# CRIMINAL JUSTICE AMENDMENT BILL (NO. 3)

AS REPORTED FROM THE JUSTICE AND LAW REFORM COMMITTEE

## COMMENTARY

### Recommendation

The Justice and Law Reform Committee has examined the Criminal Justice Amendment Bill (No. 3) and recommends that the bill be passed with amendments.

### Conduct of the examination

The Criminal Justice Amendment Bill (No. 3) was introduced on 27 November 1997 and referred to the Justice and Law Reform Committee on 9 December 1997 for consideration. The closing date for submissions was 6 March 1998. The committee received and considered 11 submissions. Submissions from the Chief District Court Judge, Keith Hancox, and the New Zealand Prisoners Aid and Rehabilitation Society (NZPARS) were heard orally. We spent one hour and 20 minutes hearing evidence on the bill and consideration took five hours and 29 minutes. Advice was received from the Department of Corrections and the Ministry of Justice.

This commentary sets out the details of our consideration of the bill and the major issues we addressed.

### Background to the bill

#### Purpose of the bill

The Criminal Justice Amendment Bill (No. 3) (the bill) expands the use of home detention in the New Zealand criminal justice system. A pilot home detention scheme has been operating in New Zealand for three years in Auckland, based on amendments to the Criminal Justice Act 1985 (the principal Act) made in 1993. Inmates who are not serious violent offenders, or who have not received an indeterminate sentence, and who have been sentenced to prison for more than one year have been able to be released from prison to be detained at home when they become eligible for parole. During the pilot, detainees have been monitored by an electronic system and supervised by specially designated probation officers.



*Price Code: K*

Detainees may leave the home for reasons which are approved by the home detention officer, such as for employment, to attend training or habilitation programmes, or in emergencies.

The expansion of the use of home detention beyond the pilot scheme accords with Government policy to promote correctional policies that offer alternatives to prison. The National-New Zealand First Coalition Agreement referred to expanding the use of electronic monitoring in relation to convicted offenders. The primary objective of the bill is to offer an alternative to imprisonment which would be more cost effective than prison and provide greater rehabilitative benefits to the offender.

### Main features of the bill

The bill provides for two new options for the expanded use of home detention. Firstly, it authorises the courts to make an order allowing an offender who has been sentenced for up to two years to serve all or part of his or her sentence by way of home detention (the sentencing option). This option also authorises probation officers to apply to the courts to make a home detention order during the term of an offender's sentence of imprisonment. Secondly, it authorises the Parole Board and District Prisons Boards to release an offender sentenced to imprisonment for a term of two years or more (except serious violent offenders and those serving indeterminate sentences) to home detention at a time three months prior to the date when he or she is first eligible for parole (the pre-parole option). The bill also enables victims of offences to make written submissions to the Parole Board or District Prisons Board when they hear applications for parole or the release of an offender to home detention.

### Methods of home detention

The bill itself is concerned only with the legal framework for the imposition of home detention and does not attempt to prescribe the methodology for its operation. However, during our consideration of the bill, we were interested to learn that compliance with the conditions of home detention can be monitored in different ways, some of which are technologically more sophisticated than others.

We were shown two devices that may be used in the electronic monitoring of offenders released to home detention. One was a permanent ankle bracelet linked to a central active monitoring unit, the other a screen similar to a television screen linked to a central security agency in Wanganui. We were also advised of the means of checking on offenders released to home detention, such as random visits by a probation officer and random phone calls at any time of the day. While the operational implementation of any home detention scheme is not part of our consideration, we expect the Department of Corrections will ensure that all means of securing compliance by offenders with the conditions of home detention will be robust.

## Submissions

We received and considered 11 submissions on the bill. We received submissions both for and against the bill, with a number of submitters commenting on the need for further piloting and evaluation and issues the bill would need to address if home detention is to operate effectively. A number of concerns were raised in submissions regarding the sentencing option. Submitters argue that a sentence of imprisonment served by way of home detention implies a lesser sentence and is yet another addition to an already full "menu" of community-based sentencing options. However, submissions were generally supportive of the pre-parole option, in that it provides greater opportunities for offenders to gain rehabilitation in the

community in a restricted manner before being released back into the community unfettered.

## Approved residence to include marae

We discussed the issue of whether a marae could be used as a residence in which an offender may serve a sentence of imprisonment by way of home detention. The term "residence" is not usually defined in legislation, although some social welfare legislation includes a definition which is specific in that context. Where a commonly used word is left undefined in legislation, the court will normally define it in accordance with its ordinary everyday meaning. The Chief District Court Judge indicated to us that it would be open to Judges to define the term "residence" to mean any place where persons reside as including a marae.

We consider that, for the sake of certainty, the bill should specify that, without limiting the term, "residence" can include a marae. We recommend that clause 2 be amended accordingly.

## Unnecessary duplication of concurrent sentences provisions

Clause 3 of the bill amends section 13 of the principal Act and relates to concurrent sentences. Clause 3 prevents a court from imposing either a community-based sentence or a suspended sentence of imprisonment if the offender is already subject to a home detention order, except where new section 21F (as provided for in clause 4) allows.

The Legislation Advisory Committee questions whether clause 3 is necessary. It states that concurrent sentences are already covered by the provisions of new section 21F and suggests it may aid the accessibility of legislation to have all the provisions relating to concurrent sentences together in one provision. We agree with the Legislation Advisory Committee and recommend omitting clause 3 accordingly.

## Sentencing option

### Home detention order made at sentencing stage of proceedings

Clause 4 of the bill as introduced inserts into the principal Act new sections 21D to 21H. The new sections provide for home detention orders to be made at the sentencing stage of proceedings. New section 21D provides that an offender may be made subject to a home detention order by the courts at time of sentencing if the offender is sentenced to a term of imprisonment of not more than two years, or is sentenced to concurrent or cumulative terms of imprisonment which, in the aggregate, are not more than two years. New section 21E provides that an offender may be made subject to a home detention order after spending part of his or her sentence in prison, if a probation officer makes an application to the court during the term of the sentence and at any time before the offender is eligible for release on parole.

New section 21D provides that, where a Judge is considering making a home detention order or is dealing with an application from a probation officer for a home detention order, he or she before proceeding to make the order, must ensure a report from a probation officer is available. The report assesses the offender's suitability for home detention, and takes into account the following factors:

- the likelihood of the offender committing further offences while serving his or her sentence of imprisonment under a home detention order
- the nature of the offence

- the welfare of the offender and likelihood that his or her rehabilitation will be assisted by home detention
- the safety of the occupants of the residence
- any victim impact statement given to the court that relates to the offence.

New section 21F provides that, if the offender is convicted of an offence punishable by imprisonment and the offence is committed while he or she is under home detention, the home detention order must be revoked unless there are special reasons for not doing so. The new section also deals with offences committed before the offence for which the home detention order was made.

New section 21G provides that a person is not to be treated as being "in custody" merely because he or she is serving a sentence of imprisonment by way of home detention, and thus any breach of conditions cannot be regarded as "escape from lawful custody". New section 21H deals with the right of appeal against the making of a home detention order. Clauses 5 to 10 also relate to the sentencing option and consequentially amend various provisions of the principal Act.

**Primary objective of bill is to create alternative to imprisonment**

We acknowledge that home detention may be viewed by some as a new community-based sentence. It is not. Home detention is a means by which certain offenders may serve a sentence of imprisonment.

