

# **Making Law and Policy that Work**

A Handbook for Law and Policy Makers  
on Reforming Criminal Justice and  
Penal Legislation, Policy and Practice



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**Penal Reform International** (PRI) is an international, non-governmental organisation, working on penal and criminal justice reform worldwide. It aims to develop and promote international standards for the administration of justice, reduce the unnecessary use of imprisonment and promote the use of alternative sanctions which encourage reintegration while taking into account the interests of victims. PRI also works for the prevention of torture and ill-treatment, for a proportionate and sensitive response to women and juveniles in conflict with the law, and promotes the abolition of the death penalty. PRI has regional programmes in the Middle East and North Africa, Central and Eastern Europe, Central Asia and the South Caucasus. It has Consultative Status at the United Nations Economic and Social Council (ECOSOC) and the Council of Europe, and Observer Status with the African Commission on Human and People's Rights and the Inter-Parliamentary Union.

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## Preface

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This year marks the 20th anniversary of Penal Reform International's (PRI) existence as an international non-governmental organisation (NGO) working to promote penal reform worldwide.

Those of us who have volunteered as Board members over the years are proud of the many contributions made by our dedicated staff in London and in most regions of the world. PRI in its advocacy work as part of its consultative status with the United Nations (UN) and Council of Europe as well as our observer status with the African Commission on Human and Peoples' Rights, is able to suggest reforms to criminal justice and correctional systems that are grounded in the reality of PRI's work in the field.

An example of this was the 1995 publication and widespread distribution in many languages of *Making Standards Work: An international Handbook on good prison practice*.

PRI has recognised the need for a companion document that could have as its ambit the entire continuum from arrest to trial to sentences to be served in the community or custodial facilities, and ultimate re-entry into society.

I extend my deep appreciation to Mary Murphy, PRI's indefatigable Policy Director, for her leadership in the production of *Making Law and Policy that Work*.

Essentially this book is aimed at law and policy makers.

As a former Member of the Canadian House of Commons and Chair of its Justice Committee (1984 to 1988) I am well aware of the pressures on elected officials to be 'tough on crime'.

It is my hope that *Making Law and Policy that Work* will encourage legislators to be smart on crime by looking at what works in making societies safer. The committee I chaired tried to do this in our 1988 report, *Taking Responsibility*, which suggested that the development of sound penal policy – one that has strong public support – requires governments to be prepared to inform their citizens about the facts, not the myths, of crime and to search for effective ways to improve public safety.

My wish is that this publication will help other legislators and their officials to do so.

David Daubney  
Chairperson PRI, 2010

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# Foreword

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By Aquilino Q. Pimentel, Jr., Chairman of the Committee on the Human Rights of Parliamentarians of the Inter-Parliamentary Union (2010),<sup>1</sup> Minority Leader, Senate of the Republic of the Philippines

*Making Law and Policy that Work* is an apt title of this Handbook prepared by Penal Reform International.

It looks at ways in which parliamentarians and legal experts can construct a fair and effective approach to criminal justice in a world intended to be governed by law and order. Its extensive and well-crafted proposals for reforms of the penal systems of countries throughout the world would indeed make justice attainable for even the most marginalised sectors of human society.

## Universal norms

The Handbook intersperses details of procedural issues in the administration of criminal justice with the substantial demands of the internationally recognised standards of criminal justice such as due process and the universal norms of human rights.

To provide a substantial basis for its recommendations, the volume refers to a wide range of sources such as the African Charter on Human and Peoples' Rights; European Committee for the Prevention of Torture; UN Convention on the Rights of the Child; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Centre for Prison Studies; UN Interregional Crime and Justice Research Institute; UN Office on Drugs and Crime; and the World Health Organization.

## Innovative measures

This Handbook has many innovative measures. Here, for example, is one interesting proposal that needs deep analysis prior to its acceptance by the authorities especially of developing countries: make the arrests of offenders 'the last resort'. In many nations still striving for the democratic ideal, arresting suspects of criminal acts is the first order of the day, and detaining them for several days ostensibly to complete their investigation is not unusual. The Handbook therefore emphasises the importance of having thorough consultations with the authorities governing countries with diverse customs and traditions before the proposals recommended to modernise their respective criminal justice systems may be adopted.

Other innovative measures are found in this book such as non-custodial sanctions for women and other offenders. The authorities are urged to imprison pre-trial defendants

only when absolutely necessary in order to help decongest the prisons and also to impress upon society in general and the offenders in particular that the latter – given reasonable treatment by the community – may yet reintegrate themselves as productive members of society sooner rather than later.

## Fair treatment

To be fair, a trial requires a judge (or a jury) that listens to sufficient evidence before judgement is rendered to acquit or convict the person concerned.

Even if the accused is convicted, the Handbook proposes that he or she be allowed to enjoy activities and comforts that would hasten his or her rehabilitation into a law-abiding citizen. For instance, even in prison, a person – detained or convicted – is entitled to ample space where he or she may exercise and function as a human being.

Incidentally, the overcrowding of prison cells is a blight that is widespread in developing countries. The Handbook rightly condemns this and suggests that the authorities concerned remedy it as speedily as possible.

## Restarting lives

Before we end this Foreword, there is something that the Handbook tackles that needs underscoring. In today's world, children getting into conflict with the law have become a problem in all societies.

What should society do with children who violate the law? Treat them like other criminals? Impose the sanctions of the law commensurate with the crimes they commit? Mix them with adult offenders?

The Handbook thinks otherwise. It posits the view that, among other things, prison and judicial officials, the children's families and the community in which they live need to get their act together to help children restart their lives and become useful members of society as early on as possible.

Without hesitation, then, it is urged that reform-minded government authorities, legislators, and students of law and justice read and benefit from the insights of the authors of the Handbook who have obviously studied the issues of the criminal justice systems of the world from 'A' to 'Z'.

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## Acknowledgements

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Many people reviewed this Handbook at different points in its development. Frances Sheahan and Norman Bishop played a major part in shaping the document in its final form. Emily Tucker helped make the transition from an early draft produced by Conor Foley and Mel James. Marie Cacace steered the Handbook through the production process. Other members of PRI's Board and staff contributed from their extensive experience of working with governments and civil society to effect criminal justice reforms within a framework of international standards and norms, in particular Tsira Chanturia, David Daubney, Maria Eugenia Hofer Denecken, Alison Hannah, Eka Iakobishvili, Jenni Gainsborough, Taghreed Jaber, Juliet Lyon, Jackie Macalesher, Saule Mektepbayeva, Simone Othmani, Viktoria Sergeyeva, Rani Shankardass, Bryan Stevenson and Anthony Tang. The draft Handbook was presented and discussed at an ancillary meeting to the XIIth United Nations (UN) Congress on Crime Prevention and Criminal Justice in April 2010 in Salvador de Bahia, Brazil. Ingeborg Schwartz, Human Rights Programme Manager at the Inter-Parliamentary Union, and members of its Committee on the Human Rights of Parliamentarians Sharon Carstairs, Rosario Green and Aquilino Q. Pimentel Jr., commented on the draft text, and the latter has kindly contributed

a foreword. In addition, the following were generous enough to review all or part of the text at various stages: Rob Allen, Tomris Atabay, Elias Carranza, Per Colliander, Renny Cushing and Susannah Sheffer, Gunhild Fridh, Zhang Qing, Zhongdong Zhai. None of these contributors bears responsibility for errors of omission, commission, interpretation or emphasis.

Preparation and printing of the first edition of this Handbook were made possible by a grant from the Sigrid Rausing Trust, to whom we express our thanks for their generous support. This second edition was produced with the financial assistance of the UK Government.

*Making Law and Policy that Work* is intended to be a living publication that reflects the latest developments and thinking on criminal justice reform. We therefore welcome your comments, corrections and contributions, particularly examples of good practice in policy, legislation and implementation. To contribute to *Making Law and Policy that Work*, please send an email to [publications@penalreform.org](mailto:publications@penalreform.org)

## Acronyms used

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ACHPR	African Charter on Human and Peoples' Rights
AIDS	Acquired immune deficiency syndrome
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	United Nations Convention on the Rights of the Child
DAC	Development Assistance Committee
HEUNI	European Institute for Crime Prevention and Control
HIV	Human immunodeficiency virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPS	International Centre for Prison Studies
ILANUD	United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders
IPU	Inter-Parliamentary Union
JDPL	Juvenile Delinquency Prevention Law
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
OPCAT	Optional Protocol to the Convention against Torture
PRI	Penal Reform International
TB	Tuberculosis
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNICEF	United Nations Children's Fund
UNICRI	United Nations Interregional Crime and Justice Research Institute
UNODC	United Nations Office on Drugs and Crime
WHO	World Health Organization

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# About the Handbook

*Making Law and Policy that Work* is aimed at specialists and non-specialists faced with the responsibility of creating a policy and legislative framework for criminal justice and penal systems. It recognises that criminal justice reform requires expertise and experience in a variety of disciplines which are rarely embodied in one person. It takes into account the fact that many countries in transition lack specialists. It aims to provide clear guidance and practical suggestions for reform in line with an international human rights framework which can be applied in different contexts and countries.

Unfortunately, sometimes criminal justice reforms are undertaken without regard for the accumulated knowledge and consensus of opinion reflected in the international and regional standards and norms. Not all them are even well known, and the significance of those which concern, for example, health, disability, education, labour, children, women, minorities and foreign nationals is not always appreciated by those who draft policy and legislation in the sphere of criminal justice. We have thought it important, therefore, in the first section to give prominence to the principal sources which should be consulted and on which we have relied in preparing the Handbook. Even this list is not exhaustive, and in the appendices we have set out further sources of information such as websites. Guidance on the practical implementation of these standards and norms can be found in a number of publications produced by the UN and other international bodies and which we also reference.

The second section examines key principles which should underpin reform of criminal justice policy and legislation. These include basing reform on international human rights

norms; taking full account of available evidence; focusing on crime prevention; developing ways and means of assisting offenders to lead law-abiding lives; recognising individual differences of offenders and of victims; avoiding discrimination within the criminal justice system; taking account of the advantages of diverting offenders from the formal criminal justice system; and being economically viable.

The third section looks at practical steps which can be taken to implement law and policy reform in line with underpinning principles. It aims to identify the relevant international standards which apply and to highlight the concrete actions which are necessary to improve criminal justice and penal systems.

The final section offers strategies for ensuring that the process of developing policy and law is informed by international standards, takes advantage of evidence of what works, and involves broad consultation.

The appendices include a list of international and regional organisations that can provide research and support to the reform process, and a glossary.

We are aware that the aims and objectives of *Making Law and Policy that Work* are ambitious. We have tried to be as comprehensive as possible, while producing a publication which can realistically be read by busy politicians, civil servants and members of civil society. Further sources of information and guidance are offered in the appendices. We hope that this Handbook will stimulate interest in the many facets of criminal justice reform which go unexplored, and result in fair, humane and effective justice that respects the rights, characteristics and needs of all members of society.



# Principal Sources for the Handbook

Extensive guidance is available for law and policy makers engaged in reforming their criminal justice and penal systems. This guidance includes a wide range of international standards and norms that have been agreed by the international community, mainly through the UN but also through regional bodies. Guidance on the practical implementation of these standards can be found in a number of publications produced by the UN and other international bodies. The principal sources relied on in the Handbook are detailed below.

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# 1 UN human rights treaties<sup>2</sup>

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The following treaties are legally binding on States that are parties to them. States parties are obliged under international human rights law to respect, protect and fulfil their provisions and to report on the ways in which national legislation, policy and practice reflect this. Each treaty has established a committee of experts to monitor implementation of the provisions by the States parties. Some of the treaties are supplemented by optional protocols dealing with specific issues, for example the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment that establishes a system of visits to places of deprivation of liberty by an international Subcommittee appointed by the UN Committee against Torture and a National Preventive Mechanism designated by the State party.

- International Covenant on Civil and Political Rights (1966)
  - Optional Protocol to the International Covenant on Civil and Political Rights (1966)
  - International Covenant on Economic, Social and Cultural Rights (1966)
  - International Convention on the Elimination of All Forms of Racial Discrimination (1969)
  - Convention on the Elimination of All Forms of Discrimination against Women (1979)
  - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
  - Convention on the Rights of the Child (1989)
  - Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (1989)
  - Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999)
  - Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000)
  - Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000)
  - Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002)
  - Convention on the Rights of Persons with Disabilities (2006)
  - Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006)
  - International Convention for the Protection of All Persons from Enforced Disappearance (2006) (not yet in force)
  - Optional Protocol to the Covenant on Economic, Social and Cultural Rights (2008)
-

## 2 Other UN human rights instruments of relevance to criminal justice and penal law and policy reform<sup>3</sup>

Human rights standards concerned with criminal justice law and policy reform are also enshrined in other types of UN non-treaty instrument: declarations, recommendations, bodies of principles, codes of conduct and guidelines. The most relevant of these are outlined below. These instruments complement the treaties, have significant moral force and provide useful and practical guidance. Their value rests on their recognition and acceptance by a large number of States and they may be seen as declaratory of principles that are broadly accepted by the international community. Some of their provisions are declaratory of elements of customary international law.<sup>4</sup>

- Universal Declaration of Human Rights (1948)
- Standard Minimum Rules for the Treatment of Prisoners (1955)
- Code of Conduct for Law Enforcement Officials (1979)
- Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (1984)
- Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power (1985)
- Basic Principles on the Independence of the Judiciary (1985)
- Standard Minimum Rules for the Administration of Juvenile Justice (1985) ('Beijing Rules')
- Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (1988)
- Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989)
- Standard Minimum Rules for Non-custodial Measures (1990) ('Tokyo Rules')
- Guidelines for the Prevention of Juvenile Delinquency (1990) ('Riyadh Guidelines')
- Rules for the Protection of Children Deprived of their Liberty (1990)
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)
- Basic Principles on the Role of Lawyers (1990)
- Guidelines on the Role of Prosecutors (1990)
- Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Healthcare (1991)
- Guiding Principles on Drug Demand Reduction of the General Assembly of the UN (1998)
- Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2002)
- Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (2010) ('Bangkok Rules')<sup>5</sup>
- Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012)

# 3 Regional treaties and instruments

Regional intergovernmental bodies have also developed declarations and treaties for the protection of human rights. These standards are generally only applicable to States that belong to the particular regional organisation. The regional bodies cited in this Handbook are the African Union, the Organization of American States and the Council of Europe. The associated mechanisms to monitor compliance with human rights standards by countries in these regions include the African Commission and Court on Human and Peoples' Rights,<sup>6</sup> the Inter-American Commission on Human Rights and Court of Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe.

Within the member states of the Council of Europe the observance of human rights standards in places of detention is monitored by the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. There is also an independent Commissioner for Human Rights appointed by the Council of Europe. In 1997 the African Commission on Human and Peoples' Rights appointed a Special Rapporteur on Prisons and Conditions of Detention in Africa.

## Africa<sup>7</sup>

### Treaties

- African Charter on Human and Peoples' Rights (1981)
- African Charter on the Rights and Welfare of the Child (1990)

### Other instruments

- Kampala (Uganda) Declaration on Prison Conditions in Africa (1996)
- Kadoma (Zimbabwe) Declaration on Community Service (1997)
- Arusha Declaration on Good Prison Practice (1999)
- Kampala Declaration on Prison Health in Africa (1999)
- Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2001)
- Ouagadougou (Burkina Faso) Declaration on Accelerating Prison and Penal Reform in Africa (2002)
- Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) (2002)
- Lilongwe (Malawi) Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004)

## Americas<sup>8</sup>

### Treaties

- American Convention on Human Rights (1969)
- Inter-American Convention to Prevent and Punish Torture (1985)
- Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990)
- Inter-American Convention on the Forced Disappearance of Persons (1994)
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belém do Pará') (1994)

### Other instruments

- Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008)

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## Europe<sup>9</sup>

### Treaties

- European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (1950)
- Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty (1983)
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987)
- Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (2002)

### Other instruments

- European Rules on Community Sanctions and Measures (1992)
  - Improving the Implementation of the European Rules on Community Sanctions and Measures (2002)
  - European Prison Rules (2006)
  - European Rules for Juvenile Offenders Subject to Sanctions or Measures (2009)
  - Council of Europe Probation Rules (2010)
-

## 4 Useful publications

The following publications by international organisations provide additional guidance on international standards and the criminal justice reform process.

A Compendium of Comparative Prison Legislation, PRI, 2008

Africa's Recommendations for Penal Reform, PRI, 2008

A Handbook on Alternatives to Imprisonment, UNODC, 2007

Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice, UNODC, 2006

Crime Prevention and Criminal Justice Tools Catalogue, UNODC, 2012 (an overview of all handbooks and manuals published by the UNODC)

Criminal Justice Assessment Toolkit, UNODC, 2006

Criminal Justice Assessment Toolkit: Crime prevention and assessment tool, UNODC/UN-Habitat, 2009

From coercion to cohesion: Treating drug dependence through healthcare, not punishment, UNODC, 2010

Guidance for Legislative Reform on Juvenile Justice, Children's Legal Centre and UNICEF, Child Protection Section, New York, 2011

Handbook for Prison Managers and Policymakers on Women and Imprisonment, UNODC, 2008

Handbook on Planning and Action for Crime Prevention in Southern Africa and the Caribbean Regions, UNODC, 2008

Handbook on Prisoners with Special Needs, UNODC, 2009

Handbook on Restorative Justice Programmes, UNODC, 2006

Handbook on Security Sector Reform, OECD and DAC, 2007

Health in Prisons: A WHO Guide to the essentials in prison health, WHO, 2007

A Human Rights Approach to Prison Management: Handbook for prison staff, Andrew Coyle, International Centre for Prison Studies, 2nd edition, 2009

Juvenile Justice Training Manual, PRI and UNICEF, 2007

Making Standards Work, PRI, 2001

Manual for the Measurement of Juvenile Justice Indicators, UNODC and UNICEF, 2006

Monitoring Places of Detention – A Practical Guide, Association for the Prevention of Torture (APT), 2004

Penal Reform and Gender: Update on the Bangkok Rules, International Centre for Prison Studies/UN Nations INSTRAW/ Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2012

Penitentiary Questions: Council of Europe recommendations and resolutions, 2010

Prevention of acute drug-related mortality in prison populations during the immediate post-release period Copenhagen, WHO, 2010

The Madrid Recommendation: Health protection in prisons as an essential part of public health, Copenhagen, WHO, 2010

Trencín Statement on Prisons and Mental Health, WHO, 2008

UNODC Report: Promoting Health, Security and Justice: Cutting the threads of drugs, crime and terrorism, UNODC, 2010

World Medical Association Handbook of Declarations (including the Tokyo Declaration Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment), 2006



# **A Fair and Effective Approach to Criminal Justice**

This section outlines the principles that should underpin law and policy reform which aims to create fair and effective criminal justice and penal systems. These principles derive from international standards and norms.

The section also includes examples of reform from a number of different jurisdictions.

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# 5

## A fair and effective approach to criminal justice

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A classical view of the purpose of criminal justice is that it exists to transmit messages to society about the boundaries delimiting unacceptable behaviour and conduct. A corollary of this is that the system, and the sanctions which it imposes, should be proportionate and equitable in relation to the crimes committed, and that decisions should be determined justly and fairly.

The starting point for this Handbook is that criminal justice and penal systems have three essential and inter-related objectives:

- to protect the public and prevent crime
- to administer justice fairly
- to help offenders lead law-abiding lives and to assist their resettlement in the community after imprisonment

To put these objectives at the heart of the reform process means engaging in every aspect of the criminal justice system from crime prevention to sanction to assisting offenders to lead law-abiding lives. It means addressing also areas which are outside the criminal justice sphere but essentially interrelated, such as social welfare provisions, housing, health and education.

It means being guided by what the international standards and norms say about when people should be sent to prison and when they should be diverted from the criminal justice system or sentenced to a non-custodial sanction. It also means using the best evidence available that particular responses for particular crimes have the potential to deliver justice, protect the public, and create safer communities.

# 6

## Underpinning principles of law and policy reform

Reform of criminal justice and penal policies and legislation requires significant investment of time and resources. It is inherently political and concerns complex and sensitive power relations within society.

It is an exercise that is not confined to developing countries or those in transition. New forms of crime, antiquated or poorly articulated laws and procedures, overburdened trial courts, lack of political leadership and insufficient coordination among the police, prosecution, courts and other actors in the criminal justice system are problems faced by all countries.

Reform may be more difficult to tackle in developing and transition states where exacerbating factors can be more prevalent, such as poorly trained judges, police, and prosecutors; limited legitimacy or credibility of national institutions; outdated organisational mandates; inadequate resources; extensive political interference; use of the system to combat political opposition; and corruption. However, regardless of the circumstances in which it unrolls, the reform process needs to be guided by core principles to prevent it being hijacked by short-term political interests or reactions to individual events.

The following are some underpinning principles of law and reform that need to be in place. These will ensure that the reform process is sustainable and involves a reflective appraisal of the evidence as to what is required to create a fair and effective criminal justice system.

These underpinning principles are discussed in more detail below.

### 6.1 International human rights norms provide an essential framework for criminal justice policy, legislation and programmes

International law places a set of obligations on States. Standards and norms take into account the diversity of a country's economic and social development, cultural traditions and legal systems and set out guarantees that every system should strive to provide.

Most of the main human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), contain references to the treatment of people who are subject to the criminal justice process. They are treaties that are legally binding

on all States that have ratified or acceded to them; this means that these States have a legal obligation to ensure that law and policy is in conformity with the treaties' provisions. Law and policy should also build on the many commitments, recommendations, standards and case law set out in the international standards that complement the broader principles of the human rights treaties. (See the section on Principle Sources for the Handbook above.)

### 6.2 Law and policy reforms should take full account of available evidence concerning what is likely to be effective in achieving stated aims

Many commentators unfavourably contrast the way governments take healthcare decisions and the way they approach criminal justice. In the case of health, governments who blatantly ignore scientific evidence in their policies are criticised for the risks to which they expose their population and that of neighbouring countries. However, such criticism is rarely levelled at governments who ignore evidence of what works to reduce crime in their criminal justice law and policy and thereby expose communities to high rates of crime. For example, recent research into the relationship between government policy and research conducted by Huddersfield University in the United Kingdom found that 'In general, evidence appeared to be less central to policy making in criminal justice than health, and only in the latter sphere were there concrete examples of bodies established to promote evidence-based healthcare. Recent examples of criminal justice policy making, including large-scale crime reduction programmes and interventions funded by the Youth Justice Board, suggest that criminal justice policies are influenced primarily by factors other than evidence, such as political expediency.'<sup>10</sup> Funding for criminal research was also found to be disproportionately small relative to that spent on health (they estimate that research funding as a percentage of the cost of crime was 0.07 per cent).

Harsh and repressive legislation, policies and practices that are in conflict with international human rights standards, empirical evidence or internationally acknowledged good practice should not be initiated or supported for reasons of political expediency. To do so is a wasted opportunity for reform that could reduce crime, increase public safety and administer justice and security fairly for all.

### 6.3 Imprisonment is not the answer to every question

In many countries around the world the prison population is rising rapidly (the number of prisoners worldwide stands currently at 9.8 million, with a recent rise noted in 71 per cent of countries).<sup>11</sup> This is in part because international standards and norms which deal with criminal justice are not implemented properly, and in part because misconceptions prevail about which measures are most effective in preventing crime and ensuring public safety. The wide range of community sanctions or diversion measures that could be used instead of imprisonment fail to be considered and the length of sentences is increasing in many countries, resulting in a larger overall prison population. External factors too are pushing prison populations upwards, such as economic and demographic change, fast urbanisation, public opinion, the media and the reaction of politicians to public expressions of concern.<sup>12</sup>

Imprisonment has several objectives. It seeks to punish offenders by depriving them of their liberty after they have been convicted of an offence, and to protect the public from further crimes. In theory, it provides rehabilitation during the period of confinement and it deters others from committing crime.

It is often assumed that there is a direct relationship between the use of imprisonment and crime rates. However, studies in many countries have shown that a rise in the prison population is not linked to any obvious increase in crime.

Research by Tapio Lappi-Seppälä, Director of the Finnish National Research Institute of Legal Policy, examined variations in imprisonment regionally and nationally and concluded that 'crime and incarceration rates are fairly independent of one another; each rises and falls according to its own laws and dynamics.'<sup>13</sup> This research was focused on countries in Western and Eastern Europe, the Baltics as well as the United States, Canada, New Zealand and Australia. Using data from Latin America and the Caribbean, the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD) concluded the following, 'It is unfortunately true that crime has been on the rise in the countries since the eighties...; it is also true that new bills

or laws that intend to solve the crime problem and even other social problems through severe punishment are being frequently adopted, often with the sole purpose of managing political predicaments through a response to social alarm, and at times even kindling such an alarm with untrue or exaggerated information. The combination of both factors has resulted in a most accelerated increase in prison populations...'<sup>14</sup> The available research seems to demonstrate that there is no simple relation between crime rates and incarceration. Different approaches to crime control have been taken by Canada and the United States: high incarceration in the US has not reduced crime rates nor has low incarceration in Canada resulted in increased crime rates.

Nor is there necessarily a relationship between levels of crime and the deterrent effect of sentences, in particular the deterrent effect of more severe sentences. A well-publicised regime of severe sentencing does not always result in a low crime rate. In 2008 in South Africa, researchers into sentencing guidelines found that, 'Admittedly, the mere existence of a criminal justice system and the fact that a successful prosecution will probably result in some kind of punishment has a deterrent effect. However, the precise deterrent effect of different sentences has proved to be indeterminable and likewise for the extent of the particular sentence chosen.'<sup>15</sup> Deterrence theorists themselves agree that the ability to deter crime with formal punishment alone is quite limited, and that any deterrence must be coupled with 'formal and informal processes of socialization, [...] where formal sanctions are reinforced by informal sanctions.'<sup>16</sup>

Law and policy makers can play an important role in building a criminal justice system which has fairness, justice and equity at its heart and which punishes offenders proportionately. They can make concrete decisions about the scope and content of criminal law and can determine when certain offences can be de-criminalised or indeed criminalised. They have responsibility for determining the extent to which crime prevention is a political priority, whether police, judges and prosecutors are able to deploy measures of diversion effectively, whether judges can use non-custodial measures and sanctions effectively and whether law and policy allows for prisoners to be given conditional release before the end of their sentences.

### Promoting prison population reductions through sentencing, probation and parole reforms, and re-examining effective public safety

Four states in the United States – Kansas, Michigan, New Jersey, and New York – have reduced their prison populations by 5-20 per cent since 1999 without any increases in crime.

This came about at a time when the national prison population overall increased by 12 per cent; and in six other states it increased by more than 40 per cent. The reductions were achieved through a mix of legislative reforms and changes in practice by corrections and parole agencies. The reforms included:

**Kansas** – Changed sentencing guidelines to divert lower level drug cases to treatment rather than incarceration and expanded support services to people on parole supervision.

**Michigan** – Eliminated most mandatory minimum sentences for drug offences; enacted statewide initiative to reduce parole revocations and enhance employment, housing, and treatment services for people leaving prison.

**New Jersey** – Increased parole releases by adopting risk assessment instruments and utilising day reporting centres and electronic monitoring.

**New York** – Scaled back harsh drug penalties, established Drug Treatment Alternative to Prison programmes, and applied ‘merit time’ credits to speed up parole consideration.

Source: *Downscaling Prisons: Lessons from Four States*, released by Justice Strategies and The Sentencing Project.

## 6.4 An important focus of reform is crime prevention

Political discussion about crime prevention tends to emphasise the state’s responsibility to protect its citizens through security and policing. But law enforcement is only one of many tools available to governments to address criminal behaviour. Criminal activity is often associated with, or is a likely consequence of, wider social problems

and it is in the state’s own interest to take a broad view of the causes and costs of crime.

Crime reduction plans may usefully focus, therefore, on associated social problems, such as poverty, poor or badly designed living environments, unemployment, racial, ethnic or sexual inequality, cultural, religious or other conflicts, poor public health services, lack of accessible healthcare responses to substance abuse, inadequate schools and youth services and family dysfunction. Because the social problems that give rise to crime will vary from community to community, prevention should be viewed as a collaborative effort between national legislatures and local government, law enforcement agencies, health care professionals, as well as families, schools and members of civil society. Strategies should be tailored to the particular needs of individual neighbourhoods.

Risk groups will also differ from community to community. As a consequence, law and policy makers need to work with community leaders and any social service professionals to identify the various local factors that make individuals more susceptible to criminality and to develop strategies to combat those problems. For example, children and teenagers are among the most vulnerable citizens in any community. They require more robust legal protections than adults and more comprehensive social policies to support their physical, emotional and educational development. This kind of targeted policy making reduces the need to rely on law enforcement and can be more effective in the long term in protecting the public from crime.

### Governments can address the risk of crime by:

- promoting protective factors through comprehensive and non-stigmatising social and economic development programmes, including health, education, housing and employment
- promoting activities that address marginalisation and exclusion
- promoting positive conflict resolution
- using education and public awareness strategies to foster a culture of lawfulness and tolerance, while respecting cultural identity

Source: *Promoting the Prevention of Crime – Guidelines and selected projects*, UNODC.

## Reducing violent crime in Bogotá: A holistic approach to crime prevention

Between 1993 and 2002 homicide rates in Bogotá plunged from 80 to 28 homicides per 100,000 people, accidents were reduced by half and the police increased arrest rates by 400 per cent without any increase in the overall size of the police force. This was reportedly achieved through political commitment and allocation of sufficient resources to combat crime and violence. The evaluation data suggest that the following strategies reduced violence and prevented crime:

1. *Campaigns to Promote Citizen Disarmament and Control of Alcohol Consumption.* Systematic gathering of information about violent crime in certain areas enabled a plan to be devised to control the circulation of firearms. In 2001, for instance, around 6,500 firearms were voluntarily returned to the police as a result of this plan. In addition, alcohol sales ended at 3am on weekends. Firearms and alcohol control had a significant (although not large) effect in violence reduction.
2. *Regeneration of Decayed Urban Spaces.* Two of the most violent areas in Bogotá underwent urban and transport infrastructure renewal. As a result, levels of crime and violence declined substantially in both areas. In Avenida Caracas, the levels of homicide declined by 60 per cent from 1999 to 2003; in the Cartucho zone, robbery went down by 70 per cent between 2000 and 2003.
3. *Neighbourhood Crime-monitoring Committees.* Neighbourhood Crime-monitoring Committees encouraged collaborative relationships between community police officers and local residents. As a result, there was an increase in crime prevention efforts.
4. *Family Police Stations.* Police stations were established to control family violence and evaluation data found that these were more effective than conciliation measures in reducing domestic violence. ►

## 5. Professionalisation of the Police.

Police reform and modernisation were accomplished through a plan emphasising results-based performance. Training in preventive policing was widely accepted by citizens as an efficient alternative to reduce violence.

