



IPRT
Irish Penal Reform Trust

The practice of pre-trial detention in Ireland

Research Report

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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, raising awareness, and building alliances.

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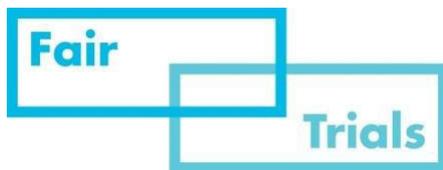
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I. Executive Summary

“Obviously, the starting position is these are innocent people. We shouldn’t be interfering with their liberty either by detaining them or imposing conditions.”

Interviewee 7

This Report confines the terms ‘remand’ and ‘remand in custody’ to prisoners who are untried and un-convicted as this accords with the categorisation of the Irish Prison Service¹ and Rules 71-74 of the *Prison Rules, 2007* and is limited to the scheme for adult accused persons.

The general consensus among those working in the Irish criminal justice system, including members of An Garda Síochána (the police force), defence practitioners, prosecutors and the judiciary is that Ireland operates a comparatively fair bail system. As observed from the hearings and case files, people refused bail and remanded in custody at the District Court level can lodge a fresh application in the High Court which holds a special bail list.² During High Court bail applications, the Researcher observed that the applicant has a good prospect of being granted bail with conditions, unless the objection(s) under the *O’Callaghan Rules*, or section 2 of the *Bail Act, 1997* are such that the judge does not accept that the perceived risk(s) may be effectively met with conditions. Bail was granted in 22 of the 47 cases observed in the High Court.

The research suggests that there are different approaches to bail in urban and rural districts, with judges in courts outside Dublin more likely to remand a person in pre-trial detention even where the number of previous bench warrants (warrants issued by a court for failing to turn up to court on criminal charges) received was relatively low. A knowledge/practice exchange between Gardaí, lawyers and judges in both urban and rural areas might contribute to addressing the inconsistency in approach nationally. The research data also reveals that there is a general over-use of bail conditions. Indeed, something of a ‘pro forma’ rather than an individualised approach is perceptible in the setting of conditions.

In the pre-trial context, there is a right to release on bail in Ireland, but it is not an absolute right. This research found widespread agreement among defence lawyers, An Garda Síochána (the police force), prosecutors and the judiciary that the Irish court bail

¹ See, for example, *Irish Prison Service Annual Report 2014*, p. 20 available at http://www.irishprisons.ie/images/pdf/ar2014_english.pdf (accessed 25 March 2016)

² During the course of this research, the High Court bail list was held on Mondays, with any overflow from a given Monday dealt with the following Thursday. However, since 15 February 2016 there is no longer any High Court bail list on Mondays. Bail applications originating in Dublin are now heard on Tuesdays and Wednesdays, with bail applications from outside Dublin scheduled for Thursdays. See President of the High Court’s *Notice and Practice Direction HC63 - Bail Applications at Cloverhill Courthouse*, 28 January 2016, at <http://www.courts.ie/courts.ie/library3.nsf/16c93c36d3635d5180256e3f003a4580/1d186f0811ccd5bb80257f490053a86c?OpenDocument> (accessed 21 March 2016)

system works reasonably well in practice. A minority of defence practitioners surveyed (20%, n=6) were, however, of the opinion that the judiciary are unduly deferential to members of An Garda Síochána and tend to accept their objections to bail regardless of their merit. There may also be an urban/rural divide in terms of the depth of understanding on the part of Gardaí and District Court judges about the precise application and limits of the bail laws.

Only one interviewee expressed the view that the case-law of the European Court of Human Rights (ECtHR) relating to pre-trial detention was particularly relevant in the Irish bail context. According to the other 10 interviewees, the rules on granting bail in Ireland are governed by the Irish Constitution, the *O'Callaghan Rules* and section 2 of the *Bail Act, 1997*.

Out of the 91 bail hearings attended, judges ordered pre-trial detention in 44% of cases (n=40); that is, they refused bail, or revoked it on review. Bail with conditions was granted in 48% of hearings (n=44). The prosecution raised previous convictions and offences committed on bail in relation to 40% applicants (n=37), as a basis for persuading the court of the risk of future offending under section 2 of the *Bail Act, 1997*. Judges only cited the risk of reoffending as a ground for refusing bail in respect of 13% of applicants (n=12).

The research reveals that there is both an over-use of conditions and inadequate monitoring of compliance with bail conditions. **Not a single case of release on court bail without conditions was observed during the course of the research.** This is a startling finding, since the 91 bail applications observed were drawn from a wide range of offences, from very minor matters involving first-time offenders, to charges of murder, with mostly property offences in between. People charged with offences at the lower end of the offending scale were routinely granted bail subject to multiple onerous conditions. Granting bail with multiple onerous conditions will in some cases have significant implications and in some cases will constitute an interference with liberty.

Since people subject to pre-trial bail conditions have not yet been convicted of the offence with which they are charged, such infringements on their personal liberty can only be justified if necessary, proportionate and lawful. While Gardaí are frequently reluctant to see a defendant released on bail without onerous conditions, their monitoring of such conditions seems to be, at best, haphazard. One interviewee stated that in 40% of his applications to revoke bail, the conditions are not being monitored properly by Gardaí.

A key recommendation of this research is that Gardaí should regularly receive comprehensive refresher training in Irish bail law and request only those bail conditions they reasonably believe are necessary to meet any reasonable objection to bail.

Requiring Gardaí to proactively monitor conditions imposed may encourage a more nuanced and proportionate approach to the proposal of conditions.

The absence of any grant of completely unconditional court bail from the research raises the issue of the role of the judiciary in considering objections to bail. Conditions should be selected and imposed on the basis that they are reasonable, proportionate and objectively necessary to meet an identified risk. Even where there are strong objections submitted by the Prosecution, the judiciary should avoid any appearance of a 'pro forma' approach to bail conditions, i.e. imposition of a standard set of conditions in every case without a consideration of the individual circumstances or risk level. Onerous conditions should be reserved for those who present as flight risks or pose a significant threat to society.

Legislative reform in this area is currently underway in Ireland. Head 11(1) of the *General Scheme of the Bail Bill, 2015* requires judges to give their reasons for their bail decisions, including the conditions set. This is a welcome development, since a legal obligation to explain the rationale for the imposition of conditions in every case should operate to reinforce the duty to adopt an individualised, proportionate approach. Head 11(2) of the Bill states that where requested by the defence or prosecution, the judge may approve a written record of their decision in a bail application. It would be preferable if the judge was required to keep a written record of their decisions in all cases, whether or not they are requested to do so by the defence or prosecution. Providing written reasons for all decisions relating to bail would enhance transparency in this complex area of law, better supporting evidence-based policy formulation in the future.³

³ However, if this proposal is considered unworkable within the current capacity and resources available to the courts, a compromise may be the use of digital audio recording (DAR) within the minimum of formality and at no additional cost to the applicant. See Irish Penal Reform Trust, *IPRT Position Paper 11 Bail and Remand* (2015), p. 18, at http://www.iprt.ie/files/IPRT_Position_Paper_11_on_Bail_and_Remand_sml.pdf (accessed 23 March 2016).

II. Introduction

Background and objectives

This report *The Practice of Pre-trial Detention in Ireland Research report* is one of 10 country reports outlining the findings of an EU-funded research project that was conducted in 10 different EU Member States in 2014 - 2015.

More than 100,000 suspects are currently detained pre-trial across the EU. While pre-trial detention has an important part to play in some criminal proceedings, ensuring that certain defendants will be brought to trial, it is being used excessively at huge cost to national economies. Unjustified and excessive pre-trial detention clearly impacts on the right to liberty and to be presumed innocent until proven guilty. It also affects the ability of the detained person to access fully their right to a fair trial, particularly due to restrictions on their ability to prepare their defence and gain access to a lawyer. Furthermore, prison conditions may also endanger the suspect's well-being.⁴ 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.

While there have been numerous studies on the legal framework governing pre-trial detention in EU Member States, limited research into the practice of pre-trial detention decision-making has been carried out to date. This lack of reliable evidence motivated this major project in which NGOs and academics from 10 EU Member States, coordinated by Fair Trials International (Fair Trials), researched pre-trial decision-making procedures. The objective of the project is to provide a unique evidence base regarding what, in practice, is causing the overuse of pre-trial detention. In this research, the procedures of decision-making were reviewed to understand the motivations and incentives of the stakeholders involved (defence practitioners, judges and prosecutors). It is hoped that these findings will inform the development of future initiatives aiming at reducing the use of pre-trial detention at domestic and EU-level.

This project also complements current EU-level developments relating to procedural rights. Under the Procedural Rights Roadmap, adopted in 2009, the EU institutions have examined issues arising from the inadequate protection of procedural rights within the context of mutual recognition, such as the difficulties arising from the application of the European Arrest Warrant. Three procedural rights directives (legal acts which oblige the

⁴ See Parliamentary Assembly of the Council of Europe, *Abuse of pre-trial detention in States Parties to the European Convention on Human Rights* (2015) at <http://website.pace.net/documents/10643/1264407/pre-trialajdoc1862015-E.pdf/37e1f8c6-ff22-4724-b71e-58106798bad5> (accessed 25 March 2016).

Member States to adopt domestic provisions that will achieve the aims outlined) have already been adopted: the *Interpretation and Translation Directive* (2010/64/EU), the *Right to Information Directive* (2012/13/EU), and the *Access to a Lawyer Directive* (2013/48/EU). Three further measures are currently under negotiation – on legal aid, safeguards for children, and the presumption of innocence and the right to be present at trial.

The Roadmap also included the task of examining issues relating to detention, including pre-trial, through a Green Paper published in 2011. Based on its case work experience and input sought through its Legal Expert Advisory Panel (LEAP)⁵, Fair Trials responded to the Green Paper in the report “Detained without trial” and outlined the necessity for EU-legislation as fundamental rights of individuals are too often violated in the process of ordering and requesting pre-trial detention. Subsequent Expert meetings in 2012 – 2013 in Amsterdam, London, Paris, Poland, Greece and Lithuania affirmed the understanding that problems with decision-making processes might be responsible for the overuse of pre-trial detention, and highlighted the need for an evidence base clarifying this presumption. Regrettably, no action has been taken to date with regards to strengthening the rights of suspects facing pre-trial detention. However, the European Commission is currently conducting an Impact Assessment for an EU measure on pre-trial detention, which we hope will be informed by the reports published under this research project.

Regional standards

The current regional standards on pre-trial detention decision-making are outlined in Article 5 of the *European Convention on Human Rights* (“ECHR”). Article 5(1)(c) ECHR states that a person’s arrest or detention may be “effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it 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” (Article 5(4) ECHR). The European Court of Human Rights (ECtHR) has developed general principles on the implementation of Article 5 that should govern pre-trial decision-making and would strengthen defence rights if applied accordingly. These standards have developed over a large body of ever-growing case law.

⁵ <http://www.fairtrials.org/fair-trials-defenders/legal-experts/> (accessed 25 March 2016).

Procedure

The ECtHR has ruled that a person detained on the grounds of being suspected of an offence must be brought promptly⁶ or “speedily”⁷ before a judicial authority, and the “scope for flexibility in interpreting and applying the notion of promptness is very limited”.⁸ The trial must take place within a “reasonable” time according to Article 5(3) ECHR and generally the proceedings involving a pre-trial detainee must be conducted with special diligence and speed.⁹ Whether this has happened must be determined by considering the individual facts of the case.¹⁰ The ECtHR has found periods of pre-trial detention lasting between 2.5 and 5 years to be excessive.¹¹

According to the ECtHR, the court imposing the pre-trial decision must have the authority to release the suspect¹² and be a body independent from the executive and from both parties of the proceedings.¹³ The detention hearing must be an oral and adversarial hearing, in which the defence must be given the opportunity to participate effectively.¹⁴

Substance

The ECtHR has repeatedly emphasised the presumption in favour of release¹⁵ and clarified that the state bears the burden of proof in showing that a less intrusive alternative to detention would not serve the respective purpose.¹⁶ The detention decision must be sufficiently reasoned and should not use “stereotyped”¹⁷ forms of words. The arguments for and against pre-trial detention must not be “general and abstract”.¹⁸ The court must engage with the reasons for pre-trial detention and for dismissing the application for release.¹⁹

The ECtHR has also outlined the lawful grounds for ordering pre-trial detention to be: (1) the risk that the suspect will fail to appear for trial;²⁰ (2) the risk the suspect will spoil

⁶ *Rehbock v Slovenia*, App. 29462/95, 28 November 2000, para 84.

⁷ The limit of acceptable preliminary detention has not been defined by the ECtHR, however in *Brogan and others v UK*, App. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988, the court held that periods of preliminary detention ranging from four to six days violated Article 5(3).

⁸ *Ibid*, para 62.

⁹ *Stogmuller v Austria*, App 1602/62, 10 November 1969, para 5.

¹⁰ *Buzadj v. Moldova*, App 23755/07, 16 December 2014, para 3.

¹¹ *PB v France*, App 38781/97, 1 August 2000, para 34.

¹² *Singh v UK*, App 23389/94, 21 February 1996, para 65.

¹³ *Neumeister v Austria*, App 1936/63, 27 June 1968, para 24.

¹⁴ *Göç v Turkey*, Application No 36590/97, 11 July 2002, para 62.

¹⁵ *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 145.

¹⁶ *Ilijkov v Bulgaria*, App 33977/96, 26 July 2001, para 85.

¹⁷ *Yagci and Sargin v Turkey*, App 16419/90, 16426/90, 8 June 1995, para 52.

¹⁸ *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003, para 63.

¹⁹ *Buzadj v. Moldova*, App 23755/07, 16 December 2014, para 3.

²⁰ *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003,, para 59.

evidence or intimidate witnesses;²¹ (3) the risk that the suspect will commit further offences;²² (4) the risk that the release will cause public disorder;²³ or (5) the need to protect the safety of a person under investigation in exceptional cases.²⁴ 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.²⁵ Pre-trial detention based on “the need to preserve public order from the disturbance caused by the offence”²⁶ can only be legitimate if public order actually remains threatened. Pre-trial detention cannot be extended just because the judge expects a custodial sentence at trial.²⁷

With regards to flight risk, the ECtHR has clarified that the lack of fixed residence²⁸ alone or the risk of facing long term imprisonment if convicted does not justify ordering pre-trial detention.²⁹ The risk of reoffending can only justify pre-trial detention if there is actual evidence of the definite risk of reoffending available;³⁰ merely a lack of job or local family ties would be insufficient.³¹

Alternatives to detention

The case law of the European Court of Human Rights (ECtHR) has strongly advocated that pre-trial detention be imposed only as an exceptional measure. In *Ambruszkiewicz v Poland*, the Court stated that the

“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.”³²

²¹ Ibid.

²² *Muller v. France*, App 21802/93, 17 March 1997, para 44.

²³ *I.A. v. France*, App 28213/95, 23 September 1988, para 104.

²⁴ Ibid, para 108.

²⁵ *Tomasi v France*, App 12850/87, 27 August 1992, para 102.

²⁶ *I.A. v. France*, App 28213/95, 23 September 1988, para 104.

²⁷ *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 149.

²⁸ *Sulaoja v Estonia*, App 55939/00, 15 February 2005, para 64.

²⁹ *Tomasi v France*, App 12850/87, 27 August 1992, para 87.

³⁰ *Matznetter v Austria*, App 2178/64, 10 November 1969, concurring opinion of Judge Ballardore Pallieri, para 1.

³¹ *Sulaoja v Estonia*, App 55939/00, 15 February 2005, para 64.

³² *Ambruszkiewicz v Poland*, App 38797/03, 4 May 2006, para 31.

Furthermore, the ECtHR has emphasised the use of proportionality in decision-making, in that the authorities should consider less stringent alternatives prior to resorting to detention,³³ and the authorities must also consider whether the “accused’s continued detention is indispensable”.³⁴

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.

Review of pre-trial detention

Pre-trial detention must be subject to regular judicial review,³⁵ which all stakeholders (defendant, judicial body and prosecutor) must be able to initiate.³⁶ A review hearing has to take the form of an adversarial oral hearing with the equality of arms of the parties ensured.³⁷ This might require access to the case files,³⁸ which has now been confirmed in Article 7(1) of the *Right to Information Directive*.³⁹ The decision on continuing detention must be taken speedily and reasons must be given for the need for continued detention.⁴⁰ Previous decisions should not simply be reproduced.⁴¹

When reviewing a pre-trial detention decision, the ECtHR demands that the court be mindful that a presumption in favour of release remains⁴² and continued detention “can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention”.⁴³ The authorities remain under an ongoing duty to consider whether alternative measures could be used.⁴⁴

³³ *Ladent v Poland*, App 11036/03, 18 March 2008, para 55.

³⁴ *Ibid*, para 79.

³⁵ *De Wilde, Ooms and Versyp v Belgium*, App 2832/66, 2835/66, 2899/66, 18 June 1971, para 76.

³⁶ *Rakevich v Russia*, App 58973/00, 28 October 2003, para 43.

³⁷ See above, note 11.

³⁸ *Wloch v Poland*, App 27785/95, 19 October 2000, para 127.

³⁹ See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0013>.

⁴⁰ See above, note 3, para 84.

⁴¹ See above, note 13.

⁴² See above, note 12, para 145.

⁴³ *McKay v UK*, App 543/03, 3 October 2006, para 42.

⁴⁴ *Darvas v Hungary*, App 19574/07, 11 January 2011, para 27.

Implementation

The guidelines of the ECtHR are not being consistently upheld in national courts and EU countries have been found in violation of Article 5 ECHR in more than 400 cases since 2010.

Notwithstanding any possible EU action on this issue at a later stage, the ultimate responsibility for ensuring that the rights to a fair trial and right to liberty are respected and promoted lies with the Member States. Ireland must, therefore ensure that national laws and practice comply with the minimum standards developed by the ECtHR.

Introductory comments on the bail system in Ireland

There is no express statutory presumption in favour of granting pre-trial bail to an adult in Ireland. However, the leading case in this area suggests that people should be denied bail only in cases of necessity.⁴⁵ Bail is when a person is released from custody because of a bond or promise made either by the accused person, or by them and another person (a surety), to guarantee that the accused will appear for trial. As stated by the Courts Service of Ireland: “Bail is based on the principle that the accused is presumed innocent until proved guilty.”⁴⁶ The majority of people charged with criminal offences are released on bail by the Gardaí under the station bail (police) system.⁴⁷

Bail in Ireland is governed by common law, the Constitution, and by statute law, most notably the *Criminal Procedure Act, 1967* and the *Bail Act, 1997*.⁴⁸ For those brought before the Court, various factors are considered when deciding whether to refuse bail under section 2 of the *Bail Act, 1997* (“section 2 bail objection”) such as the seriousness of the charge and likely sentence, the strength of the evidence, any previous convictions including convictions committed on bail, and any other pending charges.⁴⁹ Under section 2 the court might also take into account the fact that the accused person is addicted to a controlled substance within the meaning of section 2 of the *Misuse of Drugs Act, 1977*.

⁴⁵ See *People (Attorney General) v O’Callaghan* [1966] 1 IR 501: “From time to time necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases “necessity” is the operative test”.

⁴⁶ See Courts Services, *Bail* at

<http://www.courts.ie/offices.nsf/lookuppagelink/0F835AC1CFB039A080256E78003F26A2> (accessed 25 March 2015). See Law Reform Commission, *Report on an examination of the law of bail* (LRC 50-1995), available at <http://www.lawreform.ie/fileupload/Reports/rBail.html> (accessed 21 March 2016).

⁴⁷ Unfortunately, there are no official figures on the precise numbers released on station bail. However, 6 interviewees during the course of this research mentioned that most people were granted station bail.

⁴⁸ The *Bail Act, 1997* has been amended by the *Children Act, 2001*, the *Courts and Court Officers Act, 2002*, the *Criminal Justice Act, 2007* and the *Criminal Justice Miscellaneous Provisions Act, 2009*.

⁴⁹ See section 2(2) of the *Bail Act, 1997*. This provision is restated in Head 27 (Refusal of bail to prevent the commission of a serious offence) of the recently published *General Scheme of the Bail Bill, 2015* with some new additions relating to domestic burglary.

III. Research Methods

This project was designed to develop an improved understanding of the process of the judicial decision-making on pre-trial detention in 10 EU Member States. The research was carried out in 10 Member States with different legal systems (common and civil law), legal traditions and heritage (for example Soviet, Roman and Napoleonic influences), differing economic situations, and importantly wide variations in the use of pre-trial detention in criminal proceedings (for example approximately 12-14% of the total prison population in Ireland are on remand pending trial⁵⁰ whereas in the Netherlands 39.9% of all prisoners have not yet been convicted).⁵¹ The choice of participating countries allows for identifying good and bad practices, and proposing reform at the national level as well as developing recommendations that will ensure enhanced minimum standards across the EU. The individual country reports focusing on the situation in each participating country provides in-depth input to the regional report which will outline common problems across the region as well as highlighting examples of good practice, and provides a comprehensive understanding of pan-EU pre-trial decision-making.

