

Women in Prison and Children of Imprisoned Mothers Series



English

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# Pre-Trial Detention of Women

And its impact on their children

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February 2007

Quaker United Nations Office



## **Women in Prison and Children of Imprisoned Mothers – Project Background**

The Quaker United Nations Office, Geneva, has since 2004 been undertaking research on Women in Prison and the Children of Imprisoned Mothers as part of a joint project with the Quaker Council for European Affairs (Brussels), Quaker Peace and Social Witness (United Kingdom) and the Friends World Committee for Consultation representation to the United Nations Commission on Crime Prevention and Criminal Justice and the United Nations Crime Congress.

The project aims to gain a clearer understanding of the particular problems faced by women prisoners and children of imprisoned mothers and how these problems can be better addressed by governments and policy makers.

Hard copies of this paper may be available on request.

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QUNO's work on the Women in Prison Project is funded by Irish Aid.

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## Executive Summary

Under international standards, detention pending trial is a measure of last resort and is only permitted if the following conditions are met:

- the person concerned is reasonably suspected of having committed an offence; and
- there is legal provision for such pre-trial detention; and
- there is a risk of the suspect either:
  - (a) absconding (failing to appear for trial), or
  - (b) interfering with witnesses, evidence or other trial processes, or
  - (c) committing further offences; and
- there is no alternative way the risk can be addressed other than detention.

Furthermore, the standards specify that pre-trial detention should not be used in the case of alleged offences which would not themselves carry a custodial sentence.

However, in too many countries too many people, including women, are held in pre-trial detention for too long. The overuse of pre-trial detention is part of the global phenomenon of over-incarceration, is not limited to any one country or region, and has specific aspects and issues which need consideration.

Over-use of pre-trial detention falls into two categories:

- Too frequent recourse to such detention
- Detention for too long a period of time

The main reason is the failure to provide or use alternatives to custody which can be used individually or in combination in order to address the specific risks identified in the individual case. Such alternatives should include:

**Undertakings**, such as to appear before a judicial authority as and when required, not to interfere with the course of justice, or not to engage in particular conduct (including that involved in a profession or particular employment);

**Reporting requirements**, for example on a daily or periodic basis to a judicial authority, the police or other authority;

**Supervision** by an agency appointed by the judicial authority; or **electronic monitoring**;

**Residence** at a specified address, with or without conditions as to the hours to be spent there;

**Restrictions** on leaving or entering specified places or districts without authorisation; on meeting specified persons without authorisation;

**Surrendering documents** such as passports or other identification papers; and

Providing or securing **financial or other guarantees** as to conduct pending trial.

However, none of the requirements placed on women should put them in danger, such as requiring residence at an address where the woman has been subjected to abuse.

Where alternatives do exist, they may not be used because the judicial authorities do not know about them, because they do not have confidence in their effectiveness, or because they are not permitted to use them (for example, certain offences may require mandatory pre-trial detention). In other circumstances, it may be that there are not sufficient alternatives, such as insufficient places in bail hostels, or that the distribution does not cover all areas of the country.

When considering individual decisions, the specific circumstances of the individual accused person should be considered in relation to the specific risk identified. Often, the ability to provide a financial guarantee, or whether the person has secure employment or secure accommodation, are factors in considering whether the individual is likely to abscond before trial. However, these are areas in which women may be at a disadvantage since most female offenders are in low-income groups, are less likely to have secure full-time employment, to own or rent accommodation in their own name, and to be able to provide financial sureties. These may be factors in the disproportionate pre-trial detention of women and girls.

Since most female offenders are the sole or main carer of minor children, this is a factor which should be taken into consideration in decisions about detention pending trial. Caring responsibilities may be evidence of being less likely to abscond. At the same time, the negative impact on children of their mother being detained should be taken into account and be an added incentive to use non-custodial alternatives to pre-trial detention. Not only is there the question of physical separation, but also the emotional impact, the likelihood that rented accommodation and/or employment will be lost, and that children will be taken into care. The cumulative effect may lead to permanent separation even if the mother is then acquitted. Furthermore, worrying about their children is one of the factors that leads to the high incidence of mental health problems and self-harm amongst female detainees.

In addition to over-use, the actual conditions and regime under which pre-trial detainees are held raise concerns. Although they have not been found guilty of any offence, their conditions of detention are often more restrictive than those of convicted prisoners. This affects both male and female pre-trial detainees but certain aspects, such as limitations on visiting and family contact, may have a disproportionate impact on female detainees who have caring responsibilities. In addition, access to mental health, drug and substance abuse programmes, as well as education or work programmes, tends to be much more limited for pre-trial detainees.

Finally, the excessive duration of pre-trial detention, often lasting years, sometimes longer than the maximum custodial sentence for the alleged offence, requires urgent attention, including requirements to regularly review the continued need for detention in individual cases, impose maximum time limits for pre-trial detention, and review judicial processes in order to speed up trials.

## Introduction

In too many countries too many women are held in pre-trial detention for too long. States, and the international community as a whole, need to recognise this invisible population and address their needs.

The Quaker United Nations Office, Geneva, is in the fourth year of a project on the human rights of women in prison and children of imprisoned mothers. In the course of the project it has become obvious that the overuse of pre-trial detention is part of the global phenomenon of over-incarceration. It has also become clear that human rights concerns arising from pre-trial detention differ in some respects from those arising from imprisonment and that as such they are worthy of focussed exploration. Many of the aspects of the problems raised are not gender specific, but this paper, produced as part of the wider project on women's imprisonment and its impact on their children, is focused on the experience of pre-trial detention for women and girls.

*In some countries the majority of detained women have not been convicted*

In England and Wales 66% of receptions of women into prison in a year are pre-trial detainees.<sup>1</sup> In Bolivia 77 % of women in prison are pre-trial.<sup>2</sup> In India more than 70% of the female prison population are pre-trial: many remain in jail for four to five years charged with offences which would carry sentences shorter than that.<sup>3</sup>

*A greater proportion of the female prison population have not been convicted than of the male prison population*

In Scotland 25% of the female daily average prison population are pre-trial detainees compared to 17% of the male daily average prison population.<sup>4</sup>

*The number of women in pre-trial detention is rising and fast*

In England and Wales between 1992 and 2002 there was a 196% increase in female pre-trial detention receptions compared to 52% for men.<sup>5</sup>

Women and girls, like men and boys, are detained by States for a wide variety of reasons; this paper is concerned with those detained under the criminal justice system. The systems that allow for pre-trial detention vary from country to country; for the purposes of this paper the term is understood to mean the judicially-authorized detention of an accused pending trial. Some of the issues raised pertain to detention post-arrest but prior to coming before a competent authority,

<sup>1</sup> Edgar, K. (2004) *Lacking Conviction: The Rise of the women's remand population* (Prison Reform Trust), p.14

<sup>2</sup> Bastick, M (2005) *Commentary on the Standard Minimum Rules on the Treatment of Prisoners* (Quaker United Nations Office, Geneva), p. 82

<sup>3</sup> Shankardass, R. et al (2000) *Workshop on New Models of Accessible Justice: The India Experience* (Penal Reform and Justice Association), p.5

<sup>4</sup> Statistics Bulletin CrJ/2005/8 Prison Statistics Scotland, 2004/05

<http://www.scotland.gov.uk/Publications/2005/08/18102211/22165#a> (Accessed January 2007)

<sup>5</sup> Women's Offending Reduction Programme (2004) *Women's Offending Reduction Programme Action Plan* (The Home Office), quoted in Edgar, K. (2004) *Lacking Conviction: The Rise of the women's remand population* (Prison Reform Trust), p.15

during trial and whilst awaiting sentence. This paper looks at problems arising from *prima facie* lawful pre-trial detention of women and girls, questions its lawfulness in certain circumstances and examines some alternatives.

Human rights concerns about pre-trial detention are not restricted to any one region but are global. They fall into three broad categories:

- the detention facilities and regime;
- excessive use of pre-trial detention; and
- excessively long pre-trial detention.

Although pre-trial detainees have not been found guilty of any crime their conditions of detention are often more restrictive than those of convicted prisoners. This affects both male and female pre-trial detainees but certain aspects, such as limitations on visiting and family contact, may have a disproportionate impact on female detainees who have caring responsibilities. The excessive nature of the use and length of pre-trial detention is at times in contravention of the international standards, in particular regarding the presumption against pre-trial detention and the requirement that the decision to detain is well reasoned and proportional. The Committee on the Rights of the Child has highlighted the impacts of pre-trial detention on juveniles, as well as the particular obligations of States with regard to juveniles, in its General Comment No. 10 (2007): Children's Rights in Juvenile Justice (CRC/C/GC/10)

## Part I: International Standards

Underpinning the legal considerations of the applicability of pre-trial detention are the right to liberty<sup>6</sup> and the presumption of innocence.<sup>7</sup>

The International Covenant on Civil and Political Rights states in Article 9(3) that: “it shall not be the general rule that persons awaiting trial shall be detained in custody,” making the presumption against pre-trial detention explicit. In its General Comment 8 on Article 9 of the Covenant, the Human Rights Committee elaborated that “pre-trial detention should be the exception and as short as possible.”<sup>8</sup> The Committee has reiterated this point in its Concluding Observations on Country reports:

[The Committee] stresses in this regard that the imposition of such [pre-trial] detention should not be the norm but should be resorted to only as an exceptional measure to the extent necessary and consistent with due process of law and article 9 (3) of the Covenant.<sup>9</sup>

The UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment elaborates this further in Principle 39:

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

Similarly the UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) require that whilst pre-trial detention should be applied with due regard for the investigation and the protection of society and the victim, it should nonetheless be used only as a measure of last resort.<sup>10</sup>

The standards applying to children are even stronger. The UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), state that “Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.”<sup>11</sup> The

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<sup>6</sup> Universal Declaration of Human Rights, adopted by General Assembly Resolution 217A (III), 10 December 1948, Articles 8 & 9

<sup>7</sup> Universal Declaration of Human Rights, adopted by General Assembly Resolution 217A (III), 10 December 1948, Article 11(1)

<sup>8</sup> Human Rights Committee, General Comment No. 08: Right to liberty and security of persons, Art. 9

<sup>9</sup> Human Rights Committee (2000) Concluding Observations: Argentina (CCPR/CO/70/ARG), paragraph 10.

<sup>10</sup> United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), adopted by General Assembly resolution 45/110, 14 December 1990, Rule 6.1

<sup>11</sup> UN Standard Minimum Rules for the Administration of Juvenile Justice, adopted by General Assembly resolution 40/33, 29 November 1985, Rule 13.1; similarly, Recommendation Rec(2006)13 of the Committee of Ministers of the Council of Europe to member states on the use of remand in custody, the conditions in which it takes places and the provision of safeguards against abuse, adopted 27 September 2006. The UN Standard Minimum Rules for the Administration of Juvenile Justice define juvenile as “2.2(a) A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult”. However, the Convention on the Rights of the Child was adopted and entered into force since this declaration was drafted and defines child as “1. For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” Therefore, there is a presumption that juveniles are anyone under 18 years of age.



Convention on the Rights of the Child reinforced this provision by stating that any deprivation of the liberty of a minor must only ever be used as a measure of last resort.<sup>12</sup> In its General Comment No. 10, the Committee on the Rights of the Child has reiterated this as well as the requirement to “strictly limit the use of deprivation of liberty”.<sup>13</sup>

### **Standards on legitimate use of pre-trial detention**

Women are put in pre-trial detention for numerous reasons, not all of which are in conformity with international standards. International law permits a limited number of legitimate reasons for detaining unconvicted individuals.

The Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders established a two-part test for the application of pre-trial detention. Firstly, to overcome the right to liberty there must be grounds to believe that the individual committed the offence or offences which are under investigation, that is to say that there must be a reasonable suspicion. Secondly, because this criterion alone is not enough to legitimise detention, one of the following grounds must also apply:

- risk of the suspect absconding
- risk of the suspect committing further offences
- risk of the suspect interfering with the process of the trial

The seriousness of the offence with which the individual is charged is often used by States as a justification for detention pending trial. However, whilst it may be a factor to take into consideration, it cannot alone justify the detention. The Crime Congress laid out a number of other factors that may be taken into consideration when deciding whether or not to detain an individual pending trial:

In considering whether pre-trial detention should be ordered, account should be taken of the circumstances of the individual case, in particular the nature and seriousness of the alleged offence, the strength of the evidence, the penalty likely to be incurred, and the conduct and personal and social circumstances of the person concerned, including his or her community ties<sup>14</sup>

Through its jurisprudence the Human Rights Committee has elaborated a set of criteria similar to those of the Crime Congress. The detention must be lawful, i.e. there must be domestic legislative provisions governing the use of pre-trial detention. The Human Rights Committee has been clear that lawfulness in this sense is not the sole factor in assessing whether the detention is in conformity with international standards.

The drafting history of article 9, paragraph 1, confirms that ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the

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<sup>12</sup> Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25, 20 November 1989, Article 37 (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”.

<sup>13</sup> Committee on the Rights of the Child, General Comment No. 10 (2007): Children’s Rights in Juvenile Justice (CRC/C/GC/10, 2 February 2007), paragraph 14

<sup>14</sup> Quote from Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders <http://hrw.org/prisons/pretrial.html> (accessed December 2006)

circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.<sup>15</sup>

The Committee of Ministers of the Council of Europe have made clear that not only must these conditions be fulfilled, but also that “there is no possibility of using alternative measures to address” these concerns.<sup>16</sup> In other words, these requirements are necessary before pre-trial detention can be justified but even then they may not be sufficient if there are other ways of addressing them.

The European Court of Human Rights has found that “by reason of their particular gravity and public reaction to them, certain offences may give rise to public disquiet capable of justifying pre-trial detention”.<sup>17</sup> However, the Office of the UN High Commissioner for Human Rights has challenged this as a legitimate criterion for ordering pre-trial detention:

The question arises, however, whether, in a democratic society governed by the rule of law, pre-trial detention, however brief, can be legally justified on the basis of a legal notion so easily abused as that of public order.<sup>18</sup>

Although the international standards foresee the legitimate use of pre-trial detention, there are circumstances in which its use becomes a violation of the right to liberty and the presumption of innocence. In its consideration of State reports, the Human Rights Committee has noted that in certain circumstances pre-trial detention may not be consistent with the presumption of innocence, for example, if the duration is excessive, or is set according to the length of sentence if guilt is established, or if it is applied automatically.<sup>19</sup>

Similarly the Committee Against Torture has stated that an over-long period between arrest and trial may in itself violate the Convention Against Torture:

In the view of the Committee, the undue prolongation of this pre-trial stage represents a form of cruel treatment of the individual concerned, even if he is not detained.<sup>20</sup>

It is with these standards in mind that the reasons for pre-trial detention, as well as its length and conditions, are assessed in this paper.

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<sup>15</sup> *Hugo van Alphen v The Netherlands* (1990) (CCPR/C/39/D/305/1988), paragraph 5.8.

See also: *Mukong v Cameroon* (1994) paragraph 9.8 “Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interfere with evidence, or the reoccurrence of crime”

<sup>16</sup> Recommendation Rec(2006)13 of the Committee of Ministers of the Council of Europe to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (adopted 27 September 2006), paragraph 7

<sup>17</sup> *Tomasi v France*, 12850/87 [1992] ECHR 53 (27 August 1992), paragraph 91

<sup>18</sup> Office of the UN High Commissioner for Human Rights in association with the International Bar Association (2003) *Human Rights and the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations), p.194

<sup>19</sup> Human Rights Committee (2000) Concluding Observations: Argentina (CCPR/CO/70/ARG), paragraph 10; Human Rights Committee (2006) Concluding Observations: Italy (CCPR/C/ITA/CO/5), paragraph 14.

<sup>20</sup> Committee Against Torture (1998) Report of the UN Committee Against Torture (A/53/44), paragraph 68

## Part II: The Overuse of Pre-Trial Detention for women

**“Unnecessary deprivation of liberty would be regarded as arbitrary and thus inconsistent with international standards.”<sup>21</sup>**

### Recognising the Problem

The excessive use of pre-trial detention is one aspect of the recognised global problem of over-incarceration.<sup>22</sup> The over-reliance on holding individuals in custody prior to trial has been recognised as a serious human rights problem by the United Nations (UN) Working Group on Arbitrary Detention and the UN human rights treaty bodies.

Based on their experience of country visits and receiving individual communications, the Working Group on Arbitrary Detention has “observed with concern that - despite recognition of this principle at the international and constitutional level - in some countries the number of pre-conviction detainees approaches and sometimes even exceeds that of convicts imprisoned.”<sup>23</sup>

The Human Rights Committee has raised concerns about human rights violations resulting from both the conditions and the circumstances of pre-trial detention in all regions of the world. Reviewing their comments on the issue it is clear that human rights concerns in the context of pre-trial detention are not limited to States with particular legal systems nor to those at particular stages of economic development but occur throughout the world.<sup>24</sup> A number of their specific concerns are considered below in more depth.

The Committee Against Torture has highlighted the problem of over use of pre-trial detention and recommended that States “should adopt the necessary measures to reduce pre-trial detention wherever possible.”<sup>25</sup>

The profile of pre-trial detainees is an issue about which the Committee on the Elimination of Racial Discrimination has raised concerns that “persons held awaiting trial include an excessively high number of non-nationals” and “persons belonging to racial or ethnic groups, in particular non-citizens - including immigrants, refugees, asylum-seekers and stateless persons - Roma/Gypsies, indigenous peoples, displaced populations, persons discriminated against because of their descent, as well as other vulnerable groups which are particularly exposed to exclusion, marginalization and non-integration in society.”<sup>26</sup>

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<sup>21</sup> Jeremy McBride (1999) *Pre-Trial Detention in the OSCE Area: OSCE Review Conference, September 1999*, ODIHR Background Paper 1999/2 (OSCE)

<sup>22</sup> Working Group on Arbitrary Detention (2006) Report of the Working Group on Arbitrary Detention (E/CN.4/2006/7), paragraphs 60-67

<sup>23</sup> Working Group on Arbitrary Detention (2006) Report of the Working Group on Arbitrary Detention (E/CN.4/2006/7), paragraph 64

<sup>24</sup> See for example: Human Rights Committee (2005) Concluding Observations on Mauritius (CCPR/CO/83/MUS); Human Rights Committee (2005) Concluding Observations on Uzbekistan (CCPR/CO/83/UZB); Human Rights Committee (2004) Concluding Observations on Namibia (CCPR/CO/81/NAM); Human Rights Committee (2003) Concluding Observations on Portugal (CCPR/CO/78/PRT); Human Rights Committee (2001) Concluding Observations on Czech Republic (CCPR/CO/72/CZE); Human Rights Committee (2001) Concluding Observations on Guatemala (CCPR/CO/72/GTM)

<sup>25</sup> Committee against Torture (2005) Conclusions and Recommendations on Nepal (CAT/C/NPL/CO/2), paragraph 22

<sup>26</sup> Committee on the Elimination of Racial Discrimination, General Comment 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, preamble and paragraph 1.III.2

Recognising that women from minority groups are likely to face multiple discrimination in their interaction with the justice system the Committee on the Elimination of Racial Discrimination also noted the need to pay “particular attention to the situation of women and children belonging to the aforementioned groups, who are susceptible to multiple discrimination because of their race and because of their sex or their age.”<sup>27</sup>

### The Roots of the Problem

There are a variety of reasons why States make excessive use of pre-trial detention. Some of these may contravene international human rights norms. It is, therefore, important to explore the over-use in order to understand better what measures can be taken to address it. Detention that is not necessary in light of at least one of the criteria laid out in the international standards may be arbitrary and a violation of the rights of all whose detention is grounded upon or caused by it.

#### *1. Lack of alternatives available in the State*

In some countries a significant cause of the overuse of pre-trial detention is the lack of alternative measures. For example, the Open Society Justice Initiative has identified that in Mexico “pre-trial detention has become the most widely used precautionary measure” and this is in part because “the country’s legislation currently contemplates few alternatives for accused persons awaiting trial.”<sup>28</sup> The lack of alternatives to pre-trial detention either in law or in practice ties the hands of judges who may feel that detention is not appropriate but have no alternative means of overcoming the perceived risk posed by releasing the individual pending trial.

Alternatives provided in legislation also need to be available in reality and in sufficient supply. In some countries individuals may be detained simply because there are no places available on alternative schemes. In England and Wales, “In some areas there was a scarcity of bail hostel places so that a remand in custody occurred more frequently and inevitably this has a disproportionate effect on the poorer and more socially deprived defendant.”<sup>29</sup> Providing an alternative which only certain groups in society can access may contravene the prohibition on discrimination.

In some countries appropriate alternatives are provided for in legislation but are not utilised by judges, either because they do not know about them or because they do not have confidence in them. The European Committee for the Prevention of Torture delegation to Georgia was informed that “the alternatives to imprisonment provided for in the existing legislation were used rather infrequently.”<sup>30</sup> The European Union’s Better Bail Decisions Project found that in Spain, “The new regulation stated that pre-trial detention could only be imposed when it was objectively necessary and when measures merely restricting liberty would not be sufficient. But

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<sup>27</sup> Committee on the Elimination of Racial Discrimination, General Comment 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, adopted on 17 August 2005, preamble

<sup>28</sup> Open Society Justice Initiative (2005) *Myths of Pretrial Detention in Mexico*, p.15

<sup>29</sup> European Union, Law Society of England and Wales, General Council of Spanish Advocates and Czech Bar Association (2004) *Better Bail Decisions* (European Union), p.7

<sup>30</sup> European Committee on the Prevention of Torture (2005) Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 to 28 November 2003 and from 7 to 14 May 2004, paragraph 151

the reality was different. This was because judges were not prepared to take risks by granting bail. Instead they were influenced by public opinion.”<sup>31</sup>

States that fail to provide alternatives – in law or practice – and thus detain the vast majority of accused regardless of whether they meet the criteria for lawful detention are acting in violation of the individual’s right not to be arbitrarily detained.<sup>32</sup> In such circumstances it is the failure of the State to provide an alternative rather than the actions of the individual that is the primary reason for the detention. Countries faced with this problem need governmental commitment to providing appropriate alternatives in law and practice; possible alternatives are discussed in more detail in the section below entitled “Alternatives and Good Practice”. Judges should be made fully aware of the alternatives and the government should ensure that the alternatives are credible so that decision-makers can have confidence in them. Otherwise they will not be utilised in practice and the over-use of pre-trial detention will continue.

