

HOME DETENTION AS A STAND-ALONE SENTENCE

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Introduction

In 2007, the Government introduced a raft of new non-custodial sentences with the express aim of reducing New Zealand's increasing prison population.¹ At the heart of these changes was the establishment of home detention as a stand-alone sentence.² Before then, judges acted only as a "gate-keeper", determining whether leave to apply for home detention should be granted – the final decision rested with the parole board.³ Home detention could be 'front ended' for offences receiving less than two years imprisonment; applications were able to be made immediately after sentencing.⁴ For longer

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¹ Criminal Justice Reform Bill 2006 (93-1) (explanatory note) at 1. New Zealand's rate of imprisonment is greater than the OECD average, see *OECD Factbook 2008: Economic, Environmental and Social Statistics* (OECD, 2008).

² Sentencing Amendment Act 2007; Sentencing Act 2002, ss 80A–80ZI.

³ *R v D* [2008] NZCA 254 at [36]. Despite bureaucratic misgivings and a less than successful pilot programme, home detention was introduced as a form of parole in New Zealand shortly before the 1999 general election. Regarding the pilot programme, see A Church and S Dunstan *Home Detention: The Evaluation of the Home Detention Pilot Programme 1995-1997* (Ministry of Justice, Wellington, 1997).

⁴ D King and A Gibbs "Is Home Detention in New Zealand Disadvantaging Women and Children?" [2003] 50 Probation Journal 115 at 115. Under the pre-2007 system home detention could potentially be granted for essentially the entirety of a sentence, although offenders would typically have to serve one or two months in prison before a decision was reached. In exceptional

offences, application could be made for home detention within the final three months before release to parole. The new stand-alone sentence of home detention, which repealed and replaced the old 'front end' model, was designed to be an alternative to short sentences of imprisonment,⁵ giving greater flexibility to sentencing judges.

The advantages of home detention are much lauded. Politicians from both sides of the political divide have been attracted by the fiscal advantages of home detention compared to imprisonment and the possibilities of encouraging rehabilitation and reducing recidivism.⁶ In this paper I address the nature and operation of the stand-alone sentence of home detention. I further consider how the courts have interpreted and applied the sentence before concluding on the overall efficacy of the new sentence and outstanding policy issues.

A. Features of Home Detention as a Stand-alone Sentence

Home detention is a "hybrid" sentence.⁷ It is not defined as a community sentence,⁸ nor is an offender subject to home detention

circumstances a sentencing judge had the discretion to delay the activation of prison sentences so that probation reports could be made to determine eligibility for home detention without the offender needing to spend time in prison.

⁵ Criminal Justice Reform Bill 2006 (93-1) (explanatory note) at 5. Home detention ranks directly below imprisonment in the hierarchy of sentences in s 10 of the Sentencing Act 2002.

⁶ The level of bi-partisan support of home detention is unusual for criminal justice policy in New Zealand. The initial home detention schemes were introduced by the then National-led government in 1999, shortly before the general election. Successive Labour-led governments retained the schemes, expanding home detention to a stand-alone sentence in 2007. Although the enacting legislation was opposed by National, then Justice spokesperson, Simon Power, said in debate on the Second Reading of the Bill that the party was "warmly enthusiastic" about the introduction of home detention as a stand-alone sentence: (19 June 2007) 640 NZPD 9983.

⁷ *R v D*, above n 3, at [65].

⁸ It is not listed in the Sentencing Act 2002, s 44.

regarded as “in custody”.⁹ A sentence of home detention, of between 14 days and 12 months,¹⁰ may be imposed for any offence punishable by imprisonment, or where home detention is expressly provided for.¹¹ The 12 month maximum means that home detention is generally not available in cases where a term of imprisonment of greater than two years is justified.¹² This disparity is explained by the requirement that a sentence of home detention be served in full. Thus, a sentence of home detention is regarded as roughly equivalent to half the length of a sentence of imprisonment,¹³ though this is not an automatic computation.¹⁴

A sentence of home detention is available only if a less restrictive sentence cannot achieve the relevant purposes of sentencing, and a “short term” sentence of imprisonment is otherwise appropriate.¹⁵ A relevant pre-sentence report considering the suitability of the proposed residence, the safety and welfare of the occupants and the offender’s consent to the conditions of detention is required.¹⁶ The occupants of the residence must be informed of the offender’s past and current offending and their consent obtained.¹⁷ Home detention is versatile and may be combined with a sentence of a fine, reparation, or community work.¹⁸ This is valuable as it not only enables a wide application of home detention but it also aids the court in ensuring the least restrictive sentence is imposed.

