

# Reducing pre-trial detention

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In many countries, very large numbers of people in prison have not been convicted of a criminal offence but are waiting for their guilt or innocence to be established by a court. Some will eventually be acquitted of any crime; all should be presumed innocent. Yet in many cases their period of detention on remand may last months or years. Conditions are often worse than for convicted offenders and in many countries detainees are subject to highly restricted regimes with limitations on visits and on opportunities to take part in education, training or work. Countries with the highest levels of overcrowding also have prison populations with the highest proportions of pre-trial detainees. In 40 countries more than half of prisoners are held on remand.

High rates of pre-trial detention can be found on most continents, particularly in low income countries and states emerging from conflict. Data from the Institute for Criminal Policy Research (ICPR) shows that pre-trial detainees represent 86 per cent of the prison population in Bolivia, 83 per cent in Liberia, and 74 per cent in Bangladesh. In Europe, while rates are lower, more than a third of those in prison in the Netherlands, Italy and Denmark are awaiting trial.<sup>1</sup>

There is a growing recognition at the global level that action needs to be taken to reduce pre-trial detention. Goal 16 of the UN Sustainable Development Goals 2015-2030 aims to promote peaceful and inclusive societies for sustainable

development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.<sup>2</sup> One of the proposed indicators for measuring progress against this Goal is the percentage of unsentenced detainees in a country's overall prison population.

Penal Reform International (PRI) has a long tradition of working to develop alternatives to unnecessary pre-trial detention, in particular by introducing a role for paralegals in assisting unrepresented defendants. During 2015, PRI initiated a comparative research study into how bail works as an alternative to pre-trial detention. A survey questionnaire was distributed with generous assistance from Advocates for International Development (A4ID) and responses received from 45 jurisdictions.<sup>3</sup> The study found that while bail and other options for release pending trial are available in the legislation of many countries, there are many practical problems in ensuring that pre-trial detention is used as a last resort and for the shortest possible time.

Drawing on international standards, practical experience and findings from the research, PRI has drawn up this plan to assist countries to reform their legislation, policy and practice in relation to pre-trial justice.

1. Institute for Criminal Policy Research (formerly the International Centre for Prison Studies), *World Prison Brief*, [http://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=All) <accessed 21 February 2016>.

2. For more information about Goal 16 of the Sustainable Development Goals, see <https://sustainabledevelopment.un.org/sdg16> <accessed 21 February 2016>.

3. This research was conducted by international law firms Dechert LLP, DLA Piper, White & Case LLP in January 2015 brokered by Advocates for International Development (A4ID).

## 01 Review the scope of the criminal law so that it is not used more widely than necessary

There are wide variations between countries in the extent and nature of behaviour which is subject to the criminal law. In many low income countries, criminal law provisions date back to the colonial era and include offences such as being a ‘rogue and vagabond’, or ‘idle and disorderly’, which have little justification in the 21st century. There have been initiatives to limit the proliferation of criminal offences in other countries.

→ In January 2016, Italy decriminalised a long list of minor offences so that they are dealt with as administrative infractions rather than crimes. These include driving a motor vehicle without a licence, and the offence of ‘abuse of popular gullibility’ – a form of deception.<sup>4</sup>

→ Uruguay legalised the sale of marijuana in May 2014.<sup>5</sup>

→ Between 2010 and 2015 the Ministry of Justice in England and Wales established a procedure for ensuring that new criminal offences were genuinely necessary. The Ministry has also monitored the creation and deletion of offences in new pieces of legislation introduced by each department of state.<sup>6</sup>

## 02 Ensure international standards underpin legislation on pre-trial justice

The key principles guiding reform of pre-trial justice must be drawn from international standards. These include:

- the presumption of innocence;
- a strong presumption for release before trial, with the onus on the prosecution to show the need for detention in all cases;
- the need for courts to be guided by principles of necessity and proportionality in reaching decisions about pre-trial detention;
- clear and simple legislation that is easily understood by lawyers and non-lawyers alike.

In some countries, once particular charges are brought, a defendant is not permitted to remain in the community pending trial and pre-trial detention is in effect mandatory. This blanket approach does not permit the kind of individualised assessment which is needed and should therefore be resisted. There should be the possibility of release in all kinds of cases, with no crimes automatically ineligible for release. The Rome Statute which deals with the gravest international crimes permits suspects to apply for interim release before trial.<sup>7</sup>

Defendants should be released unless, as a result of strong evidence, there are reasonable grounds for believing that in their particular case they will fail to appear in court, interfere with justice or commit serious offences, and that no measures in the community can reduce these risks to an acceptable level. Remands in custody should be limited to cases which meet a certain threshold of seriousness, in which there is a strong likelihood of conviction in the event of which a prison sentence is probable. Clear statutory guidance should be provided on the factors which courts can legitimately take into account in reaching a view about whether grounds for withholding bail are met, together with a requirement for courts to cite specific reasons for withholding bail and to record these.