Five research elements were developed to gain insight into domestic decision-making processes, with the expectation that this would allow for a) analysing shortfalls within pre-trial detention decision-making, understanding the reasons for high pre-trial detention rates in some countries, and establish an understanding of the merits in this process of other countries, b) assessing similarities and differences across the different jurisdictions, and c) the development of substantial recommendations that can guide policy makers in their reform efforts.

The five-stages of the research were as follows:

- (1) Desk-based research, in which the project partners examined the national law and practical procedures with regards to pre-trial detention, collated publicly available statistics on the use of pre-trial detention and available alternatives, as well as information on recent or forthcoming legislative reforms. Based on this research, Fair Trials and the partners drafted research tools which – with small adaptations to specific local conditions – explore practice and motivations of pre-trial decisions and capture the perceptions of the stakeholders in all participating countries.

⁵⁰448 out of 3,791 prisoners on 31 July 2015. See http://www.irishprisons.ie/images/dailynumbers/31_july_2015.pdf (accessed 21 March 2016). 504 out of 3,780 prisoners on 24 March 2016. See http://www.irishprisons.ie/images/dailynumbers/24_march_2016.pdf (accessed 25 March 2016). See also http://www.prisonstudies.org/country/ireland-republic#further_info_field_pre_trial_detainees (accessed 21 March 2016).

⁵¹ <http://www.prisonstudies.org/country/netherlands>, data provided by International Centre for Prison Studies, 18 June 2015 (accessed 21 March 2016).

- (2) A defence practitioner survey, which asked lawyers for their experiences with regards to the procedures and substance of pre-trial detention decisions.
- (3) Monitoring pre-trial detention hearings, thereby gaining a unique insight into the procedures of such hearings, as well as the substance of submissions and arguments provided by lawyers and prosecutors and judicial decisions at initial and review hearings.
- (4) Case file reviews, which enabled researchers to get an understanding of the full life of a pre-trial detention case, as opposed to the snapshot obtained through the hearing monitoring.
- (5) Structured interviews with judges and prosecutors, capturing their intentions and motivation in cases involving pre-trial detention decisions. In addition to the common questions that formed the main part of the interviews, the researchers developed country-specific questions based on the previous findings to follow-up on specific local issues.

30 criminal defence lawyers across Ireland participated in the online survey.⁵² The link was disseminated via social media and direct correspondence with IPRT's legal network. The Irish Criminal Bar Association also kindly forwarded the email to its membership. Fair Trials International also disseminated the link to the Irish members of their experts network, the Legal Experts Advisory Panel. The survey was live from September 2014 until mid-April 2015.

Hearing monitoring was conducted on a total of 11 days in various urban and rural court locations in Munster and Leinster between November 2014 and January 2015. In total the Researcher observed 40 cases relating to bail in the District Court (including 7 that did not relate to pre-trial detention), 4 cases at the Circuit Court, and 47 High Court bail cases. At some bail hearings the Researcher acquired additional background information through informal conversations with defence lawyers, the prosecuting Gardaí or the sitting judge about the nature of the underlying charges, or the basis for the original objection to bail which was not always clear due to the brevity of the hearings especially at District Court level.

Due to the low volume of bail cases, particularly relating to pre-trial detention, observed in the various District Courts, a decision was made to focus on High Court bail hearings for the remaining days assigned to court observation. On three of the four days spent observing the High Court bail list, the same judge was presiding, thus data gathered through this channel must be interpreted with that in mind.

⁵² www.surveypplanet.com (accessed 25 March 2016).

At the end of January 2015 permission was granted to access 50 bail files belonging to Garda Court Presenters (specialised police prosecutors operating in the District Courts of the Criminal Court of Justice in Dublin), redacted of personal, identifying information (i.e. their names and dates of birth, etc.), and case files relating to a full day of High Court bail applications held by the Office of the Director of Public Prosecutions (DPP). The Researcher conducted the case-file analysis during the last week of February 2015 in Dublin. 84 case files were reviewed, including 37 Garda District Court files, 45 Director of Public Prosecutions (DPP) files relating to High Court bail matters, and two Supreme Court appeals of High Court bail decisions.

The files were relatively brief and could sometimes be difficult to follow due to the limited information contained therein. The Garda files contained a hand-written "Tracking Form" with a section documenting the defendant's physical characteristics, their PULSE⁵³ (police ID) number, their criminal history (warrants and previous convictions), and a short description of the reasons for the objection(s). The DPP files contained an affidavit and a notice of motion to the High Court. There was usually only limited information about the underlying charges or the reasons why bail was refused in the relevant District Court. At the back of the files there was a brief comments section where the prosecuting counsel noted the outcome of the bail hearing, including any conditions attached where bail was granted.

Interviews with four judges, two from the High Court, one from the Circuit Court, and one from the District Court were conducted in March 2015, along with interviews with seven prosecutors. Of the prosecutors, three were members of An Garda Síochána who worked as Court Presenters, one was a State Solicitor in the DPP's Office, and three were barristers instructed by the DPP in High Court bail matters.

The office of the President of the High Court recommended two High Court judges for interview, while the Circuit Court judge and the District Court judge responded to a general request for judicial interviewees sent to judges sitting in various locations. The three Garda Court presenters were selected by the Inspector in charge of Court Presenters. The author contacted the three prosecuting counsel and the State Solicitor at the DPP's office directly requesting their participation.

In addition to the questions set by Fair Trials, the Researcher asked interviewees questions relating to their experiences and perceptions of differences between the practice of rural and urban Gardaí and judges, and whether they could propose any suggestions for improvements in the Irish context. The content of the interviews was

⁵³ PULSE (Police Using Leading Systems Effectively) is the internal Garda IT system where all information relating to convictions, warrants etc. is stored.

analysed according to the thematic headings set by Fair Trials, which were informed by the case-law of the ECtHR.

60% (n=18) of the 30 respondents who completed the Defence Practitioner Survey were barristers. Over half of the respondents practiced in Dublin and 47% (n=14) stated that more than 50% of their practice consisted of criminal cases. 67% (n=20) dealt with over 50 criminal cases in the past year, and 43% acted in over 50 bail applications in the past year. 67% of respondents revealed that more than 50% of their criminal cases are remunerated by way of criminal legal aid, with the remaining 33% stating that all their criminal cases are remunerated by way of criminal legal aid.

The Researcher and IPRT wish to thank the following people for their support for the research:

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- Mr Barry Donoghue, Deputy Director of the Office of the Director of Public Prosecutions and Mr Seamus Cassidy, Head of Appeals Section.
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IV. Context

Background information

The Republic of Ireland has a population of 4.6 million people. Approximately 12% of the population (544,000 persons) are foreign nationals, the majority of whom come from within the European Union.⁵⁴

Ireland is a common law jurisdiction and has a Constitution, *Bunreacht na hÉireann*, which was enacted in 1937. The Constitution can only be amended following a referendum in which the majority of those casting their vote on the day approve change.⁵⁵

Ireland has a dualist system which means that international human rights treaties do not automatically become a part of domestic law unless the Oireachtas (Parliament) introduces domestic legislation to this effect, such as the *Criminal Justice (Convention against Torture) Act, 2000* and the *European Convention on Human Rights Act, 2003*.

The principle of *ultima ratio* is not clarified in Irish law. Ireland has no legislation expressly stating that imprisonment should be the last resort for adult offenders either in the context of pre-trial detention, or more generally. IPRT has campaigned over a long period for the enactment of such legislation,⁵⁶ arguing that since there is a presumption against imprisonment in the context of Section 143(1) of the *Children Act, 2001*, such a presumption should be “acceptable more generally”, with judges considering all community-based alternatives to remand before they consider imprisonment.⁵⁷ The *Criminal Justice (Community Service) (Amendment) Act, 2011* amends the *Criminal Justice (Community Service) Act, 1983* and requires the court to consider whether to make a community service order where the court is considering imposing a prison sentence of 12 months or less.

⁵⁴ See *Immigration in Ireland – 2013 in Review*, at <http://www.justice.ie/en/JELR/Pages/PR14000001> (accessed 21 March 2016).

⁵⁵ Article 46 provides that any provision of the Constitution may be amended, whether by way of variation, addition or repeal. It also provides that every proposal for amendment must be initiated in Dáil Éireann as a Bill. Once the Bill passes by both houses of the Oireachtas, it is submitted by referendum to the decision of the people.

⁵⁶ See IPRT *White Paper on Crime IPRT Response to Discussion Document 3 Organised and White Collar Crime* (2011) p. 15 and *IPRT Position Paper 5 Penal Policy with Imprisonment as a Last Resort* (2009).

⁵⁷ See IPRT *Discussion Document on the Rights and Needs of Remand Detainees* July 2013, pp. 4-5.

Overview of the legal framework governing pre-trial detention in Ireland

The majority of people charged with criminal offences are released on bail by the Gardaí under the station bail (police) system.⁵⁸ Section 31 of the *Criminal Procedure Act, 1967* as amended by the *Criminal Justice (Miscellaneous Provisions) Act, 1997*, provides that a person may be granted station bail “whenever a person is brought in custody to a Garda Síochána station by a member of the Garda Síochána, the sergeant or other member in charge of the station may, if he considers it prudent to do so and no warrant directing the detention of that person is in force, release him on bail.” Release on station bail may be with or without a surety.⁵⁹

Where a person is charged with an offence and not released on station bail, he or she will be brought before a District Court as soon as possible. The District Court judge may either remand the accused in custody or release them conditionally whereby the accused will enter into a bail bond with or without surety.

However, there are certain specific circumstances in which an accused person may be detained for a length of time before being brought before the court where the police have reasonable grounds to believe such detention is necessary to investigate the offence in question.⁶⁰ Provisions exist under section 4 of the *Criminal Justice Act 1984*; section 42 of the *Criminal Justice Act 1999*; section 30 of the *Offences Against the State Act 1939*; section 2 of the *Criminal Justice (Drug Trafficking) Act 1996*; and section 50 of the *Criminal Justice Act 2007*.

⁵⁸ Unfortunately, there are no official figures on the precise numbers released on station bail. However, 6 interviewees during the course of this research mentioned that most people were granted station bail.

⁵⁹ Head 24(2) “Release on bail in certain cases by members of Garda Síochána” of the *General Scheme of the Bail Bill, 2015* provides that station bail may be subject to conditions, including not to commit any offences while on bail, not to interfere with the evidence and not to directly or indirectly cause harm to, threaten, menace, intimidate or put in fear— (i) the complainant, (ii) a witness to, or any person involved in the prosecution of, the offence alleged, or (iii) a family member of a complainant or witness.

⁶⁰ In terms of the periods of detention in the context of police questioning, the clock may stop in particular circumstances. If the accused person is taken for medical attention during this time, any period of absence is not taken into account. Under section 4 of *Criminal Justice Act, 1984* or section 42 of *Criminal Justice Act, 1999*, if the accused consents to a rest period between 12 midnight and 8 am, time will stop to facilitate such rest period. If the accused is certified as unfit for questioning, time will be suspended until he or she is once again able and it will also stop where he/she is waiting for a legal consultation and no questioning is taking place. Additionally, if the accused takes a legal challenge regarding the lawfulness of his or her detention, that time is not counted in relation to section 4 of the *Criminal Justice Act 1984*, section 42 of the *Criminal Justice Act, 1999*, or section 50 of the *Criminal Justice, 2007*.

Table 1: Allowable detention periods for the investigation of offences

Allowable periods of police detention for the purposes of investigating offences	Section 4 Criminal Justice Act 1984	Section 42 Criminal Justice Act 1999	Section 30 Offences Against the State Act 1939	Section 2 Criminal Justice (Drug Trafficking) Act 1996	Section 50 Criminal Justice 2007
Initial Period	6 hours	6 hours	24 hours	6 hours	6 hours
First extension authorised by Superintendent	6 hours	6 hours	24 hours (by Chief Super or higher)	18 hours (by Chief Super or higher)	18 hours
Second extension authorised by Chief Superintendent	12 hours	12 hours		24 hours	24 hours
First extension by District or Circuit Court			24 hours (by District Court? on application of Superintendent)	72 hours	72 hours
Second extension by District or Circuit Court				48 hours	48 hours
Total	24 hours	24 hours	72 hours (3 days)	168 hours (7 days)	168 hours (7 days)

Source of Table: Citizens Information website⁶¹

There is no express statutory presumption in favour of granting pre-trial bail to an adult in Ireland. Bail is when a person is released from custody because of a bond or promise made either by the accused person, or by them and another person (a surety), to guarantee that the accused will appear for trial. As stated by the Courts Service of Ireland: “Bail is based on the principle that the accused is presumed innocent until

⁶¹See note on *Detention after arrest* at http://www.citizensinformation.ie/en/justice/arrests/detention_after_arrest.html (accessed 23 March 2016)

proved guilty.”⁶² Bail in Ireland is governed by common law, the Constitution, and by statute law, most notably the *Criminal Procedure Act, 1967* and the *Bail Act, 1997*.⁶³

The presumption of innocence is not explicitly stated in the Irish Constitution; however, it enjoys constitutional protection as an “unenumerated” personal right under Article 40 of the Constitution⁶⁴ and is also implicit in the requirement of Article 38.1 of the Constitution, that “no person shall be tried on any criminal charge save in due course of law”.⁶⁵ Article 6(2) of the ECHR states that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”. Since the incorporation of the *European Convention of Human Rights* (ECHR) into Irish law by the *European Convention on Human Rights Act, 2003*, the Irish Courts must interpret the law in a way that gives effect to Ireland’s obligations under the Convention.

The case of *Hoffman v Director of Public Prosecutions and Coughlan*⁶⁶ concerned an appeal where a District Court judge in a bail application in an assault case commented that:

“People cannot attack the Gardaí with cut-throat razors and anyone who does can stay in jail.”

O’Neill J held that rulings and decisions made in bail applications must not proceed on the basis of a presumption of guilt. He condemned the District Court judge’s approach as implying:

“a complete disregard for the presumption of innocence enjoyed by the applicant and indeed it indicates the very reverse, a presumption of guilt together with the imposition of a custodial punishment for the crime alleged, by a denial of bail. An approach such as this to a bail application entirely misconceives the judicial function and is an abuse of judicial power.”

The leading Irish case on bail is the *People (Attorney General) v O’Callaghan*⁶⁷ where the Supreme Court found that the sole purpose of bail was to secure the attendance of the accused at trial. O’Dálaigh CJ stated that preventive detention in the context of bail:

⁶² See Note on Bail on the Courts Services website, at <http://www.courts.ie/offices.nsf/lookuppagelink/0F835AC1CFB039A080256E78003F26A2> (accessed 21 March 2016) See Law Reform Commission, *Report on an examination of the law of bail* (LRC 50-1995), available at <http://www.lawreform.ie/fileupload/Reports/rBail.pdf> (accessed 21 March 2016).

⁶³ The *Bail Act, 1997* has been amended by the *Children Act, 2001*, the *Courts and Court Officers Act, 2002*, the *Criminal Justice Act, 2007* and the *Criminal Justice Miscellaneous Provisions Act, 2009*.

⁶⁴ *People (Attorney General) v O’Callaghan* [1966] 1 IR 501.

⁶⁵ See *Bunreacht na hEireann*, available at http://www.constitution.org/cons/ireland/constitution_ireland-en.htm (accessed 21 March 2016).

⁶⁶ Unreported, High Court, O’Neill J., 4th March, 2005.

⁶⁷ *The People (Attorney General) v O’Callaghan* [1966] 1 IR 501.

“transcends respect for the requirement that a man shall be considered innocent until he is found guilty and seeks to punish him in respect of offences neither completed nor attempted. I say “punish” for deprivation of liberty must be considered a punishment unless it can be required to ensure that an accused person will stand his trial when called upon.”⁶⁸

Up until the mid-1990s bail could only be refused under the *O’Callaghan Rules* where there was a likelihood that the accused would evade justice, by absconding to avoid trial or interfering with evidence or witnesses. However, in response to concerns over a perceived increase in offending by people while on bail, Article 40.4.6, the Sixteenth Amendment of the Constitution, was inserted in 1996 as a result of a referendum.⁶⁹ Section 2(1) of the *Bail Act, 1997* gave effect to this amendment, providing that:

“Where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person.”

Various factors are considered when deciding whether to refuse bail under section 2 of the *Bail Act, 1997* (“section 2 bail objection”) such as the seriousness of the charge and likely sentence, the strength of the evidence, any previous convictions including convictions committed on bail, and any other pending charges.⁷⁰ Under section 2 the court might also take into account the fact that the accused person is addicted to a controlled substance within the meaning of section 2 of the *Misuse of Drugs Act, 1977*. Section 4 of the 1997 Act permits the courtroom to be cleared where evidence of previous convictions is presented in relation to a section 2 bail objection and restricts the publication by the media of such evidence in order to facilitate a fair trial.

Historically, the lack of data on the use of remand makes it difficult to draw firm conclusions as to whether the law is being applied consistently as per section 2 of the *Bail Act, 1997*. However, it is clear from the wording of the provision that defendants should not be denied bail unless they have been charged with a serious offence and the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence - **punishable with 5 years’ imprisonment or more** - by that person while on bail.⁷¹ Then, and only then, should the additional factors be taken into account. If there is not a substantial risk that the accused will commit a **serious** crime

⁶⁸ Ibid, pp. 508 and 509.

⁶⁹ Article 40.4.6 of the Irish Constitution states that “Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person.”

⁷⁰ See section 2(2) of the *Bail Act, 1997*. This provision is restated in Head 27 (Refusal of bail to prevent the commission of a serious offence) of the recently published *General Scheme of the Bail Bill, 2015* with some new additions relating to domestic burglary.

⁷¹ See section 1 of the *Bail Act, 1997*.

if released on bail, consideration of his or her criminal record, or history of addiction etc., should not be relevant.

In practice, 3 interviewees stated that Gardaí in the District Court frequently object to bail under section 2 in cases involving allegations of theft, robbery and burglary, which are duly classified as **serious** indictable⁷² offences according to the Schedule to the *Bail Act, 1997* (as amended), yet are frequently dealt with summarily.⁷³ Attendance at High Court bail applications and comments from interviewees revealed that the applicant will typically have previous convictions for these types of offences in the District Court, including convictions for such offences committed while on bail. However, the District Court may only sentence a person to a maximum of 12 months imprisonment on a single charge, or a maximum of 2 years where the accused is charged with two or more offences, one of which was committed while on bail.⁷⁴

In this regard, hearing monitoring and the responses from 5 interviewees suggest that the High Court may grant bail following a District Court refusal under section 2 where a person has a high volume of convictions for theft, burglary or robbery, but none from the Circuit Court, and the DPP has either directed summary disposal on the current charges, or is likely to make such a direction in due course because the offence is at the lower end of the “seriousness” scale. The Researcher observed that in such bail applications the High Court is likely to decline to uphold the prosecuting Garda’s section 2 objection on the basis that the offending is at the lower end of the scale, despite the high volume of convictions for offences classed as **serious** offences in the Schedule to the *Bail Act, 1997*. However, where an applicant also has a long history of bench warrants⁷⁵ for failing to appear, bail might instead be refused under the *O’Callaghan Rules*.

Later changes to the bail framework include sections 6 and 7 of the *Criminal Justice Act, 2007*. Section 6 of the 2007 Act obliges the accused person to supply a personal statement as a precondition to bail for serious offences. The written statement must contain detailed information, including the accused’s sources of income within the preceding 3 years (section 61A (1) (c)); his or her property, whether wholly or partially owned by, or under the control of, the applicant and whether within or outside the State (section 61A (1) (d)). The accused must also reveal any previous convictions for a serious offence with which he/she is charged (section 61A(1)(e)); any offences committed while

⁷² An indictable offence is an offence which can only be tried in the Circuit Court but the term also includes 'either-way' offences – offences which can be tried in the District court or the Circuit Court – including theft, burglary and robbery.

A person is 'tried on indictment' before a judge and jury in the Crown Court.

⁷³ See Courts Services *Annual Report 2014*, at p. 40, which states: “Indictable offences dealt with summarily decreased by 29% to 45,033 from 63,049 in 2013”.

⁷⁴ Section 11 of the *Criminal Justice Act, 1984*.

