"Source: Department of Justice Canada, A Review of the Young Offenders Act and the Youth Justice System in Canada: Report of the Federal-Provincial-Territorial Task Force on Youth Justice, 1996. Reproduced with the permission of the Minister of Public Works and Government Services Canada, 2008."

CHAPTER 4 - DIVERSION

The concept of diversion includes a variety of activities and programs that function to remove persons accused of less serious offences from further involvement with the justice system. Juvenile diversion began in the 1970's in some provinces in Canada (Quebec, Manitoba and British Columbia) and was formally incorporated into the Young Offenders Act (YOA) through the Act's endorsement of the "taking no measures or taking measures other than judicial proceedings" (section 3) and express statutory requirements for alternative measures (section 4).[1]

This chapter looks at interventions that occur after a police officer has apprehended (not necessarily charged) a young person but before adjudication by the youth court. Interventions range from the least structured type of diversion (the exercise of discretion by police) through to the most formal (alternative measures that need to address the requirements set out in section 4 YOA). Although the term "diversion" has been used to describe mechanisms that take place at various stages of the criminal justice system - including the "diversion" of youth away from custody - here, diversion refers to "front-end" decisions and programs that occur before the adjudication by the youth court.

Generally speaking, there are three premises underlying front-end diversion. The **non-intervention** premise assumes that much youth crime is transitory in nature and that involvement in the justice system is stigmatizing and hence potentially harmful to the young person. Because many young persons desist from crime without a formal reaction from the justice system, little formal state intervention is required. "Non-intervention," however, does not necessarily mean that nothing has happened. Deterrence can, for example, be accomplished by the fact of apprehension for the crime (rather than a formal court process and court sentencing) and by informal sanctions, such as the disapproval of parents and the measures taken by them. As well, parents may take the initiative in providing guidance or assistance to the young person. Practices such as police and Crown warnings fall into this category of responses to youth crime. In times of fiscal restraint, this rationale for diversion is increasingly attractive because, if implemented successfully, the diversion of a relatively large number of cases can contribute to the ability of the justice system to focus its scarce resources on more serious offenders.

1.Soon to be proclaimed amendments to the Criminal Code (Bill C-41) provide similar legislative authority for alternative measures for adults.

The **rehabilitative** rationale postulates that some young persons, especially the troubled young teenager, require assistance or rehabilitation measures in order to avoid future conflicts with the law. The assumption is that attempts to intervene in the early stage of the young person's criminal career, through social and educational measures, will prevent them from moving to a committed criminal life style.

The **restorative justice** premise for diversion focuses on the restoration of material and psychological losses to victims and the community. In the restorative justice approach, criminal behaviour is defined as primarily a conflict between individuals - the person whose property or person was violated is the primary victim, and the state is only a secondary victim. Dialogue and negotiation between the offender and the primary victim serve as central elements of restorative justice. In practice, restorative justice is usually operationalized by reparative measures such as community service work, services to the victim, victim restitution/compensation, and victim-offender reconciliation.

These three premises can be somewhat conflicting. For example, a routinely applied non-intervention approach will likely miss some cases of high need youth who might benefit from earlier intervention. Conversely, an over-reaching rehabilitative approach can result in unnecessary and expensive - and sometimes counterproductive - interventions. In the non-intervention approach, no rehabilitative or restorative interventions would usually occur. This does not mean that these premises are incompatible, however, since different approaches may apply to different types of young persons and offences. For example, first time offences - such as shoplifting or possession of marijuana - where there is no outstanding loss or harm to a victim, may be more amenable to a non-intervention approach, whereas offences involving outstanding losses would be more amenable to a restorative justice approach. One of the challenges of efforts to expand the use of diversionary mechanisms is to establish multi-faceted approaches and then, within that, to identify cases best suited to non-intervention as opposed to rehabilitative or restorative measures.

Diversion is widely accepted and common practiced - but with apparently considerable variation across jurisdictions in Canada. Recently, the idea of utilizing diversion programs to an even greater extent has begun to emerge. There has been a movement away from questioning whether diversion programs should exist, to seriously contemplating whether they should be expanded to include youth who have committed offences other than the most minor offences. Greater use of diversion is one way of allowing the youth justice system to focus its efforts on more serious matters.

4.1 OBJECTIVES *AND BENEFITS* OF DIVERSION

The objectives of diversion programs and processes can vary widely, but it is not uncommon for objectives to be oriented towards the "offender", the victim and the community as a whole, as well as the justice system itself. Objectives can also vary according to the priority placed on the premises underlying the concept (as described above), and the outcomes the procedure or program is attempting to achieve.

The hypothesized offender benefits include the avoidance of labeling and the provision of services that may not otherwise be received. Diversion programs may reduce the stigma believed to be associated with the formal process of being charged, appearing in court, and receiving a sanction imposed by the youth court. Young people who become involved in the youth justice system, it is argued, come to see themselves, and to be seen by others, as offenders. Furthermore, they are more likely to be exposed to serious or chronic young offenders who may encourage further involvement in crime. The outcome may be to actually increase the likelihood of them becoming reinvolved in the justice system. Diversion may help to reduce these labeling and learning effects.

The second offender and (ultimately) community-related benefit of youth diversion is seen to be the rehabilitation of "at risk" young persons through the provision of support and rehabilitative programs to those in need. "Early intervention" approaches that aim to prevent future criminal behaviour by means of social learning, problem solving, and other programs that foster the person's social-cognitive development are examples. Moreover, because diversion programs usually proceed at a faster pace than the youth justice system, there is a closer connection between the offence and the rehabilitative intervention.

The community can also benefit because diversion can provide greater opportunities, in a less formal and more personal process, for involvement of the victim, families and the broader community in dealing with the misbehaviour and crimes of young persons residing in their community. Citizen participation allows community values and traditions to be accommodated, which is often difficult to achieve in the formal justice system. By involving the victim and other members of the community, both the offending behaviour and the operation of the system are demystified. The active involvement of community members - through, for example, participation in youth justice committees (see Chapter 2) - assists in reintegrating troublesome young persons back into the community. Victims who receive compensation or other forms of reparation are often more satisfied with diversion, which is speedier and more personalized than the formal court process.

Several commentators - such as the recent Jasmin Report in Quebec - have recommended that the use of strategies such as reconciliation between the victim and offender and reparation/compensation be expanded in order to give victims greater voice and involvement in the process. Diversion can also encourage greater participation of parents and other family members in interventions concerning their children.

The justice system objectives of diversion include speeding up case processing in the courts and reducing the costs associated with full scale court processing. By removing minor cases from the courts and dealing with them informally, more serious matters can be dealt with more expeditiously and the costs of the youth court and correctional services may decrease.

4.2 POTENTIAL NEGATIVE EFFECTS OF DIVERSION

Despite these advantages, it is possible for diversion to have negative effects. Diversionary strategies always have the potential for "net widening" - that is, persons are diverted who would otherwise have been informally dealt with by police, or received a minimal disposition from the court, such as an absolute discharge. Critics of diversion have argued that net widening is an almost invariable negative consequence of diversion programming.

Why is net widening assumed to be a consequence of diversion? As Doob (1983) has remarked, decisions are turned into non-decisions -- that is, the presence of the diversion option makes the police (or other referral agent) decision easier. The police officer "can leave the juvenile with the diversion committee and let them worry about what should be done". A slightly different reason why net widening may occur is that the decision-maker may believe that the young person requires something less than a charge, but something more than a warning and release. The presence of a diversion program offers an attractive third option.

Net widening is viewed negatively for two reasons, one pragmatic and the second related to the rights of the young person. First, the objective of decreasing juvenile justice system caseloads - and therefore reducing or limiting costs - is much more difficult to achieve if more persons are brought into the system. Second, with diversion, cases that are not diverted may be treated more severely because of the assumption that there must be a good reason why the case was not dealt with less formally. As a corollary, diverted persons who later re-offend and are referred to court may be treated more harshly because the court could take the view that the young person has already has his or her "free chance" to avoid court intervention; in effect, the re-offending suggests that the lesson has not been learned.

Research in Canada on the issue of net widening is equivocal. In Quebec, where the Youth Protection Act brought about a major restructuring of the youth protection and justice systems, research seems to suggest that police responded by referring more young persons to the screening agency than they had referred to court in the past. However, in Ontario, the introduction of alternative measures in 1988 had no apparent effect on police charging for theft. The most common offence referred to alternative measures.

Another possible negative impact of introducing new diversionary strategies is that a new bureaucracy can be created, outside of the formal justice system and without the same protections that are part of proceedings within the youth court process. Moreover, this second level of bureaucracy has the potential to be costly and unwieldy.

A third potential problem with diversion is that decisions to divert are not open to public scrutiny in the same way as youth court decisions are. Given this, some argue that there is a danger that discriminatory practices, which are not readily observable, may arise.

Finally, in an effort to justify the program to skeptics, there can be the temptation to maximize rather than minimize interventions. For example, some diversion practitioners have been known to assert (even boast) that one of the program's benefits is that its penalties are more onerous than what would have been received from the youth court. In other words, programs may develop a retributive rather than a non-interventionist, restorative or rehabilitative orientation.

4.3 INTERNATIONAL PERSPECTIVES

The United Nations Convention on the Rights of the Child (Article 40) provides that measures other than judicial proceedings should be used to deal with children who have infringed the penal law, whenever appropriate and desirable, providing that human rights and legal safeguards are fully respected. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) also establishes standards in the field of youth justice. The role of discretion at all levels of youth justice administration is discussed in Article 6, which refers to the need to take the most appropriate action in each individual case and to ensure accountability. Article 11.1 requires that "consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority". Article 11.2 provides that "the police, the prosecution or other agencies dealing with juveniles cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings" in accordance with the specified legal

criteria.

The Commentary to the Beijing Rules states that diversion is not necessarily limited to petty cases since the merits of individual cases may make diversion appropriate, even when more serious offences have been committed. In terms of possible responses to youthful offending, the Commentary suggests that, in many cases, non-intervention is the best response. Diversion at the outset and without referral to alternative (social) services may be the optimal response. This is especially the case where the offence is of a non-serious nature and where the family, the school, or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner. Special reference is made to diversion programs that involve victim restitution and those that seek to avoid future conflict with the law through temporary supervision and guidance. Finally, the Commentary recommends that care should be taken to minimize the potential for coercion and intimidation at all levels of the diversion process.

In several other countries, diversion appears to be used more extensively than in Canada. In England and Wales, nearly ninety percent of ten to thirteen year olds, and almost two-thirds of fourteen to sixteen year olds are dealt with by police cautions. In New Zealand, about three-quarters of apprehended young persons are cautioned and diverted by the police; of the remainder, a large proportion are dealt with by family group conferencing. In Victoria and Queensland, Australia, over sixty percent of apprehended youth are dealt with by police cautions.[2]

There appears to be high rates of diversion as well in several European countries. In Germany and the Netherlands, 63 and 80 percent (respectively) of cases are "discharged", i.e., they are not brought before the courts. In Sweden and Denmark, about seventy percent of cases are dismissed by the prosecutor. In Italy, about eighty percent of fourteen to eighteen year olds receive a "judicial pardon".[3]

In the United States, it is estimated that 28 percent of cases are diverted by the police and, of those referred to the juvenile courts, nearly one-half are diverted through "non-petition".[4]

2.*See Moyer (1995) for a description of police diversion in Commonwealth countries.*

3.*See McCarney (1996) for a description of European juvenile justice systems.*

4.*Hornick et.al. (1995). In this report, it is suggested that diversion is much more widely used in the United States than in Canada. While there may be differences, the extent of these differences are unclear - there are not reliable national data in Canada on the extent of use of alternative measures and rates of police diversion in both countries need to be taken into account in order to make valid comparisons..*

The experience of some of these other countries is discussed in more detail later in this chapter.

4.4 PROVISIONS OF THE YOUNG OFFENDERS ACT

The Declaration of Principle (section 3) explicitly endorses consideration of "taking no measures" and of "taking measures other than judicial proceedings" where it is not inconsistent with the protection of society. It also provides that young persons have "a right to the least possible interference with freedom that is consistent with the protection of the public, having regard to the needs of young persons and the interests of their family."

Although not entirely clear, "taking no measures" can be construed as an implicit endorsement of the police exercising discretion not to charge or, for example, "letters of caution" or decisions to take "no further action" after there has been screening for alternative measures.

Provisions in section 4 of the Act allow for a range of alternative measures programs, which are available in all jurisdictions in Canada. The alternative measures provisions give provinces and territories the authority to develop programs in accordance with specified principles to protect the rights of young persons. Although the Act provides considerable flexibility for diversion programs, the young person must acknowledge responsibility for his or her actions, and consent to the alternative measures that are proposed. The young person also has the right to consult a lawyer and the right to have the case proceed to court. There must, in the opinion of *the Attorney General or agent of the Attorney General* , be sufficient evidence to prosecute the young person before alternative measures can be authorized. If authorized, and the young person has not complied with, or only partially complied with, the terms and conditions of the alternative measures, there is a capacity to bring the matter before the youth court.

A prior history of alternative measures can be introduced in subsequent court proceedings for other offences, subject to the non-disclosure provisions set out in section 45 YOA. These require that alternative measures records be subject to non-disclosure "on the expiration of two years after,the young person consents to participate in the program".

The Act also establishes a mechanism by which the community can become involved in alternative measures and other programs for young persons (section 69). In any province or territory, the Attorney General "may establish one or more committees of citizens, to be known as youth justice committees, to assist without remuneration in any aspect of the administration of this *Act* or in any

programs or services for young offenders". In several Canadian jurisdictions, youth justice committees, made up of volunteers from the community, have the mandate to hear alternative measures cases and to decide on the measures to be carried out by the young person. Youth justice committees are discussed in detail in Chapter 2 (Integration and Coordination).

4.5 CANADIAN EXPERIENCE

In Canada, diversion can occur at two points in the process, with two different decision-makers, the police and the Crown. At the point of initial contact with a young person, the police officer has four options: to take no action; to divert the youth from the formal system with an informal warning or other such action; to recommend to the Crown that the youth be considered for pre-charge alternative measures (in jurisdictions where such programs exist); or, to charge the youth (or - in some provinces - to recommend to Crown Counsel that the young person be charged). Once a young person has been charged, there are two options: to proceed with the case through the full youth court process or to refer the young person to a post-charge alternative measures program. Police are usually viewed as the "gatekeepers" to the youth justice system, because even in jurisdictions where Crown approval is required prior to a formal charge being laid, the police still make the initial decision as to whether the case will be reported to the Crown and also sometimes make recommendations vis-a-vis alternative measures or not.

A different type of diversion has *also* been used for a number of years in British Columbia and, more recently, in Manitoba and Alberta: a "warning letter" of sorts can be sent to first offenders allegedly involved in, for example, minor property offences by the Crown or probation services, depending on the jurisdiction. No admission of responsibility is required of the young person. In effect, this type of diversion results in no further action by the authorities and is consistent with a non-intervention rationale.

4.5.1 Police Discretion

Even if a young person who commits a crime is apprehended by the police, this does not necessarily mean that a charge will be laid if the offence is a less serious one. Police discretion can involve electing to take no action, informally warning the young person, or advising the parents and letting the parents take it from there. Police statistics provide a rough indication of the number of youth charged with an offence or dealt with in other ways. As discussed in the Descriptive Profile report, of those youth apprehended by police in 1994, approximately two-thirds were charged and one-third were dealt with informally

by the police, including referral to pre-charge alternative measures.[5] Since the proclamation of the YOA, and since the implementation of the uniform maximum age in 1985, the proportion of youth dealt with by way of formal charges has increased in several jurisdictions. The corresponding decrease in the exercise of police discretion has occurred for all types of crimes, although the less serious offences show the greatest increase in charging.[6] Therefore, in several jurisdictions, it seems that more young persons than in the past are entering the justice system for less serious offences. The reasons for these apparent changes in police discretion are not well understood, although factors such as changes in police and public attitudes towards the ability of community members to deal with youth crime are among the possible explanations; that is, attitudinal shifts may have resulted in greater reliance being placed on the formal system than on the informal mechanisms used in the past to sanction young persons involved in minor criminal behaviour. If so, this may suggest that there may be "room" to promote the more frequent use of informal police handling of youth cases.

Another important observation is that police statistics indicate great variability across jurisdictions in the extent to which police charge young persons (or, inversely, informally deal with them). For example, in 1993, police statistics indicate that, depending on the jurisdiction, from almost one-half to less than 20 percent of young persons apprehended for a criminal offence were dealt with informally.[7] These differences would suggest, again, that there may be room to promote greater use of police discretion in several jurisdictions.

Another form of police diversion involves police-sponsored diversion programs which, although not widespread, exist in some communities in Canada. These have program components - such as counseling and reparative activities - and usually operate on an informal and voluntary basis, outside the ambit of the more formalized alternative measures process.

5. The data on youth dealt with "informally" are not uniform across Canada, and "not charging" does not necessarily mean that a youth was diverted. Police forces differ in the extent to which they record the details of situations in which they informally divert youth. The category may include youth who were diverted into pre-charge alternative measures programs or those who were dealt with informally (i.e., warned, sent home to their parents, etc.). However, it may also include instances where there is insufficient evidence to charge the youth, the complainant refuses to press charges, and other reasons. Although not necessarily a completely accurate reflection of police decision-making with regard to young persons, the data do provide a rough indication of the number of youth who are dealt with informally by the police.

6. The interpretation of these changes in statistics has been the subject of some debate; see Carrington (1995) and Markwart and Corrado (1995).

7. While, as noted, there are some uncertainties about the reliability of police statistics respecting young persons "not charged," these differences between jurisdictions are, in all likelihood, too great to be explained by differences in police reporting practices.

4.5.2 Alternative Measures

Alternative measures programs divert youth from criminal prosecution and court-imposed dispositions and deal with them in a less formal environment. Most alternative measures programs in Canada are pre-charge or combined pre- and post-charge programs, although Ontario's programs are exclusively post-charge.[8] In most jurisdictions, the Crown Attorney refers or authorizes a referral of a youth to alternative measures. There are mixed models for the delivery of alternative measures including, for example, youth justice committees (or community accountability panels), panels of concerned professionals (e.g., police, child welfare workers), private agencies such as the John Howard or Elizabeth Fry Societies, or probation officers, depending on the area.

There are differences among jurisdictions in the extent to which members of the general public are involved in alternative measures programs, although the use of youth justice committees has grown in recent years, with extensive programs in several jurisdictions. Youth justice committees, established under section 69 of the YOA, decide on the nature of alternative measures sanctions after a meeting with the young person and, often, the parents and can also be involved in monitoring compliance and facilitating services. Such committees are a valuable mechanism to ensure community participation in decision-making and to provide the opportunity for the young person to be held accountable to the community at large. (Youth justice committees are discussed in detail in Chapter 2; Integration and Coordination).

Jurisdictions also differ in eligibility criteria for alternative measures, as set out in provincial/territorial guidelines; most outline at least in general terms the eligible offences and prior record conditions. Only Quebec has open ended criteria. In several jurisdictions, a large number of offences are excluded, such as indictable offences against property; offences against the person are rarely considered for diversion. First offenders are the primary candidates for alternative measures, although in some jurisdictions (e.g., Quebec and Manitoba), young persons can be diverted more than once.

A complete national picture of the proportion and characteristics of cases dealt with by alternative measures programs is not available. However, a review of the Prince Edward Island Alternative Measures Program found that approximately one-third of all young persons apprehended for offences in that

8. A "pre-charge" alternative measures program means the diversion occurs before the laying of an information, i.e., there is no appearance in court. A "post-charge" process occurs after the laying of an information and appearance in court, but before adjudication (thereby obviating the need for adjudication by the Crown staying the charge).

province are referred to alternative measures,[9] while in British Columbia, the estimate is that sixteen percent of all police reports to Crown Counsel are addressed by alternative measures (bearing in mind that the province has a high rate of police diversion).[10] In New Brunswick, the figure is 22 present. According to the Jasmin Report, the use of alternative measures almost doubled between 1984 and 1994 in Quebec. Of all jurisdictions, Quebec appears to be setting the pace for the use of diversion programs; perhaps not coincidentally, Quebec has the lowest per capita rate of young persons appearing in youth court and the lowest rate of custody use.

The typical measures that flow from alternative measures agreements include community service work, charitable donations, attendance at educational sessions (e.g., anti-shoplifting programs), essays/posters or other assignments, restitution/compensation to the victim, and victim apologies. In Quebec, recent data show that the largest proportion of measures are community work (43 percent), followed by social-rehabilitation programs (37 percent), and payment to the victim or a community group (12 percent). Counseling as a form of alternative measures does not appear to be common in most jurisdictions; nor is victim-offender mediation or reconciliation a common intervention (although there are some dedicated victim/offender reconciliation programs in some locations).

In most jurisdictions, the majority of youth who are referred to alternative measures programs are: between the ages of twelve and fifteen; first time offenders; involved in minor property offences; and male, although a larger proportion of females are involved in alternative measures programs than are found guilty in youth court.[11]

*It appears that t*he vast majority of young persons accepted into alternative measures programs successfully complete the sanctions. For example, in the recent P.E.I. research mentioned above, 97 percent of alternative measures agreements were successfully completed. In other provinces and territories, completion rates reportedly range from 85 to 95 percent.

The extent to which alternative measures affect recidivism is not currently

9. Choice Resource Enterprises, (1995).

10. The extent to which the police exercise their discretion not to charge (or file a report to the Crown) probably affects the rate of use of alternative measures, i.e. a high rate of use of police discretion may result in lower rates of use of alternative measures since the police have already "siphoned off" many less serious cases. Ideally, a portrait of the proportion of all youth "diverted" would discretely capture all forms of diversion - including informal police discretion and alternative measures - but available data do not allow these comparisons.

11. Canadian Centre for Justice Statistics, 1993.

known. No study in Canada has been able to develop a totally equivalent group of young persons who are processed through the courts so as to compare the recidivism of alternative measures-referred and court-referred young persons. Despite this methodological difficulty, the data suggest that recidivism rates are certainly no higher for those who have been diverted to alternative measures programs.[12] Studies of recidivism have found that a relatively small minority of diverted young persons become subsequently involved in the justice system: a four-year follow-up in P.E.I., found that 21 percent of the youth referred to alternative measures were charged with another offence in this time period; a Nova Scotia study found that 22 percent of alternative measures cases re-offended in a three year follow-up; a study in Alberta found that, after 18 months, only five percent of shoplifters who received warning letters and a similar percentage of those diverted to alternative measures programs re-offended. This latter study suggests that, for minor property offences involving first offenders (to which the Alberta study was restricted), a warning with no other action does not increase the likelihood of re-offending.[13]

In summary, available data suggest that a large percentage of young persons diverted into alternative measures programs successfully complete the conditions of the program and are unlikely to re-offend. This indicates that most alternative measures participants are not deeply entrenched in criminal activity. This should not be surprising, given the fairly restrictive entry criteria (and/or practice in terms of referral of cases to alternative measures) in the majority of jurisdictions. It is possible that many young persons who enter alternative measures programs could be dealt with by means of warnings and "no further action", rather than by program measures such as community service. Some justice system professionals have suggested that alternative measures programs should be "two-tiered", with more intensive interventions reserved for young persons who have (allegedly) committed somewhat more serious crimes (i.e., other than minor shoplifting or property damage), or who have had some past involvement in delinquent activity.