4. ‘Italy decriminalizes obscene acts, other minor crimes to unburden justice system’, *The Japan Times*, 17 January 2016, <http://www.japantimes.co.jp/news/2016/01/17/world/crime-legal-world/italy-decriminalizes-obscene-acts-other-minor-crimes-to-unburden-justice-system/#.VsmVuPmLTct> <accessed 21 February 2016>.

5. ‘Uruguay cannabis market still struggles for legitimacy a year after historic ruling’, *The Guardian*, 13 July 2015, <http://www.theguardian.com/world/2015/jul/13/uruguay-marijuana-cannabis-market-sale-legitimacy> <accessed 21 February 2016>.

6. UK Ministry of Justice, *Criminal Offences Gateway Guidance*, <http://www.justice.gov.uk/downloads/legislation/criminal-offences-gateway-guidance.pdf> <accessed 21 February 2016>.

7. Article 59, <http://legal.un.org/icc/statute/romefra.htm> See Davidson CL, ‘No Shortcuts on Human Rights: Bail and the International Criminal Trial’, *American University Law Review*, Vol 60 Issue 1 2010, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1601&context=aulr> <accessed 21 February 2016>.

## 03 Divert cases away from the court system wherever possible

Prosecution is not the most effective or economical way of dealing with every case of criminal behaviour. Keeping young people out of the courts helps them to grow out of crime, while defendants with drug or mental health problems can be fast tracked directly into treatment instead of court. Minor cases are often best dealt with by police or prosecutor warnings. Compensation, mediation or reparation, sometimes known as restorative justice, outside court can often provide a better solution for the offender and victim, in traditional settings or other fora. Despite this, in many countries the police are incentivised to make arrests, even for petty offences, thereby increasing their prospects of promotion. In other countries, prosecutors have limited scope for resolving criminal matters outside the courtroom. There are however many examples of good practice.

→ In New Zealand, a police diversion scheme enables eligible offenders to complete diversion activities within a given timeframe to avoid both a full prosecution and the possibility of receiving a conviction. This means that judicial time is reserved for more serious offences and offenders. Conditions can include: letter of apology, counselling, community service or involvement in restorative justice sessions with the victim.<sup>8</sup>

## 04 Offer courts a wide range of release options when defendants appear in courts

When cases cannot be completed on first appearance, courts should have a wide range of release options, ranging from unsecured release through to money bail, with courts required to apply the least restrictive measures necessary. Such options should ensure the defendant's appearance at future court hearings and protect the safety of the community, victims and witnesses pending trial. Courts should review the release options appropriate to the risks and special needs posed by individual defendants if released into the community. These might include curfews or house arrest, monitored through electronic bracelets. However, the Council of Europe has noted that: 'in some pre-trial cases, the judiciary has prescribed electronic monitoring to suspects who would not normally be remanded in custody because they do not present a risk of flight or of interfering with the course of justice. This is not to be encouraged, either at the pre-trial (or indeed sentencing) stage, particularly in view of its cost and intrusiveness'.<sup>9</sup>

→ In two US states, research found that moderate- and high-risk defendants who received pre-trial supervision were significantly more likely to appear for their day in court than those who were unsupervised. In addition, long periods of supervision (of more than 180 days) were related to a decrease in new criminal activity; however, no such effect was evident for supervision of 180 days or less.<sup>10</sup>

## 05 Set amounts of money bail according to the circumstances of the individual defendant

Many of those remanded in custody cannot afford the amounts of bail which have been determined by the courts. This leads to injustice and unnecessary punishment of poor people. In Brazil, the introduction of money bail appears to have increased rather than reduced the numbers in pre-trial detention.<sup>11</sup> In systems where they are used, clarity is needed about the status, role and obligations of the bail guarantor – the person who guarantees that the person will surrender to custody as required and will undertake to pay a guaranteed sum if there is a failure to do so.

8. New Zealand Police, Adult Diversion Scheme policy and factsheet, <http://www.police.govt.nz/about-us/publication/adult-diversion-scheme>, <accessed 21 February 2016>.

