Should Big Brother Be Watching? An Assessment of Home Detention in New Zealand

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1

Introduction

Home detention has been available in New Zealand since 1999. Its introduction followed the adoption of similar systems in numerous overseas jurisdictions. Home detention involves restricting an offender to the home and monitoring compliance through an electronic monitoring device. It is available as a front end option, allowing offenders sentenced to 2 years imprisonment or less to apply to serve their sentence by way of home detention provided they have been granted leave by the sentencing judge. It is also available as a back end option to offenders sentenced to more than 2 years imprisonment as an early release mechanism.

There has been very little written about home detention in a New Zealand context. The government contends it is a success but this claim remains largely untested. This dissertation will question the success of the scheme and consider whether changes should be implemented to improve home detention. The need to consider such issues is particularly pressing as at present the government is advocating wider use of home detention as a means to cope with New Zealand's increasing rate of imprisonment. This dissertation argues that the review of home detention provides an ideal opportunity to amend New Zealand's home detention system and exploit its rehabilitative potential. The home detention statistics highlighted by the government suggest home detention is a success but this may be an interpretive gloss to help ensure home detention is viewed

as a viable alternative to imprisonment. This possibility means any analysis of the system must be undertaken with extreme caution and must explore beyond any apparent successes of home detention.

Home detention is a unique type of sentence that poses many issues ranging from its impact on an individual's right to privacy to whether or not it is effective as a means of punishment. The cost saving potential of home detention has also been a major factor in its development but whether this should take precedence over the need to punish offenders and denounce their conduct is contentious. At present home detention involves very little in the way of rehabilitation and instead focuses on the idea that it acts as a punishment. In spite of this many people still perceive home detention as a 'soft option' that fails to hold offenders accountable for their actions. The plight of victims is highly publicised and this has contributed to calls to get tough on crime. In sentencing offenders, the courts are conscious of balancing the competing interests of the offender and the victim. On the one hand is the need to deter and punish the offender, while on the other is the goal of aiding the offender's rehabilitation.

A discussion of the merits of home detention requires an understanding of its operation and an awareness of the issues surrounding its use. Accordingly, the first chapters of this dissertation will trace the development and operation of home detention in New Zealand and critically analyse factors that suggest the success of the scheme. The dissertation will then focus on the objections raised to home detention with particular emphasis on arguments concerning the competing aims of punishment and rehabilitation.

The use of home detention in overseas jurisdictions will be canvassed. The benefits and shortcomings of various approaches will be examined and compared to the New Zealand approach. The final chapter will discuss the future of home detention in New Zealand, paying particular attention to the proposal to introduce home detention as a sentence in itself.

Legislative amendment to provide for home detention as a sentence in itself provides the opportunity to give rehabilitation a greater role and have it form part of an offender's punishment. Rehabilitation is often viewed as the antithesis of punishment but there is no reason why these two factors must sit at opposite ends of the spectrum. A structured programme of rehabilitation would impose demands on a detainee's time that would be far more arduous than the current system. Compulsory attendance at such a programme may be viewed as a greater punishment and would have the dual benefit of aiding rehabilitation.

This dissertation will conclude that in its current form home detention is failing to achieve its goals. Although justified on the basis that home detention aids reintegration into the community the structure of the sentence does little to achieve this. Consequently, this dissertation will contend that a more structured rehabilitation programme needs to be implemented and that the government needs to promote home detention's rehabilitative potential rather than arguing that it acts as an effective punishment.

2

History and Development

2.1 The Beginnings of Electronic Monitoring

The use of home detention as a means of confinement and control can be traced back to biblical times when the Romans placed Paul, the apostle, under house arrest. The modern form of home detention had its origins in the United States of America. In the 1960s Ralph K Schwitzgebel of the Science Committee on Psychological Experimentation at Harvard University developed a form of electronic monitoring for use on patients with mental problems.[1]

The use of the technology faltered until Jack Love, a New Mexico District Court judge, realised the potential for electronic monitoring of offenders.[2] In April 1983 the first order was made requiring an offender who had breached parole to wear an anklet to monitor his future behaviour.

There are two main types of monitoring, passive and active. Passive systems involve periodic contact with the detainee to ensure they are where they are supposed to be.[3] The passive system is

1 Schmidt, Curtis, " Electronic Monitors" in McCarthy (ed), Intermediate Punishments, Intensive Supervision, Home Confinement and Electronic Surveillance, (New York, 1987) at p 143. In 1964 Schwitzgebel unveiled a one kilogram transmitter battery pack that could be worn by a person and determined the wearer's location on a screen. The device was tested on 16 volunteers. The study obtained favourable results that indicated the technology was useful in monitoring whereabouts.
2 Ministry of Justice, (1997) Home Detention, The Evaluation of the Home Detention Pilot Programme 1995-1997, at p 83. Love was inspired by a 1977 Spiderman cartoon in which a criminal attached an electronic bracelet to Spiderman to keep tabs on his whereabouts.
3 Black, King, "Electronic Monitoring in the Criminal Justice System" in Australian Institute of Criminolgy, Trends and Issues in Crime and Criminal Justice No. 254 (Australian Institute of Criminology, 2003) at p 2. Usually this contact is via telephone and requires verification of the individual's identity by a password, a device that the detainee wears or a biometric such as a retinal scan or a fingerprint. Passive systems are only effective for detention and difficulties can arise with verification of identity when a biometric is not used.

often criticised for being disruptive because of the dependence on telephone contact that can occur at anytime, day or night. Active systems utilise a device that is worn by the detainee which continuously emits a signal that is relayed to the monitoring station via a device in the detainee's home.[4] If the detainee breaks the device or strays too far from the home the signal is interrupted and authorities are automatically alerted. Active systems have the advantage of monitoring the detainee at all times which ensures authorities are immediately notified of any breaches.

Global Positioning Systems (GPS) are also being used overseas as a means of detention in the same way active systems are utilised. GPS consists of three components, satellites, a network of ground stations and mobile user devices.[5] GPS monitors a detainees movements and an alert is triggered if the detainee leaves permitted areas. The technology eliminates the need for a device to be installed in the detainee's home and is currently being trialled in some parts of New Zealand. Phase two of the trial has recently been completed and involved a 'live' trial of offenders[6]; results are not expected until 2007.

2.2 Development in New Zealand - The Early Stages

It is important at this stage to briefly outline the development of home detention in New Zealand and identify the statutory regimes that govern its operation. Planning for a home detention programme in New Zealand began in the late 1980s. The Minister of Justice requested a report on the possibilities of home detention, specifically aimed at reducing prison populations.[7] In May 1989 a paper was presented to the Corrections Conference outlining a proposal for pre-parole home detention. At this time home detention schemes were already in place in the United States, the United Kingdom, Australian and Canada.[8] In early 1991 a working party was established to

4 Rondinelli, "Tracking Humans: The Electronic Bracelet in a Modern World" [1997] Criminal Lawyers Association Newsletter - Canada (Internet) <http://www.criminallawyers.ca/newslett/aug97/rondinelli.htm> accessed 20/7/2006.

5 Black, Smith (2003) above n 3 at p 2.

6Department of Corrections, (2006), Report on Phase 1, Voice Verification and GPS (internet) <www.corrections.govt.nz/public> accessed 4 August 2006. Phase One of the trial involved Corrections staff testing the capabilities or limitations of the technologies over varying topographies.

7 Ministry of Justice, (1997) above n 2 at p 97.

8 Ibid at p 13.

study home detention schemes operating overseas. Electronic monitoring had been removed from the proposal for a pilot in mid 1989 but was later reintroduced, in part because of the enthusiasm of the Ministry of Justice for electronic monitoring to play a role in the home detention project. It was thought that the intensive supervision electronic monitoring entailed might minimise adverse public reaction to an 'early release' programme such as home detention. Arguments against electronic monitoring continued to be raised and eventually it was agreed that a 'programmed contact' (passive) system would be appropriate for the pilot. The passive system required detainees to send a picture of themselves using video phone technology when they were telephoned at random intervals.[9]

2.3 The Pilot Programme

The Criminal Justice Amendment Act 1993 provided for the establishment of the pilot home detention scheme. Under the Act inmates sentenced to imprisonment for a term of 12 months or less were eligible for release on parole on home detention provided the sentence was not for serious violent offending or an indeterminate sentence.[10] Section 2 of the Act defined an 'indeterminate sentence' as a sentence of imprisonment for life or a sentence of preventive detention and also set out the provisions of the Crimes Act 1961 which were deemed 'serious violent offences'. Section 107D(2) of the Criminal Justice Amendment Act 1993 specified an offender could be released to home detention on the condition that they did not leave their place of residence and that they co-operated and complied with any lawful direction given by their probation officer.[11] The home detention pilot aimed to get some inmates out of prison earlier and ease the transition of inmates from prison to the community through the provision of both support and control measures.[12]

9Ministry of Justice, (1997) above n 2 at p 14.

10 Criminal Justice Act 1985, s 89A.

11 Criminal Justice Amendment Act 1993, s 107D(2).

12 Ministry of Justice, (1997) above n 2 at p 62.

As well as providing for the implementation of the pilot programme the introduction of the Criminal Justice Amendment Act introduced other changes, some of which caused difficulties for the home detention proposal. The new legislative scheme introduced a crucial change in parole provisions. Offenders who were eligible for home detention at one third of their sentence were now also eligible for standard parole. A legal adviser in the Department of Justice noted that "the change in provision removed much of the incentive for offenders to want to try home detention at all, since it promised to be a much stricter and more punitive form of release from prison".[13] This change meant that home detention was only a viable option for those inmates unlikely to be paroled after serving one third of their sentence. Unfortunately when the Bill proceeded through Parliament few members noted that the change would make it very difficult for home detention to achieve its original goal of reducing prison populations.

An obvious solution to this problem would have been to make home detention available before the one third point. This change was implemented when the scheme was introduced nationwide in 1999. The amendment allowed offenders to apply to be released to home detention for the 3 months prior to their parole eligibility date. This criteria remains under the current legislation but is a source of criticism for political opponents who argue it is further eroding truth in sentencing.[14]

On 27 March 1995 the home detention pilot took its first detainee. During the 18 month evaluation period 37 inmates were released to home detention for an average period of 3 months.[15]

The Ministry of Justice undertook an evaluation of the pilot and published a comprehensive report titled *Home Detention, The Evaluation of the Home Detention Pilot Programme*.[16] The experience of detainees, sponsors (the individual most involved with the detainee on home detention) and probation officers were closely monitored and their views were detailed in the final report. The

13 Ministry of Justice, (1997) above n 2 at p102.
14 Simon Powers, National Party.
15Ministry of Justice, (1997) above n 2 at p 9.
16 Ibid.

report concluded that home detention worked both for and against reintegration of inmates into their families and communities.[17] The evaluation recognised that a return to family life aided reintegration but that a lack of rehabilitative programmes for many detainees meant the causes of their offending were not addressed. Since the adoption of a nationwide scheme few efforts have been made to address this shortcoming. There are no mandatory rehabilitation programmes so unless the Parole Board imposes participation in a programme as a special condition[18] offenders will not have any structured rehabilitation while on home detention. This is a significant flaw in the current home detention system and it is worrying that this issue has still not been addressed even though almost a decade has passed since the pilot.

Other objectives were also analysed in assessing the effectiveness of the pilot programme as a whole. Compliance with the programme was satisfactory; only one detainee was recalled to prison during the pilot for repeated rule breaking.[19] The report recognised that the cost to the government per detainee per year was slightly more than the cost of keeping an inmate in a minimum security prison.[20] However it was noted that the programme could be made more cost effective if the numbers in the programme were increased to a level where there would be economies of scale. The evaluation stipulated that any further developments should 'proceed with caution' and noted numerous pitfalls in the pilot.[21] The report concluded that if the concept of home detention was to be further explored the current legislative framework required amendment to provide an incentive for inmates to opt for home detention for early release, an issue that was of particular importance because of the schemes potential to reduce prison populations.

17 Ministry of Justice, (1997) above n 2 at p 74.

18 As they are entitled to do under the Parole Act 2002, s 15.

19 Ministry of Justice, (1997), above n 2 at p 65.

20 Ibid at p 76 . The cost to the government of keeping a detainee on home detention was calculated at $44,800 compared to $43,700 to keep an inmate in a minimum security prison.

21 Ibid at p 78-79. Particularly regarding gaining information about entry to the programme and the working conditions of the home detention team. The disruptive nature of the video phone technology was also criticised and it recommended active monitoring be considered to resolve some of the issues associated with the passive system. As a result of this recommendation active monitoring was implemented when the scheme was introduced nationwide.