⁷⁵ A bench warrant is issued by a judge and authorises the arrest of the subject of the warrant as a result of the person’s failure to appear before the court.

previously on bail (section 61A(1)(f)); and any previous applications by the person for bail, indicating whether or not bail was granted and the conditions attached (section 61A(1)(g)). A penalty ensues where an offence to knowingly provide false or misleading information or conceal any material fact has been committed (section 6(11)).⁷⁶

Section 7 of the 2007 act (inserting section 2A of the *Bail Act, 1997*) permits so-called *belief* evidence, for example about a person's membership of a criminal gang, from officers holding the rank of Chief Superintendent or higher to bolster a section 2 objection regarding the likelihood of future offending if granted bail.⁷⁷ This undermines the presumption of innocence and "modifies the general rule on the admissibility of opinion evidence and gives evidential status to an expression of opinion."⁷⁸

Right to legal advice

In Ireland there is a constitutional right to legal representation in criminal cases.⁷⁹ An accused person has the right to legal advice before questioning. Solicitors are now also permitted to attend their clients' police interviews.⁸⁰ Prisoners, both sentenced and remand, have a right to legal advice while in prison at any reasonable time. Legal aid is available for 'essential visits' by counsel or a solicitor to a person in custody.⁸¹

Where an accused does not have means to pay for legal representation, the State may be obliged to provide that legal representation under section 2 of the *Criminal Justice (Legal Aid) Act, 1962*.⁸² Normally, in requesting legal aid for a bail application, a solicitor

⁷⁶ This provision is replicated in Head 5 (Statement by applicants for bail charged with serious offences) of the recently published *General Scheme of the Bail Bill, 2015*.

⁷⁷ This provision is restated in Head 29 (Evidence in applications for bail under Head 27) of the *General Scheme of the Bail Bill, 2015*.

⁷⁸ See IHRC, *Observations on the Criminal Justice Bill, 2007*, pp. 16-20.

⁷⁹ The constitutional right to a trial in due course of law is contained in Article 38.1 of the Constitution.

⁸⁰ See *DPP v Gormley and White* [2014] IESC 17, at

<http://www.courts.ie/judgments.nsf/bce24a8184816f1580256ef30048ca50/146243a82fed833780257c930048b8b0?OpenDocument> (accessed 21 March 2016). At para 9.13, the Supreme Court held that "the entitlement not to self-incriminate incorporates an entitlement to legal advice in advance of mandatory questioning of a suspect in custody" and that "the right to a trial in due course of law encompasses a right to have early access to a lawyer after arrest and the right not be interrogated without having had an opportunity to obtain such advice. The conviction of a person wholly or significantly on the basis of evidence obtained contrary to those constitutional entitlements represents a conviction following an unfair trial process".

⁸¹ See S.I. No. 362/2011 - *Criminal Justice (Legal Aid) (Amendment) Regulations, 2011*

⁸² In *The State (Healy) v O'Donoghue* [1976] 1 IR, it was held that "where an accused faces a serious charge and, by reason of lack of education, requires the assistance of a qualified lawyer in the preparation and conduct of a defence to the charge then, if the accused is unable to pay for that assistance, the administration of justice requires (a) that the accused should be afforded the opportunity of obtaining such assistance at the expense of the State in accordance with the Act of 1962 even though the accused has not applied for it and (b) that the trial of the accused should not proceed against his will

will merely explain to the judge that the accused is unemployed and give in receipt of Social Welfare payments, or if the accused is on a low income, give details of his/her salary. During hearing monitoring, the Researcher witnessed the judge ask prosecuting Gardaí if they had any objections to legal aid being granted in 3 cases, and in two other cases the Gardaí themselves objected to legal aid and requested a statement of means to be presented. In general, the Gardaí will not object unless they have evidence that the defendant is misleading the court about his or her personal finances (i.e. they know, or suspect that the applicant has the means to pay for his or her legal representation).

With regard to the District Court, and Circuit Court appeals, a *solicitor* working on the legal aid scheme may claim from €201.50 depending on how many clients s/he is representing in a particular bail hearing and how many cases they run on a particular day.⁸³ Each subsequent appearance will result in a fee of €50.39 being paid. The number of subsequent appearances will vary from case to case. For a contested application in the Circuit Court or Special Criminal Court they are also entitled to €91.52 for the bail application and €97.22 for an essential visit to the prison. The latter two fees will also be paid to counsel.⁸⁴

In practice, outside of Dublin it is very rare for the same solicitor to represent a defendant if a bail refusal is appealed to the High Court, due to the cost and time implications of having to travel to Cloverhill Courthouse in Dublin. However, hearing monitoring suggests that the lack of continuity of legal representation does not necessarily have a negative impact on the defendant's prospect of bail being granted in the High Court, since the defence teams were all afforded the time to cross examine prosecution witnesses and to fully articulate the reasons why bail should be granted. In short, the quality of High Court defence representation observed was of a decent standard overall.

Statistics on bail

Publication of accurate, disaggregated statistics relating to crime and punishment in Ireland has traditionally been patchy. There are few reliable officially published statistics on bail, pre-trial detention and adherence to conditions. For instance, there is no data on the average duration of pre-trial detention, the ratio of annual arrests to remand orders, the number of people granted station bail in comparison with court bail, or the number of people remanded in custody following breach of bail conditions. The average cost to keep an adult person in prison in 2014 was €68,959.⁸⁵ There is no data available

without such assistance if an appropriate certificate under s. 2 of the Act of 1962 has been granted in relation to the trial of the accused."

⁸³ *Criminal Justice (Legal Aid) (Amendment) Regulations, 2011*, S.I. No. 362/2011.

⁸⁴ *Ibid.*

⁸⁵ Irish Prison Service, *Annual Report 2014*, p. 1 at

http://www.irishprisons.ie/images/pdf/ar2014_english.pdf (accessed 21 March 2016).

that relates specifically to the cost of pre-trial detention as distinct from detention post-conviction.

The most recent prisoner daily population figures published by the IPS for 24 March 2016 reveal that on that day 13% (504 out of 3,780) of the total prison population were held on remand pending trial.⁸⁶

According to the Irish Prison Service (IPS) the number of **committals under sentence** to Irish prisons for each of the last 5 years was as follows:

2014: 12,336⁸⁷ **2013:** 12,011⁸⁸ **2012:** 13,536⁸⁹ **2011:** 12,990 **2010:** 12,487

The number of defendants **committed to prison on remand** for the past 5 years was:

2014: 3,358⁹⁰ **2013:** 3,234⁹¹ **2012:** 3,632⁹² **2011:** 4,546⁹³ **2010:** 4,836⁹⁴

On first glance it appears that there has, therefore, been a steady reduction in the numbers of people being remanded in pre-trial detention during the period 2010-2013. However, there has been a small increase 2013-2014. Digging deeper, when fines committals are excluded from the above figures for 2014, it can be seen that in that year there are almost equal numbers of committals under sentence [3,874 in 2014] and committals on remand [3,358 in 2014].

Pre-trial detention rates in Ireland

Year	Number in pre-trial/remand imprisonment	Percentage of total prison population	Pre-trial/remand population rate (per 100,000 of national population)
2000	379	13.1%	10
2005	478	15.8%	11
2010	642	14.8%	14
2016	539	14.2%	12

Source: International Centre for Prison Studies⁹⁵

⁸⁶ http://www.irishprisons.ie/images/dailynumbers/24_march_2016.pdf (accessed 25 March 2016).

⁸⁷ http://www.irishprisons.ie/images/pdf/ar2014_english.pdf, p. 24 (accessed 21 March 2016).

⁸⁸ http://www.irishprisons.ie/images/pdf/ar_2013.pdf, p. 22 (accessed 21 March 2016).

⁸⁹ <http://www.irishprisons.ie/images/pdf/yearlysentencelength12.pdf> (accessed 21 March 2016).

⁹⁰ http://www.irishprisons.ie/images/pdf/ar2014_english.pdf, p. 24 (accessed 21 March 2016).

⁹¹ http://www.irishprisons.ie/images/pdf/ar_2013.pdf, p. 22 (accessed 21 March 2016).

⁹² <http://www.irishprisons.ie/images/pdf/annualreport2012web.pdf> p. 19 (accessed 21 March 2016).

⁹³ <http://www.irishprisons.ie/images/pdf/annualreport11.pdf>, p. 24 (accessed 21 March 2016).

⁹⁴ <http://www.irishprisons.ie/images/pdf/annualreport2010.pdf>, p. 14 (accessed 21 March 2016).

⁹⁵ See http://www.prisonstudies.org/country/ireland-republic#further_info_field_pre_trial_detainees (accessed 21 March 2016). The figures in the table reflect the number of pre-trial/remand prisoners in

While the IPS Annual Reports provide figures of committals on remand, they are based on cases rather than individuals. A person could, therefore, have been committed on remand more than once in a given year, inflating the figures. However, the Annual Reports also provide daily snapshot figures which reflect the number of people in prison that day. These are listed below, as they reflect most accurately the number of prisoners, i.e. individuals in prison on remand, for a given day. These give a more accurate reflection of trends, but provide an incomplete picture statistically.

IPS Remand/Trial Prisoners Daily Snapshot figures 2010-2014

Year	No. of Remand/Trial prisoners	Total No. of prisoners	%
2014	556	3,777	15
2013	614	4,099	15
2012	567	4,298	13
2011	609	4,313	14
2010	709	4,440	16

Source: *Irish Prison Service Annual Reports, 2010-2014*

On 28 February 2013, the total percentage of prisoners on remand was 15.1%.⁹⁶ The majority – 19% – of these remand prisoners (111 of 596 people) were detained on drugs charges, while the next largest group (17% or 102 people) were remanded on theft and related charges. Only 4.5% were on remand for homicide offences, 6% for sexual offences, 10.7% for ‘Attempts/Threats to Murder, Assaults, Harassments and Related Offences’, while 5.2% were held in pre-trial detention for public order offences, 3.3% for criminal damage offences and 2.6% for road traffic offences.⁹⁷

the prison population on a single date in the year (or the annual average) and the percentage of the total prison population that pre-trial/remand prisoners constituted on that day.

⁹⁶ See Parliamentary Question on ‘Prisoner Numbers’, 21 March 2013, at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/DebatesWebPack.nsf/takes/dail2013032100065?opendocument> (accessed 21 March 2016).

⁹⁷ Ibid.

Recorded Crime Offences (Number) by Type of Offence and Year

Year	Homicide Offences	Attempts & threats to murder, assaults, harassments and related offences	Controlled drug offences	Robbery, extortion and hijacking offences	Burglary and related offences	Theft and related offences	Public order and other social code offences
2009	88	18,353	21,982	2,491	26,910	77,031	57,351
2010	89	17,703	20,005	3,196	25,420	76,827	54,941
2011	66	17,062	17,695	2,931	27,695	76,975	49,060
2012	79	15,710	16,452	2,817	28,133	76,402	43,862
2013	83	14,336	15,405	2,812	26,185	78,954	36,379

Source: Central Statistics Office⁹⁸

Recommendations:

- **The Department of Justice and Equality in conjunction with An Garda Síochána, the Courts Services, the Director of Public Prosecutions, the Irish Prison Service and the Central Statistics Office should compile and share more comprehensive statistics relating to the use of remand, with a view to enhancing knowledge and understanding of statistical trends in this complex area of law and practice.**
- **The Government, the Courts Service and the Irish Prison Service should conduct an analysis of how many people remanded in custody go on to receive a custodial sentence to assess the necessity of using this measure to the extent it is currently used.**

⁹⁸ <http://www.cso.ie/multiquicktables/quickTables.aspx?id=cja01> (accessed 21 March 2016)

V. Procedure of pre-trial detention decision-making

As stated above in the introduction, the ECtHR has held that a person detained on the grounds of being suspected of an offence must be brought promptly⁹⁹ or “speedily”¹⁰⁰ before a judicial authority, and that trial must take place within a “reasonable” time. Where a person is remanded in pre-trial detention the trial must be conducted with special diligence and speed.¹⁰¹ The decision-making court must be independent from the executive¹⁰² and have the authority to release the suspect.¹⁰³

Court bail

Where station bail is not granted, it is open to the defence to apply for court bail.¹⁰⁴ The court in which the application is made depends on the nature of the underlying charges. In most cases a judge of the District Court decides whether to grant bail and on what terms. Those who are arrested and charged with offences are brought before a judge of the District Court as soon as possible,¹⁰⁵ usually a day or two after arrest. According to the case file review, 35% (n=29) of accused persons were brought before a court one day after arrest and charge. In 8% (n=7) of case-files the first court appearance was 2 days after arrest and charge.¹⁰⁶

The District Court's jurisdiction to grant bail is governed by section 28 of the *Criminal Procedure Act, 1967* as amended by section 11 of the *Bail Act, 1997*. In the District Court the accused will either be released conditionally whereby he/she will enter into a bail bond with, or without surety, or alternatively the judge will remand the accused in custody.

⁹⁹ *Rehbock v Slovenia*, App. 29462/95, 28 November 2000, para 84.

¹⁰⁰ The limit of acceptable preliminary detention has not been defined by the ECtHR, however in *Brogan and others v UK*, App. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988, the court held that periods of preliminary detention ranging from four to six days violated Article 5(3).

¹⁰¹ *Stogmuller v Austria*, App 1602/62, 10 November 1969, para 5.

¹⁰² *Neumeister v Austria*, App 1936/63, 27 June 1968, para 24.

¹⁰³ *Singh v UK*, App 23389/94, 21 February 1996, para 65.

¹⁰⁴ <http://www.courts.ie/offices.nsf/lookuppagelink/0F835AC1CFB039A080256E78003F26A2> (accessed 21 March 2016)

¹⁰⁵ There are also certain specific circumstances in which an accused person may be detained for a length of time before being brought before the court where the police have reasonable grounds to believe such detention is necessary to investigate the offence in question. Provisions exist under section 4 of the *Criminal Justice Act, 1984*; section 42 of the *Criminal Justice Act, 1999*; section 30 of the *Offences Against the State Act, 1939*; section 2 of the *Criminal Justice (Drug Trafficking) Act, 1996*; and section 50 of the *Criminal Justice Act, 2007*. See the Note on *Detention after arrest* at http://www.citizensinformation.ie/en/justice/arrests/detention_after_arrest.html http://www.citizensinformation.ie/en/justice/arrests/detention_after_arrest.html#lc10c8 (accessed 21 March 2016). http://www.citizensinformation.ie/en/justice/arrests/detention_after_arrest.html#lc10c8 (accessed 21 March 2016).

¹⁰⁶ In 38% (n= 32) of case files it was unknown what the time period between arrest and first court appearance was. In 2% (n=2) case files the accused person appeared in court 3 days after arrest.

Under section 29 of the *Criminal Procedure Act, 1967* if a person is accused of murder, conspiracy to murder, piracy, treason, certain offences against the State, or a “grave breach” under the *Geneva Conventions Act, 1962*, he or she will have to apply for bail in the High Court.¹⁰⁷ As discussed in further detail in the **Review of pre-trial detention** section below, where bail is refused in the District Court, an accused person can apply to the High Court for bail where there will be a full oral adversarial hearing unless bail is agreed on consent by the legal representatives.

Closed bail applications

The Researcher was excluded from court on three occasions at the Criminal Courts of Justice (CCJ) in Dublin under section 4(2) of the *Bail Act, 1997* as a person unconnected with the bail application in relation to section 2 bail objections where evidence of previous convictions was to be presented by the Gardaí. *Interviewee 6* confirmed that it was common practice for people to be removed from court in the CCJ for section 2 bail objections on the basis that this was done to safeguard the accused person’s right to a fair trial.

Section 2 objections are usually dealt with as the last items on the court list in the District Courts of the CCJ to facilitate clearing of the courtroom. As the prosecuting Garda is required to provide the defence lawyer with a written copy of the section 2 objection in advance of the application, the oral submissions of the defence might be presumed to be more robust than in a simple bench warrant matter (where a person has failed to appear in court and was arrested on a warrant issued by the sitting judge). In the High Court sitting at Cloverhill Courthouse, there was no section 2 bail objection dealt with “otherwise than in public” as provided for under section 4(2) of the 1997 Act. The High Court was, however, cleared 5 times for *in camera* bail applications involving juveniles.

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Impact of pre-trial detention and delay

As regards the length of pre-trial detention, the jurisprudence of the European Court of Human Rights (ECtHR) requires State authorities to exercise ‘special diligence’ throughout detention on remand. It is not sufficient for the State to have demonstrated that one of the risks set out above exists and cannot be reduced by any bail condition.

¹⁰⁷ This provision is restated in the Head 12 of the *General Scheme of the Bail Bill, 2015* with certain additions, including an offence (h) an offence under the *Criminal Justice (United Nations Convention against Torture) Act, 2000*.

¹⁰⁸ Under section 94 of the *Children Act, 2001* only court officers, parents or guardians of the child, other adult relations, persons directly involved in the case, bona fide members of the press and such “other persons (if any) as the Court may at its discretion permit to remain” may attend a case involving a child.

The State must also act expeditiously from the day the accused is placed in custody until the outcome of the case.¹⁰⁹ Factors relevant to assessing whether the State has acted expeditiously include the complexity of the case, the conduct of the accused, and the efficiency of the national authorities. 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”.¹¹⁰

70% (n=21) of lawyers surveyed believe that people detained pre-trial are more speedily dealt with than those released on bail, particularly in a contested trial. There is more pressure on the prosecution to produce evidence and advance the trial if a defendant is in custody. Three interviewees stated that where a person is remanded in custody, pressure is placed on the prosecuting Garda to get the case court ready.

“[O]bviously if a person is deprived of their liberty the pressure is on to get the file complete, to get witnesses, get statements in, get certs or whatever is required in as soon as possible and not to delay the investigation, keeping the defendant in custody longer than is necessary ... get directions back from the DPP. So it’s more stressful and more pressurised for the prosecuting member [if the defendant is remanded in custody pending trial].” *Interviewee 4*

However 30% (n=9) of defence lawyers were doubtful that people remanded in custody pending trial were, in fact, given priority for an early trial date, as reflected in these comments from different respondents.

“You get a trial date when you get a trial date, generally you don’t have an option unless there is a vacated trial.”

“I think the lists are set well in advance and the date of trial is based on that mostly, however if a person is detained, it may serve to speed up a trial somewhat, but the lists are the lists.”

60% (n=18) of lawyer respondents stated that where pre-trial detention is lengthy, judges impose deadlines for the completion of various stages of investigation. According to one defence lawyer, if a pre-trial procedure becomes protracted, “the Court may revisit the issue of granting bail to a detained person, or on rare occasions, the Court may strike out the proceedings for want of prosecution”. Another stated that prior to striking out a case, the case would have to be marked “time running” and then “peremptory”. A further respondent stated that “where a case is struck out, it is still

¹⁰⁹ *Kalashnikov v Russia* 36 EHRR 587.

¹¹⁰ *McKay v UK* (2006) 44 EHRR 827.

open to the prosecution to subsequently reinstitute the same proceedings when they are ready to proceed”.

73% (n=22) of lawyer respondents felt that there were common reasons for the lengthy duration of pre-trial detention. Examples of reasons given include the insufficient number of trial judges, particularly at the Central Criminal Court, the number of witnesses involved, failure of the state to provide expedient evidential disclosure, pressure on court lists, and the complexity of the case (e.g. murder trials). One respondent observed that:

“Lengthy is a relative term and too much emphasis is given to back dating of sentences which is of no assistance to those who are acquitted.”

In the District Court, judges manage very busy lists. When interviewed, some judges and prosecutors expressed dissatisfaction with the duration of pre-trial detention for people awaiting Circuit Court trial, due to delays with the court lists. Regarding more general concerns about the use of pre-trial detention, one interviewee stated:

“Of course, one is detaining an innocent person. I have presided over a number of trials where bail had been refused and the accused were subsequently found to be not guilty.” *Interviewee 1*

Interviewee 3 expressed regret that people remanded in custody for trial in the Circuit Court had to wait so long for their hearing. (Interviewee said it could take up to 2-3 years,¹¹¹ whereas a District Court hearing could be typically fixed within 2-3 months.) Interviewee 3 suggested that there might be merit in extending the sentencing powers of District Court judges so that defendants could opt for their case to be disposed of in the District Court, rather than spend a protracted period in pre-trial detention awaiting jury trial in the Circuit Court. Regarding delays with cases coming on for hearing, a further interviewee advocated a third hearing court. He also remarked that:

“There are only two courts at the CCJ that deal solely with hearings and I can guarantee you that they do not sit for 8 hours. Court sits from about half ten until 1 and then it breaks for lunch and then from 2 it’s supposed to sit till half four, but I’ve rarely seen a hearing court sit after lunch.” *Interviewee 6*

¹¹¹ One interviewee (*Interviewee 6*) said the time between initial charge and hearing date had improved since the introduction of the opening of the Criminal Court of Justice and the pre-trial system in the Circuit Court, but that it would still take a year to have a hearing where guilt was admitted and 2 years if the defendant was contesting the case.

One defence lawyer suggested that there should be dates assigned for bail hearings in the Circuit Court, instead of having to have recourse to the High Court at Cloverhill Courthouse in Dublin.