9. European Committee on Crime Problems (CDPC), Draft Recommendation CM/Rec(2014) of the Committee of Ministers to member States on electronic monitoring, 19-21 February, 2014, CM(2014)14 add2, <https://wcd.coe.int/ViewDoc.jsp?id=2150953&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383> <accessed 21 February 2016>.

10. Laura and John Arnold Foundation, *Pretrial Criminal Justice Research*, [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf) <accessed 21 February 2016>.

11. 'Behind Brazil's Arrest First, Ask Later Policy', *Insight Crime*, 24 February 2015, <http://www.insightcrime.org/news-analysis/brazil-pretrial-detention-prison-population> <accessed 21 February 2016>.

Legislation should require consideration of the resources, character and closeness of the bail guarantor to the person when their suitability is being determined. The legislation should still allow discretionary forfeiture if failure were to occur. The European Court of Human Rights has ruled that bail amounts must be assessed with reference to the defendant, their assets, and their relationship with the guarantor.<sup>12</sup>

→ A Community Bail Fund has been set up in Brooklyn, USA, with more than USD 200,000 raised from private individuals and foundations to cover bail for low-level offenders with close community connections. When they return to court, the money is recycled to cover other defendants' bail.<sup>13</sup>

## 06 Introduce and enforce time limits for remands in custody, after which defendants should be reviewed or freed on bail

Where defendants are remanded in custody, their cases should be regularly reviewed, with courts required to justify decisions to prolong a defendant's pre-trial detention or ongoing custody by citing specific evidence as to why they should not be granted bail or otherwise released. Periods on remand should never exceed the maximum length of the sentence which might be imposed in the event of conviction. Account should be taken of time served on remand when determining the length of a custodial sentence, by subtracting the days spent on remand from the period spent serving the sentence in prison.

→ In Ukraine, pre-trial detention is limited to 12 months in the case of serious crimes and six months for petty crimes.<sup>14</sup>

→ In a landmark ruling in September 2014, the Indian Supreme Court ordered prisons to release pre-trial detainees who had been held for more than half of the maximum term they could be sentenced to if they were found guilty.<sup>15</sup>

## 07 Provide legal aid and assistance supplemented, where necessary, by paralegals to provide advice to defendants

In line with the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems,<sup>16</sup> countries should be developing systems for providing legal advice for defendants who cannot afford to pay for a lawyer. In terms of pre-trial detention, legal advice, whether provided by national public defender services, private lawyers or paralegal schemes, will improve access to justice and case management during the pre-trial phase of criminal proceedings.

→ In Sierra Leone, the NGO, Timap for Justice, runs a wide-ranging criminal justice programme, part of which involves paralegals identifying all remand inmates in prison. In cases where remand inmates have not previously applied for bail or have been erroneously denied bail by a magistrate, the paralegal explains the bail process and aids the inmate in launching a new application for court bail. The paralegals also identify, contact and inform guarantors of their role and responsibilities. In cases where remand inmates have been awaiting trial through several court adjournments, the paralegals refer the cases to Timap lawyers.

12. *Neumeister v Austria*, European Court of Human Rights, 27 June 1968.

13. 'Community Bail Fund For Poor Defendants To Launch In Brooklyn', *Huffington Post*, 23 March 2015, [http://www.huffingtonpost.com/2015/03/17/brooklyn-community-bail-fund\\_n\\_6886836.html](http://www.huffingtonpost.com/2015/03/17/brooklyn-community-bail-fund_n_6886836.html) <accessed 21 February 2016>.

14. Information obtained from survey of bail conducted by international law firms, Dechert LLP, DLA Piper, White & Case LLP, in January 2015 brokered by Advocates for international development (A4ID).

15. Supreme Court of India, Writ. Petition (Crl.) No. 310 of 2005 titled as 'Bhim Singh Versus Union of India & Ors.', 24 September 2014, Endst No. 29613 Gaz. II(17).

16. Adopted by the UN General Assembly on 20 December 2012, A/RES/67/187.

## 08

**Establish effective file management**

An effective system of file management is crucial to ensuring that cases do not get lost in the system. The newly revised Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) require a standardised prisoner file management system in every place where persons are imprisoned.<sup>17</sup> This must include, where applicable, information related to the judicial process, including dates of court hearings and legal representation. Prisoner file management systems should also be used to generate reliable data about trends relating to and characteristics of the prison population, including occupancy rates, in order to create a basis for evidence-based decision-making by policymakers.