2.4 Nationwide Implementation

Despite the concerns identified in the evaluation of the home detention pilot amended legislation was passed in 1999 to enable countrywide implementation of home detention. First, amendments to the Criminal Justice Act 1985 specified that judges were able to decide whether an offender could apply to a District Prison Board to serve their sentence on home detention. When considering whether to grant leave, the court was required to consider the factors set out in section 21D of the Criminal Justice Act 1985.[22] Only those offenders sentenced to less than two years imprisonment were eligible to be considered for front end home detention. Offenders could also apply to have the start of their sentence deferred while their application for home detention was considered. Secondly, offenders serving determinate sentences of more than two years imprisonment could apply to be released on home detention three months prior to their one third parole eligibility date.[23] This was known as the back-end or pre parole option. Making back end home detention available prior to the one third parole eligibility date represented a change in the legislative framework and was intended to increase the number of inmates opting to apply for back-end home detention.

The introduction of the Sentencing Act 2002 and the Parole Act 2002 changed the regime that home detention operated under. The legislation provided for the creation of a national Parole Board. The Parole Board replaced District Prison Boards' as the body responsible for determining home detention applications.

Home detention was gradually extended to smaller urban areas from 1999 although the scheme still does not operate in some parts of the country.[24] As the use of home detention increased, from 479 detainees in 2000 to 1525 between June 2004 and July 2005[25] concerns about its operation

22 Refer Appendix 1 for Criminal Justice Act 1985, s 21D.

23 Refer Appendix 2 for Criminal Justice Act, s 103A.

24 Parole Act 2002, s 33.

25 Ministry of Justice, (2001) Conviction and Sentencing of Offenders in New Zealand 1991-2001 and Parole Board, (2005) New Zealand Parole Board Annual Report 2004/2005.

emerged. Of particular concern was the inability of the court to impose bail conditions on offenders awaiting determination of a home detention application where the sentence had been deferred. This meant that offenders granted deferral were not subject to any conditions during this interim period. This, coupled with unease about the frequency with which sentences of imprisonment were being deferred, the high number of applications and confused public perception about the scheme resulted in a review of home detention.[26]

2.5 The 2004 Amendments

Specific amendments were recommended to address these concerns. These included clarifying the circumstances in which leave to apply should be granted, tightening the circumstances in which deferral may be granted and requiring that offenders who have the start of their sentence deferred are released subject to conditions of bail. These amendments were contained in the Sentencing Amendment Act 2004 and the Parole (Extended Supervision) Amendment Act 2004 and came into force on 6 July 2004.

The Presumption

Section 97 of the Sentencing Act 2002 created a mandatory requirement that the court consider the appropriateness of granting leave to apply for home detention in every case where the sentence (or total of the sentences imposed) is 2 years' imprisonment or less.[27] This requirement ensures all eligible offenders are considered for home detention and helps reduce the likelihood that a suitable candidate for home detention will be overlooked. This aspect of section 97 remains unchanged since the 2004 amendments.

Section 97(3) of the Sentencing Act 2002 provided that the court must grant the offender leave to apply for home detention unless satisfied it would be inappropriate. Under this provision the

25Ministry of Justice (2005) Review of Home Detention: Responses to Journalists Queries.

27 Refer Appendix 3 for Sentencing Act, s 97 (as amended).

courts saw themselves as performing a 'sifting role'[28], determining cases where home detention was clearly inappropriate, but leaving the primary responsibility for determining applications to the Parole Board. Although not the intention of the legislation, judges interpreted section 97(3) as a presumption in favour of granting leave.[29] In *Feng v Police*[30] Salmon J. stated "the Sentencing Act 2002 contains a presumption in favour of home detention where a sentence of 2 years or less is imposed".[31] Feng was charged with dangerous driving causing death and 2 cannabis related charges. This decision followed soon after the enactment of the Sentencing Act 2002 and the approach adopted was confirmed by the Court of Appeal in *R v Brazendale*[32]. Brazendale was being sentenced on charges relating to cultivation and supply of cannabis and theft of electricity. Although the court declined leave to apply for home detention they re-affirmed that section 97(3) creates a presumption in favour of home detention. Similarly in *Chandra v Police*[33] Harrison J. stated that the onus is on the judge to give "cogent reasons to justify refusal" and that the primary responsibility for determining whether or not to grant home detention rests with the Parole Board.

The view that there was a strong presumption in favour of granting leave meant that the Courts were often reluctant to deny leave. In *Huata v Police*[34] the sentencing judge denied leave on a charge of possession of cannabis for supply. The judge reasoned that to allow leave would send the wrong message as the offending had occurred at home with young siblings present. On appeal leave was granted because, while the court considered it unlikely that the appellant would be granted home detention, the range of mitigating factors meant the possibility could not be discounted.

28 *Chandra v Police* (HC Auckland, A03/03, 6 March 2003, Harrison J).

29 Hall, *Halls Sentencing* (LexisNexis, Wellington, 1993) at p 861,701.

30 *Feng v Police* (HC Auckland, A127/024, September 2002, Salmon J).

31 Ibid at p 5.

32 *R v Brazendale* (CA349/02, 3 April 2003, Keith, McGrath, Glazebrook JJ).

33 *Chandra v Police*, above n 28.

34 *Huata v Police* (HC Hamilton, AP95/02, 9/12/2002, Paterson J).

In the period January to June 2003 leave to apply for home detention was granted by the court for 48.3% of offenders sentenced to prison sentences of two years or less.[35] These figures suggest that the discretion of the court to determine whether wider sentencing considerations (such as denunciation, deterrence and safety of the community) made home detention inappropriate was only being exercised to a limited degree. To address this the Sentencing Amendment Act 2004 repealed section 97(3) and replaced it with a new provision.

The new provision provides that leave to apply for home detention will only be granted where the court is satisfied it is appropriate, taking into account the factors listed. This is a positive development and means that court has regained the primary role in determining the offender's general suitability for home detention. It is not for the Parole Board to reassess that issue; the Board is principally concerned with the safety risks and the home circumstances of the offender. This is reflected in the repeal by the Parole (Extended Supervision) Amendment Act 2004 of the requirement in s 35(2)(b) Parole Act 2002 for the Board to be satisfied as to the offender's suitability for home detention before giving a direction.

Section 97(3) requires that the court consider the nature and seriousness of the offence, the circumstances and background of the offender and any relevant matters in the victim impact statement when deciding whether leave is appropriate. Consideration of these factors was also required under the original section 97(3) but with the reverse onus. In *R v Hakiwai*[36] the Court of Appeal emphasised the importance of taking *all* the factors in subsection (3) into account when considering whether to grant leave to apply for home detention.

In considering the nature and seriousness of the offending the courts have indicated that they are unlikely to grant leave when offences have been committed within the home. In *R v Jones*[37] the

35 Ministry of Justice, (2003) The Sentencing Act 2002: Monitoring the First Year (internet) <www.justice.govt.nz/pubs/reports/2004/sentencing-act-first-year/indew.html> accessed 05 September 2006.

36 *R v Hakiwai* (CA19/03, 30 May 2003, McGrath, Laurenson, Doogue JJ); see also *Peeke v Police* (HC Hamilton, CRI2004-419-144, 4 February 2005, Cooper J).

37 *R v Jones* (CA412/01, 31 May 2002, Elias CJ, Gault P, John Hansen J).

defendant was convicted of supply of LSD and the sale of cannabis. The court succinctly stated, "because the offending occurred in the home we are not prepared to grant leave".[38] The courts have also noted that deterrence is a factor when considering the nature and seriousness of the offence. In *R v Papuni*[39] the Court of Appeal recognised that where the deterrent purpose of a sentence will be undermined by home detention, leave to apply may be refused.[40] In assessing the nature and seriousness of the offence the courts have stated that this must be in terms to the particular offender and their role rather than the nature of the crime generically.[41] In *Terewi v Police*[42] Fisher J. recognised that the rehabilitative potential is frequently the key factor in determining whether leave is appropriate.[43]

The 2004 amendment removes any presumption if favour of granting leave and means judges are less likely to grant leave to apply for home detention.[44] This may be reflected in figures that show since the amendments to the Sentencing Act 2002 the average number of offenders serving home detention has decreased so that in the last half of 2004, the average was 540, down from 600 in the last quarter of 2003.[45]

Deferment of Sentence

Section 100 of the Sentencing Act 2002 provided that the court could defer the start of the sentence if they were satisfied that there were special reasons (such as retention of employment) as to why the sentence should not start immediately. 'Retention of employment' was not out of the ordinary so it diluted the special reasons requirement and resulted in many offenders being granted deferral. The amendment contained in section 11(1) Sentencing Amendment Act 2004 provides that there must be 'exceptional circumstances' to justify deferral of the sentence. Retention of employment

38 *R v Jones* above n 37.

39 *R v Papuni* (CA124/03, 11 August 2003, Keith, Blanchard, Tipping JJ).

40 Ibid. Papuni was a solo father with 3 children. He was convicted of possession of cannabis for sale. The Court of Appeal accepted that the fact that the offending occurred at home, and had a commercial aspect, meant a deterrent sentence was appropriate.

41 *Tau v Police* (HC Auckland, A25/03, 25 February 2003, Heath J).

42 *Terewi v Police* (HC Auckland , A103/00, 14 July 2000, Fisher J).

43 Ibid.

44 *Edmonds v Police* (HC Christchurch, CRI2004-409-174, 7 October 2004, Heath J).

45 Ministry of Justice, (2004) Conviction and Sentencing of Offenders in New Zealand 1995-2004. Note that figures are half yearly and quarterly respectively.

was removed as an example of a special reason which suggests that since the amendment employment considerations will generally be insufficient to justify deferral. In the Justice and Electoral Committees report on the Parole (Extended Supervision) and Sentencing Amendment Bill[46] the case of *R v Porter*[47] was referred to as an example of an employment case that may meet the new 'exceptional circumstances' threshold. In this case the offender was the sole director of two trucking firms and deferral was held to be justified because of the adverse impact on his employees and their families if he was absent.[48] The change from 'special reasons' to 'exceptional circumstances' is reflected in the decrease in the number of deferrals granted by the court from 545 in 2003/2004 to 326 in 2004/2005.[49]

Under the original legislation a loophole in the system meant offenders who had the start of their sentence deferred were not subject to any conditions while awaiting the outcome of their home detention application. This loophole has been closed by section 22 of the Sentencing Amendment Act 2004. This section provides that the Bail Act 2000 is amended by the insertion of section 39A which stipulates that if deferral is granted offenders are subject to the standard conditions of bail.[50]

Section 36 of the Parole (Extended Supervision) Amendment Act 2004 also added a further standard condition in relation to home detention. Although electronic monitoring was already a part of the home detention system it was not explicitly stated in the legislation. The new section 36 provides that an offender must submit to electronic monitoring as and when required by a Probation Officer.

The Ministry of Justice has recently decided that further consideration should be given to whether wider changes need to be made and a comprehensive review of home detention has been

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46 Justice and Electoral Committee, (2004), Report on the Parole (Extended Supervision) and Sentencing Amendment Bill, (internet)
< http://www.parliament.govt.nz/NR/rdonlyres/D1983C67-9AEC-481A-8FC3-D17AB9721166/14418/DBSCH_SCR_2771_2976.pdf> accessed 5October 2006.

47 *R v Porter* (CA305/01, 26 September 2001, Blanchard, Heron, Goddard JJ).

48 Ibid.

49 Parole Board (2004), New Zealand Parole Board Annual Report 2003/2004 and Parole Board, (2005) above n 25.

50 Refer Appendix 4 for Sentencing Amendment Act, s22.

undertaken. It appears that this review is, at least in part, motivated by the governments desire to extend the scheme in an effort to reduce prison populations rather than because of a willingness to address concerns about the operation of the current system.

3

The Application Process and Administration

3.1 Leave to Apply for Home Detention

Under the current system a sentencing judge determines whether or not to grant leave to apply for front end home detention. If leave is not granted an offender is able to appeal the decision to the High Court under section 98 of the Sentencing Act 2002. The decision whether to grant leave to apply for home detention is a matter for the broad discretionary judgement of the sentencing Court. Accordingly, the appellate Court will interfere only if there has been a wrongful or improper exercise of the discretion.[51]

In some circumstances the judge may allow the start of the sentence to be deferred until the Parole Board considers the application.[52] If the offender decides not to apply for home detention they must report to prison to begin their sentence in prison at the end of the deferment period, if they fail to do so a warrant will be issued for their arrest.

If the offender is granted leave to apply, but does not have a deferred sentence, they will be imprisoned. The offender can then apply for a hearing from prison. The offender's case officer

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51 *R v Hakiwai* (CA19/03, 30 May 2003, McGrath, Laurenson, Doogue JJ). The Court of Appeal refused to overturn a refusal to grant leave to apply for home detention on the basis that it was open to the sentencing judge to decide home detention was inappropriate in light of the need to deter reoffending.