## 2. *Mandatory denial of pre-trial release for certain crimes and certain groups of individuals*

Some States operate a system of mandatory denial of pre-trial release for certain crimes.<sup>33</sup> It may be appropriate to take the nature or severity of the crime into account when deciding whether or not to release an individual prior to trial. However, mandatory detention is by definition arbitrary since it does not allow the decision maker to take the individual circumstances into account.<sup>34</sup>

The majority of women are not charged with violent offences; however, if mandatory pre-trial detention is tied to mandatory sentencing then this can have a big impact on women. For example, the rapid increase in the number of women in prison in the USA is due in part to the introduction of mandatory sentencing for certain drugs offences. According to a recent Open Society Institute study, mandatory pre-trial detention is a particular problem in Mexico, where the extension of the list of crimes for which an individual cannot be released pending trial in part resulted in the doubling of the pre-trial detention population between 1994 and 2004.<sup>35</sup> The legislature has “established sweeping categories of crimes, such as the catalogue of so-called ‘grave offenses,’ which prohibit release before trial, effectively ensuring pretrial detention for many accused. These are applied indiscriminately by judges, who are barred from taking into account the particular details of each case and must apply pretrial detention solely on the basis of the offense with which the accused has been charged. In making a pretrial detention decision, judges may use their discretion only in cases of accused persons charged with a select list of misdemeanors or crimes considered as ‘non-grave.’”<sup>36</sup>

In other countries there are categories of individuals who cannot be released pending trial. For example, in the Czech Republic the EU’s Better Bail Decisions Project’s “biggest concern was that a person who is subject to extradition proceedings could not be released on bail.”<sup>37</sup>

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<sup>31</sup> European Union, Law Society of England and Wales, General Council of Spanish Advocates and Czech Bar Association (2004) *Better Bail Decisions* (European Union), p.14

<sup>32</sup> International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, article 9(1)

<sup>33</sup> Human Rights Watch, *Excessive Pretrial Detention*, web briefing <http://hrw.org/prisons/pretrial.html> (accessed January 2007)

<sup>34</sup> Comments on mandatory sentencing made by Leila Zerougi, Chairperson-Rapporteur of the Working Group on Arbitrary Detention, in the context of an interactive dialogue on 20 December 2006 during the second regular session of the Human Rights Council, audio files available on <http://www.ohchr.org/english/bodies/hrcouncil/2session/audio.htm> (accessed January 2007)

<sup>35</sup> Open Society Justice Initiative (2005) *Myths of Pretrial Detention in Mexico* (Open Society Institute), p.11

<sup>36</sup> Open Society Justice Initiative (2005) *Myths of Pretrial Detention in Mexico* (Open Society Institute), p.13

<sup>37</sup> European Union, Law Society of England and Wales, General Council of Spanish Advocates and Czech Bar Association (2004) *Better Bail Decisions* (European Union), pp.7 & 16

Mandatory measures call into question the fulfilment of the requirement that pre-trial detention be judicially controlled.<sup>38</sup> Mandatory denial of pre-trial release places the judiciary in a position in which they are prohibited from considering the individual circumstances of the case and thus from making a genuine decision. Legislation and other orders or guidelines that provide for mandatory denial of pre-trial release for whatever reason should be revoked and judges given the power to make reasoned decisions on a case by case basis. The Human Rights Committee is clear that “there should not be any offences for which pre-trial detention is obligatory.”<sup>39</sup>

### 3. *Pre-trial detention of those not facing custodial sentences*

It is difficult to understand how there can be any justification for detaining individuals charged with offences that do not carry a custodial sentence. Indeed, the Council of Europe Recommendation Rec(2006)13 is clear that “Remand in custody shall generally be available only in respect of persons suspected of committing offences that are imprisonable”.<sup>40</sup> In Mexico “approximately 56,000 persons sentenced in local courts in 2002 were initially detained because they were accused of having committed a ‘grave offence,’ or were deemed dangerous to society. ... In many of these cases it is likely that penalties would have been commuted to monetary sanctions, such as a fine or some other non-custodial sentence, which makes imprisonment all the more aberrant and unreasonable.”<sup>41</sup>

The UN Centre for Human Rights,<sup>42</sup> made it clear in its Professional Training Series publication on pre-trial detention that: “If imprisonment is not to be expected as punishment for a crime, every effort should be made to avoid pre-trial detention.”<sup>43</sup> Furthermore, even where imprisonment is a possibility, the Centre stated, “It is desirable that States identify certain crimes the penalties for which are so lacking in severity that pre-trial detention may be inappropriate. In regard to such offences, delays that occur prior to and during trial are often longer than the penalty for the crime and make pre-trial detention inappropriate.”<sup>44</sup>

This problem is complicated because in some countries there has been a lowering of the threshold for custodial sentences. British criminologist Barbara Hudson’s report argued that in England and Wales “for women, the real threat is that there is no sense of a firm lower limit to the offences which are appropriately dealt with by way of imprisonment.”<sup>45</sup> The high proportion of women who are detained pending trial but whose cases are dismissed or who do not receive a custodial sentence is indicative that pre-trial release is being denied to those for whom it is appropriate.

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<sup>38</sup> *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, Article 9(3)

<sup>39</sup> Human Rights Committee (2000) Concluding Observations on Argentina (CCPR/CO/70/ARG), paragraph 10

<sup>40</sup> Recommendation Rec(2006)13 of the Committee of Ministers of the Council of Europe to member states on the use of remand in custody, the conditions in which it takes places and the provision of safeguards against abuse (adopted 27 September 2006), paragraph 6

<sup>41</sup> Open Society Justice Initiative (2005) *Myths of Pretrial Detention in Mexico* (Open Society Institute), p.14

<sup>42</sup> The UN Centre for Human Rights was the predecessor of the Office of the UN High Commissioner for Human Rights.

<sup>43</sup> UN Centre for Human Rights (1994) *Professional Training Series No.3: Human Rights and Pre-trial Detention – A Handbook of International Standards relating to Pre-trial Detention* (United Nations), paragraph 80

<sup>44</sup> UN Centre for Human Rights, (1994) *Professional Training Series No.3: Human Rights and Pre-trial Detention – A Handbook of International Standards relating to Pre-trial Detention* (United Nations), paragraph 79

<sup>45</sup> Hudson, B. “Gender issues in penal policy and penal theory” in Carlen, P. (ed.) *Women and Punishment* (Willan Publishing) quoted in Edgar, K. (2004) *Lacking Conviction: The Rise of the women’s remand population* (Prison Reform Trust), p.6

States should ensure that individuals who are charged with crimes that do not carry a custodial sentence are not held in pre-trial detention. Similarly, there should be frequent reviews of the need to hold the individual prior to trial and serious consideration should be given to releasing any individuals who have been held for the same length or longer than the maximum custodial sentence available for the crime with which they are charged.

#### 4. *Interpretation of risk of absconding*

Of all the reasons behind the over-use of pre-trial detention, the interpretation of the risk of absconding may be the one with the most discriminatory impact on women. Judges make risk assessments because “courts [are] dealing with people who they presume to be innocent, [therefore] they [have] to think about how much of whatever risk there [is], society should bear (by granting bail) and how much the defendant should bear (by being remanded in custody or on conditional bail).”<sup>46</sup>

In assessing the risk that the woman will not report for her next trial appearance judges are likely to develop indicators of the risk of absconding. The use of indicators in making this assessment is not wrong as such and can be a useful part of reasoned decision making. However, problems can arise from the use of a limited set of indicators or the reliance on indicators for all that may be appropriate for one social group, such as applying to women indicators that were designed with male defendants in mind. Although the indicators may appear gender neutral they can have a discriminatory impact: common indicators of stability resulting in a higher probability of appearance at trial include regular employment or stable accommodation. Because women are less likely to have a regular job or own or rent property in their own name, they may appear by these indicators to be at greater risk of absconding.

The Working Group on arbitrary detention has expressed its concern about the discriminatory impact of some of the indicators for assessing an individual’s “roots in the community”:

...in legal systems where pretrial detention is ultimately linked to bail, poverty and social marginalization appear to disproportionately affect the prospects of persons chosen to be released pending trial. Bail courts base their decision whether to release an accused person also on his or her “roots in the community”. People having stable residence, stable employment and financial situation, or being able to make a cash deposit or post a bond as guarantee for appearance at trial are considered as well-rooted. These criteria of course are often difficult to meet for the homeless, drug users, substances abusers, alcoholics, the chronically unemployed and persons suffering from mental disability, who thus find themselves in detention before and pending trial when less socially disadvantaged persons can prepare their defence at liberty.<sup>47</sup>

Similarly, the Committee on the Elimination of Racial Discrimination has concerns about the disproportionate impact of such indicators on those from particular racial or ethnic groups. In light of this they have recommended that States should ensure:

That the guarantees often required of accused persons as a condition of their remaining at liberty pending trial (fixed address, declared employment, stable family ties) are

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<sup>46</sup> European Union, Law Society of England and Wales, General Council of Spanish Advocates and Czech Bar Association (2004) *Better Bail Decisions* (European Union), p.18

<sup>47</sup> Working Group on Arbitrary Detention (2006) Report of the Working Group on Arbitrary Detention (E/CN.4/2006/7), paragraph 66

weighed in the light of the insecure situation which may result from their membership of such groups, particularly in the case of women and minors.<sup>48</sup>

These statements confirm that it can be discriminatory to treat different people alike. In this vein the European Union's Better Bail Decisions Project recommended that: "Bail conditions imposed on people not in their home country must be realistic and reflect their circumstances."<sup>49</sup> This is particularly important in countries where almost the entire female prison population is made up of foreign nationals.<sup>50</sup> The Council of Europe Recommendation goes further stating, "Wherever practicable, alternative measures shall be applied in the state where a suspected offender is normally resident if this is not the state in which the offence was allegedly committed."<sup>51</sup>

The Quaker United Nations Office has noted previously that "Women offenders typically come from economically and socially disadvantaged segments of society. Typically, they are young, unemployed, have low levels of education and have dependent children. Many have histories of alcohol and substance abuse. A high proportion of women offenders have experienced violence or sexual abuse."<sup>52</sup> They are also likely to have mental health problems.<sup>53</sup> Therefore, the majority of women facing pre-trial detention will present one or more characteristics that are likely to be considered as indicating that they will not attend their next court hearing.

It is important that they are not detained purely on the basis of such assumptions. The facts relating to the individual woman before the court must be considered and other indicators assessed. For example, if dependent children were viewed as indicative of community ties or stability, women's caring responsibilities could be taken into account. The European Union's Better Bail Decisions Project concluded that family ties should be considered as an indicator of stability.<sup>54</sup> A UK Court of Appeal judgment states that: "With a mother who is the sole support of two young children...the judge has to bear in mind the consequences to those children if the sole carer is sent to prison."<sup>55</sup> There is no good reason why this should not apply also to decisions regarding pre-trial detention. Indeed, the Council of Europe Recommendation is clear that "Wherever possible remand in custody should be avoided in the case of suspected offenders who have the primary responsibility for the care of infants."<sup>56</sup> Moreover, the State is required by the UN Convention on the Rights of the Child to take the best interests of the child into consideration in all decisions affecting the child. This requirement is considered further in Part IV on the Human Rights Concerns of Women in Pre-Trial Detention and Their Children.