Source: Llorente and Rivas, 2004, in Buvinić, M., Alda, E. & Lamas, J. *Emphasizing Prevention in Citizen Security: The Inter-American Development Bank's Contribution to Reducing Violence in Latin America and the Caribbean*, Washington DC, IDB, 2005

## 6.5 There are advantages in diverting offenders from the formal criminal justice system

Diversion is the term applied to measures that 'divert' people from the formal criminal justice system. These measures can be used as an opportunity to respond to crime appropriately and proportionately by addressing an offender's behaviour and by ensuring that they make good the harm done to the victim or the wider community. Diversion measures have the potential to intercede meaningfully in the lives of certain individuals in order to create positive change that will prevent re-offending. The measures need to be carefully targeted so that the objectives of rehabilitation and public safety are met.

Critics of the use of diversion options often argue that they can be unfair to the victim and are a soft option for the offender concerned. However, victims do not always prefer the most severe sanctions available in law, and in some cases the victim's interests may be in direct opposition to those of the prosecutor. For example, in cases of crime within families, victims may prefer rehabilitative to punitive measures. In relation to property crime, the victim's primary objective may be financial restitution, in which case it may be better from the victim's perspective for the offender to remain within the community employed and continuing to earn a wage.



## Diversion Pilots in Chile

In Chile a multi-disciplinary group comprising the Prosecutor's Office, the Defence Office, Courts, treatment providers and Paz Ciudadana Foundation have since 2008 been piloting a project to divert into treatment offenders who commit domestic violence offences. Reports from the pilot projects claim that so far they have demonstrated that this approach, when targeted properly, can both satisfy the victim's interests and decrease the risk of re-offending.<sup>17</sup>

They concluded that a successful diversion programme requires:

- reliable systems for determining that offenders have in fact offended before they are diverted
- overall commitment to the principle that diversion is a legitimate and effective option
- comprehensive legislation that provides for the exercise of discretion in law enforcement
- adequate resources given to diversion programmes within the community
- rigorous internal training, procedures and practices in police departments, prosecutor and judicial offices which ensure that they take every opportunity to divert

Law and policy makers can introduce diversion measures at many points within the criminal justice system; options may include mediation, counselling programmes and educational and vocational training courses. The following are some key principles for the development of measures of diversion:

### Offences where diversion is appropriate

Diversion need not be restricted to minor offences but can be used as an option when appropriate to achieve the objectives of protecting the public and preventing crime; administering justice fairly; and rehabilitating offenders and reintegrating them into society. There may be mitigating circumstances that make diversion appropriate even where a more serious offence has been committed.

Legislators can designate certain categories of offences, and certain categories of offenders, for diversion. Drug-related offences, victimless crimes, status offences,

crimes that are a direct result of mental or physical health problems could all be removed from the legal ambit of the criminal system and treated as civil matters.

### Offenders who will respond to diversion

Access to diversionary programmes should not be arbitrary. Offenders need to be carefully selected for participation in diversion programmes and the most appropriate intervention to meet their needs also needs careful consideration. This allocation should be guided by explicit criteria, such as their capacity to respond to the intervention, their carefully assessed risk to the public or to the staff responsible for the programme or intervention, the nature of the offence committed and the personal or social factors which are linked to the likelihood of re-offending. To this end, reliable assessment tools enabling such allocation should be developed and used. Agencies with the discretionary power to divert individuals from formal proceedings must exercise that power on the basis of established criteria.

### Consent

Diversion requires the informed consent of the offender to the particular diversionary option. People should be given sufficient information about the diversionary options available and any consequences of withholding consent. They should not feel pressured into consenting to diversion programmes (for example, to avoid a court appearance). Care should be taken to minimise the potential for coercion at all levels in the diversion process.

### Procedural safeguards

Diversionary options must respect procedural safeguards such as the presumption of innocence, the right to be informed promptly and directly of charges, the right to silence, equal treatment before the law, the right to access legal assistance and an interpreter. Individuals must be reliably determined to have offended before requiring diversion. Diversion programmes '*cannot be dumping grounds for weak cases that the prosecution would otherwise be unable to win*'.<sup>18</sup>

### Review and accountability

Agencies that have the discretion to divert people should be held accountable for the way in which they exercise this discretion. Precise mechanisms for review and accountability will vary between justice systems. However, efforts must be made to ensure sufficient accountability for the exercise of discretion at all stages and levels.

Furthermore, the use of diversion measures should be monitored and systematically evaluated to ensure they are working effectively.

### Diversion in practice

An NGO in Bangladesh called the Maduripur Legal Aid Association (MLAA) manages a community mediation programme using a multi-tier structure of village mediation committees supported by MLAA field workers. Local mediators are selected, trained and supervised by MLAA field workers in consultation with local officials, religious, and social leaders. The local committees meet twice a month to mediate village disputes, free of charge. Most disputes involve property or marital problems. Agreements are voluntary and are not enforceable in court. Where the differences are irreconcilable, or one party fails to comply with the terms of the settlement, the community is made aware of the failure and/or the matter is taken up for adjudication in the formal system. The MLAA programme currently mediates roughly 5,000 disputes annually and resolves roughly two-thirds of them. Satisfaction with the programme is high. Most users prefer the programme both to the traditional village dispute resolution system and to the courts.

Source: *Index of Good Practices in Reducing Pre-Trial Detention*, PRI, 2005, [www.penalreform.org/pri/files/man-2005-index-pre-trial-v7-en.pdf](http://www.penalreform.org/pri/files/man-2005-index-pre-trial-v7-en.pdf)

## Overview of decision points in the criminal justice system

### Allegation

Police may:

- Discuss possible systemic crime prevention measures with the local community
- Arrest
- Impose verbal sanctions
- Broker an arbitrated settlement or restitution to the victim
- Offer victim offender mediation, family group conference, etc.
- Caution

Or

- Detain

### Crime Prevention

A wide range of actors including local community and residents' groups, businesses, religious groups, housing, education, health and public transport authorities, the media, police, courts, prisons, probation can:

- Identify problems
- Design integrated local solutions
- Provide services to support crime prevention, protect victims, ensure support for those who have served sentences in the community or in closed conditions



### Investigation

Investigation may be directed by a judge, magistrate, prosecutor, investigator or police. They may:

- Discharge
- Release on bail pending trial
- Divert away from the formal criminal justice system to other measures such as: education, treatment, community service, restorative justice programmes, etc.

Or

#### ■ Detain pending trial

- At a later stage replace detention with a community measure

### Adjudication

Adjudication will be undertaken by the relevant body (judge, magistrate). They may:

- Acquit and release if found not guilty
- If a defendant admits guilt, divert to other measures – education, treatment, community sentence, etc.
- Impose a sentence if found guilty

The sentence may be:

- Fine
- Drug treatment
- Community service
- Restorative justice programme etc.

Or

#### ■ Imprisonment

### Formal charge

A decision to charge may be taken by a judge, magistrate, investigator or police.

They may:

- Discharge
- Release on bail pending trial
- Divert way from the criminal justice system to other measures – education, treatment, community service, restorative justice programme, etc.

Or

#### ■ Detain pending trial

- At a later stage replace detention with a community measure

### Community measures

In case of ineffectiveness of a non-custodial measure, the relevant body may impose:

- A series of other community based measures

Or

#### ■ Imprisonment

### Prison

Internal and external decision making bodies may recommend:

- Education, treatment, restorative justice, etc.
- Short-term release into the community
- Early conditional release into the community (with electronic or other monitoring and support)
- Early release
- Open prison conditions, with access to the community for work, education etc.

Or

- Serving the full sentence or tariff in closed conditions until release, which may be under permanent monitoring and possibility of recall

## 6.6 Promoting crime prevention and public safety means giving serious consideration to developing ways and means of assisting offenders to lead law-abiding lives

Poverty, unemployment, lack of housing, broken families, histories of psychological problems and mental illness, drug and alcohol abuse and domestic violence are realities in most offenders' lives. At the same time as addressing the general conditions that are conducive to crime, it is equally important to provide help to individual offenders to become law-abiding citizens. This can only be achieved if the period of time an individual is involved with the criminal justice system is used as an opportunity to intercede meaningfully in their lives in order to create positive change that will prevent future offences.

Given that the vast majority of offenders across the world come from highly marginalised and disadvantaged sections of the population, this is not an easy undertaking and the goal of rehabilitation is generally not being met. This is particularly the case when offenders receive a sentence of imprisonment. The evidence shows that even with exceptional resources and well-based methods, prisons can only achieve limited rehabilitation. It is far more usual that prison life tends to reinforce criminal identities, criminal associations and knowledge of criminal techniques which then lead to re-offending and a cycle of further imprisonments and criminality – a cycle that does nothing to build safer communities.

Law and policy makers need to develop a wide range of responses that can address the similarly wide array of problems that lead to criminality in the first place. These may include diverting offenders away from the formal criminal justice system, for example to undertake mediation with a victim (see 6.7 below). These may also include sentences of the court that deal with the offender in the community rather than in prison. These involve some restriction of liberty through the imposition of conditions and obligations such as attendance at counselling programmes or drug treatment and testing. The use of such sanctions needs to be carefully targeted and guided by explicit criteria, such as the capacity of offenders to respond to the intervention, their carefully assessed risk to the public or to the staff responsible for the programme or intervention, the personal or social factors which are linked to the likelihood of re-offending, the nature of the offence and the impact it had on the victim (if there is a victim). Reliable assessment tools are needed to enable

such allocation (see section on Non-custodial sanctions and measures below for more detail).<sup>19</sup>

Where an offender has received a prison sentence because no other sanction would be proportionate to the seriousness of the offence and the nature of its commission, then the time spent in prison should be used as an opportunity for rehabilitation through means such as work, maintaining family contacts, drug treatment if required, education and vocational training (see section on Rehabilitation and imprisonment below).

## 6.7 All offenders are not the same in their characteristics and needs and law and policy reforms should take this into account

An individualised approach can help to address the factors that predispose people to offending behaviour and reduce the likelihood of re-offending. In practice this means that at key points in the criminal justice procedure, assessments should take account of the nature of the offence and its impact on any victim, as well as the characteristics of the individual, including age, gender, nationality, mental and physical health, prior record, and any other contributing or mitigating factors, such as family and home circumstances, which might have an impact on the suitability of arrest or prosecution in the particular case. Due weight should also be given to decision making, which is likely to support future abstention from crime.

An individualised approach means that judges have the discretion to sentence (with consistency) to a wide range of different sanctions that are appropriate for different offences and offenders as well as for the protection of society (see section on Effective sentencing below). It means that from the point of reception in prison, prison authorities gather basic personal facts about a prisoner including previous convictions and the current offence. This information can then be the foundation for an individual sentence plan that is devised in consultation with the prisoner and may for example include access to drug treatment if required. It means that re-entry plans for prisoners on their release take into account their individual needs and circumstances.

In practical terms, mechanisms need to be developed to ensure that the personal characteristics of an offender can be taken into account at various key stages of the criminal justice system. In some countries this role is taken

by defence lawyers and probation services. In countries where these are not widely available, the role may be taken by paralegals or civil society organisations. They will be involved in:

- providing judicial authorities and others with high-quality information and assessments to help with sentencing and decisions regarding diversion
- enforcement of non-custodial measures and sanctions and supervision of individuals sentenced to them
- provision of practical and social care at all stages of an offender's contact with the criminal justice system

## 6.8 Victims have varying characteristics and needs and law and policy reforms should take this into account

Providing appropriate support to those affected by crime is vital to public confidence in the justice system. Victims, witnesses and the wider public need to know that reporting a crime brings a benefit including, where necessary, help to rebuild the victim's life. Often victims' groups express frustration at the misconception that their interests are met by tailoring the response to the type of offence committed against them and apprehending the offender.

Most victims need something more, including information about how their case is progressing; about the outcome of a court case; about what will happen to the perpetrator; about when a perpetrator will be released if imprisoned. They need to be safe and they need to be confident that they will not be re-victimised by the process of assisting with a prosecution. However, there will still be some victims who have different expectations, support networks and difficulties. Their needs and the impact of the offence committed against them should be assessed on an individual basis, and appropriate interventions formulated. This will usually mean working in partnership with other government agencies, for example, regarding provision of safe housing or changing schools.

Here are examples of the various stages in the criminal justice process when victims' individual needs may need to be taken into account:

- when a police statement is taken
- when a suspect is charged
- if a suspect is released on bail (is the victim vulnerable and in need of support?)

- prior to giving evidence (does the victim require advice and assistance prior to giving evidence or making a statement to the court?)
- following sentencing
- following release from prison

### Assessing the needs of victims of domestic violence

**Multi-Agency Risk Assessment Conferences are held in the United Kingdom in cases of domestic violence. Key agencies – police, probation, education, health, housing and the voluntary sector – work together on an individual victim's case to share information. This means that they can build up a comprehensive picture of the abuse and agree action to support and protect domestic violence victims and their families.**

*Source: Redefining Justice: Addressing the individual needs of victims and witnesses, Sara Payne, Victim Support Services, UK, 2009*

## 6.9 Law and policy reforms should not be discriminatory in intention or effect

The criminal procedure is a process of continuous selection and targeting and at times can act in a discriminatory manner. Discrimination is defined in this context as unfair treatment based on prejudice, ignorance or omission. It occurs against certain groups during the period of investigation, during stops, searches, seizures and arrest, as part of the decision to charge a person, and during periods in police custody. Those who are economically and socially disadvantaged are discriminated against because they may not be able to access legal aid and be properly represented. They may therefore be more likely to be detained before trial and ultimately convicted. Court decisions or administrative procedures may also be discriminatory against certain groups. Vulnerable groups also suffer discrimination whilst serving sentences, whether to imprisonment or other sanctions, and may suffer hardship and stigmatisation after release from prison.

Law and policy makers need to recognise that people who are discriminated against are more likely to offend and more likely to be processed through the criminal justice system

than others. This should be viewed as an incentive to produce policies that are aimed at eliminating discrimination within society. It also means that positive action should be taken to ensure that the special needs of vulnerable groups are met. For example, women, children, mentally and terminally ill prisoners, people with disabilities, the aged, ethnic and religious minorities and foreign nationals may have particular needs which mean that they are especially unsuited for imprisonment, or have needs that are best addressed through diversion.

At a minimum, the international standards are clear that detention should be avoided for children and people with mental disabilities.<sup>20</sup> In addition, careful consideration needs to be taken of the additional disadvantage which detention imposes on women (particularly women with care of children and other dependents), the elderly and people with physical disabilities. In most countries, the majority of women are in prison for non-violent, property or drug offences. Generally, women have a lower involvement in serious violent crime. In many countries, a relatively high proportion of female prisoners serve fairly short prison sentences.

### Non-custodial sanctions and measures for mothers

**In Russia, federal legislation allows for mothers of children under the age of 14 and pregnant women who have been convicted of less serious offences to have their sentences deferred, shortened or revoked. Female prisoners who are pregnant or who have young children and who are imprisoned for less serious offences may have their sentences deferred until their children have reached the age of 14.**

*Source: Russian Federation: Fourth periodic report to the UN Committee against Torture, July 2004 (CAT/C/55/Add.11)*

## 6.10 Reforms should be resourced and economically viable

Criminal justice and penal reform need to be economically viable, sustainable and cost-effective. This is not simply about using resources efficiently, or doing things more cheaply, it also means directing resources to the best possible effect. This means that any analysis of the cost of reform needs to assess the most effective allocation

of resources across the system as a whole – from crime prevention policy to reintegration and release – rather than on individual services such as prison administration or policing. Cost analysis of reforms also needs to take into account both the long-term and indirect costs and benefits of policy changes (see section on Cost analysis of reform proposals).

The economic costs of maintaining a criminal justice system can be very high. They can include policing, provision of legal aid, administration of courts, running of prisons and post-release supervision of offenders. The social costs of crime are also high and take the form of physical injury, psychological trauma, feelings of mistrust, vulnerability and fear. Apart from these costs, communities experiencing widespread, continual criminality are less likely to function well economically. Fear of crime can inhibit existing commercial activity, deter new business and enterprise, lower the quality of life and reduce property values. In a recent survey, 49 per cent of Zambian businesses saw crime as a major threat to expansion as did 70 per cent of their counterparts in Kenya, 27 per cent in Uganda and 26 per cent in Tanzania.<sup>21</sup>

Evidence suggests that preventing crime in the first place is significantly cheaper than reacting to crime after the event. The financial expense of setting up and running criminal justice infrastructure can often far exceed that associated with sustainable social programmes dedicated to improving the overall well-being and safety of the community. However, there is a tendency for spending on policing and prisons not to be questioned whilst other interventions, for example, local level community crime prevention programmes, may be subject to strict budgetary constraint and scrutiny.

To be economically advantageous, crime reduction plans need to be tailored to the particular circumstances of individual neighbourhoods. This type of localised, integrated approach to crime prevention can have collateral benefits. Citizens who are diverted away from criminality will be more likely to engage as productive members of the community contributing to its economic and social life in positive ways. The more a state invests in strategies to combat the circumstances which are associated with criminal conduct, the less that state will need to spend subsequently on policing, prosecution and punishment.

Having cost-effectiveness as a driver of reform means it is important to assess the impact of high levels of spending on prisons on the state's ability to allocate sufficient resources to other, less costly but possibly more effective means of dealing with offenders. Less costly means might

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include diverting offenders from the formal criminal justice system or using non-custodial sentences that may, in any event, be more effective at preventing re-offending for some groups of offenders.

### **Cost-benefits of community sanctions**

In 2008, the United Kingdom based consultancy Matrix Knowledge Group conducted research into the economic case for and against prison.<sup>22</sup> It calculated that some community-based interventions, including community service and residential drug treatment, can provide better value for money, in terms of the costs of reducing re-offending, than basic prison sentences. Basic prison sentences means imprisonment without any additional interventions designed to reduce re-offending, for example, drug treatment or an offending behaviour programme. Their research also showed that there can be cost benefits in sentencing less serious, non-violent offenders to a community sanction instead of imprisonment. The Matrix Knowledge Group also found that if a custodial sentence is necessary to protect the public, it is generally more cost-effective to enhance the sentence with drug treatment, some behavioural change programmes and educational or vocational training.



# Strategies for Developing Law and Policy

This section makes a number of recommendations regarding the process of planning, implementing, publicising and evaluating criminal justice reform initiatives. These aim to facilitate adoption by parliaments of legislation and policies that work. The need for professional research, widespread consultation, legislative costing and careful use of the media are highlighted, as are the need to comply with international standards and the importance of training and dissemination. Reference is made to the assistance available from inter-governmental bodies.

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# 7 Establishing the process

Criminal justice reform cannot succeed without the support, active or passive, of the wider community. The development of legal and policy reform cannot, therefore, be limited to a technical analysis by an isolated group of experts and practitioners. To be effective and sustainable the development process needs to include widespread consensus building both on the need for reform and on the strategies for carrying it out. This is particularly true for progressive, evidence-based reforms such as increased use of non-custodial sanctions and measures, which are less well known and understood than imprisonment and fines. Reform is an opportunity for national debate on the role and function of the criminal justice system, and each member of society's role and function in relation to that system.

**‘Justice Law and Order Sector’, a sector wide approach to justice reform in Uganda**

This is a reform process that adopted a sector wide approach. Members include: Ministry of Justice and Constitutional Affairs, Judiciary, Prison service, Police service, Director of Public Prosecutions, Uganda Law Reform Commission, Uganda Human Rights Commission, Ministry of Local Government (Local Council Courts), Ministry of Gender, Labour and Social Development (Probation and Juvenile Justice).

[www.jlos.go.ug](http://www.jlos.go.ug) (accessed 12 July 2010)

**Parliamentary committees on criminal justice**

The establishment of a parliamentary standing or select committee on criminal justice provides one mechanism for law and policy makers to work with a wide variety of actors. It can be a useful non-partisan body for scrutinising the executive, conducting inquiries, commissioning research and debating particular issues. It can also reach out to civil society groups and people working on issues of criminal justice and penal policy to draw on their expertise and involve them in its debates. By providing a forum for informed discussion it can help to raise awareness about issues relating to criminal justice reform amongst both parliamentarians and the wider public. By working across party political lines it can also help to build a consensus in favour of policies that actually are effective in managing prisons and cutting crime.

	Essential elements in developing law and policy reform
Identify problems and causes Draft proposals Do a compatibility check (national law, international standards)	<ul style="list-style-type: none"> <li>■ legal research, development of drafting</li> <li>■ ensuring access to socio-legal, economic and other empirical research</li> <li>■ developing discussion and consultation papers, reports and draft legislation</li> <li>■ reviewing compatibility of proposed reforms with international human rights standards</li> <li>■ reviewing compatibility with existing legislation</li> </ul>
Cost analysis	<ul style="list-style-type: none"> <li>■ researching the full cost of implementing the existing system</li> <li>■ examining the costs of implementing the reform</li> <li>■ looking at long-term and indirect costs and benefits of policy and law changes</li> <li>■ considering which is the most effective allocation of resources across the system as a whole</li> </ul>



<p>Inclusive consultation Building consensus</p>	<ul style="list-style-type: none"> <li>■ discussion of consultation methods, timing and use of the responses</li> <li>■ use of consultants, working parties and advisory groups, seminars and public meetings</li> <li>■ engagement with the general public and with particular interest groups</li> <li>■ approaches tailored to diverse populations, such as those which are large, small, indigenous, ethnic minorities, scattered, disabled, with literacy problems</li> </ul>
<p>Dissemination Training</p>	<ul style="list-style-type: none"> <li>■ developing a plan for engaging with government and others to ensure legislation and reform is disseminated, for example, to police, judges, prison service officials and probation services, defendants and prisoners</li> </ul>
<p>Monitoring and Evaluation</p>	<ul style="list-style-type: none"> <li>■ ensuring internal (institutional) monitoring and evaluation</li> <li>■ considering the role of independent national inspectorates</li> <li>■ developing external (that is, civil society) monitoring processes to track the success and failures of the reforms, and to identify lessons learnt and further steps (legislative, policy etc.) needed to complete or further develop the reform programme</li> <li>■ developing criteria to be used for evaluation</li> <li>■ linking the reviews to compliance with recommendations made under international and regional treaties (for example, United Nations Universal Periodic Review, reports under the Convention on the Rights of the Child, UN and Council of Europe Conventions against Torture, etc.)</li> </ul>

### Strategies that can assist the development of fair and effective law and policy reform:

- **Look backwards as well as forwards.** Developing sound law and policy reform requires the ability to look back at what has gone before as well as forwards towards future implementation, and to balance the two. This requires knowledge, time and understanding.
- **Identify the political context.** Laws are generally shaped through political processes, so the political context becomes crucial to legislative reform in favour of a progressive criminal justice system. Work in this area involves understanding the power dynamics and interest groups, confronting power structures at all levels, and promoting democratic and inclusive political structures. Identification of resistance must be prepared for in advance, but also opportunities for legislative reform.
- **Listen to public opinion.** Reform requires more than a textual review of existing legislation and jurisprudence and will benefit from public forums and other opportunities to gauge public perceptions of the law, and first-hand accounts of how specific laws (or a lack thereof) affect everyday lives.
- **Take a holistic approach.** This takes into account not only the interdependence of the various parts of the justice and penal systems, but also their interdependence with the state systems which provide health, social support, education, child welfare, etc.
- **Make use of good practice.** Good practice is reflected in the standards and norms that have been developed at international and regional level. In addition, practical examples of implementing those standards and norms and insight into the experience are available in neighbouring and other countries.
- **Use the support available from international agencies and organisations.** There are a variety of agencies and organisations that are able to provide technical assistance to jurisdictions attempting to reform their criminal justice and penal law. These include the Justice Section of UNODC, the International Centre for Criminal Law and Criminal Justice Policy, UNICEF, and PRI. A list of relevant bodies and organisations is supplied in Appendix 1.

## 8

## Identifying problems and their causes

### Preliminary issues

From the outset of the reform process:

- Conduct preliminary research and consultation to define what should be the key objectives of the reform process and identify the changes that may be required. Research should involve consideration of the international standards and norms that apply.
- Consult a wide variety of sources and stakeholders, and undertake discussion aimed at achieving a consensus on goals to guide the new legislation. Consultation with people and organisations with a particular interest in reform can promote broad ownership of the strategy, and mitigate the effects of purely political influence on the reform process. The people consulted should include not only police and law enforcement, lawyers, judges and court services, prison and probation staff, but also social services, local authorities, education committees, civil society groups, those who have passed through the criminal justice system and their relatives and many more.
- Identify defects and problems in the existing law and policy, existing problems and their possible causes, and, based on the process of research and consultation, try to tailor proposed law and policy reforms appropriately.
- Is new legislation necessary? Consider whether existing laws would be sufficient to address the identified problem if policy, funding and other aspects of implementation were improved. Even if there is a need for legislative change, this may be in the form of amendments. It is not always the case that completely new legislation and policy need to be drafted.

### Gathering data and evidence

#### Preliminary consultations in Southern Sudan

UNODC, the International Centre for Criminal Law Reform and Criminal Justice Policy, and the Rule of Law Unit of the UN Mission in Sudan were involved in a project to support capacity building and reform efforts of the Southern Sudan Prison Service. The project began with a survey of politicians, the police, the judiciary, the prison service, traditional leaders involved in

the management of customary law, and local and international organisations.

A series of main aims were identified through these surveys, and subsequent discussions and priority strategic areas were then agreed upon by the main stakeholders. Areas included reducing the number of offenders in prison for failing to pay a fine and removing all mentally ill individuals from prisons. An important element of this approach was to encourage local ownership of the strategic plan and to hold regular meetings with the main stakeholders to review and monitor project progress.

Source: *Penal Reform and Prison Over-Crowding*, UNICRI, 2009, [www.unicri.it/news/0904-3\\_penalreform/penal\\_reform2009.pdf](http://www.unicri.it/news/0904-3_penalreform/penal_reform2009.pdf) (accessed 10 February 2010)

Law and policy-making is a process of making decisions about what to do (or not do) and usually involves identifying alternatives and choosing among them on the basis of factors which policy makers consider relevant or important. Evidence is less easy to define, but can be taken to mean information that helps to support or challenge a policy or law. This might take the form of empirical, largely quantitative, academic research, but other evidence is also valuable, such as public and stakeholder opinion and qualitative research. It is logical to base reform on evidence of what works to reduce and prevent crime, to enhance public safety, to administer justice fairly and to rehabilitate offenders. It is imperative that any evidence used is reliable and in line with accepted academic standards, and that sources are genuinely independent of private, economic or ideological influence.

Before the drafting process begins, law and policy makers should review the evidence that is available that can support or challenge the reform process. For example, how accessible is it? Is there enough of it? Is it rigorous and relevant? Does it suggest practical, achievable law and policy actions? Are the concepts familiar or new? What are the gaps?

As a minimum it is necessary to have access to reliable data that reveals the type and prevalence of crime, where and when it is occurring and the characteristics and circumstances of those committing crime. It is also desirable to have access to data and evidence that reveals the efficiency and cost-effectiveness of the criminal justice

and penal systems. An important reference tool for law and policy reformers is UNODC's *Criminal Justice Assessment Toolkit* that covers all aspects of justice systems and provides a comprehensive overview of the sort of data that is required for a full and detailed analysis of criminal justice systems.<sup>23</sup>

Evidence and data can include the following:

- **Caseload data.** Data that measures the volume of events in the justice system such as the number of incidents reported to police; the number of charges filed by police; the number of persons charged; the number of persons appearing in court; the number of court appearances; and the number of admissions to prisons.
- **Case characteristics data.** Data on case characteristics provide more detail on the caseload. These data include, for example, the types of offence committed, the age and sex of offenders, the types of sentences given, the magnitude of the sentences, and the ethnicity and education level of those being sentenced.
- **Resource data.** These quantify the costs of administering the justice system. They include such items as the number of persons employed, the functions of persons employed, expenditure on wages and salaries, operating costs and revenues. Resource data, when combined with caseload data, can provide performance indicators and outline the level of services provided by the various agencies involved.

Finally, it will be necessary to gather evidence about the resources that are needed to implement the proposed reform, and whether these resources are already available or will need to be argued for from the public purse.

## Working in countries where data and evidence are lacking

Unfortunately, penal policies and related legislation often change, not as a result of a slow and careful examination of the conclusions of independent research, but under the influence of political or religious ideology, and in reaction to atypical incidents which receive intensive media coverage.

In some countries, legislators and policy makers are not able to make decisions based on evidence and data for a variety of reasons, for example because essential elements are not compiled at all, compiled in an unreliable and inconsistent manner, not available for technical reasons (for example, lack of electronic databases), or not shared for reasons of secrecy. Many simply lack access

to scientists capable of designing data collection systems and analysing the resulting data. Where evidence is lacking new criminal justice policy and legislation need at least to reflect the international standards and norms agreed to be universally applicable. They are the product of scrutiny and discussion by experts at a global level, and so have considerable legitimacy.

The UN-affiliated research institutes and other international or regional bodies conduct and compile analysis and research that can help to fill some gaps. In 2010 the UN-affiliated European Institute for Crime Prevention and Control (HEUNI) together with UNODC published *International Statistics on Crime and Justice* ([www.unodc.org/documents/data-and-analysis/Crime-Statistics/International\\_Statistics\\_on\\_Crime\\_and\\_Justice.pdf](http://www.unodc.org/documents/data-and-analysis/Crime-Statistics/International_Statistics_on_Crime_and_Justice.pdf)). This for the first time draws together global responses to the *UN Surveys on Crime Trends and the Operations of Criminal Justice Systems* (UN-CTS). Crime Victim Surveys are also available for some countries. UNODC also provides recommendations for criminal justice statistical gathering and for the conduct of victimization surveys and surveys on juvenile justice. The Council of Europe publishes annual statistics on the prison population (SPACE I) and community sanctions and measures (SPACE II) ([www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/prisons\\_and\\_alternatives/statistics\\_SPACE\\_I](http://www.coe.int/t/e/legal_affairs/legal_co-operation/prisons_and_alternatives/statistics_SPACE_I)).

Lack of relevant criminological disciplines also makes it difficult to gather evidence of interventions that have been successful in reducing crime and rehabilitating offenders. In discussing efforts to address prison overcrowding in Africa, for example, Muntingh stated recently that 'reliable information on what works and what does not is virtually non-existent for Africa.'<sup>24</sup> Research conducted by academics or civil society is often not widely disseminated, and its policy implications may not always be clearly drawn out. It is vital that when research is available, it is translated into authoritative guidance for law and policy makers and that there is a mechanism for dialogue between researchers and policy makers.

Where law and policy makers have a degree of say in supporting research, they can initiate innovative pilot projects that have the potential to prevent crime, protect the public, administer justice fairly and rehabilitate offenders. Such projects could be mainstreamed as quickly as possible following successful evaluations. Civil society organisations working on criminal justice systems may also have documented interesting examples of pilot projects that can be reviewed and taken into account.