52 Sentencing Act 2002, s 100. If the start date is deferred the offender has two weeks to lodge an application with the Board. They are required to complete a home detention checklist which includes information on the proposed residence and provides approval from the occupants. A probation officer assists with this step and a hearing before the Parole Board is then scheduled.

will help the offender to complete a home detention checklist and the offender's hearing will be scheduled.

An offender serving a term of imprisonment of more than 2 years can apply within five months of their parole eligibility date to serve the rest of their sentence on home detention.[53] If the Board approves their application, they cannot begin home detention until three months before their parole eligibility date. If approval is granted, they will begin home detention but must return to the Board for a parole hearing at least once every 3 months. If parole is not granted when they return to the Board they will remain on home detention.

3.2 The Parole Boards decision, conditions and consequences of breach

The decision whether to grant home detention is made by a panel that comprises of 3 members of the Parole Board. A judge is the panel convenor and there are 2 other members with backgrounds in relevant fields.[54] In deciding whether or not to grant home detention the Parole Board is guided by section 35 of the Parole Act 2002.[55] On receipt of an application for home detention, section 34 of the Parole Act 2002 requires that the Board request a report from a probation officer on the offender's suitability for home detention.[56] The probation officer's report is collated with all other information relating to the offender's current and previous convictions, sentencing notes, rehabilitative programmes, and submissions from the police and victims. This material is available to the Board three weeks prior to the hearing. The documentation is useful in providing records of previous offending and information on the offender's background.[57]

53 Parole Act 2002, s 33.

54 Such as social work, probation or other community service organisations. All 3 members have an equal say in the decision.

55 Refer Appendix 5 for Parole Act 2002, s 35.

56 This report addresses the individual's offending, the likelihood that the offender's rehabilitation and reintegration into the community will be assisted by home detention, the safety and welfare of other household members and the outcome of any restorative justice processes.

57 Ten weeks before the hearing the offender is told of the date for the impending hearing and any registered victims are notified by the Board. The superintendent of the prison in which they are detained, their probation officer and the police are also informed of the hearing date. The Board requests information from the Department of Corrections staff involved with the offender and invites written submissions from registered victims, police and the offender. Registered victims can request a meeting with Board Members to make a verbal submission. All the information is reviewed by the Board prior to the hearing.

Before granting home detention the Board must be satisfied, on reasonable grounds, of the factors set out in section 35 of the Parole Act 2002.[58] To help assess the offender's suitability the applicant attends the Parole Board hearing.[59] If the application is successful they are given a release date and informed of any conditions that will be imposed under section 36 of the Parole Act 2002.[60] Special conditions can also be imposed to aid rehabilitation or provide for the reasonable concerns of victims.[61] Statistics on the imposition of special conditions are not collected but Parole Board member Jim Thompson has stated that conditions prohibiting the consumption of alcohol are almost always imposed to help to maintain public confidence in the sentence and ensure the detainee cannot maintain a partying lifestyle while on home detention.[62]

If, upon release to home detention, the detainee breaches any of the conditions imposed they may be recalled to prison.[63] The probation officer is responsible for making a recall application that is decided by the Parole Board. When the application is received an interim recall order can be made by the panel convenor if they believe the detainee poses an undue risk to the safety of others in the household or the wider community or if they believe the detainee is likely to abscond.[64] If no interim recall is ordered the Board must notify the detainee of the recall application. The application is considered in due course and the Board is able to make a final recall order recalling an offender to continue serving his or her sentence in prison if satisfied that one of the grounds for recall, set out in section 61, has been met.[65] If the Board refuses a recall application the offender resumes home detention.[66]

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58 Refer Appendix 5 for Parole Act 2002, s 35.

59 Unlike a court appearance, the hearing is conducted within the prison and is relatively informal. The Board asks the offender questions about their progress in prison and plans if released to home detention. The offender is then asked to leave the room and the panel discusses the case and decides whether home detention should be granted. The offender is then brought back and informed of the panel's decision and their reasons.

60 Parole Act 2002, s 36. Standard conditions relate to the place of residence, the use of electronic monitoring and compliance with directions given by probation officers.

61 Refer Appendix 6, Parole Act 2002, s 15.

62 Interview with Jim Thompson, Member of New Zealand Parole Board, Dunedin, 8 August 2006.

63Parole Act 2002, s 61. Stipulates that an offender can also be recalled if they pose an undue risk to the safety of the community or an individual, if they have committed an offence punishable by imprisonment, if they are jeopardising the safety of others in the household or a change in circumstances means a suitable residence is no longer available.

64 Parole Act 2002, s 62.

65 Refer Appendix 7, Parole Act 2002, s 61.

66 Parole Act 2002, s 66.

3.3 Life on Home Detention

Management of the Detainee

In the preceding discussion the formalities of home detention have been outlined. An understanding of the realities of life on home detention is also required if a fair assessment is to be undertaken. When the Board decides an offender shall be released to home detention the Department of Corrections notifies Chubb at least two days before the offender is due for release. This allows Chubb time to make the necessary preparations, which can include organising the installation of a landline and ensuring monitoring equipment is available in the particular area. The offender is transported to the closest prison and taken to the residence where they will be serving home detention. Chubb then attaches the electronic anklet and sets up the monitoring equipment. The detainee is informed where the boundaries are, usually a properties perimeter fence as it helps give the detainee some sense of enclosure and is less easy to breach than an 'invisible line'.[67]

At the start of home detention detainees are assessed and placed within one of three management regimes.[68] This placement reflects the level of supervision the detainee requires, the first management regime being for those requiring the least supervision and the third for those requiring the most.[69] All offenders then go through 3 phases of supervision within their regime.[70]

The Freedom of Home Detention

While on home detention the detainee is effectively under house arrest. But the realities of this are less restrictive than the term 'home detention' suggests. Detainees who have jobs are able to leave their home for specified periods to go to work. Chubb is contracted to carry out regular checks of

67 Interview with Jo-Ann Duff, Community Probation Officer, Dunedin, May 2006.

68 Department of Corrections, Community Probation Service Operations Manual (internet) http://www.corrections.govt.nz/public/policyandlegislation/cps/index.html accessed 12 August 2006.

69 Ibid. Detainees move between the phases at designated stages of their sentence. For sentences of six months or less the detainee progresses to phase two after serving half of their sentence, after serving three quarters of their sentence they progress to phase three.69 If a sentence is longer than six months the probation officer has discretion to progress the detainee to the next phase before the half or three quarter mark is reached. If conditions have been breached the detainee will not progress to the next phase and will be given four more weeks after which enforcement action will be considered if progress is still inadequate.

70 Ibid. Those in the third management regime are subject to the most intense supervision, including three visits from a probation officer per week in phase one, decreasing to one visit per week in the third phase. Detainees in the first management regime are one visited once per week in the first phase and alternate between one home and one office visit per week in the second and third phases. Office visits involve the detainee going to the nearest community probation office to meet with their probation officer rather than the probation officer coming to the detainee's home.

detainees on approved absences to ensure they are not breaching their conditions.[71] As the sentence progresses the detainee is given greater freedom to leave the home on approved absences. What constitutes an 'approved absence' is left undefined in both the legislation and the Community Probation Services Operations Manual, meaning there is the risk of unequal treatment of offenders. The only guidelines provided are that these absences need to be arranged with the probation officer at least two days in advance and that they contribute towards the achievement of the Sentencing Plan objectives. There are also no statutory guidelines for the progressive nature of home detention. The only directions are provided in the Community Probation Operations Manual which sets out the various stages of home detention.[72] This leaves individual probation officers with wide discretion meaning detainees' with similar circumstances may encounter vastly different treatment. This is a flaw in the system that needs to be remedied by the creation of statutory guidelines outlining the type of occasions where approval should be granted and noting any relevant matters that must be considered.

While in prison offenders can apply for release to attend a narrow range of events[73]. Home detention is marketed as a direct alternative to imprisonment but the ready approval of absences from the home is in stark contrast to the restrictions of prison. Freedom to leave the home is at odds with the 'home detention' aspect of the system. It does align with ideas of reintegration into the community but reintegration is only necessary for offenders for have been imprisoned for a long period and are granted back-end home detention. The majority of detainees are on front-end home detention and have spent little (or no) time in prison meaning reintegration is not a necessary consideration and consequently absences from the home are difficult to justify.

While a detainee is on home detention visitors are permitted although the Parole Board can impose non-association orders with specific individuals as a special condition of home detention.[74] In some instances the Parole Board specifies that a Probation Officer may impose a non-association

71 The frequency of such checks is difficult to assess. Although Community Probation may argue checks occur regularly the rely on Chubb to undertake the actual monitoring.

72 Department of Corrections, above n 68 see also above n 69-70.

73 Such as funerals and tangi.

74 Parole Act 2002, s 15. Statistics on the imposition of non-association orders are not collected.

order, affected by notifying the detainee in writing. This is another example where Probation Officers are given considerable discretion and whether this is a positive development is contentious. The effectiveness of non association orders is difficult to assess. Orders that relate to contact with victims are usually easy to monitor because victims will almost always opposed to contact and will notify police or probation if the non association order is breached. In contrast orders that prohibit contact with co-offenders or gang associates are more difficult to monitor because often both parties are keen to recommence relations and thus will make efforts to conceal their association or at least ensure the authorities remain unaware.

In the later phases of their sentence detainees may be allowed to go out to attend social gatherings or family events but pre-approval from their probation officer is required. The electronic anklet must be worn on such occasions and thus detainees never get a complete sense of freedom. Whether or not they should is a point of contention - some detainees argue the lack of freedom is unfair but when the aims of sentencing are examined (which include holding the offender accountable, deterring the offender and others and denouncing the conduct) the restrictions in place can be easily justified. The stigma of wearing an electronic anklet and the associated lack of freedom are still considerably less onerous than prison.

Absconding – The Real Freedom of Home Detention

Many detainees find life on home detention difficult because of the close monitoring the sentence entails. Random face to face checks are carried out by Probation Officers as well as constant electronic surveillance.[75] Comments from detainees suggest the inability to leave the home impacts severely on detainees and many struggle with the fact they are 'on the outside' but still 'imprisoned'.[76] The lack of real barriers in comparison to the lock and key environment of prison means detainees may be tempted to abscond. Statistics show that the number that actually do is relatively low. Media coverage of such events can fuel the public perception that home detention

75 Above n 71 for discussion on the frequency of such checks.

76 Bill, Detainee, quoted in Gibbs, King, The Electronic Ball and Chain? The Development, Operation and Impact of Home Detention in New Zealand (University of Otago, 2001) at p 58.

is too lenient and does not punish offenders.[77] The right to freedom of expression means the media are unlikely to cease reporting failures of the system and indeed their coverage has advantages in that it reminds those who administer the scheme of the need to ensure the safety of the community as well as facilitate home detention.

If detainees do abscond, Chubb is notified via the electronic equipment as soon as the detainee leaves the designated zone. A phone call is made to the residence and if unanswered Chubb will go to the residence to check the detainee whereabouts. If the detainee is absent Chubb notifies the Probation Officer responsible for the detainee and the Probation Officer will decide what further action should be taken. The legislation governing home detention makes no mention of these procedures; instead they are outlined in the Community Probation Services Operations Manual.[78] On paper these procedures sound appropriate but whether they are strictly complied with is questionable. The lack of legislative guidance leaves Probation Officers with wide discretion and the potential to respond in whatever manner *they* think appropriate.

The guidelines specify that if the detainee does not return to the residence the Probation Officer must liase with the police who will issue an arrest warrant. When the detainee is recaptured they are likely to be recalled to prison, although again there is some room for discretion. Unless the offender is viewed as a serious threat to public safety efforts to locate them are generally limited to contacting their family and known contacts. If these efforts fail they might only be found if they re-offend or are stopped at a routine traffic stop. The action taken when detainees abscond is vastly different to that taken when offenders escape from prison. Home detention is intended to be a method of serving a sentence of imprisonment. These discrepancies need to be addressed if home detention is to be viewed as a real alternative to imprisonment.

77 Sunday Star Times, Prisoners Flee Home Detention, 2 July 2006.

78 Department of Corrections, above n 68.

4

The Success of the Scheme

The preceding discussion has outlined the development and operation of home detention, now the crucial matter to be considered is whether home detention is in fact successful. Following its inception in 1999 the use of home detention increased markedly. In 2000 393 applications for front-end home detention were approved and 87 applications for what is now known as back-end home detention (then called pre-parole home detention). Since then the use of home detention has continued to increase. In 2004/05 the total number of applications approved was 1525.[79]

The high number of applications granted raises questions about the success of the scheme. The impact of any criminal justice policy is difficult to gauge and this is particularly true for the home detention scheme. Circumstances vary between offenders', a programme that may effect positive changes in one offender may have the opposite effect on another. However some assistance is provided by statistics that show the number of breaches of home detention conditions and compare recidivism rates between those who serve a sentence of home detention and those that are imprisoned.

