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**The Home Detention Bill 1996:
Commentary and Background**

by

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EXECUTIVE SUMMARY

- The Home Detention Bill 1996 introduces a **new sentencing option**, home detention. Home detention is a program that confines offenders to their place of residence, continuously or during specified hours. Under the NSW scheme the confinement is monitored by a combination of random telephone checks and visits by supervising officers and by electronic devices. The **objectives** of home detention include depriving the offender of liberty, providing a cheaper alternative to full-time imprisonment, and sparing minor offenders the ordeal and contamination of prison (page 3).
- Home detention can be used at several stages in the criminal justice system: to release persons on bail; as a sentencing option for the court; and as an early release program from prison. In NSW it will be a sentencing option for courts to divert offenders from prison by ordering that they serve a sentence of imprisonment of up to 18 months by way of home detention (page 5).
- The NSW scheme will combine home detention with programs to **rehabilitate** the offender or integrate the offender into the community, such as community service work, drug and alcohol counselling, life skills training and so on (pages 12-13 and 25).
- Home detention has several **advantages** over imprisonment: it costs less for the government to operate; it is more humane for offenders as it avoids the destructiveness of prison; it prevents minor offenders coming into contact with more hardened criminals; it provides an alternative to prison for offenders with special needs (such as pregnant women, or offenders with disabilities); it allows offenders to remain in the community and to retain or seek employment; it prevents families from being split up; it allows offenders to undertake rehabilitation; supervising officers can provide support for the offender and his or her family; it controls and punishes offenders by confining them to the home (pages 13-16).
- The **problems** with home detention are that it is not completely secure, and it cannot prevent a determined offender from re-offending; it may be perceived as too lenient and easy to breach, and it may seem to trivialise the offences for which it is available; if it is not carefully implemented it may be used as an alternative to lesser sentences rather than as an alternative to imprisonment, and may therefore increase the number of people in the corrections system; it may be difficult to find offenders who are suitable for home detention; problems with monitoring technology may compromise the effectiveness of home detention; the use of home detention may lead to a decline in rehabilitation services or support for offenders; home detention may be stressful for the offender and his or her family and places the family in the role of 'warder'; home detention requires a stable residence and a telephone and so it may be more available to well-off offenders than to poor or transient ones; and the use of electronic monitoring on offenders may be the first step in monitoring other sections of the public (page 16-24).

- Under the Bill home detention is **not available for certain offences**: murder, attempted murder, manslaughter, sexual assault, sexual offences involving children, armed robbery, any offence involving a firearm, assault occasioning actual bodily harm (or any more serious assault), stalking or intimidation, a domestic violence offence against a person with whom the offender intends to reside or with whom the offender has a relationship; and drug offences if so prescribed by the regulations (page 25).
- A home detention order is **not available to certain offenders**: those who have been convicted at any time of murder, attempted murder, manslaughter, sexual assault, sexual offences involving children, stalking or intimidation; or who have been convicted within the last five years of a domestic violence offence against (or are subject to an apprehended violence order to protect) a person with whom the offender intends to reside or with whom the offender has a relationship; or who has been convicted of an offence prescribed by the regulations (page 26).

1. INTRODUCTION

The recently introduced Home Detention Bill¹ aims to allow certain offenders sentenced to a term of imprisonment of up to 18 months to serve the sentence in their homes rather than in prison. This paper discusses the development of home detention in Australia and overseas, the advantages and problems of home detention, and the operation of the proposed New South Wales home detention scheme.

Home detention is "a program of confinement and supervision that restricts the defendant to his or her place of residence continuously or during specified hours, enforced by appropriate means of surveillance".² The surveillance may be human contact with the offender during the hours of detention, or may be electronic, or a combination of the two. The New South Wales home detention scheme is intended to be a combination of human and electronic monitoring.

The objectives of home detention include depriving the offender of liberty by confinement in the home within specified periods, providing a cheaper alternative to full time imprisonment, and sparing the offender, particularly the minor offender, the ordeal and contamination of prison.³

2. DEVELOPMENT OF ELECTRONICALLY MONITORED HOME DETENTION

Correctional policies over the last few decades have investigated the use of "intermediate punishments", which fall between low severity punishments (such as fines and good behaviour bonds) and incarceration. Intermediate punishments include community service orders, intensive supervision orders and home detention.

The terms "**home detention**" and "**intensive supervision**" are used to describe a wide range of corrections. An order for intensive supervision requires the offender to follow specified programs under the close supervision of an officer, and may require the offender to do community work. The supervision often involves telephone calls and visits once or more a day, sometimes becoming less frequent as the offender continues to follow the program successfully. The emphasis of intensive supervision programs is on keeping track of the offender's whereabouts and activities, and developing responsible behaviour in the offender. The supervising officers have both a support and surveillance role.

Home detention may take the form of simple confinement to the home, with no other

¹ NSWPD, 20/6/96, p 3384.

² United States Sentencing Commission, quoted in M Burns, "Electronic Home Detention: New Sentencing Alternative Demands Uniform Standards" (1992) 18 *Journal of Contemporary Law* 75 p 78.

³ New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33, April 1996 ¶9.14.

intervention. However, home detention is usually combined with rehabilitation or community service requirements similar to the kinds of requirements placed on offenders by intensive supervision orders. In general, home detention is designed to be more punitive and restrictive than intensive supervision. The offender under home detention is confined to the home, while this is not necessarily the case with intensive supervision. Normally, offenders on home detention or intensive supervision continue their employment or study.⁴

In the United States in the early 1980's several states introduced intensive supervision and home detention programs. Supervising officers monitored offenders by random telephone and face to face checks. Interest in the possibilities of home detention was intensified by the development of electronic technologies to monitor compliance with the detention conditions.

The first device capable of monitoring a person's whereabouts was developed at Harvard University in the 1960's⁵. The system involved wearing a 1 kg transmitter which emitted radio signals that could be picked up by receivers located within about a quarter of a mile.⁶ The inventor saw in "electronic telemetry", as he called it, a more humane form of punishment than incarceration, and also a more effective way to reduce recidivism - it increased the probability of authorities detecting any re-offending, and "monitored offenders would be deterred from associating with others on joint criminal enterprises, or would be rejected from criminal groups because of their risky status".⁷

The technology remained experimental until the early 1980's, when the reduced cost and increased reliability of electronic equipment combined with the interest of a district court judge in New Mexico to produce the first viable monitoring system. In 1984 the first electronically monitored home detention programs were set up in Florida and since then the use of home detention, especially electronically monitored home detention, has increased dramatically in the United States.

The Equipment

There are two basic types of electronic monitor. The first is **passive**, where the offender's telephone is randomly called by a central computer. The offender's responses are recorded and the offender is required to confirm his or her presence by placing the monitor in a device attached to the phone; this transmits a message to the central computer confirming

⁴ New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33, April 1996 ¶9.11.

⁵ Notes, "Anthropotelemetry: Dr Schwitzgebel's Machine" (1966) 80 *Harvard Law Review* 403.

⁶ R Fox, "Dr Schwitzgebel's Machine Revisited: Electronic Monitoring of Offenders" (1987) 20 *Australian and New Zealand Journal of Criminology* 131

⁷ Ibid p 132, referring to R Schwitzgebel, "Electronic Alternatives to Imprisonment" (1968) 5 *Lex et Scientia* 99; R Schwitzgebel, "Electronically Monitored Parole" (1968) 48 *Prison Journal* 34; R Schwitzgebel, "Development of an Electronic Rehabilitation System for Parolees (1969) 2 *Law and Computer Technology* 9; R Schwitzgebel, "Issues in the Use of and Electronic Rehabilitation System for Chronic Recidivists" (1969) 3 *Law and Society Review* 597.

the identity of the person called. The monitor is worn around the wrist or ankle on an unremovable band.