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<sup>48</sup> Committee on the Elimination of Racial Discrimination, General Comment 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, (adopted 17 August 2005)

<sup>49</sup> European Union, Law Society of England and Wales, General Council of Spanish Advocates and Czech Bar Association (2004) *Better Bail Decisions* (European Union), p.14

<sup>50</sup> See Amnesty International (2005) *Gulf Cooperation Countries: Women Deserve Dignity and Respect* (Amnesty International), p.48

<sup>51</sup> Recommendation Rec(2006)13 of the Committee of Ministers of the Council of Europe to member states on the use of remand in custody, the conditions in which it takes places and the provision of safeguards against abuse (adopted 27 September 2006), paragraph 2(2)

<sup>52</sup> Bastick, M. (2005) *Commentary on the Standard Minimum Rules on the Treatment of Prisoners* (Quaker United Nations Office), p.3

<sup>53</sup> Taylor, R. (2004) *Women in Prison and Children of Imprisoned Mothers a Preliminary Research Paper* (Quaker United Nations Office), pp.4-6

<sup>54</sup> European Union, Law Society of England and Wales, General Council of Spanish Advocates and Czech Bar Association (2004) *Better Bail Decisions* (European Union), p.22

<sup>55</sup> *Regina v Mills*, [2002] 2 Cr. App. R. (S.) 52

<sup>56</sup> Recommendation Rec(2006)13 of the Committee of Ministers of the Council of Europe to member states on the use of remand in custody, the conditions in which it takes places and the provision of safeguards against abuse (adopted 27 September 2006), paragraph 10



A complicating factor is that some women do not inform the court or their lawyer that they have children because of the fear that the children will be taken into care.<sup>57</sup> Therefore, it is essential that courts and lawyers are made aware of the need to take the impact on children into account and that informing the court about defendants' children will in practice help them to be protected rather than putting them at risk and that defendants understand this.

A further concern is the use of pre-trial detention in place of treatment or care. Mental health problems, drug misuse and the chaotic lifestyles that can result are likely to be considered as indicators that a woman will not appear for trial. However, rather than only considering the possible results of releasing the woman, the court should also consider the impact of detaining her. This consideration should take in both the impact on the woman herself and the impact on any children for whom she is responsible. Thought should be given to whether the proposed societal good gained in detaining her is outweighed by the effect the detention may have in making it harder for her to stabilise her life or maintain a fragile stability. For example, will detention pending trial cause her to lose her employment or housing or place on a waiting list for treatment? The court should take into account the possibility that such negative impacts of detention will make the woman less likely to abscond.

Pre-trial detention should not be used as an alternative to mental health care or drug-misuse treatment that the woman needs. The European Union's Better Bail Decisions Project's recommendations stated that: "Prison was not an appropriate environment for those with mental health problems and every effort should be made to divert them from being remanded in custody."<sup>58</sup> A study published by the UK Home Office found that "only 28 per cent of patients who were diverted into treatment were reconvicted within two years of discharge, a profound improvement on their offending rates prior to admission and much better than the standard reconviction rate from prison."<sup>59</sup> Judges should have the option of diverting women into a mental health facility for assessment and treatment where appropriate.

The decision maker should use indicators appropriate to the individual appearing before them. Decisions that are made on the basis of social prejudice or stereotypes and which do not take into consideration the individual's circumstances are not in fact decisions based on an assessment of the risk posed by the individual in question. As such they do not fall within the legitimate reasons for detaining an individual pending trial.

#### 5. *Failure to take into account a lack of means to pay financial guarantees*

A connected issue is the failure of the State to provide alternatives that do not require financial guarantees as this discriminates against those who do not have the resources to pay. This may have a disproportionate and detrimental impact on women as they are more likely to be unable to meet the financial requirements set for release prior to trial.

A lack of appropriate alternatives has the same effect as a complete lack of alternatives for individuals who are not able to access them. For example, in Mexico "five out of every one hundred people charged with 'minor crimes,' who have the right to be released on bail, remain in pre-trial detention because they are too poor to pay for their bail."<sup>60</sup> In James Fort prison in

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<sup>57</sup> Wedderburn, D. (2000) *Justice for Women: The Need for Reform* (Prison Reform Trust), p.9

<sup>58</sup> European Union, Law Society of England and Wales, General Council of Spanish Advocates and Czech Bar Association (2004) *Better Bail Decisions* (European Union), p.12

<sup>59</sup> James, D. et al. (2002) *Outcome of psychiatric admission through the courts* RDS Occasional Paper No 79 (London: The Home Office) quoted in Edgar, K. (2004) *Lacking Conviction* (Prison Reform Trust), p.10

<sup>60</sup> Open Society Justice Initiative (2005) *Myths of Pretrial Detention in Mexico* (Open Society Institute), p.14

Ghana at least 60% of the pre-trial detainees had been granted bail but were not released because they were unable to pay the surety required.<sup>61</sup>

The Committee on the Elimination of Racial Discrimination highlights the potentially discriminatory nature of making release dependent on the payment of financial sureties and asks States to ensure: “that the requirement to deposit a guarantee or financial security in order to obtain release pending trial is applied in a manner appropriate to the situation of persons belonging to such groups, who are often in straitened economic circumstances, so as to prevent this requirement from leading to discrimination against such persons.”<sup>62</sup>

The inability to pay a financial guarantee alone should not result in the individual being detained. In a situation where release prior to trial on the condition of a financial guarantee would be offered but it is clear that the woman would not be in a position to pay a financial guarantee then other forms of guarantee should be considered.

#### 6. *Slow functioning of the judicial system*

The slow functioning of the judicial system has an impact on the number of people in pre-trial detention as well as the length of pre-trial detention. The human rights violations arising from over-long pre-trial detention are addressed in the next part of this paper.

The Human Rights Committee has recommended that “additional resources should be allocated to the judiciary, in order to reduce the number of detainees in pre-trial detention” because “the backlog in the adjudication of cases encountered by the judicial system contributes to this situation [of overcrowding].”<sup>63</sup>

The failure of the State to deal with cases promptly should not be a reason for people to be detained longer than is necessary in light of the objective criteria laid out in the international standards.

#### 7. *“Protection” – detaining women for their own safety*

A UK Law Commission report in 2001 stated that an individual could be detained pending trial if “the detention is necessary for the defendant’s own protection.”<sup>64</sup> However, this is not a widely accepted justification for detention pending trial and is highly problematic. The Prison Reform Trust’s report on women on remand in England and Wales highlights starkly that when the decision to detain a woman is because it is thought that she would be at risk if released “courts trade on the possibility that a defendant might be harmed if she were released on bail against the certainty that she will be damaged by placing her in custody.”<sup>65</sup>

The Working Group on Arbitrary Detention has considered this problem and recommended that:

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<sup>61</sup> Penal Reform International (2005) *Reducing Pre-trial Detention: an index on good practices developed in Africa and elsewhere* (Penal Reform International) p.37

<sup>62</sup> Committee on the Elimination of Racial Discrimination, General Comment 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, (adopted 17 August 2005)

<sup>63</sup> Human Rights Committee (2004) Concluding Observations on Suriname (CCPR/CO/80/SUR)

<sup>64</sup> Law Commission (2001) *Bail and the Human Rights Act* (Law Commission, London) paragraph 3.20 (4), referring to European Court of Human Right judgment *LA v France*, 1998-VII p.2951, paragraph 108

<sup>65</sup> Edgar, K. (2004) *Lacking Conviction* (Prison Reform Trust), p.7

“Recourse to deprivation of liberty in order to protect victims must be reconsidered and, in any event, must be supervised by a judicial authority. This measure must be used only as a last resort and when the victims themselves desire it.”<sup>66</sup>

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<sup>66</sup> Working Group on Arbitrary Detention (2002) Report of the Working Group on Arbitrary Detention (E/CN.4/2002/77), Recommendation 2: Detention as a means of protection of victims, paragraph 61

### Part III: Length of pre-trial detention

In addition to a widespread problem of States misusing and over-using pre-trial detention, the problem is compounded by the excessive duration of pre-trial detention. As with over-use, there are a variety of reasons explaining why individuals are held pre-trial for such long periods of time. The International Centre for Prison Studies has identified five key factors affecting the length of pre-trial detention:

- “- the speed of the police or prosecutor’s investigation
- the capacity of the system to transport defendants from prison to court
- the workload in the courts and the resources available to conduct trials
- the availability of legal advice and public defenders for pre-trial detainees
- in certain circumstances, a concern of the defendant to postpone the trial as long as possible”<sup>67</sup>

The Human Rights Committee has noted with alarm the length of pre-trial detention in some States reporting to it and has stated that it is “concerned about the length of pre-trial detention, which is often incompatible with articles 9(3) and 14 [of the International Covenant on Civil and Political Rights].”<sup>68</sup> The Committee thus clarifies that although pre-trial detention can be legitimate under certain circumstances the length can violate the rights to liberty (Article 9) and due process (Article 14). The Committee Against Torture has stated that a lengthy period prior to trial may amount to cruel treatment in violation of the Convention Against Torture.<sup>69</sup>

The Inter-American Commission on Human Rights has concluded:

Due to excessive delays in bringing people to trial, and the lack of a proper system for provisional release on bail, the majority of the prison population have languished in jail for prolonged periods without any judicial determination of their guilt or innocence. This delay and deprivation of liberty constitutes a terrible injustice for individuals who may be incarcerated for periods of years only to at last be found innocent, and for those who are preventively detained for longer than the period prescribed by law had they been sentenced. These delays are a clear breach of the American Convention because they violate the principle that an individual must be presumed innocent until proven guilty. Moreover, such delays deny affected individuals their freedom without due process of law.<sup>70</sup>

#### Right to a trial within a reasonable time

There is an internationally protected right to a trial within a reasonable time enshrined in articles 9(3) and 14(3)(a) of the International Covenant on Civil and Political Rights. Whilst the complexity of some criminal investigations may require that a longer period be allowed before bringing a defendant to trial there are points beyond which it is not reasonable to hold the individual.

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<sup>67</sup> King’s College London, International Centre for Prison Studies (2004) *Guidance Note 5: Pre-trial detention* (London: International Centre for Prison Studies)

<sup>68</sup> Human Rights Committee (2003) Concluding Observations on Latvia (CCPR/CO/79/LVA); Human Rights Committee (2004) Concluding Observations on Namibia (CCPR/CO/81/NAM), paragraph 13

<sup>69</sup> Committee Against Torture (1998) Report of the Committee Against Torture (A/53/44), paragraph 68

<sup>70</sup> Inter-American Commission on Human Rights (1997) Report on the Situation of Human Rights in Ecuador (OEA/Ser.L/V/II.96, Doc. 10 rev. 1), chapter 7

The Office of the UN High Commissioner for Human Rights' manual on Human Rights and the Administration of Justice draws together the Human Rights Committee's jurisprudence on the notion of 'reasonable time'.<sup>71</sup> The Human Rights Committee has held that "what constitutes 'reasonable time' is a matter of assessment for each particular case"<sup>72</sup> but has begun to create a series of parameters around this basic principle. The State must be able to give "satisfactory" reasons for the length of the detention; the Human Rights Committee found that without such reasons one year and nine months awaiting trial was not a "reasonable time".<sup>73</sup> "Evidence gathering" was found not to be a sufficient reason for holding an individual for four years.<sup>74</sup> In its consideration of State Party reports the Human Rights Committee has observed that it is not "compatible with the presumption of innocence that the length of pre-trial detention is not a product of the complexity of the case but is set by reference to the possible length of sentence."<sup>75</sup>

The Committee is clear that insufficient resources do not excuse lengthy pre-trial detentions, a lack of "adequate budgetary appropriations for the administration of criminal justice...does not justify unreasonable delays in the adjudication of criminal cases."<sup>76</sup>

Some of the Human Rights Treaty Bodies have suggested that it might be appropriate to enact limits on the maximum duration of pre-trial detention. For example the Committee Against Torture has stated that: "The law should also specify a reasonable time limit for pre-trial detention and completion of criminal proceedings."<sup>77</sup> Similarly the Committee on the Rights of the Child recommended that States "set by law a clear maximum length of pre-trial detention of persons under-18. This should be less than that allowed for adults...".<sup>78</sup>