4.2 Breaches

Statistics showing the number of breaches are also useful in analysing the success of the scheme. In the year 2003/2004 approximately 87% of all home detention orders were successfully

79 Parole Board, (2005) above n 25.

completed. Of the 13% of offenders not successfully completing their sentence approximately 8.5% are due to recalls to prison or breaches of conditions. The other 4.5% are mostly attributed to voluntary return to prison, the imposition of a subsequent sentence or an appeal of the original sentence.[80] The high percentage of home detention orders successfully completed may be evidence of the schemes success but equally it could be attributable, at least in part, to the reluctance of Community Probation to initiate breach proceedings.

Breaching a home detention order attracts a maximum penalty of a $2000 fine or 12 months imprisonment.[81] Breach action can be taken for a breach of any of the conditions of home detention. Despite these provisions few detainees are charged with breaching, partly because the Community Probation Services' Operations Manual stipulates that breach action should not be taken for minor or first time incidents (although it fails to define what these are).[82] The manual sets out the appropriate responses in particular situations. Failure to attend a treatment programme or counselling only warrants a verbal warning or in some circumstances a written warning; the guide does not indicate what would justify the more serious sanction. Leaving the residence without reasonable excuse, provided they return, will justify a written warning or in some circumstances a breach action, again there is no guidance as to which will be appropriate.

The discretion available to Probation Officers is evident from these guidelines and intensifies concerns that each detainee may be subjected to vastly different treatment. The variety of sanctions that fall short of breach action mean that the number of breaches recorded in statistics are an inaccurate reflection of the actual misdemeanours of the detainee. The low number of breaches is often trumpeted as a success of home detention but in light of this information this claim must be considered with extreme caution.

80 Parole Board, (2005) above n 25.

81 Parole Act 2002, s 71.

82 Department of Corrections, above n 68.

4.3 Re-offending and Rehabilitation

Re-offending is one of the most serious types of breaches and analysis of rates of re-offending provide a more useful indication of the success of the scheme. From July 2004 to June 2005 the percentage of detainees charged with further offending while on home detention has dropped from 0.8% to 0.3%.[83] These figures show the level of re-offending is low and suggest that the level of monitoring involved in home detention helps deter re-offending. But this success is tempered by the fact that offenders in prison also have a low chance of re-offending. The distinction is that on the 'outside' detainees have far more opportunities to offend and thus the low rate of re-offending is more significant.

The recidivism index is based on the percentage of offenders who are re-imprisoned or re-offend in a specified follow up period. In a 24 month period between 1999 and 2000 29.1% of minimum security offenders were re-imprisoned compared to 11.9% of those on home detention.[84] This figure only shows the number of detainees re-imprisoned in the follow up period; within two years 29.4% of detainees have been reconvicted.[85] Although this is lower than the figure for offenders in a minimum security prison (48.7%)[86] it does raise some questions about whether home detention really works to rehabilitate offenders. Those admitted into the home detention scheme have been selected on the basis that they pose a lower risk to the community. In theory this selection bias should mean that even if they had been imprisoned their likelihood of re-offending would also be lower than the general prison population. If this is the case it could mean the fact offenders serve home detention makes no difference to the likelihood of re-imprisonment. This would not be true for all offenders but it does remind readers to treat with caution any figures which suggest home detention definitely works to reduce re-imprisonment rates.

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83 Department of Corrections, "Judges Update, Re-offending Rate Drops" (internet) http://www.corrections.govt.nz/public/pdf/judgeupdates/2005sepissue.pdf accessed 4 August 2006.

84 Department of Corrections, "Judges Newsletter - Home Detention, Is it Working" (internet) www.corrections.govt.nz/public/pdf/judgeupdates/2003augissue3.pdf access 19 May 2006.

85 Department of Corrections, above n 83.

86 Department of Corrections, above n 83.

As with any sentence a degree of non compliance is inevitable. The fact that 87% of all orders have been successfully completed and that re-offending while on home detention is less than 1% suggests the sentence successfully aids rehabilitation. However this apparent success must be weighed against the significant number of detainees that go on to re-offend within 2 years. The following chapters will argue that implementing a structured form of rehabilitation may reduce long term re-offending and thus make home detention successful beyond the end date of the sentence.

5

Issues Surrounding the Use of Home Detention

5.1 The Role of Punishment

Home detention can blur the line between punishment and rehabilitation. The sentence does possess some of the typical attributes of punishment[87] but many in the community still view home detention as too lenient. This perception is interesting as most people believe home detention involves an offender being 'locked up at home'. If the public were aware that home detention actually allows considerably more freedom it is likely the sentence would be met with a chorus of disapproval. The release of Donna Awatere Huata to home detention in May 2006 is an example of this. The standard conditions of release to home detention were imposed[88] and the Parole Board also imposed special conditions including a condition prohibiting her from consuming alcohol or drugs; but despite these constraints her family held a party to celebrate her release! The relative freedom to socialise within the home is markedly different to the prison environment and the extent of such privileges is unlikely to be understood by most of the public.

Concern that home detention does not physically restrain detainee's ties in with disquiet about whether it does serve as a punishment. The controls on a detainee on home detention are in stark contrast to the prison environment. If a detainee chooses to abscond or re-offend they could easily

87 Nellis, "Electronic Monitoring and Social Work" in Will Electronic Monitoring Have a Future in Europe (Germany, 2003) at p 221.

88 Parole Board Decision, Donna Awatere Huata (internet) http://www.paroleboard.govt.nz/nzpb/media/decisions/huatamay06.html accessed 5 June 2006.

do so before authorities could intervene.[89] Opponents of home detention have seized upon this as a major flaw in the home detention scheme. But the risk of re-offending is also present when offenders are sentenced to community based sentences and there is often little difference between the type of offender who receives home detention and one who is sentenced to a community based sanction. The similarities in the profiles of offenders indicates that discretion plays a significant role in the decision whether to grant home detention. It is inevitable that different judges and different Parole Board panels will not make the same decisions even if faced with the same (or very similar) factual scenarios. Whether this can be deemed a serious flaw in the home detention scheme is contentious as the situation mirrors that which occurs in all sentencing decisions. An offender may feel aggrieved if they are refused home detention, particularly if an offender in a similar situation had previously been granted home detention, but this is discretion is an essential part of the sentencing process.

The Sensible Sentencing Trust are vocal in their belief that home detention must serve as an 'effective punishment rather than a cost cutting move'.[90] This organisation was formed in 2001 and lobbies for tougher sentences for violent offenders and 'truth in sentencing'. In line with this philosophy the Sensible Sentencing Trust is opposed to back end home detention and believes front end home detention is only appropriate for first time offenders. The Trust has a wide membership base and thus their doubts about home detention may echo those of a significant proportion of the population.

Victims of crime often perceive home detention as too lenient and not a real punishment. The counter argument is that home detention does impose some real constraints on a detainee. For some detainees the sentence may not be difficult, particularly if they are accustomed to being at home but many detainees will have led an active social life prior to their offending and being restricted to the home may impact severely on their lifestyle. People working in the system believe

89 Refer p 24 for statistics on use.

90 Garth McVicar in Otago Daily Times, Home Detention Seen As Effective Punishment, 21 August 2006.

that for most detainees home detention is more difficult than prison.[91] They argue that the structured prison environment requires little of an offender in comparison to home detention that necessitates a real desire to complete the sentence. The idea that home detention is a more onerous sentence is hard to comprehend when one imagines the relative freedom it entails in comparison to the prison environment but the fact that the detainees interviewed in the study by Gibbs and King all struggled does suggest it may act as an effective punishment.[92]

On the other side of the spectrum is concern that home detention is a mere method of containment and not enough other support is in place for the detainee. Critics argue that the goal of rehabilitating offenders is not being achieved under the current system. Although statistics show reconviction rates are lower than for those who are imprisoned this is not necessarily attributable to the format of home detention. Most offenders need to change their behaviour to avoid re-offending and programmes aimed at this could dramatically improve the home detention system. The home detention programme in the Netherlands is centred on these other rehabilitative features, the actual detention is only a peripheral aspect of the wider scheme.[93] Implementing rehabilitation programmes and changing the emphasis in the New Zealand scheme would be likely to lead to enhanced rehabilitation of detainees which would in turn result in lower rates of re-offending.

5.2 Legal Issues

Privacy

Having examined the conflict between punishment and rehabilitation it is also necessary to analyse other legal issues raised by home detention. One of these issues is the considerable intrusion into the privacy of both the individual detainee and the other members of the household. When the idea of electronic monitoring of offenders was first raised in the 1980s concerns about breaches of privacy were identified as a major hurdle to implementing the scheme. The attachment of a device

91 Interview with Jo-Ann Duff, above n 67.

92 Gibbs, King, The Electronic Ball and Chain? The Development, Operation and Impact of Home Detention in New Zealand (University of Otago, 2001).

93 Boelens, “Electronic Monitoring in the Netherlands” in Will Electronic Monitoring Have a Future in Europe (Germany, 2003) at p 86.

to the person and the fact that the person's every move can be tracked means electronic monitoring is an invasive technology, in both a physical and psychological sense. Early fears were that widespread use of electronic monitoring and home detention would result in the type of society described in George Orwell's novel *1984* in which the actions and movements of citizens were closely monitored by government authorities.[94] However the restricted development of home detention has ensured this situation did not eventuate and today the issue of privacy appears less contentious. The expansion of GPS monitoring may raise new privacy issues as surveillance will extend beyond the boundaries of the home and may be considered more invasive.

The development of a consent based system home detention system has ensured breach of privacy actions have little basis. Section 34 of the Parole Act 2002 provides that consent must be obtained from all other members of the household over 18 years of age. The granting of consent effectively waives any claim for a breach of privacy unless the consent was obtained under coercion or without adequate information. For the detainee claims of a breach of privacy are even less likely to have any foundation. In comparison to a prison cell the conditions of home detention are far less invasive. It has generally been conceded that offenders' privacy rights are not afforded the same degree of protection as other citizens.[95] This is based on the idea that through their unlawful actions offenders forfeit some of these rights.[96]

Since its introduction electronic monitoring has not been subject to a successful challenge on human rights grounds, mostly because the offender's informed consent is required before any order is made.[97] Under the current New Zealand legislation offenders must apply for consideration for home detention making their acceptance of the conditions explicit. The proposal to introduce home detention as a sentence of the courts will require new mechanisms to ensure an offender's informed consent is obtained. This might mean offenders will stipulate whether they wish to be

94 Orwell, 1984, (David Campbell Publishers, London, 1949).

95 John Howard Society of Alberta, (2000) Electronic Monitoring, (internet) <www.johnhoward.ab.ca/PUB/A3.htm> accessed 6 July 2006.

96 Despite these concessions it remains important that detainees are fully informed of the operation of home detention and the consequences of any violations. The typical offender is not well educated and thus it is essential that the realities of home detention are clearly explained.

97 Whitfield, "Electronic Monitoring and Social Work" in Will Electronic Monitoring Have a Future in Europe (Germany, 2003) at p 203.

considered for home detention prior to sentencing. This will be a return to the consent based system that was in place under the Criminal Justice Act 1985. Section 35 of that Act specified that the consent of the offender must be obtained prior to the imposition of community service. In a sense, the system will give offenders options in determining their sentence rather than simply having a court impose whatever they think appropriate. Although this may appear a significant change, in fact it will not be a major departure from the current system under which offenders have the choice whether or not to apply to the Parole Board for consideration for home detention.

Equality under the Law

When assessing the legal issues surrounding home detention arguments may be raised concerning the concept of equality under the law. The fundamental tenet of home detention is that the offender has a home to go to. Critics of the system argue that offenders who do not have a suitable residence to carry out home detention have no alternative but to remain in prison.[98] They contend that this is discrimination and represents inequality before the law. It is a problem that is difficult to solve but it seems unfair that the entire population should be denied the benefits of home detention simply because a minority of potential applications are unable to access the service because they do not have suitable accommodation. The establishment of half way houses or hostels where detainees could go to serve home detention could go some way to helping address this problem. Alongside this could be the extension of home detention to marae to provide a further option for some offenders. There are no known cases where a detainee has served home detention on a marae despite the fact that the Sentencing Act 2002 provides that a home detention residence can include a marae.[99] In many cases the Probation Service goes to great lengths to help ensure offenders have the best chance of being granted home detention. If the proposed accommodation is unlikely to be acceptable to the Parole Board the offender will be notified and efforts will be made to find a more suitable alternative; if a telephone needs to be installed this will not hinder the application process.