In an **active** system the offender wears a transmitter which continuously transmits to a receiver inside the home (often connected to the phone), which in turn informs a central computer of the offender's presence. If the offender goes out of range or tampers with the device, a violation is recorded at the central computer. There are other active systems on the market which do not rely on phones; instead, the signal from the transmitter is picked up directly by the monitoring agency or probation officer.⁸

There are also **hybrid** systems combining passive and active elements, where an active system may switch automatically to passive if there is a fault or interference with the transmission.

An experimental system is **voice verification**. A computer randomly calls the offender who is required to repeat a randomly selected series of words and numbers. Voice verification technology confirms the identity of the speaker. Another experiment is with **tracking** devices based on equipment used to track wild animals.

The basic systems can also be combined with other surveillance technology. For example, some programs include equipment that tests alcohol levels over the phone, or use video cameras to send visual images to the probation department.⁹

3. APPLICATION OF HOME DETENTION

Home detention can be used as a "front door" or "back door" program. "**Front door**" programs use home detention as a sentencing option for courts as an alternative to incarceration, allowing the offender to serve the sentence at home. "**Back door**" programs allow offenders already in gaol to be released early to serve the remainder of the sentence at home.

Although both forms of home detention involve supervision and surveillance by correctional officers, surveillance tends to be the major focus of back-end programs, where supervision is, generally, less interventionist.¹⁰

⁸ Ibid, p 135.

⁹ Used in Baton Rouge, Louisiana USA: A Grace, "Home Incarceration under Electronic Monitoring: A Statutory Review" (1990) 7 *New York Law School Journal of Human Rights* 285 p 302. In an Annapolis, Maryland drunk driver monitoring program, video cameras are installed in offenders' homes, "but they are not always turned on. Rather, a jailer calls the offender once or twice a day and asks him to step in front of the camera, take a self-administered breath alcohol test, and display the results before the camera": Peck, "High-Tech House Arrest", *Progressive*, July 1988 at 28, quoted in M Burns, "Electronic Home Detention: New Sentencing Alternative Demands Uniform Standards" (1992) 18 *Journal of Contemporary Law* 75 p 88.

¹⁰ New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33, April 1996

Home detention can be used as a condition of **bail** to allow some people who would otherwise be remanded in custody to be released to their homes pending trial or sentencing. It can also be used for offenders with **special needs**, such as offenders who are pregnant or have children, or who have HIV/AIDS or other chronic illnesses, or mental or physical disabilities.

The following section of the paper describes a selection of home detention and intensive supervision programs in Australia and other countries.

(1) United States

The first large-scale electronic monitoring project commenced in Palm Beach County, Florida in 1984, known as the In-House Arrest System.¹¹ It had both “front-door” and “back-door” functions: one scheme for offenders on probation, and one scheme of early work release for minimum security prisoners.¹²

Probationers paid a weekly fee to Pride Inc, the non-profit corporation assigned responsibility for monitoring them, to cover the cost of the equipment and supervision. They were required to maintain a working telephone or make arrangements to live with a person who had a phone. They also had to report weekly to the probation office to have the transmitter straps inspected, and to discuss any problems in relation to probation or confinement at home. Most of the probationers were convicted of drink driving offences, and were given a choice of 30 days on monitored detention or 10 days in gaol. The sentence and its conditions had to be acceptable to the prosecutor, the defendant, the defence attorney, and an officer from the probation service.

The program for work release prisoners allowed them to return to their homes rather than to prison at the end of the day. Prisoners convicted of crimes against the person or drug offences were ineligible to participate; in addition, persons convicted of causing death by culpable driving including drunk driving were ineligible unless the victim's family consented.¹³ The prisoners paid a daily supervision fee to the county gaol, and spent an average of 55 days each on home detention.

Subsequently a large number of electronically monitored home detention programs were implemented across the United States - in 1988 thirty-two American states had monitoring programs,¹⁴ and in 1992 in the United States some 45 000 persons were being handled by

¶9.16.

¹¹ Home detention is also known as home confinement and home imprisonment. The term “house arrest” is no longer generally used, probably due to its connotation of suppression of political dissidents.

¹² R Fox, “Dr Schwitzgebel's Machine Revisited: Electronic Monitoring of Offenders” (1987) 20 *Australian & New Zealand Journal of Criminology* 131 p 136.

¹³ *Ibid* pp 136-7

¹⁴ M Burns, “Electronic Home Detention: New Sentencing Alternative Demands Uniform

about 1, 200 different agencies.¹⁵ As electronically monitored home detention has spread, it has been applied in a variety of combinations of equipment, degree and kind of face-to-face contact and supervision, curfew times, permissible activities, place of residence and type of conviction. Programs have been targeted at specific offenders, such as juvenile burglars, drink drivers and drug offenders.¹⁶

Some programs have found that home detention and intensive supervision schemes do not benefit significantly from the addition of electronic monitoring. For example, the Georgia Department of Corrections in 1982 implemented Intensive Probation Supervision (IPS) of offenders. The program monitored offenders using officers specialised in rehabilitative programming and surveillance. Supervision standards included five contacts per week in initial stages, curfews enforced by frequent home visits, employment verification, and drug and alcohol testing.¹⁷ In 1987 electronic monitoring was introduced experimentally for drug offenders in this program as an enhancement of, rather than a replacement for, intensive face-to-face human supervision. One caseload used a passive electronic device that performed curfew checks by voice verification and also provided a breath/alcohol test through the same mouthpiece. Another caseload used active electronic bracelets, and the third caseload used only human surveillance.¹⁸ Preliminary conclusions of field staff (after 18 months) did not support the use of electronic monitoring in conjunction with intensive supervision or with drug abuse cases:

Curfew checks routinely performed by IPS officers were thought to be very effective in keeping track of probationers' whereabouts, and electronic monitoring did not result in any widespread violations of curfew. Officers expressed the view that this equipment did not significantly enhance the level of supervision that IPS maintains through home visits alone.¹⁹

An intensive drug program in Clackamas County, Oregon, was designed for drug offenders who have failed in prior substance abuse programs or on probation/parole. It combined electronic surveillance with two weekly drug treatment group sessions, one weekly life structuring group session, attendance at a minimum of two weekly community self-help

Standards" (1992) 18 *Journal of Contemporary Law* 75 p 83

¹⁵ J Lilly, R Ball, G Curry and J McMullen, "Electronic Monitoring of the Drunk Driver: A Seven-Year Study of the Home Confinement Alternative" (1993) 39 *Crime and Delinquency* 462 p 464, citing A Adelson, "Making Homes into Prisons, Carefully" (1992) *New York Times* (National Edition), November 15, p.12.

¹⁶ T Baumer, M Maxfield and R Mendelsohn, "A Comparative Analysis of Three Electronically Monitored Home Detention Programs" (1993) 20 *Justice Quarterly* 121.

¹⁷ B Erwin, "Old and New Tools for the Modern Probation Officer" (1990) 36 *Crime and Delinquency* 61 p 62.

¹⁸ Ibid p 65.

¹⁹ Ibid p 67.

group meeting (such as Alcoholics Anonymous) and drug and alcohol testing.²⁰ Participants paid a daily fee. The program consisted of 14 weeks of surveillance plus treatment, followed by 14 weeks of non-monitored, voluntary attendance at treatment meetings. The overall conclusion was that "community-based sentencing options which combined electronic monitoring with drug treatment warrants further consideration as intermediate sentencing options" and can lower recidivism rates.²¹

Concerns about public safety initially restricted home detention to offenders perceived to be a low risk to public safety, with little prior criminality. It was used to enhance probation rather than as an alternative to incarceration.²² As rates of violation and re-offending have remained acceptably low, and as pressures on prisons increase, the kinds of offences for which home detention is available have expanded.²³

Studies of sentencing practices in the United States indicate that judges seem to apply an informal rule of thumb in sentencing, ordering home detention sentences that tend to be approximately three times the length of whatever the alternative jail sentence would have been. An increase in the quantity of electronically monitored time is seen to compensate for the less onerous quality of punishment.²⁴ This practice seems to occur when the home detention available is simply home confinement without rehabilitation, treatment, or community service requirements, rather than where the home detention is combined with intensive supervision and intervention.²⁵

Home detention in the US has expanded extremely rapidly in response to the drastic overcrowding in prisons and the escalating costs of building and maintaining prisons for an ever-increasing prison population.²⁶ In countries with lower imprisonment rates, the

²⁰ A Jolin and B Stipak, "Drug Treatment and Electronically Monitored Home Confinement: an Evaluation of a Community-Based Sentencing Option" (1992) 38 *Crime and Delinquency* 158 p 160.

