

**SPECIAL FEATURE**  
**COMMENTS ON THE WORKING**  
**PAPERS OF THE LAW REFORM**  
**COMMISSION OF CANADA**

**WORKING PAPER 7**

**DIVERSION**

*Judge J. L. Clendenning\**

In requesting a commentary on Working Paper 7 of the Law Reform Commission of Canada, the Faculty Editor of the *Ottawa Law Review* suggested: "The comments, rather than indicating extensive legal research, are mainly intended to reflect your reactions from a practical/judicial/academic standpoint." My comments must of necessity partially be a reflection of my own background, and in view of my relatively recent admission to the legal profession in 1968, I think it fair to say my experience may perhaps be more extensive in other areas.

Part of the experience acquired was in the field of police work, as a constable with the Ontario Provincial Police in the years 1951-1953. Certainly that involvement with law enforcement must colour any opinions I might render on the issue of diversion.

Generally speaking, I am in favour of diversion. However, as the Working Paper indicates, diversion is not a new concept, having been exercised by the police through their discretion not to invoke the court process in many situations.<sup>1</sup> Of recent date the exercise of this discretion by police forces has to a great degree been restricted for many reasons, and I would suggest the failure to utilize this discretionary power is reflected in the increased caseload of virtually any criminal court.

Society, particularly since the second World War, has become increasingly concerned with "productivity", and this preoccupation has unfortunately been applied to the operation of the complete law-enforcement process and perhaps more specifically to police departments, whose efficiency is determined by "clearance rates". This "productivity" assessment of police

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<sup>1</sup> THE LAW REFORM COMMISSION OF CANADA, *DIVERSION*, WORKING PAPER 7, at 4 (1975).

forces has motivated police departments to increase staff from a ratio, as I recall, of one officer to one thousand population in 1953, to a level of approximately one to five hundred at the present rate, thus enabling them to achieve an increase in their "clearance rates". This increase in personnel and the fact that promotion is based on "productivity" or "clearance rates" make it necessary to reduce the individual officer's exercise of discretion, thus increasing the size of court dockets.

Perhaps an even more profound reason for the diminishing role played by discretion or diversion in police departments has been the increasing public criticism over the past quarter century of the exercise of that discretion, and suggestions that it has been exercised unfairly. I would suggest that a police officer would be most reluctant to consider diversion by a warning or by taking a youthful offender home to his parents when such action could in fact elicit criticism. By following that course of action he has everything to lose through criticism, and nothing to gain by way of promotion.

The increased ratio of police officers to population also has an effect on the exercise of that discretionary power. An officer responsible for only five hundred people has additional time available to submit individual cases to the court process for final resolution.

Perhaps more important in the refusal to exercise this discretion is simply the attitude of society itself: the lack of "self-determination" or inability to resolve individual problems. I think it fair to say that parents have a propensity for looking to some agency of government to resolve any difficulties they might encounter and, in an increasingly complex society, regard themselves as incapable of coping with the individual problem. For example, it was not unusual twenty five years ago for a police officer, when apprehending a youthful offender, to exercise his discretion by taking the offender home to his parents for discipline rather than subjecting him to the court process. Disciplinary measures imposed by the parents of those days would often be far more severe than any sanctions imposed by the judicial system in the present day. If a parent today imposed similar restrictions, given our permissive society, the youth might be completely alienated from his family.

For all these reasons, as well as others which time and space preclude, it is fair to say that diversion in the form of police discretion was formerly exercised to a greater degree than at present.

My overall reaction to Working Paper 7 is that the proposal is merely an attempt to formalize and extend the principle of police discretion, or to formalize what was in fact police practice twenty five years ago. Formalization of criteria for a diversionary program would, I suggest, entail increases in staff or personnel of many agencies, a factor which was considered in the Working Paper.

Although I agree wholeheartedly with the concept of diversion, I seriously question whether in this period of austerity the increased costs of

administering such a program would in fact be acceptable to the community at large. This may in fact pose the biggest stumbling block to the implementation of such a program, although it may not be an insoluble problem.

The Working Paper states that

diversion encourages the community to participate in supporting the criminal justice system to a degree that was not always possible under the trial model. Professionals, para-professionals, ex-offenders and ordinary citizens are encouraged to join the delivery of services to the criminal justice system, for the diversion programs rest upon a community base.<sup>2</sup>

I would suggest that community involvement in the criminal justice system can perhaps be one of the principal benefits, and may at the same time restrict the increased costs of such a program, thereby rendering it more acceptable to society.

My own personal experience in Hastings County has been that the community is not only more interested and knowledgeable concerning the criminal justice system, but is prepared to give its time voluntarily for participation in that system. Such participation in a diversionary program not only engenders a recognition on the part of the community of the complex problems involved in criminal justice, but also assures a fair and just application of the concept of diversion, while diminishing criticism of the exercise of the individual police officer's discretion. Community involvement would to a great degree render the discretion as one exercised by the community itself and would to that extent perhaps make it more acceptable. In effect, diversion would be "community self-determination" within the confines of the criminal justice system.

Before concluding this rather brief commentary I feel obligated to express one reservation, a reservation which is very succinctly stated in the Working Paper: "[i]t would be unfortunate if pre-trial diversion were used as a means whereby a larger and larger proportion of people in trouble were discouraged from handling their own problems and encouraged or obliged to turn to state-run criminal justice programs".<sup>3</sup> The propensity of society is to turn to various state-run agencies for resolution of many of its problems, in effect delegating the power of decision to that agency. I am concerned that this will happen to any diversionary program within the criminal justice system. I can easily conceive of situations arising where parents would be prepared to abrogate their decision-making and disciplinary functions to an impartial tribunal, rather than rely on self-determination. The same could also be said of the individual police officer who, although exercising his discretion less frequently than before, may feel that submitting it to an agency administering a diversionary program would completely negate any possibility of criticism. If this occurred, not only would the rules relating to diversion have to be formalized, but a permanently estab-

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<sup>2</sup> *Id.* at 24.

<sup>3</sup> *Id.* at 15.

lished bureaucracy might have to be created to cope with the problem, thereby negating any community involvement.

Diversion has been defined as a "turning aside or altering the natural course of a thing".<sup>4</sup> In my opinion the natural course, as it applies to the criminal justice system, has been the increasingly frequent invocation of that procedure to attempt to resolve problems in virtually every aspect of our existence, from minor parking infractions to pollution of the air we breathe. This increasing reliance upon the criminal justice system as the final arbiter of all problems must of necessity detract from its efficacy as an institution of social control, either vis-à-vis the individual or vis-à-vis the state.

Diversion, as suggested by the Law Reform Commission paper, is merely an attempt in one small area to "turn aside or alter the natural course", by diverting some offences from the criminal justice system. I have grave reservations whether the formalized structure proposed may not cause even increased reliance upon the system, thereby defeating the trend it was intended to cure.

I trust I do not seem overly pessimistic, but I would suggest that the prime importance of the paper lies not necessarily in its proposals, but in its educative function. Hopefully it will promote public discourse on the subject of diversion.

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<sup>4</sup> BLACK'S LAW DICTIONARY 564 (4th ed. 1951).