



October 1, 2007

Catherine Latimer
General Counsel and Director General
Youth Justice Policy

Dear Ms. Latimer,

Re: Consultation on Pre-trial Detention of Youth: *Youth Criminal Justice Act*

The Church Council on Justice and Corrections (CCJC) is responding to the paper you sent in June a little late in the day, having in the meantime had the opportunity to consult with a number of well informed people in our networks as well as to dialogue about our views on this important issue through the participation of our Past President Maureen Murphy in the September consultation gathering you held.

Following discussions at the recent meeting of CCJC's Board of Directors, we are pleased to express our support for the main concerns and directions that we understand to have been endorsed at that consultation gathering. We are alarmed by the findings of continued high use of pre-trial detention, the high numbers of non-violent offenders detained, the use of coercive measures for social welfare purposes, the shameful use of incarceration for administrative reasons, and the unfortunate use of inappropriate conditions of release. We believe it is very important to develop more and better strategies to reduce the numbers of youth who are still being sent into pre-trial detention. We support the elimination of wording and conditions of bail that are not helpful to achieving the overall purposes and objectives of the Youth Criminal Justice Act in a manner that is fully consistent with its principles. We support the exploration of collaboration with Youth Justice Committees as one example, among other creative possibilities, of constructive community involvement in problem-solving that can offer an alternative to conditions for bail.

As a general background for clarifying the rationale and basis for these statements and positions, we offer the following reflection on the general perspective from which we believe these issues should be approached.

Introduction

A useful starting point for this question would be that the goal, in relation to the number of harmful acts by youth, should be to have that number reduced by our actions and not increased. It has been noted that Canada tends to incarcerate young people at a higher rate than

do other states even though Canada is a peaceful, safe, and an advanced nation. For example, see the 5th WHEREAS in the Preamble to the YCJA:

“And whereas Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons;” (our emphasis)

Contrast that with research that shows that use of incarceration tends to increase, not decrease crime (see for example “the Psychology of Criminal Conduct”, D.A. Andrews, James Bonta, pp. 329-356, especially at pp. 331-339).

The meta-analytic review done by Smith, Goggin and Gendreau (found at Public Safety, Government of Canada website) showed that, after the review of 117 studies involving 442,471 offenders, imprisonment tends to increase crime recidivism by 3% (for short custody periods, longer jail terms tended to increase crime recidivism by 7%) as compared with probation for example.

Therefore, echoing Bonta, Andrews, Smith, Goggin and Gendreau, jailing young people should not be expected to reduce youth crime/recidivism, instead it can be expected to increase crime/recidivism.

Returning to our starting point, then, our society’s future well being (which includes less harmful acts by youths against others) requires that we limit the use of custody, including pre-trial custody. Our search should be to reduce future harm and as part of that to ensure that only those who need to be in custody are actually in custody, and equally, if not more importantly, that those who do not need to be in custody are not there or released immediately before the damage is done.

How to tell the difference? Is there a way of telling which young people need to be in custody because only custody could work? Possibly, but that seems to be still far in the future, with our present risk assessment calculations possibly racially based and inaccurate.

Since we are talking about youth it may be useful to remember that adolescence is a time of development, of formation, of deeply personal decisions. It is, of course, a test of any society how well they teach their young to succeed in that society, consistent with the needs of the society, as a whole. Once again the preamble to the YCJA:

“WHEREAS members of society share a responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood;” (the first WHEREAS)

What this statement reminds us of is that the whole society trains, educates and gives fundamental values to our youth. Therefore it is a basic mistake, and awful flaw, to act as if the youth criminal justice system can take on this responsibility. How can that system replace even something as basic as education that matches the abilities...

(and lack of same, remembering for example that 75% of children in custody have some form of disability). See for example Y. Henteleff's Position Paper on the Proposed Amendments to the YOA (Ottawa; learning Disabilities Association of Canada: 10 October 1996) at 52 (Appendix III). Also in Virginia, the Department of Criminal Justice Services, in a published report in 2000, stated that:

"In Virginia, data on juveniles with special education needs in the juvenile justice correctional system... between 1993-1998, approximately 39% to 42% of juveniles committed to the department of Juvenile Justice were identified as being eligible for special educational services at the time of commitment. One of the most frequently identified special educational needs was services for learning disabilities."

As well, *"Keilitz and Dunivant (1987) indicate the adolescents with learning disabilities were 220% more likely to be adjudicated than other adolescents"*, Crime Times 8:1 (2002) at 5.)

...and education that matches the realistic potential uses of their skills in the ordinary society? Not to mention the development of an individual personality and a code of personal ethics which are clearly one of the development goals of a youth, -- how is that helped or warped by the criminal justice system?

What of learning to select good peers, forming good relationships? Even if a youth was to meet another person who was an appropriate friend in custody, how fragile would that friendship be once one or the other is released from custody? What of love? Can it be learned in custody? Would we want it to be?