²¹ A Jolin and B Stipak, "Drug Treatment and Electronically Monitored Home Confinement: an Evaluation of a Community-Based Sentencing Option" (1992) 38 *Crime and Delinquency* 158 p 160.

²² T Baumer, M Maxfield and R Mendelsohn, "A Comparative Analysis of Three Electronically Monitored Home Detention Programs" (1993) 20 *Justice Quarterly* 121 p 122.

²³ For example, in a program in Oregon, participants' convictions included armed robbery, drug offences, manslaughter and sexual offences: D Glaser and R Watts, "Electronic monitoring of drug offenders on probation" (1992) 76 *Judicature* 112.

²⁴ J Lilly, R Ball, G Curry and J McMullen, "Electronic Monitoring of the Drunk Driver: A Seven-Year Study of the Home Confinement Alternative" (1993) 39 *Crime and Delinquency* 462 p 467.

²⁵ Oral advice from Probation and Parole Service.

²⁶ M Renzema, "Home Confinement Programs: Development, Implementation, and Impact" in J Byrne, A Lurigio, and J Petersilia, *Smart Sentencing: The Emergence of Intermediate Sanctions* Sage Publications 1992 p 47; T Baumer and R Mendelsohn, "Electronically Monitored Home Confinement: Does It Work?" in J Byrne, A Lurigio, and J Petersilia, *Smart*

approach to home detention has been more cautious.

(2) United Kingdom

Home detention with electronic monitoring is still experimental in the United Kingdom, though there are several intensive supervision programs (known in the UK as “tracking”). In 1991 curfew orders were introduced, which require offenders to remain for up to 12 hours a day at a specified place, for not more than 6 months.²⁷ Trials of electronic monitoring to accompany curfew orders are taking place in several locations.²⁸ 18 offenders were sentenced to electronically monitored curfew orders in 1995, and a further 47 offenders were so sentenced during the first half of 1996.²⁹ Experiments with electronic monitoring of persons awaiting trial have been carried out.

(3) Singapore

Singapore also has an electronically monitored home detention scheme.

Introduced in 1991, it was a sanction imposed on 40 ‘drug addiction inmates’ at the back end of their period of institutional imprisonment. Since then the program has been extended to wider groups of detainees. One officially predicted figure was that 2, 820 prisoners would be tagged by the mid-1990s. The Singaporean scheme ... is tightly locked into a work release program, with employment in private enterprise companies an essential element of the conditions of home based detention. Prisoners wear an electronic anklet that sends periodic silent signals to the monitoring centre to ensure they are detained in their own homes in the non-working time from 7 pm to 7 am.³⁰

(4) Canada

The Saskatchewan Department of Justice conducts an Intensive Probation Supervision/Electronic Monitoring Program as a front-end scheme. Supervisors develop a specific detailed case plan for the offender while on the program that directs the offender to

Sentencing: The Emergence of Intermediate Sanctions Sage Publications 1992.

²⁷ *Criminal Justice Act 1991* (UK) s 12.

²⁸ P Coyne, “On the home stretch”, *New Statesman & Society*, 9 February 1996; “Electronically Monitored Curfew Orders: Pilots in Three Selected Areas from July 1995” *NAPO News* February 1996 No. 76 p 6.

²⁹ *PD(HC)* 4/6/96 p 319.

³⁰ A Aungles, “Three Bedroomed Prisons in the Asia Pacific Region: Home Imprisonment and Electronic Surveillance in Australia, Hawaii and Singapore” (1995) *Just Policy* No. 2, 32 p 34

examine the problems and needs that contributed to the illegal behaviour.³¹ Electronic monitoring is used on most but not all of the offenders in the program.

(5) Other Australian States

The Australian Law Reform Commission rejected home detention as a sentencing option in its 1988 report.³² Nevertheless, every Australian State except Tasmania has developed a home detention or intensive supervision program. The programs vary significantly, but they generally combine close supervision and control with community service work and programs aimed at altering the personal habits leading to criminal behaviour. Not all Australian states use electronic monitoring, and they vary as to the use of private sector firms to carry out surveillance and rehabilitation, and the amount of face to face or telephone contact between the offender and the supervisor.

South Australia

A back-end home detention program with electronic monitoring is used in South Australia. The South Australian scheme has an upper limit of 12 months on home detention, and some people awaiting trial are released on bail to electronically monitored home detention.

Victoria

Victoria has a front-end program of “intensive correction orders”.³³ The scheme does not confine offenders to their homes; rather, they attend a community corrections centre for 12 hours a week to undertake community service work and treatment programs (if required), and are visited regularly by community corrections officers. Electronic monitoring is not used. An intensive correction order may not exceed 12 months.

Northern Territory

The Northern Territory has a “front-end” home detention program,³⁴ with a maximum of 12 months on home detention. It does not use electronic monitoring.³⁵

³¹ T Lang, “Electronic Monitoring’s Place in Community Corrections” in *The State of Corrections*, Proceedings of the American Correctional Association, Annual Conference 1993 p 132.

³² ALRC, *Sentencing Report No 44*, 1988 ¶131.

³³ *Sentencing Act 1991* (Vic) ss 19 - 26.

³⁴ *Sentencing Act 1995* (NT) ss 44-48.

³⁵ The New South Wales Law Reform Commission reported that “the Northern Territory abandoned electronic surveillance bracelets as they were frequently not placed in the receiver correctly, or were inadvertently knocked off offenders’ wrists ... In Queensland, where tin roofs interfered with the signals emitted by bracelets and receivers, electronic surveillance is no longer used”: NSWLRC, *Sentencing*, Discussion Paper 33, April 1996 ¶9.12 n 27.

Queensland

A 'back-end' home detention program involving early release from prison has been operating in Queensland for some time.³⁶ The program does not use electronic monitoring.³⁷ The Queensland legislation does not set an upper limit on home detention, but the policy of the Queensland Community Services Commission is that home detention should last no more than 4 months.

Western Australia

Currently Western Australia uses home detention as a "back-end" scheme for offenders who are sentenced to prison for less than 12 months.³⁸ Under the scheme offenders must serve one month or one third of the sentence (whichever is the greater) in prison before being released on home detention. Four months is the maximum amount spent on home detention. Home detention is also used as a condition of bail. Prisoners on home detention are electronically monitored and must undertake community service. Probation officers supervise the program but the daily physical checks are carried out by a private security firm.

Western Australia is introducing a "front-end" intensive supervision scheme under the *Sentencing Act 1995 (WA)*.³⁹ This Act has not yet been proclaimed to commence. Under the *Sentencing Act 1995* the term of an "intensive supervision order" must be at least 6 months and not more than 24 months. The order may impose a curfew requirement of 6 months or less, which will be electronically monitored, and may require community service work and/or treatment or counselling.

(6) New South Wales

In New South Wales a home detention scheme has been tested by the Probation and Parole Service since 1992. This "Intensive Community Supervision" (ICS) scheme combines electronic monitoring with close supervision by probation officers. The program has allowed courts to impose a form of home detention as an alternative to custodial sentences of up to 18 months. Since commencement of the ICS, 150 offenders have served home detention.⁴⁰

Offenders have to consent to participation in the program. It has been used in cases involving property and drunk driving. Some cases have involved repeat offenders.

