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Editorial

The Youth Criminal Justice Act

The new Youth Criminal Justice Act is long and complex and not yet proclaimed in force. It will take years to determine its effects on the youth criminal justice system. A preliminary reading suggests that the Act contains something for everyone and much will depend on the way its flexible procedures are administered in each province.

In more than a nod to the get-tough crowd, “adult sentences” are made available in certain situations to young persons 14 years of age and older. The very phrase “adult sentence” suggests a willingness to abandon the idea that teen-aged offenders should be treated differently than adults, as does the possibility that a young person could serve his or her adult sentence in a penitentiary. At the same time, provinces such as Quebec can ensure that 14- and 15-year-olds are not subject to presumptive adult sentences.

Murder, attempted murder, aggravated sexual assault and manslaughter are presumptive offences for which youths can receive an adult sentence. There is even a milder Canadian version of the American “three strikes” strategy, as a third serious violent offence becomes a presumptive offence for an adult sentence. The test in s. 72 for determining whether an adult sentence is required is driven by concerns about the length of sentence necessary “to hold the young person accountable for his or her offending behaviour”.

In addition to the principle of restraint, the principles of parity and proportionality are emphasized in the sentencing principles in s. 38. Taken on their own, these principles are quite similar to those used in the adult system. The general principles contained in ss. 3 and 4 of the Act, however, suggest a more youth-specific approach with, for example, an instruction that “fair and proportionate accountability” should also be “consistent with the greater dependency of young persons and their reduced level of maturity”. There is also recognition of the goals of “rehabilitation and reintegration”.

At the last minute, s. 38(2)(d) was added so that judges would consider “all available sanctions other than custody that are reasonable in the cir-
cumstances... with particular attention to the circumstances of aboriginal young persons”. This mirrors s. 718.2(e) of the Criminal Code, but it remains to be seen whether this provision will reduce the overrepresentation of Aboriginal people in both jails and youth detention centres.

The Act provides a long list of alternatives to imprisonment. They include the new concepts of police or Crown cautions, as well as reprimands, absolute and conditional discharges, community service and reparation orders. One of the most innovative dispositions is the ability under s. 42(2)(h) to order a young person to compensate any person in kind or by way of personal service for loss, damage or injury. The victim must consent, the order cannot be longer than a year or 240 hours of service, and it cannot interfere with the young person’s education or hours of work. This type of restorative sentence has significant potential, especially given the predominance of property crime in youth offences. It also avoids the real danger of the other reparative provisions because it does not provide an advantage to youths who can draw on family savings to make restitution. If the new emphasis on reparation is simply a matter of making payment from existing resources, it will do little to provide alternatives to imprisonment for the most disadvantaged young offenders.

There is more recognition of crime victims than in the Young Offenders Act. Victim interests in receiving respect, reparation and information are recognized in the principles; victims have a right in s. 12 to know the offender’s identity and disposition when an extrajudicial sanction is applied. The offender’s acknowledgment of harm and reparation to the victim are relevant considerations under s. 38 for sentencing. Victim concerns, however, do not always point in the same direction. Victims can have some harms acknowledged and repaired through extrajudicial measures. On the other hand, they can oppose diversion and tie their hopes to punishment and victim impact statements. The Youth Criminal Justice Act’s concern with victim interests does not point inevitably in a punitive or a non-punitive direction.

There was much talk about family conferences when the Act was introduced, but its provisions are quite vague on this important subject. It does not provide a particular structure or philosophy for conferences and simply gives those administering the Act a discretion to convene conferences. Some conferences will be part of diversion, while others will provide advice for judges at sentencing. The Act does not encourage or structure the use of family conferences in the same way as innovative New Zealand legislation, which has led to the significant reduction of youth imprisonment in that country while also producing significant levels of victim satisfaction.

The actual use of extrajudicial measures will largely depend on the provinces. The new Act presumes that such measures, including police or Crown cautions, are adequate to hold young people accountable for non-violent first offences. They are not precluded in other cases, but the provinces make the ultimate call. In order to encourage greater use of extrajudicial measures, it may be necessary for the federal government to make robust use of its spending power as contemplated in provisions for agreement between any federal Minister and the provinces.

In addition to its focus on punishment and adult sentences for the most serious cases and diversion and extrajudicial measures for the less serious cases, the Act also retains the idea that young people should have enhanced procedural protections. The oft-criticized s. 56 of the YOA is largely intact, but with the qualification that a “technical irregularity” does not result in automatic exclusion. In earlier drafts, the admission of irregular statements depended on whether their admission would bring the administration of justice into disrepute, thus making the issue contingent on the survival of the fair trial test under s. 24(2) of the Charter in the adult system. Section 146(6) now makes the issue dependent on whether admission would bring disrepute to “the principle that young persons are entitled to enhanced procedural protections to ensure that they are treated fairly and their rights are protected”.

It is tempting to suggest that the Youth Criminal Justice Act will please neither the get-tough crowd nor those with more faith in a restorative and rehabilitative approach. At the same time, however, it may be a virtue that the Act acknowledges both sides of our public debate about youth justice while refusing to give either side total victory. The ultimate effect of the Act will depend on its administration.

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