The use of imprisonment in the criminal justice sector is as a last resort for those who have committed serious offences and/or have a long criminal record. In New Zealand, custodial sentences are imposed on about eight percent of all convicted offenders and 20 percent of all convicted violent offenders. [1]

The primary objective for the development of a home detention scheme is to provide an effective alternative to imprisonment. Firstly, home detention will be more cost effective than prison. The cost of home detention per offender is estimated to be between $22,500 and $24,000 per annum. In comparison, the cost of prison per offender is $30,350 per annum for a minimum-security inmate, excluding capital and depreciation costs. Secondly, home detention may provide greater rehabilitative prospects for offenders, and offer greater community and possibly family reintegration.

**Sentence of home detention may result in "net-widening"**

A large proportion of submitters addresses the issue of "net-widening" and a concern that the courts may perceive home detention as another form of community sentence. The Chief District Court Judge told us there is a danger that Judges may be tempted to impose a sentence of imprisonment on an offender just so a home detention order may be made. He commented that if Judges know there is a possibility of making a home detention order, they may sentence offenders to imprisonment when otherwise they may not have. This is a useful example of "net-widening". A number of submitters suggest that home detention as a sentencing option may result in an overall increase in detention rates.

**"Net-widening" may occur under bill as introduced**

The bill as introduced requires that the courts must first sentence an offender to imprisonment before considering imposing a home detention order. We recognise that "net-widening" may be a potential risk of the home detention scheme, as set out in the bill as introduced.

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[1] Criminal Justice Policy Group, *The Use of Imprisonment in New Zealand*, Ministry of Justice, June 1998, page 7.

The bill aims to minimise any risk by requiring that Judges must first sentence an offender to imprisonment before imposing a home detention order. This process would require the Judge to consider, first, whether an offender should be sentenced to imprisonment and, second, if it is considered that home detention is a possibility, obtain a report from a probation officer on the offender's suitability for home detention. Because of the complexity of preparing a home detention report, it was envisaged that a second court appearance would be necessary. While the report was being prepared, the offender would begin his or her sentence of imprisonment in a penal institution, unless the Judge stayed the commencement of the sentence, as provided for in the bill.

We consider that under the regime provided for in the bill as introduced, "net-widening" may still occur. Judges may have a reasonable idea at the time of sentencing whether an offender is a candidate for home detention. In some cases, it may be possible for the Judge to request a probation officer's report to be prepared at the time the offender is convicted, so that it may be considered at sentencing. In such circumstances, the Judge would be sentencing with the benefit of having additional information before him or her.

We are concerned that there may indeed be a greater risk that the ability to impose a home detention order may influence a Judge in imposing a sentence of imprisonment. Offenders who may have otherwise received a lesser sentence would be subject to a harsher penalty, which would result in "net-widening".

**Separation of sentencing and release functions recommended**

The Chief District Court Judge suggested that, in order to reduce the potential for "net-widening", the sentencing decision should be separated out from the decision whether to impose a home detention order. He suggested someone other than the sentencing Judge may make the home detention order.

We consider that District Prisons Boards should be given the function of releasing offenders to home detention under the sentencing option. The Boards are chaired by a District Court Judge and have extensive experience in offender placement decisions, taking into account rehabilitative needs and other relevant factors. However, so as not to undermine the sentencing decision made by the Judge, we recommend that District Prisons Boards should be able to consider only those offenders who have been given leave to apply for home detention by the sentencing Judge. The Judge must consider this question in every case where an offender is sentenced to two years imprisonment or less, and must take into account the nature and seriousness of the offence and any relevant matters in the victim impact statement when considering whether to grant leave. In such cases where the sentencing Judge believes the offender does not deserve any leniency, he or she may prevent home detention from being considered by the District Prisons Board by denying leave to an offender to apply for home detention.

We consider that this two-stage process will reduce the capacity for "net-widening". The process will also reinforce the policy behind the bill in that home detention is a sentence of imprisonment. An offender will have to be sentenced to imprisonment before being able to apply for home detention, if a Judge has given him or her leave to do so. Therefore, we recommend that the bill be amended to remove all references to home detention orders. We recommend that clause 4, as introduced, be omitted and new clause 4 be inserted accordingly.

We also recommend that clause 11 be amended to refer to the release of an offender to home detention under the sentencing option. We recommend amending clause 11 to provide that District Prisons Boards may release an offender who has been sentenced to imprisonment for up to two years to home

detention under the sentencing option if the sentencing Judge has granted the offender leave to apply.

We also recommend consequentially amending clauses 2, 5 to 8, 10, 14 and 22, and omitting clauses 13, 15 to 19 and 21, which all deal with home detention orders.

### Timing an important factor in release to home detention

We consider that the time lapse between the Judge sentencing an offender to imprisonment and the District Prisons Board determining the release of an offender under a home detention order is valuable. We consider that the initial period spent in prison, particularly for first offenders, may have a deterrent factor before the offender becomes "institutionalised".

However, clause 8 provides that a Judge may defer the commencement of the term of the sentence. Deferment may be appropriate when the costs of imprisoning an offender outweigh the potential benefits. It may also be necessary under humanitarian grounds, such as when an offender released to serve a sentence of imprisonment by way of home detention requires the continuing care of dependent children or may not otherwise remain in employment. We recommend amending clause 8 to provide that a Judge may do this if he or she has granted leave for the offender to apply to a District Prisons Board for release to home detention *and* is satisfied there are special reasons why the sentence of imprisonment ought not to commence immediately.

We also consider it is important that the District Prisons Boards meet on a regular basis to consider applications for release to home detention. Therefore, we recommend that the bill be amended to state that the District Prisons Board must consider any application as soon as practicable.

## Victims' involvement in sentencing decision considered

Currently, victim impact statements are used to inform the sentencing process. They are presented to the court by the prosecutor, but there is no right for the victim to make submissions directly at sentencing itself. However, as discussed above, we recommend distinguishing the sentencing and making of a home detention order functions. The victim impact statement available at the sentencing stage is written to inform a sentencing Judge of the impact of the offence on the victim. It is not intended to convey the victim's view on how a sentence may be served, or what the impact of a decision to release the offender to serve a sentence by way of home detention may be on the victim. Moreover, it may be that victims are significantly affected by the timing and conditions of an offender's release to home detention.

Therefore, we recommend an amendment to clause 12 to make it clear that victims will have the right to make submissions to the District Prisons Board at the time the Board considers the application for release to home detention under the sentencing option. The same right exists under the pre-parole option, as discussed below.

## Probation officer's report must be considered

Clause 4 of the bill as introduced inserts new section 21D (3) into the principal Act, and requires the court to request a report from a probation officer on the offender's suitability for home detention as a sentence. Section 21D (5) then lists the factors the court must consider in determining the suitability of the offender for home detention. The Legislation Advisory Committee notes that new section 21D (5) does not expressly require consideration of the report.

As discussed above, we recommend that District Prisons Boards should be given the authority to release an offender to home detention, if the sentencing Judge has granted leave for the offender to apply. In any case, we consider it is unlikely that a report would be requested from a probation officer and then not be considered by a District Prisons Board. However, for clarity, we recommend that the bill be amended by making it an express requirement for a District Prisons Board, as the releasing authority, to consider the report from the probation officer in determining the offender's suitability for home detention.

## Pre-parole option

### Release provisions considered

Clause 11 of the bill as introduced inserts into the principal Act new section 103A to provide for the pre-parole release of certain offenders to home detention. The new section applies to offenders who are:

- subject to a determinate sentence of imprisonment of two years or more, and
- eligible to be released on parole under section 89(3) of the principal Act after the expiry of one-third of their sentence.