³⁶ *Corrective Services Act 1988 (Qld)* ss 86-91.

³⁷ See note 35.

³⁸ *Offenders Community Corrections Act 1963* ss 50A-50J.

³⁹ ss 68-75.

⁴⁰ *NSWPD*, 6/6/96 p 3367.

In 1994 there were 43 offenders in the Intensive Community Supervision scheme; currently there are 14. There are only four staff working on this program, which has given rise to obvious logistical problems.

The scheme makes use of surveillance bracelets, in conjunction with supervision by correctional officers. The most common form of monitoring is the making of random telephone calls to the offender's residence. Usually three calls a day are placed to verify that the offender is in the house at times that he or she is supposed to be there. The offender is not allowed to take any alcohol or drugs while on the program, so random urine samples are also taken.⁴¹

The Probation and Parole Service is still testing types of electronic monitoring equipment to find the most satisfactory arrangement. The offender is subject to visits and phone calls by probation officers at any time during the hours he or she is required to be at home, and also at places where the offender has permission to be (such as at work). The program combines close supervision with support for offenders to change criminal behaviour.

Restrictions and requirements placed on participants include curfews, drug and alcohol checks, community service work and appropriate personal development activities. Monitoring is based on a very high level of personal contact with offenders, family, employers and other significant persons in the offender's lives. Curfew compliance is checked at random on a 24 hour, seven day per week basis by ICS officers and is also electronically monitored. Many offenders consider this programme more demanding than full-time gaol.⁴²

Difference between Home Detention Bill 1996 and ICS scheme

Home detention under the proposed Act will be very similar to the ICS program that has been run since 1992 by the Probation and Parole Service of the Department of Corrective Services. The main difference is that an offender is placed on ICS under s 558 of the *Crimes Act 1900*, which allows a court to defer imposing a sentence as long as the offender complies with conditions specified by the court. In contrast, a home detention order will be a method of serving a sentence of imprisonment that has been imposed by the court. Serious breach of an ICS condition results in the offender being returned to court to have the deferred sentence imposed, while serious breach of a home detention order will result in the offender serving the remainder of the sentence in prison.

A person subject to a home detention order will participate in an intensive community supervision scheme. That is, rather than simply sitting at home, the offender will be given permission to leave the home to work or study and follow certain activities organised with the Probation and Parole Service. A tight control is kept on the offender's activities both inside and outside the home, and social visits outside the home are only permitted after the

⁴¹ New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33, April 1996 ¶9.19-9.20.

⁴² Probation and Parole Service, *ICS Evaluation Report 1994* ¶1.3.

offender has demonstrated good behaviour on the program.⁴³

The home detention program will also be more widely available than ICS is currently. It is intended that home detention will divert as many as 500 offenders from prison by the end of the decade.⁴⁴ The Home Detention Bill 1996 is discussed in more detail from page 25.

4. ADVANTAGES OF HOME DETENTION

(1) Lower cost

A sentence of home detention costs the government substantially less than imprisonment for an equivalent period of time.⁴⁵ The cost of the New South Wales Intensive Community Supervision program is estimated at \$25 a day, with one third of that being spent on surveillance equipment.⁴⁶ It costs \$101 a day to keep an inmate in a minimum security prison.⁴⁷ The expense of building and maintaining prisons and problems of prison overcrowding encourage programs to divert suitable offenders from incarceration to community-based corrections.

Diverting non-violent minor offenders from prison means prisons have more space and facilities for the more dangerous inmates.

There is clear consensus in the community that full-time imprisonment should be reserved for those who represent a threat to public safety or who have committed crimes meriting the harshest of sanctions. The majority of offenders are not in this category and are far better dealt with through various community-based options.⁴⁸

(2) More humane

Home detention avoids the psychological destructiveness and degradation of prison and keeps less serious or first time offenders from contact with hardened criminals. It can also be used for prisoners with special needs (such as pregnancy, young children, HIV/AIDS or disabilities) who face extra difficulties in prisons with limited facilities.

⁴³ Oral advice from the Probation and Parole Service.

⁴⁴ Hon R Debus, *NSWPD*, 6/6/96 p 3368.

⁴⁵ Hon R Debus, Second Reading Speech, *NSWPD* 20/6/96 p 3384.

⁴⁶ New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33, April 1996 ¶9.14 n 30.

⁴⁷ Department of Corrective Services, *Annual Report for the Year Ended 20 June 1995*, Appendix 25.

⁴⁸ Hon R Debus, Second Reading Speech, *NSWPD* 20/6/96, p 3384.

(3) Rehabilitation

Home detention allows offenders to follow treatment and educational programs, and encourages development of individual responsibility. Substantial self-discipline is required to successfully complete a home detention order, whereas in prison offenders are simply told what to do and activities are arranged for them. Home detention enforces a structured lifestyle, which many offenders lack.⁴⁹ Or, as it has been put, ‘Marriage and the family are the most effective correctional institutions we have’.⁵⁰

When reasonably well executed, a home confinement program externally encourages a change in the offender’s life-style for the term of the sentence. For instance, a substantial number of the offenders we interviewed reported that home confinement allowed them to “dry out”, review their lives, and get to know their families again.⁵¹ Others obtained jobs, second jobs, or reported better job attendance and performance. Many of the offenders reported that their spouses were particularly attracted to HD because they know the offenders would come home after work ... The potential for rehabilitation rests in the ability to design and use electronic monitoring programs to encourage a non-criminal life-style and to facilitate internalization of these changes by the offenders.⁵²

It is very difficult to reach general conclusions as to the effectiveness of home detention in reducing recidivism, due to the wide variation in program structures, the types of equipment used, the stage at which home detention is used (pre-trial, front-end or back-end), the kinds of offenders targeted, the nature of supervision, the extent to which rehabilitative measures are included, and the different incentives for compliance and sanctions for breach. However, some US studies indicate that home detention or intensive supervision may be able to produce lower re-offending rates than imprisonment.⁵³

⁴⁹ J Quinn and J Holman, “Intrafamilial Conflict Among Felons Under Community Supervision: An Examination of the Co-habitants of Electronically Monitored Offenders” (1991) 16 *Journal of Offender Rehabilitation* 177 p 180.

⁵⁰ J Braithewaite, *Crime, Shame and Reintegration* Cambridge University Press, 1989 p 91, citing D Bayley, *Social Control and Political Change*, Research Monograph 49, Woodrow Wilson School of Public and International Affairs, Princeton University, citing C Silberman, *Criminal Violence, Criminal Justice*, Random House, New York, 1979.

⁵¹ T Baumer and R Mendelsohn, *The electronic monitoring of nonviolent convicted felons: An experiment in home detention, final report* 1990 Indiana University, Indianapolis.

⁵² T Baumer and R Mendelsohn, “Electronically Monitored Home Confinement: Does It Work?” in J Byrne, A Lurigio, and J Petersilia, *Smart Sentencing: The Emergence of Intermediate Sanctions*, Sage Publications, 1992 p 63.

⁵³ For example, FS Pearson, *Final Report on New Jersey’s Intensive Surveillance Programme* 1987 Rutgers University, New Jersey; J Petersilia, *House Arrest* 3 (Crime File Series 1988) Department of Justice p 4; A Jolin and B Stipak, “Drug Treatment and Electronically Monitored Home Confinement: an Evaluation of a Community-Based Sentencing Option” (1992) 38 *Crime and Delinquency* 158.

(4) Avoid severing family and community ties

Home detention means that an offender's family is not broken up by a sentence of incarceration. The offender can receive support from his or her spouse, parents, friends etc. By remaining in the community, offenders can work (or seek work) or study. If earning, they can pay taxes, compensation to victims, child support and so on. In a family where the offender is the main breadwinner, the family is not reduced to relying on state support. An offender may also contribute to the community by undertaking community service work.