Although the Treaty Bodies have not suggested what this maximum length might be it should certainly be less than the maximum sentence for the crime with which the individual is charged. Where the problem of lengthy pre-trial detention owes more to the slow functioning of the judicial system than to the necessity of detaining a particular individual a maximum length or 'sunset clause' would guarantee that the individual was not held for an unreasonable amount of time without putting the additional strain on the judicial system of holding hearings on the possible release of the particular individual. For example Indian jurisprudence established that defendants should not be held for more than half the length of the maximum sentence possible for the crime with which they are charged (although it is not clear that this is being implemented).<sup>79</sup> Similarly a law introduced in 1997 in Bulgaria restricted the length of pre-trial detention to one year or, exceptionally, two years for those accused of the most serious crimes. Coupled with a restriction of the grounds for pre-trial detention this led to a decrease of almost a

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<sup>71</sup> Office of the UN High Commissioner for Human Rights and the International Bar Association (2003) *Human Rights and the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations), p.191

<sup>72</sup> Human Rights Committee (1991) Communication No. 336/1998, N. Fillastre v. Bolivia

<sup>73</sup> Human Rights Committee (1998) Communication No. 733/1997, A. Perkins v. Jamaica

<sup>74</sup> Human Rights Committee (1991) Communication No. 336/1998, N. Fillastre v. Bolivia

<sup>75</sup> Human Rights Committee (1996) Report of the Human Rights Committee (A/50/40) paragraph 157

<sup>76</sup> Human Rights Committee (1991) Communication No. 336/1998, N. Fillastre v. Bolivia

<sup>77</sup> Committee Against Torture (1998) Report of the Committee Against Torture (A/53/44), paragraph 68

<sup>78</sup> Committee on the Rights of the Child (2006) Concluding Observations on Liechtenstein (CRC/C/LIE/CO/2), paragraph 35

<sup>79</sup> Venkatachaliah, M. "The Formal Justice System: An Overview of its Strengths and Weaknesses" in Shankardass, R. et al (2000) *Workshop on New Models of Accessible Justice: The India Experience* (Penal Reform and Justice Association), p.42

quarter of the pre-trial detention population in less than a year.<sup>80</sup> While such limits are valuable, perhaps in particular in dealing with a backlog of cases, such a time limit does not excuse that the failure to review and reconsider cases *before* the time limit is reached (see next section).

#### Right to regular review of the decision to detain

Individuals being held in pre-trial detention have the right to have the necessity of their detention reviewed at regular intervals. This right is derived from the requirement that detention be based on a reasoned decision. Although it may initially be justifiable to hold an individual, circumstances could change during the criminal investigation and the detention may no longer be legitimate. A system of regular review can enable the release of those held unnecessarily and result in a decrease in the number of pre-trial detainees as well as in the length of detention for some individuals as appropriate.

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment recognises that courts should be able to review the necessity of detention,<sup>81</sup> as did the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders.<sup>82</sup> The Organisation for Security and Cooperation in Europe concluded that: “In view of the presumption in favour of liberty, it is unlikely that an interval of much more than a month between the occasions on which the justification for pre-trial detention is submitted to judicial reconfirmation would be acceptable.”<sup>83</sup>

In this regard it is essential that defendants be fully informed of the timing of such hearings and also about how they can defend themselves during such hearings. They must be provided with access to any verified information that may assist them in their application for release. The UK Prison Service is clear that “Unconvicted prisoners should receive all possible assistance to secure release on bail, including help in meeting bail conditions, in applying for bail, and in providing verified information for the Crown Prosecution Service.”<sup>84</sup> Once detained it often becomes harder for the individual to mount a defence than for those on the outside. This should not be the case and violates the principle that everyone is equal before the law.<sup>85</sup> Each decision to prolong the detention must be reasoned and the individual has a right to see and understand the reasons for which they are being held.

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<sup>80</sup> Vassilev, Peter (1999) *Regulating Bulgaria's Prison Population*, Prison Populations, Measures to Reduce Overcrowding in Prisons, Information Pack 1 (Penal Reform International) quoted in King's College London, International Centre for Prison Studies (2004) *Guidance Note 5: Pre-trial detention* (International Centre for Prison Studies)

<sup>81</sup> The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173, 9 December 1988, principles 11.3 and 39

<sup>82</sup> Jeremy McBride (1999) *Pre-Trial Detention in the OSCE Area: OSCE Review Conference, September 1999*, ODIHR Background Paper 1999/2 (OSCE), paragraph 4.3.1

<sup>83</sup> Jeremy McBride (1999) *Pre-Trial Detention in the OSCE Area: OSCE Review Conference, September 1999*, ODIHR Background Paper 1999/2 (OSCE), paragraph 4.3.1

<sup>84</sup> HM Prison Service (1992) *Model Regimes for Local Prisons and Remand Centres* (Home Office) quoted in Edgar, K. (2004) *Lacking Conviction: The Rise of the women's remand population* (Prison Reform Trust), p.32

<sup>85</sup> Universal Declaration of Human Rights, adopted by General Assembly Resolution 217A (III), 10 December 1948, Article 7 “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

## Part IV: Principle human rights concerns for women in pre-trial detention and their children

General consideration of the conditions in which women in prison live and the impact this has on their rights are explored in QUNO's report *Women in Prison and Children of Imprisoned Mothers: a preliminary research paper*.<sup>86</sup> However, there are some human rights concerns that are particular to pre-trial detention or that are different during pre-trial detention. The UN Office on Drugs and Crime recognises that pre-trial detention is "the period [in the criminal justice process] most open to abuse."<sup>87</sup>

Despite the fact that a pre-trial detainee has not been found guilty of a crime and should be presumed innocent, conditions for pre-trial detainees are frequently worse than for sentenced prisoners and the impact can be as devastating. One reason for this can be the relatively short length of detention. The UK Home Secretary observed in 2002 that: "Those on remand ... are not inside for long enough for ... programmes to make a difference – but they are there long enough to lose their jobs, their family relationships, and even their homes. This can push someone off the straight and narrow for good."<sup>88</sup> Such programmes may include educational, mental health care or drug treatment and detoxification programmes.

Another key factor causing conditions to be worse is the imposition of requirements on who the detainee can communicate with inside and outside of the prison due to the ongoing investigation. The International Centre for Prison Studies has noted that a "consequence of this requirement may be that communal activities are prohibited and detainees are in their cells 23 hours a day."<sup>89</sup> The particularly harsh impact of such restrictive regimes for women with caring responsibilities is examined below.

As the Organisation for Security and Cooperation in Europe (OSCE) has recognised "the guiding principle in the restrictions to which persons in pre-trial detention are subject is that the limitations should be no more than is necessary for the penal procedure and the security of the detaining institution."<sup>90</sup> In fact "...the presumption of innocence necessarily imposes some additional limits on the way in which persons in pre-trial detention are treated."<sup>91</sup> The OSCE suggested that "those supervising persons in pre-trial detention should also be specially trained for the purpose so that they appreciate the unconvicted status of those persons and treat them accordingly."<sup>92</sup>

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<sup>86</sup> Taylor, R. (2004) *Women in Prison and Children of Imprisoned Mothers a Preliminary Research Paper* (Quaker United Nations Office)

<sup>87</sup> UN Office on Drugs and Crime and the Organisation for Security and Cooperation in Europe (2006) *Criminal Justice Assessment Toolkit, Custodial and Non-Custodial Measures: 2 Detention Prior to Adjudication* (UN Office on Drugs and Crime and OSCE), p.1

<sup>88</sup> Blunkett, D., then UK Home Secretary, *The Observer*, 2 February 2002

<sup>89</sup> King's College London, International Centre for Prison Studies (2004) *Guidance Note 5: Pre-trial detention* (International Centre for Prison Studies), p.4

<sup>90</sup> Jeremy McBride (1999) *Pre-Trial Detention in the OSCE Area: OSCE Review Conference, September 1999*, ODIHR Background Paper 1999/2 (OSCE) paragraph 4.6.4

<sup>91</sup> Jeremy McBride (1999) *Pre-Trial Detention in the OSCE Area: OSCE Review Conference, September 1999*, ODIHR Background Paper 1999/2 (OSCE), p.23

<sup>92</sup> Jeremy McBride (1999) *Pre-Trial Detention in the OSCE Area: OSCE Review Conference, September 1999*, ODIHR Background Paper 1999/2 (OSCE), paragraph 4.6.4

### Impact of pre-trial detention on fair trial guarantees

Those held in pre-trial detention may find it harder to raise an adequate defence. This can amount to a violation of the principle of equality before the law enshrined in Article 14 of the International Covenant on Civil and Political Rights. However, it does serve to highlight just how important it is that the detention be the result of a judicial decision taken in accordance with due process guarantees. Otherwise the detention of many becomes totally arbitrary as imprisonment may owe more to the decision to detain the individual pending trial than to a balanced assessment of the case. This problem has been highlighted by the Working Group on Arbitrary Detention:

As empirical research in many countries has shown that defendants who are not detained pending trial have significantly better chances to obtain an acquittal than those detained pending trial, the bail system deepens further the disadvantages that the poor and marginalized face in the enjoyment of the right to a fair trial on an equal footing.<sup>93</sup>

It is crucial that the right to a defence lawyer<sup>94</sup> is not impeded by detention pending trial. The detainee must be allowed to communicate with their lawyer as often as necessary in the period leading up to trial. The detaining authority must provide appropriate rooms for the detainee to meet with the lawyer. Such spaces may be visually monitored but confidentiality requirements demand that they are not within earshot of guards or others.<sup>95</sup>

### Lack of a special regime for women and girls in pre-trial detention

Although the UN Standard Minimum Rules for the Treatment of Prisoners require that pre-trial detainees be held separately from convicted prisoners this is often not implemented. Female pre-trial detainees are more likely to be held with convicted prisoners than their male counterparts because there are fewer facilities for detaining women. Additionally, despite a requirement that they have a different, less restrictive, regime than convicted prisoners they are frequently subjected to the same regime and in some countries are even subject to stricter regimes because they are classified as high-risk prisoners. In the Australian state of New South Wales pre-trial detainees are automatically classified as maximum-security prisoners. This means that they face tight security and restrictions on personal property and visiting entitlements.<sup>96</sup>

### Pregnant women and women with infants in pre-trial detention

The dearth of information on what happens when women give birth in pre-trial detention and whether young children accompany women into pre-trial detention suggests a need for further research into these areas.

The UN Office on Drugs and Crime is very clear that:

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<sup>93</sup> Working Group on Arbitrary Detention (2006) Report of the Working Group on Arbitrary Detention (E/CN.4/2006/7), paragraph 66

<sup>94</sup> International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, article 14(3)(d)

<sup>95</sup> UN Standard Minimum Rules on the Treatment of Prisoners, approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rule 93; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988, Principle 18; UN Rules for the Protection of Juveniles Deprived of their Liberty, adopted by General Assembly resolution 45/113 of 14 December 1990, Rule 18

<sup>96</sup> Beyond Bars Alliance New South Wales (2005) *Submission to the Anti Discrimination Commission for an Inquiry into the Discrimination Experienced by Women Within the Criminal Justice System in New South Wales*, from <http://www.sistersinside.com.au/media/NSWADCreport.pdf> (accessed January 2007), p.19



Pregnant women and women with infants should not be remanded in custody unless there are exceptional circumstances.<sup>97</sup>

A specialist on pregnancy in prison has commented that “pregnancy during incarceration must be understood as a high-risk situation, both medically and psychologically, for inmate mothers and their children”.<sup>98</sup> This avoidable potential damage should be taken into account by judges deciding whether to detain pregnant women pending trial. Detention of pregnant women pending trial is only justifiable in exceptional circumstances.

