

Aboriginal Justice Implementation Commission

Recommendations on the Young Offenders Chapter of the Aboriginal Justice Inquiry

Introduction

The Aboriginal Justice Implementation Commission was established by Order-in-Council 459, November 24, 1999, to advise the government on methods of implementing recommendations of the Report of the Aboriginal Justice Inquiry (1991) for which the Province of Manitoba is responsible and accountable.

The Commission is to provide status reports and implementation recommendations on a quarterly basis but is also authorized to make any particular recommendations when appropriate.

In its September 30, 2000 quarterly report the Commission outlined its priorities for implementation of the Inquiry Recommendations. Two elements of the outlined approach are the need to focus on children, youth and the family, and to prevent young people from becoming involved with the justice system. In addition, dealing appropriately with young people who come into contact with the justice system is essential to prevent re-involvement and long term problems. The Commission also noted two other aspects of its mandate. First, it is very conscious of the need to establish priorities and noted that a dollar spent in one area could mean that that dollar was not available in another. Second, it noted that the Federal Government and Aboriginal communities and organizations have a role to play in reducing Aboriginal involvement with the justice system.

Taking all of these elements, the need to focus on children and youth, the need for appropriate treatment by the justice system, the need to establish priorities and the need for involvement of the Federal Government and Aboriginal communities and organizations, into account, the Commission believes that recommendations based on the Young Offenders chapter of the Inquiry are appropriate. The Commission believes that many of the recommendations suggested by the Inquiry may be implemented without the expenditure of new funds.

Aboriginal Justice Inquiry Recommendations

In the Young Offenders chapter of its report the Inquiry made recommendations aimed at both the Provincial Government and the Federal Government. The recommendations aimed at the Federal Government dealt, for the most part, with amendments to the Young Offenders Act. The Commission is aware that a new Youth Criminal Justice Act is before the parliament of Canada and that the proposed Act was, and continues to be, the subject of extensive debate across the country. The Commission does not propose to comment on that aspect of the Inquiry's work, as the Commission's mandate requires it to make recommendation for those areas that the Province of Manitoba is responsible and accountable. As noted in its September 30, 2000 quarterly report, the Young Offenders Act is in the jurisdiction of the Government of Canada.

In the chapter on Young Offenders, the Inquiry endorsed the following approaches:

- That young people be treated in a way that has the least interference with their freedom that is compatible with the protection of society, their own needs, and their families interest ,
- That pre-trial detention be used only when absolutely necessary,
- That young people be transported out of their home communities only as a last resort,
- That custody be used only when necessary,
- That more and better use be made of community resources for diversion programs,
- That diverting youth out of the court system completely or using alternative measures programs that provide options for dealing with young people once they have been charged should be used as much as possible.

Current Situation

The Department of Justice advises that steps have been taken and programs have been put in place to attempt to address the issue of over-representation of Aboriginal young people in jails. The Commission was advised, for example, that in 1993 twenty-five percent of the youth in custody were from Northern Manitoba, while the current figure is eight percent. In addition, the Department of Justice has established a Youth Bail Management program in Winnipeg in an effort to keep young people out of custody in inappropriate situations such as, for example, where a young person has no place to spend the night. Finally, the department has expanded the number of youth justice committees from thirty-two in 1987 to sixty-six currently.

However, notwithstanding these and other efforts, the issue continues to grow. According to the Inquiry, on October 1, 1990, Aboriginal youth accounted for 64% of the inmates of the Manitoba Youth Centre and 78% of the inmates at Agassiz Youth Centre. As of September 6, 2000 the male and female, sentenced and unsentenced, Aboriginal Youth in custody population was 77% at the Manitoba Youth Centre and 85% at Agassiz Youth Centre. Manitoba also has the highest percentage of youth admissions to remand in Canada. In Manitoba, 70% of the young people admitted to custody are admitted to remand which means they are waiting for a court hearing or sentencing. The vast majority of these young people would be persons who have been denied bail while awaiting trial. They are in custody notwithstanding that they have not been found guilty of an offence.