98 John Howard Society of Alberta, (2000) above n 95.

99 Any application for home detention on a marae would be subject to the normal conditions relating to the suitability of the residence.

Equality under the law also arises when analysing the availability of home detention in rural areas. In some parts of the country offenders cannot undertake home detention because the programme is not in place.[100] Difficult terrain, lack of probation staff and poor cell phone coverage are all given as explanations as to why home detention is unavailable. Judges have identified the unfairness of this situation[101] but little progress has been made in remedying this issue. A return to a passive based system or the use of GPS are alternatives that could resolve this equality.

5.3 The Costs

Home detention has been heralded as a highly effective cost saving mechanism but this claim requires further consideration. Detainees who are not earning are entitled to receive government benefits while on home detention.[102] This provision means that although home detention is marketed as less than half the cost of prison in reality the difference between the two figures is often significantly less because of the payment of a benefit.[103] Offenders on home detention may be entitled to receive the emergency benefit of approximately $170.00 per week.[104] If this is the case this increases the cost of home detention by $8,840.00 per year, bringing the cost of home detention much closer to the cost of imprisonment in a minimum security prison.

A study carried out in Canada suggests that savings are actually minimal. On a per person basis home detention programmes are cheaper than prison but the writer argues the savings attained are negligible.[105] He contends that the small proportion of offenders released to home detention are unlikely to affect prison budgets because building costs, maintenance and staff numbers will remain the same.

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100 Central Otago, parts of West Coast.

101 *Linn v Police* (HC Dunedin, CRI2006-412-000008, 11 April 1006, Fogarty J).

102 Parole Act 2002, s 38.

103 Department of Corrections, "Corrections News" (internet) <www.corrections.govt.nz/public/pdf/judgeupdates/2003augissue3.pdf> accessed 24 July 2006. Home detention costs $23,602 per annum compared with $58,692 to house a minimum security inmate.

104 Detainees receive the emergency benefit because they are not able to be work tested and thus are ineligible for the unemployment benefit. This entitlement depends on their age and marital status.

105 John Howard Society of Alberta, (2000) above n 95.

In New Zealand 1525 offenders were placed on home detention in 2004/05.[106] This compares to an average prison population of 6555 over this period.[107] It is arguable that in New Zealand significant savings can be achieved by the operation of home detention because the numbers on home detention are a considerable proportion of the total prison population (approximately 23%). Certainly this potential for reduced costs is one of the reasons behind the proposal to extend the use of the scheme. Throughout the sentencing spectrum there is potential for reduced cost, locking away those sentenced to life imprisonment and throwing away the key could also result in cost savings (by measures such as ending rehabilitation programmes and restricting activities to reduce staffing numbers) - but this would never be contemplated. Proponents of home detention need some other reason aside from economic efficiency to justify the use of the sentence. The economic realities demanding expediency must not be allowed to overshadow the principles of criminal justice regarding punishment.

In some other jurisdictions detainees are required to shoulder part of the cost of home detention. In America home detention programmes are heralded as highly cost effective because detainees contribute significantly in fees.[108] In some instances the fee is waived if the detainee is able to show they cannot afford to pay. This type of system could be introduced in New Zealand but because prison is free (or more correctly paid for by the tax payer) it is likely the imposition of a fee would be criticised and could place unfair hardship on those with low incomes and high family maintenance costs.

A better alternative to recoup some of the costs of home detention and to increase the economic efficiency of the scheme would be to require detainees to undertake community work while on home detention. Under the current law the Sentencing Act 2002 prohibits the imposition of a sentence of imprisonment and community work. Home detention is viewed as a sentence of

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106 Parole Board, (2005) above n 25.

107 Department of Corrections, Managing Increased Inmate Numbers (internet) <http://www.corrections.govt.nz/public/pdf/manage-inmate/brief-on-muster-management-15-june.pdf> accessed 28 September 2006.

108 John Howard Society of Alberta, (2000) above n 95.

imprisonment served at home and thus cannot be imposed in conjunction with community work. The proposed amendments to home detention will allow both home detention and community work to be imposed. As well as helping recoup costs it will also give the sentence more structure as detainees will be out in the community and will spend less time locked up at home. Such a development would be the antithesis of 'home detention' but could help detainees regain work ethic that may assist their reintegration to the workforce. At present there are few activities in place for detainees. Some attend counselling or specific programmes[109] but otherwise there is little to assist rehabilitation into the community, despite the fact it is a specific goal of home detention. Successful programmes in the Netherlands are focused on these other rehabilitative aspects and the introduction of community work will bring the New Zealand system closer to that operating in the Netherlands.[110] The inclusion of community work alongside home detention will cause additional challenges in monitoring detainees. Electronic anklets will need to be programmed with extended boundaries and community work supervisors may need to be employed to monitor detainees. This could result in a return to the type of supervision required under the old sentence of periodic detention. Although this may be an additional cost the imposition of community work may have dual benefits of aiding rehabilitation and recovering some of the costs of home detention.

5.4 Impact on Family Life

A further issue that arises is the impact of having a detainee in the home on other members of the household. A need to be aware of this means the Parole Board should always cautious when imposing home detention, particularly when there is doubt about the level of support from other members of the household. When preparing the pre-sentence report the Probation Officer assesses the proposed residence and their comments of its suitability are considered by the Parole Board. The consent of other adults in the household must be obtained prior to the release of the detainee.[111] The Parole Board is wary of making a home detention order if they suspect the family

109 such as Stopping Violence, Straight Thinking.

110 Refer p 39-41 for further discussion.

111 Parole Act 2002, s 35(C).

member feels compelled to consent.[112] This possibility aside, most family members are keen to have the offender home and are supportive of applications for home detention. However for many the reality of having the detainee in the household is far more difficult than they envisaged.

Having a detainee in the household may increase stress. The constant surveillance and unannounced visits from probation officers may be trying, particularly in families with children where they can cause interruption to routines. Home detention can also increase the financial burden on the household, particularly if the detainee is not working. Detainees are eligible for benefits but these are minimal[113] and in households already struggling financially the impact of another person can lead to further stress. The nature of home detention also means detainees are forced to spend more time than they usually would at home. One family member commented "It was a big test of our relationship … being stuck in a house together for so long. It was stressful".[114] Some offending is linked to a desire to avoid family problems and home detention occasionally results in an offender being locked up with the family they are trying to avoid. In discussion with Judge Carruthers he commented that the Parole Board are hesitant to release offender's to home detention if there is any suggestion that domestic violence could ensue.[115] For the two year period between 2004-2006 there were 134 approved recalls from home detention. Reliable data as to the reasons for recall were available in 114 cases. Of these 114 cases 4 recalls were granted based upon some type of violence at the home detention address.[116] In 1 case the offender became a victim, and in the other 3 cases the offender re-offended (2 against partner, and 1 against father).[117] These statistics demonstrate that in some instances domestic violence does occur despite the efforts of the Parole Board to assess this risk.

112 Interview with Judge Carruthers, Chairman of New Zealand Parole Board, Dunedin, 8 August 2006.

113Refer p 33 for discussion of benefits.

114 Sam, Sponsor, quoted in Gibbs, King, above n 92 at p 73.

115 Interview with Judge Carruthers, above n 112.

116 Statistics obtained from Alistair Spierling, Manager New Zealand Parole Board Administrative Support Service, 22 September 2006.

117 It should be noted that there may be other cases where domestic violence incidents, or threats of violence, formed part of an application to recall an offender. Data was only available where such incidents were part of the grounds upon which an application for recall was granted.

The present legislation makes no provision for another household member to initiate proceedings to have the detainee recalled to prison. The Parole Act 2002 stipulates that recall proceedings can only be initiated by the Chief Executive of the Department of Corrections or a Probation Officer. The only grounds for recall that could have some application are those that provide that the offender may be recalled if they are jeopardising the safety of any person at his or her residence or a suitable residence is no longer available because of changed circumstances.[118] Even if the legislation had an express provision whereby family members could withdraw their consent it is unlikely this would be widely used as many would not wish the offender to be returned to prison or would fear reprisals if they withdrew consent. Effectively the current situation means that if consent is withdrawn the household member must rely on the probation officer to commence recall procedures; while it is unlikely this would be refused most household members are probably unaware of this difficulty when they consent to having the detainee in the home.

On the other hand, the benefits of home detention may outweigh the negatives. Re-establishing ties with children, breaking cycles of offending and maintaining employment were all identified as positives by detainees interviewed for a study conducted by Gibbs and King.[119] The study was based on findings from interviews with 21 detainees and their sponsors as well as comments from probation officers and members of home detention boards. The study took a social work type angle and focused on the personal experiences of detainees and their sponsors. Although, this was not a scientific study it does provide valuable insight into the operation of home detention. Since the study there have been amendments to the legislation governing home detention. These changes have largely been concerned with procedural matters and thus have had little impact on the day to day experiences of detainees on home detention meaning that the responses from detainees still provide a useful indication of the home detention experience.

118Parole Act 2002, s 61.

119Gibbs, King, above n 92 at p 70-74.

When assessing the impact of home detention the underlying assumption appears to be that the detainee would have been imprisoned if they were not released to home detention. On this basis comparisons generally rank home detention as preferable. However, if home detention has in fact resulted in net widening, and offenders who would not otherwise be sent to prison are being sentenced to home detention then these benefits disappear as the sentence is undoubtedly more onerous than other community based sanctions.

5.5 Net Widening

Under the current system the instances in which net widening can occur are limited. It may occur in front end situations if a Judge regards home detention as a community-based sentence, rather than an alternative to imprisonment. If this happens an offender who would not ordinarily receive a custodial sentence may be sentenced to imprisonment because the Judge wants them to qualify for the scheme. The likelihood of this situation arising is low because home detention is viewed as a sentence of imprisonment and this explicitly ranks it above community based sanctions.

6

International Perspectives

Since the development of electronic monitoring in the United States the technology has been adopted in many other countries. The use of the technology has differed, from a simple means of confinement to part of a much wider programme of supervision. In this chapter the development and operation of home detention in several other jurisdictions will be examined.

6.1 The Netherlands

In 1995 electronic monitoring experiments began in the Netherlands.[120] These experiments were successful and electronic monitoring was introduced into legislation in 1999.[121] The current statutory framework is contained in the Custodial Institutions Act (Penitentiaire Beginselenwet) 2000. The legislation targets two groups; long term prisoners who may be eligible to serve the last 1-6 months of their sentence on home detention and offenders who, without electronic monitoring, might have received a sentence of up to one year imprisonment. Effectively these two categories are very like the New Zealand scheme which provides for back end and front end home detention. However the Netherlands system is distinct in that no category of crime or offender is specifically

120 Whitfield, The Magic Bracelet, Technology and Offender Supervision, (Waterside Press, England, 2001) at p 47. In 1988 the use of electronic monitoring was first considered in the Netherlands. An advisory committee reported to the Ministry of Justice on the desirability of the development. The National Lawyers Association, the academic community and the Association of Judges all expressed doubts about the development and this coupled with concerns about violations of privacy resulted in plans for electronic monitoring being shelved.

120 Ibid. In 1992 the option was raised again by a group of civil servants who pointed out that the development of electronic monitoring to replace 350 prison cells could save the government more than 20m guilders.120 The potential for cost saving was eventually enough to overcome doubts about the system and a pilot began in 1995.

121 Schaap, "Results of the Evaluation of the Netherland Project on Electronic Monitoring" in Will Electronic Monitoring Have a Future in Europe (Germany, 2003) at p 89. Front door home detention was introduced in December 1999, back door home detention was introduced in January 2000.

excluded. Every offender is assessed on an individual basis to determine suitability for electronic monitoring regardless of the type of crime they have committed. Like the New Zealand system, an assessment of risk underpins the decision making process.

The Netherlands system means than even offenders convicted of the most serious crimes including murder and manslaughter may be eligible for home detention. On first impressions this may be viewed as objectionable but it on closer analysis it is in fact an astute development that New Zealand could do well to further consider, particularly considering its implications for reducing prison populations. At present the principle of proportionality means home detention is not even contemplated for offenders who commit particular types of crimes and are serving indeterminate sentences. In New Zealand offenders convicted of the most serious crimes are currently paroled upon reaching their parole eligibility date and satisfying the Parole Board that they do not pose a risk to the safety of the community. If parole is refused their case will be periodically reheard or they will be released upon reaching their final release date. The important feature is that eventually almost all offenders are released back into the community. Making back-end home detention available to all offenders may aid offenders reintegration to society and allow some offenders to be released to home detention at a stage when parole may not have been granted. It is unlikely to result in increased risk as a stringent selection process based upon individual risk assessments will ensure only suitable offenders are chosen. It will be particularly useful as a tool for offenders who require an extra step in their reintegration into the community.