⁹ Sentencing Act 2002, s 80A(5).

¹⁰ Ibid, s 80A(3).

¹¹ Ibid, s 80A(1).

¹² *R v Iosefa* [2008] NZCA 453 at [41].

¹³ *Savage v Police* HC Whangarei CRI-2008-488-1, 14 February 2008 at [27].

¹⁴ *Golding v Police* HC Whangarei CRI-2008-488-3, 14 February 2008 at [16].

¹⁵ Sentencing Act 2002, s 15A. As noted, a “short term” of imprisonment is interpreted as a sentence of imprisonment of less than two years.

¹⁶ Ibid, s 26A(2).

¹⁷ Ibid, s 26A(3). This consent may be withdrawn at any time. The residence must also be located in an area where a home detention programme is operated.

¹⁸ Ibid, s 19.

It is a popular misconception that home detention entails incarceration-like constant restraint. A detainee must not leave their residence unless authorised; this typically involves approval from a probation officer,¹⁹ or on special conditions imposed by the court.²⁰ Approved absences may include working, attending rehabilitative or restorative activities, or any other specifically approved activity.²¹ Special conditions may be imposed where there is a significant risk of further offending, standard conditions are insufficient, or to make use of rehabilitative or reintegrative programmes.²² Compliance is enforced through monitoring by the Probation Service or contractors and use of an electronic anklet is frequently made, although not a requirement.²³ It is an offence to breach home detention conditions, post-detention conditions or to refuse entry to a parole officer.²⁴

Once the sentence is completed the offender may remain subject to post-detention conditions, typically for a further 12 months.²⁵ Standard conditions are automatically imposed on sentences of more than six months and may be imposed on shorter sentences by the Court.²⁶ Standard conditions involve reporting to a probation officer, not changing residence without permission, and refraining from specific activities or associations.²⁷ Special conditions similar to those that may be imposed during home detention can also be used post-detention.²⁸

¹⁹ *Ibid*, s 80C(2). The only cases where approval is not required in the case of urgent medical or dental treatment, or where there is a serious risk of death to the offender or any other person.

²⁰ *Ibid*, s 80D.

²¹ *Ibid*, s 80C(3).

²² *Ibid*, s 80D.

²³ *Ibid*, ss 80C(2) and 80E.

²⁴ *Ibid*, ss 80S, 80U and 80T.

²⁵ *Ibid*, s 80N.

²⁶ *Ibid*.

²⁷ *Ibid*, s 80O.

²⁸ *Ibid*, s 80P.

B. Application in the Courts: Legal Issues

1. The approach to sentencing

The courts consider the decision to grant home detention as a two stage process.²⁹ The first stage involves setting a sentence of imprisonment and determining whether it is “short” (less than two years). If this is the case, the second step is whether to commute that sentence to home detention. At the first stage, a judge should not consider home detention, to ensure that home detention commuted at stage two is “reserved for those who would truly otherwise have been imprisoned”.³⁰ This is important to reduce so called “net-widening”; where an offender who should have received a lesser sentence is given home detention due to a mischaracterisation of the sentencing hierarchy by the judge.³¹

Purposes of sentencing, such as denunciation and deterrence, are best accounted for at the first stage. These purposes do not logically control the stage two decision as to home detention.³² The stage two decision is appropriately based, for the most part, on the personal circumstances of the offender and their circumstantial suitability for home detention.³³ That is not to say that principles and purposes of sentencing cannot be considered in the second stage, and that judges

²⁹ *R v Vharha* [2009] NZCA 588 at [31] per William Young P. It is important to note that while the President was dissenting as the ratio decidendi in *Vharha* the majority accepted his framing of a two-stage test at [20]. The President’s test was also accepted unanimously by the Court of Appeal in the later decision of *Osman v R* [2010] NZCA 199 at [20]. It now seems settled that this two-stage approach is appropriate for the decision to commute sentences of imprisonment to home detention.

³⁰ *R v Vharha*, above n 29, at [31].

³¹ See Geoffrey G Hall *Sentencing: 2007 Reforms in Context* (LexisNexis New Zealand Ltd, Wellington, 2007) at 345.

³² *R v Vharha*, above n 29, at [45].