The officers who supervise and check on the offender can become closely involved with the offender and his or her family. These supervisors can be a source of assistance and advice to both the offender and the family.

(5) Punishment and control

The conditions of home detention allow close control of the activities of offenders. The offender is punished as well as controlled by the prohibition on leaving the home without permission or undertaking usual recreations, by the obligations to perform unpaid community work, by the random visits and phone calls during the day and night, and by any social stigma arising from wearing electronic monitoring devices.

The element of supervision and monitoring in home detention orders is intrusive and demanding. For example, the offender may be required to submit regularly to a urine analysis test. In the United States, some offenders have turned down the opportunity to take part in these types of programs, preferring prison instead. This is because offenders do as they are told in prison, whereas in intensive supervision programs they have to take responsibility for themselves.⁵⁴

Home detention incapacitates offenders by confining them at home during the high-risk evening hours and weekends, reducing the opportunity to re-offend.

⁵⁴ New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 April 1996 ¶9.13, citing J Petersilia and S Turner, "Comparing Intensive and Regular Supervision for High-Risk Probationers: Early Results From an Experiment in California" (1990) 36 *Crime and Delinquency* No.1.

5. PROBLEMS RELATING TO HOME DETENTION

(1) Re-offending during term of home detention

Home detention may reduce the opportunities for re-offending but they cannot prevent it if the offender is determined to breach the order. The risks of home detention have been pointed out:

The existing literature suggests that the incapacitative and public safety potential of this sanction have probably been considerably overstated. Home confinement, however monitored, is neither an electronic jail⁵⁵ nor home incarceration⁵⁶ ... The incapacitation provided by home confinement programs is, thus, strictly voluntary, bolstered only by the threat of detection and sanctions for violations. This suggests that the primary target population for home confinement will continue to be “low-risk” offenders who are not thought to be a threat to public safety. In this sense, home confinement may be an acceptable sentencing alternative, but its application as an alternative to secure custody appears to be limited.⁵⁷

The Opposition has also drawn attention to the danger to public safety from releasing offenders to their homes and has called on the Government to exercise tighter control in implementing the program.⁵⁸

However, home detention appears to be successful in maintaining acceptably low rates of re-offending during the term of detention:

Overall, the literature suggests that a new arrest while on home confinement is relatively uncommon. Renzema and Skelton⁵⁹ report overall arrests at 3.7%; our study found that 3.3% of other offenders logged new arrests⁶⁰. In a review of

⁵⁵ B Berry, “Electronic jails: A new criminal justice concern” (1985) 2 *Justice Quarterly* 1.

⁵⁶ JR Lilly, RA Ball and J Wright, “Home Incarceration with electronic monitoring in Kenton County, Kentucky: An evaluation” in BR McCarthy (ed) *Intermediate Punishments: Intensive supervision, home confinement, and electronic surveillance* 1987, Criminal Justice Press, Monsey NY.

⁵⁷ T Baumer and R Mendelsohn, “Electronically Monitored Home Confinement: Does It Work?” in J Byrne, A Lurigio, and J Petersilia, *Smart Sentencing: The Emergence of Intermediate Sanctions* Sage Publications 1992 pp 64-65. See also T Baumer, M Maxfield and R Mendelsohn, “A Comparative Analysis of Three Electronically Monitored Home Detention Programs” (1993) 20 *Justice Quarterly* 121 p 122.

⁵⁸ Hon K Chikarovski MP, Shadow Minister for Corrective Services, “Chikarovski Calls for Tighter Safeguards on Home Detention”, *Media Release* 21/6/96.

⁵⁹ M Renzema and D Skelton, *Final Report: The use of electronic monitoring by criminal justice agencies 1989: A description of extent, offender characteristics, program types, programmatic issues, and legal aspects* 1990 Kutztown University Foundation, Kutztown PA.

⁶⁰ T Baumer and R Mendelsohn, *The electronic monitoring of nonviolent convicted felons: An experiment in home detention, final report* 1990 Indiana University, Indianapolis.

several programs, Petersilia⁶¹ reported in-program arrest rates for most programs around 5%, with one program reporting 16% arrested while being monitored.⁶²

In New South Wales, an evaluation of the ICS found that 5% of the participants were arrested and charged with offences committed during their order.⁶³ All the offences were dealt with at the Local Court level. The report concluded that ICS has not significantly added to community risk.

(2) Effectiveness as punishment

Some commentators and victims rights advocates argue that home detention may be ordered for offences for which a term of imprisonment is justified. Such leniency would not meet community expectations of deterrent and punitive effects of sentencing. For example, the Opposition called for codification of the categories of offences for which home detention will be available:

When the previous Liberal government began trials of the scheme, it was never intended to replace gaol for more serious offences and this needs to be clearly spelled out. For instance, while driving offenders unnecessarily strain the prison system we need to know that offences on the more serious end of the spectrum - like culpable driving resulting in death or serious injury - will not be considered for home detention when gaol terms remain far more appropriate.⁶⁴

It has been suggested that home detention may trivialise some offences, such as drunk driving and fine default.⁶⁵

(3) Increase number of people in criminal justice system

Many commentators have noted that when intermediate sentences are introduced in order to divert some offenders from custody, these intermediate sentences will sometimes be ordered for people who would not have been at risk of a custodial sentence in the first place. Sentencers tend to use sentences which are meant as alternatives to imprisonment as

⁶¹ J Petersilia, *Expanding options for criminal sentencing* 1987 Rand Corporation, Santa Monica.

⁶² T Baumer and R Mendelsohn, "Electronically Monitored Home Confinement: Does It Work?" in J Byrne, A Lurigio, and J Petersilia, *Smart Sentencing: The Emergence of Intermediate Sanctions* Sage Publications 1992 p 62. See also T Baumer, M Maxfield and R Mendelsohn, "A Comparative Analysis of Three Electronically Monitored Home Detention Programs" (1993) 20 *Justice Quarterly* 121 p 130.

⁶³ Probation and Parole Service, *ICS Evaluation Report*, ¶5.3.

⁶⁴ Hon K Chikarovski, "Chikarovski Calls for Tighter Safeguards on Home Detention", *Media Release* 21/6/96.

⁶⁵ R Lay, "Home Detention: A Community Programme" in D Biles (ed) *Current Australian Trends in Corrections* Federation Press 1988 p 186.

alternatives to more lenient sentences. When this happens, home detention is no longer diverting offenders from jail, and the number of people in the corrections system increases. This phenomenon is known as “net widening” (widening the net of corrections to catch more people).⁶⁶

English and Australian experience with suspended sentences and attendance centre orders shows how courts do, in fact, elevate a sentence to a higher level of gravity than the case warrants in order to gain access to a mitigated version of that sanction. Just as imprisonment was often wrongly threatened so as to allow it to be suspended or served at an attendance centre, so will it now be threatened to justify the attachment of an electronic tag. The net-widening effect of this will become evident on offenders breaching the conditions of release. They will be called upon to serve a period of imprisonment because [they] were seen as deserving imprisonment the first time around. In this way a sentence originally intended to reduce prison crowding will add persons who should not be there.

If the legislation goes so far as to require that a sentence of imprisonment be announced before being converted to a form of house arrest, there will be the added problem of the period ordered being inflated because it is anticipated that it will be served in the community.⁶⁷

Some commentators do not see this as an objectionable tendency:

Such “net widening”, if it can be shown to be occurring, is not necessarily bad social policy. The potential harm to individual offenders might be outweighed by increased system credibility (i.e. general deterrence) and public satisfaction with the quality of justice.⁶⁸

Concern about the possible net-widening effects was one of the reasons that the Australian Law Reform Commission rejected home detention as a sentencing option.⁶⁹ The New South Wales Law Reform Commission has questioned whether net widening is actually a problem and proposes that in any case this problem could be addressed by judicial education.⁷⁰

⁶⁶ S Cohen, "The Punitive City: Notes on the Dispersal of Social Control", (1979) 3 *Contemporary Crises* 339; S Cohen, *Visions of Social Control*, Polity Press 1985.