The existence of research and development bodies that are independent of individual governments, but responsive to their research and development needs, and whose work and vision is long term, can be a safeguard against insufficiently grounded initiatives, providing continuity of purpose and information to successive administrations. The relationship between the Finnish National Institute of Legal Policy and Ministry of Justice is seen as having facilitated maintenance of a sustained policy to reduce the prison population for over twenty years.

In countries that do not have the resources to create and sustain an independent research centre, university departments (such as sociology, psychology, statistics and child welfare) can be encouraged by government and

civil society organisations to design and conduct research studies. Such initiatives can be the genesis of future work, with a process of critical thinking about crime and punishment begun, and acceptance in government circles that policy making in this field benefits from a factual basis.

It is important that research outcomes are made available beyond limited academic circles and in a way that is accessible. Regular presentations of local, national and international research at contact meetings and seminars involving politicians, judges, prosecutors, advocates, media representatives (local and national) and others informs public opinion and lays the ground for support of emerging, evidence-based reforms.<sup>25</sup>

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# 9 Drafting reform proposals

Policy and law reform should be extensively discussed and agreed before legislative drafting takes over. When these stages are complete, the drafting process will be more likely to have a reliable grounding and be enforceable, taking into account both the socio-economic context and international obligations and guidance.

## Guidelines for ensuring that the process of drafting is as effective as possible:

- **Clear drafting standards.** To avoid costly re-drafting at a later stage careful consideration is needed from the outset of the level of detail, choice of language, possible consequences and problem areas. Drafting guidelines are frequently available at a national level (see, for example, Canada's Uniform Drafting Conventions: [www.ulcc.ca/en/about](http://www.ulcc.ca/en/about), accessed 17 July 2010).
- **Access to international and regional standards and norms.** Policies and legislative practices depend on national context, such as cultural traditions, religious beliefs, the political climate and legislative tradition, and are rarely directly transferrable from one country to another. However, those who draft national legislation need also to have access to and to reflect the international standards and norms. The UN has published a *Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice*.<sup>26</sup> Different regional bodies have also produced extensive recommendations on specific areas of criminal justice implementation. The Venice Commission, the Council of Europe's advisory body on constitutional matters, is for relevant countries an invaluable source.<sup>27</sup> PRI's own publication *Making Standards Work* provides guidance in interpreting the standards which apply to prisons.<sup>28</sup>
- **Examples from other countries.** It is also useful to consider national law and policy from other countries. PRI, for example, has published on its website and is currently updating a *Compendium of Comparative Prison Legislation*.<sup>29</sup>
- **Advisory group of experts.** Such a body should carefully explore the advantages and disadvantages of each aspect of reform. If it does not exist, it could be established and briefed to comment on the draft legislation. Ideally it will include people who have a strong understanding of the national legislative tradition, of the local context and specifics, of the national language (or languages), an extensive knowledge of international and regional standards and norms, and a realistic understanding of the resources available for the criminal justice and penal system. In some common law jurisdictions, Law Reform Commissions can drive the drafting process. These are independent statutory bodies whose main role is to keep the law under review and make proposals for reform.
- **'Model' codes.** Some organisations have undertaken projects to produce 'model' codes that could potentially be of use as a guide for countries undertaking reform of their criminal justice systems. Such codes could be used by policy makers amending existing legislation to fill gaps and to update legislation; to ensure compliance with international human rights standards; and to ensure that legislation contains provisions which correspond to new and emerging criminal challenges a country might be facing. Model codes can also be used to provide guidance if a state is drafting new criminal justice legislation; or legislation that tackles a new issue not previously addressed (possible examples include 'terrorist' offences, organised crime or war crimes). Providing they are used carefully and in conjunction with full research and consultation on a national level, model codes can be a useful tool.<sup>30</sup>
- **One law or several laws.** A key issue for consideration is if the reform agreed upon will be best incorporated into one or several laws. For example, should there be separate laws for different stages of the criminal process such as probation, prison, pre-trial detention? In some circumstances a radical approach whereby the whole package of criminal legislation is drafted might prove effective – for instance the Criminal Procedural Code, the Criminal Code and the Penal Code. This approach can have the advantage of ensuring compatibility and unified standards, and avoids legislative contradictions that can lead to problematic implementation.
- **Law or regulation.** Decisions also need to be made about which provisions need incorporating into law, and which can be detailed in regulation. A legislative system that comprises many different normative acts on different subjects can result in contradictory provisions, provisions which are not recognised as valid by one or another institution, and can therefore create obstacles to smooth implementation of the central legal provisions.

# 10 Compatibility of reform proposals with existing legislation

Law and policy makers need to ensure that any new legislation takes into account the provisions of existing laws and regulations governing criminal justice and penal law and policy. The criminal justice laws of many countries have been in place for over 50 years and some date back 200 years. Given that informed opinion on criminal justice has evolved considerably since those times – and international human rights law has also developed in the interim – there is a need to ensure that existing laws are kept under review and updated where necessary.

The process of revision does not simply involve dropping out-of-date provisions; it requires a thorough review of current laws in accordance with current international human rights standards. It should also be informed by the examples of good legislation and practice with regard to those standards that exist elsewhere.

Law makers need to consider not just other laws and regulations directly related to criminal justice policy, but all legislation that could potentially impact on levels of crime and on offenders. For example, community-based policies that work towards breaking the cycle of drug addiction will result in former users being more likely to be socially and economically productive. Ensuring that laws relating to the conduct of elections, the provision of healthcare and education take into account the rights of prisoners is as relevant as making changes to the penal code or other law governing the use of force or instruments of restraint. Ensuring that prisoners are covered by the scope of anti-discrimination protection and laws regulating freedom of religion and expression is as necessary as introducing a new prison disciplinary code.

Changes to primary legislation will also usually need to be accompanied by changes to supporting regulations, rules and administrative measures which must be planned for and must be consistent with the goals of the new laws. Amendments introduced while a Bill is progressing through parliament, must be closely scrutinised to ensure that they are compatible with the purpose of the original legislation.

## Uniform Law Conference of Canada

**The Criminal Section of the Conference assembles government lawyers, Crown prosecutors, private lawyers, academia and members of the judiciary to consider issues regarding the implementation and reform of the Criminal Code and related statutes. This forum also provides provincial, territorial and federal governments with an opportunity to consult Section members on draft policy positions contained in submitted discussion papers. The Section makes recommendations for changes to federal criminal legislation based on identified deficiencies, defects or gaps in the existing law, or based on problems created by judicial interpretation of existing law.**

[www.ulcc.ca](http://www.ulcc.ca) (accessed 12 July 2010)



# 11 The use of international human rights standards and norms in reform proposals

Law and policy makers should ensure that any laws that they pass are compatible with their obligations under international law. If a State is not bound by a particular international legal standard then the passage of a relevant piece of legislation provides **an opportunity for agreeing to be bound by its provisions**. The UN has produced a Handbook to assist governments on the technical aspects of treaty ratification that can be downloaded on-line from the UN's website.<sup>31</sup> It is intended to provide particular assistance to States with scarce resources and limited technical proficiency in treaty law and practice.

After a treaty has been ratified and has entered into force, parliamentarians must **make sure that the national implementing legislation is adopted which corresponds to its provisions**. It is important for law and policy makers to familiarise themselves with the process of becoming a party to a treaty – usually through signature followed by ratification, acceptance, approval or accession. There is often a period of time between when a government signs an international treaty and when its parliament enacts legislation agreeing to be bound by it. Law and policy makers should, therefore, **familiarise themselves with what international instruments their government has signed but not yet ratified**. They can ask parliamentary questions and initiate debates about this. Parliamentarians can also table their own bills calling on the government to ratify a particular treaty. Some States express 'reservations' or 'declarations of understanding' at the point of ratifying treaties. These are designed to limit their scope and effectiveness. Parliamentarians can challenge such limitations if they think that they are unjustified.

Many international human rights treaties require States parties to submit regular reports describing how they are implementing the treaty's obligations. Parliamentarians can help to ensure that governments actually do submit these reports on time and can **draw attention to the conclusions and recommendations of the relevant monitoring bodies relating to national legislation when the record of their State is reviewed**. These recommendations can be used to assist the reform drafting process.

Four main methods are generally available for the implementation of international human rights instruments into domestic law:

- direct incorporation of rights recognised in the international instruments into a bill of rights in the national law

- enactment of different legislative measures in the civil, criminal and administrative laws to give effect to the different rights recognised in human rights instruments
- self-executing operation of international human rights instruments in the national legal order
- indirect incorporation as aids to interpret other law

States will therefore follow different practices when incorporating international human rights law dealing with criminal justice issues into their domestic legal structures so that their provisions can be implemented by state authorities.<sup>32</sup> The international standards and norms dealing with criminal justice and penal systems can have a great impact on national legal systems: they can be used by national courts as tools for deciding how to interpret and develop national law; they can be used as the basis for cases (provided they are part of national law); and they can be used to establish the minimum standard of protection which national law should attain.

While international and regional instruments are useful for standard setting, they are not always designed for direct national implementation. Indeed, sometimes the standards simply say that a particular question should be dealt with in national legislation and do not stipulate how the state should implement its provisions. It is for law and policy makers to interpret how the minimum standards can best be implemented so that they are practically enforceable taking into account socio-economic conditions.

National constitutions increasingly reflect a commitment to human rights. At times the rights are listed in a separate section generally known as a bill of rights. Drafters of recent constitutions often consider the language of international and regional norms in fashioning their guarantees. Judicial interpretations of principles enshrined in the constitution can play a vital part in addressing issues that directly affect prisoners. In India, for example, the interpretation of Article 21 of the Constitution that covers the protection of life and liberty is now widely used to assert the rights of prisoners.<sup>33</sup>

Some of the possible constitutional provisions that deal with the treatment of offenders are:

- the right to life and integrity of the person
- the right to be free from torture or other ill-treatment
- the right to health
- the right to respect for human dignity
- the right to due process of law

- the right to freedom from discrimination of any kind
- the right to freedom from slavery
- the right to freedom of conscience and of thought
- the right to freedom of religion
- the right to respect for family life
- the right to self-development

Criminal justice and prison legislation is frequently introduced by a statement of principles. This is useful, as it may anchor the legislation in international standards and norms at the same time as making explicit reference to any existing fundamental constitutional provisions regarding human rights. The main purpose of the statement of principles is to provide a point of orientation for the readers of the legislation. They can use it both to interpret subsequent provisions of the legislation or, more generally, to inform decisions about criminal justice and prison policy. Criminal justice officials and prison administrators may find legislation that sets out principles particularly useful when they need to exercise a discretionary power. Clearly stated principles should remind them that their discretion is not unfettered but should be exercised in accordance with the objectives contained in the principles.

### **The reform process as a means of improving compatibility with international standards**

- **Take the opportunity to embed international standards in national law.**  
The reform process is an opportunity to conduct a review and to consider whether additional national legislation, or amendments, are required to ensure that international standards are properly embedded in national law.
- **Consider ratification of key treaties.**  
For those countries that have not yet ratified the key human rights treaties, the drafting process and debate surrounding the need and objectives for reform can be used as an opportunity to encourage ratification. The process can be used to generate awareness of the benefits of human rights treaties for criminal justice reform, through discussion among parliamentarians and use of television and radio.
- **Review the reservations.**  
For those countries that have made reservations to the key human rights treaties, the reform process can be used as an opportunity to assess whether the reservations really are required.



# 12 Cost analysis of reform proposals

Spending on criminal justice and prison reform may on the face of it be difficult to justify both within government and with the public more widely – it does not compare easily within the public imagination with spending on hospitals and schools. The economic case for reform needs therefore to be carefully constructed. Time spent encouraging debate about the criminal justice and penal system, what prison should be like, what benefit society obtains from it and what alternatives there are is not time wasted, but begins to make an economic case for reform.

Most parliaments will require an assessment of whether the legislation going before them is resource neutral or requires additional budget. A stage of assessing the cost implications of new policy and legislation therefore needs to be built in. This is also important in helping to decide priorities. The cost analysis needs to consider: what are the costs of implementing the reform? Is this the most effective allocation of resources across the system as a whole? What are the long-term and indirect costs and benefits of policy and law changes?

Such costing of reforms is of course easier said than done. Criminal justice budgets are notoriously difficult to pin down, being spread across many departments. Some criminal justice reform may ‘transfer’ costs from the area of criminal justice to the area of social policy, for example, if a state is undertaking social welfare interventions as part of a long-term crime prevention initiative. Reform may create new costs, or highlight costs that were previously hidden. For example, if you have planned release and through care of prisoners the bodies responsible for social support, housing, health, employment and so on will have new obligations or will be forced for the first time to fulfil existing obligations.

## Legislative costing in South Africa

The draft Child Justice Bill introduced in 1998 in South Africa proposed changes to the juvenile justice system. It was the first bill to fully comply with the country’s Public Finance Management Act No. 1, which requires estimation of the financial implications of any law that gives additional powers or obligations to the government. To meet this requirement, the costs of implementing the draft Bill were estimated by ‘(1) establishing a “baseline” estimate of expenditure on the prevailing juvenile justice system, and setting up an analytical framework ►

that would review five sectors (police, welfare, justice, correctional services and education) across national and provincial spheres of government, and (2) estimating the expected impact of the changes proposed by the draft Bill.’

The estimations considered the effects of changes that would save time for prosecutors in the Department of Justice but increase the demands on probation officers, while at the same time saving costs for the Department of Correctional Services and Department of Safety and Security, but raise costs for the Department of Welfare. These factors were then reconsidered when the draft Bill was revised in 2000.

Source: A. Sutton, UNICEF Brazil; R. Gore, *Influencing Budgets for Children’s Rights*, June 2004, pp. 18-21

## Suggestions for undertaking a cost analysis of proposed reforms

- **Consider the long-term savings from short-term investment.** A cost in one area may deliver a pay-off saving in another, and this is the sort of information that it is important to have available in negotiating passage of the policy and legislation. For example, when prisoners are included in national health programmes, properly diagnosed with mental illnesses and learning disabilities, provided with national education programmes, receive proper care for invalidity and so on, this creates additional costs for the state budget to bear. However, the benefits that will accrue in the long-term are potentially very large.
- **Involve the Ministry of Finance.** The ministry (or equivalent) should be involved in developing legislation from an early stage to ensure that adequate financial allocations are made for implementing new laws and policies.
- **Identify the differing costs of custodial and non-custodial sanctions and compare this with the outcomes of sentences** (for example how many people re-offended and how much money was allocated to their sentence). The differing ways in which criminal justice budgets are formulated does not always easily permit a comparison between the level of funding for custodial and non-custodial sentences. Where it is possible to make this relative comparison, the results

are stark. For example, in Luxembourg the probation service (which deals with prisoners after release as well as people who have received non-custodial sentences) receives 18.4 per cent of the budget available to the prison service while dealing with the same number of clients as the prison service. Sweden's probation system receives about 25 per cent of the funds received by the prison service but each day deals with double the number of clients.<sup>34</sup>

- **Do not assume that privatising services will inevitably bring an overall benefit.** Private prisons (those run by profit-making companies in contract with the State) are run in only a handful of countries: for example, Australia, United Kingdom, New Zealand, South Africa, and the United States. Privatisation is often introduced in the belief that it is operationally more adaptable, efficient and cost-effective. However, private prisons are also perceived as a threat to the democratic control of prisons, and to initiatives which seek to keep the use of imprisonment at the minimum necessary level, since they are run by private companies that have a vested interest in maintaining if not increasing numbers. There is a risk that privatisation can result in being tied into a contract that results in paying for empty spaces, spaces in the wrong part of the country, or in too high security conditions. There may be strong economic and governance arguments for privatising individual services, such as education or catering. However, these need to be carefully balanced by consideration of how this could reduce flexibility in the future. In addition, many countries struggle to manage the sort of detailed contractual relationships which are required.

### Private prisons: Costa Rica's experience

Costa Rica recently explored the possibility of entering into a contract with a private company that would construct a prison for 1,200 inmates and manage and maintain it for twenty years at a cost of US\$73 million. Instead the government made a strategic choice to build a prison at its own expense for 2,600 inmates at a cost of just US\$10 million. It calculated that the ongoing costs of the private contract for managing and maintaining the prison for twenty years would have been US\$37 per inmate per day. It calculated that the government was able to do this for just US\$11. It also estimated that the costs of maintaining one prison under a private contract would have been detrimental to the rest of the prison system where the other 80 per cent of inmates were held. Finally, the government was able to increase the daily per capita amount for the whole prison population by US\$16.

Source: UNICRI – Workshop on Penal Reform and Prison Overcrowding, *The Case of Latin American and Caribbean Countries: The Good Examples of Costa Rica and the Dominican Republic*, [www.unicri.it/wwk/publications/books/series.php](http://www.unicri.it/wwk/publications/books/series.php)

# 13 Inclusive consultation with stakeholders

Review and reform of the criminal justice system is an opportunity for a national debate on its role and function. Systematic involvement of all sectors of society and government is an important step to achieving the critical mass required to ensure that optimum laws for security, justice and offender rehabilitation are both adopted and implemented. Public involvement in particular has a number of specific benefits: it allows law and policy makers to tap wider sources of information, perspectives and potential solutions, and improves the quality of decisions reached; it alerts policy makers to any concerns and issues that may not be picked up through existing evidence; it helps to monitor the performance of current policies and whether there is need for change; and it helps build public trust in government and the legitimacy of decisions reached.

Sometimes it is felt that involving the public in criminal justice reform can be risky or present unwanted hurdles in finalising a law or policy. For example, it will take too long and delay matters; there will be too many administrative burdens; public expectations of what can be achieved through citizen involvement will be too high; campaigns will try to hijack the consultation and focus opposition; or the exercise will produce unrepresentative views. However, the benefits of public involvement far outweigh these risks.

To maximise the scope, quality, diversity and effectiveness of criminal justice reform requires cooperation and collaboration between various local, national and international stakeholders. From an early stage of developing law and policy, all of the necessary players in the policy debate need to be included. This might involve consultation with:

- different political parties
- ministries and official bodies
- professional bodies
- academic researchers
- police
- judiciary
- prison management
- international monitoring bodies (such as the CPT or UN Subcommittee on the Prevention of Torture)
- probation services
- victim support groups

- women's groups
- children's rights groups
- minority rights groups
- disabled rights groups
- offenders who have received non-custodial sentences
- prisoners
- offenders' families

## Preparation of policy on Norway's correctional services

This policy came about through a broad consultative process in which a great many people from different areas of society were involved. Serving and former Justice Ministers were asked for their views, and emphasised the importance of security and rehabilitation. A think tank of leading scientific and cultural figures was consulted. Their contribution was that *'if we are to find good penal methods, we must also look at fundamental structural factors in society that lead to crime.'* Two large professional conferences were held regarding ethics and change. Prisoners and staff in six prisons discussed what they meant by the phrase *'a good day in prison.'* Victims of crime and the family and friends of inmates also contributed.

Another conference was held for public agencies and the voluntary sector to discuss re-entry after a prison sentence. Young people were invited to look at the reform proposals and said, *'there is a clear division between informed and uninformed opinion as regards punishment. It is probably important to show the public that prison can actually present a dramatic change in the prisoner's life.'* A joint meeting was arranged between students at the National Police College and at the Department of Criminology of Oslo University. The Minister of Justice also consulted with employees from all sectors of the Norwegian correctional services and visited a total of 49 prisons to talk to inmates and staff.

# 14 Building consensus

Criminal justice reform cannot proceed without the active support, or at least acquiescence, of the community, and the consultation process described in the previous section is part of building consensus. This is particularly necessary where progressive reforms are envisaged such as greater use of non-custodial sanctions and measures, including restorative justice initiatives. Engaging the community requires an investment on the part of law and policy makers in educating the public through awareness-raising campaigns.

It is very important to clarify with the legislators, political and civil society organisations, social service agencies, civil advocates and the public the rationale behind the proposed reforms and the statistical (and other) evidence in their favour. Information should be disseminated to promote a clear understanding of the effects of punishments and to reduce unfounded public confidence that a harsh sentencing regime will always result in a reduction in crime. Using an evidence-based approach plays an important part in this as it allows for the reforms to be put into context and the statistical and other evidence in its favour to be produced.

## The reform process in Kazakhstan

A governmental working group on non-custodial sanctions and measures in Kazakhstan brought together representatives from relevant governmental departments and NGOs to formulate suggestions to reform and amend criminal legislation. The group's recommendations exerted significant influence on a new law that took effect in 2002, which increased the use of non-custodial sanctions and measures, rationalised sentencing policy, and relaxed the requirements needed before a prisoner could be considered for conditional release, among other measures.

The prison service, recognising the need for public support for these reforms, conducted a massive public awareness campaign on the harmful effects of imprisonment and the benefits of alternatives. The reform reduced the prison population and increased the use of non-custodial sentences. It is also striking that the crime rate steadily decreased from 2002 as imprisonment began to be used less. The legislative basis for non-custodial sanctions and measures seeking ►

**to reduce the prison population was expected to deliver at stabilisation of the prison population in future, a significant achievement when prison population figures were rising in many countries of the world.**

*Source: A Handbook on Alternatives to Imprisonment, UNODC, 2007*

The media can be a very useful resource for disseminating information about, and garnering support for, reform. Positive and proactive relations should be pursued with the media to create publicity about the ineffectiveness of harsh sentencing and extreme punitive practices in reducing crime, and to advertise the need for the proposed reforms. This can reduce the risk of the public only having access to information about criminal justice from a media which propagates the view that imprisonment is the optimum response to crime. Law and policy makers can also seek ways of informing the public through others who may enjoy greater trust or credibility among the general public such as encouraging prison monitoring bodies or the police to give interviews to the media.

## Setting the media agenda in Russia

PRI had a good experience in Russia of working with a local media foundation to ensure that journalists had regular information about developments in the criminal justice system, including prisons. Journalists received training in objective reporting of criminal justice news. The initiative was particularly geared at ensuring informed reporting about the practical implications of legislative changes then coming into effect and which resulted in a growth in the use of alternative sanctions and release of former prisoners into the community. Anticipating the anxiety which members of the public could have about the impending large-scale releases, the collaboration ensured that information was provided about the general profile of those who would be released, and about the procedures which would be adopted in order to minimise the risk to the public. This had a role in creating a more welcoming landscape for the prisoners' transition to a new life.

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# 15 Dissemination and training

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Reform of criminal justice legislation and policy is not sufficient on its own, and law and policy makers must ensure that it is implemented on the ground by building dissemination and training in to their planning (including financial planning). Once new legislation has been enacted, it must be published and comprehensively disseminated. Public officials, including police, prosecutors, judges, the prison and probation services, all need to be briefed and to receive training about the intention of the reforms and what the legislative changes mean in practice. As well as internal regulations, job descriptions and person specifications may need to be changed. Lawyers, defendants and

prisoners also need to be informed about the content of new laws and their respective rights and responsibilities under them. Posters, libraries, internal bulletins, the media can all be used.

In some countries the authorities develop mission statements for the various services based on their new laws, setting out the values underpinning their penal systems, for example. These can be displayed on notice boards within the prisons themselves as a reference point for staff, prisoners and visitors.

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# 16 Ongoing monitoring and evaluation

Reform is not a one-off event, and no reform process is immune to unforeseen obstacles, resistance and stagnation. For this reason internal and external mechanisms of oversight, review and accountability are essential.

Independent national inspectorates are the most effective way of monitoring the functioning of prisons and community sanction services and are recommended in the UN Standard Minimum Rules for the Treatment of Prisoners, the European Prison Rules and the European Rules on Community Sanctions and Measures. The work of such independent inspectorates can ensure that the existing provisions of laws and policies are being fully and consistently implemented while also identifying gaps in those provisions where national and other interventions need to be organised and implemented.

## Her Majesty's Inspectorate of Prisons (HMIP) for England and Wales

This is an independent inspectorate which reports on conditions for and treatment of those in prison, young offender institutions and immigration detention facilities. Following ratification by the UK of the Optional Protocol to the UN Convention against Torture (OPCAT), the inspectorate has taken on a coordinating role for 18 existing independent bodies throughout the UK that have the right regularly to inspect all places of detention.

'Expectations' is the document which sets out the detailed criteria used by HMIP to appraise and inspect prisons. These include reference to international standards and norms as well as national law and regulations and are freely available on the internet.

[www.justice.gov.uk/inspectorates/hmi-prisons](http://www.justice.gov.uk/inspectorates/hmi-prisons)  
(accessed 12 July 2010)

If, as is hoped, a country's reform is closely tied to improving compliance with international and regional human rights standards in the area of criminal justice, these will need to be built in to the national monitoring framework. With regard to standards and norms associated with places where people are deprived of their liberty, such as prisons and police stations, the related international and regional monitoring frameworks and their annual reports can also be a useful guide (for example, the

Council of Europe Committee for the Prevention of Torture, the Sub-Committee on Torture under the UN OPCAT, the ACHPR Special Rapporteur on Prisons and Conditions of Detention, etc.)

Laws and policies will normally also foresee internal mechanisms for accountability (including appeals and complaints mechanisms) but should also designate monitoring processes to track success, identify weaknesses and areas for improvement so that the process of reform is ongoing and continually improving. Although there can be reluctance to admit and document shortcomings in implementation, the data collected can be essential in securing financial, technical and moral support from national and international donors. This of course requires certain standards to be agreed upon to evaluate whether the police, judiciary, prosecution service and services overseeing non-custodial sentences are working effectively, fairly and efficiently. This is not without its pitfalls.

For measuring **police** performance the traditional yardsticks have been reported: crime rates, arrests, clearance rates (which reflect the ability to solve crimes) and response times (which measure the ability to arrive at the crime scene in the shortest possible time). Other broader performance measures might include statistical evidence on use of force, brutality, discourtesy and corruption. The quality of service provided by the police, and the trust and confidence which citizens have in the service, should also be measured, as experience has shown that limiting police performance measurement to crime solution can be counter-productive. Particularly where a country's police force lacks access to good forensic technology and investigation techniques, an over-emphasis on clear-up rates in the estimation of police service delivery can lead to discriminatory action against minorities, and torture or other ill treatment aimed at forcing confessions.

With regard to the performance of the **judiciary**, the key areas for measuring performance could be independence and accountability, competence, efficiency, equality, fairness and integrity. Independence could be measured in terms of the judiciary's separation from the other branches of government and its freedom to decide on cases devoid of any external pressure, political or otherwise. Actual and perceived independence of the judiciary must both exist. Accountability is measured by the existence of checks and balances on the judiciary's performance and utilisation of public funds. There must be transparency in the court's activities. To measure competence, it is



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possible to look at the qualifications of incumbents as well as the promotion, rewards, and compensation systems in place. To measure efficiency, it could be considered whether criminal courts are able to hear cases in a timely manner without sacrificing principles of due process. The yardsticks of equality, fairness, and integrity would be the court's observance of due process and equal protection in its procedures and decisions.

For the **prosecution service**, the measures of performance could be competence, efficiency, accountability and independence. Competence and efficiency are manifested in the turnaround time of the caseload and percentage of convictions in cases brought to trial. Accountability and independence are two sides of the same coin. Independence of the prosecutor relates

to the level of discretion in deciding whether or not to prosecute a case and in the manner in which a case is prosecuted. The prosecutor should be able to decide based on professional considerations, rather than political expediency. On the other hand, with independence comes accountability, which means in this context that the prosecutor should be able to explain and defend a decision to prosecute a case or not.

Criteria for measuring and evaluating the performance of **organisations overseeing non-custodial sentences** could include the extent to which they protect the public, their success in managing offenders (for example the numbers of offenders who complete non-custodial sentences successfully) and their overall efficiency and effectiveness.

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# Substantive Issues for Reform

This section of the Handbook considers the options available to law and policy makers at all stages of the criminal justice process. It refers to the international standards that are relevant and recommends concrete actions necessary to improve and reform criminal justice and penal systems. Please note that a glossary explaining some of the terms used is included in Appendix 2.

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# 17 Access to justice

## 17.1 Due process

For any criminal justice system to have legitimacy within the community, it must operate in accordance with due process. This means that fair, reliable and consistent procedures are followed at all stages of the justice process. Arbitrariness, violence, and discrimination in law enforcement have been shown to exacerbate crime, including serious human rights violations, and to deter community cooperation with the justice system. While effective due process requires clear legislation governing proper criminal procedure at each stage, it is also important that guidelines are flexible enough to allow for discretion in the exercise of authority by police, prosecutors and judges. Such flexibility is necessary to ensure individualised treatment of offenders or potential offenders, which is in turn necessary to reduce recidivism and promote the overall social health of the community.

## 17.2 Arrest as a last resort

### International Standards

- Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. (ICCPR, Article 9)
- Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest, and shall be promptly informed of any charges against him. (Body of Principles, Principle 10 and ICCPR, Article 9.2)
- Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose. (Body of Principles, Principle 2)
- Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. (Standard Minimum Rules for Non-custodial Measures 5.1)

### What this means in practice

An individual may only be deprived of his or her liberty on grounds and according to procedures established by law and in conformity with international standards. Arrest is justified only where there is reasonable suspicion that a person has committed an offence and should be a last resort. Those with the power to detain and imprison offenders should operate according to a presumption against detention.

Unfortunately, local law, policy or procedure often severely restrict the ability of police to exercise their discretion not to arrest or initiate a prosecution. Police officers should not be required to arrest all persons suspected of certain specific categories of crime without regard to age, prior record, mental or physical health. Where officers do have some official leeway in the decision to detain, sources of support and guidance for those diverted should be available, and police procedure, practice and training should take the possibility of alternative responses into account.

### Issues to be addressed by domestic law and policy

- If all the complaints received by police in most jurisdictions were prosecuted, they would overload the criminal justice system. In many countries, the police do divert offenders from the criminal justice system, using their own discretion. However, they should be held accountable and have clear guidelines as to the extent of their discretionary powers, as well as a set of established criteria for deciding whether or not diversion is a suitable response. This makes the use of discretion transparent and fair. Such use needs also to be closely monitored so that there is accountability. There should be the option to remit cases to appropriate authorities for decision on the options available.
- In deciding how to dispose of a given case, police need to consider not only the nature of the offence and its impact on any victim, but the characteristics of the individual, including age, gender, nationality, mental and physical health, prior record, and any other contributing or mitigating factors, such as family and home circumstances, which might have an impact on the propriety of arrest and/or detention in the particular case.
- The legal and regulatory framework needs to ensure that police have options other than arrest open to them to be used where appropriate in the interests of justice. These might include:

- verbal sanctions such as a caution or warning
- an arbitrated settlement
- restitution to the victim
- victim – offender mediation
- family group conference

### Mediation before arrest for certain offences in India

In March 2010, the Allahabad High Court Order of Division sent directives to the Government of the State to consider the advisability of setting up mediation and reconciliation centres in courts and police stations in as many districts of the State as possible. When a complainant approaches a police station or a concerned lower court with complaints of violence and harassment, it was stated, unless the offences are of a grave nature involving serious injuries and the possibility of recurring violence, the parties should be diverted to mediation courts or mediation units at police stations.