³³ *Ibid*, at [33].

cannot prefer imprisonment to home detention on the grounds that home detention would not send the “right message”, but judges should be “cautious” when doing so.³⁴ Two offenders may have the same culpability for an offence and receive an equal starting sentencing of imprisonment, yet one may have their sentence commuted to home detention and the other may not due to differing personal characteristics. The balancing of home detention and imprisonment through the s 8(1)(g) and s 16 tests is crucial; home detention is to be preferred unless imprisonment is demonstrably necessary.³⁵ The courts have accepted that home detention is a “real alternative to imprisonment”,³⁶ and can sometimes be better for society’s interests than imprisonment.³⁷

³⁴ Ibid, at [36]. An example of a case where this approach was appropriate was *Connolly v R* [2010] NZCA 129. In that case a police officer was convicted of inducing a sex worker to have sexual connection with him with her consent being induced by a threat. He was sentenced to two years imprisonment. The Court of Appeal upheld the sentencing judge’s decision not to commute the sentence to one of home detention, despite the offender’s characteristics otherwise being suited to this, because, at [82], “the sentencing purposes of denunciation and general deterrence called for nothing less than a sentence of imprisonment in the circumstances of this case”.

³⁵ *R v D*, above n 3, at [66]. Section 8(g) of the Sentencing Act 2002 requires a court to impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in s 10A. Section 16(1) requires the court, when considering the imposition of a sentence of imprisonment for any particular offence, to have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community.

³⁶ *R v D*, above n 3, at [60]; *R v Iosefa*, above n 12, at [41].

³⁷ *R v Hill* [2008] NZCA 41 at [33]. One such case was *R v Faithfull* HC Auckland CRI-2007-044-007451, 14 March 2008. In *Faithfull*, a man pleaded guilty to attempting to murder his terminally ill wife. The Court held that this was a case where it was not in society’s interest to send the offender to prison and a sentence of 12 months home detention was sufficient. In *R v Hall* [2008] NZCA 207 the Court took a similar approach with a young man who was convicted as a party to an aggravated robbery. The Court held that given his

2. Selection of offenders

There is some debate about what offenders should be sentenced to home detention. Rackmill notes a number of United States' guidelines which state that home detention is not appropriate for violent offenders, offences involving firearms, drug use or dealing, or "predatory property offenders".³⁸ In other jurisdictions, persons with specified convictions are barred from receiving home detention.³⁹ In New Zealand, less rigid tests are applied to determine suitability for home detention.⁴⁰ Much depends on the pre-sentence report provided by a probation officer and the level of family support available to the offender.⁴¹ A further consideration is the likelihood of reoffending and, to the extent that reoffending is possible, how effective will home detention be in incapacitating the detainee.

Home detention is occasionally used for serious violent offending, but typically only where the circumstances of the offending or offender are particularly unusual, such as where an offender had low culpability, had shown a significant, self motivated attempt at rehabilitation, or their

good previous record and positive prospects for rehabilitation it would be in society's interest to impose a sentence of eight months home detention.

³⁸ Stephen J Rackmill "An Analysis of Home Confinement as a Sanction" [1994] 58 Fed Probation 45 at 48. While dated, Rackmill's paper provides an interesting perspective on home detention as at the time of writing he was serving as Chief United States Probation Officer, Eastern District of New York.

³⁹ See for example the Australian state of Victoria where convictions for various types of sexual offending, firearms offending, stalking and a number of other specified offences permanently statutorily bar an offender from receiving home detention: Sentencing Act 1991 (Vic), s 18ZV.

⁴⁰ *Savage v Police*, above n 13, at [20]. The Court noted, "it is clear that the legislature intended to confer a broad discretion and the weight to be given to relevant factors will be a matter for the sentencing Judge".

⁴¹ *Golding v Police*, above n 14, at [12] and [15].

violence was out of character.⁴² Home detention had been used for a wide spectrum of offending (see Table 1). This is largely due to the two stage approach set out in *Vhavha* which examines the suitability of the offender separately from the offence. Home detention can also be used where imprisonment would create undue hardship on an offender,⁴³ or their family.⁴⁴

Offence	Percentage	Number
Homicide and related offences	0.2%	6
Acts intended to cause injury	13.1%	387
Sexual assault and related offences	3.0%	90
Dangerous or negligent acts endangering persons	2.4%	70
Abduction, harassment, offences against the person	1.1%	33
Robbery, extortion	4.4%	131

⁴² *Smith v Police HC Rotorua CRI-2009-463-000110*, 18 December 2009; *R v Faithfull*, above n 37.

