

INQUIRY INTO BACK END HOME DETENTION

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Theme: Addresses all ToRs

Summary: Under the Terms of Reference

- Cites 5 benefits and 7 disadvantages,
- discusses external leave programs in 4 other jurisdictions,
- echoes the Law Reform Commission POV on BEHD's impact on truth-in-sentencing,
- notes the appropriate authorities empowered to determine an offender's appropriateness for BEHD in the 4 other jurisdictions,
- discusses eligibility within NSW and a range of other interstate and international jurisdictions,
- discusses experiences of other jurisdictions in implementing BEHD.

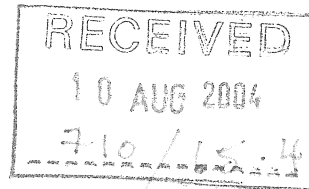


Criminal Law Review Division

NEW SOUTH WALES ATTORNEY GENERAL'S DEPARTMENT

Ms Rachel Callinan
Director
Standing Committee on Law and Justice
Legislative Council
Parliament House
Sydney NSW 2000

06 AUG 2004



Dear Ms Callinan

INQUIRY INTO BACK-END HOME DETENTION

I refer to your letter dated 22 June 2004 inviting the Criminal Law Review Division to make a submission to your inquiry into back-end home detention.

As requested, I have considered the terms of reference and will address each in turn.

(a) The perceived benefits and disadvantages of back-end home detention

The benefits of back-end home detention include:

- (i) It reduces prison populations, which relieves pressure on overcrowding and the need to build more prisons;
- (ii) It is cost-effective because it is less expensive than imprisonment. Furthermore, prisoners who can obtain employment may do so and their families will not require financial support from the Government;
- (iii) It provides an incentive for offenders to behave whilst serving time in prison;
- (iv) It can improve the rehabilitation and reintegration of prisoners into society at the end of their sentence. It can enable offenders to re-establish employment and contact with families. This is especially significant for offenders with children; and
- (v) It eliminates many of the psychological effects of incarceration.

The disadvantages of back-end home detention include:

- (i) The lack of physical restraint on an offender leaves open the possibility of re-offending before authorities can intervene;
- (ii) The less onerous conditions of home detention could be perceived by victims and the public as too lenient;

- (iii) The wearing of an electronic device carries its own psychological pressures. Pressure in the household can lead to domestic violence and other related offences;
- (iv) It creates class-determined prisons (for example, imprisonment in a five-bedroom mansion in the Eastern Suburbs versus imprisonment in a Housing Commission flat in the Western suburbs);
- (v) It can be onerous on the home detention 'sponsor' who must support and take care of the home detainee's needs;
- (vi) Using the home as a quasi-prison deprivatises the home; and
- (vii) In the event that the switch from full-time imprisonment to home detention is an administrative decision rather than a court decision, transparency in sentencing is reduced (see point (c) below).

(b) The relationship between back-end home detention and existing external leave programs

I do not have sufficient knowledge of existing external leave programs in NSW to consider the impact of introducing back-end home detention in this state. However, below is a brief outline of what I understand to be the relationship between back-end home detention and existing external leave programs in four jurisdictions that currently operate back-end home detention schemes.

South Australia

Back-end home detention (BEHD) is one of a number of "community corrections" options, including parole, probation, bail supervision and community service. Once BEHD is completed the person is either released on parole or it will be the end of their sentence and they will be released unconditionally.

Queensland

There are three post-prison community based release alternatives available: a work order (to enable a prisoner to seek and obtain employment), a BEHD, and parole. Once BEHD is completed the prisoner goes on parole.

United Kingdom

BEHD may be issued solely or as part of a joint order with another community sentence, for example, community punishment, a sentence that aims to enhance rehabilitation by giving offenders new skills and opportunities for practical learning. Participants are encouraged to develop positive social attitudes, to solve problems and to learn useful vocational skills.