## 17.3 The use of pre-trial measures

### International Standards

- ... It shall not be the general rule that persons awaiting trial shall be detained in custody... (ICCPR, Article 9.3)
- Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. (ICCPR, Article 10.2)
- Unconvicted persons are presumed to be innocent and shall be treated as such. (Standard Minimum Rules for the Treatment of Prisoners, Rule 84.2)
- Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim. Alternatives to pre-trial detention shall be employed at as early a stage as possible. (Standard Minimum Rules for Non-custodial Measures, Rule 6)

- A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it. (Body of Principles, Principle 17)
- A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial. (Body of Principles, Principle 38)
- (1) The police, the prosecuting authorities and the judiciary should be aware of the problems caused by prison overcrowding and should join the prison administration in seeking solutions to reduce this; (2) Judicial investigations and proceedings should ensure that prisoners are kept in remand detention for the shortest possible period, avoiding, for example, continual remands in custody by the court; (3) There should be a system for regular review of the time detainees spend on remand. (Kampala Declaration on Prison Conditions in Africa)

### What this means in practice

The unnecessary and unnecessarily prolonged imprisonment of un-convicted prisoners is a severe infringement of the right to liberty as laid out in Article 9 of the ICCPR, which states that no one shall be subjected to arbitrary arrest or detention or deprived of his or her liberty except in accordance with lawful procedures. The international framework governing pre-trial measures is clear and exacting. As a general rule, individuals awaiting trial must be presumed innocent until proven otherwise and the only justification for using imprisonment in these circumstances is if there are strong grounds for believing that a criminal suspect might flee to avoid standing trial or intimidate potential witnesses or jurors and there is no alternative, less costly and intrusive, means of preventing this.

Pre-trial detainees must be segregated from the convicted prison population and are subject to a different set of rules appropriate to their unconvicted (innocent until proven guilty) status. In any prison, those on remand should be a privileged category of prisoner able to dress in their own clothes, receive food from outside, have access to their own doctors, procure reading and writing materials and receive regular visits from their legal advisers in preparation for trials.

## Pre-trial detention needs to be limited

Unnecessary use of pre-trial detention is widespread in many parts of the world, resulting in severe over-crowding in detention facilities. In some countries pre-trial prisoners make up more than half the prison population, with rates in excess of 60 per cent encountered in countries as far apart as Lebanon, Cameroon, India and Bolivia.<sup>35</sup> This represents a significant violation of the right to liberty and suggests that the strict criteria laid out in international standards for when courts can impose pre-trial detention is not complied with.

As well as being a measure of the quality of justice the system provides, the size of the pre-trial population is an indicator of the efficiency of the criminal justice system as a whole. Misuse of pre-trial detention is often caused by a failure to stick to statutory limitations on the time persons spend in pre-trial detention. It is also associated with ineffective and inefficient justice administration, including poor strategic planning and weak case management capacity. Women in particular may be more likely to be placed in pre-trial detention than men because they are less likely to be able to meet the criteria for bail set by the court (such as secure employment and owning or renting property in one's own name). Furthermore, women's caring responsibilities are rarely taken into account. The consequences are serious. Even if a woman is acquitted at trial, she may have lost her job, her home or her place on mental health or drug rehabilitation programmes whilst in pre-trial detention. For children, having a mother placed in pre-trial detention has many of the same detrimental effects as having a mother imprisoned following conviction.

Overuse of pre-trial detention leads to many other serious problems and rights violations. In overcrowded and under-resourced places of detention the rapid spread of transmissible diseases, especially TB, and HIV and AIDS, is common and a major public health and financial risk. Pre-trial detention can also have a profound impact on the mental health of accused people: the suicide rate of pre-trial detainees is in some countries reported to be ten times that of persons in the outside community, whilst the rate for sentenced prisoners is three times higher than that of persons in the outside world.<sup>36</sup> Such detention also has a negative impact on the ability of defendants to prepare their defence, and therefore infringes their right to equality of arms.

## Issues to be addressed by domestic law and policy

The international standards are clear that pre-trial detention should be a measure of last resort applied only where it is essential to protect society or to ensure that a serious offender attends trial at a future date. If a defendant meets these criteria and is remanded in detention awaiting trial then time spent on remand should be kept to a minimum and deducted from the length of any sentence of deprivation of liberty imposed. If pre-trial detention is used in accordance with international standards as a measure of last resort, this is likely to enable governments to divert funds otherwise spent on the considerable expense of maintaining pre-trial prisons towards crime prevention, legal aid, and education.

The following are some suggestions for practical strategies to ensure that pre-trial detention is used as a measure of last resort:

### ■ Use of non-custodial measures to avoid pre-trial detention

An individual accused of a criminal offence has the right to be brought promptly before a judge to determine the legality of his arrest, and to determine the next steps to be taken in his case. The judge may determine that there is no legal basis for the arrest in which case the matter will be discharged, or decide that the interests of justice will be better served by use of a diversionary measure such as family mediation. He or she may consider that the defendant fulfils the criteria for detention pending trial or may consider that they should be subject to bail, conditional or otherwise. It is essential that judges have a wide range of flexible bail conditions available to them such as ordering defendants:

- not to engage in particular conduct, leave or enter specified places or districts, or meet specified persons
- to remain at a specific address
- to report on a daily or periodic basis to a court, the police or other authority
- to surrender passports or other identification papers
- to provide or secure financial or other forms of security as to attendance at trial or conduct pending trial

### ■ Increasing access to bail for the poor

One strategy to reduce pre-trial detention is to increase the accessibility of bail to those with limited resources. For example, in South Africa a scheme was set up

enabling those who could not afford very small bail fees to nonetheless be released pending trial. This reduced the number of persons in pre-trial detention and improved the functioning of the courts at several of the pilot sites.<sup>37</sup>

### ■ Ensuring the right to representation

Pre-trial detainees have the right to counsel. Legal advice and/or representation is an essential and cost-effective means of realising fair, timely and transparent criminal justice. Competent legal representation ensures that prosecutors and police perform their work adequately and inspires public confidence in the system. Defendants who are not represented are more vulnerable to coerced confession or even torture, rendering the evidence produced at trial legally inadmissible. Although providing free legal aid can be costly, hidden costs are incurred when defendants represent themselves. For example, when accused persons represent themselves in court they often do not request bail because they do not know they are entitled to do so. Among other less tangible costs, this leads to unnecessary use of prison space.

Where it is impossible to provide in practice, legal advice and assistance do not always have to be furnished by trained and experienced lawyers. In many countries, the number of lawyers is limited and restricted to the urban centres and civil work. (For example, the law in Rwanda requires that all detainees be provided with access to lawyers. However, as of 2007 there were only 273 lawyers in the entire country, mostly located in the capital.)<sup>38</sup> The international trend is towards an 'inclusive' approach to legal aid to encourage legal aid, encouraging legal aid providers from civil society and not only from the legal establishment.

With the adoption of resolution 2007/24 on International Cooperation for the Improvement of Access to Legal Aid in Criminal Justice Systems, the Economic and Social Council requested the UNODC to study ways and means of strengthening access to legal aid in the criminal justice system, as well as the possibility of developing an instrument such as a declaration of basic principles or a set of guidelines for improving access, taking into account the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa. The Lilongwe Declaration adopted a broad concept of 'legal aid' to include: 'legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution...' At the end of 2012, the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems were adopted by the UN General Assembly.

For those held in detention pending trial, the state must guarantee regular consultation between the detainee and their legal representative, provide appropriate facilities in which such meetings can take place, and take steps to protect the confidentiality of lawyer-client communications. This means that the right to legal representation needs to be guaranteed in legislation, and resources made available for criminal defence services through sound financial management. Quality legal advice must be accessible for the poor and disadvantaged, and attention should be given to building a financially sustainable legal aid framework which includes the use of pro bono lawyers, university clinics and paralegals.

### Innovative provision of legal aid in Malawi

The Paralegal Advisory Service (PAS) started in Malawi in 2000 and aims to act as a resource for the training of paralegals in Malawi and abroad. The paralegals conduct daily 'paralegal aid clinics' in prisons using inter-active drama techniques to maximise the participation of prisoners (as many as 200 attend a clinic). The impact of PAS has been noted beyond the prison walls. Case-flow within the criminal justice system has improved, judiciary now visit prisons and screen the remand caseload more frequently, the police are less prone to 'dump' people in prison pending lengthy investigations and relatives have a reliable source of information and assistance. Similar schemes, based on the Malawi model, have been implemented elsewhere, including in Benin (Programme d'Assistance Judiciaire aux Détenus) and in Kenya (Kenya Prison Paralegal Project).

Source: *The PLC Manual: A manual for paralegals conducting paralegal aid clinics in prison*, jointly published by the Paralegal Advisory Service Institute (PASI) and PRI, 2nd edition, 2007

### ■ Enforcing statutory time limits

In many jurisdictions, time limits for detention in pre-trial prisons are set down in legislation. Law and policy makers can also encourage these time limits to be respected by employing cost orders against courts for unnecessary adjournments; discharging cases that take too long at the investigative stage and instituting regular pre-trial hearings



to monitor progress in a case. In Bihar, India, for example, judicial officials periodically visit prisons to review cases and dispense on-the-spot rulings.<sup>39</sup> These ‘camp courts’ only handle matters involving minor offences but are a useful way to reduce overcrowding, make justice delivery more timely, and restore hope in the life of prisoners. They have proved highly effective at reducing the backlog of simple bailable criminal cases.

*‘I am deeply pained to notice that all over the country a very large number of under-trial prisoners suffer prolonged incarceration even in petty criminal matters merely for the reason that they are not in a position even in bailable offences to furnish bail bonds and get released on bail. Many of them during such confinements only develop criminal traits and come out fully trained criminals ... I therefore suggest for your consideration that every Chief Metropolitan Magistrate and Chief Judicial Magistrate of the area in which a District jail falls may hold his court once or twice a month depending upon the workload in jail to take up the cases of those under-trial prisoners who are involved in petty offences and are keen to confess their guilt. Legal Aid Counsel may be deputed in jail to help such prisoners and move applications on their behalf on the basis of which the Chief Metropolitan Magistrate or the Chief Judicial Magistrate may direct the investigating agency to expedite the filing of the police report ... I feel this exercise can go a long way in providing speedy justice to the poor under-trial prisoners and also reduce the under-trial population which is becoming a cause of concern.’*

Letter to Chief Justices of all High Courts from the Chief Justice of the Supreme Court of India, Adarsh Sein Anand, 29 November 2009<sup>40</sup>

### ■ Good information management systems

Having good information management systems that can provide current, accessible information on cases awaiting trial is essential because it ensures that the right to liberty is not violated. Communication, collaboration and co-ordination between criminal justice agencies in case management at a local level can also be improved by having local meetings of case management agencies (police, judiciary and prisons) and organising prison visits by judges to screen remand cases.

### ■ Placing responsibility for pre-trial detention facilities with the Ministry of Justice

It is accepted as good practice to have the prison administration, including pre-trial detention facilities, placed under the jurisdiction of the Ministry of Justice rather than the Ministry of the Interior. This reflects the principle of separating the power of agencies that have responsibility for investigating charges and those that are responsible for the management of detention. The law enforcement agencies with responsibility to prevent and detect crime, identify and apprehend suspects are normally under pressure to move cases speedily on, sometimes at the cost of other vital considerations such as truth, justice and physical integrity. Thus, overcrowding in detention facilities and respect for the rule of law may be low on their list of priorities, especially if there is no clear policy, training and support provided, and little oversight of compliance with basic human rights.

When pre-trial detention establishments are within the jurisdiction of the Ministry of Interior (and they are sometimes located within police custody premises not designed to hold people for more than a few hours, a situation even more likely when prisons are overcrowded) it can be difficult to protect some of the most fundamental rights of detainees. There is a risk of torture and of pressure being placed upon detainees to confess to crimes, using conditions of detention, access to lawyers, doctors and families, among many others, as a means of reaching this aim. When remand prisoners are placed in institutions under the jurisdiction of another authority, this kind of pressure is possible but less likely. There needs to be clear policy, regulation and training of prison staff to ensure that investigating authorities do not influence the treatment of pre-trial detainees.

### Reducing pre-trial detention in Nigeria

The Open Society Justice Initiative, working with Nigeria’s Legal Aid Council and the Nigeria Police Force, developed a programme for Reform of Pre-trial Detention and Legal Aid Service Delivery in Nigeria to respond to the problem of large numbers of prisoners being held in pre-trial detention for unreasonable periods of time because of a lack of coordination among the principal criminal justice entities, lack of legal representation for detainees at the point of contact with the police and the lack of a ►

firm statutory limit to the duration of pre-trial detention. The programme did the following:

- worked with the police and the states' justice ministries to establish a case file management system from the moment of arrest, and identified key steps to ensure that a case file moved expeditiously from one agency to another and from one level of administration to another
- established a Duty Solicitor Scheme placing lawyers on 24-hour call at designated police stations to provide legal assistance to suspects
- inspired Practice Directions issued by state chief judges mandating judicial monitoring of pre-trial custodial orders and limiting their duration to nine months
- promoted draft legislation proposing a statutory limit on pre-trial detention of not more than one month

The project was successful in reducing the numbers of people detained before trial and for an unreasonable length of time before their trial was heard. The project lawyers also sought to reduce the supply side of the inflow of detainees into prison by advocacy efforts at police stations, leading to an increase in the number of cases discharged by the police.

Source: *Justice Initiatives: Pre-trial Detention*, Open Society Justice Initiative, 2008, [www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/pre-trial20080513/Justice\\_Initiative.pdf](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pre-trial20080513/Justice_Initiative.pdf) (accessed 14 June 2010)

## 17.4 Access to justice: the right to fair trial

### International Standards

- Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. (ICCPR, Article 14)
- Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. (ICCPR, Article 14.2)

- All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (ICCPR, Article 26)
- (1) Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal. (2) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender. (ACHPR, Article 7)

### What this means in practice

The right to a fair trial starts from the moment a person is suspected of having committed a criminal offence and continues until that person is finally convicted or acquitted. It combines a number of inter-related rights including equality before the law, the presumption of innocence and the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Access to justice should not be viewed as a luxury reserved for the wealthy. Access to justice is a basic human right for everyone regardless of gender, age, religion, caste, creed, class or other status such as sexuality.

### Issues to be addressed by domestic law and policy

#### ■ Presumption of innocence

The presumption of innocence requires that the person charged be considered innocent until the prosecutor, who has the burden of proving the guilt of the accused, proves in a court of law that the person committed the criminal offence 'beyond a reasonable doubt' (or in a civil jurisdiction, according to the 'intimate conviction' of the judge). Thus, in a system that operates fairly, the outcome of a criminal case will depend in part on the quality and

the weight of the evidence. Investigation and evidence gathering is the gateway to the courts and unless it performs adequately, the quality of subsequent justice will be poor. This means that sufficient resources should be allocated towards the process of investigation and evidence gathering. The presumption of innocence needs to be incorporated into national constitutions and codes of criminal procedure.

### ■ Equal before the law

People with learning disabilities and difficulties, and individuals living in poverty are among the many who face daunting challenges in accessing justice.<sup>41</sup> Every accused person has the right not to be discriminated against in the way the investigation or trial are conducted or the law is applied. The presence of bias, favour, or corruption in a court system denies justice and undermines the rule of law.

Many prisoners cannot afford to hire a lawyer and are also often illiterate and unaware of their legal rights. This places them in a particularly vulnerable position; for example they may be at risk of signing statements without a proper understanding of what they contain or of being open to coercion. Corruption within criminal justice systems can also adversely affect the poor; as Sarkin points out 'the poor are disproportionately detained vis-à-vis their wealthy counterparts because they cannot afford the counsel or bribes necessary to secure early release.'<sup>42</sup>

Legal representation is an essential and cost-effective means of realising fair, speedy and transparent criminal justice (see Ensuring the right to representation above). In many countries the right to counsel has long been established in the legal or constitutional framework at least for the most serious crimes, but the extent to which defendants are aware of this right and able to exercise it varies considerably. A central challenge is the chronic under-funding of legal representation despite recognition of its critical importance in both international standards and often national law. Furthermore, defence lawyers may not have access to the same resources as the prosecution in preparation and presentation of their cases. This is contrary to the fair trial concept of equality of arms. Fair trial rights that ensure equality before the law need to be incorporated into national constitutions and codes of criminal procedure.

## 17.5 Effective sentencing

### International Standards

- The purpose and justification of a sentence of imprisonment, or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life. (Standard Minimum Rules for the Treatment of Prisoners, Rule 58)
- The use of non-custodial measures should be part of the movement towards depenalization and decriminalization instead of interfering with or delaying efforts in that direction. (Standard Minimum Rules for Non-custodial Measures, Article 2.7)
- The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate. (Standard Minimum Rules for Non-custodial Measures, Article 8.1)
- Deprivation of liberty should be regarded as a sanction or measure of last resort, and should therefore be provided for only where the seriousness of the offence would make any other sanction or measure clearly inadequate. (Appendix to 1999 Council of Europe Recommendation No. R (99) 22 of the Committee of Ministers to Member States concerning Prison Overcrowding and Prison Population Inflation. Basic Principle I(1))
- The decision to impose or revoke a sanction or pre-trial measure shall be taken by a judicial authority. [Glossary Provision 3: For the purposes of these Rules the term 'judicial authority' means a court, a judge or a prosecutor]. (European Rules on Community Sanctions and Measures, Rule 12)

### What this means in practice

Imprisonment should be a measure of last resort and used only when no other sanction would be proportionate to the seriousness of the offence and the nature of its commission taking into account any aggravating or mitigating factors. When sentencing, account should be taken of the probable impact of the sentence on the individual offender, so as to avoid excessive hardship and to avoid impairing their possible rehabilitation. Sentencing



should be guided by key inter-related principles: proportionality, consistency, freedom from improper discrimination, transparency, efficiency and effectiveness.

## Issues to be addressed by domestic law and policy

### ■ An individualised approach to sentencing

Individualised sentencing involves consideration of multiple factors including the nature of the offence, the likely effects of the contemplated sanction, the personal characteristics of the offender, and any other circumstances in the life of the offender or the community that might be relevant to the choice of penalty. This means that the court should have access to background information about a defendant. No discrimination in sentencing should be made by reason of race, colour, gender, nationality, religion, social status or political belief of the offender or the victim. Factors such as unemployment, cultural or social conditions of the offender should not influence the sentence so as to discriminate against the offender.

In assessing whether a given prison sentence is proportionate to the offence it punishes, judges must take into account not only the seriousness of the offence, but also any mitigating or aggravating circumstances in the individual case. Judges should have the discretion to sentence to a wide range of different sanctions that are appropriate for different offences and offenders as well as for the protection of society. At the same time consistency in sentencing must be ensured amongst judges.

*'... it is desirable that discretionary powers should be vested in judges in order to assist in individualising the application of the law, and make it adaptable to the circumstances of each case. Experience has shown that without discretion, the application of the law becomes mostly harsh and very unjust.'*

Judge Sanji Mmasenono Monageng, of the International Criminal Court, former Chairperson, African Commission on Human and Peoples' Rights and judge of the High Courts of Swaziland and Gambia

Source: *Law and Justice: The Case for Parliamentary Scrutiny*, Inter-Parliamentary Union, Geneva, 2006, p88

In order for individualised treatment to become a meaningful feature of criminal adjudication, policy makers

must work with law enforcement, civil society and social service professionals to develop a wide variety of sentencing options of application to a wide variety of offences and offenders. These options might include mental health treatment and drug orders, non-custodial sentences such as community service, fines, electronic monitoring, curfews, verbal sanctions, judicial supervision, restorative justice programmes and probation programmes supported by other services such as counselling, health care, education and job training.

The range of available sentences for an offence should not be so wide as to afford little guidance to courts on how serious an offence is and it is useful therefore to grade offences according to their relative severity taking account not only of the different forms of sanction (for example suspended sentence, fine) but also the varying degrees of harshness that can be associated with that sanction (for example high or low fines, long or short community orders). Such grading would enable courts to select the non-custodial sentence most appropriate for the individual offender and which also reflects the relative seriousness of the offence.

### ■ A consistent approach to sentencing

The Council of Europe provides useful guidance on enhancing consistency in sentencing.<sup>43</sup> It suggests that one option is to use the technique of 'sentencing orientation'. This indicates ranges of sentence for different variations of an offence, according to the presence or absence of various aggravating or mitigating factors, but also leaving courts with the discretion to depart from the orientations. The 'starting points' technique indicates a basic sentence for different variations of an offence, from which the court may move upwards or downwards so as to reflect aggravating and mitigating factors. These starting points or orientations can be adopted through legislation, guideline judgments by superior courts, independent commission, ministry circular or by guidelines for the prosecution.

Arrangements should be made to ensure that judges and the public are regularly provided with information about sentencing practice. In order to promote consistency in sentencing, judges and magistrates should have the opportunity to attend regular training on sentencing on a sufficiently frequent basis.

### ■ Previous convictions

Although it may be justifiable to take account of an offender's previous criminal record when sentencing, the impact of previous convictions should depend on the specific characteristics of the offender's record. For

example, the impact needs to be reduced if there has been a significant period free of criminality prior to the present offence; the present offence is minor; or the previous offences were minor; or the offender is still young.

## 17.6 Non-custodial sanctions and measures

### International Standards

- The selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, background of the offender, the purposes of sentencing and the rights of victims. (Standard Minimum Rules for Non-custodial Measures, Rule 3.2)
- The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate. (Standard Minimum Rules for Non-custodial Measures, Rule 8.1)
- (1) that petty offences should be dealt with according to customary practice, provided this meets human rights requirements and that those involved so agree, (2) whenever possible petty offences should be dealt with by mediation and should be resolved between the parties involved without recourse to the criminal justice system, (3) the principle of civil reparation or financial recompense should be applied, taking account of the financial capability of the offender or of his or her parents, (4) the work done by the offender should if possible recompense the victim, (5) community service and other non-custodial measures should if possible be preferred to imprisonment... (Kampala Declaration on Prison Conditions in Africa, 1996)
- Adequate services for the implementation of community sanctions and measures should be set up, given sufficient resources and developed as necessary with a view to securing the confidence of judicial authorities in the usefulness of community sanctions and measures, ensuring community safety, and effecting an improvement in the personal and social situation of offenders. (Rec.R(2000)22 on improving implementation of the European rules on community sanctions and measures, Appendix 2, No.19)

### What this means in practice

Sentencing authorities need to have a range of non-custodial sanctions and measures available to them in legislation and reality. These could include mental and physical health care programmes, treatment for substance abuse, job training, judicial supervision, electronic monitoring, community service, probation, conditional or suspended sentences of imprisonment and restorative justice programmes. The international standards are clear that imprisonment rather than non-custodial measures and sanctions should only be used as a last resort when no other options remain. Where imprisonment is considered to be necessary, courts should impose the minimum period of imprisonment that meets the objectives of sentencing.

### Some examples of successful non-custodial sanctions and measures

#### ■ Use of fines

Fines are among some of the most frequently employed alternatives to custody.<sup>44</sup> Some of the issues that need to be addressed in implementing fines as a sanction are: minimising opportunities for corrupt practices, establishing rules in law, and guidelines for judges, obliging courts to consider fines as a first option for certain crimes. Fines should be calculated so that they do not disproportionately disadvantage the poor. For example, a system of day fines may be introduced, following successful practice in countries such as Sweden and Finland. This requires fines to be fixed in relation to how serious the crime is in terms of day-units. Then each unit is valued in proportion to the income and financial situation of the convicted person. Thus, if a crime is valued at 20 'days', each day might be valued at \$US1 for a poor person and \$US20 for a richer person.<sup>45</sup>

#### ■ Drug treatment courts

For offenders with entrenched addictions and related criminal behaviour, drug treatment courts can reduce substance abuse through a combination of treatment and supervision. They were first introduced in the United States, but have since been adopted by countries all over the world. In Brazil, drug courts fall under the umbrella of the Therapeutic Justice Programme.<sup>46</sup> This was introduced to address the overcrowded prison system in a context where the cost of housing a single inmate was more than five times the minimum wage and where recidivism rates were at 85 per cent. The programme assessed offenders holistically, weighing a range of factors, from the

seriousness of the offence to the individual's mental and physical health. Twenty Brazilian states that implemented the programme reported a 50 per cent decrease in drug use among participants.

### ■ Creative collaboration

Many innovative non-custodial sanctions and measures have developed as a result of creative collaboration between law enforcement, social service professionals, academics, and civil advocates. One example is the Changing Lives Through Literature program, which allowed selected and assessed, high risk offenders to choose to participate in a literary seminar rather than serve a prison sentence.<sup>47</sup> The course was led by a university professor, and monitored by a court representative. Offenders read classic fiction and poetry, and the instructor led discussion on the themes represented in the text, helping participants to see the relevance of those themes to their own lives. The programme has been introduced in several states in the United States and a pilot programme was launched in the United Kingdom. Several studies have indicated that programme participants are more than 50 per cent less likely to re-offend than their counterparts who serve prison sentences.

### Intensive supervision with electronic monitoring in Sweden

Sweden adopted a system of intensive supervision with electronic monitoring during the 1990s. At the offender's request, the regional prison and probation management can currently commute the implementation of a prison sentence of up to six months to one of intensive supervision in the community with electronic monitoring. Over 90 per cent of such requests are granted and the satisfactory completion rate is equally high. A careful plan with time schedules is drawn up by the probation branch and allows for time to be spent at work, in an education or crime prevention programme or other approved activity. On average about 40 hours per week are spent under intensive supervision in the community. Family members are informed of the conditions applying and must agree to accept them. In addition prisoners serving a sentence of two years or more may apply to serve up to four months before their date for (automatic) conditional release under ►

intensive supervision with electronic monitoring. The Swedish system differs from those that use electronic monitoring only to maintain the offender in house arrest. Monitoring is carried out principally by means of an electronic transmitter bracelet device. In addition, contact persons at the sites of permitted activities monitor for illicit absence and report to the probation branch. Probation officers make unannounced visits to the offender's home to ensure that the prohibition on the use of alcohol or drugs is maintained.

Overall, Sweden is reported to have found the measure a positive one. Since intensive supervision necessarily involves restrictions of personal choice and liberty, those sentenced to electronic monitoring and their family members may experience some of the restrictions as stressful. However, the advantages of intensive supervision outweigh the disadvantages that imprisonment entails. The initial investment in the electronic equipment is relatively costly but over time the running costs are far less than those required for the enforcement of imprisonment. Providing that a sufficient number of offenders sentenced to imprisonment can be successfully diverted to intensive supervision in the community with electronic monitoring, there can be a reduction in the size of the prison population without ignoring other requirements of the criminal justice process.

Source: Swedish Prison and Probation Service

### ■ Restorative justice

Restorative justice programmes which facilitate communication, explanation, apology and reconciliation can help to hold offenders accountable, support healing for victims, provide an opportunity for community members to take some control over crime, reduce re-offending and promote the peaceful re-entry of the offender in the community.

They can be introduced for adults:

- as part of police adult diversion process
- pre-sentence (after a guilty plea but before sentencing)
- post-sentence (in the parole of offenders and as part of re-entry into the community)

Several African countries, including South Africa and Botswana, observing the restorative capabilities of customary law in local communities, have recently begun to incorporate traditional courts into state-run justice systems. These long-standing local dispute resolution forums are usually run by community leaders in community justice proceedings that emphasise reconciliation, restitution, and settlement. In 2008 the South African government, recognising the authority that such courts have for some members of their community, and their superior efficiency for certain types of disputes, passed the Traditional Courts Bill. The Bill acknowledges the legitimacy of traditional courts, and sets out various provisions for integrating them into the nation's existing judicial and constitutional framework.

Evidence suggests that victims value restorative justice programmes and that they can be effective in reducing re-offending for certain types of offences and offenders. One study showed that restorative justice was far more effective in dealing with crimes of violence than with other offences such as theft from shops, because the offender was confronted with the very obvious harm that he or she had inflicted on the victim.<sup>48</sup>

Restorative justice programmes are also increasingly being used with young offenders as an alternative to formal punishment and the associated stigmatisation. In Northern Ireland restorative justice is integrated as the main measure to deal with under-eighteens who commit offences. As a result, child prison numbers have dropped, and there is a recorded 90% victim satisfaction rate.<sup>49</sup> Many restorative justice programmes have developed completely outside the criminal justice system, in schools or in the community, and the techniques are based on the same kind of mechanisms that are used to deal with infractions of school rules, such as playground fights, bullying, minor theft or extortion and vandalism.

### Legislative provisions that support restorative justice processes in New Zealand

A number of legislative reforms were passed into law in New Zealand that support and recognise restorative practices:

- **Sentencing Act 2002 which states the court 'must take into account any outcomes of restorative justice processes' and included ►**

### provisions facilitating restorative justice conferences

- **Victim's Act 2002 which supports restorative justice conferences as a victim's right**
- **Parole Act 2002 requires a Parole Board to give 'due weight' to any restorative justice outcomes when considering the release of prisoners on parole**
- **Corrections Act 2004 which requires the prison system to provide prisoners with 'access to any process designed to promote restorative justice between offenders and victims' where appropriate**

Source: Paper on Restorative Justice presented by Judge D.J. Carruthers, Chairman of the New Zealand Parole Board, to the UN Congress on Crime Prevention 2010

UNODC has produced a *Handbook on Restorative Justice Programmes*, which provides more details.<sup>50</sup>

The UN has also adopted a resolution containing a set of *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* ([www.unodc.org/pdf/crime/terrorism/2002/19eb.pdf](http://www.unodc.org/pdf/crime/terrorism/2002/19eb.pdf), accessed 17 July 2010). To ensure that restorative justice programmes conform to principles of fairness and justice, the Basic Principles stipulate the following safeguards:

**The right to consult with legal counsel:** The victim and the offender should have the right to consult with legal counsel concerning the restorative process and, where necessary, should have access to translation and/or interpretation.

**The right of minors to the assistance of a parent or guardian:** Minors should, in addition, have the right to the assistance of a parent or guardian.

**The right to be fully informed:** Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision.

**The right not to participate:** Neither the victim nor the offender should be coerced, or induced by unfair means to participate in restorative processes or to accept restorative outcomes. Their consent is required. Children may need special advice and assistance before being able to give valid and informed consent.

The application of restorative justice measures is still at the exploratory stage in many jurisdictions. However, the evidence so far is that it can be an important non-custodial sanction, and that law and policy makers have a key role in providing strategic leadership to this process.

