IPRT Preliminary Submission on
General Scheme of the Bail Bill
August 2015

Introduction

The Irish Penal Reform Trust (IPRT) is Ireland's leading non-governmental organisation campaigning for the rights of everyone in the penal system, with prison as a last resort. IPRT is committed to reducing imprisonment and the progressive reform of the penal system based on evidence-led policies. IPRT works to achieve its goals through research[1], raising awareness, building alliances and growing our organisation. IPRT welcomes the invitation from the Joint Committee on Justice, Defence and Equality for written submissions in relation to the General Scheme of the Bail Bill 2015. While the Bill is a largely welcome development, constituting a comprehensive re-statement and consolidation of existing Irish law on bail, it also provides an opportunity to revisit aspects of the existing bail legislation which are problematic, as well as flagging concerns about some of the new provisions[2].

Use of Pre-Trial Detention

According to the International Centre for Prison Studies, the percentage of pre-trial detainees in Ireland has fluctuated between 13-15% of the total prison population over the last 15 years[3]. While pre-trial detention has an important part to play in some criminal proceedings, ensuring that certain defendants will be brought to trial, where it is used excessively, this results in considerable cost to the national economy. More importantly, unjustified and excessive pre-trial detention impacts on the right to liberty and the presumption of innocence. An accused person who is remanded in custody will find it more difficult to adequately prepare his defence[4]. The loss of liberty brings with it loss of contact with family and community. It also takes the accused person out of the workplace with the consequent impact on earnings. For these reasons, international human rights standards including the European Convention on Human Rights (ECHR) require that pre-trial detention is used as an exceptional measure of last resort.

IPRT believes that any reform of national bail laws require careful consideration of applicable due process principles, constitutional implications and international human rights obligations, both universal and regional. Any interference with the rights of the individual must be justified by demonstrating that the interference is in pursuit of a legitimate aim, and that the interference is proportionate to the achievement of that aim. Furthermore, adequate and effective safeguards should be in place to ensure that the rights of the individual are not interfered with arbitrarily or unjustifiably.

1. Brief overview of the right to liberty

Article 5 of the European Convention on Human Rights provides that no one shall be deprived of his liberty save in specified cases and in accordance with a procedure prescribed by law. One of those specified cases is the

> *"lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it*

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[1] IPRT has just completed the Irish national report for of an EU wide research project on the use of pre-trial detention: "*The Practice of Pre-trial detention: Monitoring Alternatives and Judicial Decision-Making in Ireland*", to be published 2015

[2] This submission includes: (1) Brief overview of the right to liberty (2) A note on the provision of bail supports and (3) Analysis of Draft Heads of the General Scheme of the Bail Bill.

[3] http://www.prisonstudies.org/country/ireland-republic

[4] Criminal Law, 3rd Ed, Roundhall, Cecilia Ní Choileáin, page 20

is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

Anyone deprived of liberty under the exceptions set out in Article 5 "shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful"[5]. The European Court of Human Rights (ECtHR) has developed general principles on the implementation of Article 5:

i. Pre-trial detention should only be imposed **only as an exceptional measure**. The Court has stated that -

> *"detention of an individual is such a serious measure that it is only justified where other, less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it also must be* **necessary** *in the circumstances.[6]"*

ii. To justify the detention of a person who is presumed innocent, there must be '*a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty*'.[7] It follows that a system of **mandatory detention on remand is incompatible with Article 5(3)** of the Convention.[8]

iii. There is a **presumption in favour of release**[9] and the state bears the burden of proof on showing that a less intrusive alternative to detention would not serve the respective purpose.[10]

iv. **Lawful grounds** for ordering pre-trial detention are: (1) the risk that the suspect will fail to appear for trial;[11] (2) the risk the suspect will spoil evidence or intimidate witnesses;[12] (3) the risk that the suspect will commit further offences;[13] (4) the risk that the release will cause public disorder;[14] or (5) the need to protect the safety of a person under investigation in exceptional cases.[15] However, the individual should only be detained if one of these grounds applies *and a condition of bail could not mitigate the risk in question*. The **authorities must consider measures to counteract any risks**, such as requiring security to be lodged or court supervision.[16] They are obliged to give proper consideration to any offer of a financial guarantee to ensure the accused's presence at the hearing.[17]