New Zealand

Other external programs include community service and conditional release after a short-term sentence. After BEHD if the offender reaches his/her statutory release date s/he is released. In the case of an offender who is subject to a long-term sentence the offender is released on parole.

(c) The impact of back-end home detention on the principle of truth-in-sentencing

In its 1996 report on sentencing, the New South Wales Law Reform Commission expressed the view that it is not possible to formulate a satisfactory scheme for back-end home detention without compromising the concept of truth in sentencing:

We maintain our position that in order to preserve truth in sentencing, any order for back-end home detention must be imposed by the sentencing court at the time of sentencing rather than by an administrative decision after the sentence has been imposed. However, we also recognise the force of the argument that it is very difficult for a sentencing court to predict at the time of sentencing whether or not an offender will be suitable for home detention. This would require the sentencing court to predict not only the future behaviour of the offender while serving his or her prison term, but also whether or not there will be a suitable residence in which the offender can serve the home detention order. In our view, the divergence of opinions in the submissions as to the way in which back-end home detention should operate is indicative of the difficulties involved in implementing a satisfactory scheme. We therefore do not recommend the introduction of back-end home detention in New South Wales.¹

(d) The appropriate authority to determine whether an offender may proceed to back-end home detention

In the four jurisdictions mentioned above, the following authority is empowered in to determine whether an offender may proceed to back-end home detention:

| | |
|-------------------------|--|
| <i>South Australia:</i> | CEO of Department of Corrective Services |
| <i>Queensland:</i> | CEO of Department of Corrective Services |
| <i>United Kingdom:</i> | Probation Service |
| <i>New Zealand:</i> | Parole Board AND the Court |

(e) The criteria for eligibility for back-end home detention

Below is an outline of the current criteria for home detention in New South Wales and the current criteria for back-end home detention in South Australia, Queensland, the United Kingdom and New Zealand.

Criteria for New South Wales' primary sentencing home detention scheme

¹ NSWLRC Report 79 (1996) – Sentencing, para 7.31

Home detention is currently a primary sentencing option under Part 6 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) where the offender has been sentenced to prison for a term not exceeding 18 months. The court must first have sentenced the offender to the sentence of imprisonment before the option can be considered.

Home detention is not available as a sentencing option for certain offences including: murder or manslaughter, sexual assaults, sexual offences involving children, armed robbery, any offence involving the use of a firearm, various assault offences, stalking/intimidation offences, domestic violence offences, and some drug offences.

Nor is home detention available for offenders with a certain criminal history, for example a person who has previously been convicted of one or more specified offences, or a person who has been subject to an apprehended violence order made for the protection of a person with whom it is likely the offender would continue a relationship with if a home detention order was made.

Before making a home detention order the court must be satisfied:

- That an offender is suitable for home detention.
- That home detention is appropriate in the circumstances
- That the persons with whom it is likely the person will reside or continue a relationship with have consented in writing
- That the offender has signed an undertaking to comply with specified obligations.

Before making a home detention order the court must consider an assessment report of the Probation and Parole Service on the offender and any other evidence from a probation and parole officer as it considers necessary. The Court may impose conditions on a home detention order.

Criteria for South Australia's post-prison or 'back-end' home detention scheme

Under Division 6A of the *Correctional Services Act 1982* (SA) the CEO of Correctional Services has the discretion to release a prisoner from prison to serve a period of home detention to complete his/her sentence.

A prisoner cannot be released into home detention if:

- The prisoner is serving a sentence in respect of which a non-parole period has not been fixed unless the total term to be served is less than one year; or
- The prisoner has not yet served one-half of that non-parole period.

The prisoner must satisfy any criteria determined by the Minister. The release of a prisoner into home detention is subject to the following conditions:

- Prisoner must remain at residence and not leave residence except for remunerated employment, or urgent medical or dental treatment, or any other purpose approved or directed by the authorized officer to whom the prisoner is assigned.
- Prisoner must be of good behaviour.
- Prisoner must obey the lawful directions of the authorized officer.