Another objective of many alternative measures programs is speedier processing. In most jurisdictions, those referred to alternative measures spend less time in the system than those who go through the youth court process. This may be especially true of alternative measures programs that are pre-charge in nature.

---

12. See Doob et. al. (1995).

13. In British Columbia, there were both formal diversion programs and Crown letters to parents in place before the YOA. A pre-YOA study of comparable groups of first-time property offenders who were dealt with by Crown letters and formal diversion similarly found low rates of recidivism and, as in the Alberta study, no differences between the groups.

Despite the availability and use of different forms of diversion in Canada, including alternative measures programs, the youth courts are typically over-loaded. Nearly eighty percent of the cases brought before the youth courts in 1994-95 were for non-violent offences. Nearly one-half of the cases involved property offences; of the cases involving violence, nearly one-half were less serious common assaults.

4.6 INNOVATIVE PROCESSES AND PROGRAMS

In order to obtain the greatest possible benefit from diversion, a broad range of interventions for young persons apprehended for less serious criminal activity is required. The challenge is to develop creative responses at all decision-making points in the youth justice system that will lead to an overall re-structuring of the system, while at the same time avoiding the development of a cumbersome and expensive bureaucracy that operates parallel to the formal system. This section briefly describes some possible means by which the "front end" part of system decision-making could be re-structured.

4.6.1 Community Policing

This relatively new approach to law enforcement emphasizes a strong partnership between the police and the community they serve, in order to deal in a proactive way with crime and disorder problems at the neighbourhood and community level. Community policing usually involves decentralized police management and resource deployment, based on a less hierarchical police organization and increased front-line responsibility and autonomy. In successful community policing areas, line officers are more involved in the community, more knowledgeable about the resources available, and better equipped to handle minor criminal matters by means of alternatives to charging. If supported by a system of formal and informal rewards that recognize that police work that diverts youth in conflict with the law is equally, if not more valued, than responses that formally invoke the criminal justice system, community policing may result in more informal resolution of crimes involving young persons and involve the family and community in the resolution of these conflicts.

4.6.2 Formal Police Cautioning

Formal police cautioning is a police-based procedure currently in use in England and Wales, New Zealand, and in several states in Australia. Cautioning is a formal warning which differs from current police practices by the nature of the setting in which the caution occurs (the police station), the identity of the person giving the warning (a senior police officer), and, in most jurisdictions, by the presence of parents. Formal cautioning is intended to impress upon young

persons the seriousness of their behaviour and to be an intermediate step between an informal warning by police and court referral. It is not designed to be an alternative to the use of informal "on the street" warnings by line police officers.

Countries with formal cautioning programs have mandated the procedure either by legislation or by administration directives. Other jurisdictional variations in cautioning practices include whether evidence of the caution can be introduced in subsequent court proceedings, and, whether the caution can involve sanctions such as community work.

In England and Wales, cautions can only be given if there is sufficient evidence to prosecute, if the young person admits to the offence, and if the parents consent (although parental consent should only be sought after it has been decided to caution the young person). The caution is formally administered to the young person, often in the presence of his/her parents, by a senior police officer. Home Office Circular 14/1985 presented new guidelines for police in their dealings with juveniles, with a view to promoting "more effective and consistent cautioning practice". The policy intentions of the circular were to: expand offenders' opportunities of real diversion by means of police cautioning; encourage inter-agency liaison, in favour of cautioning; and, to develop greater consistency in cautioning decision-making.

The circular explicitly referred to the dangers of "net widening" and encouraged the use of "no further action" and "informal warnings" instead of formal cautions. In addition, the circular included the following guidelines:

- "As a general principle, in the case of first time offenders where the offence is not serious it is unlikely that prosecution will be a justifiable course." The criteria to be used to determine seriousness were: "whether significant harm has been done to a person, substantial damage has been done or property of substantial value has been stolen".

- Second and subsequent cautions should not be precluded when, (a) there was a reasonable lapse of time between offences, or (b) the earlier offence was trivial or different in character. The implication is that each referral should be viewed on its merits with the intention of increasing the proportion of cautions (which had generally been low).

- There is an advantage in the police seeking the views of other agencies when the police decision is not an obvious one.

The 1990 Home Office circular stated that cautioning is recognized as an

increasingly important way of avoiding court proceedings and reducing, for many offenders, the risk of recidivism. Courts should be used only as a last resort, particularly for juvenile and young adult offenders. It notes the disadvantages of inappropriate and repeated cautioning, emphasizes the importance of the participation of other agencies in the cautioning decision, calls for appropriate monitoring, and specifies the conditions that must be met before a caution can be given. These include:

- a reasonable prospect of conviction;
- the offender's admission of the offence; and
- informed consent by the juvenile or the juvenile's parents regarding the caution. Victims should be contacted for their views, but their consent to a caution is not required.

The effects of the changes in directives were substantial. In England and Wales between 1979 and 1989, there was a large increase in the proportion of young persons cautioned for indictable offences (of the total of those cautioned and sentenced by the court, which are the only statistics collected by the Home Office): ten to thirteen year olds, from 66 to 88 percent; and, fourteen to sixteen year olds, from 35 to 64 percent.[14] The evolution of cautioning in England over the past two decades and its effect on other parts of the youth justice process are noteworthy. The increase in the 1980's in England in the use of cautioning is believed to be a contributing factor to the reduction in the use of custody for young persons.

Criminal justice organizations in the United Kingdom have recently recommended that police cautioning be governed by statute and that guidelines be laid down in regulations, rather than by Home Office directives to police services. Among the arguments in favour of legislating the practice of cautioning are: the legal basis for cautioning is fragile; there are wide variations in practice; and cautioning plays such an important role in dealing with most categories of offenders (both adult and juvenile) that it should receive legislative recognition.

Similar positive effects of formal cautions have been documented in New Zealand. In the first full year of operation of the Children, Young Persons and their Families Act, almost 75 percent of apprehended young persons were warned and diverted by the police, a 35 percent increase from five years

14. Ball (1992).

earlier.[15]

In a 1992-93 Report of the Home Affairs Committee of the House of Commons, it was reported that 87 percent of all those cautioned, including young adults, are not subsequently convicted within two years. With respect to juveniles only, a study found that only eleven percent of cautioned youth who were under fourteen years old, and sixteen percent of fourteen to sixteen year olds, were convicted during a two year follow-up period.[16] Australian data indicate that 70 to 85 percent of young people who are cautioned do not come to the attention of the police a second time.[17]

The principal advantages of police cautioning include: the possibility that discretionary decisions will be more structured; the avoidance of unnecessary court appearances for less serious offences; the provision of a setting in which young offenders and families can assume responsibility for avoiding further offences; the promotion of family involvement; prompt response to criminal activity; less stigma to the young person; and lower costs. The principal disadvantages include: the potential for net widening; continued inconsistency in discretionary decisions; the possibility that the process will be publicly perceived to be "soft" on young offenders; and, rights-related concerns such as the potential compromise of voluntariness of participation and procedural fairness, and the fact that police decisions are not open to public scrutiny.

4.6.3 Mediation

The restorative justice model underlies victim-offender mediation, reconciliation, and restitution programs. Mediation and reconciliation are primarily used for property crimes, although these interventions are being used in a growing number of cases of offences against the person.[18] The purposes of victim-offender mediation are to: hold offenders personally accountable for their behaviour; emphasize the human impact of crime; provide opportunities for offenders to take responsibility for their actions by facing their victim and making amends; promote active victim and community involvement in the justice process; and, enhance the quality of justice experienced by both victims and offenders.

---

15. Morris and Maxwell (1993).

16. Keith (1992).

17. Morgan (1993).

18. Umbreit (1994).

Victim-offender mediation/reconciliation programs differ in their operational characteristics, such as referral source, diversion versus post-adjudication referral, case management procedures, and use of volunteer mediators. Victim-offender mediation and reconciliation programs attempt to provide a conflict resolution process perceived as fair to both parties. Reconciliation is obtained through the assistance of a mediator who brings together the victim and offender. Many programs accept referrals after a formal admission of guilt has been entered with the court, although some also accept referrals before this, as part of a diversion program.[19] In the more formal mediation programs, a program representative meets individually with the offender and the victim in order to allow the mediator to listen to the story of each party, build trust, explain the program, and encourage participation. At the mediation session, the mediator meets with the parties to discuss the facts and feelings related to the offence, and develop a plan for making things right. An agreement may include: community service work; work for the victim; financial compensation to the victim; a charitable donation; supplying a written or oral apology to the victim; or writing an essay to the victim. Follow-up consists of monitoring the mediation agreement and ensuring the completion of the negotiated terms. Most programs report that in more than 90 percent of all mediation sessions a written restitution agreement has been successfully negotiated and signed by the victim, offender, and mediator.[20]

Several studies have concluded that there is a high level of satisfaction among victims and offenders who have participated in mediation programs. For example, a multi-site study of four mediation programs in Canada found that 78 percent of victims and 74 percent of offenders were satisfied with the way the justice system responded to their case, compared to only 48 percent of victims and 53 percent of offenders who were referred to mediation but did not participate. In 92 percent of the cases which were mediated, negotiated agreements were acceptable to both parties. The author concluded that the diversion of appropriate criminal complaints after a charge has been laid, but prior to adjudication has potential for reducing the caseload pressures facing courts.[21]

A variant of this type of diversion program is peer mediation, which has been established in a few schools in Canada in order to deal with student misbehaviour while on school property. The long term goal of peer mediation programs is to inculcate non-violent conflict resolution into the school's culture.

19. Galaway and Hudson (1990).

20. Umbreit (1994).

21. Umbreit, 1995.

One short term objective is to decrease the number of school disciplinary actions.[22]

One of the practical problems with introducing mediation and victim-offender reconciliation processes into diversion programs is that many victims of youth crimes are corporate victims, such as large stores (in shoplifting), whose representatives would not normally become involved in a mediation session. Mediation is best suited to situations where the victim is a private citizen. Another practical issue is the time required to meet with victims and offenders and to arrange mediation sessions; this mode of dealing with offending requires a considerable investment of staff time and hence resources. If the victim is, for example, angry or fearful or the offender is nervous and hesitant, considerable skill may be required of the mediator.

4.6.4 Family Group Conferences

Another process which conceptually bears some similarity to the North American victim-offender reconciliation/mediation movement is the Family Group Conference (FGC), originally developed in New Zealand but later expanded to several Australian states and to South Africa. In New Zealand, FGC's were enshrined in the Children, Young Persons and Their Families Act (1989). Legislative reform in New Zealand was motivated by a number of factors, including the realization that too many youth were charged and brought before the courts, often for offences which were not particularly serious. Inadequate resources were provided to the court to deal with the issues brought before it and the courts were ill suited to deal with social and family problems. Others believed that the "justice" model was ineffective in preventing delinquency.[23]

In New Zealand, the FGC takes a "reintegrative shaming" approach based on Maori cultural values. The process focuses on accountability, reparation, and reconciliation. The objectives of the FGC are to provide:

- offenders with an opportunity to understand the consequences of their actions and repair the harm done;
- offenders with the opportunity to accept some level of responsibility for their acts;

---

22. See, for example, Justice for Children and Youth, 1995.

23. See Morris and Maxwell (1993) and Brown (1993).

- family and significant others with an opportunity to accept some level of accountability; and,

- victims with recognition and the opportunity to participate in the process of reparation.

In Australia, the FGC is used as a front-end diversionary measure whereas in New Zealand, the process can occur at various stages before and after judicial proceedings are initiated. In the wake of an offence, and where responsibility for the offence is admitted, victims, offenders, their respective families and supporters are given an opportunity to meet in the presence of a coordinator or facilitator. The aim is to discuss the offence and decide on an outcome which seeks to repair the damage and minimize further harm arising from the offence.

Family group conferences are administered in varying ways, depending on the jurisdiction: in parts of Australia, conferencing was established by police and they make the referrals and organize the meetings; court services departments, multi-agency youth justice teams, and school guidance counselors (for school-based victimization) are also used. In New Zealand, the department of social welfare is the central coordinating agency.

In New Zealand, studies of the new legislation have found that there was a large decrease in the number of cases dealt with by the courts after the introduction of family group conferences and police cautioning.[24] The per capita rate of court appearances decreased on average from 63 court appearances per 1,000 youth aged 14 to 16 in the three years before the enactment of the Act, to a rate of only 16 per 1,000 after the legislation was implemented.[25]

Under the FGC program in Wagga Wagga, New South Wales, the emphasis is on dealing with as many cases as possible. Young people are formally charged and processed through youth court only if their offences are serious, if their criminal history is substantial, or if they deny the offence or refuse to participate. Research on the Wagga Wagga police-based FGC concluded that:

- the introduction of the FGC was not associated with any net-widening effect.

- the introduction of the FGC resulted in a much higher proportion of juveniles being diverted -- mainly as a consequence of changes in

---

24. Unfortunately, the information does not permit identification of what had the greatest effect on the reduction of court caseloads in New Zealand: formal police cautioning programs or family group conferences.

25. Department of Social Welfare, 1995.

eligibility criteria which did not exclude youth who were apprehended on two or more occasions.

- re-apprehension rates for juveniles diverted under the FGC program remained as they had been previously under the conventional police cautioning system.

- the rate of re-apprehension for those offenders whose cases were dealt with by conference was approximately half that of a group of offenders whose comparable cases had gone to court.[26]

As is the case with mediation and reconciliation strategies, the family group conference approach to juvenile diversion is not inexpensive. Given this, it could be argued that FGC's should not be employed for minor, first time offences, but rather somewhat more serious crimes or for youth who exhibit repeated criminal behaviour.

4.6.5 Quebec

In Quebec, there is a uniform youth policy which is reflected in the implementation of both the YOA and that province's Youth Protection Act (YOA). The philosophy which underlies both systems is that of rehabilitation and education. The YPA applies to any child under the age of eighteen whose security or development is considered to be in danger, including where the child has serious behavioural disturbances and the parents fail to take the measures necessary to remedy the situation or the remedial measures taken by them fail. The expression "serious behavioural disturbances" includes offending behaviour. The youth protection system is geared to dealing with youth at risk before they proceed to more serious offending.

The directors of youth protection in Quebec are designated as provincial directors under the YOA and play a key role in decisions about alternative measures. Given this dual role, and an integrated service delivery system, these individuals are well placed to decide whether, for example, child welfare measures, formal processing through the youth courts, or other measures are appropriate to the case. Quebec has the lowest per capita rate of cases brought before the youth courts in Canada.

Although the law and procedures are obviously different, Quebec's system bears some resemblance to approaches taken in several European countries and in Scotland, where there is no sharp distinction made between youthful offenders

26. Moore, 1995:

and children in need of care and protection, and a philosophy where there is an over-aching emphasis on rehabilitation and education.

4.6.6 Other Programs

A variety of other types of programs can be (and are) used as components of diversion programs. For example, in aboriginal communities, elders are used to facilitate reconciliation and reparation for crimes involving young persons; in some cases, dispute resolution programs seek to permit the laws and traditions of the indigenous justice system to be re-introduced into the community. Community accountability panels and Youth Justice Committees, made up of community members, promote greater community involvement of ordinary citizens in dealing with youth in conflict with the law. Many formal and informal diversion programs utilize referrals to programs for substance abuse counseling, anger management training, problem solving, and employment counseling.

Youth Justice Committees are discussed in detail in Chapter 2.

4.7 DISCUSSION AND RECOMMENDATIONS

The available information suggests there are several reasons to believe that the diversion of young persons in Canada from the formal youth court and youth correctional process could be increased, including:

- the wide differences between jurisdictions, along with apparent increased police charging rates in several jurisdictions for less serious offences, suggests that the police could more frequently exercise their discretion not to charge.

- the success of other jurisdictions - such as England and Wales, Australia and New Zealand - suggests that formal police cautioning systems can be frequently applied and be successful in reducing youth court and youth correctional cases.

- the low rates of recidivism (in both Canada and other jurisdictions) with non-intervention procedures such as formal police cautions and caution letters suggests these approaches do not compromise public protection.

- the success of other jurisdictions, such as New Zealand and Australia, with initiatives like family group conferencing in reducing youth court caseloads.

- the apparent differences between jurisdictions in the criteria for and

extent to which alternative measures is employed suggests that this alternative might be able to be used more frequently in jurisdictions that have more restrictive criteria and lower rates of use.

- the high rates of compliance with alternative measure agreements and low rates of recidivism suggest that this alternative may be able to be used more frequently in somewhat more serious cases without compromising public protection.

- *a large proportion (79%) of youth court cases involve non-violent offences and, of those involving violence, nearly one-half involve less serious common assaults.*

- probable public acceptance, at least with respect to diversionary programs which include reparation or victim-offender mediation and community involvement.

Beyond this, the youth justice system needs to promote diversion as much as possible. The youth court process is slow, impersonal and expensive; formal youth correctional intervention is also expensive, often unnecessary, and, as some research suggests, can actually be harmful if there is over-intervention that does not correspond to the needs and circumstances of the young person. If there was more frequent use of diversion, the youth court and youth correctional systems would be better positioned to focus its efforts and resources on more serious offenders.

The question then is what legislative and administrative steps are required to promote the more frequent use of the different forms of diversion, bearing in mind that the need to do so (or degree of the same) may vary by jurisdiction, given existing differences in the extent to which diversion is employed.

With respect to police decision-making, there are two key areas that could be addressed - informal police warnings and formal police cautions. With respect to informal police warnings, the reference in the Declaration of Principle (s.3) to "taking no measures" only provides indirect and weak support of police discretion; otherwise, there is no express recognition of this important element of youth justice decision - making nor guidance. Similarly, in the interest of both consistency in decision-making and encouragement of informal police warnings, policy guidelines could be developed to encourage informal warnings, when the situation warrants. These guidelines could include criteria which address when alternatives to laying a charge should be considered and the range of possible responses by police, also including the principle that charges should be laid only when it is determined that all other responses are inappropriate.

The Task Force also agreed that, in light of successful experiences of other countries, jurisdictions should be encouraged to establish formal police cautioning programs for the diversion of appropriate youth cases. Due process issues should be addressed in the development of such programs. In all cases where a formal caution is being considered and wherever some type of accountability will be required of the young person (i.e., when a sanction such as restitution or community service is a possible outcome of the program), the young person should have the option of proceeding through the formal justice system. Records issues would have to be addressed in order to guard against *inappropriate* use of cautioning. In addition, decisions would have to be made about whether and under what circumstances formal cautions could be introduced in youth court in any subsequent proceedings against the young person.

While there was agreement among the Task Force about the potential merits of establishing formal police cautioning, question arose about the means of doing so. In this regard, three options were considered:

- a non-legislative approach, i.e., where jurisdictions would be encouraged to establish police cautioning programs as a matter of administrative policy.

- a legislative, discretionary approach, which would authorize the establishment of formal police cautioning programs, at the discretion of each jurisdiction.

- a legislative, mandatory approach which would provide for the mandatory establishment of a formal police cautioning program in each jurisdiction.

While there was some support for each option, a majority of the Task Force - in the interest of flexibility and the need to recognize the different forms of diversion - supported a legislative approach which would accord jurisdictions the discretion to implement a formal police caution program.

In light of the above, **the Task Force recommends that, with respect to police diversion,**

(1) Jurisdictions, in cooperation with police forces, should develop guidelines to encourage and guide police in the exercise of their discretion to deal with cases informally, which guidelines should address:

- **criteria respecting when alternatives to laying (or recommending) a charge should be considered and the range of possible alternatives; and**

- **formal charges should only be laid (or recommended) when it is determined that alternative responses are not appropriate to the circumstances.**

(2) **The Act should be amended to encourage the use of police discretion not to lay charges in appropriate circumstances and to encourage the police to consider a range of options to formal charges, including informal warnings, formal police cautioning, and referring the young person to other agencies, *or to police-based diversion programs.***

(3) **The Act should be amended to provide for the establishment of formal police cautioning programs, which may be implemented at the discretion of each jurisdiction.**

The Task Force also agreed that steps should be taken to encourage and guide the use of diversion and alternative measures programs. **The Task Force recommends - bearing in mind that the following should be placed in the context of earlier recommendations (Chapter 2) respecting the use of "conferencing", including at the diversionary level - that:**

(1) **Jurisdictions should develop or review guidelines/best practice standards respecting diversion - including objectives, eligibility criteria, screening procedures, information sharing and coordination with other agencies - with a view to encouraging and maximizing the diversion of less serious cases from the formal youth court process.**

These guidelines and standards should be made available to decision-makers in the youth justice system, including police, correctional services, Crown counsel, defence counsel, and community organizations active in youth justice issues.

(2) **Jurisdictions should develop or review objectives for diversion and alternative measures. Objectives that should be considered include: to hold the youth accountable for his or her actions in the least intrusive manner possible; to focus on reparation to the victim, wherever possible; to involve victims and community members in**

the decision-making process and follow-up; to encourage the family and the community to take more responsibility for youthful misbehaviour and crime; to avoid delays in processing; to enhance public understanding of youth crime by increasing public involvement; and to allow for the most efficient use of resources.

(3) Jurisdictions should consider the establishment or, as applicable, further development of Youth Justice Committees, pursuant to section 69 YOA, as a means of implementing and delivering diversion programs and increasing community involvement in the youth justice system.

(4) To support the preceeding recommendations, research should be undertaken *into factors affecting the police or other decision-maker's discretion to charge young persons or to use diversion; variations across Canada and across locations in charging and diversion decisions; and the effectiveness of various models of police diversion and alternative measures.*

Finally, one quasi-diversionary option that is available for adults is what is commonly known as a "peace bond". Section 810 Criminal Code authorizes a Provincial Court judge or justice of the peace to require an individual to enter into a recognizance where there are grounds to believe that that individual will cause injury to or damage the property of another person (or will injure the spouse or child of the other person). Although an information must be laid and there must be a hearing, the section does not create an offence. The recognizance can be for a period of up to twelve months and may contain such conditions as the court considers desirable; the inclusion of specific terms respecting the possession of firearms, ammunition or explosives, non-attendance at certain premises and non-communication must be considered. The recognizance is enforceable. In the adult context, peace bonds are used, for example, in domestic or other disputes and are directed to the prevention of harm.

There is some uncertainty in law as to whether peace bonds are applicable to young persons.[27] Peace bonds could be employed as an alternative to formal charges in certain circumstances where the victim has a fear of harm. For example, a case of assault where there has been a history of bullying and intimidation might be handled by a peace bond with a condition of no contact or

27.Sections 51 and 52 YOA state that, with some exceptions, the provisions of the Criminal Code and of Part XXVII of the Code (which includes s. 810) apply in respect of "offences" alleged to have been committed by young person. Because s.810 does not create an offence, there is uncertainty as to the applicability to young persons. There is conflicting case law in this regard.

communication, instead of proceeding with the full processing of an assault charge.

If it is clarified that peace bonds are applicable to young persons, some modifications may be required. For example, section 810 Criminal Code provides that if a person fails or refuses to enter into a recognizance, the court may commit the person to prison for a term not exceeding twelve months.