v. The detention **decision must be sufficiently reasoned** and should not use "stereotyped"[18] forms of words. The arguments for and against pre-trial detention must not be "general and abstract".[19] The court must engage with the reasons for pre-trial detention and for dismissing the application for release.[20]

vi. the authorities must exercise '**special diligence**' throughout detention on remand. In other words, it is not enough for them to have demonstrated that one of the risks set out above exists and cannot be reduced by any bail condition. They must then act expeditiously from the

[5] (Article 5(4) ECHR).
[6] *Ambruszkiewicz v Poland*
[7] *Ilijkov v Bulgaria* (2001).
[8] *Caballero v UK* (2000) 30 EHRR 693.
[9] *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 145.
[10] *Ilijkov v Bulgaria,* App 33977/96, 26 July 2001, para 85.
[11] *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003,, para 59.
[12] Ibid.
[13] *Muller v. France*, App 21802/93, 17 March 1997, para 44.
[14] *I.A. v. France*, App 28213/95, 23 September 1988, para 104.
[15] Ibid para 108.
[16] *Tomasi v France* (1992) 15 EHRR 1.
[17] *Neumeister* 1 EHRR 91.
[18] *Yagci and Sargin v Turkey,* App 16419/90, 16426/90, 8 June 1995, para 52.
[19] *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003, para 63.
[20] *Buzadj v. Moldova*, App 23755/07, 16 December 2014, para 3.

day the accused is placed in custody until the day the charge is determined.[21] A further and ongoing **obligation arises 'to review the continued detention** of a person pending his trial with a view to ensuring his release when the circumstances do not justify the continued deprivation of liberty'.[22]

vii. The **mere fact of having committed an offence is not a sufficient reason for ordering pre-trial detention**, no matter how serious the offence and the strength of the evidence against the suspect.[23]

viii. Pre-trial detention based on "the need to preserve public order from the disturbance caused by the offence"[24] can **only be legitimate if public order actually remains threatened.**

ix. Pre-trial detention **cannot be extended just because the judge expects a custodial sentence at trial**.[25]

x. With regards to flight risk, the ECtHR has clarified that **the lack of fixed residence**[26] **alone or the risk of facing long term imprisonment if convicted does not justify ordering pre-trial detention**.[27] The risk of reoffending can only justify pre-trial detention if there is actual evidence of the definite risk of reoffending available;[28] merely a lack of job or local family ties would be insufficient.[29]

xi. The authorities should consider **less stringent alternatives** prior to resorting to detention,[30] and the authorities must also consider whether the "accused's continued detention is indispensable".[31]One such alternative is to release the suspect within their state of residence subject to **supervision**. States may not justify detention in reference to the non-national status of the suspect but must consider whether supervision measures would suffice to guarantee the suspect's attendance at trial.

2. A Note on Provision for Bail Supports

Given all the foregoing, it is extremely regrettable that the *General Scheme of the Bail Bill 2015* does not include any statutory provision whatsoever for bail supports, which represent a crucial issue in any discussion on bail and pre-trial detention. There is always a risk that bail law will be misapplied to grant respite to the communities or, perhaps, in an effort to offer interventions such as drug treatment or mental health support - or because the chaotic nature of their lives means that the accused may find it difficult – without support – to adhere to bail conditions that may be imposed.[32]

The most effective way to improve compliance with bail conditions, particularly where the accused person has a chaotic life and complex personal challenges, lies in the provision of bail supports and services that allow the accused to remain within their community and address offending-related behaviour in a familiar environment.