New section 103A provides that, if an offender is deemed suitable, a District Prisons Board or the Parole Board may release the offender to home detention at any time within the three months prior to his or her eligibility date. When determining whether an offender is deemed suitable, the relevant Board must consider generally the same criteria as the court considers when making a home detention order under the sentencing option.

The relevant Board, in determining whether an offender is suitable for pre-parole release to home detention, must also have regard to:

- any representations made by the offender, whether orally or in writing
- any written submissions made by any other person on the offender's behalf
- any report made by the Superintendent of the penal institution in which the offender is detained
- any report made by the Department of Corrections or the Ministry of Health relating to the case
- any report made by the victim or victims, as provided for by new section 106A, as set out in clause 12 of the bill.

The relevant Board is able to place an offender under home detention for up to 12 months and before that time expires can extend the time for a further 12 months if the offender consents. In practice, if the offender is deemed suitable, we were advised that he or she may be released from home detention and placed under standard parole conditions at a time earlier than the time of expiry of the home detention order. The Parole Board must consider the case of any person who has been put on home detention every three months to determine whether he or she should be placed under standard parole conditions.

### Support for pre-parole option

A high proportion of submitters favour the pre-parole option in that it would seem to reward offenders for good behaviour, but still enforces the policy behind the scheme in that home detention remains a sentence of imprisonment. Moreover, the pre-parole option may offer an incentive to offenders to rehabilitate and reduce potential "contaminating effects" of imprisonment by reducing the amount of time offenders spend in prison.

### Actual time offender may be released under pre-parole option unclear

Section 103 of the principal Act already provides for the release of offenders from the time of their eligibility for release on parole to their final release date. New section 103A, as provided for in clause 11 of the bill, provides for release of offenders to home detention at any time within the three months prior to their eligibility for release on parole. We consider this creates confusion as to the actual time at which an offender may be released to home detention under the pre-parole option.

We recommend repealing section 103 of the principal Act and inserting a new section 103 which provides for the release of an offender to home detention by a District Prisons Board. This amendment completes the two-stage process under the sentencing option. We recommend amending new section 103A to provide for the release of an offender to home detention at any time from three months prior to his or her parole eligibility date through to the final release date. We also recommend inserting new section 103B to provide for the matters the relevant Board must consider when deciding whether to release an offender to home detention. We recommend that clause 11 be amended accordingly.

## Home detention order cannot be made if not operating in geographical area

We were concerned that only those offenders who are likely to be released to home detention in urban areas of New Zealand will be eligible for home detention. We were advised that it would be difficult and costly to provide an adequate level of supervision to offenders serving a sentence of imprisonment by way of home detention in remote areas. It is also unlikely that offenders detained in remote areas would be able to participate in programmes designed to reduce their likelihood of re-offending. We note that a similar situation exists with regard to periodic detention, which is also not available in all areas of New Zealand.

Given that home detention will not be available on a nationwide basis, we consider that the bill should be explicit in stating that an offender may not be released to home detention if home detention is not operating in the area where the offender intends to reside. We recommend that the bill be amended to make explicit that an offender may apply to the District Prisons Board for release to home detention only in an area where a home detention scheme is operating.

## Involvement of victims in the pre-parole process

### Victims able to make submissions to releasing body

Clause 12 of the bill inserts into the principal Act new section 106A and enables victims of offences to make submissions to the Parole Board or District Prisons Board when it hears applications for parole or the release of offenders to home detention. As discussed above, we recommend extending such a provision to the District Prisons Boards' consideration of serving a sentence of imprisonment by way of home detention.

Three submitters generally support clause 12 in that it enhances the rights of victims to make submissions. The Anti-Harassment Group and NZPARS are both strong supporters of victims' rights. The Christchurch Community Law Centre, however, qualifies its support and suggests that the victims' addresses not be disclosed to offenders by way of a written submission.

Keith Hancox, on the other hand, opposes this provision outright because he considers "it represents an effective re-litigation of matters covered during sentencing" and would provide only illusory benefits to victims. NZPARS also

comments on the rights of offenders to respond to victims' statements and notes that offenders are not able to retain a copy of victims' submissions. NZPARS considers that "clause 12 has elements which leave it open to accusations of a lack of natural justice".

There is a question of balancing the respective rights of the victim and the offender. We support the right of victims to make written submissions to the Parole Board or District Prisons Board when they hear applications for parole or the release of offenders to home detention. We also support the right of the offender to respond to the submission. However, we do not consider that the ability of the offender to respond to the submission is affected by not being able to retain a copy. Often, victims may be discouraged from making a submission if they think that the offender may be able to use the submission to harm them again in some way.

We agree with the Christchurch Community Law Centre in that additional protection should be provided to the victim so that the victim's address cannot be disclosed to the offender. We recommend that clause 12 be amended so that the offender is not entitled to have access to the victim's address.

### Victims should be notified of offender's release to home detention

The Courts and Criminal Matters Bill, reported back to the House by us on 28 August 1998, also refers to the rights of victims in the criminal justice sector. Clause 16 of the Courts and Criminal Matters Bill as introduced inserts a new section 11 into the Victims of Offences Act 1987. The new section adds a requirement that the victim be notified of the offender's impending parole hearing, or hearing for a home detention order allowing the offender to serve the remainder of his or her sentence by way of home detention, or a hearing for the release of the offender to home detention.

In our report on the Courts and Criminal Matters Bill, we recommended that new section 11 of the Victims of Offences Act (as provided for in clause 16 of the bill) be amended by removing the references to home detention in order for these matters to be considered with this bill. We recommended that these provisions should be enacted by way of consequential amendment to this bill, given that this bill provides for the establishment of the home detention scheme. We recommend that new clause 21A, to provide for notification of an offender's release to home detention be inserted into the bill accordingly.

## Consequential amendments to provisions of principal Act

A number of provisions in the principal Act were not amended by the bill. We consider it is necessary to amend these provisions by way of consequential amendment through this bill. We recommend inserting a number of new clauses in order to do this.

We recommend inserting new clause 4A into the bill to refer to home detention in relation to the commencement of a period of non-association. We also recommend inserting new clauses 4B and 7A into the bill to refer to home detention in respect of the effect of subsequent sentences.

We recommend inserting new clauses 18A and 18B into the bill to provide for the ground by which an offender serving his or her sentence by way of home detention is to be recalled to a penal institution to continue to serve his or her sentence. New clause 18A provides that an offender may be recalled if a suitable residence in which to serve the sentence of home detention is no longer available because of changed circumstances. New clause 18B provides that a District Court Judge may exercise the powers of the Chairperson of the District Prisons Board

with regard to an interim order for recall, if the Chairperson is unavailable. We recommend that new clauses 18A and 18B be inserted into the bill accordingly.

We also recommend inserting new clause 21 into the bill to provide that warrants of commitment for full-time custodial sentences must state whether the offender is a person to which the new section 21D relating to home detention applies and, if that section does apply, the way in which the requirements of that section have been satisfied. We recommend that the bill be amended accordingly.

## Offender may apply to return to prison

The Auckland Council for Civil Liberties submits that an offender should be able to seek to return to prison if that is his or her wish. Clause 19 of the bill as introduced inserts a new section 107GA (1) into the principal Act, which permits an offender to apply to the court to vary or discharge any special conditions. There is not provision for the offender to apply for revocation of the order.