- Any other conditions that the CEO thinks appropriate.

The CEO must assign the prisoner to an authorized officer responsible for supervision during the home detention order. The CEO must revoke a home detention order in the event of a breach of conditions and may revoke the order for any other reason.

The SA Corrections website states (www.corrections.sa.gov.au/comm.htm):

Generally prisoners who have been convicted of serious violent offences are not granted home detention and it will rarely be granted for prisoners until they are in the last six months of their sentence.

However, the Prisoner Assessment Committee, which has strong input from the police, community and victims besides Departmental representation, may in exceptional cases grant home detention for 12 months.

In such a case the prisoner would have to have displayed outstanding behaviour in prison, have an extremely supportive family and have full time work.

The idea behind home detention is to ease a prisoner back into the community and assist them to become stable within the community.

Most prisoners granted home detention will be required to remain within the confines of their place of residence and have an electronic bracelet or anklet attached to them.

The Department has electronic means by which random telephone calls are made to this residence which has a device attached to the telephone. When the call comes, at any hour of the day, the prisoner must place the wristlet into the device to signify they are at home.

If this does not happen the home detention officer will immediately attend the residence and if the prisoner is not there the police are alerted.

More lately a state-of-the-art system is radio based. A miniature radio transmitter is attached to the offender and a receiver placed in their home. Each receiver has a set alert distance which, if breached, will alert a supervisor.

This system also has a drive-by facility. A supervisor can simply drive past a place where an offender on home detention is supposed to be attending and the radio transmitter will be picked up indicating the person is there. This removes the intrusive nature of supervision that disturbs a workplace by personal visits.

Officers can also attend the residence at any time and also make personal telephone calls to the prisoner to make sure he or she remains there.

Home detainees will be required to remain drug and alcohol free and other conditions can be set.

If these conditions are found to be breached the prisoner will be returned to prison.

Over time if the prisoner displays success in living back in society, the supervision level may start to reduce.

In fact with time the prisoner may be relieved of the electronic system if the trust level is so high.

Prisoners in this category are permitted to attend work or education daily and they may also be allowed to venture into the community as long as they first apply for permission from their home detention officer.

Once the home detention period is over the person will either be on parole or have completed their sentence.

Home detention from prison is the prerogative of the Department.

Criteria for Queensland's post-prison or 'back-end' home detention scheme

Chapter 5, Part 1 of the *Corrective Services Act 2000* (Qld) makes provision for the granting of post-prison home detention. In considering a prisoner's application for post-prison home detention a corrections board may consider any information it considers necessary.

A home detention order may include:

- A condition that the corrections board considers reasonably necessary to:
 - Ensure the prisoner's good conduct or
 - Stop the prisoner committing an offence; and
- A condition that the prisoner carry out a corrective services officer's lawful instructions.

A home detention order cannot contain a condition that the prisoner perform community service.

A prisoner released on home detention may leave the prisoner's home only for one of the following purposes:

- To comply with the conditions of the home detention order or an existing court order
- To attend to the necessities of life, including for example to buy food or to collect a social security benefit
- To seek or engage in approved employment
- To engage in an activity approved by a corrections board, or a corrective services officer, including for example to attend a rehabilitative program
- To prevent or minimize a serious risk of death or injury to the prisoner or another person
- To receive medical or health treatment
- For another purpose approved by the chief executive

However, the prisoner must get a corrective services officer's approval before leaving home. Except in an emergency, the approval must be in writing and state the conditions of the approval.

The CEO may, by written order grant leave to a prisoner on home detention to travel interstate for a period of not more than 7 days. The leave is subject to the conditions the CEO decided.

The CEO may, by written order, suspend, amend or cancel a post-prison community based release order if s/he reasonably believes the prisoner has failed to comply with the order or poses a serious and immediate risk of harm to himself or herself or someone else. The CEO can then issue a warrant for the prisoner's arrest.