In light of the above, ***the Task Force recommends that:***

> ***The Act should be amended so that it is clarified that peace bonds, which are available for adults under section 810 Criminal Code, are also applicable to young persons with such modifications as may be appropriate to the circumstances of young persons.***

REFERENCES - CHAPTER 4

Axon, L., and Moyer, S. (1995). Alternatives to custody: A report to the Federal-Provincial/Territorial Task Force on Youth Justice. Ottawa: Department of Justice.

Ball, Caroline. (1992). "Young offenders and the youth court." Criminal Law Review, (5) 277-287.

Brown, M. (1993). "Juvenile Justice in New Zealand." In Atkinson L. and Gerull S. (Eds.), National Conference on Juvenile Justice: Proceedings of a conference held 22-24 September 1992. Canberra: Australian Institute of Criminology.

Canadian Centre for Justice Statistics (1993). Alternative measures for young persons in Canada. Statistics Canada.

Canadian Centre for Justice Statistics (1994a). A review of the Alternative Measures survey: 1991-92. Statistics Canada.

Carrington, P. (1995) "Has violent youth crime increased? Comment on Corrado and Markwart." Canadian Journal of Criminology 37(1) 61 - 73.

Choice Resource Enterprises (1995). Young offenders alternative measures review. Ottawa: Department of Justice.

Department of Social Welfare (1995). The Children, Young Persons and their Families Act in Operation - Key Statistics. Wellington, New Zealand.

Farrington, D., Osborn, S., and West, D. (1978). The persistence of labeling effects. British Journal of Criminology, 18, 277-284.

Galaway, B., and Hudson, J. (1990). Criminal justice, restitution and reconciliation. Monsey, NY: Criminal Justice Press.

Gendreau, P., and Ross, R. (1987). Revivification of rehabilitation: Evidence from the 1980's. Justice Quarterly, 4(3), 349-407.

Home Office (1994). The cautioning of offenders. Home Office Circular 18/1994.

Home Office (1990). The cautioning of offenders. Home Office Circular 59/1990.

Home Office (1985). The cautioning of offenders. Home Office Circular 14/1985.

Hornick, J., N. Bala and J. Hudson (1995). The Response to Juvenile Crime in the United States: A Canadian Perspective. Calgary: Canadian Research Institute for Law and the Family.

Hornick, J.P., and Rodal, S. (1995). The use of diversion and alternatives to traditional youth court: An international comparison. Prepared for the Department of Justice.

House of Commons Home Affairs Committee (1993). Juvenile offenders. Sixth Report.

Jasmin Report (1995, May). In the name of ... and beyond the Act. Report of the task force established to study the administration of the *Young Offenders Act* in Quebec. Highlights of the Report.

Justice for Children and Youth. (1995). Setting up peer mediation programs in partnership with the criminal justice system. Toronto: Ontario.

Keith, S. (1992) "The criminal histories of these continued in 1985 and 1988". Research Bulletin (32) 44 - 46. London: Home Office Research and Statistics Department.

Lundman, R. (1993). Will diversion reduce recidivism. Crime and Delinquency, 22, 428-437.

Markwart, A. and R. Corrado (1995). "A response to Carrington". Canadian Journal of Criminology 37(1) 74 - 87.

McCarney, W. (1996) Juvenile Delinquents and Young People in Danger in an Open Environment. Winchester: Waterside.

Moore, D. (1995). A new approach to juvenile justice: An evaluation of Family Conferencing in Wagga Wagga. A Report to the Criminology Research Council. Centre for Rural Social Research, Charles Sturt University-Riverina, Wagga Wagga, NSW.

Morgan, F. (1993). "Contact with the Justice System over the Juvenile Years". In Atkinson L. and Gerull S. (Eds.), National Conference on Juvenile Justice: Proceedings of a conference held 22-24 September 1992. Canberra: Australian Institute of Criminology.

Morris, A. and Maxwell, G. (1993). "Juvenile Justice in New Zealand: A new paradigm." The Australian and New Zealand Journal of Criminology, 26, 72-90.

Moyer, S. (1995a). A Profile of the Juvenile Justice System in Canada: A Report to the Federal-Provincial/Territorial Task Force on Juvenile Justice. Ottawa: Department of

Justice.

Moyer, S. (1995b). Police diversion in commonwealth countries: A report to the Federal-Provincial/Territorial Task Force on Youth Justice. Ottawa: Department of Justice.

O'Connell, T., and Thorsborne, M. (1995). Conferencing, a restorative approach to interventions for serious incidents of harm in the school setting. Paper and workshop presented at the Seventh National Conference on the Behaviour Management and Behaviour Change of Children and Youth with Emotional or Behaviour Problems. Newcastle, NSW.

Secretary of State for the Home Department (1993). Juvenile Offenders: Government Reply to the Sixth Report from the Home Affairs Committee Session 1992-93 HC 441. London, England.

Silverman, R., and Creechan, J. (1995). Delinquency treatment and intervention. Working Document WD1995-7e, Report No. 2. The Youth Justice Education Partnership Research Series. Ottawa: Department of Justice Canada.

Smith, R, Hornick, J., Copple, P., and Graham, J. (1995). Community resource committee: A community-based strategy for dealing with youth crime and violence in Calgary. Calgary Police Service. Alberta.

Umbreit, M.S. (1988). Victim understanding of fairness: Burglary victims in victim-offender mediation. Minnesota Citizens Council on Crime and Justice: Minneapolis, MN.

Umbreit, M.S. (1994). Victim meets offender: The impact of restorative justice and mediation. NY: Criminal Justice Press.

Umbreit, M.S. (1995). Mediation of criminal conflict: An assessment of programs in four Canadian cities. Ottawa: Department of Justice.

Zehr, H. (1990). Changing lenses: A new focus for crime and justice. Scottsdale, PA: Herald Press.

CHAPTER 5 - PRETRIAL DETENTION

Pretrial detention is a legal process whereby a young person who is arrested and charged with an offence may be held in custody pending the outcome of the charges before the courts.

Generally speaking, the decision to arrest and charge a young person (or adult) with an offence is made by a police officer.[1] At this stage, the police officer will either release the youth from custody (with or without conditions) or hold the youth in custody for a formal hearing before a justice to determine whether release will be granted. The formal process for determining whether release will be granted is the judicial interim release hearing, which is commonly referred to as the bail hearing.

The decision to detain a young person in custody prior to the resolution of the charges is significant because the youth is presumed to be innocent of the charges before the courts and has not been found guilty of the offence for which he or she is held in custody. The judicial decision to detain a young person in custody pending trial - with its obvious attendant impacts on schooling, employment, familial and peer relationships - may be viewed as a classic balancing of society's right to preventive detention on specified grounds against the young person's right to the presumption of innocence and the least interference with freedom that is consistent with the protection of the public.

Studies have shown that incarceration prior to trial can make preparation of an individual's case more difficult. The young person's lawyer may, for example, have to attend at the custodial facility, consuming expensive legal resources and time. As well, the youth's ability to locate witnesses to testify in his or her defence, to establish an alibi, and so on, is diminished.[2] These findings are particularly significant when dealing with young persons who are acknowledged in the Young Offenders Act (YOA) to have special needs and to require guidance and assistance.

Furthermore, it is at least arguable that a negative impression may be left on the youth court judge or, in some circumstances, the jury,[3] by virtue of the

---

[1]In British Columbia, Quebec and New Brunswick, the Crown must review the police report and approve a charge before it can be laid.

[2]See, for example, Schlesinger (1986).

[3]If transferred to adult court or tried in youth court for murder, and if trial by judge and jury is elected.

young person being held in detention. In many jurisdictions, a youth in detention comes into court under guard, perhaps wearing prison clothes or the clothes he or she was arrested in, and sits in a place that is more isolated from counsel than in other circumstances. The perceptions that are left as a result of this treatment are difficult to measure.

Pretrial detention could also have an impact on the eventual disposition imposed on the young person. Studies conducted with adult offenders have found that whether or not the accused person receives bail is a crucial, if not determinative, factor as to how the case will proceed. Specifically, Friedland found that persons detained prior to trial were more likely to be convicted of the offence for which they were charged and more likely to receive custodial sentences than offenders who had been granted bail.[4]

This chapter will examine international perspectives, the current law in Canada, available statistics, policy issues and some options for change respecting the use of pretrial detention.

5.1 INTERNATIONAL PERSPECTIVES

Article 37 of the United Nations Convention on the Rights of the Child only addresses pretrial detention in a general way:

> "no child shall be deprived of his or her liberty arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only a measure of last resort for the shortest appropriate period of time."

The United Nations Minimum Standard Rules for the Administration of Juvenile Justice, in addition to setting out standards requiring separation from adults and the right of appeal of detention, cautions about the dangers of "criminal contamination" and provides that:

- detention pending trial should be used only for as a measure of last resort and for the shortest period of time; and
- whenever possible, detention should be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home (Article 13).

---

[4]See, also, Doob and Koza (1974-75) and Neubaum and West (1982), but an American study of young persons in detention by Frazier and Bishop (1985) reached a substantially different conclusion about the impact of pretrial detention.

It is difficult to summarize the situation in the United States because each state has full jurisdictional responsibility for laws and programs respecting pretrial detention. In the past decade or more, there has been considerable attention focused on the decarceration of juvenile "status" offenders and on reducing the number of youth detained at the pretrial stage in adult prisons, neither of which are problems in Canada. In addition, however, initiatives have been taken in several states to limit the use of pretrial detention by, for example:

- establishing administrative screening mechanisms after arrest to determine whether detention is appropriate;

- reforms of statutory criteria and the establishment of court-based guidelines to narrow the test for detention to include only the most serious offenders and offences;

- establishing legislative time limits on the allowable time frame for a detention hearing to be held and on the length of time a juvenile may be held in detention pending trial; and

- developing alternatives to detention, such as various non-residential programs, intensive supervision and electronic monitoring.

In several states, a juvenile may be detained on the grounds that the youth represents a danger to him or herself, criteria that are not applicable in Canada.

In England and Wales, the Police and Criminal Evidence Act (PACE) sets out detailed procedures for the arrest and detention of young people. Although somewhat stricter than Canadian procedures - for example, a review of the detention by a senior police officer should take place before six hours have elapsed - the criteria for police detention include the youth's own protection or own interests. As in the United States, there has been considerable concern about the detention of young persons in adult prisons - the further development of separate youth accommodation, bail support programs, bail information schemes, remand foster homes and open residential care spaces have been recommended.

As discussed in Chapter 2, New Zealand has established family group conferencing, which can be held at any stage of proceedings, including before trial. Family group conferences can be used to identify alternatives to detention.

5.2 THE CURRENT LAW

By virtue of section 51 of the YOA, the provisions of Part XVI of the Criminal Code that relate to the pretrial release of adults charged with offences apply to young persons, with such modifications as the circumstances require. Generally speaking, where a young person has been arrested and charged with an offence, the police must initially determine whether to release the youth with or without conditions pending trial, or to hold the young person for a judicial interim release hearing (bail hearing) pursuant to the Code.

Pretrial release proceedings fall into two categories: those charged with very serious offences, such as murder, listed in section 469 C.C. and those charged with any other offences. Aside from very serious offences, the police in most cases have the authority to release the young person subsequent to arrest and dispense with the need for a bail hearing.

Depending on the circumstances, a police officer or officer-in-charge may release a young person charged with an offence on a number of forms of release, including: a promise to appear in court; a recognizance not exceeding $500 with or without deposit (a recognizance is an acknowledgement that the person entering into the agreement is indebted to the amount specified in the document); or an undertaking that requires the young person to maintain certain conditions of release (for example, to remain within a certain territorial jurisdiction).

Despite the detailed provisions for release noted above, the police retain a wide discretion to hold a young person in custody. Where the young person has not been released by the police as described above, he or she must be brought before a justice (a justice of the peace or youth court judge) and dealt with according to law, generally speaking within a 24 hour period following the arrest.

Screening procedures that, in effect, authorize the police decision to hold a young person for a detention hearing are mandated in section 7(5) YOA, but are not mandatory, i.e. the provinces and territories may or may not choose to implement these provisions.

Young persons charged with offences not listed in section 469 C.C. are automatically entitled to a bail hearing before a justice. It is important to note that, in most situations, the young person is entitled to be released on an undertaking without conditions unless Crown Counsel can show cause why the young person should be given a more onerous form of release or why the young person should be detained in custody pending trial. The

general rule is that the onus is on the prosecutor to show cause why the young person should be held in custody pending trial.

There are two grounds upon which Crown Counsel can seek to establish that the detention of the young person is justified:

- where detention is necessary to secure the young person's attendance in court (commonly known as the primary ground);

- where detention is necessary for the protection or safety of the public, having regard to all the circumstances, including any substantial likelihood that the young person will, if released from custody, commit a criminal offence or interfere with the administration of justice (commonly known as the secondary ground).

The applicability of the secondary ground is only relevant where detention is not justified on the primary ground.

Where the justice determines that the young person shall be granted some form of bail pending trial, there are a number of options for release. Generally speaking, the justice has two main options for release: an undertaking or a recognizance. The young person may be released on his or her own undertaking to appear in court, with or without conditions, or on a recognizance release. The recognizance release can be in different forms, involving a sliding scale of conditions and supervision that may include the imposition of sureties and/or conditions and/or deposit of money.

One of the distinguishing features of the legislative procedures for bail involving young persons is a special provision in the YOA that allows for release in circumstances where the court is satisfied that the young person would be otherwise detained. Specifically, section 7.1 YOA provides that where a responsible person is willing and able to take care of and exercise control over the young person, the young person may be placed in the care of that person instead of being detained in custody pending trial. Given this, an alternative to detention is available to youth who would otherwise be detained, if a responsible person comes forward and the court decides release is appropriate in the circumstances.

In the event that the young person or Crown Counsel wishes to challenge the original decision of the justice, recourse is available through a bail procedure that differs from the procedure available for adults in some material respects. Where the initial bail hearing was not conducted by a youth court judge, both the young person and the prosecutor are entitled to a review procedure that

allows all the evidence to be re-called and new submissions given. In all other cases where the original hearing was before a youth court judge, recourse is available through the review procedures established in the Criminal Code.

5.3 STATISTICAL MEASURES

Recent data collected from the Canadian Centre for Justice Statistics indicates that the average daily population of young persons in pretrial detention[5] has steadily increased in Canada over the period of 1989-90 to 1993-94. While this may initially suggest that increases in pretrial detention are a matter of national significance, closer attention to the data reveals wide jurisdictional differences in both the per capita rates of use of detention and in changes since 1989-90. Although the overall rate of pretrial detention has risen since 1989-90, it is important to note that in some jurisdictions (in particular some of the Atlantic provinces and the Yukon) there has been no appreciable increase in the rate of detention during this period.

As the Descriptive Profile report indicates, in 1993, several jurisdictions (especially Ontario, Manitoba, Alberta and the two territories) used detention more frequently than others, both as a proportion of the twelve to seventeen year old population and of the youth-at-risk of detention.[6] It is interesting to note that while the data suggest that the use of pretrial detention is relatively low in Quebec when compared with other provinces, the recently released Jasmin Report noted an increase in the use of pretrial detention in Quebec and has developed recommendations that respond to this concern.

The extent to which detention is used in relation to the overall population of youth or youth-at-risk is not the only measure of the use of pretrial detention. The Descriptive Profile report indicates that in Canada, in 1993, almost one out of five (19 percent) of young persons held in custody (i.e., sentenced and remand) on a given day were in detention, but again there are wide variations across jurisdictions.[7]

Another way of measuring the use of pretrial detention is to consider the nature of the offences for which young persons are admitted into detention.

---

[5]It should be noted that these population counts include both youth who are held in detention pending adjudication and those who have been found guilty but are being held pending disposition. Breakdowns by type are not available.

[6]The youth-at-risk measure is the rate of detention per 10,000 young persons charged.

[7]Ranging from 6 percent in Newfoundland and P.E.I. to 28 percent in Manitoba.

Statistics are available for British Columbia, Ontario (only for 16 and 17 year olds) and Nova Scotia. In Ontario and British Columbia, the data are quite similar in many respects: almost one half of all admissions in both jurisdictions are for property offences and slightly less than one quarter of all admissions are for breaches of court orders and other offences against the administration of justice. There is a slightly higher rate of detention for offences against the person violence in British Columbia (just less than one-quarter) than in Ontario and Nova Scotia (19 percent). There is a smaller proportion of admissions for property offences (37 percent) in Nova Scotia than in British Columbia and Ontario.

The average length of remands in detention appear to be somewhat comparable in most of the jurisdictions where data is available (British Columbia, New Brunswick, Nova Scotia, and Ontario): the average number of days in detention is approximately ten days in these jurisdictions.[8]

Very little data are available that relate the issue of systemic delay to pretrial detention. While anecdotal reports suggest that systemic delay in the justice system affects detention rates, present data are incomplete in this area and no firm conclusions can be drawn. We do know from the Descriptive Profile report that youth court processing times have increased in many jurisdictions; this would tend to suggest that the average number of days youth are remanded into detention awaiting trial may have correspondingly increased over time. However, the fact that most jurisdictions have in place procedures for expediting trials involving young persons in custody must also be considered; anecdotal reports received from several jurisdictions suggest that these procedures have a positive impact on reducing court processing times for in-custody matters.

There are no statistics available which describe the frequency of use of placements in the care of a responsible person pursuant to section 7.1 YOA, but it is believed these provisions are employed relatively infrequently.

5.4 POLICY ISSUES

Although the statistics, research and other information respecting the use of pretrial detention are very limited, they raise several policy questions:

---

[8]Data received from the Yukon Territories suggests a much higher average number of days spent in detention: for 1994-95, the average number of days was 33, although this figure appears to be declining in 1995-96.

Jurisdictional Differences in Use

There are wide variations in the inter-jurisdictional rates of use of pretrial detention, whether measured as per capita rates per 10,000 youth population, per 10,000 youth charged, or as a proportion of all youth in custody. For example, Alberta and Manitoba's rates of use of pretrial detention are more than double the rate of British Columbia, even though these provinces have similar youth crime rates. Ontario's rate is markedly higher than the rates of Quebec and the Atlantic provinces. The available data do not explain these differences and the research in this area is extremely limited. Nonetheless, the wide differences in rates across jurisdictions suggest that the use of pretrial detention might be able to be reduced in jurisdictions with higher rates of detention. As well, because these differences arise despite the fact the same law applies across jurisdictions, the solutions would seem more likely to be found in administrative and program measures than in changes to the law.

Short Duration of Stay

Very little variation was found in the average number of days a youth was remanded into detention across reporting jurisdictions; the average stay being approximately ten days. One inference that may be drawn from this is that many youth brought into detention by police are released (or their matters disposed of) within a few days of arrest. Anecdotal information gathered in this area suggests that, in many jurisdictions, at least one-third of all youth brought into detention are released on consent of Crown Counsel or after a show cause hearing.

This information raises questions about the initial determination to detain or release that must be made by the police officer. It appears that only one jurisdiction - Quebec - has detailed arrest and release procedures for police officers that are specific to youth. Only Quebec, Manitoba and Nova Scotia have implemented section 7(5) of the YOA, which gives provinces the authority to designate an independent body to approve the decision to detain a youth prior to the bail hearing being held.[9]

Seriousness of Offences

More than seventy percent of all young offenders detained in British Columbia and Ontario are alleged to have committed property offences or

---

[9]In Quebec, the designated authority is the provincial director, while in Nova Scotia and Manitoba it is justices of the peace.

offences against the administration of justice, including breaches of court orders. In Nova Scotia, the figures for property offences and "other offences," including offences against the administration of justice, are slightly lower at approximately 64 percent. Less than one-quarter in all three jurisdictions are detained for violent offences. These statistics would suggest to some that there may be substantial room for developing alternative processes and procedures that would allow youth charged with breaches of court orders and property offences to remain in the community pending the outcome of their charges. However, these statistics do not account for prior history of offences, including a history of violence, nor can it be said that the protection of society from violent crime is or should be the only grounds for detention. In law, the primary ground for detention is to ensure the young person's attendance in court. Many would argue, for example, that a charge involving an offence against the administration of justice can, depending on the circumstances, be construed as a telling indicator of prospective non-compliance with bail conditions and the likelihood of a failure to appear.

Child Welfare Considerations

Several jurisdictions have expressed similar concerns about the use of pretrial detention: the perception that some youth are detained in custody for child welfare reasons unrelated to the primary and secondary grounds outlined in the Code. Further, some have expressed concerns that decision makers at the pretrial hearing may be overreaching with conditions of release for youth in an attempt to maintain "inappropriate degrees of control" (or social control) if bail is granted. It may be argued that the law is unsettled as to the degree to which child welfare considerations may properly influence the release decision in the bail hearing.

There is some empirical support for this observation, at least in Ontario. In a study of bail hearings involving youth held for detention hearings in three cities in Ontario, Gandy found that judges placed some youth in custody for primarily child welfare reasons that were, he argued, outside of the primary and secondary grounds for detention in the Code. Judges justified their detention decision by indicating that the youth was "out of control" or "because it was in the public interest." This "out of control" finding justified detention in a number of varying situations, including verbal aggression of youths against parents and/or group home staff, or repeated failure to abide by a curfew. Youth who were granted bail were often given conditions of release unrelated to the incident before the courts, and the sheer number of

conditions often "set the youth up" for a further breach of bail.[10]

Screening and Release Mechanisms

Most jurisdictions do not currently employ a risk assessment tool at the pretrial detention stage. (Risk assessment instruments are discussed in Chapter 8.) As well, very few jurisdictions have developed standards or guidelines for parties - such as police officers, youth workers, and Crown Counsel - who are or may be involved in the release/detention decision. There also appears to be little use of the provisions in the YOA that allow for the screening and authorization of the police decision to detain, as well as for the release of a young person into the care of a responsible person. It is ironic that some of the most distinctive release procedures available for youth (the screening of police decisions and an alternative form of release) appear to be among the most under-utilized provisions of the YOA.

Alternatives to Detention

Jurisdictions were canvassed as to the availability of programs that acted as alternatives to pretrial detention. While some jurisdictions (for example, British Columbia) appear to have developed an array of viable alternatives to detention, most other jurisdictions have limited or no innovative programming in this area.

It is acknowledged that simply developing more programs that act as alternatives to detention will not go far enough in limiting the reliance on detention. System wide processes to reduce the unnecessary use of detention are required. In this sense, innovative programming would be viewed as a component of the overall system. Any programs contemplated as alternatives to detention must also be sensitive to concerns about "net widening."

---

[10]As well, in a study conducted of factors affecting predispositional detention and release in Canada, the judicial decision to release was found by Carrington et.al. (1988) to be strongly connected to legal and sociolegal factors in four out of five Canadian cities. Sociolegal factors, while less important than legal factors, included matters typically associated with child welfare considerations noted above: whether the youth had a bad family status, was involved in child welfare proceedings, had a bad activity status or was out of control. The study further indicated that legal, sociolegal and extra legal factors (including gender, age and race) were all relevant considerations influencing the decision to detain at arrest. A note of caution should be exercised in drawing significant conclusions from this research, as the findings were based on data collected prior to the inception of the YOA. It is believed, however, that most of the cities involved in the study applied the same test for judicial interim release that is currently used, although perhaps with not the same degree of attention to due process considerations.