We acknowledge there may be situations when an offender feels that he or she cannot continue to comply with a home detention order. For example, the situation may be proving highly stressful for the offender's partner or children. We recommend that a new section 103C be inserted into clause 11 of the bill to provide that an offender may apply to the District Prisons Board or the Parole Board that directed his or her release to be returned to prison.

## Inclusion of serious violent offenders considered

The bill, as introduced, excludes from the pre-parole option offenders who are serving a determinate sentence of more than two years for "serious violent offences", as defined in section 2 of the principal Act. Offenders in this category include those serving sentences for manslaughter, attempted murder, unlawful sexual connection, sexual violation, aggravated robbery, robbery, and injuring and wounding offences. These offenders account for approximately 37 percent of the sentenced prison population. We considered whether serious violent offenders should be automatically excluded from the scheme.

### Submissions for and against including serious violent offenders

Three submitters, Keith Hancox, NZPARS and the Howard League for Penal Reform, support the idea that serious violent offenders should be eligible for home detention under the pre-parole option. NZPARS considers that exclusion of serious violent offenders means that only a limited population may qualify for home detention and, therefore, the number of offenders on home detention may never have an impact on the overall prison population. Keith Hancox suggests that including serious violent offenders in the scheme will produce positive rehabilitative benefits for offenders that elect to adopt a new way of life. He believes that such an incentive is currently lacking from New Zealand's criminal justice system and that this is "the single greatest impediment to efforts to persuade serious violent offenders to adopt and follow societal norms". The Howard League for Penal Reform considers that it is often the case that serious violent offenders present no risk to society well before their sentence is up.

### Arguments for including serious violent offenders

We considered a number of arguments in favour of including serious violent offenders in the home detention scheme. Such a move may give offenders an incentive to improve or rehabilitate while imprisoned. For offenders who have spent a long period in prison, it may be a useful mechanism by which to ease them back into the community with the advantage that some control would be retained over them for a period. The inclusion of serious violent offenders would

increase the number of offenders able to be released on home detention, making the scheme more cost effective, saving approximately 50 prison beds per annum. It may also increase the number of Māori and Pacific Islanders able to be included in the scheme, as higher numbers of these ethnic groups are included in the serious violent offender category.

We considered whether a case-by-case decision may be appropriate for serious violent offenders. It is arguable that, by the end of their sentence, some offenders in this category may be no more dangerous in the community than other types of offenders. However, a rigid and well-designed assessment system would need to be applied in order to make the decision-making process objective and to protect public safety.

**Serious violent offenders to remain excluded from bill**

Arguably, serious violent offenders pose a greater security risk. The pilot scheme in New Zealand did not include serious violent offenders and, thus, they are essentially an unknown risk in terms of both other residents of the "home", and the general public.

We note that it may be right that a serious violent offender faces better rehabilitative prospects if he or she is to serve his or her sentence by way of home detention. However, we do not have enough evidence to support this conclusion. It is also true that by including serious violent offenders under the home detention scheme, approximately 50 more offenders may be able to participate in the scheme. This may also reduce the overall costs of the scheme.

The majority of us consider that, because the home detention scheme has been operational in New Zealand only on a pilot basis and the full implications of home detention on a wider level have not yet been trialed, serious violent offenders should not be eligible for home detention and recommend no change to the bill.

The majority of us consider that the issue of the release of serious violent offenders to home detention ought to be considered in the context of a wider review of the requirement that such offenders must be released automatically at the expiry of two-thirds of their sentence (final release date). On that basis, we urge the Government to undertake such a review.

## Application of home detention with respect to reparation

We considered the issue of reparation with regards to offenders serving a sentence of imprisonment by way of home detention. We support home detention in that it may enhance the ability of offenders to pay reparations to their victims. Offenders who are released on home detention may be able to undertake paid employment outside of the residence in which they are detained. Section 13 (1) of the principal Act already allows the courts to impose a sentence of reparation concurrently with a sentence of imprisonment for the same offence. However, the offenders' means, the nature and extent of their existing financial obligations and the maximum amount they are likely to be able to pay are important considerations when deciding to order reparation. We consider that some offenders should be better placed to pay reparation if released to home detention and able to continue in employment. We see this as a positive benefit of the home detention scheme and encourage the courts to impose reparation more frequently in such instances.

## Application of home detention to persons on bail

We considered other applications of the home detention regime. We considered whether electronic devices such as those used for home detention may be useful for those who are subject to curfews as a condition of bail, for example. The Chief

District Court Judge agreed that home detention may possibly be useful in that context.

We were advised that consideration of this issue is outside the scope of this bill, which applies to the use of home detention for *convicted* offenders. In considering the issue of electronic monitoring of persons released on bail, issues of civil liberties would also need to be addressed. Moreover, the focus of electronic monitoring of persons released on bail would be compliance with the home detention. The focus of home detention as provided for in this bill is more on rehabilitation and the provision of a cost effective alternative to imprisonment.

The question of who may take responsibility for monitoring persons subject to home detention while on bail would also need to be considered. Alleged offenders who are released on bail are not the responsibility of the Department of Corrections, but rather the New Zealand Police (the Police). Electronic monitoring of persons released on bail would necessitate the development of new infrastructure within the Police, not provided for in this bill.

We consider that electronic monitoring and the use of home detention is an effective method of keeping track of alleged offenders released on bail. However, any amendments which would allow for electronic monitoring of bail conditions should be considered in the context of a review of bail provisions in the Crimes Act 1961 and the Summary Proceedings Act 1957. The Ministry of Justice is currently working on a project on the review of bail. We look forward to the results of this review.

## Conclusion

The overarching purpose of this bill is to provide an effective alternative to imprisonment that increases the rehabilitation prospects for offenders, reduces the number of offenders in prisons and, yet, still protects the safety of society. We have amended the bill in a number of ways which we consider enhance the use of home detention as a means of serving a sentence of imprisonment.

Primarily the amendments we recommend focus on the removal of the power of the sentencing Judge to make a home detention order. We consider that by allowing the sentencing Judge to grant leave for an offender to apply to a District Prisons Board for release to home detention, the capacity for "net-widening" under the sentencing option will be reduced.

We also considered the impact that release to home detention of an offender may have on the offender's victim. We recommend amendments to give victims greater input into the decision whether or not to release an offender to home detention and to provide greater protection to victims when doing so.

We considered carefully the issue of including serious violent offenders under the pre-parole option of the home detention scheme. However, in the absence of experience with the scheme and possibly a wider review of the automatic release provisions for serious violent offenders, the majority of us consider that serious violent offenders should not be eligible for home detention.

# KEY TO SYMBOLS USED IN REPRINTED BILL

## AS REPORTED FROM A SELECT COMMITTEE

*Struck Out (Unanimous)*

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|---|---|
| Subject to this Act, | Text struck out unanimously |

*New (Unanimous)*

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| Subject to this Act, | Text inserted unanimously |

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| (*Subject to this Act,*) | Words struck out unanimously |
| Subject to this Act, | Words inserted unanimously |

*Hon Nick Smith*

# CRIMINAL JUSTICE AMENDMENT (NO. 3)

ANALYSIS



A BILL INTITULED

**An Act to amend the Criminal Justice Act 1985**

BE IT ENACTED by the Parliament of New Zealand as follows:

**1. Short Title and commencement**—(1) This Act may be cited as the Criminal Justice Amendment Act **(No. 3) 1997**, and is part of the Criminal Justice Act 1985* ("the principal Act").

