ALTHOUGH THERE HAS BEEN MUCH EMPHASIS IN THE PAST DECADE toward the greater diversion of young people away from the court system there has also been a concern to improve the process for young people who are formally prosecuted. Numerous issues such as better access of young people to quality legal representation, more opportunities for young people and their families to participate in and understand the court process and more appropriate sentencing options will be familiar to those with even peripheral involvement in the juvenile justice area. An issue that has been less debated is the process of reviewing the merit and operation of sentences imposed upon young people found guilty of offences.

Queensland has recently completed a comprehensive review of its response to young people in conflict with the law. The issue of appropriate mechanisms to review the sentences of young people was examined in this process. This paper will discuss the present situation in Queensland with respect to the review of sentences, identify the considerations that had to be taken into account and outline the approach soon to be implemented in Queensland.

Background

In Queensland persons aged between 10 and less than 17 years are regarded as young people with respect to criminal law. On average, over two-thirds of young people apprehended for offences are diverted from formal prosecution by the long established and successful police cautioning scheme. The rest are brought before Children's Courts constituted throughout the State by stipendiary magistrates and, in some remote areas, justices of the peace. In 1989-90 there were 4,371 appearances of young people in Children's Courts.
To put this in perspective, these appearances represented just over 2 per cent (2.05%) of the total workload of Children's Courts and adult Magistrate's Courts appearances for offences combined.

Table 1

<table>
<thead>
<tr>
<th>Appearances Children's Court</th>
<th>Appearances Magistrates Court</th>
<th>Total</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987-88</td>
<td>4,448</td>
<td>184,752</td>
<td>2.40%</td>
</tr>
<tr>
<td>1988-89</td>
<td>4,364</td>
<td>197,643</td>
<td>2.16%</td>
</tr>
<tr>
<td>1989-90</td>
<td>4,371</td>
<td>213,302</td>
<td>2.05%</td>
</tr>
</tbody>
</table>

The sentencing options available to Children's Courts are found under the present Children's Services Act 1965. In summary, a court may:

- "admonish and discharge" without further penalty;
- order a young person to be supervised by the Department of Family Services and Aboriginal and Islander Affairs for a period of up to two years;
- order a young person to pay a fine;
- order a young person to pay restitution or compensation; or
- order a young person into the "care and control" of the Director-General, Department of Family Services and Aboriginal and Islander Affairs for a period of up to two years.

Young people have the same rights as adults to appeal against a finding of guilt. They also have the same rights, and access to the same mechanisms as do adults, to appeal against the merit of a sentence. Where the case relates to a simple offence, a young person can appeal to a District Court Judge. If a sentence or conviction for an indictable offence is disputed a young person can appeal to Queensland's highest court, the Court of Appeal. However, it is rare for young people to use these avenues of redress. Only a handful of cases have been dealt with by appellate courts since the commencement of the Act in the mid 1960s. There are at least three reasons for this.

Firstly, young people tend to be reluctant to appeal against non-custodial sentences. For example, a young person placed under a supervision order for a minor first offence would typically resist appealing even though he or she has a good case for arguing that an admonishment and discharge would be more appropriate. The commitment of time involved in appealing, including applying for and obtaining legal representation, instructing counsel and further court appearances is perceived by many as more onerous than the sentence itself.
Secondly, appeal against a court's "custodial" sentence is of limited utility since the real decision about a young person's liberty is made by administrators. Unlike most other Australian States and Territories a court in Queensland does not yet have the power to sentence a young person to a period of detention except in relation to very serious offences such as when a child is found guilty of an offence for which an adult is liable to life imprisonment. A court can order such a child to be "detained at Her Majesty's pleasure" for an indeterminate period (Section 63, Children's Services Act 1965). This order is to be repealed by the Juvenile Justice Act 1992.

The decision to detain a young person is made by a delegated officer of the Department of Family Services and Aboriginal and Islander Affairs. This administrative power derives from guardianship that is conferred upon the Director-General when a young person is placed on a care and control order. On the same basis the Department makes the decision about a date of release from detention limited only by the length of the order itself. For example, in the context of a twelve-month care and control order the Department may decide that the child be released from detention after four months and that the balance of the order be served in the community under supervised conditions.

Thirdly, the time frame for the hearing of appeals concerning indictable offences is so long that most young offenders in custody would have effectively completed their sentence before the hearing. For example, the typical period of detention for young offenders admitted to detention for the first time is about eight weeks while it takes some three to four months to get a hearing before the Court of Appeal. A significant consequence of this is a lack of a substantial body of case law providing guidance in sentencing young people and influencing consistency and equity in sentence outcomes.

Currently, administrators of the Department act in a quasi-judicial manner and frequently modify the effect of some sentence orders on young people to promote consistency. This is particularly the case with respect to whether a young person is detained, and the period of that detention under a care and control order. For example, if a young person is to be detained, soon after the young person's admission to a detention centre senior officers of the Department set a date for discharge. A major consideration in determining this date is detention periods set previously for young people found guilty of similar offences. While this process can ameliorate the effects of the worst disparities in sentencing between young people it has major problems. Included in these are that:

- the process is a "hidden court" that lacks the level of scrutiny and accountability to which a court is subject;
- the process lacks independence—the important decision about a young person's loss of liberty is made by the correctional agency; and
- the process does not assist the sentencing courts to establish consistency.
New Legislation

An early policy position taken in the development of new juvenile justice legislation in Queensland was that the fundamental basis for sentencing young people should be the nature and extent of the offences they have committed not their perceived "welfare" needs. The criminal justice system is a poor mechanism for addressing disadvantage. Given this principle the significant administrative powers conferred upon the Department through such provisions as the care and control order described earlier could not be justified—if a young person is to be deprived of his or her liberty, that decision should be made by a properly constituted court and not by public servants. Thus, in the context of a wider range of new non-custodial sentencing options, it was proposed to give the courts the power to directly detain a young person.