Although the Dutch scheme was implemented as a cost saving mechanism Han van der Leek, Deputy Director General of the Netherlands Probation Service, is quick to point out that the scheme is 'not available for the sole purpose of saving cell space'.[122] Instead he states 'we are against imprisonment which serves no other good than to isolate the offender during a certain

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122 Han van der Leek in Whitfield above n 120 at p 53.

period of time'.[123] This approach ensures that offenders who do not pose a risk to society remain in the community but are still held accountable for their offending. The programme aims to serve as both a punishment and a means to influence behaviour.[124]

The implementation of electronic monitoring in the Netherlands was overseen by Ruud Boelens who views the system as a 'real alternative to imprisonment' and believes it has to have a 'rather tough character'[125] because of this. Electronic monitoring is only one part of the programme which is oriented towards re-socialisation of the offender. The 24 hour programme allocates time for particular activities and is unique in that detainees have no general right to 'free time' except for two hours on Saturdays and Sundays. The programme allocates on average 30 hours per week to programme activities that include work, training or education. The remaining time is divided between approved community based social activities (that could include sport or church) and time at home.[126] Most detainees spend an average of 3 to 4 months on electronic monitoring. The intensive nature of the programme means it does not work well if used for long periods of time. In comparison to New Zealand's home detention scheme the Netherlands system is far more regimented and involves stricter controls on the detainee's time. The New Zealand system is intended as a means of serving a sentence of imprisonment which makes it difficult to justify the more lenient approach. Despite the demanding nature of the system in the Netherlands the home detention scheme has a high completion rate of 93%.[127] Boelen is confident the system contributes to the reintegration of offenders into the community.[128]

6.2 Australia

In 1988 electronic monitoring was introduced in Australia in the Northern Territory. Initially it was a small scale scheme aimed at establishing home detention in remote Aboriginal communities

123 Han van der Leek, "Electronic Monitoring In Europe" (internet) <www.cep-probation.org/reports/electronic_monitoring_in_europe.html> accessed 2 August 2006.

124 Refer p 28-30 for discussion of whether home detention does serve as a punishment

125 Ruud Boelens in Whitfield above n 120 at p 55.

126 Ibid.

127 Haverkamp, Mayer, Levy, "Will Electronic Monitoring have a Future in Europe" in Will Electronic Monitoring Have a Future in Europe (Germany, 2003) at p 4.

128 Boelen in Whitfield above n 120, at p 55.

and reservations.[129] Since its introduction other states have introduced electronic monitoring but the statutory regimes' the systems operate under vary from state to state. The following discussion will outline the ways in which home detention has been developed in different states to deal with different stages of the custodial process.

Firstly, only Western Australia specifically provides for electronic monitoring at the pre-trial stage. The Bail Act 1982 (WA) allows home detention to be imposed and the accused person may be required to wear an electronic device. In other states electronic monitoring may be available at the pre-trial stage under the broad discretion available when imposing bail conditions.

Secondly, legislation in Western Australia and Queensland provides for the use of electronic monitoring post-prison. In Western Australia the Sentencing Administration Act 1995 allows certain prisoners to be released on home detention. They may be required to wear a monitoring device. In Queensland the Corrective Services Act 2000 provides that offenders released on community-based release orders (which include home detention) may be required to wear a monitoring device.

Finally, the Northern Territory and Western Australia are the only states that have legislation enabling home detention with electronic monitoring as a primary sentencing option. The Northern Territory's Sentencing Act 1995 provides that a court may make an order suspending the sentence on the offender entering into a home detention order. Section 44 of this Act specifies that a court which sentences an offender to a term of imprisonment may make such an order where satisfied it is desirable to do so in the circumstances. This is a vague constraint and conveys a wide discretion. Prior to making an order the court must have received a report from the Director of Prison Services stating suitable

129 Whitfield above n 120 at p 75.

arrangements are in place for home detention.[130] The order cannot remain in force for more than 12 months. There appears little other statutory guidance governing the granting of home detention orders which contrasts with the specific requirements in the New Zealand legislation.

In Western Australia the Sentencing Act 1995 provides that a court may impose an intensive supervision order with a curfew that requires the offender to 'submit to surveillance or monitoring'. This order can be in place for between 6 and 24 months.[131] In New South Wales electronic monitoring is not specifically authorised but the court is able to sentence offenders to home detention with 'such conditions as it considers appropriate'.[132] In the Northern Territory and Western Australia electronic monitoring is not always required but other conditions are imposed including requirements that the detainee remain at stated premises, not drink alcohol, and not leave the premises at any time without permission. Home detainees are subject to random checks (at home and work) and breath and urine testing may be required.[133]

The time limits in place in both the Northern Territory and the Netherlands suggest recognition that electronic monitoring does not work well when used for long periods of time. In New Zealand home detention orders are for a maximum of 12 months, but under the Parole Act 2002 an order can be extended for a further 12 months, effectively meaning a detainee can be on home detention for up to 2 years. The Parole Board is conscious of the fact compliance decreases if the detainee spends too long on home detention and as a result few people are placed on home detention for the full two years despite the fact that the legislation permits it.[134] This reality indicates that perhaps an amendment is warranted to avoid a situation where the Parole Board is effectively legislating by placing their own time limits on home detention.

130 Sentencing Act 1955 (NT Australia), s 45.

131 Sentencing Act 1995 (WA), s 69.

132 Crimes (Sentencing Procedure) Act 1999 (NSW).

133 Correctional Services Northern Territory, "Home Detention" (internet) www.nt.gov.au/justice/graphpages/corrservs accessed 21 August 2006.

134 Department of Corrections, "Corrections News" (internet) <www.corrections.govt.nz/public/pdf/judgeupdates/2006augissue3.pdf> accessed 24 September 2006. The average time spent on home detention in 2004/2005 was 4 months.

The fragmented development of electronic monitoring in different Australian states continues as new strategies are attempted to reduce re-offending and aid reintegration into the community. However there is some national continuity since the establishment of guidelines for the implementation and use of home detention and electronic monitoring.[135] The development of home detention as a sentence in its own right in some states suggests the home detention is being recognised as a valuable option in intermediate sentencing.

6.3 England

Trials of electronic monitoring began in Britain in 1989. The first trial resulted in a failure rate of 58 per cent and was declared a disaster by many media commentators. A new trial was launched in 1995 involving the use of curfew orders as a sentence of the court. This trial was a success. [136] The current provisions governing this aspect of home detention are contained in the Powers of Criminal Courts (Sentencing) Act 2000. The Act provides that the court may sentence offenders aged 16 years or over to a curfew order with electronic monitoring for a maximum of 6 months.

The success of the curfew trial, coupled with concerns about rising prison populations led to the passing of the Crime and Disorder Act 1998. This Act provided for the introduction of a home detention curfew scheme for the early release of prisoners, a back end option. Under the scheme most prisoners serving sentences of over three months and under four years would be eligible for release on home detention up to 2 months prior to their automatic release date (which was the half way point of their sentence). Prison governors were given the task of making individual release decisions. At first the number granted early release remained low[137] after governors were reminded that it was their decision and they would be held accountable for any failures to take proper account of risk. Since its slow start the early release scheme has continued to expand and Dick Whitfield believes the schemes low breach rate has meant it has helped establish electronic

135 Established at the Corrective Services Ministers' Conference 1996.

136 Three areas were chosen for the initial trial and after 12 months the successful completion rate was over 80 per cent. The trial was extended further and on 1 December 1999 curfew orders were made available to every court in England and Wales.

137 Whitfiield, above n 120 at p 36. 31% in the first year.

monitoring and home detention as a credible option in a way that curfew orders were unable to achieve.[138] The current legislation is contained in the Criminal Justice Act 1991. The provisions have been extended to allow for release up to 4.5 months early on a curfew with electronic monitoring. Home detention and electronic monitoring is also used extensively as a tool to ensure compliance with bail conditions for juvenile offenders and as part of detention and training orders for offenders under 18 years of age.

Home detention has been widely used in England as both an early release mechanism and a sentence of the court. The use of home detention in early release situations has increased from 3028 in the year from January 1998 to March 1999 to 19,096 in the year from January 2004 to March 2005.[139] As a sentence of the court the numbers have increased from 415 to 22,603 over the same period.[140] Comprehensive infrastructure is in place to ensure the system is widely used but with this comes pressure to expand the system further and increase cost efficiencies. Although research undertaken in 2001 indicates success rates are high[141] Dick Whitfield advocates a cautious approach to expansion to ensure the system continues to achieve positive outcomes.[142]

138 Whitfiield, above n 120 at p 37. The Home Secretary, Jack Straw claimed a 95% success rate in the first year although these figures have been challenged.
139 Home Office Research, (2001) "Electronic Monitoring of Released Offenders, An Evaluation of the Home Detention Curfew Scheme Study 222", (internet) <www.probation.homeoffice.gov.uk/output/page137.asp#Statistics> accessed 22 August 2006.
140 Ibid.
141 Ibid.
142 Whitfield above n 120 at p 43.

7

The Future of Home Detention

7.1 Home detention as a sentence in itself

The imposition of home detention as a sentence in itself has recently been announced by the government and is intended to be implemented in New Zealand by July 2007. This will mean that judges will be able to impose a sentence of home detention rather than imposing imprisonment and granting leave to apply for home detention. At present, in New Zealand, the decision to impose 'front end' home detention is made by the Parole Board. The development of home detention as a sentence in itself will align New Zealand more closely with the Northern Territory, England and the Netherlands where courts have jurisdiction to impose sentences of home detention. By drawing on the experiences of overseas jurisdictions other changes could occur alongside this development to further enhance the system.

The government's proposal for amendments to home detention is largely motivated by concerns about increasing prison populations. Widening the net and imposing a sentence of home detention on offenders who would previously have been imprisoned is one option that could result in significant reductions in prison populations. Under the current system there is a sizable leap from a community based sentence to one of imprisonment. Creating a new band of intermediate sentences based around home detention may help narrow this gap and provide an alternative for judges when they consider offending does not warrant imprisonment but the imposition of a community based sentence appears too lenient.

Introducing home detention as a sentence in itself will pose many new issues. Of foremost concern is whether judges will have enough information before them at sentencing to decide whether or not to impose home detention. In Western Australia home detention is available as a sentence in itself and has a successful completion rate of approximately 85 per cent.[143] This is lower than New Zealand's completion rate. There are numerous factors that this could be attributed to but policy makers need to consider whether this indicates that selection at the sentencing stage is less stringent than that undertaken by the Parole Board at a later date. If the proposal to introduce home detention as a sentence it itself does proceed careful planning will be required to ensure judges have the necessary information before them at sentencing so that poor selection does not impact negatively on completion rates.

Under the current system comprehensive reports are prepared by Probation after leave to apply is granted.[144] These reports assess the offender's background and suitability for home detention. The proposed changes may mean these reports will need to be prepared for every offender that comes before the court and may be sentenced to less than two years. This would be a logistical nightmare and would be highly inefficient. One way to avoid this would be to give a sentencing indication at an intermediate stage indicating whether home detention was likely to be granted. An alternative would be to specify particular offences where home detention is likely and ensure home detention is addressed in all pre-sentence reports for offenders convicted of these offences. The latter option would not require major changes to the reporting process and is preferable on this basis.

Introducing home detention as a sentence in itself increases the risk that net widening will occur. When the introduction of home detention was initially being assessed in the 1990s the Justice and Law Reform Committee prepared a report on the scheme. The Committee acknowledged that net-widening could occur if sentencing Judges were given jurisdiction to make home detention

143 Corrective Services Western Australia, "Successful Completion Rates for Financial Year 00/02" (internet) <www.correctiveservices.wa.gov.au/> accessed 22 August 2006.

144 Department of Corrections, above n 68.

orders.[145] Under the current system judges must be satisfied a sentence of imprisonment is warranted as there is no guarantee that the Parole Board will approve the application for home detention. Under the new system offenders may be sentenced to home detention when previously they would have received a community sentence.

The loose framework outlined in the "Effective Interventions" documentation suggests that little progress has been made beyond deciding the development is a good idea; there is a real shortage of information on how the new scheme will be implemented.[146] This shortcoming implies that there is still time for significant changes to the home detention regime extending beyond the amendment that will simply provide for the imposition of it as a sentence in itself. Instead it is argued that a major restructuring of home detention should take place with a change in emphasis from detention to rehabilitation.