Again, how to decide which youth should be in custody and which not in custody? Probably as courts, when faced with defining principles, and when Parliament has also grappled with defining the appropriate principles, the appropriate defining line must be the justice system's role in the Canadian community as a whole. That returns us to our starting point. That the role of the youth criminal justice system must be geared solely to reducing harmful acts committed by youth against others in our society. The desires, the wishes, even the legitimate concerns of others, for various causes, symbols and even for specific youth, must be denied if the youth criminal justice system is in danger of putting youth in custody for reasons other than for its primary purpose. Because the use of custody tends to increase recidivism/crime, it's clear that,

"Whereas communities, families, parents and others concerned with the development of young persons should, through multi-disciplinary approaches, take reasonable steps to prevent youth crime by addressing its underlying causes, to respond to the needs of young persons, and to provide guidance and support to those at risk of committing crimes." (the second WHEREAS in Preamble to YCJA),

for the youth criminal justice system to take over the responsibilities of the community, the family, parents and others concerned with the development of young people, means that these people don't take responsibility. Worse, it means that it isn't done because pre-trial detention under the YCJA **cannot do** what parents, family, community and others do for youth.

Regarding pre-Trial detention

Turning now to the question of police detention and our starting point (i.e. that our decisions should move us to the goal of reduction of harmful acts by youth towards others in our society), certain principles arise naturally.

Obviously, we, and the police, want all our actions to help move us to our starting point goal. Obviously, also, since youth are in the developmental stage including developing morals, we want to be able to stand united with the police to explain all police actions as being consistent with our primary goal. That, it is submitted, takes leadership.

Perhaps an example might make it clear. What if a youth, who commits one offence, is released with conditions, and then subsequently, never commits any more offences against the public but does not keep the conditions. For example, she does not like her foster home and is homesick for her family. Does putting her in pre-trial detention reduce her potential to do further harmful acts to others, or increase it? There is reason to believe detention may increase it (see earlier research by Bonta, Andrews, Smith, Goggin and Gendreau).

But what of the moral development of this young woman? You cannot harm others is a clear moral. Sometimes you must let others run your life is not a moral, it is a practical lesson. Practical lessons, life lessons, how to successfully negotiate for independence, these are lessons learned through family, friends, community, schools, etc. - they are not learned in incarceration since freedom and independence cannot be part of detention.

The lesson for this young woman, from her eyes, may look something like this. If you steal from a store the police come, you may go to jail, if you go home to your mom and someone doesn't like it, the police may come, you may go to jail. If you skip school, maybe jail. If you talk to your friends (against your conditions) you may go to jail. The young woman can be sure that this is true because her peers have had the same experiences and confirm her suspicion. Therefore, who can say there is a moral? We may all agree, we, the police, the youth their peers and others, that the point has become to control the youth. If you are in control, this may seem a good thing, if you're being controlled it may seem to be a bad thing. Perhaps even immoral.

To hold youth more often for breaches of undertakings or breaches of probation than any other offence (other than murder) must raise clear alarms. Is a young man being at a store (from which he had been ordered to stay away after shoplifting) more an indication of committing harm in the future than an aggravated assault? Clearly not.

The research done by the Police Discretion Study is very helpful. The reasons given by police for detention of youth include "for the good of the youth" and, it seems, 'to teach the young person a lesson' (II(B)(4) at page 11). Arguably these are valuable goals. Perhaps, the police may have wished to return the youth to the parents but when Crowns had talked to parents they were less likely to release the youth because, it seems, the parents wanted the youth locked up (p. 20 of discussion paper).

Police may find themselves thinking that they are the only resource, the only solution. If indeed they are the only solution, the only resource, then we are in trouble. Since jail tends to corrupt and is being used to control youth, not to enforce our primary goal, we may lose all ability to achieve our goal.

The choice, it is submitted, is clear. Either the youth justice system must refuse to take sides (usually on behalf of youth workers, parents, schools, etc) and to use its resources to control youth, or, if it is involved, it must return the responsibility for youth development to the community meanwhile steadfastly refusing to use pre-trial detention to “teach the youth a lesson” or “for the youth’s own good”. Those responsibilities do not belong to the police, or to those deciding on pre-trial detention for that matter.

It seems that approximately 73% of youth detained had, as their most serious charge, administration of justice charges, including breach of probation (p. 11 of discussion paper). Since these charges rarely involve harm to others and seem to almost always involve conflict between the teen and parent, or school, or professional worker, and since other youth typically have similar conflicts, it is dangerous to use pre-trial detention as a response. Clearly we lose moral authority when we place youth in custody where their recidivism/crime will likely be increased and we run the danger of confirming the arguments of their anti-social peers. “They think breaking your curfew is as serious as breaking-in (to a house), missing your worker’s appointment as serious as robbery.”

Therefore, there should be a presumption against police detention of youth whose charges on arrest consist only of administrative charges. Probably police forces should be encouraged to make it clear to youth that our system is primarily concerned with harm to others and that administration breaches, while serious and while they may be punished appropriately, will be dealt with in a manner consistent with our primary goal.