The Role of the Family and the Community

It has been noted anecdotally that in many cases across jurisdictions, families (including extended families) are not routinely present at hearings. When families do attend, they are often intimidated by the formal youth court process or unable to meet the desired level of supervision required by the justice or youth court judge for release. It is trite to say that the families of offenders involved in the justice system often have limited resources and may not be able to supervise the youth during all periods of the day and night. As well, the greater involvement of the community can be helpful in identifying and mobilizing alternatives to detention. (Parental involvement is discussed in detail in Chapter 10, and community involvement in Chapter 2.)

Involvement of Other Agencies

Anecdotal reports suggest the need for other agency service providers to become more actively involved in the release determination. Many youth facing bail hearings are actively involved with one or more service agencies, including child welfare services. In many jurisdictions, the service agency is not routinely notified that a bail hearing will be commenced. The service agency can be a valuable resource in the determination of release at the judicial interim release hearing. (Inter-agency coordination is discussed in detail in Chapter 2.)

Costs of Pretrial Detention

The costs of pretrial detention are very high, as much or more than $200 per diem in some jurisdictions. With the rate of pretrial detention increasing in some jurisdictions, it only follows that the attendant costs associated with providing detention services have also increased. In the current climate of fiscal restraint, it also follows that the costs associated with detention must be closely weighed against the benefits of detaining youth (often in increasing numbers) in custody, especially if suitable alternative means of supervising these youth in the community may be available or able to be developed.

Systemic Delay

This is also an area where further information and analysis is required. What is apparent is that youth court processing times have increased in several jurisdictions. It is not known whether time in detention has kept pace with the increasing systemic delay in some jurisdictions, given various mechanisms that have been adopted in the provinces for expediting in-

custody matters. It is important to highlight, however, that any amount of delay in the pretrial context is especially significant, given the attendant consequences to the youth who is an accused person.

It should also be noted that various provisions within the current procedures for judicial interim release may allow for significant delays in the process to occur. For example, Crown or defence counsel may request up to a three day remand at any stage of the detention hearing for the youth. The three day remand may be granted without the consent of the youth. While it is acknowledged that there are very legitimate reasons for the adjournment of bail hearings at Crown Counsel's request, the right to adjourn proceedings must be weighed against the young person's interest in having the matter determined in an expeditious fashion. Defence counsel may also seek further adjournments of the bail hearing with the consent of the accused. It is probably rare that the youth at the outset of the proceedings will disagree with counsel's request, especially where his or her liberty is at stake.

5.5 PROGRAMS AND PROCESSES

This section will examine ways in which identified concerns about pretrial detention in some jurisdictions might be addressed, drawing from experience within Canada as well as other jurisdictions. It is recognized that great variation exists across and within jurisdictions with respect to pretrial detention practices.

Administrative Screening Mechanisms

Various jurisdictions within the United States have devoted energy and resources to the development of procedures that attempt to identify youth arrested by police who are appropriate for release. For example, administrative authorities may be authorized to review and approve the police decision to detain a youth prior to the youth being brought before the court for a formal detention hearing. Using a risk assessment instrument, an objective assessment is made of the youth's risk to the community (and to him or herself) if release were to be granted. All youth deemed inappropriate for detention by the authorities must be released forthwith.

The YOA also contains a specific provision that allows for screening of the police decision to hold a youth for a bail hearing. Section 7(5) of the Act allows the Lieutenant Governor in Council to designate a person or group of persons whose authorization is required before a young person who has been arrested may be detained in custody. The provision has been implemented in Quebec, where the provincial director is the designated authority. Because

there is an integrated service delivery system in Quebec, matters that involve primarily child welfare considerations are referred at the outset to child welfare services.

Similarly, in most areas of Manitoba, before a youth or adult may be held in detention, the police decision to hold the person for a bail hearing must be confirmed before a justice of the peace. This practice was specifically established as a strategy for reducing population counts in detention. While no formal evaluations are available, anecdotal information indicates that this practice has substantially reduced the number of Crown consent releases at show cause hearings.[11] Justices of the peace are also designated as the screening authority under section 7(5) YOA in Nova Scotia.

Risk Assessment Instruments

Broadly speaking, risk assessment and classification refers to the process of estimating an individual's likelihood of continued involvement in criminal behaviour and making decisions about the most appropriate level of intervention for the identified risk level. In the few jurisdictions in Canada currently using risk assessment instruments, their application is limited to the context of dispositional decision making.[12] However, risk assessment instruments could also be used to assist in identifying individuals who may be appropriate for release into the community following arrest. Youth who are released prior to their trial could also be placed on different levels of intensity of community supervision based on the risk assessment information. In this regard, Ontario is currently experimenting with the use of risk assessments at the pretrial detention stage as a method of screening candidates for an intensive supervision pilot program in Toronto.

Guidelines for Justice Professionals

Few jurisdictions in Canada have had experience with the implementation of detailed guidelines for justice professionals. Jurisdictions report that police officers currently follow mandated procedures for the arrest and detention of youth for a judicial interim release hearing. However, very few jurisdictions have developed detailed guidelines for police officers beyond the provisions set out in the Criminal Code and YOA. In this regard, the Jasmin Report

---

[11]But note that Manitoba has one of the highest per capita rates of use of pretrial detention in the country.

[12]Ontario, Manitoba, and the Yukon employ these instruments, while British Columbia and, on a more limited basis, Newfoundland are in the course of implementing them.

specifically recommended that a guide to practices and procedures be formulated and put into effect in respect of the decision by the police and the youth protection director to detain a young person before first appearance.

Similarly, very few jurisdictions reported the existence of guidelines that structure Crown decision-making. In the jurisdictions that have implemented guidelines for Crown Counsel, primarily British Columbia and Ontario, no guidance is given in relation to decision making at bail hearings specific to youth.

An example of an integrated set of guidelines for pretrial detention with system wide application was developed by the Joint Commission on Juvenile Justice Standards in the United States. The central premise of the guidelines is that decision-making in all components of the youth justice system must be structured to achieve the same goal: reducing the unnecessary use of pretrial detention for youth.

One of the primary features of the guidelines is that detention should only be justified on the basis of protecting the jurisdiction of the court, or where the youth is likely to inflict serious bodily harm on others, if released. Detention should never be ordered on the basis of child welfare considerations, or to punish, treat, rehabilitate or assist in an investigation. A strong "gatekeeper" function is also recommended and provided for in the guidelines. An intake official initially screens the matter prior to the initial court appearance and determines whether the youth should be held for a bail hearing or released.

Alternatives to Detention

"House arrest", although not specifically mandated in the YOA or Criminal Code, is a form of judicial interim release where rigorous conditions are imposed on the youth, usually including intensive supervision. The conditions imposed by the judge or justice of the peace effectively confine the young person to his or her residence except for stipulated purposes. House arrest will often include strict reporting conditions, a curfew and a condition that the youth comply with the rules of the residence.

While house arrest may provide additional opportunities for release, the argument may be made that this option creates unfairness, given that all offenders are not equally eligible due to personal circumstances. For example, a youth with a stable home environment and family support is more likely to be granted house arrest than a young person who does not have this support.

Youth Justice Committees may be officially designated pursuant to section 69 of the YOA to assist, without remuneration, in any aspect of the administration of the Act or in any programs or services. Youth justice committees have been officially designated in several provinces and territories. As discussed in Chapter 2, youth justice committees and inter-agency committees are forms of "conferencing" which can be useful in identifying and mobilizing community resources which can act as alternatives to detention.

Probably the most fundamental difference between the adult and the youth court bail hearing is the ability of the youth court to order the young person into the care of a responsible person, even where detention in custody would be otherwise appropriate. Despite the availability of this procedure, anecdotal information suggests that, in a number of jurisdictions, many youth justice practitioners are not well acquainted with these provisions and that they are not commonly used. Some have argued that a youth is unlikely to be released pursuant to this section if the individual who comes forward as a responsible person has already been found to be an unworthy surety for the youth pursuant to the provisions of section 515 of the Code. While this argument appears to be initially sound, it should be pointed out that people within the youth's immediate community of care who have limited financial resources may in fact be approved as a responsible person, even in the absence of being able to meet a substantial surety release.

It should also be pointed out that the responsible person provisions are enforceable - any person who fails to comply with an undertaking pursuant to section 7.1 commits an offence punishable by summary conviction (s.7.2). Some have argued that these provisions are harsh and place a heavy onus on the person charged with the care and control of the young person, possibly deterring use of the provisions. However, it can also be argued that the purpose and intent of the provisions speak directly to offering substantial assurances that the youth, if released, will have the conditions of release closely monitored and will attend court. In this sense, greater protections are offered to the community through a release granted pursuant to section 7.1. The argument may be made that in borderline cases, some persons held to be unfit to stand as a surety for the young person would nevertheless be acceptable as responsible persons pursuant to the combined provisions of section 7.1 and 7.2 of the Act.

There are numerous examples of innovative programs in Canada and in other jurisdictions which are designed to extend the opportunity for community release to offenders who would not have normally qualified for release. Some examples of these programs are described in the Appendix to this

chapter. Priority should be given to development of alternative programs and they should evaluated. In saying this, it should again be emphasized that in some Canadian jurisdictions, the use of pretrial detention for young persons has not been identified as especially problematic, as shown by lower rates of detention. In those jurisdictions, an emphasis on the development of alternative programs to reduce reliance on detention may not be as necessary.

Any consideration of alternatives to pretrial detention must be guided by the over-arching themes of ensuring attendance at court and protection of the public, as well as the avoidance of "net-widening" and incurring increased costs. If these concerns are to be taken into account, the planning of alternatives to pretrial detention must initially ascertain the needs and profile of the youth, as well as regional variations in pretrial detention practices. Appropriate screening mechanisms and assessment instruments may also be necessary to identify the appropriate target group for the program.

5.6 DISCUSSION AND RECOMMENDATIONS

The available information on the use of pretrial detention, although limited, suggests some avenues for change which may assist in limiting the use of detention.

Research findings and high rates of use of pretrial detention in some jurisdictions suggest that sociolegal and extralegal considerations can play a role in the decision to detain a young person in custody pending trial. These factors - most commonly referred to as "child welfare considerations" - are, it is argued, outside the formal legal factors which are to be taken into account in the judicial interim release process mandated by section 515 Criminal Code. For example, it is argued that the fact that a young person is living on the street should not lead to detention, but rather is a situation that requires supportive alternative services.

If child welfare considerations were expressly ruled out in the legislation so that they could not be considered by the court, then the judicial interim release process would better accord with the due process emphasis of the Act and the overall numbers of youth held in pretrial detention might be reduced. Further, an amendment of this nature would be consistent with recent amendments brought about by Bill C-37 vis-a-vis dispositional custody decisions: section 24 (1.1) YOA provides that an order for custody shall not be used as a substitute for appropriate child protection, health and other social measures.

Not all members of the Task Force agreed with the proposal to amend the Act so that child welfare considerations alone do not constitute a valid ground for detention. From this perspective, what appear to be "child welfare considerations" cannot easily be disentangled from the primary or secondary grounds for detention. For example, the fact that an "unmanageable" young person has a poor family situation with little or no parental supervision or control can be directly relevant to the issues of securing attendance at court or preventing the commission of further offences. Further, the fact that high (and increasing) pretrial detention rates seem to be peculiar to some jurisdictions and not others suggests that administrative and program solutions - not changes in law which would be applicable to all - may be the better course. Other concerns included the need to differentiate between "child welfare" considerations and the more narrow issue of "child protection" and the different maximum ages of child protection jurisdiction that apply across the provinces and territories.[13]

In considering the above, **a substantial majority of Task Force representatives recommend that:**

> **With respect to the legal criteria for pretrial detention, the Act should be amended to state clearly that child welfare considerations alone do not constitute a valid ground for detention.**

The Task Force considered options that would go beyond this by requiring the court to, for example, consider releasing a young person to a responsible person pursuant to section 7.1, prior to making a detention order. Under the current law, consideration of a section 7.1 undertaking is discretionary and obviously only applies in circumstances where a suitable responsible person comes forward. Again, this option would be consistent with recent amendments to section 24 YOA vis-a-vis dispositional custody, which require that custody shall only be imposed when all available alternatives to custody that are reasonable in the circumstances have been considered.

While initially appealing, this option was not supported by the Task Force, for sound reasons. Of necessity, the pretrial detention decision-making process is an expeditious one. Most detention stays are quite short, averaging only ten days in jurisdictions where data is available. A mandatory requirement to consider placement with a responsible person, or other alternatives, could

---

[13] "Child welfare" is broader than "child protection" - for example, a fifteen year old with poor family circumstances may not necessarily be in need of protection from abuse or neglect, but may still require supportive (child welfare) services. The maximum ages for child protection jurisdiction in the provinces and territories range from fifteen to eighteen.

lead to protracted searches by the court for alternatives, thereby complicating and lengthening the decision-making process and inadvertently leading to a greater use of pretrial detention. In short, this option, though well intended, could backfire.

It would seem, then, the issue of maximizing the use of alternatives to pretrial detention would be best achieved by program and administrative initiatives. In this regard, it appears that there has not been extensive development of alternatives to pretrial detention - such as bail supervision, intensive supervision and bail hostel programs - in most jurisdictions. There is a more extensive range of alternative programs available (at least in urban centres) in British Columbia, a province which has a relatively low rate of use of pretrial detention. Certainly more could be done in the area of developing alternatives, but the capacity to do so would be dependent on the availability of financial resources to implement these programs. Where programs are available, it is important that suitable information about these programs be provided to participants in the decision making process, including Crown counsel, defence counsel and the judiciary. In the development of alternative programs, there is always some danger that alternatives will not reduce detention levels, but will be used as an "add-on" - another layer of supervision for individuals who would have been released into the community in any event. The possibility of "net-widening" should be taken into consideration when designing and implementing alternative programs. The use of risk/need assessment instruments could assist in identifying prospective candidates for release and also in ensuring that alternative programs are not provided to those who do not require intensive levels of supervision.

In light of this, **the Task Force recommends that:**

> **Priority should be given to the development of community-based alternatives to pretrial detention, especially in jurisdictions where the rate of use of pretrial detention is relatively high. Additionally, jurisdictions should ensure that information regarding available alternative programs is readily accessible to participants in the judicial interim release decision-making process, including Crown Counsel, defence counsel, and the judiciary.**

Alternatives to detention need not, however, always be directly delivered or financed by the youth justice system. The active involvement of the family (including extended family), and of the community, in the planning and decision-making process can be helpful in identifying, for example, a suitable responsible person (s.7.1) who may be willing to provide care and

supervision for the young person. In many cases, the young person may require the assistance of other youth serving agencies, such as child welfare, mental health or substance abuse treatment. Means to promote greater family, community and inter-agency involvement through forms of "conferencing" - such as youth justice committees, family group conferences, and inter-agency case conferences - are discussed in detail in Chapter 2. Means to enhance parental and family involvement are more specifically discussed in Chapter 10.

In light of the above, **the Task Force recommends that:**

> **The active involvement of the family, the community and other youth serving agencies in the pretrial release process should be encouraged, as appropriate to the circumstances of the case.**

As noted, few jurisdictions have implemented the provisions of subsection 7(5) YOA, which allows the Lieutenant Governor in Council to designate a person or group of persons whose authorization is required before a young person may be detained in custody following arrest. The fact that average stays in detention are very short, and that many young persons are released with the consent of the Crown once brought before a justice as youth court judge, suggests that initial detention by the police could be avoided in some cases. The implementation of a screening and authorization mechanism, as contemplated by subsection 7(5), could prove to be useful in screening out these cases. This screening could also be complemented by the use of risk/need assessment instruments, which would assist in the identification of lower risk cases more suitable for release.

Given this, **the Task Force recommends that:**

> **Consideration should be given to implementing the provisions of section 7(5) YOA to establish a process for screening and authorization of pretrial police detention, especially in those jurisdictions with high rates of use of pretrial detention.**

Ultimately, the extent of use of pretrial detention is the product of decision-making, not just by the court, but also by the police, Crown Counsel, and other parties who may play a role, such as youth workers. Standards and guidelines can be used to assist police in deciding whether to hold a young person in custody pending a bail hearing. Police currently have substantial discretion to release an individual, subject to conditions when appropriate. Most guidelines currently in existence in Canada do not go beyond a recitation of the provisions of the Criminal Code and the YOA. More

substantial guidance could assist in reducing the number of situations where a young person is detained and subsequently released following a bail hearing.

Similarly, very few jurisdictions in Canada report the existence of guidelines to assist Crown decision-making. In jurisdictions which have implemented guidelines for Crown Attorneys, no specific guidance is given in relation to youth detained following arrest. As a result, Crown Attorneys, and the youth court, may not be directing their attention to opportunities, such as section 7.1 (release into the care of a responsible person), to consider alternatives to detention.

Guidelines and standards can also assist in ensuring that detention is not requested strictly on the basis of child welfare considerations, or to punish or rehabilitate.

In light of this, **the Task Force recommends that:**

> **Jurisdictions should consider the development of best practice standards or guidelines for youth justice officials involved in pretrial detention decisions, including police, Crown Attorneys and youth workers. Standards or guidelines could include the following:**
>
> **(1) Given recent amendments to the Criminal Code according police augmented powers of release, practices and procedures could be formulated, in cooperation with police forces, in respect of the decision by police to detain a young person before first appearance.**
>
> **(2) Best practice standards could be developed to assist Crown Attorneys in developing positions on release, including a consideration of release to a responsible person pursuant to section 7.1.**
>
> **(3) For jurisdictions implementing a screening mechanism pursuant to subsection 7(5) YOA, guidelines could ensure the effective application of objective criteria, including risk/needs assessment.**

Finally, it was learned that there is very little in the way of detailed statistics or research in relation to the use of pretrial detention (and much less so than

there is with respect to dispositional decisions).[14] For example, statistics indicating the numbers of youth released following show cause hearings or on the consent of the Crown are not readily available. The factors that are involved in the decision to detain young persons, as distinct from adults, are also uncertain. A comparison of adult and youth detention may, for example, indicate the extent to which extra-legal considerations are influencing detention decisions for young persons. If this is the case in some jurisdictions, it would perhaps suggest that other social measures are necessary to limit the resort to pretrial detention. Comparisons of jurisdictions that have high and low rates of use of pretrial detention may also be informative. Obviously, the identification of factors that contribute to wide inter-jurisdictional differences in rates would be helpful in developing appropriate strategies to address concerns (if such exist in a specific jurisdiction).

In light of this, **the Task Force recommends that:**

> **Research should be conducted into factors that contribute to the use of pretrial detention of young persons generally and, in particular, high rates of use in some jurisdictions.**

[14]Other areas of concern with respect to pretrial release and detention are the apparent absence of an offence of interference with a pretrial order of the court (akin to section 51 YOA; interference with dispositions) and parental involvement in the pretrial decision-making process. These are discussed in Chapter 10.

APPENDIX - CHAPTER 5

INNOVATIVE PRETRIAL PROGRAMS

1. Intensive Supervision Programs

Intensive supervision programs are characterized by high levels of contact and intervention by caseworkers, small caseloads and strict conditions of compliance. This type of supervision has been effectively used as an alternative to custody at the pre- and post-adjudicative stages in many locations in Canada and the United States.

Intensive supervision programs may be grouped according to the particular focus of the program. Some programs rely heavily on rehabilitative interventions, while others emphasize surveillance and control. The third group, known as the productive engagement model, emphasizes the completion of positive tasks and goals as requirements of success. Lastly, the family preservation model focuses on reintegrating the youth with his or her family and strengthening familial relationships.

- **Program Examples**

The intensive supervision program offered in Brant County, Ontario - Facing Responsibility or Serving Time (FROST) - relies on a heavy treatment component as well as strong parental involvement. Operated by the St. Leonard's Society, the program was developed as a direct alternative for offenders (aged 12-15) charged with an offence that would qualify them for open custody, early release from custody or release on bail.

A formal intake and assessment procedure takes place at the predisposition stage and a decision is made regarding a referral. In the initial phase of the program, FROST clients complete a needs inventory which attempts to identify the particular issues faced by the youth. The program plan is developed from this inventory to address the needs of the client.

Intensive contact between the client and program caseworker occurs on a daily basis. There is a minimum stay of three months in the program, but duration varies with court involvement. A recent evaluation indicates that almost three quarters of referrals are medium to high risk, indicative of the program operating as a legitimate alternative to detention. The recidivism rate of 16.6% may be viewed as relatively low, given the nature of the clients involved in the program.

The central region of Ontario's Ministry of Community and Social Services has also recently embarked upon on intensive supervision program. The Early Release Support Program (ERSP) currently operates as a pilot project in downtown Toronto. Eligible youth (aged 12 to 15) are screened for the program using a risk/needs assessment tool. The program is intended to target youth who are considered to be at moderate to high risk of offending and who have been refused bail at first instance by the justice of the peace.

Youth deemed acceptable for the program must bring a bail review application before a youth court judge for release. The youth may be released on bail with a condition that he or she be amenable to the conditions imposed by the ERSP staff.

British Columbia has provided a number of bail supervision programs which are intended as alternatives to detention. Regular bail supervision, supervised by probation officers, is available on a province-wide basis. In addition, there are several contracted programs that provide more intensive levels of supervision and care. For example, the Connections program in Victoria is exclusively offered as an alternative to pretrial detention. Caseworkers have very small caseloads and closely monitor conditions of release, such as curfews and school attendance. The program also has access to several privately contracted foster-type homes, where the young person may be placed if the family circumstances are not suitable. In addition to intensive supervision, the caseworkers provide family support and crisis intervention services as well as facilitate and support community-based services for the young person.

As part of a continuum of services provided in the Fraser region of British Columbia, the Juvenile Intensive Supervision Program (JISP) provides supervision for up to 35 male and female offenders who are on judicial interim release. This program has the capacity to offer a youth a bed for up to 14 days, during which time alternative living arrangements are made with either family, friends, or through the Ministry of Social Services. The supervisor meets with the youth a minimum of two times a week, in person, and does nightly curfew checks. Support is also provided to family members and assistance with transportation to court appearances is given.

The Vancouver Metro Intensive Supervision Program is designed for youth aged 13 to 17. The purpose of the program is to provide close supervision of the youth and detailed reports of the young person's compliance with conditions. Young persons are also provided assistance with crisis counselling, school and employment placement. The program provides liaison and counselling support with the family during the supervision period.

2. Electronic Monitoring

Electronic monitoring has been used at the pretrial detention stage in some locations in the United States. Many of the programs are part of a continuum of supervision/home confinement services, with electronic monitoring being one of the most intrusive forms of supervision. One example of this type of program is the Juvenile Monitoring System, operating in Dothan, Alabama. A small device called a visual phone display is connected to the parents' or guardians' home telephone. A computer located at the police department is programmed to randomly call the juvenile during the hours he or she is restricted to the home. When the juvenile receives a call, he or she must respond to the computer's voice commands to verify compliance with bail conditions. Electronic monitoring programs may also include a treatment component.

Any consideration of implementing an electronic monitoring program for youth at the pretrial detention stage would have to address the specific policy consideration of its appropriateness for youth. British Columbia, which has an extensive electronic monitoring program for (sentenced) adults, has decided not to implement it with young offenders on the grounds that young people are more likely to be responsive to human interaction that is offered through, for example, the types of intensive supervision programs described above.