Drawing from the Dutch experience greater demands on the detainee's time could be imposed requiring attendance at programmes and structured weekly routines. This development could result in more time spent away from the home and thus the term 'home detention' may not accurately reflect the actual sentence. It may be argued that this type of sanction would not serve to effectively punish offenders but whether punishment or rehabilitation should be the focus of sentencing is contentious. There are numerous theories concerning the role of sentencing. In the latter half of the twentieth century the consequentialist approach centring on rehabilitation of the offender was dominant.[147] More recently there has been a move towards a 'justice model' of punishment that sees offenders as responsible for their wrongdoing rather than merely objects that need to be subjected to rehabilitative treatment.[148] This stance is reflected in the current Sentencing Act 2002 but interestingly, section 7 of the Act makes no explicit mention of

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145 Mitchell " Home Detention" (1999) NZLJ 363 at p 365.

146 Ministry of Justice (2006) Effective Interventions in the Criminal Justice Sector (internet) < www.jutice.govt.nz/effective_interventions/> accessed 17 August 2006.

147 Duff, Marshall, Emerson Dobash, Dobash (ed.) Penal Theory and Practice, Tradition and Innovation in CriminalJustice, (Manchester University Press, London, 1994) at p 5.

148 Ibid.

punishment. Despite this case law suggests that punishment still plays an important role in sentencing decisions. In *Rameka v Police*[149] Justice Hanson came to the conclusion that "the dual and sometimes conflicting objectives of punishment and rehabilitation" must both be balanced. In the New Zealand context the principle of proportionality is central to any sentencing decision; this may demand that an aspect of punishment is incorporated in a sentence and that rehabilitation cannot be the sole focus. This would mean that if use of home detention were expanded its punitive character would need to be emphasised to ensure it is recognised as a punishment rather than simply a method to aid rehabilitation.

7.2 Use pre trial

There is no legislation that explicitly provides for the use of home detention or electronic monitoring at the pre trial stage. In *R v Faisandier*[150] the court, at the request of the defendant and on the condition that she bear the cost of electronic surveillance, imposed a form on home detention as a condition of bail.[151] The case reached the Court of Appeal after the defendant argued that the sentencing judge should have made greater allowance for the pre-conviction detention. The defendant argued that if the period on home detention had been spent in remand custody the full period would have been treated as time served. In their judgment the Court of Appeal recognised that the defendant had done the country a service by pioneering a home detention scheme at her own expense. This factor, coupled with the highly restrictive nature of the detention, led the court to conclude that an allowance of 12 months (from a sentence of four years) was appropriate.

149 *Rameka v Police* (AP463/32/2002, HC Rotorua, 10 June 2002).

150 *R v Faisandier* (CA 185/00, 12 October 2000).

151 Ibid. The defendant was confined to her home for 24 hours a day until her trial 10 months later. Upon conviction the defendant was sentenced to 4 years imprisonment with a deduction of 6 months for the time spend on home detention prior to conviction. The sentencing judge refused to allow for a day-for-day deduction on the basis that the punitive nature of the detention had been mitigated by the fact that the defendant did not have to live in unfamiliar and unpleasant surroundings.

The decision can be contrasted with the later case of *R v Nichols*[152] where the court refused to make any allowance for time spend under electronic surveillance while on remand. The court held that while the defendant suffered restrictions he was on bail and not on remand in custody. They distinguished the case of *R v Faisandier*[153] on the basis that in that case the defendant had been confined to the home for 24 hours whereas Nichols had only been prohibited from leaving town.

The government expressly approved the use of electronic monitoring as a condition of bail in December 2005.[154] The option for the Courts to consider electronic monitoring of a special condition of bail started in Northland and Auckland on 25 September 2006.[155] It is intended that the scheme will be available nationwide by 1 December 2006. The scheme is being overseen by the Police and includes the employment of non-sworn electronic monitoring bail assessors to manage applications for the new type of bail. They will perform a role similar to Probation Officers and will be responsible for preparing reports assessing the suitability of defendants for this option.[156] The decision to allow the police to administer electronic bail means the system may become increasingly fragmented. There is constant concern about the shortage of policing resources and electronic bail is likely to impinge on these resources even further. At present the police are responsible for monitoring compliance with bail but electronic bail imposes greater limits and thus more breaches must be anticipated meaning the strain on policing resources will be further tested.

The new option has the potential to aid in reducing prison populations this will be dependent on the willingness of judges to grant electronic bail rather than a custodial remand. In 2004 the average daily number of prison inmates on remand was 1286. This equated to 20% of the total prison population.[157] If some of these offenders can be channelled into the new electronic bail

152 *R v Nichols* (CA406/02, CA417/02, 16 June 2003).

153 *R v Faisandier*, above n 150.

154 New Zealand Police (2006) Electronic Monitoring on Bail (internet) <www.police.govt.nz/service/embail/> accessed 1 October 2006.

155 Ibid.

156 Ibid.

157 Parole Board, (2005) above n 25.

scheme the pressure on the prison system could ease significantly. Electronic bail also has the advantage of providing an early indication of whether a detainee is likely to be a suitable candidate for a sentence of home detention. The new option does not make express allowance for a deduction in sentence length for time spent on electronic bail. The variance between the approaches adopted by the courts in *R v Faisandier* and *R v Nichols* suggests that such guidance should be provided to settle this point of contention.

8

Conclusion

Recent events indicate New Zealand is about to embark on a new era in the use of home detention and electronic monitoring. As new developments are contemplated there are numerous lessons that can be learnt from the home detention experience so far. Overseas developments provide additional guidance and highlight possibilities that should be explored in New Zealand.

As a concept home detention has numerous merits. It helps avoid the negative influences offenders can be exposed to in prison and may aid in the rehabilitation of offenders. It has the advantage of costing less than imprisonment, a factor that should be a peripheral benefit but instead it has become a focus as the government struggles to find ways to reduce spending. The current system appears to function adequately, most detainees successfully complete home detention and the selection process seems to operate effectively. But, while these findings make it tempting to conclude home detention should remain unchanged on closer inspection it is evident there are numerous aspects that can be improved.

Governmental organisations are quick to point to statistics suggesting the scheme is successful but these must be considered with caution. This dissertation argued that such statistics have been presented to encourage the expansion of home detention because of increasing prison populations rather than to create an accurate picture of home detention. Although figures show few instances

of offending while on home detention the rate of recidivism in the two year period following release is approximately 30 per cent. This indicates that efforts must be made to further the long term rehabilitative potential of home detention and decrease the recidivism rate.

Channelling offenders into home detention is one alternative being considered by the government to avoid the cost of making more prison beds available. Home detention is cheaper than imprisonment, but the cost effectiveness of home detention is an improper basis for justifying the introduction of the sentence. Instead home detention must reflect the principles of sentencing set out in the Sentencing Act 2002. Home detention is justified on the basis that it acts as an effective punishment but the accuracy of this statement is doubtful. It is argued that instead legislators should promote the rehabilitative role of the scheme and ensure this is a central to the expansion of home detention.

Under the current system there is a worrying lack of legislative guidance for probation officers responsible for administering home detention. This means that unfair outcomes can result because of variations in the exercise of discretion. This dissertation recommends that statutory guidelines be established to set out appropriate responses and ensure all detainees receive the same treatment.

A further issue associated with the present system concerns equality under the law. Expansion of home detention to all parts of New Zealand must be a priority, or if topography makes this impossible, alternative methods such as a return to the passive type system or the utilisation of GPS need to be made available. This is particularly pressing as the introduction of electronic bail and home detention as a sentence in itself means more people are likely to be affected by this inequality.

When home detention as a sentence in itself is introduced a major practical concern will be the ability of judges to decide on the appropriateness of home detention at sentencing. The current framework requires that Probation Officers carry out extensive assessments and reporting prior to

the Parole Board hearing. This assessment is only undertaken for offenders that have been granted leave to apply for home detention at sentencing. If home detention becomes a matter for determination at sentencing the number of offenders who require this assessment will increase significantly. New processes will need to be implemented to ensure that this task is completed and that judges are provided with the necessary information to decide if home detention is appropriate.

The introduction of home detention in its own right is a positive development. It has the potential to improve the current system but the mechanics of its operation must be carefully managed to ensure its success. If the amendments are accompanied by provisions specifying the information available to judges at sentencing and further clarifying the discretion available to Probation Officers the changes will be effected with little interruption to the current system. If the new system is to be deemed a success wider changes need to occur alongside these amendments. Allowing offenders to remain in the community and retain positive contacts is an important tool in rehabilitation but more needs to be done to emphasis the rehabilitative aspect of home detention. The Dutch example should be closely examined and a programme of structured rehabilitation should be implemented. Home detention alone is insufficient; a rehabilitation programme must accompany the new sentence, without this it is doubtful that the proposed changes will succeed in improving the home detention scheme.

Electronic bail is a logical step in the development of offender supervision but the decision to allow the police to administer electronic bail threatens to fragment the home detention system. It is imperative that efforts are made to align the two systems so that offenders who serve electronic bail and then go on to home detention have some continuity and are not subjected to two quite different regimes. If electronic bail is more lenient than home detention offenders may struggle to accept the limits of home detention resulting in more breaches and a decrease in the number of successful completions.

Changes to home detention are imminent. To ensure their success due regard must be paid to the experiences and problems associated with the current system. If the amendments address the faults in the current scheme home detention has the potential to become a particularly valuable sentencing tool.

SELECT BIBLIOGRAPHY

New Zealand Legislation

Criminal Justice Act 1985
Criminal Justice Amendment Act 1993
Sentencing Act 2002
Bail Act 2000
Parole Act 2002
Crimes Act 1961

Overseas Legislation

Sentencing Act 1955 (NT Australia)
Sentencing Act 1995 (WA Australia)
The Bail Act 1982 (WA Australia)
Sentencing Administration Act 1995 (WA Australia)
Corrective Services Act 2000 (QSLD Australia)
Crimes (Sentencing Procedure) Act 1999 (NSW Australia)
Powers of Criminal Courts (Sentencing) Act 2000 (England)
Crime and Disorder Act 1998 (England)
Custodial Institutions Act (Penitentiaire Beginselenwet) 2000 (Netherlands)

Cases

Chandra v Police (HC Auckland, A03/03, 6 March 2003, Harrison J)
Edmonds v Police (HC Christchurch, CRI2004-409-174, 7 October 2004, Heath J)
Feng v Police (HC Auckland, A127/02, 4 September 2002, Salmon J)
Huata v Police (HC Hamilton, AP95/02, 9/12/2002, Paterson J)
Linn v Police (HC Dunedin, CRI2006-412-000008, 11 April 2006, Fogarty J)
Peeke v Police (HC Hamilton, CRI2004-419-144, 4 February 2005, Cooper J)
R v Brazendale (CA349/02, 3 April 2003, Keith, McGrath, Glazebrook JJ)
R v Faisandier (CA185/00, 12 October 2000, Gault, Ellis, Robertson)
R v Hakiwai (CA19/03, 30/5/03)
R v Nichols (CA406/02, CA417/02, CA, 16 June 2003, Blanchard, McGrath, Glazebrook JJ)
R v Porter (CA305/01, 26 September 2001, Blanchard, Heron, Goddard JJ)
Rameka v Police (HC Rotorua, AP463/32/2002,10 June 2002, O'Regan J)
R v Jones (CA412/01, 31 May 2002, Elias CJ, Gault P, John Hansen J)
Tau v Police (HC Auckland, A25/03, 25 February 2003, Heath J)
Terewi v Police (HC Auckland , A103/00, 14 July 2000, Fisher J)

Interviews

Interview with Judge Carruthers, Chairman of New Zealand Parole Board, Dunedin, 8 August 2006.
Interview with Jim Thompson, Member of New Zealand Parole Board, Dunedin, 8 August 2006.
Interview with Judge MacDonald, Member of New Zealand Parole Board (Panel Convenor), Dunedin, 31 May 2006.
Interview with Ievaivai Nua , Member of New Zealand Parole Board, Dunedin, 8 August 2006
Interview with Jo-Ann Duff, Community Probation Officer, Dunedin, May 2006.

