

ALTERNATIVE MEASURES UNDER THE *YOUNG OFFENDERS ACT*: A COMMENTARY ON BEATON AND BEAULIEU

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The *Young Offenders Act* is often presented as an Act which has turned away from an "in the interests of the child" philosophy, and moved into a more conservative direction by emphasizing the responsibility of the young offender for his or her actions.¹ On the other hand, the *Young Offenders Act* has come under sustained media attack because it extends, to age eighteen, the protection offered to younger offenders. It is also attacked because young offenders committing more serious offences are liable to shorter sentences than young adults who commit similar offences. Also criticized are the "alternative measures" provisions, and the discretion which is thereby given to police authorities. Recent amendments passed by Parliament should silence the most conservative critics, while leaving room for criticism from those who would prefer a more paternalistic approach to juvenile crime based on the principle of "the best interests of the child."

However, one important aspect of the *Young Offenders Act* has been overlooked: the issue of alternative measures. In this brief comment, I will examine the legal impediments of, and the effectiveness studies regarding, alternative measures under the Act.

Effectiveness of Alternative Measures From a Legal Perspective

The effectiveness of alternative measures under the *Young Offenders Act* is often assessed by the legal community in legal terms. In other words, focus is directed to the internal functioning of the legal process. This focusing can be illustrated by referring to the relevant case law. Three main areas have been examined: the discretionary nature of alternative measures, the absence of any obligation on the part of provinces to implement them, and the variety of programmes being implemented.

The first issue raised in relation to alternative measures is whether a young person has a right to be diverted or whether diversion is a discretionary act on the part of the police and the Crown. At first, youth court judges seemed inclined to

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¹See L.A. Beaulieu, "Introduction" in L.A. Beaulieu, ed., *Le jeune contrevenant. Les décisions. Perspectives sur les principes et la pratique* (Toronto: Wall & Emerson, 1990) at 1-5; J. Hudson, J.P. Hornick & B.A. Burrows, eds, *Justice and the Young Offender in Canada* (Toronto: Wall & Thompson, 1988); D. Hurley, "The Young Offenders Act" (1992) 8:3 *Solicitor's Journal* [New Brunswick] 15; J. Trépanier, "Principes et objectifs guidant le choix des mesures prises en vertu de la Loi sur les jeunes contrevenants" (1989) 49:4 *Rev. du Bar.* 559.

recognize that a young offender had some rights to participate in the decision of whether to use alternative measures or not.² In *R. v. R.Q.*³ and *R. v. J.B.*⁴ a youth was prosecuted without having an opportunity to make a case regarding the use of alternative measures. In both cases it was held that the youth's right to counsel under s. 11 of the the *Young Offenders Act* had been violated. In *R. v. R.Q.* the charges were dismissed. In *R. v. J.B.* the trial was adjourned so that consideration could be given to the youth's diversion and to ensure that his right to have counsel present during the deliberation was not infringed upon. In *Re Graham T.*,⁵ a young person pleaded guilty to a minor incident of shoplifting. Even though he had no previous involvement with the youth justice system, he was still prosecuted rather than diverted. He was given an absolute discharge because of the inherent disproportionality between the results that can follow from an administrative decision to prosecute, and a decision to invoke alternative measures.

However, in *Re T.W. and The Queen*⁶ the Court of Queen's Bench held that a young person has no right to participate, either personally or through counsel, in the Crown's consideration of using alternative measures. Such consideration was within the exclusive domain of the Crown. Furthermore, in *R. v. Frantz Mark B.*⁷ a judge held that a court has no discretion to review the Crown's decision to divert a young person into an alternative measures programme.

The second issue is whether or not a province is obligated to establish alternative measures. This issue was raised in an Ontario case because Ontario was the only jurisdiction which had yet to establish such an alternative measures programme. In *R. v. S. (S.)*⁸ the majority of the Ontario Court of Appeal held that the fact Ontario had not implemented the alternative measures provisions of the *Young Offenders Act* violated s. 15 of the *Charter*. One class of individuals, young persons in Ontario, were being treated differently from those, in similar situations, elsewhere in Canada. The Supreme Court of Canada reversed the decision of the Ontario Court of Appeal⁹ saying that it is wrong to interpret s. 15 of the *Charter* as stating that every Canadian citizen must have access to the same

² For the legal aspects see generally, R.N. Komar & P. Platt, *Bala and Lilles Young Offenders Service* (Markham: Butterworths, 1984) s. 4, at 3111-3136; P. Platt, *Young Offenders Law in Canada* (Toronto: Butterworths, 1989) at 6-1 to 6-12.

