

Victim-Offender Restorative Justice Conferencing and the Youth Criminal Justice Act., by Hilary Linton*

Canada incarcerates its youth at a rate higher than any other western country, even the US.¹ Youths are incarcerated at a higher rate than adults who commit the same offences, with 80 % of youth sentences being for non-violent offences.² The “get-tough-on-crime” approach prevalent in boot camps and American-style “Scared Straight” programs has failed to reduce youth crime; in fact, it has led to increased recidivism.³ Children and youths are not influenced by the concept of deterrence.

What does help reduce youth crime and rehabilitate young offenders, according to research from Canada and elsewhere, is a restorative process that bring the youth, the victim and their families or supporters together, and requires the youth to take responsibility for the offence, hear the consequences of his or her actions and participate in a meaningful process focused on repairing the harm caused.

The Youth Criminal Justice Act (YCJA), which took effect in April 2003, emphasizes the use of restorative justice principles as a means of achieving the goals of reducing over-reliance on incarceration for non-violent young people and reserving the most serious interventions for the most serious offences.⁴

The starting point for the YCJA is that the use of out-of-court measures are often the most effective way to meet the objectives of protecting society and treating young offenders fairly and appropriately. Extrajudicial measures are **presumed to be**

¹ Tustin and Lutes, *A Guide to the Youth Criminal Justice Act* (2002: Butterworths);

² *ibid.*

³ Anand, *Preventing Youth Crime: what works, what doesn't and what it all means for Canadian juvenile justice policy*, (1999) 25 Queen's L.J., p. 177-249.

⁴ Preamble YCJA

adequate to hold accountable first-time, non-violent offenders.⁵ Police and crown attorneys are directed to use extrajudicial measures **in all other cases, whether or not the offence is violent, whether or not the young person has a prior record or not, if the use of such measures is adequate to hold the young person accountable.**⁶

Police and crown attorneys are directed to consider whether one of the progressively more formal out-of-court sanctions will be sufficient to hold the youngster accountable, starting with warnings, cautions and referrals to community programs or agencies,⁷ and progressing to “extrajudicial sanctions” which can include restorative justice conferencing.⁸

On the surface, the YCJA represents a clear shift in approach. It uses much more restorative language and permits a much broader use of measures other than court than the Young Offenders Act (YOA).

*“In deciding which sanction to apply and how to proceed, you should ensure that it is applied fairly and is proportionate to the offence. You should use the least restrictive measure that will hold the youth accountable, ensuring the minimum intervention warranted to respond to the conduct. The measure should always be less than one a court would impose for this conduct...”*⁹

However, because the administration of justice is a matter of provincial jurisdiction, interpretation of the statute will vary considerably depending on each province’s political agenda and corrections objectives.

⁵ YCJA s. 4(c)

⁶ YCJA s. 4(d)

⁷ YCJA s. 6-9

⁸ YCJA s.10-12; family group conferencing is a form of restorative justice conferencing that originated in New Zealand in the 1980s.

⁹ Department of Justice Canada Checklist for Police, Crown Prosecutors and Officials: Extrajudicial Sanctions s. 10.

Under the YOA, alternative measures were generally used only for first offenders charged with a Class I offence. These are the least serious offences (ie/ theft and fraud under \$5000). Young offenders charged with the most serious, Class III offences were ineligible for alternative measures programs (weapons offences, assault causing bodily harm etc.) as were offences against women and children and drunk driving offences.¹⁰ Class II offences fall in between; a Class II offence resembling a Class I offence in its gravity would likely be referred to alternative measures.

There is no explanation in the Alternative Measures Policy and Procedures Manual for the reasons for limiting alternative measures to minor offences. And, even though the YCJA is clear that extrajudicial measures should be considered in every case, Ontario has not so far expanded the scope of offenders eligible for extrajudicial measures.

Research from Canada and elsewhere shows that restorative processes are more likely than a court proceeding, probation or a punitive sentence to provide a meaningful awareness to a youth of the consequences of wrongful conduct.¹¹ Ontario policy, however, remains very offence-based, without regard to restorative principles of considering the nature of the harm done and the most appropriate means of repairing that harm.

Further, studies show that the victims and offenders who gain the most from conferencing processes are those involved in more serious crimes. For instance, the RISE conferences in Australia produced significant reductions in recidivism among

¹⁰ Alternative Measures Policy and Procedures Manual

¹¹ Latimer, Dowden and Muise, *The Effectiveness of Restorative Justice Programming: A Meta-Analysis* (Department of Justice Canada 2001)

juveniles whose crimes involved violence, but none for less serious property crimes.¹² In New Zealand all but the most egregious offences are referred to out-of-court processes such as conferencing. A judge of the New Zealand court advises strongly against the exclusion of serious cases from conferencing processes:

*“It is probably tempting to limit trial (conferencing) schemes to what might be thought to be the easier cases, but this is a serious mistake. In many ways, the deeper the hurt that has occurred the great the need for healing (often on both sides) and the greater the potential benefit to the community from “putting right the wrong”, as has been shown in Hollow Water (Canada).”*¹³

Ontario is effectively denying the benefits of a restorative process to the offenders and victims who would most benefit from it.

Restorative justice processes offer much hope for Ontario's over-crowded and under-funded youth criminal justice system. However, realizing that hope will involve battling inertia, political will, greater resources for rehabilitative services and greater public awareness of the benefits of this different approach to resolving youth crime.

* Hilary Linton is a family and civil mediator at Riverdale Mediation in Toronto. This paper is an excerpt from her LL.M. research paper.

¹² Sherman, Strang and Woods, *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments* (2000)

¹³ McElrea, *The New Zealand Model of Family Group Conferences* (1997).