In cases where the woman has a dependent child or children the rights of those children should also be taken into account both when making the decision to detain and throughout the detention. Article 3 of the UN Convention on the Rights of the Child establishes that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Therefore the judge must take into consideration the impact on dependent children of detaining their mother. This is reinforced by Articles 7 and 9 of the Convention on the Rights of the Child which establish the right of the child to be cared for by his or her parents and requires State parties to “ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”

#### Family contact

All detainees have a right to contact with their families.

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family...<sup>99</sup>

This is of great importance to many women with dependent children. The welfare of their children is frequently their first concern on being detained and remains of utmost importance throughout the period of detention. Equally, it is also important that juvenile detainees are able to maintain contact with their families.

The right to family contact begins with the right to notify family (or friends or others) of the detention and the location of detention. The detainee must also be able to notify family of their location every time that this location is changed. There is a right to continuing correspondence and contact with friends and family beyond the initial time of detention:

Rule 92 of the UN Standard Minimum Rules for the Treatment of Prisoners: An untried prisoner shall be allowed to inform immediately his family of his detention and shall be

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<sup>97</sup> UN Office on Drugs and Crime and the Organisation for Security and Cooperation in Europe (2006) *Criminal Justice Assessment Toolkit, Custodial and Non-Custodial Measures: 2 Detention Prior to Adjudication* (UN Office on Drugs and Crime and OSCE), p.26; see also Recommendation Rec(2006)13 of the Committee of Ministers of the Council of Europe to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (adopted 27 September 2006), paragraph 10

<sup>98</sup> Acoca, L. (1998), quoted in Bastick, M. (2005) *Commentary on the Standard Minimum Rules for the Treatment of Prisoners* (Quaker United Nations Office), p.43

<sup>99</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 19

given all reasonable facilities for communicating with his family and friends, and for receiving visits from them...<sup>100</sup>

When addressing State party reports the Human Rights Committee has made clear that “States must ensure ...that [pre-trial] detainees ... are permitted to contact their families from the moment of apprehension”<sup>101</sup> and has encouraged States to “take appropriate measures to ensure detainees’ rights to contact their families”.<sup>102</sup>

The right of the detainee to family contact is not unfettered. They are “subject ...to restrictions and supervision as are necessary in the interests of justice and of the security and good order of the institution.”<sup>103</sup> Pre-trial detention can prove to be more detrimental to the maintenance of family contact than incarceration following sentence because of additional restrictions due to ongoing investigations. In many countries the prosecution can ask for contact with certain named individuals to be restricted or stopped altogether. The impact of such decisions on children of detainees can be direct, as when the ruling states that there is to be no contact between the detainee and their child, or it may be indirect, for example by ruling that certain family members cannot have contact with the detainee meaning there may be no appropriate family member to bring children to visit.

However, the restrictions that can be placed on the right to family contact are limited. The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment specifies:

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.<sup>104</sup>

Moreover, where the family of the detainee includes children, their rights as children must be respected. These rights include family contact; the Convention on the Rights of the Child enshrines this right:

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.<sup>105</sup>

Therefore, although the detainee’s right to family contact is subject to ‘restrictions necessary in the administration of justice’,<sup>106</sup> the children’s right to contact with their parents can only be limited if it is in the best interests of the child. The Convention on the Rights of the Child grants such children the explicit right to information concerning their detained parent:

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<sup>100</sup> UN Standard Minimum Rules for the Treatment of Prisoners, Rule 92; see also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16

<sup>101</sup> Human Rights Committee (2001) Concluding Observations on the Democratic People's Republic of Korea (CCPR/CO/72/PRK), paragraph 18

<sup>102</sup> Human Rights Committee (2002) Concluding Observations on Hungary (CCPR/CO/74/HUN), paragraph 8

<sup>103</sup> UN Standard Minimum Rules for the Treatment of Prisoners, Rule 92; see also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 19

<sup>104</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 15

<sup>105</sup> Convention on the Rights of the Child, Article 9(3)

<sup>106</sup> UN Standard Minimum Rules for the Treatment of Prisoners, Rule 92

Where such separation [of children and parents] results from any action initiated by a State Party, such as the detention, imprisonment, ... of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child.<sup>107</sup>

### High risk of suicide and self-harm

The risk of self-harm and suicide is greater in pre-trial detainees than in sentenced prisoners. Statistics from the Australian Institute of Criminology showed that deaths in pre-trial detention were almost double those in the sentenced prison population.<sup>108</sup> In the UK it was reported that over a quarter of women held in pre-trial detention had attempted suicide in the previous year and just under a quarter had suicidal thoughts in the week before being interviewed.<sup>109</sup>

Additionally, the risk of self-harm and suicide is greater amongst detained women than amongst detained men. In the UK “in 2003, 30 per cent of women were reported to have harmed themselves compared with six per cent of men. On average each woman who injured herself did so five times compared to twice for men. Hence while women make up just six percent of the prison population they accounted for nearly half of all reported self-harm incidents.”<sup>110</sup>

This suggests that female pre-trial detainees are the group within the prison population most likely to self-harm or attempt suicide. Detaining authorities need to recognise this increased risk and take measures to avoid incidences of self-harm and suicide amongst female pre-trial detainees. Self-harm and suicide attempts must be understood in the context of mental health and other problems and not treated as a disciplinary offence. A Prison Reform Trust report quoted a former UK prisoner who said:

I believe that women are in far more danger of becoming mentally ill during their incarceration: especially those that are family carers and have close family ties. The prison system is not prepared properly for this, for the complexity of women and their issues that do affect them deeply, mentally rather than physically.<sup>111</sup>

The UN Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care states that “persons ... who are detained in the course of criminal proceedings or investigations against them, and who are determined to have a mental illness or who it is believed may have such an illness” have a “right to the best available mental health care”.<sup>112</sup>

Recognising the initial period of custody as one of the most distressing times for women in detention, the “First Night in Custody” project was established in Holloway women’s prison in the UK. As the Prison Advice and Care Trust (PACT) who run the project explain: “The scheme offers an orientation pack, a link worker to make contact with women’s families and

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<sup>107</sup> Convention on the Rights of the Child, Article 9(4)

<sup>108</sup> Beyond Bars Alliance New South Wales (2005) *Submission to the Anti Discrimination Commission for an Inquiry into the Discrimination Experienced by Women Within the Criminal Justice System in New South Wales*, from <http://www.sistersinside.com.au/media/NSWADCreport.pdf> (accessed January 2007)

<sup>109</sup> Wedderburn, D. (2000) *Justice for Women: The Need for Reform* (Prison Reform Trust), p.4

<sup>110</sup> Innocent Until Proven Guilty, *Women on Remand – Key Facts and Figures*, at [www.innocentuntilproven guilty.com/women](http://www.innocentuntilproven guilty.com/women) (accessed December 2006)

<sup>111</sup> Rickford, D. (2003) *Troubled Inside: Responding to the mental health needs of women in prison* (Prison Reform Trust), p.1

<sup>112</sup> The UN Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care, adopted by General Assembly resolution 46/119, 17 December 1991, Principles 1 and 20

referrals to a range of external and internal services such as legal advisors, the prison chaplaincy and the prison education department.”<sup>113</sup> Due to the success of the scheme the prison is now developing a “First Night Suite” which will be available to new arrivals for up to 36 hours.

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<sup>113</sup> “Saving Lives” in *Fresh start: the magazine of the Prison Advice and Care Trust*, Summer 2005, No 84, p.9

## Part V: Non-custodial alternatives and other means of reducing pre-trial detention

**“Detention is only justifiable, however, if the risk cannot be addressed by the imposition of appropriate bail conditions.”<sup>114</sup>**

The UN Office on Drugs and Crime is clear that “in the case of women, special consideration should be given to the use of alternatives to pre-trial detention (and to imprisonment), due to the particularly harmful effects deprivation of liberty can have on them, their families and children.”<sup>115</sup> But what are the alternatives to pre-trial detention?

### Examples of non-custodial alternatives

States have a responsibility to develop a range of alternatives to pre-trial detention that allow them to release defendants pending trial. Such measures “shall be employed at as early a stage as possible” in accordance with the UN Standard Minimum Rules on Non-Custodial Measures.<sup>116</sup> A number of possible measures are outlined below; this is by no means an exhaustive list and States are encouraged to develop new non-custodial measures and ensure that they are “closely monitored and their use systematically evaluated.”<sup>117</sup> The Standard Minimum Rules on Non-Custodial Measures are also clear that:

The use of non-custodial measures should be part of the movement towards depenalization and decriminalisation instead of interfering with or delaying efforts in that direction.<sup>118</sup>

The detaining authority should have at its disposal measures including the unconditional release of a defendant and this should be seen as one end of a spectrum with detention at the other end.

The Council of Europe Recommendation lists alternatives to pre-trial detention as including:

Undertakings to appear before a judicial authority as and when required, not to interfere with the course of justice and not to engage in particular conduct, including that involved in a profession or particular employment; requirements to report on a daily or periodic basis to a judicial authority, the police or other authority; requirements to accept supervision by an agency appointed by the judicial authority; requirements to submit to electronic monitoring; requirements to reside at a specified address, with or without conditions as to the hours to be spent there; requirements not to leave or enter specified places or districts without authorisation; requirements not to meet specified persons without authorisation; requirements to surrender passports or other identification papers; and requirements to provide or secure financial or other forms of guarantees as to conduct pending trial.<sup>119</sup>

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<sup>114</sup> Edgar, K. (2004) *Lacking Conviction: The rise of the women's remand population* (Prison Reform Trust), p.3

<sup>115</sup> UN Office on Drugs and Crime and the Organisation for Security and Cooperation in Europe (2006) *Criminal Justice Assessment Toolkit, Custodial and Non-Custodial Measures: 2 Detention Prior to Adjudication* (UN Office on Drugs and Crime and OSCE), p.26

<sup>116</sup> UN Standard Minimum Rules on Non-Custodial Measures (The Tokyo Rules), adopted by General Assembly resolution 45/110 of 14 December 1990, rule 6.2

<sup>117</sup> UN Standard Minimum Rules for Non Custodial Measures, Rule 2.4

<sup>118</sup> UN Standard Minimum Rules for Non Custodial Measures, Rule 2.7

<sup>119</sup> Recommendation Rec(2006)13 of the Committee of Ministers of the Council of Europe to member states on the use of remand in custody, the conditions in which it takes places and the provision of safeguards against abuse (adopted 27 September 2006), paragraph 2(1)

The measures below are not listed in order of severity along this spectrum as it is not possible to make such assessments on a general level. The relative severity of a measure will depend on the individual and their personal circumstances. It is possible that the most appropriate conditions are a combination of several of the measures below.

#### *Bail, bond or surety*

What: Bail, bonds and sureties refer to monetary guarantees whereby the defendant or another gives a specified sum of money to the court which is forfeited if the defendant does not appear for trial.

Why: This measure may be appropriate where the risk the Court is trying to address is a risk of the defendant absconding.

#### *Reporting requirements*

What: The defendant may be released but required to report at regular intervals to the police or another authority. The frequency and method of reporting – by phone or in person – can vary.

Why: This measure might be used to address both the risk of absconding and the risk that the defendant will re-offend.

#### *Release with geographical limitations/restrictions on movement*

What: The defendant may be released on condition that they do not enter or leave certain areas. This may or may not be linked to certain times of day or certain events. For example if the defendant is charged with violent crimes committed whilst attending a football match they may be released on condition that they do not enter a specified area around the football ground for a time period covering several hours before, during and after football matches. Compliance may be supervised by spot checks or electronic monitoring.

Why: This measure might be used where there is a risk of re-offending or a risk of interfering with victims, witnesses or other evidence.

#### *Release with curfew*

What: The defendant may be released but be restricted to the place or area where they live during certain hours. This may be supervised by spot checks or electronic monitoring.