³ (1985), 14 W.C.B. 48 (Ont. Prov. Ct, Fam Div.).

⁴ (1985), 20 C.C.C. (3d) 67 (B.C. Prov. Ct).

⁵ (1987), 57 C.R. (3d) 388 (Alta Prov. Ct, Yth. Div.).

⁶ (1986), 45 Sask. R. 191 (Q.B.).

⁷[1988] W.D.F.L. 1198 (Ont. Prov. Ct, Fam. Div.).

⁸(1988), 63 C.R. (3d) 64 (Ont. C.A.).

⁹*R. v. S. (S.)*, [1990] 2 S.C.R. 254; See also *R. v. S.(G.)*, [1990] 2 S.C.R. 294.

level of service in each province. The Supreme Court also held that s. 4 of the *Young Offenders Act* does not impose a mandatory obligation on a province to establish alternative measures programmes.

The third issue concerns the implementation of alternative measures programmes. The programmes vary greatly from jurisdiction to jurisdiction and include simple diversion, community work, training, counselling, victim-offender mediation, and so forth. In New Brunswick, once the decision has been made to divert the young offender to an alternative measures programme, the case is handed over to provincial probation officers who supervise the whole process. Specific measures such as counselling, life-skills training, drug and alcohol rehabilitation are assigned to specialized agencies, such as the detoxification centers, family and counselling services, and so forth.

Effectiveness of Alternative Measures From a Social Perspective

Very little research has focussed on the assessment of the effectiveness of the *Young Offenders Act* as a whole and much less has tried to assess the alternative measures provisions.¹⁰

A few researchers have compared the provisions under the *Juvenile Delinquents Act* and the *Young Offenders Act*.¹¹ Research undertaken in British Columbia has shown that the *Young Offenders Act* has undesirable consequences such as the utilization of greater police authority in some areas of police practice, an increase in the total number of young offenders under pre-dispositional surveillance, case backlog attributable to increased use of court time, case delay as a result of the due process provisions, and a greater reliance on incarceration as a dispositional sanction.¹² Furthermore, when comparing the last year of the administration of the *Juvenile Delinquents Act*¹³ with the *Young Offenders Act* for offenders under 16, it is found that custodial dispositions have generally increased everywhere in Canada.¹⁴

¹⁰See J. Hudson *et al.*, *supra*, note 1.

¹¹See R.R. Corrado & A. Markwart, "The Prices of Rights and Responsibilities: An Examination of the Impacts of the *Young Offenders Act* in British Columbia" (1988) 7 *Can. Fam. Law Journal* 93; A.D. Dobb & L.A. Beaulieu, "Variation in the Exercise of Judicial Discretion with Young Offenders" (1992) 34:1 *Can. J. Crim.* 35; A.D. Dobb, "Trends in the Use of Custodial Dispositions for Young Offenders" (1992) 34:1 *Can. J. Crim.* 75.

¹²Corrado & Markwart, *ibid.*

¹³1983/84.

¹⁴See the review of the literature by A.D. Dobb, *supra*, note 11. There have been increases of 73% in British Columbia, 79% in Ontario, 88% in Alberta, with a slight decrease of 9% in Saskatchewan.

Some researchers have tried to explain the greater use of custodial dispositions under the *Young Offenders Act*. According to Jean Trépanier,¹⁵ in disposing of a case the judge's choice of measures must be based on the objectives to be achieved, and must also be guided by identifiable legal principles. The problem, according to Dobb and Beaulieu,¹⁶ is a lack of overall policy for dispositions under the *Young Offenders Act*. This inevitably leads to widely disparate treatment of similar young offenders convicted of identical offences. Dobb and Beaulieu sent four hypothetical young offender cases to 43 judges across Canada, asking them to recommend a sentence. The sentences showed a great deal of variability in the dispositions recommended in each case.