Hearing monitoring and case-file review, as well as interviews conducted, revealed that in the High Court there are 50 cases on an average bail list. The research reveals that many of these matters are dealt with by consent, e.g. variation of the bail amount or residence requirement, while 10-12 are given a full hearing and others are withdrawn, or put back to the next High Court bail list which could be a whole week later.

This inevitably means that not all High Court bail applications are heard promptly. The case file review revealed that the delay is occasionally caused by a failure of the prosecuting Garda to attend court. Hearing monitoring suggests that cases were mainly put back to the next bail list because counsel were not ready to proceed when the case was called (e.g. because the client had not been produced by the prison in order to take instructions in a timely manner). Three times during High Court bail monitoring, the judge expressed frustration that no parties to a bail application were ready to proceed. On one occasion he rose and returned to his chambers for ten minutes because no parties to a bail application were in a position to continue.

The case-file review and court observation showed that depending on its place on the list, a bail application could be put over until the following Thursday, or even the following Monday due to the heavy court lists.¹¹² Where there are extensive delays with the High Court List, a person may potentially spend weeks in pre-trial custody. One defence practitioner surveyed stated:

“There is only one judge in the High Court to hear fifty applications or more. The Supreme Court has commented (in the case of Tristan McLoughlin) that it is virtually impossible for justice to be done in such circumstances. ... Also, although Section 28(2) of the Criminal Procedure Act, 1967 provides that "Refusal of bail at a particular appearance before the District Court shall not prevent a renewal of the application for bail at a subsequent appearance or while the accused is in custody awaiting trial" in practice most District Court judges will not entertain a renewal of an application unless there has been a "change in circumstances", often interpreted very narrowly and excluding the circumstance of the further period in custody.”

¹¹² See President of the High Court's *Notice and Practice Direction HC63 - Bail Applications at Cloverhill Courthouse*, 28 January 2016 which moved the bail list from Monday to Tuesday for High Court bail applications originating in the greater Dublin area, with any excess applications dealt with on Wednesday and cases from outside Dublin being scheduled for Thursdays. At <http://www.courts.ie/courts.ie/library3.nsf/16c93c36d3635d5180256e3f003a4580/1d186f0811ccd5bb80257f490053a86c?OpenDocument> (accessed 23 March 2016).

In the *DPP v McLoughlin*¹¹³ the Supreme Court adverted to the time pressure under which the judge presiding over the High Court bail list is required to operate, stating that it is a matter of concern if a judge “is attempting to deal with a very long list of cases, to be determined in a limited time, in circumstances where the issues may not be opened sufficiently, or where a judge has insufficient time to state his full reasons.”

As discussed in detail in the section on the **Substance of Pre-trial Decision-making** below, in High Court bail applications the accused person and their defence team of a solicitor and barrister are afforded a full opportunity to present their oral arguments as to why bail should be granted. Moreover, the two judges of the High Court who were observed during the hearing monitoring portion of the research took care to explain the reasons behind their decision to either grant or refuse bail in comprehensible language for the benefit of the accused. Thus, while the Supreme Court’s statement in *McLoughlin*,¹¹⁴ regarding the time pressures facing judges working their way through the busy High Court Bail List may well be true as regards the capacity to open the issues sufficiently, or to fully state their reasons for refusing bail, the statement is even more relevant to judges in the District Court where the vast majority of bail applications (and refusals) are made in a matter of minutes.

In terms of ensuring that the defendant’s right to liberty is protected against unnecessary and unlawful intrusion, it is vital that in contested bail hearings, adequate time is given to “opening the issues sufficiently” which means (a) hearing the bail objections, (b) permitting the defence to cross-examine the prosecuting Garda (and any other relevant witness) and rebut the objections, (c) determining whether the objections can be met by conditions, and (d) giving full reasons for granting or refusing bail, including the necessity of any conditions imposed and the consequences of their breach.

New practice regarding the High Court bail list

An earlier draft of this Research Report contained a recommendation that consideration should be given to providing a third day per week for hearing bail applications at the High Court. In early 2016 a Notice and Practice Direction on High Court bail at Cloverhill Courthouse was issued by the President of the High Court to the effect that since mid-February 2016 there is no longer any High Court bail list on a Monday. Bail applications originating in Dublin are now heard on Tuesdays and Wednesdays (if the Tuesday list cannot be completed), with bail applications from outside Dublin scheduled for Thursdays.¹¹⁵ Bail hearings for accused persons from Dublin cannot be adjourned to

¹¹³[2009] IESC 65.

¹¹⁴ [2009] IESC 65.

¹¹⁵ See President of the High Court’s *Notice and Practice Direction HC63 - Bail Applications at Cloverhill Courthouse*, 28 January 2016 at

Thursdays, nor can applications from people outside Dublin be heard on Tuesdays or Wednesdays.

The purpose of this change is to enhance efficiencies in the system. Under the old High Court bail list system witnessed by the Researcher no distinction was drawn between applicants who had to be transported from outside Dublin and those in prisons within the greater Dublin area. When bail applicants were transported from regional prisons such as Cork, Limerick or Castlerea to Cloverhill Courthouse and their applications were not reached on a particular day, they would have to be returned to that prison, only to return again to Cloverhill for the next High Court bail list. The same was true of any witnesses party to the bail application. Clearly, this was a costly waste of time and resources. Spatial constraints at the courthouse also meant that bail applicants were frequently detained in prison vans while waiting their hearing, a practice which was problematic in terms of safeguarding human rights and maintaining security.

An additional major change to the administration of the High Court bail list going forward is that the President of the High Court, Mr Justice Peter Kelly, will assign a single judge to administer the High Court bail list for the full law term in order to ensure continuity of practice.¹¹⁶ This means that there will no longer be a mix of judges with varying levels of criminal justice or bail experience presiding over the High Court bail list, depending on their availability.

Back-dating sentences

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. There is no legislative provision requiring sentences to be backdated. In any event, this would be of little consolation to people who are eventually acquitted, or who have their cases struck out. One defence practitioner surveyed stated:

“It is not the law in Ireland, as it should be, that a Court must make a deduction from a term of imprisonment of any time spent in pre-trial detention. Most judges would appropriately back-date sentence, but not all do. I had a client who was sentenced to a month's imprisonment for a minor offence and had spent longer than that on remand, but the District Court judge would not back-date the sentence. Other charges were struck out or dismissed at the same time and I

<http://www.courts.ie/courts.ie/library3.nsf/16c93c36d3635d5180256e3f003a4580/1d186f0811ccd5bb80257f490053a86c?OpenDocument> (accessed 23 March 2016)

¹¹⁶ Ibid. From 15 February 2016 until the end of the law term the President of the High Court undertook to administer the High Court bail list himself.

believed that this influenced the Court in refusing to back-date the sentence, but I was informed it was [that judge's] policy never to do so."

It is clear from statements of the ECtHR that Article 5 protects the right of any person deprived of their liberty to be put on trial "within a reasonable time or be released pending trial". Article 9(3) of the *International Covenant on Civil and Political Rights* (ICCPR) also affirms this right, while Article 9.5 of the ICCPR states that anyone who has been the victim of "unlawful detention shall have an enforceable right to compensation." In Ireland there is no right to compensation where a person is subject to pre-trial detention for a protracted period, only to be later acquitted, or given a non-custodial penalty.

Recommendations:

- **The judicial convention to backdate the sentence to allow for time served on remand should be credited to any custodial sentence imposed should be recognised in legislation.**
- **The *General Scheme of the Bail Bill, 2015* should provide that people remanded in pre-trial detention will receive priority in terms of an early trial date.**
- **The *General Scheme of the Bail Bill, 2015* should provide that compensation may be available to a person who spends a lengthy period on remand only to be subsequently acquitted.**
- **All courts that hear bail applications should sit for sufficient periods as to allow judges have sufficient time to attend to all court business, including contested bail applications daily.**
- **Consideration should be given to providing a third hearing court in the CCJ.**

Involvement of the accused and the role of the defence in the pre-trial detention procedure

As outlined in the introduction, the ECtHR has ruled that pre-trial detention hearings must involve an oral and adversarial hearing, in which the defence have the opportunity to effectively participate.¹¹⁷

¹¹⁷ *Göç v Turkey*, Application No 36590/97, 11 July 2002, para 62.

According to the 84 case files reviewed, 54% of bail applicants were in pre-trial detention for less than a month at the time of the bail application (n=46).¹¹⁸ The court observation component of the research found that the accused person was typically present at the bail hearings (85%, n=84). In almost all cases they were physically present in the court, but 3 out of 91 people participated in the hearing by way of video-link from prison. Of the 8 hearings monitored involving a foreign national, an interpreter was provided in 5 cases.

90% (n=27) of lawyers surveyed stated that the defence lawyer is always present during pre-trial detention hearings. One respondent commented -

“The only video conference facilities locally are in Cork city. Very often it is not possible to attend in Cork and we usually retain agents to do so. Female prisoners are dealt with in Limerick prison and it is virtually impossible to attend in person. [The] legal aid fee for a second court attendance is €50 making it an economically impossible proposition to appear outside of one's geographical area.”

Forty District Court hearings involving bail matters (7 of which did not relate to bail in the pre-trial context) were observed during the course of this research. **The mean duration of each hearing lasted just over 6 minutes**, but this figure is somewhat skewed by the fact that one single hearing lasted 25 minutes because the accused pleaded guilty to various charges following a brief consultation with his lawyer. For example, six District Court bail hearings lasted 2 minutes, six lasted 3 minutes, six lasted 5 minutes and two lasted 15 minutes.

High Court bail applications, described by *Interviewee 1* as “a miniature criminal trial”, are generally much longer. **The mean duration observed in the High Court was 16.8 minutes.**¹¹⁹ This means the oral arguments made by both sides in the High Court (including sworn testimony from the accused and witnesses, for example, on occasion where a complainant professes a fear of intimidation, or where family members offer their address for a residence requirement) were perceived to be far more comprehensive, as was the judicial reasoning in granting or refusing bail.

Since most bail applications in the District Court occur shortly after arrest and charge, lawyers do not usually have access to the case file. 69% of survey respondents stated that the defence does not have access to the case file in advance of the bail hearing,

¹¹⁸ 4.76% (n=4) were in pre-trial detention for >1Months-3Months, 2.38% (n=2) were remanded for >3Months-6Months and 2.38% (n=2) were in pre-trial detention for >6Months-1Year. In the remaining case files it was unclear how long the person was remanded in custody pre-trial.

¹¹⁹ The longest hearing in the High Court was 58 minutes and the shortest was 7 minutes.

which is relevant to Article 7(1) of the EU *Right to Information Directive*.¹²⁰ As one respondent stated:

“Defence lawyers often conduct bail hearings without seeing the statements made against the accused. However, the presumption of innocence usually protects the defence in this regard and the focus of the application is on the accused's bail record rather than the allegation against him.”

As observed during the hearing monitoring, defence lawyers get very little time to prepare for a bail application at District Court level and this was also evidenced from the replies to the Defence Practitioner Survey. 39% (n=12) of respondent lawyers stated that the defence lawyer has on average 30 minutes or less to prepare for the initial bail application, with 13% (n=4) stating lawyers would usually have less than 10 minutes to prepare. 23% (n=7) were of the view that the average preparation time was one hour or less, while 26% (n=8) thought that the average time was more than an hour.

During the course of a bail application the defence lawyer may request disclosure of certain documents or evidence, such as witness statements or CCTV footage. The requested evidence will not normally be furnished on the day, rather the judge will make a disclosure order specifying that it be provided to the defence lawyer by a certain date.¹²¹

90% (n=27) of the 30 respondents to the Defence Practitioner Survey confirmed that defence lawyers have an opportunity to make submissions during bail applications. At the District Court, such submissions will be fully oral. While some form of defence submission was made in all 91 hearings observed, in two cases where a solicitor was appointed by the court, their contribution to bail matters was limited to a one-line request for bail to be granted, coupled with a request for a legal aid order to be made.

Section 13(1) of the *Criminal Justice Act, 1984* provides that it is an offence, punishable with a fine or up to 12 months imprisonment if a person who is released on bail in criminal proceedings fails to appear before a court in accordance with his recognisance (bail bond). Section 13(2) however provides that it is a defence to such a charge if the accused shows that he had a “reasonable excuse” for his non-appearance. In cases where bail applicants were arrested on a bench warrant, defence lawyers made submissions

¹²⁰ See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0013> (accessed 23 March 2016).

¹²¹ The duty of disclosure in summary prosecutions was set out the Supreme Court in *Director of Public Prosecutions v Gary Doyle* [1994] 2 IR 286 and while there is no general duty on the part of the State to disclose witness statements etc. pre-trial, a disclosure order may be made due to (a) the seriousness of the charge;(b) the importance of the statements or documents;(c) the fact that the accused has already been adequately informed of the nature and substance of the accusation;(d) the likelihood that there is no risk of injustice in failing to furnish the statements or documents in issue to the accused." See https://www.dppireland.ie/filestore/documents/Chapter_9_Disclosure.htm (accessed 23 March 2016).

seeking to explain their client's prior failure to appear by reference to a mix-up with dates (n=2)¹²² or due to illness or tragedy (n=2), so as to counter a usually perfunctory bail objection based on the risk of evading justice.

In High Court bail applications observed, defence requests regarding bail conditions to which their client was willing to adhere were sometimes vague. During the course of the research, it was not unusual to hear or read words similar to "my client is willing to agree to abide by any terms set by the Court." The underlying reason for this may be the premium which clients placed on the success of bail applications, and the connected pressure this placed on practitioners; as one interviewee stated, the client wants two things from his defence lawyer: "Get me bail and get me off!" (*Interviewee 8*)

This statement about the dynamic of the relationship between an accused person and their defence lawyer might go some way to explain why lawyers will agree to bail on virtually any terms. Lawyers can count themselves successful if they get their client bail, even if the bail terms ultimately turn out to be too onerous (or, indeed, merely more onerous than necessary) in the long term.

The conditions most frequently offered by the defence during High Court bail hearings were money bail (32%, n=29),¹²³ a residence condition (30%, n=27) and a sign on requirement (20%, n=18). In 8% (n=7) of bail hearings monitored, attendance at a drug treatment facility (usually merely for assessment) was suggested by the defence. Where bail was granted, the conditions suggested by the defence were often incorporated into the bail bond in conjunction with a number of other conditions including a mobile phone condition (a requirement to carry a fully charged mobile phone and to be available to answer it at all times), "stay away" orders, requirements to surrender passports etc., in a pro forma fashion. Imposing unnecessary and excessive conditions on a defendant puts them at a distinct disadvantage in terms of compliance and can, indeed, often set them up to fail.¹²⁴ It is important that lawyers remain vigilant not to offer or agree to unduly onerous and unnecessary conditions.

The defendant has access to both a solicitor and a barrister (counsel) for a bail application in the High Court. For applicants from outside Dublin, it would be highly unusual to be represented by the same solicitor in the local District Court and the High

¹²³ Money bail usually means that money must be lodged as a term of bail. Often it is a nominal amount owing to the "low means" of the bail applicant. However, the Researcher noted cases where the applicant was instructed to "lodge nothing" even when an amount of €100 was fixed.

¹²⁴See Canadian Civil Liberties Association And Education Trust, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention* (2014), at https://ccla.org/dev/v5/doc/CCLA_set_up_to_fail.pdf (accessed 23 March 2016).

Court in Dublin. One survey respondent stated that “it is not cost effective to travel to Dublin” and suggested that there should be an appeal to the regional Circuit Court.

Defence counsel for High Court bail hearings are generally instructed on the morning of the bail list and the amount of time they will have to prepare will depend to a large extent on the place of their client on the list (which may have in excess of 50 cases). From the 47 High Court bail hearings directly observed and the generally high quality of oral arguments made by defence counsel, it would appear that despite the time constraints, the preparation time is adequate. There is a discernible sense of lawyers striving to secure their clients’ freedom in the High Court. This is due to the quality of the legal representation, particularly to the addition of defence counsel (usually younger barristers) who demonstrate considerable enthusiasm and knowledge of the bail laws. The “mini-trial” mechanism for High Court bail hearings affords the defence a full opportunity to debunk weak prosecutorial bail objections and to offer conditions as an alternative to further pre-trial detention.

Recommendations:

- **The General Scheme of the Bail Bill, 2015 should contain a provision stating that where a solicitor is assigned by a court to an accused person for a bail application at short notice, the judge should grant a short adjournment to enable the solicitor to take full instructions from their new client before proceeding with the application.**
- **Defence lawyers should be vigilant in advising clients on appropriate conditions and in challenging any proposals for unnecessary, disproportionate or unduly onerous conditions, and suggest other more proportionate or suitable alternatives - especially where the charge is at the lower end of the scale.**
- **Where bail is set by consent in the High Court, defence lawyers should strive to secure bail on the least onerous terms possible for their clients, especially where the charge is at the lower end of the scale. In particular, they should seek an individualised (relevant and proportionate) approach to the setting of conditions and resist any “pro forma” approach by the prosecution or judge.**

The role of the prosecution

The prosecution opposed bail in 65% (n= 59) of the 91 hearings monitored and 83% (n=70) of the 84 case files reviewed. The prosecution consented to bail in only 9% (n=8) of the bail hearings observed (e.g. where a person arrested on a bench warrant gave a satisfactory justification for non-attendance) and in 7% (n=6) of the case files reviewed.

Six applications related to requests by the defence to vary bail terms such as the bail amount, sign on requirement (e.g. due to medical incapacity, or distance from a Garda Station) or the curfew requirement. In five of the High Court case files reviewed the applicant decided to withdraw their bail application on the day for reasons unknown (i.e. no reasons for the withdrawal were noted in the file).

Like defence lawyers, prosecutors have little time to prepare for each individual bail application. Garda Court Presenters¹²⁵ who prosecute all matters in the District Court of the CCJ start work reviewing their files for that day at 6am and court starts at 10.30am, providing four and a half hours to assess whether there are any bail applications for the day. Court Presenters are only empowered to deal with objections to bail under the *O'Callaghan Rules*. For section 2 objections the prosecuting member must attend court and articulate the precise reasons for his or her concerns regarding future offending if bail were to be granted.

One interviewee stated that Garda Court Presenters always speak to the relevant defence lawyer before the bail application to give advance notice of the nature of the prosecution's objections and the conditions they might entertain if bail were to be granted (*Interviewee 4*). Where there is an objection to bail on the grounds of the apprehension of the commission of a serious offence under section 2 of the *Bail Act, 1997*, the prosecuting Garda gives advance *written* notice of their objection(s) to the defence.¹²⁶ *Interviewee 10* stated that she and her colleagues usually "take a transparent approach" and give full oral notice of objections before bail applications in the High Court. She said it was impossible to provide written notice to defence counsel because prosecuting barristers are usually briefed on the morning of the bail hearing by the DPP.

As regards the understanding¹²⁷ that ordinary rank and file Gardaí have of bail law, one interviewee stated:

"The standard of knowledge - without putting us on a pedestal - is very poor down the country in relation to bail. If that standard were used up here, the amount of High Court cases that would be taken would be astronomical. I

¹²⁵ A Garda Court Presenter is a specialised police prosecutor who deals with all matters in the relevant District Court of the Criminal Courts of Justice in Dublin on a given day, including prosecutions, sentencing matters, fines and bail applications relating to *O'Callaghan* objections. For a section 2 bail objection the prosecuting member, also referred to as the "arresting Guard" usually has to attend Court. However, sometimes a nominated Garda, not directly related to the charge will appear to make the section 2 objection instead. The specialist Court Presenter system has yet to be rolled out in rural locations. In country courts it is the local Garda inspector who prosecutes 2-3 days a week.

¹²⁶ See *In the matter of an application pursuant to Article 40.4.2. of the Constitution of Ireland 1937 between Martin McDonagh and the Governor of Cloverhill Prison*, Supreme Court, 28th January 2005.

¹²⁷ One interviewee (*Interviewee 6*) reported that there is no specialist training from An Garda Síochána relating to bail, but through good working relationships with state solicitors in the Office of the Director of Public Prosecutors Garda Court Presenters have managed to proactively secure relevant training from that office, including on bail issues.

suppose, if we're lucky once a week, we'd get a Habeas Corpus, where there was an issue of bail being refused, maybe even once a fortnight. If the same standard used down the country was used up here, I'd say we'd have one every day. There are people going into custody, I won't say because of the local arrangements, but maybe because of the local familiarity and definitely we sometimes get stuff up from the country and we ask 'do you know what you're doing?', literally 'do you know that what you're asking us to do is probably unconstitutional, not to mind anything else.' That's coming from a lack of proper training. "Interviewee 6

All of the DPP's High Court bail files reviewed contained a notice of motion and affidavit exhibiting the charge sheet(s) in respect of which bail is being sought along with an outline of the background. There was also generally a handwritten note from counsel of the basic details including previous convictions, warrants and orders agreed and the judgment itself, but there is little information on the nature and severity of the alleged offences, personal circumstances and means of the applicant or nature and jurisdiction of previous convictions.