### Sentencing circles in Canada

Sentencing circles are conducted in many aboriginal communities in Canada. In circle sentencing all of the participants, including the judge, defence counsel, prosecutor, police officer, the victim and the offender and their respective families, and community residents, sit facing one another in a circle. Circle sentencing is generally only available to those offenders who plead guilty. Discussions among those in the circle are designed to reach a consensus about the best way to resolve the conflict and dispose of the case, taking into account the need to protect the community, the needs of the victims, and the rehabilitation and punishment of the offender.

The sentencing circle process is typically conducted within the criminal justice process, includes justice professionals and supports the sentencing process. A fundamental principle of circle sentencing is that the sentence is less important than the process used to arrive at an outcome or a sentence.

Source: *Handbook on Restorative Justice Programmes*, UNODC, 2006

### Issues to be addressed by domestic law and policy

#### ■ Close involvement of the judiciary

Experience from a number of different countries suggests that it is crucial to have the judiciary closely involved in the design and implementation of non-custodial sanctions and measures. Sentencing is carried out by the judiciary and if judges have no confidence in non-custodial penalties they will not use them. Judges can be involved in many ways, for example, in devising a structure of non-custodial sentencing, in defining the range of cases which should be given a non-custodial sentence or through membership of boards and committees which exercise a supervisory role in relation to the implementation of the penalties. Furthermore, they can be called upon to justify their use of

imprisonment when a non-custodial sentence is available. The provision of information about successful outcomes of non-custodial sanctions and measures can also contribute to their credibility amongst the judiciary.

### Judges explaining reasons for imposing prison sentences in Kazakhstan

In October 2001 the Criminal Collegium of the Supreme Court in Kazakhstan introduced a requirement for judges to explain their reasons in their judgements for imposing a prison sentence, rather than an alternative, if the law provided for both options for the offence committed. This resulted in an initial fall in the percentage of cases where offenders were sentenced to prison. In 2000, 51.3 per cent of sentences were imprisonment. By 2002 this had fallen to 41.8 per cent.

Source: Atabay, T., Laticevschi, V., Vasil'eva, T., *Human Rights and Health in Prisons: A review of strategy and practice*, PRI and The Royal Netherlands Tuberculosis Foundation, 2006, p72

#### ■ Targeting non-custodial sanctions and measures appropriately

A global analysis of the use of non-custodial sanctions and measures found that community sanctions can fail for the following reasons:<sup>51</sup>

- they may come into law but not be used
- when they are used they may not function as true *alternatives* to imprisonment but as an additional sort of punishment adding to the overall volume of criminal sanctions
- they may be introduced without a clear idea of which offenders, who are currently being sent to prison, should be given the alternative sanctions

To avoid these difficulties, targeting is vital. The allocation of individual offenders to specific programmes and interventions should be guided by explicit criteria, such as their capacity to respond to the intervention, their carefully assessed risk to the public or to the staff responsible for the programme or intervention, and the personal or social factors which are linked to the likelihood of re-offending. To this end, reliable assessment tools enabling such allocation should be developed and used.



The rules relating to the supervision and implementation of community sanctions should be flexibly enforced. In the Czech Republic, for example, a programme of new non-custodial sentences was introduced in 2002. Initially this resulted in a reduction in the prison population but after a while a rise in the number of prisoners occurred. This was attributed to the incorrect targeting of non-custodial sentences which resulted in offenders failing to complete community sanctions and therefore being sent to prison or re-offending. The lack of coordination between judges and the Czech Probation and Mediation Service to ensure correct targeting was identified as the main reason for this situation.<sup>52</sup>

### ■ Delivering non-custodial sentences

The way non-custodial sentences are delivered has an impact on their success or failure. All non-custodial sentences that require some form of supervision need an infrastructure of officials to coordinate with the sentencing court, supervise the offenders, monitor the sentencing patterns, and interact with the local community where the offenders live and will carry out their sentence. Non-custodial sentences depend heavily on the consent and support of a wide range of local non-criminal justice agencies. The greater the local involvement the more likely it is that non-custodial sentences will be properly resourced. Without systemised cooperation between social welfare and health services and the justice sector, truly rehabilitative sanctions cannot be implemented.

While adequate staff and finances are essential to the successful implementation of non-custodial sentences, it can be effective to rely on and develop existing structures and staff rather than setting up a completely new system. These structures can include court administrations, municipal authorities, social agencies and voluntary organisations (for example, for the supervision of non-custodial sentences in the community).

### ■ Communication with the public

Communication with the public is essential. Relationships with the public are at the heart of any drive to replace some prison sentences with other penalties. A major function of the agency responsible for implementing non-custodial sentences is to understand the concerns of the public and to reassure them that the work with offenders is well supervised and purposeful and contributes to a safer society.

### ■ Ongoing monitoring

A policy of replacing some prison sentences with community measures is dependent on information being regularly available on sentencing patterns and the use of non-custodial sentences. When the information shows that the policy is not working, for example, because the non-custodial sentences are not being used or are not being used for the right target group, remedial action such as discussions with the judges must be taken by a responsible body.

## 17.7 The death penalty

### Standards relevant to the death penalty

- Every human being has the right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. (ICCPR, Article 6.1)
- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation. (ICCPR, Article 7)
- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. (ICCPR, Article 10.1)
- (1) No one within the jurisdiction of a State Party to the present Protocol shall be executed. (2) Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction. (ICCPR, Second Optional Protocol, Article 1.1, 1.2)
- subsequent order of standards is changed
- The death penalty shall be abolished. No one shall be condemned to such penalty or executed. (European Convention for the Protection of Fundamental Rights and Freedoms, Protocol 13, Article 1)
- The General Assembly... calls upon all States that still maintain the death penalty:... (c) To progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed; (d) To establish a moratorium on executions with a view to abolishing the death penalty. (UN Gen. Assembly Res. 62/149)
- No child shall be subjected to torture, cruel treatment or punishment, unlawful arrest, or deprivation of liberty. Both capital punishment and life imprisonment without

the possibility for release are prohibited for offences committed by persons below 18 years... (Convention on the Rights of the Child, Article 37)

The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction. (American Convention on Human Rights, Protocol to Abolish the Death Penalty, Article 1)

- The death penalty shall be abolished. No one shall be condemned to such penalty or executed. (European Convention for the Protection of Fundamental Rights and Freedoms, Protocol 13, Article 1)
- The willingness... to introduce a moratorium [on executions] upon accession [to the Council of Europe] has become a prerequisite for membership of the Council of Europe on the part of the Assembly. (Council of Europe Parliamentary Assembly Resolution 1097 (1996)).

### What this means in practice

*'Disappointing as it may be, it is not surprising that international law has not been able to proscribe the death penalty. At first sight it might be thought that, since international law enshrines respect for the right to life high in its pantheon of firmly established human rights rules, the death penalty would be seen as an obvious violation of that right. Similarly, the layperson could be forgiven for assuming that the international legal prohibition of torture and cruel, inhuman or degrading treatment or punishment would rule out the death penalty – particularly since it is generally accepted that corporal punishment does fall foul of the prohibition.'*

*Unfortunately, however, logic is not necessarily the determinant of law and international law is no exception. On the contrary, it is a system of law that is heavily influenced by the practice of States. This is because it is a system of law made by States for States, each of which is as sovereign and equal as every other one. This means it is not a 'majority rules' system, but one based significantly on State consent. So, generally rules of international law have to be interpreted in the light of what States actually do or claim the right to do, and as long as so many and such significant States continue to defend their right to retain the death penalty, international law is incapable of declaring the practice illegal.'* ►

Professor Sir Nigel Rodley, member of the United Nations Human Rights Committee and Commissioner of the International Commission of Jurists<sup>53</sup>

While international law does not yet proscribe the death penalty, state sanctioned executions are widely considered to violate the right to life and the right to be free from cruel, inhuman and degrading treatment. There is a worldwide tendency towards abolition of the death penalty, in evidence most recently in the response to the 2008 second UN General Assembly Resolution calling for a moratorium. Similarly, under the Rome Statute of the International Criminal Court, the death penalty is excluded from punishment which the Court is authorised to impose, even though the Court has jurisdiction over extremely grave crimes: crimes against humanity, genocide and war crimes, and in establishing the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, the UN Security Council excluded the death penalty for such crimes. As of 2009, 139 countries had abolished the death penalty either in fact or in practice.<sup>54</sup>

International law requires that safeguards be put in place with regard to use of the death penalty, and restricts the categories of person and crime to which it can apply. In addition, prisoners who are facing the death penalty have the same rights as other prisoners and may not be subjected to torture or other cruel, inhuman or degrading treatment or punishment, including conditions of detention which constitute such treatment.

States are prohibited from executing children (persons below eighteen years of age) and pregnant women. Various international standards exclude the automatic and mandatory imposition of the death penalty and extradition of persons facing capital charges unless the receiving country has given credible assurances that they will not be executed. They call for mothers with young children, persons suffering from any mental or intellectual disabilities and the elderly to be exempted from application of the death penalty. States are urged to abolish the death penalty, to institute moratoria pending abolition and to commute death sentences, to apply the death penalty only for 'the most serious crimes' (which the UN Human Rights Committee has stated may not include economic offences, including embezzlement by officials, political offences, robbery, abduction not resulting in death, 'illicit'

sex and apostasy), progressively to reduce the number of offences for which the penalty may be applied and neither to reintroduce it once suspended nor to extend its scope. In addition, those facing a death sentence must have the right to appeal to a higher jurisdiction, to seek clemency, to benefit from sufficient time following sentence to do so, and to have implementation of the sentence suspended in the meantime.

### Human and financial costs of the death penalty

Research shows that the death penalty does not deter crime any more than does the availability of extremely long prison sentences. Indeed in some cases abolition has coincided with a decrease in crime rates.<sup>55</sup> In Canada, for example, the homicide rate per 100,000 of the population was over one-third lower in 2005 than when the death penalty was abolished in 1976.

Families of the victim do not always prefer the death penalty. Indeed, the interests of the family of the victim may be in direct opposition to those of the prosecutor. The wife of Gus Lamm, Victoria Zessin, was murdered in 1980 when his daughter Audrey was 2 years old. Years later, when the state Pardon Board was considering the perpetrator's request for commutation of his death sentence Gus was not allowed to speak in opposition to the sentence, unlike his sister-in-law, who supported it. 'I felt that what was happening didn't have anything to do with justice, it had to do with politics.' This case and others led Renny Cushing, a New Hampshire state representative and Executive Director of Murder Victims' Families for Human Rights, to initiate a Crime Victims Equality Act, which came into force in New Hampshire in October 2009. 'I had supported victims' rights and victims' compensation legislation in my state... but it wasn't until I started working against the death penalty that I realized there was also a need for another kind of victims' law. I worked directly with some families - and heard stories about others - who were denied the right to speak, or to get information, or to receive assistance from the court-appointed victims' advocate, because they were against the death penalty... It seemed that if you were opposed to the death penalty, you were, in some eyes, forfeiting your identity as a crime victim.'<sup>56</sup>

## State of New Hampshire

*In the Year of Our Lord Two Thousand Nine*

**AN ACT relative to equality of treatment of victims of crime.**

*Be it Enacted by the Senate and House of Representatives in General Court convened:*

**312:1 New Subparagraph; Rights of Crime Victims. Amend RSA 21-M:8-k, II by inserting after subparagraph (t) the following new subparagraph:**

**(u) The right to all federal and state constitutional rights guaranteed to all victims of crime on an equal basis, and notwithstanding the provisions of any laws on capital punishment, the right not to be discriminated against or have their rights as a victim denied, diminished, expanded, or enhanced on the basis of the victim's support for, opposition to, or neutrality on the death penalty.**

**Effective Date: October 6, 2009**

From the newsletter of Murder Victims' Families for Human Rights, 'Article 3', Newsletter 9, Fall 2009/ Winter 2010

The death penalty is extremely expensive to maintain. The costs of death penalty cases, from adjudication through to execution, far exceed those associated with comparable non-death penalty cases.<sup>57</sup> This diverts resources that could be used to provide services for victims and to prevent violent crime. Trials involving the death penalty are longer, and appeals more numerous and complicated. The lengthy appeals process brings with it repeated court appearances, each potentially entailing a revisiting of the original experience for the victim's family. The death penalty prolongs the suffering of the families of both victim and offender, while the prisoners who have received a capital sentence often spend years in a situation of uncertainty, awaiting execution in maximum security conditions which in some cases have been deemed to constitute cruel, inhuman or degrading treatment.

The death penalty would violate human rights even if it were applied with perfect accuracy to only the 'worst of the worst' offenders. The reality is that criminal justice systems are flawed, and it is rarely possible to eliminate the chance of executing an innocent person.<sup>58</sup> A number



of Islamic scholars have argued that this makes the death penalty, as administered today, incompatible with Sharia.<sup>59</sup> In many countries the death penalty is applied arbitrarily, or in the service of oppressive regimes. It is also often applied in a discriminatory fashion, disproportionately affecting racial, religious and linguistic minorities and the poor.

The death penalty is problematic to administer. Many methods of execution used in death penalty states today are obviously brutal, such as hanging, electrocution, and gassing. Some states have tried to reduce the pain involved in execution by using lethal injection. Although this method may provide a less violent experience for the individuals responsible for carrying out the execution, there is considerable controversy over whether or not lethal injection is any less painful for the person being executed, and in countries where it is used there have been several instances of 'botched' executions, involving broken needles, ineffective injections, and unanticipated negative side effects of the lethal drugs. In September 2009, for example, Romell Broom spent two hours on a gurney in the United States as officials tried to find a vein.<sup>60</sup> After 18 attempts the execution was called off. No method of execution will ever be reliably pain free, but regardless of the method used, it is the act of killing itself which is cruel, inhuman and degrading.<sup>61</sup>

### Issues to be addressed by domestic law and policy

General international law envisages the goal of abolition.

States who are serious about preparing for abolition can enact a number of comprehensive measures within their domestic legislation and policy which will facilitate this goal. This includes:

- reducing the number of crimes which are death penalty applicable. Legislation can be reviewed to ensure that the crimes for which the death penalty may be applied are only for the *most serious crimes*;<sup>62</sup>
- extending the categories of person on whom a death sentence may not be pronounced to include mothers and the elderly;
- reviewing legislation and practice (including resources) to ensure that they guarantee to those facing a death sentence the right:
  - to qualified and competent legal assistance at all stages of the proceedings (trial, sentencing and appeal),
  - to legal aid in full equality if the defendant does not have sufficient means,
  - where relevant to consular assistance
  - to be presumed innocent
  - to be tried promptly by a competent, independent and impartial tribunal established by law
  - to appeal to a higher jurisdiction
  - to seek clemency or pardon
  - to have implementation of the sentence suspended while such appeal, clemency or pardon process is pending.
- reviewing practices to ensure that death sentences are not being applied in a discriminatory or arbitrary fashion;
- establishing moratoria on death sentences and executions;
- commuting death sentences (in view of the suffering which may be inherent in the uncertainty of delay) or at least ensuring humane conditions for those under sentence of death;
- where executions do occur, putting in place measures to ensure that they are carried out so as to inflict the minimum possible suffering; and
- taking real steps towards abolition, such as publishing full information on the application of the death penalty, preparing draft legislation, reviewing prison practice with regard to those convicted of the most serious crimes, and engaging in public discussion.

Full abolition of the death penalty can be achieved via recognition in a country's Constitution that this penalty is a violation of the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment.

Pending full abolition, amendments to national law should prohibit:

- mandatory death sentences;
- the execution of juveniles (persons below eighteen years of age), including the execution of offenders who were juveniles at the time of their crime (and where the offender is over the age of eighteen at the time of sentence);
- the execution of pregnant women;

- the execution of persons suffering from mental or intellectual disabilities (both at the time of their offence and at the time of execution); and
- the extradition of persons to countries where they would be at risk of execution.

If the death penalty for an offence is replaced in law with a lighter penalty, any person convicted of that offence should benefit from that lighter penalty.

States should ratify binding international and regional instruments which commit them neither to reintroduce the penalty if abolished nor, if retained, to extend its scope.

This includes:

- International Covenant on Civil and Political Rights
- Second Optional Protocol to the International Covenant on Civil and Political Rights;
- Protocol to Abolish the Death Penalty, American Convention on Human Rights;
- Protocols 6 and 13, European Convention on Human Rights;
- Convention on the Rights of the Child

If the death penalty is introduced or re-introduced, the principle of non-retroactivity should be respected, that is, the offence must have been an offence at the time it was committed and the penalty must have been laid down at the time.

## 17.8 Acting in the best interests of the child

### Selected international standards

- The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation. (African Charter on the Rights and Welfare of the Child Article 17(3))
- States Parties shall ensure that:
  - a No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age;
  - b No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
  - c Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
  - d Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action. (Convention on the Rights of the Child, Article 37)
- A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence. (Convention on the Rights of the Child, Article 40.4)
- In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. (ICCPR, Article 14.4)
- Sufficient attention shall be given to positive measures that involve the full mobilisation of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law. (UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Article 1.3)
- In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of

proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions. (Beijing Rules, Article 6.1)

- The disposition of the competent authority shall be guided by the following principles: (a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of society; (b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum. (Beijing Rules, Article 17.1)
- If juveniles do not comply with the conditions and obligations of community sanctions or measures imposed on them, this shall not lead automatically to deprivation of liberty. Where possible, modified or new community sanctions or measures shall replace the previous ones. (European Rules for Juvenile Offenders subject to Sanctions or Measures, Rule 30.1)

### What this means in practice

When a child comes into conflict with the law, the UN Convention on the Rights of the Child (CRC) is clear that the principle of the best interests of the child applies. This means that police, prosecution service, judges, social workers and lawyers – all those involved in taking decisions about the child – must act in that child’s best interests at all times and treat them in a way which takes into account their age and the desirability of their having a positive future. The Beijing Rules underline that the aims of juvenile justice should be two-fold: the promotion of the well-being of the child and a proportionate reaction to the nature of the offence and to the offender.

International standards specify certain due process guarantees which must be observed in juvenile justice processes and proceedings. Children must be treated within a system that is separate from that of adults from the moment of arrest and diversion (referral to social work or other agencies rather than continuation of formal criminal justice proceedings) should be a priority. Detention must be a matter of last resort, for the shortest time possible and only for the most serious offences. This reflects an understanding that imprisonment interrupts children’s education and moral development and deprives them of family and other essential support at a critical period in their lives.

Many (if not most) juvenile justice systems do not in practice operate in the best interests of the child, and the rights of children in conflict with the law can be severely compromised in a variety of ways. A 2003 Defence for Children International Report found that there are more than a million children in prisons.<sup>63</sup> Children are frequently imprisoned unnecessarily and for longer than is required.<sup>64</sup> The period during which children are most at risk is in police custody, as it is then that detained children are most likely to become victims of torture and other forms of cruel treatment.

### The voice of a child prisoner in Southern Sudan

**A 15-year-old boy answered questions for a mental health assessment as part of a prison reform programme in Southern Sudan (assisted by UNODC). At the time of the assessment he had been remanded in prison for seven months awaiting trial for an offence of minor theft.**

**He had not received any indication of when his trial may be heard nor had any contact with his family since being arrested. He had no access to education, except for basic literacy lessons provided by convicted prisoners to juveniles.**

**He was not able to work in the prison farms as this is only available to convicted prisoners. He explained: ‘who would not be suffering from some mental sickness when locked in here with nothing to do, nothing to keep the mind active and no idea how long I will be in prison as I don’t know how long the sentence to be served is, or even when I will have a date for a trial.’**

Source: UNODC’s Programme in South Sudan, [www.unodc.org/unodc/en/justice-and-prison-reform/projects\\_Sudan\\_real\\_life.html](http://www.unodc.org/unodc/en/justice-and-prison-reform/projects_Sudan_real_life.html) (accessed 14 June 2010)

### ■ Who is a child?

The CRC sets an upper age of childhood at 18 years, unless according to law majority is attained earlier. Other international instruments such as the African Charter on the Rights and Welfare of the Child also use 18 as the age limit for determining when a person loses the right to special protection when in conflict with the law. Ideally, any

juvenile justice system should therefore benefit all those below the age of 18 years.

In some countries, determining whether a person is under 18 years old, or even their identity, is not easy. It is particularly difficult when birth registration systems are not in place or incomplete, and technical means of establishing are not available. In some countries, collecting data on the administration of juvenile justice can be frustrated by the fact that the ages of young offenders are falsified by police trying to avoid this dilemma and/or to avoid the extra work that should be undertaken where juvenile offenders are concerned. The UN Guidelines for Action on Children in the Criminal Justice System require states to ensure the effectiveness of birth registration programmes, but in those instances where the age of the and where the age of the individual entering the justice system is unknown, recommend that measures be taken to ascertain the true age of a child by independent and objective assessment.

The age of the child is also important when determining the question of criminal responsibility; this means the age at which a child can be arrested and go through the justice system. The monitoring body for the CRC has consistently regarded any minimum age of criminal responsibility below 10 years as being too low, and has regularly requested countries to consider raising the minimum age of criminal capacity to 12 years or higher. There is considerable international disparity in where countries have fixed the minimum age of criminal responsibility, ranging from seven years, which prevails in many common law jurisdictions, to ages as high as 16 years in Mozambique and 18 in Belgium.

## Issues to be addressed by domestic law and policy

### ■ Preventing offending

A state's priority is to protect children from the types of social conditions – deprivation, abuse and neglect, discrimination, lack of access to education – that might lead to them breaking the law in the first place. So-called 'status offences' (behaviour that would not be criminally punishable in an adult, for example, not attending school, running away from home) should be decriminalised. National, regional or local strategies should be developed aimed at avoiding or reducing children's involvement in gangs or organised armed violence. In addition, national drug and substance abuse reduction strategies should include specific measures that target children and youth, and there should be social welfare based strategies aimed at reducing the number of

children living or working on the street, assisting families, schools and communities, and preventing children from coming in conflict with the law.

### ■ Rehabilitation at the heart of juvenile justice

A rehabilitative approach is the key to preventing relatively minor juvenile offending from escalating into prolific adult offending. Research shows that juvenile offenders often have multiple problems and difficulties which need to be addressed, such as disruptive or abusive family life, a background of institutionalisation and inadequate support structures, addictions, illiteracy and interrupted education, and poverty. Opponents of the rehabilitative approach to juvenile justice often characterize it as being 'soft on crime.' But evidence increasingly shows that a hostile and punitive juvenile justice system increases recidivism rates among young people, while a system focused on education and social reintegration can reduce them.

### US: Detention Diversion Advocacy Programmes reduce reoffending and save money

Detention, Diversion, Advocacy Programmes (DDAP) in the USA are operated by non-profit organisations specialising in work with children and families. They provide case workers, typically from the child's community, and focus on providing advice combined with intensive support at individual, family and court level. Evaluations of such programmes in various locations in the US showed an overall recidivism rate of 34 percent compared with 60 percent in a comparison group. A rough cost/benefit analysis conducted for the programme in one particular location (Boston) suggested a per diem cost of 70 USD, compared with 225 USD for custody.

Source: *Reducing child imprisonment in England and Wales – lessons from abroad*, Prison Reform Trust, 2009

One way for legislators to promote a rehabilitative juvenile justice system is to decriminalise certain types of behaviour, particularly minor infractions and status offences. For example, in 1999, in response to rising juvenile delinquency rates, China passed the Juvenile Delinquency Prevention Law (JDPL) which removes status offences from the ambit of the criminal legal system

altogether, and characterises a range of low-level offences, such as truancy, vandalism, gambling, and petty theft, as ‘minor delinquencies’. It stipulates that these types of behaviour should be handled by the parents and the community. The JDPL also creates a set of sub-categories among the more serious offences, distinguishing those that require rehabilitation but not punishment from those that require both rehabilitation and punishment. Gang fights, prostitution, drug abuse and weapons possession are all examples that fall into the ‘rehabilitation but no criminal responsibility’ category. For offences in this group, the JDPL designates administrative, rather than judicial, procedures to increase the level of supervision and educational discipline in the juvenile’s day-to-day life.<sup>65</sup>

### The Missouri Model

**In the United States, the state of Missouri decided to address a juvenile delinquency crisis in the 1980s through a radical reform of their juvenile justice system. Today, the majority of young offenders in Missouri are diverted prior to adjudication, or referred through the judicial process to social programmes designed to meet their particular needs. These include special education classes, substance abuse programmes, and counselling and mental health treatment.**

**Institutional care is reserved for only the most difficult cases, and detention centres focus exclusively on improving the lives of the young people who are sent there. All detention centres are small, with a high staff-to-student ratio allowing for individualized attention. Every child is assigned a personal case manager who advocates for them both within the system and also after they leave it. This approach ensures continuity of care, and supports the children during the often difficult transition back into the community. The facilities themselves are friendly and open, resembling college dormitories. Every aspect of life in Missouri detention facilities – from education to psychological counseling to recreation – is designed to be therapeutic. The ‘Missouri Model’ has an indisputably successful track record. Long-term and short-term recidivism rates for alumni of the Missouri system are drastically lower than those for all other states in the nation. In many of the most** ►

**punitive states, three-year recidivism rates hover at around 50 per cent, whereas in Missouri all but about 10 per cent of system graduates avoid re-offending. The cost of running the Missouri system is also less than half the cost of juvenile systems in more punitive states.**

*Source: Handbook on Restorative Justice Programmes, UNODC, 2006*

### ■ Diversion: the keystone of juvenile justice

Diversionary measures encourage children to be accountable for their actions in a less formal and more local setting which they can better engage and identify with, and understand. The majority of children commit only minor offences, such as shoplifting or property offences, to which custody is clearly a disproportionate response. However, the use of diversion need not be limited to minor offences.

From the moment of arrest, law enforcement officials or other relevant agencies (such as social workers or child welfare officers) endeavour to divert the matter away from the formal justice process. Ideally, they receive training and qualifications in working with children in conflict with the law. They [deletion] have access to written guidelines outlining when they can exercise their discretion to divert cases. They have access to a variety of services and resources in the community. The schemes to which juveniles are diverted offer responses tailored to their particular needs, and are not punitive in nature.

Diversion should help children to continue with their education. In Afghanistan, for example, a non-residential Juvenile Rehabilitation Centre was established in 2003 in Kabul.<sup>66</sup> This open centre provides daytime education and vocational training for children in conflict with the law as a means of pre-trial supervision and as a non-custodial sentencing option. Children might return to their families at night, but spend the day at the centre, where they receive supervision and support services.



### Criteria for diversion to be used for children in contact with the law

These criteria are taken from the UN Committee on the Rights of the Child General Comment Number 10: Children's Rights in Juvenile Justice:

- The child must admit guilt to the offence in question and freely and voluntarily give consent in writing to the diversion – care must be taken to minimise the potential for coercion and intimidation at all levels in the diversion process.
- States authorities should consider the consent of the child's parents, particularly when the child is below 16 years of age.
- The law should contain specific provisions that indicate in which cases diversion is possible.
- Police, prosecutors, and other agencies who make decisions on these provisions should be regulated and reviewed.
- The child must have the opportunity to seek legal or other assistance on the diversionary measure offered to him or her.
- The completion of any diversion by the child should result in a definite and final closure of the case.

### ■ Children and judicial proceedings

When diversion is not possible, or when court intervention is in the child's best interest, judicial proceedings should be flexible and informal to accommodate the circumstances and characteristics of the individual child. Law enforcement officials should take a holistic approach and work with the child's family members and with community social services. They should ensure that legal proceedings do not interfere with the child's education and development, and address any mental or physical health issues the child may have.

Ideally, states should maintain separate systems for juvenile justice distinct from the adult criminal justice system. Where this is impossible in the short term, states should create a separate legal and procedural framework for handling juvenile cases.

Guidelines for juvenile adjudication and sentencing include the following:

- Privacy provisions to shield the proceedings and their outcome from the public and the press.
- Support for the child's right to participate fully in all aspects of the proceedings, including the availability of court appointed counsellors who work with the child's defence lawyer to secure outcomes that will be in the child's best interests.
- A presumption against pre-trial detention.
- Absolute prohibitions on certain punishments, especially the death penalty, and life imprisonment without the possibility of parole.
- Detention should be a matter of last resort and only for the shortest possible period of time. Any disposition of a juvenile case should have the goal of promoting the child's rehabilitation, and should take into consideration age and gender, any other special needs and family situation.
- Adjudicators should take these same factors into account when, in exceptional cases, assigning any kind of punitive sentence, which must be proportionate to the gravity of the offence.
- Where children do not comply with the terms of their measure or sentence, return to court for imposition of custody should not be the automatic response.

### Canada: Constructive responses to breaches of community sanctions

In Canada, 20% of custodial sentences were given in response to breaches of community sentence conditions, often resulting in children being imprisoned for behaviour that would not normally entail a criminal charge. Reducing this automatic reaction became a key element in reducing the numbers of children in custody. A feature of the 2002 Youth Criminal Justice Act was a special provision that a first breach of a community sentence could not result in custody. Published with the legislation were practitioner guidelines that encouraged, also in the case of multiple breaches, careful review of the conditions attached to children's community sentences. They reasserted the aim of addressing children's welfare needs and the need to focus on more effectively promoting ►

compliance. Reviews are held in court, with child and parent/guardian participation.

Source: *Reducing child imprisonment in England and Wales – lessons from abroad*, Prison Reform Trust, 2009

### Lao PDR Village Mediation Units

As part of a larger children's justice project to promote diversion, Save the Children Fund UK and the Ministry of Justice in Lao PDR supported the establishment of Children's mediation units to operate at the village level. These units mediate in children's cases which have been brought by the victims, local police and parents. Mediation will not take place if children do not admit to committing the offence. If the offence is too serious to be dealt with by way of mediation – murder, rape, extreme violence for example – it will be referred to the police.

A Central Management Team comprising officials of the Ministry of Justice oversees the project on behalf of the Minister. At the provincial level, there is a Provincial Monitoring Committee and a Provincial Operations and Training Team; at the district level, it is the District Implementation and Monitoring Committee. These bodies are made up of a cross-section of senior members of the criminal justice system, for example, the judiciary, police, prosecutors' office, mass organisations of the Lao Women's Union and the Lao Youth Union and other relevant ministries.

Source: *Improving the Protection of Children in Conflict with the Law in South Asia*, UNICEF and Inter-Parliamentary Union, 2007

### ■ Children below the age of criminal responsibility

Responses to the actions of children in conflict with the law who are below the age of criminal responsibility should not be punishment by another name and deprive the child of the protection of the law. The Committee on the Rights of the Child has repeatedly criticized so-called protective responses, such as placement in social welfare centres, where this is not a measure of last resort, is punitive and not adequately regulated in law. As with children above the minimum age of criminal responsibility, responses which are oriented at treatment while the child remains in a domestic environment and attends school have been shown to be the most effective.