Conditions of release

Regarding conditions of release, our primary goal, our starting point, is to reduce harms committed by young people towards others. The youth justice system too often is used to control youth. Therefore it is difficult to justify conditions such as “keep the peace and be of good behaviour”. Of course we should all want peace and good behaviour, but perhaps the elimination of harmful acts may require actions which some may consider not ‘peaceful’ or “good behaviour”, for example the suffragette movement (including chaining themselves to railings, smashing windows, setting fire). Accordingly, we cannot justify those terms on our primary principle. Also it is vague. Finally, the youth criminal justice system is unwillingly being enlisted as a control mechanism. The same comments can be made regarding “house rules”. What control does that grant? What lesson about harm is imparted?

It follows then that conditions of release must be re-thought. The problem is that probably every judge is trying to be helpful when they impose what they see as reasonable conditions on a youth. Are they wrong? What is wrong with a young person being ordered to go to school, to stop drinking, to obey the house rules? These are all good ideas and will probably help the young person’s development. The problem is that they are improvement plans, a good thing, like quitting smoking, losing weight, exercise more, - and improvement plans consistently have “setbacks”. Improvement plans connected to criminal law cannot easily countenance “setbacks”. The more obvious, if unthinking response, is arrest and custody, with all its dangers. Not to mention the damaging effects of a record.

The RCMP at a Saskatchewan First Nation reserve, Beardys-Okemaysis, thought differently. An RCMP presence was invited on to the reserve, as was a Provincial Court presence. The reserve had a justice co-ordinator. Almost no breaches were brought before the courts, young people were almost never detained in a custodial facility for such things as breach of curfew. Instead, they were referred to the justice coordinator. The result was that the justice

officials could focus the community's mind on harmful acts and that meant those harmful acts were steadily decreasing. A similar suggestion was made by the commission on First Nations and Metis People and Justice Reform (Saskatchewan, Final Report).

If the youth justice system cannot ensure that development programs, when they are incorporated into release conditions, continue to be treated as development programs (i.e. for example you chose not to exercise today but to go to the pub instead, tomorrow's a new day) rather than becoming a part of a power struggle with a youth over how they are to reach their goals, - then the youth criminal justice system should be very careful that it is not making the situation worse.

Conclusion

It is clearly our moral responsibility to educate our young people. But to educate them to what? About what?

Too often the youth criminal justice system steps into the power struggle between a parent and child, or a youth worker and child, or realistically almost any adult/child relationship. To some adults, the involvement of the criminal system is their goal. So, what's the moral?

The operating technique, (some have said the motto), of the Roman Empire, was let them hate us so long as they fear us. Is that the moral we want young people and their peers to take from our criminal system? Power is good, lack of power, tough luck?

The alternate view, which we state has always been ultimately successful, if not without slips, includes a rejection of power as a source of moral authority and instead reminds youth that we must look much deeper to something like our primary purpose, that is, not to harm others.

Young people need to prepare for a life of independence and self-sufficiency, working at jobs that give them an ability to be part of a community. A proper youth criminal justice system would recognize that need and would use its own moral authority to encourage our community to provide that to youth. Not as a partner with a big stick. But, if necessary, as a guardian for the racial minority youths, the disabled youth, the near-orphan children, and the children from foster homes, those far behind in school (these are the characteristics of these youth in custody including pre-trial detention). In the interest of our primary goal.

The youth criminal justice system needs to be a partner with the community to be able to state clearly to youth that we know that they have fallen behind the other youth and that we don't reject them for that, we only condemn the harmful acts; that the youth criminal justice system recognizes that their deficits should be overcome as soon as possible.

The youth criminal justice system should be able to say consistently to youth that those who would encourage you to harm others are wrong, they are to be avoided. Not saying you can't be with some friends because you skip school with them, or drink with them, or stay out past your curfew with them. There should not be criminal sanctions, especially detention, attached to these.

The youth criminal justice system needs to encourage the recognition that we have all made mistakes, in the past we have all harmed others. Now we must say to youth that the harms done to them, the harms they have done, are important lessons that we all share. That the lesson to be learned is how not to harm others. How to recognize harm to others, name it, and work to

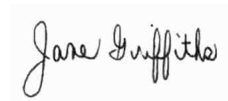
eliminate it. The youth, the youth criminal justice system, the general community, are all partners. It is our partnership that will create our better future. Not fear.

Our invitation:

We at the Church Council on Justice and Corrections believe that the habitual reflex Canada has developed, of putting youth in custody as a commonly accepted response to many problem behaviours, does not represent 'good investment logic' . We hope to collaborate with other partners to raise more awareness about this in Canadian communities, in order to encourage citizen involvement in increasing public safety through the promotion of responses to problem behaviour that can demonstrate more effective accountability for the results of public expenditures.

Our staff and board would be pleased to engage in future discussions with your department about ways in means through which we may collaborate in achieving this objective. Please do not hesitate to contact us to explore this further.

Sincerely,

A handwritten signature in cursive script that reads "Jane Griffiths". The signature is written in black ink on a white background.

Rev. Jane Griffiths
President