*1985, No. 120
Amendments: 1986, No. 83; 1987, Nos. 25, 95, 168; 1989, Nos. 20, 91; 1993, Nos. 43, 93; 1994, No. 28; 1995, No. 69; 1996, No. 81

(2) This Act comes into force on a date to be appointed by the Governor-General by Order in Council.

*Struck Out (Unanimous)*

**2. Interpretation**—(1) Section 2 (1) of the principal Act (as substituted by section 2 (1) of the Criminal Justice Amendment Act 1993) is amended by repealing the definition of the term "home detention", and substituting the following definitions:

" 'Home detention' means the detention, in an approved private residence, of an offender who—

"(a) Is subject to a home detention order; or

"(b) Is released to home detention under Part VI:

" 'Home detention order' means—

"(a) An order under **section 21D** allowing an offender to serve his or her sentence of imprisonment by way of home detention; or

"(b) An order under **section 21E** releasing an offender to serve the remainder of his or her sentence of imprisonment by way of home detention:".

(2) Section 2 (1) of the principal Act (as so substituted) is amended by repealing the definition of the term "residential conditions", and substituting the following definition:

" 'Residential conditions' means the conditions prescribed in section 107D and imposed on an offender who—

"(a) Is subject to a home detention order; or

"(b) Is released under Part VI to an habilitation centre or to home detention:".

*New (Unanimous)*

**2. Interpretation**—(1) Section 2 (1) of the principal Act is amended by repealing the definition of the term "home detention", and substituting the following definition:

" 'Home detention' means the detention under a sentence of imprisonment, in an approved residence (including a marae), of an offender who is released to home detention under **section 103B**; and 'release to home detention' and 'serving a sentence by way of home detention' have corresponding meanings:".

*New (Unanimous)*

(2) Section 2 (1) of the principal Act is amended by repealing the definition of the term "residential conditions", and substituting the following definition:

" 'Residential conditions' means the conditions prescribed in section 107D and imposed on an offender who is released under Part VI to an habilitation centre or to home detention:".

*Struck Out (Unanimous)*

**3. Concurrent sentences**—Section 13 of the principal Act (as substituted by section 2(1) of the Criminal Justice Amendment Act (No. 2) 1993) is amended by repealing subsection (7), and substituting the following subsection:

"(7) If an offender who is before a court for sentence—

"(a) Is already detained under a full-time custodial sentence imposed on an earlier occasion; or

"(b) Is subject to a home detention order,—

then, except as provided by **section 21F**, the court may not impose on the offender any kind of community-based sentence or a suspended sentence of imprisonment."

**4. New heading and sections inserted**—The principal Act is amended by inserting, after section 21C (as inserted by section 7 of the Criminal Justice Amendment Act 1993), the following heading and sections:

"*Home Detention Orders*

"21D. **Home detention orders**—(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, if each term is not more than 2 years; or

"(c) Two or more terms of imprisonment that are cumulative, if the aggregate term is not more than 2 years.

"(2) The court may order the offender to serve the sentence or the concurrent or cumulative sentences by way of home detention.

*Struck Out (Unanimous)*

"(3) The court must request a report on an offender's suitability for home detention to be provided by a probation officer.

"(4) The court may make a home detention order only if satisfied that—

"(a) The offender is suitable for release to home detention; and

"(b) The occupants of the residence to which the offender will be serving his or her sentence of home detention understand the conditions of the home detention order and consent to the offender's detention in that residence in accordance with those conditions; and

"(c) The offender has been made aware of and understands the conditions that would apply to a home detention order and agrees to comply with those conditions.

"(5) In determining whether an offender is suitable to serve his or her sentence by way of home detention, the court must consider the following matters:

"(a) Generally the likelihood of the offender committing further offences if the offender serves his or her sentence by way of home detention:

"(b) The nature of the offence:

"(c) The welfare of the offender and the likelihood that his or her rehabilitation will be assisted by home detention:

"(d) The safety of the occupants of the residence:

"(e) Any victim impact statement given to the court that relates to the offence for which the offender has been convicted.

"(6) A home detention order under this section expires when—

"(a) The offender is released on parole; or

"(b) The offender reaches his or her final release date; or

"(c) The order is revoked,—

whichever happens first.

"(7) **Sections 78 (2), 107CA, 107D, 107EA, 107GA, 107H, 107O, 107P, 107Q, and 107R,** with any necessary modifications, apply to home detention orders under this section.

*Struck Out (Unanimous)*

"21E. **Home detention order may be made during term of sentence**—(1) This section applies to offenders sentenced to—

"(a) A term of imprisonment of not more than 2 years; or

"(b) Two or more terms of imprisonment to be served concurrently, if each term is not more than 2 years; or

"(c) Two or more terms of imprisonment that are cumulative, if the aggregate term is not more than 2 years.

"(2) At any time before the date an offender is eligible for release on parole, a probation officer may apply to a District Court for an order that an offender be released to home detention under this section.

"(3) **Subsections (3) to (7) of section 21D**, with any necessary modifications, apply to applications and orders under this section.

"21F. **Effect on home detention order of subsequent conviction**—(1) Despite section 13 (7), if an offender is convicted of an offence while subject to a home detention order and the court sentences the offender to periodic detention, and that offence was committed before the commission of the offence to which the home detention order applies or is an offence against **section 107H**, the court may order that the sentence of periodic detention be served concurrently with the sentence to which the home detention order applies.

"(2) The court may not sentence to periodic detention an offender to whom **subsection (1)** applies unless the court is satisfied that, in the special circumstances of the offence or of the offender, it is in the interests of justice to do so.

"(3) If an offender is convicted of an offence while subject to a home detention order and the court imposes a sentence of imprisonment, and that offence was committed before the commission of the offence to which the home detention order applies, the court may order that the sentence be served concurrently by way of home detention with the sentence to which the home detention order applies so long as the aggregate term is not more than 2 years.

*Struck Out (Unanimous)*

"(4) If an offender is convicted of an offence committed while subject to a home detention order, the following provisions apply:

"(a) If the offence is punishable by imprisonment, the court must revoke the home detention order and order that the offender be returned to a penal institution to serve the remainder of his or her sentences, unless the court considers there are special reasons for ordering otherwise:

"(b) If the offence is not punishable by imprisonment, the court may, but is not required to, revoke the home detention order.

"21G. **Persons serving sentence by way of home detention not to be treated as being in custody**—An offender is not to be treated as being in the custody of any person merely because the offender is serving a sentence of imprisonment by way of home detention.

"21H. **Right of appeal against making of home detention order**—For the purposes of Part IV of the Summary Proceedings Act 1957 and Part XIII of the Crimes Act 1961, a home detention order is a sentence."

*New (Unanimous)*

**4. New heading and sections inserted**—The principal Act is amended by inserting, after section 21C, the following heading and sections:

"*Home Detention*

"21D. **Court to consider granting offender leave to apply for release to 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) 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.

*New (Unanimous)*

"(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.

"21E. **Effect of subsequent conviction on home detention**—(1) Despite section 13 (7), if an offender is convicted of an offence while serving a sentence by way of home detention and the court sentences the offender to periodic detention, and that offence was committed before the commission of the offence for which home detention is being served or is an offence against **section 107H**, the court may order that the sentence of periodic detention be served concurrently with the sentence that is being served by way of home detention.

"(2) The court may not sentence to periodic detention an offender to whom **subsection (1)** applies unless the court is satisfied that, in the special circumstances of the offence or of the offender, it is in the interests of justice to do so.