3. Alternative Incarceration Centres

In the United States, the Cook County Circuit Court, in conjunction with the Annie E. Casey Foundation, has developed a continuum of detention alternatives that include the provision of an emergency shelter for youth. Remands are made to the shelter primarily in cases where the youth is unable to return to the family home pending trial. It has been established to prevent the unnecessary detention of youth who, in the absence of a parent, may be detained for primarily child welfare considerations.

Similarly, the Hawthorne Heights shelter in North Carolina provides a safe temporary place for youth that may act as an alternative to detention.

4. Client Specific Planning

The Judicial Interim Release Program (JIRP), operating primarily in Regina and Saskatoon, includes elements of a client specific planning approach (see Chapter 6). Normally, a youth court judge will request a report from a youth worker as to suitability for release to the program. The courtworker will interview the youth and other interested parties and make a recommendation for release.

If the youth is deemed suitable, the courtworker will prepare a plan for release that will address concerns the judge may have on both the primary and secondary grounds for detention. The courtworker will develop a plan for release that will attempt to manage the risk that the youth presents and is tailored to the needs of the youth. Before a youth is released, he or she must agree to abide by the conditions set out in the bail order and to cooperate with the youth worker. Several options for release are available, including release to a community home, where the youth is managed outside his or her own residence in a familial setting.

Intensive supervision is also available where services are delivered directly to the youth and his or her family. Again, the youth must be willing to abide by and follow the plan of care, as established by the case worker. While formal evaluations of this program have not been conducted, anecdotal evidence suggests that repeat offenders are often admitted into the program.

5. Bail Verification and Supervision Programs

Bail supervision programs, currently operating in some jurisdictions, monitor the activities of the accused young offender in the community. Interviews are conducted at the earliest opportunity while the youth is in custody. If an individual is deemed acceptable for release to the program, this is indicated to the court at the judicial interim release hearing. If the youth is released on bail, efforts are made, through regular reporting, to stabilize the client's life by instilling order and consistency and through counselling and guidance offered by the bail worker. If a client does not comply with the arranged bail conditions, he or she may be re-arrested.

REFERENCES - CHAPTER 5

Alcala, R. (1993). Disposition Resource Manual. Reno: National Council of Juvenile and Family Court Judges.

Annie E. Casey Foundation (1992). Juvenile Detention Alternatives Initiative and Planning Guide.

Barclay, G.C. (1993). Information on the Criminal Justice System in England and Wales. London: Home Office Research and Statistics Department.

Carrington, P., Moyer, S., and Kopelman, F. (1988). "Factors affecting pre-disposition detention and release in Canadian juvenile courts," Journal of Criminal Justice (16) 463-76.

Cohen, E. and Klugel, J. (1979). "The detention decision: A study of the impact of social characteristics and legal factors in two metropolitan courts." Social Forces (58) 146-61.

Centre for Canadian Justice Statistics (1994). Corrections Key Indicator Report for Adults and Young Offenders. Ottawa: Statistics Canada.

Department of Juvenile Justice (1992). Family Ties: The First Eighteen Months - A Resource Guide. New York.

Doob, A., Marinos, V. and Varma, K. (1995). Youth Crime and the Youth Justice System in Canada: A Research Perspective. Department of Justice Canada Working Document.

Doob, A. and Koza, P. (1974-75). "The relationship of pretrial custody to the outcome of a trial." Criminal Law Quarterly (17) 391-400.

Dunkel, F., and Vagg, J. (1994). Waiting for Trial: International Perspectives on the Use of Pre-Trial Detention and the Rights and Living Conditions of Prisoners Waiting for Trial, vols. 1 and 2. Frieburg: Eigenverlag Max-Planck Institut.

Dunlap, E., and Roush, D. (1995). "Juvenile Detention as Process and Place." Juvenile and Family Court Journal (1) 3-16.

Frazier, C. and Bishop, D. (1985). "The Pre-Trial Detention of Juveniles and it Impact on Case Dispositions." Journal of Criminal Law and Criminology (76).

Friedland, M.L. (1965). Detention Before Trial. Toronto: University Press.

Gandy, J. (1992). Judicial interim release (Bail) hearings that resulted in detention prior to trial of youths charged under the Young Offenders Act in three Ontario cities. Toronto: The Policy Research Centre of Children, Youth, and Families.

Goldkamp, J.S. (1984). Development and Implementation of Bail Guidelines - Highlights. Washington: National Institute of Justice.

Henry, A. (1993). "Pre-Trial Programs: Describing the Ideal." Federal Probation (57).

Howell, J.C. (1995). Guide for Implementing the Comprehensive Strategy for Serious, Violent, and Chronic Juvenile Offenders. Washington: Office of Juvenile Justice and Delinquency Prevention.

Juvenile Justice Standards (1980). Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition. Massachusetts: Institute of Judicial Administration and American Bar Association.

Kenewell, J., Bala, N. and Colfer, P. (1991). "Young Offenders," in Barnhorst, R. and L.C. Johnson (eds.), The State of the Child in Ontario. Toronto: Oxford University Press.

The Law Reform Commission of Canada (1988). Compelling appearance, interim release and pre-trial detention. Ottawa: Supply and Services Canada.

Lescheid, A., Hoge, R., and Andrews, D. (1993). Evaluation of the Alternative to Custody Programs in Ontario's Southwest Region. Prepared for the Ministry of Community and Social Services, London.

McCarthy, B. (1987). "Preventive Detention and Pre-Trial Custody in the Juvenile Court." Journal of Criminal Justice (15).

Naismith, P. (1990). Judicial Interim Release for Youths: The Law and Other Exigencies (unpublished). Presented at Far Hills Inn, Val-Morin, Quebec.

National Association for the Care and Resettlement of Offenders (1996). The Police and Criminal Evidence Act 1984 and Young Offenders. London, England: NACRO.

National Centre for Juvenile Justice (1994). Juvenile Detention Hearings: Time Requirements, Hearing Purpose and Criteria for Detaining.

Penal Affairs Consortium (1996). Juveniles on Remand. London, England.

Report of the Commission On Systemic Racism in the Ontario Criminal Justice System (1995). Prepared for the Commission on Systemic Racism in the Ontario Criminal Justice System, Toronto.

Schlesinger, S.R. (1986). "Bail Reform: Protecting the community and the accused." Harvard Journal of Law and Public Policy (9) 171-202.

Stasiak, E., Nixon, B., and Winter, K. (1995). Awaiting Trial: Accused Persons Remanded to Custody. Document of the Solicitor General and Correctional Services, Ontario.

CHAPTER 6 - COMMUNITY-BASED DISPOSITIONS

Most people would agree that protection of the public and rehabilitation of youth are the main aims of the youth justice system, and also that the system should respond appropriately to wrongdoing, hold offenders accountable for their behaviour, and do so in a way that is proportional to the offence, as well as being fair and equitable. While there may be general agreement about these aims, there is not a broad consensus about how to achieve them at the dispositional phase. There has been a growing recognition among many youth justice system professionals, however, that there could be changes in the types of dispositions imposed on young offenders - specifically, reducing the reliance on custody for less serious offences by promoting the use of community-based alternatives which, it is argued, can achieve these aims as well or better than custody.

In Canada's youth justice system, custody is a frequently imposed disposition: three out of ten youth court cases with a finding of guilt result in either open or secure custodial dispositions. Despite the relatively frequent use of custody in most jurisdictions, there are many short and medium term drawbacks both to the young person and to society. The development and use of alternatives to custody for less serious young offenders, along with expansion of "front end" procedures to avoid court processing in the first place (see Chapter 4), are strategies that can achieve a variety of societal and justice system objectives, including the protection of the public through the rehabilitation of young people.

There is a common belief that crime control is directly under the control of the youth justice system; that is, it is assumed that crime will decrease if the penalties associated with it increase. This theory assumes that young persons rationally weigh and consider the consequences of their actions, know the penalties for various offences, believe that they will be caught, and think they will actually get a heavier penalty. As discussed in Chapter 2, research has not confirmed these assumptions.[1] The assumption that custody deters individual youth from re-offending is also questionable. Some research, for example, suggests that the placement of low- and moderate-risk offenders in custody can actually worsen the propensity to offend upon release.[2] Taking into account the drawbacks of

---

1. See also Doob et al. (1995).

2. Andrews, Leschied and Hoge (1992).

custody, and in the absence of appreciable evidence to the contrary, it appears that a wider use of non-custodial sanctions does not lead to an increase in criminal behaviour, especially when these sanctions are properly planned and implemented.[3]

Community programs can be as effective as custodial programs because they tend to be more comprehensive and individualized. It has been argued that services in the community can be delivered in meaningful ways by targeting youth at a variety of risk levels.[4] Most young offenders who pose low and moderate levels of risk can be safely supervised while remaining in their communities.

Other rationales for the use of non-custodial sanctions are that they promote integration back into the community and avoid the "contamination" effects of custody (whereby less serious offenders learn criminal skills and acquire anti-social attitudes from more criminally sophisticated offenders in custody).

In addition to these generic reasons in favour of expanding the use of community sanctions for less serious offences, there is also a Canada-specific reason: the use of custodial sanctions differs considerably from jurisdiction to jurisdiction. In some parts of the country, the likelihood of a young person being incarcerated is much higher than in other jurisdictions (i.e., per capita rates of custody use vary greatly). A greater use of community-based alternatives in jurisdictions with higher rates of custody may be one approach to resolving or at least narrowing these jurisdictional disparities. The very fact that there are substantially lower rates of custody in some jurisdictions suggests that there may be "room" for other jurisdictions to reduce custody rates by promoting community-based alternatives.[5]

These arguments in favour of greater use of non-custodial measures for many offences are not to be interpreted as meaning that custody does not achieve other justice system aims, such as denunciation and incapacitation. However, since most incarcerated young offenders are

---

3. Joutson and Zvekic (1994).

4. See, for example, Andrews et. al. (1992) and Silverman and Creechan (1995).

5. See, Descriptive Profile Report. Some have argued that inter-jurisdictional differences in custody rates - especially open custody - are problematic for a variety of reasons, including differences in the way in which open custody is operationalized from jurisdiction to jurisdiction (Markwart, 1992). However, secure custody comparisons are less problematic, comparisons of which still indicate wide differences in rates.

sentenced for non-violent offences, denunciation is not often a primary concern. And, similarly, even though incapacitation is achieved through custody, this is typically only a temporary and costly benefit, given the short average length of committals to custody.[6]

In every jurisdiction, the very large majority of custodial dispositions involve non-violent offences. Since reliance on the youth justice system as a means of resolving disputes appears to be increasing in some jurisdictions, and the youth population is expected to increase over the next decade in several jurisdictions, there will most likely be even greater demands on young offender correctional services in the near future, a period when it is expected that there will continue to be limited available financial resources to support services. To continue to rely on custodial sanctions to the same extent for non-violent offenders when there is no empirical evidence of a beneficial impact on the behaviour of young offenders is expensive -- and may also be counter-productive -- especially given research which suggests that community-based alternatives which address the criminogenic factors associated with offending may be as or more effective than custody.

The development of alternatives to custody is not, however, necessarily a straightforward panacea to the problems faced by youth corrections in Canada. There are a number of concerns that need to be considered when the expansion of community-based correctional programs is being planned.

First, the development of alternatives to custodial dispositions does not necessarily mean that they will be used for the "right" people. "Net widening" is a potential outcome, because decision-makers may see the new options as desirable, and therefore suitable for young offenders who would not have been otherwise committed to custody. One outcome of an increase in alternatives can, therefore, be that more, rather than fewer, young persons will be required to participate in relatively intrusive programs.

A related concern is that, because alternatives to custody usually involve more frequent contact between young offenders and youth workers, the incidence of "technical" violations (i.e., breaches of conditions such as curfew, drug or alcohol consumption, school attendance) rises because the probation officer/youth worker is now more aware of the day-to-day

---

6.Youth Court Survey data indicate that the average length of secure custody sentences is less than four months and open custody sentences average about three months (FY 1993-94 data).

behaviour of the young person. These violations may result in charges of breach of a non-custodial disposition and a committal to custody for that offence -- the alternative thereby becomes an indirect route to custody. These concerns are summarized by one commentator:

> "Most so-called 'alternatives' are used instead as 'add-ons' to what would otherwise be regular probation sentences. Second, many of these programs target the "least serious" of the institution-bound population... The result is a flip-flop of correctional resources, which places the least serious offenders under the strictest supervision available within the system, while more dangerous offenders emerge from a period of incarceration to regular aftercare, where supervision is puny by comparison with most JIPS [juvenile intensive probation programs]. Third, because of their enhanced strictness, JIPS often produce a failure rate equal to or higher than that of regular probation... When JIPS cases fail, the youths frequently receive a more severe punishment than they would have received had they failed on regular probation" (Clear, 1991).

Youth court data indicate that, although the large majority of cases that receive custody do not involve violence and many involve administration of justice offences such as breach of probation, most young persons committed to custody are recidivists, and many are chronic recidivists. That is, even though the current offence may be less serious, the court's rationale for the custodial disposition may be the repetitive nature of offending, combined with the failure of previous community dispositions to check criminal behaviour. It could be argued that alternatives to custody may have little effect on overall custody use until there is an acceptance among system personnel that alternatives provide adequate societal protection and are suitable for the sizeable recidivist population dealt with by the youth courts. As will be discussed later, a change in the attitudes of system personnel towards the efficacy of imprisonment seems to have been a key element in the reduction in youth custody use in some other countries.

An argument often used in support of increased use of community-based alternatives is that they are less costly than custody. In fact, some community alternatives can approach custody in terms of costs (e.g., intensive supervision programs). Most young offenders who are committed to custody for non-violent offences are there for relatively short periods: in 1993-94, almost thirty percent of the young persons committed to custody had orders of less than one month. If these short

custodial dispositions were replaced with somewhat longer, intensive supervision in the community, then the costs of custody and the community alternative may be roughly the same (or the community disposition may be even more expensive). Furthermore, minor reductions in the number of youth committed to custody, especially those who receive short dispositions, may not appreciably reduce the overall costs of custodial operations because a large proportion of facility and operational costs are fixed. Significant cost reductions can only be achieved through the closing of a facility, or a unit of a facility. Also, as noted above, the adoption of community-based alternatives may result in net-widening, so that persons who would not have been committed to custody receive more intensive, and expensive, interventions. Finally, some community-based alternatives, while less expensive to implement, may affect other social costs (e.g., certain programs may place a burden on the family of the offender).

A possible obstacle to changes in dispositional patterns is public concern about the functioning of the youth justice system and resistance to reforms that may be perceived as insufficiently responsive to societal interests. As outlined in Chapter I of this report, a majority of the Canadian public believe that the youth justice system is too lenient. There is evidence, however, that many members of the public are not fully aware of the typical cases going through the youth court (non-violent, property-related or victimless crimes), and the quite substantial percentage of cases that receive custody. It has been argued that, if the costs of custody and the nature of typical cases were included in an opinion survey, support for harsher dispositions would be considerably less,[7] an argument that is supported by a study of the public's views on adult sentencing patterns.[8]

Alternative community-based sanctions must be geared towards addressing the factors which directly contribute to the criminal behaviour of offending youth (i.e., criminogenic factors), and it is essential to match the program intervention to these needs. Because of considerable differences in the types of offences and offenders that receive custody, there is no one alternative-to-custody program which will be applicable to all young persons.

Not every community disposition is or should be considered as alternative

---

7. Doob et. al. (1995).

8. Doob and Roberts (1988).

to custody. Rather, community dispositions can be conceptualized as falling into two broad types: those that are sanctions in their own right and those that are intended as alternatives to custody. For example, community service, orders for personal services to the victim and compensation or restitution orders are sanctions which serve the goals of restorative justice and, therefore, are justifiable in their own right. Probation orders may not (but sometimes can) be an alternative to custody but are often used, for example, to facilitate the supervision of reparative sanctions or rehabilitative measures. However, probation and other community dispositions (such as an intensive community service order) can be used as an alternative to custody, especially if a component of the order includes special interventions such as attendance programs, intensive supervision, and/or treatment/counselling programs.

The distinction between community dispositions as sanctions in their own right and as alternatives to custody acknowledges that the use of community dispositions varies according to the circumstances of the offence and offender, and the goals that are sought in each individual case. For a wide range of less serious offences, custody is not considered an option. In these cases, probation or community service orders are often the most appropriate response. At the other extreme, for very serious offences or offenders, some form of custodial disposition is often necessary. For those in the centre of this continuum -- a sizeable percentage of young offender cases -- non-custodial sanctions may, if appropriately implemented and targeted to the right population, be as or more effective as custody in preventing recidivism, less costly and more humane.

6.1 INTERNATIONAL PERSPECTIVES

International Instruments

Extracts from international instruments relating to youth court sentencing practices are presented in this section in order to provide a framework within which the relevant provisions of the Young Offenders Act (YOA) and proposals for reform can be assessed. The considerable number of instruments that address community dispositions illustrates the importance of the issue to the international justice community.[9]

---

9. Several instruments specifically provide for and strongly promote community-based responses and include the: United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); United Nations Convention on the Rights of the Child; International and Interregional Co-operation in Prison Management and Community-Based Sanctions and Other Matters ; United Nations Standard Minimum Rules

The following general themes are found in international instruments. The well-being/best interests of the child should be a primary consideration; any reaction to juvenile offenders shall always be in proportion to the circumstances and needs of the offender and the offence. It is important to develop positive measures that involve the full mobilization of all possible resources -- including the family, volunteers, schools, and other community resources -- for the purpose of effectively, fairly and humanely dealing with the juvenile in conflict with the law. It is also important for the youth to remain with his or her family, whenever possible. There is a specific call to maintain progress towards the treatment of juveniles as a special category in the application of the criminal law and the administration of justice, and, as far as possible, to avoid the use of imprisonment for persons below sixteen years of age.

The Commentary of one international instrument acknowledges unresolved conflicts of a philosophical nature in sentencing youth: rehabilitation versus just deserts; assistance versus repression and punishment; and, general deterrence versus individual incapacitation. The Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), while not prescribing which approach is to be followed, identify one approach that is most closely in accord with internationally accepted principles: the disposition shall always be in proportion not only to the circumstances and gravity of the offence, but also to the circumstances and the needs of the juvenile as well as to the needs of society; restrictions on personal liberty shall be limited to the minimum possible; deprivation of liberty shall not be imposed unless the offence is a serious act involving violence or for persistence in committing other offences and unless there is no other appropriate response; and the well being of the juvenile shall be the guiding factor. In adult cases, and possibly also in cases of severe offences by juveniles, just deserts and retributive sanctions might be considered to have some merit, but in most juvenile cases such considerations should always be outweighed by the interest of safeguarding the well-being and the future of the young person. Strictly punitive approaches are not appropriate.

Several instruments call for full use to be made of the range of existing alternatives sanctions and the development of new alternative sanctions, such as: verbal sanctions (admonition, reprimand, warning and cautioning); conditional discharge; care, guidance and supervision orders; probation; community service; financial penalties, compensation and

---

for Non-Custodial Measures (The Tokyo Rules); and, United Nations Rules for the Protection of Juveniles Deprived of Their Liberty.

restitution; confiscation or an expropriation order; intermediate treatment and other treatment orders; orders to participate in group counselling and similar activities; orders concerning foster care, living communities or other educational settings; suspended or deferred sentence; referral to an attendance centre; house arrest; and, any other mode of non-institutional treatment.

Non-custodial measures should be used in accordance with the principle of minimum intervention. The selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality and background of the offender, the purposes of sentencing, and the rights of victims. The competent authority shall attempt to establish a suitable alternative non-custodial measure, and imprisonment may be imposed only in the absence of other suitable alternatives. The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period. The Commentary to the Beijing Rules notes that:

> "progressive criminology advocates the use of non-institutional over institutional treatment. Little or no difference has been found in terms of the success of institutionalization as compared to non-institutionalization. The many adverse influences on an individual that seem unavoidable within any institutional setting evidently cannot be outbalanced by treatment efforts. This is especially the case for juveniles, who are vulnerable to negative influences... Moreover, the negative effects, not only of loss of liberty but also of separation from the usual social environment, are certainly more acute for juveniles than for adults because of their early stage of development" (Article 19.1).

States are also called upon to foster favourable attitudes on the part of the community at large. Public participation should be encouraged as it is a major resource and one of the most important factors in improving ties between offenders undergoing non-custodial measures and the family and community. Public participation should be regarded as an opportunity for members of the community to contribute to the protection of their society.[10]

---

10. These international instruments also address other matters related to non-custodial dispositions, such as the discretion to discontinue proceedings, research and planning, policy formulation and program development, and linkages with relevant agencies and activities.

International Experiences

Internationally, several jurisdictions were successful in effecting substantial decreases in youth custodial populations during the 1980's, changes which, as will be discussed later, stand in contrast to what has occurred in Canada.

In England and Wales, between 1981 and 1988, custodial dispositions for male young offenders decreased by fifty to sixty percent.[11] The factors that contributed to the decrease were: changes in legislation,[12] changes in attitude (no longer supporting early intervention and custody), the introduction of Intermediate Treatment programs, and an increase in police cautioning (see Chapter 4). The changes in attitude included a realization that custodial sentences for youth were not having a positive impact on recidivism rates. In the early 1980's, there was a major increase in funding for non-custodial measures, known as Intermediate Treatment, which were designed to provide alternatives to custody by substituting rigorous community penalties that utilized a multi-agency approach.

In New Zealand, family group conferencing -- enshrined in The Children, Young Persons and Their Families Act, 1989 -- has apparently contributed to a substantial decrease in custody use, along with the expansion in police cautioning. Family group conferences (FGCs) deal with all those offenders whose offences are considered by the police to be too serious or persistent to be dealt with by cautioning (see Chapter 4). The FGC deals with virtually all young offenders, including multiple offenders, recidivists and those who have committed the most serious offences (excluding murder and manslaughter, which are addressed in adult court).

Where the young person does not deny the charge, the FGC makes a recommendation as to disposition to the court or recommends that

---

11. Allen (1991).

12. The 1982 Criminal Justice Act placed limitations on the discretion of judges to make custodial orders by specifying three criteria, at least one of which had to be met: that the offender is unable or unwilling to respond to non-custodial penalties; that a custodial sentence is necessary for the protection of the public; or that the offence is so serious that a non-custodial sentence cannot be justified. The Act also introduced a range of non-custodial penalties which were intended for serious and persistent offenders. These included community service orders, supervision orders and attendance centre orders. Social inquiry reports were required in every case in which custody was being considered. However, the Criminal Justice and Public Order Act 1994 introduced secure training orders for persistent young offenders between ages 12 and 14 and increased the maximum term of detention in a young offender institution that a court may impose on offenders from 15 to 17 years of age.

proceedings be discontinued. If the young person denies the charge and there is a finding of guilt, the court must refer the matter to the FGC for its recommendations regarding sentence. The FGC has a range of "high tariff" community-based alternatives to choose from. These options include, in increasing order of severity:

- supervision order, with or without conditions, limited to a maximum of six months;
- community work order, with the consent of the young person, to a maximum of 200 hours of supervised work;
- supervision with activity order, with the consent of the young person, a three month order of supervision activity, which may be followed by a three month supervision order;
- supervision with residence order, an order which may total nine months, the first three months of which is spent in the custody of the Department of Social Welfare.