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[21] *Kalashnikov v Russia* 36 EHRR 587.
[22] *McKay v UK* (2006) 44 EHRR 827.
[23] *Tomasi v France,* App 12850/87, 27 August 1992, para 102.
[24] *I.A. v. France*, App 28213/95, 23 September 1988, para 104..
[25] *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 149.
[26] *Sulaoja v Estonia,* App 55939/00, 15 February 2005, para 64.
[27] *Tomasi v France,* App 12850/87, 27 August 1992, para 87.
[28] *Matznetter v Austria,* App 2178/64, 10 November 1969, concurring opinion of Judge Balladore Pallieri, para 1.
[29] *Sulaoja v Estonia,* App 55939/00, 15 February 2005, para 64.
[30] *Ladent v Poland,* App 11036/03, 18 March 2008, para 55.
[31] Ibid, para 79.
[32] Under Section 6(b) of the *Bail Act 1997,* such conditions include: (i) that the accused person resides or remains in a particular district or place in the State, (ii) that the accused person reports to a specified Garda Síochána Station at specified intervals, (iii) that the accused person surrenders any passport or travel document in his or her possession or, if he or she is not in possession of a passport or travel document, that he or she refrains from applying for a passport or travel document, (iv) that the accused person refrains from attending at such premises or other place as the court may specify, (v) that the accused person refrains from having any contact with such person or persons as the court may specify.

Examples of bail supports include bail information schemes, bail support/supervision schemes, remand fostering, bail hostels, bail reviews on custodial remand.[33] The aims of these services and supports is the prevention of offending on bail, ensuring appearance at court and reducing remands to custody to the essential minimum[34]. They are particularly effective in reducing use of remand of young people[35], women[36] and those with addictions or mental illness, personal difficulties or unstable lifestyle. In this regard it is relevant to note that *The Corston Report*[37] also recommended that more **supported bail placements for women** suitable to their needs must be provided and defendants who are primary carers of young children should be remanded in custody only after consideration of a probation report on the probable impact on the children.[38]

In addition to preventing offending for the duration of the bail period, help with offending-related difficulties is reported to be of benefit even after the remand period.[39] Research conducted in Scotland on supervised bail found all interviewees except one to have experienced a **positive change in their behaviour over time**, including a desire to avoid trouble or jail, learning to avoid conflict situations and refraining from drinking or taking drugs.[40]

In terms of court appearances, bail supports and services have a significant impact in **ensuring that young people in particular attend court.** An evaluation of schemes in England and Wales found that young people attended all court hearings in 94% of programmes,[41] while in Ontario, Canada, 81% of bail supervision programme clients attended all of their court appearances.[42] This not only improves the prospects of clients successfully completing bail, but also **increases court efficiency by avoiding failures to appear**.

Bail supports and services have also been effective in reducing the number of remands to custody, with the aforementioned evaluation in England and Wales showing a direct correlation between an increase in the use of bail supports and services and a **decrease in the number of young people being remanded in custody**. In Victoria, Australia, a bail support programme contributed to reducing the number of defendants remanded: all interviewed magistrates said that they would have remanded individuals were it not for the programme.[43] Data for bail supervision services in Scotland also shows that 80% of those completing their bail supervision period did not receive a custodial sentence, strongly suggesting that the service fulfilled its aim of restricting the use of custody.[44]

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[33] Seymour, M., Butler, M.: *Young People on Remand*. Report commissioned by the Office of the Minister for Children and Youth Affairs, Department of Health and Children, Ireland, 2008, p. 3.

[34] Bail Support Policy and Dissemination Unit, *Guide to the National Standards for Bail Supervision and Support Schemes* (2001), at p.9.

[35] See IPRT Report *Turnaround Youth*, 2015 http://www.iprt.ie/files/IPRT-Turnaround-web-optimised.pdf

[36] See IPRT Position Paper: Women in the Criminal Justice System, 2013 http://www.iprt.ie/files/IPRT_Position_Paper_on_Women_in_the_Criminal_Justice_System.pdf For female remand prisoners not from Dublin who are detained in the Dóchas centre, or those not from Limerick who are remanded at the female prison there, they may be unable to exercise their right to enhanced visits if family members, including small children are unable to embark on long journeys to appear at the prison for a 15 minute visit.

[37] http://www.justice.gov.uk/publications/docs/corston-report-march-2007.pdf

[38] *A report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System* 2007, p. 58.

[39] Freeman, "The Experience of Young People Remanded in Custody: A Case for Bail Support and Supervision Schemes" (2008) 5 *Irish Probation Journal* 91-102.

