

Home and Periodic Detention – Does the System Preclude Their Use?

Background

- The current legislative scheme for sentencing in NSW declares home and periodic detention the only “alternatives to full time detention”. Community service orders, fines, bonds and other measures are legislated as “non custodial sentences”.
- For this reason, discussion of alternatives to prison needs to focus on these two alternatives if it does not want to encourage the “net widening” possible if custodial and non custodial sentences are confused.
- The Select Committee Report to which CLRI contributed found that home and periodic detention were underused and could help to solve the problem of increased prisoner numbers by increased use.
- The Committee recognised that greater availability and more judicial education would both be necessary to increase use.

What do they entail?

- The judge must first decide that a community based non-custodial sentence is not appropriate.
- If a custodial sentence is appropriate the judge should then consider whether it should be served by periodic detention or by a full time custodial sentence.
- If periodic detention is an option then the judge should order a suitability assessment.
- If the assessment is positive for periodic detention and the judge can set a term of less than 3 years, then a term of years is set (approximating the term that the judge would set for the person to serve in prison) and the periodic detention periods are determined by counting the weekends within that period. The sentence is then that number of periods.
- If the assessment for periodic detention is not possible, or if the judge determines that the offence and offender require a full time custodial sentence, then the judge should decide the term of the full time sentence.
- Once the term is handed down, and if it is less than 18 months, the judge should consider whether home detention is appropriate and if it is, then a suitability assessment should be requested.
- Once the assessment is back (this may involve some trial period), the judge would then make a home detention or a prison order to comply with the term already set.

Suitability

- Neither program allows people who are prone to violence
- Periodic detention disallows people with a drug or alcohol problem. Home detention requires that the person begins and commits to a programme.
- Home detention requires the understanding and compliance of the family or the other members of the detainee’s home. Also the person needs not to be at risk of suffering or perpetrating domestic violence or sexual abuse.

- Some medical conditions would disallow periodic detention for the reason of the work obligations of detainees.
- Home detention requires a suitable home and a dedicated telephone line and periodic detention requires transport proximity to the centre.
- Parents of young children need to be able to
- Other requirements involve the individual's case and experience and the understanding of the correctional services officer performing the assessment.
- While it is known that neither service is available all over the state, other reasons for unsuitability have not ever been fully explored by corrective services for periodic detention, and have not been explored since 1998 for home detention. These questions could be better researched but would require the resources of Corrective Services.

Periodic Detention

- Generally, periodic detention is served on weekends, from about 6pm on Friday night until Sunday evening. Some centres are now open during selected weekday periods, so as to allow for shift workers or others who are unable to serve their sentences on weekends.
- Inmates live in dormitory accommodation and perform community service during the two weekend days.
- There are no restrictions imposed on offenders when they are not in periodic detention.
- If periodic detainees breach the terms of their detention and are determined not to be suitable for periodic detention, their original term becomes current and they serve the remainder of their time in full time custodial sentences, generally prison, although some are now being considered for home detention instead.

Home Detention

- Home detainees remain in their homes the entire length of their sentences unless scheduled to leave for a specific, approved purpose.
- A correctional service officer responsible for the home detainee will visit the home or work place at random times to ensure the detainee's presence, and will conduct random drug and alcohol tests.
- The home detainee wears a wrist band that electronically certifies their presence at the telephone handset during computer generated monitoring phone calls. These can happen at any time of the day or night.
- Home detainees are not allowed to consume alcohol or drugs or to socialise except with members of their household for the term of their sentence.
- If home detainees are employed or are undertaking approved study, they can seek permission to leave their homes, but they must at all times be able to be reached by telephone or scheduled to return within a prescribed period.
- Home detainees with children are allowed to care for the children only in the most basic way – to the extent that they can collect them from school and go to medical treatments. Recreation is not allowed out of reach of the family phone without supervisor permission. This is not generally given except in single parent homes.
- The end of a home detention term may see some relaxing of these restrictions, but only to accommodate rehabilitation or resettlement into general society. The case officer knows the whereabouts and plans of the home detainee until the last days of the sentence.

Potential problems with the law as it stands

After a review of the supreme court cases heard since the 1999 *Crimes (Sentencing Procedure) Act* and the applicable earlier judgements, I have found some things that I believe need to be looked at. These were the basis of a paper I wrote last year, but the research was really for CLRI, since we are looking at alternatives to prison.