"(3) If an offender is convicted of an offence while serving a sentence by way of home detention and the court imposes a sentence of imprisonment, and that offence was committed before the commission of the offence to which the home detention relates, the court may order that the sentence of imprisonment also be served by way of home detention concurrently with the other sentence that is being served by way of home detention, unless the aggregate term is more than 2 years.

"(4) Except where **subsection (1) or subsection (3)** applies, if an offender is convicted of an offence while the offender is serving a sentence by way of home detention, the court,—

"(a) If the offence is punishable by imprisonment, must order that the offender be returned to a penal institution to serve the remainder of his or her

*New (Unanimous)*

sentences, unless the court considers there are special reasons for ordering otherwise:

"(b) If the offence is not punishable by imprisonment, may, but is not required to, order that the offender be returned to a penal institution to serve the remainder of his or her sentences.

"21F. **Persons serving sentence by way of home detention not to be treated as being in custody**—An offender is not to be treated as being in the custody of any person merely because the offender is serving a sentence of imprisonment by way of home detention.

"21G. **Right of appeal against order granting or declining leave to apply for release to home detention**—For the purposes of Part IV of the Summary Proceedings Act 1957 and Part XIII of the Crimes Act 1961, an order under **section 21D (4)** (either granting or declining to grant leave to apply under **section 103** to a District Prisons Board for release to home detention) is a sentence."

**4A. Commencement of period of non-association**—Section 28E (2) of the principal Act is amended by adding the words "or from home detention (as the case may be)".

**4B. Effect of subsequent sentences**—Section 28G (1) (c) (i) of the principal Act is amended by inserting, after the words "released from a penal institution", the words "or from home detention (as the case may be)".

**5. Conditions of sentence**—Section 49 (a) (i) of the principal Act (as substituted by section 23 of the Criminal Justice Amendment Act 1993) is amended by inserting, after the words "after release from the penal institution", the words "or (*the expiry of the home detention order applying to the offender (as the case may be)*) release from home detention (as the case may be)".

**6. Cumulative sentences**—Section 55 (4) of the principal Act (as added by section 26 (2) of the Criminal Justice Amendment Act 1993) is amended by inserting, after the words "after release from the penal institution", the words "or (*the expiry of the home detention order applying to the offender (as*

*the case may be)*) release from home detention (as the case may be)".

**7. Commencement of sentences**—Section 59 (1) of the principal Act (as substituted by section 28 of the Criminal Justice Amendment Act 1993) is amended by inserting in paragraph (a) (i), and also in paragraph (b) (i), after the words "the penal institution", the words "or (*on the day after the date on which the home detention order applying to the offender expires (as the case may be)*) released from home detention (as the case may be)".

*New (Unanimous)*

**7A. Effect of subsequent sentences**—Section 63 (2) (d) of the principal Act is amended by inserting, after the words "section 94 of this Act", the words "or from home detention (as the case may be)".

**8. Commencement of sentence or term of committal**—(1) Section 78 (2) of the principal Act is amended by inserting, after the words "on humanitarian grounds", the words "or if he or she has (*requested a report on the suitability of the offender for home detention*) granted leave for the offender to apply to a District Prisons Board for release to home detention and is satisfied there are special reasons why the sentence should not commence immediately".

(2) Section 78 (9) of the principal Act (as substituted by section 37 (2) of the Criminal Justice Amendment Act 1993) is amended by inserting, after the words "a penal institution", the words "or (*on the day after the date on which the home detention order applying to the offender expires (as the case may be),*) release from home detention (as the case may be)".

**9. Secretary to determine offender's final release dates**—Section 91 of the principal Act (as substituted by section 43 (1) of the Criminal Justice Amendment Act 1993) is amended by inserting, after the words "corrective training,", the words "or who is serving a sentence of imprisonment by way of home detention,".

**10. Jurisdiction of Parole Board to release offenders on parole**—Section 97 (2) of the principal Act (as substituted by section 43 (1) of the Criminal Justice Amendment Act 1993) is

amended by omitting the words "once in every 12 months thereafter", and substituting the words "once in every 12 months after the offender becomes so eligible or (if the offender is (*subject to a home detention order or has been released to home detention under section 103 or* **section 103A**) serving a sentence by way of home detention) once in every 3 months after the offender becomes so eligible".

*Struck Out (Unanimous)*

**11. Pre-parole release to home detention for offenders sentenced to determinate term of 2 or more years imprisonment**—The principal Act is amended by inserting, after section 103 (as substituted by section 43 (1) of the Criminal Justice Amendment Act 1993), the following section:

"103A. (1) This section applies to offenders who are—

"(a) Subject to a determinate sentence of imprisonment of 2 years or more; 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 within the 3 months immediately preceding the date an offender is eligible for release on parole, a District Prisons the Board or Parole Board (as the case may be) may direct that the offender be released to home detention under this section.

"(3) An offender who applies for a direction under this section must lodge his or her application with a District Prisons Board or Parole Board (as the case may be) before the start of the 3-month period referred to in **subsection (2)** but not more than 2 months before that period starts.

"(4) Sections 103 (3), 103 (4), 104, 106, 107 (5), 107 (6), 107 (7), 107A (5), 107A (11), 107B, **107D (2)**, 107F, and 107G, with any necessary modifications, apply to applications and releases to home detention under this section.

"(5) An offender who is released to home detention under this section is subject to recall under this Act as if he or she had been released on parole."

*New (Unanimous)*

**11. New sections substituted**—The principal Act is amended by repealing section 103, and substituting the following sections:

"103. **Release to home detention where offender has leave granted by court**—(1) An offender who has leave under **section 21D** to do so may apply to a District Prisons Board for release to home detention in an area where a home detention scheme is operated by the Secretary.

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

"103A. **Pre-parole home detention for offenders serving determinate sentence of more than 2 years**—(1) This section applies to offenders who are—

"(a) Subject to a determinate 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 date referred to in **subsection (2)** but not more than 2 months before that date.

"(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.

"103B. **Determination of application for release to home detention**—(1) The Board must request that a Probation Officer prepare for the Board a report on the offender's suitability for release to home detention.

*New (Unanimous)*

"(2) The Board may direct that an offender be released to serve his or her sentence by way of home detention if the Board—

"(a) Has considered the Probation Officer's report; and

"(b) Has considered the matters set out in **subsection (3)**; and

"(c) Is satisfied about the matters set out in **subsection (4)**.

"(3) The Board must consider—

"(a) Generally, the likelihood of the offender committing further offences upon his or her release; and

"(b) The nature of the offence; and

"(c) The welfare of the offender and the likelihood that his or her rehabilitation will be assisted by home detention; and

"(d) The safety of the occupants of the residence; and

"(e) Any submissions made by victims of the offender.

"(4) The Board must be satisfied that—

"(a) The offender is suitable for release to home detention; and

"(b) The occupants of the residence to which the offender will be released understand the conditions of the offender's release to home detention and consent to the offender's detention in that residence in accordance with those conditions; and

"(c) The offender has been made aware of and understands the conditions that would apply on release to home detention and he or she agrees to comply with them.

"(5) If the Board declines to direct that an offender be released to home detention, it may (on application or of its own motion) from time to time reconsider its original decision on the offender's application for release to home detention.

"(6) Nothing in this section affects or limits the matters that the Board must consider under section 104 in relation to release on parole.