Eight of the DPP's High Court bail files revealed that bail was granted, or bail terms varied (typically a reduction in the bail amount), by consent. In these cases no oral hearing at the High Court took place, and the defence counsel and prosecution negotiated the terms of conditional bail outside the court. Three files noted that there was **no Garda present** to make submissions on their original bail objection.¹²⁸

Changes to case file requirements

It should be noted that the *Rules of the Superior Courts (Bail Hearings), 2015* came into effect on 23 November 2015, several months after the empirical aspects of this research was completed. These rules now require that a notice of motion seeking bail must be grounded on an affidavit sworn by the applicant. Since February 2016 an affidavit sworn by a solicitor will no longer suffice.¹²⁹ Indeed, the Central Office of the High Court will not issue or provide a return date for a notice of motion seeking bail

¹²⁸ In one of these cases, the applicant was charged with section 11 (Production of article capable of inflicting serious injury) of the *Firearms and Offensive Weapons Act, 1990*. Terms of bail fixed by consent as follows: Own bond €500, lodge all. Sign on daily at a specified Garda station 9pm-9am, Residency requirement, surrender passport, Do not interfere with witnesses, Do not leave jurisdiction or apply for new passport, mobile phone condition. In another, the person was charged with section 3 of the *Misuse of Drugs Act, 1977*. The bail terms agreed were as follows: Own Bond €100, sign on at a specified Garda Station twice a week and a residency condition.

¹²⁹ See President of the High Court's *Notice and Practice Direction HC63 - Bail Applications at Cloverhill Courthouse*, 28 January 2016 at

<http://www.courts.ie/courts.ie/library3.nsf/16c93c36d3635d5180256e3f003a4580/1d186f0811ccd5bb80257f490053a86c?OpenDocument> (accessed 23 March 2016).

unless it is grounded upon an affidavit sworn by the applicant. This may prove challenging for detainees in more remote prison locations, at a distance from the lawyers representing them.

Moreover, Order 84 rule 15(3) of the *Rules of the Superior Court*¹³⁰ specifies that the affidavit sworn by the applicant must articulate “fully the basis upon which the application is made to the High Court” including: details of any prior refusal of bail and the location of the Court in question, the applicant’s current place of the detention, the applicant’s normal address, as well as his/her proposed address if bail is to be granted, the particulars of the underlying charge(s), the terms on which bail was granted in relation to such charge(s), the personal details of any proposed independent surety, whether the applicant previously sought High Court bail on the charge(s) in question, whether any warrants for failure to appear have been issued in relation to the applicant and what surety and/or other conditions relating to bail (if any) the applicant is proposing to the High Court.

In relation to the matter of charge sheets and what should be contained in bail case files going forward, Mr. Justice Peter Kelly in his *Notice and Practice Direction* issued in February 2016 reminded lawyers of the need to set out the numbers of all charge sheets in respect of which bail is sought in a “form 1”, which must be attached to the bail motion at the time of filing in the Central Office of the High Court, in accordance with the practice direction from 10 September 2014. Any supplemental charges must be recited in an additional form 1. The President of the High Court reminded practitioners further that the 2014 practice direction “directed the discontinuance of lodging charge sheets by way of exhibits to the affidavit grounding such a notice of motion in the Central Office is discontinued. That direction continues in force.”¹³¹

In terms of so-called applications “for short service” a notion of motion seeking bail must comply fully with Order 84, rule 15(3), and must also “set forth the facts which are relied upon to justify short service of the notice of motion.”¹³²

¹³⁰ Order 84 rule 15(3) of the *Rules of the Superior Court* at <http://www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/a53b0f76ffc6c5b780256d2b0046b3dc?OpenDocument> (accessed 21 March 2016) as substituted by Section 3(2) of the *Rules of the Superior Courts (Bail Hearings)*, 2015 S.I. No. 470 of 2015 at <http://www.irishstatutebook.ie/eli/2015/si/470/made/en/pdf> (accessed 21 March 2016)

¹³¹ See President of the High Court’s *Notice and Practice Direction HC63 - Bail Applications at Cloverhill Courthouse*, 28 January 2016, paras 10-13 at <http://www.courts.ie/courts.ie/library3.nsf/16c93c36d3635d5180256e3f003a4580/1d186f0811ccd5bb80257f490053a86c?OpenDocument> (accessed 23 March 2016)

¹³² *Ibid*, para 14.

Recommendations:

- **Gardaí should request only those bail conditions they reasonably believe are absolutely necessary to meet any reasonable objection to bail.**
- **Training, including refresher courses by way of Continuous Professional Development (CPD) should be provided to all Gardaí nationally on the legal and constitutional basis for objecting to bail. Clear official guidelines should be developed by An Garda Síochána for prosecuting Gardaí and Court Presenters. This training could include the obligation to observe hearings. There could also be an online learning component through the PULSE system where individual members can log onto a portal with educational videos on various issues relating to bail.**
- **Prosecuting counsel in the High Court should be mindful of adopting a ‘pro forma’ approach to bail conditions and should urge their relevant Garda to only request such conditions as are necessary and proportionate to meet the identified risk.**

VI. Substance of pre-trial detention decision-making

“We all rather recoil at the idea of a person presumed innocent being detained.”
Interviewee 1

As outlined in the introduction, the ECtHR has emphasised the presumption in favour of release.¹³³ It is the responsibility of the State to establish that a less intrusive alternative to detention would not mitigate the risk(s) in any given case.¹³⁴ Moreover, detention decisions must be well reasoned and judges should not employ “stereotyped”¹³⁵ forms of words, or “general and abstract”¹³⁶ arguments. They should engage with the reasons for pre-trial detention and for dismissing the application for release.¹³⁷

Out of the 91 bail hearings attended, judges ordered pre-trial detention in 44% of cases (n=40), i.e. they refused bail, or revoked it on review, for example, due to a breach of conditions (including allegations of fresh offending during breach of curfew). Bail with conditions was granted in 48% of hearings (n=44). The remaining 7 hearings before the District Court did not relate to pre-trial detention, although the issue of bail, or bail conditions was raised.

Other than the evidence of Gardaí, judges do not have access to evidence from professionals such as Probation Officers in respect of risk assessment and recommendations about the defendant’s suitability for release on bail. In practice, most District Court bail applications are conducted in less than five minutes, with little detailed argumentation from either the prosecution or defence and very little explanation by judges for their decisions to grant or refuse bail. 20% of lawyers surveyed (n=6) were of the view that the prosecution has more influence than the defence lawyer in bail applications and that District Court judges generally accede to the Gardaí requests. One lawyer stated:

“I believe that judges, when faced with having to make a decision where prosecution are objecting to bail, on whatever basis, tend to accord undue weight to prosecution objections.”

However, the hearing monitoring and the case files relating to the High Court did not reveal undue judicial preference for prosecution arguments. Nonetheless, the fact that bail was granted in 22 of the 47 cases observed in the High Court may demonstrate that at least some District Court judges were persuaded by weak objections to bail offered by a Court Presenter in CCJ under the *O’Callaghan Rules*, or by the prosecuting Garda under

¹³³ *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 145.

¹³⁴ *Ilijkov v Bulgaria*, App 33977/96, 26 July 2001, para 85.

¹³⁵ *Yagci and Sargin v Turkey*, App 16419/90, 16426/90, 8 June 1995, para 52.

¹³⁶ *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003, para 63.

¹³⁷ *Buzadj v. Moldova*, App 23755/07, 16 December 2014, para 3.

section 2 or the *O'Callaghan Rules* outside Dublin. It is also possible that the personal circumstances of individual bail applicants changed in the interim, which makes the grant of bail more likely i.e. a surety became available, or an offer of a drug treatment place was made.

"I find that much turns on the judge hearing the case with Judge [A] being the most liberal to date, Judge [B] being very fair and down the middle and Judges [C, D and E] being more conservative although they rarely sit. This can lead to an element of forum shopping, i.e. applicants withdrawing cases before more conservative Judges or finding a way to adjourn them to a more favourable judge." *Interviewee 10*

23% (n=7) of defence practitioners stated that judges made their decisions based on the evidence provided by both sides, while another 23% (n=7) believed judges relied mainly on Garda (police) evidence and prosecution submissions. 10% (n=3) defence practitioners surveyed felt judges tend to rely on Garda evidence, in conjunction with their own experience and common sense, while three others used the following phrases to describe how that judges make their decisions: (1) "very much by instinct", (2) primarily based on the applicant's "previous history vis-a-vis honouring bail terms, and (3) based on "value judgments having heard *viva voce* [oral] evidence from Gardaí and the accused or his independent surety."

The hearing monitoring and case file review revealed that the prosecution frequently objects to bail on multiple grounds. The most common ground for opposing bail during the hearings monitored was the likelihood of committing further offences. The prosecution raised previous convictions and offences committed on bail in relation to 40% of applicants (n=37), as a basis for persuading the court of the risk of future offending under section 2 of the *Bail Act, 1997*. Judges only cited the risk of reoffending in the context of a section 2 bail objection as a ground for refusing bail in respect of 13% of applicants (n=12), with specific reasoning articulated in each case.

23% of applications (n=21) had their drug use raised as a reason for objecting to bail, usually in the context of a section 2 objection, whereby the prosecuting Garda would give evidence that the person's chronic heroin addiction made it very likely that he or she would commit further serious offences (usually theft, burglary or robbery) while on bail. Defence lawyers occasionally referenced their client's addiction as the reason for incurring a cluster of bench warrants over a particular period.¹³⁸

¹³⁸ In one High Court bail application relating to breach of a barring order, the female applicant told the judge that addiction was linked to her mental health problem and that her warrant history was linked to her drug taking. She had not been keeping track of the days of her court visits, but expressed that "I will turn up, because I am off drugs now."

While flight risk (usually phrased in terms of the likelihood of failing to appear) was the second most common reason for bail objections, invoked in respect of 35% (n=32) of bail applicants in hearings monitored, judges referred to flight risk as a reason for refusing bail in 18% of cases (n=16). In all but one of these cases, the reasoning for the decision was specific. For example, they made clear that refusal was due to the applicant's poor bench warrant history – in one case 25 bench warrants, including 3 recent warrants and 5 section 13 convictions for failing to appear¹³⁹ - or due to the fact that the applicant previously absconded and had to be extradited back to Ireland.

The prosecution objected to bail in 11% of bail hearings monitored (n=10) on the basis of risk of witness intimidation under the *O'Callaghan Rules*. Judges only refused bail on the basis of danger to the investigation in three cases. In these cases oral evidence of intimidation was presented by prosecution witnesses to support the bail objection. In this regard, Head 28(1) of the *General Scheme of the Bail Bill, 2015* purports to empower the court to hear complainant evidence in bail applications, stating that:

“A court considering an application for bail may, on the application of a member of the Garda Síochána, hear evidence from the complainant as to: (a) the likelihood of direct or indirect interference or attempted interference, within the meaning of Head 26(2), by the accused person with the complainant or a family member of the complainant; (b) the nature and seriousness of any danger to any person that may be presented by the release of the accused person on bail.”

While this would be a completely new legislative provision, court observation of bail hearings during this research reveals that there is currently no impediment to judges hearing complainant evidence of the sort contemplated in Head 28. Indeed, in bail objections based on the risk of witness intimidation the preference of the courts is to hear direct oral evidence from the complainant.¹⁴⁰ However, in rare circumstances hearsay evidence may be admitted, for example where a Garda gives an account of a particular incident or incidents, explaining that the complainant was unwilling to attend the bail application for fear of further intimidation or harm. As stated by the Supreme Court in *McGinley*¹⁴¹ the judge in a bail application where witness intimidation is raised must expressly make a finding on the probability of such interference by the accused or a person acting on his direction:

“The test is not whether the members of An Garda Síochána have fears or an apprehension for witnesses. The court itself should be satisfied of the probability of the risk of interference or intimidation and make that finding expressly.”¹⁴²

¹³⁹ Section 13(1) of the *Criminal Justice Act, 1984*.

¹⁴⁰ See *The People (DPP) v McGinley* [1998] 2 I.R. 408 at p. 414.

¹⁴¹ *DPP v McLoughlin* [2009] IESC 65.

¹⁴² *Ibid.*

In one hearing monitored where a strong *O'Callaghan* objection was raised regarding witness intimidation in the context of a serious assault in the domestic context, a Garda provided hearsay evidence to support the risk of further violence and intimidation to the female complainant. Bail with a "stay away" ¹⁴³ order and other conditions was, however, granted.¹⁴⁴ In 20% of bail hearings judges imposed stay away orders from victims or witnesses (n=18).

Judges referred to danger to the public as the basis for refusal in only four cases and in all cases gave concrete and specific reasons relating to the level of violence alleged against the applicant in the alleged offence and other previous offences, which made future violent behaviour probable.

In compliance with the ECtHR jurisprudence, the seriousness of the offence does not of itself act as a bar to bail being granted in Ireland. Three interviewees stated that the seriousness of the offence would be a factor in making a section 2 objection to bail and mentioned offences such as theft, burglaries and robberies as serious offences where the Gardaí would be likely to strenuously object to bail, if there was a risk of future offending.

Both High Court judges who were observed administering the Monday bail list gave clear, comprehensive reasons for their decisions, particularly when refusing bail. Of the five people accused of murder who applied for bail in the High Court, three were granted bail. One of those who was denied bail had attempted to flee the jurisdiction after the alleged murder, while there was strong Garda evidence of random and unprovoked acts of violence by the other individual. In the latter case, the judge refused bail stating that although the section 2 objection was not "the strongest objection" he ever heard, in the context of "random acts of extreme violence, there was a "short history of such" and it was, therefore, reasonably likely that further acts of serious violence would be committed. On the *O'Callaghan* objection, the judge declined to make an order, but noted that the applicant "is clearly a flight risk due to the seriousness of the offence. In such a case bail could only be granted with a serious independent surety."¹⁴⁵

¹⁴³ Head 16(1)(v) of the *General Scheme of the Bail Bill, 2015* adds a new bail condition designed to cover situations where the person released on bail might pose a risk of ongoing intimidation to the complainant or his or her family members, providing: "that the accused person refrains from having contact (direct or indirect) with the complainant or any member of the complainant's family unless such contact is approved by the court".

¹⁴⁴ Judge decided to grant bail, restricting contact with the alleged injured party. "It is not about money, but her safety". Bail conditions were as follows: own bond €5,000, lodge nothing. Reside at an address agreed with Garda, curfew at that address 1pm-7am. Daily sign on 9am-9pm. "No contact, direct or indirect with the alleged victim". Usual mobile phone condition. Judge accepted that there was a strong possibility of further intimidation and asked prosecution if they wanted any further condition. The Garda said "no".

¹⁴⁵ Two co-accused were granted bail with onerous conditions, because there was less evidence of previous violent behavior.

In granting bail with the requirement of a €10,000 independent surety in respect of a different murder charge, the judge agreed that both applicants were per se flight risks, owing to the seriousness of the offence. However, he noted that there was no Garda objection regarding fears of interfering with witnesses. He also acknowledged arguments made by defence counsel that the allegation had been hanging over both men for several years and they had not left the jurisdiction.

The general consensus among judges and prosecutors interviewed during the research was that the Irish bail system worked well in practice and that owing to the “Constitutional presumption in favour of bail”, the onus is on the prosecution to put forward compelling arguments to sustain their objections to bail.

However, in reality, the brevity of bail applications at District Court level and the fact that some judges may be unduly risk-averse and more influenced by Garda submissions than those of the defence, means that in any given week there are inevitably people placed in pre-trial detention who should have been granted bail¹⁴⁶ - generally those charged with a summary offence, with a low warrant history and/or only District Court convictions – who often do get bail at the High Court (sometimes after spending weeks on remand due to delays with the High Court Bail List).

Recommendations:

- **Regular judicial training in bail matters, for both newly appointed judges and periodic refresher training, should incorporate the evolving jurisprudence of the European Court of Human Rights in respect of bail and pre-trial detention.**
- **An exchange between urban and rural judges may also be helpful in raising awareness of the correct application of domestic legal standards and the jurisprudence of the European Court of Human Rights.**
- **Judges should be required to give clear, comprehensive reasons for their bail decisions with specific reference to the objection(s) and the supporting evidence that influenced the decision. Where bail is granted with conditions attached, judges should explain why each condition is necessary and proportionate, as well as the consequences of any breach.**

¹⁴⁶ 22 of the 47 bail applications observed in the High Court were granted.

Concerns regarding characteristics of bail applicants

While some members of the judiciary declined to be drawn into policy matters during interview, all demonstrated an awareness that complex social problems addiction, mental health and homelessness have a direct bearing on the bail system.

Regarding defendant characteristics that might make an objection to bail more likely, *Interviewee 2* stated that legislation was enacted regarding addiction, namely section 2 of the *Bail Act, 1997*, “to cover people with chronic drug habits because they generally commit crimes to feed their habits.”

When prompted about the relevance of a person’s homelessness to their perceived ability to answer bail, *Interviewee 2* stated that where homelessness was a factor, the court might impose a condition to reside at a homeless hostel. On this same theme, another interviewee stated:

“They generally won’t put in a residence condition if the person is homeless, unless they are going to live in one of the hostels. If he’s homeless, you can’t deny him his liberty, because he’s unfortunate enough not to have a place to reside. If he undertakes, through his solicitor to reside at a certain hostel, well that can be written in.” *Interviewee 4*

Interviewee 1 stated that most people who come before the court “are a fair distance from first time offenders. A pattern of very heavy offending and a history of warrants would cause concern.” On the type of defendant characteristics that would be likely to lead to bail objections another interviewee stated:

“Well, obviously if they have shown an inability in the past to answer bail or to comply with bail conditions, the likelihood that they will comply in the future is diminished. If they’re a drug addict, the likelihood of them re-offending is increased. And just going on their history, you can see that there’s a likelihood of re-offending.” *Interviewee 4*

Interviewee 5 was of the view that “more hostels” might improve the bail system in Ireland, while *Interviewee 6* suggested that there might be merit in investment in half-way houses for people without a stable address. *Interviewee 1* suggested that it might be helpful for the Probation Service to play a more active role in supervising people on bail “especially in finely balanced sexual cases”. When prompted about the potential usefulness of bail hostels¹⁴⁷ or other bail supports, *Interviewee 6* stated:

¹⁴⁷ Bail hostels were established in the UK to reduce the prevalence of people being remanded in custody simply because they were of no fixed abode. According to *Home Office Research Study No. 53, Remand Decisions in Brighton and Bournemouth* (1989) 14% of those remanded in custody in a particular sample of defendants had been so remanded primarily due to homelessness.

“Presumably, it would be an expansion of the Probation Service here, but this would be a big step for this country, that would be a very, very big step. But I can see where there’s an argument to be made for it, especially with teenagers so they have some kind of normality, a house that they can go to. ... If there was some semblance of stability, I can see how it would be of some benefit. “

Recommendations:

- **The General Scheme of the Bail Bill, 2015 should contain a provision establishing bail supports, including bail hostels and bail information schemes in prisons.**
- **The Probation Service should be involved in the management of bail hostels and other community based supports to improve compliance with bail conditions and should, therefore, receive additional funding in Budget 2017 and into the future to ensure that any such schemes have a reasonable prospect of success.**

Women and the bail system

UK research suggests that women are more likely than men to be remanded to prison for offences that are not likely to lead to a custodial sentence.¹⁴⁸ While the numbers of bail hearings involving female applicants observed during this research were low, the fact that 5 out of 8 were remanded in custody, mostly for relatively minor charges, suggests that in Ireland also women may be more likely than men to be remanded in custody in the first instance, or have their bail revoked. This may in some instances be because the circumstances of their lives are often particularly chaotic and affected by addiction, mental health issues and homelessness.¹⁴⁹

Of the 91 bail matters observed, 81 involved male applicants and 10 involved females. Of the ten hearings involving female applicants, only eight related to bail in the pre-trial context. One woman was charged with murder, two with theft, two with burglary, one with handling stolen property and two with breach of a District Court Barring Order. Sixteen of the case files reviewed involved females, one of whom was described as a “danger to herself” in the Garda Tracking Form.

¹⁴⁸ Prison Reform Trust, *Innocent until proven guilty: Tackling the overuse of custodial remand* (2011), at <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Remand%20Briefing%20FINAL.PDF> (accessed 23 March 2016).

¹⁴⁹ See Irish Penal Reform Trust, *IPRT Position Paper 10: Women in the Criminal Justice System* (2013), at <http://www.iprt.ie/contents/2571> (accessed 23 May 2016).