[40] Scottish Government Social Research, *Supervised Bail in Scotland: Research on Use and Impact* (2012), at p.14.

[41] Youth Justice Board for England and Wales, *National Evaluation of the Bail Supervision and Support Schemes Funded by the Youth Justice Board for England and Wales from April 1999 to March 2002* (2005).

[42] Department of Justice, Canada, *The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System*.

[43] Department of Justice, Victoria, Australia, *Bail Support Programme Evaluation* (2003, 2008).

[44] Kirkwood and Dickie, "The Case for Bail Supervision" (2008) *Scottish Criminal Law* 264-267.

In addition to the efficacy of bail supports and services, research has also shown that such schemes are **more cost effective than custodial remands**. In Ontario, Canada, for example, bail supervision and verification programmes cost approximately $3 a day per client in comparison to custody costs of $135 a day per inmate.[45] Similarly in Scotland, off-setting the cost of supervised bail against the reduction in prison costs from reduced use of remand over a three-year period resulted in a net benefit of between £2 million and £13 million.[46] In 2014 the average cost of an "available, staffed prison space" in an Irish prison was €68,959 - or an average of €189 per day, per prisoner. If there are (on an average day[47]) 520 remand prisoners held, it costs the State approximately €100k per day to house remand prisoners.

IPRT strongly recommends that the Bill include an evidence-based approach to provision for bail services and supports aimed at the prevention of offending on bail, ensuring appearance at court and reducing remands to custody to the essential minimum.

3. Analysis of Draft Heads:

Head 5: Statements by applicants for bail charged with serious offences

The Irish Human Rights Commission[48] made the following observation about s.6 of the Criminal Justice Act 2007 which first provided that "personal statements" must be provided by bail applicants:

> *"The Commission believes that an obligation to supply a personal statement as a precondition for bail for serious offences imposes a weighty responsibility on the applicant who is presumed innocent before the law. While the onus of responsibility is on the prosecution to provide facts regarding the likelihood of the applicant to absconding, interfering with witnesses or committing offences while on bail, this burden is somewhat shifted, whereby it is the applicant who must supply detailed personal information and the time needed to gather such personal information may create difficulties for a detained applicant where information is not readily available or accessible. In general terms, the relevance and purpose of such statement is* questionable."

IPRT agrees with the previously expressed view of IHREC that the applicant's source of income and possession of assets do not have any automatic bearing on his or her likelihood to stand trial, interfere with witnesses or commit offences while on bail. Further, the time needed to gather such personal information may create difficulties for a detained applicant where information is not readily available or accessible - the implications of a delay on the applicant is continued detention.

IPRT recommends that the Committee critically examine the relevance and purpose of the obligation to provide a personal statement and the implications of such a requirement on continuing detention for the defendant.

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[45] Department of Justice, Canada, *The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System*. See also Tanner, Wyatt and Yearwood, "Evaluating Pre-trial Service Programmes in North Carolina" (2008) 72(1) *Federal Probation* 18-27.

[46] Scottish Government Social Research, *Supervised Bail in Scotland: Research on Use and Impact* (2012), at p.18.

[47] See for most recent figures http://www.irishprisons.ie/images/dailynumbers/27_aug_2015.pdf

[48] Now the Irish Human Rights and Equality Commission

Head 7: Period of Remand

Head 7 extends both the reasons for which a person may be unable to be brought before the court and the further period that he or she may be remanded from "more than 8 days" to "more than 15 days". In the absence of any reference in the interpretative provisions, IPRT queries both the definition of "*good and sufficient reason*" at Head 7(5)(a) and also the proportionality of the facility to remand a person for "*such further period which may exceed 15 further days as the court considers reasonable*"[49]. Given the significant consequences for the right to liberty and the complete dependence of detainees on others to provide transportation to and from court, IPRT's view is that the breadth of the current formulation is both unnecessary and disproportionate.

Where an accused spends a lengthy period in pre-trial detention, the judicial *convention* is to backdate the sentence to allow for time served on remand. However, the sentencing judge is not legally obliged to give credit for time served. The Bill should contain a clear legislative provision requiring sentences to be backdated; Head 7 may be appropriate.