Criteria for United Kingdom's post-prison or home detention curfew scheme

In the UK home detention is used "towards the end of a custodial sentence, as a form of transition from prison back into the community." (*Probation: Electronic Tagging*, Home Office, London, http://www.cjsonline.gov.uk/access/working/homeoffice/probation_tagging.html). Under the *Crime and Disorder Act 1998* (UK) all adult prisoners serving sentences of between 3 months and 4 years are eligible for home detention unless they fall within one of the exclusion categories below. The maximum period of home detention was recently changed to 4 ½ months and the minimum is normally fourteen days. Minimum curfew duration is 9 hours a day. In practice most curfews run for 12 hours overnight.

Section 34A of the *Criminal Justice Act 1991* provides that the following offenders are not eligible for curfew orders:

- Violent and sex offenders who are serving extended sentences where extended supervision is involved
- Offenders serving a term for failing to return to custody following a period of temporary release
- Offenders subject to a hospital order under the *Mental Health Act 1983*
- Offenders serving a sentence for the failure to successfully complete a curfew order
- Offenders who are serving sentences and who are liable for removal from the United Kingdom
- Offenders who have been returned to prison for breach of their release conditions
- Fine defaulters and contemnors (both criminal and civil) as they are not serving a sentence of imprisonment.

All offenders serving a sentence that falls within the eligibility range must be assessed for suitability by the Probation Service before being formally offered a home detention order:

Prisoners will normally be released on HDC unless there are substantive reasons for retaining the prisoner in custody until his or her automatic release date. Only when there are clear and substantive grounds to indicate that the prisoner is unlikely successfully to complete the period on HDC will release normally be refused. These are:

- an unacceptable risk to the victim or to members of the public;
- a pattern of offending which indicates an unacceptable risk of re-offending during the home detention curfew period;
- a probability of failure to comply with the conditions of the curfew; or
- an unsuitable address for HDC

(<http://www.homeoffice.gov.uk/docs/probat.html>)

There are two different levels of violations. A level 1 violation results in an immediate breach of HDC. These include being absent during an entire curfew period, intentional destruction of equipment or assaulting a member of the contractor's staff. A level 2 violation results in a written warning from the contractor. More than two level 2 violations result in a breach of HDC. Level 2 violations include shorter absences in one curfew period, cumulative absences over the length of the curfew or minor damage to the equipment. Decisions to revoke the order are taken by the Parole Unit of the Prison Service.

Criteria for New Zealand's post-prison or 'back-end' home detention scheme

In New Zealand, Home Detention Orders are an early release from prison option under the *Sentencing Act 2002*. Under section 97 a court must grant an offender leave to apply to the Parole Board under s 33 of the *Parole Act 2002* for home detention unless it is satisfied that it would be inappropriate to grant leave taking into account:

- the nature and seriousness of the offence
- the circumstances and background of the offender
- any relevant matters in the victim impact statement in the case; and
- any other factor the court considers relevant.

The orders are available to convicted offenders who have not committed serious violent offences and who are serving sentence(s) the total of which is/are not more than 2 years. Prisoners can apply for home detention 5 months before the end of their sentences.

Upon receiving an application under s 33 the Parole Board must request a report from the relevant probation officer, then grant home detention if satisfied on reasonable grounds that (s 35(2) *Parole Act 2002*):

- the offender will not pose an undue risk to the safety of the community or any person if s/he is detained on home detention
- the offender is suitable for home detention having regard to:
 - the likelihood that s/he will commit further offences while on home detention
 - the nature of the offence for which the person is currently serving imprisonment
 - the welfare of the offender and the likelihood that his or her rehabilitation and reintegration will be assisted by home detention
 - the safety and welfare of the occupants of the home detention residence
 - the outcome of any restorative justice processes that may have occurred.

An offender may leave the residence in which s/he is on home detention only:

- to seek urgent medical/dental treatment
- to avoid or minimise a serious risk of death or injury to the offender or another person
- to undertake certain other activities with the approval of a probation officer.