⁴³ *R v Riri* [2008] NZCA 441. In *Riri* an offender was sentenced to two years and three months imprisonment for possession of methamphetamine for the purpose of supply. *Riri* was severely paraplegic man who required 24 hour nursing care. The Court of Appeal quashed his sentence of imprisonment as it concluded the prison system could not meet his needs. A sentence of six months home detention was substituted.

⁴⁴ *Garnett v R* [2010] NZCA 173. The Court noted that while mothers of young children are not exempt from sentences of imprisonment, the appellant's difficult family circumstances could not be overlooked. The appellant was the mother of very two young children, one with serious health problems. A sentence of home detention was found to be appropriate in those circumstances.

etc		
Unlawful entry/burglary, break and enter	8.5%	252
Theft etc	5.6%	167
Fraud, deception etc	9.9%	292
Illicit drug offences	13.1%	388
Prohibited and regulated weapons/explosives offences	0.8%	23
Property damage etc	2.5%	75
Public order offences	0.6%	18
Traffic and vehicle regulatory offences	28.6%	846
Offences against justice procedures, Government security and Government operations	5.3%	158
Miscellaneous offences	0.9%	26
Totals	100.0%	2962

Table 1: Home Detention by Offence Type 2009 (source: Statistics New Zealand)

3. Sentencing Principles

(a) Deterrence and Denunciation

The Courts have grappled with the new sentence of home detention in a number of immigration fraud cases. In *R v Hassan* the Court of Appeal noted that the importance of maintaining the integrity of a country's immigration system meant that deterrence was an "important sentencing principle in this area" and that "those who dishonestly challenge the immigration system can expect deterrent sentences and can expect to be sent to prison".⁴⁵ This proposition was approved in *R v Chatha* and *R v Vharba*.⁴⁶ The majority in *Vharba* noted that home detention was a "more relaxed" regime that may undermine deterrence of those seeking to commit immigration fraud.⁴⁷

These sentiments ran contrary to an earlier decision which held that home detention provided, "in considerable measure, the principles of deterrence and denunciation", albeit less than imprisonment.⁴⁸ Further, William Young P, dissenting in *Vharba*, was sceptical as to whether there was any marginal increase in deterrence between a short prison sentence and a sentence of home detention.⁴⁹ As the Court of Appeal later rhetorically questioned in *Osman v R*, "how would refugees in a tent camp in Africa be deterred by a short sentence of imprisonment vis-à-vis home detention?"⁵⁰ In light of the Court of Appeal's unanimous decision in *Osman* it would seem that the position as to the deterrent effect of home detention is now settled. Home detention can be a deterrent sentence and does have the effect of holding offenders to account.⁵¹

(b) Incapacitation

⁴⁵ *R v Hassan* [2008] NZCA 402 at [27] per Ronald Young J.

⁴⁶ *R v Vharba*, above n 29; *R v Chatha* [2008] NZCA 547.

⁴⁷ *R v Vharba*, above n 29, at [23] per Chisholm and Priestley JJ.

⁴⁸ *R v Iosefa*, above n 12, at [41].

⁴⁹ *R v Vharba*, above n 29, at [40].

⁵⁰ *Osman v R*, above n 29 at [23].

⁵¹ *Ibid*, at [25].

Home detention entails a level of incapacitation, enhanced by electronic monitoring and surveillance.⁵² However, home detention has a lesser incapacitative effect than imprisonment; offenders can easily violate their detention and commit further crimes before they are picked up by monitors.⁵³ Two points can be made in this regard. First, there is a risk of reoffending whenever an offender receives a community based sentence; there will typically be little difference in the nature of offenders serving a community sentence and those serving home detention.⁵⁴ So long as the sentencing judge makes a sufficient inquiry into the circumstances and nature of a particular offender (including this risk to the community), risk of reoffending is minimised. Secondly, the level of incapacitation that characterises imprisonment is a poor comparator for home detention; home detention is not designed to provide complete incapacitation but it does nevertheless have an incapacitating effect for many detainees.⁵⁵

(c) Rehabilitation

Home detention has strong rehabilitative potential. If detainees are motivated to reform themselves, home detention can both facilitate this rehabilitation and foster a sense of self-responsibility. It enables detainees to remain in society (to some extent) and provides access to employment and rehabilitative programmes that is unmatched in a custodial environment.⁵⁶ Home detention has the added advantage of

⁵² Fred L Rush Jr “Deinstitutional Incapacitation: Home Detention in Pre-trial and Post-conviction Contexts” (1987) 13 N. Ky. L. Rev. 375 at 393.

