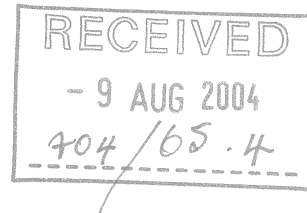


5 August 2004

Attention The Director,
Standing Committee on Law and Justice,
Legislative Council,
Parliament House,
Sydney NSW 2000



Dear Sir/Madam

Inquiry into back-end home detention

I refer to the Terms of Reference on the above topic.

Thank you for your invitation to provide comments. The Legal Aid Commission of New South Wales (Legal Aid NSW) submission is attached.

Legal Aid NSW also thanks the Standing Committee for allowing an extension of time to provide its submission to 6 August 2004.

If you require any further information, please do not hesitate to contact me.

Yours faithfully

A handwritten signature in black ink, appearing to read "Lyndsay Brooker".

Ms Lyndsay Brooker
A/Manager Review and Reform

DISCUSSION PAPER

27 July 2004

Enquiry into Back-end Home Detention

**Submission on behalf of the
Legal Aid Commission of New South Wales
to the
Legislative Council Standing Committee on Law and Justice**

The Legal Aid Commission of New South Wales (Legal Aid NSW) is established under the *Legal Aid Commission Act 1979* (NSW) and is an independent statutory body. It provides legal services to socially and economically disadvantaged people. Legal services include representing them in federal and state courts and tribunals. It also works in partnership with private lawyers in representing legally aided people.

Where Legal Aid NSW feels able to support the proposal, it has indicated that to be the case.

The Legal Aid NSW submissions follow the enumerated points included in the Terms of Reference.

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

There has been significant ongoing concern at the increasing prison population and the effectiveness of our gaol system in rehabilitating inmates. The strictness of home detention coupled with the physical placing of prisoners within the family home, or at least in an environment within the community, would provide a significant step in the transformation of a prisoner's ability to adapt from an institution back into the community. This support period would cushion the impact as the prisoner moves from a non-

parole period to a parole period. In this way the Legal Aid NSW is supportive of back-end home detention.

It is expected that there will be a cost transfer from the New South Wales Department of Corrective Services to the prisoner. Persons would be placed in their home environment that would otherwise have remained in the prison system. The benefit that may flow is that this may allow for funding to be directed towards rehabilitation programs. Further, the expected reduction in the prison population may also result in less pressure on existing rehabilitation programs.

The disadvantages of back-end home detention would include a perceived discrimination against a significant portion of the prison population who would otherwise not be eligible for home detention. This group could include those suffering from mental health conditions, indigenous people and socially isolated persons who may otherwise not fulfil the criteria of home detention.

Another disadvantage may be the limited opportunities as to the availability of home detention in remote areas of the State leading to an inconsistent treatment of offenders.

There is also a view that an intended consequence of combining non-custodial options with custodial options is that it raises a real danger that sentences will in practice become more severe.

(b) the relationship between back-end home detention and existing external leave programs
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There is no reason why back-end home detention could not coexist with existing external leave programs. This will obviously depend upon the criteria that are set for back-end home detention. It is understood that the New South Wales Department of Corrective Services has authority to release inmates on what are called temporary release programs. This permits leave from gaol without a guard for purposes of study leave, works release, day leave and weekend leave.

Unlike home detention, the criteria is the security classification as opposed to the offence that led to the conviction. Currently inmates must be a minimum C3 security classification and be around six months from the expiry of the non-parole period. There are strict rules surrounding this release. Home detention is currently not available for offences such as sexual assaults, armed robbery, serious assaults and commercial drug offences. If this were also the case with any back-end home detention, then it would be necessary that existing external leave programs continued. However, in many cases persons who were otherwise able to take advantage of temporary release programs may be eligible for back-end home detention. The big concern is that it is the New South Wales Department of Corrective Services that decides the eligibility and suitability for temporary release programs whereas back-end home detention would be approved through the sentencing court or the Probation and Parole Service.

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

It is agreed that back-end home detention would impact on the principles of truth in sentencing especially if the sentencing court is not the authority that determines whether an offender may proceed to home detention. The debate that lead to truth in sentencing in essence occurred because the courts consistently held that remissions could not be taken into account when setting the non-parole period. This was because the offender had no legally enforceable right to remissions and the courts were not at liberty to extend the non-parole period by an amount representing the likely discount on sentence, which would be obtained through remissions. Clearly if the sentencing court is the appropriate authority to determine whether an offender may proceed to back-end home detention then the principle of truth in sentencing would be maintained. If, however, the determining authority was the Parole Board, then this could be seen to be contrary to the concept of truth in sentencing. To help overcome this the sentencing court could at the time of sentencing, order that back-end home detention should not be available in a particular case.

The negative media reaction and public outcry in regards to the early release of prisoners to home detention is not expected to be as lively as the times when prisoners were in receipt of remissions and released early. Home detention is recognised as a penalty of some significance and would have the other popular benefit of providing a less expensive sentencing option than imprisonment and a more humane form of punishment.

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

There is a significant benefit to having the Parole Board make the decision as to whether an offender may proceed to back-end home detention. It is appreciated, however, this becomes an administrative decision which does affect the principle of truth in sentencing and may be seen to dilute the power of the sentencing court.

The most significant difficulty for the sentencing court in determining back-end home detention is that it would not be in a position to make an adequate assessment as to the eligibility of home detention so far away from the prisoner taking up of the home detention. The availability and suitability of a home for a prisoner at the time of sentence may not be suitable or available at the time of eligibility of home detention. Further, a court would not be knowledgeable as to how a prisoner has progressed in gaol and in that regard whether the person is still a suitable candidate for a home detention order. It would require the sentencing court to predict the future behaviour of a prisoner and also as to whether there is a suitable residence. This would make this a difficult task and in that regard the Parole Board would be better placed to make a determination as to the eligibility of a prisoner for home detention.

It would not be practical for the sentencing court to revisit the original decision to grant an order for back-end home detention nearer the time of the proposed release.

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

The criteria for eligibility for back-end home detention may need to be as consistent as possible to current legislation involving home detention with the maximum period of home detention being 18 months rather than applying to offenders who are sentenced to terms of imprisonment of 18 months or less.

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

It is understood that the State of Queensland has a back-end home detention scheme.

CONCLUSION

Legal Aid NSW is grateful for the opportunity to make submissions to the Legislative Council Standing Committee on Law and Justice on the Inquiry into Back-end Home Detention. Where Legal Aid NSW feels able to support the introduction of a bank-end home detention scheme, it has indicated that to be the case. It is hoped that the Standing Committee in its continuing deliberations will review those areas where Legal Aid NSW has expressed concern.

Should you wish to discuss any aspect of this submission please contact Brian Sandland on telephone 9219 5732 or via email brian.sandland@legalaid.nsw.gov.au.