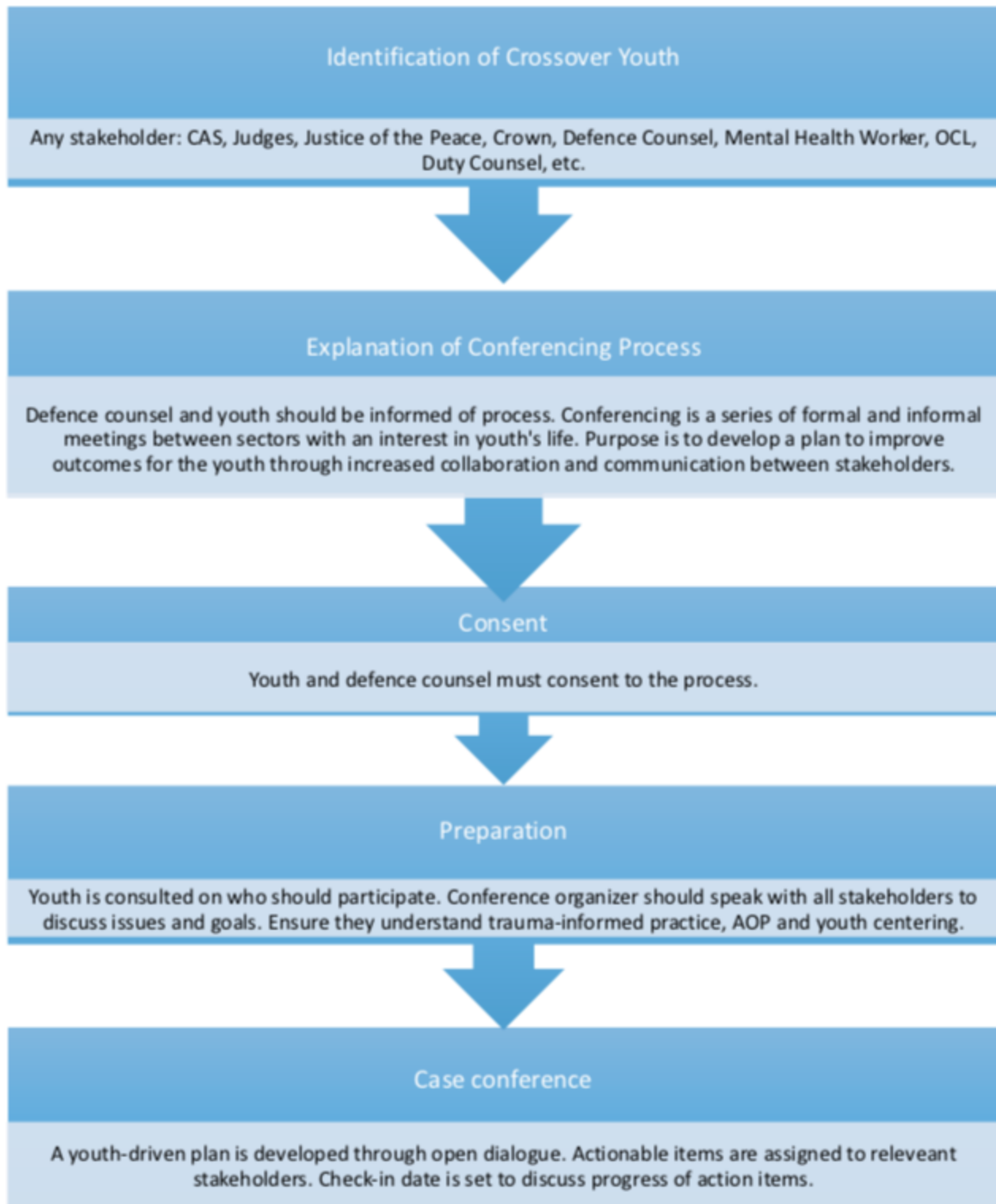
EXCEPT

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.

Appendix D – Model of a Case Conference Flow Chart



### Use of YCJA Records

There may be situations where a youth who is a candidate for child protection intervention has a pre-existing youth criminal justice record.

Young persons are not to be held to the same expectations of responsibility and moral blameworthiness as adults. Their records are not meant to follow them in the same way as for adults. The YCJA has provisions to protect records made in the course of YCJA proceedings. These records are meant, with a few exceptions, to stay private once the youth has reached the age of maturity.

“...privacy is worthy of constitutional protection because it is “grounded in man’s physical and moral autonomy”, is “essential for the well-being of the individual,” and is “at the heart of liberty in a modern state.” These considerations apply equally if not more strongly in the case of young persons.”

*A. B. v. Bragg Communications*, 2012 SCC 46 at para 18 [quoting from *Toronto Star Newspapers v. Ontario*, 2012 ONCJ 27]

“[young persons are entitled to] a higher expectation of privacy”

*R v K.M.* 2011 ONCA 252 at para 97

A trail to their record can be constructed unwittingly. When these records leave controlled YCJA proceedings and enter child protection proceedings there are less automatic procedural safeguards that ensure compliance with the privacy principles in the YCJA.

Protecting a youth does not just mean winning a protection hearing. Maintaining a youth’s privacy in YCJA matters can protect a youth’s future potential. It offers the best chance to foster the youth’s rehabilitative process.

### YCJA

118 (1) Except as authorized or required by this Act, no person shall be given access to a record kept under sections 114 to 116, and no information contained in it may be given to any person, where to do so would identify the young person to whom it relates as a young person dealt with under this Act.