# 18 Rehabilitation and imprisonment

## 18.1 Basic conditions for effective rehabilitation

### International standards relevant to rehabilitation

- No one shall be subjected to torture or to cruel, inhuman and degrading treatment or punishment. (UDHR, Article 5)
- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. (ICCPR, Article 10)
- The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. (ICCPR, Article 10.3)
- The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility. (Standard Minimum Rules for the Treatment of Prisoners, Rule 65)
- All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality (Basic Principles for the Treatment of Prisoners, Principle 6)
- The medical services of the institution shall seek to detect and shall treat any physical or mental illnesses or defects which may hamper a prisoner's rehabilitation. All necessary medical, surgical and psychiatric services shall be provided to that end. (Standard Minimum Rules for the Treatment of Prisoners, Rule 62)
- Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation. (Basic Principles, Principle 9)
- All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation. (Standard Minimum Rules for the Treatment of Prisoners, Rule 10)
- The treatment of prisoners should emphasise not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution

in the task of social rehabilitation of the prisoners.

There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of the prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners. (Standard Minimum Rules for the Treatment of Prisoners, Rule 61)

- Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his family as are desirable in the best interests of both. (Standard Minimum Rules for the Treatment of Prisoners, Rule 79)

*'[T]he fact is that our clients themselves have considerable resources to influence outcomes. And that, in the end is what all prison and probation work comes down to – to mobilise our clients' resources to live a better life both for themselves and for the good of the community'.<sup>67</sup>*

### What this means in practice

Depriving someone of their liberty is in itself an extreme punishment. The UN Standard Minimum Rules for the Treatment of Prisoners make it very clear that the purpose and justification of a sentence of imprisonment is to protect society against crime and not to inflict further punishment. This can only be achieved if the period of imprisonment is used to ensure, as far as possible, that upon returning to society the released prisoner is willing and able to lead a law abiding and self-supporting life. Rehabilitation in prison therefore requires safety, adequate medical care, work, involvement in educational, cultural, and recreational activities, contact with family, friends and the outside world. This is not possible where there is overcrowding, disproportionate numbers of prisoners for the available staff, and all the other ills which accompany overcrowding. Only by greatly reducing prison numbers does it become possible, even for a country with many resources, to make prisons more effective institutions for rehabilitation and resettlement.

Rehabilitation in prisons also means that the individual needs of prisoners are addressed by programmes covering a range of problems, such as substance addiction, mental or psychological conditions, anger and aggression, any one of which, or in combination, may have led to an offence being committed. Essential also are staff who are trained



and required by their terms of employment to engage with and seek the cooperation of individual prisoners, and to prioritise facilitation of regular contact between prisoners and their family, friends and the wider community.

One of the many challenges of effective rehabilitation is that prisoners are often drawn from groups of society who are extremely poor, have disrupted and chaotic family lives, have been unemployed, with low levels of education, lived on the streets, been addicted to illegal drugs and alcohol, and have no reliable social network. If the goal of rehabilitation is given inadequate attention by prison authorities and accorded low priority risk factors will not be addressed and reoffending will be extremely likely.

Short custodial sentences make rehabilitation logistically almost impossible and therefore should be avoided.

### Issues to be addressed by domestic law and policy<sup>68</sup>

#### ■ A safe environment

Rehabilitative activities will not be productive in a prison climate dominated by violence, threats, blackmail, hostile staff-prisoner relations, and the circulation of drugs, alcohol and even weapons. It is very important, therefore, that prisons are safe and secure places where there are opportunities for prisoners to be successfully engaged in work and rehabilitation programmes, and where prisoners are not under threat from other prisoners for doing so.

#### ■ Rehabilitation and security

The maintenance of security in prison needs to be based on dynamic security. This means the development by staff of positive relationships with prisoners based on firmness and fairness, in combination with an understanding of their personal situation and any risk posed by individual prisoners. The European Prison Rules further recommend that prisoners be 'allowed to discuss matters relating to the general conditions of imprisonment and shall be encouraged to communicate with the prison authorities about these matters.'<sup>69</sup>

Concerns over security should not be allowed to obscure the rehabilitative purpose of incarceration. Studies show that prison regimes geared towards rehabilitation actually have fewer problems with security and disorder. A significant proportion of the resources allocated to the prison system should therefore be directed towards the creation of facilities and programming that will contribute to the betterment of inmates, increasing their chances of successful re-entry. These may include treatment programmes for mental health

issues, and substance abuse problems, education and vocational training, job placement, and family counselling. It may also be tailored to prisoners with particular needs.

### Denmark: Civil society mentors help young foreign prisoners prepare for release

In Danish prisons a mentor programme for young foreign prisoners was introduced in 2000 to respond to the particular difficulties and isolation that foreign prisoners face on re-entry.<sup>70</sup> The mentor is an adult who is not part of the prison system and whose task is to support the released person just before and just after release.

Source: Handbook for Prisoners with Special Needs, UNODC, 2006

#### ■ An individualised approach from the first day

Rehabilitation should begin from the first day of the sentence, and support should continue until the prisoner has discharged their sentence entirely. From the point of reception in prison, prison authorities should gather basic personal facts, including previous convictions and the current offence. This information should be the foundation for an individual sentence plan that is devised in consultation with the prisoner. Techniques of rehabilitation vary, from educational and vocational training, to helping learn a life skill for use outside the prison, to psychological and even physical rehabilitation. Drug-addicted prisoners should be able to receive appropriate treatment both inside prison and, if necessary, upon release.

### Council of Europe and the 'normalization principle'

Prison life should be arranged so as to approximate as closely as possible to the realities of life in the community (the normalization principle)

Council of Europe Recommendation Rec (2003) 23 of the Committee of Ministers to Member States on the management by prison administrations of life-sentence and other long-term prisoners

## ■ Adequate prison conditions

Living conditions in a prison are among the chief factors determining a prisoner's sense of self-esteem and dignity.

**In a 2007 report on prison conditions in Georgia, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) cautioned that prisoners who experienced the 'deplorable conditions' in Prison No. 5 in Tbilisi 'will return to society psychologically shattered and physically diseased.'**<sup>71</sup>

(The prison was demolished in 2008.)

Prisoners who experience good conditions of detention will be far more willing and able to respond to rehabilitative programmes. Basic requirements include: adequate accommodation, hygienic conditions, clothing and bedding, food, drink and exercise and a safe, secure environment. Being allocated to a prison which allows regular visits from family and friends, and access to rehabilitative activities is also important.

It is essential for the psychological and physical health of prisoners that they do not spend most of their time in close confinement. The CPT stresses that a satisfactory programme of activities involving for example work, education and sport is of crucial importance for the wellbeing of prisoners. The goal is to ensure that prisoners spend eight hours or more outside their cells, engaged in purposeful activity of a varied nature. This should apply to all prisoners (except for those in segregation units due to disciplinary offences, who should have at least the internationally agreed minimum of one hour's time spent out of cell, and ideally more).

## ■ Clear statement of purpose

While legislation and standards governing prison regimes are established at the national and international levels, their implementation often falls to local and regional prison management and staff who have day-to-day responsibility for providing adequate conditions of detention. The prison service should be guided by a clear set of principles to ensure that the issue of rehabilitation is properly understood and implemented at ground level.

### Statement of purpose of the Hong Kong Correctional Services

**We protect the public and reduce crime, by providing a secure, safe, humane, decent and healthy environment for people in custody, opportunities for rehabilitation of offenders, and working in collaboration with the community and other agencies.**

Source: Website of the Hong Kong Correctional Services [http://www.csd.gov.hk/english/abt/abt\\_vis/abt\\_vis.html](http://www.csd.gov.hk/english/abt/abt_vis/abt_vis.html) (accessed 28 June 2010)

### Statement of purpose of the Singapore Prison Service

**As a key partner in Criminal Justice, we protect society through the safe custody and rehabilitation of offenders, co-operating in prevention and aftercare.**

Source: Website of the Singapore Prison Service [http://www.prisons.gov.sg/about\\_us.html](http://www.prisons.gov.sg/about_us.html) (accessed 28 June 2010)

## ■ Provision of targeted rehabilitative activities

Research shows that steady employment is one of the most important factors preventing re-offending. In principle, work provided for prisoners should include vocational training and increase offenders' chances of employment after release: care should be taken that prison labour is not exploited and the profit motive does not override the aim of increasing the earning capacity of prisoners after release. In countries with limited resources the emphasis is likely to be on work to meet the daily needs of prison life, such as growing food and making soap or blankets. Although prisoners' work is often repetitive and gives them no useful skills it can still benefit them if it is paid. Prison wages can vary from the equivalent of the national minimum wage to an amount that will buy one packet of cigarettes.

Civil society organisations can also help organise activities to develop the skills of prisoners. For example, in Turkey a voluntary organisation, Tur Hiz, comprising commercial interests and vocational trainers, works

with the prison administration to provide training for prisoners in areas where there is currently a shortage of skilled labour.<sup>72</sup> The training in commercial cleaning is particularly linked to the growing tourism industry. Volunteer trainers provide training in prisons to industry standards; practical placements are then provided in hotels and the offices of the provincial government.

### ■ Adequate medical care

Prison populations contain an over-representation of members of the most marginalised groups in society, people with poor health and chronic untreated conditions, mental health problems, the vulnerable and those who engage in activities with high health risks such as injecting drugs and commercial sex work. Women in prison are particularly vulnerable as they come in disproportionate numbers from backgrounds of violence and abuse. There are particular aspects of healthcare which are important in the prison context. The infection rates for TB, HIV and hepatitis B and C, for example, can be up to a hundred times higher in prisons than in the outside community.<sup>73</sup>

By its very nature, imprisonment can have a damaging effect on both the physical and mental well-being of prisoners. In many countries mentally ill people are held in prison rather than in hospital, sometimes in padded cells or in restraints. Suicide rates in prisons can be disproportionately high. Healthcare in prisons in many countries is provided by a health service responsible to the prison administration and having little contact with the Ministry of Health. Such health services are often criticised for low standards, isolation from the mainstream health services, and lack of independence.

*'In many ways prisons remain a backwater of primary care. There are huge amounts of unmet health needs existing in prisoners. They include addiction, mental illness, and the consequences of trauma and infection, particularly blood borne viruses. The prevalence of hepatitis C infection in the prison population is huge. The defining nature of offending correlates closely with sociopathic personality disorder, recidivism and social exclusion. Yet the "inverse care law" applies as much to prisons as to other parts of society – if not more so. The practical problem of arranging surgeries and enabling incarcerated patients to attend is well recognised. The security implications of escorting a patient to hospital for planned or urgent care is a recurring issue.'*

Dr Marcus Bicknell, a UK prison doctor talking about his work

Source: Internet forum run by government on the role of the prison officer <http://forums.parliament.uk/prison-officers/index.php?read,1,119,page=2> (accessed 27 November 2009)

Ensuring that prisoners maintain good health is essential for the success of public health policies, as disease in prisons is easily transferred to the public via staff and visitors, with almost all prisoners eventually returning to the community and potentially transmitting infections to others. States have a clear responsibility both to provide healthcare and to establish conditions which promote the wellbeing of both prisoners and staff. Many countries cannot provide healthcare of a reasonable standard to the general populace and provision for prisoners is less of a priority. However, even in these circumstances prisoners are entitled to the best possible healthcare free of charge. Any medical treatment provided in prisons should be at least comparable to what is available in the outside community.<sup>74</sup>

*'The CPT is aware that in periods of economic difficulties sacrifices have to be made, including in penitentiary establishments. However, regardless of the difficulties faced at any given time, the act of depriving a person of his liberty always entails a duty of care which calls for effective methods of prevention, screening, and treatment.'*

European Committee for the Prevention of Torture, 11th General Report on the CPT's activities 2001

Reforming healthcare in prisons can have a positive impact on all aspects of prison life: it can improve living conditions generally; it can open prisons up to working more with civil society; it can lead to increased cooperation with the Ministry of Health and national health programmes; ensure continuity of care; and can increase the chances of success of rehabilitative programmes. Improvements in prison health can also lessen workplace stress for prison workers, improve job satisfaction and reduce turn-over. Dr Marc Danzon of the WHO has said that: *'It is unacceptable that we allow prisons to encourage unhealthy practices meaning that people leave prison in poorer health than when they arrived. This lowers their chances of reintegrating into*

*society and spreads infectious diseases beyond the prison walls. Work by countries to protect the health of prisoners helps not only individuals but the whole of society.*<sup>75</sup>

### ■ Standards of care for the mentally ill

Prison populations have a disproportionately high rate of people suffering from mental or behavioural disorders. Many of these disorders may be present before admission to prison, and prison may further exacerbate them. Others may develop during imprisonment. Studies carried out in women's prisons in India have indicated that women prisoners are more likely than men to develop mental health issues and that at least a third of women prisoners suffer from one or other mental disorder after coming to prison. One important recommendation of these projects was counselling by trained persons to both prevent and address mental health issues.<sup>76</sup>

Prisons may undermine mental health through factors such as overcrowding, violence, enforced solitude, lack of privacy or insecurity about future prospects. Good prison management should focus on detecting, preventing and treating mental disorders. Prisons can provide appropriate treatment and access to acute care in psychiatric wards of general hospitals. They can also, among other things, provide psychosocial support, train staff, educate prisoners and ensure that they are included in national mental health plans. There are a number of benefits to responding to mental health issues in prison. Not only will such a response improve the health and quality of life of the prisoner and the prison population in general, but addressing mental health issues can also relieve some demands on staff forced to deal with prisoners with unrecognised or untreated mental health issues.

### ■ Standards of care for drug addicts

Drug addiction in prisons can be widespread: for example it is estimated that half of the EU's prison population has a drug-use history.<sup>77</sup> For many prisoners a return to drug use and regular offending on release is a common outcome. Addressing the needs of prisoners with drug problems is therefore a critical challenge for their rehabilitation in terms of both public health and crime prevention policy. At best prison can be an opportunity to encourage drug users to address their addiction. Resources may be provided for adequate treatment programmes and services which could include information; screening on infectious diseases; treatment for drug dependence; and preparation for release. Effective after care is essential if this investment in prison-based treatment is to work. The availability of treatment and social care on release is imperative.

## Health protection in prisons as an essential part of public health – The Madrid Declaration

At a meeting held in Madrid, Spain, in October 2009 and attended by representatives of 65 countries, national and international agencies, and experts in prison and public health, urgent need was recognized for the following measures in relation to all prison systems:

- measures to use alternatives to imprisonment where possible and to reduce overcrowding;
- counselling, screening and treatment programmes for infectious diseases, including HIV/AIDS, tuberculosis, hepatitis B and C and sexually transmitted infections;
- treatment programmes for drug users, according to assessed needs, resources and national and international standards;
- harm reduction measures, including opioid substitution therapy, needle and syringe exchange, provision of bleach and condom distribution;
- availability of post-exposure prophylaxis and prevention of mother-to child transmission;
- guidelines on the hygiene requirements necessary for the management of communicable diseases in prisons and other infections and the prevention of nosocomial infections;
- guaranteed throughcare for prisoners upon entry and after release from prison, in close collaboration with stakeholders and local health services;
- mental health support, especially to prisoners suffering from communicable diseases;
- training of all prison staff in the prevention, treatment and control of communicable diseases.

Source: World Health Organization Regional Office for Europe, *The Madrid Recommendation: Health protection in prisons as an essential part of public health*, WHO, 2010

## ■ Contact with the outside world

Ensuring that prisoners have sufficient contact with the world outside prison is essential to alleviate feelings of isolation and alienation, which hinder rehabilitation and social reintegration. Allowing prisoners as much contact as possible with their families and friends will help sustain relationships, contributing to an easier transition from prison to society on release. In some countries with inadequate resources for prison activities, family and community links may be the main way to reduce the harmful effects of imprisonment and promote reintegration. All prisoners, pre-trial and sentenced, are also entitled to legal advice, and the prison authorities are obliged to provide them with reasonable facilities for gaining access to such advice and facilities for consultation.

Placing importance on the maintenance of contact with family places some demands on prison authorities: first of all prisoners should be sent to prisons near to their homes and families so that they can have family visits in as confidential a manner as possible. Women prisoners often take prime responsibility for childcare and the damage of being separated from their children should be mitigated by ensuring they maintain a relationship with their children. Because there are fewer female prisoners there are fewer single-sex prisons for women. Women who are held in single-sex prisons are therefore more likely to be held long distances from their families and communities than men, making visiting and the maintenance of family ties more difficult. This is especially problematic for women who were the sole carers of dependent children before their imprisonment. Juvenile prisoners also need to preserve relationships with their families and others outside. Forms of contact other than visits are also important including being able to send and receive correspondence.

Some examples of good practice in encouraging contact with the outside world:

- In July 2007 the National Human Rights Commission of Mexico announced that the city's prison system had allowed the first conjugal visit to a prisoner with a sexual orientation other than heterosexual, in line with the Commission's recommendations. In Mexican prisons prisoners are allowed to receive conjugal visits and most do not require the visitor to be married to the inmate.<sup>78</sup>
- In Rajasthan and some other states in India open village-type prisons have been established for long-term prisoners who have served a part of their sentence and have met the criteria for being moved to open prisons. They live in these 'open camps' in individual

dwellings with their families, and go to work either in the camp or in the neighbourhood as, for example, doctors, decorators, teachers, shop-owners and café owners. The children of these prisoners are successfully integrated into local community schools.<sup>79</sup>

- The Prisons Department in Singapore introduced its first in-prison tele-visiting unit in 2001. The scheme was designed to help relatives who live too far away from the prison or who for other reasons had difficulty visiting.<sup>80</sup>

### Queensland, Australia establishes video conference facilities to give Aboriginal prisoners access to their remote home communities

#### Procedure – Telephone and video-conference calls for offenders

##### 5. Personal video-conference calls

##### 5.1 General

##### Refer CSA s. 51

**Access to video-conference calls may be approved by the general manager for the purposes of helping approved offenders maintain relationships with family members who would otherwise be required to travel long distances to visit the offender. For example, access may be granted to assist in the maintenance of family relationships and address the special needs of Aboriginal and Torres Straits Islander offenders.**

Source: Website of the Queensland (Australia) Correctional Services [www.correctiveservices.qld.gov.au/Resources/Procedures/Offender\\_Management/documents/ofmpropriestelvidserv.shtml#5](http://www.correctiveservices.qld.gov.au/Resources/Procedures/Offender_Management/documents/ofmpropriestelvidserv.shtml#5) (accessed 28 June 2010)

## ■ Building and maintaining relationships for women with babies and young children

Non-custodial sentences for women, and in particular pregnant women and women with dependent children, should be preferred wherever possible and appropriate. Custodial sentences being considered only in the rare cases when the offence is serious or violent, the woman presents a continuing danger, and after taking into account the best interests of the child or children (while ensuring that appropriate provision has been made for the care of



such children). However, some women spend part or all of a pregnancy in prison and give birth while still serving their sentence, and in a number of jurisdictions mothers keep children with them in prison, either by choice or necessity. The bonding of infants with their primary carer is essential for long term emotional development. This means that the mother and child should be in a unit where they can live together on a continuous basis and under as normal conditions as possible. Special arrangements must be made to support mother and child before the time comes for release, both in relation to children who remain with their mothers and those for whom other temporary or permanent arrangements are made.

The age at which children have to part from their imprisoned mothers is difficult to determine and is to be decided on the basis of the best interests of the child. Any decision is a balancing act between the adverse effect on children of growing up in the abnormal, and sometimes unhealthy environment represented by prison, and the importance of facilitating the bond between mother and child in early age which is widely agreed to be important for a child's emotional development. Such a decision should involve social welfare authorities (where available) and be based on carefully developed and transparent procedures.

### **Latvia: Children's home for children of mothers in prison**

The women's prison is semi-closed and there is a children's home located in a separate building on prison grounds, where children stay until the age of four. Imprisoned women are allowed to stay with their children all the time until the age of one, and then are allowed to meet their children twice a day for 1.5 hours. Once children reach the age of four they are either placed in the care of relatives or in other children's homes, which house eight-10 children on any given day. Within a project funded by the Soros Foundation-Latvia, the children's home cooperates closely with the Social Paediatric Centre and has started an innovative parenting skills programme for women prisoners.

Source: *Handbook for Prison Managers and Policymakers on Women and Imprisonment*, UNODC, 2008

### **Russia: Progress in the situation of imprisoned mothers, but lack of work and accommodation pose barriers upon release**

In two mother and baby units out of the 13 which exist in the Russian Federation, convicted women prisoners live in joint accommodation with their babies and may do so until the baby reaches the age of three (with some flexibility if the mother is due for release within a year). After this the child goes into the care of family members or the appropriate welfare authorities. However, upon release women who wish to be reunited with their children face barriers as they are required to prove that they can provide financial support and accommodation. This makes planning access to work and accommodation all the more important for the prison departments responsible for assisting women in their rehabilitation and reintegration.

Source: Alla Pokras, Penal Reform International, Presentation to the conference *Gender, Geography and Punishment in Comparative Perspective*, held in Oxford (UK), as part of a programme funded by the UK Economic and Social Research Council, 23 June 2010

### **Life imprisonment and rehabilitation**

In some jurisdictions, for certain offences, it is open to the court to impose a sentence of life imprisonment that means the convicted person remains in prison for the rest of their life. International standards require that this be mediated by the possibility of applying for conditional release, typically once a minimum period has been served; a multi-agency parole board will usually make a decision on release taking into account the risk that the prisoner poses to the public. The Council of Europe recommends that the cases of all prisoners (including long-term and life-sentenced prisoners) should be examined as early as possible to determine whether or not a conditional release can be granted, and that such a review of life sentence should take place, 'if not done before, after eight to fourteen years of detention and be repeated at regular intervals.'<sup>81</sup>

In addition to becoming institutionalised, long-term prisoners may experience a range of psychological problems

(including loss of self-esteem and impairment of social skills) and have a tendency to become increasingly detached from society – to which almost all of them will eventually return. Regimes that are offered to prisoners serving long sentences should seek to compensate for these effects in a positive and proactive manner. The UN recommends that states should provide life sentence prisoners with ‘opportunities for communication and social interaction’ and ‘opportunities for work with remuneration, study, and religious, cultural, sports, and other leisure activities’.<sup>82</sup>

## 18.2 Prison management and effective rehabilitation

### International standards relevant to prison management

- All members of the personnel shall at all times so conduct themselves and perform their duties as to influence the prisoners for good by their example and to command their respect. (Standard Minimum Rules for the Treatment of Prisoners, Rule 48)
- (1) The prison administration shall provide for the careful selection of every grade of the personnel, since it is on their integrity, humanity, professional capacity and personal suitability for the work that the proper administration of the institutions depends. (2) The prison administration shall constantly seek to awaken and maintain in the minds both of the personnel and of the public the conviction that this work is a social service of great importance, and to this end all appropriate means of informing the public should be used. (Standard Minimum Rules for the Treatment of Prisoners, Rule 46)
- (1) So far as possible, the personnel shall include a sufficient number of specialists such as psychiatrists, psychologists, social workers, teachers and trade instructors. (2) The services of social workers, teachers and trade instructors shall be secured on a permanent basis, without thereby excluding part-time or voluntary workers. (Standard Minimum Rules for the Treatment of Prisoners, Rule 49)
- (1) In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment. (2) A detained or imprisoned person

shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places. (Body of Principles, Principle 29)

- Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty. (Code of Conduct for Law Enforcement Officials, Article 3)

*‘The full contribution which our prisons can make towards a permanent reduction in the country’s crime-rate lies also in the way in which they treat prisoners. We cannot emphasise enough the importance of both professionalism and respect for human rights.’*

Nelson Mandela, speaking at the official launch of the re-training and human rights project of the South African Department of Correctional Services, (Kroonstad, 25 June 1998)

### What this means in practice

The role of prison staff is to treat prisoners in a manner which is decent, humane and just, ensure that all prisoners are safe, make sure that there is good order and control and provide prisoners with the opportunity to use their time constructively. Force may only be used when absolutely necessary and only to the extent necessary. Prison staff should be people of high integrity and humanity and should therefore be carefully recruited. The international standards also emphasise the importance of ensuring the rule of law within the prison gates, making the public and wider community aware of the social importance of the work in prisons and of allowing for internal and external inspection and monitoring.

### Issues to be addressed by domestic law and policy<sup>83</sup>

#### ■ Importance of investing in prison staff

Unfortunately the status of prison staff is very low in most countries. Little attention is given to their proper recruitment and training. A large majority will not have sought a career in the prison service and their salaries are normally quite inadequate, which contributes to dissatisfaction and corrupt practices. Prison work is extremely demanding and prison staff should be properly

paid, recruited, trained and supported. To meet the challenges of the rehabilitation and reintegration of prisoners, staff members should be recruited who share the overall values of the correctional system.

### ■ Forging links with civil society

Many governments rely on the support of external donor and development assistance as well as civil society in ensuring the good administration of their prisons. This is particularly the case in low-income countries which have to determine how to allocate scarce funds to meet a range of competing priorities. Religious groups often play a prominent role in providing support to prisoners. Civil society involvement can take many forms:

- providing humanitarian aid to prisoners, such as food and medicines
- assisting with the social reintegration of released prisoners
- assisting with prison activities such as education and sport
- monitoring adherence to human rights standards
- using the law to protect prisoners' rights providing public education

## Building relationships between prisons and civil society

### Fiji: Partnership with the Rugby Union

**In a joint initiative of the Fiji Prisons and Correctional Service and the Fiji Rugby Union, rugby coaching and refereeing clinics are leading to prisoners receiving certificates which can help them to reintegrate into society upon release and earn a living. This reflects the goals of the Yellow Ribbon Programme, borrowed from the Singapore Correctional Service. These are: to create community awareness of the need to give offenders a second chance; to generate acceptance of them and their families; and to inspire community action in support of rehabilitation and reintegration.**

Source: Website of the Fiji Prisons and Correctional Service, [www.corrections.org.fj/pages.cfm/rehabilitation-programs/sports.html](http://www.corrections.org.fj/pages.cfm/rehabilitation-programs/sports.html) (accessed 28 June 2010)

### ■ Prison administration structures

Prison administrations are generally public authorities, within the jurisdiction of a government ministry. They should be accountable to an elected legislature and the public should be regularly informed about the state and intent of prison reforms. It is accepted good practice to have the prison administration, including pre-trial detention facilities, placed under the jurisdiction of the Ministry of Justice (see section on Pre-trial detention facilities under the Ministry of Justice above). The Council of Europe recommends to all accession states, that where this is not the case, a transfer of the prison service from the Ministry of Interior to the Ministry of Justice takes place. This step is important because it reflects the principle of separating the authority of agencies that have responsibility for investigating charges and those that are responsible for the management of prisons. Secondly, in countries where the Ministry of Interior is a military authority, it provides for the prison service to be under a civil rather than military authority.

Another important reason for prisons to be under civilian authority is that they should foster close links with other public service agencies such as social welfare and health agencies. This is more likely to happen if the prisons fall under the aegis of civilian rather than military authorities.

Prison systems are organised in vastly varying ways; they might have different tiers such as federal, state and district; they may be organised centrally with the central administration having full control over regional and local administrations. The ideal system will be one in which clear national policies are in place which ensure international and national standards are adhered to nationwide but which also allows for regional and local prison staff to use individual initiatives which explore innovative ways of implementing prison reform programmes.

### ■ The rule of law in prisons

By their nature prisons are closed institutions in which large numbers of people are held against their will, often in cramped conditions. It is inevitable that at times prisoners will break prison rules and regulations, and sometimes indeed they will break the national law. In the latter case it is essential that the procedure followed is the same as for any other citizen. In the former case, a clear set of internal procedures need to be in place and the possibility of an independent appeal against decisions made. In both cases there must be the possibility of independent legal advice.



Similarly, prisoners must have the possibility to start criminal proceedings, and to register complaints and have them heard and resolved regarding their treatment in prison. There also needs to be a clearly articulated and available procedure by which prisoners can make confidential written complaints to a person or institution independent of the prison administration, such as a prison ombudsman, a judge or magistrate, when they feel that the prison administration is failing to respond to their complaints or when they are complaining against a disciplinary decision. Such a complaint must not be grounds for reprisals.

The rule of law does not stop at the prison gates, and prisons which are not run in line with the rule of law will both fail in their obligation to provide conditions appropriate for the rehabilitation of prisoners and run the risk of serious disorders as prisoners resort to desperate measures in order to assert their rights.

### ■ Adequate external oversight

In addition to systems of complaints, independent inspection and monitoring are an important tool for encouraging an environment within prisons where rehabilitation can take place. Independent inspection can highlight and prevent abuses against detained people; it provides a protective mechanism for prison staff against unfounded criticism, supports staff who want to resist involvement in bad practice and, if such reports are published, helps to keep the challenges of prison reform in the public eye and to identify needs for change in policy, practice and legislation.

The nature of inspections carried out in prison varies from country to country and within federal states, but most systems make provision for both an internal (institutional) and external (independent) system. National external inspection bodies may include parliamentary commissions or persons appointed by the government, and lay inspection bodies (sometimes referred to as monitoring boards). They may also include Human Rights Commissions or Ombudsman's offices. In some countries, there is a special judge with responsibility for prison inspections. Specialist bodies responsible for industrial safety or health and safety at work, education, food, women's rights, children's rights, health and the rights of those with disabilities, among others, are another type of independent inspection mechanism.

### Japan: Penal Institution Visiting Committees

**In 2002, serious abuse by prison staff of inmates at Nagoya Prison was uncovered. In 2005 a committee of inquiry set up by the Ministry of Justice recommended greater transparency in prison operations. In 2005 the Act on Penal Detention Facilities and Treatment of Inmates was enacted and in 2006 amended. From 2006 the Penal Institution Visiting Committee system began to function. Members of the Visiting Committee (doctors, lawyers and other local citizens) visit the prison premises, can interview prisoners unattended by prison staff and receive from them confidential communications. They then offer their opinion to the head of the detention facility. The Japan Bar Association plays a pivotal role, with its members being present in all committees. In 2007 Visiting Committees began to be established also for detention centres operated by the police, and in 2009 for immigration detention centres.**

Source: Japan Federation of Bar Associations, Opinion for the Twelfth UN Congress on Crime Prevention and Criminal Justice, 2010

To be most effective, inspectors' reports should be made public, and should be made to a body that is independent of the institutions being inspected, for example to parliament. Inspectors should have guaranteed tenure so that reports can be transparent and as critical as required, and special powers and immunities, including the right of unrestricted access to places, people and documentation/data.

There is also an important level of informal scrutiny which exists in a prison where there is regular contact between the prison and outside community bodies. Where the latter come into prison on a regular basis there is less likelihood of abuse and more likelihood of understanding and acceptance within the community.