⁵³ Ibid, at 394. However, with improvements in monitoring technology it is now becoming harder for detainees to abscond.

⁵⁴ Rebecca Checketts “Should Big Brother Be Watching? An Assessment of Home Detention in New Zealand” (LLB (Hons) Dissertation, University of Otago, 2005) at 29.

⁵⁵ Rush, above n 52, at 394.

⁵⁶ Randy R Gainey, Brian K Payne and Mike O’Toole “The relationships between time in jail, time on electronic monitoring, and recidivism: An event history analysis of a jail-based program” (2000) 17 Justice Quarterly 733 at 737.

keeping young offenders out of prison, away from the influence of seasoned criminals. It is likely that rehabilitation occurring in the offender's own community has a greater chance of success.⁵⁷ However, rehabilitative potential is highly dependent on rehabilitative programmes being adequately funded, otherwise the sentence risks becoming one of "mere surveillance".⁵⁸

C. Policy Issues

1. By the Numbers⁵⁹

Home detention appears to be an underutilised sentence, possibly as it is still only a new sentencing option, comprising only some 2.9 per cent of total sentences.⁶⁰ However, its use is likely to grow in coming years as greater pressure is put on prison capacity.⁶¹ The data reveals other insights. The statistical description of an "average" person serving home detention is a male European over 30 years of age convicted of traffic or vehicle related offences, minor assaults or drug related offending.⁶² As a proportion of relevant total sentences, men

⁵⁷ Joan Petersilla "Exploring the Option of House Arrest" [1986] Fed. Probation 50 at 53.

⁵⁸ Dorothy K Kagehiro "Psycholegal issues of Home Confinement" (1992) St Louis U LJ 647 at 656.

⁵⁹ Data on the nature of offenders and the use of home detention is my own analysis of Statistics New Zealand's unprocessed data on sentencing in New Zealand. See Statistics New Zealand <www.stats.govt.nz>, under the "Table Builder" tool.

⁶⁰ This may also be due to some reluctance by the judiciary to apply new sentences as alternatives to imprisonment. This has been the experience in some Australian states where "the courts are, both in principle and practice, reluctant to depart from the use of the prison." See N Keay "Home Detention - an alternative to Prison?" (2000) 12 Current Issues Crim Just 98 at 98.

⁶¹ The Ministry of Justice forecast (to 2013) shows a slow but steady increase in home detention. See Ministry of Justice *2009-2017 Criminal Justice Forecast Report* (Ministry of Justice, Wellington, 2009) at 6.

⁶² These characteristics are very similar to the findings of Whitfield who described the typical home detainee as male, over 30 years of age, few previous

and women received an approximately equal number of home detention sentences, while more Maori than European, and more young (10-16) than old offenders received home detention (see Table 2).⁶³

Age group	10-16	7-19	20-24	25-29	30-39	40+	Unknown	Total
Number	32	434	596	443	711	736	10	2962

Table 2: Home Detention by Age Group 2009 (source: Statistics New Zealand)

A pre-2007 study of home detention found it had a very low reconviction rate of only 27 per cent after 12 months.⁶⁴ Data shows

convictions, employed and typically convicted of a property related offence. See D Whitfield D *Tackling the tag: The electronic monitoring of offenders* (Waterside Press, Winchester, 1997); Whitfield D *The magic bracelet: Technology and offender supervision* (Waterside Press, Winchester, 1997) cited in A Gibbs and D King “The Electronic Ball and Chain? The Operation and Impact of Home Detention with Electronic Monitoring In New Zealand” (2003) 36 The Australian and New Zealand Journal of Criminology 1 at 3.

⁶³ While this data is broadly indicative it is not as useful as it could be. The best comparative data would have compared sentences of home detention as a proportion of those offenders eligible for home detention (i.e. facing sentences of less than two years imprisonment). Unfortunately such data was not readily available for this paper.

⁶⁴ A Gibbs and D King “Alternatives to Custody in the New Zealand Criminal Justice System: Current Features and Future Prospects” (2002) 36 Social Policy and Administration 392 at 397. This compares favourably to imprisonment which has an 80 per cent reconviction rate and community service with 52 per cent. However, reconviction rates alone may tell a misleading story. There are many relevant factors not controlled for in such statistics – the variation in reconviction statistics is likely to be due in large part to the nature of the offenders subject to a particular sentence; those subject to home detention sentences are less likely to reoffend regardless of their sentences. There is likely to be an element self-selection bias in this data. See Hall, above n 31, at 344.