"103C. **Other provisions applying to home detention**—(1) Sections 106, 107 (2) to (7), 107A (5), 107A (8), 107A (11), **107D (2) and (3)**, 107F, 107G, and 107I to 107N, with any necessary modifications, apply to applications for and releases to home detention.

*New (Unanimous)*

"(2) An offender who is serving a sentence by way of home detention is subject to recall under this Act as if he or she had been released on parole.

"(3) An offender who is serving a sentence by way of home detention may at any time apply to the District Prisons Board or Parole Board that directed his or her release for a direction returning the offender to a penal institution."

**12. Right of victims to be heard at parole hearings and hearing to consider release to home detention**—The principal Act is amended by inserting, after section 106 (as substituted by section 43 (1) of the Criminal Justice Amendment Act 1993), the following section:

"106A. (1) In determining any application or considering any matter to which (*section 103 or* **section 103A**) **section 103B** or section 104 applies, the Parole Board or a District Prisons Board (as the case may be) must have regard to any written submissions made by the victim of the offender.

"(2) In addition to or instead of making written submissions, the victim may, with leave of the Board, make oral submissions to the Board.

"(3) Despite anything in section 107 (5), the offender may be shown a copy of any of the victim's submissions but is not entitled to be given the victim's address or to retain a copy of any of the victim's submissions.

"(4) In this section, 'victim' has the same meaning as it has in section 2 of the Victims of Offences Act 1987."

*Struck Out (Unanimous)*

**13. Special conditions applying to offenders subject to home detention orders**—The principal Act is amended by inserting, after section 107C (as substituted by section 43 (1) of the Criminal Justice Amendment Act 1993), the following section:

"107CA. (1) In making a home detention order, a court may impose on the offender such special conditions as the court thinks necessary—

*Struck Out (Unanimous)*

"(a) To protect the public or any person or class of persons who may be affected by the sentence or release of the offender; or

"(b) For the rehabilitation or welfare of the offender.

"(2) Without limiting the generality of **subsection (1)**, the court may impose under that subsection a condition that the offender undergo a programme on such terms as are specified by the court."

**14. Residential conditions**—Section 107D of the principal Act (as substituted by section 43(1) of the Criminal Justice Amendment Act 1993) is amended by repealing subsections (2) and (3), and substituting the following subsections:

"(2) Where an offender is (*subject to a home detention order or is*) released to home detention, the following conditions apply in addition to any special conditions imposed under (*section 107A (11) or* **section 107CA**) section 107C:

"(a) The offender must not at any time leave the place where he or she is serving home detention, except—

"(i) To seek or engage in employment approved by a probation officer; or

"(ii) To seek urgent medical or dental treatment; or

"(iii) To avoid or minimise a serious risk of death or injury to the offender or any other person; or

"(iv) To attend training or other rehabilitative activities or programmes approved by a probation officer; or

"(v) For such other purpose as a probation officer may from time to time approve:

"(b) The offender must co-operate with, and comply with any lawful direction given by, the probation officer assigned to him or her.

"(3) An offender who is subject to residential conditions must—

"(a) Keep in his or her possession the copy (*of the home detention order or*) of the licence issued under section 107F (*(as the case may be)*); and

"(b) If requested to do so by a member of the Police, or by a probation officer, produce the copy of (*the home detention order or*) the licence for inspection."

*Struck Out (Unanimous)*

**15. Requirements applying to home detention order**—The principal Act is amended by inserting, after section 107E (as substituted by section 43(1) of the Criminal Justice Amendment Act 1993), the following section:

"107EA. (1) A home detention order must set out—

"(a) The special conditions and residential conditions applying under the order; and

"(b) The duration of those conditions; and

"(c) The offender's liability for recall.

"(2) The Registrar of a court that makes a home detention order must give the offender a copy of the order.

"(3) If the conditions applying to a home detention order are varied by a court order made under **section 107GA**, the Registrar of the court must give the offender a copy of that variation order.

"(4) While an offender is subject to a home detention order,—

"(a) The offender must be under the supervision of a probation officer for the district in which the offender is for the time being residing, or of such other probation officer as the Secretary may from time to time direct; and

"(b) That probation officer must be a designated home detention officer under section 124 (3A)."

**16. Released offender on licence**—Section 107F of the principal Act (as substituted by section 43(1) of the Criminal Justice Amendment Act 1993) is amended by adding the following subsection:

"(5) This section does not apply to offenders who are subject to a home detention order."

**17. Variation and discharge of conditions of home detention order**—The principal Act is amended by inserting, after section 107G (as substituted by section 43(1) of the Criminal Justice Amendment Act 1993), the following section:

"107GA. (1) If an offender is subject to a home detention order and the order is subject to conditions, a probation officer, or the offender, may at any time apply to a District Court for the variation, discharge, or suspension of all or any of those conditions.

*Struck Out (Unanimous)*

"(2) The court may not vary any residential conditions applying to the offender unless the court revokes the order sentencing or releasing the offender to home detention.

"(3) A probation officer may at any time apply to a District Court for the imposition of any additional conditions on an offender's home detention order, and the court may impose additional conditions that are not inconsistent with the standard conditions applying to the offender.

"(4) On an application under **subsection (3)**, a probation officer may, if it is reasonably necessary, suspend any special conditions to which the application relates until the application is determined.

"(5) If a probation officer makes an application under this section, the probation officer must, before the application is to be heard, notify the offender in writing of the order sought and give the offender an opportunity to make representations to the probation officer about the application."

**18. Breach of conditions**—The principal Act is amended by repealing section 107H (as substituted by section 43 (1) of the Criminal Justice Amendment Act 1993), and substituting the following section:

"107H. (1) An offender commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding $2,000 who fails, without reasonable excuse, to comply with any condition of—

"(a) A home detention order applying to the offender; or

"(b) His or her release under this Part.

"(2) If a probation officer or member of the Police believes on reasonable and probable grounds that an offender who has been released under this Part has committed a breach of a condition referred to in **subsection (1)**, that officer or member may arrest the offender without warrant.

"(3) The conviction and sentencing of an offender under this section does not limit the power to recall an offender under this Part."

*New (Unanimous)*

**18A. Application for recall**—(1) Section 107I (6) (e) of the principal Act is amended by adding the expression "; or".

(2) Section 107I (6) of the principal Act is amended by adding the following paragraph:

"(f) In the case of an offender serving a sentence by way of home detention, a suitable residence in an area where a home detention scheme is operated by the Secretary is no longer available because of changed circumstances."

**18B. Interim order for recall**—(1) Section 107J (1) of the principal Act is amended by inserting, after the expression "paragraph (e)", the expression "or **paragraph (f)**".

(2) Section 107J of the principal Act is amended by adding the following subsection:

"(6) Where the Chairperson of a District Prisons Board is unavailable to deal with an application under this section in respect of an offender who is serving a sentence by way of home detention, a District Court Judge may exercise the powers conferred on the Chairperson of that Board by this section."

*Struck Out (Unanimous)*

**19. New sections added to Part VI**—The principal Act is amended by adding to Part VI (as substituted by section 43 (1) of the Criminal Justice Amendment Act 1993), the following sections:

"107O. **Application for recall of offenders subject to home detention order**—(1) This section applies to offenders who are subject to a home detention order.

"(2) A probation officer may apply to a District Court (which court may be the District Court closest to the place where the offender to whom the application relates resides or is believed to be located) for an order—

"(a) Recalling an offender to continue serving his or her sentence in a penal institution; and

"(b) Revoking the home detention order applying to the offender.