In summary, the important points to note are:

- Manitoba admits a high number of youth into custody in comparison to most other provinces
- Aboriginal youth are vastly over-represented in sentenced custody admissions, 75% of sentenced custody admissions in 1998-99 versus 16% of the youth population

- Manitoba has a very high rate of admissions to remand custody. For example in a recent one day snap shot, of 278 youth in custody, 114 were on remand custody
- The over-representation issue has become more of an issue of Winnipeg youth as the number of youth from outside Winnipeg has declined

Commission Comments

The Commission, based on the findings of the Inquiry and the Commission's consultations and research, supports the recommendations made to Manitoba in the Inquiry's chapter on Young Offenders. The Commission supports the least interference, proportionate, incremental approach to the involvement of young people in the justice system as outlined by the Inquiry. The Commission notes that this approach is also supported in The United Nations Convention of the Rights of the Child, which Canada has ratified. Article 37, states:

"States Parties shall ensure that:

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;"

The Commission recognizes that public safety will require the incarceration of some young people but also believes it is important to recognize that the inappropriate jailing of a young person can cause more harm than good. For example, it is no credit to a society that a young person is kept in jail because he or she has no place to sleep or there is no one to take responsibility for the youth or his or her lawyer is unable to appear at a bail hearing that day. The Commission believes we can do better than that.

The Justice "system" is made up of many individuals who are required to make many discretionary decisions. The Inquiry laid out an approach for police, crown attorneys, youth justice committees and chiefs and council that encourages a proportionate, incremental response, starting with diversion from the Court system as much as possible. In Schedules A and B the Commission repeats, for the consideration of appropriate authorities, the Inquiry's suggested approach and alternatives to custody that the Inquiry suggested police, Crown attorneys and Judges consider.

The Inquiry commented upon the disproportionate impact that the "normal" and "ordinary" approaches that Justice personnel take have on Aboriginal youth. It said,

It is well known that Aboriginal communities have long been isolated by culture, geography, poverty and deprivation, and so have been overlooked, ignored and excluded by the rest of society. This can be seen clearly in northern and remote Aboriginal communities. But what may not be well understood is the impact these conditions have had upon decisions made about their lives in the criminal justice system.

In deciding whether to grant bail, whether to consider a custody sentence or whether to release a young Aboriginal person from custody, criminal justice officials will frequently consider factors such as whether the young person has a job or is involved in an education program. The court considers whether the

young person's parents are employed. It considers the perceived "stability" and resources of the family and the community, the presence of alcohol or drug problems, whether the youth or the youth's parents have a fixed address and, if so, how long they have lived at that address. Decisions made on the basis of these types of factors discriminate against Aboriginal people, because those factors are linked directly to the marginal social, cultural and economic place of Aboriginal people in society"

The Commissions believes that this is an important point that should be remembered by all, especially in dealing with the situation of the very high number of youth in custody on remand, a very high proportion of which are Aboriginal youth.

The high number of youth in pre-trial detention is of concern to many in the Justice and Child Welfare system. The Commission heard many possible causes and suggestions for improvement, including;

A lack of available beds in the Child Welfare system
A lack of alternatives available to Judges
Questions around timely attendance by counsel
Questions about discretionary decisions by all involved

What may be lacking is recognition of the seriousness of the issue and a committed and concerted effort to ensure that pre-trial detention is used only in appropriate cases, primarily where the issue is public safety.

In this area the Commission recommends that:

The Government of Manitoba commit itself to reducing the number of young people held in pre-trial detention from one of the highest in Canada to at least the national average and put in place the services to accomplish this.

As part of a demonstrated commitment to this goal the Justice Department should, as often as is possible, publish comparative statistics on its website. If statistics comparing Manitoba with other Provinces are only available annually the Department should publish its own statistics quarterly with comparative numbers annually.

As there are many possible causes for the high number of young people in pre-trial detention there is also likely a need for a variety of solutions. One of the more promising partial solutions is improvement and expansion of the Youth Bail Management Program. The Commission suggests the government give careful consideration to this approach.

The Inquiry made a number of recommendations in support of its overall approach to the treatment of young people by the justice system. The Commission believes these recommendations support a least interference, proportionate and incremental approach and recommends the following to the government of Manitoba.