Why: This might be used when there is a risk of re-offending absconding.

#### *Release with limitations on the people the defendant can have contact with*

What: The defendant may be released but prohibited from meeting with or trying to contact certain named individuals.

Why: This is likely to be used when there is a risk of the defendant interfering with the witnesses, contacting co-defendants or committing further offences against certain individuals.

#### *Supervised release*

What: The defendant may be released subject to the requirement that they live in or attend an approved centre designed for this purpose such as a bail hostel. Bail hostels are “approved hostels ...intended to provide an enhanced level of supervision to enable bailees...to remain in the community.”<sup>120</sup> Such centres may be run by non-governmental organisations or the State.

Why: May be used to address any of the risks.

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<sup>120</sup> Edgar, K. (2004) *Lacking Conviction: The rise of the women's remand population* (Prison Reform Trust) p.43

## Criteria for non-custodial alternatives

### *Assessment on a case-by-case basis*

Every assessment regarding the appropriateness of non-custodial measures should be made on the basis of the case before the court. There should be no mandatory measures as these prevent the court from taking full account of the circumstances of the individual before them. The decision about which measures to use should consider non-custodial measures first and only order detention if no other less restrictive measure is available.

### *Appropriate to the risk posed by the defendant*

The appropriateness of an alternative will depend on which of the risks posed by not detaining the defendant the court is trying to obviate. Thus, the decision about which measures are appropriate should take the assumed risk into account. Some measures that are appropriate when trying to ensure that the defendant does not abscond, such as requiring financial guarantees, are not going to meet the concerns about re-offending.

### *Principle of minimum intervention*

The overriding principle of all non-custodial alternatives to pre-trial detention must be the principle of minimum intervention.<sup>121</sup> This means that the conditions attached to release must disrupt the defendant's daily life as little as possible. This is of particular importance where the defendant is the primary or sole carer of dependent children as the impact on the children must be kept to an absolute minimum in accordance with their best interests. However, it is also fundamental for all accused persons given the presumption of innocence until guilt is proved.

In order to ensure that this principle is upheld, the court must have at its disposal as much information as possible about the defendant's life. The courts should be aware that women's circumstances, needs and responsibilities may differ from men's and therefore different measures may be required. Critical information for the court to have includes whether the defendant is employed and if so where and when they work; whether they are the primary or sole carer for dependant children; how secure their accommodation is; whether they are currently undertaking any treatment for mental health problems or drug misuse. Attention should be given to ensuring that the defendant does not lose employment, accommodation or custody of her children because of the conditions imposed on her release pending trial.

Although this principle applies to all of the measures at the court's disposal it is of particular relevance when drawing up conditions of release relating to reporting requirements, curfews and restrictions on whom defendants can meet and where they can go. Compliance with the conditions should not interfere with the ability of the defendant to continue working or continue any treatment she may be undertaking. The defendant must also be able to continue with childcare routines, and other essential tasks.

The Organisation for Security and Cooperation in Europe's report on pre-trial detention correctly states that "the difficulty of observing the requirements of the measure chosen should not be used as a device simply to prevent release."<sup>122</sup> It is the State's responsibility to provide a range of measures that are broad and flexible enough to meet the circumstances of the

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<sup>121</sup> UN Standard Minimum Rules for Non Custodial Measures, Rule 2.6 "Non-custodial measures shall be used in accordance with the principle of minimum intervention."

<sup>122</sup> Jeremy McBride (1999) *Pre-Trial Detention in the OSCE Area: OSCE Review Conference, September 1999*, ODIHR Background Paper 1999/2 (OSCE), p.29

defendant. The multiplicity of responsibilities and risks many women face should not preclude them from non-custodial alternatives to pre-trial detention.

#### *Clarity, precision and reasonableness*

The UN Standard Minimum Rules on Non-Custodial Measures require that “conditions to be observed shall be practical, precise and as few as possible.”<sup>123</sup> Therefore, in addition to having as unobtrusive an impact as possible, the defendant must fully understand the conditions under which they are released and compliance should not be impossible. Where the defendant is a juvenile, this may require extra efforts to ensure that they understand the conditions they are required to observe.

#### *Must not put the physical or mental health of the defendant at risk*

The measures used by the court to protect against the risk it foresees must not place the defendant at risk, physically or mentally.<sup>124</sup> Therefore, residential centres for bail supervision must be safe and secure and feel safe and secure to the defendant. Given the high proportion of detained women who have suffered domestic violence the court should be sure that placing limitations on where the defendant can go does not trap her in an abusive situation or put her at risk of further abuse. The same consideration should be made in respect of imposing curfews. Women who have previously been abused by a family member with whom they live should not be confined to that place at certain times of day. Similarly, if a woman without secure accommodation is reluctant to commit to residing with a particular friend or relative as a condition of her release the court should be aware that this may be due to a history of abuse rather than uncooperativeness on the part of the defendant.

In order to meet this requirement and comply with the principle of minimum intervention the conditions of release should not jeopardise any health treatment the defendant is undertaking. This includes mental health and drug dependency treatments.

#### *Defendant's consent*

The Standard Minimum Rules on Non-Custodial Measures are clear that “non-custodial measures imposing an obligation on the offender, applied before... formal proceedings or trial, shall require the offender's consent.”<sup>125</sup> The defendant herself has the most information about whether or not certain measures are appropriate or realistic; the courts should not assume that an unwillingness to consent to certain measures is due to a lack of willingness to cooperate. As mentioned above the defendant may not be willing to consent to a condition if it places her or her children at risk.

#### *Defined in law*

Non-custodial alternatives to pre-trial detention should be defined in law.<sup>126</sup> However, the legislation defining and controlling non-custodial measures should be flexible, in that it should allow the decision-maker to construct a set of conditions appropriate to the individual before them.

#### *Applied without discrimination - Available to all*

All the measures should be applied without discrimination. Discrimination should be understood as also including treating different cases alike. For example, a female defendant who

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<sup>123</sup> UN Standard Minimum Rules for Non Custodial Measures, Rule 12.2

<sup>124</sup> UN Standard Minimum Rules for Non Custodial Measures, Rule 3.8

<sup>125</sup> UN Standard Minimum Rules on Non-Custodial Measures, Rule 3.4

<sup>126</sup> UN Standard Minimum Rules for Non Custodial Measures, Rule 3.1



has suffered sexual violence may not feel able to reside in a mixed gender bail supervision facility whereas a woman without that experience may.

In addition to the principle of non-discrimination there should also be a principle of equitable availability, whereby measures are available throughout the country and not only in isolated pockets of good practice or just in urban centres.

*For residential supervision, enough appropriate places must be available*

Enough resources must be available to support and run all of the non-custodial measures discussed. In residential bail supervision facilities, sometimes called “bail hostels” there is a need to resource not only enough places generally but also to ensure that there are enough appropriate places available.

In the UK there is the paradoxical situation that officials report that there are not enough places in bail hostels for women but in fact bail hostels are under-occupied. A report published by the Prison Reform Trust in the UK in 2004 identified two possible causes of this: firstly that the hostels are rejecting certain women, and secondly that women are rejecting certain hostels.<sup>127</sup> Bail hostels may exclude women who are drug dependent or have serious mental health problems. Reasons that women may reject bail hostels include the distance from their homes, a lack of appropriate facilities for children, or because the hostel is mixed gender.

The Prison Reform Trust’s report contains a thorough examination of the problems associated with the provision of places in Bail Hostels in the UK. From this it is possible to draw out some key factors to be taken into consideration by States when implementing this as a non-custodial alternative to pre-trial detention:

- Provision of enough places
- Distribution around the country
- Provision of single gender accommodation
- Provision of places appropriate to the defendant population – i.e. if there is a high rate of drug dependency then there need to be enough places that are approved to take drug dependent women; the same for mental health problems
- Provision of places with safe, secure accommodation for children

A woman for whom release to a bail hostel is appropriate should not end up in pre-trial detention because the State has failed to provide enough appropriate accommodation. Where bail hostels are provided and are under-occupied research should be undertaken into why they are under-occupied and action taken to address the concerns of women who are rejecting places because they are inappropriate.

*Alternatives requiring financial guarantees must take the situation of the individual into question*

As discussed in Part II, the lower economic status of most women defendants means that financial guarantees may *de facto* not be available to them. As noted by the OSCE “any financial guarantees required should be linked to his or her assets”.<sup>128</sup> However, there may be individuals who are simply unable to find the money for a financial guarantee and may not have anyone who can do this for them; in these circumstances it is essential that this should not be the only non-custodial measure at the court’s disposal. Inability to pay such guarantees must not be the only reason that a defendant is not released pending trial.

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<sup>127</sup> Edgar, K. (2004) *Lacking Conviction: The rise of the women’s remand population* (Prison Reform Trust), p.44

<sup>128</sup> Jeremy McBride (1999) *Pre-Trial Detention in the OSCE Area: OSCE Review Conference, September 1999*, ODIHR Background Paper 1999/2 (OSCE), p.29

*If one measure is found to be inappropriate others should be tried*

If an individual breaches the terms of their release they should not necessarily be detained for the rest of the period pending trial.

The failure of a non-custodial measure should not automatically lead to the imposition of a custodial measure.<sup>129</sup>

Alternative measures should be considered before the decision is taken to detain an individual who has infringed the conditions of their release.

*Availability of alternatives must reduce the use of pre-trial detention*

The Committee on the Rights of the Child warns that the availability of alternatives must reduce the use of detention in practice rather than “widening the net” of sanctioned children.<sup>130</sup> While this may be particularly likely to happen in the case of children, the principle is a generally applicable one.

#### Ways of decreasing the use and length of pre-trial detention

Throughout this paper the case has been made that a reduction in the use and length of pre-trial detention is not only desirable but also necessary in order for States to comply with their international legal obligations. But how can a reduction in pre-trial detention be achieved? Detention must not only be seen as a last resort but actually used only after considering all the possible non-custodial alternatives. However, there will be circumstances in which States feel that the detention of a defendant pending trial is the only appropriate course of action. Given that States will continue to detain some individuals pending trial it is useful to consider some of the means of reducing the number of pre-trial detainees and the length of pre-trial detention. These measures should be taken alongside the implementation of non-custodial measures and not used instead of them. States should address the systemic reasons for the excessive use and length of pre-trial detention in addition to addressing individual cases.

Penal Reform International’s report *Reducing Pre-Trial Detention* identifies several broad categories of action for reducing pre-trial detention.<sup>131</sup> These and other possible measures are outlined below.

#### *1. Identifying the problems*

The first step toward change and reform is to recognise that there is a problem with the over-use and length of detention and to examine where in the criminal justice process the problem stems from. For example, is it a matter of the slow functioning of the judicial system or is it the case that many defendants are automatically detained, or perhaps a combination of both? Without knowing what the particular problems with the system are in a given country it is not possible to address them effectively and efficiently.

Penal Reform International’s report includes two examples of how States have gone about this – prison censuses and trial observations. In Kenya, Malawi and Uganda prison censuses were conducted. These collected data relating to the prison population as a whole but also turned up interesting results in respect of pre-trial detainees. For example the Ugandan census found that

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<sup>129</sup> UN Standard Minimum Rules for Non Custodial Measures, Rule 14.3

<sup>130</sup> Committee on the Rights of the Child General Comment No. 10 (2007): Children’s Rights in Juvenile Justice (CRC/C/GC/10), paragraph 28(a)

<sup>131</sup> Penal Reform International (2005) *Reducing Pre-trial Detention: an index on good practices developed in Africa and elsewhere* (Penal Reform International)

more than 460 detainees had been detained for longer than their constitutional maximum remand period and should have been released unconditionally to await their trial.<sup>132</sup> For the information in a prison census to be useful in identifying ways to reduce the pre-trial detention population the data collected should include:

- (a) who detainees are (age, gender, nationality, health needs, caring responsibilities),
- (b) what they are charged with,
- (c) the reasoning behind the decision to detain them,
- (d) the period for which they have been detained so far,
- (e) the frequency with which their detention has been reviewed.