Texts

Ball *House Arrest and Correctional Policy: Doing Time At Home* (Sage Publications, 1988)

Cooke *The Laws of New Zealand* (Butterworths, 1993) (Updated September 2006)

Duff, Marshall, Emerson Dobash, Dobash (ed.) *Penal Theory and Practice, Tradition and Innovation in CriminalJustice* (Manchester University Press, 1994)

Gibbs, King *The Electronic Ball and Chain? The Development, Operation and Impact of Home Detention in New Zealand* (University of Otago, 2001)

Hall *Halls Sentencing* (Butterworths, 1993) (Updated September 2006)

Mayer *Will Electronic Monitoring Have a Future in Europe* (Germany, 2003)

McCarthy (ed) *Intermediate Punishments, Intensive Supervision, Home Confinement and Electronic Surveillance* (New York, 1987)

McElrea, *Re-thinking Criminal Justice* (Legal Research Foundation, 1995)

Orwell *1984*(David Campbell Publishers, 1949)

Robertson *Adams on Criminal Law* (Brooker & Friend, 1993) (Updated June 2006)

Whitfield *The Magic Bracelet, Technology and Offender Supervision* (Waterside Press, 2001)

Articles

Black, King “Electronic Monitoring in the Criminal Justice System” (2003) Australian Institute of Criminolgy, Trends and Issues in Crime and Criminal Justice 254

Broadhead “Tagging” (1998) 1800 New Law Journal 148

Department of Corrections “Home Detention” (2000) 539 Lawtalk 7

Department of Corrections “Home Detention, Is it Working” (2003) Judges Update August

Department of Corrections “Re-offending Rate Drops” (2005) Judges Update September

Gullick "Sentencing and the Home Detention Curfew Scheme" (2002 May) Criminal Law Review (UK) 391

John Howard Society of Alberta (2000) Electronic Monitoring

Keay "Home Detention – An Alternative to Prison" (2000) Current Issues in Criminal Justice 98

Lily, Ball "A Brief History of Electronic Monitoring and House Arrest" (1987 Summer) Northern Kentucky Law Review 343

Mitchell "Home Detention" (1999) NZLJ 363

Rondinelli "Tracking Humans: The Electronic Bracelet in a Modern World" (1997) Criminal Lawyers Association Newsletter - Canada

Singh "Home Detention Statistics" (2003) 605 Lawtalk 8

Stone "Home Detention Curfew- Doe it Work" (2002) 166 Justice of the Peace 951

Newspaper Articles & Television Programmes

Inside New Zealand "Parole" (TV 3, Documentary, 2005)

Otago Daily Times "Home Detention Seen As Effective Punishment" 21 August 2006

Sunday Star Times "Prisoners Flee Home Detention" July 2 2006

Government Reports

Department of Corrections (2006) *Report on Phase 1, Voice Verification and GPS* (internet)

Department of Corrections (2006) *Community Probation Service Operations Manual* (internet)

Department of Corrections (2005) *Managing Increased Inmate Numbers* (internet)

Ministry of Justice (1997) *Home Detention, The Evaluation of the Home Detention Pilot Programme 1995-1997* (prepared by Church, Dunstan)

Ministry of Justice (2001) *Conviction and Sentencing of Offenders in New Zealand 1991-2001*

Ministry of Justice (2004) *Conviction and Sentencing of Offenders in New Zealand 1995-2004*

Ministry of Justice (2005) *Review of Home Detention: Responses to Journalists Queries*

Ministry of Justice (2003) *The Sentencing Act 2002: Monitoring the First Year* (internet) (prepared by Chhana, Spier, Hurd, Roberts)

Ministry of Justice (2006) *Effective Interventions in the Criminal Justice Sector* (internet)

New Zealand Police (2006) *Electronic Monitoring on Bail* (internet)

Parole Board (2004) *New Zealand Parole Board Annual Report 2003/2004*

Parole Board (2005) *New Zealand Parole Board Annual Report 2004/2005*

Parole Board Decision (2006) *Donna Awatere Huata* (internet)

Overseas Government Reports

Correctional Services Northern Territory*, Graphs Page* (internet)

Corrective Services Western Australia *Successful Completion Rates for Financial Year 00/02* (internet)

Home Office Research (2001) *Electronic Monitoring of Released Offenders, An Evaluation of the Home Detention Curfew Scheme Study 222* (internet) (Prepared by Dodgson, Goodwin, Howard, Llewllyn, Mortimer, Russell, Weiner)

APPENDIX ONE

Criminal Justice Act 1985

1 October 1999 to 29 June 2002

21D Court to consider granting offender leave to apply for release to home detention in certain cases (Repealed)

(1) This section applies if a court sentences an offender to—

(a) A term of imprisonment of not more than 2 years; or
(b) Two or more terms of imprisonment to be served concurrently, each term of which is not more than 2 years; or
(c) Two or more terms of imprisonment that are cumulative, the aggregate term of which is not more than 2 years.

(2) The court must consider whether to grant the offender leave to apply under section 103 to a District Prisons Board for release to home detention.

(3) In considering whether to grant leave under this section, the court must consider—

(a) The nature and seriousness of the offence; and
(b) Any relevant matters in the victim impact statement in that case.

(4) The court must make an order either granting leave or declining to grant leave.

(5) For the purposes of this section, a sentence of imprisonment referred to in subsection includes a suspended sentence of imprisonment and the court that orders that the suspended sentence take effect for the term specified in the order suspending the sentence, or that a lesser period of imprisonment be substituted, is the court that must consider whether to grant the offender leave to apply under section 103 to a District Prisons Board for release to home detention.

APPENDIX TWO

Criminal Justice Act 1985

1 October 1999 to 29 June 2002

103A Pre-parole home detention for offenders serving determinate sentence of more than 2 years (Repealed)

(1) This section applies to offenders who are—
 (a) Given a sentence of imprisonment of more than 2 years; and
 (b) Eligible to be released on parole under section 89(3) after the expiry of one-third of their sentence.

(2) At any time during the period commencing on the date that is 3 months before the date an offender is eligible for release on parole and ending with the offender's final release date, a District Prisons Board or the Parole Board (as the case may be) may direct that the offender be released under this section to home detention.

(3) An offender to whom this section applies may apply to a District Prisons Board or the Parole Board (as the case may be) for release to home detention in an area where a home detention scheme is operated by the Secretary.

(4) An application under this section may be lodged before the start of the period referred to in subsection (2) but not more than 2 months before that period.

(5) The Board must consider the application as soon as practicable in accordance with section 103B.

(6) For the purposes of this section and sections 103B and 103C, terms of imprisonment under cumulative sentences are to be treated as 1 term.

APPENDIX THREE

Sentencing Act 2002 (as amended)

97 Court must consider granting offender leave to apply for home detention in certain cases

(1) This section applies if a court sentences an offender to—
- (a) a term of imprisonment of not more than 2 years; or
- (b) 2 or more terms of imprisonment to be served concurrently, each term of which is not more than 2 years; or
- (c) 2 or more terms of imprisonment that are cumulative, the aggregate term of which is not more than 2 years; or
- (d) 1 or more terms of imprisonment to be served concurrently with a sentence or sentences of imprisonment under which an offender is already detained, the total term of all the sentences being not more than 2 years.

(2) For the purposes of subsection (1)(d),—
- (a) the total term of 2 or more sentences of imprisonment is a term beginning with the commencement date of the first of the sentences to commence and ending with the sentence expiry date (as specified in subpart 3 of Part 1 of the Parole Act 2002) of the sentence last to expire:
- (b) an indeterminate sentence of imprisonment is to be treated as if it were a determinate sentence of imprisonment of more than 2 years:
- (c) a person who is detained under an interim recall order under the Parole Act 2002 is not detained under the sentence to which the interim recall order applies.

(3) The court may grant the offender leave to apply to the New Zealand Parole Board under section 33 of the Parole Act 2002 for home detention only if the court is satisfied that it would be appropriate to grant leave, taking into account—
- (a) the nature and seriousness of the offence; and
- (b) the circumstances and background of the offender; and
- (c) any relevant matters in the victim impact statement in the case.

(4) The court must make an order granting leave or declining to grant leave.

(5) If the court sentences the offender to more than 1 term of imprisonment on the same occasion,—
- (a) only 1 order under subsection (4) may be made; and
- (b) that order applies in respect of all the sentences of imprisonment imposed on that occasion.

APPENDIX FOUR

Sentencing Amendment Act 2004

Section 22 - New heading and new section 39A inserted in Bail Act 2000
The Bail Act 2000 is amended by inserting, after section 39, the following heading and section:

39A Bail on deferment of sentence

(1) This section applies if the start date of a sentence imposed on an offender following summary conviction is deferred under section 100 of the Sentencing Act 2002 and the offender is not liable to be detained under any other sentence or order.

(2) If this section applies, the court that defers the start date of the offender's sentence must grant the offender bail.

(3) An offender who is granted bail under this section must be released on condition that the offender must,—

- (a) if he or she has been given leave to apply for home detention,—
  - (i) apply, within 2 weeks of the bail being granted, for home detention in accordance with section 33(1) of the Parole Act 2002; and
  - (ii) appear at any hearing by the New Zealand Parole Board of that application; and
- (b) Surrender himself or herself to the Superintendent of the penal institution concerned at the expiry of the period of the deferral, being the period specified by the court or the period ending with the date on which the New Zealand Parole Board determines the application for home detention, whichever is sooner.

(4) The provisions of sections 31 to 38, and 41 to 44, as far as they are applicable and with all necessary modifications, apply as if the offender were a defendant who had been granted bail.

(5) If any decision is made under section 34(1) (as applied by subsection (4)) in respect of an offender, the provisions of section 41(3) to (6) and section 42, as far as they are applicable and with all necessary modifications, apply as if the offender were a defendant granted bail."

APPENDIX FIVE

Parole Act 2002

35 Direction for detention on home detention

(1) The Board may direct an offender who has applied for home detention to continue serving his or her sentence on home detention.

(2) The Board may give a direction under subsection (1) only if it is satisfied on reasonable grounds that—

- (a) the offender will not pose an undue risk to the safety of the community or any person or class of persons if he or she is detained on home detention rather than in a [prison]; and
- (b) Repealed.
- (c) the relevant occupants (as defined in section 34(3)) of the residence in which the offender will be detained—
  - (i) understand the conditions of home detention that will apply to the offender; and
  - (ii) consent to the offender's detention in the residence in accordance with those conditions; and
- (d) the offender has been made aware of and understands the conditions that will apply during home detention, and he or she agrees to comply with them.

(3) The Board may not give a direction under subsection (1) if the period between the date on which the offender would start home detention and his or her statutory release date is 2 weeks or less.

(4) The Board may direct that an offender who is subject to a long-term [determinate] sentence may commence home detention at any time after the date that is 3 months before the offender's parole eligibility date.

(5) The Board may direct an offender to be detained on home detention only in an area in which a home detention scheme is operated by the chief executive.

(6) If the Board declines to direct an offender to continue serving his or her sentence on home detention, it may (on application or of its own motion) from time to time reconsider its original decision on the offender's application.

APPENDIX SIX

Parole Act 2002

15 Special conditions

(1) If the Board imposes standard release conditions on an offender, or if the standard detention conditions apply to the offender, the Board may (subject to subsections (2) and (4)) impose any 1 or more special conditions on the offender.

(2) A special condition must not be imposed unless it is designed to—
- (a) reduce the risk of reoffending by the offender; or
- (b) facilitate or promote the rehabilitation and reintegration of the offender; or
- (c) provide for the reasonable concerns of victims of the offender.

(3) The kinds of conditions that may be imposed as a special condition include, without limitation,—
- (a) conditions relating to the offender's place of residence (which may include a condition that the offender reside at a particular place), or his or her finances or earnings:
- (b) conditions requiring the offender to participate in a programme (as defined in section 16) to reduce the risk of further offending by the offender through the rehabilitation and reintegration of the offender:
- (c) conditions that the offender not associate with any person, persons, or class of persons:
- (d) conditions requiring the offender to take prescription medication.
- (e) conditions prohibiting the offender from entering or remaining in specified places or areas, at specified times, or at all times:]
- (f) conditions requiring the offender to submit to the electronic monitoring of compliance with any release conditions, or conditions of an extended supervision order, that relate to the whereabouts of the offender.]

(4) No offender may be made subject to a special condition that requires the offender to take prescription medication unless the offender—
- (a) has been fully advised, by a person who is qualified to prescribe that medication, about the nature and likely or intended effect of the medication and any known risks; and
- (b) consents to taking the prescription medication.

(5) An offender does not breach his or her conditions for the purposes of section 71 if he or she withdraws consent to taking prescription medication, but the failure to take the medication may give rise to a ground for recall set out in section 61.

APPENDIX SEVEN

Parole Act 2002

61 Grounds for recall

The grounds for recall are that—

(a) the offender poses an undue risk to the safety of the community or any person or class of persons; or
(b) the offender has breached his or her release conditions or detention conditions; or
(c) the offender has committed an offence punishable by imprisonment; or
(d) in the case of an offender who is serving his or her sentence by way of home detention,—
    (i) the offender is jeopardising the safety of any person at his or her residence; or
    (ii) a suitable residence in the area where a home detention scheme is operated by the chief executive is no longer available because of changed circumstances; or
(e) in the case of an offender who is subject to a special condition that requires his or her attendance at a residential programme,—
    (i) the offender is jeopardising the safety of any person at the residence, or the order or security of the residence; or
    (ii) the offender has failed to remain at the residence for the duration of the programme; or
    (iii) the programme has ceased to operate, or the offender's participation in it has been terminated for any reason.