The new detention order was to be determinate and limited by a series of "sentencing caps" depending upon the seriousness of the offence committed and the seniority of the presiding court official. In summary:

- a justice of the peace cannot impose a detention order,
- a magistrate may order a period of detention of up to six months,
- a judge may order detention for a period of up to two years, and
- for serious indictable offences, a judge may order a period of:
  - up to seven years detention for an offence for which an adult would be liable to fourteen years imprisonment (for example attempted arson);
  - up to ten years detention for an offence for which an adult is liable to life imprisonment;
  - up to fourteen years detention for a "life" offence against the person involving an extreme level of violence (for example murder/rape).

A major risk in taking this course of action without adequate mechanisms for reviewing sentences is that unjust outcomes, including disparities in the use of detention and the length of detention to be served, would be without effective challenge. This would be inconsistent with the expressed intention of the new legislation that detention be used only as an option of last resort and for the shortest possible time.

Sentencing Review Options

Essential features of any review mechanism are that it should be:

- expeditious, that is, delays beyond the normal operation of young people's sentence orders, as already noted, would render the mechanism ineffective;
accessible to young people both in terms of cost and simplicity of procedure; and

capable of promoting consistency in sentencing.

Three policy options were considered.

Retention of administrative powers to determine release or discharge dates

Under this option the Department would determine the date of release of a young person from custody under the detention order set by the court having regard to the seriousness of the young person's offence and comparative periods of custody served by similar young people. Whilst having the potential to be timely and accessible, this option obviously contradicts the policy of empowering the court to order detention. What is given by one hand is taken away by the other. In relation to non-custodial sentences like probation, it would involve determining a date of early discharge from the order based on similar criteria. Again, this process would undermine the authority and intention of the sentencing court. Finally, this approach could only modify the effect of the sentence order not the order itself nor could it provide guidance to courts sentencing in the future.

Establish a parole board

A parole board could be set up chaired by an experienced legal practitioner, such as a judge. The board would review the detention order and set a release date as it considered appropriate. Though this option would have the benefit of being more independent than the first option, a quasi-judicial body is inappropriate to review the merit of judicial decisions. Further concerns include:

- the cost of setting up a mechanism with such limited functions in a decentralised State like Queensland;
- that the mechanism would have no impact on the appropriateness of non-custodial sentences; and
- that the existence of the board with the function of modifying detention orders would relieve the onus upon a sentencing court of "getting it right in the first place".

Establish a new judicial review process for young people

This option involves the establishment of a new appellate jurisdiction within the Children's Court itself. If the major obstructions to the use by young people of the existing appeals system could be overcome it is recognised that the objective of promoting greater consistency in sentencing could be more readily achieved through a court based review. The new mechanism does not affect a young person's right to appeal through "traditional" avenues of appeal. The difficulty with this option is the cost associated with the
establishment of a judicial office of greater seniority than the magistrates that currently constitute the Children's Court.

There are precedents for this option in South Australia and Western Australia with Children's Court judges in both States having the power to review the sentences of less senior judicial officers of the court. It is also noted that the appointment of such a position with similar powers was advocated by the Victorian Child Welfare Practice and Legislation Review (1984) and the New South Wales Youth Justice Coalition (1990) Report.

The third option has been adopted in Queensland. In August 1992 the Queensland Parliament passed the Children's Court Act and the Juvenile Justice Act. A new unified Children's Court of Queensland is established under the Children's Court Act and provision is made for a District Court Judge to be appointed concurrently as a Children's Court judge. Where more than one Children's Court judge is appointed, one is to be appointed as President of the court. The office of the judge is empowered under the Juvenile Justice Act 1992 to review a sentence made by a Children's Court Magistrate upon application by the young person concerned, or by the Director-General of the Department of Family Services and Aboriginal and Islander Affairs acting in the young person's interests. Upon rehearing on the merits of the sentence the judge may:

• confirm the order;
• vary the order; or
• discharge the order and substitute another order.

The Act requires that a review is conducted with as little formality and as expeditiously as possible. It is anticipated that, with the use of facsimile machines and ex-parte hearings, a review will be possible, even with respect to sentences made in remote areas, within days of an application being made. These features make this judicial review mechanism relevant and "user friendly" to young people and, therefore, more effective.

While having the capacity to respond to individual cases this system will also enable the development of an authoritative body sentencing precedents to provide guidance to the courts. This will be particularly important during the first couple of years of operation of the Juvenile Justice Act when sentencing "benchmarks" are being set.

Conclusion

If increased powers are to be granted to courts dealing with young people who have committed offences, effective checks and balances are needed to guard against the inappropriate use of these powers. An administrative review mechanism that performs such a function, similar to the present arrangement in Queensland, is unacceptable and without effective safeguards. Traditional judicial review mechanisms have had limited impact on the sentencing of young offenders, particularly those at the lower end of the system. What is needed is a specialised judicial review mechanism that is responsive to the particular challenges presented by juvenile offenders. Such
a mechanism will soon be implemented in Queensland with the creation of the position of Children's Court judge.

References