IPRT recommends that the meaning of "good and sufficient reason" be further clarified.
IPRT recommends that the facility to remand should be limited to the "next available court date".
IPRT recommends that the Bill should contain a clear legislative provision for time served on remand to be credited towards any custodial sentence imposed.

Head 10: Provisions on Admission to Bail

Head 10(2) provides that an applicant for bail *shall* be granted bail except where, having regard to the provisions of the Act, the court does not consider it to be a case in which bail should be allowed. This formulation is welcome. IPRT has long called for imprisonment to be used as a last resort. This principle should be afforded even greater weight in relation to people who have yet to be tried and convicted of any criminal offence. However a serious problem with the current Irish remand scheme is that people may technically be detained on bail for longer than either the maximum sentence for the offence with which they are charged or the maximum likely sentence in the circumstances of their particular case. The 'no real prospect' test contained in Schedule 11 of the UK legislation *Legal Aid, Sentencing and Punishment of Offenders Act 2012* provides that defendants should not be remanded to custody if the offence is such that the defendant is unlikely to receive a custodial sentence. The Prison Reform Trust summarise the 'no real prospect' test as being designed *"…to remedy the misuse of custodial remand by establishing a test of a reasonable probability that the offence is imprisonable as a criterion of whether the court can deny bail."*[50]

IPRT recommends that Head 10(2) be strengthened by the addition of the words *"…or where there is no real prospect that the defendant will receive a custodial sentence were they to be convicted of the offence with which they have been charged."*

[49] To illustrate the potential risks: on 29 June 2015, 42 prison officers of the prison escort service "forgot" to bring their driving licences to work, widely interpreted as a form of wildcat industrial action. Escorts of prisoners to the criminal courts of justice were therefore widely delayed. If similar action were repeated it may easily result in a remanded person being "*unable to be brought before the Court*" and, if court accepted that lack of availability of transport constituted "*good and sufficient reason*" it would be open to the court to remand that person for a further period of over two weeks. http://www.irishprisons.ie/images/pdf/psec_ccj.pdf

[50] See Prison Reform Trust, *Tackling the Overuse of Custodial Remand*, October 2011, p. 2.

Head 11: Requirement to Give Reasons for Bail Decisions

The requirement in Head 11(2) of the 2015 Bill to record in writing a decision to grant or refuse bail, the conditions that may attach, or any decision to revoke bail is welcome. One of the core principles developed by the ECtHR concerning the substance of pre-trial detention decisions is that the courts in question must give reasons behind detention decisions and not use identical or "stereotyped" forms of words, and the arguments for and against pre-trial detention must not be "general and abstract". IPRT has also previously advocated for all decisions where imprisonment is imposed to be recorded in writing. In terms of improving accountability and transparency around judicial decision-making in the bail context, it would be preferable if *all* decisions were recorded in writing as a matter of course, and did not require a specific request from the defence or the prosecution. This provision would benefit not only the accused person and their family members, but also victims, practitioners and criminal justice analysts.

IPRT recommends that Head 11 of the 2015 Bill should be amended by the addition of the word "written" after "give", together with the deletion of Head 11(2).

Head 16: Conditions of bail

Head 16(1)(b) allows for such conditions to be imposed "*as the court considers appropriate*" having regard to the circumstances of the case, including a number of specified conditions listed. Where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. The word "*appropriate*" is vague and subjective. The phrase "*necessary and proportionate*" is clearer and inserts the required element of objectivity.

IPRT recommends that Head 16 be amended by the replacement of the word "appropriate" for the phrase "necessary and proportionate".

This Head also introduces a power of arrest <u>without</u> warrant by Gardaí for breach of bail conditions. Under the current law, a Garda cannot arrest an accused person released on bail without warrant for breach of conditions in any circumstances. Extending Garda powers to arrest without warrant for breach of bail conditions in the absence of provision for bail supports and services, is a short term and simplistic solution to a complex problem.

IPRT recommends that the power to arrest without warrant for breach of bail conditions is removed from the Bill.