In eight bail hearings involving women, five were remanded in custody. One woman with serious mental health and addiction problems was granted bail in the High Court, only to be arrested a few weeks later on a warrant for breach of the bail conditions relating to the requirement to reside at a homeless hostel and maintain a curfew there. She was brought before the District Court in a very distraught condition. In remanding her in custody to be returned to the High Court, the judge directed that she be given “in-house treatment” in prison.

In another case before the District Court, a woman was arrested on a bench warrant for failing to appear. Her lawyer explained her non-attendance at court as being due to the fact that she had an access visit with her child who was in care and she did not want to miss it, or have to reschedule it.¹⁵⁰ However, the judge was “not disposed to grant bail” and remanded her in custody for one week. He made no express reference to a specific legal basis for refusing bail. When the lawyer requested legal aid, the judge ordered a statement of means to be completed, despite assurances that the applicant and all her family were Social Welfare recipients.

Where a woman had 19 charges pending relating to burglary, the judge said "there has to be a refusal on *O'Callaghan*" due to her bench warrant history and the likelihood she may not turn up to trial. She had 38 bench warrants dating back to 2005 and thirteen section 13 convictions for failing to appear.¹⁵¹ In total she had 65 previous convictions, 30 while on bail. In relation to section 2 of the *Bail Act, 1997* the prosecution made the link between her drug addiction and likely future offending. Regarding *O'Callaghan* the Judge stated:

“People shouldn't be refused bail just because they are an awful nuisance to Gardaí, but there does come a point where refusal is appropriate. Objection under section 2 refused as offending wasn't sufficiently serious and she was tackling her addictions issues.”

A woman who was described as a chronic alcoholic was arrested on a warrant for breach of bail conditions and brought before the District Court. She was visibly in a very poor physical condition. Her solicitor told the court that his client was "not in a good way at all. She's not well, she is very ill", mentioning an alcohol-related illness. He proceeded to say "we're hoping we wouldn't make a bail application today" and the judge remanded the woman in custody for a week. Obviously, an unconvicted person, female or male, should not be remanded in custody for reasons other than those

¹⁵⁰ Section 13(1) of the *Criminal Justice Act, 1984* provides that it is an offence, punishable with a fine or up to 12 months imprisonment if a person who is released on bail in criminal proceedings failed to appear before a court in accordance with his recognisance. Under section 13(2), however, it is a defence to a section 13 charge if the accused shows that they had a “reasonable excuse” for non-appearance.

¹⁵¹ Section 13(1) of the *Criminal Justice Act, 1984*.

prescribed by law including “for their own good”. In this regard, see Baroness Corston’s recommendations in the context of remand and female offenders.¹⁵²

Recommendations:

- **Women unlikely to receive a custodial sentence should not be remanded in custody.**
- **Women must never be sent to prison “for their own good”, to “teach them a lesson”, for their own safety or to access services such as detoxification.**
- **Supported bail placements for women suitable to their needs should be developed as part of the Joint Irish Prison Service and Probation Service Strategy for Women Offenders.**
- **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, and consideration of the “best interests of the child” principle.**

Bail and foreign nationals

According to the case files, 11 of the 84 bail applicants received were foreign nationals. Bail was objected to in all 11 cases, on the basis of flight risk under the *O’Callaghan Rules*. Out of 11, 6 were remanded in custody at the first hearing, while 2 were granted bail. The other three pleaded guilty to their charges. While this sample is very small, it suggests that those who are foreign nationals will face difficulties in meeting objections on the basis of flight risk.

According to the ECtHR, in cases involving non-national defendants the court should always consider alternatives, e.g. surrendering passports, residence requirements and reporting conditions, etc., before ordering pre-trial detention. It was unclear from the case files if the courts in question considered any alternatives in the six cases where bail was refused.

During the bail hearings observed, eight cases involved nine non-nationals. In five of these cases the Gardaí directly referred to the fact that they were non-nationals with no real ties to the jurisdiction. Again, while the numbers of bail hearings involving foreign nationals encountered were low, the fact that a bail applicant is not from Ireland and has

¹⁵² The Home Office, *A report by Baroness Jean Corston of a review of women with particular vulnerabilities in the Criminal Justice system* (2007), p. 9 and p. 58.

only been here a short time, with no family or firm friendships - “no ties to the jurisdiction” - will be raised as a matter of course by Gardaí in connection with flight risk.

Where the non-national is from outside the EU, the objection may have more weight because the European Arrest Warrant (EAW) system would not apply. *Interviewee 7* stated that he treats EU nationals the same as Irish nationals for bail purposes due to the EAW system.

Three of the applicants in the case files were allegedly in Ireland illegally and not registered with the Garda National Immigration Bureau. In these cases the Gardaí referred to difficulties establishing the true identity of the detained non-nationals. Since Head 18 of the recently published *General Scheme of the Bail Bill, 2015* restates section 6B of the *Bail Act, 1997* (inserted by section 11 of the *Criminal Justice Act, 2007*) for electronic tagging, the Gardaí should in future consider consenting to the release of foreign nationals on bail subject to residence and reporting requirements and – as a last resort before pre-trial detention - electronic tagging, while they seek to establish the individual’s identity.

Recommendation:

- **In bail applications involving non-national defendants the court should always consider granting bail with conditions such as surrender of passport to meet objections of flight risk before considering pre-trial detention.**

VII. Alternatives to Detention on Remand

“People have a right to apply for bail. If you can grant bail, even on pretty strict, pretty searching terms you will.” *Interviewee 1*

“If you refuse bail, there must be a reason. The default position is bail.” *Interviewee 7*

As stated by the ECtHR in *Ambruszkiewicz v Poland*:¹⁵³

“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.”

In terms of the proportionality in decision-making, the ECtHR has also ruled that less severe alternatives should be considered before remanding an accused in custody.¹⁵⁴

Being released on bail is *the* alternative to pre-trial detention in Ireland. However, release on court bail is usually subject to a plethora of conditions. Section 6 of the *Bail Act, 1997* provides for conditions that may be attached to release on bail, including a residence condition, reporting requirement to a Garda Station and stay away orders from certain locations or people. While judges are not currently obliged to give written reasons for their decisions to grant or refuse bail, they should give an oral explanation of their decision in terms the applicant can understand. Moreover, under section 6(2) the judge must ensure that a copy of the recognisance (bail bond) containing the conditions of bail is given to the accused and his or her surety, where applicable.

The research suggests that Irish judges consider alternatives to detention, and indeed opt to impose bail with conditions where they believe conditions can meet the risk posed (e.g. relating to failure to appear, witness intimidation, the possibility of future offending etc.). *Unconditional bail was not granted in any case observed or reviewed during the research.* By comparison, research from the UK project partners at the University of the West of England, Bristol revealed that unconditional bail was granted in the first pre-trial detention hearing in relation to 6 out of 12 indictable only offences, 12 out of 37 either-way offences, and 8 out of 15 summary only offences.¹⁵⁵

In only one bail application observed did a defence lawyer specifically question the necessity of imposing conditions, namely a “sign on” requirement. Most defence lawyers surveyed believe that judges do not order pre-trial detention lightly, or without considering alternatives. 93% (n=28) of respondents to the Defence Practitioner Survey agreed that the defence is able to propose bail conditions to judges. 79% (n=23) thought

¹⁵³ *Ambruszkiewicz v Poland*, App 38797/03. 4 May 2006, para 31.

¹⁵⁴ *Ladent v Poland*, App 11036/03, 18 March 2008, para 55.

¹⁵⁵ This information was helpfully provided to the Researcher by email by Dr Tom Smith, Senior Research Fellow and Associate Lecturer in Law at the University of West England on 07 July 2015.

judges have confidence in bail conditions. While 63% felt that judges often consider granting bail with conditions, 20% (n=6) believed judges always did so, and 17% (n=5) thought judges rarely did so.

While 33% of respondents (n=33) thought that most judges were open and receptive to their suggestions, 17% (n=5) believed that receptiveness to their suggestions depended on the judge in question and 23% (n=7) felt that judicial openness to defence suggestions depended on the circumstances. Two respondents believed they could not suggest alternatives to judges. They were of the view that the judge made up their mind prior to even hearing the defence suggestions regarding conditions. Regarding judicial receptiveness to defence suggestions about bail conditions one lawyer stated:

“There is an unfortunate practice, whereby if bail is contested, and an applicant is admitted to bail, very strict conditions are there for the asking from the prosecution's perspective. That means when a defendant gets bail, and should get bail, because there was an objection, generally judges will impose curfews and strict sign on conditions as a matter of course. This almost amounts to social control”.

Interviewee 7 stated that while judges “should favour bail in all cases”, it may sometimes be necessary to grant bail with conditions that cannot be met - such as an obligation to reside at an address outside an area where there was an ongoing risk of witness intimidation, or to provide an independent surety in order to meet the precise objections raised by the prosecution.

Money Bail and independent sureties

If granted bail, the accused or their surety (e.g. a parent, spouse/partner or other suitable person approved by the District Court) may be required to lodge a proportion of the bail sum set. According to the ECtHR, a financial surety must not be excessive and must be fixed according to the purpose for which they are intended, that is to secure the accused person's attendance at trial.¹⁵⁶ Additionally, the amount of money must never be set solely based on the seriousness of the charge, but must also take into account the accused's financial circumstances.¹⁵⁷

There has been a good deal of recent jurisprudence on the appropriate setting of independent sureties. In 2006 the *Broderick*¹⁵⁸ case addressed the difficult issue of how judges, when fixing the amount of bail, should balance the competing requirements to

¹⁵⁶ *Neumeister v Austria*, App 1936/63, 27 June 1968, paras 13 and 14.

¹⁵⁷ *Mangouras v Spain*, App 12050/40, 28 September 2010.

¹⁵⁸ *DPP v Broderick* [2006] IESC 34.

ensure that an applicant will stand trial by fixing bail at an appropriate level on the one hand, but by not fixing it at a level which he cannot meet on the other.¹⁵⁹ *Broderick* concerned an appeal to the Supreme Court against a refusal by the High Court to reduce the bail amount (€50,000 own bond and €50,000 independent surety) set in the District Court in a drugs case involving a large seizure of cocaine and diamorphine. The Supreme Court held that Butler J. was in error in finding that “if the applicant could handle €1.3 million worth of drugs and was part of a criminal gang, he could meet the bail as fixed by the District Court.” Kearns J. stated that the approach taken in the High Court was a “flat contradiction of the presumption of innocence.”

The issue of fixing the appropriate level of bail in high value drug cases again gave rise to a Supreme Court appeal in the unreported decision of the *DPP v Bell* in 2013.¹⁶⁰ At the time Butler J. in the High Court had adopted a practice of fixing an independent surety at 10% of the street value of the drugs seized. Finding that this approach was arbitrary and rigid and paid insufficient attention to the individual circumstances of the applicants, the Supreme Court held that:

- a) There can be no fixed policy adopted when ascertaining quantum (sum of money) in bail applications;
- b) All individual circumstances of every applicant need to be considered;
- c) The amount of bail should be reasonable and not so high that it is tantamount to a denial of bail, but bearing in mind “the overriding test” of the probability of any applicant failing to appear;
- d) Quantum should be determined by the applicants ability to pay and other factors bearing in mind social background, friends and family;
- e) Two applicants can be granted different terms bearing in mind different social and financial circumstances.

Following *Bell*, a married couple, both foreign nationals, were granted €100 own bond bail (no cash lodgement) in the High Court in spite of the flight risk they posed.¹⁶¹ The Supreme Court held that Butler J. erred in law “in concluding that he was prevented from setting an independent surety as he was no longer permitted to apply a fixed policy in relation to an independent surety as an appropriate way to arrive at the financial terms of bail in respect of an applicant.” In stating that *Bell* created no new law, Denham J. reiterated that in determining the conditions for bail, a court must not adopt a fixed policy, but rather consider all the circumstances of the case. These include ability to pay, the nature of the offence, and the gravity of the offence. The amount of bail should be just and reasonable in all the circumstances, having regard to the particular

¹⁵⁹ *Ibid.*

¹⁶⁰ Supreme Court, ex-tempore, 13 June 2013.

¹⁶¹ *Li Jiuwan Chong and Ching Ann Low v The People (DPP)* 08 May 2014.

circumstances of accused, and bearing in mind "the overriding test of the probability of the accused failing to appear for trial".

*Nahas v DPP*¹⁶² involved an appeal to the Supreme Court about an independent surety requirement in the post-conviction bail context on the basis that any surety requirement for the appellant, who was a homeless man, was "tantamount to a refusal of bail". In the High Court, McDermott J. reduced the amount of the independent surety set by the District Court, but refused to remove it entirely due to the existence of eighteen previous failures to appear, stating:

"It seems to me that his complete disengagement requires some level of independent surety in this case and on that basis I will reduce to €100 independent surety all to be lodged and €500 own bond with no lodgement."

In dismissing the appeal, McMenamin J. in the Supreme Court held that there was no error in principle on the part of the High Court judge in retaining the surety and the effect of imposing the surety set was not unreasonable in all the circumstances, given the applicant's previous poor attendance at court on bail on previous occasions. In relying upon the judgement of Kearns J. in *Broderick*,¹⁶³ McMenamin J. stated that the High Court had to engage in a balancing exercise in such applications when determining the appropriate quantum of bail, and McDermott J. had directed his mind correctly to the task in the instant case.

Money bail was ordered in 35% (n= 32) of hearings monitored. This was usually bail on the persons own bond of €100, with no requirement to lodge any money, but could also involve a cash lodgment or independent surety. This research suggests that bail applicants, many of whom are of limited means (defence lawyers, particularly counsel in the High Court often use the phrase "he is a man of low means" to describe their clients)¹⁶⁴ are admitted to bail on their own bond and not required to lodge a financial sum.¹⁶⁵ Where an accused has a notable bench warrant history, he or she may be required to make a cash lodgment, usually €100. In rare cases, where the applicant is accused of a particularly serious offence e.g. murder, or is deemed to pose a significant flight risk for some other reason, or was alleged to have been found in possession of a large amount of drugs, a high-level independent surety may be required, for example €10,000 in a murder case. If the accused person fails to appear in court on any occasion to answer

¹⁶² Supreme Court, 09 April 2014, *ex tempore*, Mc Menamin, J.

¹⁶³ *DPP v Broderick* [2006] IESC 34.

¹⁶⁴ Hearing monitoring revealed that only 7% (n=6) of the 91 bail applicants were employed. 41% (n=37) were unemployed, while the employment status of the other 53% (n=48) was unknown. Of the 84 case files reviewed, only 4% (n=3) bail applicants were identified as employed, while 44% (n=37) were unemployed and the employment status of the 51% (n=43) was unknown. The final accused person's file was marked RIP and his case was struck out.

¹⁶⁵ They will, however, be required to abide by various other conditions such as a residence requirement, reporting condition, curfew etc.

the charge, any bail paid into the court may be estreated (forfeited) under section 91(1) of the *Bail Act, 1997*.

Drug treatment

Participation in a drug treatment programme was not set as a bail condition in a single case observed during this research, or in any case file examined.¹⁶⁶ Indeed, *Interviewee 8* stated that he did not believe it would ever be appropriate for a judge to make a person's release on pre-trial bail contingent on his or her participation in a drug treatment programme. Despite the fact defence lawyers frequently emphasise their clients' openness to receiving drug treatment during bail applications, he considered a drug treatment order to be more appropriate as a rehabilitative measure before imposing a sentence.

One interviewee raised difficulties regarding the Gardaí's inability to arrest without a warrant where people were granted bail to attend a residential drug treatment facility - either for pre-assessment from the District Court or pending sentence in Circuit Court (pleading guilty to several charges at once amounts to a change of circumstance so a new bail application could successfully be made) and then absconded.¹⁶⁷ He advocated the use of electronic tagging in bail cases involving drug treatment,¹⁶⁸ stating:

"If you had a system with those bracelets, those bail bracelets - I know the legislation is there for electronic tagging - and send them off to a residential treatment centre with the electronic tagging, then let them rehabilitate. It doesn't cost the State anything because they are kept by the rehabilitation centre. I don't know what the cost of monitoring them is. I've seen these bracelets and it takes a wherewithal to get them off. I think the [Garda] Inspectorate made recommendations that there should be power of arrest for breach of bail conditions. In an ideal world, if people want to rehabilitate, leave them." *Interviewee 6*.

¹⁶⁶ IPRT received feedback from a practising lawyer who read the report prior to publication that this finding was unusual in her experience.

¹⁶⁷ In this regard, Head 16(9)(a) of the *General Scheme of the Bail Bill, 2015* provides that a Garda may arrest the accused person without warrant, where he or she "with reasonable cause, suspects that a person who has been admitted to bail is about to abscond for the purpose of evading justice".

¹⁶⁸ As mentioned above, electronic tagging is provided for in section 6B of the *Bail Act, 1997*, as inserted by section 11 of the *Criminal Justice Act, 2007*. However, this is not used as a bail condition in practice. Head 18 of the *General Scheme of the Bail Bill, 2015*, nonetheless, restates section 6B,

Recommendation:

- **In bail applications where the accused has alcohol or drug addiction issues, without the requisite support abstinence conditions are likely to be breached, further criminalizing the defendant. In this regard, the provision of bail supports, including bail hostels with a “one-stop-shop” set-up, where the accused can access treatment for underlying addiction, mental health issues etc., as well as assistance in attending court, may improve adherence to bail conditions.**

Common conditions and general findings from the research

In 29% of cases (n=26) judges ordered the accused to “sign on” (reporting condition) at police stations. In 16% of cases (n=15) applicants were ordered to stay away from certain locations, often the place (the street, shop, pub etc.) where the offence was alleged to have occurred. In 20% of cases (n=18) judges ordered individuals to stay away from victims, witnesses, or co-conspirators. In 33% of cases (n=30) other conditions were attached, including curfew, a residence clause to stay at a particular address, a “mobile phone condition” and an obligation to surrender a passport and not apply for a new one. In one High Court bail application involving serious driving offences, including dangerous driving and unauthorised taking of a vehicle, the judge imposed a condition “not to drive or be a passenger in any MPV¹⁶⁹ other than public transport”.

Although there is legislative provision for electronic tagging in section 6B of the *Bail Act, 1997*, as inserted by section 11 of the *Criminal Justice Act, 2007*, the research reveals that is not used as a bail condition in practice. Head 18 of the *General Scheme of the Bail Bill, 2015* restates section 6B, which may suggest that the legislature hopes to encourage greater use of electronic tagging as a bail condition in the future.¹⁷⁰ In its submission on the *General Scheme of the Bail Bill, 2015* IPRT commented that while “some provision

¹⁶⁹ MPV stands for “Mechanically Propelled Vehicle”, the technical term for a car, bus, van, motorbike etc. in the Road Traffic Acts, 1961 to 2014. In this regard, Head 16 of the *General Scheme of the Bail Bill, 2015*, which restates section 6 of the *Bail Act, 1997* as regards possible conditions courts can impose as part of a bail recognisance, adding a number of new conditions relating to intimidation of family members of the injured party. A new condition (vii) provides that “the accused person shall not drive a mechanically propelled vehicle (within the meaning of the Road Traffic Acts 1961 to 2014), where the person has been charged with a serious offence related to the driving of such a vehicle and the court considers it necessary to impose such a condition to prevent the commission of a serious offence related to the driving of such a vehicle.”

¹⁷⁰ In 2009 the then Minister for Justice, Deputy Dermot Ahern announced a pilot scheme whereby sex offenders released from prison would be subject to electronic tagging. See C. Lally, “Sex offenders face electronic tagging in pilot project”, *The Irish Times*, 30 January 2009, available at <http://www.irishtimes.com/news/sex-offenders-face-electronic-tagging-in-pilot-project-1.1237862> (accessed 23 March 2016) Indeed, the Researcher is aware that some prisoners released early from prison on Temporary Release under the Community Return and Community Support Schemes have been subject to electronic tagging as a condition of their release.

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”.¹⁷¹ IPRT also drew attention to the need for any legislative scheme governing electronic tagging in the pre-trial context to comply with Council of Europe Recommendation CM/Rec(2014)4.¹⁷²

As regards the types of conditions most frequently used, an interviewee stated:

“I have a pro forma bail thing. Own bond would be the standard. Cash lodgement is rare enough given the financial circumstances of most people. They are usually stealing to feed their drug habit, or sometimes maybe to feed their kids. They basically don’t have the cash, so it would be own bond mostly. Sign on is routinely asked. The phone condition is only really for a serious offence, because the Gardaí have copped on actually that if they ask for a condition, they have to be following up on it. Otherwise it’s a spurious condition. ... When they ask for A, there’s a duty on them to make sure that those conditions have been asked for, for a reason”. *Interviewee 3*

One interviewee referred to the revocation of Circuit Court bail and raised the issue of the role of the Gardaí in terms of monitoring the conditions that they demand to meet an objection to bail in any given case.