The custodial option is rarely recommended by family group conferences. For example, in 1993, of 199 sentencing recommendations made, only one percent involved a custodial term. In only seventeen percent of youth court cases was an order made at a higher level than that recommended by the family group conference.[13]

The impact of the changes to New Zealand legislation on custodial rates and budgets was considerable. The number of custodial sentences imposed on young offenders more than halved in the year following the introduction of the legislation and the numbers have remained at the lower level since.[14] It has been observed that the apparent effectiveness of family group conferencing in New Zealand is probably dependent on an effective police cautioning system, which diverts a substantial proportion of juvenile offences; otherwise, family group conferencing, which can be resource intensive, could not cope with the volume of cases.[15]

In Victoria, Australia, the number of youth sentenced to detention in youth training centres decreased from 694 in 1981 to 127 in 1992, the apparent result of the widespread use of diversion, alternative court sanctions -- such as attendance, community service and youth supervision

13. Maxwell and Morris (1993).

14. Spier (1995).

15. Carol (1994).

(intensive supervision) orders -- and culturally appropriate programs to address the needs of aboriginal peoples.[16]

Some American states have successfully implemented de-institutionalization, most notably Massachusetts and Utah. In these states, the reforms involved closing large training schools, establishing a few small high security treatment facilities for violent and chronic young offenders, and developing diverse networks of community-based programs that allowed for individualized treatment.[17]

In Germany, the imprisonment of juveniles decreased by more than fifty percent between 1982 and 1990. Again, changes in attitudes of judges and social workers are cited as among the major reasons for the reduction; these professionals recognized that research had found that removing young persons from society negatively affected their subsequent recidivism and job prospects. As a result of the widespread dissemination of research findings, the judiciary began, so far as possible, to avoid giving prison sentences.[18] Community work projects, combined with training in victimization, social skills training programs, intensive intermediate treatment (three months of a day program), day-fines, and compensation orders, were employed as alternative sanctions.[19] Also notable was the close collaboration among community groups, social workers, police, prosecutors, churches, academia, and the judiciary that helped to produce alternative programs.

In 1981, Italy introduced legislative reforms which resulted in imprisonment being imposed only on youth convicted of particularly serious and violent offences. Part of the legislative package included provisions for the suspension of prison sentences. One aspect of this scheme, applicable to both youth and adults, allows those sentenced to a prison term to spend only ten hours a day in a prison setting.[20]

---

16. Ibid.

17. Centre for the study of Youth Policy (1987). In contrast, however, there has been a widespread trend in many American States to rely more on transfers to adult court; see, Chapter 8.

18. U.S. Department of Justice (1996).

19. Van der Laan (1992).

20. Information about Europe in this section is largely derived from AIMJF (1994) and McCarney (1996). References to "prison" or "imprisonment" are generally limited to the use of secure institutions; open residential placements, such as group and foster homes and similar resources are also employed in Europe.

The Scandinavian countries rarely resort to custodial terms for young offenders. In Sweden, youth between fifteen and eighteen years can only be sentenced to a prison term for "particular reasons", e.g., when referral to a welfare board is not possible; only one percent of convicted fifteen to eighteen year olds in Sweden receive juvenile prison sentences. In Norway, the introduction of a comprehensive regime involving mediation and other conflict resolution measures has widely abolished person sentences for youth.

In Austria, juvenile legislation amended in 1988 provides the judiciary with a number of alternative penalties, such as a suspended sentence, conditional on probation whose conditions are intended to provide an intensive intervention in the youth's behaviour and way of life. The statute provides for the entire or partial suspension of a prison sentence for all offences. A youth whose prognosis for rehabilitation is not good may receive a partial suspension of a custodial sentence. The legislation also provides for the decriminalization of less serious crimes for youth who are fourteen and fifteen years old, if there is no particular need to apply the criminal law, and introduced mediation and reparation as a primary response. There were significant decreases in the juvenile prison population in Austria.

Proposed amendments to the youth justice law in France explicitly state that criminal sanctions are to be imposed on youth in only exceptional circumstances and for specific reasons. Incarceration is also considered to be an exceptional measure reserved for the most serious of offences, such as serious personal injury offences and drug trafficking. Even though the proposed legislation has not yet been implemented, the imprisonment of juveniles declined (overall) by 47 percent since 1981 in France; the decline in the number of imprisoned juveniles between thirteen and sixteen years olds was even more pronounced (86%).

The "mitigation model" of sentencing is evident in several European countries, wherein juveniles are subject to a mitigated maximum penalty that would be applicable to an adult under the penal code. For example, for many offences in France a youth under the age of sixteen must be subject to a maximum of one-half of what an adult would be subject to for the same offence, while the one-half rule can be applied to those over sixteen.

In recent years, a common theme has been an emphasis on mediation and reparation in countries such as Austria, Germany, Belgium, France and Norway. Another common trend is that imprisonment is becoming more

and more the exception for anyone under the age of sixteen.

The low rates of imprisonment of juveniles in some European countries is striking. For example, in Austria - a country somewhat smaller in population than Ontario but which includes eighteen year olds in its juvenile justice system - there were only eighty sentenced youth in that country's one juvenile prison in 1991.

6.2 PROVISIONS OF THE YOUNG OFFENDERS ACT

The key provisions of the Declaration of Principle (s.3 YOA) which are directly relevant to non-custodial dispositions include:

- while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;

- young persons who commit offences require supervision, discipline, and control, but because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;

- in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families; and

- parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate.

An amendment to the Declaration of Principle arising from Bill C-37 also focuses on public protection through rehabilitation as a key determinant in dispositional decision-making: paragraph 3(1)(c.1) defines the protection of society as a primary objective of the criminal law relating to youth and indicates that that objective is best served by rehabilitation. The latter, in turn, is best achieved by addressing the needs and circumstances of a young person that are relevant to the young person's offending behaviour.

In section 20, the Act provides for a range of community-based dispositions, including: absolute and conditional discharges; a fine not exceeding $1000; an order of compensation for loss of or damage to property; an order of compensation in kind or by way of personal services; an order of restitution; an order for community service; and, an order of probation. Probation is a wide-ranging disposition because a variety of conditions can be imposed, including, for example: curfews, residential placement, school attendance, counselling or treatment, and so on.

In subsection 24(1), the Act provides a statutory test to be applied before a custodial disposition is imposed. The principle of restraint in the use of custody is evident in this subsection, which states that a young person should not be committed to custody unless the court considers such a disposition "necessary for the protection of society having regard to the seriousness of the offence and the circumstances in which it was committed and having regard to the needs and circumstances of the young person". This test applies to committals to both open and secure custody. As a result of Bill C-37, the Act was further amended in an effort to limit the use of custody and promote alternatives to custody. In making the determination set out above in section 24(1), the youth court must take the following into account:

- an order of custody shall not be used as a substitute for appropriate child protection, health and other social measures;
- a young person who commits an offence that does not involve serious personal injury should be held accountable to the victim and to society through non-custodial dispositions whenever appropriate; and,
- custody shall only be imposed when all available alternatives to custody that are reasonable in the circumstances have been considered.

These factors are intended to acknowledge that young persons can be held accountable for their actions through the use of community dispositions, provided that public protection is not compromised.

6.3 CANADIAN EXPERIENCE

The vast majority of cases referred to the youth court in Canada involve non-violent offences.[21] In 1993-4, 84 percent of cases fell into this category. Indictable (serious) offences against the person made up six percent of the total, and another ten percent involved less serious offences against the person, such as common assaults. Youth courts also deal with a relatively high number of administration of justice offences, including failure to appear in court, breach of bail conditions, failure to comply with a non-custodial disposition (s.26 YOA), and escape from custody/unlawfully at large. In 1993-4, seventeen percent of all cases dealt with in youth court involved these types of charges.

For young offender cases resulting in a finding of guilt, the most common dispositions are probation (66 percent), community service with or without probation (31 percent), fines (10 percent) and restitution/compensation (7%).[22] More than one-quarter of cases (29 percent) result in either open or secure custody. While there are jurisdictional variations in the percentage of youth court cases that receive custody, custodial sentence lengths show an even greater difference by jurisdiction. In 1993-4, the average open custody order ranged from two to four months, while secure orders varied from two to six months, depending on the jurisdiction.[23]

Indictable offences against the person make up only about ten percent of the cases committed to custody; summary/hybrid offences comprise 56 percent of the total; the remainder are indictable property offences, such as break and enter and thefts over $5,000.

Since implementation of the YOA, the number and proportion of youth court dispositions involving custody have increased in some jurisdictions. For example, one researcher found substantial increases in the proportion of cases receiving custodial sentences in four of the six provinces he

---

21.Data derived from the Descriptive Profile Report, which defines a case somewhat differently from regular Youth Court Survey publications.

22.Because multiple dispositions are fairly common (eg. probation and community service), totals exceed 100%.

23.These statistics are drawn from the Descriptive Profile Report. Note that they are based on youth court cases receiving custody, not on the actual number of young persons in custody ("custody counts"). If the offence types for cases actually serving custody dispositions was available, the picture would almost certainly greatly differ. Because more serious (indictable) offences receive longer sentences than do summary/hybrid cases, the "actual-in counts" involve a much higher percentage of serious cases.

examined.[24] Although the percentage of custodial dispositions increased in some areas, the length of these dispositions appeared to decrease. In Canada overall, average sentences are currently less than four months, and many young persons are sentenced to less than one month in custody. This suggests that the youth courts have moved their dispositional decision-making toward a "short, sharp shock" model of sentencing.[25]

Probably the best indicator of the extent to which custody is used in Canada is the "average daily count" of young persons held in custody (and serving a court-imposed sentence, i.e., excluding young persons in detention). In 1994-5, an average of over 4,100 young offenders were serving a custodial disposition each day. The per capita rate of this "average daily count" in custody was 17.6 per 10,000 young persons, which means that almost 18 of every 10,000 youth in Canada were in custody on a typical day. The actual number of youth held in sentenced custody increased by nearly twenty percent from 1987-88 to 1994-5, while the per capita rate increased by thirteen percent.

Another aspect of the Canadian situation that is not well known outside the youth justice community is the very large difference among the provinces in the extent to which custody is used. The per capita rates in the two Territories are very high and not typical of the Canadian situation. The per capita rates of eight provinces are roughly two to four times higher than the two jurisdictions with the lowest rates (Quebec and British Columbia). The differences among the jurisdictions in their rates of custody use bear little or no relationship to the seriousness of crimes involving young offenders -- suggesting that factors other than offending patterns are responsible for the disparities. These variations in custody use also suggest that efforts to create viable alternatives to custody may be more needed in some jurisdictions than in others.

6.4 INNOVATIVE PROGRAMS AND PROCESSES

In Canada, as well as in other countries, a number of different approaches have been used to develop community alternatives for youth who would otherwise receive custodial sentences. This section illustrates some ways in which custodial alternatives may be expanded. The programs which are examined are not meant to be all inclusive; nor do they necessarily

24.Doob (1992).

25.Doob, Marinos and Varma (1995).

conform to the present Canadian policy for young offenders. However, an attempt is made to discuss different concepts and include examples of programs which exist within Canada and internationally.

Sentencing Recommendations

Predisposition reports (PDR's) are summaries of an investigation into a youth's background, personal and family situation, previous history of unlawful behaviour, current circumstances, and attitude toward the offence and the victim. Reports are prepared by a probation officer/youth worker at the request of a judge to assist in making a decision with respect to what would be the most appropriate disposition. Although there are no precise data on the extent to which these reports are requested, anecdotal evidence suggests that they are a fairly routine part of many dispositional hearings, especially when custody is being considered.[26]

Some sentencing recommendations are meant to go beyond the customary PDR. For instance, in some areas of the United States, defence-based advocacy reports have been prepared by non-system personnel acting on behalf of the young person (not the court). The difference between the two reports is in their focus -- PDR's tend to be standardized, whereas defence-based advocacy reports are individualized, may provide more detail about the youth's background, and include a complete rehabilitative plan that identifies specific alternative (non-institutional) dispositions. An evaluation of case disposition advocacy in San Francisco found that 72 percent of the youth who received advocacy services were diverted from custody, compared to 49 percent of those who received regular pre-disposition reports.[27]

A similar concept, Client Specific Planning (CSP), not only assesses client needs relating to rehabilitation, employment and supervision, but also proposes specific programs to address these needs. This type of pre-sentence preparatory work may increase the possibility that a proposal involving an alternative to custody will be accepted by the sentencing judge and that the sentence will be successfully completed.

CSP is based on three principles: there must be effective controls on the offender; there must be significant restitution; and, there must be some

26.PDR's are mandatory (with some exceptions) when the court is considering custody.

27.Macaillair (1994).

form of sanction imposed by the court. Community service is an integral component of most plans, based on the premise that criminal activity invariably extracts something of value from the community. However, the community service is closely monitored by intensive supervision. Although CSP involves a more intensive pre-sentence evaluation than is currently the norm, one of the benefits experienced in some jurisdictions is that it uses existing community resources, rather than creating new ones. The savings in custodial resources may offset the additional resource requirements at the sentencing stage. In an examination of evaluations of Client Specific Planning programs, CSP was found to be effective as a means of de-institutionalization. In six of seven studies, CSP either reduced the percentage of individuals incarcerated or the length of time to be served in custody.[28]

In Canada, sentencing circles based on traditional aboriginal healing and talking circles are being used in a number of aboriginal communities, and have the potential to affect the way in which aboriginal young offenders are sentenced. As discussed in Chapter 12, aboriginal youth are greatly over-represented in the youth justice, and especially youth custody, systems. Sentencing circles are premised on the belief that traditional aboriginal justice systems used circles to facilitate reconciliation and peace, rather than for retribution and deterrence. A circle characteristically involves the accused and victim, their families, elders, the presiding judge and other interested community members. The defence counsel, a prosecutor and a police officer are also normally in attendance. Offenders are referred to a sentencing circle by a judge, at their own request, by defence counsel, or by a community justice committee. The objectives are to enable community members to recommend a sentence to the judge and to reconcile the offender and the victim. The advantages of conducting a sentencing circle include fashioning sentences that assist aboriginal offenders who have a genuine desire to heal and change their lives, and reinforcing and building a sense of community to heal individuals and families.

There are no national or provincial/territorial criteria or guidelines which have been established for the use of sentencing circles. It is unclear whether victims must agree to the circle being held. This ambiguity surrounding the role of the victim has called into question the appropriateness of sentencing circles for more serious matters, which

---

28.Yeager (1992).

may be more suitable for the formal court process.[29]

Youth justice committees have been formally established in several jurisdictions under section 69 of the YOA. One function of these committees can be to provide recommendations on sentencing to the youth court. Indeed, in some aboriginal communities, these committees operate as sentencing circles. In Alberta and Manitoba, the committees established in aboriginal communities have primarily taken on a sentence advisory role while those operating in non-aboriginal communities have focused on alternative measures programs.

Youth justice committees often invite various parties to participate in the sentencing process, such as the offender, the offender's family, the victim, police, and other interested persons. A sentencing plan is reached by consensus. The committee may also consult with other interested parties, for example, school officials, social workers, substance abuse counsellors and other agencies instrumental in carrying out the disposition. Members of the committee can also monitor the progress of the offender and the family to ensure that the disposition is followed.[30]

Family group conferences, initially developed in New Zealand, bear some resemblance to Youth Justice Committees and sentencing circles in Canada. In a family group conference, the young person, his or her parents (and extended family), the victim, the police, a facilitator, and sometimes representatives of the community and social service agencies are brought together to formulate a mutually agreed sentencing plan which typically involves an emphasis on reparation to the victim and to the community. As noted, the widespread use of family group conferencing appear to have lead to a substantial decrease in the use of custody in New Zealand.[31]

29.LaPrairie (1994). Sentencing circles are also discussed in Chapter 2.

30.Youth justice committees are discussed in more detail in Chapter 2.

31.Family group conferencing is discussed in more detail in Chapter 2.

Parent/Family Interventions

There are a variety of approaches to family/parent interventions and support programs including, for example, parent education and parent support groups, parent/family skills training, family preservation programs, and various types of intensive, family-based therapies. Kumpfer (1994) presents a useful review of these types of programs, and of evaluations of the same.

A Canadian example of a parent training and support program is the Family Preservation Program, established in six communities in Saskatchewan; the program is designed to provide practical community-based options for youth who would otherwise receive a custody disposition. This three to six month program offers a voluntary in-home service to families. Program staff work with young people and their families to improve family functioning and resolve difficulties which may have contributed to the offending behaviour. They also assist youth and their families to prepare for the youth's release from custody. Services include developing effective conflict-resolution skills; exploring alternative ways of dealing with stress; identifying areas which may require counselling or treatment; finding accommodation for the youth or family; acting as a liaison between the family and the school; making referrals to other community-based agencies; and working with parents to develop more effective parenting skills. The theoretical underpinning of the program is that, by involving the family in the treatment of a young offender and doing it in the home rather than at traditional social work clinics, recidivism can be reduced.

Reparative Sanctions: Restitution and Community Service

Restitution programs provide the opportunity for an offender to pay for the damage he/she has done to the community, either through fine payment or employment leading to compensation of the victim. Although these options are usually imposed on the least serious offenders, experience in the United States (see below) has found that these programs, when combined with other treatment modalities, can be used as an alternative to custody.

The Second Chance program, initiated in 1995 in Saskatchewan, has been developed for aboriginal and non-aboriginal young offenders. Youth found guilty of charges like theft, break and enter, and vandalism are eligible for the program, if recommended in a pre-dispositional report. The program strives to encourage youth to take responsibility for their actions

and compensate victims for their losses. The program assists youth in finding employment so that they can pay fines or restitution. The money the youth earns is funnelled directly into an account through the court system and restitution funds are forwarded to the victims when the account covers the amount owed.

A similar program, run by the Regina Friendship Centre, is the Atoskata Victim's Compensation Project. This program differs from alternative measures programs because it allows compensatory options for youth as part of their dispositional planning. The targeted population are court-ordered aboriginal and non-aboriginal youth between the ages of twelve and seventeen, convicted of automobile theft. This project provides: work opportunities which will generate earnings to be directed to victims of crime, opportunities to do personal service work for victims of crime, mentoring relationships with aboriginal elders as a form of traditional healing and learning relevant to offending behaviour, and supervision and guidance for youth.

In a study on the effect of restitution programs on recidivism in four juvenile court jurisdictions in the United States, youth were randomly assigned into restitution programs or traditional dispositions such as probation. The study revealed that in two sites juveniles had less (approximately 10%) subsequent contact with the law in a two to three year follow-up. The results suggest that restitution programs may have an effect on the rate of recidivism among youth due to the intensive supervision level of the programs. Since youth are involved in the community and spend most of their free time at work or in other activities, they may spend less time with other youth involved in crime. In addition, by being confronted by their victim, youth may learn the consequences of their actions.[32] A review of research studies in several countries dealing with attitudes toward the use of restitution found that victims and offenders, justice system personnel, and citizens and legislators were highly supportive of using restitution as an alternative to incarceration for property offenders.[33]

Victim-offender mediation/reconciliation programs, which can be employed as both diversion and dispositional measures, are discussed in Chapter 4.

32.Schneider (1986).

33.Hudson (1992)

Community service is intended to engender a sense of responsibility in the offender, and may be used when the young person is unable to pay restitution, or when no restitution is involved (because there was no property loss or damage). In Canada, community service is most often a condition of probation, although "stand-alone" community service orders are found in some jurisdictions. One of the arguments often made on behalf of community service is that it provides for community involvement in the reintegration of the offender. Although little research exists to support this argument, it has been argued that the involvement of the community is enhanced when community service is carried out within community organizations.[34] As noted earlier, community service is a fairly common disposition in Canadian youth courts.

Multi-pronged, Intensive Approaches to Probation

A number of American programs utilize restitution, community service, surveillance, and strict probation conditions for high risk offenders. Several jurisdictions in Canada have also established intensive supervision programs for cases assessed as being of higher risk and/or need. These programs are sometimes called "intermediate interventions". Simple "keep 'em busy" and/or under surveillance approaches to juvenile intensive supervision will not work unless they are combined with cognitive-behavioural program elements that target offender characteristics which are known to be associated with re-offending,[35] are multi-faceted, and include role-playing, modelling and social cognitive skills training.[36] The way in which the program is delivered (e.g., day programs, attendance centres, group work, or intensive supervision) is probably less important than the contents of the program and how closely the contents are geared to the needs of the offenders. For example, unskilled community work may not achieve much unless the program includes instruction (informal or formal) on other areas such as the skills needed in holding a job, or how to deal with work-related stress (e.g., handling a difficult person without resorting to verbal or physical assault).

34.Joutsen and Zvekic (1994).

35.Andrews and his colleagues (1992) suggested that – in terms of targeting treatment to those criminogenic factors or offender needs which are capable of change – the most promising targets are changing antisocial attitudes, feelings and peer associations; promoting familial affection in combination with enhanced parental monitoring and supervision; promoting identification with anti-criminal role models, increasing self-control and self-management skills; replacing the skills of lying, stealing and aggression with other, more prosocial skills; reducing chemical dependencies; and generally shifting the density of rewards and costs for criminal and non-criminal activities in the young offender's environment.

36.Antonowicz et al. (1995)

The "productive engagement" model of intensive supervision uses employment as a tool to accomplish the goal of supervising the offender. According to one of its proponents, the merits of a productive engagement approach include:

- providing a legitimate income to permit prompt payment of the maximum amount of restitution to victims;
- offsetting some of the costs of correctional programs through contract arrangements for offender labour and deductions from paychecks for fees and fines;
- providing exposure to conventional peers and role models, and to norms that support employment and a "work ethic";
- reinforcing to youthful offenders, through work requirements, the message of the cost of crime, and;
- offering the opportunity to learn responsible money management, and to develop offender competencies.[37]

Strategies for achieving these benefits include: subsidized individual placement which use public funds, fees or fines to pay salaries to offenders -- who then pay restitution -- for work in public or private nonprofit agencies; private-sector job banks based on agreements with local small businesses to reserve job slots for restitution clients; and, project-supervised work crews which use groups of offenders who are generally paid through contracts with government agencies and/or subsidy funds to complete socially beneficial projects.

An example of this model was the juvenile intensive supervision program in Quincy, Massachusetts. High-risk offenders were selected, based on the state's recidivism prediction scale. The program reduced recidivism rates to approximately fifty percent from a projected rate of ninety percent. Offenders were ordered to perform a minimum of 250 hours of community service and pay any restitution determined. The maximum number of hours ordered was 1,000. Restitution orders averaged $350. The probationers were ordered to attend school and abide by curfews set by the program; if suspended, expelled or caught skipping school, they were required to report for community service until re-enrolled. Because many high-risk offenders will fail in the first several attempts, strategies must be developed for dealing promptly and effectively with these initial failures before they are allowed to escalate. Progress with this population is incremental in nature, and successful programs must incorporate a

37.Brazemore (1991).

system of rewards and punishments for good and poor performance. As the high risk offender's performance improves, controls can be loosened and vice versa. By responding incrementally and progressively to both bad and good behaviour, programs can avoid the ultimate sanction of institutionalization while ensuring an acceptable completion rate.[38]

The "Intermediate Treatment" movement that was earlier cited as helping to reduce the use of custody in England and Wales in the 1980's utilized a variety of approaches, including group work, individual counselling, community meetings, discussion workshops, daily monitoring, mediation and reparation, parental involvement/meetings, full-time remedial education, and one-on-one supervision.[39]

The Youth Futures Residential and Day Attendance Program in British Columbia is one of many Canadian examples of an intermediate intervention program. The program is a sentencing option for young offenders aged thirteen to seventeen (male and female) who require more than probation, but not incarceration. Referrals are made by youth probation officers for youth who exhibit problems ranging from attention deficit disorders and social immaturity to substance abuse and acting out. These problems are often exacerbated by family disfunction, weak community linkages and negative peer relationships. Youth are required to attend as a condition of probation. The aim of the program is to provide young offenders and their families with fresh knowledge and skills, and to encourage youth to retain these positive new resources when they have completed the program. During the first week of participation, the youth is placed with a "host family" and an assessment of the youth and his/her family is undertaken. Then, each youth is assigned a youth worker responsible for carrying out the assessment plan, including monitoring curfews, supervising and providing individual support to the youth, and participating in recreation and cultural programming. The program includes: a day program, focusing on educational and vocational skill development; an evening program, emphasizing personal and social skills; weekend programs, focusing on recreational and cultural interests; and, an after-school program when a youth requires programmed activities. To aid in consistency and follow-through, the program emphasizes a collaborative case approach involving other service organizations.