Head 18 & 19: Electronic Monitoring of Certain Persons admitted to Bail

"Electronic monitoring" is a general term referring to forms of surveillance with which to monitor the location, movement and specific behaviour of persons in the framework of the criminal justice process. The current forms of electronic monitoring are based on radio wave, biometric or satellite tracking technology. They usually comprise a device attached to a person and are monitored remotely. In February 2014 the Council of Europe adopted Recommendation CM/Rec(2014)4[51] on the use of

[51] https://wcd.coe.int/ViewDoc.jsp?id=2163631

electronic monitoring, representing the first guidance on this internationally. The recommendations therein include (but are not limited to) the following:

- that decisions to impose or revoke electronic monitoring shall be taken by the judiciary, **without discrimination and at pre-trial stage with special care not to widen the net**[52]
- that type and **modalities of tagging need to be proportionate** to the offences alleged in terms of duration and intrusiveness
- that it is imperative to take into account the **impact they have on families** and other third parties, as well as **age, disability or other relevant personal circumstances** of each suspect
- conditions of execution **should not be so restrictive as to prevent a reasonable quality of everyday life** in the community
- Electronic monitoring confining offenders to a place of residence without the right to leave it should be **avoided as far as possible in order to prevent the negative effects of isolation, in case the person lives alone, and to protect the rights of third parties who may reside at the same place.**
- National law needs to regulate **how time spent under electronic monitoring supervision at pre-trial stage may be deducted from any final sanction**; and
- Particular attention shall be paid to **regulating strictly the use of data** collected in the framework of electronic monitoring

It is notable that <u>none</u> of these safeguarding factors appear to have been considered in the current General Scheme. IPRT believes that that any interference with those rights must be proportionate and justified in the circumstances of the particular case. While some provision for electronic tagging may be useful as a genuine alternative to imprisonment on remand if properly resourced, and if applied only in those cases where the only other option would have been imprisonment, the preferable option would be the provision of effective bail supports and services[53]. Recent research[54] from the UK on the use of electronic tagging there (as an alternative to imprisonment on conviction) highlighted the challenges of such technology, including continuing inaccuracies in information conveyed by the courts to the probation service or electronic monitoring provider, which were serious enough to undermine the efficient management of cases. This is of particular concern where Head 19 allows documentary evidence to be adduced as evidence of the facts contained therein in respect of compliance or non-compliance with a tagging condition.

IPRT recommends that any proposed scheme for pre-trial electronic tagging be reviewed for compliance with Council of Europe Recommendation CM/Rec(2014)4 before being introduced into legislation.

Head 27: Refusal of bail to prevent the commission of a serious offence

Where an application for bail is made by a person charged with a serious offence, Head 27 permits the court to take into account addiction to alcohol or drugs. To treat addiction as a criminal justice issue rather than a health issue belies a fundamental misunderstanding of both and highlights again, the absence of effective bail supports. The IPRT *Shifting Focus* position paper[55] highlighted the close

[52] "Widening the net" refers to the practice by which instead of electronic monitoring being a genuine alternative to pre-trial detention it instead becomes a widely imposed condition of bail

[53] Observations of the Criminal Justice Bill 2007, Irish Human Rights Commission, 29 March 2007, page 19. The form of intrusion involved in electronic monitoring may infringe the right to privacy under Article 40.3.1, personal liberty under Article 40.4.1, and bodily integrity under Article 40.3.2. Provisions of the European Convention on Human Rights are also relevant; the most applicable provisions to the surveillance of offenders through electronic monitoring are individual liberty under Article 5, the right to private and family life under Article 8, and the right of freedom of peaceful assembly and association under Article 11.

[54] It's Complicated: The management of electronically monitored curfews, HMI Probation, June 2012, http://www.justiceinspectorates.gov.uk/probation/wp-content/uploads/sites/5/2014/03/electronic-monitoring-report-2012.pdf

[55] http://www.iprt.ie/files/IPRT_Barnardos_IAYPIC_Shifting_Focus_Position_Paper_EMBARGOED_TO_23_SEPT_2010.pdf

correlation between mental health, drug/alcohol dependency and offending. Government should, in the first instance, adopt an approach aimed at ensuring equal access to health, education and social services to those in need. Targeted interventions, where risks have emerged, should be a secondary stage of intervention. Such an approach would not only address the health and related problems that promote disadvantage and marginalise families and communities, it would have the added value of preventing the onset or continuation of criminal behaviour.