- **The police consider alternatives to the laying of charges in all cases involving Aboriginal youth and, when appropriate, exercise their**

discretion to take no legal measure or to take measures other than laying a charge.

- Police departments continue to designate youth specialists and provide specialized training to all officers involved in the administration of the Young Offenders Act.
- When a youth court judge denies bail, the judge consider releasing the young offender into the custody of his or her parents, or another responsible person, as contemplated by section 7.1(1)(a) of the Young Offenders Act.
- Aboriginal communities be provided with resources to develop bail supervision and other programs that will serve as alternatives to detention.
- Young offenders be removed from their community only as a last resort and only when the youth poses a danger to some individual or to the community.
- Child and family service agencies be directed to continue to provide services to youth clients charged with an offence.
- Child welfare and youth justice services be better integrated and co-ordinated so that all their services are available to young people charged with offences.
- The adequacy of administrative and financial resources provided to youth justice committees be assessed.
- The provincial government establish Aboriginal focussed diversion and alternative measures programs which incorporate the following principles:
 - Aboriginal culture must be integrated into the program. Diversion schemes which involve the use of Aboriginal elders, peacemakers and other aspects of Aboriginal culture appear to have the greatest potential for success. In the context of Manitoba's urban Aboriginal communities, the program decision-makers could be drawn from the Aboriginal community within the urban environment.
 - Judges must allow the community to become involved in sentencing but they must retain ultimate responsibility for sentencing.
 - The program should attempt to involve all those who have a direct interest in the case, including the victim and the community.
 - Programs should be able to accept referrals at any stage of the criminal justice process. They should also

be able to accept referrals from the community before any charges have been laid and, if possible, before the authorities become involved.

- **The community's respect for the program is vital. This means that one primary goal of the program must be to seek reconciliation and the restoration of peace in the community.**
 - **The establishment of a range of innovative options that can be used by the decision-makers will be critical to the success of alternative measures programs based in Aboriginal communities. An appropriate plan for an Aboriginal youth might, for example, involve participation in an Aboriginal operated wilderness program, an education program, an employment training program, or a treatment program.**
 - **Aboriginal supervisors from the community must monitor the disposition. The community must see sanctions that originate from, and are enforced by, the community, and not some outside force.**
 - **These programs should be formally designated and recognized as *Young Offenders Act* programs so that their role has official recognition and official support.**
- **The Aboriginal Court Worker Program provide a court worker wherever Youth Court sits.**

One caution the Commission wishes to make is that careful attention must be paid to the issue of a proportionate response and least interference. The lowest sanction possible and appropriate should be used in order not to "net widen" or use greater resources than necessary to address an issue. It is of no benefit to use probation, a family group conference or appearance before a Youth Justice Committee when a simple warning will suffice. The resources used to supervise probation, conduct a family group conference or a Youth Justice Committee in that situation are resources that are not then available for a more serious case. As much as possible intervention needs to be targeted to the needs of the young people.

Other Recommendations

The Inquiry made other recommendations on which the Commission wishes to comment. The Inquiry recommended that accused youth that must be held in pre-trial detention be held in detention facilities in their own communities. The Commission believes pre-trial detention should be used as a last resort for youth and that all other options should be considered before pre-trial detention is used. The Commission was advised that one factor in the reduction in the number of youth from the North involved in the justice system may be the strong and effective stand in managing child welfare issues taken by Aboriginal Child and Family Services agencies in the North. It has been

suggested that, with a community-based response, youth that previously would have been charged with offences and be sent to custody are now handled more appropriately by local child service agencies.

The Commission is loathe to recommend the construction of detention facilities in all Aboriginal communities and recommends that if no other option is available the Justice Department contract with local operators to provide open custody services. Secure custody facilities for pre-trial detention should be kept to a minimum.

The Inquiry also recommended that youth probation, for Aboriginal youth be made part of the responsibility of Aboriginal child and family service agencies. The Commission believes that the effect of its recommendations that child and family services for Aboriginal people and probation services for Aboriginal people be delivered by Aboriginal controlled agencies should result in closer co-ordination of youth probation and child welfare services.