→ During 2013 and 2014, a series of consultations with officials and policymakers in Malawi led to the development of new case folders, registers (for court and prison) and a court diary, which are intended to assist courts in ensuring that cases are placed on the court roll so that time limits are met.<sup>18</sup>

## 09

**Innovate court practice to reduce delay and detention**

In many countries, courts struggle to keep pace with the demands of criminal justice and defendants face lengthy delays before they can be tried. However, a variety of innovations have been introduced to overcome the obstacles faced by courts in providing timely hearings. These include regular visits to prisons by prosecutors, judges and magistrates to analyse files and identify detainees who have been held past their trial date; mobile courts which take place within jails; and the use of new technology.

→ A video conferencing system has been launched in the Bahamas as part of the country's Swift Justice initiative, which is designed to speed up court matters and reduce the backlog of cases. The virtual system will allow for bail applications, remand hearings, arraignments and criminal case management to be conducted via video link or videoconferencing.<sup>19</sup>

→ In Uganda, Community Service Department Volunteers work in police stations, courts and prisons to educate detainees about Community Service Orders which can be imposed instead of prison sentences particularly when a defendant pleads guilty. The volunteers also provide the court with information about the defendant and opinion within the local community about the prospect of the defendant's return to society without a custodial sentence. As a result, courts are able to make speedier sentencing decisions without the need for lengthy remands in custody.<sup>20</sup>

## 10

**Make special efforts to keep women and children away from remand detention**

The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) note the particular risk of abuse that women face in pre-trial detention and require appropriate measures in policies and practice to guarantee women's safety at this time.<sup>21</sup> Rule 58 states that alternative ways of managing women who commit offences, such as diversionary measures and pre-trial alternatives, should be implemented wherever possible and appropriate. The Rules also say that when deciding on pre-trial measures for a pregnant woman or a child's sole or primary caretaker, non-custodial measures should be preferred wherever possible and appropriate.<sup>22</sup>

17. Nelson Mandela Rules, Rule 6.

18. CSPRI, Promoting Pre-trial Justice in Africa Newsletter, 10 November 2015, <http://ppja.org/about-ppja/newsletter-10-toward-better-case-management-in-malawi-toward-decriminalisation-of-petty-offences-in-africa-toward-indicators-for-pre-trial-justice-in-africa/view> <accessed 21 February 2016>.

19. 'Bahamas' Swift Justice initiative goes high-tech', *The Bahamas Weekly*, 2 October 2012, [http://www.thebahamasweekly.com/publish/bis-news-updates/Bahamas\\_Swift\\_Justice\\_initiative\\_goes\\_high-tech24361.shtml](http://www.thebahamasweekly.com/publish/bis-news-updates/Bahamas_Swift_Justice_initiative_goes_high-tech24361.shtml) <accessed 21 February 2016>.

20. Penal Reform International, *Excellence in Training on Rehabilitation in Africa (EXTRA) Project: Mid-term Evaluation*, <http://www.penalreform.org/resource/evaluation-excellence-in-training-on-rehabilitation-in-africa/> <21 February 2016>.

21. UN Bangkok Rules, Rule 56.

22. UN Bangkok Rules, Preliminary Observations, para 9.

Under the UN Convention on the Rights of the Child, the arrest, detention or imprisonment of a child should [...] be used only as a measure of last resort and for the shortest appropriate period of time. The vast majority of children deprived of their liberty are detained pre-trial. This kind of detention should only be used in exceptional circumstances (where it is necessary to ensure the child's appearance at the court proceedings or where the child is an immediate danger to himself/herself or others) and only for limited periods of time.

→ A pilot Juvenile Police Department established with PRI support in Jordan resolved between 70 and 90 per cent of cases at police level in the North Amman District between January 2012 and October 2013. This compares to an estimated 30 per cent in areas of Jordan that were outside its jurisdiction.<sup>23</sup>

→ In Sierra Leone, the NGO, AdvocAid, provides specific legal representation to women offenders who are too poor to afford private legal services. In particular, they offer the services of a 'Duty Counsel' whose goal is to limit the number of women imprisoned by ensuring that alternatives are explored as a first option (bail, mediation etc). The Duty Counsel's duties include for example: providing information on the defendant's rights and options, explaining charges, completing bail applications for them and helping contact family members to provide surety in bail hearings.<sup>24</sup>

23. Penal Reform International, *Impact evaluation: Reforming the juvenile justice system in Jordan (2011-2013)*, 2013, <http://www.penalreform.org/resource/impact-evaluation-reforming-juvenile-justice-system-jordan-20112013/> <accessed 21 February 2016>.

24. Information provided to PRI. For more information, see <http://advocaidsl.org/access-to-justice/> <accessed 21 February 2016>.

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