Head 27(3) and (4) of the *General Scheme of the Bail Bill, 2015* requires the courts to have regard to persistent serious offending by an applicant for bail in relation to domestic burglary and is linked to Head 1 of the Criminal Justice (Burglary of Dwellings) Act 2015 which provides that, for the purposes of bail applications, a previous conviction for domestic burglary coupled with two or more pending charges shall be evidence of a likelihood to commit further domestic burglaries in the context of section 2 bail objections.[56] The proposed amendment goes so far as to effectively negate the presumption of bail for certain types of accused, namely those with one or more previous convictions for burglary, and in fact creates a legislative presumption in favour of preventive detention founded on a presumption of guilt. Head 27(8) of the Bill is a positive legislative addition requiring that the defence must be served with advance notice of the precise basis of the objection to bail to prevent the commission of a serious offence.

Head 27(9) of the *General Scheme of the Bail Bill, 2015* provides that the Head "applies to serious offences being tried summarily or on indictment." However, by definition serious offences in the Scheme are offences *"specified in Schedule 1 for which a person of full capacity and not previously convicted may be punished by a term of imprisonment of 5 years or by a more severe penalty*". Since both the interpretation provisions of the *Bail Act 1997* and the General Scheme refer specifically to serious offences carrying a penalty of 5 years of more, and the *Criminal Justice (Community Service) (Amendment) Act 2011* requires judges to consider community service for offences which would normally receive a custodial sentence of 12 months or less (on the basis that such offences are less serious in nature than offences tried by a judge and jury in the Circuit Court where there are higher penalties), there is a strong argument that serious offences should be confined to those offences **where the DPP has directed, or is likely to direct trial on indictment**.

Head 27(9) of the *General Scheme of the Bail Bill, 2015* should be amended to state "applies to serious offences being tried on indictment."

Head 29: Evidence in Application for Bail under Head 27

The Irish Human Rights Commission[57] made the following observation[58] about s. 7 of the Criminal Justice Act 2007 which first gave evidential status to the expression of opinion in bail proceedings -

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[56] Head of the General Scheme of the *Criminal Justice (Burglary of Dwellings) Bill*, 2015 provides: "The Bail Act 1997 is amended by inserting the following section after section 2A:
"*Refusal of bail for protection of dwellings*
2B (1)The purpose of this section is to better defend and vindicate the rights provided for by Article 40.5 of the Constitution.
2) In proceedings under section 2 where an application for bail is made to any court by a person not below the age of 18 years charged with a burglary offence in respect of a dwelling, the fact that the accused person—
(a) has been convicted of a burglary offence in respect of a dwelling no more than 5 years before the date of the application for bail, and
(b) (i) has been charged with and is awaiting trial for two or more other burglary offences in respect of a dwelling or dwellings, or
(ii) has been convicted of and is awaiting sentence for two or more other burglary offences in respect of a dwelling or dwellings,
shall be evidence of the likelihood of the future commission by the accused person of a burglary offence in respect of a dwelling and the court shall have regard to such likelihood in determining whether the refusal of the application for bail is reasonably considered necessary to prevent the commission of a serious offence by the accused person." See also Head 27(3), (4), (5) and (6) of the *General Scheme of the Bail Bill, 2015* which deal with objections to bail to prevent the commission of serious offences of domestic burglary.
[57] Now the Irish Human Rights and Equality Commission
[58] See Observations of the Criminal Justice Bill 2007, Irish Human Rights Commission, 29 March 2007, page 17