⁶⁷ R Fox, "Dr Schwitzgebel's Machine Revisited: Electronic Monitoring of Offenders" (1987) 20 *Australian & New Zealand Journal of Criminology* 131 p 142.

⁶⁸ M Renzema, "Home Confinement Programs: Development, Implementation, and Impact" in J Byrne, A Lurigio, and J Petersilia, *Smart Sentencing: The Emergence of Intermediate Sanctions* Sage Publications 1992 pp 48-49.

⁶⁹ ALRC, *Sentencing Report No 44*, 1988 ¶131.

⁷⁰ New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33, April 1996 ¶9.6

(4) Suitable targets for home detention

A difficulty noted by some commentators is finding offenders suitable for home detention. The aim of home detention is to divert from prison offenders who pose a low risk to the community. The problem is that such offenders - generally minor or first-time offenders with community ties and no violent history - are probably not at risk of custodial sentence in the first place.⁷¹

If imprisonment is used as a last resort and reserved for serious or dangerous offenders, and if home detention is intended to divert low-risk offenders from prison, it will be difficult to find suitable candidates for home detention. If low-risk offenders are actually being sent to prison, however, then home detention may play a significant role in diverting offenders from prison.

The group of offenders most appropriate for home detention seems to be offenders who pose a low danger to public safety, but whose persistent re-offending puts them at risk of a custodial sentence⁷² (such as persistent drink-drivers). These are offenders who commit relatively minor crimes but for whom a sentence such as community service or periodic detention seems too lenient.

(5) Reliance on technology

When home detention is enforced by electronic monitoring, there are often problems with monitoring equipment, such as interference with signals and unreliable equipment.⁷³ Errors in recording the presence and absence of offenders compromise the effectiveness of home detention. The capacity of monitoring systems to produce reports that the offender is at home when actually absent, or that the offender is absent when actually at home, raises questions about using computer-generated reports to enforce home detention conditions or to prove a breach of the conditions.

Electronic monitoring also increases the cost of the enforcement of home detention:

While electronic monitoring equipment automates the basic monitoring process, it also creates a considerable amount of work. In addition to system maintenance and operation, program personnel must train and orient clients, in some cases connect

⁷¹ A George, "Home Detention: The Privatisation of Corrections" (1988) 13 *Legal Services Bulletin* 211 p 212.

⁷² Oral advice from the Probation and Parole Service.

⁷³ Transmissions can be blocked or distorted by environmental conditions such as lightning, proximity to an FM radio station, metal walls or partitions, water in waterbeds or bathtubs. Poor telephone lines, wiring, and equipment may transmit signals that cannot be read accurately. Power, telephone and computer failures may make it appear that a violation has occurred when it hasn't or the reverse: R Corbett and G Marx, "Emerging Technofallacies in the Electronic Monitoring Movement" in J Byrne, A Lurigio and J Petersilia, *Smart Sentencing: The Emergence of Intermediate Sanctions* Sage Publications 1992 p 97.

equipment, update offender schedules, keep track of excused absences, review and interpret messages generated by the equipment, follow up suspected violations (both via telephone and in person), conduct independent field checks of the offenders and the equipment, and attend and/or conduct violation hearings. When the system is out of order for more than a brief period, offenders must be contacted manually ... In providing more intensive monitoring, the automated process produces its own configuration of tasks and duties, which may be more time-consuming and costly than manual methods of monitoring.⁷⁴

(6) Focus on surveillance

S Rackmill, "An Analysis of Home Confinement as a Sanction" (1994) 58 *Federal Probation* 45 p 48. See also R Fox, "Dr Schwitzgebel's Machine Revisited: Electronic Monitoring of Offenders" (1987) 20 *Australian & New Zealand*

Fears have been expressed that the use of home detention will weaken efforts to rehabilitate offenders. It is said that supervising officers will concentrate on monitoring and surveillance of offenders, and will reduce efforts to support offenders. It is also argued that the use of surveillance technology can have a dehumanising effect on those subjected to it, and can counteract efforts to rehabilitate offenders:

Electronic surveillance capabilities may make easier the part of the job that records the offenders' whereabouts, but at the same time they may make more difficult the part of the job that involves the motivation of offenders and gaining their co-operation.⁷⁵

The New South Wales Law Reform Commission stated that:

The Commission's discussions with departments which run home detention schemes indicate that the supervision provided by correctional officers is the most valuable and effective aspect of the scheme.⁷⁶

It has been noted that extended periods of confinement to the home can be very wearing for the offender, and may lead to "cabin fever".⁷⁷ Many jurisdictions have made a conscious effort to maintain face-to-face rehabilitation and treatment programs in conjunction with electronic monitoring.

⁷⁴ T Baumer and R Mendelsohn, "Electronically Monitored Home Confinement: Does It Work?" in J Byrne, A Lurigio, and J Petersilia, *Smart Sentencing: The Emergence of Intermediate Sanctions* Sage Publications 1992 pp 59-60.

⁷⁵ B Erwin, "Old and New Tools for the Modern Probation Officer" (1990) 36 *Crime and Delinquency* 61 p 73; see also A George, "Home Detention: the privatisation of prisons" 13 *Legal Services Bulletin* 211.

⁷⁶ New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33, April 1996 ¶9.12.

⁷⁷ *Journal of Criminology* 131.

(7) Effect of home detention on offender's family

Concern has been expressed at the effects of home detention on the persons with whom the offender resides, in cases where the offender will not be living alone. These co-habitants agree to the conditions of the home detention and so take on some responsibility for the management of the offender. Co-habitants are subjected to the random phone calls and visits by supervisors to check on the offender. The offender may also rely on them to do things for him or her which the detention prevents the offender from doing. This role for the offender's family or friends can lead to increased tensions and conflict within the home, making life unpleasant and possibly dangerous for the offender and the co-habitants.⁷⁸

The issue of offenders pressuring persons into consenting to the offender residing with them on home detention has also been raised. It has been suggested that the family of a violent offender may be at risk of violence if they object to the offender being released into the home.⁷⁹ It is also argued that in practice the role of caring for and supporting offenders on home detention falls on the offender's family, generally the offender's wife, partner or mother, so that the work of caring for offenders is transferred from the paid professionals of the state to unpaid domestic labour.⁸⁰

Some commentators have discussed the significance of turning the home into a prison:

With EM [electronic monitoring] the home becomes deprivatised ... Figuratively, prisons have been dismantled, and each individual cell has been reassembled in private homes. Once homes start to serve as modular prisons and bedrooms as cells, what will become of our cherished notion of "home"?⁸¹

It has also been pointed out that home detention involves the state intruding into the home even where electronic monitoring is not used:

Intrusion depends not on technology but on the extent to which the practice affects the dignity and privacy of those intruded upon. Frequent, unannounced home visits may be more disturbing than an electronic telephone monitor that verifies the offender's presence in the home but cannot see to it.⁸²

⁷⁸ J Quinn and J Holman, "Intrafamilial conflict among Felons Under Community Supervision: an Examination of the Co-habitants of Electronically Monitored Offenders" (1991) 16 *Journal of Offender Rehabilitation* pp 17-24.

⁷⁹ M Feiner, *Home Detention: a summary paper issued by Victorian Office of Corrections* 1987 Department of Justice, Melbourne.

⁸⁰ A Aungles, *The Prison and the Home*, Institute of Criminology Monograph Series, No.5, Sydney 1994 pp 66-69; J Finch and D Groves (eds), *A Labour of Love: Women, Work and Caring* (1983) p 225.

⁸¹ R Corbett and G Marx, "Emerging Technofallacies in the Electronic Monitoring Movement" in J Byrne, A Lurigio, and J Petersilia, *Smart Sentencing: The Emergence of Intermediate Sanctions* Sage Publications 1992 p 96.