An issue arising out of pre-trial detention is the transportation of young people out of their own communities either from the north to the south and back or from a First Nation or Metis community to a northern urban centre. The Commission has been advised that this practice has decreased but is still of concern to the Department of Justice. It is currently being studied. The Commission believes that public transparency might aid the effort to find a solution to this problem. The Commission recommends that:

The Department of Justice collect and publish monthly statistics showing the number of youth that have been transported from their home community to another location, the reason for the movement and the time that the youth spent away from his or her community.

If the Department finds for example that a high percentage of the youth transported originate in one or two areas and that they are regularly released on appearance before a Judge and transported back to their home the Department would have cause to investigate. Publication of the statistics will give those who have questions for the Department information to formulate appropriate questions.

In its chapter on Young Offenders the Inquiry also made recommendations on Aboriginal participation at all levels in the youth justice system and the need for crime prevention approaches. The Commission will be dealing with both of these issues in a separate series of recommendations.

The Commission wishes to restate its view that its preferred approach to the issue of young people involved with the justice system is to focus on approaches that will help ensure that young people are not involved with incidents that will bring them into contact with the justice system. Those approaches involve supporting early childhood development, strong ties to family and community, sports and recreation activities and encouraging education.

**Schedule A,
Consideration of the use of diversion
Aboriginal Justice Inquiry, p. 579**

“Those involved in the justice system should give strong consideration to the use of diversion whenever an inappropriate act of a young person is brought to their attention.

- **The Police.** When an offence has been committed, the police are contacted and are usually the first representatives of the justice system to examine the circumstances. It is the police who decide if the youth should be charged and, if so, what charge is to be laid.

Police authorities should be directed by the Minister of Justice to consider whether some diversionary program is available and appropriate, rather than immediately laying a criminal charge. They should consider speaking to and, if necessary, lecturing the youth. A letter to the parents, warning of the youth's conduct, might be of value. A meeting with the youth, the parents and the band chief, or a member of a youth justice committee, might be all that is necessary to indicate the unacceptable nature of the conduct and to discourage repetition. If the police do not want to remain involved, referral to a justice committee might be appropriate. This is more likely to happen if community-based policing is being practised.

- **The Crown Attorney.** The Crown attorney should proceed in a manner similar to that which we propose for the police. If the police bring a matter to the Crown attorney and charges have been laid, or are being considered or recommended, the Crown should consider whether the case can be diverted from the court process. If the Crown attorney is not aware of any services available in a certain community, people from that community, such as the chief or the justice committee, should be consulted to see if they would be willing to try to deal with the problem.

It should be Department of Justice policy that diversion be carefully considered before a criminal charge is laid or proceeded with.

- **Youth Justice Committee.** These committees should do whatever is necessary to make sure that police, lawyers and the court are aware of their existence and the services they provide. They should also keep records to show the results of their efforts. It is important for others involved in the justice system to know which programs have been of value.

- **Chief and Council.** The chief and council, as representatives of their community, should support diversion programs and should encourage the establishment of youth justice committees and other support groups within their community. In this way, they can assume more control over what happens to youth from their community. A continuing and supportive dialogue should take place between the chief, the police, lawyers and judges serving their community.”

Schedule B

Alternative Measures, Aboriginal Justice Inquiry, p. 580

The Inquiry suggested that police, Crown attorneys and Judges consider alternative measures in every case. Some of the alternative measures that the Inquiry thought should be considered are:

- “• Staying of proceedings. This might be appropriate where the youth has learned a lesson from his or her conduct and from what has happened to him or her in being apprehended and brought to court.
- Returning the youth to the parents with a reminder of the potential for problems and the direction to be responsible for the conduct of the youth.
- Placing the child with a person who is willing to have the youth in his or her residence and is prepared to give the youth needed support and guidance.
- Requiring the youth’s attendance at counselling programs. These programs might be to develop life skills or to deal with a substance abuse problem.
- Requiring the youth’s attendance at a particular school, either for academic or vocational training.
- Requiring the youth to apologize to the victim.
- Requiring the youth to make restitution or perform services for the victim.
- Requiring the youth to do general community work under the direction of some specified person or the administrator of community service orders.
- Referring the youth to a youth justice committee for its attention.
- Referring the youth to a peacemaker.
- Requiring the youth to appear before the chief and council and to make an apology to the whole community.”