38.Klein (1991).

39.Bottoms et al. (1990).

In summary, intermediate interventions are designed for young persons who would otherwise have received custodial sentences -- a sizeable segment of the custodial population who are chronic but not "dangerous" young offenders. What these programs have in common is that they provide mid-range alternatives to what has often been a bi-polar response to young offenders: institutionalization (which may or, probably, may not address the needs of incarcerated youths and their ability to function successfully in their home communities after release) and community-based programs (which frequently lack the degree of control characteristic of custodial dispositions).

A key element to these types of programs is individualization and assessment. There are a host of factors (needs) which contribute to offending and these vary according to the individual case. Youths also pose different levels of risk. Assessment and, in particular, risk/needs assessment instruments are discussed in Chapter 8.

Systemic Strategies

The most famous experiment in the de-institutionalization of juvenile offenders occurred in Massachusetts, where large training schools were closed and institutional budgets were re-allocated to small, secure treatment-oriented facilities and networks of community-based programs. One study found that recidivism rates for youth parolees in the Massachusetts system decreased from 42 to 23 percent in the three years following implementation.[40] Following this dramatic move, the annual correctional cost per young person in Massachusetts was reported to be much lower than in many other states.[41] While it is improbable that widespread closure of secure custody facilities would be feasible in today's climate, the Massachusetts experiment -- and similar approaches taken in Utah and some other American states -- provides support for the view that large youth correctional institutions can be replaced with small, secure facilities and multi-faceted and individualized interventions in the community without detriment to the community.

Somewhat in keeping with this approach, the United States Office of Juvenile Justice and Delinquency Prevention has proposed a comprehensive strategy for serious, violent and chronic juvenile offenders which involves both prevention, employing a "social development model,"

40.Macallair (1993). See, also, Austin et. al. (1991).

41.Ferdinand (1991).

and intervention strategies. With respect to intervention strategies, the proposals cite the experience of Massachusetts and other states and conclude that evaluations demonstrate that innovative programs, including secure and non-secure community-based programs, can be used effectively as alternatives to incarceration for many serious and violent offenders. The strategy, based on a "graduated sanctions" approach, supports intensive supervision, small secure treatment units, intensive aftercare programs, and a variety of intermediate interventions such as day treatment and education programs, family-based therapeutic interventions, and so on.[42]

6.5 DISCUSSION AND RECOMMENDATIONS

Non-custodial dispositions can be construed as sanctions in their own right and as alternatives to custody. Non-custodial dispositions are, in fact, the most common dispositions meted out by youth courts. Nonetheless, the proportion of youth court cases committed to custody (29%) is relatively high. There are reasons to believe that non-custodial alternatives to custody could be increased (and, conversely, custody rates reduced) in Canada, including:

- the disparity in rates of custody between Canadian jurisdictions suggests that rates could possibly be reduced in jurisdictions with higher rates;

- a substantial majority of youth are committed to custody for non-violent offences, which suggests that alternatives may not compromise public safety (bearing in mind that most of those committed to custody are recidivists, and many are chronic offenders);

- research which indicates that individualized and well planned community-based programs that are directed toward the needs and circumstances of young offenders are as or more effective than custody; and

- the apparent success of several other countries in reducing youth custody populations.

Other considerations are the high costs of custody and the well-known

---

42.Wilson and Howell (1993).

ineffectiveness of the same in preventing recidivism.

At issue is what changes may be required to better promote the use of community-based alternatives to custody, i.e., legislative versus administrative/program changes. With respect to legislative changes, the Task Force considered the option of proposing an amendment to section 20 YOA to provide for a form of intensive supervision in the community -- an "upper end" probation order designed for young persons who would otherwise have received a custodial disposition. This option was not supported because the present legislation is generally seen as providing sufficient scope for the use of alternatives to custody. Section 24 YOA, in conjunction with the Declaration of Principle and the broad range of conditions that can be imposed as part of a probation order, provide an adequate legislative foundation for the development of non-custodial alternatives. In effect, then, the encouragement of a greater reliance on alternatives to custody is seen as principally a matter of program initiatives, the availability of financing to support those initiatives, and policy.

A different kind of "upper end" community disposition that could be incorporated into section 20 YOA is the "conditional disposition," similar to the conditional sentence for adults contained in Bill C-41 (which will soon be proclaimed in force). Conditional sentences for adults have the following features:

- the sentencing judge orders a custodial sentence, but then orders the release of the offender into the community upon both mandatory and optional conditions where the court is satisfied that this would not endanger public safety;
- the order is more readily enforceable than a probation order (i.e., a new charge of breach is not required and the proof of a breach is based on a balance of probabilities that the offender has, without reasonable excuse - the proof of which lies upon the offender - breached a condition);
- should the offender breach a condition of release, the offender may be detained and brought back before the court;
- a number of options will then be available, including re-release upon conditions, or completion of the remainder of the sentence in custody; and
- a streamlined process is provided for amending conditions.

One of the key features of a conditional sentence is that the court must first decide to impose imprisonment and then release the offender to the community -- as such, it has the potential to act as a true alternative to imprisonment.

The availability of a conditional disposition could provide youth court judges an additional alternative to custody. Because of the greater enforceability and consequences of a breach of a condition, judges may be more inclined to release a young person on a conditional disposition (as compared to release on a probation order). For similar reasons, a conditional disposition might provide a greater incentive to the young person to abide by the conditions of the release. Another consideration is that it would seem anomalous to have an alternative sentence available for adults that is not also available for youth, especially given the principle of the mitigated accountability of young persons.

The primary concern about the proposal for a conditional disposition is the potential for "net widening," i.e., that the new disposition may, in practice, not be used for young people who would otherwise be committed to custody but rather for those who, in the absence of the new disposition, would have been placed on probation. If so, the greater enforceability and consequences of a breach of a condition could inadvertently lead to more admissions to custody for breaches. Arguably, concerns about net-widening could be addressed by the new (Bill C-37) factors discussed earlier that the court must consider before making an order for custody (s. 24 YOA); by establishing a statutory requirement that a predisposition report must be prepared before a conditional disposition could be imposed; and by assessing risk --- through, for example, risk/needs assessment instruments (Chapter 8) -- in the interest of ensuring that the new disposition is only employed with higher risk youth and the conditions imposed are appropriate to the case. Another way to address net widening concerns could be to require the consent of the provincial director prior to the imposition of a conditional disposition; therefore, the court would not have the jurisdiction to order the conditional sentence unless the provincial director consented.

Notwithstanding these means of better ensuring that the proposed new disposition would be applied to the intended target population, several members of the Task Force remained concerned about the potential for net-widening. One way to address these concerns would be to endorse the concept of a conditional disposition for young persons, subject to an assessment of the effects of the new conditional sentence in the adult

system, including the issue of net-widening.[43]

Another way to promote the use of community-based alternatives to custody is through the development of administrative guidelines for youth justice officials, including probation officers and Crown Counsel. Many jurisdictions do not provide specific guidance to officials in the youth justice system regarding the need to encourage the use of non-custodial alternatives. Any guidance that is provided tends to be only an outline of the applicable law to be considered. An example of guidelines to assist ir decision-making is found in British Columbia, where probation officers responsible for the preparation of pre-disposition reports are given direction on the appropriate considerations when making recommendations to the youth court. Specific guidance is provided on the circumstances when open and secure custody dispositions are normally to be recommended. Guidelines or "best practice" standards should also be of assistance to other court personnel, such as Crown Attorneys, in formulating appropriate disposition recommendations.

If community-based alternatives to custody are to be recommended by youth justice officials and ordered by the court, then suitable and effective community programs, of course, have to be in place. Resource availability is a significant issue in youth court and youth correctional systems that are already overloaded and typically wanting in resources. Passive acceptance of a steady influx of custody cases will not, however, change the situation. As well, it is important to note that the youth justice system does not, and should not, operate in isolation. Other youth serving agencies and the community can play an important role in fashioning individualized alternative community plans for young offenders. In Chapter 2, means to promote inter-agency and community involvement in the youth justice system, through conferencing, are discussed.

In light of the above, **the Task Force recommends that:**

In the interest of promoting the most effective use of community-based programs:

(1) Consideration should be given to the inclusion of a "conditional disposition" in section 20 YOA, akin to the conditional sentence for adults in Bill C-41, but subject first to experience with and assessment of the impact, including net-widening, of conditional

---

43.If a conditional disposition option is eventually enacted, there should be a review and reconciliation, to the extent possible, of the mechanisms for enforcement of a conditional disposition order and an order for conditional supervision.

sentences in the adult system.

(2) **Jurisdictions should consider the development of administrative guidelines for youth justice professionals, including probation officers and Crown Counsel, to provide guidance on disposition recommendation/submissions, including encouragement of the use of community-based alternatives to custody.**

(3) **Jurisdictions should give priority to the development of multi-faceted intensive supervision, day attendance and other community-based programs that act as alternatives to custody, having regard to the need to direct these programs to a population that would otherwise be placed in custody and thereby avoid or minimize net-widening. New programs should include a monitoring and assessment component and, where possible, new and existing types of programs should be formally evaluated to ascertain their effectiveness.**

Research is also required into the use and relative effectiveness of custody and community-based alternatives to custody. It is necessary to go beyond the "bare bones" of available statistics on youth court dispositions to examine in some detail **representative** samples of youth court cases. Comparative analyses of cases receiving custody and those receiving various other dispositions could include variables such as the nature of the dispositions available to and considered by the youth court; the reasons for the disposition; its duration; the participation of the young offender in programs and services while serving the disposition; the recurrence of offending during and/or after the disposition; whether the disposition was reviewed and, if so, with what results; and the various circumstances and needs of the young person before, during and following completion of the disposition. Information sharing among jurisdictions is also important. Regardless of the location of a particular alternative program, details of the project design and subsequent evaluations should be disseminated to other jurisdictions.

As noted, non-custodial dispositions can act as alternatives to custody, but also are sanctions in their own right which are applied in circumstances where custody would not be an option. In this regard, the Law Reform Commission has previously recommended (for adults) different types of community dispositional orders, including good conduct, reporting, residence and performance orders. A reporting order, would require an undertaking from the young person to, for example, report to

the police (or a person appointed by the court), while a performance order would require that the young person undertake to perform certain tasks such as participation in counselling, attending school, and so on. As such, these types of more narrowly focused orders could, for example, act as an alternative to a probation order.

In considering this matter, the Task Force thought that the range of non-custodial dispositions available in section 20 YOA is adequate and that the incorporation of more discrete types of community dispositions would pose no real advantage over a probation order - a probation order can, for example, be limited to narrow conditions which satisfy the same ends as a reporting, residence or performance order[44]

One issue connected to community dispositions, however, relates to the enforceability of orders for monetary compensation for losses or damages. As noted, compensation/restitution orders are fairly infrequent (7% of youth court case dispositions), probably because many offences do not require it and because many young persons do not have the means to pay.

For adults, sections 725 and 726 Criminal Code (soon to be amended by Bill C-41 as section 741 C.C.) permit a victim to file an order for compensation made against an accused in a criminal court with a civil court, if the order for compensation has not been paid forthwith. If so filed, the order is entered as a judgment enforceable against the accused as if it were a judgment rendered in that court in civil proceedings. By virtue of subsection 20(8) YOA, these provisions are not applicable to young persons. If the Act was amended to make these provisions applicable to young persons, there would be at least some increased likelihood of victims eventually receiving compensation.[45]

The principal concern about making youth court orders for compensation civilly enforceable is that it could lead to circumstances where a debt is

---

44. Note, however, that a good conduct order is somewhat akin to a peace bond, available for adults under s.810 C.C. but there is some uncertainty about whether these statutory peace bonds (as opposed to common law peace bonds) are available for young persons. Peace bonds are not sentences/dispositions per se and therefore are discussed in Chapter 4.

45. The civil enforceability of youth court compensation orders might also be tied to complementary provincial and territorial civil legislation vis-a-vis parental responsibility for damages or losses arising from the criminal acts of their children. For example, such legislation could make a parent severely liable for a youth court compensation order that is filed for civil enforcement, subject to a legal test of negligent conduct by the parent. (See, Chapter 10 regarding parental civil liability).

left hanging over the head of a young person for several years - for example, the case of a thirteen year old - thereby impeding later rehabilitative opportunities such as post-secondary education. Essentially what is at issue is competing social values: the right of an innocent victim to compensation versus the interests of young persons, which interest can also serve the broader public interest in the long term.

There are also potential complications since, for example, the registration of a civil judgment could lead to identification of the young person as an offender, similar to any other civil judgment filed against young persons in relation to civil law suits.

The Task Force was not able to achieve consensus on this issue - a slight majority supported amendments which would facilitate civil recovery. Given this, **a majority of the Task Force recommends that:**

> **The Act and, as required, the Criminal code should be amended to permit a youth court order for compensation to be filed as a civil judgment against a young person. This may also require consequential amendments to provincial legislation.**

It should also be noted that there are administrative program measures which can facilitate compensation to victims. For example, Saskatchewan has recently established a pilot victim compensation program in Regina for young offenders. The program, which involves a multi-agency approach and includes a mentoring component, facilitates work opportunities for youth which produces income that is used to pay compensation to victims. Alternatively, the youth may carry out personal services to the victim or make payments to a charity designated by the victim. Programs that facilitate compensation to victims should be encouraged.

Another area connected to community-based dispositions is offences against the administration of justice, which primarily include the offence of failure to comply with a non-custodial disposition (but also breach of a bail condition, failure to appear, or escape custody/unlawfully at large). As noted, offences against the administration of justice comprise a relatively large proportion (17%) youth court cases in Canada and of committals to custody - in 1993/94, 41 percent of youth found guilty of an offence under section 26 YOA were committed to custody. Of all the youth court cases resulting in a committal to custody (for any type of offence), 14 percent were for section 26 YOA offences and an additional

5.5 percent for the failure to appear or breach of an undertaking (recognizance).[46]

The average custody disposition length for section 26 YOA offences is less than two months, which suggests that custody may not be imposed for public protection purposes - it is likely that a key consideration in many of these kinds of cases is maintaining the integrity of the youth justice system through, for example, denunciatory or deterrent dispositions.

In many situations, a custody disposition may be the only realistic response to a breach. The young person may have already been given several opportunities to comply with a court order or to rectify offending behaviour. Responses short of custody may be viewed as only giving the young person another opportunity for non-compliance and undermine the integrity of the court. Similarly, if the original offence was relatively serious and probation with conditions to attend to a specialized community-based program as an alternative to custody was ordered, then a custodial response to a breach should be expected in many cases.

However, anecdotal evidence also indicates that, in some cases, custody for a breach is ordered where the original offence was less serious (i.e., where custody would not have been a realistic consideration) and the breach is also less serious (eg. curfew, school attendance). In this regard, there is a need to ensure that the conditions of probation (or bail orders) are focused on the underlying offence and behaviour of the young person and are necessary in order to hold the young person accountable or to manage the risk presented by the young person in the community. Additional or unrealistic conditions may "set up" a breach and result, in effect, in the court being backed into a corner to maintain the integrity of the original disposition.

One way to address this concern is for jurisdictions to develop guidelines for key youth justice officials which address the relevance and necessity of conditions of probation (and bail orders). In light of this, **the Task Force recommends that:**

> **Jurisdictions should consider the development of best practice standards or guidelines for youth justice officials involved in the supervision or prosecution of administration**

---

46. An additional 8.1% were for escape custody or unlawfully at large.

of justice offences - including probation officers and Crown Attorneys - so that non-custodial orders are used effectively and appropriately and so that recommended conditions are aimed at offender accountability and rehabilitation, addressing issues presented by the underlying offence and the management of the risk presented by the young person.

Police forces could also be included in the development of these guidelines.

Alternative responses to breaches could also be explored. For example, many minor breaches are dealt with by warnings but, if they persist, then a formal charge is often the only alternative. Administration of justice offences are specifically excluded from consideration for alternative measures in some jurisdictions while in other jurisdictions that do not specifically exclude them, the usual practice is not to direct such charges into alternative measures programs. Policies in this regard could be reviewed.

Also, section 32 YOA provides an opportunity for a review and change of the conditions of a non-custodial disposition in circumstances, for example, where the young person is unable to comply with or experiencing serious difficulty in complying with the terms of the disposition. Young persons should be informed or reminded of their capacity to apply for a review and, in appropriate circumstances, encouraged to do so when it appears there are grounds to justify a review.

REFERENCES - CHAPTER 6

Allen, R. (1991). "Out of jail: The reduction in the use of penal custody for male juveniles 1981-88." The Howard Journal, 30(1), 30-52.

Andrews, D.A., Leschied, A.W., & Hoge, R.A. (1992). Review of the profile, classification and treatment literature with young offenders: A social-psychological approach. Ontario: Ministry of Community and Social Services.

Antonowicz, D.H., Izzo, R.L., and Ross, R.R. (1995). "Characteristics of effective offender rehabilitation programs," in R.R. Ross and R.D. Ross (eds.), Thinking straight: The reasoning and rehabilitation program for delinquency prevention and offender rehabilitation. Ontario: Air Training and Publications, pp. 39-64.

Association internationale des magistrats de la jeunesse et de la famille (AIMJF) (1994). Jeunes délinquants et jeunes en danger en milieu ouvert: Utopie ou réalité? Toulouse, Editions Erès.

Austin, J. et.al (1991) Unlocking Juvenile Corrections: Evaluating the Massachusetts Department of Youth Services. San Francisco : National Council on Crime and Delinquency.

Axon, L., and Moyer, S. (1995). Alternatives to custody: A Report to the Federal-Provincial/Territorial Task Force on Youth Justice. Ottawa: Department of Justice.

Bazemore, Gordon. (1991). "Work experience and employment programming for serious juvenile offenders: prospects for a "productive engagement" model of intensive supervision," in T. Armstrong (ed.), Intensive Interventions with High-Risk Youth: Promising Approaches in Juvenile Probation and Parole. Monsey, N.Y.: Willow Tree.

Bottoms, A. et al. (1990). Intermediate Treatment and Juvenile Justice: Key findings and implications from a national survey of intermediate treatment policy and practice. London: H.M. Stationary Office.

Braithwaite, J. (1989). Crime, shame, and reintegration. Cambridge: Cambridge University Press.

Brown, M. (1993). "Juvenile Justice in New Zealand". In Atkinson L. and Gerull, S. (eds), National Conference on Juvenile Justice: Proceedings of a conference held 22-24 September 1992. Canberra: Australian Institute of Criminology, 1993).

Canadian Centre for Justice Statistics. (1995). Corrections key indicator report for adults and young offenders. Ottawa: Statistics Canada.

Carroll (1994). "Implementational Issues: Considering the Options for Victoria," in, Alder, G. and J. Wundersitz (eds.), Family Group Conferencing and Juvenile Justice. Canberra: Australian Institute of Criminology.

Centre for the Study of Youth Policy (1987). Reinvesting Youth Corrections Resources: A Tale of Three States Ann Arbor, Michigan: University of Michigan.

Clear, Todd R. (1991). "Juvenile intensive probation supervision: theory and rationale," in T. Armstrong (ed.), Intensive Interventions with High-Risk Youth: Promising Approaches in Juvenile Probation and Parole. Monsey, N.Y.: Willow Tree Press.

Department of Social Welfare, New Zealand. (1995). The Children, Young Persons and their Families Act in Operation - Key Statistics. Wellington, N.Z.

Doob, A.N. (1992). Trends in the use of custodial dispositions for young offenders. Ottawa: Canadian Centre for Justice Statistics.

Doob, A.N., and Roberts, J.V. (1988). "Public punitiveness and public knowledge of the facts: Some Canadian surveys," in Walker and M. Hough (eds.), Public attitudes to sentencing: Surveys from five countries. Aldershot, England: Gower.

Doob, A.N., Marinos, V., and Varma, K. (1995). Youth crime and the youth justice system in Canada: A research perspective. Department of Justice Working Document WD1995-1e.

Ferdinand, T.N. (1991). "History overtakes the juvenile justice system." Crime and Delinquency, 37(2), 204-224.

Gendreau, P., and R. Ross (1987). "Revivification of rehabilitation: Evidence from the 1980's." Justice Quarterly, 4(3), 349-408.

Greenwood, P.W. (1986). "Promising approaches for the rehabilitation or prevention for chronic offenders," in P. Greenwood (ed.) Intervention strategies for juvenile offenders. Westport, Connecticut: Greenwood.

Hudson, J. (1992) "A Review of Research Dealing with Views on Financial Restitution," in, H. Messmer and H. Otto (eds.), Restorative Justice on Trial. Boston: Kluwer.

Joutsen, M., and Zvekic, U. (1994). "Noncustodial sanctions: Comparative overview," in U. Zvekic (ed.), Alternatives to imprisonment in comparative perspective. Chicago: Nelson-Hall.

Junger-Tas, Josine. (1992). "Juvenile Delinquency in the Netherlands: Trends and Perspectives." International Journal of Comparative and Applied Criminal Justice, 16(1) 207-229.

Klein, Andrew R. (1991). "Restitution and community work service: promising core ingredients for effective intensive supervision programming," in T. Armstrong (ed.), Intensive Interventions with High-Risk Youth: Promising Approaches in Juvenile Probation and Parole. Monsey, N.Y.: Willow Tree Press.

Kumpfer, K. (1994) Family Strengthening in Preventing Delinquency: A Literature Review. Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention.

La Prairie, Carol. (1994). Altering course: New directions in criminal justice and corrections. Ottawa: Department of Justice.

McCarney, W. (1996). Juvenile Delinquents and Young People in Danger in an Open Environment. Winchester: Waterside.

Macallair, D. (1993). "Reaffirming rehabilitation in juvenile justice." Youth and Society 25(1) 104-125.

Macallair, D. (1994). "Disposition case advocacy in San Francisco's juvenile justice system: A new approach to deinstitutionalization." Crime & Delinquency 40(1) 84-95.

Maxwell, Gabrielle M., and Morris, Allison. (1993). Families, victims and culture: youth justice in New Zealand. Wellington, N.Z.: Social Policy Agency and Institute of Criminology.