If an offence punishable by imprisonment is committed by a detainee serving HD the Court must order imprisonment unless it considers that there are special reasons for

ordering otherwise. For offences not punishable by imprisonment, the court has the discretion as to whether the offender should be returned to prison for violating the HD order (s 99 *Sentencing Act 2002*)

(f) The experience of other jurisdictions in implementing back-end home detention schemes

South Australia

The number of intakes in post prison home detention in the 2002/2003 period was 265. Of these, 87% or 230 successfully completed this order. In comparison, during 2001-2002, 277 prisoners were released to Home Detention, and of these 236 or 86% successfully completed this order. (*Correctional Services, "2004 Community Corrections, South Australia"*)

Queensland

The number of intakes in post prison home detention in the 2002/2003 period was 264. Of these, 84% successfully completed this order. In comparison, during 2001-2002, 294 prisoners were released to Home Detention, and of these 89% successfully completed this order. (*Department of Corrective Services Annual Report 2002-03*)

United Kingdom

In the first 16 months of the home detention scheme in the UK:

- 5% of curfewees were recalled to prison mostly for a breach of curfew, but a quarter of recalls were due to changes in circumstance.
- Breaches of curfew fell into four main categories
 1. equipment failure
 2. psychological issues
 3. domestic or housing issues
 4. lifestyle
- Women were more likely to be eligible for the tagging than men.
- Offenders convicted of crimes with a high reconviction rate, eg burglary, are less likely to be tagged than those who committed an offence with a low reconviction rate, eg fraud.
- 37% of prisoners said the chance of being put on the scheme positively influenced their behaviour in prison.
- The scheme was estimated to have saved the Prison Service £36million.
- 2% of participants re-offended while on curfew, but re-offending rates were almost identical to a control group in the six months following curfew.

(*"Electronic monitoring of released prisoners: an evaluation of the Home Detention Curfew Scheme"*, Kath Dodgson, Philippa Goodwin, Philip Howard, Siân Llewellyn-Thomas, Ed Mortimer, Neil Russell and Mark Weiner, *Home Office Research Study 222*, March 2001)

- Between 1 April 2003 and 30 June 2004, 21, 323 offenders started a home detention curfew order in the UK.

(<http://www.probation.homeoffice.gov.uk/output/Page170.asp>)

New Zealand

A 2003 review found that the home detention scheme in place was working well, apart from minor technological problems and some negative impacts on families and sponsors of offenders subject to monitoring (Gibbs & King, 2003, "The Electronic Ball and Chain? The operation and impact of home detention with electronic monitoring in New Zealand", *ANZJC*, vol 36, no1, pp.-17).

However, in June 2004 the Government announced another review of the home detention scheme after a succession of media reports highlighting abuse of the system. Complaints have been made by opposition parties, for example:

Home detention was originally put in place to allow non-violent offenders to be confined at a lower cost to the taxpayer. Regretfully, investigation by New Zealand First discovered that far from being given to non-threatening offenders, a new type of home "detention" called "Back End Home Detention" was increasingly being given to killers, rapists and child abusers. We also discovered that the monitoring of home detainees was slack, that unbeknown to the public, offenders were enjoying large amounts of time out and about in the community and that some were involved in criminal activities whilst on home detention. (New Zealand First website, <http://www.nzfirst.org.nz/newsletter/mar04/03.php>)

It was reported that between January 2002 and February 2003, 87 of the 1017 offenders then on home detention (including those who were granted HD when originally sentenced and those receiving it in the last 3 months of their prison sentence) had breached conditions and 10 of those were recalled to prison.

Corrections officials have defended HD, saying that after a 12-month follow-up period, only 7.1% of people placed on HD have been re-imprisoned. By comparison, 19.8% of people released from minimum security jails were re-imprisoned within a year.

The review will consider whether the sentencing judge and not the Parole Board should decide whether someone should be given home detention.

(g) Any other related matter

None.

Yours sincerely



Lloyd Babb
Director