⁸² A von Hirsch, "The Ethics of Community-Based Sanctions" (1990) 36 *Crime and Delinquency* 162 p 165.

(8) Class and race issues

Home detention can lead to stratification of punishment along socio-economic lines.⁸³ White-collar criminals are more likely to be seen as a reasonable risk, and are more likely to have a telephone and a residence that is suitable for monitoring. Studies in the United States have shown that socio-economic discrimination can occur.⁸⁴ An American judge has commented:

The poor and the minority defendant is usually one who has committed a violent crime, is without means, and has little or no recognition in his community... [T]he middle-class defendant gets alternative sentencing or part-time imprisonment, usually without incarceration, and the poor and minority defendant gets a heavy jail term with incarceration. This certainly is not justice. Alternative sentencing and part-time imprisonment have strong class overtones.⁸⁵

This is of particular concern in Australia in relation to Aboriginal offenders. In the Royal Commission into Aboriginal Deaths in Custody, the Commissioner commented that the home detention programme "appears best suited to serve those offenders who live in the traditional western style fixed place of residence, generally, with an individual telephone service connected. This is not the case with many Aboriginal offenders, particularly those from remote areas who may lead a semi-itinerant life-style".⁸⁶

It appears that Aboriginals suffer special disadvantages in relation to the definition of home. In one sense Aboriginal people have strong kinship and familial ties with their communities. Yet in some communities, there is heavy consumption of alcohol, and risk that an inmate on the program will break the stringent rules of home detention by drinking alcohol. The solution in North Queensland has been to release Aboriginals to rehabilitation centres. These centres act as a half-way house - not full home detention, yet not prison ... For the Aboriginal inmate whose society is based on a communal rather than an individualistic responsibility, the pressure of a family to accept the other member without complaint is strong. There is for cultural reasons, a strong expectation of hospitality which extends well beyond the narrow bounds of close spouses. This may have an advantage in that it provides a

⁸³ Law Reform Commission, *Sentencing Report No 44*, 1988 AGPS ¶131.

⁸⁴ For example, in a US study of electronic monitoring of drink-driving offenders, it was shown that although 37% of those convicted of driving while intoxicated in Palm Beach County had incomes under \$10 000 p.a., only 17% of those sentenced to electronic monitoring had incomes under \$10 000 p.a.: J Lilly, R Ball, G Curry and J McMullen, "Electronic Monitoring of the Drunk Driver: A Seven-Year Study of the Home Confinement Alternative" (1993) 39 *Crime and Delinquency* 462 p 473. See also N Morris and M Tonry, *Between Prison and Probation*, Oxford University Press, New York 1990.

⁸⁵ Justice Bramwell, quoted in M Burns, "Electronic Home Detention: New Sentencing Alternative Demands Uniform Standards" (1992) 18 *Journal of Contemporary Law* 75 p 95

⁸⁶ *Regional Report of Inquiry into Individual Deaths in Western Australia* vol 1, AGPS 1992, pp 406-7.

much larger source of potential placement, but alternatively, it may lead to special difficulties in determining whether the family member is comfortable about taking a family member on the program.⁸⁷

Another option is to release offenders who have no stable residence to a hostel such as those run by the Salvation Army. In Saskatchewan, Canada, if an offender cannot afford a telephone, the Department of Justice will install and pay for telephones.⁸⁸

(9) Spread of electronic monitoring and high technology controls

Many commentators have expressed concern at the possibility that electronic monitoring will be found so useful that its use will spread beyond monitoring offenders. Monitoring has been used on new-born babies in hospitals, and nursing homes are looking at using monitoring to keep track of confused elderly people. Other possible applications that have been suggested include tagging people with mental illness, people with HIV/AIDS, people with access to secret information (eg to monitor whereabouts of employees), inside prisons to keep track of prisoners, people undertaking treatment programs and juveniles subject to curfew checks.⁸⁹

Technological developments also raise the possibility of more intrusive surveillance. "As more investment is made in technological tools, however, there may be a fascination with the technologies of enforcement ... there is no doubt that new technologies can become captivating".⁹⁰ Suggestions for use of technology include incorporating listening devices or two-way radio communications into the monitor attached to the offender; one or two way visual images of the offender in the home; tracking devices that will show the location of the offender (rather than confirming the presence or absence of an offender at a particular location); installing detectors in shops and public places that will sound the presence of a person wearing a monitoring device; and installing implants in offenders that release an electric shock or a sedative when triggered by a supervisor.⁹¹

⁸⁷ P Moyle, "Home Detention in North Queensland and Aboriginal Inmates: Equality or Discrimination" *Socio-Legal Bulletin* No. 11 Summer 1993/1994 28 pp 32-33.

⁸⁸ T Lang, "Electronic Monitoring's Place in Community Corrections" in *The State of Corrections*, Proceedings of the American Correctional Association, Annual Conference 1993 p 134.

⁸⁹ A George, "Home Detention: The Privatisation of Corrections" (1988) 13 *Legal Services Bulletin* 211.

⁹⁰ B Erwin, "Old and New Tools for the Modern Probation Officer" (1990) 36 *Crime and Delinquency* 61 p 66.

⁹¹ For example, M Winkler, "Walking Prisons: The Developing Technology of Electronic Controls", (1993) 27 *The Futurist* 23.

6. HOME DETENTION BILL 1996

The *Home Detention Bill 1996* if passed will allow the courts to order a sentence to be served by way of home detention. The object is to establish a sentencing option which is an alternative to full-time imprisonment. The scheme will be similar to the current Intensive Community Supervision Scheme (see page 12).

Home detainees will be subject to a high level of initial supervision and monitoring by a supervisor who will be a probation and parole officer. Monitoring will occur via a combination of electronic means, telephone contact and personal visits. The checks on the offender will be random with the frequency determined by the type of offence and the offender's circumstances, for example, whether the offender is working. An offender serving a sentence by way of home detention will be confined to his or her home. The offender will be able to leave the home for purposes approved by the supervisor. Circumstances which would be approved for absence from home would include continuation of employment, seeking employment, attendance at a rehabilitation course, visits to a doctor and undertaking community work. The times for such absences from the home would be specified by the supervisor.⁹²

It is also envisaged that as an incentive to follow the program successfully, there may be staged reduction in the stringency of security measures and increases in privileges.⁹³

(1) Sentences suitable for home detention

A sentence of up to 18 months may be served on home detention (that is, a fixed term of 18 months or less, or a minimum and additional term which taken together do not exceed 18 months).⁹⁴

Home detention is not available for a sentence of:

- murder, attempted murder or manslaughter;
- sexual assault of adults or children, or sexual offences involving children;
- armed robbery;
- any offence involving use of a firearm;
- assault occasioning actual bodily harm (or any more serious assault, such as

⁹² Hon R Debus, Second Reading Speech, *NSWPD*, 20/6/96 p 3384.

⁹³ Hon R Debus, Second Reading Speech, *NSWPD*, 20/6/96 p 3384.

⁹⁴ Clause 5.

malicious wounding or assault with intent to do grievous bodily harm);

- stalking or intimidation;
- a domestic violence offence against a person with whom the offender would wish to reside, or continue or resume a relationship if a home detention order were made; or
- any offence under the *Drug Misuse and Trafficking Act 1985* that is prescribed by the regulations.

(2) Offenders not suitable for home detention

A home detention order cannot be made for an offender:

- who has been convicted at any time of murder, attempted murder, manslaughter, sexual assault of adults or children or sexual offences involving children, or any other offence prescribed by regulation;
- who has been convicted at any time of stalking or intimidation; or
- who has within the last five years been convicted of a domestic violence offence against (or has been subject to an apprehended violence order for the protection of) a person with whom the offender would wish to reside, or continue or resume a relationship, if a home detention order were made.