Miller, J.G. (1991). Last one over the wall: The Massachusetts experiment in closing reform schools. Columbus: Ohio State University Press.

Moyer, S. (1995). System approaches to reducing the use of custody: A report to the Federal-Provincial/Territorial Task Force on Youth Justice. Ottawa: Department of Justice.

Peat and Marwick. (1986a). Fact book on community service order programs in Canada. Ottawa: Department of Justice Canada.

Peat and Marwick. (1986b). Fact book on restitution programs in Canada. Ottawa: Department of Justice Canada.

Pelikan, Christa. (1992). "The Austrian Juvenile Justice Act 1988. A New Practice and New Problems," in Messmer, Heinz and Otto, Hans-Uwe, (eds.), Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation - International Research Perspectives. Dordrecht: Kluwer Academic Publishers.

Saskatchewan Social Services. (1995). The Family Preservation Program. Regina, Saskatchewan.

Silverman, R.A., and Creechan, J.H. (1995). Delinquency treatment and intervention. Working Document WD1995-7e, Report No. 2. The Youth Justice Education Research Series. Ottawa: Department of Justice Canada.

Spier, P. (1995). Conviction and Sentencing of Offenders in New Zealand: 1985 to 1994. Policy and Research Division, Department of Justice, Wellington.

United States Department of Justice, Office of Justice Programs, National Institute of Justice. (1996). "Alternative Sanctions in Germany: An Overview of Germany's Sentencing Practices." Research Preview, February 1996.

Wilson, J. and J. Howell (1993). Comprehensive Strategy for Serious, Violent and Chronic Juvenile Offenders. Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention.

van der Laan, Peter. (1992). "Same Programs, Different Outcomes: The Use of English Alternative Practices for Juveniles in the Netherlands." in H. Messmer, and H. Otto, (eds.), Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation - International Research Perspectives. Dordrecht: Kluwer Academic Publishers.

Yeager, M.G. (1992). Survey of Client Specific Planning programs and their feasibility as an alternative to incarceration in Canada. Report 1992-06. Ottawa: Ministry of Solicitor General Canada.

CHAPTER 7 - CUSTODIAL PROCESSES

In Chapter 6, the issue of community-based alternatives to custody was addressed. In Chapter 8, other issues directly related to the use of custody are addressed, such as assessment, rehabilitation and reintegration programs, and the placement of older youth in adult correctional facilities. As well, the role of other agencies in providing alternative and complementary services to youth is discussed in Chapter 2. Accordingly, this chapter does not address all aspects of custody, but rather will address, in fairly summary fashion, matters related to custodial processes, including:

- the determination of the level of custody (open or secure);
- temporary release from custody; and
- release from custody to conditional supervision.

7.1 DETERMINATION OF LEVEL OF CUSTODY

From its outset, the Young Offenders Act (YOA) has provided for two types or levels of custody - open and secure - and for the youth court, at disposition and review, to decide which type of custody a young person will be placed in.

Secure custody is only broadly defined in section 24.1 YOA as a place or facility designated by the Lieutenant Governor in Council for the "secure containment or restraint of young persons". In practice, secure custody usually involves secure detention centre types of facilities, but in some jurisdictions can also include isolated forest camps or intensively staff group homes. Open custody is defined in the same section as including a community residential centre, group home, child care institution, forest or wilderness camp, or any other like place or facility. In practice - and bearing in mind that there are differences between jurisdictions in how open custody is operationalized - open custody resources can include all of these types of facilities and, in some jurisdictions, "community" (foster-type) homes.

As noted, if a decision is made by the court to commit a young person to custody, the court also decides whether the custody will be open or secure. Since predisposition reports are required (except when waived by consent) before imposing a custody disposition, this decision may be assisted by information or recommendations in that report.

If a young person is initially committed to secure custody, only the youth court can order subsequent placement in open custody by way of an application for review under sections 28 or 29 YOA[1]. If placed in open custody, the provincial director may (administratively) transfer the young person to secure custody for a temporary period not exceeding fifteen days if the young person escapes or attempts escape or the transfer is necessary for the safety of the young person or the safety of others in the place of open custody. Once this temporary placement has expired, the young person must be returned to open custody. Otherwise, the only way to effect the secure placement of a young person who is in open custody is if a new offence is committed (eg. escape) and the young person is found guilty and committed by a youth court to secure custody.

In 1994-95, 53 percent of the sentenced youth custody population was in

---

[1] Section 30 YOA provides for the establishment of review boards, but no jurisdiction has implemented them (Newfoundland previously had a review board for a short period). The authority of a review board is more limited than that of the youth court

open custody; there were some differences according to jurisdiction, ranging from a high of 70 percent in open custody to a low of 45 percent.

The open and secure custody provisions represent a marked departure from historical and adult practices. Under the Juvenile Delinquents Act, the juvenile court could commit a young person to a training or industrial school, or to the care of child welfare authorities, but decisions as to placement and release were administratively determined. In the adult system, when the court sentences a person to imprisonment, decisions as to whether the offender will be placed in facilities of greater and lesser security are made administratively.

Although not a public issue, the provisions for open and secure custody have been the source of considerable concern for most provincial and territorial youth correctional administrators. Several jurisdictions have taken the position that decisions about placement in a level of custody should be administratively determined. Essentially, what is at issue is whether decisions about placement are best decided by the courts or administratively. In 1991, the federal Department of Justice released a Consultation Document on the Custody and Review Provisions of the Young Offenders Act which identified issues and options for change. In brief, some of the key concerns about the open and secure provisions included:

Predisposition reports do not necessarily contain information about how a young person will behave and adapt to a particular type of custodial environment, nor can this be known until there is experience with the young person in custody.

- unsuitable placements in open custody, even if infrequent, can inhibit effective programming for the young person and other youth in custody. For example, only one very disruptive youth who is placed in a group home can disrupt the program for all. Moreover, unsuitable placements can, in effect, "set up" these youth, resulting in repeated temporary transfers to secure custody and reinforcing a cycle of failure.

- unsuitable placements in open custody can lead to escapes and subsequent offending.

- there is a tendency for youth who have been found guilty of more serious offences to be placed in secure custody and those with less serious offences in open custody. Yet, the nature of the offence does not necessarily address how a young person will adapt to a particular

custodial environment, resulting in some more serious offenders being unnecessarily held in secure custody and some very difficult and disruptive, but less serious offenders being held in open custody.

- the provisions requiring judicial authorization by way of a section 28 or 29 YOA review, because of the delay inherent in these procedures, inhibit timely "cascading" from secure to open custody. There is also a reluctance to apply for reviews in circumstances of "marginal" or somewhat uncertain cases because of the inability (except for temporary transfers) to return the young person to secure custody in the event the open custody placement is not successful.

- the bifurcation of custody into open and secure is artificial and does not reflect the reality of practice. In fact, there are many levels of security and control. In addition, there is an uncertainty about the line of demarcation between secure and open custody (and between open custody and an order for residence made as a condition of probation).

- the need to establish two systems of custody and the inability (or limited ability) to mix secure and open custody populations leads to duplication and inefficiency and inhibits the development of special programs, especially for minority populations (eg. females, aboriginals) or youth who have particular program requirements (eg. sex offenders, substance abuse treatment).

- court reviews to effect changes from secure to open custody are time consuming and costly to over-burdened youth court systems.

In contrast, the arguments advanced in support of judicial determination of the level of custody included:

- the provisions are consistent with the Declaration of Principle, and international instruments respecting juvenile justice, which reflect the principles of minimizing the deprivation of liberty (open custody), the protection of society (secure custody), and the due process rights of young persons (judicial decision-making).

- the decision is made in a public forum and is visible to the community.

- judicial decision-making is not unduly influenced by administrative and resource considerations.

- judicial decision-making better ensures that the original intent of the custodial disposition is respected.

- arguably, the courts are better positioned to weigh concerns about the protection of society.

- the requirements for open custody have promoted the development of a diverse range of custodial programs, including less restrictive forms of custody such as open residential centres, group homes and community homes.

In 1990, there was a unanimous resolution by provincial and territorial Attorney Generals which urged that the custody provisions of the Act be amended to provide the provincial director with greater flexibility in the placement of young persons while also providing for mechanisms to protect the liberty of young persons against inappropriate placements. In response to this, and to the Consultation Document described earlier, Bill C-37 enacted several changes to these provisions, the key elements of which (in summary) include:

- the former offence-based criteria which needed to be satisfied before the court could order secure custody were repealed and replaced by new criteria, applicable to both secure and open custody, which are not offence-based and which include that custody shall not be used as a substitute for child welfare, health, or other social measures. These changes may address concerns about the tendency to decide placement in open or secure on the basis of the nature of the offence and also concerns about the "net-widening" effects of open custody.

- jurisdictions have the option to continue with judicial decision-making as to placement in either level of custody or to designate the provincial director as the decision-making authority.

- in deciding whether a young person shall be placed in open or secure custody the youth court or the provincial director shall take into account enumerated factors, such as a young person should be placed in a level of custody involving the least degree of containment and restraint (having regard to specified considerations), the needs and circumstances of the young person, escape risk, and so on.

- where the youth court is the decision-making authority, the provincial director may, as described earlier, temporarily transfer the young person from open to secure custody, but otherwise only the court may

authorize subsequent changes from secure to open custody by way of an application for review under sections 28 or 29 YOA. (There remains no capacity to "convert" an open custody disposition to secure custody).

- where the provincial director is the decision-making authority:

  (I) the provincial director may place the young person in either secure or open custody after having taken into account the enumerated factors described above.

  (ii) the provincial director may administratively transfer the youth from secure to open custody if the provincial director is satisfied that the needs of the young person and the interests of society would be better served thereby.

  (iii) the provincial director may administratively transfer the youth from open to secure custody if there has been a material change in circumstances and having considered the enumerated factors described above.

  (iv) where the young person is administratively placed in secure custody and disagrees with the provincial director's decision, the young person may apply to the youth court for a review of that decision; the court may either confirm or alter the provincial director's decision.

Given these changes, it might be expected that the debate about the open and secure custody provisions may have subsided because the Act now allows jurisdictions to elect a quasi-administrative decision-making procedure (subject to statutory criteria and judicial review of secure custody placements). This is not, however, the case.

At present, no jurisdiction is planning to designate the provincial director as the decision-making authority because of several concerns about these new provisions, including:

- because of the availability of a right to a court review and the practical reality that the "final" decision about placement in secure custody, in effect, rests with the youth court, it is anticipated that there would be a significant number of court reviews. This would have considerable workload and cost implications for the provincial director (vis-a-vis attendance of hearings and preparation of reports), legal aid and court-

appointed counsel, Crown Counsel, and court resources.

- added complexity to the process by, in effect, creating a two-tiered system of decision-making about secure custody placements, i.e., first by the provincial director and then, on review, by the youth court.

- a court review process lacks timeliness, given the requirements for filing an application, notice, application for legal aid or court-appointed counsel, fixing a hearing date, the preparation of a report by the provincial director, and conducting a hearing. Given the relatively short duration of many custodial dispositions, it is possible some dispositions may expire before the court review process is complete.

- the role of Crown Counsel in the process is unclear; the provincial director may have to retain counsel, thereby adding further complexity and costs to the process.

- arguably, it is not appropriate for youth court judges to review and change administrative decisions, given their understandable lack of familiarity with the nature and dynamics of custodial operations. If it is accepted that placement decisions should be made administratively, it would be more consistent for there to be recourse to administrative review mechanisms and the common law.

- the quasi-judicial nature of the provincial director's decision-making raises concerns about potential civil liability issues.

It is not argued that there should be no mechanism of recourse available to young persons in these circumstances, but rather that an administrative mechanism would be more timely, cost efficient and appropriate. In this regard, there are different means of accomplishing an administrative review, i.e., through existing complaints processes, an Ombudsman, Child Advocate, or perhaps an administrative tribunal established by a jurisdiction for that express purpose. As well, the young person could still have ultimate recourse to the courts by way of prerogative writ.

The disadvantages of an administrative recourse mechanism include:

- administrative and resource considerations may influence decisions;

- there would not be uniformity across jurisdictions with respect to the administrative review mechanisms employed;

- recourse, except for prerogative writs, would not be carried out in a public forum;

- the young person would not have the same right to counsel; and

- few young persons are familiar with or have ready access to recourse mechanisms available at common law.

While, in the view of provincial and territorial representatives, relying on an administrative review process and the common law as mechanisms of recourse would be more appropriate than the court review procedures established by Bill C-37, question still remains about whether the Act should define open and secure custody at all. An alternative would be to repeal the open and secure provisions and replace them with a single disposition of "custody". If so, placement within a range of facilities and programs with varying degrees of security would be administratively determined. The advantages of this approach would be:

- the identified problems relating to placement and movement between levels would be resolved, as would the identified problems associated with the quasi-administrative options made available by Bill C-37.

- the courts may be more reticent to impose a custodial disposition, i.e., the net-widening effects of open custody would be avoided or minimized. Currently, the courts may be imposing open custody dispositions as an intermediate sanction; with a single disposition of custody and, given only a choice only between community alternatives and custody, the courts might choose the community alternatives more often.

- although not defined in law, varying levels of security and open custody resources would still be continued, especially given that less secure resources are less expensive than secure resources (sometimes considerably so) and the experience of adult correctional systems, which maintain a variety of types of custodial programs.

- given case law in the adult correctional system vis-a-vis Charter protected liberty interests, there would remain safeguards respecting fair process in youth correctional decision-making, including placement.

- cost and workload savings for the courts, Crown Counsel, legal aid/court-appointed counsel and youth correctional services.

- an enhanced capacity to develop specialized programs for minority and special needs youth.

The primary disadvantages of a single disposition of custody include:

- removal of a legislative guarantee of the establishment of open custody resources, with the consequent danger that open custody resources may be eroded, especially given that open custody resources tend to be smaller and easier to close than larger secure institutions.

- potential increased use of secure custody, given that cautious youth correctional administrators may be more inclined to place and retain youth in higher security levels.

- the potential for administrative decisions to be unduly influenced by resource and administrative considerations.

- potential lack of consistency in resources and decision-making across jurisdictions.

In considering the above:

Provincial and territorial representatives recommend that the provisions for open and secure custody in the Act be repealed and replaced by a single disposition of custody so that placement within a system of custody involving a varied range of programs and security is administratively determined.

If this recommendation is not accepted, provincial and territorial representatives alternatively recommend that the provisions brought about by Bill C-37 respecting the youth court review of secure custody placement decisions made by the provincial director should be repealed, so that the young person's recourse is to administrative review mechanisms and the common law.

Federal representatives did not take a position on this matter, but indicated a willingness to further study the recourse mechanism established in Bill C-37.

7.2 TEMPORARY RELEASE

When a young person is committed to custody, temporary releases from custody by the provincial director can provide a means of accessing rehabilitative community programs and facilitating gradual and controlled reintegration into the community. These types of releases should be encouraged in appropriate circumstances.

Section 35 YOA enables the provincial director to temporarily release a young person who has been committed to custody for a period not exceeding fifteen days, with or without escort, for medical, compassionate or humanitarian reasons or for the purpose of rehabilitating or reintegrating the young person into the community. This section also permits "day releases" during specified hours so that the young person may attend school, obtain or continue employment, attend an outpatient treatment program, and so on. Where the provincial director revokes an authorization for release, or where there is a failure to comply with any terms or condition of the release, the young person may be arrested without warrant and returned to custody (and, in some circumstances, charged with unlawfully at large).

There are two issues of concern related to temporary release, both connected to the specified length of the release. Overnight temporary releases are limited to fifteen days, a time limit which can be too short to access many non-custodial programs such as a residential substance abuse treatment program, an aboriginal cultural program, a specialized community re-entry program or even types of employment opportunities (eg. fishing boat or logging camp). In many cases, short notice as to the availability of space in these alternate programs, along with the time required to process a review under sections 28 or 29 YOA, preclude the possibility of a court review. As well, it is sometimes desirable not to proceed by way of court review in the interest of testing how the young person responds; if the response is positive, then an application for review may be made at a later date.

To address these circumstances, the provincial director sometimes authorizes "back-to-back" temporary releases, i.e., for a further fifteen days (or less). This can require the young person to be brought back to the custody centre for re-issue of the release.

One way to address many of the circumstances described above and to avoid the need for back-to-back temporary releases would be to amend section 35 YOA so that the provincial director is able to authorize temporary releases for a longer period of time. The selection of a new maximum length would, to some extent, be arbitrary, but thirty days seems to be a reasonable

length of time to accommodate many of the circumstances described above. In this regard, it should be noted that proposed changes (Bill C-53) to the Prison and Reformatories Act will increase the duration of temporary absences for adults from fifteen to sixty days. Given that most youth custody dispositions are, after taking into account remission (which is not applicable to youth), as long or longer than adult sentences of imprisonment for many offences (see Chapter 3), then a maximum thirty day temporary release period is, in comparison, a modest proposal.

It could be argued that, instead of amending section 35, current practices of back-to-back temporary releases could simply be continued. An amendment would, however, have the advantages of providing more certain legal authority for extended releases and the avoidance of cumbersome procedures, such as the young person having to return to the custody centre for re-issue of a temporary release.

It is recognized that there may be some concern that extended periods of temporary release may be seen to encroach upon the jurisdiction of the youth court to authorize release from custody (sections 28 and 29 YOA) and, if mis-applied, potentially undermine the original intent of the custodial disposition. Given the great range of disposition lengths, the many different circumstances under which temporary release or judicially authorized release may occur, and the practical reality that court review procedures are complex and time-consuming, it is probably unrealistic to expect that a clear line could be drawn in legislation which identifies the boundaries between the administrative authority to release under section 35 and judicially authorized release under sections 28 and 29. These are more matters of policy and practice which should recognize that, where reasonable in the circumstances, proceeding by way of an application for judicial review under section 28 or 29 YOA is the preferred course. As well, it is recognized that temporary releases should only be used for legitimate programming purposes and as a tool to facilitate the rehabilitation of the young person or reintegration into the community. This is, in fact, already more or less addressed in the Act: section 35 sets out the purposes of release and provides that a young person who is temporarily released shall be released "only for such periods of time as are necessary to attain the purpose for which the young person is released".

While extending the maximum period for temporary releases to thirty days would address most of the programming situations discussed above, it would not address all of them, especially certain treatment situations. For example, many residential substance abuse or mental health treatment programs exceed thirty days, while in some situations placement in a program such as

mental health treatment may be of uncertain duration (i.e., dependent on treatment progress). There is, therefore, a need to provide greater flexibility in the temporary release authority (i.e., beyond thirty days) in limited circumstances of the need for medical, treatment or rehabilitation purposes. In recommending this, it is recognized that any amendment in this regard should take into account the need to respect the primary responsibility of the youth court to authorize release for longer periods.

In light of the above, **the Task Force recommends that :**

With respect to temporary release from custody,

(1) **Section 35 YOA should be amended to increase, from fifteen to thirty days, the maximum period the provincial director may authorize the temporary release of a young person from custody.**

(2) **Section 35 YOA should also be reviewed with a view to according great flexibility to the temporary release provisions, beyond the recommended thirty day maximum, in circumstances of medical, treatment or rehabilitative needs, having regard to the need to respect the processes established in the Act for judicial authorization of release from custody.**

7.3 RELEASE ON CONDITIONAL SUPERVISION

Upon mandatory annual reviews or on application, the youth court may, subject to specified grounds and criteria being satisfied, authorize the release of a young person under either sections 28 or 29 YOA (the latter being reserved for applications only by the provincial director). As a result of Bill C-37, some changes were made to these provisions to expedite the process (section 29), broaden the grounds for review (section 28), and alter the requirements for leave of the court to review (section 28). Another change is that the youth court may, if it approves release under section 28, order the young person to be placed on either conditional supervision or on probation. Formerly, a young person could only be placed on probation (except where the disposition was for murder).

Conditional supervision is considerably different from probation in two respects. First, it is more readily enforceable. If a young person breaches a condition of probation, then a new charge (section 26 YOA) must be laid and proven beyond a reasonable doubt, the maximum penalty for which is six months custody. For a conditional supervision order, the provincial director may suspend the conditional supervision if there are "reasonable grounds to believe that (the) young person has breached or is about to breach a condition of the order", the result of which is arrest and detention. The provincial director must then review the suspension and either cancel it or refer it to the youth court for a review. On review, the court, if satisfied on reasonable grounds that the young person has breached or was about to breach a condition, may continue the suspension for a period of time not to exceed the remainder of the original disposition (or cancel the supervision and, if so, it may vary the conditions or impose new conditions).

Second, there are considerable differences in the mandatory conditions for each type of order. For a probation order, the two mandatory conditions (section 23 YOA) are minimal; additional optional conditions may be imposed. In contrast, there are eight mandatory conditions for a conditional supervision order (section 26.2 YOA), including the broad condition to "comply with such reasonable instructions as the provincial director considers necessary in respect of any condition of the conditional supervision in order to prevent a breach of that condition or to protect society". Optional conditions may also be imposed.

Conditional supervision as an option for judicially authorized release from custody serves two purposes which are connected to the easier enforceability and more wide-ranging mandatory conditions of the order: these aspects enhance the opportunities to protect society and, given this,

may also encourage the courts to authorize release from custody more frequently.

Conditional supervision was originally enacted in 1992 as a component of a new youth court disposition for murder (Bill C-12) and, as per Bill C-37, remains a component of the new lengthened youth court disposition for murder.

Concerns have been raised about the appropriateness of having conditional supervision available as a release option for all custodial dispositions and about potential net-widening effects. With respect to the first concern, question has been raised about whether it is necessary or appropriate to potentially have conditional supervision imposed on a less serious, non-violent young person in custody. With respect to net-widening concerns, it has been suggested that young persons may be placed on conditional supervision in circumstances where probation would be adequate. Given that conditional supervision may require a greater degree of monitoring than probation and that the response to breaches (or anticipated breaches) is more intrusive, the use of this option in circumstances where probation would otherwise be adequate could result in significant impacts on supervisory workloads.

In counterpoint, it could be argued that the degree of supervision applied to conditional supervision is largely a matter of the provincial director's discretion, which supervision could vary according to needs and circumstances of the case. Also, conditional supervision is no more onerous than, for example, a temporary release from custody by the provincial director (section 35 YOA) or parole in the adult system (which applies to imprisonment for any type of offence). Moreover, it is possible that, given the principles of least possible interference with freedom and the protection of society (section 3 YOA), case law may eventually evolve which addresses circumstances where release to probation versus conditional supervision is appropriate.

To address these concerns, two options were considered:

- that the present provisions should remain in place, but that jurisdictions should monitor and assess the effectiveness of conditional supervision as a form of release from custody; or

- section 28(17)(c)(ii) YOA should be amended to provide that a young person may be placed on conditional supervision only where the youth court is satisfied that placing the young person on probation would not be appropriate in the circumstances.

The first option reflects the view that orders for release to conditional supervision are new and more experience with and assessment of their use is required before changes should be considered. The second option would require the court to consider the suitability of probation before ordering conditional supervision, thereby lessening the anticipated problems of net-widening and over-intrusiveness.

The Task Force did not reach a consensus on these options and, in light of that, decided not to make a formal recommendation. It is assumed that, at minimum, monitoring and assessment of the use of conditional supervision orders will be undertaken, either systematically or as a matter of course as problems (if any) with these orders arise in jurisdictions.