“Basically, to make a long story short, what I do is I could have about forty - and these are all new cases coming in every Friday – where they’ve been returned from the District Court the Circuit Court and they’ve had bail conditions put on them and I would go through and cross reference on PULSE whether the conditions are being monitored and I’d know pretty quick from PULSE. I’d ring the Guard. “Has he been signing on?” Then “I don’t know.” “Did you contact the station?” “No.” So I would say, approximately 40% of the cases I would deal with every week on Friday are not being monitored, and wouldn’t be monitored except we take the view that they should be monitored and you should be pro-active about it.” *Interviewee 6*

Recommendations:

- **Where Gardaí object to bail and ask for conditions, they should only request those that are absolutely necessary to meet the risk and it should be incumbent**

¹⁷¹ See *IPRT Preliminary Submission on General Scheme of the Bail Bill August 2015*, p. 8 at http://www.iprt.ie/files/IPRT_Submission_on_General_Scheme_of_Bail_Bill_Final.pdf (accessed 25 March 2016)

¹⁷² *Ibid.*

on them to ensure compliance is monitored. Ideally, the *General Scheme of the Bail Bill, 2015* should contain a provision expressly stating that Gardaí should request the least onerous conditions possible to meet the risk(s) identified and that where a Garda requests conditions, he or she assumes responsibility for monitoring adherence to such.

- There should be an audit undertaken by An Garda Síochána of bail conditions and the role/duty of prosecuting Gardaí to monitor them.
- Where conditions are attached to bail, judges should be vigilant to adopt an individualised approach, taking into account the circumstances of the accused, the offence(s) charged and the objections raised and only attach such conditions as are strictly necessary and proportionate to meet those objection(s) and avoid the imposition of impossible conditions.
- Where a judge believes an accused may commit further offences of domestic burglary, he or she should consider granting bail with conditions such as curfew and electronic tagging to mitigate the risk, before remanding a person in custody.
- Head 18 of *General Scheme of the Bail Bill, 2015* providing for pre-trial electronic tagging should be reviewed for compliance with Council of Europe Recommendation CM/Rec(2014)4.
- The *General Scheme of the Bail Bill, 2015* should contain a provision expressly stating that judges should impose the least onerous conditions possible to meet the risk(s) identified and should avoid imposing impossible conditions.

VIII. Review of pre-trial detention

For the purposes of this section the term “review” includes hearings in which a fresh bail application is made, applications to vary bail conditions by the accused and applications to revoke bail by the prosecution for breach of conditions.

Reviews of pre-trial detention are important because the people being detained remain legally innocent. Their deprivation of liberty becomes more difficult to justify the longer they are detained before trial. According to the ECtHR, pre-trial detention must be subject to regular judicial review,¹⁷³ and all stakeholders (defendant, judicial body, and prosecutor) must be capable of initiating such a review.¹⁷⁴

Section 28(2) of *Criminal Procedure Act, 1967* provides that a refusal of bail “at a particular appearance before the District Court shall not prevent a renewal of the application for bail at a subsequent appearance or while the accused is in custody awaiting trial.” Section 28(3) states: “Where an application for bail is refused, or where the applicant is dissatisfied with the bail, he may appeal to the High Court.” It is also open to the prosecution to apply to revoke bail in the High Court. Section 28(3)(a) of the *Criminal Procedure Act, 1967* as substituted by section 19 of the *Criminal Justice Act, 2007* provides that the Director of Public Prosecutions (DPP) can appeal the decision to grant bail or the conditions of bail to the High Court.

Section 3 of the *Bail Act, 1997* provides that where a person has been refused bail under section 2 and the trial for the offence has not commenced within four months from the date of refusal the person can apply to the court for bail on the basis of delay by the prosecutor, such as delay in serving the Book of Evidence. Under section 3 the Court can release the person on bail if satisfied that the interests of justice so require.

In 2001 the *People (DPP) v Doherty*¹⁷⁵ where bail had been refused due to concerns about witness intimidation, it was held that the fixing of a relatively remote trial date was not a change of circumstance that would enable an applicant to bring a further bail application.

In the 2004 case of *Maguire v the DPP*¹⁷⁶ a man who was charged with membership of an unlawful organisation before the Special Criminal Court was denied bail in the High Court under section 2 due to the fear of him committing further serious offences. He reapplied four months later under section 3 of the 1997 Act (permitting a person refused bail under section 2 to make a fresh application after a delay of four months, such as

¹⁷³ *De Wilde, Ooms and Versyp v Belgium*, App 2832/66, 2835/66, 2899/66, 18 June 1971, para 76.

¹⁷⁴ *Rakevich v Russia*, App 58973/00, 28 October 2003, para 43.

¹⁷⁵ Unreported, Supreme Court, 30 July 2001.

¹⁷⁶ [2004] IESC 53.

delay in serving the Book of Evidence) when his trial still had not commenced. The then President of the High Court refused to grant bail on the basis that the delay was due to the inability of the Special Criminal Court to afford a prompt hearing, rather than any delay on the part of the prosecutor.¹⁷⁷

The Supreme Court held that section 2 did not create a discrete, self-contained and exclusive jurisdiction in relation to cases where the section was invoked. It was open to the court in a bail hearing to take into consideration additional factors, established at common law, including a consideration of when the applicant's trial would, or was likely to, take place. According to the Supreme Court, any bail hearing which excluded this consideration failed to vindicate the applicant's rights under the Constitution and the *ECHR* to personal liberty and a trial within a reasonable period. As regards the wording of section 3 of the 1997 Act, the interests of justice required a consideration of the actual time to be spent in custody, irrespective of any culpability on the part of the State.

In 2014 in the case of *Leroy Roche*¹⁷⁸ Charleton J. in the Supreme Court remarked that section 3 of the *Bail Act, 1997* was an unnecessary addition, since "at common law, an accused is entitled to apply to the court of trial or to the High Court for bail and is under no limitation in that regard, save perhaps that of showing a relevant and appropriately probative change of circumstances where repeated calls on that jurisdiction are made."¹⁷⁹ The court also noted that although some legislation "refers to the jurisdiction of the High Court as appellate, this is not correct. It is a full jurisdiction that is exercised *de novo* and can be invoked in any bail matter by either the accused or by the prosecution."¹⁸⁰

It is, therefore, clear from the Irish legislation and case-law, that an accused person can apply for bail at the court of trial at **any** appearance before that court, *or* can bring a bail application to the High Court. Where he or she can establish a change of circumstances, such as the availability of a surety, there is a renewed onus on the court to consider granting bail.

In a High Court review hearing of a case where the State objected to bail under the *O'Callaghan Rules* and section 2, the applicant had 52 previous convictions, 46 of them committed while on bail. Twenty of his convictions were from the Circuit Court, nineteen

¹⁷⁷ During interview one interviewee referred to a case where bail was granted in a high profile case involving paramilitaries, where the defendants had already been through a murder trial which collapsed due to problems with the evidence, and faced a delay of at least 18 months waiting for a new trial. Under such circumstances, the court considered that it was unconscionable to keep the defendants in pre-trial detention, notwithstanding the seriousness of the underlying charge.

¹⁷⁸ *In the matter of an application pursuant to Article 40.4.2° of the Constitution of Ireland Between Leroy Roche and The Governor of Cloverhill Prison*, Supreme Court 18 July 2014.

¹⁷⁹ *In the matter of an application pursuant to Article 40.4.2° of the Constitution of Ireland Between Leroy Roche and The Governor of Cloverhill Prison*, Supreme Court 18 July 2014, para 15.

¹⁸⁰ *Ibid*, para 22.

of which committed while on bail. He also had nine bench warrants for failing to appear. Refusing under section 2 only, the judge stated:

"The section 2 objection is very strong. I can't see how one can get over it. The bench warrant history is not bad, but the 46 offences on bail is very serious."

In a review hearing where the applicant had a long history of drugs misuse the judge refused bail, saying:

"The material is ample. There is a degree of offending in the past, associated with addiction - one of the things relevant to section 2. There is a very high risk of relapse and reoffending. He is in custody, he's out of custody and he's off again. A refusal is reasonably necessary both in his interest and everyone else's".

The judge stated he would only consider bail at this time with a firm residential drug treatment placement. Regarding the applicant's progress tackling addiction issues, the judge said "he looks like he's making progress. Self-treatment is fantastic, but if it's not supported, if he went out tonight, he could slip up very quickly".

In another bail application involving a person with addiction problems, the judge refused bail due to flight risk under the *O'Callaghan Rules*. The judge stated that a €3,000 cash lodgement "would go some way to allay Garda fears, but not far enough." Regarding the section 2 objection, the judge was of the view that the evidence of past behaviour was not strong enough. As to the applicant's heroin addiction and the Garda fears under section 2 that he would continue to commit crimes to feed his habit, the judge requested information as to the current cost of feeding such a habit.

In another High Court review, the judge refused bail because the bench warrant history of 55 warrants and 25 section 13 convictions for failing to appear was "one of the worst" he had encountered. Regarding the evidence of the applicant's recent drug-taking, the judge observed: "He was drug-free for almost seven years and at the beginning of this year he decides to take up crack cocaine. I am satisfied he has no regard for bail conditions." Although the applicant had 125 previous convictions, the judge accepted that there were "worse offenders around" since the prior offences were all disposed of in the District Court. However, the judge stated that "the sheer numbers are a problem. 125 times he disregarded bail conditions." He declared the section 2 objection "good, but I am not willing to make an order on that, due to the type of offending."

Although the four bail reviews discussed above ultimately resulted in continued pre-trial detention, the judicial decisions were clearly reasoned and based on the evidence presented in court. The bail review system in Ireland, in which the High Court plays a central role, appears to work well in practice. People denied bail in the District Court have a right to apply for bail in the High Court where they will get a much more comprehensive hearing, and stand a good chance of being granted bail if the Garda

objections are weak, i.e. there are a low number of bench warrants or the previous convictions relevant to section 2 objections were primarily, or exclusively from the District Court. The involvement of the High Court provides effective oversight of decisions of the lower courts. However, as outlined above, if there is also strong evidence of failing to appear a refusal of bail under the *O'Callaghan Rules* may be justified.

Where defence counsel has the opportunity to cross examine the prosecuting Garda and any witnesses (alleging fear of intimidation etc.), to draw the court's attention to existing legal precedent (for example, on the setting of independent sureties), to call the applicant to explain under oath why he or she failed to adhere to certain bail conditions or had taken certain bench warrants, and to give a full picture of the applicant's personal circumstances (family status, means to pay bail, low level of offending, addiction issues etc.), the judge was placed in the best position to make a fair and well-reasoned decision in granting or refusing bail.

Interviewee 2 stated that the practice of the DPP's office is to maintain objections to bail raised in the District Court, "unless they are no longer maintainable" in the High Court. Presumably, some of the cases where bail with conditions are agreed by consent in the High Court (without an oral adversarial hearing), fall into this "no longer maintainable" category. The research suggests that the depth of the participation of the defence team (a solicitor and barrister) in High Court bail applications has an impact on the outcome for the applicant. As mentioned previously, the mean length of a High Court application observed was 16.8 minutes, as compared with 6 minutes in the District Court.

Recommendations:

- **Defence lawyers should thoroughly consider making a fresh application for bail every time the defendant has to appear in court, especially where there is any change in circumstances, which permits new submissions to be made.**
- **Where a fresh bail application is made, the sitting judge should be mindful of the ongoing presumption in favour of release and give full consideration to whether it is necessary and proportionate under the circumstances to continue to remand a defendant in custody.**

IX. Outcomes

The research yielded very little information on the number and proportion of acquitted pre-trial detainees or people who went on to receive a non-custodial sentence. Of the bail hearings attended, very few applicants had even a hearing date set in the case of a contested trial. Of the case files reviewed, only the Tracking Forms of the Garda Court Presenters contained any information on the outcomes of prosecutions. All the DPP files reviewed were from February 2015, so dates for hearing were not yet assigned.

In 25% (n=21) of the 37 Garda Tracking Sheets relating to District Court bail matters, guilty pleas were entered by the accused. 15% (n=13) of Tracking Sheets noted that a custodial sentence was imposed. In 12% (n=10) of these files a non-custodial sentence was imposed, while 11% (n=4) were marked TIC, meaning "Taken into Consideration". In three cases, the charges were struck out. One file was marked RIP.

X. Legislative Reform - General Scheme of the Bail Bill, 2015

On the 23 July 2015 the Minister for Justice and Equality, Deputy Frances Fitzgerald published the *General Scheme of the Bail Bill, 2015* stating that it "will strengthen the law to protect the public against crimes committed by offenders out on bail."¹⁸¹ According to Minister Fitzgerald: **"This new Bill will seek to improve the operation of the bail system and make the law as effective as possible in protecting the public while also safeguarding the rights of the individual. While the Bill must reflect the constraints of the Constitution and the jurisprudence of the European Court of Human Rights, the intention is that the proposed new provisions will provide better guidance to the courts on how such protection might be provided."**¹⁸² It is hoped that this Report will help to inform the official discussion regarding the proposed new Bail legislation and influence the content of the legislation in its final incarnation.

The stated intention to codify the law in respect of bail is largely a welcome development. It is hoped that this Bill will constitute a comprehensive restatement and consolidation of existing Irish law on Bail. The main principle of the *O'Callaghan Rules* is contained in Head 26, namely refusal of bail to prevent evasion of or interference with justice. Head 27, entitled "refusal of bail to prevent commission of serious offence" restates the law relating to section 2 bail objections, with a few amendments including the addition of addiction to alcohol as a factor that judges can take into account when reaching their decision.

¹⁸¹ See "An Taoiseach and Minister Fitzgerald announce new Bail Bill", 23 July 2015, available at <http://www.justice.ie/en/JELR/Pages/PR15000430> (accessed 23 March 2016).

¹⁸² Ibid.

There are many constructive legislative additions intended to assist judges in reaching their bail decisions, including references to additional conditions in Head 16(1)(v)¹⁸³ and 16(1)(vii)¹⁸⁴ that they may consider when granting bail in relevant cases. Head 27(8) of the Bill which codifies the decision of the Supreme Court in *In the matter of an application pursuant to Article 40.4.2 of the Constitution of Ireland 1937 between Martin McDonagh and the Governor of Cloverhill Prison*¹⁸⁵ is also 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 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 subhead (3). In the absence of any reference in the interpretative provisions, 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*”¹⁸⁶ are questionable. Given the significant consequences for the right to liberty and the complete dependence of detainees on others to provide transportation to and from court, the breadth of the current formulation is both unnecessary and disproportionate.

As noted above, 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 the appropriate location for such a provision.

¹⁸³ The new “stay away” condition covers situations where the person released on bail might pose a risk of ongoing intimidation to the complainant or his or her family members.

¹⁸⁴ In a bail application where the underlying charge involves dangerous driving or unauthorised taking of a vehicle, a judge can apply condition not to drive a “mechanically propelled vehicle”

¹⁸⁵ Supreme Court, 28 January 2005.

¹⁸⁶ 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. See Irish Prison Service, *Statement by the Irish Prison Service regarding delays in escorting prisoners to certain courts*, 29 July 2015 at http://www.irishprisons.ie/images/pdf/psec_ccj.pdf (accessed 23 March 2016).

Recommendations:

- In Head 7 of the *General Scheme of the Bail Bill, 2015* the meaning of “good and sufficient reason” should be further clarified.
- In Head 7(5) (a) of the *General Scheme of the Bail Bill, 2015* the facility to remand should be limited to the “next available court date”.
- The *General Scheme of the Bail Bill, 2015* should contain a clear legislative provision for time served on remand to be credited towards any custodial sentence imposed. Head 7 may be the appropriate location for such a provision.

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.”¹⁸⁷

Recommendation:

- **Head 10(2) of the General Scheme of the Bail Bill, 2015 should 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.”**

¹⁸⁷ See Prison Reform Trust, *Tackling the Overuse of Custodial Remand*, October 2011, p. 2, at <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Remand%20Briefing%20FINAL.pdf> (accessed 23 March 2016).

Head 11: Reasons for bail decisions

Head 11(1) of the proposed legislation obliges judges to give reasons for bail decisions, and Head 11(2) states that when requested to do so either by the defence or prosecution judges must record their decision in writing. Judges should already be giving clear, specific reasons for their bail decisions as part of their judicial function in administering justice in public. Indeed, as outlined in the introduction, 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 for detention decisions and not use identical or “stereotyped”¹⁸⁸ forms of words¹⁸⁹ and the arguments for and against pre-trial detention must not be “general and abstract”.¹⁹⁰

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 a new innovation and a welcome one. IPRT has previously advocated for all sentencing decisions where imprisonment is imposed to be recorded in writing,¹⁹¹ including the reasons behind the decision. 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. It is submitted that Head 11 of the 2015 Bill should be amended to require bail decisions to be recorded in writing at all times.¹⁹²

Recommendation:

- **Head 11 of the *General Scheme of the Bail Bill, 2015* should be amended to require bail decisions, and the reasoning behind such decisions, to be recorded in writing at all times.**

¹⁸⁸ *Yagci and Sargin v Turkey*, App 16419/90, 16426/90, 8 June 1995, para 52.

¹⁸⁹ See *European Court of Human Rights, Guide on Article 5 of the Convention Right to Liberty and Security*, p. 10 available at http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf (accessed 23 March 2016) See para. 36 where the ECtHR states: “the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time may be incompatible with the principle of protection from arbitrariness enshrined in Article 5 §1 (*Stašaitis v. Lithuania*, §§66-67).”

¹⁹⁰ *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003, para 63.

¹⁹¹ See for example, IPRT *Briefing Paper on Criminal Justice (Community Service) (No. 2) Bill 2011*, available at http://www.iprt.ie/files/IPRT_Briefing_on_CSO_Bill_2011_%28Second_Stage%29_22_March_20112.pdf (accessed 23 March 2016) At para. 3 IPRT argued that “the presumption against imprisonment in section 3(1)(a) should be strengthened by requiring the sentencing judge not only to consider imposing a CSO in lieu of imprisonment for a qualifying sentence but by *obliging him or her to give written reasons* behind a decision to imprison the convicted person.”

¹⁹² However, if this proposal is considered unworkable within the current capacity and resources available to the courts, a compromise may be the use of digital audio recording (DAR) within the minimum of formality and at no additional cost to the applicant. See Irish Penal Reform Trust, *IPRT Position Paper 11 Bail and Remand* (2015), p. 18.

Head 16: Arrest without warrant for breach of conditions

The proposed Bill also introduces a power of arrest without warrant for Gardaí for breach of bail conditions where it is necessary to arrest the person immediately to prevent absconding or to prevent harm, interference or intimidation to the victim or a witness to the offence. Head 16(6) of the Bill replicates section 6(5) of the *Bail Act, 1997* in permitting a court to issue a warrant for the arrest of the person released on bail, if a Garda or their independent surety provides information to the court in writing, and on oath, that the accused is “about to contravene any of the conditions of the recognisance”. However, Head 16(9) provides that without prejudice to the provisions of subhead (6), a Garda may arrest the accused person without warrant, where he or she:

“(a) with reasonable cause, suspects that a person who has been admitted to bail is about to abscond for the purpose of evading justice, or

(b) (i) with reasonable cause, suspects that a person who has been admitted to bail—

(I) is about to contravene any of the conditions of the recognisance,

(II) is in the act of contravening any of the conditions of the recognisance, or

(III) has contravened any of the conditions of the recognisance, and,

(ii) considers that it is necessary to arrest the person immediately to prevent harm, interference or intimidation to the complainant, a witness to the offence alleged or to any other person specified in a condition referred to in subparagraph (v) or (vi) of subhead (1)(b).”

Under the current law, a Garda cannot arrest an accused person released on bail without warrant for breach of conditions in any circumstances. The proposed arrest without warrant power is, therefore, a significant change which would undermine the pre-trial rights of accused persons who are released on bail subject to conditions. Moreover, the crucial term “reasonable cause” is not currently defined in the Bill and could give rise to confusion and inconsistency in application. Requiring the Gardaí to apply to the courts for a bench warrant to arrest an accused for breach of conditions, **as is currently the case**, is a vital legal safeguard against unwarranted state intrusion into the liberty of legally innocent persons and should be maintained in the new bail scheme.