The data relating to (b), (c), (d) and (e) may be of immediate use to the individual if it is discovered that the reasoning behind the decision did not conform with the legitimate criteria for detention, or if they have exceeded a statutory maximum detention period or if their case has not been reviewed recently and developments mean that they no longer need to be held. The data relating to (a) will help the prison authorities to identify over-represented groups, for example foreign nationals, and address any discrimination that may be leading to this over-representation. Knowing what defendants are charged with will also help identify trends and ensure that only those charged with offences carrying a custodial sentence are detained pending trial.

Trial observations are useful in identifying problems in the functioning of the courts. The trial observation may identify that cases are progressing very slowly, or alternatively trial observation may show that decisions are taken too quickly. Whilst it is necessary that cases do not take unreasonably long to process, a perceived need for rapid processing should not prevent the case from being considered on its individual merits. Processing cases too quickly, without a proper consideration of the non-custodial alternatives, may lead to over-use of detention just as slow processing leads to over-length. In the courts in England and Wales decision-making was so quick as to bring into question whether the judge had given proper consideration to the case. One study found that “a large majority of remand hearings last less than ten minutes and a substantial minority less than two minutes”.<sup>133</sup> The Law Commission reported that decision makers had a tendency to act on advice from the Prosecution,<sup>134</sup> therefore suggesting that the prosecution and not the courts *de facto* decide on the detention of the defendant.

Trial observations in Malawi helped identify the limited contact between defendants and their lawyers as a key shortcoming in remand hearings. They found that in almost every case the lawyers, paid for by legal aid, first met their clients immediately before the hearing. Therefore, there was very little possibility of becoming fully acquainted with the facts of the case let alone knowing the defendant well enough to raise relevant factors about lifestyle, needs and responsibilities that should be taken into account when deciding whether or not the defendant should be detained. The importance of improving legal aid as a means of reducing over-use of pre-trial detention is considered below.

In Ukraine trial observations are being used to form the basis of an “audit of conformity with international standards”. This will be disseminated and could be used as a basis from which to address any problems identified.<sup>135</sup>

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<sup>132</sup> Penal Reform International (2005) *Reducing Pre-trial Detention: an index on good practices developed in Africa and elsewhere* (Penal Reform International, pp.8-9)

<sup>133</sup> Anthea Hucklesby (1997) “Remand Decision Makers” in *Criminal Law Review* 269-281, quoted in Edgar, K. (2004) *Lacking Conviction* (Prison Reform Trust), p.4

<sup>134</sup> Law Commission (2001) *Bail and the Human Rights Act* (The Law Commission)

<sup>135</sup> Open Society Justice Initiative (2004) *Ukraine: Reducing Pre-Trial Detention – Monitoring and Judicial Skills Building* from [http://www.justiceinitiative.org/activities/ncjr/ptd/ukraine\\_ptd](http://www.justiceinitiative.org/activities/ncjr/ptd/ukraine_ptd)

Trial observers should take note of whether female defendants are treated differently from male defendants and whether such different treatment is discriminatory or whether it is taking account of the different needs and responsibilities of female defendants.

### 1. *Improving inter-agency cooperation*

Improved inter-agency cooperation can help to avoid detaining some defendants and speed up the release of others.

In the context of court diversion schemes, where courts are empowered to divert defendants into the health service for treatment or assessment, there needs to be effective communication between all the agencies involved. In the UK a study found that “only 28% of patients diverted into treatment were reconvicted within two years of discharge” and noted that this was a “profound improvement on their offending rates prior to admission and much better than the standard reconviction rate from prison.”<sup>136</sup> However, the Prison Reform Trust has noted some shortcomings in the system of diversions and thus a need for better cooperation and communication between prisons, health services and the courts as part of addressing the problem.<sup>137</sup> They observed that “prison is not an environment which is suited to working with a woman’s drug dependency problems, notwithstanding the uninformed hopes of the court, which the Chief Inspector [of Prisons] felt might be tempted to send women to prison to obtain proper detoxification.”<sup>138</sup> Therefore, if the courts were more aware of the difference in treatment available in the two settings it might lead to fewer defendants being inappropriately detained.

Penal Reform International’s *Index on Good Practices* contains a number of examples where projects to improve communication between the various agencies working with pre-trial detainees helped reduce the length of pre-trial detention. These projects include establishing “Case Management Committees” consisting of various stakeholders that meet regularly to assess whether cases are progressing at an acceptable rate and to identify and solve problems. For example, in Malawi paralegals and prison officers brought severe overcrowding – requiring detainees to sleep in shifts – to the attention of the Case Management Committee. As a result a number of officials including magistrates, court clerks and police prosecutors went to the prison and ordered the release of some of the detainees.<sup>139</sup> Similarly in Pakistan a committee made up of the District Magistrate, a Sessions Judge and the Deputy Senior Superintendent of Police is empowered to release defendants and discontinue cases if appropriate.<sup>140</sup>

Interagency cooperation and the types of committees mentioned above can help to dramatically reduce case backlog, a major factor causing overlong pre-trial detention. For example, in Senegal a case management database was developed containing information on all detainees. Local and central courts and the relevant governmental ministry were given access and trained in how to use it (this is due to expand to prison authorities). The software is set up so that an “alarm bell” is triggered each time a procedural deadline is being breached.<sup>141</sup>

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<sup>136</sup> Dr. David James et al. (2002) *Outcome of psychiatric admission through the courts* RDS Occasional Paper No 79 (Home Office) quoted in Edgar, K. (2004) *Lacking Conviction* (Prison Reform Trust), p.10

<sup>137</sup> Edgar, K. (2004) *Lacking Conviction* (Prison Reform Trust), pp.9-11

<sup>138</sup> Edgar, K. (2004) *Lacking Conviction* (Prison Reform Trust), p.22

<sup>139</sup> Penal Reform International (2005) *Reducing Pre-trial Detention: an index on good practices developed in Africa and elsewhere* (Penal Reform International), p.17

<sup>140</sup> Penal Reform International (2005) *Reducing Pre-trial Detention: an index on good practices developed in Africa and elsewhere* (Penal Reform International), p.19

<sup>141</sup> Penal Reform International (2005) *Reducing Pre-trial Detention: an index on good practices developed in Africa and elsewhere* (Penal Reform International), p.20

With respect to female detainees, such committees should be fully aware of the differential impact on women of pre-trial detention and be able to identify and release the women for whom detention is not or is no longer appropriate. It is also of great importance that there be clear lines of communication between statutory social services bodies and the courts with respect to what will happen to children for whom the defendant is caring if she is detained and the long term prospects of her regaining custody of her children if they are removed from her care.

## 2. *Provision of Legal Aid*

The International Covenant on Civil and Political Rights enshrines the right to legal counsel, specifically the right “to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”<sup>142</sup> The provision of good quality legal aid ensuring that this right is implemented for all defendants can result in a decrease in the number of defendants who are detained pending trial. However, Penal Reform International has noted that “The legal aid programmes provided in most countries are too expensive and do not work.”<sup>143</sup>

The provision of effective legal aid services can contribute to a decrease in the pre-trial detention population by ensuring that the court deciding on detention does not make such decision purely on the recommendation of the prosecuting authorities. Legal representatives can ensure that the defendant understands the process and present to the court relevant information that may change the court’s opinion on the risk posed by the defendant or on the suitability of non-custodial measures. It is important that defendants have access to a lawyer to represent them from the time of arrest onwards; the lawyer should be fully qualified to advise the defendant and to represent them in hearings about detention pending trial as well as in the trial itself. Lawyers should have the time and facilities necessary to familiarise themselves with the case and to construct arguments for release pending trial.

Penal Reform International details a number of programmes designed to provide less costly and more widely available legal aid, including through law students and lawyers in training.<sup>144</sup> These programmes can fill a vacuum or bolster a deficient legal aid system; however, it is important that the poorest in society do not get sub-standard legal advice because they are unable to afford qualified assistance. Therefore, legal aid programmes should be monitored to assess their quality and all those participating should receive ongoing training. The State has a responsibility to provide for legal assistance for those who cannot afford it; the provision of services by non-governmental bodies does not negate the duty of the State to fund such assistance.

There should be an adequate number of female legal aid lawyers for female defendants who are uncomfortable with male lawyers and there should be an adequate number of legal aid lawyers who are fully aware of the particular needs and responsibilities of female defendants and how these may affect the decision of the court.

## 3. *Judicial training*

As noted in Part II the existence of alternatives to pre-trial detention in legislation is useless unless judges are fully informed about them and have confidence in them. Therefore, judges should receive ongoing training to inform them of the various non-custodial alternatives to pre-

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<sup>142</sup> International Covenant on Civil and Political Rights, Article 14(3)(d)

<sup>143</sup> Penal Reform International (2005) *Reducing Pre-trial Detention: an index on good practices developed in Africa and elsewhere* (Penal Reform International), p.21

<sup>144</sup> Penal Reform International (2005) *Reducing Pre-trial Detention: an index on good practices developed in Africa and elsewhere* (Penal Reform International), pp.22-23

trial detention and to ensure that they understand them and are aware of their efficacy in overcoming the risks that defendants pose.

Judges should also be required to make clearly reasoned decisions about detention pending trial and these decisions should be recorded and distributed to the parties to the case. If the decision and the reasoning behind it are clear it is less likely that the decisions will be taken without proper consideration and it enables the defendant and their lawyer to be in a better position to challenge the decision if appropriate.

Judges need to be made aware of the difference between the impact of detention on male and female detainees and the impact on any family members for whom they may be caring.

#### 4. *Improving public awareness*

As the Open Society Justice Initiative has identified: “Public attitudes can profoundly influence the extent to which pre-trial detention is used.”<sup>145</sup> Therefore, one means of reducing pre-trial detention is to change the current focus of public pressure for a pro-incarceration approach to criminal justice through public awareness campaigns. Such campaigns should encourage discussion about the social cost of pre-trial detention, particularly the social cost of detaining women who are caring for dependent children, and educate the public about the alternatives. The Open Society Justice Initiative’s publication *Myths of Pretrial Detention in Mexico* is a good example of how public perceptions can be challenged and how widespread but ill-founded fears can be allayed.<sup>146</sup>

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<sup>145</sup> Open Society Justice Initiative (2004) *Latvia: Promoting Bail in Place of Pretrial Detention* from [http://www.justiceinitiative.org/activities/ncjr/ptd/latvia\\_bail](http://www.justiceinitiative.org/activities/ncjr/ptd/latvia_bail) (accessed February 2007)

<sup>146</sup> Open Society Justice Initiative (2005) *Myths of Pretrial Detention in Mexico* (New York: Open Society Institute)



## **Pre-Trial Detention of Women**

### **And its impact on their children**

Drawing together findings from academics, professionals and the United Nations, this paper examines the ways in which women are disproportionately affected by pre-trial detention and how this impacts on their children. It considers the reasons for the over-use of pre-trial detention, issues around over-long periods of detention and the problems of inappropriate conditions of detention for pre-trial detainees. It also provides practical suggestions for improvements as well as a range of alternatives to pre-trial detention.

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If you are interested in learning more about the Women in Prison Project or would like to work with us on this issue please contact us. Our full contact details are printed on the inside cover.

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