### Jurisdiction

A superior court judge **does not** have the jurisdiction to order a youth record released. This is important for child protection proceedings occurring in unified family court. Only a youth justice court judge acting under the authority of the YCJA has the jurisdiction to grant access to records made under the Act.

“...Parliament in “clear and unambiguous terms” has placed the responsibility for determining access to records on the shoulders of the youth justice court judges.”

*S.L. v. N.B.*, 2005 CanLII 11391 (ON CA), para 54

### Statutory Access Period

S.119(2):

Extrajudicial sanction – 2 years

Acquitted – 3 months

Withdrawn – 2 months

Dismissed – 2 months

Reprimand – 2 months

Stay – 1 year

Absolute Discharge – 1 year

Conditional Discharge – 3 years

Summary Conviction – 3 years\*

Indictable Conviction – 5 years \*

\*Calculated from the end of the sentence imposed

### Record Keeping

It is illegal to breach a youth's privacy and keep a record detailing their criminal justice involvement past the permissible statutory access period without a s.123(1) order from a youth criminal justice judge. You are not allowed to keep any record with this information. This prohibition includes historical records; all reference to their criminal justice involvement must be redacted.

### Use

Section 129 of the YCJA:

“No person who is given access to a record or to whom information is disclosed under this Act shall disclose that information to any other person unless the disclosure is authorized under this Act.”

An example of a prohibited use:

A youth is convicted of a summary offence at 13 years old. They are sentenced to 6 months of custody. The youth has not been subsequently charged with any other offences. They are now 19 years old turning 20. They have a child and CAS is investigating with the possibility of apprehension of the newborn.

In that case, it would be impermissible for there to be any record of the youth's conviction in the CAS system. The investigator cannot rely on that information to advance their investigations or even allow the fact of the conviction to raise their suspicions.

Maintaining that record without a s.123(1) order is illegal and counter to the principles of privacy enshrined in the YCJA.

CAS employees should be mindful of what records they seek to have added to the court record before submitting documents. The use of an expired record is also impermissible in court and cannot be used as evidence. No inferences can be drawn and it should never be tendered. The privacy interests contained in the YCJA are based on the principle that individuals under 18 years of age should not be burdened with a public record of their criminal behaviour.

In family court proceedings when submissions are struck from the record a line is drawn through the middle of the information. This process is not as impenetrable as a redaction. It is often possible to discern what was originally written.

Caution should be exercised before the court proceedings to ensure the access period has not expired.

### **Use of s.34 Assessments**

Youth involved in the criminal justice system have a heightened expectation of privacy:

“...privacy is worthy of constitutional protection because it is “grounded in man’s physical and moral autonomy”, is “essential for the well-being of the individual,” and is “at the heart of liberty in a modern state.” These considerations apply equally if not more strongly in the case of young persons.”

*A. B. v. Bragg Communications*, 2012 SCC 46 at para 18 [quoting from *Toronto Star Newspapers v. Ontario*, 2012 ONCJ 27]

“[young persons are entitled to] a higher expectation of privacy”

*R v K.M.* 2011 ONCA 252 at para 97

### **Section 34 of the YCJA**

A section 34 assessment is a medical, psychological or psychiatric report ordered by the court. It is to be conducted by a qualified expert. In order for the assessment to be useful the process requires an extraordinary invasion of a youth’s privacy. The youth is questioned about intimate details and observations are made about deeply ingrained behaviours.

A youth also opens themselves up to legal jeopardy by participating. While section 147(1) limits the use of these reports, section 147(2) allows the report to be admissible in court in certain circumstances.

The information contained in a section 34 is sensitive. A section 34 report has an even higher privacy standard attached to it than the rest of the YCJA records.

“...particularly sensitive records such as medical reports are available only in limited circumstances to specifically identified persons or groups.”

*L.(S) v B. (N.)*, (2005), 195 C.C.C. (3d) 481 (C.A.) at para 24

These reports are marked confidential. However, many times the page marked confidential is ripped off or simply ignored. This is reckless and impermissible.

### People who can Access

Section 34(7)(a) allows the following people to access the report:

- (i) the young person;
- (ii) any parent of the young person who is in attendance at the proceedings against the young person;
- (iii) any counsel representing the young person; and
- (iv) the prosecutor.

This provision allows CAS access to the report if they are the legal guardians of the youth.

### Statutory Access Period

The access period for the s.34 report is found in s.119(2):

Extrajudicial sanction – 2 years

Acquitted – 3 months

Withdrawn – 2 months

Dismissed – 2 months

Reprimand – 2 months

Stay – 1 year

Absolute Discharge – 1 year

Conditional Discharge – 3 years

Summary Conviction – 3 years\*

Indictable Conviction – 5 years \*

\*Calculated from the end of the sentence imposed

### Use

A young person has access to their own report during the prescribed period, as would their legal guardian. However, it is illegal for them to distribute the report to anyone else without a court order.

Section 129 of the YCJA:

“No person who is given access to a record or to whom information is disclosed under this Act shall disclose that information to any other person unless the disclosure is authorized under this Act.”

Only a youth justice court judge can order a s. 34 report to be released. Any distribution of a section 34 without an order from a youth court judge is illegal.

Example:

Some s.34 assessments include a psycho-educational assessment. That portion can be used outside of a courtroom for special accommodation, in a school for example. It is important that if that portion of the assessment is used by the youth in that setting that it is separated from the rest of the report.

Out of the abundance of caution an order should be sought from a youth criminal court judge to distribute any section of the report.

### Things to Remember

1. This material is confidential
2. Only shared with an order from youth court judge
3. Authorized distribution should be done in most minimally invasive manner
4. Youth must be educated on the sensitivity of the content