> *"It must be stated that it is the sole responsibility of the judge in bail proceedings to draw inferences from fact. For this reason, witnesses are obliged to confine their testimony to stating facts; statements of opinion are generally inadmissible. Section 7 of the proposed Bill however modifies this general rule and gives evidential status to an expression of opinion in bail proceedings. It allows a member of An Garda Síochána, not below the rank of the chief superintendent, to give his or her opinion on whether refusal of bail is reasonably considered necessary to prevent the commission of a serious offence by the applicant. The IHRC queries the extent to which the applicant has the opportunity to cross-examine the opinion evidence, in particular when privilege is claimed. Not only is the basis for which the opinion is made not supported, but so too is the applicant denied the opportunity to rebut the opinion evidence. Moreover, the IHRC has concerns regarding the purpose and appropriate weight that should be attached to an expression of opinion and the potential it may have in determining the granting or refusal of a bail application. It could in effect amount to executive detention of the accused; refusal of a bail application being a responsibility that rests under law with the judiciary alone."*

IPRT echoes these concerns. We further note at Head 5(7) that while any witness may be cross examined on the content of his or her "personal statement" there is no provision at this Head for a right to rebut the opinion evidence of An Garda Síochána[59]. The rationale underlying the distinction in procedure as between defence and prosecution is unclear, and will create inequality in a key criminal procedure where the right to liberty is at stake.

IPRT recommends that Head 29 should contain a provision expressly providing that a person tendering opinion evidence under this section may be cross-examined on the content of that statement.

IPRT further recommends that the section contain a clear statement that such opinion evidence "shall not alone be determinative of the question as to whether the applicant shall be remanded on bail".

Head 40: Mandatory Consecutive sentences

Head 40 provides for <u>mandatory</u> consecutive sentences for certain specified bail offences. The Law Reform Commission was unequivocal in its finding in 2013 that:

> *"It has <u>not</u> been illustrated that mandatory or presumptive sentences for repeat offending achieve their intended sentencing aims and, as a result, that these regimes are likely to reduce criminal conduct. The Commission therefore recommends that the use of mandatory or presumptive minimum sentences <u>not be extended</u> to other forms of repeat offending."*[60] [Emphasis added]

The Strategic Review Group on Penal Policy was equally clear in its finding that

> *"There is concern as to the impact of presumptive minimum mandatory sentences on prisoner numbers as well as questions as to the extent to which these sentences have contributed*

[59] Although Head 29(7) says that nothing in this head limits the jurisdiction of the Court to grant bail

[60] http://www.lawreform.ie/news/report-on-mandatory-sentences.405.html

to reducing crime"…. no further mandatory sentences or presumptive minimum sentences should be introduced[61].

IPRT has also published a paper in 2013 on Mandatory Sentences[62] which concluded that mandatory sentences were ineffective as a deterrant, gave rise to injustice and were not cost effective. Given the lack of evidence that mandatory sentences reduce crime, and the consensus of both law reform and penal policy experts that there should be no extension to existing presumptive schemes, there appears to be little rationale for the inclusion of such a provision.

IPRT recommends that the reference to mandatory consecutive sentences be removed.

Conclusion

It goes without saying that increased numbers of pre-trial detainees will have an impact on the prison population. At the end of August 2015, five prisons are already over capacity, with Cork at 130% and Limerick at 122%[63]. Exposure to prison itself is damaging to offenders and makes people more likely to re-offend, not less likely. While pre-trial detention has an important part to play in some criminal proceedings, ensuring that certain defendants will be brought to trial, it impacts on the right to liberty and the presumption of innocence. Provision for bail supports and services make social and economic sense. The most effective way to improve compliance with bail conditions, particularly where the accused person has a chaotic life and complex personal challenges, lies in the provision of bail supports and services which

- allow the accused to remain within their community
- address offending-related behaviour where that is relevant
- encourage attendance at court
- increase court efficiency
- decrease the number of remands and
- result in cost savings

IPRT
August 2015

[61] page 98-99 http://www.justice.ie/en/JELR/Strategic%20Review%20of%20Penal%20Policy.pdf/Files/Strategic%20Review%20of%20Penal%20Policy.pdf
[62] See http://www.iprt.ie/files/IPRT_Position_Paper_3_-_Mandatory_Sentencing_updated.pdf
[63] http://www.irishprisons.ie/images/dailynumbers/31_aug_2015.pdf