With respect to the effectiveness of alternative measures, Page and Peachey¹⁷ indicate that evaluation of alternative measures programmes is scarce, and that studies to date have been more descriptive than analytical. In fact, only one study has compared the effectiveness of alternative measures as opposed to the regular treatment of young offenders.¹⁸ That research was done in Quebec where the alternative measures provisions were implemented in 1977, with the passage of the *Youth Protection Act*.¹⁹ The authors took a sample of 919 boys from 14 to 18 who went through the system between 1979 and 1984: 498 were diverted and 421 were not. The subjects were followed from 1981 to 1988 through verification of youth and adult court files. The effectiveness of both measures was assessed. Both groups relapsed at much the same rate (20%) until they reach 18. Among the alternative measures group, the measures of a reparative type had the lowest recidivism rate.

Further, in their research, LeBlanc and Beaumont found that certain classes of young offenders are less likely to relapse when alternative measures are used, such as younger first time offenders who are still under their parents' control. The probability of diversion is lower for older offenders who have dropped out of school, who have a file, and who are not under their parents' control.²⁰

We do not have figures for the province of New Brunswick. I have been told by parole officers that about 50% of young offenders in New Brunswick are diverted to alternative measures programmes. Furthermore, as Beaton noted in

¹⁵Trépanier, *supra*, note 1.

¹⁶Dobb & Beaulieu, *supra*, note 11.

¹⁷"Face to Face: Victims-Offenders Mediation under the Young Offenders Act" in J. Hudson *et al.*, *supra*, note 1, 105 at 108.

¹⁸M. LeBlanc and H. Beaumont, "L'efficacité de la déjudiciarisation à Montréal en 1981" (1991) 33:1 *Can. J. Crim.* 61.

¹⁹R.S.Q. 1977, c. P-34.1.

²⁰LeBlanc and Beaumont, *supra*, note 18 at 71.

her paper, it is felt that alternative measures are very successful.²¹ These feelings are reflected by Bala's comments when he writes that "it is generally felt that alternative measures represent a socially useful experiment for dealing with first-time offenders in a humane, socially inexpensive fashion."²²

Not everyone agrees with such sweeping statements. LeBlanc and Beaumont, the only ones to have systematically assessed a diversion programme, ask whether it is efficient to use diversion, which in their view is more costly, if it is no more efficient than the judicial process.

Conclusion

At first glance it seems that alternative measures play an important role in the administration of the youth criminal system. Its function is to separate the more severe cases from the less severe ones. The more severe cases are treated by the courts. Cases treated by the courts are treated more severely under the *Young Offenders Act* than they were under the *Juvenile Delinquents Act*.

However, the use of alternative measures raise a number of problems. First, one must ask whether all similar cases are diverted or whether diversion varies from region to region within the same province. Since diversion programs are established and run by provinces, it can be assumed that there is no uniformity among the provinces. To treat similar cases differently is not good for justice. A second issue which can legitimately be raised is that of who benefits from alternative measures. From the available criminology data, and from LeBlanc and Beaumont's research, it can be hypothesized that underprivileged children are not being offered alternative measures as often as children whose parents are more privileged. More research is needed in this regard.

A third issue is the effectiveness of alternative measures against recidivism. If, as LeBlanc and Beaumont have shown, there is no significant difference in recidivism rates between those who are diverted and those who are not, and privileged children are diverted more often, could it be that diversion measures are a ground of discrimination for the benefit of parents who are better off? This issue should be investigated thoroughly in a society which prides itself as affording equal treatment to all its citizens. Finally, the cost effectiveness issue is a controversial one. Bala states that diversion measures are relatively inexpensive, but the only research available on the subject concludes that diversion measures are more costly and are not more efficient.

²¹M.B. Beaton, "The *Young Offenders Act: Between a Rock and a Hard Place*" (1993) U.N.B.L.J. 295 at 298.

²²N. Bala, "The *Young Offenders Act: A Legal Framework*" in J. Hudson *et al*, *supra*, note 1 at 22.

I believe that the entire *Young Offenders Act* must be re-assessed. The diversity of dispositions for similar cases is a priority. Furthermore, the only agencies which have the authority and the capacity to undertake such research, the provincial Departments of Justice, must become involved. If a department does not have the relevant expertise, it can contact university professors who would be more than willing to assist. One thing is clear: these issues must be addressed and assessed before it is too late.