some 27 percent of detainees breach conditions.⁶⁵ However, it is likely many of these breaches are minor, such as returning home late from an approved absence. Home detention is a double-edged cost saver for governments – not only is it cheaper to administer than imprisonment, it also saves the cost of creating new prison capacity.⁶⁶ It was estimated in 2006 that a stand-alone sentence of home detention would save some 310 prison beds.⁶⁷ This gives the potential for significant fiscal savings. The cost of monitoring a person sentenced to home detention is \$21,640 per annum, compared to \$59,170 for a minimum-security prisoner.⁶⁸ Further, if an offender remains working the Government retains tax revenue.⁶⁹

(a) Effect on offenders

Home detention enables offenders to be rehabilitated aided by the maintenance of employment and family relationships.⁷⁰ Many detainees find that the experience of home detention creates positive changes in their attitude and self-discipline, and embrace the ability to attend rehabilitative programmes.⁷¹ A New Zealand study found that men who have been subject to home detention learn to be more self-responsible.⁷²

⁶⁵ NZPA “Home detention breached by 27% of offenders” *The Dominion Post* (Wellington, 3 September 2010) at 4.

⁶⁶ Rackmill, above n 38, at 47.

⁶⁷ “Effective Interventions” Cabinet Policy Committee Paper 7: Home Detention. Ministry of Justice at 1.

⁶⁸ Hall, above n 31, at 344.

⁶⁹ Ronald P Corbett and Ellsworth AL Fersch “Home as Prison: Use of House Arrest” [1985] 49 Fed Probation 13 at 16.

⁷⁰ Hall, above n 31, at 344.

⁷¹ Gibbs and King, above n 64, at 10.

⁷² King and Gibbs, above n 4, at 123.

Public perceptions of home detention often see it as a “soft” or “easy” option.⁷³ However, home detention is the next most restrictive sentence to imprisonment.⁷⁴ Studies of detainees show that many face similar pains to imprisonment.⁷⁵ Detainees often struggle to avoid the temptations that a non-custodial sentence brings.⁷⁶ A detainee faces a significant curtailment of their liberty and autonomy; they may only leave their house as approved, their home may be inspected as required by a probation officer and if subject to electronic monitoring their location can always be found.⁷⁷ This adds to the significant boredom, stress and frustration felt by detainees. Home detention may entail significant financial consequences for detainees; this can be compounded by difficulties in obtaining or retaining employment due to the need to involve the employer in the monitoring process and the infeasibility of monitoring some jobs. This is unfortunate as it may limit the rehabilitative advantages of home detention. Although home

⁷³ Nicola Shepheard “Conflict over ‘soft’ home detention option” (2008) New Zealand Herald <www.nzherald.co.nz>; This is fuelled by the comments of groups like the Sensible Sentencing Trust who lobby for ‘tougher’ sentences. See, Beck Vass “Home detention for teacher who ‘groomed’ boys” (2010) New Zealand Herald <www.nzherald.co.nz>; Sensible Sentencing Trust “Home Detention a Sham Says Watchdog” (press release, 2 May 2008).

⁷⁴ Gibbs and King, above n 64, at 402. This has also been recognised in the Sentencing Act 2002, s10A and by the High Court in Beedell v MSD HC Wanganui CRI-2010-483-000009, 11 February 2010, at [15], where Dobson J noted that the prisoner was “not under any illusion that a sentence of home detention is easier to serve than a term of imprisonment. Particularly for home detention sentences near the upper end of the 12 month limit, there is no doubt that the constraints whilst living in the community make them difficult sentences to complete in a range of domestic situations.”

⁷⁵ Brian K Payne and Randy R Gainey “A Qualitative Assessment of the Pains Experienced on Electronic Monitoring” [1998] 42 International Journal of Offender Therapy and Comparative Criminology 149 at 153.

⁷⁶ Ibid.

⁷⁷ Ibid, at 154; Gibbs and King, above n 64, at 402. Payne and Gainey cite a number of revealing comments of detainees featured in their study: “this is jail inside your home”, “the only thing this lacks is the bars on the windows”, “the only difference between this and jail is that I’m not in a cell, I’m in a house”.

detention can be difficult, most detainees compare it favourably to imprisonment.⁷⁸ Interestingly, many offenders believed some time in prison was necessary to fully appreciate home detention.⁷⁹ This is something lost when home detention is used as a stand-alone sentence, rather than in conjunction with imprisonment.