(3) Conditions for a home detention order

The offender must consent in writing to the order, as must the persons (if any) who would be residing with the offender during the period of the offender's home detention.

The offender must be assessed for suitability by the Probation and Parole Service, and the assessment must recommend that the sentence may be appropriately served by way of home detention. The court may decline to make a home detention order despite a favourable assessment.

An order cannot be made if the court considers it likely that the offender will commit any sexual offence or any violent offence on home detention, even though the offender may have no history of committing offences of that nature.

This provision gives the court a wide discretion to refuse to order home detention for the purpose of community protection. It does not seem that the court needs to have any ground or provide any reason for deciding that an offender is likely to commit sexual or violent offences, and it does not need to justify refusing an order.

(4) Assessment of suitability

In determining whether an offender is suitable, the Probation and Parole Service must consider:

- any criminal record of the offender and the likelihood of re-offending;
- any drug dependency;
- the likelihood that offender will commit a domestic violence offence;
- whether any circumstances of the offender's residence or activities would interfere with effective monitoring of home detention;
- whether the persons with whom the offender intends to live (or continue or resume a relationship) understand the requirements of home detention and are prepared to live in accordance with them;
- whether a home detention order would place at risk of harm any person living with or in the vicinity of the offender;
- any other matter prescribed by regulation.

These provisions show a concern to address some of the issues raised above, such as community protection, the risks of domestic violence, and the effect of home detention on family life. These are all relevant considerations in the court's discretion to order home detention. The home detention program has been designed to minimise or avoid as far as possible problems associated with home detention.⁹⁵

The Bill attempts to avoid the possibility of persons who would not be at risk of imprisonment being sentenced to home detention by requiring that a sentence of imprisonment be passed before home detention can be ordered.

(5) Operation of home detention orders

The detention will be regulated by the terms of a home detention undertaking, which must be signed by the offender. The undertaking will set out the offender's obligations under the home detention order and his or her consent to them - for example, submission to blood and urine testing.

Regulations will set out standard conditions to be included in the order. The order may also contain additional conditions required by the court or by the Parole Board. The additional conditions may relate to the offender's employment and may require the offender to perform community service work.

⁹⁵ Oral advice of Probation and Parole Service.

The standard conditions will probably include requirements that the offender must not leave the specified place of residence without permission; must wear a monitoring device; and must refrain from consuming alcohol or drugs

Any additional conditions may be revoked or varied, and new conditions can be added, by the Parole Board by notice in writing served on the offender. It seems that additional conditions can be imposed, varied or revoked at any time during the term of the order, and there is no need to obtain the offender's consent to the addition, variation or revocation of conditions after the offender's initial consent to the order.

Neither the standard conditions of the order nor conditions imposed by the court may be revoked by the Parole Board. Additional conditions imposed by the Parole Board may not be inconsistent with standard conditions or conditions imposed by the court. Unlike some other jurisdictions⁹⁶ there is not provision for a court to vary the standard or court-imposed terms of the order.

(6) Breach of home detention order

If an offender's supervising officer is of the opinion that the offender has committed a serious breach of a home detention order, or has repeatedly breached the order, the supervisor must apply to the Parole Board for revocation of the order. There is no definition of what amounts to a "serious" breach - it is left to the supervisor to decide. There are internal guidelines in the Probation and Parole Service to maintain consistency in decisions as to when an application should be made to revoke an order.⁹⁷

If a supervisor applies to have a home detention order revoked, the Parole Board may require the offender to appear before the Board to show cause why the order should **not** be revoked. The burden of persuading the Board is therefore on the offender.

A decision whether or not to revoke a home detention order will be an administrative decision by the Parole Board, rather than a judgment by a court. The Parole Board is not obliged to hold an inquiry into an alleged breach of conditions before revoking a home detention order. It has the power to revoke a home detention order when it is of the opinion that it is proper to do so.⁹⁸

It appears that the Parole Board may revoke a home detention order whether or not it is satisfied that the offender has in fact breached the order.⁹⁹ However, to discipline the offender short of revoking the home detention order, the Board must be satisfied that the

⁹⁶ For example, *Sentencing Act 1995* (NT) s 47; *Sentencing Act 1991* (Vic) s 25.

⁹⁷ Oral advice from Probation and Parole Service.

⁹⁸ Clause 16.

⁹⁹ Clause 16(1).

order has been breached.¹⁰⁰

The Bill does not deal with the question of proof of breach of an order where the evidence for the breach is the records generated by electronic monitoring equipment. Some jurisdictions have provided in legislation for the evidentiary value of computer-generated records.¹⁰¹ In New South Wales, the question of whether electronic monitoring records are sufficient to establish that an offender has breached a home detention order is unlikely to arise, as the Probation and Parole Service will not rely on electronic monitoring records alone in applying for revocation of the order. When monitoring equipment indicates a breach, the alarm is followed up by a supervising officer by telephone and in person, and it is the evidence of the supervising officer which will be put to the Parole Board if an inquiry is held.¹⁰²

Where the Parole Board is satisfied that the offender has breached the home detention order, but it is not of the opinion that the order should be revoked, it may discipline the offender in such manner as the regulations may prescribe.¹⁰³ Under the Bill breach of a home detention order is not in itself an offence. This contrasts with some other jurisdictions where breach of a home detention order is in itself a fresh offence, attracting penalties including a term of imprisonment.

The Board may inquire into the alleged breach of conditions even if the offender does not appear in response to a notice requiring him or her to appear. The Board may issue a warrant for the offender's arrest if it thinks fit.

(7) Revocation of home detention order

If an order is revoked, the Parole Board commits the offender to prison to serve a term of imprisonment equal to the period from the date of revocation of the order to expiry of the fined or minimum term of the original sentence of imprisonment. The Parole Board may direct that the date of revocation of the home detention order is the date on which the conditions of the home detention order were breached or a later date.¹⁰⁴

The offender may make representations to the Parole Board as to the revocation of the order, or as to a decision of the board to make the revocation of the order effective from a

¹⁰⁰ Clause 16(3).

¹⁰¹ For example, the *Sentencing Act 1995* (NT) s 48(8) provides that where records purporting to relate to the activities of an offender, including records generated through or by a monitoring device, are produced to a court, the matter contained in the records is evidence of the activities of the offender.

¹⁰² Oral advice from the Probation and Parole Service.

¹⁰³ Clause 16(3).

¹⁰⁴ Clause 16.

date earlier than the day on which the Board decided to revoke the order.¹⁰⁵

If a court sentences a person on a home detention order for another offence, the court may exercise the Parole Board's powers to revoke the home detention order.¹⁰⁶ Presumably the offender does not have the right to make representations as to revocation of the order in these circumstances, though this is not specified in the Bill.

(8) Parole

Offenders with a minimum and additional term will proceed to parole at the end of the minimum term under the same conditions as they would have had they been in full-time custody.¹⁰⁷

(9) Review of Act

After the Act has been operation for 18 months, the Minister must review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.¹⁰⁸

7. CONCLUSION

Home detention has several advantages over imprisonment for the offender and for the community, and can be a practical and useful sentencing option. There are many concerns about the use of home detention, however. Some concerns relate to particular home detention programs or the ways in which they are put into effect; other concerns are intrinsic to the use of home detention in itself.

Home detention cannot be regarded as a cure-all for over-crowding in prisons or high imprisonment costs. The stringent conditions placed on the use of home detention under the *Home Detention Bill* in order to protect public safety limit its availability to divert offenders from prison.

Experience has shown that a home detention program must be carefully designed and implemented to be useful, acceptable to the public and fair to the offender. The courts, offenders, the community, the probation service and the media all have a role in determining whether home detention will be a successful part of the sentencing regime in New South Wales.

¹⁰⁵ Clause 17.

¹⁰⁶ Clause 23.

¹⁰⁷ Clause 21.

¹⁰⁸ Clause 28.