Depending on the status of the state's ratification of international treaties, inspections may also be carried out by international and regional bodies, such as the Special Rapporteur on Torture of the UN, the Subcommittee on Prevention of Torture envisaged by the Optional Protocol

to the UN Convention against Torture, the Council of Europe's CPT, and the Special Rapporteur on Prisons and Conditions of Detention in Africa. The International Committee of the Red Cross, an international non-governmental organisation, monitors prison conditions in many countries on the basis of bilateral agreements, but maintains confidentiality on its reports.

### **Monitoring under the Optional Protocol to the UN Convention against Torture (OPCAT)**

On 22 June 2006 OPCAT came into force with its twentieth ratification. At the time of writing 51 states had ratified the Protocol, and an additional 23 were signatories. The Protocol provides for establishment of an international Subcommittee on Prevention of Torture composed of independent members with relevant professional experience, serving in their individual capacities. It requires also that each state party 'maintain, designate or establish' one or more 'independent national preventive mechanisms for the prevention of torture at the domestic level'. Both are mandated to visit places of deprivation of liberty and to make recommendations to the authorities for the protection of those deprived of their liberty from torture or other ill-treatment. Both should benefit from unrestricted access to closed places, to information, and to private interviews.

The Subcommittee's communications with states are confidential unless the state requests publicity or makes the communications public itself (in the case of the Council of Europe Committee for the Prevention of Torture confidentiality is usually waived, and this is emerging as a common practice also in relation to the Subcommittee, for example in relation to its reports on Sweden and the Maldives). The Subcommittee and national preventive mechanisms also produce annual reports which are public.

Source: [www.apt.ch](http://www.apt.ch) (accessed on 28 June 2010)

# 19 Re-entry into the community on release

*'[I]t is known that imprisonment per se does not rehabilitate people nor does it facilitate the ultimate goal of reintegration. It contributes to the formation of a prison sub-culture within an environment where social relations are based on survival, violence and hierarchy. Can we then say that after a period of imprisonment people are better equipped to deal with life?'*<sup>84</sup>

*'The successful reintegration of offenders into the community is the best security for society.'*<sup>85</sup>

## International standards relevant to re-entry

- With the participation and help of community and social institutions, and with due regard to the interest of victims, favourable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions. (Basic Principles for the Treatment of Prisoners, Principle 10)
- Before the completion of the sentence, it is desirable that the necessary steps be taken to ensure for the prisoner a gradual return to life in society. This aim may be achieved, depending on the case, by a pre-release regime organized in the same institution or in another appropriate institution, or by release on trial under some kind of supervision which must not be entrusted to the police but combined with effective social aid. (Standard Minimum Rules for the Treatment of Prisoners, Rule 60 (2))
- The duty of society does not end with a prisoner's release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient after-care directed towards the lessening of prejudice against him and towards his social rehabilitation. (Standard Minimum Rules for the Treatment of Prisoners, Rule 64)
- From the beginning of a prisoner's sentence consideration shall be given to his future after release and he shall be encouraged and assisted to maintain or establish such relations with persons or agencies outside the institution as may promote the best interests of his family and his own social rehabilitation. (Standard Minimum Rules for the Treatment of Prisoners, Rule 80)
- (1) Service agencies, governmental or otherwise, which assist released prisoners to re-establish themselves in society shall ensure, so far as is possible and

necessary, that released prisoners be provided with appropriate documents and identification papers, have suitable homes and work to go to, are suitably and adequately clothed having regard to the climate and the season, and have sufficient means to reach their destination and maintain themselves in the period immediately following their release. (2) The approved representatives of such agencies shall have all necessary access to the institution and to prisoners and shall be taken into consultation as to the future of a prisoner from the beginning of his sentence. (3) It is desirable that the activities of such agencies shall be centralized or coordinated as far as possible in order to secure the best use of their efforts. (Standard Minimum Rules for the Treatment of Prisoners, Rule 81)

## 19.1 Re-entry planning as a crime reduction strategy

Prisons are not well suited for the social reintegration of offenders, who might be isolated from society for long periods, in a closed environment, where they will be susceptible to all the harmful and de-socialising effects of imprisonment. The adverse effects of prison need to be minimised and support provided to prisoners to live law-abiding lives upon release.

For the individual offenders, the difference between a well-managed transition back to the community and a poorly managed transition can be the difference between becoming a functioning member of society and ending up back in front of a judge. For communities, the difference between a comprehensive re-entry programme and a superficial one can mean the difference between a rising and a declining crime rate. Nearly all offenders will return to society, so there is a strong incentive for law and policy makers to manage their release and reintegration back into the community as successfully as possible. Although it tends to be one of the most neglected areas of prison policy, re-entry is one of the most crucial components of long-term crime reduction.

### Issues to be addressed by domestic law and policy

#### ■ Re-entry planning in prisons

Many prison systems do not provide inmates with any services related to re-entry, and those that do usually have programmes that are too limited in scope and focus exclusively on short-term services for offenders on the

verge of release. Like all other aspects of an effective criminal justice and penal system, successful social re-integration requires a long-term, holistic and individualised approach.

Re-entry should be seen as part of the rehabilitation process and preparation for re-entry should begin as soon as the offender starts to serve his sentence and continue until he or she is discharged from community supervision. For this to happen, policy makers, prison administrators, probation services, social institutions, and members of the public must all share a commitment to rehabilitation as the purpose of imprisonment, and to successful social reintegration as the goal of rehabilitation. This means that each aspect of the daily prison regime should be scrutinised in terms of what effect it is likely to have on the progress of each offender towards reintegration. Prison officials in particular must accept that reintegration is a core part of their work and this can be achieved through including it in their training curriculum and in job descriptions. Distribution of resources within the prison system should reflect the end goal of successful re-entry.

### ■ Co-ordination and partnerships between agencies are essential

The management of the reintegration of offenders comes under the responsibility of more than one jurisdiction. For reintegration efforts to be effective, cooperation between the various institutions involved is essential. The Swedish probation branch of the Prison and Probation Service, for example, has recently been made responsible for the planning of sentence implementation and treatment measures not only for probationers and parolees but also for prisoners. This is a welcome step toward providing for early preparation for release from prison.<sup>86</sup> Effective re-entry also demands strong leadership from the top of the prison service; for example, it can be very effective to have a body responsible at headquarters level specifically for policy formulation and strategic planning for the social reintegration of prisoners within its care.

Many jurisdictions face severe overcrowding and have a shortage of trained prison staff. There might be few opportunities to make links with the world outside the prison and prisoners are often given a hostile reception from outside society when they leave. However, prison administrations can still accomplish a great deal within the limits of the resources available to them and should also consider developing partnerships with civil society and educational organisations in the community in order to increase the opportunities available to prisoners.

In Sweden, for example, there is an organisation called KRIS which consists mainly of ex-prisoners who have become well-established law-abiding citizens. They offer help to incarcerated prisoners to prepare for conditional release and offer to meet and provide lodging to prisoners at the moment of release in order to ensure that they do not drift back into criminal circles.<sup>87</sup>

In some districts of Moldova, NGOs have had an important role to play in contributing to the preparation for release of prisoners and their aftercare in society.<sup>88</sup> They set up a working group to assist with prisoners' preparation for release and to link prison preparation with social and health services outside prison. They provided training to prison psychologists and social workers. They created a comprehensive mechanism, which addressed the medical and social needs of prisoners, with information flow to civilian structures and feedback, as well as community mobilization. This led to an increased success rate of uninterrupted post-release TB treatment, as well as better social support for prisoners after release.

### A co-ordinated response to re-entry in the United States

**In Maryland in the United States different agencies co-ordinate to provide re-entry services for prisoners. These services include housing assistance, substance abuse treatment, mental health counselling, education, vocational training and other services. The programme provides pre-release preparation as well as services in the community. Former prisoners are also provided access to social and medical services designed to meet their specific needs for reintegration.**

**Community-based organisations assist the ex-prisoner to develop social networks as well as increase offender accountability. The goal is to ensure continuous case management during the transition from confinement to the community. The programme has been successful in reducing criminal offending albeit in a limited way. Fewer clients (72 per cent compared to 77.6 per cent in the comparison group) committed at least one new crime in the period during which the programme was evaluated. Overall participants committed 68 fewer crimes during the evaluation period than former prisoners in the comparison group. There were, however, no significant** ▶

differences in time to re-arrest, likelihood of a new conviction, number of new convictions, or time to a new conviction.

Source: Griffiths, C.T., Ph.D, Dandur, Y. and Murdoch, D., *The Social Reintegration of Offenders and Crime Prevention*, The International Centre for Criminal Law Reform and Criminal Justice Policy, ICCLR, April 2007

### ■ Setting an example: shaping public attitudes about re-entry

*'Non-acceptance by the community arguably makes recidivism inevitable. The role of the community in the reintegration process therefore speaks for itself.'*<sup>189</sup>

Community support is crucial to a successful social reintegration programme. The African Commission's Special Rapporteur 2004 report on prisons in South Africa observed that: 'The public seems to regard prisoners as social outcasts who deserve whatever treatment is given to them. The public is therefore concerned about keeping prisoners locked up rather than about the conditions in which they are confined. As a result, it is reluctant to assist the department in its programme of rehabilitation and reintegration...It is therefore difficult for ex-offenders to be employed, to get loans, and to get meaningful support from their families and the community.'<sup>90</sup> This highlights the importance of gaining and maintaining community support for the reintegration of offenders back into the community.

Efforts should be ongoing to increase the public's understanding of offenders and ex-offenders, to dispel prejudices and stereotypes, and to recognise the short and long-term benefits associated with coordinated social reintegration, including initiatives such as temporary and conditional release schemes. States must educate all those involved in the administration of justice and the public about the importance of effective rehabilitation and re-entry as a cost-effective means of protecting communities. This could involve reassuring the public that people who represent a risk to the community receive supervision and are reincarcerated if they fail to comply with release conditions. Where appropriate media campaigns can be deployed.

### Voice Beyond the Walls: Public awareness radio programmes in Zululand, South Africa

This project produces radio dramas and programmes from inside prisons for external community radio stations. These have a huge audience. In four prisons, the prison communities form dramatic collectives and tell their stories to the outside world in the form of polished and artistically developed plays and stories. This has helped the development of the offenders involved and has also had a huge impact on the audience in terms of gaining an insight into life in prison.

Source: *Creating Paths for Offender Reintegration, Conference Report*, Open Society Foundation for South Africa, 2008

## 19.2 Preventing re-offending by addressing unemployment

Studies show that steady employment is one of the best guarantees against recidivism, but finding and keeping a job can also be one of the most difficult challenges a former offender faces upon release. Prisons should therefore take a keen interest in enhancing the employability of inmates.

### Issues to be addressed by domestic law and policy

#### ■ Health and work

The first step in this process should be to provide assistance with any health problems that may be interfering with the offender's ability to hold down a job. In some cases involving mental health and substance abuse problems, it can be helpful to combine treatment programmes with temporary or intermittent release. For example, the Swedish prison code allows prisoners to leave prison for a period of time in order to participate in off-site programmes that might contribute to their rehabilitation. This provision is most often used to temporarily place drug and alcohol abusers in therapeutic group homes, where they receive treatment, peer support, and non-punitive supervision.



### ■ An individualised approach to finding work

Prisons should assess each individual offender's level of education, work experience, and skill set, in order to develop a long-term job plan. The work that offenders do while incarcerated should be part of this long-term plan, and should enable offenders to improve existing skills and develop new ones. Many prisoners may have learning disabilities which require treatment, or may have long histories of educational neglect that have resulted in illiteracy or other large gaps in skills and knowledge. The prison system must have the ability to diagnose these problems, and the resources and relationships to address them. Prisoners should have the option to participate in learning programmes that conform to national standards, and which result in nationally recognised diplomas or other certifications of achievement that will improve their credentials for future employment.

### ■ Building relationships with employers

One of the best ways to ensure the future stability of employment for offenders is to help them establish relationships with outside employers while in prison and to create legal and financial incentives for companies that hire offenders. For example, in the United Kingdom, the Offenders' Learning and Skills Service works in partnership with private companies and organisations to provide training and job opportunities for prisoners.<sup>91</sup> These private organisations interview, select, and train offenders during their detention. Chosen individuals are granted day release to work for the company for the remainder of their sentences, and are given regular full-time jobs upon completion of their prison terms. While further research is needed to evaluate this programme and others like it, there is some evidence that it has succeeded in reducing two-year recidivism rates in the sample population by as much as 50 per cent.

States can create incentives for companies to hire former offenders, by giving tax breaks or offering to subsidise employee benefits. In Turkey, the Labour Law obliges companies that employ more than 50 staff to include a fixed percentage of ex-prisoners among their staff.<sup>92</sup> If companies do not fulfil this obligation, then they must pay a fine to the Ministry of Labour and Social Security. The Employment Institution of the Ministry of Labour and Social Security has a mandate to help former prisoners with vocational training and appropriate rehabilitation programmes to enable them to find suitable employment and assist with their social reintegration. The Ministry uses the fines to fund vocational training programmes in prisons, the education of and training of probationers

and prisoners, and post-release assistance. Further, companies with fewer than 50 employees are offered a financial incentive to employ former prisoners, whereby the employer's obligation to pay the social security of these former prisoner employees is halved with the other half being paid by the state treasury.

### ■ Limiting access to criminal records

The stigma associated with having a criminal record often deters potential employers. Legislators can help address this problem by limiting the situations in which employers can have access to criminal records, restricting the types of information that potential employers see when they are granted access, requiring that such records also report any positive progress by the offender, and creating procedures by which former offenders can petition to have their records expunged or sealed. The records of juvenile offenders should never be available to the public, the press, or to potential employers.

## 19.3 Community and family relationships

According to research on recidivism, another of the determining factors in whether an individual re-offends is the extent of his family and community relationships. These connections help provide support and structure during the often extremely stressful transition back to society. Such relationships can be extremely difficult to maintain while serving a prison sentence. It is in the interests of policy makers and prison officials to ensure that prisoners are able to maintain contact with the outside world. This means taking affirmative steps to enable regular visitation and correspondence between prisoners and their loved ones.

### Issues to be addressed by domestic law and policy

#### ■ Working with professionals

Sometimes the anxiety and uncertainty associated with re-entry can itself become an obstacle to successful reintegration. The prison and probation systems (where they function) can help with some of these stresses by working with other social service agencies in the community to provide assistance with housing, transportation, ongoing medical care and job searches. But in some cases (for example where the offender is likely to encounter his victim on a regular basis, or where the crime in question had a high public profile) individuals and those close to them may need additional help managing

the transition. This might take the form of restorative justice programmes or independent or group counselling for the offender, the victim and their families.

All of these efforts are most effective when begun early, and when based around ongoing supportive relationships. Offenders should begin to develop relationships with social workers, NGO workers, counsellors, religious advisors, probation officers, and healthcare professionals at the start of their prison sentence. All of these individuals need to be encouraged to visit the prison regularly, and to participate in the rehabilitation process throughout. This will only happen through the coordinated efforts of the prison staff, law enforcement, social service agencies, civil society and the public, and with the encouragement of government and civil advocates.

### ■ Building relationships with family

In some cases, the very fact of having served time in prison may in itself damage an individual's bonds with friends and family. In extremely patriarchal societies women may be at an extra disadvantage on release, as they face not only the discrimination associated with being a former offender, but additional censure for non-conformity with gender stereotypes. Where the stigma is particularly strong, families of female offenders may explicitly reject them, and – where there are children involved – even deny them their parental rights. Because the number of women prisoners is comparably few, so is the number of women's prisons. This means that women are more likely to have to serve their sentences at a great distance from their communities, which makes it even more difficult to preserve relationships. To address these problems, the prison regime should include social, legal and psychological services targeted to the particular needs and concerns of female prisoners. As far as possible, prison facilities should be small and local, rather than large and centralised. This not only enables ongoing contact between women prisoners and their families, it also enables greater coordination between the prison administration and the offender's community in carrying out rehabilitation.

### ■ Short sentences

While the kinds of prison-based comprehensive educational and training programmes discussed above are obviously not practical in the context of brief stays in prison, it is still the responsibility of the prison administration to connect those serving short sentences with community-based services that can assist with the transition back to society. Civil society organisations – which should be involved in shaping and implementing

the rehabilitation schemes in prisons generally – can be particularly helpful in helping to plan and manage the aftercare of those serving short-term sentences. In the United States, for example, hundreds of not-for-profit groups have sprung up to address a wide range of interests relating to offenders, former offenders and their families. These include organisations that provide transitional housing, job placement and training, legal aid, counselling, financial and educational assistance to the children and spouses of prisoners, and visiting-day transportation for the loved ones of prisoners.

## 19.4 The role of conditional release

*'The international research shows that sensible parole decisions based on the best research can be three to four times more successful in preventing re-offending than automatic release at the end of a fixed sentence.'*

Judge D.G. Carruthers, Chairman of the New Zealand Parole Board<sup>93</sup>

Conditional release refers to the release of a prisoner under certain conditions before the end of a sentence. It can be discretionary, after a certain minimum period of the sentence has been served, or it can be mandatory when it takes place automatically after a minimum period or a fixed proportion of the sentence has been served. Conditions of release may include payment of compensation to the victim, entering a drug or alcohol abuse treatment programme, working or following some other occupational activity, such as vocational training, participation in personal development programmes, or prohibition to reside in or visit certain places. Violation of the conditions of release may result in revocation and re-imprisonment.

### Issues to be addressed by domestic law and policy

#### ■ Role of parole boards

The decision to grant conditional release is often the responsibility of an independent board of parole or commission whose primary objective is to ensure public safety. Parole boards can encourage prisoners' motivation to work towards re-entry by providing the opportunity for an accelerated release date and less restrictive conditions of release. Once in the community, supervising authorities can encourage prisoners through prospects of reduced reporting requirements, loosened conditions, and early



discharge. Parole boards can also play an important role in keeping victims informed of when an offender may be released and involving them appropriately in the parole release decision-making process, and they can integrate victim safety into their supervision strategies.

### Conditional release in Kazakhstan

In Kazakhstan, new legislation came into force in 2003, which relaxed the requirements for gaining the right to conditional release, among other measures. In 1998, the prison population of Kazakhstan totalled 86,000 (prisons) and 16,000 (pre-trial detention facilities). It had the dubious distinction of being third in the world in terms of its high prison population rate.

By March 2005 these figures had reduced dramatically to 44,284 and 8,324 respectively and it had moved down to 25th in the world. This reduction has been attributed largely to the relaxation of rules regulating the right to conditional release. Prisoners released on parole more than doubled. At the same time, the general rate of recidivism (including all prisoners released) decreased by 7.8 per cent between 2002 and 2003.

Source: Atabay, T. et al

### ■ Release preparation

Conditional release in the absence of earlier release preparation is unlikely to be successful. To be effective it must be used as an integral part of a social re-integration programme. Part of the difficulty with re-entry policy is that it is not always clear who has responsibility to ensure it is successful. Parole or probation services are especially well placed at the juncture between prisons and the community to be part of an effective re-entry effort. In many cases they already have responsibilities that reach backward into the prison to collaborate in release planning, and forward into the community to influence post-release management of offenders and responses to parole violations. They are therefore well situated to reduce the fragmentation which frequently occurs amongst different criminal justice bodies and to provide coherent oversight of re-entry. In countries where a parole service does not exist (the majority of developing countries) then the role of civil society organisations becomes essential to actively encourage reintegration.

### NGO involvement in reintegration: Rebuilding and Life Skills Training Centre (REALISTIC) in South Africa

REALISTIC designs a reintegration plan for each prisoner who is on conditional release based on the individual's needs and capacity. Participants are generally between 14 and 25 years old and have to attend a six-week camp where they reflect on their own lives and deal with the stigma of being an ex-offender. They are challenged to abstain from using drugs and are expected to participate in activities aimed at teaching them to deal with the real issues underlying their addiction. Activities include hiking, art lessons, environmental education, fitness training, team building, writing exercises and lessons on personal hygiene. Two weeks after each six-week camp they are tested for illegal substances by a doctor who runs a private practice. On average approximately 80 per cent of those who attend the camps tests negative after each camp.

Participants are encouraged to form family support groups with the help of REALISTIC's trained facilitators. Home visits are regularly done and families are as far as possible invited to be involved in the work of REALISTIC. To date REALISTIC has offered its support to approximately 200 ex-offenders of whom 85 per cent did not break their parole conditions or return to prison for other offences.

Source: *Creating Paths for Offender Reintegration, Conference Report*, Open Society Foundation for South Africa, 2008

### ■ Risks of conditional release

Conditional release guidelines are frequently used by parole boards to assess the risk of recidivism by considering factors such as the severity of the offence, age of offender, prior incarcerations and prison disciplinary conduct. However, the use of conditional release does entail risks. A high-profile crime committed by an offender on conditional release can generate a great deal of criticism of the paroling authority and create pressure to deny conditional release for others. This should be managed through investment in rehabilitation and post-release support, as well as ongoing public education about effective rehabilitation and re-entry.

## 20 Conclusion

*'Most people understand that crime is not prevented by prison. Many would support a movement that made it a source of pride for a community to gradually shift its resources out of imprisonment and into violence prevention, helping disturbed families, providing more educational opportunities, supporting the children who will without such help become the next generation of prisoners, creating new alternatives where members of the public are involved and can use the skills present in so many people of mediating and resolving conflicts.'*

Baroness Vivien Stern, Senior Research Fellow in the International Centre for Prison Studies at King's College, London, and Honorary Secretary-General of PRI, in *A Sin Against the Future: Imprisonment in the World*, London, 1998

No country reshaping its criminal justice system has the luxury of starting from a blank page. History – recent and not so recent, sometimes violent and divisive, custom, myth, and the reality of existing commitments in the form of human beings, budgets, institutions, legislation and existing policies, all tie the hands of those who begin the task of drafting something new.

However, any administration that wants eventually to have a properly functioning and humane criminal justice system has no choice but to loosen those ties and go back to first principles. Careful examination of the aims and meaning of justice, why things are the way they are, and how they might be – international standards and norms, successful practices in other countries – is the only route towards discarding the many accretions that have no evidential

basis, redressing the balance for vulnerable groups, and healing rather than further harming society.

In its practical work around the world PRI has for twenty years tried to respond to governments who are prepared to work in this way, and to support them. Experience showed that an additional tool was needed. The Handbook did not set out to provide a step by step, detailed guide to reforming each individual criminal justice system. The differences among legal traditions, economies and social welfare systems are too great, and the criminal justice system is itself too vast a field. The Handbook aimed, rather, to raise, in logical order, issues of which each stakeholder should be aware and which should be discussed before a reform process is designed and undertaken. It aimed to provide references to more detailed sources of guidance, including PRI's own practical interpretation of the standards that relate to imprisonment, *Making Standards Work*. It aimed to inform about the community interventions which, inexplicably, still take second place in most criminal justice discussions, despite delivering real benefits in a way that it is very difficult, and perhaps impossible, for prison to achieve. The Handbook aimed also to remind the reader that only a reform process that includes all members of society who are interested and affected is likely to be successful in creating a criminal justice system that responds to the needs of that society. If we have increased our readers' understanding of this, we will be satisfied.

We intend the Handbook to be a living and responsive tool, and will do our best to add to it as readers' comments are received ([lawandpolicy@penalreform.org](mailto:lawandpolicy@penalreform.org)). Reform is a process of continuous reflection, renewal and considered reaction to emerging developments, and we will try to mirror that process.

## Endnotes

- 1 Created in 1889, the Inter-Parliamentary Union (IPU, [www.ipu.org](http://www.ipu.org)) is the international organisation that brings together the representatives of parliaments. It fosters exchange of experience among parliaments and parliamentarians, considers questions of international interest, contributes to defence and promotion of human rights as an essential factor in parliamentary democracy and development. It contributes also to strengthening and developing the way representative institutions work. It supports and closely cooperates with the United Nations, whose objectives it shares. It cooperates also with regional inter-parliamentary organisations, and with international intergovernmental and non-governmental organisations which are motivated by the same ideals.
- 2 The texts of these treaties are all accessible from the website of the United Nations High Commissioner for Human Rights at [www.ohchr.org](http://www.ohchr.org) along with up-to-date information about the countries that have signed and ratified them.
- 3 The texts of the following instruments are all accessible from the website of the United Nations High Commissioner for Human Rights at [www.ohchr.org](http://www.ohchr.org). Many of these instruments are also discussed in great detail in *Making Standards Work: An international handbook on good prison practice* which is available to download for free at [www.penalreform.org](http://www.penalreform.org)
- 4 Customary international law is international law that develops through a general and consistent practice of States, followed because of a sense of legal obligation: for example, while the Universal Declaration of Human Rights is not, in itself, a binding instrument, certain provisions of the Declaration are considered to have the character of customary international law. The absolute prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment is found in a number of international human rights and humanitarian treaties and is also regarded as a principle of customary international law.
- 5 The United Nations Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the 'Bangkok Rules') were adopted by the UN General Assembly in 2010 and were an important step forward in recognising the specific needs of women in the criminal justice system. They are also the first international instrument which specifically addresses issues faced by children with parents in prison.
- 6 It should be noted that the African Union (AU) adopted a single legal instrument to create an African Court of Justice and Human Rights, at the July 2008 AU Summit. The Protocol on the Statute of the African Court of Justice and Human Rights provides for the African Court on Human and Peoples' Rights and the Court of Justice of the AU to be merged together. This process is ongoing.
- 7 The treaties are available at the website of the African Commission on Human and Peoples' Rights [www.achpr.org](http://www.achpr.org); other instruments are available in the compendium *Africa's Recommendations for Penal Reform*, PRI, 2008, which can be downloaded for free from [www.penalreform.org](http://www.penalreform.org)
- 8 These instruments are all accessible from the website of the Organization of American States at [www.oas.org](http://www.oas.org) along with up-to-date information about the countries that have signed and ratified them (where relevant).
- 9 The following are all accessible from the website of the Council of Europe at [www.echr.coe.int](http://www.echr.coe.int) along with up-to-date information about the countries that have signed and ratified them (where relevant).
- 10 The Huddersfield Policy and Prevention Analysis Site – [www.scopic.ac.uk/StudiesHuddersfield.html](http://www.scopic.ac.uk/StudiesHuddersfield.html) (accessed 1 March 2010).
- 11 See Walmsley, R., *World Prison Population List* (8th edn.), International Centre for Prison Studies, King's College London, based on the latest information available in early December 2008, and on a comparison with data available for countries previously monitored.
- 12 Snacken, S., Beyens, K., and Tubex, H., *European Journal of Crime, Criminal Law and Criminal Justice*, 3 (1995), 18-53.
- 13 Seppälä, T. L., *Global Trends and Local Exceptions: Explaining Differences in the Use of Imprisonment*, Version 6.4.2009; see also Mauer, M., *Comparative International Rates of Incarceration: An Examination of Causes and Trends*, The Sentencing Project, 2003; King, R., Mauer, M., and Young, M., *Incarceration and Crime: A Complex Relationship*, The Sentencing Project, 2005.
- 14 Elías Carranza [et al.], *Crime, Criminal Justice and Prison in Latin America and the Caribbean: How to implement the United Nations' rights and duties model*, Siglo xxi editores (2010), pp. 63-4.
- 15 Terblanche, S., *Research on the Sentencing Framework Bill*, Open Society Foundation for South Africa, 2008.
- 16 Fagan, J., and Meares, T., 'Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities', *Ohio State Journal of Criminal Law*, 6 (2008) 173-229; see also Fagan, J., 'Do Criminal Sanctions Deter Drug Crimes?', in MacKenzie, D.L. and Uchida, C.D., (eds.), *Drugs and Crime* 188 (1994); Sherman, L., 'Defiance, Deterrence and Irrelevance: A Theory of the Criminal Sanction', *Journal of Research in Crime and Delinquency*, 30 (1993), 445.
- 17 See website of the NGO involved in this project, Paz Ciudadana Foundation, for more details [www.pazciudadana.cl](http://www.pazciudadana.cl). At the time of writing, an impact assessment was planned.
- 18 See National Association of Criminal Defense Lawyers, *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform*, pp. 26, 24-6, 31-3, 38-9 (September 2009).
- 19 See for example, Moore, B., *Risk Assessment: A practitioner's guide to predicting harmful behaviour*, London, Whiting & Birch, 2000.
- 20 UN Standard Minimum Rules for the Administration of Juvenile Justice, Rule 19: (1) The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period. UN Standard Minimum Rules for the Treatment of Prisoners Rule 82 (1) Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible. Rule 82 (2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management.
- 21 Cited in UNODC's *Handbook on Planning for Crime Prevention in Southern Africa and the Caribbean*, [www.unodc.org/documents/justice-and-prison-reform/CPhandbook-120109.pdf](http://www.unodc.org/documents/justice-and-prison-reform/CPhandbook-120109.pdf) (accessed 27 November 2009).
- 22 Matrix Knowledge Group, *The Economic Case For and Against Prison*, November 2007; Matrix Knowledge Group, *The Economic Case For and Against Prison: Update*, November 2008; *Make Justice Work and Matrix Evidence: Are short-term prison sentences an efficient and effective use of public resources?*, June 2009.
- 23 Available at [www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html](http://www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html)