Please note that the sentencing decisions at first instance, which would have answered some of my questions and worries, are not available in the same way that upper court judgements are available. Local and even district court decisions are generally not even transcribed from the court tapes unless they are requested. This is generally not done unless one side considers an appeal. Even if these judgements were in written form, they cannot be sorted by crime or by sentence, but must be requested by defendant name, judge name and date, and cost \$3.50 per page for a printout.

For this reason, where there are questions below that refer to the message sent by the upper courts to sentencing judges, it is impossible to tell how sentencing judges react without talking to them. Even this, of course, will not produce a completely accurate record of the effect of the upper court's approach to these two sentencing options. The best option, in my opinion, would be a thorough search of the first instance sentencing judgements for relevant offences in relevant areas. This is not possible at this time.

For this reason, the issues raised here need further examination. Eileen Baldry does not believe that there is a good deal more than I have in the public sphere and agrees with Ken Studerus, the head of Home Detention that the next step is really to talk with the Chief Magistrate, Patricia Staunton, about some sort of survey or study with magistrates, perhaps in areas targeted for their crime patterns. Whether CLRI wants to take this on is another question.

I believe that we would serve some good by speaking with her about the points below, and by speaking with the researchers at the Law Reform Commission, who are running an ongoing enquiry into sentencing (although not on this topic at the moment) and who are in the best position to suggest necessary legislative changes. Also, the judicial commission may be interested in something that looks at current judicial approaches to a sentencing issue.

Periodic Detention

- Judges believe that PD is “no more punitive than a community service order”
- Judges dismiss Periodic Detention as not as strong as a “custodial sentence”, even though the legislation does not define it as non custodial.
- Periodic detention in the upper courts are being replaced (albeit in borderline cases) by prison terms of as little as half of the original term.
- This and judicial comment indicate that periodic detention is seen more as a bridge between custodial sentences and community sentences, rather than as an alternative, as the legislation demands.
- By delinking periodic detention from home detention and prison and allowing assessments for periodic detention at the same time as non custodial community sentences, did the new legislation open the chance of net widening, so that those who would otherwise have been given community sentences were faced with periodic detention?
- The PD term is set after PD itself. This means that a judge can set the longest PD term available, believing that those weekends will be the total sentence, and then breach may put the person in prison for the entire term. Should PD be more like HD in that the term needs to be set first, or should a more careful breach system be negotiated?

Home Detention

- Home detention has been called a “serious watering down of the sentence of imprisonment” and “a significantly more lenient sentence than the same sentence serviced by full time incarceration”
- One judge in the guideline judgement on the issue (binding on all other courts) did not believe that Home Detention was equivalent to even the lowest security prisons.
- The same judge in the same judgement stated that by ordering home detention for a prison term that was within the appropriate time range, the sentence would become appellable for being outside the “range of a proper sentencing discretion”. Given that home detention can only be considered after the term has been set (both for Prison and Home Detention), this one statement renders home detention all but impossible to order safely. Does this mean that those who order home detention and who are not appealed have made the order on an inflated original term – indicating sentence creep?
- He also said that it would be unfair to raise the hopes of offenders by ordering suitability assessments for those who may not be considered suitable, so judges should be wary when seeking assessments. Is this heeded, and if it is, does it stop borderline people from even being considered for home detention?
- Another court found that the requirement that certain offenders serve “full time custodial sentences would...not be satisfied by the imposition of home detention” – indicating that even home detention is not to be seen as a real alternative to prison.
- One judge felt that a visit to prison would show “what is really entailed by a full time custodial sentence” and another suggested that the offender needed the “short sharp shock” of prison that home detention could not offer. This sort of reasoning indicates where some on the bench stand on the issue of retribution, rehabilitation and general and specific deterrence, of course. There needs to be some work done on whether prison is considered by our society as a restrictor of liberty or whether the violence and danger of prison are seen as part of the sentence imposed by society. Home detention can do the first, but should not do the latter.
- The theory of rehabilitation seems to have been considered by the upper courts once a person had already shown some promise. The value of either home or periodic detention for their potential to offer rehabilitation did not appear to be of as much import as the way that they could be offered as rewards to those who had already begun to change.
- One study found that judges would order home detention more readily if the act was not set up the way that it is – but does this indicate that they would increase the HD sentences, and so detract from home detention’s nature as an alternative to prison.

This is a snapshot of the reading that I did, but I hope that it gives a simple understanding of the issues that I see with home and periodic detention. I believe that for the regimes to survive in the long run, the judiciary, at least, needs to change its views...but perhaps this returns us to the older question of public opinion and an election year.