(b) The Home as a Prison

Home detention arguably turns homes into pseudo-prisons or “surrogate prisons”.⁸⁰ George notes that, consistent with other governmental cost-shifting measures, home detention essentially “seconds private homes into public prison space” with the cost of running this “prison” being borne by families.⁸¹ This may somewhat overstate the point. Sponsors must consent to their homes being used for home detention and the state still provides monitoring – but it is certainly true that families, and offenders, bear a substantial cost.

Some scholars have argued that home detention is inherently inequitable; the nature of the house and home life affect the quality of detention.⁸² It could be argued that a detainee sentenced to live in a lavish abode has a vastly different experience to one who must reside in comparative squalor. However, as Rush notes, this issue is only really concerning from a ‘just deserts’ or retributive perspective;⁸³ it has little bearing on other purposes on sentencing.

(c) Effect of Home Detention on families

⁷⁸ Gibbs and King, above n 64, at 10.

⁷⁹ Ibid.

⁸⁰ K Heggie *Review of the NSW Home Detention Scheme* (NSW Department of Corrective Services, Australia, 1999) at 60.

⁸¹ Amanda George “Women and Home Detention – Home Is Where the Prison Is” (2006) 18 Current Issues Crim Just 79 at 80.

⁸² Rush, above n 52, at 380.

⁸³ Ibid, at 381.

Home detention can have a major impact on sponsors' lives. The majority of home detention sponsors are women,⁸⁴ and many are willing to sacrifice their quality of life to help a co-residing detainee.⁸⁵ To this end, women are potentially vulnerable as they often feel "more obliged than men to sponsor home detainees, to be responsible for the welfare of the children and for harmony within the household".⁸⁶ This results in women "bearing the main burden and stress associated with home detention".⁸⁷ Given these factors there is a risk that the consent procedures provided for are "disingenuous",⁸⁸ sponsors would usually always rather see their family member avoid prison, so arguably they have little choice at all.⁸⁹

Martinovic argues that in many instances co-residents are penalised along with detainees.⁹⁰ Sponsors often feel obliged to help detainees comply with conditions of detention;⁹¹ this may involve limiting their own freedom and paying for essential requirements of the detention

⁸⁴ A Aungles "Three Bedrooomed Prisons in the Asia Pacific Region: Home Imprisonment and Electronic Surveillance in Australia, Hawaii and Singapore" [1995] 2 *Just Policy* 32 at 35.

⁸⁵ Martinovic, above n 89 at 93.

⁸⁶ King and Gibbs, above n 4, at 120.

⁸⁷ *Ibid*

⁸⁸ George, above n 81, at 84.

⁸⁹ Marietta Martinovic "The Punitiveness of Electronically Monitored Community Based Programmes" (Paper presented at the Probation and Community Corrections: Making the Community Safer Conference convened by the Australian Institute of Criminology and the Probation and Community Corrections Officers' Association Inc and held in Perth, September 2002) at 8. See also King and Gibbs, above n 4, at 119. Most women reported that they felt they had a "choice" but nevertheless felt "a sense of obligation because they were keen to have their loved one out of prison".

⁹⁰ Martinovic, above n, at 89.

⁹¹ A Gibbs and D King "Home Detention with Electronic Monitoring: the New Zealand Experience" (2003) 3 *Criminal Justice* 199 at 208.

scheme.⁹² All family members are disrupted by monitoring regimes and surveillance strategies (such as phone calls at all hours of the day, or inspections), this often causes distress and upset,⁹³ compounded by a feeling of lost privacy.⁹⁴ There is also a risk that the confines of home detention can create a 'pressure cooker' environment.⁹⁵ This may strain relationships and lead to conflict. There is a concern that when this manifests in violence or other abuse, sponsors may be afraid to report it as they do not want to be responsible for a revocation of the detainee's home detention.⁹⁶

A New Zealand study of detainees and their families found that, on the whole, periods of home detention either had little effect, or had a positive effect, on the relationship between detainees and their sponsors (typically parents or partners).⁹⁷ However, a significant minority of sponsors thought that the confinement created by home detention caused more tension and arguments.⁹⁸ In some cases respondents were particularly positive about their detainee partners being able to spend more time with their children than had previously been possible. However, some were concerned about social stigmas being attached to their children,⁹⁹ and themselves,¹⁰⁰ as a result.

⁹² Martinovic, above n 89, at 95. This may include paying to maintain a "suitable residence", paying for a telephone connection and electricity (required for monitoring) and paying for transport to and from rehabilitative programmes.

⁹³ See generally, Martinovic, above n 89, at 95; Church and Dunstan, above n 3, at 57; Heggie, above n 80, at 70.