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- 24 Muntingh, L., 'Alternative Sentencing in Africa' in Sarkin, J., (ed.) *Human Rights in African Prisons*, Athens, Ohio, Ohio University Press, 2008, pp. 178-203
  - 25 From a conversation with Norman Bishop, who developed the Research and Development Unit within the Swedish Prison and Probation Administration.
  - 26 Available at [www.unodc.org/unodc/en/justice-and-prison-reform/compendium.html](http://www.unodc.org/unodc/en/justice-and-prison-reform/compendium.html)
  - 27 All Council of Europe member states are members of the Venice Commission as well as Kyrgyzstan, Chile, the Republic of Korea, Mexico, Morocco, Algeria, Israel, Tunisia, Peru and Brazil. Belarus is an associate member, while Argentina, Canada, the Holy See, Japan, Kazakhstan, the United States and Uruguay are observers. South Africa and Palestinian National Authority have a special co-operation status similar to that of the observers. For more information see [www.venice.coe.int](http://www.venice.coe.int)
  - 28 Available at [www.penalreform.org/publications/making-standards-work-international-handbook-good-prison-practice](http://www.penalreform.org/publications/making-standards-work-international-handbook-good-prison-practice)
  - 29 This can be accessed at [www.penalreform.org/resources/man-2008-compendium-prison-legislation-en.pdf](http://www.penalreform.org/resources/man-2008-compendium-prison-legislation-en.pdf)
  - 30 From 2001-2008 the United States Institute of Peace and the Irish Centre for Human Rights, in cooperation with the Office of the High Commissioner for Human Rights and the UNODC, launched the Model Codes for Post-Conflict Criminal Justice Project after an extensive consultation process that involved over 250 international experts. The process resulted in four model codes being produced: A Model Criminal Code; A Model Code of Criminal Procedure; Model Detention Act; and Model Police Powers Act. These Model codes were primarily intended to provide guidance to post-conflict countries but it was noted during consultations that they could be of use to other states with limited resources as well. See [www.nuigalway.ie/human\\_rights/Projects/model\\_codes.html](http://www.nuigalway.ie/human_rights/Projects/model_codes.html) (accessed 10 February 2010).
  - 31 <http://untreaty.un.org/english/treatyhandbook/hbframeset.htm> (accessed 28 February 2009).
  - 32 In some countries, international (and at times regional) human rights law automatically becomes a part of national law. In other words, as soon as a state has ratified or acceded to an international agreement, that international law becomes national law. Under such systems treaties are considered to be self-executing. In other countries, international human rights law does not automatically form part of the national law of the ratifying state. International law in these countries is not self-executing, that is, it does not have the force of law without the passage of additional national legislation.
  - 33 Judgment: P. N., Bhagwati, J. in Francis Coralie Mullin v The Administrator Union Territory of Delhi & others. 1981 AIR 746 1981 (SCR (2) 516.
  - 34 Kalmthout, A., *Probation in Europe*, Wolf, 2008.
  - 35 World Prison Brief 2009.
  - 36 Schonteich, M., 'The Scale and Consequences of Pre-trial Detention Around the World' in *Justice Initiatives: Pre-trial Detention*, New York, Open Society Justice Initiative, 2008 pp. 44-56. See [www.soros.org/initiatives/osji/articles\\_publications/publications/pre-trial\\_20080513/Justice\\_Initiati.pdf](http://www.soros.org/initiatives/osji/articles_publications/publications/pre-trial_20080513/Justice_Initiati.pdf) (accessed 26 November 2009)
  - 37 The International Centre for Criminal Law Reform and Criminal Justice Policy, *Strategies and best practices against overcrowding in correctional institutions*, Griffiths, Curt Taylor and Murdoch, Danielle
  - 38 United States Department of State, Rwanda Country Reports on Human Rights Practices 2007, [www.state.gov/g/drl/rls/hrrpt/2007/100499.htm](http://www.state.gov/g/drl/rls/hrrpt/2007/100499.htm), cited in Griffiths 2009.
  - 39 This example was cited in *Custodial and Non-custodial Measures: Detention Prior to Adjudication*, UNODC, 2006 ([www.unodc.org/documents/justice-and-prison-reform/cjat\\_eng/2\\_Detention\\_Prior\\_Adjudication.pdf](http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/2_Detention_Prior_Adjudication.pdf) (accessed 27 November 2009)).
  - 40 For more information see *Liberty at the cost of Innocence: A Report on Jail Adalats in India*, Commonwealth Human Rights Initiative, 2009.
  - 41 For more information about corruption in criminal justice systems see the UN Convention against Corruption (adopted 2005) [www.unodc.org/unodc/en/treaties/CAC/index.html](http://www.unodc.org/unodc/en/treaties/CAC/index.html)
  - 42 Sarkin, J., *Prisons in Africa: An Evaluation from a Human Rights Perspective* International Human Rights Journal, 9 (2009), 22-49.
  - 43 Recommendation No. R (92) 17 of the Committee of Ministers to member states concerning consistency in sentencing (1992).
  - 44 UNODC, *Handbook of Basic Principles and Promising Practices on Alternative to Imprisonment*, Criminal Justice Handbook Series, 2007, p. 29.
  - 45 Stern, V., *Developing Alternatives to Prison in East and Central Europe and Central Asia, A Guidance Handbook*, King's College London, International Centre for Prison Studies, May 2002.
  - 46 For more information see the website of the National Association of Therapeutic Justice [www.anjt.org.br/index.php](http://www.anjt.org.br/index.php) (accessed 27 November 2009).
  - 47 Changing Lives Through Literature: An Alternative Sentencing Program <http://ctl.umassd.edu/home-flash.cfm> (accessed 27 November 2009).
  - 48 Prison Reform Trust, *Out of Trouble: Making Amends*, PRT, 2009
  - 49 *Rethinking Crime & Punishment: The Report*, Esmée Fairbairn Foundation, December 2004.
  - 50 United Nations Office on Drugs and Crime, *Handbook on Restorative Justice programmes, Criminal justice handbook series*, UNODC, 2006.
  - 51 Stern, V., *Developing Alternatives to Prison in East and Central Europe and Central Asia, A Guidance Handbook*, King's College London, International Centre for Prison Studies, May 2002, p. 23.
  - 52 This example was cited in *Custodial and Non-custodial Measures: Alternatives to Imprisonment*, UNODC 2006 ([www.unodc.org/documents/justice-and-prison-reform/cjat\\_eng/2\\_Detention\\_Prior\\_Adjudication.pdf](http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/2_Detention_Prior_Adjudication.pdf) (accessed 27 November 2009)).
  - 53 Quoted in Priseman, R., *No Human Way to Kill*, Seabrook Press, 2009, see also [www.mvfr.org](http://www.mvfr.org)
  - 54 See Amnesty International website at [www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries](http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries) (accessed 27 November 2009).
  - 55 Fagan, J., Zimring, F., and Geller, A., Symposium, 'Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty', *Texas Law Review*, 84 (2006), 1803.
  - 56 [www.mvfr.org/sites/default/files/pdf/MVFR9-09.pdf](http://www.mvfr.org/sites/default/files/pdf/MVFR9-09.pdf), accessed 24 June 2010.
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- 57 See Death Penalty Information Center, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis* (October 2009); see also Fagan, J., Zimring, F., and Geller, A., Symposium, *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, *Texas Law Review*, 84 (2006), 1803; Cook, P. and Slawson, D., *The Costs of Prosecuting Murder Cases in North Carolina*, 1993.
- 58 See Grann, D., 'Trial by Fire: Did Texas Execute an Innocent Man?', *The New Yorker*, 7 September 2009; Death Penalty Information Center, The Innocence List, [www.deathpenaltyinfo.org/innocence-list-those-freed-death-row](http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row) (last accessed 21 December 2009); Death Penalty Information Center, *Innocence and the Crisis in the American Death Penalty* (September 2004).
- 59 For example, see speeches by Hamdy Murad and Hassan Zeid Mohammed at the seminar *The Death Penalty In the Arab World*, held in July 2007 in Amman, Jordan, available in English summary on [www.penalreform.org/content/arab-regional-conference-abolition-death-penalty](http://www.penalreform.org/content/arab-regional-conference-abolition-death-penalty), accessed 26 June 2010.
- 60 Craig, J. and Preston, L., 'Botched execution brings reprieve', *The Cincinnati Enquirer*, September 16, 2009.
- 61 See Mortenson, J., 'Earning the Right to Be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause', *Iowa Law Review*, 88 (2003), 1,099 (discussing failed executions and execution methods).
- 62 The following have been identified as **not** constituting the 'most serious' by various international and regional inter-governmental bodies: economic offences, political offences, kidnapping not resulting in death, religious practice, sexual relations between consensual adults, drug-related offences, prostitution.
- 63 *Kids Behind Bars: A Study on Children in Conflict with the Law*, Defence for Children International, 2003.
- 64 See Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Youth Offenders in the United States in 2008*, 2008; Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-year-old children to die in prison*, 2007.
- 65 Zhang, L. and Liu, J., 'China's Juvenile Delinquency Prevention Law: The Law and the Philosophy', *International Journal of Offender Therapy and Comparative Criminology*, 51 (2007), 541.
- 66 This example was cited in *Improving the Protection of Children in Conflict with the Law in South Asia*, UNICEF and Inter-Parliamentary Union, 2007.
- 67 Berman, A.H. and Farbring, C.Å., (eds.): *Kriminalvård i praktiken: Strategier för att minska återfall i brott och missbruk. (Prison and probation work in practice: strategies to reduce relapse into crime and drug misuse)*, Studentlitteratur, Lund, 2010.
- 68 Many of the issues discussed in this section are covered comprehensively in Coyle, A., *A Human Rights Approach to Prison Management*, ICPS, 2009.
- 69 Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules – No. 50.
- 70 This example was cited in *Handbook for Prisoners with Special Needs*, UNODC, 2006 [www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf](http://www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf) (accessed 27 November 2009).
- 71 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Report to the Georgian Government 2007.
- 72 See 65 above.
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- 74 The World Medical Association has produced a *Handbook of Declarations* that includes reference to the fact that prison doctors should have the same relationship with prisoners as civil doctors to their patients.
- 75 *The Unintentional Punishment*, WHO October 2009 [www.euro.who.int/mediacentre/PR/2009/20091028\\_1](http://www.euro.who.int/mediacentre/PR/2009/20091028_1) (accessed 27 November 2009).
- 76 'Where the Mind is Without Fear and the Head is Held High', Report on the Mental Health and Care of Women and Children in Prison in Andhra Pradesh, PRAJA, 2001.
- 77 *Drugs in Focus*, European Monitoring Centre for Drugs and Drug Addiction Briefing Note, Jan-Feb 2003.
- 78 *Handbook on Prisoners with special needs*, UNODC, 2009 ([www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf](http://www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf) (accessed 27 November 2009)).
- 79 'Open Prisons in India: How Open Can Open Be', PRAJA and PRI, 2002.
- 80 Website of the Ministry of Home Affairs, Government of Singapore, [www.mha.gov.sg/basic\\_content.aspx?pageid=75](http://www.mha.gov.sg/basic_content.aspx?pageid=75) (accessed 28 June 2010)
- 81 Council of Europe Resolution 76 (2) On the Treatment of Long-Term Prisoners 1976.
- 82 UN Recommendations on Life Imprisonment, 1994.
- 83 Many of the issues discussed in this section are covered more comprehensively in Coyle, A., *A Human Rights Approach to Prison Management*, ICPS, 2009.
- 84 Muntingh, L., *After Prison: The case for offender reintegration*, African Human Security Initiative Monograph 52 (March 2001) [www.iss.co.za/Pubs/Monographs/No52/Content.html](http://www.iss.co.za/Pubs/Monographs/No52/Content.html) (accessed 27 November 2009).
- 85 Ioana Naivalurua, Commissioner, Fiji Prisons and Corrections Service. See [www.corrections.org.fj](http://www.corrections.org.fj) for more information.
- 86 See the Swedish Prison and Probation website for more information about this, [www.kriminalvarden.se/sv/English/](http://www.kriminalvarden.se/sv/English/) (accessed 27 November 2009).
- 87 See website [www.kris.a.se](http://www.kris.a.se) for more information.
- 88 This example was cited in *Social Reintegration*, UNODC 2006 [www.unodc.org/documents/justice-and-prison-reform/cjat\\_eng/4\\_Social\\_Reintegration.pdf](http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/4_Social_Reintegration.pdf) (accessed 27 November 2009).
- 89 Judge Deon van Zyl, Inspecting Judge, Judicial Inspectorate of Prisons, Pretoria, South Africa, *Creating Paths for Offender Reintegration, Conference Report*, Open Society Foundation for South Africa, 2008.
- 90 Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa Mission to the Republic of South Africa 2004.
- 91 See Report on The Offenders' Learning and Skills Service 2008 [www.nao.org.uk/publications/0708/meeting\\_needs\\_the\\_offenders%E2%80%99.aspx](http://www.nao.org.uk/publications/0708/meeting_needs_the_offenders%E2%80%99.aspx) (accessed 27 November 2009).
- 92 This example was cited in *Social Reintegration*, UNODC 2006 [www.unodc.org/documents/justice-and-prison-reform/cjat\\_eng/4\\_Social\\_Reintegration.pdf](http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/4_Social_Reintegration.pdf) (accessed 27 November 2009).
- 93 Taken from a paper presented by Judge Carruthers as part of the UN Congress on Crime Prevention and Criminal Justice, 2010.

# Appendices

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# A1 International and regional bodies which can provide information and support to the reform process

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Council of Europe, Council for Penological Co-operation  
[www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/prisons\\_and\\_alternatives](http://www.coe.int/t/e/legal_affairs/legal_co-operation/prisons_and_alternatives)

European Institute for Crime Prevention and Control, affiliated with the United Nations – HEUNI  
[www.heuni.fi](http://www.heuni.fi)

International Centre for Criminal Law Reform and Criminal Justice Policy – ICCLR and CJP  
[www.icclr.law.ubc.ca](http://www.icclr.law.ubc.ca)

International Centre for Prison Studies  
[www.kcl.ac.uk/schools/law/research/icps](http://www.kcl.ac.uk/schools/law/research/icps)

Inter-Parliamentary Union  
[www.ipu.org](http://www.ipu.org)

Office for Democratic Institutions and Human Rights  
[www.osce.org/odihr/13431.html](http://www.osce.org/odihr/13431.html)  
[Legislationline.org](http://Legislationline.org)

Office of the High Commissioner for Human Rights  
[www.ohchr.org](http://www.ohchr.org)

Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights  
[www.osce.org/odihr](http://www.osce.org/odihr)

Penal Reform International – PRI  
[www.penalreform.org](http://www.penalreform.org)

Raoul Wallenberg Institute of Human Rights and Humanitarian Law  
[www.rwi.lu.se](http://www.rwi.lu.se)

United Nations African Institute for the Prevention of Crime and the Treatment of Offenders – UNAFRI  
[www.unafri.or.ug](http://www.unafri.or.ug)

United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders – UNAFEI  
[www.unafei.or.jp/english/](http://www.unafei.or.jp/english/)

United Nations Children’s Fund – UNICEF  
[www.unicef.org](http://www.unicef.org)

United Nations Interregional Crime and Justice Research Institute – UNICRI  
[www.unicri.it](http://www.unicri.it)

United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders – ILANUD  
[www.ilanud.or.cr](http://www.ilanud.or.cr)

United Nations Office on Drugs and Crime – UNODC  
[www.unodc.org](http://www.unodc.org)

Venice Commission  
[www.venice.coe](http://www.venice.coe)

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# A2 Glossary of terminology used

## General terms

*Accused:* The person charged; the person who has allegedly committed the offence.

*Acquittal:* Discharge of defendant following verdict or direction of not guilty.

*Adjudication:* Judgment or decision of a Court or tribunal.

*Arrest:* Lawful detention by a police officer.

*Assessment:* Information prepared for the court or other decision makers which attempts to establish the risks posed by an offender, including the circumstances in which they may re-offend, by a process of identifying possible contributory factors and actions which could be taken to reduce the risk of committing a new offence.

*Bail:* Release of a defendant from custody, until his/her next appearance in Court, subject sometimes to security being given and/or compliance with certain conditions; this security can be monetary or non-monetary.

*Chaplain:* A representative of a religious faith who is attached to an institution, for example a prison, in order to serve the spiritual and social welfare needs of the specific faith community or the community in general.

*Charge:* A formal accusation against a person.

*Conviction:* When an offender has pleaded or been found guilty of an offence in a court he or she is said to have been convicted. The conviction then appears on the offender's criminal record.

*Crime prevention:* A range of approaches which prevent (or reduce) crime. They may include social development, community integration, urban renewal and working with specific people who are identified as vulnerable to crime, or likely to commit offences, including offenders and former offenders.

*Criminal justice system:* The practices and institutions of governments directed at upholding public safety, enforcing laws and administering justice.

*Defendant:* Person standing trial or appearing for sentence.

*Detainee:* Sometimes used as a general term for any person deprived of their liberty, more often applied to persons deprived of their liberty in a criminal process at the stage before sentence has been pronounced or until all appeals have been exhausted, when the detainee may begin to be termed a prisoner.

*Due process:* The principle that the government must respect all of the legal rights owed to a person according to the law.

*Dynamic security:* The development by staff of positive relationships with prisoners as a group and individually, based on firmness and fairness, in combination with an understanding of their personal situation and characteristics, including any specific risk they may pose or face.

*Individualised approach:* This means that an individual's personal characteristics as well as the nature of the offence are taken into account at all stages of the criminal justice process.

*Judicial authority:* A court, a judge or a public prosecutor.

*Measure:* A sanction imposed by a judicial or administrative authority before or instead of a decision on a sentence, or a sentence that does not involve imprisonment.

*Mitigation:* The explanation for the offence given by or on behalf of a guilty party in an attempt to minimise the sentence.

*Normalisation:* The principle whereby prison life should be arranged so as to approximate as closely as possible to the realities of life in the community.

*Offender:* Someone who has been convicted of a crime. Sometimes also used of someone who is suspected of having committed a crime.

*Paralegal:* A person who provides legal aid to people. This can be anything from informing about the law and court procedures to advice and assistance with legal problems. They will have received some training on law but not to the level of a qualified lawyer.

*Penal system:* The part of the criminal justice system which deals with non-custodial sanctions and measures, probation, parole and prison.

*Pre-trial detention:* Any period of detention of a defendant ordered by a judicial authority and prior to conviction. This does not include the initial deprivation of liberty by the police or law enforcement officer.

*Prisoner:* The term most commonly applied to a person deprived of their liberty in a criminal process. It may be applied to a person post-conviction and pronouncement of sentence, or it may apply to a person at any stage from police apprehension to provisional or final release.

*Probation service:* A body, or division of a body, created or commissioned by the state to work with suspects or offenders serving sentences in the community, or shortly to return to the community from prison. Typical tasks include continuous assessment, management of risk and dangerousness, provision of and oversight over rehabilitative programmes delivered in the community and designed to reduce re-offending.

*Prosecution:* The institution or conduct of criminal proceedings against a person.

*Rehabilitation:* A broad concept whereby the underlying factors that lead to criminal behaviour in the first place are addressed and the likelihood of re-offending reduced; often used interchangeably with reintegration or treatment.

*Re-entry:* Process by which a prisoner is prepared to re-integrate into society when he or she has served a prison sentence.

*Re-offend:* When an offender commits a new crime after being convicted of a previous offence.

*Revocation:* An action taken by a competent body such as the court, public prosecutor, prison authority, parole agency, in response to a violation or violations of the conditions attached to a non-custodial measure. This does not imply automatic reversion to custody, but could involve considering what other non-custodial measure or form of supervision might be more effective.

*Sanction:* A penalty or obligation that can be imposed on a suspect or offender in the pre-trial, trial and post trial phase by a recognised authority.

*Status offence:* Behaviour of one category of person that would not be criminally punishable in another, for example, in relation to children, not attending school, running away from home.

## Terms regarding non-custodial measures and sanctions

*Absolute discharge:* The court takes no further action against an offender, but the offender's discharge may appear on his or her criminal record.

*Caution:* Warning given following admission of guilt as an alternative to prosecution. May form part of a person's criminal record although not a conviction. A conditional caution has reparative and/or rehabilitative conditions attached.

*Community service order:* A sentence served in the community during which offenders work unpaid and under supervision of benefit to the local community.

*Compensation:* A sanction or measure that involves requiring an offender to compensate the victim.

*Conditional discharge:* A discharge of an offender without sentence on condition that he/she does not re-offend within a specified period of time. If an offence is committed in that time then the offender may also be sentenced for the offence for which a conditional discharge was given.

*Conditional release:* The early release of a prisoner who is then subject to continued monitoring as well as compliance with certain terms and conditions for a specified period under threat that he or she will be recalled to prison if the conditions are not complied with. This can be discretionary, after a certain period of the sentence has been served, or it can be mandatory when it takes place automatically after a minimum period or a fixed proportion of the sentence has been served (see Parole).

*Curfew order:* A curfew order is similar to house arrest. People must stay indoors, usually at their home, for the curfew period.

*Discharge:* The offender is found guilty of the offence, and the conviction appears on his or her criminal record, but either no further action is taken at all (absolute discharge), or no further action is taken as long as the offender does not offend again in a certain period of time (conditional discharge).

*Diversion:* An administrative procedure allowing certain offenders to bypass the formal criminal justice system in order to avoid further prosecution and conviction by participating in, for example, mediation processes or a treatment programme, or by compensating the victim.

*Drug treatment and testing:* A sentence for drug users who receive treatment for their drug use and may have to give regular urine tests to make sure they are not using drugs.

*Electronic monitoring:* An offender or person on bail has an electronic tag worn on the ankle or wrist which notifies monitoring services if the offender is absent during the curfew hours.

*Fine:* A sentence of the court which involves the offender paying money to the court as punishment for their crime.

*Half-way house:* A living space, normally run by the probation or prison service, designed to bridge the gap between life in prison and life in society.

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*Mediation:* A way of resolving conflicts or differences of interests between the offender and the victim. This service may be provided by probation services or civil society or victim support organisations.

*Non-custodial measures and sanctions:* Sentences of the court which deal with the offender in the community rather than in prison. These involve some restriction of liberty through the imposition of conditions and obligations such as attendance at counselling programmes or drug treatment and testing.

*Non-custodial measures to avoid pre-trial detention:* These are requirements imposed on a defendant in order to avoid pre-trial detention. They may include: undertakings to appear before the court as and when required; not to interfere with witnesses; periodic reporting to police or other authorities; submitting to electronic monitoring and/or curfews; surrender of passports.

*Parole:* Early release of a prisoner who is then subject to continued supervision and bound to comply with certain terms and conditions for a specific period, with the possibility of a recall to prison if the conditions are breached (see Conditional release).

*Offending behaviour programme:* A programme of work undertaken with an offender which is designed to tackle the reasons or behaviour which leads to his or her offending; for example, substance-related offending, domestic abuse programmes, sex offender treatment programmes.

*Restorative justice:* Processes that give victims the chance to tell offenders the impact of their crime, to get answers to their questions and to receive an apology, and give offenders the chance to understand the impact of their actions and to do something to repair the harm. Restorative justice may take place as an alternative to prosecution for less serious crimes, when an offender has pleaded guilty in court but before sentence, after sentence, in prison or in the community.

*Suspended sentence:* A custodial sentence which will not take effect unless there is a subsequent offence within a specified period.

*Tagging:* See Electronic monitoring.

*Temporary release:* Release of a prisoner during sentence, for a set amount of time, for a specific purpose, or generally as preparation for a return to society upon conditional or final release.

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# A3 Selected further reading

## Useful websites for reference

African Commission on Human and Peoples' Rights – [www.achpr.org](http://www.achpr.org)

Association for the Prevention of Torture – [www.ap.t.ch](http://www.ap.t.ch)

Council of Europe – [www.coe.int](http://www.coe.int)  
see in particular Penitentiary questions: Council of Europe recommendations and resolutions: 2010

European Institute for Crime Prevention and Control, affiliated with the United Nations – [www.heuni.fi](http://www.heuni.fi)

Geneva Centre for the Democratic Control of the Armed Forces – [www.dcaf.ch](http://www.dcaf.ch)

Interagency Panel on Juvenile Justice – [www.juvenilejusticepanel.org](http://www.juvenilejusticepanel.org)

International Centre for Criminal Law Reform and Criminal Justice Policy – [www.icclr.law.ubc.ca](http://www.icclr.law.ubc.ca)

International Centre for Prison Studies – [www.kcl.ac.uk/schools/law/research/icps](http://www.kcl.ac.uk/schools/law/research/icps)  
see in particular the Guidance Notes, World Prison Briefing and A Human Rights Approach to Prison Management

International Committee of the Red Cross – [www.icrc.org](http://www.icrc.org)

Inter-Parliamentary Union – [www.ipu.org](http://www.ipu.org)

Office for Democratic Institutions and Human Rights – [www.osce.org](http://www.osce.org)

Office of the High Commissioner for Human Rights – [www.ohchr.org](http://www.ohchr.org)

Organization of American States – [www.oas.org](http://www.oas.org)

Penal Reform International – [www.penalreform.org](http://www.penalreform.org)

Quaker United Nations Office – [www.quno.org](http://www.quno.org)

Raoul Wallenberg Institute of Human Rights and Humanitarian Law – [www.rwi.lu.se](http://www.rwi.lu.se)

The Restorative Justice Consortium – [www.restorativejustice.org.uk](http://www.restorativejustice.org.uk)

Restorative JusticeOnline - [www.restorativejustice.org](http://www.restorativejustice.org)

UN African Institute for the Prevention of Crime and the Treatment of Offenders – [www.unafri.or.ug](http://www.unafri.or.ug)

UN Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders – [www.unafei.or.jp/english/](http://www.unafei.or.jp/english/)

UN Children's Fund – [www.unicef.org](http://www.unicef.org)

United Nations Department of Peacekeeping Operations (DPKO) – [www.un.org/en/peacekeeping/cljas](http://www.un.org/en/peacekeeping/cljas)

UN Interregional Crime and Justice Research Institute [www.unicri.it](http://www.unicri.it)

UN Latin American Institute for the Prevention of Crime and the Treatment of Offenders – [www.ilanud.or.cr](http://www.ilanud.or.cr)

UN Office on Drugs and Crime – [www.unodc.org](http://www.unodc.org)

World Medical Association – [www.wma.net](http://www.wma.net)  
see in particular the WMA's Handbook of Declarations

Venice Commission – [www.venice.coe](http://www.venice.coe)

## Books, articles and reports

### General background

Farral, S., *Rethinking What Works with Offenders: Probation, social context and desistance from crime*, Willan Publishing, 2004

Kalmthout, A., *Probation in Europe*, Wolf, 2008

Rodley, N., *The Treatment of Prisoners under International Law*, OUP, 2009

Van Zyl Smit, D., *Principles of European Prison Law and Policy*, OUP, 2009

### Reform process

*A Handbook on Planning for Crime Prevention in Southern Africa and the Caribbean*, UNODC, 2008

*Access to Justice in Africa and Beyond*, PRI, 2007

*Access to Justice in Sub-Saharan Africa*, PRI, 2001

*Africa's Recommendations for Penal Reform*, PRI, 2008

*Compendium of Comparative Prison Legislation*, PRI, 2008

*Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice*, 2006

*Criminal Justice Assessment Toolkits*, UNODC, 2006

*Criminal Justice Assessment Toolkit: Crime prevention and assessment tool*, UNODC/UN-Habitat, 2009

Dandurand, Y., *Enhancing Criminal Justice Reforms*, Paper presented to Eleventh UN Congress on Crime Prevention and Criminal Justice

*Handbook for Prison Managers and Policymakers on Women and Imprisonment*, UNODC, 2008

*Handbook on Planning and Action for Crime Prevention in Southern Africa and the Caribbean Regions*, UNODC, 2008

*Handbook on Security Sector Reform*, OECD and DAC, 2007

*Law and Justice: The Case for Parliamentary Scrutiny*, Inter-Parliamentary Union, Geneva, 2006

*Making Standards Work*, PRI, 2001

Model Codes for Post-Conflict Criminal Justice: [www.nuigalway.ie/human\\_rights/Projects/model\\_codes.html](http://www.nuigalway.ie/human_rights/Projects/model_codes.html)

Organisation for Economic Co-operation and Development (OECD), Development Assistance Committee (DAC)  
*Handbook on Security Sector Reform*, Paris, OECD, 2007

Penitentiary questions: Council of Europe recommendations and resolutions: 2010

UN Treaty Handbook: <http://untreaty.un.org/english/treatyHandbook/Eng.pdf>

## Effective sentencing

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Fagan, J., and Meares, T., 'Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities', *Ohio State Journal of Criminal Law* 6 (2008), 173-229

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Mauer, M., *Comparative International Rates of Incarceration: An Examination of Causes and Trends*, The Sentencing Project, 2003

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Sherman, L., 'Defiance, Deterrence and Irrelevance: A Theory of the Criminal Sanction', *Journal of Research in Crime and Delinquency*, 30 (1993) 445

Terblanche, S., *Research on the Sentencing Framework Bill*, Open Society Foundation for South Africa, 2008

## Non-custodial measures and sanctions

*Alternatives to Imprisonment in East Africa: Trends and Challenges*, Penal Reform International, 2012

*Custodial and Non-custodial Measures: Alternatives to Imprisonment*, UNODC, 2006

*A Handbook on Alternatives to Imprisonment*, UNODC, 2007

*Handbook on Restorative Justice Programmes*, UNODC, 2006

Moore, B., *Risk Assessment: A practitioner's guide to predicting harmful behaviour*, London, Whiting & Birch, 2000

*Rethinking Crime & Punishment: The Report*, Esmée Fairbairn Foundation, December, 2004

*The Socioeconomic Impact of Pretrial Detention: A Global Campaign for Pretrial Justice Report*, Open Society Foundations/UNDP, 2011

Stern V., *Developing Alternatives to prison in East and Central Europe and Central Asia, A Guidance Handbook*, International Centre for Prison Studies, King's College London, May 2002

*The PLC Manual: A manual for paralegals conducting paralegal aid clinics in prison*, jointly published by the Paralegal Advisory Service Institute (PASI) and PRI, 2nd edition, 2007

## Prison conditions

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Coyle, A., *A Human Rights Approach to Prison Management*, International Centre for Prison Studies, 2009

*Drugs in Focus*, European Monitoring Centre for Drugs and Drug Addiction Briefing Note, Jan-Feb 2003

*Handbook on Prisoner File Management*, UNODC/PRI, 2008

*Handbook on Prisoners with Special Needs*, UNODC, 2006

*Health in Prisons: A WHO Guide to the essentials in prison health*, Copenhagen, WHO, 2007

Human Rights and Prisons Series, OHCHR/PRI, 2005

*Index of Good Practices in Reducing Pre-trial Detention*, PRI, 2005

*Open Prisons in India: How Open Can Open Be?*, PRAJA and PRI, 2002

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*Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk*, A Global Campaign for Pretrial Justice Report, Open Society Foundations, 2011

*Prison Health as Part of Public Health: The Moscow Declaration*, Geneva, World Health Organization Europe, 2003

Sarkin, J., *Human Rights in African Prisons*, Athens, Ohio, Ohio University Press, 2008

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Schonteich, M., 'The Scale and Consequences of Pre-trial Detention Around the World' in *Justice Initiatives: Pre-trial Detention*, New York, Open Society Justice Initiative, 2008, pp. 44-56

Walmsley, R., *World Prison Population List* (8th edition), International Centre for Prison Studies, King's College London, 2009

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World Medical Association Handbook of Declarations (including the Tokyo Declaration Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment (2006))

### Prisoner re-entry into society

Burke, P. and Tonry, M., *Successful Transition and Re-entry for Safer Communities: A Call to Action for Parole*, (produced by the Center for Effective Public Policy, 2006). Available at: [www.cepp.com/documents/A%20Call%20to%20Action%20for%20Parole.pdf](http://www.cepp.com/documents/A%20Call%20to%20Action%20for%20Parole.pdf)

*Creating Paths for Offender Reintegration, Conference Report*, Open Society Foundation for South Africa, 2008

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### Children in contact with the law

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Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-year-old children to die in prison*, 2007

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## Death penalty

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*Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, Report of the UN Secretary General, 18 December 2009, E/2010/10

*Death Penalty Information Pack*, Penal Reform International, 2011

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