*Struck Out (Unanimous)*

"(3) An application may be made under this section if the applicant believes on reasonable grounds that—

"(a) The offender has breached the conditions of the order; or

"(b) The offender has committed an offence; or

"(c) Because of the offender's conduct, or a change in his or her circumstances since release, further offending is likely; or

"(d) The offender is jeopardising the safety of any person in the residence where the offender is serving home detention.

"(4) An application made under this section must specify the grounds in **subsection (3)** on which the applicant relies and the reasons for believing that the grounds apply.

"(5) If a probation officer makes an application under this section, the probation officer must,—

"(a) Before the application is heard, notify the offender in writing of the application and give the offender an opportunity to make representations to the probation officer about the application; and

"(b) Serve a copy of the notification on the offender; and

"(c) Inform the court of any representations made by the offender.

"(6) For the purposes of **subsection (5)**, delivery of a notification at the address where the offender is serving home detention is sufficient service of the notification.

"(7) If an application is made under this section, the sentence to which the application relates stops running except for any period, between the date of lodgment of the application and the date it is determined, during which the offender is held in custody.

"(8) If an order recalling an offender is made under **section 107O** and the sentence to which the order relates has stopped running by virtue of **subsection (7)**, that sentence starts to run again only when the offender is taken into custody.

"107P. **Interim order for recall of offenders subject to home detention order**—(1) If an application is made under **section 107O**, the court may make an interim order for the recall of the offender.

*Struck Out (Unanimous)*

"(2) On making an interim order for the recall of the offender, the court must also issue a warrant in the prescribed form for the offender to be detained in a specified penal institution; and if, on the making of any such order, the offender is still at large, any member of the Police may arrest the offender without warrant for the purpose of returning him or her to the penal institution specified.

"(3) If an order is made under this section and a warrant is issued, the offender must be given—

"(a) A copy of the application made under **section 107O**; and

"(b) A notice—

"(i) Specifying the date on which the application is to be determined, which date must not be earlier than 14 days, nor later than 1 month, after the date on which the offender is taken into custody under this section; and

"(ii) Advising the offender that he or she is entitled to be heard and to state his or her case in person or by counsel; and

"(iii) Requiring the offender to notify the court, not later than 7 days before the date on which the application is to be determined, whether he or she wishes to make written submissions or to appear in person or be represented by counsel.

"(4) If an order is made under this section, the home detention order is suspended and the offender must be detained in the penal institution specified in the warrant where he or she must continue to serve his or her sentence pending the determination of the application for recall.

"107Q. **Determination of application for recall of offender subject to home detention order**—(1) A court may make an order referred to in **section 107O** if satisfied, on the balance of probabilities, that 1 or more of the grounds in **subsection (3)** of that section have been established.

"(2) Without limiting the matters that the court may consider in determining the application, the court must consider the need to protect the public or any person or class of persons from the offender.

"(3) If the court refuses to make an order under this section,—

*Struck Out (Unanimous)*

"(a) The court must direct the offender's release if he or she is in custody, unless the offender is liable to be detained under any other provision of this Act or any other Act:

"(b) The court may, at the same time, vary or discharge the conditions of the home detention order as it thinks fit without the necessity for a separate application:

"(c) Any conditions that were previously suspended under **section 107P (4)** continue to apply to the offender on release under this subsection.

"107R. **Appeal from order under section 107GA or section 107Q**—(1) If a District Court makes an order under **section 107GA or section 107Q**, the offender may, within 28 days of the date of the order, or such longer time as the High Court may on application allow, appeal to the High Court against the making of the order.

"(2) Sections 116 to 120, 123, 129, 130, 133, 134, 136, and 143 of the Summary Proceedings Act 1957, with any necessary modifications, apply to every appeal under this section.

"(3) The offender must be detained in custody pending the determination of any appeal under this section and the offender's sentence continues to run during that period.

"(4) On hearing an appeal under this section, the High Court may—

"(a) Confirm the order:

"(b) Refer the matter back to the District Court with a direction to reconsider:

"(c) Quash the order and, unless the offender is liable to be detained under any other provision of this Act or any other Act,—

"(i) Direct the release of the offender from custody; or

"(ii) Direct the release of the offender from custody and refer the offender to the appropriate Board to consider the imposition of release conditions under this Part:

"(d) Make such further or other orders as the case may require.

*Struck Out (Unanimous)*

"(5) In the exercise of its powers under this section, the High Court may receive as evidence any statement, document, information, or matter that the District Court would have been entitled to receive at first instance.

"(6) The High Court is not be bound to allow the appeal on the ground merely of the improper admission or rejection of evidence unless in the opinion of the court a substantial wrong or miscarriage of justice has been occasioned.

"(7) Without limiting the matters the court may consider in determining the appeal, the court must consider the need to protect the public or any person or class of persons from the offender.

"(8) In referring a matter back to the District Court under **subsection (4) (b)**, the High Court must—

"(a) Advise the District Court of its reasons for so doing; and

"(b) Give the District Court such direction as it thinks just as to any rehearing or to the reconsideration or determination of the whole or any part of the matter."

**20. Repeal of section 125A**—(1) Section 125A of the principal Act (as inserted by section 46 of the Criminal Justice Amendment Act 1993) is repealed.

(2) The Department of Justice (Restructuring) Act 1995 is consequentially amended by repealing so much of the Second Schedule as relates to section 125A of the principal Act.

*Struck Out (Unanimous)*

**21. Warrant of commitment for full-time custodial sentence**—Section 143 of the principal Act is amended by inserting, after subsection (4), the following subsection:

"(4A) If a court makes a home detention order, the court must issue a warrant of commitment as if the offender were to serve his or her sentence in a penal institution."

*New (Unanimous)*

**21. Warrant of commitment for full-time custodial sentence**—Section 143 of the principal Act is amended by inserting, after subsection (2), the following subsection:

"(2A) Every warrant issued under this section must include a statement as to whether the offender is a person to whom **section 21D** applies; and, if that section applies to the offender, the warrant must state the way in which the requirements of that section have been satisfied."

**21A. Victims of Offences Act 1987 amended**—(1) The Victims of Offences Act 1987 is amended by repealing section 11, and substituting the following section:

"11. (1) The victim of an offence of sexual violation or other serious assault or injury should be given the opportunity to request notification of any of the following:

"(a) The offender's impending release from penal custody or release to or from home detention:

"(b) The offender's escape from penal custody or home detention:

"(c) The time and date of the offender's parole hearing or hearing for release to home detention.

"(2) Where the victim makes such a request, then so long as the victim has supplied a current address and telephone number to the chief executive of the Department of Corrections, the victim should be—

"(a) Promptly notified of the offender's impending release, or escape, from penal custody or home detention; and

"(b) Given reasonable prior notice of the time and date of the offender's parole hearing or hearing for release to home detention."

(2) The Department of Justice (Restructuring) Act 1995 is consequentially amended by repealing so much of the Second Schedule as relates to section 11 of the Victims of Offences Act 1987.

**22. Transitional provisions relating to home detention**—(1) (*A home detention order*) An order under the principal Act granting or declining to grant an offender leave to apply for release to home detention may be made in respect of a person who is convicted on or after the date this Act comes into force of an offence to which **section 21D** (*or section 21E*) of the

principal Act applies, whether the offence was committed before or on or after that date.

(2) A direction releasing an offender to home detention may be made under ***(section 103A)*** **section 103B** of the principal Act if the offender's sentence was imposed before the date this Act comes into force and the offender is a person referred to in **subsection (1)** of that section.

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