⁹⁴ George, above n 81, at 84, 86 and 87.

⁹⁵ Martinovic, above n 89, at 98.

⁹⁶ King and Gibbs, above n 4, 120.

⁹⁷ Ibid.

⁹⁸ Ibid, at 121.

⁹⁹ Ibid, at 122.

¹⁰⁰ Martinovic, above n 89, at 98.

King and Gibbs (2003) pose some potential solutions to the burden faced by women as sponsors and co-residents of detainees.¹⁰¹ They suggest that greater support needs to be provided to sponsors by Corrections staff. Given the implicit understanding that sponsors have a role to play in supervising detainees, this may include some form of financial allowance to reimburse sponsors for extra costs the detention entails.¹⁰² Finally, the authors suggest a relaxation of home detention rules to allow for “family outings” or “time out” may ease some of the stresses home detention creates.

(d) Comparison and Interaction with other sentencing options

Home detention is only one of a number of non-custodial sentencing options in the Sentencing Act 2002. The sentence of community work – where offenders are required to perform some form of community service – has long been a widely utilised sentencing option. The 2007 sentencing reforms introduced a number of other options into the sentencing matrix forming a “hierarchy” of sentences based on restrictiveness.¹⁰³ These were the sentences of community detention and intensive supervision.

Community detention essentially entails a curfew – periods when an offender is required to be at home – but at other times the offender is free to do as they choose.¹⁰⁴ This is involves less restrictiveness than a sentence of home detention which requires an offender to be in their approved residence unless they have otherwise been allowed to leave. Community detention looks to the causes of an offenders offending, at least in a temporal sense, and seeks to restrict their behaviour to

¹⁰¹ King and Gibbs, above n 4, at 123. Martinovic, above n 89, at 100 makes similar suggestions.

¹⁰² It should be noted that both detainees and sponsors can still be eligible for the unemployment and emergency benefits “Home Detention/Habilitation programmes” <www.workandincome.govt.nz>.

¹⁰³ Sentencing Act 2002, s 10A.

¹⁰⁴ Ibid, ss 69B–69M.

prevent them being in situations where they are likely to offend. For example, an offender who typically offends when they drink may have a curfew placed on them at night. This is an effective sentencing option as it enables the offender to remain, for the most part, part of society, while taking them away from situations likely to trigger their offending. For many offenders this sentence will be more effective than home detention and may invoke positive change in offenders. However, home detention will be more appropriate where there is no clear pattern or situational trigger to an offender's offending or where high levels of deterrence or incapacitation are thought to be warranted for community protection or denunciation.

Intensive supervision expands on the pre-existing sentence of supervision.¹⁰⁵ Intensive supervision enables the court to grant a wider range of special conditions than are currently possible under a sentence of supervision while maintaining a probation officer focus. It also allows the court to impose a sentence of up to two years (ordinary supervision is limited to between six months and one year).

The introduction of these new non-custodial sentences has been complemented with a greater flexibility for judges to combine different sentences. This enables judges to more easily tailor sentences to meet the characteristics of a particular offender. However, only general comparisons can be made with home detention. Community detention and intensive supervision sit at the same level in the sentencing hierarchy, directly below home detention. Further, community detention and intensive supervision are targeted at offenders who require little incapacitation compared to those serving a sentence of home detention.

Conclusion

¹⁰⁵ Ibid, ss 54B–54L.

On the whole, home detention is a valuable alternative to imprisonment in New Zealand. The state benefits fiscally and offenders benefit through an easier road to rehabilitation, able to attend programmes and maintain work and family ties. The introduction of a stand-alone sentence of home detention, combined with New Zealand's increasing prison population, is likely to see home detention becoming more widely utilised.

Of course, home detention has its flaws. In some cases, the ostensible benefits of home detention may belie a darker reality. Home detention may not only create similar pains to imprisonment for some detainees but may also pass these to innocent sponsors – often spouses and parents – through family tension, disruption and loss of privacy.

For these reasons, despite home detention being preferable to imprisonment for many offenders, it must be remembered that it is only one solution to over-imprisonment and recidivism; there are numerous other, less restrictive sentences or combinations of sentences that may be even more effective.¹⁰⁶ So long as this is kept in perspective, home detention as a stand-alone sentence is likely to form useful part of the sentencing matrix in New Zealand. However, given the relative infancy of this new sentence, a final verdict on its effectiveness may still be a number of years away.

¹⁰⁶ George, above n 81, at 88.