Recommendation:

- **Head 16(9) of the *General Scheme of the Bail Bill, 2015* should be removed. Requiring Gardaí to apply for a bench warrant for breach of bail conditions is an important legal protection as regards the liberty of accused persons.**

Head 27(3) and (4): Refusal of bail to prevent commission of a serious offences: domestic burglary

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. On a related point, the *Criminal Justice (Burglary of Dwellings) Act, 2015* became law on 24 December 2015. This bail change, which will only apply to accused persons over the age of 18, follows on from the *Criminal Law (Defence and the Dwelling) Act 2011* and in particular section 2 thereof which permits the “justifiable use of force” by the resident of a domestic dwelling in the context of burglary.¹⁹³ The concept of “defence and the dwelling”¹⁹⁴ became an issue post high-profile legal cases involving domestic burglaries such *DPP v Padraig Nally*.¹⁹⁵

Section 2 of the *Criminal Justice (Burglary of Dwellings) Act, 2015* amends section 2 of the *Bail Act, 1997* providing that in the context of section 2 objections to bail evidence of a likelihood to commit further domestic burglaries can be drawn where the accused has a previous conviction for domestic burglary in the previous five years, and (i) has been convicted of at least two domestic burglaries committed in the period starting six months before and ending six months after the alleged commission of the offence for which he or she is seeking bail, or (ii) has been charged with at least two domestic burglaries allegedly committed in the same period, or (iii) has been convicted of at least one domestic burglary and charged with at least one other domestic burglary allegedly committed in the same period.¹⁹⁶

Section 1 of the *Criminal Justice (Burglary of Dwellings) Act, 2015* provides that, for the purposes of bail applications, a previous conviction for domestic burglary coupled with

¹⁹³ The legislature took its cue from the Court of Criminal Appeal judgment in the case of *DPP v Barnes* [2007] 3 IR 130 where the court held that “...every burglary is an act of aggression...and every burglar can expect to encounter retaliatory force...”

¹⁹⁴ See *Criminal Justice (Defence and the Dwelling) Act, 2011* at <http://www.irishstatutebook.ie/eli/2011/act/35/enacted/en/pdf> (accessed 25 March 2016).

¹⁹⁵ [2006] IECCA 128.

¹⁹⁶ <http://www.irishstatutebook.ie/eli/2015/act/56/enacted/en/html> (accessed 23 March 2016) 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 at http://www.justice.ie/en/JELR/GS_BailBill072015.pdf/Files/GS_BailBill072015.pdf (accessed 23 March 2016).

two or more pending charges “shall consider the existence of those circumstances as evidence that the person is likely to commit a relevant offence in a dwelling” in the context of section 2 bail objections.¹⁹⁷ In announcing the purpose of the original Bill in April the Minister suggested that:

“This provision, while leaving the courts all necessary discretion to vindicate the constitutional rights of an accused person, would allow a court in the absence of evidence to the contrary to conclude that the accused is likely to commit a serious offence and could, therefore, refuse bail on that ground.”¹⁹⁸

The introduction of *Criminal Justice (Burglary of Dwellings) Act, 2015* is a regressive step in terms of the accused person’s general right to bail and the presumption of innocence, which has already been eroded by section 2 of the 1997 Act as acknowledged by eight of the eleven interviewees. Section 2, in its current form, encroaches on the accused person’s right to bail and suspends the presumption of innocence, permitting preventive detention in certain circumstances. In any section 2 bail objection involving burglary, judges are fully apprised of any relevant previous convictions or pending charges by the prosecuting Garda. The higher the volume of convictions, the more recent the charges for serious offences and the greater the number of offences committed on bail, the more likely it will be that a judge will refuse bail under section 2. However, the proposed amendment goes so far as to effectively negate the presumption of bail for certain types of offenders, namely domestic burglars, and in fact creates a legislative presumption in favour of preventive detention founded on a presumption of guilt.

Recommendations:

- **Head 27(3) and (4) of the General Scheme of the Bail Bill, 2015 should be removed on the basis that such provisions seek to unduly fetter the discretion of judges and in fact create a legislative presumption in favour of preventive detention founded on a presumption of guilt in respect of people accused of domestic burglary.**
- **Where a judge has reasonable cause to believe that an accused may commit further domestic burglary offences, he or she should strongly consider granting bail with conditions which directly address the perceived risk such as curfew and electronic tagging to mitigate the risk, before making any decision to remand a person in custody.**

¹⁹⁷ Section 1, *Criminal Justice (Burglary of Dwellings) Act, 2015* at <http://www.irishstatutebook.ie/eli/2015/act/56/enacted/en/html> (accessed 23 March 2016)

¹⁹⁸ <http://www.justice.ie/en/JELR/Pages/PR15000107>

Head 27(9): Clarification regarding summary disposal of “serious” offences

Head 27(9) of the *General Scheme of the Bail Bill, 2015* clarifies that an objection to bail based on the likelihood of future offending “applies to serious offences being tried summarily or on indictment.” This is a very significant clarification of the intent of the legislature as to whether a bail objection can legitimately be made about a serious offence that is likely to be tried summarily. There is no such clarity in section 2 of the *Bail Act, 1997*. Section 2 bail objections are regularly made by Gardaí in the District Court in respect of theft, robbery and burglary charges where the accused people have primarily been convicted in the District Court and are also likely to be prosecuted on the new charge(s) in the District Court.

The interpretation provisions of the *Bail Act, 1997* refer specifically to “serious offences” carrying a penalty of five years or 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 twelve 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, therefore a strong argument that section 2 objections should be confined to offences **where the DPP has directed, or is likely to direct trial on indictment** (with a judge and jury) in the Circuit Court, where the penalties are higher. Two interviewees (*Interviewees 9 and 11*) stated during interview that the Gardaí could only legitimately object under section 2 if the DPP had not already directed that the charge(s) be dealt with summarily. The key factors which are considered by the DPP in deciding on summary trial or trial on indictment include the nature of the case, the circumstances of the alleged offence and the adequacy of the available sanctions in the District Court, should the trial end in conviction. A direction for summary trial by the DPP therefore indicates a preliminary view that the offence is suitable for disposal in the lower court and the limited sanctions available are adequate. Accordingly it can be argued that section 2 objections involving offences that will be disposed of summarily would require significant justification.¹⁹⁹

Recommendation:

- **Head 27(9) should be removed since a decision by the DPP to prosecute an offence summarily indicates a lower level of seriousness as compared to an offence prosecuted on indictment. Objections to bail to prevent the commission of a serious offence should be restricted to cases where the DPP has directed, or is likely to direct trial on indictment.**

XI. Duration of pre-trial detention

In Ireland there is no statutory maximum duration of pre-trial detention. It is, therefore, possible that defendants may be “detained on bail for longer than the maximum sentence” or that remand being is used “in lieu of short sentences.”²⁰⁰ According to section 24 of the *Criminal Procedure Act, 1967* detention on remand may only be ordered for 8 days at the first pre-trial detention hearing. Thereafter, it may be extended for 15 days, or up to 30 days with the consent of the defendant and prosecutor.²⁰¹ At each of these court appearances, a defendant may raise the issue of bail afresh, so the issue of ongoing pre-trial detention may be reviewed on a regular basis.

As outlined above in the analysis on **Review of pre-trial** detention, section 3 of the *Bail Act, 1997* provides that where a person has been refused bail and the trial for the offence has not commenced within four months from the date of refusal the person can apply to the court for bail on the basis of delay by the prosecutor, such as delay in serving the Book of Evidence. Under section 3 the Court can release the person on bail if satisfied that the interests of justice so require.

In response to a question posed in the EU Commission’s *Strengthening mutual trust in the European judicial area – A Green Paper on the application of the EU criminal justice legislation in the field of detention*, about the desirability of EU rules on maximum pre-trial periods, the Irish Department of Justice responded with this one-line statement: “We do not see any merit in EU rules on maximum pre-trial periods.”²⁰²

Recommendation:

- **The *General Scheme of the Bail Bill, 2015* should contain a provision specifying the custody time limits that an adult offender can lawfully be remanded in custody before trial, similar to that already in place in the UK.**

²⁰⁰ See IPRT *Discussion Document on the Rights and Needs of Remand Detainees* July 2013, pp. 4-5.

²⁰¹ The periods of remand outlined in section 24 of the *Criminal Procedure Act, 1967* are restated in Head 7 of the *General Scheme of the Bail Bill, 2015*. This Head also incorporates aspects of section 33 of the *Prison Act, 2007* referring to the use of videolink for bail applications, permitting a person to be remanded for a further 15 day maximum period if the videolink breaks down, or cannot be established.

²⁰² See *Department of Justice and Equality response 2011*, p. 6, available at http://ec.europa.eu/justice/newsroom/criminal/opinion/files/110510/ie_department_of_justice_and_equality_response_en.pdf (accessed 23 March 2016). Question 7 was phrased as follows: Would there be merit in having European Union minimum rules for maximum pre-trial detention periods and the regular review of such detention in order to strengthen mutual trust? If so, how could this be better achieved? What other measures would reduce pre-trial detention?”

XII. Conclusions

The bail review system in Ireland, in which the High Court plays a central role, appears to broadly work well in practice. People denied bail in the District Court have a right to apply for bail in the High Court where they will get a much more comprehensive hearing.

The vast majority of people charged with criminal offences get station bail from the arresting Garda. Where station bail is refused, the person may apply (usually a day or two after charge) for bail at the District Court. There is a fast turnover of bail hearings at District Court level and the level of oral argumentation and judicial reasoning is commensurate with the speed of the proceedings.

Bail hearings are generally administered in public, except when the court is cleared for section 2 objections so that evidence of prior offending does not compromise the accused's right to a fair trial (common practice at the Courts of Criminal Justice (CCJ) in Dublin).

Many of the concerns that may exist in respect of District Court bail hearings relate to their short duration and the strained capacities of the court. Longer sitting times may ease the burden on the court of processing high volumes of bail applications.

Where bail applicants are unrepresented and solicitors are appointed from the Legal Aid panel for a contested bail hearing, in every case the appointed lawyers should ensure they are provided with sufficient opportunity to take instructions in order to deliver a fully reasoned bail application which protects the best interests of their clients.

As regards objections to bail, it is submitted that the prosecution should only object to bail if there are reasonable grounds, i.e. a demonstrable history of failing to appear. While a Garda may be technically entitled to object to bail whenever a warrant is issued, and the DPP's official policy is to maintain District Court objections in the High Court, the higher the number of warrants the stronger the objection. Common sense should dictate whether there is a real risk of the accused evading justice if granted bail.

In terms of requesting conditions, the prosecuting Garda should again act with restraint. Since there is evidence to suggest that some courts will impose whatever conditions are requested by Gardaí, Gardaí should only ask for conditions they believe are absolutely necessary to meet the objection, and no more. There should be no element of punishment or social control in their condition requirements.

Moreover, if prosecuting Gardaí ask for a long list of conditions to be set, then it should be incumbent on them to ensure the monitoring of the accused person's compliance with such conditions. Requiring Gardaí to assertively monitor conditions imposed may encourage more selectivity in the conditions requested.

The research suggests that the depth of the participation of the defence team (a solicitor and barrister) in High Court bail applications has an impact on the outcome for the applicant.

As regards the role of judges in bail matters, it is submitted that greater consideration should be given to granting unconditional bail where there is no objection to bail, or where the objections raised are very weak. Certainly, the weaker the objections, the fewer the conditions that should be applied. Even where there are strong objections well made by the Prosecution, a judge should not adopt a 'pro forma' approach to bail conditions. Onerous conditions should be reserved for those who are flight risks or pose a significant threat to society.

Much like the individualised approach judges take to sentencing, they should adopt an individualised approach to bail, matching the conditions to the circumstances of the accused, the offences with which they are charged and the objections that were raised. Judges should endeavour to give clear reasons for their bail decisions in language that the applicant can understand. In terms of enhancing accountability in the decision-making process, and aiding research and evidenced based policy formulation in this area, Head 11 of the *General Scheme of the Bail Bill, 2015* should be amended to require bail decisions to be recorded in writing at all times.

Section 2 of the *Bail Act, 1997* has watered down the presumption of innocence for people with a history of serious offences. As mentioned above, offences such as theft, robbery and burglary are defined as serious offences, but in practice are they frequently prosecuted in the District Court where the maximum penalty is imprisonment for a year in the case of a single charge - a long way off the five years of imprisonment or more envisaged by section 1 of the 1997 Act for **serious** offences.

Arguably, objections to bail "to prevent the commission of serious offences" should be confined to offences where the DPP has directed, or is likely to direct, trial on indictment before the Circuit Court, since a direction for summary disposal indicates that the alleged offending is not, in the DPP's view, so **serious** that it should be punishable with more than 12 months imprisonment. Consideration should, therefore, be given by the Oireachtas to reformulating Head 27 of the *General Scheme of the Bail Bill, 2015* in these terms.

It is submitted that the recently enacted *Criminal Justice (Burglary of Dwellings) Act, 2015*²⁰³ should be repealed. This new legislation amends section 2 the *Bail Act, 1997*, permitting judges to refuse bail due to the likelihood of future offending where a person has been convicted of one count of domestic burglary, with two or more such charges pending. Section 2, as currently constituted, already provides for judicial discretion to

²⁰³ See *The Criminal Justice (Burglary of Dwellings) Act, 2015* and Head 27(3) and (4) of the *General Scheme of the Bail Bill, 2015*.

refuse bail where evidence is produced that a person is a prolific burglar. The decision to enshrine such a low threshold in legislation in respect of this type of offending is highly punitive, replacing the presumption of innocence with a presumption of guilt. It is also likely to have a negative impact on prison numbers.

Consideration should be given to investing in bail supports, including bail hostels with a “one-stop-shop” type structure, staffed by experienced social workers who would play a role in ensuring that people likely to take bench warrants for non-attendance would turn up to court. If such bail services were to be managed by the Probation Service, additional funding would be required to ensure they had a reasonable prospect of success.

XIII: Summary of Recommendations

Courts

- **All courts that hear bail applications should sit for sufficient periods as to allow judges sufficient time to attend to all court business, including contested bail applications, daily.**
- **Consideration should be given to providing a third hearing court in the Criminal Courts of Justice.**

Defence Lawyers

- **Defence lawyers should be vigilant in advising clients on appropriate conditions and in challenging any proposals for unnecessary, disproportionate or unduly onerous conditions, and suggest other more proportionate or suitable alternatives - especially where the charge is at the lower end of the scale.**
- **Where bail is set by consent in the High Court, defence lawyers should strive to secure bail on the least onerous terms possible for their clients, especially where the charge is at the lower end of the scale. In particular, they should seek an individualised (relevant and proportionate) approach to the setting of conditions and resist any “pro forma” approach by the prosecution or judge.**
- **Defence lawyers should consider making a fresh application for bail every time the defendant has to appear in court, especially where there is any change in circumstances to potentially warrant release on bail.**

Gardaí and Prosecutors

- **Gardaí should request only those bail conditions they reasonably believe are absolutely necessary to meet any reasonable objection to bail.**
- **Training, including refresher courses by way of Continuous Professional Development (CPD) should be provided to all Gardaí nationally about the legal and constitutional basis for objecting to bail. Clear official guidelines should be developed by An Garda Síochána for prosecuting Gardaí and Court Presenters, e.g. regarding bench warrant history, section 2 objections etc. This training could include the obligation to observe hearings. There could also be an online learning component through the PULSE system where individual members can log onto a portal with educational videos on various issues relating to bail.**
- **Prosecuting counsel in the High Court should be mindful of adopting a pro forma approach to bail conditions and should urge their relevant Garda to only**

request such conditions as are necessary and proportionate to meet the identified risk.

- Where Gardaí object to bail and ask for conditions, they should only request those that are absolutely necessary to meet the risk and it should be incumbent on them to ensure compliance is monitored. Ideally, the *General Scheme of the Bail Bill, 2015* should contain a provision expressly stating that Gardaí should request the least onerous conditions possible to meet the risk(s) identified and that where a Garda requests conditions, he or she assumes responsibility for monitoring adherence to such.
- There should be an audit undertaken by An Garda Síochána of bail conditions and the role/duty of prosecuting Gardaí to monitor them.

Judges

- Regular judicial training in bail matters, for both newly appointed judges and periodic refresher training, should incorporate the evolving jurisprudence of the European Court of Human Rights in respect of bail and pre-trial detention.
- An exchange between urban and rural judges may also be helpful in raising awareness of the correct application of domestic legal standards and the jurisprudence of the European Court of Human Rights.
- Judges should be required to give clear, comprehensive reasons for their bail decisions with specific reference to the objection(s) and the supporting evidence that influenced the decision. Where bail is granted with conditions attached, judges should explain why each condition is necessary and proportionate, as well as the consequences of any breach.
- Where conditions are attached to bail, judges should be vigilant to adopt an individualised approach, taking into account the circumstances of the accused, the offence(s) charged and the objections raised and only attach such conditions as are strictly necessary and proportionate to meet those objection(s) and avoid the imposition of impossible conditions.
- Where a judge has reasonable cause to believe that an accused may commit further domestic burglary offences, he or she should consider granting bail with conditions which directly address the perceived risk – such as curfew and electronic tagging – to mitigate the risk, before making any decision to remand a person in custody.
- Where a fresh bail application is made, the sitting judge should be mindful of the ongoing presumption in favour of release and give full consideration to whether it is necessary and proportionate under the circumstances to continue to remand a defendant in custody.

Characteristics of defendants

- Women unlikely to receive a custodial sentence should not be remanded in custody.
- Women must never be sent to prison “for their own good”, to “teach them a lesson”, for their own safety or to access services such as detoxification.
- Supported bail placements for women suitable to their needs should be developed as part of the Joint Irish Prison Service and Probation Service Strategy for Women Offenders.
- 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, and consideration of the “best interests of the child” principle.
- In bail applications involving non-national defendants the court should always consider granting bail with conditions such as residence requirements, reporting conditions and surrendering passports etc., before remanding them in custody.
- In bail applications where the accused has alcohol or drug addiction issues, without the requisite support abstinence conditions are likely to be breached, further criminalizing the defendant. In this regard, the provision of bail supports, including bail hostels with a "one-stop-shop" set-up, where the accused can access treatment for underlying addiction, mental health issues etc., as well as assistance in attending court, may improve adherence to bail conditions.

Data and Evidence

- The Department of Justice and Equality in conjunction with An Garda Síochána, the Courts Services, the Director of Public Prosecutions, the Irish Prison Service and the Central Statistics Office should compile and share more comprehensive statistics relating to the use of remand, with a view to enhancing knowledge and understanding of statistical trends in this complex area of law and practice.
- The Government, the Courts Service and the Irish Prison Service should conduct an analysis of how many people remanded in custody go on to receive a custodial sentence to assess the necessity of using this measure to the extent it is currently used.

Legislative Reform - General Scheme of the Bail Bill, 2015

- In Head 7 of the *General Scheme of the Bail Bill, 2015* the meaning of “good and sufficient reason” should be further clarified.

- In Head 7(5) (a) of the *General Scheme of the Bail Bill, 2015* the facility to remand should be limited to the “next available court date”.
- The *General Scheme of the Bail Bill, 2015* should contain a clear legislative provision for time served on remand to be credited towards any custodial sentence imposed. Head 7 may be the appropriate location for such a provision.
- Head 10(2) of the *General Scheme of the Bail Bill, 2015* should 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.”
- Head 11 of the *General Scheme of the Bail Bill, 2015* should be amended to require bail decisions, and the reasoning behind such decisions, to be recorded in writing at all times.
- Head 16(9) of the *General Scheme of the Bail Bill, 2015* should be removed. Requiring Gardaí to apply for a bench warrant for breach of bail conditions is an important legal protection as regards the liberty of accused persons.
- Head 18 of *General Scheme of the Bail Bill, 2015* providing for pre-trial electronic tagging should be reviewed for compliance with Council of Europe Recommendation CM/Rec(2014)4.
- Head 27(3) and (4) of the *General Scheme of the Bail Bill, 2015* should be removed on the basis that such provisions seek to unduly fetter the discretion of judges and in fact create a legislative presumption in favour of preventive detention founded on a presumption of guilt in respect of people accused of domestic burglary.
- Head 27(9) should be removed since a decision by the DPP to prosecute an offence summarily undermines the “seriousness” of an offence. Objections of bail to prevent the commission of a serious offence should be restricted to cases where the DPP has directed, or is likely to direct trial on indictment.
- The *General Scheme of the Bail Bill, 2015* should contain a provision specifying the custody time limits that an adult offender can lawfully be remanded in custody before trial, similar to that already in place in the UK.
- The *General Scheme of the Bail Bill, 2015* should contain a provision stating that where a solicitor is assigned by a court to an accused person for a bail application at short notice, the judge should grant a short adjournment to enable the solicitor to take full instructions from their new client before proceeding with the application.
- The *General Scheme of the Bail Bill, 2015* should provide that people remanded in pre-trial detention will receive priority in terms of an early trial date.
- The *General Scheme of the Bail Bill, 2015* should provide that compensation may be available to a person who spends a lengthy period on remand only to be subsequently acquitted.

- The *General Scheme of the Bail Bill, 2015* should contain a provision establishing bail supports, including bail hostels and bail information schemes in prisons.
- The Probation Service should be involved in the management of bail hostels and other community based supports to improve compliance with bail conditions and should, therefore, receive additional funding in Budget 2017 and into the future to ensure that any such schemes have a reasonable prospect of success.



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